IN THE MATTER of an Application by the Australian Securities and Investments Commission to the Companies Auditors and Liquidators Disciplinary Board pursuant to section 1292 of the Corporations Act 2001

MATTER NO: 03/NSW13

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Applicant

PINO FIORENTINO
Respondent

DECISION of the Board to exercise its powers under s1292 of the Corporations Act. Notice of this decision will be given to the Respondent under s1296(1)(a) of the Corporations Act and a copy of that notice will be lodged with ASIC under s1296(1)(b) of the Corporations Act.

24 June 2014

Panel:

Howard Insall SC (Panel Chairperson)

Geoff Brayshaw

George Georges

Companies Auditors and Liquidators Disciplinary Board
Level 5, 100 Market Street, Sydney NSW 2000
Tel: (02) 9911 2970
Fax: (02) 9911 2975

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DECISION AND REASONS

A. Introduction

The Application

1. This is an application under s 1292 of the *Corporations Act 2001* ("the Act") lodged with the Companies Auditors and Liquidators Disciplinary Board ("the Board") by the Australian Securities and Investments Commission ("ASIC") on 12 June 2013. By the application, ASIC asks the Board to cancel the registration of Mr Pino Fiorentino ("Mr Fiorentino") (a registered liquidator and official liquidator).

2. Section 1292(2)(d) provides:

> "The Board may, if it is satisfied on an application by ASIC or APRA for a person who is registered as a liquidator to be dealt with under this section that, before, at or after the commencement of this section: …
>
> (d) that the person has failed, whether in or outside this jurisdiction, to carry out or perform adequately and properly:
>
> (i) the duties of a liquidator; or
>
> (ii) any duties or functions required by an Australian law to be carried out or performed by a registered liquidator;
>
> or is otherwise not a fit and proper person to remain registered as a liquidator;
>
> by order, cancel, or suspend for a specified period, the registration of the person as a liquidator".

3. The Application relates substantially to alleged actions of, or omissions by, Mr Fiorentino in 2008 and 2009, whilst he was liquidator of a company which had been known as Ella Rouge Beauty Pty Limited (ACN 088 005 538) (and which changed its name to ERB International Pty Limited on 28 March 2008) ("ERB").

4. In the Amended Statement of Facts and Contentions ("SOFAC") filed on 12 December 2013, ASIC relies upon each of the two limbs in s1292(2)(d).

5. *First*, ASIC contends that Mr Fiorentino, as liquidator of ERB, failed to carry out or perform adequately and properly the duties of a liquidator within the meaning of s 1292(2)(d) of the Act in relation to what are described as:

   (a) "the Proxy Issue" (allegations relating to Mr Fiorentino's actions in relation to notices of creditors meetings and in procuring proxies to vote at a meeting of creditors);

   (b) "the Transfer of Assets Issue" (allegations relating to Mr Fiorentino's failure to investigate a pre-liquidation disposal of business assets by ERB); and

(c) "General Conduct Issues" (miscellaneous allegations relating to the liquidation),

as detailed in Contentions 1 to 23 and 25 of the SOFAC.

6. *Secondly*, ASIC contends that Mr Fiorentino is not a fit and proper person to remain registered as a liquidator by reason of the matters in Contention 26 (which concern an alleged failure by Mr Fiorentino to disclose a prior criminal conviction in his Form 908 "Annual statement by liquidator").

7. The matter was heard over seven days, although the first four days (18 November 2013, 19 November 2013, 31 January 2014 and 3 February 2014) were not full hearing days but were essentially taken up with adjournment applications.

8. Mr Fiorentino only appeared at the hearing during the adjournment applications. He left the hearing room when the substantive hearing commenced. The matter proceeded substantially *ex parte*.

9. Mr Peter Russell of counsel appeared for ASIC.

A brief overview of the issues

10. The Contentions involved detailed allegations concerning various different aspects of the liquidation.

11. In order to understand ASIC's real complaints about the manner in which the liquidation was conducted, we set out below a brief overview of the key issues. To some extent, these incorporate our ultimate findings. However, this section is only intended as an introductory overview and our findings and the reasons for our findings are set out in detail in our consideration of each of the Contentions below.

The transfer of assets issue

12. Logically, this is the first and probably the most important issue. The background is as follows.

13. In early 2008, ERB could not afford to pay a debt which it owed to the New South Wales Office of State Revenue ("the OSR") of approximately $464,000.00. Mr Ali Hammoud ("Mr Hammoud"), the main director of ERB, was being advised by Mr Elias Bastas ("Mr Bastas"), an accountant, who was proposing a restructure involving the transfer of the business to a new company, but on the basis that the debts including the OSR would be paid. Mr Hammoud spoke to a friend, Mr Babak Moini ("Mr Moini"), who had had a successful outcome with Mr Fiorentino on a previous liquidation, which had enabled him to keep his business. Mr Moini recommended that Mr Hammoud consult Mr Fiorentino.

14. Mr Fiorentino advised Mr Hammoud that the business could be transferred to a related third party and the company liquidated. However, he procured advice from Mr Julian Svehla, barrister ("Mr Svehla"), which confirmed that this could only occur if the OSR debt was taken over by the related company, or if ERB ensured that the sale of assets was for a proper commercial value.

15. The directors proceeded to transfer ERB's business (assets and liabilities) to a related third party, Beauty World International Pty Limited ("BWI"). A purchase price of "nil" was "paid", on the basis that the assets, as acquired, matched the liabilities, as assumed, (including asserted liabilities to the directors of ERB of $2.691m but not including the OSR debt). We refer to this agreement as the "Business Sale Agreement".

16. On its face, the Business Sale Agreement was inconsistent with Mr Svehla's advice. First, ERB had transferred its business leaving the OSR debt with the insolvent shell. Secondly, the Business Sale Agreement did not provide for the sale of assets at a proper commercial value. It provided for the sale of assets worth more than $4m without any payment of cash in return. Whilst the Business Sale Agreement purported to "transfer" about $4m of ERB liabilities to BWI, this was legally ineffectual, so that, in fact, ERB received, at best, a questionable contractual promise in return for the transfer of $4m worth of assets.

17. In any event, a sale involving a transfer of all of the assets of ERB and an assumption of some but not all liabilities was not what Mr Svehla had advised and was not legitimate. Mr Svehla's advice contemplated a proper sale at a commercial value (say $4m cash). Had ERB received $4m cash, it could then have discharged its various liabilities. If the sum was insufficient to discharge all liabilities, ERB would be liquidated and the $4m would be utilised to give unsecured creditors a *pro rata* share of the assets. If certain creditors had been paid prior to liquidation, those payments could be clawed back as preferences to enable a *pro rata* distribution. The Business Sale Agreement, on its face, sought to avoid this by BWI taking over some but not all of the liabilities,

18. On 2 April 2008, ERB went into liquidation and the directors' RATA showed assets of only $1,678.00, with liabilities of about $2.6m, made up of directors' loans of about $2m, the debt to the OSR of $464,246 and a debt to the Australian Taxation Office ("ATO") of $56,294.

19. Thus, on its face, the transaction had the appearance of a phoenix transaction, whereby the directors had preserved their business by transferring it to a related third party, leaving the OSR liability in the ERB corporate shell.

20. The directors' claims in the RATA that they remained substantial creditors of ERB were also extremely suspicious, particularly as BWI had only just purported to take over directors' loans of more than $2m under the Business Sale Agreement.

21. Notwithstanding Mr Fiorentino's knowledge of the terms of Mr Svehla's advice, there is no evidence that Mr Fiorentino challenged the directors at the outset about whether BWI accepted liability for the OSR debt under the Business Sale Agreement, or that he sought justification for the payment of the purchase price of nil, particularly where a major aspect of the justification for that price was the asserted existence of directors' loans, said to be taken over by BWI.

22. Mr Fiorentino sought legal advice in relation to the Business Sale Agreement from Mr James Hamilton ("Mr J Hamilton"), solicitor, who advised him that the agreement arguably required BWI to indemnify ERB in relation to all ERB's liabilities (including the OSR debt) and that the directors should be asked about this. There is no evidence

that Mr Fiorentino followed this advice at the time or attempted to ascertain any justification for the directors' assertion in the RATA that the OSR debt remained a liability of ERB.

23. Mr J Hamilton also advised Mr Fiorentino that it may be possible to set aside the Business Sale Agreement but that Mr Fiorentino needed to assess whether the sale price was fair, including by obtaining advice about the market value of the assets transferred. There is no evidence that Mr Fiorentino ever obtained such advice.

24. In May 2008, the OSR made a claim against BWI (the purchaser of the business) for its debt on the basis of grouping provisions of the Taxation Administration Act 1996. On being informed about this by Mr Hammoud, Mr Fiorentino directly intervened on BWI's behalf in seeking to undermine the OSR's claim against BWI. He actively assisted the directors of BWI in seeking to defend BWI from the claim.

25. By September 2008, Mr Fiorentino had made investigations which caused him to form the view that there was no justification for the directors' loans claimed in the RATA. The same investigations also undermined the legitimacy of the claimed $2.691m loans, said to be taken over by BWI under the Business Sale Agreement. Unless these loans could be substantiated (and there was no evidence that they were), the purchase price paid by BWI for ERB's business appeared to be understated by about $2m.

26. As at September 2008, Mr Fiorentino estimated a dividend to unsecured creditors of ERB of 75c in the dollar. This assumed that BWI would indemnify ERB in relation to all pre-liquidation liabilities (including the OSR debt).

27. In late 2008, Mr Fiorentino threatened action against directors and BWI in relation to the indemnity (which included the OSR debt). BWI denied liability and asserted that it was not worth suing. In January 2009, Mr Fiorentino settled all claims against BWI and the directors in return for the sum of $60,000.00. He obtained no legal advice in relation to the settlement and he did not have an adequate understanding of BWI's or the directors' financial position or the strength of ERB's claims against BWI and/or the directors.

28. By May 2009, Mr Fiorentino estimated a dividend to creditors of ERB of 14c in the dollar. This reduction was largely due to the fact that the indemnity claim had been compromised. In fact, even a dividend of this much (14 cents) depended upon *ERB recovering $330,000 from the OSR*, on the basis that the pre-liquidation payments by ERB to the OSR had been a preference.

29. As at 13 November 2009, Mr Fiorentino had realised $536,929.15 during the liquidation of ERB, (substantially from tax and other refunds) the majority of which had been applied as liquidators' remuneration and out of pocket expenses (totalling $455,777.20). On 13 November 2009, Mr Fiorentino lodged a Form 578 with ASIC requesting deregistration of ERB on the grounds there were no funds left to hold a final meeting and the affairs of the company were fully wound up. On 24 January 2010, ERB was deregistered.

30. The creditors of ERB received no dividend in the liquidation. The OSR debt remained unpaid.

The Proxy issue

31. The Proxy issue deals with a number of allegations concerning Mr Fiorentino's dealings with creditors, primarily those creditors whose obligations were apparently assumed by BWI under the Business Sale Agreement, including ERB's employees and the lessor of premises leased by ERB.

32. The Proxy issue covers Mr Fiorentino's alleged failure to treat these persons as creditors and his inconsistent acceptance of proxy votes from some of these persons.

33. Of greatest significance, in May 2008, Mr Fiorentino pre-completed 28 Proxy forms in the names of ERB employees to vote in favour of approving his remuneration, despite the fact that he had never treated them as creditors or provided them with any notice of creditors meetings. He sent these Proxy forms to the director of ERB, Mr Hammoud, to be executed. Mr Hammoud executed all of these and returned them. Mr Fiorentino relied upon these proxies in the approval of his remuneration.

The general conduct issues

34. It is not necessary to deal with these in any detail at this point. The general conduct issues involve a variety of complaints regarding Mr Fiorentino's actions as liquidator of ERB, including his failure to disclose his "relationship" with Mr Hammoud in his DIRRI[1], the form and content of his reports to creditors and a failure to lodge a s 533 report in accordance with the provisions of that section.

Fit and proper person allegation

35. ASIC alleged that Mr Fiorentino is not a fit and proper person to remain registered as a liquidator on account of his failure to disclose a conviction for an offence in his Form 908 statement dated 11 November 2011.

B. Pre-hearing events

36. Although the Application was served on 12 June 2013, the substantive Hearing did not commence until 4 February 2014, having had a regrettably long and complex procedural history.

37. The Application was served upon Sally Nash & Co, Lawyers, who accepted service on behalf of Mr Fiorentino. On 14 June 2013, the Chairperson directed Mr Fiorentino to file his response by 19 July 2013. On 18 June, Ms Nash sent a letter to Mr Fiorentino informing him of the Application and that a pre-hearing conference was to be held on 25 July 2013.

38. Notwithstanding this, Mr Fiorentino subsequently went to Italy on a holiday and did not return until 22 August 2013. In the meantime, the first pre-hearing conference was held, at which Mr Fiorentino was represented by Ms Nash. Mr Fiorentino had not complied with the direction to file his Response and no explanation was provided, other than the fact that Mr Fiorentino was away. Notwithstanding this, the time for filing the Response was extended.

[1] Declaration of Independence and Relevant Relationships.

39. In accordance with the normal practice of the Board, a hearing date was fixed (21 October 2013) and a further pre-hearing conference was fixed for 3 September 2013. At that pre-hearing conference, Mr Fiorentino applied for a vacation of the hearing date. That application was rejected.

40. On 12 September 2013, Mr Fiorentino again applied to vacate the hearing date. Based upon the evidence filed in support of that application, the Chairperson vacated the hearing date and fixed the matter for hearing on 18 November 2013. After that time, the matter was prepared, substantially in accordance with the timetable.

41. At the commencement of the Hearing on 18 November 2013, Mr Tim Rickard of Counsel, appearing on behalf of Mr Fiorentino, applied for a further adjournment of the Hearing until February 2014. The basis of the application was to permit legal representatives to prepare for the hearing. Mr Fiorentino asserted that he could not afford legal representation at the Hearing but had been informed by his insurers as late as 15 November 2013 that they had agreed to indemnify him for legal costs.

42. Whilst the Panel regarded the late application for an adjournment as most regrettable, the Panel granted a further adjournment. The reasons for the Panel's decision are set out in the Decision dated 19 November 2013. The Panel adjourned the hearing to the earliest possible hearing date in the New Year. Although the Panel's initial preference was 13 January 2014, that date proved impossible, particularly having regard to the availability of witnesses. Ultimately, the Panel directed that the hearing would resume on Monday 3 February 2014.

43. A few days before the 3 February 2014 Hearing, (on 30 January 2014), Mr Rickard again applied for an adjournment on Mr Fiorentino's behalf. The Panel refused the adjournment. The reasons for the Panel's decision are set out in the Decision dated 3 February 2014.

44. On 3 February 2014, Mr Fiorentino again applied for an adjournment, this time, representing himself. The Panel refused the adjournment. The Panel gave reasons orally. At Mr Fiorentino's request, the reasons were reduced to writing and are set out in the Decision dated 5 February 2014. Mr Fiorentino indicated that he wished to challenge the Panel's refusal to adjourn the matter and the Panel granted him an adjournment for a day to do so.

45. Mr Fiorentino commenced proceedings in the Administrative Appeals Tribunal on 3 February 2014. A hearing took place at 9.30 am on 4 February 2014 and Mr Fiorentino's application was dismissed.

46. Mr Fiorentino attended the resumption of the Hearing before the Panel at 10.00 am on 4 February 2014. He attempted to address the Panel about a variety of matters, largely seeking to cavil with the Panel's refusal of his adjournment applications. The Panel indicated that it intended to proceed with the Hearing, whereupon, Mr Fiorentino departed. Thereafter, the Hearing proceeded in Mr Fiorentino's absence[2].

[2] However, after the Panel handed down its findings on the Contentions, a sanctions hearing was convened and Mr Fiorentino attended that hearing and made made oral submissions on appropriate sanctions.

47. As the Board has stressed on a number of previous occasions, there is a very clear public interest in Applications before the Board being determined as soon as possible, consistent with the requirements of natural justice.

48. If the character, competence or behaviour of a practitioner justifies cancellation or suspension of his or her registration, it is, *ex hypothesi*, desirable that the Board make orders as soon as possible.

49. In our view, the public interest served by expeditious resolution of Board matters is not limited to the need to protect the public from the actions of unfit liquidators or auditors. There is a public interest in an efficient system for deregistering unfit auditors and liquidators. It is undesirable that proceedings before the Board (which are invariably private, so that members of the public only learn of them when the Board publishes a determination) linger, unresolved, for an extended period. Members of the public are entitled to expect that the Board will deal with allegations that a respondent is unfit promptly and efficiently and to be able to know of the circumstances as soon as is appropriate. Proceedings before the Board are quite different in this respect, from private litigation, where a certain amount of delay may be tolerated subject to making appropriate orders for costs.

50. At around midday on 4 February 2014, Mr Fiorentino sent an email to the Board attaching a document entitled "To CALDB in the matter of Fiorentino". The Registrar provided a copy of this document to ASIC.

51. In that document, Mr Fiorentino makes a number of assertions.

52. He asserted that he was precluded at the hearing on 4 February 2014 from making some "points of order" as to whether correct procedure was being followed and other points which, in his view, were relevant for consideration by the Board. He referred to a number of matters which he said he was denied from putting.

53. Mr Fiorentino was not precluded from making any appropriate application or point in relation to the Hearing. The Hearing was due to proceed at 10.00 am on 4 February 2014, having already been delayed for 24 hours to permit Mr Fiorentino to go elsewhere to challenge the Board's rejection of Mr Fiorentino's applications to adjourn the matter.

54. At the resumption of the Hearing on 4 February 2014, Mr Fiorentino was asked to inform the Board of his position. As the transcript reveals, Mr Fiorentino informed the Board that he had made an application to the Administrative Appeals Tribunal. He then commenced to make a series of requests and comments. Where appropriate, they were dealt with. However, in large part, Mr Fiorentino was simply attempting to reopen debate in relation to his failed adjournment applications. He said:

> "I'd just like the Board to understand where I'm coming from because I don't think the Board really understood it, you know. I think that you get lost in minutia without seeing the big picture here and I would like to point that out, if I may".

55. Mr Fiorentino was informed that if he had an application for some order which the Panel could make, he should make it but that the Panel was not prepared to have a

debate with him about matters which had been heard and determined on the previous Monday or Friday. Mr Fiorentino then said that he withdrew his undertakings previously given to the Board and that he intended to leave. He was strongly advised to stay and deal with the Application. He then left the Hearing.

56. Otherwise, Mr Fiorentino's document, sent to the Board on 4 February 2014, is largely a repetition of matters which he raised with the Board at the hearing on 4 February 2014, and, in any event, is largely concerned with the question of adjournment and irrelevant to the substantive issues with which this decision is concerned.

57. On 5 February 2014, Mr Fiorentino commenced proceedings against the Board in the Federal Court of Australia challenging the Board's refusal to adjourn the matter. The hearing in that matter took place before Wigney J on 2 May 2014. Judgment in that matter was handed down last Thursday, 19 June 2014. Wigney J dismissed Mr Fiorentino's application.

C. Evidence and submissions

58. As already stated, Mr Fiorentino was not present before the Panel at the substantive Hearing and the only evidence adduced before the Panel was the evidence tendered by ASIC[3].

59. We have considered to what extent the Panel can or should refer to material provided by Mr Fiorentino to the Board pursuant to pre-Hearing directions.

60. Section 1294A of the Act empowers the Chairperson to hold pre-hearing conferences at which the Chairperson may, on behalf of the Board, give directions about the hearing of the matter, including directions as to the time within which evidence is to be brought before the Board in relation to the matter and directions as to the procedure to be followed at or in connection with the hearing.

61. In the present matter, the Chairperson made a series of directions pursuant to that section, including directions as to the filing of a Response and the filing of statements of evidence by Mr Fiorentino.

62. We have taken into account the Response filed by Mr Fiorentino as that document was filed in accordance with pre-hearing directions under s 1294A which required a Response for the purpose of defining the issues.

63. Section 216(9) and (10) of the Australian Securities and Investments Commission Act 2001 ("ASIC Act") provides:

> "(9) A person who is entitled to be given an opportunity to appear at a hearing and who does not wish to appear at the hearing may, before the day of the hearing, *lodge with the Disciplinary Board* in writing any submissions that he, she or it wishes the Panel to take into account in relation to the matter.

[3] This included a number of s 19 transcripts. Mr Fiorentino's s 19 transcript was admissible under s 76 of the Australian Securities and Investments Act 2001 ("ASIC Act") and the transcripts of the other witnesses were admissible under s 77 of the ASIC Act, ASIC having summonsed each of those witnesses.

(10) The Panel must take into account:

(a) a submission made to or evidence *adduced before the Panel*; and

(b) a submission *lodged with the Disciplinary Board* in relation to the matter to which the hearing relates;

when making any decision on the matter to which the submission or evidence relates." (emphasis added)

64. Mr Fiorentino adduced no evidence and made no submissions "before the Panel". Nor did he lodge any submissions prior to the Hearing pursuant to s 216(9)[4].

65. Prior to the Hearing, Mr Fiorentino had filed certain evidence with the Board in accordance with pre-hearing directions but we have not taken that material into account in making our decision, because whilst it was filed at the Board's registry, it was not "adduced before the Panel". The only material adduced before the Panel was the material adduced by ASIC after Mr Fiorentino departed the hearing room on 4 February 2014. The Panel invited submissions from Mr Russell as to whether it was appropriate to have regard to any of the material filed by Mr Fiorentino. He indicated that ASIC had no objection to the Panel having regard to that material.

66. However, after considering the issue, we believe it would be wrong to do so, having regard to the terms of s 216(10). Quite apart from the terms of the section, parties often choose not to tender or rely upon material which they have filed and it is possible that Mr Fiorentino might have decided not to rely upon particular evidence notwithstanding that he had chosen to file it. We believe it will confuse the matter if we were to have regard to evidence which has not been tendered (nor tested in cross-examination) even though ASIC has no objection to us doing so. Further, Mr Fiorentino made no request that the Panel consider the material he had filed. His position was that he objected to the matter proceeding at all, on the basis that the Panel ought to have granted him a further adjournment. When it became plain that the matter was going to proceed, he indicated that he was leaving the hearing and that he would be seeking that "the whole proceedings heard in my absence will be struck out". In all the circumstances, we believe that the correct and appropriate course is to consider only such evidence as was adduced at the Hearing.

D. The role of the Board in applications under s 1292(2)(d)

67. The majority of the contentions in the SOFAC are based upon an alleged failure to carry out or perform adequately and properly the duties of a liquidator under s 1292(2)(d). It is important to bear in mind the role of the Board in considering this issue.

68. Perhaps the clearest guidance in this regard can be found in the decision of Tamberlin J in *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) 59 ACSR 698 at [24]:

[4] The Response could be said to contain submissions and we have taken the Response into account. Mr Fiorentino's 4 February document did not purport to be a submission under s 210(9) but, in any event, we have dealt with that document.

"[24] The language of s 1292(2)(d)(ii) directs attention to the question of whether there has been a failure to *adequately* and *properly* carry out or perform the duties or functions required to be performed by a registered liquidator. The emphasis is on the adequacy level or sufficiency of performance of the function or role by the registered liquidator. In this case, the function to be performed is that of an administrator. To evaluate the level of performance is a question of fact and degree which calls for the application of a standard. It is not a qualitative consideration whether there has been performance, but rather calls for consideration as to the sufficiency of the acts or omissions of the administration. This is a task which calls for some acquaintance with professional standards applicable to the role of an administrator. (emphasis in original)

[25] Upon and after accepting appointment of the office of an administrator, the liquidator must perform the functions and tasks of that office in a proper and adequate way. This obligation to meet a standard is attracted by the terms of s 1292(2)(d) itself. It is not necessary, in my view, to identify a specific legislative duty independently imposed by legislation. When a person assumes the office of an administrator, he or she is then bound to perform adequately and properly the *functions of the office*. The focus of the provision concerns the sufficiency and quality of *the performance of the office* that must be carried out by a registered liquidator." (emphasis added)

[26] There is nothing in the language of s 1292(2)(d)(ii) which excludes regard to professional standards and codes when deciding whether the performance is a proper and adequate exercise of the office. The reference to "proper" and "adequate" invites the testing of performance against a relevant standard or benchmark of performance. The interpretation advanced for the applicant, in my view, is too narrow in requiring the identification of a specific duty directly imposed by legislation. The level of performance called for is that of "adequacy." The standard is that the duty must be performed "properly". The provision is designed to enable a Board representative of the commercial and accounting communities to consider whether the function has been adequately and properly carried out. To assess this, it is permissible, in my view, to have regard to the standards operative in the relevant sphere of activity."

69. The Board gave extensive consideration of this and other applicable authorities in the decision of *ASIC v Fernandez* [02/VIC13 – 29 October 2013] at para [39]*ff*. A summary of the principles is set out in paragraph [49] of that decision as follows:

(a) "First, whilst sub-paragraph (2)(d)(ii) requires assessment of the level and standard of performance of "duties or functions", the latter phrase, (particularly "functions") is broad. Tamberlin J referred to the assessment as relating to the sufficiency of "the acts or omissions *of the administration*", of "the functions of the office" and of "the quality of the performance of the office". It must follow that it is not necessary, in every case under s 1292, for ASIC to identify a specific "duty" required to be performed by a registered liquidator. See also *Vouris* at [100];

(b) Secondly, the level and standard of performance of the duty or function needs to be tested against a relevant benchmark. The benchmark is "professional standards";

(c) Thirdly, the assessment calls for acquaintance with professional standards, which is why the task is entrusted to the Board. The Board can be taken to be imbued with knowledge of professional standards. The task of determining the relevant accepted professional standards is a task within the expertise of the Board[5];

(d) Fourthly, the level of performance called for is that of "adequacy"; the standard is that the duty or function must be performed "properly";

(e) Fifthly, in making its assessment, the Board is entitled to have regard to published codes or standards of the professional bodies. The accepted professional standards may be found by the Board to be set by, or alternatively reflected in published standards or codes;

(f) Sixthly, the assessment will also involve having an intelligent understanding of the purposes which the provisions of the Act were trying to achieve, and what proper professional practice required to be done to enable those purposes to be achieved."

E. Application of *Briginshaw* to allegations of dishonesty

70. Contentions 3 to 5 involve explicit allegations of dishonesty.

71. In considering these allegations, the assessment required by *Briginshaw v Briginshaw*[6] has to be kept in mind[7].

72. Further, the authorities suggest that the *Briginshaw* approach applies generally in disciplinary proceedings, particularly where allegations of a serious nature are made where serious consequences may follow: *Jackson (Previously Known As Subramaniam) v Legal Practitioners Admission Board* [2006] NSWSC 1338; *Bannister v Walton* (1993) 30 NSWLR 699 at 711–712. We proceed on the basis that the *Briginshaw* test applies in the present case. We note, however, that in some respects the role of the *Briginshaw* test is limited, because there is little doubt about many of the facts.

73. In *Briginshaw v Briginshaw*, Dixon J said at 361-362:

> "... when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for

[5] However, if the matter is being determined before other non-expert bodies or courts, evidence of the accepted professional standards would be required: *Vouris, Re; Epromotions Australia Pty Ltd v Relectronic-Remech Pty Ltd (in liq)* (2003) 177 FLR 289 at [103], *Gould v Companies Auditors and Liquidators Disciplinary Board* (2009) 71 ACSR 648 at [50], [75], *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board and Another* (2007) 231 CLR 350 at [29] and [53].
[6] (1938) 60 CLR 336.
[7] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [170]

> various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences"

74. Dixon J continued, particularly with regard to circumstantial evidence (at 368-9)

> "Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find."

75. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 the Court stated at 170-171:

> "The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct." [citations removed]

76. We approach the matter in the light of the above statements of principle.

F. Outline of the key facts

77. We set out, in the following paragraphs, an outline of the key facts. In most cases, the matters set out are uncontroversial and established on the evidence. In relation to matters about which there is some controversy, we will expressly note this. Otherwise, we find that the facts in the following summary have been made out.

Mr Fiorentino's background and partnership in Hamiltons

78. Mr Fiorentino is a registered Liquidator, having been registered on 11 October 1994, and an Official Liquidator, having been registered as an Official Liquidator on 13 January 1997. He is a member of the Institute of Public Accountants, and has been a member for 7 years. Between December 2001 and 31 December 2012 he was a member of the Insolvency Practitioners Association of Australia.

79. Between July 1994 to November 2010, Mr Fiorentino was a partner with another registered liquidator, Mr William Hamilton, in the insolvency firm "Hamiltons Chartered Accountants, Business Advisors" ("Hamiltons"). Relevantly, Hamiltons' employees included:

    (a) Ms Effie Ioakimaros, ("Ms Ioakimaros") who was Mr Fiorentino's secretary. Ms Ioakimaros had no insolvency qualifications and,

    (b) Mr Benny Scarcelli, ("Mr Scarcelli") who had been working at Hamiltons for several years in an insolvency role and reported to Mr Fiorentino. Prior to joining Hamiltons, Mr Scarcelli had practised as an accountant and as an auditor.

80. At material times, profits of the firm were shared by Messrs Fiorentino and Hamilton and some staff members.

81. Hamiltons dissolved in November 2010 due to differences between Messrs Fiorentino and Hamilton. Since that time, Mr Fiorentino has been a sole practitioner operating under the name "Fiorentino", employing around 9 support staff.

The companies involved

82. As already discussed, the Application is primarily concerned with Mr Fiorentino's role as liquidator of a company known as ERB International Pty Limited ("ERB") which sold its business to a related company, Beauty World International Pty Limited ("BWI") shortly before ERB went into liquidation. ERB and BWI were companies owned and controlled by Mr Hammoud and his wife, Manel Issa ("Ms Issa").

83. ERB was incorporated on 9 June 1999 and, at that time, was known as Ella Rouge Beauty Pty Limited. Mr Hammoud and Ms Issa were its directors and equal shareholders. Mr Hammoud was the Company Secretary.

84. From around 2003 to early 2008, Mr Fady Karnib of Elite Business and Accounting Services Pty Ltd ("Mr Karnib") was the company accountant. Around 2006, Mr Hammoud retained Mr Bastas of GPL Solutions to advise in relation to a corporate restructure of ERB (then known as Ella Rouge Beauty Pty Limited) and from early 2008 onwards, Mr Bastas prepared financial statements for ERB.

85. From its inception until about March 2008, ERB owned and operated a chain of beauty salons known as "Ella Rouge Beauty".

86. BWI was incorporated on 17 June 2005. Mr Hammoud and Ms Issa were its directors and equal shareholders. Mr Hammoud was the Company Secretary as at 2 April 2008.

87. On 28 March 2008, ERB changed its name from Ella Rouge Beauty Pty Limited to ERB International Pty Limited.

88. On the same day, BWI, as Trustee for the Shanel Family Trust, purchased the business of ERB (then known as Ella Rouge Beauty Pty Limited) for no cash consideration pursuant to the Business Sale Agreement, which is discussed in more detail below.

89. On 2 April 2008, ERB was placed into liquidation, with Messrs Fiorentino and Hamilton appointed joint liquidators. ERB was deregistered on 24 January 2010.

90. On 15 December 2008, BWI resigned as Trustee of the Shanel Family Trust and was replaced by Ella Rouge Beauty Pty Limited (ACN 130 458 365) ("Ella Rouge Beauty") (another company owned and controlled by Mr Hammoud and Ms Issa). BWI was deregistered on 6 October 2010.

91. Ella Rouge Beauty currently operates the chain of beauty salons known as "Ella Rouge Beauty".

92. The Shanel Family Trust was established by a deed bearing the date 29 November 2006 which recorded, *inter alia* that the beneficiary of the Trust was Ms Issa. On 8 February 2008 the Deed was amended by way of resolution adding Mr Hammoud as a beneficiary. The original Shanel Family Trust Deed (which was undated at the time) was lodged for stamping with the OSR on 26 March 2008.

The events giving rise to ERB's liquidation

93. On 13 October 2006, the OSR commenced an audit into ERB re payroll tax, which culminated in the OSR issuing Notices of Assessment to ERB on 31 January 2007 totalling $669,835.45. On 23 February 2007, Mr Bastas informed the OSR that ERB was selling its business via franchising which would allow it to raise funds to pay out the amount. On 16 May 2007, the OSR agreed to an Instalment Arrangement with ERB by which ERB would pay the OSR $5,000 per month from June to August together with a final payment of $709,246.45 on 10 September 2007.

94. On 16 July 2007, ERB entered into five-year Franchise Agreements for its Burwood and Macarthur stores which provided for annual royalty payments commencing in the second year.

95. On 2 August 2007, ERB entered into Sale of Business contracts for each of the Burwood and MacArthur stores for $770,000 each. On 3 August 2007, the proceeds from the sales of the Burwood and MacArthur businesses were deposited to the ERB Westpac 1 account. On 9 August 2007, Mr Hammoud transferred $1 million from the ERB Westpac 1 account to the Hammoud Westpac 1 account.

96. On 6 December 2007, ERB entered into similar Franchise Agreements for the Castle Hill and Miranda stores and sold those businesses for $900,000 and $750,000 respectively. On 6 December 2007, those sale proceeds were deposited to ERB Westpac 2 account.

97. On 27 November 2007, the OSR had demanded that ERB pay its overdue liability of $715,323.10 (including interest), otherwise it would commence legal proceedings. On 11 December 2007, Mr Hammoud negotiated a Payment Agreement with the OSR by

which ERB would pay the OSR $200,000 that day, which it did, and $20,000 per month from January to June 2008.

98. On 13 February 2008, Gallagher Bassett (Workers Compensation) informed ERB that Deloittes would be carrying out a workers' compensation audit.

99. On 25 February 2008, Mr Hammoud:

    (a) withdrew $1,808,918.91 from ERB Westpac 2 account leaving zero balance;

    (b) deposited $808,918.91 to ERB Westpac 1 account;

    (c) deposited $1 million to Hammoud Westpac 2 account;

    (d) transferred $500,000 from ERB Westpac 1 account to BWI ANZ account and

    (e) transferred $300,000 from ERB Westpac 1 account to ERB ANZ Pre-liquidation account.

100. In about mid-January 2008, Mr Bastas and Mr Hammoud had a number of discussions relating to the restructure of ERB.

101. On 25 February 2008, Mr Bastas advised Mr Hammoud that the liquidation of ERB could probably be finalised within a month (by his firm) and to submit a name change for ERB. Mr Bastas is not a registered liquidator, so it would seem that he was contemplating a members' voluntary liquidation.

102. On 4 March 2008, Mr Hammoud cleared the ERB Westpac 1 account by withdrawing $109,000 and depositing it into the BWI Westpac account.

103. Accordingly, by 4 March 2008, by the aforementioned transactions:

    (a) ERB had paid $2 million to the Directors; and

    (b) ERB had paid BWI $609,831.91.

Mr Fiorentino's involvement

104. The evidence as to how and when Mr Fiorentino became involved with ERB is not consistent. This is an area where we have to make a finding against conflicting and in some respects confusing evidence. This is important background impacting the issues in the matter.

105. Mr Fiorentino's version of events, in his s 19 transcript, is to the following effect:

    (a) He met Mr Bastas a couple of times, a few weeks before his appointment on 2 April 2008 (but not as early as February 2008). He had never met him before. Mr Bastas was acting on behalf of Mr Hammoud, who had been referred to him by Mr Moini;

    (b) The purpose of the first meeting was an introductory meeting;

(c) In the second meeting, Mr Bastas told him that the company had a claim for several hundred thousand dollars from the OSR. Mr Bastas said he had never had a company in liquidation, that he did not know what to do and he wanted to make sure Mr Hammoud was going to be looked after. He was writing up the books at the time and wanted Mr Fiorentino to look at them. Mr Bastas told Mr Fiorentino that the business had been sold on 1 February, that he hadn't settled the figures and wanted some advice on them. Mr Fiorentino told him he could not give him advice;

(d) The first time he met Mr Hammoud and Ms Issa was about a week later on 2 April 2008, when they attended his office on the occasion when ERB was put into liquidation.

106. Mr Bastas' evidence, in his s 19 transcript, was to the following effect:

(a) that he had been advising Mr Hammoud prior to Mr Fiorentino's involvement and advised him to lodge tax returns, pay the tax, get the company to a position of having no assets and no liabilities, get a tax clearance certificate and then liquidate the company, as it would no longer be needed after all assets and liabilities had been transferred to another company;

(b) that he had a meeting with Mr Fiorentino and Mr Hammoud about a month, or month and a half before the liquidation, in which Mr Fiorentino had advised that ERB should be placed into liquidation;

(c) that Mr Fiorentino advised that the company was trading while insolvent and if the company was liquidated, the transfer of business could be carried out, with the contract for the transfer being valid and nothing else happening – and without having to pay all the debts;

(d) that he, Mr Bastas, was concerned that if the business was transferred leaving debts, and the company went into liquidation, the whole transfer would be reversed by the liquidator;

(e) that Mr Fiorentino called a barrister during his meeting who confirmed his (Mr Bastas') view;

(f) that Mr Hammoud listened to the alternatives and chose Mr Fiorentino's advice;

(g) that Mr Fiorentino did not seek to influence Mr Hammoud;

(h) that the contract for the transfer of business, being prepared at the time, was consistent with the approach he, Mr Bastas, would have taken had he conducted the liquidation;

(i) that he prepared accounts for the company in March 2008 with the purpose of coming up with a proper set of accounts to detail all assets and all liabilities in order to effect the contract and transfer all the assets;

(j) that he procured the drafting of the Business Sale Agreement and when it was presented to Mr Fiorentino, he was not happy with it because he thought the

right course was to leave everything as it was, and bring in a liquidator and he would sort it out and sell the assets of the company.

107. There appears to be some inconsistency in Mr Bastas' evidence because although he said (as just stated) that Mr Hammoud had followed Mr Fiorentino's advice, that the company could be liquidated without upsetting the transfer, but without paying all the debts, he later said that the effect of the contract for the sale of the business was to transfer all assets and all liabilities, except for income tax and the OSR but that any additional liabilities that cropped up were to be paid for by the new company.

