FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v iSignthis Limited

[2024] FCA 669

File number(s): VID 773 of 2020

Judgment of: **MCEVOY J**

Date of judgment: 21 June 2024

Catchwords: **CORPORATIONS** – continuous disclosure – alleged contraventions of ss 674(2) and 1041H of the *Corporations Act 2001* (Cth) – whether the company (iSignthis Limited) engaged in conduct, in relation to a financial product or a financial service, that was misleading or deceptive, or likely to mislead or deceive – whether the company failed to notify the Australian Securities Exchange (ASX) of certain information relating to the breakdown of its revenue and Visa's termination of its relationship with iSignthis in breach of continuous disclosure obligations – whether non-disclosed information would, if generally available, have a material effect on the price or value of the company's shares – whether exceptions to ASX Listing Rule 3.1 contained in Listing Rule 3.1A apply to second alleged contravention of s 674(2) – held: iSignthis Limited breached its continuous disclosure obligations on two separate occasions and s 1041H of the *Corporations Act*

CORPORATIONS – whether second defendant, Mr Karantzis (a director of the company), contravened s 674(2A) of the *Corporations Act* – whether knowingly concerned in the first contravention by the company of s 674(2) – whether second defendant had actual knowledge – held: the second defendant breached s 674(2A) of the *Corporations Act*

CORPORATIONS – provision of false or misleading information to ASX – whether the second defendant gave information to the ASX relating to the affairs of iSignthis that was false or misleading in a material particular and, or alternatively, omitted matters that, by their omission, rendered the information misleading in a material respect on two occasions arising in the context of Visa's termination of its relationship with iSignthis – held: the second defendant breached ss 1309(2) and (12) on one of the occasions alleged

DIRECTORS' DUTIES – directors' duties – alleged contraventions of ss 180(1), 181, and 182 of the *Corporations Act* by second defendant – whether second defendant breached s 180(1) in relation to information provided to the market in relation to and during an analyst briefing relating to the breakdown of revenue of the company – whether second defendant breached s 180(1) in relation to the failure to disclose the termination of Visa's relationship with the company – whether the second defendant breached s 182(1)(a) by using his position as a director improperly to gain advantage – whether the second defendant breached s 181(1) by failing to use powers and discharge duties in good faith in the best interests of the corporation and for a proper purpose – held: the second defendant breached s 180(1) on two separate occasions – no breaches of ss 181 and 182 of the *Corporations Act*

Legislation:

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) s 81

Corporations Act 2001 (Cth) ss 180(1), 181, 182, 674(2), 674(2A), 1041H, 1309(2), 1309(12), 1317G(1)(b)(iii), 1317S(2), 1318(1)

Evidence Act 1995 (Cth) s 140

Treasury Laws Amendment (2021 Measures No. 1) Act 2021 (Cth)

Corporations Regulations 2001 (Cth) reg 1.0.02A

ASX Listing Rules rr 3.1, 3.1A, 18.7, Guidance Note 8

Cases cited:

Aaron's Reefs Ltd v Twiss [1896] AC 273

Australian Broadcasting Corporation v Chau Chak Wing (2019) 271 FCR 632; [2019] FCAFC 125

Adams v Director of the Fair Work Building Industry Inspectorate (2017) 258 FCR 257; [2017] FCAFC 228

Anderson v Australian Securities and Investments Commission [2013] 2 Qd R 401; [2012] QCA 301

Angas Law Services Pty Ltd (In liq) v Carabelas (2005) 226 CLR 507; [2005] HCA 23

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (2014) 317 ALR 73; [2014] FCA 634

Australian Competition and Consumer Commission v Jayco Corp Pty Ltd [2020] FCA 1672

Australian Municipal, Administrative, Clerical and Services Union v Commissioner of Taxation [2022] FCA

1225

Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) & Ors (No 4) (2020) 148 ACSR 511; [2020] FCA 1499

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3) [2020] FCA 1421

Australian Securities and Investments Commission v Big Star Energy Limited (No 3) (2020) 389 ALR 17; [2020] FCA 1442

Australian Securities and Investments Commission v Cassimatis (No. 8) (2016) 336 ALR 209; [2016] FCA 1023

Australian Securities and Investments Commission v Citrofresh International Ltd (No 2) (2010) 77 ACSR 69; [2010] FCA 27

Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd (2019) 140 ACSR 561; [2019] FCA 1932

Australian Securities and Investments Commission v Drake (No 2) (2016) 340 ALR 75; [2016] FCA 1552

Australian Securities and Investments Commission v Fortescue Metals Group Ltd (No 5) (2009) 264 ALR 201; [2009] FCA 1586

Australian Securities and Investments Commission v GetSwift Ltd (Liability Hearing) [2021] FCA 1384

Australian Securities and Investments Commission v Mariner Corporation Ltd (2015) 241 FCR 502; [2015] FCA 589

Australian Securities and Investments Commission v Maxwell (2006) 59 ACSR 373; [2006] NSWSC 1052

Australian Securities and Investments Commission v Mitchell (No 2) (2020) 382 ALR 425; [2020] FCA 1098

Australian Securities and Investments Commission v Mitchell (No 3) (2020) 148 ACSR 630; [2020] FCA 1604

Australian Securities and Investments Commission v PE Capital Funds Management Ltd (external admins apptd) (2022) 159 ACSR 1; [2022] FCA 76

Australian Securities and Investments Commission v Vocation Ltd (In Liq) (2019) 371 ALR 155; [2019] FCA 807

Australian Securities and Investments Commission v Warrenmang Ltd (2007) 63 ACSR 623; [2007] FCA 973

Bing! Software v Bing Technologies (2009) 180 FCR 191; [2009] FCAFC 131

Briginshaw v Briginshaw (1938) 60 CLR 336

Campomar Sociedad, Limitada v Nike International Ltd

(2000) 202 CLR 45; [2000] HCA 12

Cassimatis v Australian Securities and Investments Commission (2020) 275 FCR 533; [2020] FCAFC 52

Chan v Securities and Futures Commission [2020] 3 HKLRD 266

Chew v The Queen (1992) 173 CLR 626

Commonwealth v Fernando (2012) 200 FCR 1; [2012] FCAFC 18

Cruickshank v Australian Securities and Investments Commission (2022) 292 FCR 627; [2022] FCAFC 128

Diakovasili & Anor v Order of AHEPA NSW Incorporated [2023] NSWSC 1282

Domain Names Australia Pty Ltd v .au Domain Administration Ltd (2004) 139 FCR 215; [2004] FCAFC 247

Doyle v Australian Securities and Investments Commission (2005) 227 CLR 18; [2005] HCA 78

DSHE Holdings Ltd (receivers and managers apptd) (in liq) v Potts (2022) 405 ALR 70; [2022] NSWCA 165

Earglow Pty Ltd v Newcrest Mining Ltd (2015) 230 FCR 469 at 488

Eclairs Group Ltd v JKK Oil and Gas plc [2016] 3 All ER 641

Grant-Taylor v Babcock & Brown (in liq) (2015) 322 ALR 723; [2015] FCA 149

Grant-Taylor v Babcock & Brown Ltd (in liq) (2016) 245 FCR 402; [2016] FCAFC 60

Guy v Crown Melbourne Ltd (No 2) (2018) 355 ALR 420; [2018] FCA 36

Hylepin Pty Ltd v Doshay Pty Ltd (2021) 288 FCR 104; [2021] FCAFC 201

Jones v Dunkel (1959) 101 CLR 298

Macdonald v Australian Securities and Investments Commission (2007) 73 NSWLR 612; [2007] NSWCA 304

Masters v Lombe [2019] FCA 1720

Mills v Mills (1938) 60 CLR 150

Morley v Australian Securities and Investments Commission (2010) 274 ALR 205; [2010] NSWCA 331

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 110 ALR 449

News Ltd v South Sydney District Rugby League Football Club Ltd (2003) 215 CLR 563; [2003] HCA 45

Ngurli Ltd v McCann (1953) 90 CLR 425

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

Peek v Gurney (1873) LR 6 HL 377

Permanent Building Society (In Liq) v Wheeler (1994) 11 WAR 187

R v Byrnes (1995) 183 CLR 501

R v Kylsant (Lord) [1932] 1 KB 442

Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler (2002) 41 ACSR 72; [2002] NSWSC 171

Semantic Software Asia Pacific Ltd v Ebbsfleet Pty Ltd (2018) 124 ACSR 146; [2018] NSWCA 12

State of Escape Accessories v Schwartz & Anor (2020) 156 IPR 199; [2020] FCA 1606

State Street Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 2) (2021) 164 IPR 420; [2021] FCA 137

Taco Co of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177

The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 39 WAR 1; [2008] WASC 239

TPT Patrol Pty Ltd v Myer Holdings Limited (2019) 293 FCR 29; [2019] FCA 1747

United Petroleum Australia Pty Ltd v Herbert Smith Freehills (2018) 128 ACSR 324; [2018] VSC 347

Vines v Australian Securities and Investments Commission (2007) 63 ACSR 505; [2007] NSWCA 126

Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285

Division:	General Division
Registry:	Victoria
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Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	731
Date of hearing:	28 February 2023 and 1, 2, 3, 6, 7, 8, 9, 10 March 2023 and 5, 6, 7, 8, 26, 27 June 2023
Counsel for the Plaintiff:	M Borsky KC and R Kruse
Solicitor for the Plaintiff:	Ashurst Australia
Counsel for the Defendants:	P W Collinson KC and J S Mereine
Solicitor for the Defendants:	HWL Ebsworth Lawyers

ORDERS

VID 773 of 2020

BETWEEN:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Plaintiff
AND:	**ISIGNTHIS LIMITED** First Defendant
	NICKOLAS JOHN KARANTZIS Second Defendant

ORDER MADE BY: **MCEVOY J**

DATE OF ORDER: **21 JUNE 2024**

THE COURT ORDERS THAT:

1. On or before **4:00pm** on **12 July 2024** the parties file and serve an agreed minute of orders to give effect to these reasons and for the further conduct of this proceeding; or, if there is no agreement, competing minutes of orders and short submissions (limited to 3 pages) as to their respective positions.
2. The further hearing of this proceeding be adjourned for case management hearing on a date to be fixed.
3. Costs be reserved.
4. There be liberty to apply.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

MCEVOY J:

INTRODUCTION

1 This proceeding is brought by the Australian Securities and Investments Commission (**ASIC**) against the first defendant, **iSignthis** Limited (otherwise known as **ISX** or **the company**), and the second defendant, its former chief executive officer and managing director, Mr Nickolas John Karantzis (collectively, the **defendants**).

2 iSignthis claims that until a demerger of its European operations in October 2021, it was a leading payments, electronic money and identity technology company. It was listed on the Australian Securities Exchange (**ASX**) and the Frankfurt Stock Exchange. iSignthis was headquartered in Melbourne, had its operations centre in Nicosia, Cyprus, and had sales offices in Australia, Amsterdam, Lithuania, Malta and the United Kingdom. iSignthis was suspended from trading on the ASX on 2 October 2019 and delisted in November 2022.

3 At the times which are the subject of this proceeding, iSignthis, through its subsidiaries, operated a business providing remote identity verification, payment authentication with electronic money issue, transactional banking, and payment processing services. iSignthis' primary services were achieved by way of patented platforms – a payment processing service known as "**ISXPay**®", and a remote identity verification service known as "**Paydentity**™" which utilised "know your customer" (**KYC**) data allowing service delivery in the anti-money laundering (**AML**) regulated sector. iSignthis' wholly owned subsidiaries included iSignthis eMoney Ltd (**iSeM**) (incorporated in Cyprus), **Authenticate BV** (incorporated in the Netherlands) and **Authenticate** Pty Ltd (incorporated in Australia).

4 The events giving rise to this proceeding arise broadly from two separate periods and sets of circumstances. The first is what the parties have termed the **One-off Revenue period**. This period has its genesis in March 2015 and extends until 3 August 2018. Predominantly, however, it relates to certain events in 2018 involving the recognition by iSignthis of approximately $3 million in revenue for one-off integration and set up services provided to clients under various integration agreements and the achievement of certain performance milestones at the same time as the company incurred approximately $2.85 million in one-off costs for out-sourcing services it provided under these integration agreements.

5 The second set of circumstances concerns the termination by **Visa** Inc of its relationship with iSignthis and the disclosure (or non-disclosure) of information about that termination to the Central Bank of Cyprus (**CBC**), the ASX and the market. This relates to events spanning the period from 4 October 2017 to 17 August 2020, although the focus of attention is on the period from March to August of 2020.

6 The factual background to these sets of circumstances, giving rise to the allegations which ASIC makes, is outlined further below.

7 In the context of these different events, ASIC alleges that iSignthis has contravened:

(a) the duty not to engage in conduct which is (or is likely to be) misleading or deceptive in relation to a financial product, pursuant to s 1041H of the *Corporations **Act** 2001* (Cth) in the One-off Revenue period; and

(b) its continuous disclosure obligations under s 674(2) of the Act on two separate occasions (in both the One-off Revenue period and in relation to the Visa termination).

8 Arising out of the same series of events, ASIC alleges that Mr Karantzis has contravened:

(a) s 180(1) of the Act, being the duty of a director of a corporation to exercise their powers and discharge their duties with due care and diligence, in respect of information he gave to the market during the One-off Revenue period;

(b) s 674(2A) of the Act by reason of his involvement in iSignthis' contravention of s 674(2) of the Act during the One-off Revenue period;

(c) s 180(1) of the Act in relation to the Visa termination by failing to discharge his duties with the due care and diligence insofar as the disclosure of Visa's termination of its relationship with iSignthis to the market is concerned;

(d) ss 1309(2) and (12) of the Act, by giving information to the ASX relating to the affairs of iSignthis that was false or misleading in a material particular and, or alternatively, omitted matters that, by their omission, rendered the information misleading in a material respect on two occasions arising in the context of Visa's termination of its relationship with iSignthis;

(e) s 182(1)(a) of the Act, being the duty of a director not to use their position as a director improperly to gain an advantage for themselves or someone else, insofar as he caused iSignthis to enter into the integration agreements to achieve certain performance milestones; and

(f) s 181(1) of the Act, being the duty of a director to exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose, also insofar as iSignthis' entry into the integration agreements to achieve the performance milestones is concerned.

9 For the reasons that follow, I have reached the following conclusions with regard to ASIC's allegations against iSignthis and Mr Karantzis.

10 First, that iSignthis has engaged in conduct that was misleading or deceptive in relation to a financial product pursuant to s 1041H of the Act in the One-off Revenue period. I have also concluded that iSignthis breached its continuous disclosure obligations pursuant to s 674(2) of the Act in both the One-off Revenue period and in relation to the Visa termination.

11 Secondly, I have concluded that Mr Karantzis has contravened s 180(1) of the Act in respect of representations he made during the One-off Revenue period and in his conduct during the Visa termination period. I have also concluded that Mr Karantzis contravened s 674(2A) of the Act by reason of his involvement in iSignthis' contravention of s 674(2) of the Act during the One-off Revenue period. Finally, I have concluded that Mr Karantzis contravened ss 1309(2) and (12) of the Act by giving information to the ASX that was false or misleading and which omitted matters that, by their omission, rendered the information misleading, on one occasion in May 2020 in the context of the Visa termination (but not the second occasion which is the subject of ASIC's allegations).

12 Insofar as the allegations against Mr Karantzis concerning the achievement of the performance milestones are concerned, that is to say the alleged breaches of ss 182(1)(a) and 181 of the Act, I have concluded that ASIC has not made out its case against Mr Karantzis in relation to these matters.

13 Before turning to the detail of these allegations it is convenient to deal with certain preliminary matters and provide some further information by way of background.

THE CONDUCT OF THE HEARING, THE EVIDENCE AND THE PLEADINGS

14 The hearing of this matter commenced on 28 February 2023 and took place over 15 hearing days: 28 February 2023 to 3 March 2023, 6 March 2023 to 10 March 2023, then 5 June 2023 to 8 June 2023, followed by oral closing submissions on 26 and 27 June 2023. The hearing covered all questions in the proceeding relating to liability, and ASIC seeks declarations against iSignthis and Mr Karantzis in relation to the various contraventions of the Act which it alleges.

The amount of any pecuniary penalty to be paid by reason of any contravention of the Act was not considered. ASIC's position is that it will seek pecuniary penalties against iSignthis and Mr Karantzis and orders disqualifying Mr Karantzis from managing corporations in the event that it succeeds in obtaining declarations of contraventions.

15 As will be apparent, the hearing was conducted in two tranches. The first was ASIC's opening and the company's case, together in part with the position of Mr Karantzis in relation to certain of the claims. The claims relating to false or misleading information given to the ASX and breaches of director's duties by Mr Karantzis were considered in the second tranche of the trial because these were claims only made against Mr Karantzis. In circumstances where ASIC seeks civil penalties against Mr Karantzis he exercised his right to rely on the penalty privilege; that is to say, the privilege from self-exposure to a penalty: see *Macdonald v Australian Securities and Investments Commission* (2007) 73 NSWLR 612; *Anderson v Australian Securities and Investments Commission* [2013] 2 Qd R 401. There was a more complete opening of Mr Karantzis' case in relation to these matters after ASIC had substantially closed its case.

16 For present purposes then ASIC relied upon the following lay evidence:

(a) affidavits of Mr Adam Boscoscuro, a senior lawyer employed by ASIC, sworn on 7 August 2021 and 18 October 2022;

(b) an affidavit of Mr Scott Tilden, a program manager employed by ASIC, affirmed on 6 August 2021;

(c) an affidavit of Ms Shanny Chen, an accountant employed by ASIC, affirmed on 6 August 2021; and

(d) an affidavit of Mr Richard Plews, head of compliance at Morgans Financial Limited, affirmed 31 May 2023.

17 The affidavits of Mr Boscoscuro, Ms Chen, and Mr Tilden broadly relate to the custody of evidence obtained by ASIC on its investigation, the provenance of a certain audio recording, and in relation to various queries raised by ASIC regarding some accounting matters. The affidavit of Mr Plews relates to off-market share trading. Mr Boscoscuro was cross-examined. Mr Tilden, Ms Chen and Mr Plews were not cross-examined.

18 In addition, ASIC tendered a number of documents.

19 iSignthis relied on the following evidence of lay witnesses:

(a) an affidavit of Ms Anna Ilina, the Anti-Money Laundering Compliance Officer for iSeM responsible for reporting to the CBC and MOKAS (the Unit for Combating Money Laundering in Cyprus) in relation to AML and counter-terrorism financing laws in Cyprus, sworn on 20 September 2021;

(b) an affidavit of Mr Timothy Hart, the independent non-executive chairman of iSignthis, and, from December 2021 the executive chairman of iSignthis, sworn on 21 September 2021 (**First Hart Affidavit**);

(c) an affidavit of Ms Elizabeth Warrell, the chief financial officer of iSignthis from 2 September 2019 and its joint company secretary from 1 November 2019, and the chief financial officer of iSeM from October 2021 until August 2022 when she resigned from iSignthis to focus on the business of iSeM (which is now known as ISX Financial EU Plc), sworn on 21 September 2021 (**Warrell Affidavit**);

(d) an affidavit of Mr Scott William Minehane, a non-executive director of iSignthis since November 2011, sworn on 21 September 2021; and

(e) an affidavit of Ms Linda Luu, Head of Legal, Australia, New Zealand and South Pacific for **Visa AP** (Australia) Pty Ltd, sworn on 12 October 2022 and filed by Visa AP in the proceeding in relation to objections to a subpoena issued by the defendants on 8 March 2022 seeking the production of documents and communications broadly relating to the suspension and/or termination of iSignthis and/or iSeM from around 2019-2020.

20 In addition to the lay evidence filed by iSignthis, Mr Karantzis relied on the following further lay evidence:

(a) affidavits of Mr Anthony Seyfort, a partner of the firm HWL Ebsworth, sworn on 7 March 2023 and 10 May 2023; and

(b) a second affidavit of Mr Timothy Hart, sworn on 7 March 2023 (**Second Hart Affidavit**).

21 Ms Ilina and Ms Luu were not cross-examined. Mr Hart, Mr Minehane, Ms Warrell and Mr Seyfort were each cross-examined.

22 The defendants also tendered a number of documents.

23 ASIC called Mr Andrew Sisson as an expert witness on the question of materiality as it arose in relation to various parts of the case. Mr Sisson provided three reports, the first dated 20 October 2021 and the second dated 4 February 2022. He also provided a supplementary

expert report dated 24 May 2023, which was in response to a supplementary expert report of the defendants' expert, Mr Gregory John Houston.

24 ASIC also filed an expert report of Mr Pambos Ioannides dated 2 February 2022 in relation to relevant Cypriot law.

25 Insofar as their expert evidence is concerned, iSignthis and Mr Karantzis rely on:

(a) affidavits of Mr Houston, sworn 1 December 2021, and 7 March 2023, each an annexing expert report in relation to the question of materiality;

(b) an affidavit of Mr Polyvios G Polyviou, sworn 29 November 2021, annexing a report relating to relevant Cypriot law; and

(c) affidavits of Mr Timothy Heughan, a senior manager at Computershare, sworn 19 May 2023 and 5 June 2023, annexing an expert report and a supplementary report relating to off-market trading in iSignthis' shares.

26 Mr Heughan was cross-examined. Mr Polyviou and Mr Ioannides prepared a joint expert report dated 3 March 2022 (**Cypriot Joint Report**) and ultimately were not cross-examined. Mr Sisson and Mr Houston also prepared a joint expert report dated 15 March 2022 (**Materiality Joint Report**). Mr Sisson and Mr Houston gave evidence and were cross-examined concurrently in both tranches of the hearing.

27 I consider and evaluate in some detail the evidence of Messrs Sisson and Houston below. I also consider and evaluate below, as necessary, the evidence of Messrs Polyviou, Ioannides and Heughan, and the relevant evidence of the lay witnesses.

28 The issues to be determined are set out in the parties' pleadings, but with one minor exception to which I will come in due course, it is unnecessary to linger at this juncture with a description of the parties' cases as they are put in the pleadings. This will become clear in my consideration below of ASIC's various allegations, and the defences advanced to them by iSignthis and by Mr Karantzis. My consideration of the various parts of ASIC's case in these reasons is ordered consistently with the way the parties presented matters in their written closing submissions.

29 I record, however, that the final iteration of ASIC's pleading is the further amended statement of claim dated 9 March 2023. The final iteration of the first defendant's defence is that dated 15 December 2021, and the final iteration of the second defendant's defence is that dated 8 March 2023 (and filed 9 March 2023). ASIC also filed a reply dated 15 March 2021.

FACTUAL BACKGROUND

30 Under cover of this introduction I turn to those background matters which it is necessary to understand in order to grapple with the case which ASIC brings, and the defendants' responses. As has been mentioned, there are broadly two periods of time relevant to the alleged contraventions. These periods, and the relevant circumstances, are as follows.

The One-off Revenue period

31 The **One-off Revenue period** begins in March 2015 and runs through until 3 August 2018, but with relevant facts that extend until 15 November 2019. The circumstances relate to:

(a) iSignthis' satisfaction, as at 30 June 2018, of a series of contractual conditions related to its revenue performance, the satisfaction of which led to the issuing of shares in iSignthis to other persons and entities; and

(b) representations made by iSignthis and Mr Karantzis that, ASIC alleges, were false or misleading (at the earliest on 18 June 2018 and at the latest on 3 August 2018) about the proportion of iSignthis' total revenue for the final quarter of FY2018 that was made up of one-off revenue and/or upfront fees, as opposed to recurring revenue.

The Performance Milestones

32 In March 2015 iSignthis was reverse-listed on the ASX after it acquired 100 per cent of the shares in two entities involved in the provision of online identification and payment authentication services (iSignthis BV and ISX IP Ltd) from **iSignthis Limited BVI** (the **acquisition**). iSignthis Limited BVI is a company incorporated in the British Virgin Islands (and also named iSignthis Limited) and controlled by Mr Karantzis, who was both its director and shareholder.

33 The consideration received by iSignthis Limited BVI (as vendor) for the acquisition was the issuing by iSignthis of some 300,000,000 **Ordinary Shares** and 366,666,667 **Performance Shares**. The Performance Shares were issued on terms that each class would convert on a one for one basis into Ordinary Shares upon iSignthis meeting certain **Performance Milestones** by 30 June 2018. The Performance Milestones required iSignthis to achieve revenue of $2.5 million (for Class A), $3.75 million (for Class B), and $5 million (for Class C) over a six-month reporting period.

34 In the event that iSignthis did not achieve the Performance Milestone for a class of Performance Shares before 30 June 2018, all the Performance Shares in that class would convert into a single

Ordinary Share. However, as matters controversially transpired, iSignthis was successful in meeting all of the Performance Milestones by 30 June 2018 in the final six-month reporting period before the deadline, being the third and fourth quarters of FY2018, resulting in the issue of the 366,666,667 Ordinary Shares.

35 The Ordinary Shares issued as a result of the achievement of the Performance Milestones were transferred on Mr Karantzis' direction substantially in accordance with pre-existing share arrangements, including to iSignthis Limited BVI (approximately 149 million shares worth approximately $27 million as at 30 June 2018), and under which other directors and officers of the company, including Mr Karantzis' brother Andrew, and Mr Karantzis' mother, also benefited through the transfer to them of approximately 187 million Ordinary Shares (worth approximately $34 million as at 30 June 2018).

36 It is relevant to note, on ASIC's case, that iSignthis had not achieved any of the Performance Milestones in any six-month period to 31 December 2017 following the acquisition. However, in the six-month period ending 30 June 2018, iSignthis reported revenue of approximately $5.5 million. Further detail as to the timing and source of this revenue is outlined below in considering whether Mr Karantzis breached his director's duties in relation to the Performance Shares.

The integration agreements

37 The significant rise in revenue in the reporting period ending 30 June 2018 was due to iSignthis having entered into a series of what have been referred to as integration agreements in that period. These agreements involved iSignthis contracting with particular client entities to integrate those entities into online trading platforms (such as the "Panda" platform) and/or payment platforms, and to secure the relevant licensing services for the client. iSignthis had previously integrated customers onto trading/payment platforms. The agreements entered into in the first half of 2018, however, involved a new and more remunerative integration structure for the company.

38 At a high level, the structure of these agreements was that iSignthis, through a wholly owned subsidiary (Authenticate BV), would contract with the relevant entity to provide some combination of licensing, software, and integration services and simultaneously enter into a corresponding outsourcing agreement with another company to provide those services. iSignthis, through its subsidiary, would therefore book as revenue upfront the full amount of contracted for fees under the integration agreements (including the licensing and other service

fees charged by the end-licensor), which would then be passed onto the corresponding out-sourcing party as costs incurred under the outsourcing agreement, less a project management fee of approximately 7.5 per cent.

39 Integration agreements broadly of this type were concluded by Authenticate BV, with a number of start-up companies. These were **Corp Destination** Pty Ltd, **Fcorp** Services Ltd, and **IMMO** Servis Group s.r.o.. There was later a variation agreement with Corp Destination. Corresponding outsourcing agreements were entered into with **Fino** Software Technologies Ltd, a Cyprus company outsourcing the licencing and integration services to be provided by Authenticate BV to Corp Destination and to Fcorp. An outsourcing agreement in relation to IMMO was entered into with another company, **GibiTech** Ltd. The relevant details of these agreements are considered further below.

40 iSignthis also had another commercial opportunity presented to it during the fourth quarter of FY2018 which did not proceed. That was the opportunity to provide an integrated third-party customer relationship management (**CRM**) system and trading platform to **Rodeler** Limited, working with **BitTech** Advanced Technologies Ltd. Reference will also be made to this below.

41 Upon contracting with the relevant clients, and in some instances before the contracts were executed, iSignthis, under Mr Karantzis' direction, issued invoices for the contracted-for fees. All of the revenue was recorded before 30 June 2018. iSignthis recorded a significant increase in revenue for this period on the back of agreements which were substantively low-margin and concluded on a one-off transactional basis.

42 The provision of these integration services was a well-established part of iSignthis' business. From around 2017, iSignthis sought to "integrate", or provide customers with a payment services platform, to enable it to generate recurring transactional revenue by processing funds on behalf of its customers. Transactional revenue was based on and calculated by multiplying a merchant service fee (**MSF**) of approximately 1 per cent (or 100 basis points (**bps**)) by gross processed turnover volume (**GPTV)**, the latter of which being the value of client funds which iSignthis had processed and from which it deducted its fees.

43 However, notwithstanding the substantial rise in revenue in the reporting period ending 30 June 2018, in the second half of calendar year 2018 iSignthis recorded revenue of only $1,111,365. iSignthis maintains that this decline was due to a number of issues. Namely, that the National Australia Bank Limited (**NAB**) ceased to process merchants classified under the merchant

category code that included iSignthis' subsidiary (Authenticate BV); that a change in Apple's policy of protecting user privacy had restricted transaction volumes to below contracted GPTV maximums; and that iSeM lost access to Kobenhavns Adelkasse Bank (**KAB**), meaning it could not receive deposits and therefore settlements from card schemes and Worldline (the regulated financial institution for clearing and settling the European card transactions of iSeM).

The One-off Revenue representation timeline

44 As was mentioned at the outset, during the quarter ending 30 June 2018, iSignthis recognised revenue under the integration agreements totalling approximately €1,905,025, or approximately AUD$3 million. This one-off integration and setup services revenue under the integration agreements equated to approximately 75 per cent of the reported total unaudited revenue of AUD$3.95 million, and iSignthis incurred approximately AUD$2.85 million in one-off costs for out-sourcing services under the out-sourcing agreements (this being what has been referred to as the **One-off Revenue/Costs Information**).

45 iSignthis had earlier published a report to shareholders for the 2018 half year results on 28 February 2018 and a report to shareholders for the third quarter of 2018 ending 31 March 2018 on 26 April 2018 highlighting the increase in revenue in each quarter, as well as the proportion of revenue that was "settlement revenue" or "total operating revenue".

46 In response to the 28 February 2018 report, in March 2018 **Patersons** Securities Limited, market analysts, published a research note titled "1H18 Result, Monetisation Ramping up!" which stated that "[i]n 2H18, settlement activity is expected to dominate the revenue and earnings profile, with c.65% of revenues in the 3Q18 to date being settlement related settlement activity".

47 ASIC contends that iSignthis was aware of the One-off Revenue/Costs Information as early as 18 June 2018 when it issued invoices under the integration agreements for providing services under those agreements and took steps to recognise that revenue within the 30 June 2018 quarter. On 19 June 2018 there was a meeting of the iSignthis board of directors attended by all directors, including Mr Karantzis, where the directors were provided with the draft accounts for May 2018.

48 On 22 June 2018 iSignthis made an announcement titled "Cash Receipts - Performance Rights" which stated that "Cash receipts now in excess of AUD$3.75m for H2 of AUS FY2017/18" and announcing that the Class A and B Performance Milestones would be satisfied. In response

to this announcement, on 26 June 2018, Patersons published a research note in relation to iSignthis titled "Moving to Profitability" which considered iSignthis' revenue from the quarter on an "annualised run-rate basis".

49 On 31 July 2018, iSignthis published its quarterly report for the period ending 30 June 2018. That report noted that iSignthis would hold an online **Analyst Briefing** on 3 August 2018. The 31 July 2018 quarterly report attached iSignthis' **Appendix 4C** for that quarter, being the quarterly report for entities subject to Listing Rule 4.7B of the **ASX Listing Rules** (or **Listing Rules**).

50 After the publication of the report, Mr Martyn Jacobs, an analyst from Patersons, contacted Mr Karantzis via email on 31 July 2018 asking, "[a]re you able to say how much of the revenue was integration based?". Mr Karantzis responded "[n]o - those other questions are for the annual report post audit - I don't [sic] have data".

51 On 1 August 2018, Patersons published a research note in relation to iSignthis entitled "Momentum and opportunity building". The research note stated "[w]e have also rolled over our model resulting in a c.13% increase in the valuation to $0.45 / share" and noted that the valuation used a "**DCF**" (discounted cash flow) methodology.

52 Also on 1 August 2018, Mr Jacobs sent a further email to Mr Karantzis which attached a list of questions for the Analyst Briefing on 3 August 2018. Several of these questions were in relation to the breakdown of the proportion of total revenue comprised of one-off revenue versus recurring revenue, including "[p]lease advise the % of revenue in the June qtr that can be considered genuine recurring business activity as opposed to one-off integration type revenue?". Mr Karantzis responded to Mr Jacobs and stated that "[s]ome of these are just nonsense", Mr Jacobs then replied "I expected you would say that, but these are my questions to help my understanding, and frankly that of the market in general, who largely rely on me to help them …". Mr Karantzis responded to this email stating:

> You cannot seriously expect us to answer questions that will expose sensitive strategy …
>
> Together, they make your questions appear very amateurish, and detract from the intelligent ones you have asked..
>
> So, we will limit these to what makes sense to us – not to you

53 Mr Jacobs responded to Mr Karantzis at 11.43am attaching the Patersons research note of 1 August 2018.

54 At the Analyst Briefing on 3 August 2018, Mr Karantzis gave a presentation to both market analysts and investors regarding the performance of iSignthis in the fourth quarter of FY2018. The presentation was accompanied by a PowerPoint presentation which has been referred to by the parties as the **Analyst Brief**.

55 At page 3, the Analyst Brief stated: "[r]evenue in Q418 was in excess of $3.95m". At page 6, the Analyst Brief stated: "**[o]ne off Fees / One off Setups** (Integrations) < 15% of revenue (recur on each new agreement) – Invoiced at milestone on 30 day terms". It will be recalled that the true proportion of one-off revenue for the relevant period was approximately 75 per cent.

56 After he had finished his presentation, Mr Karantzis took questions from attendees including a question from Mr Mark Davies about the percentage of revenue in the previous quarter that was from upfront and one-off fees, to which Mr Karantzis responded that they had "cited a figure in the pack of less than 15 per cent".

57 An audio recording of the analyst briefing, including Mr Karantzis' exchange with Mr Davies, was published on the ASX market announcement platform.

58 On 6 August 2018, Patersons published another research note on iSignthis entitled "June Qtr conference call insights" (**6 August Patersons research note**). This note stated that "[r]ecurring business activity constituted c. 85% of revenues, with the balance being one-off integration related revenues". That same research note was forwarded to Mr Karantzis by Mr Jacobs on 7 August 2018.

59 On 15 October 2019, the ASX wrote to iSignthis requesting a detailed breakdown of iSignthis' contracted service fees revenue by services/solutions listed in the March 2018 quarter Appendix 4C for the six months ended 31 December 2017, 30 June 2018 and 31 December 2018. iSignthis responded in writing to the ASX on 25 October 2019, stating that the relevant figure for "Integration / Set up" services for the six-month period ending 30 June 2018 was AUD$26,860. That figure was not accurate.

60 After a further query letter from the ASX on 31 October 2019 with respect to how the IMMO and Fcorp integration agreements had been categorised, iSignthis responded on 15 November 2019. iSignthis stated that the figure provided in the 25 October 2019 response was mistaken and that the true figure for "Integration / Set up" services in the six-month period ending 30 June 2018 was AUD$3,056,187.

61 Further aspects of the One-off Revenue period will be canvassed below, as relevant to the consideration of the alleged contraventions.

The Visa termination period

62 The Visa termination period has its genesis on 4 October 2017 and runs through, relevantly until 17 August 2020. While there is some overlap between this timeframe and the One-off Revenue period, the transactions and other facts giving rise to ASIC's allegations with respect to Visa's termination of iSignthis are distinct from the basis for the allegations arising out of the One-off Revenue period.

63 For the sake of simplicity, the multiple entities operating under the umbrella of Visa Inc (except Visa AP) are referred to in these reasons simply as **Visa**.

Achieving principal membership

64 On 4 October 2017, iSignthis announced that one of its subsidiaries, iSeM, had been granted Visa principal membership status in Europe. The Visa principal membership was highlighted in a number of subsequent iSignthis announcements and was mentioned in the 3 August 2018 Analyst Briefing and the Analyst Brief to which reference has already been made. The Analyst Brief and the Analyst Briefing also highlighted elements of the company's Paydentity service and its KYC and AML capabilities.

65 iSignthis identified the significance of being granted such status as enabling it to process payments made using Visa products rather than having to rely on a third party (which is itself a principal member) to perform that service on an entity's behalf. This became of particular value to iSignthis because of the fact that the NAB and Worldline, which had previously processed (as principal members) transactions on iSignthis' behalf, had indicated that they would no longer process transactions in high-risk markets, such as online gambling, in which iSignthis operated extensively.

66 On 8 August 2019, iSignthis announced, with some fanfare, that it had been granted Visa principal membership status in Australia, along with its own unique bank identification number (BIN).

67 From late 2017 and into 2020, iSignthis consistently highlighted its principal member status with Visa (as well as with other major card providers, such as Mastercard and JCB) to investors

and to the market as demonstrative of the successful establishment of its ideal operating business model. Examples of iSignthis drawing attention to this fact include:

(a) the Analyst Brief (in which Mr Karantzis's presentation included reference to Visa's 56 per cent market share in the card market);

(b) the Annual Report for the year ending 30 June 2018;

(c) a 27 November 2018 email to investors (attaching a market announcement of the same day), in which it was announced that iSignthis' own payment processing system, ISXPay, was about to go live with respect to Visa and Mastercard, allowing iSignthis to process Visa and Mastercard transactions directly; and

(d) the Annual Report for the year ending 31 December 2019.

68 As will be seen, however, before long the relationship with Visa would hit stormy waters and would ultimately founder.

A breakdown of relations

69 Under cover of an email sent on 9 March 2020, Visa sent a letter dated 6 March 2020 to iSignthis and iSeM, addressed to Mr Karantzis, advising of the suspension of the acquiring bank identification numbers for each company in Europe and Australia, and its activities as a registered third party for any other Visa members or clients, effective immediately (the **6 March letter**). The 6 March letter raised a number of "serious concerns" that Visa had with regard to compliance and application of the Visa rules by iSignthis and iSeM, namely:

(a) "AML concerns" regarding:

> 1. **Unusual transaction activity** – Visa's Financial Intelligence and Analytics ("**FIA**") program conducts ongoing monitoring of IsignThis' activities to alert Visa to any unexpected behaviour which should be investigated further. The FIA program identified an unexpectedly high volume of cross-border transactions at IsignThis merchants by United States cardholders. In addition, the FIA program identified a high number of transactions with merchant category codes ("**MCCs**") often found to be associated with miscoded and/or illegal gambling. This indicates a potential violation of the Unlawful Internet Gambling Enforcement Act 2006. Visa contacted IsignThis via e-mail on 31 October 2019 to highlight the unusual transaction activity and requested further information relating to IsignThis's AML/ATF program, as well as supporting evidence including, amongst others, a copy of the latest AML policy and e-copies of merchant onboarding documents. IsignThis provided responses including supporting evidence on 5 November 2019 but this was not sufficient to satisfy Visa's AML program thresholds. In particular, the information provided, compared to the activity identified by the FIA program, has

shown that (i) there does not appear to be a reasonable explanation for the high volumes of transactions being processed at these merchants; and (ii) there does not appear to be a clear rationale as to why such a large percentage of these transactions are being carried out by United States cardholders.

2. **Suspicious merchant activity** – a review of a sample of the websites of merchants processing high volumes with IsignThis has raised suspicion as to the true origin of the transactions. In particular, transactions were not always possible on their websites and some websites were not indexed, therefore were unidentifiable by search engines such as Google. Visa has not been able to identify a reasonable explanation as to how such merchants can be operating at these transaction volumes under such circumstances. A review of a merchant's website is a fundamental element of an effective merchant due diligence program, and this indicates gaps in the AML program of IsignThis.

3. **Derogatory news regarding IsignThis** – Visa's ongoing monitoring program has identified press coverage which raises concerns about Isignthis' internal governance as well as its client portfolio. In particular, there are numerous press articles in respect of the step taken by the Australian Securities Exchange to suspend IsignThis from trading in October 2019 for alleged lack of adherence to listing rules. It appears that the stock is currently subject to reviews by the Australian Securities and Investment Commission and the Australian Securities Exchange. Additionally, an article in the Sydney Morning Herald on 18 December 2019 alleges that an IsignThis client, FCorp, has been ordered to stop all trading by the German financial regulator as it is trading without a licence. Given these allegations, the latter article raises further concerns about the effectiveness of the due diligence being performed by IsignThis and warrants explanation.

In relation to these concerns Visa concluded that it considered iSignthis to be in violation of "Visa Rule ID# 0000652;" and

(b) ongoing "[r]isk concerns" including:

> Visa has also identified a number of on-going Risk concerns, leading to an attempted risk review in August 2019 (the "Attempted Review"). IsignThis did not cooperate with the Attempted Review, as required by the Visa Rules, and has repeatedly indicated that it would continue to refuse to provide the required information to complete such a review. In such circumstances, Visa must rely on the information available through the Visa Compliance Programs, and there has been a significant number of cases since April 2019 when IsignThis has been highlighted as a cause for concern on the leading indicators for fraud, dispute and illegal activity. In addition, there has been a sharp increase in gaming transactions (MCC 7994), credit voucher transactions and transactions on MCC 6540 (stored value card purchase / load) following the Attempted Review. IsignThis has also breached the VAMP thresholds for excessive reported fraud in January and February 2020.
>
> In addition, Visa has alerted IsignThis to a significant quantity of suspected cases of transaction laundering (alerts dated 5 November 2019, 9 December 2019 and 23 December 2019). The responses from IsignThis do not provide

> Visa with confidence that sufficient investigation by IsignThis has taken place. There does not appear to be any evidence of robust investigation into the suspicious cross border activity or further analysis of the concerns this level of activity raises.
>
> The ongoing alerts from the Visa Compliance Programs and the suspected transaction laundering identifications lead Visa to reasonably conclude that IsignThis is introducing excessive risk into the Visa payment system and is not operating in sound and safe manner.

70 Further, the 6 March letter called for iSignthis to make available certain information to Visa by 16 March 2020.

71 As is noted in the 6 March letter, it appears that Visa had previously identified a number of on-going risk concerns with iSignthis resulting in an "attempted risk review" in August 2019. Visa contended that iSignthis did not cooperate with this review.

72 Mr Karantzis, on behalf of iSignthis and iSeM, replied to the 6 March letter on both 9 March 2020 (by email) and 11 March 2020. On 14 March 2020 Visa asked for further information. Mr Karantzis sent emails to Visa on 17, 19 and 25 March 2020 seeking, amongst other things, to "bring services back to an agreed subset of merchants whilst [the] review is undertaken", citing the impacts of the COVID-19 pandemic and the suspension, and providing updated merchant listings as to deactivated and terminated merchants.

73 Matters came to a head on 17 April 2020 with a letter from Visa to iSignthis and iSeM, communicating that Visa was terminating its relationship with iSignthis and iSeM and those entities' licences and that they must cease acting as a registered third party agent for any other Visa members or clients (the **17 April letter**). The letter advanced a number of reasons for the decision, which are considered further below.

74 Adopting termination introduced by ASIC, this decision will be referred to as the **Visa Termination Decision**.

75 The following matters were noted by Visa (in the 17 April letter) as the reasons for its having decided to terminate its relationship with, and the licences of, iSignthis and iSeM:

(a) "Inadequate merchant on-boarding processes";

(b) "Inadequate merchant due diligence";

(c) "The transaction monitoring program is not fit-for-purpose" that "had failed to identify the unusual transactional behaviour ";

(d) "General lack of proactive investigation and management"; and

(e) "Failure to register and disclose the use of third-party agents".

76 The 17 April letter set out steps to be taken by both parties "to effect the termination of iSignthis as a Visa client". The letter stated:

> The IST Response has not allayed the concerns outlined in the Suspension Letter, and in fact further evidence has been provided that IsignThis is not operating appropriate programs to manage Anti-Money Laundering and Risk. Therefore, in accordance with the Visa Rules, and to safeguard Visa's global payment system from the excessive level of risk presented by the IsignThis relationship, Visa has decided to terminate its relationship with IsignThis in Europe and Australia. It must also cease acting as a registered third party for any other Visa members or clients.

77 Mr Karantzis and Mr Hart exchanged a number of emails on 18 April 2020 in which Mr Karantzis' observed that Visa's 17 April letter "couldn't [sic] be worse" and "lets [sic] see what we can do re appeal etc". Also on 18 April 2020, Mr Hart sent an email to Mr Karantzis providing what appears to be a draft announcement to the market.

78 Mr Seyfort of HWL Ebsworth, the company's principal external legal adviser, received a telephone call from Mr Karantzis on 18 April 2020 in relation to the 17 April letter. Mr Seyfort asked Mr Karantzis a "large number" of questions about the importance of Visa to iSignthis' business, and the apparent dispute with Visa. Shortly after the call, Mr Seyfort received emails from Mr Karantzis containing the 17 April letter with some of Mr Karantzis' commentary and emails Mr Karantzis had sent to Mr Hart, including Mr Hart's suggested form of a potential announcement. Mr Seyfort deposes that over the weekend of 18 and 19 April 2020 he had conversations with Mr Hart and Mr Karantzis about the 17 April letter, and that Mr Karantzis informed him that iSignthis and iSeM disputed and intended to challenge the contentions in the letter. Mr Seyfort's evidence is that he informed them that he was inclined to the view that iSignthis did not need to make an announcement on the ASX market platform, but that he would reflect on the matter.

79 On 19 April 2020 Mr Karantzis emailed Mr Hart and Mr Seyfort, with the subject line "Hail Mary", and set out a draft email he intended to send to Visa. In the email Mr Karantzis stated that "there are two theories at play here" being that:

> 1. Visa want us out and this was just the medium used. Could be that we represent far too much brand risk for them, decision made at high level, irrevocable or
>
> 2. Our friend …, who threatened to "shut us down" mid last year, has succeeded in doing so. Given he would have been one of the authors of this letter, and his newfound rise in authority, and also with a brand new … and also a brand new … - it would not be difficult for him to pull wool over and steer this to where it needs to be.

80 On 20 April 2020, Mr Seyfort spoke to Mr Karantzis and advised him that iSignthis did not need to make an announcement at that time on the basis that, in his view, it could rely on the incomplete negotiation exception to Listing Rule 3.1 of the ASX Listing Rules, and that it was doubtful that the Visa relationship was material to the price or value of iSignthis' shares. On 20 April 2020, Mr Seyfort also emailed Mr Dominic White a colleague or friend of his who was Head of Merchant Sales & Acquiring, UK and Ireland at Visa to seek advice as to the best way to engage productively with Visa. Mr White responded later that day asking who iSignthis had been dealing with at Visa.

81 On 21 and 27 April 2020, Mr Karantzis, on behalf of iSignthis and iSeM, sent emails disputing the basis for the Visa Termination Decision and, therefore, the decision itself, and requesting that Visa withdraw its decision. Mr Karantzis also provided additional documents to Visa with those emails. In the 27 April 2020 email Mr Karantzis stated iSignthis' position that there were "serious factual errors" in Visa's 17 April letter, that evidence "for or against matters raised had not been established" and contended that there had been "a failure to afford procedural fairness, natural justice and due process to iSignthis". Consequently, Mr Karantzis contended that, in iSignthis' view, "the termination was wrongful and not in accordance with either of Visa's regulatory or contractual obligations".

82 Not long afterwards, on 29 April 2020, iSignthis released a business activity report for the first quarter of the 2020 calendar year. Amongst other things this report stated:

> Processing to merchants across the Visa network was also suspended for parts of March pending response to Visa re queries on ASX "investigation", concerns re "derogatory media" and the focus on high risk merchants. The Company is providing Visa with information regarding the ASX "investigation" and other matters. Visa has notified that their response times on this matter have been impacted by COVID-19.

It is noteworthy that this business activity report did not mention either that Visa had notified its response to iSignthis in the 17 April letter, or that Visa had communicated in that letter that the suspension had been escalated to a termination of its agreement with iSignthis and iSeM.

83 On 1 May 2020, Visa responded by way of letter to the two emails which Mr Karantzis had sent (on behalf of iSignthis and iSeM) on 21 and 27 April 2020. This letter stated:

> We appreciate that Visa's decision to terminate iSignThis' membership is not a welcome one, and it is not one that is taken lightly.
>
> …
>
> As a gesture of goodwill, we have reviewed the documents you sent following the Termination Letter. Unfortunately, this information is not sufficient to impact the

> decision to terminate.
>
> …
>
> We trust that iSignThis has now had sufficient opportunity to disclose evidence of the IST Risk Programs, and nothing substantive has been omitted. Consequently, Visa will not review any further documentation from iSignThis on Visa's findings
>
> …
>
> While it is unfortunate that we have had to terminate Visa's relationship with iSignThis, it is the most appropriate course of action in this case and we are confident that Visa is acting within its rights. We will continue to communicate with you on final matters relating to the process of off-boarding.

84 Mr Karantzis responded to Visa's letter dated 1 May 2020 on 5 May 2020 on behalf of iSignthis and iSeM. Mr Karantzis sought to address Visa's concerns as disclosed in the preceding correspondence, providing reasons and evidence which iSignthis and iSeM believed should be sufficient for Visa to reverse its decision, and noting that they wished to avoid "a referral by iSignthis for regulatory intervention and/or judicial review". Mr Karantzis concluded as follows:

> In the interests of avoiding what will be a very public spectacle that will be further damaging to our brand and Visa's, and noting the above very serious issues with Visa's current position, we would be pleased to discuss the above with a decision maker of Visa in order to resolve the matter.

85 Mr Karantzis also emailed Visa's Chief Risk Officer for Australia, New Zealand and the South Pacific (Mr Sam Gianniotis) on 6 May 2020, seeking to set up a call with someone to see if it was possible to "work this out". Mr Gianniotis responded on 7 May 2020 that he would get some information and revert back to Mr Karantzis.

86 On 12 May 2020, Visa sent a letter in response to iSignthis' letter of 5 May 2020. This letter stated:

> We write in response to your letter dated 5 May 2020 (the "**5 May Letter**"), following the termination letter from Visa, dated 17 April 2020 (the "**Termination Letter**"), and subsequent correspondence.
>
> In a gesture of good faith, we have reviewed all of the information provided in the 5 May Letter, however Visa has not altered its decision to terminate the relationship with IsignThis.
>
> We will continue to communicate with you on final matters relating to the process of off-boarding, however please note that we will not review any further information relating to the basis of the decision to terminate, which is final.
>
> Please refer to the Termination Letter for the 'Next Steps' for effecting termination, particularly in relation to timeframes.

87 iSignthis accepts that after receiving the letter dated 12 May 2020 from Visa, it recognised that it was no longer possible to negotiate a commercial outcome with Visa. Accordingly, on 13 May 2020, Mr Karantzis, on behalf of iSignthis and iSeM, sent an email to Visa which acknowledged Visa's termination of the agreement but continued to dispute the basis of the termination.

Communications with the Central Bank of Cyprus

88 On 15 May 2020, an employee of the CBC, Ms Maria Kontou, sent an email to Ms Anna Ilina, the AML Compliance Officer for iSeM who was responsible for reporting to the CBC and The Unit for Combating Money Laundering in Cyprus (MOKAS), requesting information about the Visa suspension.

89 In response, between 15 and 18 May 2020, a written notification to the CBC was prepared by iSignthis.

90 iSeM provided a letter of response to Ms Kontou of the CBC on 18 May 2020.

91 It is to be noted that iSeM's 18 May 2020 letter in response did not disclose that Visa had, according to the terms of the 17 April letter, terminated its relationship with iSignthis and iSeM, nor that one of its stated reasons for coming to such a decision was a concern regarding iSignthis' and iSeM's AML programmes.

92 On 21 May 2020, Ms Ilina spoke with Ms Kontou of the CBC by telephone and Ms Kontou acknowledged receipt of iSignthis' letter and confirmed that no further clarification was required.

Communications with the ASX and further disclosures

93 A fortnight earlier, on 7 May 2020, the ASX had sent a letter to iSignthis pursuant to Listing Rule 18.7 (the **7 May query letter**). Listing Rule 18.7 provides that a listed entity "must give ASX any information, document, or explanation" that the ASX asks for to enable the ASX to be satisfied that the entity "is, and has been, complying with, or will comply with, with the listing rules or any conditions or requirements imposed under the listing rules". The letter related, inter alia, to queries surrounding the fact that iSeM had been listed, on Visa's Global Registry of Service Providers, as "SUSPENDED BY AML" and, in that context, sought disclosure of information from iSignthis in answer to a series of questions posed by the ASX.