108. Mr Moini's evidence, in his s 19 transcript, was to the following effect:

(a) Mr Hammoud was a friend who had contacted him about problems with the OSR;

(b) He referred Mr Hammoud to Mr Fiorentino, the only liquidator he knew. He told Mr Hammoud that Mr Fiorentino had done a liquidation for a company of his, Australian Laser Clinic, and had come up with a solution where he could use his parents' funds to buy the business back and effectively keep running the business. He asked Mr Fiorentino to speak to Mr Hammoud on that basis;

(c) He had a meeting with Messrs Fiorentino and Hammoud, at which the liquidation process was discussed and Mr Fiorentino stated that liquidation was the only option;

(d) At the time of this meeting, the transfer of assets to BWI had not taken place;

(e) Mr Hammoud indicated that he could come to an arrangement to pay the OSR. Mr Fiorentino said that the OSR would be listed as an unsecured creditor in the liquidation;

(f) Mr Fiorentino stated that the liquidation would cost Mr Hammoud a flat sum of $50,000.00. He justified that amount by saying that there was a lot to deal with and that the debts being walked away from were quite high, so it would require a bit of work.

109. Mr Moini's evidence about subsequent events also impacts this issue. He said that the relationship between Mr Hammoud and Mr Fiorentino subsequently became sour because Mr Fiorentino had advised him to transfer the business and liquidate and told him that the liquidation would only cost him $50,000.00, but after Mr Fiorentino was appointed, he made claims against Mr Hammoud which ended up costing him much more. Mr Moini said that Mr Fiorentino had told him that he was only doing his duty as a liquidator and that the problem had arisen because Mr Bastas had not followed his (Mr Fiorentino's) advice and had structured the sale of business incorrectly.

110. Mr Hammoud's evidence, in his s 19 transcript, was to the effect:

(a) ERB was in difficulty meeting payments to the OSR in addition to its normal trade creditors. At this point, no one had recommended sale of the business from ERB to BWI, or liquidation. He spoke to his friend Mr Moini about this and he said that he either had to liquidate or find another resource to pay;

(b) in about January to March 2008, he and Mr Moini met Mr Fiorentino in connection with the financial issues facing ERB, including the OSR claim. Mr Fiorentino recommended that he transfer the assets and liabilities of ERB to another company and then liquidate ERB and then the OSR would not chase him for this payment. Mr Hammoud's understanding was that the main reason for liquidation was because ERB could not pay the OSR. Mr Hammoud's main concern was that he would not lose his business and Mr Fiorentino told him that this would not happen. He advised Mr Hammoud to get a lawyer to draft a contract for sale of business;

(c) Mr Hammoud subsequently spoke to Mr Bastas, his accountant, who was against the idea of liquidation and asked to meet Mr Fiorentino to consider whether liquidation was in his best interests;

(d) At a subsequent meeting with the three of them, Mr Bastas and Mr Fiorentino had conflicting views concerning liquidation. Mr Hammoud believed that the company had enough revenue to pay creditors except the OSR and workers compensation. Mr Fiorentino advised that the only way to get out of the debt to the OSR was to liquidate the company. Mr Bastas said that he would not get out of that through liquidation, and that whatever he did, OSR would chase him. His view was that liquidation would be a long process which would cost too much money. He advised negotiation;

(e) Mr Hammoud took Mr Fiorentino's advice and opted for liquidation. The plan for the transfer of assets was done by Mr Fiorentino although both he and Mr Bastas were involved in this and the preparation for liquidation. Mr Hammoud started implementing the steps which Mr Fiorentino and Mr Bastas had written up on a checklist.

111. One thing about which there can be little doubt is that on 5 March 2008, Mr Fiorentino, in the company of at least Mr Bastas had a telephone conference with Mr Julian Svehla, ("Mr Svehla") a barrister, in relation to the business transfer. (This was recorded in contemporaneous documentary evidence, namely a fee note issued by Mr Svehla).

112. Mr Svehla's evidence was that there was such a teleconference involving Mr Fiorentino and an accountant, that it lasted 40 minutes and, although he cannot recall in detail what was said, that Mr Fiorentino initially spoke and said:

> "Julian I have matter where urgent advice is required. [Accountant] is also on the phone. He is an accountant."

113. Mr Svehla's evidence was that Mr Fiorentino and the accountant outlined a scenario which involved a transfer of a business from a company (First Company) to another company (Second Company) where the First Company had unpaid liabilities associated with its business including for payroll tax. The First Company was insolvent or facing impending insolvency.

114. A fee note issued by Mr Svehla under the title "GPL Solutions – Advice on transfer of assets and payroll tax" records that on 5 March 2008, Mr Svehla conducted an urgent

teleconference with Mr Fiorentino and personnel from GPL Solutions and gave "advice on transfer of assets, non-payment of payroll tax" and records:

> "Advising cannot be done by leaving payroll tax behind, need to have agreement in place for new company to meet payroll tax liability,
>
> Otherwise must ensure that the sale of assets is for proper commercial value".

115. We find the following in relation to this aspect of the matter:

(a) That as at about January 2008, Mr Hammoud was concerned about ERB's financial problems and in particular, the unpaid OSR debt;

(b) Mr Bastas was advising Mr Hammoud and was proposing a restructure involving the transfer of the business to a new company, but on the basis that the debts including the OSR would be paid;

(c) That Mr Hammoud approached Mr Moini in about January or February 2008. His main concern was to keep his business;

(d) Mr Moini suggested that Mr Hammoud consult Mr Fiorentino about liquidating ERB, as Mr Fiorentino had achieved a solution for Mr Moini when he had liquidated one of Mr Moini's companies, whilst permitting him to retain his business;

(e) Mr Moini and Mr Hammoud went to see Mr Fiorentino and they discussed ERB's inability to pay the OSR debt and Mr Hammoud's desire to explore liquidation as a means of retaining his business. Mr Fiorentino advised Mr Hammoud that he could transfer the business to a new company and that he should liquidate ERB;

(f) Mr Hammoud later consulted Mr Bastas, who was against the idea of liquidation because he believed that a liquidator would be able to reverse the transfer of business;

(g) On 5 March 2008, Mr Bastas, either alone or together with Mr Hammoud, met Mr Fiorentino to debate the issue. Mr Bastas maintained his view that that if the business was transferred leaving debts, and ERB went into liquidation, the whole transfer would be reversed by the liquidator. During the course of this meeting, Mr Fiorentino rang Mr Svehla who advised that the transfer of business to a new company could be effectuated, provided, either, that the new company took over the obligations to the OSR or that the new company paid a proper commercial value for the assets;

(h) The effect of Mr Fiorentino's advice was that ERB should be liquidated, that as a precursor to liquidation, ERB should sell its business to another company, that Messrs Hammoud and Bastas needed to work out the assets and liabilities of ERB and that Mr Hammoud should retain a lawyer to prepare the contract for sale;

(i) Mr Hammoud decided to proceed with liquidation and Mr Bastas proceeded to prepare the accounts and, either alone or with the assistance of a solicitor, drafted the Business Sale Agreement.

Implementing the advice

116. On 13 March 2008, Mr Bastas sent an email to Mr Fiorentino. The email attached three sets of accounts. In the email, Mr Bastas stated:

> "Dear Pino,
>
> *As we discussed on the phone*, please find attached financial accounts for:
>
> 1. Year ending 30/06/2007
>
> 2. Period 1/7/2007 to 29/02/2008
>
> 3. Period 1/7/2007 to 31/3/2008
>
> *As I mentioned* I have taken their accounts prepared by the internal accountant and I have adjusted them for the franchising and the transfer of assets to the family trust.
>
> I have not undertaken any audit.
>
> We are currently in the process of finalising the contract for the transfer of assets.
>
> *Please let me know your thoughts*.
>
> *Obviously our discussions are extremely confidential*.
>
> Regards
>
> Elias Bastas" (emphasis added)

117. We infer, from the terms of this email, that Mr Fiorentino had had a discussion with Mr Bastas about the nature of the draft accounts which Mr Bastas had attached to this email. The period of the accounts and the matters with which they dealt are important.

118. Each set of accounts purported to provide a snap-shot of ERB's position at a particular date. The accounts had been "adjusted" for "the franchising and the transfer of assets to the family trust". The reference to "franchising" was self-evidently a reference to the transactions in 2007 whereby ERB had disposed of franchises. The reference to the "transfer of assets to the family trust" was self-evidently a reference to the proposed transfer of the business being undertaken at the time.

119. The first set of accounts ("the 30 June 2007 accounts") purported to record the position prior to both the franchise transactions and the transfer of business. The second set of accounts (as at 29 February 2008) purported to record the position post the franchise transactions but prior to the transfer of business. (It is apparent from the evidence as a whole that the transfer of business was intended to take place – or at least was to be

treated as having taken place – on 28 February 2008). The third set of accounts (as at 31 March 2008 – prepared prospectively) purported to record the position post the franchise transactions *and* post the transfer of business.

120. It is clear to us, and we find, that Mr Fiorentino understood the matters in the last two paragraphs. It is clear that he had had a telephone conversation with Mr Bastas in which he had discussed the various accounts and their effect. Mr Bastas recorded, in his 13 March email, that he had mentioned to Mr Fiorentino how the accounts had been prepared and the fact that they had been adjusted to take account of the franchising and transfer of assets. Moreover, we infer that Mr Fiorentino had a further discussion or discussions with Mr Bastas concerning the accounts, after the receipt of the email and accounts. Mr Bastas had gone to some lengths to explain what was being done and he expressly said "Please let me know your thoughts".

121. The second set of accounts ("the 29 February 2008 accounts"), attached to Mr Bastas' email, when compared to the 30 June 2007 accounts, disclosed that:

(a) between 1 July 2007 and 29 February 2008, the total assets of ERB had been reduced by approximately $3.5m and

(b) between 1 July 2007 and 29 February 2008, the Directors Loans had been reduced by approximately $5.2m.

122. This reduction was, in very general terms, consistent with the franchise transactions (see paragraphs 94 to 96 above), whereby ERB had disposed of franchises and used the proceeds to reduce the directors' loans.

123. The third set of accounts ("the First Version of the 31 March 2008 accounts"), which were also attached to Mr Bastas' email, showed, when compared to the 29 February 2008 accounts, that:

(a) between 29 February 2008 and 31 March 2008 the assets of the company had been reduced by $7,612,863.75;

(b) between 29 February 2008 and 31 March 2008, the Directors Loans had been further reduced by $2,971,516.86 to $635,526.64; and

(c) the payroll tax liability remained a liability of ERB at 31 March 2008 ($464,246.45).

124. Again, this was, in very general terms, consistent with a transfer by ERB of its business (assets and liabilities) to a related third party, although we note that the retention of the OSR liability was *prima facie* inconsistent with Mr Svehla's advice.

125. On 28 March 2008, ERB (under its then name of Ella Rouge Beauty Pty Ltd), as vendor, and BWI as Trustee of the Shanel Family Trust, as purchaser, executed an agreement (the Business Sale Agreement), back-dated to 28 February 2008, pursuant to which ERB sold and transferred its business to BWI for no cash consideration. There are other executed copies dated 28 February 2008 and it appears that the parties intended the operative effect of the Business Sale Agreement to be 28 February 2008. The Liquidators, in their Reports, took the effective date of the Business Sale Agreement to be 28 February 2008.

126. The purchase price was the aggregate of the total values of the component parts of the business as set out in the agreement. The values of the component parts of the business in Schedule 8 listed total assets at $4,057,098.75 and total liabilities at $4,057,100.75[8]. In other words, the purchase price was zero, but it was the apparent intention that the purchaser would take over ERB's liabilities, certainly those liabilities set out in Schedule 8. The liabilities in Schedule 8 included "loans" of $2.691m. This was, in very general terms, consistent with the First Version of the 31 March 2008 accounts (discussed at paragraph 123 above) which suggested a reduction in directors' loans of $2.971m at this time.

127. It is not clear that Mr Fiorentino received a copy of the Business Sale Agreement at the time it was executed. However, he received a copy a few days later, on 2 April 2008, as discussed below.

128. As already stated, on 28 March 2008, ERB changed its name to ERB International Pty Ltd.

Liquidation of ERB

129. On 2 April 2008, Messrs Hamilton and Fiorentino were appointed joint liquidators of ERB by its shareholders, Mr Hammoud and Ms Issa.

130. Mr Hammoud signed a Form 509 Summary of Assets and Liabilities for ERB on 2 April 2008 ("the directors' RATA") showing assets of only $1,678.00, with liabilities of about $2.6m, made up of directors' loans of about $2m, the debt to the OSR of $464,246 and a debt to the ATO of $56,294.

131. We should note that Mr Russell submitted that the transaction (i.e. the transfer of business and liquidation of ERB) was a "phoenix transaction", although he did not submit (nor was it any part of ASIC's case) that Mr Fiorentino was knowingly involved in procuring such a transaction.

132. However, the directors' RATA suggested, *prima facie*, that the Business Sale Agreement and liquidation involved a phoenix transaction (ie, a transaction whereby the directors had transferred the business to a related company, leaving debts in the old company, thus permitting the business to carry on in the new company for their benefit). In our view, having received the RATA, it must have been apparent to Mr Fiorentino that there was at least a question mark over whether Mr Hammoud intended the Business Sale Agreement and liquidation to operate as a phoenix transaction or that the whole transaction, in fact, had that effect. In view of the fact that he had been party to the conversation with Mr Svehla a few weeks earlier, in which Mr Svehla had advised that it was not possible to transfer the business to a related third party, unless a proper commercial price was paid or the purchaser took over the OSR liability, Mr Fiorentino ought to have been seriously concerned about the legitimacy of the transaction.

133. On 2 April 2008, Mr Fiorentino received the following company records:

    (a) An executed copy of Business Sale Agreement dated 28 March 2008;

[8] See Clause 2, the definitions of "Business" and "purchase price" in clause 1, clause 8(a) and Schedule 8.

(b) 31 March 2008 ERB Financial Statements ("the Second Version of the 31 March 2008 Accounts").

134. Again, these documents ought to have raised serious questions in Mr Fiorentino's mind as to the legitimacy of the whole transaction. On reading the Agreement, he must have become aware that the Business Sale Agreement provided that ERB transferred its assets and liabilities[9] to BWI for zero cash consideration. The zero cash consideration came about because, by what appeared to be an amazing coincidence, the assets and liabilities listed in Schedule 8 were virtually identical in amount. The values of the component parts of the business in Schedule 8 listed total assets at $4,057,098.75 and total liabilities at $4,057,100.75[10]. The liabilities in Schedule 8 did not include the OSR debt.

135. In the Second Version of the 31 March 2008 Accounts, the Directors' Loans were recorded at $2,152,199.64 for 31 March 2008, (which reconciled with the combined amount claimed by the Directors in the RATA). However, this was a substantial increase on the figure of $635,526.64 recorded for the same time in the First Version of the 31 March 2008 Accounts (see paragraph 123 above). This meant that the Directors' claims in the liquidation were significantly greater than any other creditor.

136. Importantly, this increase appeared to be inconsistent with the terms of the Business Sale Agreement, which transferred the business at a "nil" consideration on the basis that BWI was to take over liabilities including "loans" of $2.691m. These documents suggested, *prima facie*, that either the directors' claim of $2,152,199.64 in the RATA and Second Version of the 31 March 2008 Accounts were substantially overstated or that BWI had not in fact paid adequate consideration because it had not taken over responsibility for the directors' loans in this amount.

137. On 2 April 2008 the Liquidators sent a Notice to Creditors advising of a meeting on 16 April 2008 together with a DIRRI[11] in which Mr Fiorentino declared he had no relevant relationship with ERB or any associate of ERB and, accordingly, that there were no reasons for believing that there were any relevant relationships which resulted in the liquidators having a conflict of interest or duty.

138. The Notice was only sent to the creditors as set out in the directors' RATA (i.e., directors - apparently on the basis that they were creditors for $2,152,199.64 - the OSR and the ATO). The Notice was not sent to Westfield, the lessor of the leases of the various shops, notwithstanding that there had been no formal assignment of leases, nor was the Notice sent to any employees (or former employees) of ERB.

139. On 16 April 2008, the first meeting of creditors of ERB was held during which the creditors resolved, *inter alia*, that the Liquidators appointed by the members remain as Liquidators and their remuneration be capped at $60,000 + GST. The only persons purporting to vote as creditors were the directors.

140. Mr Fiorentino said, in his s 19 transcript, that $60,000 was the amount he had nominated, because if he had done it for $10,000, he would not have been able to do a proper investigation.

[9] (Or, to be more precise, it purported to transfer liabilities).
[10] See Clause 2, the definitions of "Business" and "purchase price" in clause 1, clause 8(a) and Schedule 8
[11] Declaration of Independence and Relevant Relationships and Indemnities.

141. It is apparent that Mr Fiorentino met Mr J Hamilton of RBHM Commercial Lawyers on 21 April 2008 and sought advice from him about the Business Sale Agreement.

142. By email dated 24 April 2008, Mr Fiorentino received draft legal advice relating to the Business Sale Agreement from Mr J Hamilton ("the 24 April 2008 Legal Advice") which advised, *inter alia*, that:

(a) the Business Sale Agreement purportedly caused BWI, a related party, to take over the obligations to meet all creditors of ERB with the value of assets matching the value of creditor obligations meaning no cash price was paid;

(b) a reasonable interpretation of the Business Sale Agreement was that the parties in substance intended that the purchaser would indemnify the vendors against all creditors existing at completion, via the purchaser paying them, either at completion or after completion, whilst trading on the same business, when those creditors fell due for payment;

(c) an asset of ERB would be its claim under the Business Sale Agreement against BWI for indemnification, for the value of all the ERB creditors remaining unpaid which existed as at the sale date;

(d) Mr Fiorentino needed to ascertain ERB's creditors at the sale date, obtain and review the creditors ledger, seek from BWI a list of all ERB creditors paid pre and post liquidation, send a notice to the directors under s 475(2) and (3) of the Act seeking details about the sale and the creditors and obtain the files of any third party financial, accounting or legal advisors involved in advising ERB about the sale;

(e) there was also the possibility of the liquidator seeking to invoke the Act and common law remedies to set aside the Business Sale Agreement as an uncommercial transaction or phoenix transaction;

(f) that the liquidators would have to assess the prospects of this claim and whether the sale price was fair, assuming that BWI had in fact agreed to indemnify ERB for all its creditors at completion;

(g) assuming that only some of the creditors had been paid out on completion, the claim under the indemnity was an unsecured chose in action and the value of this chose in action may be far less than an alternative sale, in which all creditors were paid out on completion;

(h) to assess the fairness of the gross asset sale price attributed to the assets in Schedule 8 of the Agreement required Mr Fiorentino to review the company's records to create a list of the assets sold and then obtain advice on the market values;

(i) that he would probably have to seek information from Mr Hammoud;

(j) there were practical issues in choosing a remedy, as there may be problems for the liquidator in selling the business as a going concern in view of the potential for termination of franchises and leases.

143. We note that Mr Fiorentino's knowledge of the key issues at this time was not restricted to the matters set out in this advice. He already had background knowledge concerning the inception of the Business Sale Agreement, the advice given by Mr Svehla, the matters in Mr Bastas' email of 13 March and the information in the 30 June 2007 Accounts, the 29 February 2008 accounts, the First Version of the 31 March 2008 Accounts and the Second Version of the 31 March 2008 Accounts.

144. On 16 May 2008 the OSR made a demand of BWI for $205,133.99, for outstanding payroll tax by reason that:

(a) ERB and BWI constituted a group of companies;

(b) ERB was jointly and severally liable with BWI for payment.

145. From 21 May to 31 May 2008, Mr Fiorentino made representations to the OSR and otherwise gave advice and assistance to Mr Hammoud and Mr Bastas to avoid BWI not paying the payroll tax the subject of the OSR's demand.

146. By 2 September 2008, Mr Fiorentino had formed the view that ERB's liability to Directors as claimed by them in the RATA could not be substantiated and the Directors were in fact debtors of ERB in the sum of $97,206.53. This would suggest, in relation to the Business Sale Agreement, that:

(a) the Loans (a liability) in Schedule 8 may have been overstated;

(b) net assets were understated;

(c) BWI may not have paid a fair price for the assets of the Business.

147. On 23 September 2008, Mr Fiorentino sent a Notice to Creditors advising of a meeting of creditors to be held on 8 October 2008 ("23 September 2008 Notice") for the purpose of considering the attached Report of the Liquidators and:

(a) to consider whether creditors wished to indemnify the liquidators and/or provide a fund to enable the liquidators to carry out public examinations under ss 596A and 596B of the Act and, if necessary (depending on the outcome) to take legal action:

(i) concerning monies owed to ERB by BWI under the Business Sale Agreement;

(ii) to recover the amount paid to GuildSuper of $125,000 and interest or earnings thereon since the payment of that money by ERB in October 2003 ("the First Resolution");

(b) if thought fit resolve to fix the remuneration of the liquidators of ERB in the sum of $198,561.91 excluding GST for the period 2 April 2008 to 21 September 2008 ("the Second Resolution"); and

(c) if thought fit resolve that the remuneration of the liquidators of ERB be fixed on a time basis based upon Hamiltons Scale of Fees to be paid as and when incurred at the discretion of the liquidators in the first instance not to exceed

the sum of $100,000 without further approval by a meeting of creditors ("the Third Resolution").

148. By facsimile dated 26 September 2008, Mr J Hamilton, on Mr Fiorentino's instructions, sent a Notice of Demand to Mr Pateman, as solicitor for Mr Hammoud and Ms Issa, demanding payment of $97,206.53.

149. By email dated 4 October 2008, Mr Bastas advised Mr Fiorentino, *inter alia*, that:

(a) they did not agree with his assessment of money owed by BWI; and

(b) the business was under revenue pressure and there were no funds to pay unexpected costs.

150. Attached to Mr Bastas' email of 4 October 2008 was a schedule showing "Summary of Leave Entitlements and Superannuation as at 29 February 2008". This suggested that there were employees who were creditors, or at least contingent creditors, yet these employees had never received notice of any meeting.

151. On or before 8 October 2008, Mr Hammoud and Ms Issa submitted proofs of debt dated 7 October 2008 to the Liquidators of ERB claiming amounts of $1,443,151.32 and $1,431,612.85 respectively comprising employee entitlements and loans.

152. On 8 October 2008, a meeting of creditors of ERB was held, at which:

(a) Mr Fiorentino accepted proxies from 8 Former Employees;

(b) the First Resolution (for funding) did not carry; and

(c) the Second and Third Resolutions (for remuneration) did carry.

153. By letter dated 10 October 2008, Mr Pateman informed Mr J Hamilton that the Directors rejected any claims by the Liquidators that they were debtors of ERB.

154. By email dated 2 December 2008, Mr Fiorentino advised Mr Pateman that unless he received cash flows and financial accounts of BWI by 10 December 2008, he would proceed with a court application to hold mandatory examinations.

155. Also, on 2 December 2008, Mr Fiorentino informed Mr J Hamilton that he should be getting funds in the next week or so to fund public examinations and that there were plenty of dates in January.

156. In December 2008 or early January 2009, Mr Fiorentino prepared the necessary Court documents to obtain orders for the production of documents and to conduct public examinations as had been foreshadowed in his email of 19 December 2008.

157. On 14 January 2009, and with some apparent urgency that day, the Liquidators and ERB entered into the Deed of Settlement and Release with BWI, Mr Hammoud and Ms Issa, pursuant to which *inter alia*:

(a) BWI, Mr Hammoud and Ms Issa were released from all claims by ERB and the Liquidators – clause 3.1;

(b) ERB received $60,000 – clauses 1.1 and 2.1; and

(c) BWI and the Directors agreed to offer and provide all reasonable assistance as requested by the Liquidators or ERB to complete the administration, including Mr Hammoud agreeing to be examined by the Liquidators on specific matters and signing an accurate copy of the transcript of the examination - clauses 4.1 & 4.2 (Deed of Settlement and Release).

158. By the effect of its terms, clause 3.1 of the Deed of Settlement and Release *inter alia* released:

(a) the Directors from their debt to ERB of $397,306.53; and

(b) BWI from:

(i) its debt to ERB of $146,693.14; and

(ii) the Right of Indemnity in relation to ERB liabilities which included the OSR debt and any other ERB liabilities prior to the Business Sale Agreement totalling $4,719,862.77 (although it is clear that BWI in fact assumed a substantial proportion of these liabilities, other than the OSR debt, a debt to GIO General ($223,023), and a debt to Gallagher Bassett Services ($93,623)).

159. On 30 April 2009, Mr Fiorentino sent a Notice and Report giving notice of a Creditors Meeting of 15 May 2009 with 2 proposed resolutions, both concerning the Liquidators' remuneration, the first being to fix the remuneration of the liquidators in the sum of $183,943 excluding GST for the period 8 October 2008 to 29 April 2009 ("Resolution 1") and the second being that the remuneration of the liquidators be fixed on a time basis based upon Hamiltons Scale of Fees to be paid as and when incurred at the discretion of the liquidators in the first instance not to exceed the sum of $100,000 without further approval by a meeting of creditors ("Resolution 2").

160. The 30 April 2009 Notice and Report was not sent to Westfield, any former employee creditors, GPL Solutions or Mr Karnib.

161. By email dated 12 May 2009, Mr J Hamilton informed Clayton Utz that their client remained a creditor pending assignment of leases and may wish to lodge a proof of debt ("POD"). He attached the 30 April 2009 Notice and part only of the 30 April 2009 Creditors Report.

162. On 12 May 2009, Ms Ioakimaros commenced contacting creditors on Mr Fiorentino's instructions to ensure a quorum for the creditors meeting of 15 May 2009. On that day and on Mr Fiorentino's instructions, she emailed to Mr Hammoud a blank POD and Proxy form "for the employees to fill in".

163. On 13 May 2009 on Mr Fiorentino's instructions, Mr Scarcelli commenced pre-completing 28 proxies and PODs for 28 former employee creditors and then forwarded them by email to Mr Fiorentino.

164. On 13 May 2009, Mr Fiorentino forwarded 28 pre-completed proxies and PODs for former employee creditors to Mr Hammoud.

165. On 14 May 2009, GIO faxed its POD for $225,690.20 and its Proxy, which contained instructions for the proxy holder to *vote against* both resolutions.

166. Throughout 14 May 2009, Mr Fiorentino received from Mr Hammoud 31 Proxies and PODs, being the 28 pre-completed proxies and PODs for the former employee creditors as well as proxies and PODS for GPL Solutions, Mr Karnib and "Westfield Head Office".

167. The Westfield Head Office and GPL Solutions proxies were received by fax after the receipt of the GIO proxy voting against the resolutions.

168. Mr Hammoud gave evidence to ASIC to the effect that:

(a) Mr Fiorentino requested Mr Hammoud provide to him proxies and PODs from 28 Employees, Mr Karnib, GPL Solutions and Westfield;

(b) further, Mr Hammoud completed, signed and/or returned by fax, as the case may be, each of the 31 Proxies and PODs; and

(c) from time to time, Mr Hammoud would call Mr Fiorentino to confirm that Mr Fiorentino had received them.

169. Each of the 31 Proxies and PODs were *prima facie* invalid, as they had all been signed by Mr Hammoud.

170. On 15 May 2009 at 9.30am a meeting of ERB creditors was held at, or during which, *inter alia*:

(a) Mr Fiorentino chaired the meeting;

(b) Mr Fiorentino tabled the Attendance and Proxy Schedules and informed the meeting of the parties in attendance in person and/or by proxy;

(c) David McCrostie (for GIO) and Mr Svehla (as proxy for the 28 Employees, Mr Karnib, GPL Solutions and Westfield Head Office) and Mr Ian Swinnerton (for GIO [sic Gallagher Bassett]) by phone were present;

(d) Mr Svehla informed the meeting he was present in two capacities: first, as counsel for the liquidator; and second, as proxy holder and "that he had nothing to do with getting them in or whether they have adjudicated upon them correctly";

(e) Mr McCrostie questioned why the employees of the company were on the attendance schedule for voting purposes and not included as creditors in the Report;

(f) Mr Fiorentino informed the meeting, *inter alia*, that after receiving preliminary oral advice from his solicitor yesterday, he had determined that the employee claims were allowed for voting purposes only to the extent of $1 per claim as their claims were contingent;

(g) Mr Svehla moved each of Resolution 1 and Resolution 2 at the meeting; and

(h) each of Resolution 1 and Resolution 2 were recorded as being carried with:

(i) GIO, whose debt was admitted by Mr Fiorentino to the value of $225,690.20, voting against each Resolution;

(ii) Gallagher Bassett, whose debt was admitted by Mr Fiorentino to the value of $134,403.59, voting for each Resolution; and

(iii) the 28 Employees, Mr Karnib, GPL Solutions and "Westfield Head Office", whose debts were all admitted by Mr Fiorentino, which included a value of $965,000 for Westfield, voting by their proxy for each Resolution.

171. Had the 31 Proxies and PODs not been accepted by Mr Fiorentino at the Meeting, which should have occurred, then none of the resolutions would have carried because:

(a) GIO ($225,690.20) voted against;

(b) Gallagher Bassett ($134,403.59) voted for.

172. On 13 November 2009, the Liquidators lodged a Form 578 with ASIC requesting deregistration of ERB. The final Form 524 recorded that $536,929.15 had been realised during the liquidation, with $455,773.20 applied as Liquidators' remuneration and out of pocket expenses.

173. On 24 January 2010, ERB was deregistered.

174. On 22 October 2010, ASIC informed Mr Fiorentino (c/-Hamiltons) of various concerns it had identified pursuant to a Remuneration Review that ASIC had conducted of ERB in mid-2010 including that he had failed to lodge a s 533 Report.

175. On 9 March 2011, Mr Fiorentino attempted to lodge a s 533 Report with ASIC, which was not accepted and returned as ERB had been deregistered.

176. On 7 July 2011, Mr Fiorentino was convicted of an offence committed on 2 May 2011 (destroy or damage property) and was sentenced and given a 2 year good behaviour bond, with probation and parole supervision.

177. On 11 November 2011, Mr Fiorentino lodged an Annual Statement (Form 908) for the period 11 October 2010 to 11 October 2011. Mr Fiorentino answered "no" to the question whether he had been convicted of any offence, other than a traffic offence, in the period.

G. The Contentions

(a) The structure of the SOFAC and Contentions

178. The SOFAC contains 25 separate Contentions (being Contentions 1 to 23, 25 and 26).

179. Contentions 1 to 23 and 25 are said to support a finding that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator. As we read the SOFAC, ASIC seeks that finding in relation to each of three areas of Mr Fiorentino's

conduct, namely, the Proxy Issue, the Transfer of Assets Issue and the General Conduct Issues. Moreover, it is apparent that ASIC contends that any one or more of the Contentions within each of those areas justifies that finding, in itself (see the Note at page 41 of the SOFAC).

180. We have approached the matter on the basis that we should consider, first, whether each Contention within each of the three issues is made out and, if so, whether that matter, in itself, justifies a finding that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator. In dealing with each of the three issues, we will also consider whether the successful Contentions, in combination, justify such a finding.

181. A number of the Contentions contain sub-contentions and, in addition, a number of them seek to characterise particular conduct in a number of alternative ways (for example, as negligent, alternatively lacking in good faith, alternatively dishonest). To the extent required, we have dealt with every alternative permutation.

182. Contention 26 is said to support a finding that Mr Fiorentino is not a fit and proper person to remain registered as a liquidator. None of the other Contentions is relied upon to support this finding.

(b) Our approach to dealing with the factual allegations in the Contentions

183. We have dealt with the Contentions, in most cases, first, by setting out the matters relied upon by ASIC in respect of each Contention under the heading "Matters upon which ASIC specifically relies" and, secondly, by setting out the issues for determination and our consideration of those issues under the headings "Issues for determination".

184. The matters under the headings "Matters upon which ASIC specifically relies" are largely factual matters and are largely supported by documentary evidence. They are largely admitted by Mr Fiorentino in his Response. Accordingly, we accept the factual assertions under these headings unless we specifically say otherwise.

(c) Contentions going to the "Proxy Issue" (Contentions 1 to 5)

185. The first five Contentions relate to what are described as "the Proxy Issue". In fact, only Contentions 3 to 5 deal with proxies *per se*. Contentions 1 and 2 relate to an alleged failure to give notices of creditors meetings to certain creditors. Nevertheless, Contentions 1 to 5 were grouped together in the SOFAC and it is convenient to deal with them in this way.

(i) Contention 1 – failure to give 23 September 2008 Notice and Report to Westfield or any employee creditors.

186. As already stated above, Mr Fiorentino convened a meeting of creditors of ERB for 8 October 2008. A Notice to creditors and Report dated 23 September 2008 were sent to certain persons as creditors. However, the 23 September 2008 Notice and Report were not sent to Westfield or employees of ERB.

187. ASIC asserted, by Contention 1, that:

"By not giving the 23 September 2008 Notice and Report to Westfield or any of the employee creditors of ERB, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of Reg. 5.6.12(1)(a) of the Act; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section."

188. In his general response to this allegation in his Response, Mr Fiorentino denied this Contention. In substance, he asserted that, at the time of calling the 8 October meeting, he thought that Westfield was not a creditor and that the employees probably were not. He asserted that when proxies arrived from 8 former employees, he assumed that they had received notice of the meeting and the report. He took the view that he should admit their proxies on the basis that it was possible that they would be creditors in due course in some circumstances.

Matters upon which ASIC specifically relies in support of Contention 1

189. The matters upon which ASIC specifically relies in relation to Contention 1 are as follows. In his Response, Mr Fiorentino admitted all of these facts, except those specifically noted below.

190. The directors' RATA as at 2 April 2008 was certified by Mr Hammoud and recorded creditors were owed $2,672,740.94, made up as follows:

(a) Office of State Revenue ("OSR") in the amount of $464,246.45;

(b) Mr Hammoud and Ms Issa claiming to be creditors each for an amount of $1,076,099.82; and

(c) the Australian Taxation Office ("ATO") for an amount of $56,294.85.

191. On 2 April 2008, Mr Fiorentino sent a Notice to Creditors advising of a meeting of creditors to be held on 16 April 2008 ("2 April 2008 Notice"). Mr Fiorentino sent a copy of the 2 April 2008 Notice to the following creditors: the OSR, the ATO, and Mr Hammoud and Ms Issa.

192. On 2 April 2008, Mr Hammoud and Ms Issa, by separate instruments completed by Mr Hammoud in his own handwriting and signed by each of them, appointed Mr Fiorentino as their proxy for the creditors meeting to be held on 16 April 2008 with specific instructions to vote for the proposed resolutions at the meeting.

193. On 16 April 2008, the first meeting of creditors of ERB was held at, or during which:

(a) Mr Fiorentino chaired the meeting;

(b) Mr Hammoud and Ms Issa attended by their proxy, Mr Fiorentino;

(c) no other creditors attended; and

(d) the creditors resolved, *inter alia*, that the liquidators appointed by the members remain as liquidators and the remuneration of the liquidators be capped at $60,000 GST exclusive.

194. On 12 May 2008, the OSR lodged a proof of debt ("POD") for $468,838.08[12].

195. On 21 August 2008, Brian Noble of Clayton Utz, acting for Westfield, wrote to Mr Fiorentino and informed him that the lessors of the various Westfield centres ("Westfield") agreed to an assignment of shop leases from ERB to BWI, on terms contained in an enclosed deed of covenant, and requested the liquidators of ERB to sign the deed.

196. The deed of covenant referred to in the preceding paragraph provided *inter alia*:

(a) the parties to the deed were named as BWI (as Assignee), Perpetual Trustee Company Ltd and Westfield Management Ltd as responsible entity of the Bondi Junction Trust (as Lessor), ERB (as Assignor) and Mr Hammoud and Ms Issa (as Guarantor and New Guarantor);

(b) the Lessor consented to the assignment of the Lease (being the lease of Shop 4004 at Westfield Bondi Junction) by ERB to BWI from the Assignment Date (which is not defined) – clause 8;

(c) ERB, subject to the *Retail Leases Act*, remained liable and was not released from any of its obligations under the Lease, in respect of any breach before and after the Assignment Date – clause 4[13]; and

(d) ERB to pay the Lessor, on or before the Assignment Date, the amount required to be paid pursuant to the Contribution Deed – clause 9.

197. In the circumstances, ASIC alleged that from about 21 August 2008 if not before, Mr Fiorentino knew that:

(a) Westfield is and was a creditor of ERB [this is denied by Mr Fiorentino]; and

(b) none of the leases had been assigned to BWI [this is not admitted by Mr Fiorentino, and he refers to clauses 7 and 8 of the Business Sale Agreement that ERB was to provide BWI an effective assignment of the leases on execution date or within a reasonable time thereafter].

198. On 23 September 2008, Mr Fiorentino sent a Notice to Creditors advising of a meeting of creditors to be held on 8 October 2008 ("23 September 2008 Notice") for the purpose of considering the attached Report of the Liquidators and:

(a) to consider whether creditors wished to indemnify the liquidators and/or provide a fund to enable the liquidators to carry out public examinations under

[12] Mr Fiorentino denies this stating that the OSR lodged a POD dated 12 May 2008 on 14 June 2008 – Response p 19.
[13] Mr Fiorentino admits this and says that s 41A of the Retail Leases Act releases the assignor from any post assignment breaches by the lessee – Response p 19.

ss 596A and 596B of the Act and, if necessary (depending on the outcome) to take legal action:

(i) concerning monies owed to ERB by BWI under the Business Sale Agreement;

(ii) to recover the amount paid to GuildSuper of $125,000 and interest or earnings thereon since the payment of that money by ERB in October 2003 ("the First Resolution");

(b) if thought fit resolve to fix the remuneration of the liquidators of ERB in the sum of $198,561.91 excluding GST for the period 2 April 2008 to 21 September 2008 ("the Second Resolution"); and

(c) if thought fit resolve that the remuneration of the liquidators of ERB be fixed on a time basis based upon Hamiltons Scale of Fees to be paid as and when incurred at the discretion of the liquidators in the first instance not to exceed the sum of $100,000 without further approval by a meeting of creditors ("the Third Resolution").

199. A Report to Creditors accompanied the 23 September 2008 Notice ("23 September 2008 Report") in which Mr Fiorentino advised, *inter alia*, that:

(a) the Directors claimed to be creditors for $2,152,199.64, but that the liquidators had no evidence of the alleged debt; and

(b) employees' claims for wages and superannuation, leave of absence and retrenchment payments were estimated to be a total of $500,000. [Mr Fiorentino admits this but asserted, in his Response, that he formed the view that the "employees" as pleaded were not creditors of ERB].