94 Between 13 May 2020 and 21 May 2020 Mr Karantzis, on behalf of iSignthis, and the ASX exchanged heated correspondence relating to the 7 May query letter. Mr Karantzis provided responses on 13 May 2020 and 20 May 2020 which the ASX deemed to be "not acceptable".

95 On 24 May 2020, iSignthis sent a letter to its shareholders and to the ASX for release to the market titled "Letter to Shareholders re Visa Relationship & ASX Suspension". This letter stated that iSignthis would "end its contractual relationship with Visa as a principal member in approximately 90 days". That letter advised that the reason for the termination was that Visa had amended its rules, and that this amendment led to anti-competitive concerns. The letter is reproduced in full below. The 24 May 2020 letter did not expressly state that Visa had, by the terms of the 17 April letter, terminated its agreement with iSignthis; nor did it state that Visa's reasons for such termination included concerns about iSignthis' and iSeM's AML programmes.

96 On 25 May 2020, Mr Karantzis, on behalf of iSignthis, sent an email to the ASX with attachments that included a copy of the 24 May 2020 letter and a document on iSignthis' letterhead dated 25 May 2020 purporting to be a response to ASX's 7 May query letter and the questions therein.

97 The 25 May 2020 response noted that:

(a) Visa's audit of iSeM related to compliance and risk review, rather than to AML (or related) concerns;

(b) iSignthis had not received the results of the Visa audit because it had been referred to a third-party independent auditor;

(c) Visa's reasons for suspension of iSeM were founded upon brand risk, including in relation to ASX's investigation into iSignthis and "derogatory media"; and

(d) any and all allegations of issues relating to money laundering appeared to have "originated with certain elements of the Australian media" and were not part of Visa's audit.

98 It will be necessary to return in some detail to the terms of the ASX's 7 May query letter, and Mr Karantzis' response in his 25 May 2020 letter.

99 Over approximately the next two months the ASX obtained copies of correspondence which had been exchanged between iSignthis and Visa. This correspondence included the 6 March letter and the 17 April letter.

100 On 5 August 2020, the ASX sent a query letter to iSignthis (the **5 August query letter**), pursuant to Listing Rule 18.7, requiring that iSignthis answer a series of further questions, and provide further information to the ASX in relation to the breakdown of iSignthis' relationship with Visa. For present purposes, the 5 August query letter specifically sought explanations from iSignthis as to why it had not disclosed the fact of the Visa termination, nor the reasons for the termination, to the ASX.

101 Mr Karantzis, on behalf of iSignthis, responded to the 5 August query letter by way of its own letter dated 17 August 2020 (the **17 August 2020 response**). The 17 August 2020 response did not answer the specific questions which had been put to iSignthis in the 5 August query letter. It did, however, assert that review of the full series of relevant correspondence between iSignthis and Visa showed the "true position" that iSignthis and Visa "were engaged in robust negotiations for a number of months" because Visa had "expressed concern about doing business with [iSignthis] because of the controversy surrounding [iSignthis]". The 17 August 2020 response asserted that the "controversy ha[d] been massively fuelled, if not caused, by ASX".

102 The 17 August 2020 response went on to note that that "[u]ltimately, the relationship was terminated in the context of rule changes by Visa that are inconsistent with the business model of [iSignthis]" alleging, further, that such rule changes were anti-competitive. The letter also stated that Visa's AML "risk speculation" is not supported by iSignthis' independent AML audit and the lack of concern by AML regulators.

103 Once again, it will be necessary to return to the terms of the 5 August query letter and the 17 August 2020 response.

104 Against this background I turn to consider each of the sets of allegations made by ASIC against iSignthis and Mr Karantzis. I deal first with what the parties have referred to as the **One-off Revenue Representation** claims, before moving to the alleged non-disclosure of the One-off Revenue/Costs Information. I then deal with the non-disclosure of the Visa termination information, before addressing the allegations that Mr Karantzis gave false and misleading information to the ASX arising from the Visa termination. Finally, I address the breach of directors' duties allegations against Mr Karantzis in relation to the achievement of the Performance Milestones.

ONE-OFF REVENUE REPRESENTATION CLAIMS

105 As has been mentioned, ASIC alleges that iSignthis contravened s 1041H of the Act by engaging in conduct, in relation to shares in iSignthis, that was false or misleading.

106 Section 1041H of the Act provides:

> (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

107 The issue for the court to determine is whether iSignthis' conduct in presenting the Analyst Briefing on 3 August 2018, and representing that in the fourth quarter to 30 June 2018 revenue from one-off or up-front fees accounted for less than 15 per cent of the total revenue (the One-off Revenue Representation, as defined in paragraph 26 of the further amended statement of claim dated 9 March 2023), was false or misleading.

ASIC's submissions that iSignthis contravened s 1041 of the Act

108 ASIC submits and I accept that the following matters are not in dispute:

(a) On 3 August 2018, iSignthis held an online interactive session for market analysts and investors about the company's financial results and performance in the fourth quarter of the financial year ending 30 June 2018 which has been referred to as the Analyst Briefing. The Analyst Briefing was presented by Mr Karantzis and accompanied by a PowerPoint presentation, which has been referred to as the Analyst Brief.

(b) The Analyst Brief PowerPoint presentation stated:

  (i) under the heading "Quarterly summary", that "Revenue in Q418 was in excess of $3.95m"; and

  (ii) under the heading "Discussing the 'Cash to Revenue Lag'" under "Questions Received", that "One off Fees / One off Setups (Integrations) < 15% of revenue (recur on each new agreement) - Invoiced at milestone on 30 day terms".

(c) During the Analyst Briefing, the following verbal exchange occurred between Mr Karantzis and one of the participants, Mr Davies:

> Mr DAVIES: Thanks, thanks for that. Good presentation. I just wanted to ask you a couple of questions. Look, you've largely covered them but what, what percentage of the revenue last quarter was from one, from upfront and one-off fees? And, and an easy one for you. Are you, are you expecting to continue revenue growth in the next quarter?

> Mr KARANTZIS: We've actually cited a figure in the pack of **less than 15 per cent** on the first question.
>
> (Emphasis added.)

(d) Following the Analyst Briefing, a link to an audio recording of the presentation was published on the ASX Market Announcement Platform.

109 ASIC alleges that the conduct of iSignthis and Mr Karantzis in making the One-off Revenue Representation in the Analyst Brief and during the Analyst Briefing, and publishing the documents on the ASX Market Announcement Platform, was conduct done in relation to shares in iSignthis. iSignthis admits that the shares were a "financial product" within the meaning of ss763A and 764A of the Act.

110 As has been mentioned, it is not in dispute that in the fourth quarter to 30 June 2018 iSignthis recognised revenue under the integration agreements totalling approximately $3 million, which is approximately 75 per cent of the reported total unaudited revenue of $3.95 million.

111 Consistently with Mr Hart's evidence, ASIC submits that if, therefore, having regard to the information in the Analyst Brief and the answer given by Mr Karantzis during the Analyst Briefing, iSignthis represented that in the fourth quarter to 30 June 2018 revenue for one-off or up-front fees accounted for less than 15 per cent of total revenue (the One-off Revenue Representation), that information would have been false and misleading and in contravention of s 1041H which ought to have been corrected by iSignthis.

112 Insofar as the broader context in which the representations were made is concerned, ASIC submits that it includes the following surrounding facts and circumstances.

113 First, that the Analyst Briefing was made in circumstances where previous disclosures and reports made by the company had generated a narrative of a startup company building recurring transactional (or "settlement") revenue through the processing of GPTV from integrated clients.

114 The following iSignthis publications are advanced by ASIC in support of this contention:

(a) In October 2017, iSignthis published a report to shareholders for the first quarter of FY2018 ending on 30 September 2017. The report stated that cash receipts were up quarter on quarter and transaction growth was continuing. A graph represented that "total recurring transactions" were progressively increasing quarter on quarter from

zero in the first quarter of FY2017 to over 600,000 transactions in the first quarter of FY2018.

(b) In January 2018, iSignthis published a report to shareholders for the second quarter of FY2018 ending 31 December 2017. The note stated:

> • Total recurring transactions (Tx) for the December quarter outperformed expectations, increasing +153% vs the September quarter:
>
> > • This outperformance was driven by stronger than expected platform usage from existing customers and the addition of new customers in November and December 2017
> >
> > • The Company expects growth to normalise to more sustainable levels and provides guidance for the March quarter Tx volumes of approximately 30% QoQ

The report contained an updated graph of "total recurring transactions" showing an increase over the first quarter of FY2018 (of over 600,000 transactions) to approximately 1.6 million transactions in the second quarter of FY2018. It also contained a section "revenue from recurring transactions" with a graph "total recurring revenue" showing a progressive increase from zero in the first quarter of FY2017 to over €100,000 in the first quarter of FY2018 and over €300,000 in the second quarter of FY2018.

(c) On 28 February 2018, iSignthis published a report to shareholders for the FY2018 half year results to 31 December 2017. Under the heading "operational trading outlook", the report stated that "Settlement revenues now make up over 65% of our revenue by vertical and will be the primary driver of revenues going forward". Settlement revenue or transaction processing revenue was considered by the company and described in its reports as being recurring.

(d) On 26 April 2018, iSignthis published a report to shareholders for the third quarter of FY2018 ending 31 March 2018. It said that unaudited revenue for the March quarter was $1.48 million. The report stated that contracted GPTV had increased to more than $500 million, and it included a graph of "Total Operating Revenue" showing a progressive increase from zero in the first quarter of FY2017 to over €300,000 in the second quarter of FY2018 and over €1,000,000 in the third quarter of FY2018.

(e) On 31 July 2018, as has been mentioned, iSignthis released a report to shareholders for the final quarter of FY2018, ending 30 June 2018. The report presented the unaudited financial results of iSignthis for the final quarter ($3.95 million revenue) and the 6

months to 30 June 2018 ($5.5 million revenue), and stated that the Performance Milestones for each of Class A, B and C would be met. Under the heading "business update", the report stated:

> The Company is pleased with the continual transaction volume growth quarter on quarter and the generation of revenue in excess of 167% when compared with the previous quarter. Whilst we are seeing revenues from a relatively low number of integrated customers, it is pleasing to see that strong numbers are now being delivered across each of our industry verticals (Identity verification, processing and card acquiring settlement services).

115 Secondly, ASIC notes that these announcements were followed and reported on by Mr Jacobs at Patersons as follows:

(a) In response to the company's 28 February 2018 announcement, in March 2018 Patersons published a research note titled "1H18 Result, Monetisation Ramping up!". The note stated: "In 2H18, settlement activity is expected to dominate the revenue and earnings profile, with c.65% of revenues in the 3Q18 to date being settlement related."

(b) In response to iSignthis' 22 June 2018 announcement, on 26 June 2018 Patersons published a research note titled "Moving to Profitability". The note stated:

> Our interpretation is that ISX is close to achieving the $5m revenue target (c.$10.0m annualised). If this is correct, it suggests that ISX has generated c.$3.5m revenue in the June qtr or c.$14.0m on an annualised run-rate basis, as compared with c.$0.7m reported in FY17. Achieving such revenue levels would indicate that ISX has finally hit profitability and should attract a new level of investor interest. It would also suggest an earnings upgrade could be warranted for our FY19 forecasts. The recent transaction banking announcements are a sign of positive progress and we expect this new activity has had some influence in the forthcoming June qtrly.

The note continued:

> If ISX hits $5m or goes close to it, it would mean that ISX has generated c.$3.5m in revenue for the June qtr, up from c.$1.5m in the March qtr. Subsequently, ISX would be operating at a run rate of c.$14m revenue pa. This equates to our full-year forecast revenue for FY19 and would imply a future upgrade is warranted.

116 ASIC notes that Mr Sisson gave evidence that Mr Jacobs, who authored the June note, had formed a view that the $3.5 million revenue generated in the June quarter was recurring revenue, from which he anticipated that the company would be generating $14 million on an annualised run-rate. That estimate of $14 million annual revenue is only reliable, ASIC submits if the $3.5 million generated in the June 2018 quarter was recurring.

117 ASIC also notes the evidence that in July 2018 Mr Karantzis confirmed to Mr Jacobs in correspondence that the June quarter revenue could be annualised:

> Question - And therefore we can annualise this quarters revs on estimates cost base 6— 8ish meaning company is now cash flow positive and profitable?
>
> Once supply chain issues are solved, yes. …

118 Thirdly, ASIC notes that the 31 July 2018 announcement invited questions about the June quarter results in advance of the Analyst Briefing, and Mr Jacobs asked questions seeking confirmation of what proportion of the revenue was recurring. In this regard ASIC refers specifically to the following:

(a) As has been mentioned, on 31 July 2018 Mr Jacobs sent an email to Mr Karantzis asking:

> … Are you able to say how much of the revenue was integration based?
>
> Are you able to provide some colour around revenue segmentation in the qtr between the functional areas — KYC, Processing, Settlement, Transaction Banking?

(b) On 1 August 2018, Patersons published the research note to which reference has already been made entitled "Momentum and opportunity building", which Mr Jacobs sent to Mr Karantzis by email at 11.43am that day. The report stated:

> As ISX achieved >$5m revenue for the June half, it subsequently qualified for all three tranches of the c.336m performance shares, which are expected to be issued in the September qtr, subject to final audit. The new shares expand the total share base by c.50% to 1.004bn shares.
>
> **Although the result is subject to audit and the revenue target is a simple target, it would be helpful for the market to know what % of the June qtr revenue can be classified as recurring business activity as opposed to one-off in nature.** Assuming it is a high portion, understanding this point would assist the market's understanding of the underlying business momentum being experienced by the company. We hope to have this question answered on Friday's conference call.
>
> (Emphasis added.)

(c) Also on 1 August 2018, as has been mentioned, Mr Jacobs sent an email to Mr Karantzis attaching a list of questions for the forthcoming briefing. The following questions in that email related to the breakdown of iSignthis' revenue in the quarter:

> Please segment the revenue by % between KYC, Processing, Settlement and Transaction Banking?
>
> Please advise the % of revenue in the June qtr that can be considered genuine recurring business activity as opposed to one-off integration type revenue?

> …
>
> It would be helpful to have an industry breakdown of the revenue for the June half? (CFD, Options etc.)
>
> …
>
> Can you please elaborate on the 2nd dot point on page 5 that refers to an additional low margin revenue stream? Please describe what this service is, how material it can be to overall financial performance and why it is strategic?

(d) ASIC submits that the reference in Mr Jacobs' above question to the "2nd dot point on page 5" is to iSignthis' 31 July 2018 report referred to above which noted:

> Additional one off revenues to new merchants enabling direct connection to our core services. These revenues are at low margin and have a direct correlation with an increase in cost of goods sold but they will enable long term, consistent revenues via our core services and creates a stickier relationship with the merchant…

119 Insofar as the immediate context in which the representations were made is concerned, ASIC submits that includes the information communicated in the Analyst Brief and in answer to the questions put to Mr Karantzis during the Analyst Briefing, as follows:

(a) the Analyst Brief contained slides addressing "Questions Received", being those questions received following the invitation stated in the company's report to shareholders for the 30 June 2018 quarter.

(b) The "Questions Received" section of the Brief included a slide "Discussing the 'Cash to Revenue Lag'", which set out an explanation of the revenue-producing products including "One off Fees / One off Setups (Integrations)".

(c) This slide, ASIC submits, addresses the first two questions asked by Mr Jacobs set out above — as to the % revenue by segment and % revenue that is recurring as opposed to one-off integration.

(d) In that context, ASIC submits, the "Discussing the 'Cash to Revenue Lag'" slide stated that the "One off Fees / One off Setups (Integrations) < 15% of revenue (recur on each new agreement) - Invoiced at milestone on 30 day terms".

120 ASIC submits that this statement — "One off Fees / One off Setups (Integrations) < 15% of revenue (recur on each new agreement)" — could conceivably be interpreted in one of two ways.

121 The first is that such fees are less than 15 per cent of total revenue received by the company across all segments in the relevant reporting period. On this reading, so ASIC says, about 15

per cent of the company's business revenue in that period would include revenue received from integrating new customers.

122 The second way ASIC accepts this statement could be interpreted is that such fees are less than 15 per cent of the revenue over the term of a typical client relationship. That is, out of the total revenue received from a single customer – from integration, through transaction processing on a platform, until completion/termination of a client relationship – about 15 per cent is from integration services and about 85 per cent is from processing services. On this reading, ASIC accepts, no information is given about what proportion of the company's total revenue in the relevant reporting period is from one-off integration fees.

123 ASIC accepts that the words "(recur on each new agreement)" are consistent with both meanings. These words, ASIC says indicate that although these fees are "one off" in the sense of only being paid once per agreement entered into, revenue from this product (integrations) may recur as new clients are integrated. Revenues from one-off integrations would be expected to recur on each new agreement, and in each relevant reporting period.

124 ASIC submits that focusing on the information in the Analyst Brief, it is necessary for the court to characterise the effect of that information on the state of mind of an ordinary and reasonable member of the class of persons to whom the information was directed, judged by reference to the broader and immediate context.

125 ASIC submits that the information was directed to market analysts in attendance at the Analyst Briefing and to the market and investors through publication on the ASX, an invitation to the Analyst Briefing having been included in the company's 31 July 2018 report to shareholders for the quarter ending 30 June 2018. ASIC submits that an ordinary and reasonable person who attended the Analyst Briefing or listened to the Analyst Briefing after it was published on the ASX (being a reasonable person who ordinarily invests in securities), would be expected at least to have received and read that 31 July 2018 announcement, and would very likely have been following the company's financial progress including by reading previous announcements and publications made by and in relation to the company.

126 In this regard ASIC notes that Mr Houston's evidence was that Mr Jacobs' views can be taken to reflect those of market participants. Thus, ASIC submits Mr Jacobs might reasonably be viewed as representative of the ordinary and reasonable member of the class.

127 ASIC submits further that there are two contextual matters that would likely bear upon the minds of a reasonable member of the class of analysts and investors.

128 The first of these is that the Analyst Brief was prepared in the context of the 30 June 2018 quarterly results and, in part, to answer questions invited from analysts and investors about those results. In that context, ASIC submits a reasonable analyst or investor would likely interpret the information in the Analyst Brief to be directed to explaining the 30 June 2018 quarterly results (that is, the proportion of one-off revenue over that particular reporting period) and not the term of a typical client relationship. ASIC submits that, contrary to iSignthis' opening submission, there is no contextual reason why a reasonable analyst or investor would read the 15% figure as explaining the 2018 Full Year results in circumstances where the Analyst Brief was focused upon the "Quarterly Summary" for the period just ended, and the full year results would not be known for another six months.

129 The second contextual matter, ASIC submits, is that iSignthis was a start-up company focusing upon integrating and building new client relationships. In previous announcements the company had highlighted new integrations coming on board, which were expected to bring in GPTV over future reporting periods. As at 30 June 2018, GPTV revenue was anticipated by the market to be coming on-line, but the company was in the early phases of its client relationships. In the 31 July 2018 report to shareholders on the 30 June 2018 quarter, the company gave the following business update:

> The Company is pleased with the continual transaction volume growth quarter on quarter and the generation of revenue in excess of 167% when compared with the previous quarter. Whilst we are seeing revenues from a relatively low number of integrated customers, it is pleasing to see that strong numbers are now being delivered across each of our industry verticals (Identity verification, processing and card acquiring settlement services).
>
> The ongoing focus is to continue to build on these numbers in order to reach a break even position as quickly as possible. The business development division is looking at completing contracts to new customers whilst at the same time the merchant support team is finalising integration of services to contracted clients. New business, new integrations and growth of existing customers are all factors in the quarter on quarter transaction and revenue growth.

130 ASIC submits that in this context a reasonable analyst or investor would not expect the company to report on the proportions of one-off and recurring transaction revenue over the full term of a typical client relationship. The company would not be expected to have data about a typical client relationship from integration to completion given the stage of development of those relationships. ASIC contends that the company would reasonably be expected, however,

to report on how the business was tracking in integrating new customers to achieve "quarter on quarter transaction and revenue growth", and what proportion of the revenue in the previous quarter was attributable to such transaction revenue and "growth of existing customers", and what proportion was attributable to "new business, new integrations".

131 Thus, ASIC submits that in these circumstances the written Analyst Brief itself was misleading or at least likely to mislead. It is said that in the immediate and broader context in which it was made, an ordinary and reasonable analyst or investor would have understood the representation to be referring to the proportions of revenue reported for the 30 June 2018 quarter.

132 As to the oral representation said to have been made at the Analyst Briefing, ASIC submits that it is plain that Mr Karantzis' response to the question asked during the briefing was misleading or deceptive. Mr Davies' question during the briefing is submitted to have been unambiguously clear: "what percentage of the revenue last quarter was from one, from upfront and one-off fees". ASIC submits that Mr Karantzis' answer to that question: "We've actually cited a figure in the pack of less than 15 per cent" clearly represented that the percentage of revenue in the 30 June 2018 quarter from one-off integration fees was less than 15 per cent.

133 This is so, ASIC submits, whatever meaning is attributed to the written statement in the pack. If (as ASIC contends) an ordinary and reasonable analyst or investor would have understood the written statement to mean that one-off integration revenue accounted for less than 15 per cent of revenue in the 30 June 2018 quarter, the oral statement repeated that information and reinforced the false representation.

134 Alternatively, ASIC submits, by reference to Mr Sisson's evidence, if there was ambiguity in the written statement, the oral statement would very likely have dispelled that ambiguity and indicated that the information in the pack was made in relation to the 30 June 2018 reporting period, and not over the course of a client relationship.

135 In the alternative, ASIC submits, if (on the defendants' case), the written statement is taken to mean that one-off integration revenue accounts for less than 15 per cent of revenue over a typical client relationship, the oral statement would not have created ambiguity, or "confusion or wonderment" in the mind of a reasonable person. Rather, it would likely have indicated that the 15 per cent figure also applied in the 30 June 2018 quarter. Both statements, ASIC submits, can be true. If one-off integration revenue accounts for less than 15 per cent of total revenue per customer over a typical client relationship, and that proportion recurs on each new

agreement, it would not be surprising to be told that one-off integration revenue also accounted for less than 15 per cent of total revenue in a particular reporting period.

136 ASIC also submits that although it is not determinative, it is relevant and significant that the conduct did *in fact* mislead Mr Jacobs in the manner alleged: see *Domain Names Australia Pty Ltd v .au Domain Administration Ltd* (2004) 139 FCR 215 at 220 [17] (Wilcox, Heerey and Nicholson JJ). Consistently with Mr Houston's evidence, Mr Jacobs was a "representative member" of the class of persons to whom the Analyst Briefing was presented and whose views can be taken to reflect those of market participants. ASIC notes that following the Analyst Briefing, Mr Jacobs published a research note on 6 August 2018 which observed that recurring business activity constituted 85 per cent of revenue, with the balance of 15 per cent being one-off integration related revenues. Moreover, ASIC contends, not only did the One-off Revenue Representation cause Mr Jacobs to be misled, but it caused him to pass on his understanding of what was said and presented by Mr Karantzis, and to repeat the One-off Revenue Representation in his own publication to other investors and potential investors in the market.

iSignthis' response to ASIC's One-off Revenue Representation claims

One-off Revenue Representation: "in writing"

137 iSignthis' position is that it cannot be said that the one-off revenue representation was made in writing in the Analyst Brief.

138 iSignthis submits that the plain and natural meaning of the words "One off Fees/One off Setups (Integrations) < 15% of revenue (recur on each new agreement)" is that for each customer the integration fee was 15% of the total contract revenue. In this regard iSignthis notes that Mr Sisson accepted that the written statement "could be interpreted to mean less than 15% of revenue over the full term of a typical client relationship". Likewise Mr Houston considered that the written material appeared to convey the typical composition of revenue per agreement as opposed to the revenue composition for the fourth quarter of FY2018. iSignthis submits that this is also the way the company's auditors (Grant Thornton) and the company secretary, Mr Todd Richards, understood the integration revenue. iSignthis proffers the example of Mr Bradley Kraftt of Grant Thornton, in anticipation of the audit, saying to Mr Richards that he appreciated "the integration fees will, relative to billings **throughout the remainder of each contract**, … be proportionally small…" (emphasis added).

139 iSignthis points also to the third page of the Analyst Brief which is entitled "Quarterly summary". It is submitted that that page contains statements in relation to the revenue for the fourth quarter of FY2018; in particular, that it exceeded $3.95 million. However, iSignthis submits, there is no statement on that page that 15 per cent of the total revenue for the fourth quarter of FY2018 was for one-off or up-front fees. Had it been intended to convey that the expression "<15% of revenue" related to the quarterly revenue, iSignthis submits that this is the page where the reference should have appeared. In this regard iSignthis contends that the information on this page was given in the context of the quarterly reports and, in particular, the report dated 31 July 2018 which said that in the fourth quarter of FY2018 iSignthis had achieved "[a]dditional one off revenues …" which "have a direct correlation with an increase in cost of goods sold."

140 In addition, iSignthis points to the fact that the sixth page of the Analyst Brief, which contains the "<15%" reference, is entitled "Discussing the 'Cash to Revenue Lag'". This page, it is said, is concerned with the company's products generally, including "One off Fees/One off Setups". iSignthis submits that contextually, this page does not contain a statement that 15 per cent of the total revenue for the fourth quarter of FY2018 was for one-off or up-front fees.

141 iSignthis draws attention also to the eighth page of the Analyst Brief which is entitled "Discussing the 'Recurring Revenue' & 'Margins'". This, it is said, dealt with contributions to recurring revenue, including GPTV being greater than $600 million. iSignthis submits that it does not contain the alleged One-off Revenue Representation or any suggestion that 85 per cent of the total revenue for the fourth quarter of FY2018 was recurring.

142 iSignthis submits finally that the fact that the Analyst Brief does not contain the alleged One-off Revenue Representation can be implied from the fact that the oral question needed to be asked during the Analyst Briefing on 3 August 2018. It is submitted that if the written document contained the alleged representation, then there would have been no need for the question to have been asked during the presentation.

One-off Revenue Representation: "orally"

143 Insofar as the One-off Revenue Representation is alleged to have been made orally, iSignthis contends that the answer given towards the end of the presentation ("[w]e've actually cited a figure in the pack of less than 15 per cent…") referred the audience back to the written document. iSignthis submits that ambiguity immediately arose because that document referred to 15% in a different context, being the composition of revenue over the term of a typical client

relationship. ASIC's case, iSignthis contends, is too simplistic because it focuses all the attention on the question which, it admits, was clear, rather than on the answer, which it accepts was plainly not clear.

144 iSignthis notes that Mr Houston described this feature of the oral response many times in his evidence. His view is that the ambiguity arose from the combination of the question, the oral answer and the material referred to in the written document. Mr Houston explained that the written material on the page of the analyst briefing "appeared to be nothing to do with the June quarter" as he read it to be " commentary on … the lifecycle of a new merchant." Mr Houston said that the material "referred to in the answer was not a response to the question because it concerned something different…" and therefore "gives rise to ambiguity… ." And then again: "there's a question, and there is a response that says, 'yes, the answer is over there' and when I look at 'over there', and see what's said to be the answer, it's not responsive to the question".

145 In these circumstances iSignthis submits that the oral answer given to the question must have caused the audience confusion because the Analyst Brief did not contain the One-off Revenue Representation - it did not attribute less than 15 per cent of the revenue in the fourth quarter of FY2018 to up-front and one-off fees and instead said something else.

146 In any event, iSignthis submits the intended audience should be understood as being a group of sophisticated institutional investors, members of whom would have read the comprehensive quarterly report to shareholders for the fourth quarter of FY2018 only two days earlier. iSignthis submits that the terms of the quarterly report would have exacerbated the uncertainty arising from Mr Karantzis' confusing oral remark because the report disclosed "new revenue streams" including "additional one off revenues to new merchants enabling direct connection to our core services". The report said that "[t]hese revenues are at low margin and have a direct correlation with an increase in cost of goods sold…". Appendix 4C then disclosed a very large increase in quarterly receipts for the fourth quarter of FY2018, being $2.633, million matched by even larger "product manufacturing and operating costs" of $2.656 million. iSignthis notes that as Mr Hart and other witnesses explained in their evidence, "any competent analyst would have looked at the high cost of goods … and pair that with the revenue … and worked out it was low margin". Thus, it is contended, the formal quarterly report was quite inconsistent with an interpretation of Mr Karantzis' words ("we've actually cited a figure in the pack of less than 15 per cent on the first question") as conveying an answer to the question. The quarterly report,

iSignthis submits, is not reconcilable with an interpretation that "upfront and one off fees" were less than 15 per cent for the fourth quarter of FY2018.

147 Although iSignthis accepts that Mr Jacobs interpreted Mr Karantzis as conveying that "recurring business activity constituted c.85% of revenues", it is submitted that ASIC did not call Mr Jacobs and that in consequence his analytical abilities are unknown. In this regard, iSignthis notes that when Mr Jacobs was asking about the percentage of revenue for the fourth quarter of FY2018 that was "one-off integration type revenue", Mr Karantzis responded that he was "stunned that as an analyst, you havent [sic] worked out the maximum extent of the one offs". It is said that Mr Karantzis could only have been referring to the quarterly report including Appendix 4C.

Relevant principles

148 The relevant principles for determining the meaning of particular conduct and whether it was misleading or deceptive, or likely to be so, involve in the present circumstances consideration of what meaning the conduct conveyed, and determining whether that conduct in light of that meaning was misleading or deceptive or likely to mislead of deceive: ***Self Care*** *IP Holdings Pty Ltd v Allergan Australia Pty Ltd* (2023) 97 ALJR 388; [2023] HCA 8 at 407 [80]. In *Self Care* the Court explained at 407-408 [82]-[83]:

> 82 [These] steps require the court to characterise, as an objective matter, the conduct viewed as a whole and its notional effects, judged by reference to its context, on the state of mind of the relevant person or class of persons. That context includes the immediate context – relevantly, all the words in the document or other communication and the manner in which those words are conveyed, not just a word or phrase in isolation – and the broader context of the relevant surrounding facts and circumstances. It has been said that "[m]uch more often than not, the simpler the description of the conduct that is said to be misleading or deceptive or likely to be so, the easier it will be to focus upon whether that conduct has the requisite character". That said, the description of the conduct alleged and identified at the first step should be sufficiently comprehensive to expose the complaint, because it is that conduct that will ultimately, as a whole, be determined to be or not to be misleading or deceptive.
>
> 83 Where the conduct was directed to the public or part of the public, the third and fourth steps must be undertaken by reference to the effect or likely effect of the conduct on the ordinary and reasonable members of the relevant class of persons. The relevant class of persons may be defined according to the nature of the conduct, by geographical distribution, age or some other common attribute, habit or interest. It is necessary to isolate an ordinary and reasonable "representative member" (or members) of that class, to objectively attribute characteristics and knowledge to that hypothetical person (or persons), and to consider the effect or likely effect of the conduct on their state of mind. This hypothetical construct "avoids using the very ignorant or the very

knowledgeable to assess effect or likely effect; it also avoids using those credited with habitual caution or exceptional carelessness; it also avoids considering the assumptions of persons which are extreme or fanciful". The construct allows for a range of reasonable reactions to the conduct by the ordinary and reasonable member (or members) of the class.

(Footnotes omitted.)

149 The principles as applicable to s 1041H of the Act were distilled by O'Bryan J in *Australian Securities and Investments Commission v Dover Financial Advisers Pty Ltd* (2019) 140 ACSR 561 at 586-587 [98]-[99] as follows:

> 98 The applicable principles concerning the statutory prohibition of misleading or deceptive conduct (and closely related prohibitions) in the Australian Consumer Law, the Corporations Act and the ASIC Act are well known. The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error (that is, to form an erroneous assumption or conclusion about some fact or matter): *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (***Puxu***) at 198 per Gibbs CJ; *Taco Co of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 (***Taco Bell***) at 200; [*Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45; 169 ALR 677; 46 IPR 481; [2000] HCA 12 (***Campomar***)] at [98]; *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640 (***TPG Internet***) at [39] per French CJ, Crennan, Bell and Keane JJ; [*Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304; 257 ALR 610; 73 ACSR 1; [2009] HCA 25 (***Campbell***)] at [25] per French CJ. A number of subsidiary principles, directed to the central question, have been developed:
>
> (a) First, conduct is likely to mislead or deceive if there is a real or not remote chance or possibility of it doing so: see *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (***Global Sportsman***) at 87; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Australia) Inc* (2012) 38 VR 569 at [60] per Nettle JA (Warren CJ and Cavanough AJA agreeing at [33]).
>
> (b) Second, it is not necessary to prove an intention to mislead or deceive: *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216 at 228 per Stephen J (with whom Barwick CJ and Jacobs J agreed) and at 234 per Murphy J; *Puxu* at 197 per Gibbs CJ.
>
> (c) Third, it is unnecessary to prove that the conduct in question actually deceived or misled anyone: *Puxu* at 198 per Gibbs CJ. Evidence that a person has in fact formed an erroneous conclusion is admissible and may be persuasive but is not essential. Such evidence does not itself establish that conduct is misleading or deceptive within the meaning of the statute. The question whether conduct is misleading or deceptive is objective and the Court must determine the question for itself: see *Taco Bell* at 202 per Deane and Fitzgerald JJ.
>
> (d) Fourth, it is not sufficient if the conduct merely causes confusion: *Puxu* at 198 per Gibbs CJ and 209-210 per Mason J; *Taco Bell* at 202 per Deane and Fitzgerald JJ; *Campomar* at [106].
>
> 99 In assessing whether conduct is likely to mislead or deceive, the courts have

> distinguished between two broad categories of conduct, being conduct that is directed to the public generally or a section of the public, and conduct that is directed to an identified individual. As explained by the High Court in *Campomar*, the question whether conduct in the former category is likely to mislead or deceive has to be approached at a level of abstraction, where the Court must consider the likely characteristics of the persons who comprise the relevant class of persons to whom the conduct is directed and consider the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful (at [101]-[105]). In *Google Inc v ACCC* (2013) 249 CLR 435, French CJ and Crennan and Kiefel JJ (as her Honour then was) confirmed that, in assessing the effect of conduct on a class of persons such as consumers who may range from the gullible to the astute, the Court must consider whether the "ordinary" or "reasonable" members of that class would be misled or deceived (at [7]). In the case of conduct directed to an identified individual, it is unnecessary to approach the question at an abstract level; the Court is able to assess whether the conduct is likely to mislead or deceive in light of the objective circumstances, including the known characteristics of the individual concerned. However, in both cases, the relevant question is objective: whether the conduct has a sufficient tendency to induce error. Even in the case of an express representation to an identified individual, it is not necessary (for the purposes of establishing liability) to show that the individual was in fact misled. As observed by French CJ in Campbell at [25]:
>
> > Characterisation is a task that generally requires consideration of whether the impugned conduct viewed as a whole has a tendency to lead a person into error. It may be undertaken by reference to the public or a relevant section of the public. In cases of misleading or deceptive conduct analogous to passing off and involving reputational issues, the relevant section of the public may be defined, according to the nature of the conduct, by geographical distribution, age or some other common attribute or interest. On the other hand, characterisation may be undertaken in the context of commercial negotiations between individuals. In either case it involves consideration of a notional cause and effect relationship between the conduct and the state of mind of the relevant person or class of persons. The test is necessarily objective. (citations omitted)

See also *Australian Securities and Investments Commission v PE Capital Funds Management Ltd (external admins apptd)* (2022) 159 ACSR 1 at 27-28 [125]-[126] (Cheeseman J).

150 In its submissions iSignthis emphasises, both in relation to the written representation and the oral representation, that determining whether or not either representation amounted to misleading or deceptive conduct requires the relevant representation to be viewed in its entire and proper context, referring to *Parkdale Custom Built Furniture Pty Ltd v* ***Puxu*** *Pty Ltd* (1982) 149 CLR 191 at 199 (Gibbs CJ); *Australian Competition and Consumer Commission v Jayco Corp Pty Ltd* [2020] FCA 1672 at [595]-[597] (Wheelahan J); ***State of Escape*** *Accessories v Schwartz & Anor* (2020) 156 IPR 199; [2020] FCA 1606 at 236-237 [152]

(Davies J); and *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* (2014) 317 ALR 73 at 81 [41] (Allsop CJ).

151 On the subject of assessing whether the relevant conduct fits the description of misleading or deceptive, iSignthis submits and I accept that the court must address the question with reference to the class of persons at which the conduct was directed, referring in this regard to ***Campomar*** *Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at 84-85 [101]-[102] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, and Callinan JJ); and *State of Escape* at 236-237 [152] (Davies J). In this regard it may be accepted that whether a member of the relevant audience is, at least, likely to have been deceived or misled by the relevant conduct, may involve the knowledge which it is to be assumed is possessed by a member of that audience: *Campomar* at 84-85 [101]-[102]; *State of Escape* at 236-237 [152] (Davies J).

152 It may also be accepted, as iSignthis submits, that there is a distinction, for the purposes of s 1041H, between conduct which produces mere confusion and wonderment in the relevant audience, and that which is, at least, likely to mislead or deceive: ***State Street*** *Global Advisors Trust Company v Maurice Blackburn Pty Ltd (No 2)* [2021] FCA 137; (2021) 164 IPR 420 at 536 [713] (Beach J); *Guy v Crown Melbourne Ltd (No 2)* (2018) 355 ALR 420 at 525-526 [432]-[435] (Mortimer J); *State of Escape* at 236-237 [152]; and *Bing! Software v Bing Technologies* (2009) 180 FCR 191 at 206-207 [51]-[54] (Kenny J, with Greenwood and Logan JJ agreeing). As was observed by Beach J in *State Street* at 536 [713]:

> … conduct is misleading or deceptive or likely to mislead or deceive if it has the tendency to lead into error. But conduct causing confusion or wonderment is not necessarily co-extensive with misleading or deceptive conduct. Mere confusion or wonderment will not establish misleading or deceptive conduct.

Determination

153 Having regard to these principles, and viewing the relevant conduct of iSignthis in its full context and by reference to the class of persons at whom the conduct was directed, I have concluded that ASIC has made out its case that iSignthis contravened s 1041H of the Act. In particular, by the combination of the Analyst Brief and the statements made by Mr Karantzis during the Analyst Briefing, iSignthis represented that the fourth quarter to 30 June 2018 revenue from one-off or up-front fees accounted for less than 15 per cent of total revenue. In my assessment this representation was misleading and deceptive, or at least likely to mislead or deceive, in contravention of s 1041H of the Act.

154 I have formed the view that iSignthis made the One-off Revenue Representation having regard to the broader context and the more immediate context in which the representation was made, as this context has been set out above. The broader context, in my assessment, speaks for itself and does not appear to be the subject of serious challenge by iSignthis. Although it may be accepted that the immediate context (to use ASIC's description for the information communicated in the Analyst Brief and in answer to the questions put to Mr Karantzis during the Analyst Briefing) is more nuanced, particularly having regard to the competing interpretations of the Analyst Brief, fairly viewed I consider that Mr Karantzis' answer to Mr Davies' question was unambiguously clear and that Mr Karantzis' answer: "We've actually cited a figure in the pack of less than 15 per cent" constituted a clear representation that the percentage of revenue in the fourth quarter to 30 June 2018 from one-off integration fees was less than 15 per cent.

155 As ASIC submits, that is so whatever meaning might be attributed to the written statement in the Analyst Brief. If an ordinary and reasonable analyst or investor would have understood the written statement to mean that one-off integration revenue accounts for less than 15 per cent of revenue in the quarter ended 30 June 2018, Mr Karantzis' oral statement would have served to confirm that. However, if such a reader considered the Analyst Brief to be ambiguous, Mr Karantzis' statement would in all likelihood have dispelled that ambiguity and indicated that the information in the pack was made in relation to the 30 June 2018 reporting period and not over the course of a client relationship. And if the Analyst Brief is to be taken as meaning that one-off integration revenue accounts for less than 15 per cent of revenue over a typical client relationship, Mr Karantzis' answer to the question would not have created ambiguity or confusion or wonderment in the mind of a reasonable person. I accept that it would rather have indicated that the 15 per cent figure also applied in the 30 June 2018 quarter, given that both statements can be true.

156 The fact that Mr Jacobs was in fact misled only serves to buttress this conclusion.

157 It follows, therefore, that I do not accept iSignthis' submission that Mr Karantzis' answer to the clear question asked by Mr Davies gave rise to any real ambiguity. To construe the dialogue in the context of the Analyst Brief in the way propounded by iSignthis and supported by Mr Houston is intuitively and linguistically unsatisfying, if not contrived.

158 I do not accept iSignthis' submission, therefore, that Mr Karantzis' oral answer to Mr Davies' question is likely to have caused nothing more than "mere confusion or wonderment" in the

mind of the audience, to use the language of *Australian Municipal, Administrative, Clerical and Services Union v Commissioner of Taxation* [2022] FCA 1225 at [455] (Jagot J); see also *Puxu* at 198 (Gibbs CJ) and 209-210 (Mason J), *Taco Co of Australia Inc v* ***Taco Bell*** *Pty Ltd* (1982) 42 ALR 177 at 201-202, *Campomar* at 87 [106], and *State Street* at 536 [713]. Mr Karantzis' answer was, in context, misleading and deceptive or at least likely to mislead and deceive.

159 It is accordingly appropriate to make a declaration in the terms sought by ASIC, namely that by representing on 3 August 2018 that iSignthis' revenue for one-off integration and set-up fees in the period 1 April 2018 to 30 June 2018 accounted for less than 15 per cent of the total revenue in that period, iSignthis engaged in conduct that was misleading or deceptive, in contravention of s 1041H of the Act.

ASIC's allegations that Mr Karantzis contravened ss 674(2A) and 180(1) of the Act

160 ASIC also alleges that Mr Karantzis contravened s 180(1) of the Act in relation to the One-off Revenue Representation by failing to discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were the chief executive officer of a company in iSignthis' circumstances.

161 Section 180(1) of the Act provides:

> A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
>
> (a) were a director or officer of a corporation in the corporation's circumstances; and
>
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.

162 ASIC submits that a finding that iSignthis, by Mr Karantzis' conduct, contravened s 1041H of the Act might be sufficient, but it would not be necessary, to conclude that Mr Karantzis contravened s 180(1) of the Act. Section 180(1), ASIC submits, requires a director to act with care, skill and diligence. It sets out an objective test to measure the reasonableness of a director's actions, considered against how a reasonable person holding a similar position in the same circumstances would act: *Australian Securities and Investments Commission v* ***Mitchell*** *(No 2)* (2020) 382 ALR 425 at 668 [1397] (Beach J). Mr Karantzis was the chief executive officer of iSignthis, but as ASIC submits it is also necessary to consider his responsibilities and particular involvement in the operation of the company, and the distribution of responsibilities

among him and other directors and employee: see *Australian Securities and Investments Commission v* ***Mariner*** *Corporation Ltd* (2015) 241 FCR 502 at 582 [440]-[441] (Beach J).

163 In this regard ASIC emphasises that Mr Karantzis does not in his defence address or dispute the following facts:

(a) That he was involved in preparing, and had knowledge of, previous announcements and reports that the company had released to the market, which described the company's development as a start-up business, its integration of new customers, and its building of recurring transactional (or processing/settlement) revenue.

(b) That he directly corresponded with Mr Jacobs who had raised with him his particular interest in what drove the revenue increase in the six months to 30 June 2018, and in the nature or classification of that revenue and the relative proportion of one-off versus recurring revenue in that period.

(c) That he knew that Mr Jacobs would be seeking answers from him about those issues during the Analyst Briefing, in particular:

(i) on 31 July 2018, Mr Jacobs sent an email directly to Mr Karantzis asking "Are you able to say how much revenue was integration based?". Mr Karantzis read that email and considered that question, but evaded giving a response, saying falsely "I dont [sic] have data". On 31 July 2018, as Mr Hart accepted, he did have that data.

(ii) on 1 August 2018, Mr Jacobs sent an email directly to Mr Karantzis asking that he advise at the Analyst Briefing "the % of revenue in the June qtr that can be considered genuine recurring business activity as opposed to one-off integration type revenue". Mr Karantzis read that email and indicated that he would respond to Mr Jacobs' questions (or some of them) at the meeting. (ASIC submits that although Mr Karantzis described some of Mr Jacobs' questions as "just nonsense" because answers might "expose sensitive strategy", there is no suggestion that the question about percentage of recurring as opposed to one-off revenue was in that category. Indeed, when Mr Davies asked the same question at the Analyst Briefing, Mr Karantzis gave an answer without objecting to the question.)

(d) That he was involved in drafting the written Analyst Brief in preparation for presenting the 30 June 2018 quarterly results, and in answering questions invited from analysts about those results.

(e) To the extent (as asserted by the defendants) that the written statement in the Analyst Brief conveyed or sought to convey that one-off integration fees constituted less than 15 per cent of the revenue over the term of a typical client relationship, that he knew or ought to have known that such a statement would be non-responsive to the questions that had been asked in advance of the Analyst Briefing. Mr Karantzis knew that Mr Jacobs (at least) would be seeking an answer to what percentage of the revenue in the June quarter was recurring and not one-off revenue. (ASIC submits that a reasonable and diligent person in Mr Karantzis' position would have appreciated that the written statement at least had the potential to mislead or confuse, and would have sought to ensure that the information was clear and unambiguous.)

(f) At the Analyst Briefing, Mr Davies directly asked Mr Karantzis "what percentage of the revenue last quarter was from one, from upfront and one-off fees". Mr Davies' question was unmistakably clear, and it repeated what Mr Jacobs had earlier asked. (ASIC submits that there could have been no reasonable doubt about what the question asked and how it should have been answered.)

(g) There is no suggestion that Mr Karantzis misunderstood the question, or misspoke. He knew the question was coming, it was stated clearly and directly, and he knew the answer. The defendants have given no explanation for why Mr Karantzis gave the answer he did. (ASIC submits that Mr Karantzis either intentionally gave a false or misleading response, or he sought to evade the question and give a non-responsive answer - about the proportion over the term of the client relationship - and was reckless about whether or not his response was misleading or likely to mislead. Either way, ASIC submits, his conduct departs from the standard that would be expected of a reasonable and diligent director presenting a report to the market on the previous quarter's financial results.)

(h) There is no suggestion that Mr Karantzis did not know the true financial position: that is, that in the fourth quarter to 30 June 2018 the majority (more than 75 per cent) of total unaudited revenue was one-off revenue booked under the integration agreements and not recurring transactional revenue. Mr Karantzis knew the source of the revenue

– he was very closely involved in the integration agreements and invoicing. Added to this, Mr Hart gave the following evidence:

> [Senior counsel for ASIC] So you agree with me that by the meeting of 9 June 2018, the directors, including you and Mr Karantzis, understood that there were one-off revenues already to that point of in excess of 3 and a half million dollars and one-off costs associated with the back-to-back arrangement in the order of $3 million?---
>
> [Mr Hart] Correct, with a small margin [in] the middle, yes.

(i) Mr Karantzis failed to correct the One-off Revenue Representation. Mr Hart in his evidence accepted, properly, that had Mr Karantzis told the market on 3 August 2018 that less than 15 per cent of the revenues reported in the quarter ending 30 June 2018 were one-off, then iSignthis ought to have corrected that quite promptly after such a statement was made.

(j) The failure to correct became more egregious from 7 August 2018. On that date Mr Jacobs forwarded to Mr Karantzis his research note reporting on the "June Qtr conference call insights" writing "Hi John, This was released yesterday". The first two bullet points of the note stated:

- Following the release of the June Qtr cash flow statement, we dialed into the conference call today and provide a few observations
- Recurring business activity constituted c. 85% of revenues, with the balance being one-off integration related revenues. This should provide the market with the confidence that ISX has genuinely met the threshold to achieve all three tranches of the performance shares.

(ASIC submits that upon receipt of that email and note, at the latest, it would have been obvious to a reasonable and diligent person in Mr Karantzis' position that the information conveyed at the Analyst Briefing had misled Mr Jacobs, and that Mr Jacobs' release of his note would disseminate to the market false information about the company's revenue. Although the fact that Mr Jacobs was misled is not strictly determinative that the One-off Revenue Representation was objectively false or misleading, the circumstances are relevant and significant to a conclusion that Mr Karantzis failed in his duties to act with care and diligence.)

(k) The failure to correct the position continued until 15 November 2019 when iSignthis notified the ASX in response to a query letter dated 31 October 2019 that one-off integration revenue under the Fcorp, IMMO and Corp Destination integration agreements, recorded in the 30 June 2018 quarter, totalled $2,923,960.

164 It is ASIC's case that these matters show the extent to which Mr Karantzis departed from the requisite standard of care and diligence. In this regard ASIC submits that Mr Karantzis had a duty as director and chief executive officer:

(a) to exercise care and diligence to ensure that he, and the company, provided reliable, truthful and accurate information to the market, especially on topics (such as the proportion of recurring revenue) about which analysts had indicated they would be seeking answers to at the Analyst Briefing;

(b) to exercise care and diligence to ensure that he, and other company representatives, were prepared to respond to those questions, and gave reliable, truthful, accurate and responsive answers to those questions in the written material and during the Analyst Briefing; and

(c) to exercise care and diligence to correct any misunderstanding, misconception or incorrect information released or disseminated to the market of which he, or the company, was or became aware.

165 ASIC submits that Mr Karantzis not only failed in that duty, but the evidence indicates that he was either knowingly misrepresenting facts or intentionally or recklessly preventing the truth from being disclosed. ASIC contends that the defendants have proffered no other explanation for why Mr Karantzis gave the answer he did. Mr Karantzis' later failure to correct Mr Jacobs' obviously false understanding of the facts also indicates, ASIC says, that Mr Karantzis either intended Mr Jacobs to hold that false view, or was reckless about whether or not Mr Jacobs held that view and disseminated it to the market. The inference, ASIC submits, is that Mr Karantzis had no intention of informing the market that the company's financial performance in the 30 June 2018 quarter was in fact underwritten by more than 75 per cent of one-off revenue received from the integration agreements.

166 ASIC also submits that a ***Jones v Dunkel*** (1959) 101 CLR 298 inference is available against Mr Karantzis, notwithstanding that he has sought to rely on the privilege from self-exposure to a penalty in response to ASIC's allegations of a breach of civil penalty provisions: see *Adams v Director of the Fair Work Building Industry Inspectorate* (2017) 258 FCR 257 at 302 [147] (North, Dowsett and Rares JJ). ASIC contends that its case against Mr Karantzis calls for an answer, and that Mr Karantzis' failure to appear and give evidence in answer is unexplained – no reason having been advanced either his senior counsel or by Mr Hart as to why Mr Karantzis could not attend. ASIC submits that the court should infer that Mr Karantzis' evidence would

not have assisted his case; and that the court may draw with greater confidence the above inferences: ***Morley*** *v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 322 [634] (Spigelman CJ, Beazley and Giles JJA).

167 For these reasons ASIC submits that Mr Karantzis conducted himself in a manner that seriously departed from his duty to act with care and diligence, in contravention of s 180(1) of the Act.

Mr Karantzis' response to the allegation that he contravened s 180(1) of the Act

168 Other than what is advanced by iSignthis on the subject of the One-off Revenue representation in writing and orally, Mr Karantzis' response to ASIC's allegation that he breached s 180(1) of the Act is that if there was such a contravention it was just a careless mistake and was not "serious" within the meaning of s 1317G(1)(b)(iii) of the Act. In other words, if there was a contravention of s 180(1) (which Mr Karantzis denies) the contravention (in this case Mr Karantzis' statement at the Analyst Briefing) had no adverse consequences.

169 Mr Karantzis develops this contention by reference to the fact that Mr Jacobs' interpretation of Mr Karantzis' oral answer to the question at the briefing did not change his valuation of the stock, and Mr Houston's event study framework evidence on this subject. The submission is that the One-Off Revenue Representation had no material effect on the price of iSignthis' shares; in effect that Mr Karantzis' oral response to Mr Davies' at the Analyst Briefing "sank without a trace".

170 Mr Karantzis submits that insofar as the degree of departure from requisite standards is concerned, it is important to recognise that the "requisite standard" under consideration is that in s 180(1) of the Act. Mr Karantzis notes that ASIC has not brought a case that he deliberately misled anybody in his response to Mr Davies' question. The case is that he was insufficiently careful and so allowed iSignthis to make a misrepresentation in contravention of s 1041H of the Act. Mr Karantzis contends that had ASIC intended to advance a case about deliberate conduct, then it would have been alleged that Mr Karantzis was "involved" in a contravention of s 1041H by iSignthis: see *Australian Securities and Investments Commission v* ***Citrofresh*** *International Ltd (No 2)* (2010) 77 ACSR 69 at 71 [6] (Goldberg J), or that he contravened ss 181 or 184 of the Act.