200. Mr Fiorentino sent a copy of the 23 September 2008 Notice and Report to the following creditors of ERB, namely: the OSR, Mr Hammoud, Ms Issa, GIO General Limited ("GIO"), Gallagher Basset Services ("Gallagher Basset"), the Beauty Warehouse Pty Ltd and an entity by the name of Anything Wet.

201. No other creditor of ERB was sent a copy of the 23 September 2008 Notice and Report. Mr Fiorentino does not admit this allegation.

202. On 26 September 2008, Gallagher Bassett (Workers Compensation) lodged a POD for an amount of $134,403. On 30 September 2008, GIO (Workers Compensation NSW) lodged a POD for an amount of $225,690.20.

203. By email dated 4 October 2008, Mr Bastas advised Mr Fiorentino that ERB would owe 68 former ERB staff for unpaid entitlements that amounted to $763,001.97 should they have been made redundant by ERB and attached a summary of "*Leave Entitlements & Superannuation 29/02/2008*" for 68 named former ERB employees.

204. On 7 October 2008, and further to the 23 September 2008 Notice and Report, Mr Hammoud faxed nine (9) Appointment of Proxy forms to Hamiltons.

205. In relation to the 9 proxy forms:

(a) each of the 9 proxy forms was handwritten (Mr Hammoud having written his address on two of the forms) and appeared to be signed by the respective creditor;

(b) each of the 9 creditors who appointed Mr Hammoud as their proxy for the 8 October 2008 meeting instructed Mr Hammoud in their proxy form to:

(i) vote against the First Resolution at the meeting; and

(ii) vote in favour of the Second and Third Resolutions the meeting; and

(c) of the 9 persons who appointed Mr Hammoud their proxy for the 8 October 2008 meeting, 8 were former employees of ERB, all of whom then worked for BWI at the company's Head Office at Hurstville and were neither a shareholder nor director of ERB ("8 Former Employees") and the other person was Ms Issa.

206. Mr Hammoud and Ms Issa lodged formal PODs for amounts of $1,443,151.32 and $1,413,612.85 respectively, both dated 7 October 2008.

207. On 8 October 2008, a meeting of creditors of ERB was held, at and during which:

(a) Mr Fiorentino chaired the meeting;

(b) Mr Hammoud attended in his own capacity and as proxy for the 9 creditors who had submitted proxy forms, but no other creditors attended;

(c) Mr Hammoud's friend Mr Moini, his lawyer Mr Pateman and Mr Bastas were present as observers;

(d) Mr Fiorentino accepted all 9 proxy forms and allowed Mr Hammoud to vote in accordance with them; and

(e) the motion for the First Resolution did not carry and the motions for the Second and Third Resolutions carried unanimously.

208. Mr Fiorentino did not give the 23 September 2008 Notice and Report to Westfield or any of the employee creditors of ERB, other than Mr Hammoud and Ms Issa, including:

(a) those employees referred to or contemplated by Mr Fiorentino in his estimate of employees' claims referred to in the 23 September 2008 Report;

(b) the 68 named former ERB employees provided by Mr Bastas; and

(c) the 8 Former Employees.

209. In his Response, Mr Fiorentino admits that no notices were sent as pleaded but he denies that Westfield or any former employees were creditors as at 23 September 2008.

Issue for determination – Contention 1.

210. The issue for determination is whether, Mr Fiorentino, in not giving the 23 September 2008 Notice and Report to Westfield or the employee creditors of ERB:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of Reg. 5.6.12(1)(a) of the Act; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

Did Mr Fiorentino act in breach of Regulation 5.6.12(1)(a)

211. We will deal first with Regulation 5.6.12(1)(a) of the Corporations Regulations. That regulation provides:

> "(1) The convenor of a meeting must give notice in writing of the meeting to every person appearing on the company's books or otherwise to be:
>
> (a) in the case of a meeting mentioned in sub-paragraph 5.6.11(2)(a)(i) — a member, creditor or contributory of the company. …
>
> (2) The notice must be given to a person:
>
> (a) by delivering it personally; or
>
> (b) by sending it to the person by prepaid post; or
>
> (c) if the person has a facsimile transmission number to which notices may be sent to the person — by faxing it to the person at that number; or
>
> (d) if the person has a document exchange number to which notices may be sent to the person — by lodging it with the exchange at, or for delivery to, the person's receiving facilities identified by that number."

212. The meeting referred to in sub-paragraph 5.6.11(2)(a)(i) is:

> "(a) a meeting convened under Part 5.3A, 5.4, 5.4B, 5.5 or 5.6 of the Act that is:
>
> (i) a meeting of members, creditors or contributories of a company"

213. Although Mr Fiorentino did not include, in the Notice of Meeting, a reference to the Part or section of the Act under which the meeting was called (which, in our view, would be normal practice), the relevant meetings in this case were meetings to ascertain the views of creditors and thus, were convened under Part 5.5. Section 506 of the Act provides that a liquidator in a voluntary winding up may exercise any of the

powers that the Act confers on a liquidator in a winding up in insolvency or by the Court. Those powers include the power to convene a meeting of the creditors for the purpose of ascertaining their wishes under s 479. The meeting was also convened under s 499 for the purposes of fixing remuneration.

214. Accordingly, there can be no real doubt that the meeting which Mr Fiorentino convened for 8 October 2008, was "a meeting convened under Part 5.5 of the Act" that was "a meeting of … creditors" of ERB and that Mr Fiorentino was a convenor of the meeting. In the circumstances, Regulation 5.6.12(1)(a) of the Corporations Regulations required him to give notice in writing of the meeting to every person "appearing on the company's books or otherwise" to be a creditor.

215. In our view, it can properly be said that the statutory requirement imposed by Regulation 5.6.12(1)(a) on Mr Fiorentino was "a duty of a liquidator" which he was required to perform as liquidator of ERB. In any event, in convening the meeting, he was performing a duty or function required to be performed by a registered liquidator and any failure to comply with Regulation 5.6.12(1)(a) would be relevant in considering whether he had carried out or performed that duty or function "adequately and properly".

216. Did Westfield[14] appear to be a "creditor" to whom the notice was required to be given?

217. Mr Fiorentino asserted, in his Response, that at the time of calling the meeting, he believed that Westfield was not a creditor. He asserted that he had been in contact with Westfield through his solicitor (Mr J Hamilton) and was aware that the party who had moved into the leased premises was in fact making the required rental payments and that Westfield was invoicing BWI. He asserted that he had not disclaimed the leases and that no notice of default had been served upon ERB.

218. Mr Fiorentino's response is, in substance, concerned with the question whether Westfield was a creditor in respect of an amount which was then due and payable. It does not address the wider notion of a "creditor", and in particular, whether Westfield was, or more importantly, appeared to be, a contingent creditor.

219. The evidence concerning the leases and obligations thereunder is not complete. The leases were not in evidence, although there was some evidence as to their terms and it is clear that the leases imposed the usual obligation to pay rent and that this obligation continued over the balance of the lease period[15].

220. There was nothing to suggest that Westfield was a creditor in respect of rent which had accrued and was due and payable. However, a landlord is a contingent creditor with regard to future instalments for rent under a lease existing at the date of liquidation: *Lam Soon Australia Pty Ltd (admin apptd) v Molit (No 55) Pty Ltd* (1996) 70 FCR 34; *Henaford Pty Ltd v Strathfield Group Limited* (2009) 72 ACSR 240 at [13]. A landlord is a contingent creditor of the tenant because a lease creates an existing obligation, and out of that existing obligation, there is a liability on the part of the tenant company to pay a sum of money in a future event: *Community Development*

[14] References to "Westfield" are to the defined term in paragraph 43 of the SOFAC meaning the actual lessors of the various Westfield centres at which the relevant shops were located.
[15] See the draft Deed of Covenant, Ex 1 Tab 35.

Pty Ltd v Engwirda Construction Co (1969) 120 CLR 455 at 459 per Kitto J. Even if an assignment of a lease takes place, a lessor may be continue to be a creditor with respect to the difference between the market value of the reversion with and without the benefit of the company's covenant to pay rent: *Re House Property and Investment Co* [1954] Ch 576.

221. Regulation 5.6.12(1)(a) applies to creditors who have contingent claims. We note that Regulation 5.6.23 permits a contingent creditor to vote at a meeting convened in accordance with Regulation 5.6.12. Further, s 553 provides that contingent claims, the circumstances giving rise to which occurred before the relevant date, are admissible to proof against the company.

222. In our view, on the material available to Mr Fiorentino as at 23 September 2008, Westfield appeared to be a contingent creditor. In particular:

(a) First, he had received a letter from Clayton Utz on behalf of Westfield dated 21 August 2008 which made it plain (insofar as it was not already plain) that Westfield was claiming that:

(i) eight leases in the name of ERB were subsisting;

(ii) that Westfield was willing to enter into an assignment of those leases;

(iii) that the terms on which Westfield was willing to assign included terms whereby ERB acknowledge that it remained liable for its obligations, both past and future, under the leases;

(b) Secondly, Mr J Hamilton's email to Mr Fiorentino of 18 September 2008 confirmed that there had been no assignment, that Westfield was claiming that ERB had both ongoing and future obligations under the leases and that Westfield would seek instructions concerning *releasing* ERB from post assignment obligations, if an assignment were to take place. Mr J Hamilton proposed sending a letter to Westfield stating: "Given the liquidation, the rights of [Westfield] will now be to prove as an unsecured creditor in respect of any claim it might have against ERB".

223. In our view, a reasonably competent liquidator,

(a) would have been aware that a landlord of a company in liquidation under a pre-existing lease would be a contingent creditor of the company and thus a creditor for the purposes of convening a meeting under Part 5.6;

(b) would have known that as the company operated a retail business, commonly landlords are either paid late or are owed some arrears of expenses. Accordingly, an enquiry of every known or former landlord on appointment should have been made to enquire about the status of the lease and any outstanding obligations; and

(c) knowing the matters known to Mr Fiorentino as at 23 September 2008, would have believed that Westfield appeared to be a contingent creditor of ERB.

224. In our view, on the matters known to Mr Fiorentino, Westfield appeared to be a contingent creditor. Accordingly, Mr Fiorentino failed to give notice to a person appearing on the company's books or otherwise to be a creditor, namely Westfield, contrary to the requirements of Regulation 5.6.12(1)(a).

225. As to the employee creditors, on the material available to Mr Fiorentino, there appeared to be employee creditors, in particular:

(a) Whilst the Directors' RATA in the 23 September 2008 Report itself listed nil in relation to employee claims, Mr Fiorentino listed (under the heading "*Liquidator's assessment* of the RATA" (emphasis added)) "Priority Creditors" being Wages and Super of $100,000, Annual leave and long service leave of $200,000 and Retrenchment Payments of $200,000;

(b) This was elaborated in the Report, where Mr Fiorentino referred to BWI's indemnity under the Business Sale Agreement and said: "Those creditors of [ERB] at the time who remained unpaid as at the date of liquidation still remain its creditors now, but [ERB's] right to seek indemnification from [BWI] remains. This claim is reflected in the RATA above. Notably, at least the employees of [ERB] have apparently agreed to their transmission to [BWI]";

(c) Mr Fiorentino's estimate of funds available for distribution to creditors in the Report stated that of the surplus of funds available, the Employee Entitlements of $500,000 would be paid out as a first priority;

(d) Prior to the 8 October meeting, Mr Fiorentino received an email from Mr Bastas attaching a document entitled "Ella Rouge Beauty Pty Ltd – Summary of Leave Entitlements & Superannuation 29/02/2008" (that date being the day after the effective date of the Business Sale Agreement). Mr Bastas stated that the attachment related to staff entitlements should they have been made redundant and that it totalled $763,001. The schedule set out, as at 29 February 2008, the amounts payable to each of about 68 ERB employees amounts in respect of annual leave entitlement, long service leave, redundancy and super;

(e) At the 8 October meeting itself, Mr Fiorentino accepted 8 employee proxies, (notwithstanding that these were only a minority of the 68 or so employees on Mr Bastas' schedule).

226. Even in his own Response, Mr Fiorentino did not assert that the employees were *not* creditors. He asserted that the employees "probably were not" creditors, although this assertion is not elaborated. We find this assertion difficult to reconcile with the statements contained in the 23 September 2008 Report and the fact that he accepted the proxies for 8 employee creditors at the meeting.

227. In our view, on the matters known to Mr Fiorentino, the employees were persons who appeared to be creditors and by failing to give notice to them, Mr Fiorentino failed to give notice to persons appearing on the company's books or otherwise to be creditors, contrary to the requirements of Regulation 5.6.12(1)(a).

Did Mr Fiorentino act negligently?

228. As to Contention 1(a) and (c), the Code of Ethics for Professional Accountants ("APES 110") issued by the Accounting Professional and Ethical Standards Board[16] provided, as at material times in 2008 and 2009:

> "130.1 The principle of professional competence and due care imposes the following obligations on Members:
>
> (a) To maintain professional knowledge and skill at the level required to ensure that Clients or employers receive competent professional service; and
>
> (b) To act diligently in accordance with applicable technical and professional standards when providing their services."

229. Section 180 (1) of the Act provides:

> "(1) 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."

230. Section 180 is, of course, subject to the business judgment rule in s 180(2).

231. ASIC made the following observation in the Preliminary Section of the SOFAC:

> "In many of ASIC's contentions, ASIC makes reference to Mr Fiorentino being in breach, or in contravention of a particular statutory provision. In considering such contentions, ASIC notes the following obiter in CALDB's decision of *Allan Gregory Walker* of 22 December 2008 at page 19 paragraph 7.3(b).
>
> 'It is beyond doubt that there are various sources from which an [auditor's] duties may arise and they include statutory provisions, the general law and codes and the standards promulgated by the professional bodies. In this case ASIC has framed a number of its contentions as being constituted by a contravention (or failure to comply with) a specified statutory provision.
>
> However, whether there has been a contravention of any particular statutory provision is not a matter relevantly for us to decide. The exercise of our power under s 1292 does not turn on our being satisfied to a legal standard. It may be that the failure to carry out and perform a relevant duty is an offence, however that is not what we are called upon to determine by the terms of s 1292. The question for us is the adequacy and propriety of the carrying out or

[16] Formed by CPA Australia Limited, the Institute of Chartered Accountants in Australia and the National Institute of Accountants in 2006. Accountants who are members of the professional accounting bodies are required as a condition of their membership to comply with the ethical and professional standards approved by the APESB.

performance of a relevant duty and that is to be judged by the Board by making an evaluative and subjective determination.'"

232. In his Response, Mr Fiorentino made a number of assertions concerning s 180 (in a section dealing globally with ss 180 to 184).

233. *First*, he asserted that s 180-184 had not been judicially considered in respect of its application to liquidators and that the applicability of the section had been doubted in *ASIC v Edge* [2007] VSC 170. He asserted that the Board's own decision in *ASIC v McVeigh* (19 January 2010) in holding otherwise was wrong.

234. In our view, this assertion is incorrect. Section 180 clearly applies to liquidators. In *ASIC v Edge*, the very decision relied upon by Mr Fiorentino, Dodds-Streeton J expressly accepted that a liquidator was "an 'officer' *subject to the obligations in ss 180 and 181*" (at [604] – emphasis added). The concern which she raised in that case was whether declarations or findings of breach of s 180 (1) of the Act could properly be made in the context of an inquiry under s 536 of the Act (at [601]).

235. The applicability of s 180 (and other provisions of the Act - and, indeed, professional codes) was recently confirmed in the decision of Middleton J in *ASIC v Dunner* (2013) 303 ALR 98 where his Honour said (at [27]*ff)*:

> "[27] Insolvency practitioners are subject to standards imposed by:
>
> (a) Part 2D.1 of the Act (as officers of a corporation, because administrators, liquidators and receivers are all included in the definition of "officer" in s 9 of the Act);
>
> (b) equitable principles applicable to fiduciaries, including a duty to avoid conflicts of interest; and
>
> (c) industry codes.
>
> [28] As officers, liquidators and receivers are subject to the same statutory duty of care and diligence as directors under s 180 of the Act.
>
> [29] Specifically in relation to liquidators, I note that a liquidator is appointed and paid to exercise a particular professional skill, and a high standard of care and diligence is required in the performance of their duties: *Pace v Antlers Pty Ltd (in liq)* (1998) 80 FCR 485 at 497; 26 ACSR 490 at 501 (*Pace*).
>
> [30] In *Pace* at FCR 499; ACSR 503, Lindgren J stated that a liquidator:
>
> '… must exhibit care (including diligence) and skill to an extent that is reasonable in all the circumstances. "All the circumstances" will include the facts that a liquidator is a person practising a profession, that a liquidator holds himself or herself out as having special qualifications, training and experience pertinent to the liquidator's role and function, and that a liquidator is paid for liquidation work. "All the circumstances" will also include the fact that some decisions and courses of action which a liquidator is called upon to consider will be of

a business or commercial character, as to which competent liquidators acting with due care, but always without the benefit of hindsight, may have differences of opinion.'

[31] Both the Institute of Chartered Accountants in Australia (ICAA) and the Insolvency Practitioners Association of Australia (IPA) have published standards of conduct for insolvency practitioners. Specifically, the codes relied upon by ASIC in this proceeding (collectively referred to as codes) are:

(1) professional standard "APES 330 Insolvency Services" issued by the Accounting Professional and Ethical Standards Board of the ICAA (APES 330);

(2) "Code of Professional Practice for Insolvency Practitioners" issued by the IPA, most of which was operative between 31 December 2007 and 31 December 2010 (2008 IPA Code); and

(3) "Code of Professional Practice for Insolvency Practitioners" (2nd ed) issued by the IPA, operative from 1 January 2011 (2011 IPA Code).

[32] In *Re Monarch Gold Mining Co Ltd; Ex parte Hughes* [2008] WASC 201 at [37]–[40], Sanderson M stated (in the context of considering the "Code of Practice for Insolvency Practitioners", which I note is not one of the codes specifically in contemplation in this proceeding):

> [37] A code of conduct such as this has no legal status. That is to say, a failure to comply with the terms of the code would not render a practitioner liable for prosecution under the Act or any other statute. It may lead to disciplinary proceedings by the Insolvency Practitioners Assn but that is a different issue …
>
> [38] But the importance of codes such as this is not to be underestimated. Administrators and insolvency practitioners generally are said to act under the supervision of the court. That is right; but the court's ability to supervise an insolvency practitioner is, in a very real and practical sense, limited. In this day and age, insolvency practice is highly specialised and administrations or liquidations are frequently extremely complex. While it is doubtless comforting to stakeholders that courts have a supervisory role, comfort can also be drawn from the fact that ASIC play a role and that insolvency practitioners are adhering to a detailed code of conduct. This case provides a good example of the importance of the role of ASIC and the importance of the code of conduct. …
>
> [40] It is also important that the administrators paid close attention to their obligations under the code of practice. It shows that the code is something more than a public relations exercise designed to assuage the concerns of those involved with insolvency

> practitioners. That being so, it seems to me that it is appropriate to make the directions sought. It emphasises the importance to be attached to adherence to the code. It must necessarily add to the status of the code and assure the public generally that the courts regard adherence to its terms as a matter of utmost importance."

236. *Secondly*, Mr Fiorentino asserted that ASIC's reliance upon s 180 would involve making a declaration under s 1317E of the Act and that the Board does not have such jurisdiction.

237. In our view, ASIC is not seeking any declaration under s 1317E and the Board has no jurisdiction to make such a declaration. The essential question for the Board on an application under s 1292 is to form a view as to whether a liquidator has carried out or performed adequately and properly his or her duties (or functions). As Tamberlin J said in *Dean-Willcocks*, the task of the Board is to evaluate the adequacy of the performance of the function or role of the liquidator. Section 1292 invites the testing of performance of that role or function against professional standards. In carrying out its task, the Board may consider whether a liquidator has performed his or her statutory obligations such as those imposed by s 180. We doubt whether s 1292 contemplated a mechanical evaluation by the Board of the "adequacy" of performance of "duties" such as those in s 180. The duty under s 180, whilst undoubtedly a duty of a liquidator, is (in substance) a duty to exercise powers and discharge duties with reasonable care and diligence. If s 1292 required the Board literally to assess the adequacy of performance of "duties" of this kind, the question for the Board would be whether the liquidator had carried out or performed adequately and properly the duty to exercise reasonable care and diligence.

238. In our view, compliance with statutory obligations such as those imposed by s 180, may be considered by the Board as part of the ultimate question, namely, whether the performance by a liquidator of his or her duties or functions has been adequate and proper. Thus, the question raised by Contention 1 is, in substance, whether Mr Fiorentino performed his duties or functions as a liquidator in convening meetings of creditors adequately and properly having regard to (*inter alia*) whether or not he performed the obligations imposed upon him by s 180.

239. *Thirdly*, Mr Fiorentino asserted that the purpose of s 180 was as set out in *Daniels v Anderson* (1995) 37 NSWLR 438, "imposing a duty on company directors to meet the fundamental obligations to enable it to effectively guide and monitor the management of the company". He referred to *ASIC v Adler* [2002] NSWSC 171 as providing a useful summary. He asserted that nowhere in the vast anthology of decisions does what amounts to a "business management test" import some additional obligation upon a liquidator, above what is already imposed by s 536 or 447E or the relevant codes. He asserted that had Parliament intended s 180 to apply to liquidators in their capacity as such, one could assume that the wording of those sections would clearly indicate that intent. He asserted that the High Court in *Spies v The Queen* (2001) 201 CLR 603 held that s 181 did not (as apparently contended by ASIC) extend to a duty owed to creditors.

240. In our view, Parliament has clearly indicated its intent. Section 180 is not, in terms, restricted to "directors" but deals with "A director or other officer of a corporation". Section 9 of the Act provides "Officer of a corporation means … a liquidator of the

corporation" (amongst other types of officer). Further, in our view, *Spies* has nothing to do with the issue. ASIC is not asserting in this Application that s 181 applies to Mr Fiorentino in connection with a directors' duty to act in the interests of creditors.

241. *Fourthly*, Mr Fiorentino submitted that *Edge* was authority for the proposition that knowing breaches or omissions (as alleged by ASIC) were not properly characterized as breaches of s 180.

242. The short answer to this is that ASIC's allegations either amount to a breach of s 180 or they do not. That is something to be considered in relation to each particular allegation.

243. Accordingly, we reject the submissions made by Mr Fiorentino concerning s 180.

244. In our view, for the reasons already given in paragraphs 222-226 in failing to provide the 23 September 2008 Notice to Westfield and the employee creditors, notwithstanding the knowledge he possessed, Mr Fiorentino did not act with the level of diligence required by applicable technical and professional standards when providing their services or with the degree of care and diligence that a reasonable person would have exercised if he or she had been a liquidator of ERB, in accordance with the requirements of s 180.

Finding on Contention 1

245. For the above reasons, we consider that Contention 1 is established.

Does Contention 1 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

246. We refer to our discussion at paragraphs 67-69 above in relation the Board's role in considering whether a liquidator has failed adequately and properly to carry out or perform his or her duties or functions. The Panel must assess the sufficiency of the acts or omissions of Mr Fiorentino against professional standards applicable to the role of a liquidator.

247. In our view, it is doubtful that a failure by a liquidator to give a notice to a particular creditor, in breach of Regulation 5.6.12(1)(a), will, in every case, constitute a failure to carry out or perform adequately and properly the duties or functions of a liquidator. In the first place, a breach may occur through error, notwithstanding that a liquidator has appropriate systems in place designed to ensure compliance with the regulation. A failure may be *de minimis* or the circumstances of a particular breach may lack substance. This is not to diminish the importance of the need for liquidators to comply with the regulation.

248. In our view, it is relevant to the present case:

(a) that the meeting was called to consider (*inter alia*) a resolution for funding the liquidators to carry out public examinations and, depending on the outcome to take legal action concerning monies owed to ERB by BWI under the Business Sale Agreement;

(b) there were few external creditors and it was important that all external creditors be given the opportunity to express a view, particularly in view of the fact that the directors were unlikely to support this resolution;

(c) that had Westfield and/or the employees supported the resolution, it may have been passed.

249. We accept that there were some complexities in the question whether Westfield or the employees were creditors, and that it appeared that an "assignment" of the obligations may occur, which may well have diminished the risk of any significant claim. But these matters did not justify Mr Fiorentino's omission to provide notice. Westfield and the employees appeared to be creditors and it was important for Mr Fiorentino to provide them with notice of the creditors meeting.

250. It is not appropriate to attempt to speculate as to how Westfield or the employees might have reacted if given an opportunity to support this resolution. Mr Fiorentino must have considered that there was some point in putting forward the resolution to fund examinations, otherwise he would not have done so. Having done so, it was important that creditors (and particularly external creditors) were given the opportunity to support the resolution. We deal with the significance of the impact of the Business Sale Agreement below.

251. There is nothing in the evidence before us to suggest that Mr Fiorentino took a view that Westfield or the employees were not creditors by reason of some factual error or because he received legal advice supporting that view. Indeed, the views expressed in the letter from Mr J Hamilton suggested that Westfield *was* a creditor and Mr Fiorentino appeared to have accepted that the employees *were* creditors in the 23 September 2008 Report. Further, the obligation imposed by Regulation 5.6.12(1)(a) required nothing more of Mr Fiorentino than the identification of persons who "appeared" on the company's books or otherwise to be a creditor. It was not a question of a fine judgment call. There is ample evidence available to Mr Fiorentino to suggest that Westfield and the employees appeared to be creditors.

252. Mr Fiorentino asserted, in his Response, that he agreed with "the director" (presumably Mr Hammoud) that communications with employees would "go through the director and that the director would bring them up to date". He asserted that when he was informed that proxies had been received from employees, he assumed that they had effectively received notice of the meeting and were aware of his report. This allegation was not supported by evidence. But even if it had been, it was completely inappropriate for Mr Fiorentino to proceed upon this basis. If he did not consider that the employees appeared to be creditors, he had no business admitting proxies. If he did consider that they appeared to be creditors, he was obliged to provide them with proper notice and no reasonably competent liquidator would consider that an informal chain of communication to creditors, via the company's director, who may very well have motives to subvert the process, would provide an appropriate alternative to the notice requirements. Regulation 5.6.31 requires that forms of proxy must accompany the notice of meeting and Regulation 5.6.12(2), require that the notice of the meeting must be given to the *person* (i.e. the creditor) either by delivering it *personally*, or sending it to *the creditor* by prepaid post, fax or document exchange. It follows that Mr Fiorentino was required to provide any proxy to a creditor in the same way.

253. Indeed, for Mr Fiorentino to rely on the asserted agreement with the director indicates that Mr Fiorentino has failed to appreciate the importance of providing proper notice to creditors of creditors meetings.

254. In the circumstances of the present case, Mr Fiorentino's failure to provide the 23 September 2008 Notice to Westfield and the employees was a matter of significance.

255. For all of the above reasons, in our view, in failing to provide the September 2008 notice to Westfield and the employee creditors, in the circumstances identified above, Mr Fiorentino failed, adequately and properly, to perform the duties or functions of a liquidator within s 1292(2)(d).

256. We have also found that by failing to do so, Mr Fiorentino did not act with the level of diligence required by applicable technical and professional standards or with the degree of care and diligence that a reasonable person would have exercised if he or she had been a liquidator of ERB, in accordance with the requirements of s 180. These findings reinforce our conclusion that Mr Fiorentino failed, adequately and properly, to perform the duties or functions of a liquidator within s 1292(2)(d).

(ii) Contention 2 – failure to give 30 April 2009 Notice and Report to Westfield or any employee creditors.

257. ASIC alleged, by Contention 2, that:

"By not giving the 30 April 2009 Notice and Report to Westfield or any of the employee creditors of ERB, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of Reg. 5.6.12(1)(a) of the Regulations; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(d) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB."

258. The issues in Contention 2 are similar to those arising under Contention 1.

259. In his Response, Mr Fiorentino denied Contention 2. He asserted that he initially considered Westfield was not a creditor. He asserted that he had received legal advice that Westfield was not a creditor, referring to Ex 1 Tab 54. He asserted that shortly before the 15 May 2009 meeting, but after the notice went out, he was informed by his solicitor that Westfield might well be a creditor and that he then sent out a copy of the Report and advised Westfield to attend the meeting.

260. In relation to the employees, Mr Fiorentino said that the position was still uncertain at the time the 15 May 2009 meeting notices were sent out. Shortly after this, he received advice from counsel that the employees should be admitted as creditors to the

value of $1.00. He asserted that on being informed that proxies had been received from former employees, he assumed that the employees had become aware of the meeting and the contents of his report through the director.

Matters upon which ASIC specifically relies in support of Contention 2

261. ASIC specifically relies upon the following matters in support of Contention 2. Nearly all of these matters were admitted in Mr Fiorentino's Response. We will deal with any exceptions specifically. Unless we specifically say otherwise, we find that the factual allegations in this section have been established on the evidence.

262. On 10 November 2008, the OSR lodged an amended POD for $463,712.70. The Claims Register maintained by Hamiltons was updated to reflect the OSR's amended POD.

263. On 16 December 2008, Mr J Hamilton advised Mr Fiorentino that the various Westfield leases appeared never to have been assigned to BWI.

264. On 14 January 2009, ERB, Mr Fiorentino and Mr Hamilton as Liquidators of ERB, Mr Hammoud, Ms Issa and BWI as Trustee for the Shanel Family Trust entered into a Deed of Settlement and Release ("Deed of Settlement and Release") pursuant to which *inter alia*:

    (a) each of ERB and the liquidators on the one hand and BWI, Mr Hammoud and Ms Issa on the other hand mutually released the other from all suits, actions and demands relating to the Business Sale Agreement and the affairs of ERB; and

    (b) BWI, Mr Hammoud and Ms Issa paid $60,000 to ERB.

265. From the time of entry into the Deed of Settlement and Release, Mr Hammoud and Ms Issa:

    (a) were no longer creditors of ERB; and

    (b) were not liable to ERB and the liquidators in any way for any debt, claim or demand;

    (c) and thus had no further interest or concern in the winding up of ERB.

    This is denied by Mr Fiorentino. We accept that Mr Hammoud and Ms Issa were no longer creditors of ERB and were not liable to ERB for any debt claim or demand. Whether they had any "interest or concern" in the winding up may be a debatable issue but we do not consider that this matter is relevant to our decision and we make no finding about it. Indeed, we do not rely on any of the matters in this paragraph in forming our decision on this Contention.

266. On 19 February 2009:

    (a) Mr Fiorentino wrote to Mr Hammoud/BWI and *inter alia*:

(i) stated that in order for him, Mr Fiorentino, to work out creditors' dividend entitlements, he needed to obtain Counsel's advice as to what liabilities, if any, ERB had as a result of the transmission of the business to BWI to pay entitlements to employees terminated by ERB on the sale of the business;

(ii) requested Mr Hammoud/BWI provide certain information as to those employees;

(iii) attached Mr Hammoud's list of employee claims in the sum of $763,001.97, together with a schedule of employees which were current per various MYOB reports; and

(iv) noted that "*if for some reason (such as inter alia employee job security and uncertainty leading to resignation of employees and low workplace morale) you wish me not to write to every employee requesting the information in respect of their claims against ERB... I require you to put into a joint bank account in the name of the company and BWI funds to cover any claims they may have so that the employees are covered in the event they receive no payment from BWI or ERB during its winding up"*; and

(b) Mr Fiorentino recalled that letter 45 minutes later.

267. On 25 February 2009, Mr Fiorentino requested Mr J Hamilton to advise him whether it was in ERB's interest to execute the lease assignment provided by Westfield even though it would leave ERB as guarantor, so that ERB did not end up with an actual liability instead of a contingent liability.

268. On 26 February 2009, Mr J Hamilton, on instructions from Mr Fiorentino, wrote to Mr Kevin Slinger of Clayton Utz, solicitor for Westfield, and stated *inter alia* that:

(a) Mr Fiorentino believed the leases were surrendered by ERB by operation of law on 29 February 2008, or shortly thereafter, being the date that ERB sold its business to a related entity, BWI[17];

(b) Mr Fiorentino needed to consider whether there was any property he should disclaim in ERB's liquidation;

(c) to ascertain Westfield's position, Mr Fiorentino gave notice under s 568(13) of the Act requiring Westfield to state the interest it claimed in any of the shops *vis a vis* ERB; further, if Westfield asserted ERB was still a lessee of any shop, then they should set out the facts, matters and circumstances supporting that assertion for each shop; and

(d) if Westfield claimed to be a creditor of ERB, then they should specify the nature of their claim and the details of the amounts said to be owed.

269. By letter dated 12 March 2009, Clayton Utz responded, *inter alia,* that:

[17] The reference to "29 February 2008" is a reference to the Sale Agreement of 28 March 2008 which was subsequently backdated to 28 February 2008 (Bastas Transcript 1 pages 136.22 – 137.22).

(a) Westfield had not consented to the purported assignment of the leases by ERB to BWI and such assignment by ERB constituted a breach of the leases;

(b) tax invoices for rent pursuant to the leases had been issued to date to ERB;

(c) Westfield considered ERB to be its tenant, liable for the financial obligations pursuant to the leases until their expiry, and provided approximations of those financial obligations for each lease which totalled $2,729,611.81; but

(d) Westfield was willing to consent to an assignment if the parties executed the deeds sent to Mr Fiorentino on 21 August 2008.

270. On 22 April 2009, Mr J Hamilton advised Mr Fiorentino that:

(a) there was no evidence of Westfield invoicing BWI or the landlords' knowledge of the sale of business; and

(b) according to Westfield there were substantial liabilities of greater than $2 million for future rent should the leases be terminated.

271. On 30 April 2009, Mr Fiorentino sent a Notice to Creditors advising of a meeting of creditors of ERB to be held on 15 May 2009 for the purpose of considering the attached Report of the Liquidators and to *inter alia*:

(a) inform creditors of continuing investigations being undertaken by the liquidators into the affairs of ERB which encompassed among other matters, whether the employees of ERB taken over by BWI were owed any entitlements by ERB and whether ERB had lease liabilities;

(b) if thought fit resolve to fix the remuneration of the liquidators in the sum of $183,943 excluding GST for the period 8 October 2008 to 29 April 2009 ("Resolution 1"); and

(c) if thought fit resolve that the remuneration of the liquidators be fixed on a time basis based upon Hamiltons Scale of Fees to be paid as and when incurred at the discretion of the liquidators in the first instance not to exceed the sum of $100,000 without further approval by a meeting of creditors ("Resolution 2").

272. The only resolutions proposed for the 15 May 2009 meeting were the two resolutions in relation to the liquidators' remuneration.

273. A Report to Creditors accompanied the 30 April 2009 Notice to Creditors ("the 30 April 2009 Report") in which Mr Fiorentino advised, *inter alia*, that he was continuing his investigations as to whether the employees, leasing and trade creditors taken over by BWI remained creditors of ERB.

274. Mr Fiorentino sent a copy of the 30 April 2009 Notice and the 30 April 2009 Report to the following creditors of ERB, namely: the OSR, GIO, Gallagher Basset, Anything Wet and Zestwin Pty Ltd.

275. Mr Fiorentino did not give the 30 April 2009 Notice or the 30 April 2009 Report to Westfield (although Mr J Hamilton sent a copy of the notice and report, without

annexures, to Clayton Utz on 12 May 2009, three days before the meeting). Mr Fiorentino did not give the 30 April 2009 Notice or the 30 April 2009 Report to any of the employee creditors of ERB, including the 8 Former Employees whose proxies Mr Fiorentino had accepted for the 8 October 2008 meeting.

Issue for determination – Contention 2.

276. The issue for determination is whether, in not giving the 30 April 2009 Notice and Report to Westfield or any of the employee creditors of ERB, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of Reg. 5.6.12(1)(a) of the Act; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section;

(d) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB."

277. As at the time of convening the 15 May 2009, did Westfield and the ERB employees appear to be creditors?

278. As to Westfield, we refer to our discussion of the issue in relation to Contention 1 above. Nothing which happened between the 8 October meeting and the convening of the 15 May 2009 meeting indicated that Westfield ceased to be (or ceased to appear to be) a creditor. Indeed, the information available to Mr Fiorentino suggested that Westfield remained a creditor of ERB, in particular:

(a) Mr J Hamilton's advice on 16 December 2008 confirmed the various Westfield leases did not appear to have been assigned to BWI;

(b) on 14 January 2009 the liquidators and ERB entered into the Deed of Settlement and Release with the result that BWI had no remaining obligation to indemnify ERB in respect of any of ERB's creditors. This scuttled any possible argument that Westfield was not a creditor by reason of the terms of the Business Sale Agreement, particularly the existence of the indemnity;

(c) by email dated 25 February 2009, Mr Fiorentino sought advice from Mr J Hamilton as to whether he should execute the assignment proffered by Westfield "so that we do not end up with an actual liability instead of a contingent liability";

(d) by letter dated 12 March 2009, Clayton Utz made it clear that there had been no assignment of the leases and that Westfield was claiming that ERB was liable for the obligations under the leases, which totalled $2.7m;

(e) Mr J Hamilton advised Mr Fiorentino on 22 April 2009 that the assignments proposed by Westfield "could rid ERB of a substantial unsecured creditor";

(f) in the 30 April 2009 Report itself, Mr Fiorentino stated that he was attending (sic - intending) to obtain an assignment of the Westfield leases to BWI, the aim being "to significantly reduce the liability of [ERB] to Westfield as landlord of the premises formerly occupied by [ERB] if those assignments can be achieved";

(g) In his email dated 12 May 2009, Mr Hamilton, acting for Mr Fiorentino, stated: "Your client remains a creditor pending the assignment Deeds being executed and exchanged."

279. As indicated above, Mr Fiorentino, in his Response, relied upon the letter written by Mr J Hamilton to Clayton Utz on 26 February 2009 which asserted that the leases had been surrendered by operation of law and "ERB may owe no further legal obligations at all to your clients, meaning that your clients are not creditors of ERB."

280. In our view, this does not assist Mr Fiorentino. Having regard to the circumstances known to him at this time, he must have realised that this letter was assertion, rather than a statement of definitive fact. The letter invited Clayton Utz's response, in particular, whether Westfield asserted a claim against ERB and if so, the nature and amount of the claim. Clayton Utz responded to this letter in no uncertain terms setting out the facts upon which it relied to refute the assertions in Mr J Hamilton's letter and the basis for, and amount of, its claim. Following the receipt of this response, Mr Fiorentino must have been aware, at the very least, of circumstances indicating that Westfield appeared to be a creditor.