171 Mr Karantzis notes that ASIC has brought a narrow case that his oral response represented that in the fourth quarter of of FY2018 revenue for one-off or up-front fees accounted for less than 15 per cent of the total revenue, which is then said to be incorrect because such fees were much

higher than 15 per cent. His response that "we've actually cited a figure in the pack of less than 15 per cent on the first question" was incorrect, he says, in a different sense. The "pack" or Analyst Brief did not in fact cite a figure of 15 per cent on the first question. However, this, Mr Karantzis says, is not ASIC's case.

172 Mr Karantzis submits that if he made a remark which was incorrect in the sense for which ASIC contends (which he denies), and in so doing, contravened s 180(1) of the Act, then nothing more than a careless mistake was made. He submits, however, that s 180(1) of the Act does not impose a standard of perfection: *Australian Securities and Investments Commission v **GetSwift** Ltd (Liability Hearing)* [2021] FCA 1384 at [2533] (Lee J). Any error, Mr Karantzis submits, did not amount to a marked departure from the requisite standards. Mr Karantzis points out that the comment was made at the end of a long presentation devoted to other topics. After the presentation there was no observable movement in the iSignthis' share price which might have alerted him to a problem arising from his oral comment. Mr Karantzis references Mr Hart's evidence to similar effect.

Determination

173 I accept ASIC's submission that having regard to the matters set out at [163] above, Mr Karantzis departed from the standard of care and diligence that s 180(1) of the Act requires of a director of a corporation. To use ASIC's language, I accept that Mr Karantzis failed to exercise care and diligence to:

(a) ensure that he and the company provided reliable, truthful and accurate information to the market at the Analyst Briefing;

(b) ensure that he and other representatives of the company were prepared to respond to questions and give reliable, truthful, accurate and responsive answers to questions in the written material and at the Analyst Briefing; and

(c) correct any misunderstanding, misconception or incorrect information released or disseminated to the market of which he or the company was, or became, aware.

174 I accept also, as ASIC submits, that Mr Karantzis not only failed in that duty but that he either knowingly misrepresented facts or intentionally or recklessly acted to prevent the truth from being disclosed. In this sense Mr Karantzis' breach of s 180(1) of the Act must be regarded as serious. It cannot be regarded merely as a careless mistake. Mr Karantzis mis-stated a matter that he knew the market was interested in, in circumstances where he knew the correct position.

He then failed to correct his mis-statement for more than a year, knowing that the market had been misled.

175 It is no answer for Mr Karantzis to contend that, if there was a contravention of s 180(1) of the Act, it was not "serious" within the meaning of s 1317G(1)(b)(iii) of the Act because it did not have a material effect on the price of the company's shares. As ASIC submitted, the question of "seriousness" is addressed to the seriousness of the breach of the duty with which s 180(1) of the Act is concerned: see *Vines v Australian Securities and Investments Commission* (2007) 63 ACSR 505 at 551 [227] (Ipp JA). It is a duty to act with skill, care and diligence. The focus is not so much on the actual or potential harm, but rather on the degree of departure by the director from the requisite standard of care and diligence: *Australian Securities and Investments Commission v Mitchell (No 3)* (2020) 148 ACSR 630 at 639 [35] (Beach J).

176 In this context Mr Houston's evidence about the Analyst Briefing not having a material effect on the company's share price does not determine whether there has been a breach of s 180(1) of the Act and does not meaningfully inform whether any breach was serious. Mr Karantzis was obliged not to mislead the market on a matter that he knew was of interest and importance to the market. By doing so he committed a serious breach of the normative standard of honesty of conduct required by s 180(1) of the Act and on which market efficiency rests: see, in a related context, *Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 3)* [2020] FCA 1421 at [74] (Allsop CJ).

177 Finally, and as ASIC submits, Mr Houston's opinion that the One-off Revenue Representation did not have a material effect on the iSignthis share price is ultimately not to the point. Mr Houston did not analyse the materiality of the true revenue composition information for the June 2018 Quarter. The reason the One-off Revenue Representation did not have a material effect was because it perpetuated the market's incorrect understanding about the proportion of recurring revenue. As Mr Sisson explained (and I accept) as at 3 August 2018 the market had already anticipated that the revenue reported for the 30 June 2018 quarter was predominantly recurring, and this information had been encapsulated into the company's share price.

178 The harm to the market was that iSignthis' share price, which reflected an understanding that more than 85 per cent of the company's revenue in the 30 June 2018 quarter was recurring, was artificially and improperly inflated.

179 Insofar as ASIC submits that a *Jones v Dunkel* inference is available against Mr Karantzis by reason of his failure to appear and give evidence to answer ASIC's allegations, I accept that this is so. In all the circumstances, however, the drawing of the inference that any evidence Mr Karantzis might have given would not have assisted his case is unnecessary. Mr Karantzis' contravention of s 180(1) of the Act is established on the basis of the available evidence as described above.

180 It follows that there should be a declaration that Mr Karantzis has contravened s 180(1) of the Act.

BREACH OF CONTINUOUS DISCLOSURE OBLIGATIONS – ONE-OFF REVENUE/COSTS

ASIC's submissions that iSignthis contravened s 674(2) of the Act

181 ASIC also alleges that iSignthis contravened s 674(2) of the Act by failing to notify the ASX, at the latest by 3 August 2018, that in the fourth quarter to 30 June 2018 iSignthis recognised approximately $3 million in revenue for one-off integration and setup services under the integration agreements, and incurred approximately $2.85 million in one-off costs for out-sourcing services under the out-sourcing agreements (the One-off Revenue/Costs Information).

182 At the time of the alleged contravention, which is to say prior to the amendment to that section made by the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (Cth), which commenced in August 2021, s 674 of the Corporations Act provided:

> **Obligation to disclose in accordance with listing rules**
>
> (1) Subsection (2) applies to a listed disclosing entity if provisions of the listing rules of a listing market in relation to that entity require the entity to notify the market operator of information about specified events or matters as they arise for the purpose of the operator making that information available to participants in the market.
>
> (2) If:
>
> (a) this subsection applies to a listed disclosing entity; and
>
> (b) the entity has information that those provisions require the entity to notify to the market operator; and
>
> (c) that information:
>
> (i) is not generally available; and
>
> (ii) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity;

> the entity must notify the market operator of that information in accordance with those provisions.

183 An entity is a "listed disclosing entity" if it has securities that are "ED Securities" because of s 111AE: ss 111AL and 111AM of the Act. By ss 111AD and 111AE, an entity's securities are "ED Securities" where the entity is included in the official list of a "prescribed financial market", which includes the ASX, and where the entity is subject to the market's listing rules: see s 9 of the Act; *Corporations Regulations 2001* (Cth) reg 1.0.02A.

184 The reference to "the listing rules of a listing market" in s 674 is to the ASX Listing Rules. Relevantly, Chapter 3 of the ASX Listing Rules sets out the continuous disclosure requirements that a listed entity must satisfy. The general rule in Listing Rule 3.1 provides:

> Once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity's securities, the entity must immediately tell ASX that information.

185 The exception to the general rule is Listing Rule 3.1A, which provides:

> Listing Rule 3.1 does not apply to particular information while each of the following is satisfied in relation to the information:
>
> 3.1A.1 One or more of the following 5 situations applies:
>
> - It would be a breach of law to disclose the information;
> - The information concerns an incomplete proposal or negotiation;
> - The information comprises matters of supposition or is insufficiently definite to warrant disclosure;
> - The information is generated for the internal management purposes of the entity; or
> - The information is a trade secret; and
>
> 3.1A.2. The information is confidential and ASX has not formed the view that the information has ceased to be confidential; and
>
> 3.1A.3 A reasonable person would not expect the information to be disclosed.

186 The reference in s 674 to information being "generally available" is addressed by s 676 of the Act. At the relevant time s 676 provided:

> (1) This section has effect for the purposes of sections 674 and 675.
>
> (2) Information is generally available if:
>
> (a) it consists of readily observable matter; or
>
> (b) without limiting the generality of paragraph (a), both of the following subparagraphs apply:

(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and

(ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

(3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(a) information referred to in paragraph (2)(a);

(b) information made known as mentioned in subparagraph (2)(b)(i).

187 Information will be regarded as readily observable for the purposes of s 676(2)(a) of the Act if it could have been observed easily or without difficulty: ***Grant-Taylor*** *v Babcock & Brown Ltd (in liq)* (2016) 245 FCR 402 at 424 [119] (Allsop CJ, Gilmour and Beach JJ). ASIC submits that although this is an objective test, the understanding and perceptions of institutional investors on what information was in the market place, and what could be deduced, concluded or inferred from that information under s 676(3) may be relevant: see *Earglow Pty Ltd v Newcrest Mining Ltd* (2015) 230 FCR 469 at 488 [85] (Beach J). Under s 676(3), information may be generally available if it consists of deductions, conclusions or inferences made or drawn from information that is either readily observable or publicly disseminated. It may be accepted that it does not extend to speculation or conjecture.

188 Section 674(2)(c)(ii) of the Act required disclosure of information that "a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity". The deeming provision in s 677 of the Act is relevant to that assessment. It provides for a sufficient (but, ASIC submits, not necessary) condition of materiality: see *Grant-Taylor* at 419-420 [95]. Section 677 (at the relevant time) was in the following terms:

> For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED securities.

189 ASIC submits that the materiality question poses an objective ex ante test to be applied at the time disclosure should have been made: *Grant-Taylor* at 419-420 [95]. This, ASIC says, primarily requires a commercial common-sense approach from the court upon a consideration of the primary facts, although assistance may be derived from experts "who have practical experience in buying and selling shares and in the workings of the stock market": *Australian*

Securities and Investments Commission v ***Fortescue Metals*** *Group Ltd (No 5)* (2009) 264 ALR 201 at 302 [482], 307 [511] (Gilmour J). The "specialised knowledge" of an expert witness, ASIC submits, is relevantly "knowledge of how investors in listed securities react to information and specifically to new information in deciding whether to acquire or dispose of listed securities": see ***Cruickshank*** *v Australian Securities and Investments Commission* (2022) 292 FCR 627 at 655 [103] (Allsop CJ, Jackson and Anderson JJ). ASIC submits that an *ex post* (as opposed to an *ex ante*) approach to examine the effect of information actually disclosed *may* be relevant to cross-check the reasonableness of an ex ante judgment about a different hypothetical disclosure, as to which see *Fortescue Metals* at 301 [477]; *GetSwift* at [1234] (Lee J). However, there must be a rational probative connection when making that cross-check: see *Grant-Taylor v Babcock & Brown (in liq)* (2015) 322 ALR 723 at 737 [64] (Perram J).

190 ASIC submits and I accept that iSignthis was aware of the One-Off Revenue/Costs Information as early as 18 June 2018 when it issued invoices under the integration agreements totalling €1,905,025, or approximately $3 million, it following that the costs of providing those services would be incurred under the out-sourcing agreements. On 31 July 2018 the company released its report to shareholders presenting the unaudited financial results for the 30 June 2018 quarter.

191 ASIC submits that the One-Off Revenue/Costs Information was not generally available through this period. I have found that, as ASIC submits, on 3 August 2018 the market was told essentially the opposite when the One-off Revenue Representation was made at the Analyst Briefing. ASIC submits that the non-disclosure of the One-Off Revenue/Costs Information continued until 15 November 2019 when iSignthis notified the ASX in response to a query letter dated 31 October 2019 that one-off integration revenue under the Fcorp, IMMO and Corp Destination integration agreements, recorded in the 30 June 2018 quarter, totalled $2,923,960.

192 The primary issue in dispute between the parties is thus whether this information would be expected by a reasonable person to have a material effect on the price or value of iSignthis' shares. ASIC submits that, leaving to one side certain matters relating to the Appendix 4C analysis to which I will come, there is no real dispute between the parties that the information was not generally available. ASIC notes that there is no relevant Listing Rule 3.1A defence.

193 Although iSignthis has submitted that ASIC cites no precedent for any other company disclosing a breakdown of one-off versus recurring revenue, ASIC submits both that numerous ASX listed entities make this distinction in their company announcements, and that in any event this is beside the point. ASIC's submission is simply that if information that is not

generally available would be expected to have a material effect on the price or value of its securities, and no Listing Rule 3.1A defence is available, the information must be disclosed. A failure to do so, as occurred here on ASIC's case, contravenes s 674 of the Act.

Not generally available? The relevance of the 30 June 2018 Appendix 4C statement

194 ASIC observes in its closing submissions that it is not clear whether iSignthis asserts that the One-off Revenue/Costs Information *was* generally available (although as will become clear, iSignthis does make such a submission). ASIC notes that the issue is not addressed in iSignthis' written opening submissions or in any affidavit. Indeed, ASIC contends that the point was raised for the first time in the oral evidence of Mr Hart and Mr Minehane, each of whom suggested (strikingly consistently, ASIC contends) a new theory, which is that the information *was* available because it could be deduced from the 30 June 2018 Appendix 4C statement, when read with the 31 July 2018 report to shareholders.

195 ASIC submits that the Appendix 4C information did not disclose the proportion of one-off integration revenue and one-off costs in the quarter, and that no such conclusion could be observed or deduced from that information, let alone deduced easily or without difficulty: see *Grant-Taylor* at 424 [119]. ASIC contends that the confusion expressed by Mr Hart and Mr Minehane in attempting to formulate the new theory evidences that difficulty. Mr Hart, it is said, could not explain his assertion that analysts could have reverse-engineered from the Appendix 4C the extent of revenues that were attributable to the one-off integration agreements. Similarly, ASIC submits, although Mr Minehane stressed that he had not talked to Mr Hart about his evidence on this topic, he was unable to explain the theory himself and accepted that he was not capable of deducing the information. ASIC submits that his suggestion that "other people who were … more mathematically inclined … maybe they could have" is mere conjecture.

196 ASIC submits that there is no evidence that any analyst or investor was able to deduce anything from the Appendix 4C about the proportion of one-off revenue, and in this regard that it is telling that both Mr Jacobs and Mr Davies each questioned Mr Karantzis on this subject. If the information was readily observable, or capable of being identified through deduction or inference (but not mere conjecture or speculation), ASIC submits the question need not have been asked. ASIC submits also that Mr Sisson and Mr Houston both accepted that the company did not disclose the breakdown of its revenue.

197 ASIC accepts that Mr Houston suggested in his evidence that a potential "inference" could be drawn about the balance of one-off versus recurring revenues to explain the value of cash payments made for "product manufacturing and operating costs" in the Appendix 4C. ASIC's position, however, is that potential "inference" as to an increase in "product manufacturing and operating costs" does not give enough data to identify the proportion of that increase that is attributable to one-off integration costs. In any event, ASIC contends that this is speculation or conjecture, not deduction. Contrary to Mr Hart's evidence, ASIC submits, the label "product manufacturing and operation costs" is not a "proxy for costs of goods sold", let alone a proxy for one-off integration costs. The label, ASIC notes, by reference to Mr Sisson's evidence, includes a range of other costs, including the servicing of recurring revenue at lower margins. As Mr Sisson explained, each dollar of revenue earned is expected to have an associated cost, and the company had disclosed in the 31 July 2018 report that margins on transactional revenue had reduced because of a temporary increase in supply chain costs. ASIC notes also that in response to questions raised in advance of the Analyst Briefing, Mr Karantzis said that the "cash to revenue lag" was also a result of temporary supply chain issues in settlement processes, further reinforcing the impression that a large proportion of the June 2018 quarter revenue was recurring settlement revenue.

198 ASIC also contends, by reference to Mr Sisson's evidence, that the Appendix 4C as a cash flow statement does not correlate with and permit deductions about reported costs and revenue in a quarter. For example, ASIC notes that in the 30 June 2018 quarter the Appendix 4C disclosed cash receipts of $2.633 million, in contrast to reported revenue exceeding $3.95 million (the "cash to revenue lag"). ASIC submits that the Appendix 4C provides no information about the approximately $1.3 million that had been booked as revenue but not received as cash in the quarter. The true position, on ASIC's case, was that more than $900,000 was outstanding under the integration agreements.

Materiality: the lay evidence

199 ASIC submits that the One-off Revenue/Costs Information was information that was of particular interest to market analysts and investors. Mr Karantzis, it is said, was made aware of that interest through the specific directed questions asked by analysts in the lead up to, and during, the Analyst Briefing. In this regard ASIC observes that, to their credit, Mr Hart and Mr Minehane both accepted that the proportion of one-off and recurring revenue was important to the market. There can be no doubt that it was.

200 ASIC refers to Mr Hart's evidence that he and the other directors were aware that:

(a) in 2017 and 2018, iSignthis had highlighted, in its public statements and reports, the significance of recurring revenue;

(b) in 2017 and 2018 the proportion of recurring versus one-off revenue was a meaningful and important distinction for the company and its investors, because recurring revenue was more valuable;

(c) in 2018 and 2019 the market viewed iSignthis' recurring revenue more favourably than its one-off revenue, and the market was interested in the composition of iSignthis' revenues (recurring versus one-off);

(d) by 19 June 2018, one-off integration revenue for the year ending 30 June 2018 was in excess of approximately $3.5 million dollars and one-off costs associated with the back-to-back arrangement were in the order of $3 million;

(e) in June and up to and including 30 July 2018, the market did not know the extent of one-off revenue and costs;

(f) the market was interested in the composition of iSignthis' revenue, in terms of recurring versus one-off revenue.

201 Similarly, ASIC refers to Mr Minehane's evidence that:

(a) in 2017 and 2018 the distinction between recurring and one-off revenue in relation to iSignthis was known by the market by reason of iSignthis' disclosures, and was important to the market;

(b) recurring revenues were presented as preferable to one-off revenues from iSignthis' perspective, as well as the market's perspective, because one-off integration revenues were less predictable as a guide to future revenues.

202 ASIC submits that the significance of the One-off Revenue/Costs Information must also be assessed by reference to what the market had been told, and as was reinforced by the One-off Revenue Representation made by Mr Karantzis on 3 August 2018 – that the striking revenue performance in the 30 June 2018 quarter, which resulted in the company achieving the Performance Milestones, was on the back of 85 per cent recurring (transactional) revenue. ASIC notes Mr Jacobs' observation on 6 August 2018 in this regard that this representation "provide[d] the market with confidence that iSignthis ha[d] genuinely met the threshold to achieve all three tranches of the performance shares". It is ASIC's case that this evidence alone,

on a rational and common-sense basis, indicates that a reasonable person would expect the information (if disclosed) to have had a material effect on the price or value of iSignthis' securities.

Materiality: the expert evidence

203 Also relevant to the question of materiality is the expert evidence received from Mr Sisson, on behalf of ASIC, and from Mr Houston, on behalf of the defendants, on this subject.

204 Mr Sisson has almost 50 years' experience as an analyst and investor portfolio manager. This considerable experience, ASIC submits, gives him practical insight and "specialised knowledge" into the workings of the stock market and how investors in listed securities would likely react to information in deciding whether to acquire or dispose of listed securities: see *Cruickshank* at 655 [103]; *Fortescue Metals* at 302 [482], 307 [511]. This experience, it is said, informed Mr Sisson's commercial common-sense and rational approach to the material when giving his evidence.

205 By contrast, ASIC contends that Mr Houston, who is an economist, does not have that experience. ASIC submits that as an economist Mr Houston's experience as an expert is in preparing event studies based on an *ex post* statistical analysis of share price movements. Mr Houston describes an event study as an empirical technique that measures the effect of a particular event, such as the release of information to the ASX, on the price of a company's shares which allows for inferences to be drawn as to whether the change in share price on a particular day was more likely to have been due to the release of company specific news or random chance.

206 It is submitted by ASIC that Mr Houston is not an analyst or professional investment portfolio manager, and that he does not have specialised knowledge relevant to assessing *ex ante* (as distinct from *ex post*) how investors in listed securities would be likely to react to particular information. ASIC submits that the considerable lengths Mr Houston went to in applying an event study "framework" of analysis provides no meaningful assistance to the court in determining whether the One-off Revenue/Costs Information was material. That information, ASIC points out, was not notified until November 2019, after iSignthis had been suspended from trading. ASIC submits that there is thus accordingly no data against which the statistical analysis can be conducted.

207 It is ASIC's case that the materiality question is straightforward, and should not be overcomplicated. It is simply that if the One-off Revenue/Costs Information was made available to the market in June, July or August 2018, would a reasonable person expect the information to have a material effect on the price or value of iSignthis' shares? As a part of the relevant analysis, ASIC submits, it is appropriate to inquire under s 677 of the Act whether that information would, or would be likely, to influence persons who commonly invest in securities in deciding whether or not to acquire or dispose of shares in iSignthis. The question, ASIC contends, is answered by an objective test conducted *ex ante*, which the court ought to approach primarily on a commercial common-sense basis, informed by the contemporaneous evidence of market analysts, and by persons with relevant practical experience in the workings of the market.

208 Mr Sisson's answer to the question is "yes". That is, if the One-off Revenue/Costs Information had been made available to the market in the middle of 2018, a reasonable person would expect that information to have a material effect on the price or value of shares in iSignthis. ASIC submits that Mr Sisson gave straightforward common-sense evidence based on his considerable experience and knowledge of how investors in listed securities would likely react to information. ASIC says that the court should accept Mr Sisson's evidence, specifically that in his opinion:

(a) the market had already anticipated that the revenue reported for the 30 June 2018 quarter was predominantly recurring;

(b) this could be inferred for three reasons:

  (i) first, in the absence of information to the contrary, it would normally be expected that revenue would have a large recurrent component;

  (ii) secondly, share price movements on 11 and 12 July 2018 indicated that the market had already anticipated that the revenue reported for the 30 June 2018 quarter was predominantly recurring, and had encapsulated this information in the iSignthis share price; and

  (iii) thirdly, one could infer that Mr Jacobs had expectations about the likely proportion of recurring revenue because, on 26 June 2018, he reported that the company's 22 June 2018 announcement that it had qualified for at least the first and second tranches of the performance shares indicated that it had generated approximately $3.5 million revenue in the June quarter, "or c.$14.0m on an

annualised run-rate basis" (Mr Jacobs would only annualise the June 2018 quarter results if he had confidence that those revenues would recur);

(c) after the Analyst Briefing on 3 August 2018, there was no significant movement in the share price, and Mr Jacobs did not alter his valuation because the One-Off Revenue/Costs Information confirmed what he had already assumed (Mr Jacobs had valued the company on the assumption that the June 2018 quarter revenue would recur and could be annualised);

(d) if the true revenue composition information was disclosed, it would have directly contradicted information presented to the market in the Analyst Briefing that less than 15 per cent of the company's revenue in the 30 June 2018 quarter was attributable to one-off integration revenue;

(e) because the market placed greater value on recurring revenue, as a more reliable indicator of future cash flows, had the market known the true position that close to the opposite was true (and more than 75 per cent of revenue in the quarter was from one-off fees), there would have very likely been a negative price reaction; and

(f) if the true revenue composition information was disclosed, it would also have been contrary to what Mr Jacobs had assumed to be the case, and it would likely have caused him to change (and reduce) his valuation.

209 By contrast, ASIC summarises Mr Houston's evidence on the effect of the One-off Revenue/Costs Information as follows:

(a) in order to have a material effect on the price or value of the company's shares, new information would have to change the market's expectations of the company's future cash flows and/or the risks associated with those cash flows;

(b) cashflow estimates are forward looking, and market participants drew upon the company's contracted GPTV. Contracted GPTV was not changed by the One-off Revenue/Costs Information. The One-off Revenue/Costs Information would also have conveyed that new clients had been onboarded, indicating future client revenues;

(c) for the One-off Revenue/Costs information to have caused market participants to have changed their earnings expectations, the market would have needed to have held different expectations as to the relative proportions of iSignthis' one-off and recurring revenue prior to the release of this information;

(d) it was not possible to determine the market's expectations as to the relative proportion of iSignthis' revenue that was one-off or recurring prior to 31 July 2018, because analysts had not previously disclosed these expectations and iSignthis had not provided any guidance as to the composition of its revenue;

(e) although Mr Jacobs indicated that he was interested in the proportion of one-off versus recurring revenue, following the Analyst Briefing on 3 August 2018, he did not change his earnings expectations or valuation.

210 ASIC submits that there are the following five primary deficiencies with Mr Houston's evidence.

211 First, it is said, Mr Houston's analysis does not account for how the proportion of one-off revenue versus recurring revenue affects the risks associated with future cash flows. Mr Houston only addresses the expectations as to future cash flows based upon contracted and not actual recorded GPTV.

212 Mr Houston suggested that GPTV revenue was equivalent to one-off integration revenue, because the latter was indicative of future cash flows from integrated customers. This, ASIC maintains, does not account for risk. ASIC submits that there was no basis to assume that the company would succeed in reliably receiving material future cash flows from integrated customers.

213 ASIC refers to Mr Sisson's evidence in this regard:

> … it's certainly true that revenue comes in to the bank account and – and is – is a positive thing as long as it's greater than the costs incurred to it. But when you're looking at the long-term value of the company, as opposed to what's in your bank today, you need to think about sustainability of revenue. Is this revenue that's going to be able to be – grow in future or is it sort of one-off revenue? Now, certainly when it comes to valuing companies, the share market puts greater value on sustainable revenue; revenue that they can rely on to repeat again and again.
>
> … when it comes to sort of one-off revenue that we're talking about here, one doesn't have the same degree of confidence and therefore it's not valued as highly. Now, it's a question of how much more highly or – is – is – is really the relevant – the relevant issue. But – but the point – the point to my mind is that when we get to the third quarter – in other words, the September quarter of 2018 – you see a massive collapse in revenue. Now, it was something like, you know, three and a half million in the second quarter of the calendar year and it was down to less than half a million, I think, in – in the – in the third quarter of the calendar year. It was down very, very sharply. That would - - -
>
> [SENIOR COUNSEL FOR THE DEFENDANTS]: The quarter ending 30 September?
>
> MR SISSON: Yes, that's correct.

> [SENIOR COUNSEL FOR THE DEFENDANTS]: Yes.
>
> MR SISSON: That's – that's – that is what I'm talking about. It was released in November, but it was for the period to – to September. That collapse would not have happened if it had been recurrent revenue. Therefore the market – if the market thought that that revenue was recurrent, they would be more confident that revenue wasn't going to collapse. They would put greater value on the company as a result of that confidence and – and that's – I suppose that's in a nut shell why I have an opinion that if it was recurrent revenue, it would be worth – it would make the company worth more than if it's one-off revenue.

214 ASIC submits that Mr Jacobs did not consider transaction revenue and one-off integration revenue to be equivalent. In the 1 August 2018 Patersons research note Mr Jacobs stated that understanding the proportions of one-off versus recurring revenue "would assist the market's understanding of the underlying business momentum being experienced by the company". On two occasions Mr Jacobs used the word "genuine" when referring to recurring revenue, suggesting, so ASIC maintains, that if revenue is not recurrent it is not as reliable or genuine. Mr Jacobs' stated (contemporaneously evidenced) position was that recurring revenue indicated stronger business momentum and a more reliable indicator of future cashflows, a proposition which Mr Sisson appeared to embrace.

215 Secondly, ASIC submits, the market did have expectations about the proportions of one-off versus recurring revenues, for the reasons expressed by Mr Sisson. Further, in the previous six-month reporting period, the company had reported that "Settlement revenues now make up over 65% of our revenue by vertical and will be the primary driver of revenues going forward", which was noted and reported on by Mr Jacobs.

216 Thirdly, ASIC submits that Mr Houston was unwilling to make reasonable commercial hypotheses about how the true position might have influenced the market, or Mr Jacobs as a reasonable representative participant in the market.

217 ASIC says that Mr Houston had difficulty accepting that recurring revenue was more important to the market than one-off revenue because it had a higher degree of certainty that it would recur in the future. ASIC notes that Mr Houston would also not accept that Mr Jacobs would (reasonably) have placed greater weight on past recurring cashflows as indicative of future cash flows because "there's no evidence for that … in the valuations he has undertaken". That was despite Mr Houston accepting that:

(a) in 2017 and 2018, the company reported its financial results highlighting the significance of transactional recurring revenues which it said were increasing;

(b) Mr Jacobs was of the view in the second half of 2017 and the first half of 2018 that recurring revenues were increasing;

(c) Mr Jacobs' views are a good proxy as to the views of the market more broadly;

(d) the Patersons note dated 1 August 2018, which was prepared by Mr Jacobs based on his review of the 31 July 2018 report, stated "it would be helpful for the market to know what % of the June qtr revenue can be classified as recurring business activity as opposed to one-off in nature";

(e) the Patersons note dated 1 August 2018 stated (and Mr Houston agreed) that a high proportion of recurring revenue – as opposed to one-off revenue – would have assisted the market's understanding of the underlying business momentum being experienced by the company;

(f) on 1 August 2018, Mr Jacobs followed up with the company to seek to have the question as to the proportion of recurring vs one-off revenue answered at the Analyst Briefing.

218 ASIC submits that although Mr Jacobs did not change his valuation methodology upon learning, as he might reasonably have anticipated, that more than 85 per cent of the June 2018 quarter revenue was recurring, the experts must make a judgment as to how Mr Jacobs (and the market more broadly) would likely have reacted if the true position was disclosed.

219 ASIC submits that Mr Houston continued to return to the point that although Mr Jacobs said he was interested in the proportion of one-off versus recurring revenue, and received an answer on that point (albeit an answer that was misleading), he did not change his valuation. This indicated to Mr Houston that there was no objective factual basis in the material to suggest that the proportion was important to the way Mr Jacobs conducted his valuation, and so it therefore would not matter if one were to assume that Mr Jacobs and the market were told the true position, that more than 75 per cent of revenue in the quarter was from one-off fees.

220 ASIC submits however, that as Mr Sisson explained, Mr Jacobs did not have to change his valuation because the One-Off Revenue/Costs Information confirmed what he had already assumed. That is, he had valued the company on the assumption that the June 2018 quarter revenue would recur and could be annualised. If the true position had been disclosed, that would have been contrary to what Mr Jacobs had assumed to be the case, and he would not have annualised the June quarter revenue. This, it is said, would likely have caused Mr Jacobs to change (and reduce) his valuation.

221 ASIC submits that the criticisms levelled by Mr Houston at Mr Sisson for applying his own judgment and experience as to how the market might react to information is misguided and reflective of the deficiencies in Mr Houston's own analysis and experience. Expert witnesses, ASIC submits, must draw upon the "knowledge of how investors in listed securities react to information … in deciding whether to acquire or dispose of listed securities": *Cruickshank* at 655 [103].

222 Fourthly, ASIC submits that Mr Houston was also unwilling to make reasonable and rational concessions about what assumptions could reasonably be made and how the market might reasonably react to information presented to it. For example, it is said that Mr Houston was unwilling to concede the following (obvious) propositions about the relative importance of recurring and one-off revenues:

(a) that recurring revenues from "clipping the ticket" on GPTV were more important than one-off revenues because they had a higher degree of certainty of recurring in the future;

(b) that the greater proportion of the June 2018 quarter revenues were recurrent as opposed to one-off, the greater confidence the market would have had as to the future cash flows and revenues being higher than they otherwise would be;

(c) that recurring revenues were more likely to recur in the future and were a surer guide to future revenues and, therefore, were associated with cashflows of a lower risk than one-off cashflows;

(d) that Mr Jacobs, in seeking to predict the future cashflows, would reasonably have placed greater weight on the past cashflows that were expected to be recurring than past cashflows that were considered to be one off, or that the only reason Mr Jacobs could have wanted to understand it was to inform his valuation of the company;

(e) that the market would have considered or assumed based upon the information reported and disclosed by iSignthis that a substantial proportion of the company's revenue was recurring; and

(f) that the market viewed recurring revenue more favourably than one-off revenue.

223 ASIC submits that Mr Houston's refusal to make reasonable concessions revealed that he tended to advocate for the defendants, and that this limits the assistance the court can derive from his evidence.

224 Fifthly, ASIC submits that Mr Houston's evidence "approbates and reprobates" in its reliance on Mr Jacobs. On the one hand, it is said, Mr Houston focused singularly upon the valuation methodology adopted by Mr Jacobs; but on the other hand he refused to have regard to matters that Mr Jacobs himself had identified as important to his assessment of the value of the company. ASIC submits that the DCF valuation model adopted by Mr Jacobs is also, importantly, one based upon a risk profile: as Mr Sisson said, "if it's a very reliable future cash stream it's discounted at a relatively low rate". ASIC contends that the relative proportions of one-off and recurring revenues, and how recurring transactional revenue is tracking against the company's reported contracted GPTV, are important to assessing the reliability of future cash streams.

225 ASIC also points to the fact that, as Mr Sisson indicated, the valuation methodology adopted by Mr Jacobs was unreliable and "extremely difficult" to apply for an early-stage company like iSignthis, but one very likely adopted by Mr Jacobs for reasons of expediency because, as Mr Sisson said, "in the absence of anything better, you would use it." ASIC submits that part of Mr Jacobs' role as an analyst for iSignthis was to prepare a valuation methodology, but Mr Jacobs' valuation was not the only information conveyed in his reports. ASIC submits that it was certainly not the only information that a person who commonly invests in securities would rely upon when deciding whether or not to acquire or dispose of shares in iSignthis. On Mr Sisson's evidence, ASIC notes, such a person would likely appreciate the unreliability of the DCF valuation model adopted by Mr Jacobs for a company in iSignthis' position.

226 ASIC submits that Mr Jacobs' reports also summarised information and updates released by the company, opined on the business momentum of the company and expectations as to future business and cash flows, and described potential risks. These matters, it is said, would also be taken into account by a reasonable participant in the market when assessing the price or value of the company's shares, or when considering whether to acquire or dispose of shares in the company. ASIC notes that on 1 and 6 August 2018, Mr Jacobs' reports included, importantly, representations about the proportion of one-off versus recurring revenue recorded in the 30 June 2018 quarter, and what those proportions indicated about the company's business momentum. ASIC submits that the court can readily infer that Mr Jacobs would also have reported on the true position, had it been disclosed.

iSignthis' responses to ASIC's breach of continuous disclosure obligation allegations

227 iSignthis accepts that the question is whether, pursuant to rule 3.1 of the Listing Rules and s 674(2)(b) of the Act, on 18 June 2018, alternatively 19 July 2018, 31 July 2018 or 3 August 2018, the company was required to notify the ASX that in the fourth quarter of FY2018 it had recognised approximately $3 million in revenue for one-off integration and set up-services and incurred approximately $2.85 million in one-off costs for out-sourcing services. The parties are thus in broad agreement as to the question for determination in relation to the allegation that there has been a breach of the continuous disclosure obligations.

228 iSignthis' case in answer is put on the following bases.

The alleged breakdown was not required by the accounting standards

229 First, iSignthis submits that no Australian Accounting Standards Board accounting standard required the composition of its quarterly revenue to be disaggregated into "one-off integration and set-up services" and "other revenue". iSignthis submits that, as Mr Houston put it, the terms "one-off" and "recurring" are little more than slogans. They are not precise terms, terms of accounting, or terms of art in economics. Against this background, iSignthis says that it is not surprising that ASIC has not proffered a precedent establishing that any other company has ever disclosed a breakdown in its revenue for a financial period between "one-off" revenue and "recurring" revenue, a distinction which is inherently vague and ambiguous because the supposed "non-recurring" revenue can in fact "recur", and very often does. For example, it is submitted that the Analyst Brief noted that the integration fees "recur on each new agreement". Moreover, iSignthis says, the integration revenue implied future recurring revenue from the merchant signed on pursuant to the integration contracts, and so this kind of "one-off" revenue is quite different to the kinds of "one-off" items usually discounted by analysts such as a capital gain from the sale of an office building during a financial year or the write-down of an asset's value.

Report to shareholders for the fourth quarter of FY2018 – Appendix 4C statement

230 Leaving to one side whether the breakdown of the one-off Revenue/Costs Information was required by the accounting standards, the next point made by iSignthis is that the company had disclosed sufficient information for analysts to determine that the majority of the revenue it earned in the fourth quarter of FY2018 was one off low margin revenue derived from the integration of merchants. This, iSignthis says, highlights the "extreme case" ASIC is driven to press in this proceeding – that it was not merely sufficient to provide information indicating

that the preponderance of revenue was integration revenue, but it was necessary to go further by providing a precise dollar breakdown for the quarter: $3 million in revenue for integration services, and $2.85 million for the costs of those services.

231 iSignthis notes that on 26 April 2018 it released its report to shareholders for the third quarter of FY2018. In that report it disclosed that unaudited revenue for the quarter was $1,480,000, representing a quarter-on-quarter increase of 267%, and that its cash flows from operating activities included receipts from customers of $1,571,000 and payments for product manufacturing and operating costs of $157,000. iSignthis also said that it was continuing to increase the value of its contracted GPTV, which was at 4 June 2018 in excess of $550 million per annum. iSignthis notes Mr Houston's evidence that contracted GPTV conveyed the total GPTV that the company expected to process on behalf of its merchants, and represented the company's estimate of its future processing volumes.

232 However, iSignthis notes also that in the quarterly report for the fourth quarter of FY2018, it disclosed that its unaudited revenue for the quarter was in excess of $3,950,000 and that its cash flows from operating activities included receipts from customers of $2,633,000 and payments for product manufacturing and operating costs of $2,656,000. It is thus immediately apparent, so iSignthis submits, that the product manufacturing and operating costs in the June quarter were significantly greater than in the earlier quarters.

233 iSignthis refers also to the fact that in the commentary in the quarterly report, it observed that the company had created market opportunities to explore and generate new revenue streams in the fourth quarter of FY2018. These new revenue streams, it was said, included direct service integration on behalf of existing and new merchants that would provide benefits including additional "one off revenues to new merchants enabling direct connection" to its core services. The company explained that these revenues were "at low margin" and had "a direct correlation with an increase in cost of goods sold". Insofar as GPTV was concerned, the contracted value exceeded $600 million GPTV per annum but the GPTV processed in the June quarter "did not experience the growth expected by the Company, due to a number of unforeseeable events".

234 Mr Hart gave evidence about this report. He said that iSignthis had disclosed the high proportion of the one-off revenue and costs. In this regard he referred to the consolidated cash flow statement (also known as the Appendix 4C) and said that it disclosed that iSignthis had a high cost of goods in the fourth quarter of FY2018 and revenue which was low margin. Mr Hart contended, and thus iSignthis now submits, that the second dot point in the report to

shareholders, read in conjunction with the attached Appendix 4C, enabled a reasonable determination to be made that the additional one-off revenue from new merchants was low margin. iSignthis submits on the basis of Mr Hart's evidence that any competent analyst would have understood that the high cost of goods referred to in item 1.2(b) on the first page of the Appendix 4C (for the fourth quarter of FY2018) related to revenue, and that a greater proportion of that revenue related to the one-off low margin contracts.

235 It was also Mr Hart's evidence that when one compared the Appendix 4C (for the fourth quarter of FY2018) to the previous Appendix 4C (for the third quarter of FY2018), the difference was apparent and that anyone properly trained would see and acknowledge it. This was because the product manufacturing operating costs for the third quarter of FY2018 was only $157,000, compared to the $2.6 million for the fourth quarter. Mr Hart further explained that the Appendix 4C for the third quarter of FY2018 indicated that the costs of goods were one-tenth of the receipts, whereas the Appendix 4C for the fourth quarter of FY2018 disclosed that the costs of goods are equal to the receipts. It is Mr Hart's evidence (and iSignthis submits) that having regard to the much lower product manufacturing and operating costs of $157,000 for the earlier quarter, an analyst would infer that the $1,571,000 revenue in the third quarter of FY2018 was mostly recurring, compared to the revenue in the fourth quarter of FY2018 which was mostly one-off.

236 iSignthis submits that Mr Minehane gave similar evidence. He maintained that analysts could draw conclusions from comparing earlier Appendix 4Cs to the Appendix 4C for the fourth quarter of FY2018 that was attached to the 31 July report to shareholders. Mr Minehane accepted that this is not to say that the precise dollar amounts of integration revenues could be ascertained, but iSignthis submits that this is a different matter. Mr Minehane contends that an experienced analyst could take a view as to the level of one-off or recurring costs and revenues from the numbers in the Appendix 4C.

237 iSignthis submits that as an expert on market disclosure issues, Mr Houston has a skill set that includes those of a share market analyst. iSignthis notes that Mr Houston readily agreed that the Appendix 4C information:

> …does open, or allow the inference, that the likely proportion was much greater than 15%, and the reason is that – the appendix 4C material shows costs, product – costs of goods sold, or product manufacturing costs, whatever it is, is higher than the revenue. So it's actually a negative margin between those two. And that does accord with this particular statement in appendix 4C, or in that related report, that says there was a direct correlation between the signing on of new merchants and the increase of (sic)

costs of consult at – at a low margin.

238 iSignthis submits that Mr Sisson also appeared to accept that a sophisticated reader of the Appendix 4C might infer that, without knowing the precise percentage breakdown, a significant proportion of the $2.633 million in receipts for the fourth quarter of FY2018 would be integration revenue. iSignthis submits that Mr Sisson conceded this that was "a possible conclusion" and added "I'm not rejecting the process you are going through. I think there's some validity to it". iSignthis notes also Mr Sisson's further opinions in relation to the Appendix 4C information. He said that, unlike the Appendix 4C of a substantial corporation like BHP, "these things are almost skimmed over … the sort of analysis that you were doing and I'm responding to is … a lot more detailed and a lot more thought being put into it than the typical analyst – where one of these [Appendix 4Cs] gets released from a small company". He mentioned also another part of the quarterly report which referred to gross profit margins being impacted by temporary supply chain solutions as a potential explanation for the high level of product manufacturing and operating costs in the Appendix 4C. Neither of these contentions, iSignthis submits, is persuasive. iSignthis draws attention to Mr Hart's observation that the part of the quarterly report referred to by Mr Sisson was addressing the lower margin on the recurring costs, but this was a very different sector to the integration work. Mr Hart said that "the one-off revenues were associated with low margin because they had high costs". He explained that you "put the two [cost and revenue numbers] together, you get the differential and low margin. It's not difficult…".

239 iSignthis maintains that it is going too far to suggest, as ASIC does in its claim, that a company must inform the market of the precise dollar allocation of its revenue as between "integration" (or "one-off") revenue and other (or "recurring") revenue. iSignthis refers in this regard to Mr Hart's comment that "it's not the requirement of the company to hand-feed analysts".

Materiality

240 iSignthis also makes the point that even if the One-off Revenue/Costs Information had been released to the market on any of the dates suggested by ASIC, Mr Houston's opinion is that it is unlikely that such information would have had a material effect on the price or value of iSignthis' shares. In this regard iSignthis notes that Mr Houston explained that information can only be expected to affect a company's share price "if it is both new and causes the market to revise its expectations as to either the company's future cash flows and/or the risks associated with those cash flows". According to Mr Houston, in the case of iSignthis, recurring revenue

is not a surer guide to future revenue than one-off revenue because a dollar of integration revenue could turn into thousands of dollars of GPTV whereas one dollar of recurring revenue could just be one dollar the following month. He said that the market was not so much interested in the recurring revenue, it was excited by "the clicking through of the cash and the margin related to that" because "[t]hat's what makes companies profitable".

241 iSignthis relies on Mr Houston's opinion that the market formed its expectations of the company's future cash flows based on information well beyond the company's historic revenue and, in particular, drew on iSignthis' contracted GPTV to form their future revenue expectations. In fact, Mr Houston opined, analysts directly estimated iSignthis' future revenue by reference to their expectations of the company's future GPTV. iSignthis propounds Mr Houston's opinion that since contracted GPTV was not changed by the One-off Revenue/Costs Information, the information would have had a limited effect on market participants' expectations of ISX's future revenues.

242 iSignthis submits that Mr Houston's evidence in relation to each of the pleaded dates of 18 June 2018, alternatively 19 July 2018, 31 July 2018 and also the originally unpleaded date of 3 August 2018, was to the following effect.

243 As at 18 June 2018: if iSignthis had released the One-off Revenue/Costs Information on 18 June 2018 it would not have informed the market of iSignthis' total or expected future revenue and costs. Accordingly, due to its confined nature, it is unlikely that the information would have caused the market to change its expectations of iSignthis' future revenue and costs. Although the information could have caused the market to increase its expectations of iSignthis' net cash flows for the fourth quarter of FY2018, the information conveyed a net cash flow effect of only $150,000 (i.e. $3 million less $2.85 million) and so would not have had a material effect on the value of iSignthis' shares. iSignthis submits that although not mentioned by Mr Houston, ASIC's chosen date of 18 June 2018 makes no practical sense in any event because the June quarter did not end until 12 days later on 30 June 2018.

244 As at 19 July 2018: if iSignthis had released the One-off Revenue/Costs Information on 19 July 2018 the information could have caused the market to increase its expectations of iSignthis net cash flows for the fourth quarter of FY2018 by $150,000, but this would not be expected to have had a material effect on iSignthis' share price. Alternatively, the market could have interpreted the information as conveying that iSignthis' previous revenue guidance incorporated one-off revenues of $3 million. However, on this interpretation the information

would not inform the market of the extent of iSignthis' total revenue for the fourth quarter or iSignthis' recurring revenue for that quarter. Accordingly, it is unlikely that the information would have caused the market to revise its revenue expectations such that it is unlikely that the One-off Revenue/Costs Information would have had a material effect on iSignthis' share price.

245 As at 31 July 2018: the market was aware of iSignthis' actual (unaudited) revenue and cash flows for the fourth quarter of FY2018. If the One-off Revenue/Costs Information had been released on 31 July 2018 the market would have been informed of the composition of iSignthis' total revenue. However, for this information to have caused market participants to change their earnings expectations they would have needed to have held different expectations as to the relative proportions of iSignthis' one-off and recurring revenue before the release of the information. Whether they did is unknown because analysts had not previously disclosed any such expectations. Nonetheless, it is unlikely that disclosure of the One-off Revenue/Costs Information on 31 July 2018 would have had a material effect on the price or value of iSignthis' shares for two reasons. First, that the information did not change iSignthis' total revenue for the fourth quarter of FY2018; and secondly, the market's expectations of the company's future cash flows were forward looking and those expectations drew on a much wider set of information than the company's past earnings.

246 As at 3 August 2018: the disclosure of the One-off Revenue/Costs Information did not convey a change in iSignthis' total revenue and, at most, would have conveyed a different composition of the company's June quarter revenue from that which was otherwise able to be interpreted. However, market participants drew on iSignthis' contracted GPTV to form their future revenue expectations (analysts directly estimated iSignthis' future revenue by reference to expectations of the company's future GPTV) and contracted GPTV was not changed by the One-off Revenue/Costs Information.

247 iSignthis submits in relation to Mr Sisson's materiality evidence that at various times he gave three different opinions as to a date when the One-off Revenue/Costs Information would have had a material effect on iSignthis' share price if disclosed. iSignthis identifies what it characterises as his first opinion, set out at [29] of his report, as follows:

> The announcements of 22/06/18 and 31/07/18 would have raised expectations about the level of recurring revenue, but there was insufficient information to be definitive. Accordingly it is very possible that if the One-off Revenue/Costs Information became generally available between 22/06/18 and 03/08/18 that it would have had an effect on the price of ISX's securities; it would depend on whether market participants had assumed the increased revenue in 2QCY18 was recurring or not. It is only after the

> Analyst Briefing of 03/08/18 that there was a sufficiently clear discrepancy between the publicly available information and the One-off Revenue/Costs Information that I would be highly confident that release of the latter would have a material effect on the price of ISX's securities.

248 The grammatical structure of this paragraph, so iSignthis submits, leaves no doubt as to the content of Mr Sisson's original opinion – it was "very possible" that if the One-off Revenue/Costs Information became generally available between 22 June 2018 and 3 August 2018 it would have had an effect on the price of iSignthis' shares, but this would depend on whether market participants had assumed the increased revenue in "2QCY18" (the second quarter of calendar year 2018) was recurring or not (as to which Mr Sisson expressed no opinion). iSignthis notes that the opinion continues that it was "only after" Mr Karantzis' oral remark at the analyst briefing on 3 August 2018 that Mr Sisson would be "highly confident" that the release of the information would have had a material effect on the price of iSignthis' shares.

249 All of this is to say, iSignthis submits, that Mr Sisson's original opinion was that the only relevant date of disclosure was 3 August 2018 in answer to "Question 1", and that he could not be sure about any earlier date. This, it is submitted, left ASIC in a position where there was no distinction of substance between the One-off Revenue Representation case and the case concerning disclosure of the One-off Revenue/Costs Information. iSignthis notes Mr Sisson's opinion that any misstatement by Mr Karantzis at the Analyst Briefing had to be corrected and that this was separately pleaded by ASIC as part of its case addressing the One-off Revenue Representation.

250 iSignthis submits that the above analysis of paragraph 29 of Mr Sisson's first report correlates with how Mr Houston understood it. Mr Houston, it is said, observed in his first report that Mr Sisson did not "offer a definitive conclusion as to whether the One-off Revenue/Costs Information would have impacted iSignthis' share price if it was disclosed on 31 July 2018", and "in contrast", Mr Sisson concluded that the release of that information would have had a material effect if disclosed after 3 August 2018. iSignthis notes that notwithstanding those observations by Mr Houston, in the Joint Report Mr Sisson adhered to his opinion that the discrepancy between the actual facts (that 2QCY18 revenue was 84 per cent one-off) and iSignthis' representations made on 3 August 2018 (that it was less than 15 per cent one-off) was so material and significant that it would have had a material effect on the price or value of iSignthis' shares. Any "possible ambiguity about the claimed nature of the much higher revenue in 2QCY18 was dispelled by the unambiguous response in the oral briefing", says the

Joint Report. iSignthis observes that Mr Sisson also suggested in the Joint Report that it was "open to" market participants to view the additional revenue announced on 22 June 2018 as recurrent and this would normally be expected. However, iSignthis submits, it is implicit from his retention of 3 August 2018 that Mr Sisson's opinion remained that market expectations were not known or definitive about this matter. This, iSignthis says, is especially so given that Mr Sisson was responding in the Joint Report to Mr Houston's report and must have been aware of Mr Houston's interpretation of Mr Sisson's first report.

251 iSignthis submits that in the course of trial, after the opening for the defendants which made the point that ASIC's evidentiary case for non-disclosure rested only on the then unpleaded date of 3 August 2018, Mr Houston again confirmed his understanding that Mr Sisson's opinion related only to 3 August 2018. However, iSignthis notes, Mr Sisson then advanced a second opinion which was to the effect that "probable" should be substituted for "very possible" in [29] of his first report so that disclosure of the One-off Revenue/Costs Information would have had a material effect as from 22 June 2018. In this regard, iSignthis notes, Mr Sisson suggested that his views had not changed because "very possible" did not apparently contradict "probable". iSignthis says that Mr Sisson claimed that the word "only" merely signified that as from 3 August 2018 he could "go to the even higher degree of confidence". These, iSignthis submits, are not persuasive assertions. iSignthis notes also that in his second round of oral evidence Mr Sisson repeated his view that the distinction between "very possible" and "probable" did not mean that he had changed his opinion in his earlier oral evidence.

252 iSignthis submits that then, in his third report, Mr Sisson volunteered a third opinion to the effect that there was a material effect as from 12 July 2018 as compared to the earlier suggested dates of 3 August 2018 and 22 June 2018 respectively. This was on the basis that on this subsequent occasion he had given the question "more detailed consideration". iSignthis submits that Mr Sisson's new evidence in relation to 12 July 2018 in his third report ought to be rejected for the following reasons.

253 First, iSignthis submits by reference to Mr Sisson's answers in cross examination that when he developed his new opinion he did not conduct any investigation to see whether there might be another cause of the share price rise on 12 July 2018. iSignthis maintains that Mr Sisson only looked at the information which was supplied in his original brief, and that he did not ask his instructors to investigate whether there were any other newsworthy items that may have something to do with that share price rise.

254 Moreover, iSignthis submits, again by reference to Mr Sisson's answers in cross examination, that before he proffered his new opinion he had not seen the information in relation to Gobbill UK signing a partnership agreement with iSignthis and seeking additional capital to run its business faster, which he agreed it would have been relevant to consider. Mr Sisson was aware of iSignthis' announcement on 21 June 2018, which addressed access to Central Banking Facilities and SWIFT Membership, but did not specifically turn his mind to this particular press release or consider that it was worth putting into his report. Notably, iSignthis says, on 26 June 2018 Mr Jacobs of Patersons had a lot to say about the Swift membership in his research note. On Mr Sisson's theory, iSignthis submits, that new market information might not have an effect until three weeks later in the case of iSignthis shares, so it would have been relevant for Mr Sisson to consider whether iSignthis announcement on 21 June 2018 might in fact be the cause of the share price rise commencing on 11 and 12 July 2018.