281. Mr Fiorentino failed to carry out his duty to give the 30 April 2009 Notice to Westfield, a person appearing on the company's books or otherwise to be a creditor, within 10 days of the meeting, contrary to the requirements of Regulation 5.6.12(1)(a). We note, however, Mr J Hamilton sent a copy of the notice and the 30 April 2009 Report without attachments to Clayton Utz on 12 May 2009, three days before the meeting. In his email attaching the notice, Mr Hamilton stated:

> "Your client remains a creditor pending the assignment Deeds being executed and exchanged.
>
> A meeting of creditors has been called as shown in the attachment. Your client may want to appoint a proxy and lodge a proof in the interim."

282. As to the employees, we refer to the matters already known to Mr Fiorentino discussed in relation to Contention 1 above. Nothing which happened between the 8 October meeting and the convening of the 15 May 2009 meeting indicated that the employees no longer appeared to be creditors. Indeed, the information available to Mr Fiorentino suggested that they appeared to be creditors of ERB at the time of convening that meeting, in particular:

(a) Although apparently a draft, the letter from Mr Fiorentino to BWI/Mr Hammoud dated 19 February 2009, indicated that Mr Fiorentino needed to obtain Counsel's advice as to what liabilities, if any, ERB had for employee entitlements. The letter attached the schedule referring to the 68 employees which Mr Fiorentino had received from Mr Bastas;

(b) In the 30 April 2009 Report, Mr Fiorentino stated that he was investigating and seeking Counsel's advice as to whether or not claims of employees had been satisfied or assumed by BWI and thus were not creditors but that he was unable to inform creditors on this issue;

(c) On 13 May 2009, Mr Fiorentino emailed to Mr Hammoud 28 pre-completed PODs in the names of each of 28 employees, setting out the particulars of each employee's debt;

(d) Mr Fiorentino admitted 28 Former Employees as creditors at the meeting on 15 May 2009.

283. In relation to Mr Fiorentino's assertion (in response to the allegation that he failed to give notice to employees), that he assumed that the employees had become aware of the meeting and the contents of his report through the director by reason of being informed that proxies had been received from former employees, as just demonstrated, this is flatly inconsistent with the facts. *Prior* to any proxies being received, Mr Fiorentino emailed Mr Hammoud with the 28 pre-completed PODs setting out the details of each employee's claim.

284. Mr Fiorentino failed to carry out his duty to give the 30 April 2009 Notice to the employees, being persons appearing on the company's books or otherwise to be creditors, within 10 days of the meeting, contrary to the requirements of Regulation 5.6.12(1)(a).

Lack of good faith?

285. ASIC relied upon an asserted breach of s 181 of the Act (an alleged failure by Mr Fiorentino to exercise his powers and discharge his duties in good faith in the best interests of ERB). The basis for the allegation was not elaborated by ASIC beyond a submission that, given what he had been told and advised, when it came to 30 April 2009, on any objective view, it could not be said that his failure to send the notice and report was in good faith in the best interests of the company. An allegation of breach of the duty of good faith involves an allegation about the subjective state of mind of a person. We do not consider that there is a sufficient foundation for any finding of lack of good faith in relation to this Contention. In our view, the real difficulties for Mr Fiorentino, in this context, arise in connection with his dealings with employee proxies, and we deal with this in relation to Contention 3 to 5 below.

Did Mr Fiorentino act negligently?

286. In our view, having regard to the matters known by Mr Fiorentino, in failing to provide the 30 April 2009 Notice to Westfield and the employee creditors, did not act with the level of diligence required by applicable technical and professional standards or with the degree of care and diligence that a reasonable person would have exercised if he or she had been a liquidator of ERB, in accordance with the requirements of s 180.

287. We rely upon our reasons in paragraphs 222 to 226 and 278 to 283 above.

Finding on Contention 2

288. For the above reasons, we consider that Contention 2 is established. However, we base this finding on our acceptance that the matters in sub-paragraph 2(a), (b) and (c) are established.

Does Contention 2 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

289. As to whether Mr Fiorentino failed to carry out or perform adequately and properly his duties and functions concerning the Westfield notice, as indicated above, there were some complexities surrounding the question of Westfield's status and it appeared that an assignment may well be achievable. In addition, we consider that it is significant that Mr Fiorentino ultimately *did* provide the notice to Westfield, albeit only two clear days prior to the meeting. Westfield was represented by a major and reputable law firm and we doubt whether Clayton Utz would have had any real difficulty in attending the meeting and participating, had they been instructed to do so.

290. For these reasons, whilst Mr Fiorentino's conduct in failing to provide the required ten days notice to Westfield was a breach of Reg. 5.6.12(1)(a) and lacked diligence and reasonable care, we do not consider this matter, of itself, establish that Mr Fiorentino, failed to carry out or perform adequately and properly his duties and functions as a liquidator.

291. However, we consider that in failing to provide notice to the employees, Mr Fiorentino failed to carry out or perform adequately and properly his duties and functions as a liquidator. There were a significant number of employees and the combined value of their potential claims was large. Mr Fiorentino had accepted proxies for 8 of the employees at the previous meeting of creditors. Even if he was in a position of doubt about the status of the employees when convening the May meeting, he was aware of circumstances which would have caused any reasonably competent liquidator to conclude that the employees appeared to be creditors and he should still have provided them with notice. The fact that he sent to Mr Hammoud 28 pre-completed PODs in the names of the employees with the details of the debts and accepted 28 employee proxies at the May meeting, indicated that he had no real doubt that they were entitled to notice.

292. We repeat our observations concerning Mr Fiorentino's Response on this issue (see paragraph 283 above).

(iii) Contention 3 – Pre-completing and forwarding to Mr Hammoud 28 pre-completed proxies.

293. ASIC alleged, by Contention 3, that:

"In pre-completing and forwarding the 28 pre-completed proxies to Mr Hammoud for the 15 May 2009 creditors meeting, Mr Fiorentino:

(a) acted in breach of clause 21.5.1 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(d) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB; and/or

(e) acted in contravention of s 184(1)(a), (b) and (c) of the Act, in that he was reckless or intentionally dishonest and failed to exercise his powers and discharge his duties in good faith in the best interests of ERB."

Matters upon which ASIC specifically relies in support of Contention 3

294. The matters upon which ASIC specifically relies in support of Contention 3 are set out in the following paragraphs. Many of these matters were admitted in Mr Fiorentino's Response. We will deal with any exceptions specifically. Unless we specifically say otherwise, we find that the factual allegations in this section have been established on the evidence.

295. On 12 May 2009:

(a) Mr Fiorentino contacted Mr Hammoud[18]; and

(b) Ms Ioakimaros, on Mr Fiorentino's instructions, commenced contacting creditors to ensure a quorum for the creditors meeting of 15 May 2009.

296. On 12 May 2009 at around 12.39pm, Gallagher Bassett sent a 2 page fax to the liquidators, which included a completed and signed Appointment of Proxy form by which:

(a) Gallagher Bassett appointed Ian Swinnerton as its general proxy to vote at the creditors meeting of 15 May 2009; and

(b) no voting intention was indicated for either resolution.

297. Further:

(a) Gallagher Bassett produced a POD to ASIC for $134,403.59, which was signed by the Credit Team Leader on 12 May 2009 ("Gallagher Bassett POD");

(b) the fax register of Hamiltons recorded a 2 page fax was received on 12 May 2009 from "Gallagher Bassett";

(c) the Claims Register maintained by Hamiltons further recorded a POD was received from Gallagher Bassett on 12 May 2009 for $134,403.59; and

(d) accordingly, it may be inferred that on 12 May 2009 Gallagher Bassett faxed to Hamiltons the Gallagher Bassett POD together with their Appointment of Proxy.

[18] We note that Mr Fiorentino, in his Response denied that he contacted Mr Hammoud and asserted that Mr Hammoud contacted him: Response para 75(a). We do not consider that this makes any significant difference.

298. On 12 May 2009, Mr Fiorentino and Counsel retained by him, Mr Svehla, telephoned Ms Lisa Dorman, the solicitor for GIO, during which she informed them, *inter alia,* that:

(a) GIO had instructed TurksLegal to attend the 15 May 2009 creditors meeting;

(b) she would send a copy of the proxy once it had been done; and

(c) she did not want to get into GIO's position but would let them know before the meeting[19].

299. From the communications referred to above:

(a) Mr Fiorentino knew there would be a quorum for the 15 May 2009 creditors meeting, namely GIO and Gallagher Bassett, whose claims totalled $360,093.73. (Mr Fiorentino denied any knowledge of the creditors who might or might not attend, but admits that Gallagher Basset would attend by proxy; we find that he was aware that there was likely to be a quorum) and

(b) Mr Fiorentino did not know whether the resolutions to approve his remuneration would be carried at the meeting.

300. On 12 May 2009 at 3.01pm, Mr J Hamilton forwarded to Mr Fiorentino an email he had received from Mr Slinger which stated that Westfield would consent to certain amendments to the lease assignment deeds that had been proposed by Mr J Hamilton on behalf of Mr Fiorentino.

301. ASIC alleged that by this time if not before, Mr Fiorentino knew that in the absence of the lease assignments being effected, Westfield was and remained a creditor of ERB. Mr Fiorentino denied this. We find that he was aware that Westfield was, or at least appeared to be a creditor.

302. On 12 May 2009 at 3.03pm, Ms Ioakimaros sent an email to Mr Hammoud which attached a blank "Appointment of Proxy form" for the 15 May 2009 meeting (setting out the proposed resolutions for the liquidators' remuneration) and a blank "POD form", and in which Ms Ioakimaros stated "*Pino told me to send you this proxy form and proof of debt form for the employees to fill in. Can you please return them to me tomorrow*".

303. On 12 May 2009 at 4.46pm, Mr J Hamilton forwarded to Mr Slinger an email he had recently received from Ms Ioakimaros, which attached a copy of the 30 April 2009 Report (without annexures) and in which Mr J Hamilton stated "*Your client remains a creditor pending assignment Deeds being executed and exchanged. A meeting of creditors has been called as shown in the attachment. Your client may want to appoint a proxy and lodge a proof in the interim*".

304. On 12 May 2009 at 5.05pm and on instructions from Mr Fiorentino, Mr J Hamilton sent an email to Ms Elizabeth Raper, Counsel retained to advise in relation to employee liabilities of ERB, in which he instructed her *inter alia* that:

[19] Paras (b) and (c) are not admitted in the Response but the paragraph is otherwise admitted, see Response para 78. We consider that the allegation is made out on the evidence.

(a) Mr Fiorentino was looking to see if there were any obvious employee creditors left, even if as a contingent liability;

(b) the purpose being, if such creditors existed, they may be able to vote at a creditors meeting on Friday, even if only for $1.00, which would help Mr Fiorentino; and

(c) Ms Raper should inform him of what she thought, or if she could form any view by looking initially for obvious creditors.

305. Sometime prior to the 15 May 2009 creditors meeting, Messrs Fiorentino and Svehla had a conversation or conversations during which, *inter alia*:

(a) it was agreed that Mr Svehla would attend the meeting to inform creditors of Mr Fiorentino's continuing investigations. (Mr Fiorentino denied this in his Response and asserted that Mr Svehla attended to provide advice to the company; we do not consider that the distinction is of any significance to our findings);

(b) Mr Fiorentino requested that Mr Svehla be a proxy holder for creditors at the meeting because they could not be directed to him or one of his staff as one of the issues was his remuneration; and

(c) Mr Svehla agreed to be a proxy holder.

306. On 13 May 2009, and on Mr Fiorentino's instructions, Mr Scarcelli commenced pre-completing PODs and proxies for 28 former ERB employee creditors.

307. On 13 May 2009 at 5.56pm, Mr Scarcelli emailed Mr Fiorentino the pre-completed PODs and proxies for the 28 former employee creditors.

308. In relation to the 28 pre-completed POD forms for the 28 former ERB employee creditors:

(a) each had the name and address of each employee creditor, and detailed the amounts owing to each of those creditors for Long Service Leave and/or Redundancy Pay; and

(b) the debts claimed in the PODs totalled $201,374.

309. In relation to the 28 pre-completed proxy forms:

(a) each had the name and address of each employee creditor and appointed "Julian Svelah" [sic] as the proxy; and

(b) each had an "x" instructing the proxy to vote for each resolution approving the liquidators' remuneration.

310. On 13 May 2009 at 7.24pm, Mr Fiorentino forwarded Mr Scarcelli's email attaching the 28 pre-completed PODs and proxy forms to Mr Hammoud (copied to Ms Ioakimaros), and stated to Mr Hammoud: "*Herewith proxies and proof of debts claims pre-filled from information provided by you on behalf of the company and the former*

employee creditors of the company. Please have them signed and faxed to me by 3pm tomorrow Thursday 14 May 2009. Meeting at 9.30am Friday".

311. At no time did Mr Hammoud provide any information to Mr Fiorentino as to how to complete the voting intentions on each of the 28 pre-completed proxy forms. This allegation was denied in the Response. Mr Fiorentino asserted that Mr Hammoud sought assistance from Mr Fiorentino's office in completing the form and provide to Mr Fiorentino's office, his voting intentions. However, this is inconsistent with Mr Fiorentino's evidence in his s 19 examination. We find that this allegation is established on the evidence.

312. We note that in his s 19 examination, Mr Fiorentino asserted:

(a) that he knew that he could not vote in favour of a resolution concerning his remuneration if he were made a proxy at the meeting;

(b) that Mr Hammoud had requested that he (Mr Hammoud) be the point of contact for the employees in relation to the PODs and proxies;

(c) that Mr Hammoud did not give him instructions as to how each one of the employees was going to vote for the resolutions but just "to pre-fill everything, including the resolution, you know, everything done so all he had to do with it is be signed";

(d) that if anyone had wanted to "change their view, they could have just amended it".

Issue for determination – Contention 3.

313. The issue for determination under Contentions 3 is whether, in pre-completing and forwarding the 28 pre-completed proxies to Mr Hammoud for the 15 May 2009 creditors meeting, Mr Fiorentino

(a) acted in breach of clause 21.5.1 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110 and/or

(c) acted in breach of ss 180, 181(1)(a) or 184(1)(a), (b) and (c). In relation to s 184, ASIC alleged that Mr Fiorentino was reckless or intentionally dishonest and failed to exercise his powers and discharge his duties in good faith in the best interests of ERB.

Breach of clause 21.5.1 of the Code

314. The starting point in considering this issue is the Corporations Regulations.

315. We set out below pertinent provisions of the Corporations Regulations:

"**5.6.23. Creditors who may vote**

(1) A person is not entitled to vote as a creditor at a meeting of creditors unless:

(a) his or her debt or claim has been admitted wholly or in part by the liquidator or administrator of a company under administration or of a deed of company arrangement; or

(b) he or she has lodged, with the chairperson of the meeting or with the person named in the notice convening the meeting as the person who may receive particulars of the debt or claim:

(i) those particulars; or

(ii) if required — a formal proof of the debt or claim.

…

5.6.28. Appointment of proxies

(1) A person entitled to attend and vote at a meeting may appoint a natural person over the age of 18 years as his or her proxy to attend and vote at the meeting.

(2) Subject to subregulation (3) and to regulation 5.6.30, a proxy appointed under this regulation has the same right to speak and vote at the meeting as the person who appointed the proxy.

(3) If a person claims to be:

(a) the proxy of a person, appointed by an instrument of appointment mentioned in subregulation 5.6.29(2); and

(b) entitled to attend and vote at a meeting;

the person is not entitled to speak or vote as proxy at the meeting (except in relation to the election of a chairperson) unless:

(i) the instrument; or

(ii) a facsimile copy of the instrument; or

(iii) a copy of the instrument sent by email or similar electronic means;

has been lodged with the person named in the notice convening the meeting as the person who is to receive the instrument, or with the chairperson.

5.6.29. Form of proxies

(1) The appointment of a person as a proxy must be by:

(a) an instrument in accordance with Form 532, completed in hard copy in compliance with subregulation (2); or

…

(2) If Form 532 is to be completed in hard copy:

(a) the person appointing the proxy must sign the instrument of proxy, or, if incapable of writing, attach his or her mark to it; and

(b) …

5.6.30. Instruments of proxy

An instrument appointing a proxy may specify the manner in which the proxy is to vote on a particular resolution, and the proxy is not entitled to vote on the resolution except as specified in the instrument.

5.6.31. Proxy forms to accompany notice of meetings

(1) A person convening a meeting must:

(a) send a form of proxy with each notice of the meeting; and

(b) ensure that neither the name or description of any person is printed or inserted in the body of the form of proxy before it is sent out.

…"

316. We have already set out the terms of Regulation 5.6.12(2), which require that the notice of the meeting must be given to the *person* (i.e. the creditor) either by delivering it personally, sending it to *the creditor* by prepaid post, fax or document exchange. It follows that a convenor (in this case Mr Fiorentino) was required to provide any proxy to a creditor in the same way.

317. Form 532 is as follows:

"Form 532

(regulation 5.6.29)

A.C.N. or A.R.B.N.

Corporations Act 2001

APPOINTMENT OF PROXY

* I/ * We (*if a firm, strike out "I" and set out the full name of the firm*) of (*address*), a creditor/ * contributory/ * debenture holder/ * member of Limited, appoint (*name, address and description of the person appointed)* or in his or her absence as * my/ * our * general/ * special proxy to vote at the * meeting of * creditors/* contributories * debenture holders/ * members/ * joint meeting of members and creditors to be held on (*date*), or at

any adjournment of that meeting (*if a special proxy add the words "to vote for" or the words "to vote against" and specify the particular resolutions*).

Dated

Signature

CERTIFICATE OF WITNESS
(*This certificate is to be completed only if the person giving the proxy is blind or incapable of writing. The signature of the creditor, contributory, debenture holder or member must not be witnessed by the person nominated as proxy*)

I (*name*), of (*address*), certify that the above instrument appointing a proxy was completed by me in the presence of and at the request of the person appointing the proxy and read to him or her before she signed or marked at the instrument.

Dated

Signature of witness

Description

Place of residence

* Omit if inapplicable."

318. The substantial effect of the regulations, for present purposes, was that:

(a) in convening the meeting, Mr Fiorentino was required to send a form of proxy to persons appearing to be creditors, together with the notice of meeting;

(b) he was required to deliver the proxy to the *creditors* (not to Mr Hammoud on their behalf);

(c) he was required to ensure that neither the name or description of any person was printed or inserted in the body of the form of proxy sent out;

(d) no person was entitled to vote at the meeting other than a creditor whose claim was admitted by Mr Fiorentino or who had lodged a proof of debt with Mr Fiorentino;

(e) such creditor was entitled to appoint a proxy to vote at the meeting, by signing a proxy in the form of Form 532;

(f) a proxy appointed by such creditor was not entitled to speak or vote at the meeting unless the instrument appointing him or her was lodged with Mr Fiorentino.

319. The purpose of these Regulations is clear: to facilitate the use of proxies but in a way which seeks to ensure the integrity of the process, so that proxies represent the views of creditors rather than the views of the liquidator or some other person.

320. In our view, the Regulations do not permit a convenor to send proxies to persons appearing to be creditors unaccompanied by the notice of meeting, nor do they permit the convenor to send proxies via the medium of a third party.

321. Strictly, a form of proxy sent out with a notice of meeting should not deviate at all from Form 532. The italicised instructions in brackets in the Form are instructions for the person proposing to appoint a proxy and should not be deleted. The Form contemplates that *the creditor* will insert:

(a) His or her name and address;

(b) The name of the company concerned, of which he or she is a creditor;

(c) The name, address and description of the proxy;

(d) the date of the creditors' meeting;

(e) if appointing a special proxy, the words "to vote for" or "to vote against" and the particular resolutions;

(f) date and signature.

322. Indeed, Reg 5.6.31 requires that the meeting convenor must ensure that neither the name nor description of any person is printed or inserted in the body of the form. We consider that this regulation was not intending to suggest that other matters may be filled out by the convenor. Certainly, the proscription of the insertion of the name of any person must imply that the convenor should not predetermine whether the proxy is a general or special or the manner of voting for particular resolutions. Reg 5.6.30 only contemplates that the "*instrument appointing a proxy*" i.e. the signed form of proxy, may specify the manner in which the proxy is to vote on a particular resolution.

323. It is not a matter of consequence if the convenor fills out the name of the company concerned and the date of the creditor's meeting.

324. It may be accepted that the convenor may omit any clearly inapplicable asterisked term (for example, in the case of a creditors' meeting, the convenor may delete "* contributory/ * debenture holder/ * member") but this will not be the case in relation the phrase "our * general/ * special proxy", because it will be impossible for the convenor to know which of these the creditor intends to select.

325. It will be apparent from the above, that in sending pre-completed forms of proxy (and subsequently acting on the strength of those proxy forms) Mr Fiorentino failed to comply with the regulations in a number of respects and/or failed to act in a way which proper professional practice required, if the purpose of those regulations was to be achieved:

(a) He purported to send proxy forms to creditors unaccompanied by any notice of meeting;

(b) Contrary to the explicit requirements of Regulation 5.6.12(2), he sent the proxy forms to a third party, and failed to comply with the requirement to serve the proxies on *the creditors*;

(c) Contrary to the express prohibition in Regulation 5.6.31, he failed, as convenor of the meeting, to ensure that neither the name nor description of any person was printed or inserted in the body of the form of proxy before it was sent out. Indeed, he sent out the proxies himself, with, in each case, the names and descriptions of both the creditor and the proposed proxy printed in the body of the form;

(d) Contrary to the requirements of the regulations, (or, at least, contrary to the requirements of proper professional practice, if the purpose of those regulations was to be achieved), he sent out the proxies which had deleted any choice between general and special proxy and which set out the voting instruction for each of the proposed resolutions.

326. Whilst ASIC did not expressly rely upon the provisions of these Regulations in Contention 3, ASIC relied upon the Code, which set out a similar approach. The relevant provision of the Code was Clause 21.5.1 which provided as follows:

"Clause 21.5.1 (Form of Proxy)

Proxy forms accompanying the notice **must** conform strictly to the law containing:

- name of the company/bankrupt/debtor;
- the address, date and time of the meeting;
- space for:
  - the identity of the creditor;
  - the identity of the proxy holder;
  - signature and dating by the creditor
- the resolutions;
- space for the creditor to set out the proxy instructions:
  - the voting instruction on each item; or
  - delegation e.g. name proxy holder or chairman.

Proxy forms **must** not be pre-completed. They **must** not contain:

- the name of the creditor;
- the instructions on how the vote is to be cast; or
- the name of the proxy holder.

Information accompanying the proxy form **should** specify:

- the date by which the completed proxy must be returned; and
- the address for return of proxy (post, fax, email).

Given the convenience for many creditors in voting by proxy, and the significance of the power given to a Practitioner under a proxy, practitioners **must** ensure that all legal requirements as to the form of the proxy and instructions as to its completion are complied with.

Returned proxies **should** be carefully checked to ensure that they are valid." (The emphasis is in the original)

327. In all material respects, this provision reproduced the requirements of the regulations and/or what, in our view, proper professional practice required to be done to enable the purposes of those regulations to be achieved, as set out in paragraphs 318-324 above. In our view, the requirements in this Clause 21.5.1, (that Liquidators must not pre-

complete the identity of the creditor, the identity of the proxy holder or instructions as to the way in which the vote is to be cast), reflect professional standards.

328. In forwarding the 28 pre-completed proxies to Mr Hammoud for the 15 May 2009 creditors meeting, Mr Fiorentino failed to comply with Regulation 5.6.31 and failed to comply with Clause 21.5.1 which reproduced the requirements of the regulations and/or what, in our view, proper professional practice required to be done to enable the purposes of those regulations to be achieved.

Was Mr Fiorentino's conduct negligent, did he lack good faith, and/or was he reckless and/or intentionally dishonest?

329. ASIC alleged that Mr Fiorentino's conduct

(a) lacked the requisite degree of care and diligence required of a liquidator in his circumstances (s 180 of the Act and section 130.1b) of the Compiled APES 110),

(b) involved a failure to act to exercise his powers in good faith in the best interests of ERB (s 181 of the Act) and, worse,

(c) that his conduct was reckless or intentionally dishonest (s 184 of the Act).

330. The latter two allegations require us to make a determination as to Mr Fiorentino's state of mind. Moreover, the allegations (particularly the allegations of recklessness and intentional dishonesty) are serious and the principles in *Briginshaw* apply. These are not findings which can be made lightly.

331. Allegations of dishonesty and serious wrongdoing must be particularised *Fortescue Metals Group Ltd v Australian Securities and Investments Commission* (2012) 247 CLR 486; (2012) 291 ALR 399; [2012] HCA 39 at [26]. The only matters which could be understood as such particulars of the allegations of dishonesty or serious wrongdoing in Contention 3 are the matters referred to above (see paragraphs 295-311 above - paragraphs 75 to 91 of the SOFAC). The essential thrust of those matters is as follows:

(a) That on 12 May 2009, Ms Ioakimaros, on Mr Fiorentino instructions, commenced contacting creditors to ensure that there was a quorum for the creditors meeting (para 75);

(b) That Mr Fiorentino knew, by 12 May 2009, that there would be a quorum made up of GIO and Gallagher Bassett, whose claims totalled $360,093.73 but did not know their voting intentions and whether the resolutions to approve his remuneration would be carried at the meeting (paras 76-79);

(c) That Mr Fiorentino knew, at that time, that Westfield was and remained a creditor of ERB (paras 80-1, 83);

(d) Mr Fiorentino then made efforts to identify whether there were any employee creditors who could vote at the creditors meeting, (Mr J Hamilton telling Ms Raper "even if only for $1.00, which would help Mr Fiorentino") (para 84);

(e) On 13 May 2009, Mr Fiorentino requested Mr Svehla to be a proxy for creditors as proxies could not be directed to him in relation to the issue of remuneration (para 85);

(f) Mr Fiorentino then instructed Mr Scarcelli to pre-complete PODs and proxies for 28 ERB employees and forwarded the pre-completed proxies (including the decision to vote in favour of the remuneration resolutions) to Mr Hammoud (paras 86 - 90);

(g) At no time did Mr Hammoud provide any information to Mr Fiorentino as to how to complete the voting intentions (Para 91).

332. These particulars do not expressly set out why the Panel should find, on the one hand, negligence, or, on the other hand, absence of *bona fides*, recklessness or intentional dishonesty.

333. In our view, ASIC has established that Mr Fiorentino failed to act in good faith in the best interests of ERB and recklessly.

334. We note that ASIC did not assert, in Contention 3, that Mr Fiorentino procured the preparation of the proxies, knowing or believing that the employees were *not* creditors. ASIC's case, as demonstrated by Contentions 1 and 2, was that Mr Fiorentino *knew* that the relevant persons were or appeared to be creditors. In that context, Mr Fiorentino was, in a sense, doing what he ought to have been doing, in attempting to give creditors the chance of voting at the meeting. Further, ASIC did not particularise a case that Mr Fiorentino procured the preparation of the proxies in breach of the Regulations or the Code, knowing that what he was doing was in breach of the Regulations or Code. We note that ASIC makes more serious allegations along these lines in Contention 4, but we need to deal with the particularised case in each Contention separately.

335. Having said that, it is clear to us that Mr Fiorentino's real aim was not to facilitate any genuine exercise of creditors' voting rights, but to procure a particular result at the meeting, namely approval of his remuneration, and to guarantee or at least enhance the probability of that outcome by procuring the execution of proxies, with pre-completed voting instructions.

336. We consider that the case of absence of good faith, as particularised, is made out on the evidence. We consider that the overwhelming inference is that Mr Fiorentino did not have a genuine belief that his actions were in the best interests of ERB. He procured the preparation of the pre-completed proxies containing a "yes" vote in favour of the remuneration resolutions, despatched them to creditors[20] who had not received any notice of the meeting, and did so two days before the meeting, in circumstances where he knew that there was no guarantee that the other creditors attending the meeting would support those resolutions. The clear inference is that Mr Fiorentino was seeking to enhance the success of the resolutions authorising payment of his remuneration.

337. The onus in establishing lack of good faith is clearly on ASIC. The objective facts, referred to above, strongly support this conclusion. We note (without suggesting that

[20] Even accepting, for the present, that Mr Fiorentino sent the forms to the employees through Mr Hammoud.

Mr Fiorentino bears any onus) that there was no evidence from Mr Fiorentino that he honestly considered that it was in the best interests of ERB to procure the passing of the remuneration resolution by the means he adopted. There is no evidence from Mr Fiorentino that he honestly believed that it was appropriate for a liquidator to pre-complete proxy forms with the names of creditors, the names of a proxy (in particular, an associate of the liquidator) and voting intentions in the proxy form. There was no evidence from Mr Fiorentino that it was appropriate to take these steps in relation to a meeting, where the only resolutions involved approval of his own remuneration. Even if such evidence had been adduced, there would have been serious questions about its credibility on the basis that no reasonable liquidator in the circumstances could have formed a similar view: cf *Wayde v NSW Rugby League* (1985) 180 CLR 459 at 469-470.

338. Further, we should note that if we are wrong in finding that the actions of Mr Fiorentino amounted to a failure to act in good faith in the best interests of ERB, in our view, the evidence shows, as a minimum, that his actions lacked the degree of care and diligence required of a liquidator in his circumstances.

339. As to the allegation that Mr Fiorentino was reckless, we consider that this allegation is established.

340. In our view, in order to establish recklessness in this context, it is necessary to show that Mr Fiorentino was aware of the possibility of the impermissible nature of his actions and proceeded regardless. As a liquidator, Mr Fiorentino should have been aware of the specific requirements of the Regulations and the Code in relation to proxies which made his actions impermissible. If he was not actually aware of those specific requirements, we nonetheless infer that Mr Fiorentino was at least aware that the Regulations and the Code imposed *some* requirements in this regardand that he pre-completed the proxy forms notwithstanding that knowledge and without checking the specific requirements.

341. As to the allegations that Mr Fiorentino was intentionally dishonest, we do not consider that this allegation is made out. A finding of "intentional dishonesty" is a very serious allegation and there must be a clear basis on the evidence for making such a finding. In order to establish dishonesty, it is necessary, at least, to show that Mr Fiorentino had some knowledge, belief or intent which according to the standard of ordinary person made his actions dishonest[21]. "Intentional dishonesty" presumably requires more[22], i.e. knowledge on the part of the person that his or her conduct is wrong or dishonest according to those standards. We do not consider that it is open to us to infer intentional dishonesty on the evidence.

Finding on Contention 3

342. For the above reasons, we consider that Contention 3 is established. However, we base this finding on our acceptance that the matters in sub-paragraphs 3 (a), (d) and (e) (recklessness) are established.

[21] *Macleod v R* (2003) 214 CLR 230.
[22] See, for example, *Kwok v R* (2007) 64 ACSR 307 at [70] where it was said the adjective "intentionally" was suggestive of the accused having to be specifically aware that their conduct was dishonest and *ASIC v Somerville* (2009) 77 NSWLR 110 at [36] to similar effect. Cf *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [173].

Does Contention 3 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

343. For the above reasons, we consider that Mr Fiorentino's failure to comply with Clause 21.5.1 was significant. We consider that the failure is, sufficient in itself to justify a finding that Mr Fiorentino failed to carry out and perform adequately and properly, the duties of a liquidator. In addition, we rely upon each of our findings that he failed to act in good faith and was reckless, and we consider that these matters also justify a finding that Mr Fiorentino failed, in this respect, to carry out and perform adequately and properly, the duties of a liquidator.

(iv) Contention 4 – Accepting the 31 proxies and allowing Mr Svehla to speak or vote as proxy at the 15 May 2009 creditors meeting.

344. ASIC alleged, by Contention 4, that

"In accepting the 31 Proxies and allowing Mr Svehla to speak or vote as proxy at the 15 May 2009 creditors meeting, Mr Fiorentino:

(a) acted in breach of clause 21.5.1 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(d) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB; and/or

(e) acted in contravention of s 184(1)(a), (b) and (c) of the Act in that he was reckless or intentionally dishonest and failed to exercise his powers in the best interests of ERB; and/or

(f) acted in contravention of s 184(2)(a) of the Act, in that he used his position dishonestly with the intention of directly gaining an advantage for himself."

Matters upon which ASIC specifically relies in support of Contention 4

345. The matters upon which ASIC specifically relies in support of Contention 4 are set out in the following paragraphs. Many of these matters were admitted in Mr Fiorentino's Response. We will deal with any exceptions specifically. Unless we specifically say otherwise, we find that the factual allegations in this section have been established on the evidence.

346. On 14 May 2009 at 9.31am, a 28 page fax containing 28 pre-completed proxy forms was faxed from ERB Head Office to Hamiltons and:

(a) all 28 proxy forms were dated 14 May 2009 and had been signed by Mr Hammoud in his own name and using his own signature; and

(b) none of the 28 proxy forms had been signed by the named former ERB employee creditor ("28 Employee Proxies").

347. Further:

(a) Mr Hammoud produced original PODs for the 28 Employees to ASIC which were all signed by Mr Hammoud in his own name and using his own signature and dated 14 May 2009 ("28 Employee PODs");

(b) the 28 Employee PODs claimed debts in the total sum of $201,374;

(c) the fax register of Hamiltons recorded that on 14 May 2009 a 29 page fax was received from "Ella Rouge", and that it was received by Hamiltons just prior to receipt of the 28 page fax from "Ella Rouge";

(d) the Claims Register maintained by Hamiltons further recorded that on 14 May 2009 Hamiltons received PODs from each of the 28 Former Employees (with the amounts in the Claims Register corresponding to the 28 Employee PODs); and

(e) accordingly, it may be inferred that the 28 Employee PODs were faxed to Hamiltons from ERB Head Office on 14 May 2009 just prior to the fax of the 28 Employee Proxies.

348. ASIC alleged that each of the 28 Employees Proxies was on its face invalid. Mr Fiorentino denies this and says that the proxies were on their face valid. ASIC relies upon the following matters:

(a) Contrary to Reg. 5.6.29(2) of the Act, each of the 28 Employee Proxies was not signed by the named former employee creditor (admitted by Mr Fiorentino); and

(b) In fact, each of the 28 Employee Proxies was signed by Mr Hammoud in his own name using his own signature (also admitted by Mr Fiorentino).

349. In our view, the important matter is that if any proper review of the proxies had been carried out, it would have been apparent that they were invalid because it was obvious that they had all been signed by the same person.

350. ASIC also asserted that each of the 28 Employee PODs was on its face invalid. Mr Fiorentino denies this and says that the PODs were on their face valid. ASIC relies upon the following matters:

(a) Contrary to Reg. 5.6.40(1) of the Act, none of the 28 Employee PODs had been prepared by the named employee creditor personally or by a person authorised by the named employee creditor (admitted by Mr Fiorentino);

(b) All of the 28 Employee PODs were signed by Mr Hammoud in his own name and using his own signature (admitted by Mr Fiorentino); and

(c) Further, none of the 28 Employee PODs indicated that Mr Hammoud was signing as an authorised person or stated his authority, contrary to Reg. 5.6.40(2) of the Act (admitted by Mr Fiorentino).

351. Again, in our view, the important matter is that any proper review of the POD's would have revealed their apparent invalidity.

352. On 14 May 2009 at 10.00am, a 3 page fax addressed to Mr Fiorentino, containing an Appointment of Proxy for the 15 May 2009 meeting in the name of Mr Karnib, ERB's former accountant, was faxed from ERB Head Office to Hamiltons and:

(a) the Appointment of Proxy (page 3 of the fax) was filled out by hand, dated 14 May 2009 and signed by Mr Hammoud in his own name and signature;

(b) the Appointment of Proxy indicated, by a handwritten "x", that the proxy was instructed to vote for both resolutions approving the liquidators' remuneration;

(c) however no proxy was named.

353. Further:

(a) Mr Hammoud produced the original POD for Mr Karnib to ASIC, which was filled out by hand by Mr Hammoud, dated 14 May 2009 and signed by Mr Hammoud and was for an amount of $15,270 for "Accounting Fees" ("Karnib POD");

(b) the fax register of Hamiltons recorded a 3 page fax was received on 14 May 2009 from "Ella Rouge" (and after receipt of the 28 page fax);

(c) the Claims Register maintained by Hamiltons further recorded a POD was received in the name of Mr Karnib on 14 May 2009 for $15,270; and

(d) accordingly, it may be inferred that the Karnib POD was faxed from ERB Head Office to Hamiltons as part of the 3 page fax referred to in paragraph (b) above.

354. ASIC alleged that the Karnib POD was on its face invalid. Mr Fiorentino denies this and says that the POD was on its faceface valid. ASIC relied upon the following matters:

(a) Contrary to Reg. 5.6.40(1) of the Act, the Karnib POD had not been prepared by Mr Karnib personally or by a person authorised by Mr Karnib (admitted by Mr Fiorentino);

(b) The Karnib POD was signed by Mr Hammoud in his own name and using his own signature (admitted by Mr Fiorentino); and

(c) The Karnib POD neither indicated that Mr Hammoud was signing as an authorised person nor stated his authority contrary to Reg. 5.6.40(2) of the Act (admitted by Mr Fiorentino).

355. We repeat our observations in paragraphs 349 and 351 above that any proper review of the POD would have revealed its apparent invalidity.

356. At no time before or after receipt of the Karnib POD, did Mr Fiorentino receive from Mr Karnib:

(a) any proof of debt or claim, formal or otherwise; and

(b) particulars of any debt or claim,

that would suggest Mr Karnib was a creditor of ERB.

357. Further, at all material times, Mr Fiorentino did not consider Mr Karnib to be a creditor of ERB. Mr Fiorentino denies this allegation but we consider that this allegation is made out.

358. On 14 May 2009 at 1.01pm, Ms Lisa Dorman of TurksLegal ("Ms Dorman") sent a 3 page fax addressed to Mr Fiorentino, which stated it attached a POD and proxy for GIO and:

(a) the Appointment of Proxy by GIO appointed Mr David McCrostie of TurksLegal ("Mr McCrostie"), and in his absence Ms Dorman, as proxy to vote at the 15 May 2009 creditors meeting; and

(b) the Appointment of Proxy contained instructions for the proxy to vote against both resolutions approving the liquidators' remuneration.