255 Secondly, iSignthis submits that the statistical evidence provided by Mr Houston implies that market efficiency in respect of iSignthis' shares is very strong. Mr Houston undertook statistical tests which he summarised in a table. Of the five days when there was a price sensitive announcement and a material change in the share price, in each case that material change occurred within one trading day of the news being given to the market, and not thereafter. This, iSignthis submits, is at odds with Mr Sisson's unlikely theory that new information could come into the market and take three weeks of trading before a price change would manifest itself.

256 Thirdly, iSignthis submits that Mr Sisson could not identify any single piece of price sensitive information which caused iSignthis' share price to increase on 12 July 2018. iSignthis says that Mr Sisson's opinion that by 12 July 2018 the market had an expectation that a large proportion of the revenue for the second quarter calendar year 2018 was recurring could only have been unreliable speculation. iSignthis also submits that he could not explain satisfactorily why, before 3 August 2018, the market thought that the revenue for the fourth quarter of FY2018 was recurring. Insofar as Mr Sisson attempted to refer back to paragraphs 15 to 18 of his original report, iSignthis submits that this did not assist, as he acknowledged in cross examination that paragraphs 16 to 18 all referred to events on or after the briefing on 3 August 2018. Further, iSignthis submits that paragraph 15 of Mr Sisson's original report did not support his new conclusion as it recorded Mr Jacob's query on 1 August 2018 that it would be helpful to know what percentage of the June quarter revenues could be classified as recurring as opposed to one-off.

257 Fourthly, iSignthis submits by reference to the cross examination of Mr Houston that in July 2018 there was an absence of contemporaneous information about what people were thinking in relation to iSignthis, other than the reports of Mr Jacobs, and this implied uncertainty as to the composition of iSignthis' revenue. Thus, iSignthis says, there is no basis to speculate that prior to 12 July 2018 Mr Jacobs assumed that the revenue earned by iSignthis in the fourth quarter of FY2018 was recurring. iSignthis submits that the uncertainty in Mr Jacobs' mind about this matter is shown by the fact that he was pursuing this very question in communications with the company. Thus, it is said, his email to Mr Richards dated 1 August 2018 asked "Please advise the % of revenue in the June qtr that can be considered genuine recurring business activity as opposed to one-off integration type revenue?". iSignthis submits by reference to Mr Sisson's answers in cross examination that he acknowledged that the company's announcement on 22 June 2018 did not say anything about recurring versus non-recurring revenue. Further, it is said, Mr Sisson conceded that Mr Jacobs was not necessarily saying that the revenue was recurring when he annualised the revenue on 26 June 2018. iSignthis notes that, as Mr Houston observed, Mr Jacobs was simply expressing the revenue figure on an annualised basis. He did not say "I expect $14 million" and he was not giving a revenue forecast. iSignthis notes also that Mr Houston also explained that there is nothing in the expression of the June quarter on an annualised basis that indicated the composition of the revenue that was either recurring or one-off.

258 Fifthly, iSignthis submits that, as Mr Houston observed, Mr Sisson's third report indicates that he had reverse engineered the cause of the price increase on 12 July 2018 by seeing a price increase and jumping to a conclusion that the market must have expected that the revenue was recurring. In particular, it is said to be apparent from paragraph 10 of Mr Sisson's third report that he proffered no evidence to support that conclusion, which he subsequently used to justify his opinion in paragraph 22 of that report.

259 Insofar as materiality more generally is concerned, iSignthis says that ASIC's reliance on some of the lay evidence is misplaced. For example, Mr Hart said that the market viewed recurrent revenue more favourably for iSignthis than one-off revenue. However, iSignthis submits, this evidence was equivocal. That is, Mr Hart rejected the proposition that if the market had known that the company's revenues were predominantly one-off and not recurring for the fourth quarter of FY2018, then that would have had adverse consequences for iSignthis' share price. In any event, however, iSignthis submits that lay evidence on a technical subject matter such as materiality does not assist the court. It is said that attention should be directed to the expert

evidence on an issue of this nature. In that regard, iSignthis submits that Mr Houston was a more reliable witness than Mr Sisson. Further, iSignthis submits that even if the correct analysis is that competent experts disagreed on materiality, the result is that ASIC has not established a case to the Briginshaw standard, as to which see *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Determination

260 I have determined, having regard to all of the relevant circumstances, that the One-off Revenue/Costs Information was *not* generally available in the period from 18 June 2018 to 31 July 2018 and thereafter until 15 November 2019 when iSignthis notified the ASX of the true position in relation to the one-off integration revenue. Insofar as iSignthis has submitted that the information *was* available because it could be deduced from the 30 June 2018 Appendix 4C statement, when read with the 31 July 2018 report to shareholders, I reject this submission for the following reasons.

261 First, I am not satisfied, as Mr Hart asserted, that it would have been possible for analysts to reverse engineer from the Appendix 4C the extent of revenues that were attributable to the one-off integration agreements. I accept ASIC's submission that Mr Hart struggled to explain how they might have done so, and that Mr Minehane was simply unable to explain the theory. Indeed, Mr Minehane accepted that he was not capable of working out the information himself on the basis that he and Mr Hart were suggesting. In this regard the fact that Mr Jacobs and Mr Davies were evidently unable to deduce sufficient information from the Appendix 4C about the proportion of one-off revenue and needed to ask questions about it speaks for itself.

262 Secondly, I do not consider that the expert evidence of Mr Houston or Mr Sisson on this subject is consistent with iSignthis' contention that the One-off Revenue/Costs Information could be deduced from the Appendix 4C. The fact that, as Mr Houston suggested, some sort of "potential interference" might have been drawn about the balance of one-off verses recurring revenues to explain the value of cash payments made for "product manufacturing and operating costs" in the Appendix 4C does not seem to me to provide a basis for concluding that analysts could have divined the true position. Indeed, I regard the argument that they could have done so as somewhat confected, particularly given that it was raised for the first time in Mr Hart's oral evidence. Mr Sisson's evidence on the point, that it was "a possible conclusion" that the contended inference might be drawn, does not, to my mind, advance the argument. Fairly viewed, in my assessment, the burden of Mr Sisson's evidence on the Appendix 4C point is

against the proposition that the One-off Revenue/Costs Information could be deduced from the Appendix 4C report.

263 Accepting then that the One-off Revenue/Costs Information was not generally available in the relevant period, in circumstances where there is no Listing Rule 3.1A defence the focus turns to the question of whether this information would be expected by a reasonable person to have had a material effect on the price or value of iSignthis' shares. For the reasons I develop below, I have concluded that this information *would* be expected by a reasonable person to have had a material effect on the price or value of iSignthis' shares.

264 The first basis for my conclusion in this regard is the frank and clear lay evidence from the company's own witnesses as to the market's interest in the revenue composition question. iSignthis' position is that the lay evidence on materiality will not assist the court, and that it is only the evidence of the experts that is relevant. I do not accept that this is so. There can be no doubt that expert evidence may be relevant to the question of materiality, but in my assessment it would not be appropriate in the circumstances here prevailing to ignore the lay evidence, based as it is on commercial common sense in the context of the relevant primary facts: see *Fortescue Metals* at 302 [481], [482], 307 [511] (Gilmore J); *Getswift* at [1101] (Lee J). The lay evidence provides a useful, real-world counterpoint to the observations which the experts make, and in the present circumstances I consider it to be highly instructive.

265 The starting point is the evidence of Mr Hart himself. Properly, because it is plainly the case, he accepted that the proportion of one-off and recurring revenue was important to the market and that he and other directors were well aware of this. Mr Hart's evidence in this regard is summarised above at [200], and I accept ASIC's submission that Mr Hart and the other directors were aware of these matters. Similarly, Mr Minehane's evidence in this regard is summarised above at [201]. I also accept Mr Minehane's evidence that at the relevant time the distinction between recurring and one-off revenue in the context of iSignthis was known by the market by reason of disclosures, and that it was important to the market. I also accept Mr Minehane's evidence that recurring revenues were presented as preferable to one-off revenues because one-off integration revenues were less predictable as a guide to future revenues.

266 It is also of real significance, in my assessment, that in his 6 August Patersons research note Mr Jacobs observed that what Mr Karantzis had told the Analyst Briefing on 3 August 2018 provided the market with confidence that iSignthis had generally met the threshold to achieve all three tranches of the performance shares. I accept ASIC's submission that this evidence

alone, on a rational and common sense basis, suggests that a reasonable person would expect the information, had it been disclosed, to have had a material effect on the price or value of iSignthis' securities.

267 The second basis for my conclusion in relation to the materiality of the information is the expert evidence of Mr Sisson. Before explaining why I have preferred Mr Sisson's evidence to that of iSignthis' expert, Mr Houston, it is important to note that I consider it important not to overcomplicate the materiality analysis. As ASIC has submitted, the materiality question is straightforward. It requires consideration simply of whether, if the One-off Revenue/Costs Information was made available to the market in June, July, or August 2018, a reasonable person would expect the information to have had a material effect on the price or value of iSignthis' shares. I accept ASIC's submission that the court needs to answer this question objectively, based on forecasts and a commercial common-sense analysis, informed by the contemporaneous evidence of market analysts, and by persons with relevant practical experience in workings of the market.

268 In my view Mr Sisson is a person with significant relevant experience in market analysis. His substantial experience gives him appropriately specialised knowledge into the workings of the stock market and how investors would be likely to react to particular information in making decisions about what listed securities to acquire or offload.

269 As has been mentioned, Mr Sisson has answered the materiality question in the affirmative. In substance it is his opinion that, for reasons he identified, the market had already anticipated that the revenue reported for the final quarter of 2017 was predominantly recurring. There was no significant movement in the share price after the Analyst Briefing on 3 August 2018 because the market regarded its assumption as having been confirmed. However, had the true revenue composition information been disclosed, in contradiction to the information given at the Analyst Briefing, this would likely have produced a negative price reaction and a reduction in Mr Jacobs' valuation.

270 To my mind Mr Sisson's conclusions are compelling. They are practical, straightforward and readily comprehensible. Insofar as iSignthis criticises Mr Sisson on the basis that he gave different opinions as to dates on which the One-off Revenue/Costs Information would have had a material effect on iSignthis' share price if disclosed, I do not regard these criticisms as well founded. In my assessment they do not undermine Mr Sisson's central and compelling opinion that the market had anticipated that the revenue for the final quarter of 2018 was

predominantly recurring and there was no significant movement in the share price after 3 August 2018 because the market considered that its assumption had been confirmed.

271 Turning to Mr Houston's evidence more generally, I would make the following observations. First, I accept that as an experienced economist his specialised knowledge is less about the day to day workings of the stock market and how investors would react to information and more theoretical in its focus. As ASIC submits, his experience is rather as an expert who conducts event studies based on an *ex post* statistical analysis of share price movements. I accept, therefore, that he does not have specialised knowledge relevant to assessing *ex ante* how investors in listed securities would react to market information. For this reason I am not satisfied that Mr Houston's event study framework provides a suitable means of assessing whether the One-off Revenue/Costs Information was material. As ASIC submits, because the information was not notified until November 2019 there is no contemporaneous data against which the statistical analysis can be conducted.

272 More specifically, however, I accept that Mr Houston's analysis suffers from the flaws that ASIC has identified (see above at [210]-[224]). These are, first, that Mr Houston's analysis fails to account for how the proportion of one-off revenue as compared to recurring revenue affects the *risks* associated with future cash flows. Secondly, the market had expectations about the proportions of one-off as compared to recurring revenues for all the reasons explained by Mr Sisson. Thirdly, on the basis of the examples ASIC identifies, I accept that Mr Houston was generally not prepared to make reasonable commercial hypotheses about how accurate information might have influenced the market, particularly Mr Jacobs as a reasonable representative participant in the market. Fourthly, also on the basis of the examples ASIC identifies, I accept that Mr Houston was unwilling to make reasonable and rational concession about what assumptions could reasonably be made and how the market might be expected to react to information it received.

273 Insofar as Mr Houston' unwillingness to make reasonable and rational concessions about assumptions is concerned, I have some sympathy for ASIC's submission that Mr Houston tended towards advocacy on behalf of iSignthis and that this limits the assistance that can be derived from his evidence. Although Mr Houston was clearly a thoughtful and experienced economist, there was, from time to time during his oral evidence, a certain rigidity in his stated views and a reluctance to embrace propositions fairly put which might have sat uncomfortably with iSignthis' case.

274 The fifth flaw in Mr Houston's analysis is the way in which it utilises, sometimes inconsistently, Mr Jacobs' reporting. Mr Houston appeared to be prepared to focus on Mr Jacobs' valuation methodology, but not on matters Mr Jacobs had identified as important to assessing the value of iSignthis. I accept ASIC's submission that Mr Houston's analysis of Mr Jacobs' valuation methodology was inappropriately selective, and that it can be inferred that Mr Jacobs would have reported on the true position had it been disclosed.

275 For these reasons, therefore, I accept that iSignthis contravened s 674(2) of the Act by failing to notify the ASX, at the latest by 3 August 2018, of the One-off Revenue/Costs Information. This is information which would be expected by a reasonable person to have had a material effect on the price or value of shares in iSignthis. Accordingly, there will be a declaration that iSignthis contravened s 674(2) of the Act on and from 3 August 2018 continuing until 15 November 2019 by failing to notify the ASX that, in the final quarter to 30 June 2018, it had recognised approximately $3 million in revenue for one-off integration and set-up services and it had incurred approximately $2.85 million in one-off costs for outsourcing services.

ASIC's allegations that Mr Karantzis contravened ss 674(2A) and 180(1) of the Act

276 ASIC alleges that Mr Karantzis contravened s 674(2A) of the Act (as applicable at the relevant time) by reason of his involvement in iSignthis' contravention of s 674(2) of the Act in relation to the One-Off Revenue/Costs Information.

277 At the time of the alleged contravention, s 674(2A) of the Act provided:

> A person who is involved in a listed disclosing entity's contravention of subsection (2) contravenes this subsection.

278 The term "involved" is defined in s 79 of the Act as follows:

> A person is involved in a contravention if, and only if, the person:
>
> (a) has aided, abetted, counselled or procured the contravention; or
>
> (b) has induced, whether by threats or promises or otherwise, the contravention; or
>
> (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
>
> (d) has conspired with others to effect the contravention.

279 ASIC further alleges that Mr Karantzis contravened s 180(1) of the Act in relation to the One-Off Revenue/Costs Information by failing to discharge his duties with the degree of care and

diligence that a reasonable person would exercise if they were the chief executive officer of a company in iSignthis' circumstances.

280 ASIC accepts that in order to establish involvement in the contravention of s 674(2) under s 79 of the Act, the court must be satisfied that Mr Karantzis intentionally participated, in the sense of having actual knowledge of the essential elements constituting the contravention: *Australian Securities and Investments Commission v* ***Big Star Energy*** *Limited (No 3)* (2020) 389 ALR 17 at 102-107 [457]-[487] and 108 [493]–[494] (Banks-Smith J). That standard, ASIC submits, is met on the evidence.

281 ASIC contends that knowledge of the elements constituting the contravention is not necessary to prove a contravention of s 180(1): the court must simply be satisfied that Mr Karantzis departed from the requisite standard of care and diligence: see *GetSwift* at [2541] (Lee J). That lesser standard, ASIC submits, is also met on the evidence: see *Australian Securities and Investments Commission v Vocation Ltd (In Liq)* (2019) 371 ALR 155 at 342 [790]-[791] (Nicholas J) and *Big Star Energy* at 112 [516]-[517], 115 [528]. In both these cases, although the court could not be satisfied that the director had knowledge of the essential elements of materiality to meet the standard required by s 79 of the Act, the director was nevertheless found to have breached the duties imposed by s 180(1) of the Act.

282 ASIC submits that Mr Karantzis does not positively defend the s 674(2A) and s 180(1) allegations, except to rely on the company's defence to the s 674 case. ASIC submits, in particular, that Mr Karantzis does not address or dispute that he:

(a) was aware of the One-off Revenue/Costs Information;

(b) knew that the One-off Revenue/Costs Information was not generally available; and

(c) knew that a reasonable person would have expected that the One-off Revenue/Costs Information, if it had been generally available, to have had a material effect on the price or value of iSignthis' shares.

283 As has been mentioned, it was Mr Hart's evidence that he and the other directors, including Mr Karantzis, were aware that:

(a) in 2017 and 2018 iSignthis had highlighted in its public statements and reports the significance of recurring revenue;

(b) in 2017 and 2018 the proportion of recurring versus one-off revenue was a meaningful and important distinction for the company and its investors, because recurring revenue was more valuable;

(c) in 2018 and 2019 the market viewed iSignthis' recurring revenue more favourably than its one-off revenue, and the market was interested in the composition of iSignthis' revenues (recurring versus one-off);

(d) by 19 June 2018, one-off integration revenue for the year ending 30 June 2018 was in excess of approximately $3.5 million dollars and one-off costs associated with the back-to-back arrangement were in the order of $3 million;

(e) in June and through July up to and including 30 July 2018, the market did not know the extent of one-off revenue and costs;

(f) the market was interested in the composition of iSignthis' revenue, in terms of recurring versus one-off revenue.

284 ASIC submits, and it may be accepted, that the evidence also shows that Mr Karantzis was in direct communications with investors and analysts both before and during the Analyst Briefing about the proportion of one-off and recurring revenue in the 30 June 2018 quarter. In this sense it may be thought that Mr Karantzis had an even greater knowledge of the importance of the One-off Revenue/Costs Information as perceived by the market than Mr Hart and the other directors. Mr Jacobs said to Mr Karantzis that his questions were not only to help his understanding but "frankly that of the market in general, who largely rely on me to help them". Mr Karantzis also knew from 7 August 2018 that Mr Jacobs had reported to the market that the company's financial results were achieved on 85 per cent recurring (transactional) revenue, which "provide[d] the market with confidence that iSignthis ha[d] genuinely met the threshold to achieve all three tranches of the performance shares". ASIC submits that Mr Karantzis thus had actual knowledge that the information would likely have a material effect on the price or value of the company, and that it would be likely to influence investors in deciding whether to acquire or dispose of iSignthis' shares.

285 Accordingly, ASIC submits that Mr Karantzis had the requisite knowledge for it to be established that he was knowingly concerned in the company's contravention of s 674(2) of the Act. Although it is not necessary to prove a contravention of s 674(2), as to which see *Big Star Energy* at 108 [494], it is also not in dispute that Mr Karantzis was aware of the company's disclosure obligations and would have appreciated that a failure to comply with those

obligations could expose the company to penalty. There is no evidence that Mr Karantzis sought legal advice in relation to these matters in 2018 or 2019. Mr Karantzis took no steps to disclose the information before 15 November 2019, when iSignthis notified the ASX that one-off integration revenue in the 30 June 2018 quarter totalled $2,923,960. For these reasons, ASIC submits Mr Karantzis also failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether iSignthis was required to disclose the One-off Revenue/Costs Information.

286 Once again, ASIC submits that a *Jones v Dunkel* inference can be drawn against Mr Karantzis. ASIC submits that the court should infer that the evidence of Mr Karantzis would not have assisted his case; and that the conclusion may be drawn with greater confidence that Mr Karantzis was knowingly concerned in the company's contravention of s 674(2) of the Act and was aware of the company's disclosure obligations, and that he failed to act with the requisite degree of care and diligence.

Mr Karantzis' response to allegations that he contravened ss 674(2A) and 180 (1) of the Act

287 Having regard to the expression of the relevant principles by Banks-Smith J in *Big Star Energy* at 108 [489], Mr Karantzis contends that for ASIC to make out its case against him it must establish that at a time contemporaneous with the contravention he knew that the One-off Revenue/Costs Information was information which a reasonable person would have expected, if it had been generally available, to be information which would have had a material effect on iSignthis' share price.

288 It is Mr Karantzis' position that all of the arguments which iSignthis has advanced as pointing to the absence of a contravention of s 674(2) of the Act also tend to establish that he could not have had the requisite actual knowledge that iSignthis had a disclosure obligation under s 674(2) of the Act, at least prior to 3 August 2018. That is to say, no accounting standard required disclosure; any reasonable company director would have concluded that there was sufficient disclosure of the integration revenue in the quarterly report for the fourth quarter of FY2018; and a leading economist, experienced in s 674 issues, has opined that the relevant information was immaterial. Mr Karantzis submits also that there is no evidence of any contemporaneous advice being given to him that such disclosure was required.

289 As to the originally unpleaded (but subsequently amended) alleged disclosure date of 3 August 2018, iSignthis says that this raises the following considerations. On 3 August 2018, iSignthis

held the Analyst Briefing, during which the company disclosed information that one market participant interpreted as conveying that less than 15 per cent of its fourth quarter FY2018 revenue was one-off. Mr Karantzis accepts that if iSignthis had disclosed the One-off Revenue/Costs Information subsequent to the Analyst Briefing, then this information would have been inconsistent with that interpretation. However, it is submitted, for the reasons advanced by Mr Houston in his first report, had iSignthis disclosed the One-off Revenue/Costs Information after 3 August 2018 it is still unlikely that the market would have changed its expectations of the company's future net cashflows. Insofar as Mr Sisson had a different opinion, that is said to be unreliable. Mr Karantzis submits that in circumstances where a reliable expert is of the view that the relevant information would not have been material, no foundation is laid to impose liability upon him under s 674(2A) of the Act.

290 Mr Karantzis submits that ASIC's case that he contravened s 180(1) of the Act is derivative from the alleged liability under s 674(2A), and that absent liability under s 674(2A) there can be no liability under s 180(1) of the Act.

Any contravention of ss 674(2A) and/or 180(1) of the Act was not serious

291 Mr Karantzis submits that were there to be any liability on the part of the company or himself, for the reasons advanced in answer to ASIC's case in this regard by iSignthis, any contravention by him was not "serious" within the meaning of s 1317G(1)(b)(iii) of the Act. In other words, Mr Karantzis says that the evidence is so controversial on materiality that a serious departure from the requisite standard of care and diligence has not been shown.

Any contravention by Mr Karantzis should be excused

292 Mr Karantzis submits in the alternative that were there to be a finding of any contravention by him of ss 674(2A) or 180(1) of the Act, at all material times he acted honestly and ought fairly to be excused for the contravention pursuant to s 1317S(2) of the Act; further or alternatively s 1318(1) of the Act. Mr Karantzis submits that there is no evidence of any advice given to him that the One-off Revenue/Costs Information ought to have been disclosed beyond the level of disclosure contained in the quarterly report for the fourth quarter of FY2018, and he relies on the evidence advanced by iSignthis in answer to ASIC's allegation that iSignthis has contravened s 674(2) of the Act.

Determination

293 Having regard to the reasons for my finding that iSignthis contravened s 674(2) of the Act, and in light of the matters explained below, I have determined that Mr Karantzis contravened ss 674(2A) and 180(1) of the Act.

294 Insofar as the contravention of s 674(2A) of the Act is concerned, I am satisfied that Mr Karantzis intentionally participated in the relevant conduct, in the sense of having actual knowledge of the essential elements constituting the contravention. I base this conclusion on the matters set out above at [282]-[285]. That is, that Mr Karantzis was well aware of the significance of the One-off Revenue/Costs Information to the market, he knew it was not generally available, and he knew that had it been generally available it would have had a material effect on the price or value of iSignthis' shares.

295 Insofar as the contravention of s 180(1) of the Act is concerned, the matters which have caused me to conclude that Mr Karantzis contravened s 674(2A) of the Act readily enable the conclusion that Mr Karantzis also failed to exercise the degree of care and diligence that a reasonable person in his position would have exercised in his consideration of whether iSignthis was required to disclose the One-off Revenue/Costs Information. Mr Karantzis should have ensured that this information was disclosed.

296 As to ASIC's *Jones v Dunkel* submission, I accept that in circumstances where Mr Karantzis did not give evidence the court could infer that his evidence would not have assisted him and could draw with greater confidence the conclusion that he was knowingly concerned in the company's breach of s 674(2) of the Act and was aware of the company's disclosure obligations and that he failed to act with the requisite degree of care and diligence for the purposes of s 180(1) of the Act. Having said that, however, I do not regard the *Jones v Dunkel* inference as significant in all the circumstances in my determination. I consider it to be clear on the available evidence that Mr Karantzis contravened ss 674(2A) and 180(1) of the Act.

297 Turning finally to Mr Karantzis' submission that any contravention of s 674(2A) and, or alternatively, s 180(1) of the Act was not serious and should be excused, that submission must be rejected. Having regard to the conclusion I have reached on the question of materiality, it cannot be accepted that the evidence on materiality is so controversial that a serious departure from the requisite standard of care and diligence is not shown. Nor, having regard to my conclusion about Mr Karantzis' actual knowledge of the essential elements of the company's

contravention of s 674(2) of the Act, can it be concluded that at all material times he acted honestly and ought fairly to be excused for his contravention of s 674(2A) of the Act.

298 Having accepted that Mr Karantzis contravened ss 674(2A) and 180(1) of the Act, there will be declarations that Mr Karantzis was involved in the company's contravention of s 674(2) of the Act as set out above and that he thereby contravened s 674(2A) of the Act, and that he also contravened s 180(1) of the Act.

NON-DISCLOSURE – VISA INFORMATION

ASIC's allegations that iSignthis contravened s 674(2) of the Act

299 Turning then to Visa's termination of its relationship with iSignthis and iSeM, ASIC alleges that by 17 April 2020, iSignthis was aware that:

(a) Visa had decided to terminate its relationship with iSeM and iSignthis (the Visa Termination Decision); and

(b) the **Reasons for Visa's Termination**, as set out in the 17 April letter, included that:

(i) iSignthis' response to the 6 March letter had "not allayed the concerns outlined in the Suspension Letter";

(ii) iSignthis was not operating appropriate programs to manage AML risk;

(iii) iSignthis' transaction monitoring program was not "fit-for-purpose" and had failed to identify unusual transaction behaviour; and

(iv) iSignthis presented an excessive level of risk to the Visa network.

(ASIC's case is put on the basis that these four specified reasons ought to have been disclosed).

300 ASIC submits that as this information (the Visa Termination Decision and the Reasons for Visa's Termination) was not generally available to the market, iSignthis ought to have disclosed it, and that by not doing so iSignthis contravened s 674(2) of the Act.

301 iSignthis accepts that the information was not generally available, but it disputes that there has been any breach of s 674(2) of the Act.

302 In these circumstances the issues between the parties are as follows:

(a) Between 17 April 2020 and 12 May 2020, was iSignthis entitled to rely upon Listing Rule 3.1A as providing a basis for non-disclosure on the grounds that the information concerned "an incomplete proposal or negotiation"?

(b) Between 12 May 2020 and 21 May 2020, was iSignthis entitled to rely upon Listing Rule 3.1A as providing a basis for non-disclosure on the grounds that it would have been a breach of the law of Cyprus to disclose the information (3.1A.1)?

(c) After 21 May 2020, did iSignthis provide the information to the ASX immediately, or at all?

(d) Was the information material: that is, would a reasonable person expect the information, had it been generally available, to have had a material effect on the price or value of iSignthis' shares?

303 I consider each of these questions below.

Was there a Listing Rule 3.1A defence between 17 April and 12 May 2020?

304 As has been mentioned, Listing Rule 3.1A provides an exception to the general rule requiring disclosure. It provides, relevantly, that information is excluded from disclosure if it concerns an incomplete negotiation (and where the information is confidential and a reasonable person would not expect the information to be disclosed). Even if the information had arisen in the context of an incomplete negotiation, ASIC submits that iSignthis would still need to show that a reasonable person would not have expected the information to be disclosed.

305 Guidance Note 8 to the ASX Listing Rules, as issued by the ASX on 28 February 2020, explains that this exception to the general rule is directed to exclude from disclosure information about market sensitive transactions where the likelihood of the transaction proceeding is low or unclear. In this regard ASIC draws attention to the following sentence in part 5.4 of the Guidance Note, which deals with incomplete proposals or negotiations:

> Negotiations will be incomplete unless and until they result in a legally binding agreement or the entity is otherwise committed to proceeding with the transaction being negotiated.

306 The footnote to this sentence, which clarifies its meaning, is in the following terms:

> The reference to an entity otherwise being committed to proceeding with a transaction is intended to capture those situations where an entity may become legally bound to proceed with a transaction without having signed a legally binding agreement (eg, through the principles of estoppel). It is also intended to capture those situations where an entity enters into an arrangement or understanding committing itself to proceed with

> a transaction without having signed a legally binding agreement. Once the entity is so committed, the transaction is no longer an incomplete proposal or the subject of incomplete negotiations.

307 It may be observed that much of the discussion in the Guidance Note revolves around proposals or transactions, and the point at which it will be necessary for disclosure to be made of the transaction in question. It must be understood, however, that this exception to the obligation to disclose extends to negotiations also, as distinct from particular corporate proposals and transactions. As the Guidance Note also observes, at the outset of part 5.4:

> This category of information is excluded from disclosure because of the prejudice it could cause to an entity and its security holders if it was effectively required to develop its corporate proposals **and conduct its commercial negotiations in public**.
>
> (Emphasis added, footnotes omitted).

308 Importantly, the first paragraph of part 5 of the Guidance Note, which deals with Listing Rule 3.1A and the exceptions to immediate disclosure, records that:

> Listing Rule 3.1A sets out exceptions to the requirement to make immediate disclosure of market sensitive information under Listing Rule 3.1. **These exceptions seek to balance the legitimate commercial interests of entities and their security holders with the legitimate expectations of investors and regulators concerning the timely release of market sensitive information. They also seek to ensure that information is not disclosed prematurely when, rather than inform the market, it could misinform or mislead the market.**
>
> (Emphasis added.)

309 Guidance Note 8 has been described as a "reliable description of the meaning and effect in law" of Listing Rule 3.1 and s 674 of the Corporations Act: *TPT Patrol Pty Ltd v Myer Holdings Limited* (2019) 293 FCR 29 at 248-249 [1262] (Beach J); although cf *Masters v Lombe* [2019] FCA 1720 at [313] (Foster J), where his Honour observed that the Guidance Note does not add anything of substance to Listing Rule 3.1 and, in any event, is not binding. Whatever may be said in this regard, the case was conducted by the parties on the basis that the Guidance Note was relevant. It is, therefore, important to have regard to all of its relevant terms.

ASIC's submissions

310 ASIC submits that the exception does not exclude from disclosure information from Visa about the decision made *unilaterally* and communicated by Visa to iSignthis on 17 April 2020 (in the 17 April letter) to terminate its relationship with iSignthis.

311 In this regard ASIC draws attention to the context in which the 17 April letter was sent. Importantly, it followed Visa's 6 March letter to iSignthis, which set out Visa's serious

concerns about whether iSignthis' was operating appropriate programs to manage anti-money laundering and risk, following a broad review by Visa of iSignthis' merchant portfolio and risk program and an "attempted risk review" by Visa in August 2019 with which iSignthis did not cooperate. The 6 March letter requested detailed information from iSignthis to address those concerns and stated that Visa may take action if not satisfied with iSignthis' response, including the "[t]ermination of Visa membership".

312 As has been mentioned, on 9 and 11 March 2020, Mr Karantzis wrote to Visa on behalf of iSignthis and iSeM, responding to the matters raised in Visa's 6 March letter. On 14 March 2020 Visa asked for further information, and iSignthis responded on 17, 19, and 25 March 2020.

313 Having regard to this correspondence, ASIC submits that there was no failure by Visa to give iSignthis an opportunity to be heard in relation to Visa's decision. ASIC submits that Visa had explained that it had concerns, explained that termination was a potential outcome, and asked iSignthis to respond to its concerns before making the decision. iSignthis took the opportunity to respond. Fundamentally, ASIC submits that there was nothing indefinite or suppositional about Visa's 17 April letter. Insofar as Mr Seyfort says that, having spoken with Mr Karantzis and Mr Hart on about 20 April 2020 he understood that the company "had a lot more to say", ASIC submits that this does not affect the finality of Visa's unilateral decision. In any event, ASIC says, Mr Seyfort had not by 20 April 2020 been provided with copies of Visa's 6 March letter and iSignthis' responses. I take this to be a submission that not much turns on Mr Seyfort's observation in this respect.

314 ASIC accepts that between 6 March 2020 and 17 April 2020 there was an ongoing communication between Visa and iSignthis about iSignthis' compliance with the Visa Rules, and the possibility that Visa would terminate iSignthis' membership was a potential outcome, but one to which Visa had not yet committed. ASIC does not allege that in this period iSignthis was required to disclose Visa's suspension decision.

315 However, ASIC says that this changed fundamentally on 17 April 2020 when Visa communicated that it had made its decision to terminate. In this regard ASIC notes that Visa's 17 April letter:

(a) referred to previous correspondence between Visa and iSignthis, including additional information that had been provided by iSignthis in response to Visa's queries, and said:

> … Visa has now fully reviewed the additional information provided by IsignThis … The information contained in the IST Response has confirmed the concerns set out in the Suspension Letter and, as a result, Visa has determined that IsignThis presents a level of risk to the Visa payment network that exceeds reasonably acceptable thresholds. Visa has therefore decided to terminate its relationship with IsignThis.

(b) gave reasons for the decision to terminate, and set out Visa's findings;

(c) concluded:

> … Therefore, in accordance with the Visa Rules, and to safeguard Visa's global payment system from the excessive level of risk presented by the IsignThis relationship, Visa has decided to terminate its relationship with IsignThis in Europe and Australia. It must also cease acting as a registered third party for any other Visa members or clients.

(d) set out the next steps "to effect the termination of IsignThis as a Visa client"; and

(e) did not invite any further information or correspondence from iSignthis about the decision.

316 Having regard to the emails that passed between Mr Karantzis and Mr Hart on 18 April 2020, (where Mr Karantzis' observed that Visa's 17 April letter "couldn't[sic] be worse" and "lets[sic] see what we can do re appeal etc" and Mr Hart's email of 18 April 2020 providing what appears to be a draft release to Mr Karantzis), ASIC submits that the immediate reaction and proposed response by Mr Karantzis and Mr Hart was to notify the market of Visa's decision to terminate, and to appeal the decision. In this regard ASIC notes that in the days following the decision, Mr Karantzis wrote to Visa on 21 April 2020 and 27 April 2020 requesting that Visa reconsider or withdraw its decision. It is said that Mr Karantzis knew that this attempt was very unlikely to succeed, describing it in an email as a "Hail Mary". ASIC submits that sending two (effectively self-serving) emails after Visa had communicated its decision does not create a commercial negotiation for the purposes of Listing Rule 3.1A, and that the court would fall into hindsight error if there was to be a focus on Visa's conduct after 17 April 2020.

317 In this regard ASIC submits that a commercial negotiation requires a bilateral engagement on the topic the subject of the "negotiation". It is apparent, ASIC contends, that Visa never indicated that it might reconsider or withdraw its decision. ASIC notes the following on this point:

(a) On 1 May 2020, in response to Mr Karantzis' 21 and 27 April 2020 emails, Visa wrote that "as a gesture of goodwill" it reviewed the information provided but that it was "not

sufficient to impact the decision to terminate". The letter stated "Visa will not review any further documentation from iSignthis on Visa's findings".

(b) Mr Hart's reaction to the 1 May 2020 letter was that iSignthis had "no choice but to go to their legal department next". That is, to challenge the decision.

(c) On 5 May 2020, iSignthis wrote to Visa raising the prospect of a legal challenge, stating that the letter was sent "[i]n an effort to avoid external regulatory intervention, and/or judicial review in an English court".

(d) On 12 May 2020, Visa responded to iSignthis' 5 May 2020 letter, repeating what it had said on 1 May 2020 that Visa would not review any further information relating to the basis of the decision to terminate, which was final.

318 In light of these matters ASIC submits that the communications between iSignthis and Visa between 17 April and 12 May 2020 were not an ongoing incomplete proposal or negotiation. Properly characterised, ASIC submits, the communications made by iSignthis were no more than an attempt to have Visa reconsider things. The evidence of Mr Hart and Mr Minehane was that the 12 May 2020 letter made it abundantly clear that Visa would not reconsider its decision. ASIC says that a different iSignthis board would likely have received that message much earlier. In ASIC's submission the evidence indicates that iSignthis acted with stubbornness and persistence in denying Visa's clear and unwavering position. That, it is said, cannot transform a unilateral decision into an incomplete proposal or negotiation.

319 Further, ASIC submits that Mr Seyfort's opinion that a negotiation might have continued well beyond 12 May 2020 if iSignthis had more to say, regardless of the clear message that Visa had stopped listening, is untenable and is not apparently shared or adopted by the company. ASIC submits that it is obviously wrong, and that it undermines Mr Seyfort's credibility. ASIC contends that if one party makes clear that its decision is final and it is not engaging in further communications, on no view could it be said that there is an extant incomplete negotiation. Further, ASIC submits, Mr Seyfort was wrong to suggest that a matter that had been the subject of a negotiation could be raised with a regulator or a court with power to review or change a decision, with Listing Rule 3.1A continuing to apply. This is because information the subject of an "incomplete negotiation" loses its protection under Listing Rule 3.1A if the information has ceased to be confidential.

320 ASIC submits that this suggestion also underscores the problem with Mr Seyfort's thesis. A matter can only be the subject of review by a court or a regulator if it concerns a decision or

completed matter to which the parties have committed. For example, it is said that a reviewable matter will generally entail something which is final and operative and determinative, and not a step along the way in an incomplete process: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 337 (Mason CJ). ASIC submits that the availability of third party review is a feature of a concluded matter, not an incomplete negotiation.

iSignthis' submissions

321 iSignthis' starting point is that the Guidance Note provides that incomplete proposals or negotiations are excluded from disclosure because of the prejudice it could cause to an entity and its security holders if it was effectively required to develop its corporate proposals and conduct its commercial negotiations in public. iSignthis emphasises that the Note says that the word "incomplete" qualifies both "proposal" and "negotiation". iSignthis submits that the information is also excluded from disclosure because of the tendency of markets to overreact in the short term to information that an entity may be contemplating a market sensitive transaction, even where the likelihood of the transaction proceeding is low or unclear. If the exception applies to parties negotiating in respect of a transaction to enter into a business relationship, iSignthis submits, it must necessarily extend to commercial negotiations intended to resolve a dispute in order to preserve that business relationship. It is said that a reasonable person would not expect such information to be disclosed until those negotiations were concluded.

322 iSignthis submits that it would have been put in an impossible position if it had been required to disclose to the ASX the "decision" communicated by Visa in the 17 April letter. A bare announcement of the decision, iSignthis contends, would have misled because it would have omitted to mention that the decision was being challenged. Equally, iSignthis submits, an announcement that Visa had asserted termination but this was being challenged in various ways would have been difficult to state fully and accurately. For example, information might have needed to be conveyed as to the details of the challenge. Moreover, iSignthis submits, publication of the basis of a challenge to a decision of a commercial counterparty would very often imperil the prospects of persuading the counterparty to change its mind. In the present circumstances it may be inferred that Visa would likely have been displeased for announcements to be made by iSignthis that the 17 April letter contained significant errors, or that Visa was acting in bad faith or in a procedurally unfair manner. This, iSignthis submits, is precisely why the carve-outs in Listing Rule 3.1A exist. iSignthis contends that companies are

not expected to make announcements about "incomplete proposals or negotiations" or "matters" that are "insufficiently definite to warrant disclosure". iSignthis submits that the risk of misleading the market is too great, and that it would be an unfair intrusion on negotiations likely to be highly sensitive.

323 iSignthis submits also that considerable insight about the underlying purpose of the "incomplete negotiation" carve out emerged from the evidence of Mr Seyfort. This advice, it is said, was based on Mr Seyfort's understanding of the terms and the purpose of the exemption, being to allow parties to do in private exactly what Mr Karantzis was planning in his draft announcement to tell the market. Mr Seyfort said:

> The exemption is there to allow – if you read guidance note 8 by the ASX – it's to allow commercial parties to negotiate things where the announcement of them would prejudice – it's a bit like moral hazard, to use the insurance term – it would change the basis on which they were negotiating, so it would render the exemption a nullity – useless.

iSignthis notes that Mr Seyfort added that the purpose of the carve out is:

> … to allow parties to do, in private, exactly what Mr Karantzis had told me in his draft announcement that was planning to do, and the obvious reaction is, well, the listing rules allow you to do this behind closed doors. Why would you announce this if you could do it behind closed doors?

324 In Mr Seyfort's opinion the exception applied both to acquisition transactions and negotiations where there was a dispute. iSignthis submits that Mr Seyfort's advice was not dependent on some actual physical step in the negotiation. His position was that a negotiation is a course of conduct and in this case it started by iSignthis trying to change Visa's initial decision. iSignthis relies on Mr Seyfort's evidence that the exemption is intended to allow parties to negotiate, so it is about a course of conduct which includes the decision to engage in that process.

325 iSignthis submits that against this background Mr Seyfort considered that the 17 April letter was the beginning of negotiations. iSignthis maintains that the letter conveyed Visa's position, prevailing at that time, that a decision had been made to terminate and it would take effect at a forthcoming date. However, having spoken with Mr Karantzis and Mr Hart, Mr Seyfort considered that it was possible to persuade Visa to reconsider its decision and change its position. In addition, Mr Seyfort considered that the company had a right to be heard in relation to Visa's assertions and decision. He understood from his discussions with Mr Karantzis and Mr Hart that iSignthis and iSeM had a lot more to say in response to the matters asserted by Visa. Thus, an announcement made by iSignthis before it and iSeM had responded to the

assertions would have detrimentally affected their ability to persuade Visa to reconsider its decision before it took effect and to negotiate a commercial resolution of the dispute.

326 iSignthis submits that in providing his advice Mr Seyfort also considered whether the assertions made by Visa, about deficiencies in the process for on-boarding merchants and assessing each merchant's degree of risk (including money laundering risk), were announceable as non-financial or qualitative information that was material to the price or value of iSignthis shares. His view was that assertions of that nature by a commercial counterparty were not, without wider context or greater operational impact, material to the price or value of a company's securities. In this regard, Mr Seyfort was conscious that Visa is not a regulator and that the other major card schemes in which iSignthis and/or iSeM participated had not made similar contentions.

327 iSignthis notes also that when Mr Seyfort gave his advice he thought there was a realistic prospect of negotiating an outcome with Visa which would result in the reversal of its decision to terminate the relationship. He explained that, based on his AML experience, the 17 April letter constituted unusual behaviour for a commercial counterparty who was earning money from the relationship and would try to keep doing business and earning money. Usually, Mr Seyfort said, there is a set of expectations that if something is not right but capable of being fixed, commercial people fix it and go on earning money together.

328 iSignthis submits that Mr Seyfort's deep experience with continuous disclosure and anti-money laundering laws was plain by reference to his evidence. iSignthis notes that between 2007 and 2020 Mr Seyfort regularly presented a course on "Meeting ASX Listing Requirements" to the Governance Institute of Australia, and that Mr Seyfort drew upon that experience in giving his evidence, noting that multiple examples, including negotiations with disputes and litigation, were given in that course so that he was confident that the "incomplete negotiation" carve out was not limited to acquisition transactions.

329 iSignthis submits that the reality that a process of engagement and negotiation occurred between 17 April 2020 and 12 May 2020 is also implied by the evidence of Ms Luu, the Head of Legal – Australia, New Zealand & South Pacific for Visa AP (Australia) Pty Ltd. iSignthis notes that in an objection schedule, which formed part of a Visa objection to a subpoena issued in the proceeding, she verified as "true and correct in every particular", a description of the position as between Visa and iSignthis as at 8 May 2020 as the "potential termination". That description ("potential termination"), iSignthis submits, corroborates the reasonableness of the

stance taken by iSignthis' directors (Mr Karantzis and Mr Minehane), non-executive chairman (Mr Hart), company secretary (Mrs Warrell) and external legal advisor (Mr Seyfort) that the company might persuade Visa to reconsider its decision.

330 In this regard iSignthis notes that Mr Hart said that he believed the incorrect assumptions in the letter "were all challengeable", and that a logical person would overturn the decision. He thought that if the company could address the errors with Visa then reasonable people with commercial sense would reverse the decision. iSignthis submits that Mr Hart's view (which was shared by Mr Karantzis, Mr Minehane and Mr Seyfort) was entirely reasonable because Visa's own internal report dated 9 November 2019, completed after its "Global Acquirer Risk Standards (GARS) Review" of iSignthis on 7 November 2019, concluded that: "[w]hilst there are a few outstanding documents requested, the review has been completed without any red flags identified" and iSignthis' "[s]ystems & processes appeared fit for purpose in our opinion". The report also noted that iSignthis had "met AUSTRAC requirements including an AML review".

331 Mr Minehane, iSignthis submits, gave similar evidence to Mr Hart. On receipt of the 17 April letter, he thought that iSignthis might be able to turn the situation around by negotiating a commercial resolution of the dispute. This, he said, was because the letter contained a number of factual errors and, in his opinion, was another instance of Visa engaging in anti-competitive conduct. He regarded the 17 April letter as a "purported termination". This evidence, iSignthis submits, was not challenged in cross-examination.

332 iSignthis submits that the course of correspondence, objectively viewed, shows that the parties were engaged in a process of dialogue until 12 May 2020. iSignthis notes that on 21 April 2020, 27 April 2020, 5 May 2020, and 6 May 2020, additional information and documents were sent to, and considered by, Visa.

333 In this regard iSignthis draws attention to the following matters, in particular:

(a) On 20 April 2020 Mr Seyfort sought the advice of a friend who worked for Visa, Mr Dominic White, as to "the best way to achieve productive engagement" with a view to persuading Visa to reverse its decision. Mr White advised that the best course was for iSignthis to continue to engage with the persons with whom it had been corresponding within Visa.

(b) On 21 April 2020, iSignthis requested that Visa withdraw the termination letter and expressed concerns that:

> … Visa appears to have rushed to findings and termination of agreement, without requesting the evidence that is clearly noted as not having been provided or addressed within Visa's report. Natural justice, due process and procedural fairness, being essential elements of an accountable and transparent governance arrangement, appear to not have been adhered to properly.

(c) On 27 April 2020, iSignthis and iSeM said that they were concerned about the "serious factual errors" in the 17 April letter and asserted that "the termination was wrongful and not in accordance with either of Visa's regulatory or contractual obligations". They provided additional documents and asked Visa to withdraw the 17 April letter and reinstate the bank identification numbers (BINs).

(d) In the 1 May 2020 letter, Visa said that "as a gesture of goodwill" it had reviewed the documents which had been sent following the 17 April letter and that the information was "not sufficient to impact the decision to terminate". iSignthis remained adamant that it was still going to challenge and rebut the assertions made by Visa.

(e) On 5 May 2020, following a meeting of the iSignthis board, a letter was sent to Visa which responded to various statements made by Visa, provided reasons and further evidence for Visa to consider, and sought a discussion "with a decision maker of Visa in order to resolve the matter."

(f) On 6 May 2020, Mr Karantzis sent a copy of the letter dated 5 May 2020 to Mr Gianniotis and asked him to set up a call with someone so they could "get to the bottom of the real issues" as the issue was clearly not as stated "on the face of Visa's document." On 7 May 2020 Mr Gianniotis said that he would get some information and come back to Mr Karantzis. Mr Karantzis then sent further information to him.

(g) On the evening of 12 May 2020, Visa said that in "a gesture of good faith" it had "reviewed all of the information provided in the 5 May Letter" but not altered its decision, which was final.

334 iSignthis emphasises Mr Seyfort's observation that the words used by Visa in its responses of 1 May 2020 (received on 2 May) and 12 May 2020 ("gesture of goodwill" and "gesture of good faith") sounded to him like a negotiation, as it conveyed something which was done voluntarily, not because of a legal obligation.

335 iSignthis submits that the point sought to be made on behalf of ASIC in the cross-examination of the lay witnesses was that, as at 17 April 2020, Visa had made "a decision" to terminate iSignthis irrespective of the fact that iSignthis sought to change or reverse that decision. Sometimes, iSignthis submits, expressions were deployed in cross-examination to suggest that the decision was final as at 17 April 2020. Almost always, however, the witnesses rejected that implication. For example, when it was put to Mr Seyfort that "the decision had been finally made to terminate the iSignthis Group", he responded: "[y]ou inserted the word 'finally' into your question. A decision had been made, but in commercial negotiations, people often make a decision and change their decision". Likewise, iSignthis submits, when senior counsel for ASIC referred to "its decision to terminate the relationship", Mr Seyfort answered "[a] decision, yes". iSignthis contends that it is unclear what concessions ASIC was seeking to extract by these exchanges. iSignthis submits that it reasonably believed that the decision was "not final" and might be reversed. iSignthis contends that there is in fact no evidence as to how firm Visa's decision actually was as at 17 April 2020, although it notes that Ms Luu's evidence suggests it may not have been so firm. iSignthis submits that whatever Visa's state of mind at various times, the objective correspondence reflects an "incomplete negotiation" until 12 May 2020.

Determination

336 Although I accept that the question is finely balanced, in my assessment there is force in iSignthis' contention that between 17 April 2020 and 12 May 2020 it was entitled to rely upon the exception to disclosure in Listing Rule 3.1A on the grounds that the relevant information concerned an incomplete proposal or negotiation; that is, a negotiation that could not actually be regarded as final and was continuing to evolve. I have come to this conclusion for the following reasons.

337 First, I consider that fairly viewed and analysed as a whole, the correspondence exchanged between iSignthis and Visa in the period 17 April 2020 to 12 May 2020 and the conduct of the parties more generally in that period is more properly to be characterised as constituting an incomplete negotiation in circumstances where the underlying information was confidential and a reasonable person would not have expected the information to be disclosed. Although it is true that Visa, in its 17 April letter, expressed the termination of its relationship with iSignthis in the language of finality, it is also the case that Visa continued to engage, one way or another, in a process of active dialogue with iSignthis until 12 May 2020. It seems that Visa continued

to review documents provided by iSignthis and to engage on a person to person basis in relation to the underlying issues. In my assessment, properly understood, in the period 17 April 2020 to 12 May 2020 iSignthis and Visa were negotiating about the legitimacy of the decision that Visa had communicated that it would terminate its relationship with iSignthis. I consider that for as long as Visa continued to engage with iSignthis in the way that it did, which was until 12 May 2020, its "decision" lacked finality in the relevant sense.

338 There are a number of features of the interaction between Visa and iSignthis at this time that are consistent with the existence of an ongoing dialogue. One is that it is apparent from Visa's letter of 1 May 2020 in response to Mr Karantzis' 21 and 27 April 2020 emails that Visa had, in fact, reviewed and considered the further information which iSignthis had provided. This covers the period from 17 April to 1 May 2020. Another is Mr Gianniotis' representation to Mr Karantzis on 7 May 2020 that he would obtain more information and come back to Mr Karantzis. Finally, and conclusively, on 12 May 2020 Visa told iSignthis that it had reviewed the further information that iSignthis had provided in its letter of 5 May 2020 but had decided not to alter its decision. Once again, the back and forth suggests that while, at one level, Visa had made a decision, that decision was not in fact final and there was still a negotiation on foot until 12 May 2020.

339 In all the circumstances I consider that it would be counter-intuitive to conclude that an immediate disclosure should have been made by iSignthis on 17 April 2020, and I do not accept that a reasonable person would have expected the Visa Termination Decision and the Reasons for Visa's Termination to be disclosed, up until 12 May 2020. As Mr Seyfort put it, although at one level Visa had communicated a decision on 17 April 2020, in commercial negotiations people often make a decision and then change the decision. Visa's level of engagement with iSignthis suggests that a negotiation remained on foot.

340 Secondly, I accept, as iSignthis contends, that if the exception in Listing Rule 3.1A applies to parties negotiating in respect of the establishment of a business relationship, it is no stretch to conclude that the exception extends, in an appropriate case, to negotiations intended to resolve a dispute so as to preserve a business relationship. I consider that it is reasonable to conclude that this is what was occurring between Visa and iSignthis in the period from 17 April to 12 May 2020. Disclosing the dispute, during this period, would have been premature and may have misinformed or misled the market given the detail in which any disclosure would have needed to have been made so as to inform the market both of the decision Visa had made, and

the nature of iSignthis' responses to the decision, as well as the progress of negotiations between the parties.