359. Further:

(a) GIO produced their proxy and POD to ASIC, which was signed on 14 May 2009, and was for an amount of $225,690.20 ("GIO POD");

(b) the fax register of Hamiltons recorded a 3 page fax was received on 14 May 2009 from "Lisa Dorman" (and after receipt of the 3 page fax from "Ella Rouge");

(c) the Claims Register maintained by Hamiltons further recorded a POD was received from GIO on 14 May 2009 for $225,690.20; and

(d) accordingly, it may be inferred that on 14 May 2009 GIO faxed to Hamiltons their POD together with their Appointment of Proxy. (This is admitted by Mr Fiorentino).

360. ASIC alleged that after receiving GIO's proxy on 14 May 2009 voting against both resolutions for the liquidators' remuneration, Mr Fiorentino knew that both resolutions approving the liquidators' remuneration would not carry at the 15 May 2009 creditors meeting unless:

(a) Gallagher Bassett voted for the resolutions (an outcome he would not know until the actual meeting and one that was not assured); or

(b) he procured further and sufficient creditors or their proxies to attend the creditors meeting and vote for the resolutions, as at that point in time:

(i) the value of the creditors' PODs voting "for" both resolutions totalled $216,644 (being the PODs in relation to the 28 Employee Proxies and the Karnib Proxy, and assuming Mr Fiorentino accepted and allowed those proxies to vote);

(ii) the value of the creditors' PODs voting "against" both resolutions totalled $225,690.20 (GIO's POD); and

(iii) the value of the creditors' PODs whose voting intentions for both resolutions were "unknown" totalled $134,403.59 (Gallagher Bassett's POD).

361. Mr Fiorentino denied the allegations in the last paragraph and asserted that he did not consider the issue pleaded. We deal with Mr Fiorentino's denial of knowledge at paragraphs 413*ff* below.

362. On 14 May 2009 at 3.40pm, a 2 page fax addressed to Mr Fiorentino, which attached an amended Appointment of Proxy for Mr Karnib, was faxed from ERB Head Office to Hamiltons, the amendment to the Appointment of Proxy being the handwritten insertion of the name of "Julian Svelah" [sic] as proxy ("Karnib Proxy").

363. ASIC alleged that the Karnib Proxy was on its face invalid. Mr Fiorentino denies this allegation and asserted that the proxy was on its face valid. ASIC relied on the following:

(a) Contrary to Reg. 5.6.29(2) of the Act, the Karnib Proxy was not signed by Mr Karnib; and

(b) In fact, the Karnib Proxy was signed by Mr Hammoud in his own name using his own signature.

364. We repeat our observations at paragraphs 349 and 351 above in relation to the question whether the proxy was invalid on its face.

365. On 14 May 2009 at 3.42pm, and for the purpose of allowing Mr Fiorentino to track the voting intentions of each creditor who would attend the 15 May 2009 creditors meeting, a document named "Creditors For and Against.doc", was created by "Effie" (Ms Ioakimaros), which listed POD amounts and the voting intention of each respective creditor, namely "for", "against" or "unknown". This allegation is denied by Mr Fiorentino. In our view, it is obvious from the form of the document that it was created for the purpose of tracking or working out voting intentions.

366. On 14 May 2009 at 4.20pm, a 3 page fax addressed to Mr Fiorentino, which attached an Appointment of Proxy in the name of GPL Solutions for the 15 May 2009 meeting, was sent from ERB Head Office to Hamiltons and:

(a) the Appointment of Proxy was filled out by hand, dated 14 May 2009, and signed by Mr Hammoud in his own name and with his signature; and

(b) the Appointment of Proxy appointed Julian Svelah [sic] as proxy and instructed the proxy to vote for both resolutions approving the liquidators' remuneration ("GPL Solutions Proxy").

367. Further:

(a) Mr Hammoud produced the POD for GPL Solutions to ASIC which was filled out by hand by Mr Hammoud, dated 14 May 2009 and signed by Mr Hammoud, and was for an amount of $35,160 for "Accounting Fees" ("GPL Solutions POD");

(b) the fax register of Hamiltons recorded a 3 page fax was received on 14 May 2009 from "Ella Rouge" (and after the Fady Karnib 2 page fax) and that Mr Fiorentino collected the fax from the fax machine (denied by Mr Fiorentino);

(c) the Claims Register maintained by Hamiltons further recorded a POD was received in the name of GPL Solutions on 14 May 2009 for $35,160; and

(d) accordingly, it may be inferred that the GPL Solutions POD was faxed from ERB Head Office to Hamiltons as part of the 3 page fax referred to in paragraph (b) above. (This is admitted by Mr Fiorentino).

368. In relation to Mr Fiorentino's denial that he collected the fax, we note Mr Hammoud's evidence to the effect that Mr Fiorentino requested him to provide the proxies, that Mr Hammoud had faxed them and called Mr Fiorentino to confirm that he had received them. We find that Mr Fiorentino became aware that the fax was received shortly after it was received at Hamiltons.

369. ASIC alleged that the GPL Solutions Proxy was on its face invalid. Mr Fiorentino denied this allegation and asserted that the proxy was on its face valid. ASIC relied on the following:

(a) Contrary to Reg. 5.6.29(2) of the Act, the GPL Solutions Proxy was not signed by GPL Solutions; and

(b) In fact, the GPL Solutions Proxy was signed by Mr Hammoud in his own name using his own signature.

370. We repeat our observations at paragraphs 349 and 351 above in relation to the question whether the proxy was invalid on its face.

371. ASIC alleged that the GPL Solutions POD was on its face invalid. Mr Fiorentino denied this allegation and asserted that the POD was on its face valid. ASIC relied on the following:

(a) Contrary to Reg. 5.6.40(1) of the Act, the GPL Solutions POD had not been prepared by GPL Solutions personally or by a person authorised by GPL Solutions;

(b) The GPL Solutions POD was signed by Mr Hammoud in his own name and using his own signature; and

(c) The GPL Solutions POD neither indicated that Mr Hammoud was signing as an authorised person nor stated his authority contrary to Reg. 5.6.40(2) of the Act.

372. We repeat our observations at paragraphs 349 and 351 above in relation to the question whether the POD was invalid on its face.

373. At no time before or after receiving the GPL Solutions POD, did Mr Fiorentino receive from GPL Solutions:

(a) a proof of debt or claim, informal or otherwise; and

(b) particulars of any debt or claim,

that would indicate that GPL Solutions was a creditor of ERB.

374. Further, ASIC alleged that at all material times from about the 8 October 2008 creditors' meeting, Mr Fiorentino did not consider GPL Solutions to be a creditor of ERB. Mr Fiorentino denied this allegation and says that the issue did not arise. We deal with Mr Fiorentino's denial at paragraphs 423*ff* below.

375. On 14 May 2009 at 5.18pm, a 3 page fax was faxed from ERB Head Office to Hamiltons, which included an Appointment of Proxy in the name of "*Westfield Head Office*" ("Westfield Proxy") and:

(a) the Westfield Proxy was filled out by hand, dated 14 May 2009, and signed by Mr Hammoud in his own name and with his signature; and

(b) the Westfield Proxy appointed Julian Svelah [sic] as proxy and instructed the proxy to vote for both of the resolutions approving the liquidators' remuneration.

376. Further:

(a) Mr Hammoud produced two (2) PODs to ASIC, which were both in the name of "Westfield Head Office", were filled out by hand, dated 14 May 2009, and signed by Mr Hammoud in his own name and with his signature, and were respectively for amounts of $956,000 (described as "Westfield Shopping Centres rent for six months") and $7,650,000 (described as "Westfield Shopping Centres Rent") ("Westfield PODs");

(b) the fax register of Hamiltons recorded a 3 page fax was received on 14 May 2009 from "Ali Hammoud" (and after receipt of the 3 page fax from "Ella Rouge");

(c) the Claims Register maintained by Hamiltons further recorded two PODs were received in the name of "Westfield Head Office" on 14 May 2009 for $956,000 and $7,650,000; and

(d) accordingly, it may be inferred that the Westfield PODs were faxed from ERB Head Office to Hamiltons as part of the 3 page fax referred to in paragraph (b) above. Mr Fiorentino admits this inference.

377. ASIC alleged that the Westfield Proxy was on its face invalid. Mr Fiorentino denied this allegation and asserted that the proxy was on its face valid. ASIC relied on the following:

(a) there is and never was a creditor of ERB known as "Westfield Head Office";

(b) The creditor or creditors of ERB in the Westfield Group was the landlord for each lease of which ERB was the tenant;

(c) Contrary to Reg. 5.6.29(2) of the Act, the Westfield Proxy was not signed by "Westfield Head Office"; and

(d) In fact, the Westfield Proxy was signed by Mr Hammoud in his own name using his own signature.

378. We repeat our observations at paragraphs 349 and 351 above in relation to the question whether the proxy was invalid on its face.

379. ASIC also alleged that the Westfield PODs were on their face invalid. Mr Fiorentino denied this allegation and asserted that the PODs were on their face valid. ASIC relied on the following:

(a) There is and never was a creditor of ERB known as "Westfield Head Office";

(b) The creditor or creditors of ERB in the Westfield Group was the landlord for each lease of which ERB was the tenant;

(c) Mr Fiorentino had been informed on 12 March 2009 that ERB's liability for the financial obligations in respect of those leases until the end of their term was in the total approximate amount of $2,729,611.81;

(d) Mr Fiorentino had never been informed by Westfield that such total liability was in any of the amounts set out on the Westfield PODs or limited to 6 months rent;

(e) Contrary to Reg. 5.6.40(1) of the Act, the Westfield PODs had not been prepared by Westfield Head Office personally or by a person authorised by Westfield Head Office;

(f) The Westfield PODs were signed by Mr Hammoud in his own name and using his own signature; and

(g) The Westfield PODs neither indicated that Mr Hammoud was signing as an authorised person nor stated his authority contrary to Reg. 5.6.40(2) of the Act.

380. We repeat our observations at paragraphs 349 and 351 above in relation to the question whether the PODs were invalid on their face.

381. ASIC alleged that in the period from 12 to 14 May 2009, Mr Fiorentino and Mr Hammoud had a number of telephone conversations at or during or in respect of which *inter alia*:

(a) Mr Fiorentino requested Mr Hammoud provide to him the:

(i) 28 Employee Proxies and PODs;

(ii) Karnib Proxy and POD;

(iii) GPL Solutions Proxy and POD; and

(iv) Westfield Proxy and PODs ("the 31 Proxies and PODs"); and

(b) Mr Fiorentino's purpose in requesting Mr Hammoud to provide the 31 Proxies and PODs was to ensure that the resolutions approving his remuneration would be carried at the 15 May 2009 creditors meeting.

382. Mr Fiorentino denies sub-paragraphs (a) and (b) of paragraph 381.

383. ASIC submits that the matters in paragraph 381 are to be found and/or inferred from *inter alia* the following:

(a) The last time Mr Fiorentino had spoken to Mr Hammoud about the liquidation of ERB was on 13 March 2009;

(b) Mr Hammoud had no interest in the liquidation of ERB after 14 January 2009, being the date of the Deed of Settlement and Release;

(c) The resolutions did not benefit Mr Hammoud in any way and only benefitted Mr Fiorentino;

(d) Mr Fiorentino had not provided to Mr Hammoud, the 28 Employees, Mr Karnib, GPL Solutions or Westfield any notice in writing of the meeting as required by Reg 5.6.12(1)(a);

(e) Mr Fiorentino and Mr Hammoud had at least the following telephone calls between them: one (1) call on 12 May 2009; one (1) call on 13 May 2009 and six (6) calls on 14 May 2009; and

(f) Mr Hammoud has given sworn evidence to ASIC to the effect that:

(i) Mr Fiorentino requested Mr Hammoud provide to him proxies and PODs from 28 Employees, Mr Karnib, GPL Solutions and Westfield;

(ii) further, Mr Hammoud completed, signed and/or returned by fax, as the case may be, each of the 31 Proxies and PODs; and

(iii) from time to time, Mr Hammoud would call Mr Fiorentino to confirm that Mr Fiorentino had received them.

384. We deal with Mr Fiorentino's denial in paragraph 413*ff* below.

385. Further and relevantly, the standard practice of Mr Fiorentino and Hamiltons in relation to the conduct of creditor meetings included:

(a) all proxies and PODs received by facsimile transmission at Hamiltons were provided to Mr Fiorentino at or after the time they were received;

(b) Mr Fiorentino provided the proxies and PODs to Ms Ioakimaros for her to update the Proxy Schedule; and

(c) on the morning and before the creditors meeting, Ms Ioakimaros provided to Mr Fiorentino the Attendance Schedule and the updated Proxy Schedule together with the proxies and PODs.

386. In accordance with the standard practice referred to above on 15 May 2009 and before the creditors meeting, Ms Ioakimaros provided to Mr Fiorentino an Attendance Schedule and an updated Proxy Schedule together with all proxies and PODs, including the 31 Proxies and PODs.

387. On 15 May 2009 at 9.30am a meeting of ERB creditors was held at, or during which, *inter alia*:

(a) Mr Fiorentino chaired the meeting;

(b) Mr Fiorentino tabled the Attendance and Proxy Schedules and informed the meeting of the parties in attendance in person and/or by proxy;

(c) David McCrostie (for GIO) and Mr Svehla (as proxy for the 28 Employees, Mr Karnib, GPL Solutions and Westfield) and Ian Swinnerton (for GIO [sic Gallagher Bassett]) by phone were present;

(d) Mr Svehla informed the meeting he was present in two capacities: first, as counsel for the liquidator; and second, as proxy holder and "*that he had nothing to do with getting them in or whether they have adjudicated upon them correctly*";

(e) McCrostie questioned why the employees of the company were on the attendance schedule for voting purposes and not included as creditors in the Report;

(f) Mr Fiorentino informed the meeting, *inter alia*, that after receiving preliminary oral advice from his solicitor yesterday, he had determined that the employee claims were allowed for voting purposes only to the extent of $1 per claim as their claims were contingent;

(g) Mr Svehla moved each of Resolution 1 and Resolution 2 at the meeting (see paragraph 271 above); and

(h) each of Resolution 1 and Resolution 2 were recorded as being carried with:

(i) GIO, whose debt was admitted by Mr Fiorentino to the value of $225,690.20, voting against each Resolution;

(ii) Gallagher Bassett, whose debt was admitted by Mr Fiorentino to the value of $134,403.59, voting for each Resolution; and

(iii) the 28 Employees, Mr Karnib, GPL Solutions and Westfield, whose debts were all admitted by Mr Fiorentino to their full value, a total of $1,207,804, which included a value of $965,000 for Westfield, voting by their proxy for each Resolution.

388. ASIC alleged that as liquidator of ERB and chair of the meeting, Mr Fiorentino's duties included:

(a) reviewing the proxies tabled at the meeting to ensure they were valid; and

(b) adjudicating upon the PODs to determine their validity and the amount for which they would be admitted for voting purposes

Mr Fiorentino denied this allegation so far as it involved the word "valid" and "validity". We deal with the issue of the obligations of a liquidator in this respect at paragraphs 393 below.

389. ASIC alleged, in the circumstances, that Mr Fiorentino should not have accepted any of the 31 Proxies and PODs at the creditors meeting and should not have allowed Mr Svehla to speak or vote as proxy at the meeting.

390. ASIC alleged that had Mr Fiorentino acted in that way, then neither of the Resolutions would have carried. Mr Fiorentino denied this allegation. We consider that this allegation is made out.

391. ASIC alleged that further or alternatively, at the time of admitting the 31 PODs and accepting the 31 Proxies to vote, Mr Fiorentino:

(a) knew; or alternatively

(b) was recklessly indifferent to the fact

that each of those 31 Proxies and PODs was invalid. Mr Fiorentino denied this allegation. We deal with this denial at paragraphs 413*ff* below.

Issue for determination – Contention 4.

392. The issue for determination under Contention 4 is whether, in accepting the 31 Proxies and allowing Mr Svehla to speak or vote as proxy at the 15 May 2009 creditors meeting, Mr Fiorentino

(a) acted in breach of clause 21.5.1 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110 and/or

(c) acted in breach of ss 180, 181(1)(a) or 184(1)(a), (b) and (c) and in addition, in breach of s 184(2)(a) of the Act, in that he used his position dishonestly with the intention of directly gaining an advantage for himself.

Clause 21.5.1 of the Code

393. In his general Response, Mr Fiorentino:

(a) Accepted that the proxies he accepted at the May meeting were not signed in the manner provided by the Act and accordingly should have been rejected;

(b) Maintained that the steps he took at the time were reasonable and normal for liquidators in that the collection and verification of proxies was a matter he typically left to staff particularly when it related to a follow up meeting of creditors;

(c) At the time, he was very busy on other matters and to all intents and purposes, he had done all he could in the ERB liquidation, unless creditors were prepared to provide further funding;

(d) In deciding what proxies to admit at the meeting, he relied upon the Proxy Schedule prepared by his staff and tabled at the meeting. On the face of it, he had no reason to query the proxies given by the former employees and Westfield[23].

394. Thus, even on Mr Fiorentino's case, it was not disputed (nor could it be rationally disputed) that the 31 proxies were invalid and should have been rejected. It follows that Mr Svehla was not a valid proxy and had no authority to vote as such. In our view, if Mr Fiorentino had rejected the 31 proxies, the resolutions approving his remuneration would not have been passed (see SOFAC paras 122 and 125).

395. Again, the starting point for a consideration of this issue is the Corporations Legislation. There is no regulation which specifically requires a convenor of a creditors meeting to check proxies for validity. However, it is implicit in the Regulations that he or she must do so. Regulation 5.6.17 requires that the liquidator will normally be chairperson of a creditors meeting. The chairperson's role includes control of process at the meeting, including the voting procedure so that he or she must form a view as to who is entitled to vote and the validity of proxies (see Regulations 5.6.19-5.6.26).

396. In our view, it is implicit in the Corporations Regulations (and, in any event, required by proper professional practice, if the purpose of those regulations are to be achieved) that a liquidator convening a meeting of creditors must check the validity of proxies.

397. We note that Clause 21.5.1 states:

> "Returned proxies **should** be carefully checked to ensure that they are valid". (emphasis in original)

398. The use of the word "should" in the Code is explained in clause 1.3 of the Code: if a practitioner had not adopted the course which the Code stated "should" be followed, the practitioner needed to be in a position to justify his or her conduct and needed to record the reasoning for diverging from the course stated in the Code. In effect, the Code required the practitioner to check proxies unless there was some justifiable reason recorded why that course was not adopted.

399. We doubt whether there will ever be circumstances where a liquidator is not required to check the validity of proxies. Indeed, clause 21.5.2 of the Code provides that:

[23] Response page 5.

"A practitioner **must** not accept a form of proxy that is incorrectly completed in a way that the practitioner considers renders it invalid or of doubtful validity". (emphasis in original)

400. This implies that the practitioner must have reviewed proxies. In our view, the correct approach is that liquidators *must* check the validity of proxies for a creditors' meeting.

401. There will be occasions where the number of proxies makes it unrealistic for the liquidator to perform the checking role personally. In these circumstances, it is appropriate for a liquidator to obtain assistance from appropriately qualified and instructed staff, but even in this case, in our view, this work should be reviewed by the liquidator and sample checking should be performed by the liquidator.

402. We note that in *ASIC v Dunner* (2013) 303 ALR 98, Middleton J held, at [95], that a liquidator failed properly to discharge his duties as liquidator where he had failed to ensure that proxies were valid.

403. The evidence of standard practice at Hamiltons was to the effect that all proxies and PODs received by facsimile transmission at Hamiltons were provided to Mr Fiorentino at or after the time they were received and that Mr Fiorentino then provided the proxies and PODs to Ms Ioakimaros for her to update the Proxy Schedule. If so, Mr Fiorentino had an opportunity to review the proxies and PODs. He either did (in which case, it should have been obvious to him that they were invalid, and he had no business accepting them) or he did not (in which case he failed to perform his obligations properly).

404. Mr Fiorentino asserted, in his Response, that he did not review the proxies but took steps which were reasonable and normal for liquidators in that he left the matter to staff and relied upon the proxy schedule. He said he had no reason to query the proxies.

405. We reject these propositions:

(a) In the first place, on the basis of this assertion, Mr Fiorentino undertook no review at all of the proxies. He did not even purport to review the work performed by his staff. Yet it was his obligation to check the proxies and, given that there were only 31, he should have checked them himself, or at least checked the work performed by staff;

(b) Secondly, the particular circumstances of the present case, known to Mr Fiorentino, warranted careful checking of the proxies:

(i) He knew that he had not sent the proxy forms to the creditors concerned. He either knew or ought to have known that the regulations required him to effect service *on the creditors* in the manner referred to in paragraphs 315 to 318 above;

(ii) He knew that he had sent the proxy forms to a third party, who had a personal interest in the affairs of ERB, which may not necessarily have coincided with the interests of the creditors;

(iii) He knew that he had not even sent a notice of meeting to the creditors concerned, so that the creditors may have had no real idea of the issues facing the company relevant to their claims.

406. These matters led to an increased likelihood that the proxies may not be properly executed and Mr Fiorentino should have checked them to avoid the very type of situation which occurred here, where the third party failed to provide the proxy forms to the creditors and took it upon himself to sign all of the proxies himself.

407. In his answer to this Contention in his Response, Mr Fiorentino said that he was very busy on other matters and, to all intents and purposes, he had done all he could in the ERB liquidation, unless creditors were prepared to provide further funding. This is clearly no answer to the complaint:

(a) In the first place, the fact that a liquidator is busy on other matters could never be a valid excuse for breaching duties of this type;

(b) Secondly, the fact that Mr Fiorentino thought he had done all he could in the liquidation is irrelevant. He had decided to convene a meeting of creditors and he was required to comply with his obligations in relation to that meeting, regardless of the ultimate outcome of the liquidation. Moreover, he accepted the proxies of 31 new creditors whose views he had never sought in relation to funding.

408. The errors in the proxies were very obvious:

(a) a brief examination of the 31 proxies reveals that they all contained the same signature;

(b) the name "Westfield Head Office" is obviously suspect;

(c) at no time, prior to or after the receipt of the Karnib proxy, had Mr Fiorentino or Hamiltons received any material to show that Mr Karnib was a creditor, nor was there any basis for thinking that he was a creditor;

(d) at no time, prior to or after receipt of the GPL Solutions proxy, had Mr Fiorentino or Hamiltons received any material to show that GPL Solutions was a creditor of ERB, nor was there any basis for thinking that GPL Solutions was a creditor.

409. The circumstances show that even if it was open to Mr Fiorentino to delegate the task, he failed to provide proper instructions or to delegate the matter to someone who was qualified to perform the task.

410. In our view, Mr Fiorentino was required to check the proxies (or at least, "should" have done so in the circumstances of this case). In accepting the 31 Proxies and allowing Mr Svehla to speak or vote as proxy at the 15 May 2009 creditors meeting Mr Fiorentino acted in breach of his obligations under the Corporations Regulations and clause 21.5.1 of the Code.

Was Mr Fiorentino's conduct negligent, did he lack good faith, and/or was he reckless and/or intentionally dishonest?

411. ASIC alleged that Mr Fiorentino's conduct

(a) lacked the requisite degree of care and diligence required of a liquidator in his circumstances (s 180 of the Act and section 130.1b) of the Compiled APES 110),

(b) involved a failure to act to exercise his powers in good faith in the best interests of ERB (s 181 of the Act) and

(c) that his conduct was reckless or intentionally dishonest (s 184 of the Act);

(d) was in contravention of s 184, in that Mr Fiorentino used his position dishonestly with the intention of gaining an advantage to himself.

412. We need to consider the matters which ASIC has particularised in support of these allegations.

413. In addition to the matters in paragraph 331 above, the particulars can only be found in paragraphs 93 to 126 of the SOFAC. Those matters are set out in paragraphs 346 to 391 above. In order to assess these matters in a meaningful way, it is necessary to set out the thrust of these allegations again:

(a) On 12 May 2009, Ms Ioakimaros, on Mr Fiorentino's instructions, commenced contacting creditors to ensure that there was a quorum for the creditors meeting (para 75);

(b) Mr Fiorentino knew, by 12 May 2009, that there would be a quorum made up of GIO and Gallagher Bassett, whose claims totalled $360,093.73 but did not know their voting intentions and whether the resolutions to approve his remuneration would be carried at the meeting (paras 76-79);

(c) Mr Fiorentino then made efforts to identify whether there were any employee creditors who could vote at the creditors meeting, (Mr J Hamilton telling Ms Raper "even if only for $1.00, which would help Mr Fiorentino") (para 84);

(d) On 13 May 2009, Mr Fiorentino instructed Mr Scarcelli to pre-complete PODs and proxies for 28 ERB employees and forwarded the pre-completed proxies (including the decision to vote in favour of the remuneration resolutions) to Mr Hammoud (paras 86 - 90);

(e) At no time did Mr Hammoud provide any information to Mr Fiorentino as to how to complete the voting intentions (Para 91);

(f) On 14 May 2009, at 9.31 am, Hamiltons received from ERB Head office the 28 invalid employee proxy forms and the 28 invalid employee PODs totalling $201,374 (paras 93 - 96);

(g) On 14 May at 10.00 am, Hamiltons received from ERB Head office the invalid Karnib proxy form and the invalid Karnib POD for $15,270 (paras 97 - 99);

(h) At no time before or after receipt of the Karnib POD did Mr Fiorentino receive any material to show that Mr Karnib was a creditor of ERB, nor did Mr Fiorentino consider him to be a creditor (paras 100 - 101);

(i) On 14 May at 1.01 pm Hamiltons received from GIO a proxy voting against the remuneration resolutions and a POD for $225,690.20 (paras 102-103);

(j) As from the time of the receipt of the GIO proxy, Mr Fiorentino knew that the remuneration resolutions would not carry unless Gallagher Bassett voted in favour of the resolutions (which he would not know until the meeting) or he procured further and sufficient creditors or proxies to attend and vote (para 104);

(k) On 14 May at 4.20 pm Hamiltons received the invalid GPL Solutions proxy and POD for $35,160 (108-111);

(l) At no time before or after receipt of the GPL Solutions POD did Mr Fiorentino receive any material to show that GPL Solutions was a creditor of ERB, nor did Mr Fiorentino consider GPL Solutions to be a creditor (paras 111 - 112);

(m) On 14 May at 5.18 pm, Hamiltons received the invalid Westfield Head Office proxy and PODs for $956,000 and $7,650,000 (paras 114 - 117);

(n) Mr Fiorentino knew that there was no creditor known as "Westfield Head Office", that the relevant name of the creditor was the Westfield Group, and he had been informed on 12 March 2009 that the Westfield claim was for $2,729,611.81 (para 117);

(o) That Mr Fiorentino requested Mr Hammoud to provide him with the 31 proxies and that his purpose in requesting the 31 proxies was to ensure that the resolutions approving his remuneration would be carried and this should be inferred from the facts that:

    (i) The last time Mr Fiorentino had spoken to Mr Hammoud about the liquidation of ERB was on 13 March 2009;

    (ii) Mr Hammoud had no interest in the liquidation of ERB after 14 January 2009, being the date of the Deed of Settlement and Release;

    (iii) The resolutions did not benefit Mr Hammoud in any way and only benefitted Mr Fiorentino;

    (iv) Mr Fiorentino had not provided to Mr Hammoud, the 28 Employees, Mr Karnib, GPL Solutions or Westfield any notice in writing of the meeting as required by Reg 5.6.12(1)(a);

    (v) Mr Fiorentino and Mr Hammoud had at least the following telephone calls between them: one (1) call on 12 May 2009; one (1) call on 13 May 2009 and six (6) calls on 14 May 2009; and

    (vi) Mr Hammoud has given sworn evidence to ASIC to the effect that:

1. Mr Fiorentino requested Mr Hammoud provide to him proxies and PODs from 28 Employees, Mr Karnib, GPL Solutions and Westfield;

2. further, Mr Hammoud completed, signed and/or returned by fax, as the case may be, each of the 31 Proxies and PODs; and

3. from time to time, Mr Hammoud would call Mr Fiorentino to confirm that Mr Fiorentino had received them (paras 118 - 119).

(p) the standard practice of Mr Fiorentino and Hamiltons in relation to the conduct of creditor meetings included that all proxies and PODs received by facsimile transmission at Hamiltons were provided to Mr Fiorentino at or after the time they were received, Mr Fiorentino provided the proxies and PODs to Ms Ioakimaros for her to update the Proxy Schedule and on the morning and before the creditors meeting, Ms Ioakimaros provided to Mr Fiorentino the Attendance Schedule and the updated Proxy Schedule together with the proxies and PODs (paras 120-121);

(q) Mr Fiorentino's duties included reviewing the proxies tabled at the meeting to ensure they were valid and adjudicating upon the PODs to determine their validity (para 123);

(r) at the time of admitting the 31 PODs and accepting the 31 Proxies to vote, Mr Fiorentino knew or alternatively was recklessly indifferent to the fact that each of those 31 Proxies and PODs was invalid (para 126).

414. Standing back from the detail, we are concerned, here, with a meeting of creditors which Mr Fiorentino had called by notice dated 30 April 2009. Notice of the meeting was only sent to the OSR, GIO, Gallagher Bassett, Anything Wet and Zestwin Pty Ltd.

415. Mr Hammoud and BWI had been released from claims and had not been served with the notice of meeting.

416. Whilst the notice stated that the purpose of the meeting was to provide information to creditors and ascertain whether any creditors wished to fund the liquidator in compulsory examinations, the only resolutions proposed in the notice related to approval of Mr Fiorentino's remuneration of $183,943.00. The proxy forms which were sent out with the notice contained no reference to any resolution other than the two remuneration resolutions.

417. The evidence shows that not much had happened in the liquidation since February 2009.

418. It is evident that an intense period of activity commenced from 12 May 2009, three days before the meeting. It is clear to us that this activity was aimed at procuring votes at the meeting.

419. An important issue, in considering this aspect of the case, is what sparked this activity and what was the reason behind it?

420. In our view, the only rational explanation for what occurred was that Mr Fiorentino initiated the search for proxies in order to ensure that the remuneration resolutions were passed. There is no reason for us to believe that Mr Hammoud initiated the activity in relation to proxies. There is no apparent reason why he would have been interested in ensuring that the remuneration resolutions passed.

421. We consider that Mr Fiorentino was directly interested in the procurement of proxies and we find that he was informed of the developments as they occurred over the period 12 to 15 May 2009, to the extent that he was not directly involved.

422. It is clear to us that Mr Fiorentino initiated the procurement of the employee proxies and selected the "yes" vote in favour of the remuneration resolutions in those proxies. He admitted that this was his decision, not Mr Hammoud's. For reasons already advanced, we do not consider that, in procuring those proxies, he acted in good faith in the interests of ERB. It must follow, in our view, that by accepting the proxies (even assuming that they were valid) he did not act in good faith in the best interests of ERB. He knew that he had pre-determined the voting decision and that this may well have undermined the integrity of the voting process. However, it may be possible to argue that he did not act dishonestly or recklessly with regard to the employee proxies because he thought that there was some possibility that the employees may be creditors and he thought, when the proxies were returned, that they had decided to vote in favour of the resolutions.

423. However, as regards at least the Mr Karnib, GPL Solutions and Westfield Head Office proxies, we do not consider that argument open.

424. Having regard to Mr Fiorentino's interest in the matter, we find that he was aware (certainly as from the time of the receipt of the GIO proxy), that the remuneration resolutions might not carry. It was clearly in Mr Fiorentino's interests to have his remuneration approved at the meeting rather than go to the trouble of a court application. We find that he procured the Karnib, GPL Solutions and "Westfield Head Office" proxies from Mr Hammoud in an attempt to ensure that the remuneration resolutions were passed.

425. We find it inconceivable that Mr Hammoud would have produced these proxies of his own initiative:

(a) In the first place, there is no rational reason why, unless asked by Mr Fiorentino, he would have volunteered proxies for these persons at all. He had never previously sought to press claims against ERB on behalf of these persons. There is no evidence that he had been asked by them to lodge proxies;

(b) Secondly, he had no real interest in lodging proxies at all, as he had no real interest in the meeting, (the only resolution being the remuneration resolutions). He and his wife and BWI had been released from claims by ERB;

(c) Thirdly there is no reason why he would have volunteered these proxies *the day before the meeting*. Untutored by Mr Fiorentino, he could have had no knowledge about the likely voting outcomes at the meeting. There is evidence of six telephone calls between Mr Fiorentino and Mr Hammoud on 14 May (to be contrasted with minimal contact in the previous months). The only rational

explanation for the emergence of these proxies at the last minute was an effort to ensure that the resolutions were passed and the person who had relevant knowledge of the risks of failure, which emerged at the last minute, was Mr Fiorentino. This suggests that the proxies were procured by Mr Fiorentino, not Mr Hammoud.

426. Thus, in our view, the objective circumstances point strongly to Mr Fiorentino having procured the Karnib, GPL Solutions and Westfield Head Office proxies because he believed that he needed the support of additional proxies to ensure that the remuneration resolutions were passed.

427. There is also direct evidence supporting this conclusion. Mr Hammoud's evidence was that all of the proxies were prepared at Mr Fiorentino's request and in accordance with his instructions. His evidence was that after the first proxies, he was contacted by Mr Fiorentino and was told that he needed him to prepare some further proxies. His evidence was that he filled in the Karnib, GPL Solutions and Westfield Head Office proxies in accordance with Mr Fiorentino's instructions given over the phone.

428. We are conscious of the fact that Mr Hammoud was not cross-examined, as Mr Fiorentino did not attend the hearing. However, as already indicated, Mr Hammoud's evidence is consistent with the objective circumstances.

429. In the circumstances, we accept Mr Hammoud's evidence and we accept the matters asserted in paragraph 118 of the SOFAC (set out at paragraph 381 above).

430. Mr Fiorentino had no basis for giving Mr Hammoud instructions as to the preparation of a proxy (or accepting a proxy) on behalf of Mr Karnib or GPL Solutions. Apart from anything else, Mr Fiorentino had no reason to believe that they were creditors of ERB. He had no basis for giving Mr Hammoud instructions as to the preparation of a proxy (or accepting a proxy) on behalf of Westfield Head Office, as he knew that there was no such creditor. In any event, he or his solicitor Mr J Hamilton was in contact with Westfield (having sent a notice of meeting and proxy form to Westfield on 12 May 2009) and would have known that any proxy would be received from Westfield direct.

431. In our view, to accept the 31 Proxies and to allow Mr Svehla to vote as proxy in these circumstances was dishonest. If we are wrong about this as regards all 31 Proxies, we find that Mr Fiorentino knew, at the very least, that the Karnib, GPL Solutions and Westfield Head Office proxies were not valid, that there was no basis for treating those persons as creditors of ERB and that he procured those proxies with purpose of ensuring that the remuneration resolutions were passed at the meeting. This involved knowledge or an intention which ordinary people would regard as dishonest.

432. In our view, in accepting the 31 Proxies and allowing Mr Svehla to vote as proxy for those 31 persons (or, if we are wrong about all 31, then at the very least, in accepting the Karnib, GPL Solutions and Westfield Head Office Proxies and allowing Mr Svehla to vote as their proxy) at the 15 May 2009 creditors meeting, Mr Fiorentino used his position (as Chairperson of the meeting) dishonestly with the intention of directly gaining an advantage for himself, namely approval of his remuneration without the need to go to court.

433. Even if we are incorrect in this conclusion,

(a) we would have held that Mr Fiorentino, in accepting the 31 Proxies and allowing Mr Svehla to vote as proxy, was reckless. His actions were reckless because, in the circumstances in which the proxies were procured, he must, at least, have suspected that there was a possibility that they were invalid, yet he proceeded with the proxies regardless. Alternatively, at the very least, he must have suspected that there was no basis for Mr Karnib, GPL Solutions and Westfield Head Office to be lodging proxies (as referred to in paragraph 430 above), yet he proceeded with the proxies regardless. We do not find that Mr Fiorentino was "*intentionally* dishonest" for the simple reason that we believe that this section requires that the person be aware that his or her conduct was wrong or dishonest and we are not in a position to make such a finding on the evidence (cf *Kwok v R* (2007) 64 ACSR 307 at [70]);

(b) alternatively, if we are incorrect in the conclusion in (a), we would have held that Mr Fiorentino, in accepting the 31 Proxies and allowing Mr Svehla to speak or vote, failed to exercise his powers or discharge his duties in good faith in the interests of ERB for the reasons set out in paragraphs 414 to 430;

(c) Finally, if we were incorrect in each of the above conclusions, we would have held that Mr Fiorentino's conduct was, at least, lacking in the diligence or reasonable care and diligence required by section 130.1b) of the Compiled APES 110 and/or s 180.

Finding on Contention 4

434. For the above reasons, we consider that Contention 4 is established. However, we base this finding on our acceptance that the matters in sub-paragraphs 4(a) and (f) are established.

Does Contention 4 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

435. Not every breach of clause 25.1.1 of the Code will constitute a failure by a liquidator to carry out or perform adequately and properly his or her functions or duties. However, in the light of the significance of this breach, as identified above, Mr Fiorentino's breach constituted such a failure.

436. Moreover, we have found that Mr Fiorentino acted dishonestly with the intention of directly gaining an advantage for himself, namely approval of his remuneration without the need to go to court.

437. In the circumstances, we find that Mr Fiorentino, in acting in the manner referred to above, failed in this respect, to carry out or perform adequately and properly his or her functions or duties.

438. We should note that if we are wrong about our finding that Mr Fiorentino acted dishonestly with the intention of directly gaining an advantage for himself, we would still have found that Mr Fiorentino's conduct, as found, constituted a failure to carry out or perform adequately and properly his or her functions or duties on the basis of the alternative findings we would have made, as referred to in paragraph 433 above.

(v) Contention 5 – Mr Fiorentino acted negligently, without good faith or dishonestly in procuring the 31 Proxies and PODs.

439. ASIC alleged, by Contention 5, that:

"In procuring the 31 Proxies and PODs from Mr Hammoud, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(c) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB; and/or

(d) acted in contravention of s 184(1)(a), (b) and (c) of the Act in that he was reckless or intentionally dishonest and failed to exercise his powers in the best interests of ERB; and/or

(e) acted in breach of s 184(2)(a) of the Act, in that he used his position dishonestly with the intention of directly gaining an advantage for himself."