341 Thirdly, it is also important to bear in mind, as iSignthis submits, that it could not practicably have continued to negotiate with Visa on a proper basis in this period had it made an announcement to the market. Any meaningful announcement would have needed to be very detailed, given the need for iSignthis to express its disagreement with Visa's reasons, and this would have been bound to have brought to an end any possibility of iSignthis persuading Visa to reconsider. Mr Seyfort's evidence about the underlying purpose of the incomplete negotiation carve out is persuasive in this respect.

342 In coming to this conclusion I attribute significance to Mr Seyfort's evidence that he considered that there was a prospect of negotiating an outcome with Visa which would leave its relationship with iSignthis intact. In this context the incomplete proposal or negotiation exception in Listing Rule 3.1A seems apposite. The fact that, as ASIC submits, there could have been no judicial review of Visa's decision unless it was final, and iSignthis was threatening to commence proceedings seeking such a review, does not, to my mind, compel the conclusion that Visa's decision was in fact final. I regard this threat, made by iSignthis in its context, as merely part of the back and forth of the negotiation between the parties. I do not attribute to it the significance which ASIC contends it has.

343 I therefore conclude, in answer to the first issue between the parties in relation to the Visa termination, that between 17 April 2020 and 12 May 2020 iSignthis was entitled to rely upon Listing Rule 3.1A as providing a basis for non-disclosure on the grounds that the information concerned a relevantly incomplete negotiation.

Was there a Listing Rule 3.1A defence between 12 May and 21 May 2020?

344 The defendants assert that between 12 May 2020 and 21 May 2020 iSignthis was entitled to rely upon Listing Rule 3.1A on grounds that it would have been a breach of a law (the law of Cyprus) to disclose the information (Listing Rule 3.1A.1).

ASIC's submissions

345 ASIC's position is that the evidence does not support this defence. In particular, ASIC submits that there is no evidence that Cypriot law required the making of any disclosure to the CBC *before* making a disclosure to the ASX. Nor, ASIC submits, is there evidence that Cypriot law required iSignthis to wait for a response to a notification before making a public announcement.

By reference to the expert opinion of Mr Ioannides on Cypriot law, ASIC submits that the evidence is to the contrary. ASIC maintains that a notification to the CBC could have been made by iSignthis' Cypriot subsidiary, iSeM, at the same time as iSignthis made disclosure to the ASX, which was required to have been made "immediately".

346 Between 12 May and 15 May 2020 ASIC submits that there is no evidence that iSignthis had taken any steps to inform the ASX or the CBC about the Visa Termination Decision, or the Reasons for Visa's Termination. Rather, ASIC says, the evidence indicates that on 13 May 2020 iSignthis did not yet intend to make any disclosure to any of its regulators about the termination decision. On 13 May 2020 Mr Karantzis sent an email to Visa requesting that Visa reconsider its reasons for the termination decision. The email stated that iSignthis "continue to assert that AML cannot be the reason for the termination", and made the following request:

> As we will be required to report to our regulators, we require that Visa either:
>
> 1. Respond to each rebuttal with evidence to support their position, or
>
> 2. Withdraw the AML allegations, and terminate on the basis of the only outstanding matter, being "brand" risk due to derogatory media, and
>
> 3. We also require formal notice of termination of each agreement in accordance with the terms of each agreement, and
>
> 4. Provide further details as to the return of the collateral for each entity and membership fees.
>
> …
>
> As such, it would be appreciated if Visa could address the above matters… so as we may close this matter with regards to AML versus brand as the reason for termination (should Visa still proceed).

347 ASIC notes also that the communications iSignthis ultimately had with the CBC were prompted by the CBC identifying public information about Visa's suspension of iSignthis, not out of any proactive steps by iSignthis to notify its regulators. ASIC points to the following in this regard:

(a) On 15 May 2020, Ms Ilina of iSeM received an email from Ms Kontou at the CBC containing a weblink leading to a public article "according to which the anti-money laundering division of Visa has suspended Isignthis". Ms Kontou asked "[p]lease inform us whether the Visa suspension applies also to Isignthis Cyprus, and provide us with your comments on the contents of the below article by COB Monday the latest".

(b) Later that day, Ms Ilina sent a message to Mr Karantzis stating that she had received an email from Ms Kontou and asking if they could discuss a response. Mr Karantzis

responded with the request: "[c]an I see emails please". Ms Ilina on-forwarded the emails.

(c) When Mr Karantzis received the CBC's request, he was unsure how to respond. He forwarded the email to Ms Warrell asking "[d]o we ask them to help us fight it or say it's brand risk and settled?"

(d) Mr Karantzis then "quickly belted … out", to use his language in the relevant email, a draft response for comments. The draft stated that "iSignthis has been suspended by Visa AML for failure to provide a PCI DSS certificate" and that "underlying this is a dispute with Visa re Risk and their Brand Risk". Ms Warrell agreed with the approach. This response was contrary to information later provided by Mr Karantzis to the ASX on 25 May 2020 that "[t]here was no suspension by Visa due to PCI DSS." It is also inconsistent with Mr Hart's evidence in cross examination that there were two separate suspensions.

(e) That draft formed the basis of the final letter sent to the CBC on 18 May 2020 to "help clarify the matter" raised by the CBC on 15 May 2020.

(f) On 21 May 2020, Ms Ilina telephoned Ms Kontou at the CBC and Ms Kontou told Ms Ilina that no further clarification was required by the CBC on the matter. Ms Ilina conveyed that information to Mr Karantzis.

iSignthis' submissions

348 iSignthis submits that the exception to Listing Rule 3.1 is not worded "it would be a breach of a law [by the disclosing entity] to disclose the information". It is said that the exception should be regarded as covering a case where a wholly owned subsidiary of the listed entity would breach "a law" were the disclosure to be made. Thus, iSignthis submits, it must follow that if, instead of the listed parent company, a wholly owned subsidiary of the parent company would breach a law of a foreign country and thereby risk losing its substantial operating licence, which in turn would affect the financial position of the listed parent company, the exception to Listing Rule 3.1 applies. A reasonable person, iSignthis says, would not expect the information to be disclosed in those circumstances.

349 It appears to be common ground that iSeM, a wholly owned subsidiary of iSignthis at the time, was subject to a legal obligation under Cypriot law, and the provisions of its operating licence, to notify the CBC of the termination of its relationship with Visa immediately and "without undue delay". In this regard iSignthis submits that the unchallenged opinion of its expert on

Cypriot law, Mr Polyviou, was that upon receipt by iSeM of the letter dated 12 May 2020, informing it of the finality of Visa's decision to terminate iSeM's licence, iSeM was under a legal obligation to inform the CBC of the termination "without undue delay". Mr Polyviou said that a public statement issued by iSignthis in Australia, disclosing the termination of the relationship with Visa *before* iSeM notified the CBC of the termination, would have led to "a clear breach of iSeM's obligation" to notify the CBC "without undue delay".

350 iSignthis notes that Mr Polyviou also explained that the CBC had the power to withdraw a payment institution's licence if it failed to inform the bank of any significant developments in respect of that licence. Mr Polyviou said that the CBC treats every possible breach with the utmost attention and seriousness, and is "very strict" in relation to breaches of legislative and/or regulatory obligation. In these circumstances Mr Polyviou said that it is usually prudent for an institution falling under the authority of the CBC to show caution and "await the CBC's response before taking further action". Mr Polyviou suggests that a reasonable person confronted with this reality would not expect the termination to be disclosed to the market until the notification process had concluded.

351 iSignthis submits by reference to Mr Hart's evidence that on 13 May 2020 Mr Hart and Mr Karantzis discussed the issue and decided to inform the CBC. Similarly, it was Ms Warrell's evidence that on the morning of 13 May 2020 she and Mr Karantzis discussed the matter and agreed that the CBC needed to be informed. Ms Warell said that she made clear that they were not waiting for a response from Visa to Mr Karantzis' email of 13 May 2020 before they went to the CBC. Mr Minehane's evidence was that the preservation of iSeM's licence was a paramount consideration for the company, and it needed to communicate with the CBC in relation to the termination of the relationship with Visa.

352 Thus iSignthis submits that the unchallenged evidence of Ms Ilina is that between 15 May 2020 and 18 May 2020 a written notification to the CBC was prepared, on 18 May 2020 the notification was submitted to the CBC, and on 21 May 2020 the CBC acknowledged receipt of the notification and said that it did not require any further clarification. iSignthis submits that the reason it took some time to prepare and submit the written notification is apparent from its length and detail, as well as the internal email communications concerning the preparation of the document.

353 iSignthis submits that whether the "breach of a law" carve out expired on 18 or 21 May 2020 turns on whether the process of notification is to be treated as completed when the letter to the

CBC dated 18 May 2020 was sent, or when the CBC said on 21 May 2020 that it did not require any further clarification. iSignthis submits that it is significant that the letter to the CBC dated 18 May 2020 contemplated the possibility of "a video conference between our executive team and the CBC, should you deem that beneficial". Moreover, iSignthis submits, it was entitled to be cautious given the risk of sanctions being imposed by the CBC as described by Mr Polyviou. iSignthis relies on Mr Polyviou's evidence that, in light of those risks, it would have been prudent to hear back from the CBC before proceeding further. iSignthis submits also that Mr Karantzis did not leave the matter in abeyance. On 20 May 2020 he asked Ms Ilina to "call the CBC in the morning and get an update on our Visa submission please". This generated a response from the CBC on the following day, 21 May 2020.

354 iSignthis submits by reference to Mr Hart's evidence that on 22 May 2020 (a Friday) and 23 May 2020 (a Saturday) iSignthis prepared a letter to its shareholders in relation to the termination of the relationship with Visa. That letter, to which it will be necessary to come, was sent to shareholders on 24 May 2020, and released to the market on 25 May 2020.

Determination

355 I do not accept iSignthis' submission that in the period between 12 May 2020 and 21 May 2020 it was entitled to rely upon the breach of a law exception in Listing Rule 3.1A to avoid disclosing the Visa Termination Decision to the market. I have reached this conclusion essentially because I do not consider that the relevant expert evidence supports the view that the law of Cyprus operated so as to require iSeM to make disclosure of the Visa Termination Decision to the CBC *before* iSignthis made the required disclosure to the ASX. In this respect I accept ASIC's submission that iSeM could have made a notification to the CBC at the same time as iSignthis made a disclosure to the ASX, which (subject to the question of materiality) was required to have been made immediately. That is to say, the disclosure could and should have been made on or shortly after 12 May 2020.

356 As Mr Ioannides observed in his Report:

> 4.5.2 iSeM was under an obligation to notify the CBC of the termination of its VISA relationship, but it was under no obligation under the laws of Cyprus to await for CBC's feedback, approval and/or response before itself making any further (or even prior) disclosures of the termination of its VISA relation. **It is noted that the Polyviou Report does not make a proposition to the contrary.**
>
> 4.5.3 Similarly, ISX was under no obligation under the laws of Cyprus to either notify the CBC or await for CBC's feedback, approval and/or response on iSeM's submission, before itself making any disclosures of the termination of

> its VISA relation. **It is noted that the Polyviou Report does not make a proposition to the contrary**
>
> (Emphasis added).

357 Consistently with Mr Ioannides' observations in the emphasised passages above, I do not read Mr Polyviou's report to advance an argument that iSignthis could not have made disclosure of the Visa Termination Decision to ASX contemporaneously with any notification that iSeM might have made to the CBC. Mr Polyviou's opinions are expressed by reference to the consequences as a matter of Cypriot law for iSeM if iSignthis had notified the ASX of the Visa Termination Decision *before* iSeM had notified the CBC.

358 It follows, therefore, that I reject iSignthis' submission that whether the "breach of a law" carve out expired on 18 or 21 May 2020 turns on whether the process of notification to the CBC is to be treated as completed when the letter to the CBC dated 18 May 2020 was sent, or when the CBC said on 21 May 2020 that it did not require any further clarification. The "breach of a law" defence to disclosure advanced by iSignthis for the period 12 May 2020 to 21 May 2020 is misconceived. Subject to the question of materiality, iSignthis could and should have made disclosure to the ASX of the Visa Termination Decision contemporaneously with its notification to the CBC, which should have occurred upon receipt of the 12 May 2020 Visa letter, or shortly thereafter.

Did iSignthis notify the ASX immediately or at all after 21 May 2020?

359 The defendants claim that iSignthis complied with its obligations under s 674(2) of the Act by publishing the letter to shareholders dated 24 May 2020. ASIC's position is that the letter to shareholders was insufficient to constitute disclosure for the purposes of s 674 of the Act.

360 To understand the parameters of this debate it is convenient to reproduce the letter:

iSignthis®

24th May 2020

Dear Shareholder

Letter to Shareholders re Visa Relationship & ASX Suspension

iSignthis Ltd (ISX or the Company) will end its contractual relationship with Visa as a principal member in approximately 90 days. The Company ceased processing as a principal acquiring member in mid-March and has been engaged since that time with Visa in commercial-in-confidence negotiations.

Visa seeks to classify regulated electronic money issuers and purchase payment facility providers such as iSignthis and Paypal, in the same way as unregulated wallets such as Apple Pay, and make them subject to Visa's staged digital wallet operator (SDWO) rules. This includes the impost of a US$100 million net tangible asset value (NTA) requirement for issuers of electronic money in Europe or for purchased payment facility operators in Australia, who seek to also be concurrent principal acquiring members of Visa.

The effect of these proposed changes is that the Company would need to choose to be either a principal acquirer, or act as a standalone SDWO, or to have an NTA of more than US$100m if it chooses to be both acquirer and SDWO concurrently.

The Company is in the process of preparing submissions to competition regulators in both Australia and the European Union regarding the impact of proposed rule changes by Visa. The Company has, in the last 72 hours, already made a preliminary submission to a key European regulator.

The Company's position is that the proposed Visa rules that take effect in October this year will restrict trade and competition.

The proposed Visa rules also impose further competitive restrictions on SDWOs including not allowing the SDWO to issue an account number to a retail customer that is not a Visa account number, including Basic Bank Account Numbers (BBANs) and International Bank Account Numbers (IBANs). Visa requiring that only Visa Primary Account Numbers (PANs) be used to reference a retail customer means that other payment and card schemes cannot be involved in a SDWO which incorporates Visa.

Further proposed rule changes by Visa include online video gaming being re-categorised, which will require ISX to have a US$100m NTA to service this sector (and that of SDWO at the same time) as a card acquirer.

The impact of Visa's suspension has seen an interruption to growth, reflected in an overall decline in revenues during March and April. The Company's augmented SEPA instant payment services have seen an increase during May. The Company is confident that its instant payment/instant notification service in the EEA is a direct substitute for Visa card acquiring, as Visa acceptance rates in gaming and with securities dealers is lower than with other schemes.

The Company has appropriate licensing in place to service regulated gaming and securities dealers with other card and payment schemes and will continue to expand its business.

It is important to note that the Company's relationships with all other card and payment schemes remain unaffected. The Company has not been subject to any anti-money laundering action or notices against it by any regulator at any time. The Company is fully certified for PCI DSS Level1 and ISO27001.

ASX Suspension

In the midst of sensitive negotiations and regulatory submissions, the ASX has issued a further query letter seeking extraordinary detail about the Company's commercial arrangements with Visa. The Company has advised ASX that it is inappropriate for it to be requesting and releasing information regarding current negotiations and submissions, as it may compromise our ability to reach outcomes of best effect for the Company and shareholders. ASX is insistent, so we have prepared circumspect

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answers to ASX's queries for release to the market tomorrow. The directors are trying to do the "right thing" for both ASX and our shareholders, although there is some tension between the twin objectives.

As shareholders will have noted, the Company remains committed to satisfying the criteria set by the ASX in its 1st May directions for having ISX securities re-quoted.

Of the directions issued by the ASX on 1st May 2020, the Company has satisfied 3 of the 4 by:

- Appendix 4C disclosure with revenue breakdown as directed by the ASX[1]
- Nona Agreement Disclosure[2]
- Variation Letter Disclosure[3]
- Appointment of an Independent Expert re continuous disclosure[4] (completion of report required to satisfy this direction)

The directors, officers and substantial shareholder Red5 Solutions Ltd have again offered to the ASX a voluntary escrow of 336m shares, which would take effect for one year to May 2021. To date, the ASX has not accepted that offer.

I also encourage shareholders to read our response to the ASX "Statement of Reasons", which is found on the iSignthis website under the "investors" menu and announcements tab dated 4th May 2020.[5]

However, our experience over the last few weeks in dealing with the ASX does not give us confidence that the ASX is acting in good faith.

Yours faithfully

NJ Karantzis
Managing Director
iSignthis Ltd

Authorised by the Managing Director (John Karantzis) and Chairman (Tim Hart) of iSignthis Ltd

[1] https://www.asx.com.au/asxpdf/20200515/pdf/44hvtppv70vh2g.pdf
[2] https://www.asx.com.au/asxpdf/20200520/pdf/44hz0sfcmwp06v.pdf
[3] https://www.asx.com.au/asxpdf/20200520/pdf/44hz0vjkf090nd.pdf
[4] https://www.asx.com.au/asxpdf/20200519/pdf/44hybwt46q2hz9.pdf
[5] https://www.isignthis.com/hubfs/Investor%20Documents%202020/ISX_Formal%20response%20to%20ASX%20reasons%5B1%5D.pdf?hsLang=en

ASIC's submissions

361 ASIC's case is that iSignthis' letter to shareholders of 24 May 2020 did not disclose the Visa Termination Decision or the Reasons for Visa's Termination and that it ought to have done so. ASIC says that, as Mr Seyfort acknowledged, the letter could convey the impression that iSignthis had ended the relationship, because iSignthis maintained that Visa had no basis to end it. ASIC submits that the letter also conveyed the impression that iSignthis ended the relationship with Visa by reason of changes in Visa's rules because Mr Seyfort believed that to be a reason for Visa's termination.

362 ASIC submits that the 24 May 2020 letter was not prepared in response to the CBC's indication on 21 May 2020 that no further clarification was required having regard to iSignthis' 18 May 2020 letter to the CBC. ASIC notes that Mr Seyfort's evidence was that the 24 May 2020 letter to shareholders was prepared following his advice to Mr Karantzis that:

> ISX should release, concurrently with a further response to the 7 May Query Letter, its explanation of the broader context and circumstances of the dispute with Visa in the form of a letter to shareholders.

According to Mr Seyfort, the reasoning behind that advice was that:

> this letter would give ISX an opportunity to properly explain the Visa dispute rather than simply responding to leading and conflated questions from ASX Limited, which give an incomplete account and tend to make a respondent look defensive.

363 ASIC notes that Mr Seyfort's advice was that iSignthis should get ahead of any ASX release of a query letter and make a public announcement to control the narrative. ASIC's position is that the letter was not intended to, and did not in substance, make a disclosure to the market about the Visa Termination Decision or the Reasons for Visa's Termination.

364 ASIC submits that it was not until 17 August 2020, almost three months later, that iSignthis acknowledged to the ASX that Visa had terminated the relationship, and iSignthis never disclosed the Reasons for Visa's Termination to the ASX.

iSignthis' submissions

365 iSignthis does not appear to contend that its letter to shareholders of 24 May 2020 did disclose the Visa Termination Decision or the Reasons for Visa's Termination. Rather, iSignthis maintains that ASIC's claim that there has been a contravention of s 674(2) of the Act because it failed to notify the ASX of the Visa Termination Decision and, in particular, the Reasons for Visa's Termination, amounts to a separate case against it. iSignthis contends that this case is

that only the matters ASIC pleaded as constituting the reasons for the Visa Termination Decision should have been released, without any comment or rebuttal on the part of iSignthis. iSignthis says that it is one thing to disclose the fact of the termination and quite another to disclose reasons with which the company vehemently disagreed.

366 In answer to ASIC's case that iSignthis did not notify the ASX immediately or at all after 21 May 2020 of the Visa Termination Decision and the Reasons for Visa's Termination, iSignthis relies on its submission that it was entitled to rely on the exceptions to the requirement to disclose provided by Listing Rule 3.1A in the period 17 April 2020 to 18 or 21 May 2020. It also maintains, by reference to Mr Houston's evidence, that the disclosure to the ASX of these matters would not have had a material effect on the price or value of its shares.

367 The materiality submissions advanced by iSignthis in this connection are as follows.

368 First, Mr Houston considered that the market was already aware of the high-risk nature of iSignthis' merchants, so the reasons for the Visa termination insofar as they concerned the nature of these merchants could not be expected to have represented new information.

369 Secondly, iSignthis submits that ASIC's case that a company in its position should have disclosed the four pleaded reasons for the termination (the Reasons for Visa's Termination) and nothing more is contradicted by Mr Houston and Mr Sisson, both of whom accepted that, realistically, if iSignthis had disclosed the Reasons for Visa's Termination it would also have provided the market with a substantive response to Visa's claims.

370 Thirdly, Mr Houston rejected ASIC's suggestion that an organisation like Visa expressing a view that iSignthis was not operating appropriate programs to manage AML risk would have been materially detrimental to the market's evaluation of the company if the market had been given that information in April or May 2020. In this regard iSignthis notes that Mr Houston's opinion is consistent with Mr Seyfort's view that assertions made by a commercial counterparty such as Visa, about deficiencies in the process for on-boarding merchants and assessing each merchant's degree of risk, are not material to the price or value of a company's securities without wider context or greater operational impact.

371 Fourthly, had iSignthis simply released the Reasons for Visa's Termination to the market on 17 April 2020, as ASIC alleges should have occurred, the announcement would have been incomplete and misleading. It would not have reflected the fact that iSignthis disputed the reasons for the termination and alleged that the decision reflected misuse by Visa of its market

power and anti-competitive conduct more generally. No AML and counter-terrorism financing regulator had ever taken any action against iSignthis or its subsidiaries. And both Mastercard International and Nexia Poyiadjis (a third party independent auditor) later verified that there was no evidence of systemic failures and weaknesses as alleged by Visa.

372 Indeed, iSignthis submits that had it made a limited disclosure of, in effect, the Visa Termination Decision and the Reasons for Visa's Termination without more, it would have caused the company to contravene s 1041H of the Act because the absence of a rebuttal would have implied that iSignthis had no answer to Visa's allegations. Similarly, a release of the Reasons for Visa's Termination as pleaded by ASIC alone would have misled because they do not mention all of Visa's reasons or properly describe all expressions. iSignthis submits that the only way for it to have dealt with this problem would have been for it to have released the whole letter, but it says that is not ASIC's pleaded case. Nor would it deal with the problem that the more that is said by way of release of information from Visa, the more iSignthis would have needed to say by way of rebuttal. iSignthis submits that it is absurd to suppose that a disclosure regime in these terms would be required of a listed company when it is trying to negotiate a commercial resolution of a dispute.

373 Fifthly, significant problems attend a decision about whether the whole or only part of Visa's 17 April letter should have been released to the market. Mr Sisson assumed that the whole of the letter would be released, and thus considered that a regulator would be concerned by the section of it headed "(d) General lack of proactive investigation and management". iSignthis notes, however, that this particular section of the letter does not fall within ASIC's four pleaded Reasons for Visa's Termination. Thus, iSignthis submits, there is an absence of alignment between ASIC's pleaded case and its expert evidence. These considerations, iSignthis contends, point to the impracticability of ASIC's case as to the disclosure of the Reasons for Visa's Termination.

Determination

374 There can be no doubt that, having regard to its terms, iSignthis' letter to shareholders of 24 May 2020 did not, in substance, make disclosure of the Visa Termination Decision or the Reasons for Visa's Termination. The letter plainly does no such thing. As Mr Seyfort accepted, a fair reading of the letter conveys the impression that it was iSignthis that had severed the relationship with Visa because of difficulties that iSignthis had with changes in Visa's rules. In my assessment the letter was more than merely a public announcement of information to

control the narrative, as iSignthis contended. With respect to the guiding minds involved, it was effectively corporate spin by iSignthis of critical aspects of Visa's decision to terminate its relationship with iSignthis. That is to say, it was essentially corporate spin of problematic information that was not generally available to the market. In reality, iSignthis' letter to shareholders of 24 May 2020 sought to create a new narrative, rather more than to control the existing narrative. The question of the materiality of the underlying information, which ASIC says should have been disclosed, is thus of central importance in the determination of ASIC's s 674(2) case against the company.

375 I accept also that it was not until the 17 August 2020 response that iSignthis acknowledged explicitly to the ASX that Visa had terminated the relationship, and that the Reasons for Visa's Termination appear never to have been disclosed by iSignthis.

376 Insofar as iSignthis has contended that it is ASIC's case that *only* the matters pleaded as constituting the Reasons or Visa's Termination should have been released to the market, without any comment or rebuttal by iSignthis, I do not accept that this is how ASIC has put its case. Indeed, as ASIC submits, iSignthis raises a straw man in this regard. Nowhere does ASIC's pleading allege that it would not have been open to iSignthis to have made a response to what Visa had said, and if the information can properly be regarded as material iSignthis ought to have made disclosure, devoid of spin and subject to whatever explanation it wanted to give, on or shortly after 12 May 2020.

Was the information material?

377 The final and critical issue for determination in the context of ASIC's s 674(2) case against iSignthis is whether the Visa Termination Decision and the Reasons for Visa's Termination constituted information that was material and which therefore ought to have been notified to the ASX. That is to say, would a reasonable person have expected the information, if it were generally available, to have a material effect on the price or value of iSignthis' shares.

ASIC's submissions

The lay evidence

378 To begin with, ASIC notes that Mr Hart gave the following evidence on the issue of materiality:

(a) The significance of principal membership of Visa and the other major card schemes was "definitely a highlight" in the company's reports, and it had been highlighted in

the chairman's letters and directors' reports in the company's annual report in terms of risks to the company of losing the principal memberships.

(b) The company "had announced, on the way up, when we had actually gained Tier 1 membership in Australia and Tier 1 membership in Europe" and that "if we told them the good news when we thought we had it, we had better tell them the bad news when we have lost it."

(c) Use of AML words in Visa's reasons presented a critical risk to the iSignthis brand and its shareholder value. The company therefore had to be careful with the words it used because the company disputed that reason.

379 In addition, ASIC submits that Mr Hart accepted that if "an organisation of Visa's standing had decided to terminate you for the reasons … in the 17 April letter, that would have had a very material effect".

380 In the same vein ASIC notes that Mr Minehane gave the following evidence on the issue of materiality:

(a) He and the other directors, including Mr Karantzis, appreciated that announcement of the fact that Visa had decided to terminate iSignthis would be materially detrimental to the value of the company, in particular if linked to the AML reasons.

(b) From 17 April and through May 2020, if the market had known that Visa had decided to terminate iSignthis for reasons including AML risks, that would have been materially detrimental to the value of iSignthis.

(c) He was acutely aware in late May 2020 of the potential material damage to the value of iSignthis that may have resulted by disclosure of the fact that Visa had decided to terminate for reasons including AML risks.

(d) If the market learned of the mere fact that Visa had decided to terminate it would have been detrimental to the value of iSignthis. It would have been even more detrimental to the value of iSignthis if the market knew that the reasons for Visa's decision included AML risk.

(e) These concerns were widely held across the group of directors, including Mr Karantzis.

381 ASIC submits that Mr Hart's evidence and Mr Minehane's evidence was consistent with the submission made by iSignthis to the Director-General of Competition in Europe dated 30 July 2020. That submission stated that Visa was very material to the business of iSignthis, and that

if iSignthis did not have access to Visa as the dominant card payment scheme, it would "cripple its future business and consumer retail strategy". Further, ASIC notes, on 27 April 2020, Mr Karantzis wrote in similar terms to Visa that "[t]he termination by Visa of the principal agreement will have significant impact to the company, our staff, shareholders and customers".

382 ASIC also draws attention to the following evidence from Ms Warrell:

(a) In 2019, prior to Visa's suspension and termination, Visa was the primary source of card processing GPTV for iSignthis, and accounted for about 80 per cent of all card processing across the year and Mastercard accounted for about 20 per cent. Of the combined GPTV for card schemes and the Single Euro Payment Area (**SEPA**), Visa accounted for about 40 per cent of all that GPTV, SEPA was about 50 per cent, and Mastercard was about the other 10 per cent.

(b) Before the Visa suspension, and then termination, Visa and SEPA were ISX's two largest sources of GPTV, and both were growing and on a similar trajectory in 2019.

(c) iSignthis had in 2018 and 2019 emphasised the importance of its memberships of all of the card schemes, in addition to its SEPA banking facilities, and in 2019 iSignthis talked about the importance of the combination of the card schemes and the SEPA capability in the annual reports.

(d) Mastercard only reached similar levels to Visa in about March 2020, at a time when Visa had been suspended and Visa's GPTV had dropped to about 20 per cent of its levels in December 2019. Mastercard never reached the limits achieved by Visa in 2019 and did not fully substitute Visa's GPTV.

(e) If Visa did not suspend and then terminate iSignthis, Visa GPTV would have in isolation remained the leading source of GPTV for card processing; and Visa and SEPA would have remained the two largest sources of GPTV for card processing, and for other payment services.

(f) Although Visa volumes would have dropped due to COVID-19 and the ASX suspension which resulted in a loss of customers in February and March 2020, Visa would have remained the leading provider of card processing GPTV.

383 It may be observed, having regard to the above matters, that the lay evidence from iSignthis' own witnesses and the contemporaneous company documents points in the same direction on the issue of the materiality of the Visa Termination Decision and the Reasons for Visa's Termination.

The expert evidence

384 Insofar as the expert evidence is concerned, ASIC draws attention to the fact that on the Visa Termination Decision, Mr Houston gave evidence accepting the following:

(a) The disclosure or announcement of the fact that Visa had decided to terminate its relationship with iSignthis would have conveyed that iSignthis would not be deriving any future cashflows from Visa transactions, and that information would have been relevant to an assessment of the value of iSignthis insofar as Visa accounted for expected future cashflows.

(b) If it be assumed that the market understood that Visa is the largest card payment scheme in the world, and given the fact that the market was aware that in 2020 almost 70 per cent of iSignthis' revenues in calendar 2019 were from processing card transactions, this would indicate that a very substantial proportion of the revenues earned by iSignthis in 2019 were associated with processing Visa transactions.

385 Ultimately, however, ASIC submits that the essential point made in Mr Houston's evidence about the Visa Termination Decision was that, in his opinion, had iSignthis announced the Visa Termination Decision on 17 April 2020, it would also have disclosed the likely impact on its business in line with its disclosure on 24 May 2020 and 25 May 2020; that is, that SEPA Instant payment services were a direct substitute for Visa card acquiring, and that the company's relationships with all other card and payment schemes were unaffected.

386 ASIC says that this assumption is flawed for the following reasons.

387 First, ASIC says, it is inconsistent with the evidence of Ms Warrell set out above. On this evidence, Mr Sisson also observed that there was no direct correlation between Visa's termination and later changes in Mastercard GPTV and SEPA transaction processing volumes. That is, it would not be credible to assume that Mastercard and SEPA would have picked up all of Visa's GPTV. ASIC submits that although some growth in Mastercard and SEPA might reasonably have been expected, the market would have expected the total to be lower without Visa. Conversely, if Visa had not terminated, the market would have expected the total to have been higher. ASIC submits that these expectations are supported by the data exhibited to Ms Warrell's affidavit describing what actually happened.

388 Secondly, ASIC submits that Mr Houston's assumption that SEPA was a direct substitute for Visa is flawed because it assumes that margin of revenue received from SEPA transactions is

equivalent to the margin of revenue received from Visa card processing. ASIC notes that Mr Sisson gave evidence that the market would expect SEPA revenue (which is processed on a per transaction/transfer rate) to be lower than Visa revenue (which is processed as a proportion of GPTV volume). ASIC says this could also be inferred from the 2019 turnover data presented by Ms Warrell, which showed that approximately 50% of the processed volumes in 2019 were attributable to SEPA, but at least 70% of iSignthis' revenues in that year were from processing card transactions.

389 Thirdly, ASIC submits that any announcement about SEPA substitution would also have had to correct other information that had been announced by the company. That included the statement in the most recent 2019 annual report regarding the company's Tier 1 strategy:

> **A substantial portion of the Group's revenue is dependent on its continued membership in international payment schemes.**
>
> **…**
>
> The Group is a principal member of Visa, Mastercard, American Express, JCB, Diners/Discover and UnionPay International as an acquirer, and the Single Euro Payment Area (SEPA) as a instant, credit and debit transfer participant. As a result, the Group's business would be adversely affected if it were to lose membership status in the payment schemes for any reason.

390 ASIC draws attention to Mr Sisson's evidence that based on this statement alone, a reasonable person would expect that the Visa Termination Decision, had it been generally available, would have had a material effect on the value of ISX's securities. ASIC submits that this is a commonsense and rational assessment of the evidence.

391 As to the Reasons for Visa's Termination, ASIC submits that Mr Sisson gave common-sense rational evidence that if Visa's reasons were to become generally available, the risks as perceived by a valuer would rise materially. This evidence, ASIC submits, is supported by the lay evidence, and the considerable lengths taken by the company to ensure that the reasons were not publicly disclosed.

392 Insofar as Mr Houston advanced four justifications for his opinion that the Reasons for Visa's Termination would not have been material, ASIC submits that none of these justifications are defensible.

393 The first of Mr Houston's justifications was that if iSignthis disclosed the Reasons for Visa's Termination it would also have made a responsive announcement that iSignthis had never been the subject of investigation or regulatory action by anti-money laundering regulators. This

evidence, ASIC submits, misunderstands the Reasons for Visa's Termination. ASIC submits that Visa did not terminate because it believed that iSignthis or its merchants were engaged in anti-money laundering. The reasons included that iSignthis "is not operating appropriate programs to manage Anti-Money Laundering and Risk", that its transaction monitoring program was "not fit-for-purpose" and "had failed to identify unusual transaction behaviour", and that iSignthis presented an excessive level of risk to the Visa network. That is, iSignthis presented an unacceptable risk that its services might fail to detect money laundering. Further, ASIC submits, the matters identified by Visa could give rise to regulatory action. Section 81 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) provides that a reporting entity must adopt and maintain an anti-money laundering and counter terrorism financing program. AUSTRAC may investigate and take action in respect of a contravention of s 81 of the Act. ASIC submits that the absence of a prior investigation or regulatory action does not immunise the company from that risk in the future. That is, a corrective announcement of the kind suggested by Mr Houston would not have countered Visa's reasons (or their perceived significance in the market).

394 The second of Mr Houston's justifications was that because iSignthis was providing services to high risk merchants, the Reasons for Visa's Termination would not represent new information. This evidence, ASIC submits, lacks credibility. As Mr Sisson rationally explained, if merchants were aware that Visa's reasons included that iSignthis' transaction monitoring program for high risk merchants was "not fit-for-purpose", this would have contradicted the reliability and capability of the products offered by iSignthis (for example, its enhanced "know your customer" and due diligence processes).

395 The third of Mr Houston's justifications was that the market would have understood that Visa's reasons were unique to Visa, because iSignthis was a member of seven card schemes and no other card scheme had expressed similar concerns. ASIC submits that there are the following three difficulties with this opinion.

(a) First, it does not take into account the fact that Visa is the largest card processing scheme, and its opinions would carry significant weight in the market.

(b) Secondly, iSignthis had only very recently commenced its Tier 1 card processing capability. The fact that Visa was the first to identify risks in iSignthis' procedures would not have allayed the market's concerns. Mr Sisson's evidence was that Visa's

reasons would be expected to trigger further investigations (regardless of the outcome), and create reputational risk.

(c) Thirdly, in April 2020 iSignthis was not a processing member of seven card schemes. Ms Warrell gave evidence that in April 2020 iSignthis was processing card transactions from Visa and Mastercard. Although the company had commenced processing from JCB in January 2020 and from DCI in February 2020, processing volumes from those schemes was de minimis in April 2020.

396 Mr Houston's fourth justification for his opinion that the Reasons for Visa's Termination would not have been material was that later audits conducted by Mastercard and Nexia Poyiadjis also supported a conclusion that Visa's reasons for termination were unique to Visa. However, these later audits, ASIC submits, are irrelevant to the expectations of a reasonable person as at April 2020. The Nexia Poyiadjis audit was conducted in June 2021, and it did find weaknesses in iSignthis' AML/counter terrorism financing (**CTF**) practices and procedures in relation to a number of categories identified by Visa, including that its transaction monitoring program was not fully compliant, which required immediate remediation to avoid systemic anti-money laundering failures. The audit was also based on iSignthis' processes and procedures in effect as at the date of the report in 2021, post-dating Visa's termination. As to a Mastercard audit, no detail is given in the evidence about when and how a Mastercard audit was conducted and what conclusions it reached.

397 ASIC submits that in giving his evidence on the materiality of the Visa information, Mr Houston was again unwilling to make reasonable and rational concessions about what assumptions could reasonably be made and how the market might reasonably have reacted to information presented to it. For example, Mr Houston was unwilling to concede any of the following propositions which ASIC contends are obvious:

(a) that the market would have been aware that Visa is the dominant credit card scheme;

(b) that the termination decision would have caused the market to attribute any greater risk to iSignthis as to its expectations of future cashflows,

(c) that the termination decision would be material if it had the effect of crippling iSignthis' business; and

(d) that if the market had known that Visa had decided to terminate iSignthis for reasons including anti-money laundering risks, without iSignthis making a corrective announcement, that would have been materially detrimental to the value of iSignthis.

398 Again, ASIC submits, Mr Houston's refusal to make reasonable concessions revealed that he tended to advocacy for the defendants, limiting the assistance the court can derive from his evidence.

Suspension from trading

399 A central issue on the question of materiality which evolved evidentially during the course of the hearing was the significance of the fact that at the relevant time, indeed since 2 October 2019, the ASX had suspended iSignthis' shares from trading. iSignthis makes the point that in circumstances where there was no trading in its shares, a reasonable person would not have expected the Visa Termination Decision and the Reasons for Visa's Termination, had this been generally available information, to have a material effect on the price of its shares.

400 However, ASIC submits that for the following six reasons iSignthis' suspension from trading is no defence to the alleged contraventions of s 674(2) of the Act:

(a) First, ss 674 and 677 of the Act refer both to the "price" or "value" of securities, where "value" is "intended to refer to the underlying value of the securities" (as to which see the Explanatory Memorandum to the *Corporate Law Reform Bill 1993* (Cth) at [239], upon the first introduction of continuous disclosure requirements in ss 1001A to 1001D of the *Corporations Law* (Cth), in substantially the same terms as ss 674 to 677 of the Act and *GetSwift* at [1069] (Lee J) (in relation to s 1001A); *Big Star Energy Ltd (No 3)* at 68 [260] (Banks-Smith J) (in relation to 1001D)). Information can have a material effect on the price or value of a listed entity's securities during a period of suspension of trading. A market-sensitive effect that occurs during a period of suspension from trading on the ASX can have a real but latent effect on the underlying value of an entity's securities, and it can also affect off-market trading during a period of suspension.

(b) Secondly, ASX Listing Rule 18.6 provides that an entity must comply with the Listing Rules "even if the quotation of the entity's securities is deferred, suspended or subject to a trading halt". ASX Guidance Note 8 similarly provides at [4.6] that Listing Rule 3.1 continues to apply while an entity's securities are in a trading halt or voluntary suspension.

(c) Thirdly, even unlisted entities removed from the ASX official list, in many instances, remain subject to continuous disclosure obligations under s 675 of the Act: see ASX Guidance Note 33 at [3.4], [4].

(d) Fourthly, the decision of the Hong Kong Court of Appeal in *Chan v Securities and Futures Commission* [2020] 3 HKLRD 266 — which holds that the disclosure obligations under Part XIVA of the *Securities and Futures Ordinance* (Hong Kong) cap 571 apply to a company notwithstanding a suspension in dealing in that company's shares — is persuasive and instructive as to the application of the disclosure obligations under the Act during a suspension of trading.

(e) Fifthly, the expert evidence of each of Mr Sisson and Mr Houston proceeded on an analysis of the effect of information on the value of iSignthis shares, notwithstanding a suspension from trading in those shares on the ASX market.

(f) Sixthly, there were off-market commercial trades in the period of suspension from 2 October 2019 to 26 October 2020.

iSignthis' submissions

401 iSignthis emphasises that to contravene s 674(2) of the Act the relevant information which has not been disclosed must have a "material effect", not just an effect, on the price or value of the securities. As has been mentioned, iSignthis submits, by reference to Mr Houston's evidence, that on 17 April 2020, 12 May 2020 and 24 May 2020, the information central to ASIC's allegations would not have been expected to have resulted in a change in the value of its shares. Thus, iSignthis submits that it did not have the disclosure obligation under s 674(2) of the Act which ASIC alleges.

402 iSignthis submits that of the various dates, 12 May 2020 is the most important to consider because that is the date upon which the "incomplete negotiation" carve out expired. It is said that although Mr Houston and Mr Sisson disagreed generally on the materiality of disclosure of the Visa Termination Decision, Mr Sisson did not address 12 May 2020 separately and confined his opinion to 17 April 2020. iSignthis submits that whatever the proper resolution of the materiality debate as at 17 April 2020, it cannot reasonably be suggested that disclosure of the Visa Termination Decision would have had a material effect as at the later date of 12 May 2020. This is said to be because on 29 April 2020 iSignthis disclosed the following:

> Processing to merchants across the Visa network was also suspended for parts of March pending response to Visa re queries on ASX *"investigation"*, concerns re "derogatory media" and the focus on high risk merchants. The Company is providing Visa with information regarding the ASX "investigation" and other matters. Visa has notified that their response times on this matter have been impacted by COVID-19.
>
> (Emphasis in original).

403 This, iSignthis submits, likely caused market participants either to anticipate or factor in an increased risk of a termination of iSignthis' principal membership from that date, and Mr Houston relied upon that announcement to reinforce his opinion as at 17 April 2020. iSignthis notes that Mr Sisson also accepted that the announcement on 29 April 2020 would have caused the market to build into its knowledge of iSignthis a risk of termination of the Visa relationship. Thus, iSignthis says, irrespective of the debate about the earlier date of 17 April 2020, as from 12 May 2020 (indeed, as from any date after 29 April 2020), there cannot be serious doubt about the lack of materiality of a disclosure of the Visa Termination Decision.

404 iSignthis also makes the following more general submissions on the question of materiality.

405 First, by reference to Mr Houston's evidence, that its shares were suspended on the relevant dates (17 April 2020, 12 May 2020 and 24 May 2020), and so it was not possible to undertake the usual event study analysis. This, it is submitted, creates an evidentiary challenge for ASIC's case because ASIC must show that there was a "material effect" on value, rather than on the price of iSignthis' shares. On this kind of issue, iSignthis says, experts can disagree. iSignthis notes that Mr Houston's observations that the inherently subjective opinions of a valuer may not correspond to a market valuation were not challenged by ASIC.

406 Secondly, iSignthis submits that ASIC's apparent case that a company in its position would have simply announced that Visa had terminated the contractual relationship, without describing the effect (if any) on its business, is unrealistic and contrary to the evidence of both Mr Houston and Mr Sisson. iSignthis says that it would have put the company at risk of misleading the market because investors would have been left to guess the likely effect of the information on the company's business.

407 In this regard iSignthis notes Mr Houston's evidence that if Visa's decision to terminate its relationship with the company had been disclosed on the various dates, this would not be expected to have resulted in a change in the value of iSignthis' shares. This is said to be because the company would also have disclosed, consistently with the shareholder letter dated 24 May 2020, that its SEPA Instant payment services in the European Economic Area (EEA) were a direct substitute for Visa card acquiring (which would also have been new information) and that the company's relationships with all other card and payment schemes were unaffected. Mr Houston's evidence was that the disclosure of the termination along with this information would not have affected potential investors' expectations of the company's net present value of future cash flows.

408 In fact, iSignthis submits, by reference to Mr Hart's evidence, that by 17 April 2020 it had announced that it was the first CBC authorised institution to enable SEPA Instant payments processing for its customers, via its ISXPay® payments network. Further, iSignthis says, again by reference to Mr Hart's evidence, that through its wholly owned subsidiaries, it was a member of six other card schemes: Mastercard, JCB International, China UnionPay, American Express as well as Diners and Discovery, and was also able to provide merchants with access to payments via alternative methods including SEPA, Poli Payments, Sofort, WeChat and AliPay.

409 In this regard iSignthis submits, by reference to the evidence Ms Warrell, that it is significant that:

(a) In the period from May 2019 to February 2020, GPTV in respect of SEPA significantly increased and exceeded GPTV in respect of Visa. Further, GPTV in respect of Mastercard was increasing.

(b) In March 2020, GPTV in respect of SEPA was 3.5 times greater than GPTV in respect of Visa and GPTV in respect of Mastercard exceeded GPTV in respect of Visa.

(c) In May 2020, GPTV in respect of Visa was significantly less than GPTV in respect of Visa for March 2020 and GPTV in respect of SEPA and Mastercard was significantly higher than GPTV in respect of SEPA and Mastercard for March 2020.

(d) Notwithstanding the decline in respect of Visa, the total GPTV for all of the card schemes and SEPA was greater than the total GPTV for all of the card schemes and SEPA for March 2020.

410 Further, iSignthis draws attention to the fact that in its annual report for FY2020 it noted that its own Tier 1 card scheme and central banking connections and infrastructure, which were finalised in early 2019, enabled the business to build scale, grow revenue and deliver its maiden profit after tax in 2019. During FY2020 it is said that the business continued to grow, with a profit after tax of $1,360,728. Also, iSignthis submits, revenue from customers grew by 21 per cent to $36 million compared to $30 million in 2019, driven by regulated services in Europe, with ISXPay Card Platform and eMoney revenues representing approximately 90 per cent of the group's revenues.

411 iSignthis submits, by reference to Mr Houston's evidence, that Mr Sisson did not assess the effect of the Visa Termination Decision, had it been disclosed on 17 April 2020, by reference

to the market's expectations of iSignthis' total GPTV and revenue or iSignthis' actual GPTV. In particular, it is said, by reference to Mr Houston's evidence, Mr Sisson did not use the available information (which he had) in relation to iSignthis' actual GPTV or iSignthis' disclosure on 24 May 2020 and 25 May 2020, which conveyed that there would likely be no reduction in the market's expectations of the company's total GPTV.

412 iSignthis draws attention to the fact that Mr Houston said ASIC's suggested hypothetical disclosure (on 17 April 2020) of the Visa Termination Decision, without the additional disclosure that he said iSignthis would also have made, was "highly artificial". This was because it would not disclose information about the impact on the business so one was left to speculate, and the purpose of disclosure is to provide information that could be material to the price of shares because of the impact on the business. Mr Houston emphasised that the important words in the opinion which he gave at [296] of his report were: "would have disclosed the likely impact on its business in line with…" its disclosure on 24 May 2020 and 25 May 2020.

413 Notably, iSignthis submits, the letter sent to shareholders on 24 May, which was also sent to the ASX for release to the market the following day, amongst other things said that:

> The Company's augmented SEPA instant payment services have seen an increase during May. The Company is confident that its instant payment/instant notification service in the EEA is a direct substitute for Visa card acquiring, as Visa acceptance rates in gaming and with securities dealers is lower than with other schemes.

414 iSignthis submits that Mr Sisson also agreed that in the real world a company in iSignthis' position would not simply make an announcement that Visa had terminated the contractual relationship, instead it would describe the significance of the information to the company's future. Mr Sisson said "if it's a listed company and the company is releasing it, it will always come with an explanator". He also accepted that normally a company would ask for a trading halt so that it has an opportunity to describe in the announcement that is released the effect of the information on its business. Mr Sisson said that he had assumed that the company would release the information (which he described as "the fact") and provide a response, being the potential implications. However, iSignthis submits, neither that assumption nor any of these concessions were included in Mr Sisson's reports (including the joint report with Mr Houston).

415 Thirdly, iSignthis submits that Mr Houston did not agree that the market would have attributed a greater risk to its expectations for the future cashflows of iSignthis from processing GPTV if it had been told of Visa's decision to terminate iSignthis on or about 17 April 2020. According

to Mr Houston, analysts directly estimated iSignthis' future revenue by reference to expectations of the company's future GPTV. iSignthis submits that Mr Houston correctly pointed out that the market did not have information as to the proportion of card processing GPTV-related revenue that was attributed to Visa in 2019. Therefore, so the argument goes, as the market's expectations of iSignthis' future revenues were based on expectations of the company's GPTV, and the market was only aware of the company's total expected GPTV, a change in the composition of the GPTV was unlikely to have caused market participants to revise their earnings expectations.

416 iSignthis draws attention to Mr Houston's opinion that "the only thing that's relevant for valuation and materiality is looking forward from the time the information comes into the market," and that the word "material" is a touchstone here and has to be treated carefully. iSignthis also relies on Mr Houston's observation that "detrimental" and "materiality" are not synonymous, and that future revenues are not equal to, or a function of, past revenues. In this regard Mr Houston said:

> … you've got a very fast-growing revenue path. There was no information about what was expected that Visa would contribute to that before it was terminated. There was already a position of declining contribution from Visa. So, you know, it's complex for those reasons.

417 iSignthis submits that Mr Sisson conceded that there is a difference between "material" in the general sense of the word and in the sense in which it is used in the Act. His evidence in respect of the materiality of Visa transactions relative to Mastercard transactions, iSignthis submits, should be rejected as it was premised on what is said to be unsubstantiated conjecture concerning the relative amounts charged by Visa and Mastercard to iSignthis. Likewise, iSignthis submits, Mr Sisson's evidence in relation to the SEPA margin being less than the Visa margin was unsubstantiated speculation and should also be rejected. iSignthis notes that ASIC failed to obtain any of this evidence from Ms Warrell, who gave evidence before Mr Sisson.

418 Fourthly, iSignthis submits that Mr Sisson's evidence that typical valuation methods (such as a discounted cash flow (DCF) model) are not applicable for valuing iSignthis should also be rejected. iSignthis submits that under cross-examination Mr Sisson conceded that analysts used a DCF model to help them value iSignthis "because there is nothing better". In fact, iSignthis says, by reference to Mr Houston's evidence, analysts such as Patersons and Fundamental Research Corp had been valuing iSignthis using typical approaches, including DCF.

419 Fifthly, iSignthis submits that Mr Houston did not agree with ASIC's postulated conclusion that disclosure of Visa's decision to terminate the relationship would have been "materially detrimental" to the value of the business given the significance of the Visa brand and payment network. iSignthis notes in this regard that when it announced (on 4 October 2017) that Visa was being added to the iSignthis platform the movement of its share price was not statistically significant. In other words, iSignthis submits, that information did not have a positive material effect on iSignthis' share price. iSignthis records that Mr Sisson agreed that this announcement did not have a material effect on the price or value of iSignthis' shares on 4 October 2017.

Determination

420 Notwithstanding iSignthis' various submissions to the contrary, I have concluded that the Visa Termination Decision *was* material and that it should have been disclosed, together with the Reasons for Visa's Termination, on or shortly after 12 May 2020. I have formed this view for the following reasons.

421 First, and most importantly, the lay evidence given by iSignthis' own witnesses is entirely supportive of the conclusion that iSignthis' principal membership of Visa was a matter of great significance for the company. As ASIC submitted, Mr Hart and Mr Minehane both thought that it was of the utmost importance. Ms Warrell's evidence also demonstrated Visa's primacy by reference to a number of indicia. Significantly, iSignthis accepted at the time that this was the position. Visa's significance was recorded in the company's reporting, particularly the 2019 annual report, and it was expressed in the strongest terms in the submission made by iSignthis to the European competition regulatory authorities in July 2020 in the aftermath of the Visa Termination Decision.

422 In my view, again conscious of the importance of not over complicating the analysis, the lay evidence alone would be sufficient to conclude that the Visa Termination Decision and the Reasons for Visa's Termination was material information which should have been disclosed to the market on or shortly after 12 May 2020. Contrary to iSignthis' submissions, the question of materiality in the present circumstances is plainly a matter which can reliably be addressed by the lay witnesses. Indeed, I accept ASIC's submission that it is strictly unnecessary to have regard to the expert evidence on materiality at all, having regard to the nature of the lay evidence.

423 Nonetheless, insofar as the expert evidence is concerned, and consistently with observations I have already made, I accept Mr Sisson's evidence that on the basis of the company's reporting

alone, particularly the statement extracted above from the 2019 annual report that a "substantial portion of the Groups' revenue is dependent on its continued membership in international payment schemes", a reasonable person would expect that the information represented by Visa Termination Decision, had it been generally available, would have had a material effect on the value of iSignthis' shares. I accept, as ASIC submits, that in all the circumstances this is a commonsense and rational assessment of the evidence. As Mr Sisson also opined, had the Reasons for Visa's Termination been generally known, the risks as perceived by a valuer would have risen materially. This too is rational and common-sense evidence.

424 Insofar as Mr Houston's materiality evidence is concerned, I would make the following observations for completeness. As to his opinion that an announcement of the Visa Termination Decision on 17 April 2020 would have been accompanied by a statement that SEPA Instant Payment Services were a direct substitute for Visa card acquiring, and the company's relationships with all other card and payment schemes were unaffected, and that this information would have rendered the Visa Termination Decision immaterial, I accept ASIC's submissions that this assumption is flawed for the reasons ASIC advances. It is inconsistent with Ms Warrell's evidence on the subject, it cannot be assumed that SEPA was a direct substitute for Visa, and any announcement about SEPA substitution would have had to correct other information released by the company which highlighted the importance for revenue of iSignthis' continued membership of international payment schemes, the most significant of which was Visa.

425 Turning to the basis of Mr Houston's opinion that the Reasons for Visa's Termination would not have been material, I accept ASIC's submission that each of the four justifications advanced by Mr Houston for this opinion cannot be supported. That is:

(a) a responsive announcement by iSignthis would not have provided a neutralising answer to the Reasons for Visa's Termination;

(b) it lacks credibility, for the reasons advanced by Mr Sisson, to contend that the Reasons for Visa's Termination would not represent new and relevant information;

(c) it cannot be accepted that the market would have understood that the Reasons for Visa's Termination were unique to Visa; and

(d) the fact that later audits might have supported a conclusion that the Reasons for Visa's Termination were unique to Visa was irrelevant to the expectations of a reasonable person in April (and I would say May) 2020 and this was not the case in any event

because a subsequent audit did in fact disclose weaknesses in iSignthis' AML/CTF practices and procedures in areas which had been identified by Visa.

426 Insofar as Mr Houston's evidence more generally is concerned, I also accept ASIC's submission that at times he was unwilling to make reasonable and rational concessions in relation to assumptions that might be made and how the market might have reacted, and that his evidence in relation to the materiality of the Visa Termination Decision and the Reasons for Visa's Termination sometimes had the flavour of advocacy to it. This is a further matter which causes me to discount the opinions advanced by Mr Houston.

427 As to iSignthis' submission concerning the significance of its disclosure on 29 April 2020 of a suspension of processing to merchants, it cannot be accepted that this information was such as to render the Visa Termination Decision and the Reasons for Visa's Termination information effectively irrelevant from the perspective of materiality. As ASIC submits, this statement did not go close to making a proper disclosure. I accept that the more detailed information was significant, and that, had it been made available, it could be expected to have had a material effect on the price or value of iSignthis' shares.

428 Lastly, having regard to what iSignthis characterises as its more general observations on materiality, I would make the following observations.

429 First, for the reasons advanced by ASIC, I do not consider that the suspension of iSignthis' shares at the relevant time provides any defence to the contravention of s 674(2) of the Act. I accept that a market-sensitive event that occurs even during a period of suspension from trading can have an effect on underlying value. The fact of suspension does not, in any event, suspend the operation of the Listing Rules and the ongoing applicability of a company's disclosure obligations. In the case of iSignthis' shares, there were off-market trades at various times in any event, and both experts were still able to undertake an analysis.

430 Secondly, and as I have already indicated, I do not accept that it is ASIC's case that iSignthis should simply have disclosed the Visa Termination Decision without providing a statement of its own reaction to Visa's decision. Accepting that iSignthis would have given its own view of the matter, it is unrealistic in all the circumstances to conclude that disclosure of the information, given its significance, would not have had a material effect on the price or value of iSignthis' shares.

431 Thirdly, I do not accept that the fact that the market did not have information as to the proportion of card processing GPTV-related revenue that was attributed to Visa in 2019 meant that a change in the composition of GTV was unlikely to affect earnings expectations. Such a conclusion, in my assessment, is unrealistic and it fails to allow for the obvious significance the market would have attributed to the termination of iSignthis' relationship with Visa.

432 Fourthly, I do not consider that iSignthis' criticisms of Mr Sisson's evidence in relation to valuation ultimately affect the conclusions which Mr Sisson reached (and which I have substantially accepted).

433 Fifthly, insofar as iSignthis submits that the fact that the company's announcement on 4 October 2017 that Visa was being added to the iSignthis platform did not have a material effect on the price or value of iSignthis' shares at the time, I do not accept that this can be extrapolated out to produce a conclusion that Visa coming off the iSignthis platform in May 2020 would not have been material. By this time there were a number of other factors in play which I accept, consistently with the lay evidence and the evidence of Mr Sisson, made this information significant.

434 Having regard to my finding that the relevant information should have been disclosed on or shortly after 12 May 2024, and that it was material, it follows that I accept that iSignthis has breached s 674(2) of the Act insofar as it failed to disclose the Visa Termination Decision and the Reason's for Visa's Termination on or shortly after 12 May 2020. There will be declarations accordingly.

ASIC's allegations that Mr Karantzis contravened s 180(1) of the Act

435 ASIC alleges that Mr Karantzis contravened s 180(1) of the Act in relation to the Visa Termination Decision and the Reasons for Visa's Termination by failing to discharge his duties with the degree of care and diligence that a reasonable person would exercise if they were chief executive officer of a company in iSignthis' circumstances.

436 ASIC submits that the primary issue for the court's determination, in relation to the period from 17 April 2020 until 12 May 2020, is whether Mr Karantzis discharged his duties because he obtained and relied upon Mr Seyfort's advice that the company could rely upon a Listing Rule 3.1A defence to disclosure of the relevant information on the grounds that there was an ongoing commercial negotiation. If the answer to that question is "yes", ASIC submits, it would only

provide a partial defence to ASIC's allegations, and the court should in any event find that Mr Karantzis breached s 180(1) of the Act on and from 12 May 2020.

437 This first aspect of ASIC's case against Mr Karantzis falls away in light of my finding that between 17 April 2020 and 12 May 2020 iSignthis *was* entitled to rely upon Listing Rule 3.1A on the grounds that the relevant information concerned an incomplete proposal or negotiation. It is thus unnecessary to give further consideration to ASIC's submission that the evidence does not support a conclusion that between 17 April and 12 May 2020 Mr Karantzis acted with the care and diligence that a reasonable person would exercise if they were the chief executive officer of a company in iSignthis' circumstances. I would not make a finding that Mr Karantzis breached s 180(1) of the Act on the basis of his conduct in the period 17 April 2020 to 12 May 2020.

438 Nonetheless, my conclusion that iSignthis was entitled to rely upon the Listing Rule 3.1A defence from 17 April 2020 to 12 May 2020 is not the end of the matter. ASIC also alleges that Mr Karantzis breached s 180(1) of the Act on and from 12 May 2020.

439 In this regard ASIC repeats the submissions which it advanced in respect of the s 674(2) contravention by the company and alleges, in relation to the period from 12 May 2020, that Mr Karantzis failed to discharge his duties with the requisite degree of care and diligence as follows:

(a) After 12 May 2020, no defence was available under Listing Rule 3.1A, and there is no evidence that Mr Karantzis sought legal advice about whether iSignthis was entitled to rely upon Listing Rule 3.1A on grounds that it would be a breach of the law of Cyprus.

(b) In any event, in the period 12 May to 15 May 2020, neither iSignthis nor Mr Karantzis took steps to inform the ASX or the CBC about the Visa Termination Decision, or the Reasons for Visa's Termination.

(c) On 13 May 2020, Mr Karantzis did not yet intend to make any disclosure to its regulators about the Visa Termination Decision, but was continuing to communicate with Visa seeking further concessions.

(d) iSignthis' communications with the CBC were actually prompted by the CBC's 15 May 2020 email identifying public information about Visa's suspension of iSignthis, not out of any proactive steps by iSignthis to notify its regulators.

(e) The company's letter to shareholders dated 24 May 2020 did not discharge the company's disclosure obligations. Mr Seyfort's evidence was that the letter was prepared following his advice that iSignthis should get ahead of any ASX release of a query letter and make a public announcement to control the narrative, in accordance with the company's and Mr Karantzis' strategy not to disclose any information that might be misused by the ASX to damage iSignthis and not to give any legitimacy to the proposition that the company had anti-money laundering issues. The letter was not intended to, and deliberately did not, disclose to the market that Visa had terminated its relationship with iSignthis or that it had done so for the reasons set out in the 17 April letter.

440 Insofar as this last matter is concerned, it will be recalled that I have found that the company's letter to shareholders of 24 May 2020 did not discharge iSignthis' disclosure obligations.

441 ASIC submits (and I have found) that there is no evidence that the law of Cyprus required iSignthis to disclose the relevant information to the CBC before it disclosed it to the ASX, or that the law of Cyprus required iSignthis to wait for a response from the CBC to any disclosure made to it before making an announcement to the ASX.

442 ASIC submits finally that a *Jones v Dunkel* inference is again available against Mr Karantzis, and the court should infer that the evidence of Mr Karantzis would not assist his case. Correspondingly, ASIC says, the court may draw with greater confidence the inferences above at [439(c)], [439(d)] and [439(e)].

Mr Karantzis' response to the allegation that he contravened s 180(1) of the Act

443 Much of Mr Karantzis' response in his closing written submissions to ASIC's allegation that he breached s 180(1) of the Act concerns his conduct in the period 17 April to 12 May 2020. As I have indicated, in light of my decision that the company was entitled to rely on the Listing Rule 3.1A defence in this period, I would not make a finding that Mr Karantzis breached s 180(1) of the Act on the basis of his conduct in this period. The situation, however, has a different complexion after 12 May 2020. In this regard Mr Karantzis makes the following submissions in answer to ASIC's allegation that the court should find he breached s 180(1) on and from 12 May 2020.

The preservation of iSeM's licence was in the best interests of iSignthis

444 Mr Karantzis submits that from 12 May 2020 iSignthis' wholly owned Cypriot subsidiary, iSeM, was subject to a legal obligation to notify the CBC of the termination of its relationship with Visa immediately without undue delay. The preservation of iSeM's licence, according to Mr Minehane and Mr Hart, "was critical" to shareholders and therefore a paramount consideration for iSignthis. Further, it is submitted, two very experienced Cypriot directors had informed the iSignthis board that iSeM's licence would be at risk if it did not wait for the CBC's feedback.

445 Mr Karantzis notes that Mr Hart explained that at the time iSeM's licence was "the most precious thing" they had, and that it was critical to shareholders that the licence to operate in Europe be maintained. Mr Hart's evidence is that if the licence had been lost, iSignthis would have lost its business, so it was critical to complete the process of notifying the CBC before doing anything else. Mr Karantzis submits, by reference to Mr Hart's evidence that both Mr Christakis Taoushanis, a very experienced banker in Cyprus, and Dr George Theocharides, who is currently the chair of CySEC (the equivalent of ASIC in Cyprus), informed the board that they needed to advise the CBC and get the CBC's feedback before they "went outside of that environment" or they would put the licence at risk. That advice, it is submitted, aligns with the opinion of Mr Polyviou (obtained by iSignthis for the purposes of this litigation) that it is usually prudent for an institution falling under the licensing and supervising authority of the CBC to show caution and await the CBC's response before taking further action.

446 Furthermore, Mr Karantzis submits, at least two company officers considered that iSignthis should await the outcome of the CBC because the regulator may have intervened in the dispute. Mr Hart said that the CBC could have reversed the decision of Visa on the basis that their logic was wrong. It is Mr Hart's evidence that once the CBC had made its decision, he considered that iSignthis needed to make the announcement. It is Mr Minehane's evidence that he also thought the CBC might intervene. Mr Minehane explained that the CBC could have "… told Visa that the agreement could not be terminated … or examined further the reasons … in relation to the AML". In particular, drawing on his experience in telecommunications, it is Mr Minehane's evidence that on 12 May 2020 he thought iSignthis needed to communicate with its regulator and that the regulator may still intervene, as he had seen happen elsewhere in relation to a wi-fi provider.

447 Mr Karantzis submits that in the circumstances it is hard to conceive of a chief executive officer in his position who would risk the business of the company instead of following the prudent advice of experienced corporate advisors and fellow directors based in Cyprus to await feedback from the CBC before making an announcement to the market in Australia.

iSignthis' shares were suspended

448 Mr Karantzis also submits that it does not follow that a director has breached s 180(1) of the Act simply because the company may have breached its continuous disclosure obligations under s 674(2) of the Act. There is no obligation on directors under s 180(1) of the Act, Mr Karantzis submits, to conduct the affairs of the company in accordance with the law generally, or the Act specifically: ***Cassimatis*** *v Australian Securities and Investments Commission* (2020) 275 FCR 533; [2020] FCAFC 52 at 575 [183] (Greenwood J), 585 [235] (Rares J) and 641 [460] (Thawley J); *Australian Securities and Investments Commission v Cassimatis (No. 8)* (2016) 336 ALR 209 at 313 [539] (Edelman J); *Australian Securities and Investments Commission v* ***Maxwell*** (2006) 59 ACSR 373 at 399-400 [104]-[105] (Brereton J). The relevant obligation for the director, Mr Karantzis submits, is whether, and the extent to which, the company's interests are jeopardised by a particular course, and if they might be, whether the risks obviously outweighed any potential countervailing benefits, along with whether there were reasonable steps which could have been taken to avoid those risks. Mr Karantzis refers in this regard to *Maxwell* at 402 [110].

449 Mr Karantzis submits also in this context that it is significant that in the period 17 April 2020 to 25 May 2020 iSignthis' shares were suspended from trading. They had been suspended for more than 7 months, and there was no immediate prospect of the suspension being lifted. Mr Karantzis submits that a reasonable chief executive officer of a company in iSignthis' circumstances would not have expected any off market commercial trading. Therefore, he says, delaying any announcement until the CBC had responded to the written notification was the prudent thing to do, particularly given the advice of Mr Taoushanis and Dr Theocharides that they should get the CBC's feedback before going "outside of that environment" or they would put iSeM's licence at risk.

450 In this regard Mr Karantzis notes Mr Minehane's evidence that "we" (being all of the directors, including Mr Karantzis) were "very cognisant that we were suspended during this period" and that Mr Minehane considered in the circumstances that his duty as a director was to look after the interests of the company and the value of the company. Mr Karantzis notes Mr Hart's

evidence that he was also conscious that the shares in iSignthis were still suspended, as well as Ms Warrell's evidence that she was not concerned about the time taken to communicate with the CBC because trading in iSignthis' shares was still suspended.

451 Mr Karantzis argues that listed securities do not generally trade during a period of suspension, and that although off market trades are a theoretical possibility, there is no evidence of any off-market trading in iSignthis' shares in the period from 17 April 2020 to 26 October 2020. Mr Karantzis notes in this regard that what evidence there is of an off-market trade from Mr Heughan's expert reports suggests that the trade occurred on 15 April 2020, the relevant negotiations for that trade having occurred between 2 April 2020 and 13 April 2020.

452 Mr Karantzis thus submits that in the circumstances the evidence of Mr Heughan bears out the reasonableness of the reasoning of the directors of iSignthis, including himself, that the best interests of the company lay in waiting a few days until the CBC responded to the notification. The directors knew that it was quite unlikely that iSignthis shareholders would commit to commercial share trades in either of the periods under consideration – 17 April to 12 May 2020 or 12 May to 21 May 2020.

If there were contraventions of ss 674(2) and 180(1) of the Act they were not serious

453 Mr Karantzis also submits that if, notwithstanding iSignthis' responses to ASIC's case, the court finds that iSignthis contravened s 674(2) of the Act, so that Mr Karantzis contravened s 180(1) of the Act, the contraventions were not "serious" within the meaning of s 1317G(1)(b)(iii) of the Act for the reasons iSignthis has submitted. That is to say, Mr Karantzis acted on legal advice in causing iSignthis not to make any disclosure during a period of "incomplete negotiations", other company officers agreed that there was some prospect of iSignthis negotiating a reversal of Visa's decision, preservation of iSeM's licence was a paramount consideration and the suspension of iSignthis' shares from trading meant that there was no real danger of iSignthis shareholders trading in an uninformed market.

Mr Karantzis ought fairly be excused for the contravention

454 Alternatively, Mr Karantzis submits, were the court to find that he contravened s 180(1) of the Act, at all material times he acted honestly and ought fairly to be excused for the contravention pursuant to s 1317S(2) of the Act; further or alternatively s 1318(1) of the Act.

Determination

455 I have concluded that in the period after 12 May 2020 Mr Karantzis contravened s 180(1) of the Act. In reaching this conclusion in the present circumstances it is important to note a number of matters about the express terms of s 180(1) of the Act. As Thawley J observed in *Cassimatis* at 639 [448]:

> (1) First, the section prescribes a standard of care and diligence that a director or other officer "must" meet in exercising their powers and discharging their duties.
>
> (2) Secondly, the section does not expressly identify what the powers or duties are which must be exercised or discharged with the requisite degree of care and diligence. Rather, it is expressed in terms which apply to the exercise of all powers and the discharge of all duties no matter what the source of the power or duty.
>
> (3) Thirdly, the section does not expressly state to whom the obligation is owed.

456 Justice Thawley expanded on the significance of these matters in the following terms at 639-640:

> [449] As to the first mater, the obligation or duty which s 180(1) imposes is a statutory one to exercise powers and discharge duties with the degree of care and diligence identified. As the appellants submitted, the section is "normative" and cast in mandatory terms. The obligation mandated by s 180(1) is the same whether enforced as a private wrong to the corporation or as a public wrong in failing to meet the standard. The statutory obligation in s 180(1) derives in part from equity, which imposes a standard of conduct and provides remedies which are not necessarily dependent on whether the conduct caused loss to the person to whom the obligation is owed — see, for example: *Reading v Attorney-General (UK)* [1951] AC 507 at 516; *Boardman v Phipps* [1967] 2 AC 46; *Chan v Zacharia* (1984) 154 CLR 178 at 198-199; *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324. Section 180(1) likewise prescribes a standard of conduct. Section 180(1) does not contain any requirement for the conduct to have caused loss in order for the section to have been contravened.
>
> [450] As to the second matter, s 180(1) does not itself identify the powers and duties to which it applies. The section imposes an obligation to meet a statutory standard of care and diligence applicable to the exercise of all of the powers and the discharge of all of the duties of a director or officer, whatever the source. If the required degree of care and diligence is not met, then the section will have been contravened.
>
> [451] Equity and the common law both impose on directors a duty of care and skill: *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407; *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187; *Daniels v Anderson* (1995) 37 NSWLR 438 (*Daniels*). What that requires is not static, but evolves with the complexity of the times: *Daniels* at 499, referring to C*ommonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115 at 126 (Tadgell J). These duties are not excluded by s 180 to the extent that they require something different from that section — see: s 185. The Corporations Act and other

> legislation is also a source of powers and duties which, subject to any contrary indication, a director must exercise and discharge in accordance with the care and diligence required by s 180(1). So is the company's constitution.
>
> [452] It follows that, in determining whether the standard in s 180(1) has been met in any given case, it is desirable to identify the power or duty with precision.
>
> [453] As to the third matter, s 180(1) does not expressly state that the obligation to exercise powers and discharge duties to the requisite standard is a duty owed to the company. Some earlier provisions, such as s 116(2) of the Companies Act 1896 (Vic), expressly stated that the duty was owed "to the company" — see the discussion by the primary judge at J[429] and following. Nevertheless, the cases have mostly proceeded on the basis that the statutory obligation imposed by s 180(1) to exercise powers and discharge duties to the requisite standard is a duty owed to the company — see, for example: *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373 (*Maxwell*) at [104]. The cases recognise that the interests of the company to which the duty is owed include the interests of the corporate entity itself, the shareholders and, at least where the financial position of the company is precarious, the creditors of the company: *Walker v Wimborne* (1976) 137 CLR 1; *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395 at 450; *Maxwell* at [102].

457 I consider that in the circumstances that confronted iSignthis after Visa's 12 May 2020 communication to the company, Mr Karantzis had a duty to ensure that iSignthis made disclosure to the ASX of the Visa Termination Decision and the Reasons for Visa's Termination. This duty arose in the context of s 674(2) of the Act by reason of Mr Karantzis' position as managing director and having regard to his central position, which has been described, in determining what course iSignthis and iSeM should take in light of Visa's final confirmation that its relationship with iSignthis would be terminated.

458 It is plainly the case and it is not contended otherwise that from 12 May 2020 Mr Karantzis did not have legal advice that he could rely upon a Listing Rule 3.1A defence to disclosure or legal advice in Cyprus that the company could not make the disclosure that was required by Australian law until it had made the disclosure required by Cypriot law to the CBC.

459 I accept, as is apparent, that from 12 May to 15 May 2020, iSignthis and Mr Karantzis did not take steps to inform the ASX or the CBC of any of the relevant information. Indeed, it would seem that on 13 May 2020 Mr Karantzis had no intention to make disclosure to the CBC or the ASX, but was continuing to communicate with Visa seeking further concessions. iSignthis' communications with the CBC did not occur until after the CBC's email of 15 May 2020 asking for an explanation of the present state of affairs. This chain of correspondence, the evidence shows, was initiated not by iSignthis but by the CBC.

460 The weight of the evidence is that after 12 May 2020 Mr Karantzis made a decision that the company would refrain from making disclosure of the Visa Termination Decision and the Reason's for Visa's Termination. Mr Karantzis decided that until the letter to shareholders dated 24 May 2020, no disclosure would be made. The outcome of Mr Karantzis' decision was that no proper disclosure of the Visa Termination Decision would be made to the ASX until 17 August 2020 and that, it seems, iSignthis would never disclose to the ASX the Reasons for Visa's Termination.

461 I also accept that, on the evidence, there is no doubt that Mr Karantzis was well aware of the significance of the Visa Termination Decision and the Reasons for Visa's Termination. He, like his fellow directors, knew that the information was material and he knew that Australian law required it to be disclosed to the ASX. The evidence demonstrates that Mr Karantzis was not inclined even to make disclosure to the CBC until the CBC itself raised the issue.

462 It follows that I reject Mr Karantzis' submission that the asserted advice from Mr Taoushanis and Dr Theocharides in Cyprus as to the desirability of informing the CBC before any further disclosure was made is relevantly exculpatory. The position is the same insofar as Mr Karantzis says that directors of iSignthis considered that the ASX should not be informed until after a response had been received from the CBC. The reality, of course, is that even after a response had been received from the CBC Mr Karantzis was still disinclined to make proper disclosure of the relevant information. As I have found, the letter to shareholders fell well short of what should have been disclosed. Mr Karantzis' submission that it is hard to conceive of a chief executive in his position who would risk the business of the company instead of taking the advance of corporate advisors and fellow directors based in Cyprus not to comply with iSignthis' legal obligations in Australia is demonstrably incorrect. Mr Karantzis had an obligation to exercise his powers and discharge his duties with the degree of care and diligence that a reasonable person in his position would exercise. His conduct in relation to the non-disclosure of the Visa Termination Decision and the Reasons for Visa's Termination in the period after 12 May 2020 failed to meet this standard.

463 It should also be recorded that I do not accept Mr Karantzis' submission, relying on the observations of Brereton J in *Maxwell* at 399-400 [104]-[105] and 402 [110] that he has not contravened s 180(1) of the Act because the relevant obligation on a director is, to use the language of his submissions, "whether, and the extent to which, the company's interests are

jeopardised, and, any potential countervailing benefits, along with whether there were reasonable steps which could have been taken to avoid those risks".

464 Whilst it is clear that s 180(1) of the Act does not impose an obligation on directors to conduct the affairs of the company in accordance with law generally or the Act specifically (as to which see *Cassimatis* at 575 [183], 585 [235] and 641 [460]; *Maxwell* at 399 [104], 402 [110]; *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623 at [22] (Gordon J); *Citrofresh* at 79 [50] (Goldberg J); and *Mariner* at [444]), s 180(1) applies according to its terms. It imposes a duty to meet the specified standard of care in exercising powers and discharging duties: *Cassimatis* at 641-642 [464] (Thawley J); see also *DSHE Holdings Ltd (receivers and managers apptd) (in liq) v Potts* (2022) 405 ALR 70 at 96 [122], 104 [152] (Leeming and Kirk JJA, Basten AJA).

465 In the present case the question of whether Mr Karantzis met the statutory standard has arisen in the context of iSignthis having contravened s 674(2) of the Act by failing to disclose relevant information in the period after 12 May 2020. Mr Karantzis' central role in this contravention is the basis upon which I have found that he has failed to discharge his duty as a director of iSignthis with the degree of care and diligence that a reasonable person in his position would have exercised. To use the language of Brereton J in *Maxwell* at 399 [104], this is one of those cases where a director has contravened his duties, owed to the company, by authorising or permitting the company to commit contraventions of provisions of the Act. The relevant jeopardy to the interests of the company here is found in the actual exposure of the company to liability under the Act. In my assessment the risk to the company of failing to disclose the relevant information, a course navigated by Mr Karantzis himself, constituted the breach of his duty under s 180(1) of the Act. Despite Mr Karantzis' submissions seeking to justify his actions in the period after 12 May 2020, I do not accept that the potential countervailing benefits of the course which he adopted outweighed the risks to the company of non-disclosure.

466 Further, the fact that the shares in iSignthis were suspended from trading does not, to my mind, assist Mr Karantzis. He was in no position to know, in the period from 12 May 2020, whether there was any off-market trading in iSignthis' shares. There may well have been, for all he knew at the relevant time. As I have found in connection with iSignthis' contravention of s 674(2) of the Act, information can have a material event on the price or value of a listed entity's securities during a period of suspension of trading, and a market-sensitive event that occurs during a period of suspension can have an effect on the underlying value of an entity's securities

and can affect off-market trading while the securities are suspended. In any event, the Listing Rules are still to be complied with even when trading in an entity's securities is suspended.

467 I note, finally, that my conclusion that Mr Karantzis has breached s 180(1) of the Act has been formed in circumstances where Mr Karantzis has not appeared to give evidence in defence of his position. I accept that in these circumstances this provides a proper basis for the court to infer that whatever evidence he might have given would not have assisted his case. In light of this I draw with greater confidence the inference that on 13 May 2020 Mr Karantzis did not yet intend to make the required disclosure, that iSignthis' communications with the CBC were prompted by the CBC's 15 May 2020 enquiry to the company, and that iSignthis' letter to shareholders dated 24 May 2020 was not intended to disclose to the market that Visa had terminated its relationship with iSignthis or that it had done so for the reasons set out in Visa's 17 April letter.

468 It follows from my reasons for concluding that Mr Karantzis has breached s 180(1) of the Act that it is not open to find that his contravention was not "serious" within the meaning of s 1317G(1)(b)(iii) of the Act. Nor, in the circumstances, can it be accepted that at all material times Mr Karantzis acted honestly and ought fairly to be excused for the contravention pursuant to s 1317S(2) of the Act; further or alternatively s 1318(1) of the Act.

469 There will, accordingly, be a declaration that Mr Karantzis contravened s 180(1) of the Act.

THE PROVISION OF FALSE AND MISLEADING INFORMATION TO THE ASX BY MR KARANTZIS

470 In the context of the non-disclosure of the Visa information by iSignthis, and Mr Karantzis' breach of s 180(1) of the Act, ASIC also alleges that Mr Karantzis personally contravened s 1309(2) and (12) of the Act for giving information to the ASX relating to the affairs of iSignthis that was false or misleading in a material particular and, or alternatively, that omitted matters that, by their omission, rendered the information misleading in a material respect. It is ASIC's case that this occurred on two occasions. First, on **25 May 2020** in response to the ASX's 7 May 2020 query letter (the **7 May query letter**), and then again on **17 August 2020** in response to the ASX's 5 August 2020 query letter (the **5 August query letter**).

471 Section 1309(2) and (12) of the Act relevantly provide:

> (2) A**n officer or employee of a corporation who makes available or gives information, or authorises or permits the making available or giving of information, to**:

…

(c) **an operator of a financial market** (whether the market is operated in Australia or elsewhere) or an officer of such a market;

being information, whether in documentary or any other form, relating to the affairs of the corporation that:

(d) **is false or misleading in a material particular; or**

(e) **has omitted from it a matter or thing the omission of which renders the information misleading in a material respect**;

without having taken reasonable steps to ensure that the information:

(f) was not false or misleading in a material particular; and

(g) did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect;

contravenes this subsection.

…

Civil liability

(12) A person contravenes this subsection if the person contravenes subsection (2).

(Emphasis added.)

ASIC's submissions that Mr Karantzis contravened s 1309(2) and (12) of the Act

472 As has been mentioned, after the ASX suspended iSignthis from trading on 2 October 2019, the ASX sent iSignthis a number of what ASIC refers to as query letters. It is uncontroversial that at this time and thereafter Mr Karantzis and iSignthis were of the view that the ASX was treating iSignthis unfairly and in bad faith. ASIC notes that Mr Seyfort, apparently informed primarily by Mr Karantzis' instructions, shared the view that the ASX "had not been acting in good faith in its dealings with ISX" and was seeking to "create a controversy about a relatively immaterial matter to justify the suspension". It is similarly uncontroversial that the relationship between iSignthis and the ASX was "characterised by mistrust". In this regard it was Mr Seyfort's evidence that:

> I was concerned that ASX Limited was formulating long query letters that were designed to provide justification for the ongoing suspension of ISX but also damage ISX upon release, regardless of the answers given by the company.

There would seem to be no doubt that Mr Karantzis and Mr Hart shared Mr Seyfort's view in this regard.

473 It is ASIC's case that Mr Karantzis and iSignthis were focussed on defending iSignthis against the ASX in relation to iSignthis' ongoing suspension, rather than on ensuring that the information given to the ASX was not misleading, which is what s 1309(2) of the Act requires. ASIC notes that Mr Seyfort advised Mr Karantzis to keep the response letters "short and accurate", and "not affirm propositions put by ASX Limited that were contested", based on what ASIC characterises as a subjective assessment of unfair questioning. Further, ASIC notes, Mr Seyfort also advised that Mr Karantzis and iSignthis, in conjunction with those short responses, should seek to control the narrative by simultaneously releasing its own account of events (in what became the 24 May 2020 letter to shareholders).

474 Consistently with the evidence of Mr Hart and Mr Seyfort, ASIC submits that the strategy adopted by Mr Karantzis was to give responses to the ASX that were "deliberately circumspect" so as narrowly to confine the information provided to the ASX in an attempt to avoid disclosing any information that might be misused by the ASX to damage iSignthis. In particular, it is said that Mr Karantzis' responses deliberately did not disclose that Visa had terminated its relationship with iSignthis for the reasons set out in the 17 April letter. ASIC submits, having regard to Mr Seyfort's evidence, that in May 2020 Mr Karantzis knew that this information was not known to the ASX, and he knew that the information would be damaging to the company. Mr Karantzis' intention, it is said, was to ensure that the responses given to the ASX did not give any legitimacy to the proposition that the company had anti-money laundering issues.

475 Once again, ASIC submits that a *Jones v Dunkel* inference is available against Mr Karantzis in relation to the allegations that he has contravened s 1309(2) of the Act. It is submitted that the court should infer that Mr Karantzis' evidence would not assist his case, and that the court may draw with greater confidence the conclusions that Mr Karantzis was aware that the information he provided to the ASX was false or misleading, and that he did not take reasonable steps to ensure that the information was not false or misleading.

476 Against this background ASIC's position in relation to iSignthis' 25 May 2020 and 17 August 2020 responses to the ASX is as follows.

The 25 May 2020 response

477 ASIC submits that iSignthis' 25 May 2020 response to the ASX's 7 May query letter was provided in the context of the strained relations described above, and in accordance with Mr Karantzis' apparently deliberate strategy to be circumspect and not candid or open. That

deliberate strategy, ASIC submits, flew in the face of Mr Karantzis' statutory obligation to take reasonable steps to ensure that the information provided to the ASX was not false or misleading (in any of its particulars, or by omission). ASIC's case is that Mr Karantzis' focus was plainly not on avoiding the provision of misleading information to the ASX.

478 In this regard ASIC points to the following questions in the 7 May query letter and iSignthis' answers in response. Question 1 listed five sub-questions under a chapeau that stated "ASX notes that the 20 March Announcement disclosed that ISX was 'expecting audit results in early April from Visa Inc with regards to access to product'".

479 Question 1(b) asked, in that context:

> Please explain the scope and subject matter of the Visa Audit and specifically whether it concerned:
>
> - the enquiries referred to in the Appendix 4C that Visa was making in relation to the 'ASX "investigation", concerns re "derogatory media" and the focus on high risk merchants' ('Visa Queries');
> - IEL's [iSeM's] PCI DSS certification;
> - anti-money laundering issues (noting the statement on Visa's Global Registry of Service Providers referred to in paragraph F above showing IEL's current status as 'SUSPENDED BY AML'); or
> - something else?

480 iSignthis responded by saying that "ISX understands that the audit was related to compliance and risk review".

481 ASIC submits that the reference to the "Visa Audit" in the question referred to, and was understood by Mr Karantzis and Mr Seyfort in May 2020 to refer to, the communications between Visa and iSignthis commencing 6 March 2020 by which Visa requested information from iSignthis to answer Visa's serious concerns about whether iSignthis' was operating appropriate programs to manage anti-money laundering and risk in compliance with Visa's rules.

482 ASIC's case, by reference to Mr Seyfort's evidence, is that the response was "deliberately circumspect" and omitted that the scope and subject matter of the "Visa Audit" required iSignthis to provide information to Visa in response to the anti-money laundering issues it had raised, notwithstanding the ASX's direct question as to whether the Audit concerned anti-money laundering issues. That omission, ASIC contends, rendered the response false or misleading in contravention of s1309(2)(e).

483 Question 1(e) asked:

> Has ISX received the results of the Visa Audit? If so, when did it receive them and what were they? If not, when is ISX expecting to receive them?

484 iSignthis' response was in the following terms:

> The audit has been referred to a third-party independent auditor. ISX has not received those results and presently has no expectation on dates due to the impact of COVID on audit capabilities.

485 Mr Seyfort's evidence was that he understood, and he understood that Mr Karantzis understood, that question 1(e) was asking if the "Visa Audit" had concluded and, if it had, what the results were. ASIC submits that Mr Karantzis knew when preparing the 25 May 2020 response that iSignthis had received the results of the "Visa Audit" on 17 April 2020. ASIC submits that on receiving the 17 April letter, Mr Karantzis knew the results: that the information provided by iSignthis had not allayed Visa's concerns, and that Visa had decided to terminate its relationship with iSignthis on 17 April 2020. Further, ASIC submits, including by reference to Mr Seyfort's evidence, that when preparing the 25 May 2020 response Mr Karantzis knew that Visa had said its decision was final. ASIC submits that Mr Karantzis also knew in May 2020 that the ASX did not know about the Visa Termination Decision.

486 ASIC submits that the response did not disclose any of the information which was known to Mr Karantzis, and that by that omission it was false or misleading in contravention of s 1309(2)(e) of the Act. The response was also false or misleading, ASIC contends, because it gave the false impression that the "Visa Audit", for which iSignthis was expecting results in April, had been forwarded to an independent auditor, and iSignthis had not yet received the results or an outcome from Visa.

487 Question 2 in the 7 May 2020 query letter listed five sub-questions under a chapeau that stated "ASX refers to … the information currently available on Visa's Global Registry of Service Providers which shows IEL's status as 'SUSPENDED BY AML'". A screenshot and link to that information was also provided in an earlier paragraph F. ASIC submits that although more targeted, question 2 was similar to the CBC's 15 May 2020 request for information about this same notice.

488 Question 2(b) asked, in that context:

> When did ISX first become aware that Visa had suspended IEL [iSeM] from processing payments to merchants across the Visa network pending a response to the Visa Queries?

489 iSignthis' response was:

> Visa Queries were not the basis for suspension. The basis for suspension included the "ASX Investigation" and derogatory media.

490 ASIC submits that this response was also false: Visa's queries *were* the basis for the suspension. ASIC says that the response did not disclose information known to Mr Karantzis concerning Visa's reasons for the suspension as set out in the 6 March letter. By that omission, ASIC submits, it was also false or misleading in contravention of s 1309(2)(e) of the Act. In ASIC's submission the response was drafted with deliberate circumspection to reflect Mr Karantzis' and iSignthis' opinion as to the reasons for suspension.

491 Question 2(d) asked:

> Did Visa indicate to IEL at the time it notified IEL of its suspension pending a response to the Visa Queries, or subsequently, the reasons for IEL's suspension? If so, what were they?

492 iSignthis' response was:

> Brand risk, including derogatory media and "ASX Investigation".

493 Again, ASIC submits, when preparing that response Mr Karantzis knew that the central and primary reason given by Visa in the 6 March letter for the suspension of iSignthis was Visa's serious concerns about whether iSignthis' was operating appropriate programs to manage anti-money laundering and risk in compliance with Visa's rules. The response, ASIC contends, was drafted with deliberate circumspection to reflect Mr Karantzis' and iSignthis' opinion as to the reasons for suspension, and not to disclose any information as to Visa's concerns about anti-money laundering issues with iSignthis.

494 ASIC submits that this omission rendered the response false and misleading in contravention of s 1309(2)(e) of the Act.

495 Question 2(e) asked:

> Noting the statement on Visa's Global Registry of Service Providers referred to in paragraph F above showing IEL's current status as 'SUSPENDED BY AML', did Visa indicate to ISX at the time it notified IEL of its suspension pending a response to the Visa Queries, or subsequently, that Visa had anti-money laundering concerns?

496 iSignthis' response was:

> The question misleadingly conflates different issues. The issues are unrelated, as PCI DSS was not part of any Visa Query, and the apparent reason for thesuspension is addressed above. No regulator has suggested that ISX has at any time been in breach

> of any anti-money laundering regulatory obligations. The only assertions of money laundering appear to have originated with certain elements of the Australian media that are closely linked to the ASX by virtue of commercial relationships, social media and the ASX itself.

497 ASIC submits that this response was false and misleading in a material particular in contravention of s 1309(2)(d) of the Act. When preparing that response, ASIC says, Mr Karantzis knew that when Visa notified iSignthis on 6 March 2020 of its suspension pending a response to the queries set out in that letter, Visa had indicated that it had serious concerns about whether iSignthis' was operating appropriate programs to manage anti-money laundering. ASIC submits that Mr Karantzis also knew that subsequently, on 17 April 2020, when Visa notified iSignthis of its decision to terminate, Visa had concluded that iSignthis was "not operating appropriate programs to manage Anti-Money Laundering and Risk".

498 Question 2(f) asked:

> If the answer to question 2 e) is 'no' then what does ISX understand by the statement on Visa's Global Registry of Service Providers that IEL's status is 'SUSPENDED BY AML'?

499 The iSignthis response was:

> ISX has no understanding of the statement. The reference makes no sense, since there is no apparent relationship between AML and PCI DSS.

500 ASIC submits that this response was also false and misleading in a material particular in contravention of s 1309(2)(d) of the Act. Mr Karantzis and iSignthis understood, ASIC says, that Visa had suspended iSignthis because it had serious concerns about whether iSignthis was operating appropriate programs to manage anti-money laundering.

The 17 August 2020 response

501 It is ASIC's case that Mr Karantzis' second contravention arose after the ASX had obtained copies of correspondence between Visa and iSignthis, including Visa's 6 March 2020 suspension letter and the 17 April 2020 termination letter. On 5 August 2020 the ASX wrote to iSignthis pursuant to Listing Rule 18.7 requiring iSignthis to answer further questions and give further information relating to iSignthis' relationship with Visa, including explanations as to why iSignthis did not disclose the Visa termination or the reasons for Visa's termination.

502 On 17 August 2020, Mr Karantzis on behalf of iSignthis responded to the 5 August 2020 query letter. His response, ASIC submits, refused to answer the specific questions asked by the ASX, and asserted that the "true position" was "that ISX and Visa were engaged in robust

negotiations for a number of months", that "Visa's actions arguably constitute a substantial lessening of competition in Australian markets", and (importantly) "[u]ltimately the relationship was terminated in the context of rule changes by Visa that are inconsistent with the business model of ISX".

503 ASIC submits that this response was false or misleading in contravention of s 1309(2) of the Act because, as Mr Karantzis well knew, Visa had terminated its relationship with iSignthis on 17 April 2020 for reasons that included that iSignthis was "not operating appropriate programs to manage Anti-Money Laundering and Risk", that its transaction monitoring program was "not fit-for-purpose" and "had failed to identify the unusual transaction behaviour", and that iSignthis presented an excessive level of risk to the Visa network.

Mr Karantzis' response to the allegation that he contravened s 1309(2) and (12) of the Act

504 Mr Karantzis denies that in responding to the ASX letters he gave false and misleading information to the ASX, as ASIC has alleged, in contravention of s 1309(2) and (12) of the Act. By way of context to his denial, however, Mr Karantzis advances detailed submissions as to the acrimonious relationship between iSignthis and the ASX, extending over many months, as background to the circumstances in which the query letters were sent by the ASX. Mr Karantzis contends also that he made reasonable enquiries so as to ensure that the company's responses to the ASX letters were not misleading and did not omit relevant information.

505 For present purposes it is unnecessary to traverse the considerable detail of Mr Karantzis' farrago of submissions explaining, from his perspective, and that of Mr Hart and Mr Seyfort, the breakdown in the relationship between iSignthis and the ASX. It is sufficient to observe that it is Mr Karantzis' position that by reason of the strained relationship, he and iSignthis had very good reason to mistrust the legitimacy of the ASX' various queries. Against that background, including that iSignthis was in litigation with the ASX, Mr Karantzis contends that Mr Seyfort advised the company to keep its responses short and accurate and to utilise the facility of a letter to shareholders to communicate with the share market. In the circumstances, Mr Karantzis contends that this was a reasonable position for the company to adopt.

506 In the context of the breakdown in the relationship between the ASX and iSignthis, Mr Karantzis submits that he took reasonable steps, and actually made "an enormous effort" to ensure that the information in the 25 May 2020 response was not misleading in a material

respect and did not have omitted from it a matter or thing the omission of which rendered the information misleading in a material respect.

507 Mr Karantzis submits that he and Mr Seyfort largely drafted the 25 May Response. The 17 August 2020 response, Mr Karantzis submits, was in fact drafted by Mr Seyfort.

508 Mr Karantzis submits that drafts of the 25 May 2020 response were passed by Mr Seyfort and they were also sent to Mr Hart for his consideration, and that Mr Hart agreed with the ultimate form of the letter.

509 Mr Karantzis notes Mr Seyfort's evidence that he also discussed with Mr Karantzis and Mr Hart a number of possible ways of responding to the 7 May query letter, including the option of not responding at all. Mr Seyfort's evidence is that he told Mr Karantzis that he should keep each answer to the questions in the 7 May query letter short and accurate, not engage in speculation, and not affirm propositions put by ASX that were contested or without adequate foundation.

510 Mr Karantzis also notes Mr Seyfort's evidence that on 21 May 2020 he spoke with Mr Karantzis and advised him that iSignthis should release, concurrently with a further response to the 7 May query letter, its explanation of the broader context and circumstances of the dispute with Visa in the form of a letter to shareholders. This was so as to give iSignthis an opportunity properly to explain the Visa dispute, rather than simply responding to what is said to have been leading and conflated questions from the ASX which gave an incomplete account and had the tendency to make any response seem defensive. Mr Karantzis notes Mr Seyfort's evidence that he had formed the view that if the ASX was going to release information selectively to the market, then iSignthis would be less vulnerable to a contention by the ASX that it was hiding something if it made a voluntary disclosure.

511 Mr Karantzis refers to Mr Seyfort's evidence that on 22 May 2020 he sent Mr Karantzis a copy of the draft letter to shareholders with his suggested changes. Mr Karantzis submits that it is important to apprehend the significance of Mr Seyfort's suggested changes. Mr Karantzis says that ASIC has suggested that the following sentence in the letter to shareholders dated 24 May 2020 was designed to hide the fact that Visa had initiated the termination of the relationship: "iSignthis Ltd (ISX or the Company) will end its contractual relationship with Visa as a principal member in approximately 90 days". However, Mr Karantzis submits, by reference to Mr Seyfort's evidence, that this change was suggested by Mr Seyfort. The earlier

draft dated 22 May 2020 which iSignthis had prepared stated: "iSignthis Ltd regrets to advise that its contractual relationship with Visa as a principal member will terminate in approximately 90 days". Mr Karantzis submits that it was then Mr Seyfort who introduced language which may have created an impression that iSignthis was the terminating party.

512 Mr Karantzis submits by reference to Mr Seyfort's evidence that he sought Mr Seyfort's advice numerous times in relation to the drafting of the 25 May 2020 response. On the afternoon of 24 May 2020 Mr Seyfort amended the draft and sent it to Mr Karantzis and Mr Hart. Mr Seyfort said that he explained his amendments to the particular responses which have been raised in this proceeding and the bases on which he considered those responses to be accurate and justifiable. Mr Karantzis notes Mr Seyfort's evidence that when he amended the draft response he was concerned to ensure that iSignthis' responses did not give any legitimacy to the ASX's implied assertions that iSeM had anti-money laundering issues and could not be misused by the ASX to damage the company and potentially obtain leverage in the ongoing litigation between iSignthis and the ASX. Mr Karantzis also notes Mr Seyfort's evidence that he was conscious of iSignthis' concerns that its confidential information had been leaked from the ASX and that the ASX had previously refused to give an undertaking to keep the company's information confidential.

The 25 May 2020 response

513 Turning then to the impugned answers to the relevant questions, Mr Karantzis submits, by way of defence, that consistently with Mr Seyfort's advice, his responses in the 25 May 2020 response were deliberately brief and are to be read with the letter to shareholders dated 24 May 2020. Mr Karantzis says that Mr Seyfort amended the responses, including the first sentence, to more clearly convey that the relationship with Visa was ending. Mr Karantzis submits that these responses were a deliberate attempt to control the narrative and release the company's version of events to the market without being censored by the ASX.

514 Mr Karantzis' specific responses to ASIC's complaints about the answers to particular questions are as follows.

Question 1(b)

515 Mr Karantzis submits that Mr Seyfort's evidence is that he amended the response to question 1(b) in order to clarify that it was iSignthis' understanding of the scope and subject matter of the "Visa Audit". With that change, Mr Karantzis submits, the response represented

to the ASX that iSignthis held the opinion that "the audit related to compliance and risk review".

516 Mr Karantzis submits that there was a proper basis for that opinion. He says that the term "Visa Audit" was defined in question 1(a) of the 7 May query letter by reference to the announcement made on 20 March 2020, in which iSignthis said it was expecting "audit results". The response given to question 1(a) was 9 March 2020, being the day that the company received the suspension letter dated 6 March 2020. The response to question 1(b) was that it "understands that the audit was related to compliance and risk review." Mr Karantzis submits that the response was consistent with Mr Seyfort's advice to keep the responses short and accurate.

517 The broad thrust of the 6 March 2020 suspension letter, Mr Karantzis submits, was that Visa held concerns about compliance with the Visa rules and therefore the risk presented to Visa by the relationship. Mr Karantzis submits that given that iSignthis did not agree with Visa's allegations, particularly in relation to the company's AML systems, it would have been misleading to include the alleged omitted information as part of the company's opinion. In this regard Mr Karantzis draws attention to Mr Hart's evidence that it would have been misleading the market to disclose what he regarded as Visa's flawed version of the facts.

Question 1(e)

518 Mr Karantzis submits that most of the cross-examination of Mr Seyfort in relation to the 25 May 2020 response addressed the answer to question 1(e), and that the answer he gave in response to question 1(e) was in fact true for the following reasons.

519 First, Mr Karantzis submits, the answer said that the audit has been referred to a third-party auditor. This was in circumstances where Mr Seyfort had said that an audit could not be referred to somebody else if it had not been received, and therefore that the receipt of Visa's audit was implicit in the answer.

520 Mr Karantzis submits that ASIC's apparent interpretation that Visa had referred the audit to a third-party auditor is untenable. Concurrently, on 24 May 2020, iSignthis had disclosed the termination of the relationship with Visa in the letter to shareholders. In those circumstances, Mr Karantzis contends, Visa would hardly be referring an ongoing audit to a third-party auditor.

521 Secondly, Mr Karantzis notes Mr Seyfort's evidence that the responses were not meant to be read in isolation, and that they needed to be read in context. Mr Karantzis submits that

Mr Seyfort had explained that there were several relevant contexts: the rest of the responses in the 10 page document, the letter to shareholders issued on 24 May 2020, the prior responses to Mr Lewis of the ASX, and that all of these "microscopic, badly put questions" were possibly being asked for an improper purpose. Mr Karantzis notes Mr Seyfort's view that in the circumstances the company was acting in its best interests in saying as much as it did. Mr Karantzis refers also to Mr Seyfort's evidence that the question was not seeking information about Visa's decision to terminate, which was communicated on 17 April 2020.

522 Thirdly, Mr Karantzis submits, it was factually correct that the company had referred the results of Visa's enquiries embodied in the 17 April letter to a third-party independent auditor. Mr Karantzis refers to Mr Seyfort's evidence that during a discussion with Mr Hart around this time he was told that the board of iSignthis had decided to refer the Visa allegations to Nexia as a matter of "good corporate governance".

523 In this regard Mr Karantzis notes that the evidence is that on 5 May 2020, during a meeting which was also attended by Dr Theocharides, the iSignthis board asked that the letters from Visa be sent to Nexia Poyiadjis, a third-party independent auditor in Cyprus, and that Nexia Poyiadjis be requested to undertake an independent review into the Visa claims. Later that day, iSignthis and iSeM sent a letter to Visa which said that they would pass the Visa correspondence, their response, and the evidence to their external AML auditor, who had been approved by the CBC for AML audits, for review of these matters. Mr Karantzis submits that the external auditor was, and still is, Nexia Poyiadjis.

524 Mr Karantzis notes also that on 6 May 2020, Mr James Cameron (the Chief Risk Officer of iSignthis) sent an email to Ms Christina Terzi of Nexia Poyiadjis requesting that it review and audit the process and procedures for the underwriting of 54 clients onboarded in the past 18 months as a means of providing Visa with an arm's length review.

525 Related to this, Mr Karantzis submits that on 18 May 2020 iSeM's written submission told the CBC that to ensure iSeM has no issues as alleged by Visa, it had forwarded to Nexia Poyiadjis those allegations for review and comment as part of their internal audit, which would be made available to the CBC.

526 Mr Karantzis submits that Nexia Poyiadjis noted that the overall objective of the report was to consider the specific AML/CTF allegations raised by Visa.

Question 2(b)

527 Mr Karantzis submits that Mr Seyfort's evidence was that the answer given accurately reflected iSignthis' opinion as to the real reasons for the suspension. Mr Karantzis notes that Mr Seyfort had seen the 17 April letter and the 6 March letter from Visa, both of which included derogatory media as one of the reasons for the suspension. The response was not misleading, Mr Karantzis submits, because it did not say that this was the only reason for the suspension.

528 Mr Karantzis submits that given that iSignthis did not consider that Visa's other stated reasons for the suspension, particularly in relation to "high risk merchants", were the real reasons for the suspension, it was not appropriate to include the alleged omitted information as part of the company's answer.

Question 2(d)

529 Mr Karantzis submits that Mr Seyfort's unchallenged evidence was that he only corrected the grammar of the draft response to question 2(d) as he considered it to be accurate and justifiable. Mr Karantzis notes Mr Seyfort's evidence that he formed that opinion because in the 6 March letter Visa had asserted that it had decided to suspend the relationship to protect the Visa brand by safeguarding its "global payment system" from what it considered to be "the excessive level of risk" presented by the relationship.

530 Broadly speaking, Mr Karantzis submits, the 6 March letter concerned Visa's brand and Visa's perception of the risk which iSignthis and iSeM posed to that brand. Mr Karantzis submits that in the context of the hostile relationship between the company and the ASX, the response to the question was consistent with the advice given by Mr Seyfort to keep each response short and accurate so that it could not be misused by the ASX to damage the company and potentially obtain leverage in the ongoing litigation between the ASX and iSignthis.