Matters upon which ASIC specifically relies in support of Contention 5

440. ASIC alleged that Mr Fiorentino procured the 31 Proxies and PODs from Mr Hammoud in circumstances where:

(a) Mr Fiorentino did not give the 30 April 2009 Notice and Report to Westfield or any of the employee creditors of ERB; and/or

(b) Mr Fiorentino had never directly contacted any of the former employees of ERB to ascertain whether they had any debts or claims against ERB or whether they wished for Mr Hammoud to represent them or communicate on their behalf; and/or

(c) Mr Fiorentino had pre-completed the 28 Employee Proxies; and/or

(d) Mr Fiorentino did not consider Mr Karnib and GPL Solutions were creditors of ERB; and/or

(e) Mr Fiorentino's purpose was to ensure that the resolutions approving the liquidators' remuneration were carried.

441. After the 15 May 2009 creditors meeting and purportedly pursuant to Resolution 1 of that meeting, Messrs Fiorentino and Hamilton, as liquidators of ERB, paid themselves by way of remuneration the total sum of $56,042.33 (plus GST) as follows:

(a) on 15 May 2009, the sum of $50,683.63 (plus GST); and

(b) on 3 June 2009, the sum of $5,358.70 (plus GST).

Issue for determination – Contention 5.

442. The issue for determination under Contention 5 is whether Mr Fiorentino, in procuring the 31 Proxies and PODs from Mr Hammoud:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110 and/or

(b) acted in breach of ss 180, 181(1)(a) or 184(1)(a), (b) and (c) and in addition, in breach of s 184(2)(a) of the Act, in that he used his position dishonestly with the intention of directly gaining an advantage for himself.

443. In substance, this Contention relies upon very similar matters to those in Contentions 3 and 4. The Contention related to "procuring" the 31 proxies and PODs in the circumstances set out in paragraph 128 of the SOFAC (set out in paragraph 440 above). The essence of the allegation is that Mr Fiorentino was responsible for procuring and pre-completed the proxies and PODs in circumstances where he

(a) did not provide the notice and Report to the persons concerned,

(b) did not have any contact with any of the employees to ascertain whether they had any debts or claims or whether they wished for Mr Hammoud to represent them or communicate on their behalf

(c) did not consider Mr Karnib and GPL Solutions were creditors of ERB

and where his purpose was to ensure that the resolutions approving the liquidators' remuneration were carried.

Finding on Contention 5

444. For the reasons already set out in paragraphs 314 to 328, 333 to 341, 393 to 410 and 414 to 432 above, we consider that Contention 5 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 5(a) is established.

445. In our view, Mr Fiorentino did procure the 31 proxies and PODs in the circumstances alleged in paragraph 128 of the SOFAC (see paragraph 440 above) and in doing so he used his position as the liquidator and convenor of the meeting dishonestly with the intention of directly gaining an advantage for himself, namely approval of his remuneration without the need to go to court.

446. Even if we are wrong in this conclusion, we would have held that Mr Fiorentino did procure the Karnib and GPL proxies and in doing so he used his position as the liquidator and convenor of the meeting dishonestly with the intention of directly gaining an advantage for himself. Even if we are wrong in this conclusion, we would have held that Mr Fiorentino's conduct, in procuring the 31 proxies and PODs in the circumstances alleged in paragraph 128 of the SOFAC was of the character set out in paragraph 433 above.

Does Contention 5 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

447. The matter alleged in Contention 5 involves a very serious matter and we have found that Mr Fiorentino acted dishonestly with the intention of directly gaining an advantage for himself. This matter, in itself, establishes that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator.

448. We should note that if we are wrong about our finding that Mr Fiorentino acted dishonestly with the intention of directly gaining an advantage for himself, we would still have found that Mr Fiorentino's conduct, as found, constituted a failure to carry out or perform adequately and properly his or her functions or duties on the basis of the alternative findings we would have made, as referred to in paragraph 446 above.

(d) Contentions 6 to 14 – The Transfer of assets issue

449. ASIC dealt with Contentions 6 to 14 together

450. **Contentions 6, 7 and 10.** ASIC alleged that Mr Fiorentino failed properly to investigate the affairs of the company including possible voidable transactions and/or possible misappropriation of funds by the Directors of ERB during the period 9 August 2007 to 31 March 2008, the royalty payments payable under the Franchise Agreements, and/or the source of the deposit of $300,000 to the ERB ANZ Pre-liquidation bank account, and thereby acted in breach of various provisions including section 130.1b) of the Compiled APES 110 and s 180 of the Act.

451. **Contention 9.** ASIC alleged that Mr Fiorentino failed properly to inform creditors of all relevant matters in connection with the suspected Uncommercial Transaction and the available remedies, in circumstances where he was seeking funding from creditors to investigate the Business Sale Agreement, and thereby acted in breach of various provisions including clause 13.4 of the Code, section 130.1b) of the Compiled APES 110 and ss 180 and 181 of the Act.

452. **Contentions 8 and 11 to 14.** ASIC alleged that Mr Fiorentino failed properly to investigate the affairs of the company including the Business Sale Agreement as an Uncommercial Transaction and/or a Related party transaction, and entered into a Deed of Settlement and Release with BWI, Ms Issa and Mr Hammoud on 14 January 2009:

(a) without properly assessing which remedies were in the best interest of the creditors, ascertaining the true indebtedness of BWI and/or the Directors to ERB and/or investigating and assessing the financial capacity of BWI or the Directors;

(b) without seeking the approval of the Court or of a resolution of creditors;

(c) without seeking legal advice in relation to the entering into, and settling of the terms of the Deed of Settlement and Release.

ASIC alleged that by doing so, Mr Fiorentino acted in breach of various provisions including section 130.1b) of the Compiled APES 110 and ss 477(2A), 477(2B), 180 and 181 of the Act.

(i) Contention 6

Matters upon which ASIC specifically relies in support of Contention 6

453. ASIC relied upon the following matters in support of Contention 6. These matters were also relied upon in support of other contentions involving the Transfer of Assets issue.

454. Most of the matters relied upon by ASIC are supported by documentary evidence and admitted in Mr Fiorentino's Response. Unless we specifically note otherwise, we accept the factual allegations set out in this section.

OSR Audit

455. By letter dated 13 October 2006, the OSR notified ERB that it was commencing an investigation into the payroll tax obligations of ERB and any associated businesses.

456. ERB had not registered for nor paid payroll tax despite having a liability to do so since 2002.

457. After receiving the OSR notification, Mr Hammoud sought the advice of Mr Bastas as he was concerned that ERB may not be able to pay the OSR payroll liability.

458. Mr Bastas recommended that Mr Hammoud implement a "corporate restructure" of ERB which involved setting up a trust structure.

459. On 31 January 2007, the OSR finalised its investigation and Notices of Assessment totalling approximately $669,935.45 were sent to ERB in respect of its payroll tax liabilities (including interest) as follows:

(a) 1 July 2002 to 30 June 2003 $113,979.56

(b) 1 July 2003 to 30 June 2004 $152,257.31

(c) 1 July 2004 to 30 June 2005 $140,604.22

(d) 1 July 2005 to 30 June 2006 $173,155.95

(e) 1 July 2006 to 31 December 2006 $89,938.41.

460. By letter dated 23 February 2007, Mr Bastas advised the OSR that:

(a) ERB was selling its business via a franchising scheme that would allow it to raise funds to pay the outstanding amount of $669,835.45 [*sic*]; and

(b) as soon as funds became available from the sale, ERB would commit to paying the OSR liability.

461. On 16 May 2007, the OSR approved an instalment plan for ERB to pay the outstanding payroll tax liability which, at that point in time, had increased to $724,246.45.

462. On 16 July 2007, ERB executed the following documents:

(a) Franchise Agreement with Unlimited Beauty Pty Limited and Le Vert Pty Limited, as franchisees, pursuant to which the franchisees were granted the right to operate a business under the name "Ella Rouge" at Westfield Burwood, 100 Burwood Road, Burwood ("ERB Burwood Franchise"); and

(b) Franchise Agreement with Unlimited Beauty Pty Limited, as franchisee, pursuant to which the franchisee was granted the right to operate a business under the name "Ella Rouge" at Level 2, Macarthur Square, Gilchrist Drive, Ambarvale ("ERB Macarthur Franchise").

463. The Franchise Agreements referred to in the preceding paragraph provided, *inter alia*, that from the commencement of the second year of the Franchise Agreement, the franchisee would be required to pay an annual royalty calculated as follows:

(a) In the 2nd year, 4% of Gross Receipts per annum, or $35,000 (plus GST) whichever was the lesser;

(b) In the 3rd year, 4% of Gross Receipts per annum, or $40,000 (plus GST) whichever was the lesser;

(c) In the 4th year, 4% of Gross Receipts per annum, or $45,000 (plus GST) whichever was the lesser; and

(d) In the 5th year, 4% of Gross Receipts per annum, or $50,000 (plus GST) whichever was the lesser ("Royalty Payments").

464. On 2 August 2007, ERB executed contracts for the sale of business pursuant to which ERB agreed to sell the following businesses operated by ERB:

(a) ERB Burwood Franchise to Le Vert Corp Pty Ltd and Unlimited Beauty Pty Ltd ATF for A&N Marouche Family Trust for $770,000 with a completion date 2 August 2007; and

(b) ERB MacArthur Franchise to Unlimited Beauty Pty Ltd ATF for A&N Marouche Family Trust for $770,000 with a completion date of 2 August 2007.

465. On 3 August 2007, several cheques, including bank cheques, totalling $1,530,000 were deposited to Westpac account no. 032055 402847 ("ERB Westpac 1 Account").

466. ASIC alleged that, on the facts, it may be inferred that the deposit of $1,530,000 referred to in the preceding paragraph represented part of the sale proceeds from the contracts for the sale of business referred to above. Mr Fiorentino admitted this.

467. On 9 August 2007, Mr Hammoud:

(a) withdrew $1,000,000 from ERB Westpac 1 account; and

(b) deposited $1,000,000 to Westpac account no. 037 145 418968 in the name of Ali Hammoud and Manel Issa ("Hammoud Westpac 1 account").

468. On 27 November 2007, the OSR issued a further demand to ERB for $715,323.10.

469. On 6 December 2007, ERB executed the following documents:

(a) Franchise Agreement with Skinopia Pty Limited pursuant to which the franchisee was granted the right to operate a business under the name "Ella Rouge" at Castle Towers Shopping Centre, Castle Hill ("ERB Castle Hill Franchise"); and

(b) Franchise Agreement with AGP Beauty Pty Ltd pursuant to which the franchisee was granted the right to operate a business under the name "Ella Rouge" at Westfield Shoppingtown Miranda ("ERB Miranda Franchise").

470. The Franchise Agreements referred to in the preceding paragraph provided *inter alia*, that from the commencement of the second year of the Franchise Agreement, the franchisee would be required to pay an annual royalty calculated as follows:

(a) In the 2nd year, 5% of Gross Receipts per annum, or $35,000 (plus GST) whichever was the lesser;

(b) In the 3rd year, 5.5% of Gross Receipts per annum, or $40,000 (plus GST) whichever was the lesser;

(c) In the 4th year, 6% of Gross Receipts per annum, or $45,000 (plus GST) whichever was the lesser; and

(d) In the 5th year, 6.5% of Gross Receipts per annum, or $50,000 (plus GST) whichever was the lesser ("Royalty Payments").

471. On 6 December 2007, ERB executed the following contracts for the sale of business pursuant to which ERB agreed to sell the following businesses operated by ERB:

(a) ERB Castle Hill Franchise to Skinopia Pty Ltd as trustee for the Skinopia Trust for $900,000 with a completion date of 6 December 2007; and

(b) ERB Miranda Franchise to AGP Beauty Pty Ltd ATF the Paradissis Family Trust for $750,000 with a completion date of 6 December 2007.

472. On 6 December 2007, the following sums totalling $1,980,579 were deposited to Westpac account no. 032-055 413909 ("ERB Westpac 2 account"):

(a) $1,480,579 comprising *inter alia* the following bank cheques:

(i) $450,000 purchased by Skinopia;

(ii) $736,708.65 purchased by AGP Beauty Pty Limited;

(iii) $280,000 purchased by an unknown party; and

(b) $500,000 from ERB Westpac 1 account.

473. ASIC alleged that, on the facts, it could be inferred that the deposit referred to in the preceding paragraph represented part of the sale proceeds from the contracts of sale of business referred to in paragraph 471 above. Mr Fiorentino admitted this.

474. On 11 December 2007, and further to a telephone conversation of that date between Mr Hammoud and David McClure of the OSR, the OSR agreed to a payment arrangement pursuant to which ERB was required to make:

(a) immediate payment of $200,000; and

(b) six payments of $20,000 to be paid monthly commencing 10 January 2008.

475. On 11 December 2007, ERB paid $200,000 to the OSR.

476. In mid January 2008, Messrs Bastas and Hammoud had a number of meetings to discuss the restructure of ERB.

477. Despite the restructure proposed by Mr Bastas, Mr Hammoud was concerned about ERB's financial situation and contacted Mr Moini.

478. Mr Moini recommended that Mr Hammoud speak to Mr Fiorentino, who had been either liquidator or administrator of several of Mr Moini's companies.

479. Shortly thereafter, Mr Moini contacted Mr Fiorentino and within a day or so Messrs Fiorentino, Hammoud and Moini met ("First Meeting"). We note that Mr Fiorentino denies this allegation. In our view, the allegation is made out (see the analysis at paragraphs 104 to 115 above).

480. At the First Meeting, Mr Fiorentino advised Mr Hammoud, *inter alia*:

(a) to liquidate ERB (then known as Ella Rouge Beauty Pty Limited);

(b) about the liquidation process and how the liquidation would proceed;

(c) he would retain his business post liquidation;

(d) the OSR would be listed as an unsecured creditor and the company's debts would be dissipated in the event of a liquidation;

(e) to change the name "*Ella Rouge Beauty Pty Limited"* to "*ERB International Pty Limited*", and to register the new Ella Rouge Beauty to avoid anyone taking the name; and

(f) the liquidation would cost a flat sum of $50,000.

481. We should note, at this stage, that we do not find that Mr Fiorentino gave advice in precisely the manner asserted above. We find that Mr Fiorentino advised Mr Hammoud that he could transfer the business to a new company and liquidate ERB and the matters in (a), (b), (c), (e) and (f) in the preceding paragraph.

482. On 24 January 2008, Hamiltons' personnel created an internal document titled "*ERB International Pty Limited, Program for Creditors Voluntary Winding Up, January 2008*".

483. On 24 January 2008 and prior to the company changing its name to ERB International Pty Ltd, Mr Bastas issued an invoice to Mr Hammoud in the name of "*ERB International Pty Ltd*".

Workers Compensation Audit

484. By letter dated 13 February 2008, Gallagher Bassett Services (Workers Compensation) advised ERB that Deloitte Touche Tohmatsu ("Deloitte") would be conducting a wage inspection of ERB for the years 18 June 2006 to 18 June 2007.

485. On 18 February 2008, BWI, by Mr Hammoud and Ms Issa, applied for an ANZ bank account no 012395 – 4853-75141 for BWI as Trustee of the Shanel Family Trust ("BWI ANZ Account").

486. On 25 February 2008, Mr Hammoud:

(a) withdrew $1,808,918.91 from ERB Westpac 2 account leaving a zero balance in that account**;**

(b) deposited $808,918.91 into ERB Westpac 1 account;

(c) deposited $1,000,000 into Hammoud Westpac 2 account;

(d) effected an internet banking transfer of $500,000 from ERB Westpac 1 account to BWI ANZ account;

(e) effected an internet banking transfer of $300,000 from ERB Westpac 1 account to ANZ account no. 012-395 3539-09367 in the name of ERB ("ERB ANZ Pre-liquidation bank account"); and

(f) applied for a Westpac bank account for BWI with that account opened and bearing account number 032-055 42-3074 ("BWI Westpac account").

487. By email dated 25 February 2008, Mr Bastas advised Mr Hammoud, *inter alia:*

(a) he could not find a liquidator who could liquidate ERB faster than GPL Solutions;

(b) the ERB liquidation could probably be finalised within a month;

(c) a tax return needed to be lodged and a tax office clearance obtained otherwise "*ASIC will not liquidate*"; and

(d) to submit a name change for the company so that a new company with the Ella Rouge name could be created.

488. On 4 March 2008, Mr Hammoud undertook the following transactions resulting in a zero balance in ERB Westpac 1 account:

(a) withdrew $109,831.91 from ERB Westpac 1 account; and

(b) deposited $109,831.91 to BWI Westpac account.

489. As at 4 March 2008, as a result of the transactions undertaken by Mr Hammoud referred to in above, between 6 August 2007 and 4 March 2008 ERB paid:

(a) the Directors $2,000,000; and

(b) BWI $609,831.91.

Legal Advice: 5 March 2008

490. On 5 March 2008, Messrs Fiorentino, Bastas and Hammoud met at Mr Fiorentino's office, at which Mr Fiorentino sought and obtained legal advice from Mr Svehla.

491. By way of teleconference Mr Svehla advised Messrs Fiorentino, Bastas and Hammoud that:

(a) the company could not transfer its assets and leave payroll tax liabilities behind and needed to have an agreement in place for the new company to meet the payroll tax liability; alternatively

(b) the sale of assets had to be for proper commercial value.

492. In the circumstances, from 5 March 2008, Mr Fiorentino knew that:

(a) payroll tax could not be left behind in ERB unless there was an agreement with BWI to pay that liability; or alternatively

(b) if the payroll tax was left behind, and there was no agreement with BWI to pay that liability, the transfer of assets of ERB to BWI needed to be at proper commercial value.

Mr Fiorentino denies this allegation. We see no basis for the denial. It is clear to us that he was present at the teleconference with Mr Svehla and was aware of Mr Svehla's advice. We have already made findings as to Mr Fiorentino's involvement at the teleconference in paragraph 115 above.

13 March 2008 Email

493. On 13 March 2008, Mr Bastas sent an email to Mr Fiorentino in which he, *inter alia:*

(a) stated that, as discussed on the phone, he [Mr Bastas] had attached various financial accounts for ERB;

(b) advised he had adjusted the accounts prepared by the internal accountant for the franchising and the transfer of assets to the family trust;

(c) advised he was in the process of finalising the contract for the transfer of the assets;

(d) requested Mr Fiorentino let him know his thoughts; and

(e) noted that their discussions were obviously extremely confidential ("13 March 2008 Email").

494. Accompanying the 13 March 2008 email were unsigned financial statements of ERB for the periods:

(a) 1 July 2006 to 30 June 2007;

(b) 1 July 2007 to 29 February 2008; and

(c) 1 July 2007 to 31 March 2008 ("the First Version of the 31 March 2008 accounts" see paragraph 123 above).

495. The the First Version of the 31 March 2008 accounts recorded, *inter alia*

(a) Total assets as at:

(i) 29 February 2008 $7,661,541.94

(ii) 31 March 2008 $51,678.19

(b) Loans from other persons ("Directors Loans") (Note 7) as at:

(i) 30 June 2007 $8,845,484.08

(ii) 29 February 2008 $3,607,043.50

(iii) 31 March 2008 $635,526.64

(c) The payroll tax liability as at:

(i) 29 February 2008 $464,246.45

(ii) 31 March 2008 $464,246.45.

496. ASIC alleged that, in the circumstances, from about 13 March 2008, Mr Fiorentino knew, or ought to have known, that:

(a) between 29 February 2008 and 31 March 2008 the assets of the company had been reduced by $7,612,863.75;

(b) between 1 July 2007 and 29 February 2008, Directors Loans had been reduced by $5,238,440.58;

(c) between 29 February 2008 and 31 March 2008, the Directors Loans had been further reduced by $2,971,516.86; and

(d) the payroll tax liability remained a liability of ERB as at 31 March 2008.

Mr Fiorentino denies these allegations. We have already made findings on this issue at paragraphs 116 to 124 above. We discuss the issue further in our consideration of Contention 6 below. The reduction of assets in (a) and the reduction of liabilities in (b) is generally consistent with the Business Sale Agreement and with BWI having taken over ERB's liabilities, including directors' loans but excluding the OSR debt.

497. On 28 March 2008, ERB entered into the Business Sale Agreement by which it sold and transferred its Business to BWI for no cash consideration. Mr Fiorentino denies this allegation and says that he does not know the date of execution but that he was provided with an agreement dated 28 February 2008 and that the books and records of ERB reflect this. We find that the Business Sale Agreement was entered into on 28 March 2008 but was intended to operate as at 28 February 2008.

498. Mr Hammoud executed the Business Sale Agreement in his capacity as director of ERB and in his capacity as director of BWI.

499. The Business Sale Agreement provided, *inter alia*, that:

(a) ERB transfer all of its assets to BWI (clause 2 and definition of "Business" in clause 1)

(b) ERB transfer all of its liabilities to BWI (clause 2 and definition of "Business" in clause 1);

(c) The purchase price was the aggregate of the total values of the component parts of the business (clause 1); and

(d) "Value of component parts of the business" (Schedule 8) were:

(i)	Finished goods at cost	$912,356.30
(ii)	Property plant and equipment	$2,874,742.45
(iii)	Goodwill	$270,000.00
(iv)	Trade creditors	($519,763.84)
(v)	Other creditors	($145,644.29)
(vi)	Lease liabilities	($700,065.76)
(vii)	Loans	($2,691,626.86).

500. The total assets listed under Schedule 8 were $4,057,098.75 and the total liabilities were $4,057,100.75, resulting in BWI paying no cash consideration for the purchase of ERB's business.

501. On 28 March 2008, and after the Business Sale Agreement was executed, ERB changed its name to ERB International Pty Ltd.

ERB Liquidation

502. On 2 April 2008, Messrs Fiorentino and Hamilton were appointed joint liquidators of ERB by its shareholders (and directors), Mr Hammoud and his wife, Ms Issa.

503. On 2 April 2008, Mr Fiorentino sent the 2 April 2008 Notice to creditors advising of a meeting of creditors to be held on 16 April 2008.

504. The RATA as at 2 April 2008 accompanied the 2 April 2008 Notice and listed the following as creditors of ERB:

(a) Directors $2,152,199.64

(b) OSR $464,246.45

(c) ATO $56,294.85

505. We note, at this point, that the assertion in the RATA that the directors were owed $2,152,199.64 appeared, on its face, to be inconsistent with the First Version of the 31 March 2008 accounts.

506. On 2 April 2008, Mr Fiorentino received the following company records:

(a) ERB Company Register;

(b) executed copy of the Business Sale Agreement dated 28 March 2008. (Mr Fiorentino denies this allegation and says that he does not know the date of execution but that he was provided with an agreement dated 28 February 2008 and that the books and records of ERB reflect this) and

(c) ERB's unsigned financial statements for the following periods:

(i) 1 July 2007 to 29 February 2008;

(ii) 1 July 2007 to 31 March 2008 ("the Second Version of the 31 March 2008 accounts ").

507. The Directors Loans as at 31 March 2008 in the the Second Version of the 31 March 2008 accounts had increased substantially from the amount recorded in the the First Version of the 31 March 2008 accounts in that:

(a) the First Version of the 31 March 2008 accounts recorded Directors Loans as a liability as at 31 March 2008 as $635,526.64; and

(b) the Second Version of the 31 March 2008 accounts recorded Directors Loans as a liability as at 31 March 2008 as $2,152,199.64.

508. In the circumstances, from 2 April 2008 Mr Fiorentino knew that:

(a) the payroll tax liability had not been paid by either ERB or BWI and that the OSR was an unsecured creditor in the liquidation;

(b) the sale of the business was not an arm's length transaction;

(c) no cash consideration had been paid on the transfer of the business; and

(d) between 13 March 2008 and 2 April 2008 there were adjustments to the balance of the Directors Loans as at 31 March 2008, with the result that ERB's liability to the Directors had increased significantly and the Director's claims in the liquidation were significantly greater than other creditors.

509. The matters in the last paragraph were admitted by Mr Fiorentino and we consider that it is very significant that he concedes that he knew these matters, particularly the significant upward adjustment in directors' loans in the two versions of the 31 March 2008 accounts.

510. On 3 April 2008, an entity called Ella Rouge Beauty Pty Ltd ACN 130 458 365 ("Ella Rouge Beauty") was incorporated.

511. On 4 April 2008, Mr Fiorentino sent a demand for various books and records to Mr Hammoud, Ms Issa and GPL Solutions.

512. On about 8 April 2008, Mr Fiorentino transferred $50,000 from Hamiltons Trust Account to the ERB ANZ Post- liquidation bank account, the source of those funds originally having been deposited to the Hamiltons Trust Account on 2 April 2008 by a cheque drawn by BWI.

513. On 11 April 2008, and in addition to the records received on 2 April 2008, Mr Fiorentino had in his possession and control 30 boxes of ERB records including:

(a) bank statements for the ERB ANZ Pre-liquidation bank account for the period 28 June 2002 to 2 April 2008; and

(b) Franchise Agreements and Contracts for the Sale of a Business relating to the:

(i) ERB Burwood Franchise;

(ii) ERB MacArthur Franchise;

(iii) ERB Castle Hill Franchise; and

(iv) ERB Miranda Franchise.

514. By email dated15 April 2008, Mr Bastas provided Mr Fiorentino with Ledger Entries Reports which:

(a) contained detailed adjustments Mr Bastas had made to the Directors Loans for the financial years ending: 30 June 2006; 30 June 2007; and 30 June 2008; and

(b) recorded that after 1 July 2007, Directors Loans had been reduced by $3,520,000 in relation to "Franchised Stores".

515. On the facts above, ASIC alleged that it can be inferred that the $3,520,000 reduction in Directors Loans was due to the sale of franchised stores. Mr Fiorentino denies this allegation and says that there was nothing to suggest any relationship with franchise sales.

516. ASIC alleged that by 30 April 2008, Mr Fiorentino had spent two hours" *reviewing the franchising agreements accounts etc*" and knew or ought to have known:

(a) between August 2007 and December 2007, ERB had sold four (4) franchises for a total sale price of $3,190,000 ("Franchise Sale Proceeds"); and

(b) Annual Royalty Payments were payable by the franchisees until 2012.

Mr Fiorentino denies these allegations. We deal with these in our consideration below.

517. ASIC alleged that if Mr Fiorentino had reviewed the following records, all of which were in his possession, namely:

(a) journal entries in the Ledger Entries Reports;

(b) Franchise Agreements;

(c) Contracts for the Sale of a Business; and

(d) ERB ANZ Pre-liquidation bank statements,

Mr Fiorentino would have identified that the Franchise Sale Proceeds were not deposited to the ERB ANZ Pre-liquidation bank account. Mr Fiorentino denies these allegations. We deal with these matters in our consideration below.

518. Further, ASIC alleged that if Mr Fiorentino had conducted the reviews referred to in the preceding paragraph and identified that the Franchise Sale Proceeds were not deposited to the ERB ANZ Pre-liquidation bank account, and had he then:

(a) made proper enquiries of the Directors; and/or

(b) made basic enquiries of various banks,

Mr Fiorentino would have identified that the Franchise Sale Proceeds were deposited to ERB Westpac 1 account and ERB Westpac 2 account.

Mr Fiorentino denies these allegations.

519. In the circumstances, ASIC alleged that had Mr Fiorentino properly investigated the affairs of the company he would have been aware that between 9 August 2007 and 4 March 2008, Mr Hammoud had effected various transactions regarding the ERB Westpac 1 and ERB Westpac 2 accounts which resulted in:

(a) ERB paying the Directors $2,000,000; and

(b) ERB paying BWI $609,831.

Mr Fiorentino denies these allegations.

520. ASIC alleged that Mr Fiorentino failed to identify the payments referred to in the preceding paragraph as either:

(a) possible Voidable Transactions pursuant to ss 588FA, 588FDA and/or 588FE of the Act (if the Directors Loans were valid); or

(b) possible Misappropriated Funds (if the Directors Loans were not valid).

Mr Fiorentino denies these allegations.

521. ASIC alleged that a reasonably competent liquidator would have attended to the matters referred to in [497-8]. Mr Fiorentino denies this allegation.

522. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. Mr Fiorentino denies this allegation.

523. As regards Mr Fiorentino's denials in the preceding paragraphs, we deal with these matters in our consideration below.

Issue for determination – Contention 6.

524. The issue for determination is whether, in the conduct of his liquidation of ERB, Mr Fiorentino failed to properly investigate the affairs of the company including possible voidable transactions and/or possible misappropriation of funds by the Directors of ERB during the period 9 August 2007 to 31 March 2008. ASIC alleged that in failing to do so, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

525. The investigation of the affairs of the company in liquidation is one of the fundamental obligations of a liquidator, whether the liquidation be voluntary or court-ordered.

526. In *Re Fermoyle Pty Ltd (In Vol Liq)* (1982) 6 ACLR 640 at 648, (a case of a voluntary winding up) Crockett J quoted McPherson: *The Law of Company Liquidation* 2nd ed at 225 where it was said:

> "One of the primary functions of the liquidator is to investigate the affairs of the company, including its promotion and formation, and the conduct of its business in the past. This must be done not only for the reason that it is necessary in order to enable him to discharge his duty of locating and collecting the assets of the company, but also because it may lead to a public examination or prosecution of delinquent officers of the company which it is part of the liquidator's duty to set in motion."

527. In *Commonwealth of Australia v O'Reilly* [1984] VR 931 at 943, again a case involving a voluntary winding up, Fullagar J confirmed that the duties of a liquidator included "to investigate the affairs of the company from its foundation onwards" and continued:

> "He should be alert to ascertain any misfeasance by officers or former officers or promoters and, so far as the assets allow, proceed to recover any preferences or any damages for which any such persons may be liable. Where the history of the company shows a likelihood of some misfeasance, he should investigate, so far as the assets allow, to see whether officers or former officers have infringed the requirements of the law, at least where the liquidation will otherwise result in no payment at all to external creditors, and where the

external creditors would have been paid in full if transactions which raise or assist to raise the likelihood had not been entered into."

528. In *Re HIH Insurance Limited* (2001) 39 ACSR 645 at [17], Santow J referred to the duties and functions of liquidators and said:

> "In recent times, the functions and duties of liquidators are seen as more extensive: for example, the duty of a liquidator to deliver a report under s 533, Corporations Act 2001 (Cth). It is recognised in cases such as *Douglas-Brown (official liquidator of Woomera Holdings Pty Ltd) (rec and mgr apptd) v Furzer* (1994) 13 ACSR 184 and *Re New Cap Reinsurance Corp Holdings Ltd* [2001] NSWSC 835; BC200106778 (per Santow J) that there is a public interest in the proper investigation of possible civil or criminal proceedings arising out of the insolvency of corporations as well as the creditors' and the public interest in a beneficial winding up of the corporation."

529. However, the liquidator's obligation to carry out investigations is subject to a number of considerations:

(a) In the first place, no liquidator is obliged to spend his own money to further a winding up if the company has no funds immediately available to him for this purpose. *Re Goonal Pty Limited* (1977) 3 ACLR 408. However, in *Commonwealth of Australia v O'Reilly* at 943, Crocket J said:

> "If the assets available (pending any recovery for misfeasance etc) do not allow of full compliance with the relevant duties, the liquidator should report the circumstances, with his opinion of the likelihood, and the reasons for his opinions, to the interested creditors and to the Corporate Affairs Commissioner."

(b) Secondly, the need for investigation depends upon the circumstances, and may require judgment on the part of the liquidator. In *Re St Gregory's Armenian School (In Liq)* (2012) 92 ACSR 588 at [33], Brereton J said:

> "[33] In evaluating the conduct of a liquidator, it is important to remember that a liquidator is required to make practical commercial judgments. Much of a liquidator's decision-making involves the application of business acumen. That a decision is not fully reasoned or supported by the fullest investigation does not mean that it should be second-guessed by the court.
>
> [34] Moreover, in an environment in which there are usually insufficient funds fully to pay claims, it is desirable that liquidators be frugal in incurring expenditure. It is usually preferable that scarce resources be preserved for the benefit of creditors and contributories, rather than expended in chasing all hares down every burrow. It is not unusual for liquidators to be criticised for incurring excessive expenditure or remuneration; *SingTel* is an obvious illustration. It is undesirable that the court adopt a policy that is calculated to encourage further expenditure by liquidators on investigations out of more abundant

caution, rather than a practical commercial judgment that further exploration is 'not worth the candle'."

530. The gravamen of Contention 6 is that:

(a) Mr Fiorentino was on notice of a number of matters which either alerted him, or should have alerted him, to the fact (or at least, the possibility) that the directors had recently received substantial payments from ERB;

(b) he should have investigated those matters further;

(c) had he done so, he could either have pursued the directors or, at least, have given a full and meaningful report to creditors and invited them to fund examinations or other action against the directors.

531. We should say, at the outset, that we accept that Mr Fiorentino had limited funds, but we do not consider that this factor has much significance in relation to Contention 6. The steps required to identify the relevant issues were limited and it is clear that, in other respects, Mr Fiorentino spent significant time and undertook significant work on the ERB liquidation. The WIP Summary for the first five months of the liquidation shows that a total of $215,109.99 was charged to the matter, including $141,047.93 for Mr Fiorentino alone.

532. In his general response to Contention 6, Mr Fiorentino asserted that

(a) the simple fact was that he was not provided with any Westpac bank account records and had no knowledge of those accounts until the s 19 examinations;

(b) the financial accounts and ledgers did not take into account these Westpac bank accounts or movements therein;

(c) although aware that there were franchise stores, he did not review the franchise agreements in detail and did not have any reason to suspect misappropriation of sale proceeds.

533. We accept that the financial records which Mr Fiorentino received from the directors and the accountants were incomplete and misleading. We accept Mr Fiorentino was not notified of the existence of the Westpac ERB 1 and Westpac ERB 2 accounts and it is apparent that Mr Hammoud and/or the accountants had set out to hide these accounts from Mr Fiorentino.

534. However, incomplete or misleading accounts and hidden transactions are routine in company liquidations, particularly those involving proprietary companies. Liquidators are required to be alive to this possibility and to carry out appropriate investigations to attempt to ascertain the correct position.

535. Here, the circumstances known to Mr Fiorentino from the outset suggested that ERB's position needed to be investigated carefully:

(a) In the first place, the proposal initially raised with Mr Fiorentino in his meetings with Messrs Hammoud and Moini and Messrs Hammoud and Bastas appeared to propose a "phoenix" transaction. It is difficult to identify any other

purpose for Mr Hammoud's desire to transfer the business and liquidate ERB. Mr Hammoud asserted that ERB could not afford to pay the OSR. There was no reason to think that the transfer of the business to BWI and liquidation of ERB would improve this position, unless the plan was to leave the OSR debt with ERB. Thus, either there was no point to the transaction, or it was intended to operate as a "phoenix" transaction;

(b) Secondly, Mr Fiorentino was aware of Mr Svehla's advice that it was impermissible to transfer the business leaving the OSR debt with ERB. Mr Svehla went on to advise "Otherwise must ensure that the sale of assets is for proper commercial value". On its face, the Business Sale Agreement did not provide for this. It provided for the sale of assets worth more than $4m without any payment of cash in return. Whilst the Business Sale Agreement purported to "transfer" to BWI about $4m of ERB liabilities, this was legally ineffectual, so that, in fact, ERB received a questionable contractual promise in return for the transfer of $4m worth of assets. This was not a sale of the assets at a proper commercial value;

(c) Thirdly, a sale of all of the assets of the business and an assumption of some but not all liabilities was not, in any event, what Mr Svehla had advised and was not legitimate. Mr Svehla's advice contemplated a proper sale at a commercial value (say $4m cash). Had ERB received $4m cash, it could then have discharged its various liabilities. If the sum was insufficient to discharge all liabilities, ERB would have been liquidated and the $4m would be utilised to provide unsecured creditors a *pro rata* share of the assets. If certain creditors had been paid prior to liquidation, those payments could be clawed back as preferences to enable a *pro rata* distribution. The Business Sale Agreement, on its face, sought to avoid this by BWI taking over some but not all of the liabilities;

(d) Fourthly, and in any event, it is plain that the Business Sale Agreement was not an arms' length transaction and the sale of assets and liabilities at equivalent value, for no cash consideration, looked contrived.

536. We are satisfied that Mr Fiorentino failed to properly investigate the affairs of the company including possible voidable transactions and/or possible misappropriation of funds by the Directors of ERB during the period 9 August 2007 to 31 March 2008 and in doing so, he failed to act diligently as required by section 130.1b) of the Compiled APES 110 and failed to exercise his powers and discharge his duties with the degree of care and diligence required by s 180 of the Act.

537. We rely particularly on the following matters.

(a) The 13 March 2008 accounts

538. The email from Mr Bastas to Mr Fiorentino dated 13 March referred to a prior telephone conversation between them and attached ERB's accounts for the period 1 July 2007 to 29 February 2008 and for the period 1 July 2007 to 31 March 2008. Mr Bastas said:

"As I mentioned I have taken their accounts prepared by the internal accountant and *I have adjusted them for the franchising and the transfer of assets to the family trust*.

I have not undertaken any audit.

We are currently in the process of finalising the contract for the transfer of assets.

Please let me know your thoughts.

Obviously our discussions are extremely confidential."

539. We leave to one side any suggestion that Mr Fiorentino was "somehow in cahoots" with the directors[24] by reason of the terms of this email, but simply note that Mr Fiorentino was told that the accounts had been adjusted for, amongst other things "the franchising". Mr Fiorentino was asked for his thoughts. We do not consider that this email was an unsolicited email about which Mr Fiorentino had no prior knowledge and which he ignored. We believe that the email shows that Mr Fiorentino was involved in consideration of the accounts prior to his appointment as liquidator and one of the issues which he had discussed with Mr Bastas, and which he thereafter considered was the fact that ERB had entered into agreements relating to franchising and that the accounts needed to be prepared in a way which took these transactions into account.

540. Whilst the accounts say nothing expressly about franchising, they record a reduction in the value of "Property, plant and equipment" and "Intangible assets" of about $3.3m in the period up to 29 February 2008. There is no equivalent increase in cash. However there is a very significant reduction in liabilities, specifically liabilities to "other persons" (which is clearly a reference to directors) and the accounts can only be read as suggesting that the franchising transactions resulted in the sale of assets worth about $3.3m and the reduction in borrowings from directors of at least an equivalent amount.

541. We find that Mr Fiorentino reviewed these accounts and would have understood that ERB, through its accountant, was asserting that directors had been repaid a significant sum from ERB's asset sale proceeds within the previous 8 months.