Question 2(e)

531 Mr Karantzis submits that although Mr Seyfort's evidence was that he could not remember how he (Mr Karantzis) had understood the question, what he (Mr Seyfort) understood was that it conflated two issues and that he had elaborated on this in the answer to highlight the point. In particular, Mr Seyfort's evidence was that he had amended the response to emphasise the ASX's erroneous conflation of the Payment Card Industry Data Security Standard (**PCI DSS**) certification status of iSeM with "anti-money laundering concerns", and to clarify that the premise of the question (contained in paragraph F of the 7 May query letter) was flawed.

532 Mr Karantzis relies on Mr Seyfort's evidence that he interpreted question 2(e) as an odd question because in his opinion the ASX was trying to be "mischievous" in the way it was asking questions, and that with this in mind the response highlighted the flaws in the question. Mr Karantzis relies on Mr Seyfort's evidence that the question was a "complex confused question" and his observation that the company had effectively pointed out the confusion in the answer. Mr Karantzis records Mr Seyfort's evidence that he considered the question to be pejorative, and that he was concerned to ensure that the response did not confer any legitimacy upon the ASX's implied assertion that iSeM had money laundering issues.

Question 2(f)

533 Mr Karantzis submits that Mr Seyfort's unchallenged evidence was that he amended the response to clarify that iSignthis did not have an understanding about what he describes as the supposition of the question because there was no apparent relationship between the PCI DSS certification status of iSeM (referred to in paragraph F of the 7 May query letter) and money laundering.

534 The representation conveyed to the ASX, Mr Karantzis submits, was that the company held a view or opinion that it did not understand the statement on Visa's Global Registry of Service Providers. There were, he submits, reasonable grounds for the company's opinion because there is no apparent relationship between AML and PCI DSS. Further, Mr Karantzis submits, ASIC did not suggest any such relationship. As far as Mr Karantzis was concerned, the statement related to the failure to send in the PCI DSS by 30 March 2020 for the European Union, not any AML concerns raised by Visa in the 6 March letter or 17 April letter. Similarly, Mr Karantzis submits, Mr Hart said that this suspension was not the same as the suspension which was the subject of the 6 March letter. In particular, Mr Hart explained that there was a notification for some confusion over their PCI DSS, and then there was the 6 March letter.

535 Mr Karantzis submits further that given that he did not agree with Visa's allegations, particularly in relation to the company's AML systems, it would have been misleading to include the alleged omitted information as part of the company's opinion.

The 17 August 2020 response

536 Mr Karantzis submits that by the time iSignthis had received the 5 August query letter, iSignthis shares had been suspended continuously for 276 days. He says that the response to the 5 August query letter was drafted by Mr Seyfort, and that it included the single sentence at

the end of the third paragraph of the letter which ASIC alleges is false or misleading in a material particular; that is, that "ultimately the relationship was terminated in the context of rule changes by Visa that are inconsistent with the business model of ISX". Mr Karantzis notes that ASIC does not plead that there is any omission.

537 Mr Karantzis submits that notwithstanding that Mr Seyfort wrote this sentence, he was not asked a single question about it or the 17 August 2020 response more generally. Mr Karantzis submits that the sentence was not false or misleading in a material particular and that it has been taken out of context and misread by ASIC. The sentence says "in the context of", which is not the same as "because of". Mr Karantzis submits that it is factually accurate because on 16 April 2020 Visa had issued an advance copy of its "Enhancement of High-Brand Risk Acquiring Rules" which were not consistent with iSignthis' business model. To comply with these new rules Mr Karantzis says the company would have needed equity capital of US$100 million. Thus he says it is correct to say that the relationship was terminated "in the context of" rule changes by Visa that are inconsistent with iSignthis' business model. Mr Seyfort's unchallenged evidence, Mr Karantzis points out, is that he included the sentence because he considered that "it indicated the most objectively verifiable context to the termination, in circumstances otherwise mired by contested claims".

538 Further, Mr Karantzis submits that ASIC's claim ignores the fact that on 15 July 2020 and 22 July 2020 the company gave to the ASX copies of 143 documents produced by Visa, including correspondence between iSignthis and iSeM on the one hand and Visa on the other hand in April 2020 and May 2020 and, in particular, the 17 April letter and the subsequent responses. In these circumstances, Mr Karantzis submits, it can hardly be said that this sentence, having regard to the documents already in ASX's possession, was false or misleading.

539 Mr Karantzis submits, by reference to Mr Seyfort's evidence, that Mr Seyfort observed that he was aware when drafting the 17 August 2020 response that the ASX had obtained copies of the confidential correspondence and documents that had passed between iSignthis and iSeM on the one hand and Visa on the other hand, including the 17 April letter. Mr Karantzis refers to Mr Seyfort's evidence that it was therefore unnecessary to repeat the contents of that correspondence which iSignthis and iSeM had disputed, and continued to dispute. Further, Mr Karantzis submits, consistently with Mr Seyfort's advice to him in responding to the 7 May query letter, that he was concerned to ensure that iSignthis did not accord legitimacy to

statements made by Visa which iSignthis believed were self-serving, false or spurious, by repeating them or implicitly accepting them.

If there was a contravention of s 1309(2) of the Act it was not serious

540 Mr Karantzis submits that if the court were to find that he contravened s 1309(2) of the Act, the contravention was not "serious" within the meaning of s 1317G(1)(b)(iii) of the Act for three reasons.

541 First, it is said that by reason of the explanations iSignthis has provided, Mr Karantzis did not depart from the requisite standard. This, Mr Karantzis submits, is because he acted on advice from Mr Seyfort, an experienced commercial lawyer, in the best interests of the company.

542 Secondly, Mr Karantzis contends that the litigious background to the ASX query letters explains the tenor of the responses. Considered together, Mr Karantzis submits, those features are inconsistent with ASIC's case that the 25 May 2020 response and 17 August 2020 response could be "contraventions" properly characterised as "serious", so as to found a case that penalties should be ordered.

543 Finally, Mr Karantzis submits that at all material times iSignthis' shares were suspended and there is no evidence of any off-market trading in the period from 17 April 2020 to 26 October 2020.

Mr Karantzis ought fairly be excused for any contravention

544 Mr Karantzis submits also that if the court were to find that he contravened s 1309(2) of the Act and that the contravention was "serious" within the meaning of s 1317G(1)(b)(iii) of the Act, in all the circumstances he should be excused.

Determination

The 25 May 2020 response

545 For the reasons that follow I have determined that Mr Karantzis contravened s 1309(2) and (12) of the Act insofar as his impugned responses in the 25 May 2020 response are concerned.

546 I observe, at the outset, that to the extent that Mr Karantzis says that the company was obliged, by reasons of its ongoing dispute with the ASX, to be other than fully candid in its responses, this argument is misconceived and must be rejected. Having regard to the clear language of the statute it can never be reasonable to decide not to respond, or not to respond openly and candidly, to questions from the operator of a financial market. As senior counsel for ASIC

submitted, this argument provides a strong indication that, in fact, all reasonable steps were not taken by Mr Karantzis to ensure that the information provided was not false or misleading. With this in mind I turn to Mr Karantzis' various responses to the ASX's questions.

Question 1(b)

547 Mr Karantzis' purported justification of his answer to question 1(b) is contrived to the point of being a virtual non sequitur. The question concerning the Visa Audit and what it concerned was a relatively simple one. The answer that Mr Karantzis gave was more than merely "circumspect" – it was plainly non-responsive. I accept that it omitted to explain that iSignthis had been required to provide information to Visa in relation to AML issues which had been raised, and that this omission rendered the response false or misleading in contravention of s 1309(2)(e) of the Act.

Question 1(e)

548 Mr Karantzis' elaborate justification of his answer to question 1(e) cannot be accepted either. The answer was plainly wrong and it was also obfuscatory. Mr Seyfort accepted that the question was understood by him and by Mr Karantzis, and in circumstances where the company well knew that Visa had communicated its intention to terminate the relationship, this is what should have been communicated in response. To refer to an audit that the company had commissioned gives the appearance of an attempt to distract the ASX. I accept that the failure of the answer to reveal the results of the Visa Audit in response to a direct question was false or misleading in contravention of s 1309(2)(e) of the Act. Further, the reference to the impact of COVID in the answer to the question was disingenuous and also has the appearance of an attempt to distract the ASX.

Question 2(b)

549 Mr Karantzis' purported justification for his answer to question 2(b) is little more than sophistry. The answer was plainly misleading. Visa's queries were the basis for the company's suspension, and it is no answer to say that it was open to Mr Karantzis to advance his own narrative about what had happened at the expense of communicating what Visa had actually said. I accept that the failure to disclose Visa's reasons for the suspension as set out in the 6 March letter was false or misleading in contravention of s 1309(2)(e) of the Act.

Question 2(d)

550 Once again, Mr Karantzis' purported justification for his answer to question 2(d) cannot be accepted. Mr Karantzis well knew that the primary reason given by Visa in the 6 March letter for the suspension of iSignthis was AML concerns. I accept that to answer the question on the basis of brand risk was to omit information known to the company, rendering the response false and misleading in contravention of s 1309(2)(e) of the Act.

Question 2(e)

551 Mr Karantzis' justification for his answer to this question cannot be accepted either. The question was plainly directed to whether Visa had any AML concerns in relation to iSignthis. In effect, Mr Karantzis chose to ignore the question and promote his own narrative on the AML issue in circumstances where he well knew that Visa did have AML concerns. I accept that his response was thus false and misleading in contravention of s 1309(2)(d) of the Act.

Question 2(f)

552 Once again, I do not accept Mr Karantzis' purported justification for this response. Mr Karantzis well knew that Visa had suspended iSignthis because of AML concerns. I accept that to feign no knowledge of what "SUSPENDED BY AML" meant, in the circumstances, was false and misleading in a material particular in contravention of s 1309(2)(d) of the Act. To parse the question in the way that Mr Karantzis does provides no answer to the allegation.

Mr Seyfort's advice does not provide a defence

553 I note, for completeness, ASIC's submission (which I accept) that Mr Seyfort's advice does not provide Mr Karantzis with a defence. This is a response to Mr Karantzis' reliance on ss 1309(7), (8), (9) and (10) of the Act and his assertion that he took reasonable steps to ensure that the information was not false or misleading because he conferred with Mr Seyfort as to the contents of the response letters.

554 Sub-sections 1309(7)–(10) provide:

> (7) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information was not false or misleading in a material particular if the person proves that:
>
> (a) the person made all inquiries (if any) that were reasonable in the circumstances; and
>
> (b) after doing so, the person believed on reasonable grounds that the information was not misleading or deceptive in a material particular.

(8) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information did not have omitted from it any matter or thing the omission of which rendered the information misleading in a material respect if the person proves that:

(a) the person made all inquiries (if any) that were reasonable in the circumstances; and

(b) after doing so, the person believed on reasonable grounds that there was no such omission.

(9) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information was not false or misleading in a material particular if the person proves that:

(a) the person relied on information given to the person by:

(i) if the person is a body—someone other than a director, employee or agent of the body; or

(ii) if the person is an individual—someone other than an employee or agent of the individual; and

(b) the reliance placed on that information by the person was reasonable in all the circumstances.

(10) For the purposes of subsection (2), a person is taken to have taken reasonable steps to ensure that information did not have omitted from it any matter or thing the omission of which rendered the information misleading in a material respect if the person proves that:

(a) the person relied on information given to the person by:

(i) if the person is a body—someone other than a director, employee or agent of the body; or

(ii) if the person is an individual—someone other than an employee or agent of the individual; and

(b) the reliance placed on that information by the person was reasonable in all the circumstances.

555 ASIC submits, as is correct, that these sub-sections were inserted into s 1309 of the Act to provide "greater clarity on what constitutes reasonable steps" in s 1309(2)(f) and (g): see the Explanatory Memorandum for the *Corporations Amendment (Simple Corporate Bonds and Other Measures) Bill 2014* at [1.16], [1.101], [2.54].

556 ASIC submits that Mr Karantzis' reliance on the advice of Mr Seyfort is untenable for two reasons. First, it is said that the response letters of 25 May 2020 and 17 August 2020 are objectively false or misleading. I accept without hesitation that this is so in relation to the 25 May 2020 response. Secondly, ASIC says that the reliance on the advice of Mr Seyfort is untenable because Mr Karantzis knew the true position. ASIC submits, and I accept, that the exemption in s 1309(2)(f) and (g) of the Act is engaged in circumstances where, if an officer

or employee does not know the underlying facts concerning information relating to the affairs of the corporation, that person does not contravene the section if the person has taken reasonable steps to ensure that the information was not false or misleading or omitted from it a matter or thing the omission of which rendered the information misleading.

557 It is clear that Mr Seyfort's advice was not sought or given in relation to the truth or accuracy of the information contained in the letters. Rather, Mr Seyfort's advice was sought and given on strategy in the context of iSignthis' broader legal dispute with the ASX. Consistent with that approach, ASIC submits, having regard to Mr Seyfort's evidence, iSignthis also sought strategic public relations advice from a public relations adviser. ASIC submits by reference to Mr Seyfort's evidence that like Mr Seyfort, this other advisor did not advise on the truth or accuracy of the matters raised in the ASX correspondence.

558 It is clear by reference to Mr Seyfort's evidence that although Mr Seyfort advised Mr Karantzis to keep his responses accurate, Mr Seyfort was not asked to, and did not, conduct a fact checking or due diligence exercise to ensure that what Mr Karantzis wrote was accurate. Mr Seyfort's evidence was that he "didn't engage with the truth or untruthfulness" of the matters concerning Visa because he "didn't know what was true or untrue". Mr Karantzis, it may be accepted, again by reference to Mr Seyfort's evidence, had "superior knowledge" to Mr Seyfort about the relationship and dealings between Visa and iSignthis. Mr Seyfort therefore relied on Mr Karantzis as to the truth of the facts (and not the reverse, which would be necessary for the application of ss 1309(7)-(10)).

559 Further, even if Mr Karantzis' answers had been checked and had been accurate (which in the 25 May 2020 response they were not), strict accuracy in the responses is not a defence. A document may be misleading even if everything in it remains literally correct: *Semantic Software Asia Pacific Ltd v Ebbsfleet Pty Ltd* (2018) 124 ACSR 146 at [100] (White JA); *R v Kylsant (Lord)* [1932] 1 KB 442 at 445, 448-449 (Avory, Branson and Humphreys JJ); *Peek v Gurney* (1873) LR 6 HL 377 at 386 (Lord Chelmsford); *Aaron's Reefs Ltd v Twiss* [1896] AC 273 at 281 (Lord Halsbury LC). I accept, as ASIC submits, that the whole of the information provided by Mr Karantzis in the 25 May 2020 letter conveyed the misleading message that Visa had temporarily suspended iSignthis for reasons relating to the ASX investigation, derogatory media and brand risk, and that the public reference to "suspended by AML" was some unrelated and nonsensical mistake.

560 I observe, finally, on ASIC's *Jones v Dunkel* point, that while an inference is available to be drawn against Mr Karantzis by reason of his failure to appear and give evidence to answer ASIC's allegations, the drawing of any such inference is unnecessary. Mr Karantzis' contravention of s 1309(2) and (12) of the Act is established on the basis of the answers which he gave in the 25 May 2020 response to the relevant questions posed by the ASX.

Mr Karantzis' contravention of s 1309(2) of the Act was serious, and he should not be excused for any contravention

561 Having regard to my findings above in relation to the relevant responses in the 25 May 2020 response it will be apparent that Mr Karantzis' contraventions of s 1309(2) of the Act were serious within the meaning of s 1317G(1)(b)(iii) of the Act. Mr Karantzis departed from the requisite standard and his reliance on Mr Seyfort does not, for the reasons I have explained, assist him.

562 Further, as will be apparent, I do not accept that what Mr Karantzis described as the "litigious background" to the ASX query letters provides any basis for a more lenient view to be taken of his conduct in relevant respects. Section 1309(2) of the Act is to be complied with. It is no defence to a failure to comply with that section that compliance was inconvenient, or inconsistent with wider corporate objectives.

563 Finally, the fact that trading in iSignthis' shares was suspended provides Mr Karantzis with no excuse for the reasons I have earlier given.

564 In all the circumstances there is no basis for Mr Karantzis to be excused for his contravention of s 1309(2) of the Act with respect to the 25 May 2020 response. There should be a declaration that Mr Karantzis has contravened ss 1309(2) and (12) of the Act.

17 August 2020 response

565 By contrast to the position in relation to the 25 May 2020 response, the question of whether or not the statement given by Mr Karantzis in the 17 August 2020 response that "ultimately the relationship was terminated in the context of rule changes by Visa that are inconsistent with the business model of ISX" was false or misleading is evenly balanced.

566 On the one hand, Mr Karantzis well knew that by the time of his 17 August 2020 response Visa had terminated the relationship for the reasons Visa had given. However, on the other hand, although Mr Karantzis' statement was less than expansive and was actually tendentious, it may not have been false or misleading if understood in a certain way. Also, it is centrally relevant

that in the preceding month iSignthis had provided the ASX with a volume of documents arising from the dispute between the company and Visa which included the 17 April letter. As is recorded in the ASX's 5 August query letter, the ASX had full visibility of the reasons why the relationship between Visa and iSignthis came to an end. This context must inform how Mr Karantzis' impugned statement is to be understood.

567 Taking into account the use of the word "ultimately", which might be thought to convey the concept that the answer was being given at a general or high level and as a statement of position, and the use of the expression "in the context of", which I accept does not mean "because of", together with the fact that iSignthis had given the ASX copies of the relevant underlying documents, I do not consider that it would be appropriate to find that Mr Karantzis' statement in the 17 August 2020 response to which ASIC objects was false or misleading in contravention of s 1309(2) of the Act. The tendentious language in which the statement is expressed, and the fact that the ASX had the underlying information, are matters which, in combination, cause me to conclude that Mr Karantzis' response, in its terms, and in context, was not false or misleading for relevant purposes.

568 Thus I would not find that Mr Karantzis breached s 1309(2) of the Act insofar as the 17 August 2020 response is concerned.

DID MR KARANTZIS BREACH HIS DIRECTOR'S DUTIES IN RELATION TO THE PERFORMANCE SHARES?

569 Returning, finally, to the matter of the Performance Shares, ASIC alleges that in taking the steps he took to enable iSignthis to achieve revenue in the six months to 30 June 2018 so as to achieve each of the Performance Milestones, Mr Karantzis contravened his duties as a director prescribed by ss 182 and 181 of the Act.

Section 182: use of position to gain an advantage

570 Section 182 of the Act provides:

> (1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:
>
> (a) gain an advantage for themselves or someone else;
>
> (b) or cause detriment to the corporation.

571 It may be accepted that an objective standard is to be applied in determining what amounts to an "improper" use of position, and impropriety is established by "a breach of the standards of

conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case, including the commercial context": *Doyle v Australian Securities and Investments Commission* (2005) 227 CLR 18 at 28 [35]; citing *R v* ***Byrnes*** (1995) 183 CLR 501 at 514-515 (Brennan, Deane, Toohey, Gaudron JJ) and *Angas Law Services Pty Ltd (In liq) v Carabelas* (2005) 226 CLR 507 at 531 [65], 533 [72].

572 ASIC's primary contention is that, in contravention of s 182(1)(a), Mr Karantzis improperly used his position to cause iSignthis to enter into what ASIC has called the "back-to-back" integration agreements to achieve each of the Class A, B and C Performance Milestones by 30 June 2018 and to gain a financial advantage for himself and others.

573 Further, or alternatively, ASIC contends that causing iSignthis to enter into the back-to-back integration agreements so as to achieve the Performance Milestones caused detriment to the company and shareholders of iSignthis, contrary to s 182(1)(b), by diluting the share capital in iSignthis and increasing the total number of shares by approximately 50 per cent to 1,004,832,159, with little benefit to the company in terms of profitability or sustainable growth.

The evidence relied upon by ASIC

574 It is uncontroversial that the Performance Shares were issued on terms that each class would convert on a one-for-one basis into Ordinary Shares upon iSignthis meeting the Performance Milestones before 30 June 2018, as follows:

(a) 112,222,222 Class A Performance Shares would convert into Ordinary Shares on iSignthis achieving revenue of at least $2.5 million over a 6 month reporting period;

(b) 112,222,222 Class B Performance Shares would convert into Ordinary Shares on iSignthis achieving revenue of at least $3.75 million over a 6 month reporting period; and

(c) 112,222,223 Class C Performance Shares would convert into Ordinary Shares if iSignthis achieved revenue of at least $5 million over a 6 month reporting period.

575 It will be recalled that the Performance Shares operated on the following basis. If iSignthis achieved at least $5 million in revenue in any 6 month reporting period before 30 June 2018, the 366,666,667 Performance Shares issued to iSignthis Ltd BVI under the terms of the acquisition would convert into 366,666,667 Ordinary Shares to be owned by iSignthis Ltd BVI.

If iSignthis did not achieve the Performance Milestone for a Class before 30 June 2018, all of the Performance Shares in that Class would convert into a single Ordinary Share.

576 There can be no doubt that Mr Karantzis had a material personal financial interest in iSignthis achieving the Performance Milestones. As has been mentioned, by virtue of the pre-existing share arrangement, he stood to obtain control over approximately 149 million Ordinary Shares through iSignthis BVI Ltd (worth approximately $27 million as at 30 June 2018), and other directors and officers of the company, as well as his mother, also stood to benefit through the transfer of approximately 187 million Ordinary Shares (worth approximately $34 million as at 30 June 2018).

577 It is also uncontroversial that iSignthis had not achieved any of the Performance Milestones in any six-month period to 31 December 2017 following the acquisition. iSignthis reported revenue as follows in that period:

(a) $28,962 in the 6 months to 30 June 2015;

(b) $58,537 in the 6 months to 31 December 2015;

(c) $385,344 in the 6 months to 30 June 2016;

(d) $308,189 in the 6 months to 31 December 2016;

(e) $1,063,003 in the 6 months to 30 June 2017;

(f) $826,912 in the 6 months to 31 December 2017.

578 On the basis of these figures, and as ASIC submits, the 6 months to 30 June 2018 was the final opportunity to achieve the Performance Milestones. ASIC's case is that the relevant documentary evidence discloses that in the first quarter ending 31 March 2018, iSignthis recorded approximately $1.5 million in revenue. Approximately $1.15 million of that revenue was received from **OT Markets** Pty Ltd, pursuant to an agreement entered into in December 2017 for integration of OT Markets to the "Pandats.com" platform. The fee structure provided for a fixed integration fee of $106,000 and an ongoing licence fee of 7% of all transactional revenue — that is, the licence fee was payable pro rata once the customer went live and commenced processing. Under this agreement, iSignthis recorded the $106,000 integration fee in February 2018 and approximately $1.05 million through the licence fee as transaction revenue in January, February and March 2018. That revenue stream came to an end following the freezing orders and other injunctions issued by this court against OT Markets in February

2018: see *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) & Ors (No 4)* (2020) 148 ACSR 511 at 519 [31] (Beach J).

579 ASIC submits that heading into the second quarter (1 April to 30 June) of 2018, iSignthis would have needed to record an additional $3.5 million in revenue to achieve the Class A, B and C Performance Milestones. It is ASIC's case that the existing revenue sources were not capable of supplying that volume of revenue. ASIC submits, by reference to the relevant documentary evidence, that as matters transpired only $518,000 was recorded in the June 2018 quarter from sources that did not include the integration agreements, and of that amount approximately $424,000 was received as a one-off payment for marketing services from Nona Marketing Ltd. In the following 30 September 2018 quarter, ASIC submits, iSignthis recorded approximately $360,807 in revenue, none of which was attributable to the integration customers.

580 ASIC submits that what it characterises as the "back-to-back" fee structure for the integration agreements was proposed by Mr Karantzis in early May 2018, Mr Hart's evidence being that he heard about the structure through discussions with Mr Karantzis. On 4 May 2018, Mr Karantzis sent an email to his brother, Mr Andrew Karantzis, setting out the structure for a new agreement to integrate Corp Destination to the "Panda" trading service platform. Mr Karantzis' proposal was for iSignthis, through Authenticate BV, to project manage the integration for Corp Destination to the Panda platform, with a fee structure based upon a "AS2124/25 fee schedule for Project Management". Authenticate BV would charge a licence fee of €290,700 (to be paid to the external Panda licensor) plus 7.5 per cent for project management, and ongoing maintenance fees.

581 ASIC says that this fee structure involved Authenticate BV charging the integration customer one-off up-front fees for licensing and integration services. It is ASIC's case that by incorporating the full licence fee charged by the end-licensor as revenue payable by the customer to Authenticate BV up-front, iSignthis was able to achieve substantial but low-margin one-off revenue in a very short period of time before the end of the 30 June 2018 milestone date. ASIC says that the integration services provided by Authenticate BV — and the approximately 7.5 per cent project management fee charged by iSignthis — could not have achieved that revenue alone. ASIC submits that under the back-to-back arrangement, iSignthis retained approximately $150,000. That is, under the integration agreements, iSignthis recorded approximately $3 million in total revenue, but incurred approximately $2.85 million in costs under the out-sourcing agreements.

582 By reference to Mr Hart's evidence, ASIC submits that prior to May 2018 iSignthis had never collected as revenue the full of amount of the licence fee upfront and paid that fee through to the external licensor, and that after 30 June 2018, iSignthis never did it again. Mr Hart's evidence was that before May 2018, iSignthis had project managed the integration of customers onto trading/payment platforms. However, ASIC submits that in previous circumstances iSignthis had charged relatively insignificant amounts for providing project management services and for platform integration, with the more substantial licence fees paid either by the customer directly to the licensor or to iSignthis pro rata once the customer commenced processing. For example, ASIC notes, the 4 May 2018 email from Mr Karantzis to his brother observes "[s]hame we didn't get paid for doing this before" and refers to a previous integration with a company "Hoch" Capital Ltd, for which iSignthis recorded in total €4,676 for integration. ASIC submits that iSignthis had also previously charged OT Markets for integration, together with a pro rata licence fee of 7 per cent of ongoing transactional revenue payable once the customer went live and commenced processing.

583 Also by reference to Mr Hart's evidence, ASIC submits that if the back-to-back fee structure had not been deployed in the integration agreements, iSignthis could not have met each of the three Performance Milestones. ASIC says, again by reference to Mr Hart's evidence, that neither of the previous integration fee structures would have enabled the company to achieve the Performance Milestones. The OT Markets structure, ASIC contends, required an active customer capable of processing high transaction volumes in a short period of time. None of the integration customers, it is said, presented that opportunity. ASIC submits, partly by reference to Mr Hart's evidence, that the integration customers were unsophisticated start-up companies that would have been unlikely to generate significant future transaction revenue, and Mr Karantzis did not have a reasonable factual basis to make a statement about the project revenue which may have been derived from that customer. As matters transpired, ASIC says that Corp Destination and IMMO (to which reference has been made above) did not process any transactions at all after integration. Fcorp (also referred to above) did not process any transactions in 2018, and in 2019 only recorded approximately $35,000 in "EMA" revenue.

584 It is ASIC's case that in May to June 2018 Mr Karantzis was closely involved in iSignthis entering into the integration and out-sourcing agreements which adopted the "back-to-back" fee structure, and rapidly invoicing each of the customers for fees under the integration agreements before 30 June 2018. By reference to certain of the relevant documentary evidence, ASIC submits the key dates are as follows:

(a) On 4 May 2018, Mr Karantzis proposed the fee structure for the integration customers.

(b) On 15 May 2018, Authenticate BV entered into the integration agreement with Corp Destination.

(c) On 23 May 2018, Mr Karantzis gave instructions to the iSignthis financial controller, Mr Shahbenderian, to prepare and send invoices for the fees under the Corp Destination agreement.

(d) On 29 May 2018, Mr Karantzis gave instructions to Mr Shahbenderian to prepare and send invoices for the fees under the yet to be signed Fcorp agreement.

(e) On 30 May 2018, Authenticate BV entered into the integration agreement with Fcorp.

(f) On 5 June 2018, Mr Karantzis circulated an unsigned copy of the IMMO integration agreement, and gave instructions to Mr Shahbenderian to prepare and send invoices for the fees under that yet to be signed agreement.

(g) On 6 June 2018 Authenticate BV entered into the integration agreement with IMMO.

(h) On 9 June 2018, Mr Karantzis wrote to Messrs Richards, Hart and Minehane in preparation for the company achieving one or more of Performance Milestones, suggesting that, "with the performance shares upcoming" they incorporate a holding vehicle in Cyprus into which the shares could be allocated "post the Milestone date", noting that "[t]he performance shares will be whatever they are". The email attached a spreadsheet with an indicative allocation of shares to each of Messrs Richards, Hart and Minehane for each Performance Milestone and a "Total if All Awarded".

(i) On 18 June 2019, Mr Karantzis gave instructions to Mr Shahbenderian to prepare and send further invoices for fees under each of the Fcorp, Corp Destination and IMMO integration agreements.

(j) On 19 June 2018, there was a meeting of the iSignthis Board of directors, attended by all directors including Mr Karantzis. The Board conducted a finance review, and prior to the meeting the directors were provided with draft accounts for May 2018. The accounts showed that, for the year to date, total income was stated to be $3,842,233, of which $3,508,431 was attributed to "Integration fees", and cost of sales was $2,278,647. (On 25 June 2018, Mr Richards sent an email to the iSignthis directors providing updated revenue information.) The Board papers observed that "Project revenue in the current quarter has generated an increase above what has been reduced from core services".

(k) On 22 June 2018, iSignthis released an announcement to the market titled "Cash Receipts – Performance Rights" advising that "cash receipts for Half Two (H2) are now in excess of Three Million Seven Hundred and Fifty [Thousand] Dollars ($3,750,000)" and that, subject to audit, the receipts will satisfy the Class A and Class B Performance Share Milestones.

(l) On 23 July 2018, Mr Niall McDonald of Grant Thornton requested that the company provide proof that the integration services had been provided.

(m) On 25 July 2018 at 10.39am, Mr Todd Richards forwarded Mr McDonald's request to Mr Karantzis. Mr Karantzis immediately drafted the Certificates of Practical Completion and, at 12.16pm, sent copies of the Certificates with instructions that they be "signed … asap".

(n) On 31 July 2018, iSignthis released the report to shareholders for the final 2018 quarter ending 30 June 2018 which has been mentioned. The report presented the unaudited financial results of iSignthis for the final quarter ($3.95 million revenue) and the 6 months to 30 June 2018 ($5.5 million revenue), and stated that the Performance Milestones for each of Class A, B and C would be met.

(o) On 28 August 2018, Mr Karantzis and Mr Richards signed a letter for the auditors stating:

> We are satisfied that the work required under all contracts with customers for the provision of integration, establishment, project and platform services has been satisfactorily completed by the Group at 30 June 2018.

585 Insofar as Mr Karantzis maintains that the integration agreements were entered into for the ordinary business purpose of building iSignthis' business, ASIC submits that this purpose cannot explain the back-to-back nature of the integration agreements by which iSignthis charged the integration customers the full amount of the third party licence fee while incurring a corresponding obligation to pass on the licence fee. It is this fee structure, engineered by Mr Karantzis and which Mr Hart accepts was put into place for the first and only time in May and June 2018 for the Corp Destination, Fcorp and IMMO agreements, that ASIC alleges was made for the improper purpose of achieving the Performance Milestones. The purpose of that structure, ASIC alleges, was to record the licence fee as revenue, which was then offset by the out-sourcing agreements. ASIC notes Mr Hart's acceptance in cross examination that after the Performance Milestones were met, the back-to-back fee structure was never implemented by Authenticate BV or iSignthis again.

586 ASIC refers to the three purposes for the structure of the integration agreements which Mr Hart advanced in cross examination: first, to speed up the process because the integration customers did not have the skills to get a platform up and running; secondly, so that the company gained expertise to deploy for future customers; and thirdly, to bring in cash. However, ASIC notes Mr Hart's concession that the licence fee revenue was not necessary for iSignthis to do that work or gain that expertise having regard to the first and second reasons. ASIC submits that Mr Hart could not explain why it was necessary or desirable for iSignthis to recognise the full amount of the licence fee as its own revenue up-front. ASIC says that the company had already integrated customers previously, and gained the relevant expertise, without charging the licence fee: Mr Karantzis having acknowledged in writing on 4 May 2018 that "we have the checklists now and know what we need to do" to project manage the integration.

587 ASIC further submits that there is also no business purpose that explains the timing of the flurry of activity to integrate and invoice each of the integration customers in the final weeks to 30 June 2018. Contrary to Mr Hart's evidence, it is said, Corp Destination, Fcorp and Immo were not "super keen to get on and capture this opportunity very quickly". The evidence, ASIC submits, is not consistent with any imperative that the customers be integrated and operating by 30 June 2018. In this regard ASIC submits:

(a) There is no evidence of correspondence with any of the customers to support the notion of a sense of urgency to enter into these arrangements or a desire to capture any "opportunity".

(b) In the six months following 30 June 2018 iSignthis recorded no transactional revenue from any of the integration customers. The company recorded €3,737 of "EMA revenue" from Fcorp, which, ASIC says, appears to be unrelated to the trading platform.

(c) None of the customers signed the agreements until the second half of 2018, and the agreements were backdated.

(d) In the following calendar year in 2019, no revenue was received from Corp Destination or IMMO, and only approximately $35,000 of "EMA revenue" was received from Fcorp, which, ASIC says, again appears to be unrelated to the trading platform integrated for Fcorp.

(e) Although iSignthis asserts the platform integrated for IMMO was deployed for another company, **Bitconvert** Limited, there does not appear to be any evidence for that assertion, and that company did not commence transaction processing until 2019.

(f) In the second half of 2018, iSignthis recorded revenue of $1,111,365, reverting to previous levels not inflated by the one-off low margin revenue recorded under the back-to-back integration agreements. The particular issues involving KAB, Apple, NAB and Worldline, to which Mr Hart referred in his oral evidence do not explain why the integration customers did not process any transactional revenue.

(g) The increase in revenue in 2019 was a result of the company achieving its vision to develop Tier 1 connection capabilities with credit card providers and other payment schemes. That achievement was unrelated to the steps taken by Mr Karantzis to receive revenue from the integration agreements before 30 June 2018.

588 Insofar as Mr Karantzis asserts that it was *his* duty to ensure that Authenticate BV raised the invoices under the integration agreements before 30 June 2018, ASIC points out that Mr Karantzis was the company's chief executive officer and Mr Richards was the chief financial officer. ASIC points to Mr Hart's evidence that the financial controller, Mr Shahbenderian, likely reported to Mr Richards, not to Mr Karantzis. Yet, ASIC notes, as the CEO Mr Karantzis sent emails in May and June 2018 to the financial controller to give instructions to prepare and send invoices under the integration agreements to be prepared as soon as possible. Mr Karantzis' close involvement, ASIC submits, is indicative of the steps he took to ensure his purpose was effected. Mr Karantzis maintained control over and proximity to the integration agreements at all stages: from the design of the fee structure to invoicing and the receipt of the revenue.

589 ASIC submits that it could not have been a purpose, as Mr Karantzis has contended, to invoice all of the integration fees before 30 June 2018 to ensure that the company had funds to pay the outsourcing services providers. GibiTech did not issue invoices to Authenticate BV until September, November and December 2018. Fino issued one invoice on 25 June 2018, and another invoice in October 2018. Further, ASIC submits, iSignthis booked the integration agreement revenue on the issuing of the invoices before 30 June 2018, and not the receipt of payments under those invoices. In July 2018 more than $900,000 was outstanding under the integration agreements. More than $600,000 remained outstanding in November 2018.

590 It must also be borne in mind, ASIC submits, that Mr Karantzis engaged in conduct that prevented the market from discovering what drove the increase in revenue in the 30 June 2018 quarter, including by making the One-Off Revenue Representation on 3 August 2018, by his involvement in failing to disclose the One-Off Revenue/Costs Information, and by his failure

to correct Mr Jacobs' publishing information that he knew to be false. The significant increase in revenue in the 30 June 2018 quarter, and the likely achievement of the Performance Milestones, had attracted the interest of market analysts. Mr Karantzis was aware that Mr Jacobs was interested in whether the revenue in the quarter could "be considered genuine recurring business activity as opposed to one-off integration type revenue".

Relevant principles

591 It may be accepted, as ASIC submits, that the prohibition against making improper use of a director's position to gain an advantage for the director or another person is a reference to the purpose of the conduct, and not the effect: *Mitchell* at 689 [1525]. The purpose of conduct is the end sought to be achieved, not the reason for seeking that end: *Mitchell* at 689 [1524]; *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 573 [18] (Gleeson CJ). A director will act for an improper purpose if the substantial purpose for the director's conduct was improper: *Permanent Building Society (In Liq) v Wheeler* (1994) 11 WAR 187 at 218 (Ipp J); *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1 at 549 [4460], 550 [4466] (Owen J); *United Petroleum Australia Pty Ltd v Herbert Smith Freehills* (2018) 128 ACSR 324 at 449 [640] (Elliot J). A director can make improper use of his or her position even if the director has the purpose or intention or belief that the conduct is in the interests of the company: *Chew v The Queen* (1992) 173 CLR 626 at 634 (Mason CJ, Brennan, Gaudron and McHugh JJ), 640 (Dawson J); *Byrnes* at 521-522 (McHugh J).

592 That is not to say, however, that a director may not act with a personal interest even where the director has not freed his or her mind of that personal interest when so acting, provided that the director's personal interest was not "the actuating motive" rather than some bona fide concern for the benefit of the company: *Hylepin Pty Ltd v Doshay Pty Ltd* (2021) 288 FCR 104 at 113 [36] (Markovic, Banks-Smith and Anderson JJ); *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* (2002) 41 ACSR 72 at 234 [735] (Santow J), citing ***Mills*** *v Mills* (1938) 60 CLR 150 at 164–5 (Latham CJ); *Ngurli Ltd v McCann* (1953) 90 CLR 425, 439-440. As a general rule, directors will have an interest as shareholders in the company of which they are directors. Therefore, in promoting the company a director will also promote his or her own interests. The mere fact that a director has derived some benefit does not result in a breach of the director's duties: *Mills* at 163.

593 In *Mills*, the directors of a company passed a resolution which increased the voting power of one of the directors, but which the directors believed to be in the best interests of the company. The resolution declared a dividend to ordinary shareholders (but not to preference shareholders) in the form of fully paid ordinary shares. This meant that all unappropriated profits at that time would eventually pass to the ordinary shareholders on winding up, which would improve the position of ordinary shareholders vis-à-vis preference shareholders. The resolution also increased the voting power of ordinary shareholders as against the preference shareholders because a large increase was made in the number of ordinary shares, while the number of preference shares remained unchanged.

594 In considering whether the directors had acted for an improper purpose, Latham CJ (at 165) identified the question as: what was "the moving cause" of the action of the directors.

595 In formulating that test, the Chief Justice observed at 163-164:

> … Ordinarily, therefore, in promoting the interests of the company, a director will also promote his own interests. I do not read the general phrases which are to be found in the authorities with reference to the obligations of directors to act solely in the interests of the company as meaning that they are prohibited from acting in any matter where their own interests are affected by what they do in their capacity as directors. Very many actions of directors who are shareholders, perhaps all of them, have a direct or indirect relation to their own interests. It would be ignoring realities and creating impossibilities in the administration of companies to require that directors should not advert to or consider in any way the effect of a particular decision upon their own interests as shareholders. A rule which laid down such a principle would paralyse the management of companies in many directions. Accordingly, the judicial observations which suggest that directors should consider only the interests of the company and never their own interests should not be pressed to a limit which would create a quite impossible position.

596 In the same vein, Dixon J observed (at 188) that the primary judge's statement, that the two directors were not unconscious of the effect of the resolution in altering voting power and that one of the directors probably hoped that it would make a majority easier, was far from finding that "an actuating motive" for the resolution was the desire to maintain voting strength.

597 More recently, in ***Eclairs Group*** *Ltd v JKK Oil and Gas plc* [2016] 3 All ER 641 Lord Sumption observed at 651 [20] (with Lord Hodge agreeing):

> Directors of companies cannot be expected to maintain an unworldly ignorance of the consequences of their acts or a lofty indifference to their implications. A director may be perfectly conscious of the collateral advantages of the course of action that he proposes, while appreciating that they are not legitimate reasons for adopting it. He may even enthusiastically welcome them. It does not follow without more that the pursuit of those advantages was his purpose in supporting the decision.

See generally the exposition of the relevant principles, including those developed by the High Court of Australia, in Lord Sumption's judgment in *Eclairs Group* at 650-653 [17]-[24].

598 Mr Karantzis submits, and I accept, that where a director's conduct is attributable to a range of different purposes, the "but for" test is ordinarily used to determine what the relevant purpose was, consideration being given to whether the director would still have acted in that way if the collateral purpose had not existed: *Mills* at 186 (Dixon J); *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 294 (Mason, Deane and Dawson JJ); see also *Diakovasili & Anor v Order of AHEPA NSW Incorporated* [2023] NSWSC 1282 at [154] (Black J); although cf *Australian Securities and Investments Commission v Drake (No 2)* (2016) 340 ALR 75 at 178-179 [497]-[498] (Edelman J).

599 In considering ASIC's case on the performance shares it is important to keep these principles front of mind. That is, is the impugned purpose the "activating motive", the "moving cause", the "but for" cause, or the "real purpose"? It must be recognised that it is open to directors of a corporation to make decision even where those decisions are consistent with their own interests.

600 Critically in the present circumstances, it must also be emphasised that ASIC bears the burden of proof in relation to Mr Karantzis' alleged breaches of ss 181 and 182 of the Act: s 140(2) of the *Evidence Act 1995* (Cth); see also *Mitchell* at 624 [1123]. Satisfaction on the balance of probabilities must take into account the nature of the cause of action, the subject matter, and the gravity of the matters alleged. Inexact proofs, indefinite testimony, or indirect inferences are insufficient in circumstances where ASIC seeks serious findings of wrongdoings, and to have Mr Karantzis banned from managing corporations in Australia: see *Briginshaw* at 362; *Morley* at 340-343 [734]-[753]; *Commonwealth v Fernando* (2012) 200 FCR 1 at 28 [129] (Gray, Rares, Tracey JJ); *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-450 (Mason CJ, Brennan, Deane, Toohey, Gaudron JJ).

Did Mr Karantzis breach s 182 of the Act?

601 Although I accept that the question is evenly balanced, applying the principles which have been set out above, I have come to the conclusion that ASIC has not proven to the requisite standard that Mr Karantzis has made an improper use of his position in relation to the performance shares and thereby breached s 182 of the Act. My conclusion is based on the following considerations, the most substantial of which is that I am unable to say that there were not legitimate business purposes for the integration agreements, structured as they were.

The existence of a legitimate business purpose

602 In my assessment, the weight of the evidence is that iSignthis had conventional and legitimate business purposes for entering the relevant agreements in the terms that they entered them. Although one can well understand the basis of the circumstantial case that ASIC brings, which is certainly buttressed by what I have found to be Mr Karantzis' conduct in preventing the market from discovering what drove the increase in revenue in the June 2018 quarter, I do not consider the evidence upon which ASIC relies to make out the breach of s 182 of the Act to be sufficient to sustain that case. Contrary to ASIC's submission, I am not satisfied, and actually persuaded, that the evidence supports only one rational and definite inference: that Mr Karantzis engineered the back-to-back fee structure for the integration agreements, and engaged in a flurry of activity in May and June 2018, for the substantial purpose of meeting the Performance Milestone revenue targets and gaining a financial advantage for himself and others.

603 Taking all relevant matters into account, and conscious of the necessary degree of satisfaction on the balance of probabilities I would need to have to find ASIC's case proven, I am unable to find that Mr Karantzis' conduct in the context of the integration agreements amounted to the improper use of his position to cause iSignthis to enter the agreements to achieve each of the Class A, B and C Performance Milestones by 30 June 2018. For the same reasons, I do not consider it open to find that Mr Karantzis' conduct in the context of the integration agreements caused detriment to the company and the shareholders of iSignthis contrary to s 182(1)(b) of the Act by diluting the share capital and increasing the total number of shares with little benefit to the company.

604 In particular, I am not satisfied that Mr Karantzis' "actuating motive" in engaging in the relevant conduct was so that iSignthis would achieve the Performance Milestones or cause detriment to the company. I do not consider that the matters relied upon by ASIC establish to the requisite standard that "but for" the Performance Milestones, Authenticate BV would not have entered into the integration agreements with Corp Destination, Fcorp and IMMO.

605 In this respect it is at least of some significance that there are no business records or admissions to support ASIC's case, or ASIC's submission that "the purpose and effect" of the integration agreements "was to bring in high volumes of very low margin revenue, with very little benefit to the company in terms of profitably or sustainable growth". By contrast, and as Mr Karantzis submits, there is a volume of material that is consistent with his claim that the integration

agreements had an ordinary business purpose. That is, that Authenticate BV entered into the integration agreements with Corp Destination, Fcorp and IMMO to build the iSignthis business and make it profitable.

606 In this regard I accept Mr Karantzis' submission that Authenticate BV's substantive role was to provide each of Corp Destination, Fcorp and IMMO with a secure cloud environment to PCI DSS requirements. This required it to establish and configure a secure cloud environment consistent with the PCI DSS and ISO27001 requirements, acquire a licence of off-the-shelf trading software on behalf of the customer, deploy the off-the-shelf trading software to the cloud environment, modify the data input and outputs to accept and transmit data to the trading software, test and put it into production with data shared between the Paydentity™ platform and the trading platform.

607 It is apparent, by reference to contemporaneous documents including email exchanges between Mr Karantzis and his brother that an objective of these capital projects (if not the objective) was "to get the transactional revenue flowing". Mr Karantzis described them as "a service to activate these guys to get OPEX" (that being the operational expenditure of the customers). The thinking, explained in the company's FY2018 Annual Report, was that they would "enable long term, consistent revenues" through the core services and create "a stickier relationship with [the] merchant".

608 The FY2018 Annual Report also noted that these capital projects had the benefit of creating a "shorter integration cycle". By directly enabling platform software provided by third parties with the iSignthis services, the company considered that it could reduce the time involved that would normally be required if the merchant purchased the platform licence directly from the provider, integrated it to their own systems, and then integrated with iSignthis.

609 Mr Karantzis advances a number of matters in answer to ASIC's case that there was no reasonable explanation for the conduct of the business in entering into the integration agreements. These include:

(a) iSignthis' need to become cash flow positive;

(b) the importance of developing a knowledge base to enable faster integrations in the future;

(c) the fact that significant revenue was earned after 31 December 2018;

(d) the commercial context in which the integration contracts arose and their purpose in bringing forward operational revenue from GPTV more quickly; and

(e) the proper basis for the structuring of the fees on the service contracts.

Taken together, these matters form the basis for my conclusion that ASIC has not proven to the requisite standard that Mr Karantzis' "actuating motive" in having iSignthis alter the integration agreements was to achieve the Performance Milestones.

610 I deal with the substance of these matters sequentially below.

(a) iSignthis' cash flow positive commercial goal

611 Mr Hart's unequivocal and entirely believable evidence was that the company's primary objective was always to become cash flow positive. To do this, he said, iSignthis had to be able to onboard customers as quickly as possible. Mr Minehane's evidence, which I also accept, was that iSignthis was looking for ways to integrate clients better at this time, so that they would use its services and the company would continue to see an increase in revenues.

612 Thus, it is apparent that from late 2017 to early 2018, iSignthis worked to integrate its platforms into popular third-party trading platforms. The company did so at its own risk in anticipation of securing new customers. At the time, as Mr Hart explained and I accept, iSignthis saw an opportunity to capitalise on "the frenzy surrounding bitcoin and the need for its potential customers to have a payment option integrated with their choice" of third-party trading platform. The company realised that some of its customers did not have the skill set to do the necessary onboarding, and so as a start-up iSignthis developed a means to get to the market faster and, as Mr Hart explained, made a small margin in doing so.

613 Mr Minehane's evidence was to similar effect: that iSignthis was trying to develop ways to bring forward clients and customers so that the customers were "more sticky" to the iSignthis platforms and would continue to use the company's services.

614 As has been mentioned, the evidence of Mr Hart and Mr Minehane, which I do not consider to have been effectively challenged by ASIC, is corroborated by the emails which Mr Karantzis himself sent in May 2018 and Mr Richards sent in June 2018. When discussing the potential business opportunity with Rodeler, Mr Karantzis said to his brother and Mr Richards "[o]ur end game isn't capital projects, but to get the transactional revenue flowing." Later that month Mr Karantzis described the purpose of the integration for Fcorp as "… a service to activate these guys to get OPEX", that is to say, the revenue derived from GPTV. Similarly, on 6 June

2018, when describing the arrangements with Corp Destination and Fcorp to Authenticate BV's accountants in the Netherlands (Hoogeveen Partners) Mr Karantzis wrote that the "revenue relates to the purchase of a CRM system (functional platform for FX trading etc) that requires iSignthis to configure and integrate to the merchant so that we can provide our core services)."

615 As iSignthis explained to the ASX in its 15 November 2019 letter, it was in a position to undertake the requisite work to integrate its platforms into the third-party trading platforms, but its customers lacked the necessary personnel and know how to deploy the third-party trading platforms. iSignthis therefore offered to deploy the cloud-based environment, install the third-party trading platform (which was to be licensed in each customer's name), and integrate the trading platform to the ISXPay® and Paydentity™ platforms which it owned and operated.

616 iSignthis' emphasis on creating positive cash flow by bringing forward clients and customers and keeping them on the company's platforms is a feature of the company's reporting at the time. In its FY2018 Annual Report iSignthis noted that key operational staff continued to build a pipeline of new business opportunities and "integration of existing customers to enable processing of transactions and generating revenues." iSignthis' report to shareholders dated 31 July 2018 and its FY2018 Annual Report noted that:

> The Company … created market opportunities to explore and generate new revenue streams in the quarter ending 30 June 2018. These new revenue streams involving eMoney accounts and direct service integration on behalf of existing and new merchants and other forms of settlement and payment services to merchants operating in high risk industries will provide the following benefits:
>
> …
>
> - Additional one off revenues to new merchants enabling direct connection to our core services. These revenues are at low margin and have a direct correlation with an increase in cost of goods sold but they will enable long term, consistent revenues via our core services and creates a stickier relationship with the merchant.
> - A shorter integration cycle. By directly enabling platform software provided by third parties with the ISX services, the Company is able to reduce the time involved that would normally be the case if the merchant purchased the platform licence directly from the provider, integrated to their own systems and then integrated with ISX.

617 Similarly, in the Analyst Brief released on 3 August 2018, iSignthis explained the business purpose of these initiatives as follows:

> The Company provides an integration service to some contracted clients. These integration services relate to the CRM platforms that our clients required in order for

volume to flow between the Consumer the Merchant and iSignthis.

The service is offered **in order to bring forward revenue** with our merchants, as their internal resources would need to be diverted in order to connect, where we have capacity to do this from them. While this is a lower margin revenue item than other product offerings it does allow for higher margin products to commence operation sooner.

(Emphasis added.)

(b) The knowledge gained was subsequently applied for faster integrations

618 I accept Mr Hart's evidence that another aspect of the legitimate business purpose reflected in the integration agreements was that iSignthis learned from these integrations and applied that knowledge to integrate other customers faster. Mr Minehane gave evidence to similar effect, which I accept, that by going through the process in the first half of 2018 iSignthis gained experience which was able to be used to undertake subsequent integrations more quickly. Much the same message is communication in iSignthis' letter to the ASX of 15 November 2019. iSignthis recorded that by integrating the Paydentity™ platform with the third-party platforms, the company (through its subsidiaries) gained valuable knowledge that it was able to deploy for subsequent customers who elected to use the same or similar third-party platforms. iSignthis explained that the knowledge enabled it to bring on new customers who were using, or wanting to use, the same or similar third-party platforms much faster than would otherwise have been possible.

(c) Revenue earned in each 6-month period after 21 December 2018

619 Inasmuch as it is a part of ASIC's case that the integration agreements were entered into for an improper purpose because iSignthis' revenue subsequently declined in the second half of calendar year 2018 and that iSignthis did not record any revenue from the platforms supplied to IMMO, I am not satisfied that this is correct. While it appears to be the case that iSignthis and its subsidiaries encountered four obstacles in the second half of 2018, it would also seem that when they were overcome, revenue grew in FY2019 and continued to do so. In its Annual Report for FY2019 iSignthis recorded that "[i]n FY2018 the Group performed a number of significant integration and set up projects, which formed the foundations for ongoing transactional revenue during FY19."

620 Insofar as these obstacles are concerned, Mr Hart's evidence was that in the second half of 2018 iSignthis experienced a decline in revenue for the following reasons. First, the company was notified by the NAB that it was ceasing to process merchants classified under Merchant Category Code (**MCC**) 6211, which included CFD, FX and securities merchants. At the time,

the NAB was the regulated financial institution for clearing and settling the Australian card transactions of iSignthis' subsidiary, Authenticate Pty Ltd. iSignthis had apparently implemented a strategy to attract and retain merchants in this category. In the interim, Authenticate Pty Ltd was unable to process any transaction types "MCC 6211" and "MCC 6051", which had a corresponding negative impact on revenue.

621 Secondly, it was Mr Hart's evidence that on 3 September 2018 iSignthis told the market that a technical issue due to changes in Apple's policy of protecting user privacy and ensuring compliance with the EU's new privacy regulations had been restricting transaction volumes to below contracted GPTV merchant maximums. The company said that it had found a solution and was ramping up transaction volumes and revenue flows.

622 It was Mr Hart's evidence that having resolved the technical issue with Apple, iSignthis and iSeM were then confronted with a third issue. At the time iSeM was using KAB as part of its clearing and processing network, including for holding iSeM's and its customers' funds in electronic money accounts. KAB was a bank licensed by the government of Denmark upon which iSeM relied to process transactions. On about 18 September 2018, KAB was taken over by the Danish government and iSeM no longer had access to accounts at KAB in which it could receive deposits. iSeM therefore could not receive settlements from card schemes and Worldline.

623 Mr Hart explained that on 26 September 2018, iSignthis told the market about the developments concerning KAB and said that it would have a "significant impact on short term revenues". iSignthis also said that this issue demonstrated that it was paramount, and therefore the main priority, for it to conclude the implementation of its Tier 1 (direct) connections to central banks and card schemes as soon as possible.

624 It was also Mr Hart's evidence that later in 2018 iSignthis moved past these obstacles. Significantly, in October 2018 iSignthis completed the establishment of its direct "Tier 1" capabilities so that it no longer had to rely on third party banking connections and infrastructure. On 18 October 2018, iSignthis announced that the JCB card acquiring service was operationally live on the Tier 1 connection. And on 31 October 2018 iSignthis told the market that testing of iSeM's deposit taking facilities and software systems had been completed and that from 4 December 2018 it could accept deposits as a monetary financial institution.

625 In cross-examination Mr Hart explained that Apple "caused issues in processing revenue from customers in general", and although that was resolved by 3 September 2018, by then iSignthis had the KAB issue. It would seem that there were "a series of issues" which rolled into each other that restricted the company's "ability to process revenue from any customers". Insofar as the NAB was concerned, Mr Hart said that they did not simply stop processing particular transaction types on one day, it was a process which occurred over a period of time in the second half of calendar year 2018, up to April 2019. Mr Hart also explained that the Worldline issue limited processing because some clients were not redirected through the workaround option as it was difficult, complex and expensive.

626 Mr Karantzis submits, by reference to Mr Hart's evidence, that the obstacles in the second half of 2018 caused a temporary decline in iSignthis' consolidated revenue. The accounting evidence would seem to establish, however, that once iSignthis' subsidiaries overcame those obstacles, the revenue earned in each six-month period after 31 December 2018 was significantly greater than the revenue earned in the six-month period to 30 June 2018. In the six months to 30 June 2018, reported revenue was $5,512,057. In the six months to 31 December 2018 it was $1,111,356. In the six months to 30 June 2019 it was $7,823,470. And in the six months to 31 December 2019 it was $23,017,827. In 2020 the reported revenues were $19,974,925 and $17,334,870, respectively.

627 Mr Karantzis submits, by reference to Mr Hart's evidence, that on 28 August 2019, iSignthis told the market that in the second quarter of 2019 (April to June 2019) it became EBIT positive and that it maintained its EBIT guidance for "FY2019 of $10.7m". On 9 September 2019, iSignthis told the market that as at 31 August 2019, annualised monthly GPTV exceeded $1.1 billion (up 160% from 30 June 2019). On 1 October 2019, iSignthis told the market that as at 30 September 2019, annualised monthly GPTV exceeded $1.9 billion (up 360% from 30 June 2019).

628 Mr Karantzis also submits, relying on Ms Warrell's evidence, that in FY2019, iSignthis' consolidated revenue was $30,841,297, which was an increase of about 400% from $6.1 million in the previous financial year ended 31 December 2018. On 28 February 2020, iSignthis announced a maiden profit following its first year of operations as a regulated monetary financial institution operating its own Tier 1 network. iSignthis said, among other things, that for the year ended 31 December 2019 there had been strong growth in GPTV from $880 million to approximately $2 billion on an annualised run rate at quarter four.

629 Moreover, Mr Karantzis submits, again by reference to Ms Warrell's evidence, that during FY2019 the platforms supplied to Fcorp and IMMO resulted in iSeM processing $43,851,845 million GPTV between these platforms and receiving combined revenue of $1,057,068. This, Mr Karantzis submits, is inconsistent with ASIC's submission that "the purpose and effect" of the integration agreements "was to bring in high volumes of very low margin revenue, with very little benefit to the company in terms of profitability or sustainable growth".

630 Mr Hart's further evidence in this respect is that:

> … We could not have processed that amount of revenue had not we integrated FCorp and IMMO onto our system... So there's a direct relationship to the original contracts and the integration work that we did to nail that GPTV to be processed.

631 Insofar as it remains a part of ASIC's case that in 2019 iSignthis did not record any revenue from IMMO, Mr Karantzis submits, by reference to Mr Hart's evidence, that while this is literally correct it fails to mention that Bitconvert executed a written agreement for the provision of payment facilitation and identity services in respect of the platform supplied to IMMO which resulted in iSeM earning revenue of $1,000,066. Mr Karantzis notes that in cross-examination Ms Warrell confirmed that this revenue was generated from Bitconvert using the trading platform that had been supplied to IMMO. Further, Mr Karantzis submits, ASIC's submission is inconsistent with the evidence in iSignthis' letter to the ASX of 15 November 2019 that Fcorp and IMMO's successors had become "large customers, processing over AUD $35 million (unaudited) GPTV collectively to date in calendar year 2019." Mr Karantzis says that ASIC's submission also fails to mention Ms Warrell's evidence that in FY2020 iSignthis reported total revenue and other income of $37,309,795. This was an increase of 21 per cent from FY2019.

632 In all the circumstances, therefore, I accept Mr Karantzis' submission that it would not be correct to conclude that the integration arrangements were entered into for an improper purpose because iSignthis' revenue declined in the second half of calendar year 2018 and that the platforms supplied to IMMO did not produce revenue. The position appears to be more nuanced, and it is apparent that after the problems that plagued the second half of 2018 were resolved, revenue grew rapidly and continued to do so.

633 It would also seem that substantial processing took place on platforms supplied to Fcorp and IMMO, resulting in significant revenue to iSignthis. I accept Mr Hart's evidence that revenue of this order could not have been processed had the company not integrated FCorp and IMMO

into its system, and that in this sense there may be said to be a direct relationship to the original contracts and the integration work that was done to enable the processing of that GPTV.

(d) iSignthis' commercial and revenue purpose in entering the integration contracts

634 In support of his case that the integration contracts had a conventional and legitimate business purpose, Mr Karantzis also addresses detailed submissions describing the background to these various contracts which, he says, points to the conventional business purpose of them. The essence of his point is that the integration agreements with Corp Destination, Fcorp and IMMO arose in a commercial context and were executed to bring forward operational revenue from GPTV faster. Senior counsel for Mr Karantzis submitted in closing that the detail of these arrangements is described in Mr Karantzis' closing written submissions not so much for the court to make findings as to the particular events as they unfolded, but to demonstrate the conventional business purpose of the agreements by reference to the narrative of events.

635 Mr Karantzis says that the commercial opportunity with Corp Destination and Fcorp was initially only for the provision of payment and identity processing services by Authenticate Pty Ltd and iSeM respectively, and in the case of Fcorp the provision of an electronic money account. It is said that the commercial opportunity for Authenticate BV to procure and integrate third party platforms for Corp Destination and Fcorp only arose after those customers had signed agreements with Authenticate Pty Ltd and iSeM for the payment and identity processing services, and that the commercial opportunity for Authenticate BV to procure and integrate two third party platforms for IMMO arose in the context of the work which was already being performed for Corp Destination and Fcorp. These three commercial opportunities, Mr Karantzis submits, all arose shortly after Authenticate Pty Ltd had completed integration services for OT Markets.

636 Mr Karantzis submits that he did not initiate the communications with Corp Destination, Fcorp or IMMO, introduce them to iSignthis or any of its subsidiaries, or negotiate the terms of the integration agreements with them. He says that he was not responsible for the requisite due diligence in relation to these customers and that this was the domain of specialist onboarding and AML employees located in the Cyprus office.

637 In circumstances where I have found that ASIC has not been able to prove to the requisite standard that iSignthis did not have a conventional and legitimate business purpose for entering into the integration contracts, it may strictly be unnecessary to descend into the detail of these various arrangements, what Mr Karantzis has described as the missed opportunity relating to

Rodeler, and the raising of the June 2018 invoices. Nonetheless, I accept that the following matters are generally supportive of Mr Karantzis' case that the integration contracts had a legitimate business purpose in the terms in which they were entered and thus that it cannot readily be said that, "but for" the allegedly improper purpose of achieving the Performance Milestones, they would not have been entered into. For completeness I deal with these various arrangements below.

OT Markets

638 Contrary to ASIC's suggestion in the cross-examination of Mr Hart, as early as February 2018 iSignthis had charged a large upfront fee for procuring and integrating a third-party (Panda) platform for one of its new customers. In December 2017 iSignthis completed the acquisition and integration of its services to OT Markets. To provide those services the agreement dated 27 October 2017 between Authenticate Pty Ltd and OT Markets (**OT Markets Agreement**) was varied by letter dated 7 December 2017 (**OT Variation**). The terms of the OT Variation required OT Markets to pay a fixed upfront fee of $106,000 plus GST as well as an ongoing license fee which was 7% of the "OT Capital Revenue" plus the unit rates provided in the OT Markets Agreement.

639 By 7 March 2018 the Panda platform, one type of third-party CRM system, had been integrated to Paydentity™ & ISXPay®.

Corp Destination

640 On 10 April 2018, Authenticate Pty Ltd presented its commercial offer to Corp Destination for the provision of an enhanced payment gateway with an anti-money laundering KYC identity option and payment facility. Commercial negotiations in relation to the terms of that offer continued for about two weeks between Mr Karantzis' brother Andrew, the Sales and Marketing Operations Director in Cyprus, and Mr Gilad Shalem of Invertitech, a company providing services, including administrative services, which companies could outsource, on behalf of Corp Destination. Those negotiations concluded on 23 April 2018 when Mr Shalem returned the following documents signed on behalf of Corp Destination:

(a) agreement entitled "Enhanced Payment Gateway with AML KYC Identity Option & Payment Facilitation" dated 17 April 2018 (Payment and Identity Services Agreement);

(b) merchant agreement in respect of the payment facility; and

(c) standard terms and conditions for the provision of identity services.

Communications concerning Corp Destination appear then to have been handed over to Ms Viera Mylonas in the Cyprus office, who was responsible for undertaking due diligence in relation to new customers, and Ms Maria Theodorou, also in the Cyprus office, who was responsible for the onboarding process.

641 On about 3 May 2018, while due diligence in relation to the Payment and Identity Services Agreement was still progressing, negotiations began with Invertitech about the procurement of a third-party CRM system and trading platform for Corp Destination as well as project management of the procurement and integration. Mr Karantzis submits that the next day he told his brother Andrew that he was inclined to use the AS2124/25 fee schedule for project management, being between 7.5% and 9.5% of the cost. He says that he calculated a proposed amount of €312,503 by adding 7.5% to the anticipated licence fee of €290,700. Mr Karantzis asked his brother to confirm a number of matters, including the anticipated licence fee, whether "Corp Destination will pay 7.5% PM fees", whether the Cyprus office has "the ability with Jorge away for Dom to project manage this" and the "delivery date".

642 On 7 May 2018 Mr Karantzis sent his brother a draft letter to vary the Payment and Identity Services Agreement. The draft letter provided for a total payment of €312,503, with 85% payable on commencement, 10% on integration and 5% on the service live date. That proposed variation was not accepted by Corp Destination as the invoice rendered and paid for the variation was only €183,025, as recorded in a document (the **Corp Destination Variation**) which was re-sent on 7 June 2018 for signing.

643 On 10 May 2018, Mr Karantzis' brother told him about Fino Software Technologies Limited (**Fino**), a company "doing Panda Integrations", and sent Mr Karantzis an image of Fino's Certificate of Incorporation. Mr Karantzis said that it looked good and asked his brother to obtain a quote for a platform "per 'Corp Destination' Specification". Later in the day, as part of the due diligence process, the AML Regulated Merchants Form and PCI DSS certificate signed on behalf of Corp Destination were received by the Cyprus office.

644 Three days later, on 13 May 2018, Mr Karantzis sent his brother two draft integration agreements in relation to the provision of an integrated CRM system and trading platform for Corp Destination. The draft service agreement between Corp Destination and Authenticate BV was for a total amount of €343,500 (excluding VAT), and the draft service agreement between Authenticate Pty Ltd and Fino was for a total amount of €313,500 (excluding VAT).

645 On 15 May 2018 Mr Karantzis also sent his brother revised documents for the provision of a third-party CRM system and trading platform to Corp Destination. The drafts were said to be consistent with VAT advice. The service agreement dated 15 May 2018 between Corp Destination and Authenticate BV was for a total amount of €343,500 (excluding VAT) (**Corp Destination Service Agreement**) and the service agreement dated 15 May 2018 between Authenticate BV and Fino was for a total amount of €313,500 (excluding VAT).

646 The Corp Destination Service Agreement, signed by Constantin Bardeanu on behalf of Corp Destination, was expressed to be effective from 15 May 2018, as was the signed services agreement with Fino. Relevantly, as will be seen, Corp Destination subsequently confirmed that the services were completed by 30 June 2018.

647 On 23 May 2018 an invoice for €475,000 was raised on behalf of Authenticate BV and sent to Corp Destination, being 85% of €345,500 (the first progress payment under the Corp Destination Service Agreement) plus €183,025 for the Corp Destination Variation.

Fcorp

648 On 25 April 2018, Fcorp enquired about opening a merchant electronic payment service with iSeM. Later that day iSeM presented its offer which included a Merchant eMoney Payment Service Commercial Agreement dated 25 April 2018 as well as a Merchant Application Form (**MAF**) and a board resolution which needed to be completed. The following day iSeM told Invertitech (which was also representing Fcorp) the due diligence requirements for the onboarding of Fcorp and Invertitech said that its onboarding team would attend to the required documents.

649 On 8 May 2018, Fcorp told iSeM that it provided trading accounts to clients to trade in financial markets and processed €500,000 per month. That day, Invertitech provided to iSeM the following documents signed on behalf of Fcorp:

(a) MAF;

(b) Merchant eMoney Payment Service Commercial Agreement dated 25 April 2018 (**eMoney Payment Agreement**);

(c) board resolution;

(d) Payment Card Industry Data Security Standard certificate;

(e) AML form; and

(f) eMoney terms and conditions.

Mr Karantzis sent an internal email that evening which said "We have just received our first eMoney Merchant Agreement. I will sign tomorrow. Please carefully review what we can and cant [sic] do per the terms, as this represents risk but also 100bps."

650 The next day iSeM sent Fcorp an executed copy of the eMoney Payment Agreement.

651 On 10 May 2018 iSeM sought further documents from Fcorp, for the purposes of completing the requisite due diligence for the opening of the electronic money account. These were subsequently provided.

652 In anticipation of an agreement between Authenticate BV and Fcorp for the provision of a third-party platform, at about 4:25pm on 29 May 2018 (Melbourne time), Mr Karantzis asked Mr Shahbenderian to raise an invoice from Authenticate BV to Fcorp for "the amount of 50% of EUROS478,500 per Contract dated 30 May 2018" (not an amount of €478,500, as ASIC submitted in its opening submissions).

653 Mr Shahbenderian prepared an invoice dated 30 May 2018 from Authenticate BV to Fcorp for an amount of €239,500, being 50% of fees due within 7 days of execution.

654 Mr Richards sent an email to Mr Karantzis in relation to these invoices. After Mr Richards had read and considered Mr Karantzis' response, Mr Richards formed the view that the issue of revenue recognition would ultimately be a matter for the auditors to be satisfied about. Mr Richards said as much to Mr Karantzis in his subsequent emails, and suggested that they start collating the documents in anticipation of the audit which would be performed by Grant Thornton.

655 As has been mentioned, during this email exchange Mr Karantzis told Mr Richards that the object of the exercise was to activate OPEX from Fcorp, Authenticate BV would be making a €36,000 profit (referring to the difference between €478,500 and €442,000), and that Fcorp "will be an ongoing customer". These statements, it may be accepted, are significant having regard to ASIC's case. First, as will be apparent, Mr Karantzis was right that Fcorp would be an ongoing customer. Secondly, Mr Karantzis' suggestion "to get OPEX" is consistent with his explanation to his brother in relation to Rodeler ("… end game isn't capital projects, but to get the transactional revenue flowing"), and was not focused on achieving the Performance Milestones. Thirdly, a margin of 36,000 is 8.1% of the cost, which is within the range of 7.5% and 9.5% of the cost that Mr Karantzis initially considered for Corp Destination based on the

AS2124/25 fee schedule for project management. Fourthly, the statement is not consistent with ASIC's submission that "the purpose and effect" of the integration agreements "was to bring in high volumes of very low margin revenue, with very little benefit to the company in terms of profitably or sustainable growth".

656 The agreement between Authenticate BV and Fcorp, signed by Olga Turkuli on behalf of Fcorp (**Fcorp Services Agreement**) was expressed to be effective from 30 May 2018 as was the services agreement between Authenticate BV and Fino.

657 iSignthis submits that, contrary to ASIC's assertion in its written opening, the Fcorp Services Agreement had a total commitment of €478,500 (not €433,900, which would have been less than the amount of €442,000 that Authenticate BV was to pay Fino), although each of the items did not add up to that total commitment. Relevantly, as will become apparent, Fcorp subsequently confirmed that the services were completed by 30 June 2018.

IMMO

658 Insofar as the contract with IMMO is concerned, at about 7:38am on 5 June 2018, Mr Karantzis' brother sent him an email which attached three documents in relation to IMMO. Mr Andrew Karantzis said:

> Another company we are going to process for, that need set up with FinoSoft.
>
> I need an agreement for 450K € and another € 450 Margins will be pretty slim on this one, as they have a couple of brands that need to be integrated.

659 About five minutes later Mr Karantzis himself responded:

> This makes no sense
>
> I need an agreement for 450K € and another € 450 Margins
>
> Try again

660 It seems reasonable to accept, as Mr Karantzis submits, that his email response implies that he had no prior knowledge about IMMO or the agreement with IMMO proposed by his brother.

661 Then, at 3:37pm that same day, Mr Karantzis sent his brother two draft integration agreements in relation to the provision of two third party CRM systems and trading platforms for IMMO. Once again, it seems reasonable to accept that this email shows that Mr Karantzis was not concerned whether IMMO paid "50 or 75% upfront" or whether it paid for either of the platforms or both, designated as "Brand A" and "Brand B". It may be accepted that if his "actuating motive" for Authenticate BV entering into the integration agreements was to achieve

the Performance Milestones, Mr Karantzis would not have been so unconcerned about the payment terms. Rather, as Mr Karantzis submits, he would have been more likely to insist that IMMO pay "75% upfront" and that they do so for both platforms.

662 The first draft agreement between Authenticate BV and IMMO was dated 6 June 2018 and had an overall commitment of €900,000, being €450,000 for each of the two platforms (**IMMO Agreement**). The second draft agreement between Authenticate BV and Fino was also dated 6 June 2018 and had an overall commitment of €884,000, being €442,000 for each of the two platforms. The second draft agreement did not proceed because Authenticate BV entered into a services agreement with GibiTech Ltd, expressed to be effective from 7 June 2018, for the same total amount of €884,000. Notably, the IMMO Agreement only required 50% of the fees to be paid upfront, not 75%.

663 At about 3:41pm on 5 June 2018, Mr Andrew Karantzis sent the IMMO Agreement to Invertitech. Shortly thereafter, he sent Invertitech a copy of four invoices raised by Mr Richards on behalf of Authenticate BV, which Mr Andrew Karantzis had earlier discussed with Mr Itay Kapiloto of Invertitech. Mr Karantzis submits that contrary to ASIC's submission in opening (that the invoice was rendered "on the basis that the services had already been provided"), the invoices were in fact (like Corp Destination and Fcorp) "due within 7 days of execution." Relevantly, as will be seen, IMMO subsequently confirmed that the services were completed by 30 June 2018.

664 Later that night, at about 10:14pm, Mr Karantzis sent an email to his brother in relation to the establishment of an electronic money account for IMMO. Attached to the email was a document entitled "E-Money Account (**EMA**) for Client Payment Services Commercial Agreement incorporating Client Terms and Conditions V1.1" dated 6 June 2018 (**IMMO EMA Agreement**).

665 Between 5 June 2018 and 12 June 2018, iSeM requested and received documents from Invertitech on behalf of IMMO for the purposes of completing the requisite due diligence for opening an EMA.

666 On the evening of 13 June 2018, Mr Andrew Karantzis sent Mr Karantzis a copy of the IMMO EMA Agreement which had been signed on behalf of IMMO. Mr Karantzis asked the Cyprus office to give him an update in relation to the due diligence for IMMO before he signed the

IMMO EMA Agreement on behalf of iSeM. He was told that iSeM was still waiting for documents which Invertitech was in the process of collecting.

667 Between 13 June 2018 and 19 June 2018, iSeM corresponded with and received documents from Invertitech on behalf of IMMO for the purpose of the due diligence.

Rodeler Limited: a missed commercial opportunity

668 Also relevant to the subject of integration contracts is that on about 11 May 2018 another commercial opportunity appears to have been presented to Mr Karantzis by his brother. This was to provide an integrated third-party CRM system and trading platform to Rodeler, working with **BitTech** Advanced Technologies Ltd, instead of Fino. Mr Karantzis sent an email to his brother which said:

> Ive looked at the Supplier Agreement – Bittech – no issues, minor markups as marked
>
> Ive then based our contract to Rodeler as mutatis mutandis on the BitTech agreement, with same terms, and a small markup.
>
> Ive put a small markup on thus – but the driver for this one is to get 24 to commit $$ upfront, and that way we then drive the schedule, as there is some skin in the game.
>
> Our end game isn't capital projects, but to get the transactional revenue flowing.

669 The draft service agreement with Rodeler, which Mr Karantzis amended, was for a total amount of €356,400 (excluding VAT). The draft service agreement with BitTech was for €343,500 (excluding VAT).

670 In the end the commercial opportunity with Rodeler did not proceed. However, it is to be noted that the proposed fee structure in these draft agreements was similar to the integration agreements which Authenticate BV entered into with each of Corp Destination, Fcorp and IMMO. It is also to be noted that the email records what Mr Karantzis submits was the real reason for undertaking these capital projects and charging large upfront fees: that is, that a large upfront capital expense would effectively commit the customer to using iSignthis' integrated payment and identity verification technology (known as Paydentity™ and ISXPay®), which would "get the transactional revenue flowing". As Mr Karantzis put it at this time: "get 24 to commit $$ upfront … as there is some skin in the game". It may be accepted that this evidence runs counter to ASIC's submission that "the purpose and effect" of the integration agreements was to bring in high volumes of low margin revenue in a way that had little benefit to iSignthis' profit or sustainable growth.

The June invoices: Corp Destination, Fcorp and IMMO

671 In anticipation of the services for Corp Destination, Fcorp and IMMO going live "over the next few days/week", Mr Karantzis submits that on 18 June 2018 he asked Mr Shahbenderian to raise invoices on behalf of Authenticate BV to each of those customers.

672 Mr Shahbenderian prepared the draft invoices, which the following morning Mr Richards finalised and sent to Mr Karantzis. Mr Karantzis subsequently asked his brother to send them to the respective customers.

673 Mr Karantzis says that by 27 June 2018 a total of €652,000 across the three capital projects had been paid into Authenticate BV's bank account. It is to be noted that this amount is different to the margin between integration licence fees and outsourcing licence fees, a matter which is addressed below.

(e) An alternate fee structure for the service contracts?

674 In the context of his contention that there was a conventional and legitimate business purpose for the integration contracts, Mr Karantzis notes that during Mr Hart's second cross-examination ASIC advanced a further contention that the "appropriate" or "correct" way to structure the fees on the service contracts would have been to arrange for the software licence provider to charge the end customer directly. This, Mr Karantzis notes, is to be contrasted with ASIC's written opening submissions which focused on a suggestion that the service contracts were "very low margin" with no ongoing business benefit. In the second cross-examination of Mr Hart and in closing oral submissions, senior counsel for ASIC suggested that for at least some of these back-to-back-arrangements there was no margin charged or to be earnt by iSignthis on the external licence fee, such that there "was no business purpose for bringing within iSignthis' accounts … the external licence fee".

675 Mr Karantzis submits that this case is misconceived for several reasons.

676 First, Mr Karantzis notes that Mr Hart had already explained that the purpose of the agreements entered into with each of Corp Destination, Fcorp and IMMO was to integrate the three customers because they did not have the skill set to do it themselves, and that the company made a small margin. Mr Hart had explained that Authenticate BV, like a builder constructing a new house who engages the kitchen contractor separately, "built the integrated platform" and engaged the necessary third parties. Mr Karantzis submits that Mr Hart was not challenged on the size of the margin made by the company on the overall contract. Similarly, Mr Minehane

said that he was aware that they could not do all the integration work themselves and that there would be certain subcontractors as part of the process.

677 Secondly, Mr Karantzis submits that there is no evidence that the service contracts with Corp Destination, Fcorp and IMMO should have been structured any differently. He notes that ASIC did not call any industry expert to suggest that those contracts ought to have been structured so that the software licence provider charged the end customer directly. And in any event, Mr Karantzis submits that this would have been uncommercial, and contrary to the best interests of Authenticate BV as by so doing it would deprive itself of the ability to charge a margin on that component of the "package" supplied to the end customer.

678 Thirdly, Mr Karantzis submits that the cross-examination of Mr Hart on this issue was premised on only two of the three documents which comprised the commercial arrangement with Corp Destination. Mr Hart was taken to the €270,000 licence fee in two of the documents but not the Corp Destination Variation, which required Corp Destination to pay Authenticate BV an additional amount of €183,025. Mr Karantzis submits that additional standalone fee (it was not charged by the software licence provider to Authenticate BV) was invoiced by Authenticate BV and paid by Corp Destination. It was in respect of, among other things, the "Licence of Trading Platform software", setting up the "hosting environment" and "Project Management". When the amount of €183,025 is taken into account, Mr Karantzis says, it is apparent that Authenticate BV made a substantial margin on the external licence supplied to Corp Destination.

679 Fourthly, Mr Karantzis submits that Authenticate BV also made a margin on the external licence supplied to Fcorp and IMMO. The fee payable by Authenticate BV to Fino for the trading platform licence was €395,000 whereas Authenticate BV charged Fcorp €405,000 for the trading platform licence, which is a margin of 2.53%. Further, Mr Karantzis says, the fee payable by Authenticate BV to GibiTech Ltd for each of the two trading platform licences was €395,000 whereas Authenticate BV charged IMMO €421,000 for each of the two trading platform licences, which is a margin of 6.58%.

680 Fifthly, Mr Karantzis submits, the implied suggestion that Authenticate BV should have arranged for each of Authenticate BV's three customers to have contracted directly with the third-party licence provider as removed from commercial reality. As Mr Hart explained:

> We were trying to integrate the clients faster, because our clients didn't have all the skills – some of the skills that we had. So just them buying software was not making

> this happen so they could continue to trade with us and have the capability of integrating with our systems. So we wanted to expediate that process by assisting them through – not only with the software, but also with the integration component and the project management of that.

681 As has been mentioned, Mr Hart denied that (as far as he was aware) Mr Karantzis was personally focussed on hitting all three performance hurdles by 30 June 2018. Mr Hart said that Mr Karantzis was taking steps to maximise revenue but not for the purpose of achieving the performance shares. Further, Mr Hart said, "we were a project manager, managing an integration for a client, and part of that is we had to purchase a licence which we then … with our fee, and with the work we did, on-charge[d] the client". It was "the whole package". Mr Hart's evidence was that while it could have been done differently it would have been slower, and that integrating "as a whole package" meant the "job's done holistically, faster and better".

682 Mr Karantzis' submissions in relation to all of these matters, supported in the main by contemporaneous documents, provide a formidable barrier to ASIC's case that the integration agreements were for reasons other than simply meeting the Performance Milestone revenue targets.

The Northwood/Moore emails

683 Turning then from Mr Karantzis' legitimate business purpose defence, a further aspect of Mr Karantzis' defence to ASIC's s 182 case concerns what was described as the "Northwood/Moore emails" and the fact that they "disappeared from ASIC's case". For clarity, these emails evidenced discussions between iSignthis and certain external advisors, Mr Chris Northwood and Mr Hamish Moore of Activ8 Capital, which made mention of the performance shares.

684 Mr Karantzis draws attention to the absence of these emails from ASIC's case in final submissions when, he says, they had been relied upon by ASIC in a misleading way in opening to suggest that a concern about meeting the Performance Milestones had motivated him to enter into the integration agreements. Mr Karantzis refers, in particular, to ASIC's contention in opening that by April 2018 "the company had not yet "quite hit all the hurdles", **in Northwood's words**" (emphasis added). It was then submitted that in "May 2018, **to again borrow Northwood's words**, Mr Karantzis was thinking about ways to get other revenue (upfront pmts … etc)" (emphasis added), so that in May 2018, he sent an email setting out the structure for a new agreement to integrate a customer, Corp Destination Pty Ltd, to the "Panda"

trading service platform. This, Mr Karantzis contends, was inappropriate because his email sent on 4 May 2018 made no mention of Mr Northwood's email or his suggestion about "thinking about ways to get other revenue (upfront pmts … etc)". Quite the contrary it is said: the references in that email to a project management fee of 7.5-9.5% and "Shame we didn't get paid for doing this before…" imply a conventional profit making motive for the suggested integration for Corp Destination Pty Ltd.

685 Mr Karantzis submits that if ASIC thought there was any connection at all between the Northwood/Moore emails and the integration agreements, then they ought to have been raised with Mr Hart in cross examination. Although Mr Karantzis concedes that Mr Hart was not a party to these emails, it is said that he was cross-examined on other documents to which he was not a party with a view to ASIC attempting to make out its case concerning the performance shares. Mr Karantzis notes that not only did Mr Hart give extensive evidence as to the true purpose of the integration agreements, he was involved in very early discussions with Mr Karantzis about this idea. It is submitted that if ASIC intended to persist with the assertion that there was any relationship between the suggestions in the Northwood/Moore emails and the integration work conducted in 2018, then those emails should have been put to Mr Hart.

686 In this context Mr Karantzis repeats certain observations which were made in opening on behalf of the defendants about the Northwood/Moore emails, as follows.

687 The first point is that the full email conversation on 27 February 2018 (with the key missing words emphasised) was in the following terms:

> Mr Northwood at 4:13pm:
>
> > …
> >
> > The Perf Shrs are always a big question we get and I think if we are on track to go really close, but not quite hit all the hurdles, we might want to consider ways to get the shareholders on board for extending or issuing other tranches, or even thinking about ways to get other revenue (upfront pmts – offering incentives for advance payments etc), **rather than the technical change in the y/e**.
> >
> > I think **it will be a bad look to use a y/e change to get them** - just doing my job as IR pointing that out.
> >
> > We are working hard to get investors and analysts on board. **We are starting to report real revenue and close to breaking the back of the hard yards you guys have done to get the market interested**.
> >
> > Worth discussing in more detail.
>
> Mr Karantzis at 4:16pm:

This is not driven by perf shares

It is driven by our regulator

Perf shares – lets see where we get to and we will deal with it/as when

Mr Northwood at 4:28pm:

I know. And yes, agree

Mr Moore at 4:36pm:

Be good if we can get a big upfront payment from a client that will get you there without any comment from anyone?

(Emphasis added.)

688 On their face, Mr Karantzis submits, the emails were about the change in iSignthis' end of financial year from 30 June to 31 December, which was to occur with ASIC's approval. Mr Hart's evidence was that iSignthis told the market about this change on 24 April 2018. Mr Karantzis submits that Mr Northwood appears to have developed an ill-informed idea that a change to a calendar year for each financial year would give more time to achieve revenue over a six month period. However, Mr Karantzis notes, the Performance Share entitlement arose if the relevant revenue was achieved "within three full financial years of Completion". Completion was 22 January 2015. Even if iSignthis changed to a calendar year for a financial year, it would report on a financial year basis to 30 June 2018. This, Mr Karantzis notes, would be "three full financial years" from Completion. Mr Karantzis says that for this reason Mr Northwood's apparent suggestion does not work. Mr Karantzis said expressly that the change in financial year was not driven by the Performance Milestones, it was "driven by our regulator". Mr Northwood replied to those comments "I know. And yes, agree."

689 Mr Karantzis says that contrary to ASIC's opening submissions, he did not adopt Mr Northwood's suggestion of upfront payments or even endorse the notion that it was worth considering. This, he says, is clear when Mr Karantzis' comment "[p]erf shares – lets see where we get to and we will deal with it/as when" is read in its proper context. Instead, Mr Karantzis submits, his response is indicative of someone who was relatively indifferent towards the achievement of the Performance Milestones. As he said in a later email to Mr Richards on 9 June 2018, the "performance shares will be whatever they are…". In fact, Mr Karantzis submits, the Northwood/Moore emails and his email to Mr Richards dated 9 June 2018 corroborated Mr Hart's oral evidence as to how Mr Karantzis viewed the performance share milestones in the first half of 2018. Mr Hart explicitly rejected the proposition that Mr Karantzis

was "personally focused on hitting the performance hurdle" or that he had a "particular interest".

690 Mr Karantzis also emphasises that at the relevant time Mr Northwood and Mr Moore were merely external advisers to iSignthis. From 1 January 2018 to 30 June 2018 Mr Northwood assisted iSignthis in managing its external communications with investors. He was not employed by the company or any of its subsidiaries. It is Mr Karantzis' position, therefore, that the Northwood/Moore emails should be understood as views expressed by outsiders, not by the company.

691 In my assessment nothing much turns on the substance of the Northwood/Moore emails. If it be relevant they do not seem to me to be supportive of an argument that Mr Karantzis had a concern about whether he would meet the Performance Milestones. If anything (and as Mr Karantzis submits) they may suggest relative indifference to achieving the Performance Milestones. On balance, however, I do not regard them as especially significant in the context of the other evidence about the reasons the integration agreements were entered into. Notwithstanding the submissions of both ASIC and Mr Karantzis on the *Jones v Dunkel* inferences that might be drawn by the fact that Mr Northwood was not called, in all the circumstances I rejected the proposition that any useful inference can be drawn.

Revenue recognition / FY2018 Audit

692 The final matter which underlies my conclusion that ASIC has not proven to the requisite standard that Mr Karantzis made an improper use of his position in relation to the performance shares and thereby breached s 182 of the Act concerns what Mr Karantzis identifies as the process by which revenue was recognised in the context of the FY2018 Audit.

693 In concluding his case in response to ASIC's allegations about the performance shares, Mr Karantzis returns to the focus of ASIC's pleaded case, which is that Mr Karantzis used his position "to ensure that iSignthis recognised" the "contracted-for fees" as revenue in the period prior to 30 June 2018; and that his reason for doing so was "to ensure that… iSignthis would achieve the one or more of the Performance Milestones". Mr Karantzis submits in this regard that although Mr Hart was a member of the Audit Committee, he was barely cross-examined in relation to these allegations.

694 To the extent that this aspect of ASIC's case is pressed, Mr Karantzis makes the following further submissions.

695 First, he says that there is no evidence that his "actuating motive" for asking Mr Shahbenderian and Mr Richards to raise invoices on behalf of Authenticate BV in respect of the integration agreements was to "ensure that" iSignthis would meet the Performance Milestones. Rather, Mr Karantzis submits, the evidence shows that when Authenticate BV entered into the agreements to provide services to each of Corp Destination, Fcorp and IMMO, it also entered into agreements to acquire services from third party platform providers known as Fino and GibiTech Ltd. As a director of Authenticate BV, Mr Karantzis submits that he had a duty to ensure that Authenticate BV raised the invoices so that the company could collect the revenue and be able to pay each of Fino and Gibitech Ltd.

696 Secondly, and in any event, Mr Karantzis submits that recognition of revenue in iSignthis' accounts for the financial year ended 30 June 2018 was a matter governed by Accounting Standards AASB 118 Revenue and AASB 111 Construction Contracts. This was subject to the control of iSignthis' auditors and iSignthis' Audit Committee, and not him.

697 Thirdly, Mr Karantzis submits (although there does not appear to be evidence about this one way or the other) that during the audit of iSignthis' accounts for the financial year ended 30 June 2018, he did not communicate with the auditors, Grant Thornton.

698 Fourthly, Mr Karantzis submits that he did not come up with the idea of obtaining an acknowledgement from the customers that the work was completed. Rather, Mr Niall McDonald of Grant Thornton sent an email to Mr Richards which said:

> … we have noted that each of the work in relation to each of these projects has been completed at 30 June 2018. In terms of evidence we could obtain in order to verify this, what sort of information are you able to provide? Ideally, we would be looking for evidence of some sort of acknowledgement from the customer that the work on the project has been completed.

699 Mr Karantzis submits (although again there does not appear to be evidence about this one way or the other) that Mr Richards subsequently informed him of the auditors' request for verification evidence. In response, Mr Karantzis says, he drafted the Certificates of Practical Completion and sent them to his brother in Cyprus. Mr Karantzis submits that he did not "instruct" Corp Destination, Fcorp and IMMO to sign the Certificates of Practical Completion. He says that he had no communication with them. Whatever be the position, it would seem that in due course each of the customers returned a completed and signed Certificate of Practical Completion, which Mr Richards then provided to the auditors.

700 Mr Karantzis submits that the evidence does not support ASIC's allegation that he "caused" iSignthis to report that all of the work under the integration agreements had been performed by 30 June 2018 and "took steps to ensure" that iSignthis recognised revenue under the integration agreements in the six months to 30 June 2018. Those assertions, he submits, fail to recognise the role of iSignthis' auditors (including in requesting the Certificates of Practical Completion) and the company's Audit Committee (which did not include him) in relation to iSignthis' FY2018 financial reports.

701 By reference to the relevant documentary evidence, Mr Karantzis submits that in 2018 Grant Thornton concentrated on revenue recognition as Accounting Standard AASB 15 was "steadily approaching". Mr Richards was the chief financial officer and company secretary of iSignthis and, according to Mr Hart (as one would expect), the Audit Committee was responsible for overseeing and supervising the company's audit processes and procedures. The iSignthis Audit Committee was comprised of Mr Minehane, who was the chairman of the committee, Mr Hart, Mr Barnaby Egerton-Warburton and Mr Richards. Mr Brad Taylor of Grant Thornton was the lead auditor. Leydin Freyer were iSignthis' bookkeepers.

702 Mr Karantzis submits, generally having regard to the relevant evidence, that during the audit of iSignthis' financial accounts for the year ended 30 June 2018 (**FY2018 Audit**):

(a) Mr Richards was responsible for communicating with, and providing information to, representatives of Grant Thornton, including Mr Taylor, Mr Brad Krafft and Mr Niall McDonald, on behalf of iSignthis.

(b) The auditors asked Mr Richards whether it was possible to obtain an acknowledgement from each of Corp Destination, Fcorp and IMMO that the work on the project had been completed.

(c) He did not instruct Corp Destination, Fcorp and IMMO to sign Certificates of Practical Completion, he had no communication with them and they did so of their own volition (although it is to be noted that it is not clear that there is evidence about this).

(d) On 23 August 2018 the iSignthis Audit Committee met with the auditors and Leydin Freyer to review the draft full year annual report and accounts for FY2018 and what the minutes referred to as the Auditor's Findings Report, but Mr Karantzis did not attend that meeting.

(e) Having met with the auditors on 23 August 2018, the Audit Committee recommended to the Board of iSignthis that the financial accounts for FY2018 should be finalised and signed off for lodgement with the ASX.

(f) On 29 August 2018, the Board's sub-committee, comprised of Mr Minehane and Mr Hart, approved the release of iSignthis' FY2018 financial accounts.

703 By reference to the relevant documentary evidence Mr Karantzis submits that in anticipation of the FY2018 Audit, on 12 July 2018 Mr Richards updated his "Capital Projects" spreadsheet, which he first prepared on 8 June 2018, and sent it to him and to his brother for them to review. He also asked them to confirm a number of matters, including the "[s]ervice deliverables as at 30 June" and "[g]o live / production dates".

704 Mr Karantzis notes his response, which was as follows:

> Todd
>
> - Corp Destination – platform ready, awaiting go live. Work completed.
> - Immo A (the Change, now live and trading)
> - Immo B (platform ready, awaiting branding)
> - FCorp – Hoch (live yesterday and trading, following platform changes)
>
> I make out that there is some EUROS 576k outstanding for work completed. AK advises that this is due circa month end or week after.
>
> Contracts – have many, not all. Im relying on the operating (Payment agreements) – as these are project agreements that enable the long term payment processing agreements. One leads to the other, as the projects are lead ins, not stand alone. Kind of hard to get contracts signed once work is done and payments are processing (the result of the project).

705 Mr Karantzis notes that the following day Mr Richards also sent his "Capital Projects" spreadsheet to Hoogeveen Partners and told them that "[a]ll merchants have been invoiced prior to 30 June and some of the COGS have been invoiced/paid". Further, in the period from 16 July 2018 to 20 July 2018, Mr Richards answered questions asked by, and provided information to, the auditors.

706 As has been mentioned, Mr Karantzis emphasises that on 23 July 2018 Mr McDonald of Grant Thornton noted that the work in relation to the projects had been completed by 30 June 2018 and said to Mr Richards that evidence to verify this would be required.

707 Mr Karantzis points to the fact that the following day, further emails passed between Mr Richards and Mr McDonald. In particular, at about 10:09am, Mr Richards said:

> The work has been completed on our side as at 30 June…
>
> This is evidenced to some extent by the fact that approximately 75% of the invoiced amount has been received.
>
> We will see what we can get from the merchant but these guys are generally not good on responding to requests and completing paperwork!

708 Mr Karantzis submits, by reference to the relevant documents, that on the morning of 25 July 2018 Mr Richards asked him whether they were able to obtain an acknowledgement from the customers that the work on the projects had been completed. That afternoon Mr Karantzis sent the email to his brother Andrew which attached unsigned Certificates of Practical Completion addressed to Authenticate BV from each of Fcorp and IMMO. Mr Karantzis said that the documents needed to be "completed and signed" and asked his brother to make sure that the person actually typed in their name and position. Two days later, on 27 July 2018, Mr Richards resent the unsigned Certificates of Practical Completion for each of Fcorp and IMMO to his brother and asked him for an update.

709 Mr Karantzis notes, again by reference to the relevant documents, that on 30 July 2018 Mr Richards received a copy of a Certificate of Practical Completion dated 25 July 2018, which was signed by a director of Fcorp, and sent it to Mr McDonald and Mr Krafft of Grant Thornton.

710 Mr Karantzis also notes, by reference to the documents, that on 1 August 2018, Mr Richards received a copy of a Certificate of Practical Completion dated 25 July 2018, which was signed by a director of IMMO. The next day Mr Richards sent the IMMO Certificate to Mr McDonald and Mr Krafft of Grant Thornton. The Certificate of Practical Completion signed by a director of Corp Destination was dated 14 August 2018. Mr Richards received it on 4 September 2018 and sent it to Mr McDonald the next morning.

711 Mr Karantzis notes also, by reference to the minutes of the meeting, that on 23 August 2018, Mr Richards, Mr Minehane, Mr Hart and Mr Egerton-Warburton attended the iSignthis Audit Committee meeting with Mr Taylor and Mr Krafft of Grant Thornton as well as Mr Watkins of Leydin Freyer (Mr Karantzis was not a member of the iSignthis Audit Committee and he did not attend the meeting). The main purpose of the Audit Committee meeting was to review iSignthis' draft full year annual report and accounts for FY2018.

712 Mr Karantzis submits, by reference to Mr Hart's evidence, that prior to the Audit Committee meeting Mr Hart had read the Audit Findings Report for FY2018 and noted that on page 5 the auditors had concluded that the revenue was not materially misstated.

713 Mr Karantzis submits also, by relevance to the minutes of the meeting, that during the Audit Committee meeting the Auditors' Findings Report was reviewed and it was noted that there were no significant findings. The Audit Committee discussed certain elements of the report, including revenue recognition and revenue. Mr Taylor and Mr Krafft of Grant Thornton explained that they had applied a greater focus on revenue recognition, given the new revenue streams and the increase in company revenue. They were satisfied the revenue was accurately recorded and that the revenue targets, which had been disclosed in the 2014 Prospectus, had been met. It was Mr Hart's evidence that in Mr Richard's absence, Mr Taylor told the Audit Committee that they had no matters of concern, there were no issues in relation to Mr Richards or the management team, and that they had been very co-operative throughout the FY2018 Audit.

714 Mr Karantzis submits, by reference to the documents, that revenue was a key audit matter in the Auditors' Findings Report. In respect of the existing Accounting Standards AASB 118 Revenue and AASB 111 Construction Contracts, the auditors concluded that "[r]evenue does not appear to be materially misstated". Insofar as the new Accounting Standard AASB 15 was concerned, the auditors concluded that "no material changes are deemed necessary for the adoption of the new revenue standard." The auditors were satisfied that customers were paying fees "based on the total commitment" in the agreements but rightly recommended that the schedules to the agreements be reviewed before execution to ensure that the terms are correct.

715 Mr Karantzis submits, again by reference to the minutes of the meeting, that the Audit Committee resolved to approve the full year report and recommend that the Board move to sign the required declaration. It was also resolved to recommend that the Board accept the management representation letter as provided and move to sign it as required.

716 Mr Karantzis submits that on 27 August 2018 Mr Richards received from Grant Thornton a copy of the management representation letter which was required to be signed. The email from Mr Krafft said that the "representations will largely be similar to the prior year letter". Later that morning the Board met and were advised by the chairman of the Audit Committee (Mr Minehane) that the committee had met, reviewed the accounts with the auditors and were able to recommend to the Board that the accounts should be finalised and signed off for lodgement

with the ASX as soon as remaining tasks were completed. The Board discussed and reviewed the draft Annual Report, with a particular focus on revenue and revenue recognition. It resolved that a sub-committee consisting of Mr Minehane and Mr Hart would undertake a final review of the draft Annual Report and financial accounts following any minor edits to the wording and once satisfied, and if any changes were immaterial, the sub-committee had approval to release iSignthis' FY2018 Annual Report and financial accounts to the ASX.

717 On 29 August 2018, the sub-committee met and approved the release of the accounts. Later that day ISX's audited Annual Report for FY2018 was released to the market.

718 Although aspects of Mr Karantzis' submissions in relation to his involvement in the process of revenue recognition in FY2018 might be regarded as little more than assertion on his part, the picture which emerges with tolerable clarity from the underlying documents is that the revenue recognition which occurred was an Audit Committee driven exercise, rather than a process controlled by Mr Karantzis. In this sense, therefore, I accept Mr Karantzis' submission that the revenue recognition which occurred in FY2018 is not something which supports ASIC's s 182 case against him.

Jones v Dunkel inferences against Mr Karantzis?

719 I note, finally, ASIC's submission that in circumstances where Mr Karantzis did not give evidence an inference is available to the effect that his evidence would not have assisted his case, and that the court may draw with greater confidence the inference that the back-to-back fee structure was designed to achieve high volumes of up-front revenue before 30 June 2018: *Morley* at 322 [634] (Full Court). That inference, ASIC contends, is already available and compelling on the evidence and no other inference explains the back-to-back fee structure. Mr Karantzis, ASIC submits, was the engineer of the back-to-back fee structure, was closely involved in relevant transactions and invoicing, and no reason has been given, including by Mr Hart, to explain his failure to give evidence: see, in this regard, *GetSwift* at [139] (Lee J).

720 At one level it may be accepted that a *Jones v Dunkel* inference is available to the effect that Mr Karantzis' evidence would not have assisted his case. Nonetheless, as Dixon CJ emphasised in *Jones v Dunkel* at 304-305, the facts which have been proved must give rise to a reasonable and definite inference, not merely to conflicting inferences of equal degree of probability so that the choice between them is a mere matter of conjecture. See also *Girlock (Sales) Pty Ltd v Hurrell* (1982) 149 CLR 155 at 161-162 (Stephen, Mason, Murphy, Aickin and Brennan JJ);

Trustees of the Property of Cummins (A Bankrupt) v Cummins (2006) 227 CLR 278 at [34] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

721 Relevantly also, in *Australian Broadcasting Corporation v Chau Chak Wing* (2019) 271 FCR 632 the Full Court observed at [134]:

> … In assessing a circumstantial case, it is important to bear in mind that the facts ultimately to be proven are those that are in issue, and not necessarily all the circumstantial facts themselves. As Dawson J observed in *Shepherd v The Queen (1990) 170 CLR 573 at p 580, "[T]he probative force of a mass of evidence may be* cumulative, making it pointless to consider the degree of probability of each item of evidence separately." This invites consideration of the combined weight of circumstantial facts, for it is the essence of a circumstantial case that the combined force of its components should be considered, and proof of some circumstantial facts may be affected by the court's assessment of other circumstantial facts: *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 at p 535 (Gibbs CJ and Mason J). Courts may fall into error by compartmentalising circumstantial facts, rather than standing back and assessing the broader picture. In *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at p 141 Tadgell JA observed that a true picture is to be derived from an accumulation of detail –
>
> > The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details: cf. *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944; *Shepherd v R* (1990) 170 CLR 573 at 579-80.

722 In the present circumstances, for the reasons I have explained, the combined weight of the circumstantial facts does not enable the drawing of an inference that Mr Karantzis designed the so-called back to back fee structure to achieve high volumes of upfront revenue before 30 June 2018 and thereby meet the Performance Milestones, notwithstanding Mr Karantzis' failure to give evidence.

723 For these reasons therefore I would not make a declaration that Mr Karantzis has breached his duties as a director in s 182 of the Act insofar as the achievement of the Performance Milestones is concerned.

Section 181: failure to discharge duties for a proper purpose

724 Section 181 of the Act provides:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties:
>
> (a) in good faith in the best interests of the corporation; and
>
> (b) for a proper purpose.

725 ASIC contends that, in contravention of s 181(1), Mr Karantzis failed to exercise his powers in good faith in the best interests of the corporation and for a proper purpose.

ASIC's submissions

726 For the reasons submitted in respect of the alleged contravention of s 182 of the Act, ASIC submits that Mr Karantzis' conduct was not in the best interests of the company, or the company's shareholders. That is because as at June 2018, on ASIC's case, the purpose and effect of the back-to-back fee structure of the integration agreements was to achieve high volumes of very low margin revenue with little benefit to the company in terms of profitability or sustainable growth. ASIC submits that the evidence leads to the conclusion that Mr Karantzis' conduct was not in good faith, and was done for the substantial and improper purpose of causing the company to achieve the Class A, B and C Performance Milestones and, consequently, to secure a financial gain for himself and others, as distinct from being conduct in the best interests of the company and all of its shareholders.

Mr Karantzis did not breach s 181 of the Act

727 Having regard to my conclusions in relation to the alleged breaches of s 182 of the Act, it cannot be accepted that ASIC has proven to the requisite standard that Mr Karantzis failed to exercise his powers in good faith in the best interests of the corporation and for a proper purpose.

728 Accordingly, therefore, I would not make a declaration that Mr Karantzis has breached his duties as a director in s 181 of the Act insofar as the achievement of the Performance Milestones is concerned.

CONCLUSION

729 Having regard to the conclusions I have expressed above, and therefore to what will now be the next stage of the proceeding, there will be an order that the parties bring in an agreed minute of orders to give effect to these reasons and for the further conduct of the proceeding.

730 If the parties are unable to agree they can file competing minutes of orders and short submissions in support.

731 The further hearing of the proceeding will be listed for case management and, for the moment, I will reserve costs. The issue of costs to date will need to be the subject of submissions if it cannot be agreed.

I certify that the preceding seven hundred and thirty-one (731) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McEvoy.

Associate:

Dated: 21 June 2024