542. We also note that a comparison between the 29 February 2008 accounts and the First Version of the 31 March 2008 accounts) suggests that between 29 February and 31 March 2008, ERB's total assets had been reduced by about $7.6m and total liabilities had been reduced by about $4.3m. The net assets as at 29 February 2008 are stated to be $2,224,988, whereas the net assets as at 31 March 2008 were stated to be negative $1,079, 457. It is apparent that, to the extent that the accounts were intended to reflect the Business Sale Agreement, the aim of that agreement was not to "transfer" *all* of the assets and liabilities, but to transfer all of the assets other than $51,028 (coincidentally, the approximate amount of the flat fee of $50,000 which Mr Fiorentino had quoted to undertake the liquidation) but leave ERB with the OSR debt ($464,246), a tax liability ($31,380) plus borrowings from the directors ($635,526). On this basis, the OSR debt and tax debt would be left in the insolvent company, yet the directors would be the creditors with the majority in value of ERB's debts.

[24] Response page 5.

543. The implication of the the First Version of the 31 March 2008 accounts is clearly that a phoenix transaction was intended. Assuming that Mr Fiorentino had no involvement in the genesis of the accounts and Business Sale Agreement, the accounts should have alerted him to the fact that a phoenix transaction was proposed, and one where the directors would control the voting in the liquidation.

(b) 15 April 2008 Ledger entries reports

544. Mr Fiorentino received an email from Mr Bastas on 15 April 2008, with Ledger Entries Reports which showed:

(a) that "Plant and equipment" ($9,923,902) had been reduced on 9 August 2007 by $3,263,902 in respect of "franchised stores" and

(b) that loans from "other persons" had been reduced on the same day by $3,520,000 in respect of "franchised stores".

545. Mr Fiorentino's report of 23 September 2008 reproduces the ledger entry reports under the heading "Investigation of payments made to Directors and Loan account Transactions with directors/shareholders". Notwithstanding the fact that the reproduced entries show the reduction of directors' loans by $3,520,000 on 9 August 2008 in respect of "Franchised stores" there is no further discussion about this, and no reference is made to any potential claim against the directors in the following sections of the report.

(c) Mr Fiorentino's review of the Franchising agreements

546. By 30 April 2008, Mr Fiorentino had spent two hours" *reviewing the franchising agreements accounts etc*". Whilst it cannot be said with certainty what Mr Fiorentino learned from reviewing the agreements, we infer that he understood, at the very least, the basic effect of the agreements which was that between August 2007 and December 2007, ERB had sold four franchises for a total sale price of $3,190,000.

(d) Mr Fiorentino's failure to contact banks

547. In our view, it is standard practice for liquidators to write to each of the major banks upon appointment in order to ascertain whether the company in liquidation holds or had previously held any accounts with that bank.

548. Had Mr Fiorentino done this, he would have identified that the Franchise Sale Proceeds were deposited to ERB Westpac 1 account and ERB Westpac 2 account.

(e) Conclusion

549. Notwithstanding the information reviewed by Mr Fiorentino referred to above, (and/or by reason of his failure to circulate the major banks) Mr Fiorentino failed to ascertain:

(a) the existence of the ERB Westpac 1 account and ERB Westpac 2 account;

(b) that Directors loans had or may have been repaid from the proceeds of the sale of ERB's franchises;

(c) the Franchise Sale Proceeds were not deposited to the ERB ANZ Pre-liquidation bank account;

(d) that the Franchise Sale Proceeds were deposited to ERB Westpac 1 account and ERB Westpac 2 account;

(e) that between 9 August 2007 and 4 March 2008, Mr Hammoud had effected various transactions regarding the ERB Westpac 1 and ERB Westpac 2 accounts which resulted in ERB paying the Directors $2,000,000 and ERB paying BWI $609,831.

550. Having regard to the matters known to Mr Fiorentino, we consider that Mr Fiorentino failed to ascertain the matters referred to above, which he ought to have ascertained and failed to undertake any adequate investigation possible voidable transactions and/or possible misappropriation of funds by the Directors of ERB during the period 9 August 2007 to 31 March 2008. We do not consider that the steps required to ascertain the position were onerous or complex.

551. We do not need to consider whether the investigation of these matters would have resulted in a successful recovery of funds by ERB.

552. We note, however, that Mr Hammoud's view, as at the time he consulted Mr Fiorentino in about February 2008, that ERB was unable to pay the OSR debt. This debt had been substantially outstanding since 31 January 2007. In those circumstances, there was certainly a basis for thinking that the repayment of the directors' loans were voidable transactions.

553. We note that Mr Fiorentino considered that he had a *prima facie* claim against the OSR for a preference in respect of the part payment of $200,000 which Mr Hammoud had made on 11 December 2007 and subsequent monthly payments of $20,000 per month from January 2008, see the 23 September 2008 Report. In contrast, the last repayment of $1,000,000 of directors' loans was actually only made by Mr Hammoud on 25 February 2008.

554. Further, we find it hard to accept that the sale of substantial assets and the use of those proceeds by the directors solely for repayment of loans to themselves, at a time when the company had a long outstanding and substantial obligation to the OSR, could have been made *bona fide* by the directors in the best interests of ERB. Alternatively, that use of ERB funds was arguably a breach of the directors' fiduciary duty not to make a profit at the expense of ERB. On this basis, the repayments would have been voidable by ERB and/or the directors would have been liable to repay the amounts as constructive trustees.

555. Further, it was extremely dubious that there were actually any "directors' loans" to be repaid in the first place. We note, as already discussed above, that Mr Hammoud, in his s 19 examination, appeared unable to substantiate the Directors' loans, beyond asserting that they were justified in view of the extent to which he and his wife had worked for ERB without pay. Mr Fiorentino came to the conclusion by 23 September 2008 that the directors were not creditors of ERB at all.

Finding on Contention 6

556. For these reasons, we consider that Contention 6 is established. We consider that Mr Fiorentino's actions lacked the diligence required by section 130.1b) of the Compiled APES 110 and/or the degree of care and diligence required by s 180 of the Act.

Does Contention 6 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

557. The necessity for Mr Fiorentino to undertake a proper investigation was fundamental to this liquidation and was an obvious matter having regard to the way in which Mr Fiorentino had been introduced to the matter. We refer to our observations at paragraphs 13 to 20, 115 to 136 above. We are satisfied that by reason of the matters in Contention 6 itself, Mr Fiorentino failed to carry out or perform adequately and properly his duties as a liquidator.

(ii) Contention 7

558. Contention 7 involves an allegation that Mr Fiorentino failed to investigate the Royalty Payments under the Franchise Agreements and the fact that these were assets which were not reflected in the Business Sale Agreement, so that the consideration paid by BWI was understated to that extent.

Matters upon which ASIC specifically relies in support of Contention 7

559. In addition to the matters referred to in paragraphs 453 to 522 above, ASIC relies upon the following matters in support of Contention 7.

560. As stated previously in relation to other Contentions, most of the matters relied upon by ASIC are supported by documentary evidence and unless we specifically say otherwise, we accept the factual allegations set out in this section.

561. ASIC alleged that by 30 April 2008, Mr Fiorentino had reviewed the Franchise Agreements and knew, or ought to have known that Royalty Payments were payable annually for each of the franchises up to the following dates:

(a) Ambarvale 2 August 2012

(b) Burwood 2 August 2012

(c) Castle Hill 6 December 2012

(d) Miranda 6 December 2012.

562. Mr Fiorentino denies this allegation, but on 29 and 30 April, he spent 6 hours (and charged $2700.00) reviewing the 2007 accounts, the February 2008 accounts, the March 2008 accounts and the franchising agreements. We infer that he became aware of the significance of the franchising agreements.

563. ASIC alleges that in the circumstances, Mr Fiorentino knew, or ought to have known that:

(a) the Royalty Payments were an asset of the business all of which were purportedly transferred to BWI pursuant to the Business Sale Agreement;

(b) the Business Sale Agreement did not list the Royalty Payments as a component part of the business for the purpose of calculating the consideration payable for the business (Schedule 8); and

(c) the consideration paid under the Business Sale Agreement was understated to the extent of the value of the Royalty Payments.

Issue for determination – Contention 7.

564. The issue for determination is whether, in the conduct of his liquidation of ERB, Mr Fiorentino failed to properly investigate the affairs of the company, in particular the Royalty Payments payable under the Franchise Agreements. ASIC alleges that in failing to do so, Mr Fiorentino

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

565. We consider this contention is made out.

566. The validity of the Business Sale Agreement and the genuineness of the purchase price was probably the most obvious and significant issue facing Mr Fiorentino when he was appointed liquidator. He knew that a few weeks earlier, Mr Hammoud had consulted him in relation to whether it was possible to transfer the business to a related third party, leaving the OSR debt with ERB and then proceed to liquidate ERB. He had been party to the conversation with Mr Svehla who had advised that this was not possible unless a proper commercial value was paid for the business. When he became aware of the terms of the Business Sale Agreement, alarms bells should have been ringing. The transaction had all the appearance of an attempted phoenix transaction. The asserted purchase price of "zero" was, at the very least, suspicious.

567. One of the first and most obvious matters Mr Fiorentino ought to have investigated, particularly having regard to his personal knowledge of the inception of the transaction, was the make-up of the purchase price and the apparently convenient purchase price of "zero", which precisely matched the value of assets and liabilities (except for the OSR debt).

568. Having examined the Franchise agreements and the Business Sale Agreement, he must have known that there was an asset which was not expressly referred to in the latter agreement. He ought to have investigated this matter and, in failing to do so, he failed to act diligently as required by section 130.1b) of the Compiled APES 110 or with the care and diligence required by s 180 of the Act.

Finding on Contention 7

569. We consider that Contention 7 is established.

(iii) Contentions 8 to 14.

Matters upon which ASIC specifically relies in support of Contention 8 to 14

570. It is convenient to consider Contentions 8 to 14 together. We will first set out the matters upon which ASIC specifically relies in relation to each of those Contentions.

571. As stated previously in relation to other Contentions, most of the matters relied upon by ASIC are supported by documentary evidence and unless we specifically note otherwise, we accept the factual allegations set out in this section.

Matters upon which ASIC specifically relies in support of Contention 8

572. Contention 8 asserts, in substance, that Mr Fiorentino failed properly to investigate the affairs of ERB including the Sale Agreement as an Uncommercial Transaction and/or a related party transaction.

573. In addition to the matters referred to in paragraphs 436 to 522 and 561 to 563 above, ASIC relies upon the following additional matters in support of Contention 8.

574. By email dated 24 April 2008, Mr Fiorentino received draft legal advice on the Business Sale Agreement from Mr J Hamilton ("24 April 2008 Legal Advice") by which he was advised and was aware, *inter alia*, that:

(a) the Business Sale Agreement purportedly caused BWI, a related party, to take over the obligations to meet all creditors of ERB with the value of the assets matching the value of the creditor obligations meaning no cash price was paid;

(b) the Business Sale Agreement was scant in details;

(c) the Business Sale Agreement was not stamped with duty;

(d) the Business Sale Agreement was most likely an uncommercial transaction as defined by s 588FB of the Act ("Uncommercial Transaction"); (This is denied by Mr Fiorentino and we agree that this was not precisely what the legal advice said. The Legal Advice indicated that the Business Sale Agreement may be an uncommercial transaction, but it would need to be shown that the agreement left ERB insolvent due to the failure of BWI to pay out all ERB's creditors and also that it was a transaction that ought not to have been entered into given its overall effect. The advice indicated that certain inquiries would have to be made in relation to these matters).

(e) in the event of an Uncommercial Transaction, the remedies available to him included:

(i) enforcing the agreement and claiming a right of indemnity;

(ii) setting aside the Business Sale Agreement and claiming:

1. the payment of money; or

2. avoiding the Business Sale Agreement; or

3. varying the Business Sale Agreement terms;

(f) all the old pre-sale creditors of ERB would be entitled to prove in the liquidation; and

(g) there was a possible claim for an indemnity under the Business Sale Agreement.

575. Further, by the 24 April 2008 Legal Advice, Mr Fiorentino had been advised and was aware that to properly investigate the Business Sale Agreement, he needed to:

(a) obtain a list of assets sold;

(b) obtain a market valuation at the time of the sale to assess the fairness of the purchase price;

(c) ascertain ERB's creditors at the sale date;

(d) obtain and review the creditors ledger;

(e) seek from BWI a list of all ERB creditors paid pre and post liquidation;

(f) send a notice to the directors under s 475(2) and (3) of the Act as applied by s 506 of the Act seeking details about the sale; and

(g) obtain the files of any third party financial, accounting or legal advisors involved in advising ERB about the sale.

576. On about 16 May 2008 and by a Notice of Demand of that date, the OSR demanded from BWI the sum of $205,133.99, being outstanding payroll tax (including penalties and interest) owed by ERB for the period 1 July 2005 to 30 June 2006, by reason that:

(a) ERB and BWI constituted a group for the purposes of sections 106I(2)(c)(i) and 106I(d) of the *Taxation Administration Act 1996*; and

(b) ERB was jointly and severally liable with BWI for the payment of that amount pursuant to section 16LA of the *Payroll Tax Act 1971* and section 45 of the *Taxation Administration Act 1996*.

577. On 21 May 2008, and by an email of that date between Mr Fiorentino and Mr J Hamilton *inter alia*:

(a) Mr Fiorentino stated that he had been informed by Mr Hammoud *inter alia* that:

(i) the OSR had issued a Notice of Demand to BWI dated 16 May 2008;

(ii) the OSR had given BWI two (2) weeks to accept an offer of $200,000 to settle the matter; and

(iii) Mr Hammoud wanted to set the amount of the demand off against the purchase price of the business;

(b) Mr Fiorentino stated that he did not think Mr Hammoud could set the amount of the demand off against the purchase price; and

(c) Mr Fiorentino sought Mr J Hamilton's advice on the interpretation of the powers of the *Payroll Tax Act* on a transmission of business.

578. On 21 May 2008, Mr Fiorentino had a telephone conversation with Mark Dinaro ("Mr Dinaro") of the OSR, in and during which *inter alia*:

(a) Mr Fiorentino objected to the grouping notice the OSR had issued to BWI;

(b) Mr Fiorentino advised the OSR it could not go after a grouped company after a company was liquidated/sold and that BWI was a shelf company at the time of the grouping; and

(c) Mr Dinaro suggested, and Mr Fiorentino said he would fax same, that Mr Fiorentino put a submission in for the OSR's perusal.

579. On 22 May 2008, Mr Fiorentino advised Mr Hammoud (and Mr Bastas) that they could bring it to the OSR's attention that:

(a) BWI was only a Trustee and could be changed at any time and wound up if necessary;

(b) BWI was only a shelf company during the 2005-2006 year and therefore the grouping was nonsense;

(c) ERB was in liquidation because it was insolvent and not because it had been trying to avoid paying payroll tax; and

(d) the OSR was not the only creditor or major creditor in the liquidation.

580. On 29 May 2008 and by an email of that date to Mr Hammoud and copied to Mr Fiorentino, Mr Bastas sought approval to send an attached letter to the OSR.

581. On 31 May 2008 and by emails of that date, Mr Fiorentino advised Mr Bastas and Mr Hammoud *inter* alia that:

(a) the letter to the OSR was okay;

(b) as the Notice of Demand was against BWI not expressly as Trustee, they may be better off changing the Trustee by resolution before a new demand was issued against BWI in its capacity as Trustee of the trading trust; and

(c) BWI could change and sell its name for $1 to a new entity.

582. Around that time, Mr Bastas sent the letter to the OSR dated 29 May 2008.

583. ASIC alleged that by Mr Fiorentino's conduct referred to in paragraphs 577 to 581 above, Mr Fiorentino was not acting in good faith or in the bests interests of all creditors in that he:

(a) facilitated or encouraged BWI to breach its obligations to ERB under the Business Sale Agreement to pay all liabilities (Clauses 1 (Definition of "*Business*"), 2, 11 and 13);

(b) represented the interests BWI against the interests of a creditor of ERB (OSR);

(c) advised or encouraged BWI not to pay the OSR, when the payment by BWI to the OSR would have reduced the amount claimed by unsecured creditors proving in the liquidation and increased the potential dividend to creditors; and

(d) facilitated or encouraged the removal of BWI as trustee of the Shanel Family Trust and thus distancing the trust assets from any claim that may be brought by the OSR or any other potential claimant, including ERB or its liquidators, against BWI.

Mr Fiorentino denies the allegations contained in this paragraph. We deal with this in our consideration below.

584. By 2 September 2008, Mr Fiorentino had formed the view that ERB's liability to the Directors as claimed by them in the RATA could not be substantiated and that the Directors were in fact debtors of ERB.

585. ASIC alleged that in such circumstances, Mr Fiorentino knew, or ought to have known in relation to the Business Sale Agreement that:

(a) the Loans (a liability) in Schedule 8 may have been overstated. (Mr Fiorentino admits this fact);

(b) net assets were understated. (Mr Fiorentino denies this allegation); and

(c) BWI may not have paid a fair price for the assets of the Business sold to BWI (Mr Fiorentino denies this allegation. However, we reject this. On the evidence, Mr Fiorentino never investigated the issue in any real depth but, as he has admitted, he was on notice that the Loans may have been overstated. In our view, he must have known that BWI may not have paid a fair price).

586. By email dated 10 September 2008, Mr J Hamilton provided Mr Fiorentino with his comments on a draft report to creditors which included *inter alia*:

(a) he thought a cost benefit analysis of the funding costs and potential returns in respect of the claims would be useful;

(b) considering the work that had been done he found it quite surprising that the value of the business had not been ascertained by now; and

(c) the business sale investigations appeared a little scant given the time which had elapsed and the remuneration incurred.

587. In the attached draft creditors report, the liquidators had concluded in their opinion "that as a result of the sale of business, the non-payment of all the Company's creditors at the sale completion and the losses incurred in the 2008 financial year, the Company became insolvent".

588. Further, in the same report, the liquidators had identified, *inter alia*:

(a) the Directors were debtors of ERB in the amount of $71,010 (page 10);

(b) BWI was a debtor of ERB in the amount of $146,693.14 (page 8);

(c) they had realised $50,000 from BWI as indemnity payments under the Business Sale Agreement (page 9); and

(d) Mr Hammoud had deposited the sum of $300,000 into ERB's ANZ Pre-liquidation bank account on 25 February 2008 as a director's loan (page 23).

589. Between 2 April 2008 and 21 September 2008, Mr Fiorentino had personally billed 310.3 hours and $141,047.93 to the liquidation, but had failed to act on the 24 April 2008 Legal Advice, in that he failed to, *inter alia:*

(a) obtain a list of the actual assets sold. Mr Fiorentino denies this allegation;

(b) obtain a market valuation at the time of the sale to assess the fairness of the purchase price despite having received $95,517.86 from debtor realisations and refunds. Mr Fiorentino admits this fact; and

(c) send a notice to the directors under ss 475(2) and (3) of the Act as applied by s 506 of the Act seeking details about the sale. Mr Fiorentino denies this allegation.

590. ASIC alleged that a reasonably competent liquidator would have considered that the Business Sale Agreement was possibly an Uncommercial Transaction and would have attended to the matters referred to in paragraph 589. Mr Fiorentino denies this allegation.

591. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. Mr Fiorentino denies this allegation.

592. ASIC alleged that Mr Fiorentino failed to properly investigate the affairs of the company and, in particular, the Business Sale Agreement (Mr Fiorentino denies this allegation) in circumstances where:

(a) prior to the transfer of the assets, and his appointment as liquidator, he had given advice to Mr Hammoud (Mr Fiorentino denies this allegation):

(i) to liquidate the company (Mr Fiorentino denies this allegation but we find this allegation is made out);

(ii) that the OSR liability would be left behind and the other debts dissipated in the liquidation (Mr Fiorentino denies this allegation and we do not find this allegation made out); and

(iii) he would retain his business post liquidation (Mr Fiorentino denies this allegation, but we find this allegation is made out);

(b) he knew that the sale involved the transfer of all of the assets of the company and that the payroll tax liability had not been paid by ERB or BWI and that the OSR was an unsecured creditor in the liquidation. (Mr Fiorentino admits this fact);

(c) he knew, or ought to have known, that in the six months leading up to the liquidation four franchises were sold for a total sale price of $3,190,000, which, in the absence of a market valuation, could have been used as a guide to value the business comprising eight remaining salons (Mr Fiorentino denies this allegation but, for reasons already given, we find this allegation made out);

(d) he knew, or ought to have known, that Loans in Schedule 8 were overstated in the calculation of the purchase price (Mr Fiorentino denies this allegation but we find that he ought to have known this);

(e) he had given advice to the Directors that BWI was only a Trustee and could be wound up at any time (Mr Fiorentino denies this allegation but we find this allegation made out);

(f) he knew that the Business Sale Agreement was most likely an Uncommercial Transaction (Mr Fiorentino denies this allegation. We find that he knew that the Business Sale Agreement might have been such a transaction);

(g) he knew that the Business Sale Agreement was a transaction between related parties. (Mr Fiorentino admits this fact); and

(h) he had reached the conclusion that the company became insolvent because of matters which included entering into the Business Sale Agreement (Mr Fiorentino denies this allegation).

593. ASIC alleged that a reasonably competent liquidator would have considered that the Business Sale Agreement was an insolvent transaction between related parties and possibly voidable under s 588FE(4) of the Act ("Related party transaction") and would have investigated the remedies available. Mr Fiorentino denies this allegation.

594. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. Mr Fiorentino denies this allegation.

Matters upon which ASIC specifically relies in support of Contention 9

595. Contention 9 alleges, in substance, that Mr Fiorentino failed properly to inform creditors of all relevant matters in connection with the suspected Uncommercial Transaction and the available remedies in circumstances where he was seeking funding from creditors to investigate the Business Sale Agreement.

596. ASIC relies upon the following particular matters in support of Contention 9.

597. By email dated 11 September 2008, Mr J Hamilton advised Mr Fiorentino that in relation to the Business Sale Agreement discussions he was holding that morning with BWI, any deal reached with BWI to settle the indemnity claim would require:

(a) creditor or court approval; and

(b) had to be documented in a Deed ("11 September 2008 Legal Advice").

Mr Fiorentino denies this allegation and we accept that the advice was simply to the effect that Mr Fiorentino should tell BWI that these would be requirements. Nevertheless, Mr Fiorentino must have known of the requirements of s 477 of the Act, if applicable.

598. On 16 September 2008, Messrs Fiorentino, Hammoud and Moini met to discuss the indemnity proceeds recoverable by ERB from BWI at which time Mr Fiorentino:

(a) advised Mr Hammoud he needed a lawyer; and

(b) recommended Mr Pateman, whom Mr Hammoud then retained.

599. As a result of the meeting referred to in the preceding paragraph, Mr Fiorentino agreed that:

(a) in return for payment by BWI of $80,351.89 to the liquidators, BWI be given a period of 3 months to develop a proposal, namely a Deed of Company Arrangement ("DOCA") which would result in a more favourable outcome to creditors in the liquidators' opinion than in the winding up of the company; and

(b) for the duration of the 3 month period, the liquidators would not take any action against BWI or Hammoud.

600. On 18 September 2008, Ms Ioakimaros advised Mr J Hamilton that Mr Fiorentino recommended he speak to Mr Pateman as Mr Pateman's clients were no longer going to make the payment referred to in the preceding paragraph, nor propose a DOCA.

601. By email dated 18 September 2008, Mr J Hamilton advised Mr Fiorentino:

(a) that ERB was legally obliged to assign the leases under the sale contract which should have occurred at completion of the Business Sale Agreement;

(b) to advise Clayton Utz that "*ERB sold all its assets to BWI, apparently under a written agreement dated 28 February 2008*"; and

(c) that a disclaimer of the leases would put ERB in breach of the Business Sale Agreement and might create a set off to ERB's claim for indemnity from BWI given the obligation to assign was pre-liquidation.

602. By email dated 23 September 2008, Mr J Hamilton provided Mr Fiorentino with further comments on a draft report to creditors which included, *inter alia*, that Mr Fiorentino needed to make it clear to creditors that the $146,693.14 was not a claim under the indemnity in the Business Sale Agreement.

603. Sometime between 2 September 2008 and 23 September 2008, Mr Fiorentino formed the view that in addition to the $71,010 the Directors owed ERB (see paragraph 588 above) the Directors owed ERB a further $26,296.53, being private expenses of the Directors paid by ERB bringing the total amount owed by the Directors to ERB to $97,306.53.

604. On 23 September 2008, Mr Fiorentino sent the 23 September 2008 Notice to creditors advising of a meeting of creditors to be held on 8 October 2008 for the purpose of considering the attached Report of the Liquidators and, *inter alia*, to consider whether creditors wished to indemnify the liquidators and/or provide a fund to enable the liquidators to carry out public examinations under sections 596A and 596B of the Act and, if necessary (depending on the outcome), to take legal action:

(a) concerning monies owed to ERB by BWI under the Business Sale Agreement;

(b) to recover the amount paid to GuildSuper of $125,000 and interest or earnings thereon since the payment of that money by ERB in October 2003 ("the First Resolution").

605. The 23 September 2008 Report accompanied the 23 September Notice 2008.

606. Mr Fiorentino sent a copy of the 23 September 2008 Notice and Report to the following creditors of ERB, namely: the OSR, Mr Hammoud, Ms Issa, GIO, Gallagher Basset, the Beauty Warehouse Pty Ltd and an entity by the name of Anything Wet.

607. In the 23 September 2008 Report, Mr Fiorentino advised creditors, *inter alia*, that:

(a) the Directors were debtors of ERB in the amount of $97,306.53;

(b) BWI was a debtor of ERB in the amount of $146,693.14;

(c) pursuant to the Business Sale Agreement, ERB had a right of indemnity against BWI for $964,246.45 ("Right of Indemnity");

(d) he had realised $50,000 from BWI as indemnity payments under the Business Sale Agreement;

(e) Mr Hammoud had deposited the sum of $300,000 into ERB's ANZ Pre-liquidation bank account on 25 February 2008 as a director's loan;

(f) the Business Sale Agreement may be set aside if it was uncommercial which would depend, in part, on whether a fair value had been paid for the assets;

(g) he did not have sufficient funds to undertake a business valuation;

(h) he had allowed $5,000 for a valuation to be obtained (Mr Fiorentino admits this but says it was a typographical error for $50,000);

(i) even if the Business Sale Agreement could be set aside, it remained an issue, as to whether commercially, the liquidators might better serve creditors by seeking to enforce the indemnity by leaving the agreement on foot;

(j) he had been in discussions with the purchaser about what it intended to do to meet its obligations to indemnify ERB under the Business Sale Agreement; and

(k) provided the Business Sale Agreement remained on foot, he estimated a return to creditors of 75 cents in the dollar.

608. ASIC alleged that in circumstances where Mr Fiorentino was seeking funding to publically examine the officers and advisors of BWI and possibly take legal action against BWI, Mr Fiorentino failed to:

(a) inform creditors he had already received legal advice that the Business Sale Agreement was most likely an Uncommercial Transaction. (Mr Fiorentino denies this allegation);

(b) provide creditors with a cost benefit analysis of the available remedies in regard to the Uncommercial Transaction. (Mr Fiorentino denies this allegation);

(c) inform creditors as to the circumstances in which it might be commercially beneficial to pursue the Right of Indemnity, as opposed to pursuing other remedies such as setting the Business Sale Agreement aside. (Mr Fiorentino denies this allegation and refers to page 9 of the Report);

(d) inform creditors he had engaged in settlement discussions regarding the Right of Indemnity where the purchaser had made an offer and withdrawn it within a day. (Mr Fiorentino denies this allegation);

(e) to assess BWI's ability to meet any claim under the Right of Indemnity. (Mr Fiorentino denies this allegation); and

(f) provide creditors with:

(i) an estimate of the funding required to undertake public examinations. (Mr Fiorentino admits this fact); and

(ii) the benefits of conducting public examinations. (Mr Fiorentino denies this allegation).

(g) ASIC alleged that as a result of Mr Fiorentino failing in the 23 September 2008 Report to provide the information referred to above, creditors were not given sufficient, relevant and material information to enable them to make an informed decision on whether to provide funding as proposed by the First Resolution. (Mr Fiorentino denies this allegation).

Matters upon which ASIC specifically relies in support of Contention 10

609. Contention 10 alleges, in substance, that Mr Fiorentino failed properly to investigate the source of the deposit of $300,000 to the ERB ANZ Pre-liquidation bank account.

610. ASIC relies upon the following additional matters in support of Contention 10.

611. Mr Fiorentino did not verify the source of the $300,000 deposit to ERB's ANZ Pre-Liquidation account on 25 February 2008, despite the sum being a large amount and despite the deposit occurring just prior to ERB transferring its business to BWI and going into liquidation.

612. ASIC alleged that had Mr Fiorentino made basic enquires of the bank and/or the Directors he would have become aware that:

(a) Mr Hammoud had not deposited the $300,000 of his own monies to ERB's ANZ Pre-liquidation account on 25 February 2008 (and therefore those monies were not a Directors' loan); but

(b) Mr Hammoud had merely transferred $300,000 of ERB's monies from ERB Westpac 1 account to the ERB ANZ Pre-liquidation account.

This allegation is denied by Mr Fiorentino.

613. ASIC alleged that a reasonably competent liquidator would have attended to the matters in the last two paragraphs and, had he done so, he would have concluded that the Directors owed the company $397,206.53 and not $97,206.53. This allegation is denied by Mr Fiorentino.

614. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. This allegation is denied by Mr Fiorentino.

Matters upon which ASIC specifically relies in support of Contentions 11 to 13

615. Contention 11 alleges, in substance, that Mr Fiorentino failed to act with diligence and reasonable care and failed to act in good faith by entering into the Deed of Settlement and Release on 14 January 2009 without properly assessing which remedies were in the best interest of the creditors and/or ascertaining the true indebtedness of BWI and/or the Directors to ERB and/or investigating and assessing the financial capacity of BWI or the Directors.

616. Contention 12 alleges, in substance that Mr Fiorentino acted in breach of s 477(2A) of the Act and failed to act with diligence and reasonable care and failed to act in good faith act in failing to seek the approval of the Court or of a resolution of creditors before entering into the Deed of Settlement.

617. Contention 13 alleges, in substance, that Mr Fiorentino acted in breach of s 477(2B) of the Act and failed to act with diligence and reasonable care and failed to act in good faith act in failing to seek the approval of the Court or of a resolution of creditors before entering into the Deed of Settlement.

618. ASIC relies upon the following additional matters in support of Contentions 11 to 13. We note that unless we specifically say otherwise, Mr Fiorentino admitted the allegations set out below.

619. By facsimile date 26 September 2008, Mr J Hamilton on Mr Fiorentino's instructions sent a Notice of Demand to Mr Pateman, as solicitor for Mr Hammoud and Ms Issa, demanding payment of $97,206.53.

620. On 1 October 2008, ERB received the following funds:

(a) $53,902.54 from BWI pursuant to a Deed of Assignment of Debts; and

(b) $26,666 being a refund of income tax from the ATO.

621. By email dated 4 October 2008, Mr Bastas advised Mr Fiorentino, *inter alia*, that:

(a) they did not agree with Mr Fiorentino's assessment of money owed by BWI; and

(b) the business was under revenue pressure and there were no funds to pay unexpected costs.

622. On or before 8 October 2008, Mr Hammoud and Ms Issa submitted proofs of debt dated 7 October 2008 to the liquidators of ERB claiming amounts of $1,443,151.32 and $1,431,612.85 respectively comprising employee entitlements and loans.

623. On 8 October 2008, a meeting of creditors of ERB was held at which

(a) Mr Hammoud attended in his own capacity and as proxy for 9 employees who had submitted proxy forms;

(b) no other creditors attended; and

(c) the motion for the First Resolution (see paragraph 604 above) did not carry.

624. By letter dated 10 October 2008, Mr Pateman advised Mr J Hamilton that the Directors rejected any claims by the liquidator that they were debtors of ERB.

625. By email dated 2 December 2008, Mr Fiorentino advised Mr Pateman that unless he received cash flows and financial accounts of BWI by 10 December 2008, he would proceed with a court application to hold mandatory examinations.

626. By letter dated 12 December 2008, Mr Bastas received a letter from the OSR requesting, *inter alia;*

(a) a certified copy of the Shanel Family Trust Deed; and

(b) a copy of any instrument appointing the trustee of the Shanel Family Trust.

627. On 15 December 2008, and by resolution of that date:

(a) BWI resigned as the Trustee of the Shanel Family Trust; and

(b) Ella Rouge Beauty - the entity incorporated on 3 April 2008 – became the new Trustee.

628. By email dated 16 December 2008 from Mr J Hamilton to Mr Fiorentino:

(a) Mr J Hamilton stated that he [Mr Fiorentino] had met Mr Hammoud in September 2008 and raised the indemnity issue;

(b) Mr J Hamilton stated ERB's accountant had sent [BWI] cash flows which Mr Fiorentino did not necessarily accept;

(c) Mr J Hamilton advised that the various Westfield leases did not appear to ever have been assigned to BWI, and queried whether Mr Fiorentino needed to consider disclaiming them;

(d) Mr J Hamilton sought instructions on what Mr Fiorentino wanted him to do about the indemnity issue given that the next step for the indemnity would be to sue BWI.

629. By email dated 17 December 2008, Mr Fiorentino was advised by Mr Pateman:

(a) that Mr Bastas was getting all the supporting documentation for the [BWI] projected balance sheet and projected P&L in order that Mr Fiorentino could see how Mr Bastas came to the figures previously estimated; and

(b) subject to that information, Mr Pateman would be instructed to negotiate a settlement of the purchase and release of parties in order to finalise all matters so far as Mr Hammoud was concerned.

630. On 17 December 2008, and in response to Mr Pateman's email to Mr Fiorentino, Mr J Hamilton advised Mr Fiorentino to do a schedule of creditors and line up a meeting.

631. On 19 December 2008, and by email of that date, Mr Fiorentino advised Mr Pateman:

(a) the Right of Indemnity against BWI was $4,719,862.77;

(b) he required the actual financial accounts and MYOB file of BWI to current to consider the present financial position of the indemnifier; and

(c) unless he received the information forthwith, he would proceed with a public examination of the directors and the external and internal accountants.

632. On or shortly before 14 January 2009, Mr Fiorentino had in his possession the following documents:

(a) BWI bank statement as at 31 December 2008 which was faxed to Mr Fiorentino on 14 January 2009;

(b) Letter from the OSR to BWI dated 10 December 2008;

(c) BWI Creditors Schedule for January 2009;

(d) BWI Aged Payable Summary as at 14 January 2009 with a print date of 14 January 2009;

(e) BWI Payroll Activity Summary Report for December 2008 quarter with a print date of 14 January 2009;

(f) Projected Balance Sheet of BWI recording negative net assets of $3,156,389 as at 30 June 2009; and

(g) Projected Profit and Loss Statement of BWI projecting for the year ended 30 June 2009 a net loss of $3,156,399.

633. On or shortly before 14 January 2009, Mr Fiorentino apparently formed the view that:

(a) BWI was in a precarious financial position;

(b) the financial position of the Directors of the company was not of substance; and

(c) it was in the best interest of the creditors to settle all claims against the purchaser and the Directors for $60,000.

634. In assessing the financial capacity of:

(a) BWI to satisfy the Right of Indemnity; and

(b) the Directors to satisfy the claims against them,

Mr Fiorentino failed to obtain and review:

(i) an actual and current balance sheet and profit and loss statement of BWI and/or the Shanel Family Trust; and

(ii) information regarding the financial position of the Directors including a statement of assets and liabilities and earnings, income tax returns and bank records ("Relevant Financial Information").

635. ASIC alleged that had Mr Fiorentino requested, and obtained, the Relevant Financial Information for the purposes of assessing the financial capacity of BWI to satisfy the Right of Indemnity and the Directors capacity to satisfy the claims against them, he would have been aware that:

(a) the Shanel Family Trust had:

(i) net assets of $1,196,988.67 as at 31 December 2008. (Mr Fiorentino denies this allegation); and

(ii) net profit of $1,196,978.67 for the six months to 31 December 2008. (Mr Fiorentino denies this allegation);

(b) for the financial year ending 30 June 2008, the Directors had combined income from wages and trust distributions of $505,206. (Mr Fiorentino denies this allegation);

(c) from 1 July 2008 to 31 December 2008, the Directors received combined beneficiary entitlements from the Shanel Family Trust of $944,804.32. (Mr Fiorentino denies this allegation);

(d) a joint bank account of the Directors recorded they had available funds of $830,743.48. (Mr Fiorentino admits this allegation); and

(e) the Directors owned two residential properties in Sydney. (Mr Fiorentino admits this allegation).

636. ASIC alleged that a reasonably competent liquidator would have attended to the matters referred to in paragraph 634 and would have been aware of the financial information referred to in paragraph 635. (Mr Fiorentino denies this allegation).

637. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. (Mr Fiorentino denies this allegation).

638. By emails dated 14 January 2009, Mr Fiorentino had the following communications with Mr Pateman:

(a) at 10.50am Mr Fiorentino sent Mr Pateman a precedent deed of settlement and release;

(b) at 11.20am Mr Pateman sent Mr Fiorentino a draft of the deed of settlement and release and asked "[*do the recitals*] *set it all up well for you re why it is good that it is settling?*";

(c) at 11.23am Mr Fiorentino advised Mr Pateman that his client needed to have a bank cheque ready for $60,000 for the deed to be acceptable;

(d) at 11.29am Mr Fiorentino advised Mr Pateman:

(i) the deed needed to refer to the indemnity granted by BWI to ERB;

(ii) BWI was in a precarious financial state and was unable to pay ERB; and

(iii) if sued for recovery, BWI would have to appoint administrators and ERB would then be liable in respect of employee redundancies, leases of premises and equipment leases.

639. On 14 January 2009 at 3.31pm, and by email of that date, Mr Fiorentino received from Mr Pateman a further draft deed of settlement and release.

640. On 14 January 2009, Mr Fiorentino (and Mr Hamilton) as liquidators of ERB, executed a Deed of Settlement and Release, pursuant to which, *inter alia*:

(a) BWI, Mr Hammoud and Ms Issa were released from all claims by ERB and the liquidators – clause 3.1;

(b) ERB received $60,000 – clauses 1.1 and 2.1; and

(c) BWI and the Directors agreed to offer and provide all reasonable assistance as requested by the liquidators or ERB to complete the administration, including Mr Hammoud agreed to be examined by the liquidators on specific matters and to sign an accurate copy of the transcript of the examination - clauses 4.1 & 4.2).

641. The Deed of Settlement and Release recited, *inter alia*:

(a) the liquidators' had formed the view that BWI did not pay sufficient consideration to ERB for the transfer of ERB's business pursuant to the Business Sale Agreement;

(b) the liquidators had demanded that Mr Hammoud, Ms Issa and BWI produce financial records demonstrating the state of the business at all relevant times since the execution of the Business Sale Agreement; and

(c) that in response to that request, Mr Hammoud, Ms Issa and BWI had produced books and records of BWI and certain projected financial statements.

642. By its terms, the Deed of Settlement and Release released *inter alia*:

(a) the Directors from:

(i) their debt to ERB of $397,306.53, comprised of $97,306.53 and $300,000; and

(ii) possible claims by the liquidators in respect of the Voidable Transactions or Misappropriated Funds of $2,000,000; and

(b) BWI from:

(i) its debt to ERB of $146,693.14;

(ii) the Right of Indemnity of $4,719,862.77 less $50,000 received from BWI on 8 April 2008; and

(iii) claims by the Liquidators in respect of the Voidable Transactions of $609,831.91.

(Mr Fiorentino denies these allegations and says that the Deed speaks for itself).

643. Mr Fiorentino entered into the Deed of Settlement and Release without having:

(a) in relation to the Business Sale Agreement, assessed which of the available remedies was in the best interests of creditors and in that regard having failed to:

(i) obtain a valuation of the assets transferred;

(ii) quantify what was sufficient consideration payable for the assets; and

(iii) undertake a cost benefit analysis of the available remedies;

(b) properly investigated the financial position of BWI;

(c) ascertained the true indebtedness of the Directors to ERB; and

(d) properly investigated the financial position of the Directors.

(Mr Fiorentino denies this allegation).

644. ASIC alleged that a reasonably competent liquidator would have attended to the matters referred to in paragraph 643. (Mr Fiorentino denies this allegation).

645. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. (Mr Fiorentino denies this allegation).

646. ASIC alleged that by entering into the Deed of Settlement and Release, Mr Fiorentino was compromising debts owing to ERB consisting of *inter alia*:

(a) $397,306.53 for monies owed to ERB by the Directors; and

(b) $146,693.14 being monies owed to ERB by BWI.

(Mr Fiorentino denies this allegation).

647. ASIC alleged that, in the circumstances and by reason of s 477(2A) of the Act as applied by s 506(1A) and Regulation 5.4.02, Mr Fiorentino required the approval of the Court or of a resolution of the creditors before entering into the Deed of Settlement and Release. (Mr Fiorentino denies this allegation).

648. ASIC alleges that further or alternatively, at all material times, the obligations of BWI, Mr Hammoud and Ms Issa under clauses 4.1and 4.2 of the Deed of Settlement and Release may have, according to the terms of the Deed, been discharged by performance more than 3 months after the Deed was entered into. (Mr Fiorentino denies this allegation).

649. ASIC alleged that, in the circumstances and by reason of s 477(2B) of the Act as applied by s 506(1A), Fiorentino required the approval of the Court or of a resolution of the creditors before entering into the Deed of Settlement and Release. (Mr Fiorentino denies this allegation).

650. At no time did Mr Fiorentino seek the approval of the Court or of a resolution of the creditors before entering into the Deed of Settlement and Release. (Mr Fiorentino admits this allegation).

651. Further, ASIC alleged that Mr Fiorentino did not seek the approval of the Court or of a resolution of creditors to enter into the Deed of Settlement and Release in circumstances where:

(a) he had received the 11 September 2008 Legal Advice advising him that any deal reached would require creditor or court approval and had to be documented in a deed. (Mr Fiorentino denies this allegation); and

(b) he received further legal advice on 23 September 2008 that the debt owed by BWI to ERB for $146,693.14 was not a claim under the indemnity in the Business Sale Agreement. (Mr Fiorentino denies this allegation).

Matters upon which ASIC specifically relies in support of Contention 14

652. Contention 14 alleges, in substance, that Mr Fiorentino failed to act diligently and with reasonable care and failed to act in good faith by failing to seek legal advice in relation to the entering into, and settling of the terms of the Deed of Settlement and Release.

653. ASIC relies upon the following additional matters in support of Contention 14.

654. Prior to entering into the Deed of Settlement and Release, Mr Fiorentino did not provide creditors with any information or details regarding his intention to enter into the Deed in circumstances where he had identified that ERB had potential claims against the following persons. (Mr Fiorentino admits that he did not provide creditors with information but denies that he had identified potential claims as alleged):

(a) the Directors for a debt of $97,306.53. (Mr Fiorentino admits this allegation);

(b) BWI for an amount of $146,693.14. (Mr Fiorentino admits this allegation); and

(c) BWI in relation to the Right of Indemnity of $4,719,862.77 less $50,000 received from BWI on 8 April 2008. (Mr Fiorentino denies this allegation).

655. ASIC alleged that a reasonably competent liquidator would have attended to the matters referred to in paragraph 654 (Mr Fiorentino denies this allegation).

656. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. (Mr Fiorentino denies this allegation).

657. On 14 January 2009 at 12.25 pm, being just prior to executing the Deed of Settlement and Release, Mr Fiorentino asked Mr J Hamilton if he was available to check a draft deed prepared by Mr Pateman.

658. ASIC alleged that it can be inferred from the following sources that from 11 September 2008 to 14 January 2009, Mr Fiorentino did not obtain any legal advice in connection with the Deed of Settlement and Release. (Mr Fiorentino denies this allegation):

(a) Mr Fiorentino's WIP records for that period contain no entry of him seeking legal advice in relation to the Deed of Settlement and Release. (Mr Fiorentino admits this fact);

(b) the only legal service providers recorded in ERB's "Form 524 Presentation of Accounts & Statements" for that period were RBHM Commercial Lawyers and Mr Svehla. (Mr Fiorentino admits this fact);

(i) Mr J Hamilton's invoice has no entry of him providing any legal advice to Mr Fiorentino in relation to the Deed of Settlement and Release; further on 15 January 2009 and by email of that date, Mr J Hamilton advised Mr Fiorentino he would not be back in the office until 18 January 2009. (Mr Fiorentino admits this fact); and

(ii) Mr Svehla's invoice has no entry of him providing any legal advice to Mr Fiorentino in relation to the Deed of Settlement and Release. (Mr Fiorentino denies this allegation).

659. We find, on the evidence, that Mr Fiorentino did not obtain any legal advice in connection with the Deed of Settlement and Release.

660. On 14 January 2009, Mr Fiorentino executed the Deed of Settlement and Release.

661. ASIC alleged that Mr Fiorentino failed to seek legal advice in relation to the entering into, and settling of the terms of the Deed of Settlement and Release (Mr Fiorentino denies this allegation) in circumstances where:

(a) he knew none of the creditors would in fact benefit from the Liquidators entering into the Deed as all the funds would be applied to outstanding remuneration. (Mr Fiorentino denies this allegation);

(b) he knew the total debts and claims being settled were the largest potential asset of ERB and that after entering into the Deed, the Liquidators would have no further recourse against BWI and the Directors. (Mr Fiorentino denies this allegation);

(c) he had previously received legal advice that:

(i) any settlement reached would require creditor or court approval and had to be documented in a Deed; and

(ii) the next step with regard to the Right of Indemnity was to sue BWI.

(Mr Fiorentino denies this allegation);

(d) he knew there were various issues which remained unresolved and affected ERB's claims against BWI, namely:

(i) employee claims provable in the liquidation; and

(ii) there were then on-going lease assignment negotiations between the liquidators, Westfield, BWI and the Directors which could, or may have been affected by the terms of the Deed;

(e) he had not sought nor obtained legal advice as to:

(i) the prospects of success of any proceedings against BWI and the Directors;

(ii) the cost and timing of taking legal action; and

(iii) whether it was appropriate to enter into the Deed in circumstances where BWI had failed to provide Mr Fiorentino with historical and current financial information he had previously requested.

(Mr Fiorentino denies this allegation) and

(f) the deed had been drafted by the lawyer representing BWI and the Directors; and he had formed the view that he needed the Deed to be reviewed by his lawyer, but proceeded to execute the Deed without obtaining the legal advice. (Mr Fiorentino denies this allegation).

662. ASIC alleged that a reasonably competent liquidator would have sought legal advice having regard to the matters referred to in paragraph 661. (Mr Fiorentino denies this allegation).

663. ASIC alleged that Mr Fiorentino failed to act as a reasonably competent liquidator. (Mr Fiorentino denies this allegation).

Issues for determination – Contentions 8 to 14.

664. The issues for determination are whether, in the conduct of his liquidation of ERB, Mr Fiorentino:

(a) failed to properly investigate the affairs of the company including the Business Sale Agreement as an Uncommercial Transaction and/or a Related party transaction (Contention 8);

(b) failed to properly inform creditors of all relevant matters in connection with:

(i) the suspected Uncommercial Transaction; and

(ii) the available remedies,

in circumstances where he was seeking funding from creditors to investigate the Business Sale Agreement (Contention 9);

(c) failed to properly investigate the source of the $300,000 deposit to the ERB ANZ pre-liquidation account (Contention 10)

(d) entered into a Deed of Settlement and Release with BWI, Ms Issa and Mr Hammoud on 14 January 2009 without properly:

(i) assessing which remedies were in the best interest of the creditors; and/or

(ii) ascertaining the true indebtedness of BWI and/or the Directors to ERB; and/or

(iii) investigating and assessing the financial capacity of BWI or the Directors (Contention 11);

(e) failed to seek the approval of the Court or of a resolution of creditors before entering into the Deed of Settlement and Release to compromise the following debts owing to ERB:

(i) $397,306.53 by the Directors; and

(ii) $146,693.14 by BWI (Contention 12);

(f) failed to seek the approval of the Court or of a resolution of creditors before entering into the Deed of Settlement and Release pursuant to which the following obligations were imposed:

(i) BWI and the Directors agreed to offer and provide all reasonable assistance as requested by the liquidators or ERB to complete the administration;

(ii) Mr Hammoud agreed to be examined by the liquidators on specific matters; and

(iii) Mr Hammoud agreed to sign an accurate copy of the transcript of the examination

and which may not have been discharged within 3 months of entering into the agreement. (Contention 13);

(g) failed to seek legal advice in relation to the entering into, and settling of the terms of the Deed of Settlement and Release. (Contention 14).

665. In the case of Contentions 8, 11 and 14, ASIC alleged that in doing so, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(c) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

666. In the case of Contention 9, ASIC alleged that in doing so, in addition to the failures and breaches referred to in the last paragraph, Mr Fiorentino acted in breach of cl 13.5 of the Code.

667. In the case of Contentions 12 and 13, ASIC alleged that Mr Fiorentino:

(a) acted in breach of s 477(2A) of the Act, as applied by s 506(1A) in the case of Contention 12 and acted in breach of s 477(2B) of the Act, as applied by s 506(1A) in the case of Contention 13; and/or

(b) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(c) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

Contentions 8, 9, 11 and 14

668. In our view, the key matters relevant to Contentions 8 (failure to properly investigate the Business Sale Agreement), 9 (failure to inform creditors or relevant matters in that regard), 11 (entering into the Deed of Settlement and Release without proper investigations) and 14 (entering into the Deed of Settlement and Release without legal advice) are as follows.

669. The central issue of substance in the liquidation of ERB concerned the fate of its external creditors. It appears that pursuant to the Business Sale Agreement, BWI

purported to assume liability for most of these, but not the debts owed to the OSR, GIO General and Gallagher Basset.

670. OSR was the main undisputed creditor of ERB. Mr Fiorentino knew about the claim even before he was appointed liquidator and he knew that the OSR claim was the main reason why Mr Hammoud was seeking to liquidate ERB. Mr Fiorentino was involved in the debate about the propriety of transferring the business and leaving ERB with the OSR debt. He was aware of Mr Svehla's advice that this was not possible unless there had been a sale at a proper commercial value.

671. Mr Fiorentino was aware from early April 2008 that the directors' RATA showed assets of only $1,678.00, with liabilities of about $2.6m, made up of directors' loans of about $2m, the debt to the OSR of $464,246 and a debt to the Australian Taxation Office ("ATO") of $56,294.

672. Thus, on its face, the transaction had the appearance of a phoenix transaction, whereby the directors had preserved their business by transferring it to a related third party, leaving the OSR liability in the ERB corporate shell. An obvious and central issue from the commencement of the liquidation was whether this suspicious transaction was legitimate.

673. Mr Fiorentino was also aware from the outset, of the highly suspicious nature of the Business Sale Agreement, which provided for a purchase price of "zero", on the supposed basis that the assets and other liabilities matched in identical terms. The claim by the directors that they remained creditors of ERB for about $2m was also highly suspicious, in view of the fact that those loans appeared to be part of the liabilities taken over by BWI under the Business Sale Agreement.

674. Mr Fiorentino was aware, as from early April 2008, that the Business Sale Agreement did not appear to satisfy the requirements of Mr Svelha's advice (see paragraphs 16, 17 and 535 above).

675. By the time of the 23 September 2008 Report the amount of the OSR debt was stated to be $738,838 – if a preference of $270,000 was recovered. As at that date, it was also clear that the other material and undisputed external creditors were GIO General ($223,023), Gallagher Bassett Services ($93,623) and, possibly, the employees. Westfield appeared to be a contingent creditor.

676. The directors never provided any support for their assertions that they were substantial creditors of the company. Certainly, as at the time of the 23 September 2008 Report, Mr Fiorentino did not accept that the directors were creditors of ERB.

677. Apart from a minor amount of cash, the main asset of ERB was its indemnity claim against BWI under the Business Sale Agreement, although by 23 September 2003, Mr Fiorentino had identified a number of miscellaneous potential claims totalling $688,354. These included claims against BWI and the directors totalling about $240,000.

678. Thus, the critical issues in the liquidation, from the outset, and throughout 2008, concerned whether BWI was obliged to indemnify ERB in relation to the external debts and whether Business Sale Agreement was able to be set aside on the basis,

amongst others, that it did not appear to satisfy the requirements of Mr Svehla's advice.

679. Mr Fiorentino was advised by Mr J Hamilton on 24 April 2008, shortly after being appointed liquidator, that the Business Sale Agreement would be read as containing an agreement by BWI to indemnify ERB in relation to any debts. He was advised to seek to ascertain all creditors at the sale date which had not been paid (by reference to the creditors' records and by writing to BWI) and, when this position had been reconciled, to make a demand for indemnification against BWI.

680. Mr J Hamilton had also advised Mr Fiorentino, at this early stage, that Mr Fiorentino may be able to invoke the Act and common law remedies (which we take to include equitable remedies) to set aside the Business Sale Agreement as an uncommercial transaction or phoenix transaction, and he noted:

(a) The prospects of this claim would need to be assessed, including whether the sale price was fair, assuming that the agreement involved an indemnity by BWI;

(b) That the claim under the indemnity would be an unsecured claim against BWI and the value of that claim may be less than an alternative sale;

(c) To assess the fairness of the sale would require creating a list of assets actually sold and advice as to their market values;

(d) The remedies under s 588F may just achieve the same effect as claiming under the BWI indemnity;

(e) However, if the sale was at an undervalue and Mr Fiorentino could achieve a higher sale price, then setting aside the agreement under s 588F may achieve more than enforcing the indemnity;

(f) There were practical issues in choosing a remedy including the potential for termination to destroy the business if franchise agreements or leases were terminated.

681. We consider that this advice was to the point and appropriate.

682. However, Mr Fiorentino knew significantly more about the inception of the transaction than did Mr J Hamilton. Mr Fiorentino knew (in addition to the matters raised by Mr J Hamilton in his advice) that some three weeks before, he and Mr Bastas (acting for BWI) had consulted Mr Svehla about the proposed transfer and liquidation and Mr Svehla had advised Mr Bastas of the impermissibility of transferring the business without covering the OSR debt, unless the sale was for a proper commercial value. He must have appreciated that reasoning applied to other creditors. He was thus aware that BWI should only have proceeded with the sale of business on that basis. He was aware that the Business Sale Agreement did not appear to satisfy the requirements of Mr Svehla's advice. And he was aware of the potential that ERB and BWI might have intended to structure the transaction so as to leave the OSR debt within the worthless ERB shell.

683. Having received Mr J Hamilton's advice, and knowing what he knew about the inception of the transaction (including that BWI was aware of Mr Svehla's advice), Mr Fiorentino should have promptly made demand of BWI. It was an easy and obvious step for Mr Fiorentino to write to BWI, or speak to Messrs Hammoud and Bastas, seeking confirmation that BWI accepted an obligation to indemnify ERB in relation to all unpaid debts, including the OSR debt.

684. This would have placed BWI on the horns of a dilemma. BWI would either have to agree that it was liable to indemnify ERB or to assert that a proper commercial consideration had been paid for the transfer of business. In our view, it would have taken little probing to expose serious difficulties for BWI in this regard. The Business Sale Agreement was only a few weeks old and it was to be expected that the calculation of the consideration would be readily substantiated by the directors.

685. The real problem for the directors would have been the reference to "loans" of $2,691,626.86 in Schedule 8 of the Business Sale Agreement. This is the same figure which appears in Mr Fiorentino's analysis of the "ledger entries" in his 23 September 2008 Report[25]. As Mr Fiorentino himself noted[26], the figures were based upon "information supplied by Fadi (sic) Karnib" and not supported by the ERB's financial records or any other hard evidence[27]. If the directors could not support the loans, the purchase price for the business in the Business Sale Agreement was understated by over $2m. Thus, there would be a strong *prima facie* case for undoing the Business Sale Agreement either as an uncommercial transaction or on the basis that BWI had acquired the business knowing that the directors of ERB entered into the transaction in breach of their duty to act *bona fide* in the best interests of ERB, in breach of their duty to act for proper purposes and in breach of their duty not to make a profit for themselves or a third party at the expense of ERB.

686. In our view, had Mr Fiorentino taken these relatively simple steps, BWI would have been placed in the position of either having to agree to indemnify ERB for the OSR debt or having to risk rescission of the Business Sale Agreement.

687. Mr Fiorentino did not take the steps we have identified above, notwithstanding his knowledge of the inception of the agreement and his knowledge that BWI had received Mr Svehla's advice.

688. Moreover, Mr Fiorentino did not undertake the important steps which Mr J Hamilton had advised him to undertake in his 24 April advice. Mr J Hamilton expressed concern about the lack of progress in his 10 September 2008 email (see paragraph 586 above).

689. In his 23 September 2008 Report, Mr Fiorentino said:

> "Whether the Agreement is uncommercial and capable of being set aside by a court would depend in part of (sic) whether a fair value was ascribed to the assets sold by the Agreement which is a non arms length transaction. The failure of the Company to received cash sufficient to pay out its creditors named in the agreement on completion or for novations of those creditors to be

[25] Ex 1 Tab 37 p 20 – see entry for 30/6/07 "Transfer of assets to Shanel – 2,691,624.86"
[26] Ex 1 Tab 37 p 20-1.
[27] We note that his rejection of the claims was not based upon the proposition that the loans had been overtaken by BWI.

obtained is also of concern. The liquidators do not have funds available to engage a valuer to undertake such a business valuation. There also remains an issue as to whether commercially, the liquidators might better serve creditors by seeking to enforce the indemnity against the purchaser by leaving the agreement on foot. The liquidator is in discussions with the purchaser about what it intends to do to meet that obligation. The liquidators have no funds available currently to investigate this claim further by public examinations."

690. This indicated two things:

(a) First, that Mr Fiorentino had made no real progress over the previous five months in dealing with the two critical issues involved in the liquidation;

(b) Secondly, he was not taking obvious and straightforward steps to advance theses issues and was suggesting that it was all too hard to do anything about the transactions. In particular, he was suggesting that he could not advance the issue of fair value and there remained an issue as to whether it might be better for creditors if he were to seek to enforce the indemnity.

691. As to the latter point, we note:

(a) As to the fair value issue:

(i) we find it difficult to accept that some form of valuation could not have been obtained by this stage at a fee which was affordable particularly having regard to the extent of money otherwise expended in the liquidation;

(ii) however, even without a valuation of assets, there was a strong *prima facie* basis for showing that the purchase price was significantly understated in relation to the directors' loans. Mr Fiorentino had, in the very same report, rejected Mr Karnib's assertions as to the directors' loans. This, of itself, and without any need to value the assets, suggested that the price paid to ERB was understated by $2,691,626. In his Response, Mr Fiorentino admitted that the Loans in Schedule 8 may have been overstated;

(iii) Thus, Mr Fiorentino apparently failed to recognise an obvious reason why the business had not been transferred at a fair value. He apparently persisted in the view that the matter was up in the air without a valuation and that he could not afford to obtain one;

(b) As to Mr Fiorentino's assertion that it might be preferable to enforce the indemnity:

(i) This was a matter which could and should have been raised at the outset of the liquidation;

(ii) In any event, whilst it may be said that, commercially, it might be better to pursue the indemnity, the two issues went hand in hand and it remained relevant to pursue the question of fair value;

(iii) Thus, the prospects of recovery on the uncommercial transaction claim would have been relevant to any compromise of the indemnity claim. If the prospects were very strong, there would be little justification for compromising the indemnity claim cheaply;

(iv) Further, if the purchase price was very significantly understated, (due, for example, to the unsubstantiated directors' loans of $2,691,626 and the exclusion of the OSR debt) so that the sale was, in substance, a fraud, it would have been important to investigate the matter and ensure that BWI and its directors were brought to account. Whilst return to creditors is obviously the most important factor in this context, there is also a public interest in making wrongdoers accountable. In *Re Liverpool Hotels Pty Ltd (In Liq)* [2010] NSWSC 72 at [57], Austin J said:

> "[57] In my view, a liquidator who is confronted by plausible evidence of equitable fraud of this kind, involving the transfer by a director of his company's property to another company controlled by him, with no evidence of shareholder consent and in circumstances of doubtful solvency, is duty bound to inquire into the matter if there are funds available for that purpose. The law regards this kind of breach of duty as serious wrongdoing, and as noted above, there is a substantial public interest in having such matters investigated and having wrongdoers brought to account: *Hall v Poolman*, at [124]–[130]."

692. In short, we believe it was necessary for Mr Fiorentino to have investigated the uncommercial transaction claim, that he should have been able to progress the valuation question in the five months since his appointment and that even without a valuation, the apparently non-existent directors' loans provided a significant reason for thinking that the consideration had been seriously understated. Yet Mr Fiorentino appears not to have given this matter any consideration or if he did, he took no action.

693. As to Mr Fiorentino's statement that he was "in discussions" with the purchaser about what it intended to do to meet the obligation under the indemnity:

(a) As already stated, we consider that BWI's apparent liability to take over or indemnify ERB in relation to the OSR debt was an obvious matter which Mr Fiorentino should have pursued from the outset of the liquidation. By this stage, Mr Fiorentino ought to have achieved a lot more in relation to this central issue, particularly having regard to the amount of creditors funds spent on the liquidation;

(b) There is no evidence that Mr Fiorentino made any effort, in his discussions, to ascertain whether BWI had any meaningful basis for opposing the indemnity argument.

694. Thus, as at the time of the October creditors meeting, Mr Fiorentino appeared to have done little to advance the real issues in the liquidation, namely the indemnity claim and the uncommercial transaction claim.

695. Although a primary purpose of the creditors meeting on 8 October was to consider whether creditors wished to indemnify or fund the liquidators in taking action in relation to the Business Sale Agreement, the Report gave creditors no real information about the utility of such action. In particular, the report omitted to state:

(a) Mr Moini and Mr Hammoud had consulted Mr Fiorentino prior to the liquidation and they had discussed ERB's inability to pay the OSR debt and Mr Hammoud's desire to explore liquidation as a means of retaining his business;

(b) That Mr Fiorentino had advised Mr Hammoud at that meeting that he could transfer the business to a new company and that he should liquidate ERB;

(c) That Mr Fiorentino (with Messrs Bastas and Hammoud) had subsequently consulted Mr Svehla who had advised that the transfer of business to a new company could be effectuated, provided, either, that the new company took over the obligations to the OSR or that the new company paid a proper commercial value for the assets;

(d) the gist of Mr J Hamilton's advice of 24 April 2008 Legal Advice;

(e) the fact that the purchase price appeared to be understated by $2,691,626, in view of the fact that the price of zero was based upon BWI assuming "loans" which, Mr Fiorentino had found to be unsupported;

(f) that BWI had agreed on 16 September 2008 to pay the liquidators $80,351.89 to the liquidators in return for a three month moratorium in which to develop a DOCA.

696. Moreover, the Report failed to provide a cost benefit analysis of the funding costs and potential returns in respect of the claims, notwithstanding Mr J Hamilton's advice of 10 September 2008 that this would be useful.

697. In our view, the Report of 23 September 2008 omitted to give creditors key information relevant to the utility of funding the liquidators to pursue claims against BWI.

698. The key issues in the liquidation, namely the indemnity claim and the uncommercial transaction claim, were not substantially advanced in the ensuing months and up to the time Mr Fiorentino came to settle with BWI on 14 January 2009.

699. After the October 2008 creditors meeting, Mr Fiorentino made a demand on the directors that they pay the sum of $97,306, the amount which Mr Fiorentino regarded as owing by them in the 23 September 2008 Report. This was not a claim under the indemnity, however, it sparked negotiations with the directors and BWI in relation to the indemnity. On 17 December 2008, Mr Pateman emailed Mr Fiorentino indicating that he would like to see the details concerning (amongst other things) ERB's estimated current creditors as this would assist in the negotiations for settlement of the sale transaction and releases that the purchaser and directors would be seeking.

700. Mr Fiorentino replied on 19 December 2008 that the creditors which were covered by the indemnity were the OSR ($463,712.70), GIO ($225,690) and Gallagher Bassett ($134,403) (in addition to the specific creditors listed in the Agreement). He

requested the actuals financial accounts and MYOB file of BWI to current so that he could consider the present financial position of the indemnifier and stated that unless he received that information forthwith, he would proceed to examine the directors and accountants.

701. He did not receive an actual and current balance sheet and profit and loss statement of BWI or the Shanel Family Trust. By 14 January 2009, he had received documents from BWI (annexed to the 30 April 2009 Report) which asserted a very bleak picture for BWI. It appears that the picture presented was false, as the accounts for the Shanel Family Trust for the period ending 31 December 2008 disclosed that it had net assets of $1,196,988.67 and had made a net profit of $1,196,978.67 for the six months to 31 December 2008. Mr Fiorentino did not investigate the financial position of the BWI directors, which indicated that they were persons of substance. We note also, that it is far from clear that Mr Fiorentino conducted any real analysis of the information provided. The BWI Aged Payable Summary and BWI Payroll Activity Summary had print dates of 14 January 2009.

702. Then, for reasons which are not explained in the evidence, a Deed of Release was prepared and executed very quickly, over the course of one day (14 January 2009). The Deed had the effect of releasing the directors and BWI in consideration for the payment of the sum of $60,000. There is no evidence that Mr Fiorentino obtained any legal advice in relation to the Deed or in relation to compromising the uncommercial transaction claim or the indemnity claim. The assertion, in his Response, that "specific advice was received and sought from Mr J Hamilton and Mr Svehla regarding the Deed (Tab 190) although no written advice was prepared" is not consistent with the evidence. Tab 190 is an inquiry from Mr Fiorentino to Mr J Hamilton as to whether he had returned from overseas and could review the Deed. The only response was an email from Mr J Hamilton on 15 January 2009 (after the Deed had been executed) stating "Pino, Slow internet from here. Back 18th". His fee notes record no work performed in January 2009. There is no indication in Mr Svehla's fee notes that he provided any advice on 14 January and the first reference in those fee notes to settlement of the directors' claims was on 16 January 2009, after the Deed was executed.

703. In considering this question of the compromise, we are particularly conscious of what was said by Brereton J in *Re St Gregory's Armenian School (In Liq)* (2012) 92 ACSR 588 at [33], quoted above, and particularly the passage where he said:

> "In evaluating the conduct of a liquidator, it is important to remember that a liquidator is required to make practical commercial judgments. Much of a liquidator's decision-making involves the application of business acumen. That a decision is not fully reasoned or supported by the fullest investigation does not mean that it should be second-guessed by the court."

704. We are conscious that liquidators are often in an invidious position in deciding whether or not to settle claims. Often they are damned if they do and they are damned if they don't (cf *Hall v Poolman* (2009) 75 NSWLR 99).

705. No doubt, BWI could have asserted that to rescind the Agreement would result in loss of value to the business through termination of franchise agreements, employees leaving and termination of leases. It might have been argued, in Mr Fiorentino's

defence, that rather than undertake lengthy and costly examinations of the directors and accountants and costly legal proceedings against BWI, it was better, in the interests of creditors, particularly in the light of BWI's apparent precarious financial position, to accept an amount, albeit small, on offer from BWI.

706. However, it was clear that the persons facing the real risk from rescission were BWI and its directors, rather than ERB. It was clear that the business had some real assets and goodwill. It appears highly unlikely that the value of the assets available to ERB upon rescission would have been insufficient to pay out ERB's creditors, particularly if the directors' loans were removed from the equation. By this time, Mr Fiorentino knew that the directors' loans were unsubstantiated. Moreover, it is to be inferred that the directors, as active participants in the new BWI business, would have had a serious interest in avoiding this scenario and that this would have encouraged them to agree to indemnify ERB's creditors. There appeared to be no downside in ERB pressing for indemnity for its creditors. After all, rescission could not leave the creditors any worse off because to accept $60,000 meant that it was highly unlikely that the creditors would get anything, once the costs of the liquidation were paid.

707. For reasons we have already explained at paragraphs 682 to 686 above, ERB had an obvious and *prima facie* strong claim against BWI and/or the directors that BWI was obliged to indemnify ERB and/or that the Agreement ought to be rescinded on the basis that it was an uncommercial transaction or otherwise entered into in breach of duty.

708. The strength (or weakness) of those claims was a matter of critical relevance to any compromise. There is no evidence that Mr Fiorentino obtained any legal advice as to the strength of ERB's claims in the context of the proposed compromise.

709. In relation to the indemnity claim, there is no evidence that Mr Fiorentino ever formed a considered view about the strength of the claim. There is no evidence that Mr Fiorentino ever confronted Messrs Hammoud and Bastas in relation to the indemnity claim, pointing out the advice which had been provided by Mr Svehla in March 2008 and seeking to ascertain how BWI intended to defend the indemnity claim. We note that the recitals in the Deed of Settlement purporting to justify the reasons for compromise make reference to the claim of insufficient consideration (Recital F) and the denials of this claim by BWI and the directors (Recital J), but there is no mention of the indemnity claim.

710. In relation to the uncommercial transaction claim, there is no evidence that Mr Fiorentino obtained any real view of the strength of this claim. He appeared to believe that the matter hinged upon obtaining a valuation and that there were no funds to pay for this. There is no evidence that he had adverted to the fact that, on the face of things, the purchase price was understated by the value of the directors' loans ($2,691,626). It was all very well for the Deed of Settlement to contain recitals that the parties took into account the "potential strength of defences by BWI, Mr Hammoud and Ms Issa", but there is no evidence that anyone understood those defences and why they had any strength.

711. Any decision to compromise the claims against BWI and the directors and the appropriate amount for which to compromise them were complicated questions. The claims included the indemnity claims worth at least $800,000, (i.e. the total of the

OSR, GIO and Gallagher Bassett claims), the claim in relation to the uncommercial transaction and the direct debt claims against BWI and the directors. A decision to compromise these claims required a proper analysis of the strength of the claims and a proper analysis of the financial capacity of the proposed defendants to meet those claims. In our view, Mr Fiorentino did not undertake such analysis.

712. Further, at no time did Mr Fiorentino obtain confirmation (far less, a binding commitment) from BWI or Mr Hammoud as to the extent of the ERB liabilities which BWI had taken over pursuant to the Business Sale Agreement. As late as April 2009 (well after he had given up all claims against BWI and Mr Hammoud), Mr Fiorentino asserted that he was continuing to investigate the extent to which BWI had satisfied or assumed ERB's obligations to its employees of $763,000 (see 30 April 2009 Report page 16, and Annexure "N") and that he was attending to the assignment of leases, the aim of which was to "significantly reduce the liability of [ERB] to Westfield as the landlord" (see 30 April 2009 Report page 17). In short, at the time of the compromise, Mr Fiorentino had no idea whether, by giving up all claims against BWI, he was accepting that ERB would be liable for significant liabilities over and above the claims of the OSR, GIO and Gallagher Bassett.

713. Liquidators need to be conscious of the need to obtain legal advice in relation to issues involving complexity and doubt. In *Re Windsor Steam Coal Co* [1929] 1 Ch 151 at 159, Lord Hanworth MR said:

> "One does not wish to attribute to a liquidator the knowledge or the experience of the lawyer, but I think that one may reasonably ask from him the exercise of some common sense and judgment when he is placed in a difficulty."

714. It appears that Mr Fiorentino was alive to the need to obtain legal advice in relation to the proposed settlement (see the email to Mr J Hamilton on 14 January 2009).

715. Mr Fiorentino settled the claims in return for a payment of $60,000. This appears to be a very small amount having regard to the strength of ERB's claims and the financial strength of BWI, the Shanel Trust and the directors. As indicated above, the settlement effectively ensured that the unsecured creditors of ERB would receive nothing in the liquidation.

716. As to the suggestion that BWI was a shell because it was only a $2.00 company acting as a trustee, the Business Sale Agreement was between ERB and BWI, as trustee for the Shanel Family Trust. The Agreement must have been carried out by BWI (the Trustee) on behalf of the Shanel Trust in accordance with the Trustee's powers. If any claim was made against BWI in relation to the Agreement, BWI would have a right of indemnity for any liability owed to ERB in relation to the trust assets. Any claim by ERB would ultimately be met from the trust assets; the claim would not be a claim against a $2.00 company.

717. We rely upon the above matters in concluding that Contentions 8, 9, 11 and 14 are substantially established. We will set out our precise findings later in these reasons.

Contention 10.

718. As regards the matter in Contention 10 (the failure to investigate the deposit of $300,000 and realise that it was not a loan from Mr Hammoud, but simply a transfer of ERB's own money), Mr Fiorentino maintained that it was highly unusual for a deposit to be a source of concern. He asserted that he was not aware of the Westpac account and had no reason not to assume that the funds were deposited by the director as shown in the accounts.

719. In our view, a reasonably competent Liquidator not only reviews amounts going out of a bank account but also amounts coming in. The fact that the business operated by the company was by its nature made up or a large number of smaller transactions from retail clients, a round amount of $300,000 coming in should have been viewed as highly unusual and warranted investigation.

720. In our view Mr Fiorentino's failure to carry out an investigation into the highly unusual transaction demonstrated a clear lack of understanding of the transaction and its unusual nature. In our view, the lack of investigation amounted to a failure to carry out or perform adequately and properly the duties of a Liquidator.

Contentions 12 and 13.

721. As regards the matters in Contentions 12 and 13, section 477(2A) and (2B) provided (as at January 2008) as follows:

> "(2A) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not compromise a debt to the company if the amount claimed by the company is more than:
>
> (a) if an amount greater than $20,000 is prescribed — the prescribed amount; or
>
> (b) otherwise — $20,000.
>
> (2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf (for example, but without limitation, a lease or a charge) if:
>
> (a) without limiting paragraph (b), the term of the agreement may end; or
>
> (b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;
>
> more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months."

722. Regulation 5.4.02 prescribed the amount of $100,000 for s 477(2A)(a).

723. Section 506(1A) provides:

> "(1A) Subsections 477(2A) and (2B) apply in relation to the liquidator as if:

(a) he or she were a liquidator in a winding up in insolvency or by the Court; and

(b) in the case of a members' voluntary winding up — a reference in those subsections to an approval were a reference to the approval of a special resolution of the company."

724. ASIC asserted:

(a) That the Deed compromised a debt of $397,306.53 owed by the Directors (i.e. the $97,306.53 demanded by Mr Fiorentino on 26 September 2008 plus the sum of $300,000 wrongly deducted from the amounts owed by the Directors on the basis that they had made the deposit) plus a debt of $146,693.14 of BWI;

(b) Deed of Settlement and Release imposed the following obligations:

(i) BWI and the Directors agreed to offer and provide all reasonable assistance as requested by the liquidators or ERB to complete the administration;

(ii) Mr Hammoud agreed to be examined by the liquidators on specific matters; and

(iii) Mr Hammoud agreed to sign an accurate copy of the transcript of the examination

and these may not have been discharged within 3 months of entering into the agreement.

725. In his Response, Mr Fiorentino asserted:

(a) *First*, that the two amounts were the claim against directors of $97,306.53 and the claim against BWI of $96,693.14. He asserted that he had no knowledge that the directors owed the additional $300,000 and that of the $146,693.14, ERB had already recovered $50,000 from BWI leaving only $96,693.14 still owing;

(b) *secondly*, each of these were disputed and thus not debts in a legal sense;

(c) *thirdly*, as regards obligations which may not have been discharged within three months, that the only continuing obligations were non-financial in nature and were intended by the parties to be effected shortly after execution of the Deed. In any event, Mr Fiorentino said that he understood that the three month time period only applied to financial obligations.

726. As to Mr Fiorentino's first point, Mr Fiorentino only believed that $97,306.53 was owed by the directors and that $96,693.14 was owed by BWI. There is no evidence that he (or ERB) had ever made a claim of a larger amount. We received no submissions as to why s 477(2A) applied in this case. The words of section 477(2A) are "a liquidator of a company must not compromise a debt to the company *if the amount claimed by the company* is more than [$100,000]". *Prima facie*, the section did not apply in the present case. In the absence of any reference to authority

suggesting otherwise, we find that there was not breach of s 477(2A) in relation to the compromise of the debts. We note that ASIC did not allege that the debts included claims under the indemnity.

727. As to Mr Fiorentino's second point, the fact that BWI and the directors disputed the claims was irrelevant. Mr Fiorentino had a reasoned basis for asserting the claims. The section does not apply only to "debts" in the sense of debts indisputably owed. Indeed, it is assumed that the debts will be disputed. As Cooper J said in *Re Rothwells Limited* [1990] 2 Qd R 181 at 188:

> "There must be some real dispute as to the liability of the creditor and some question as to the certainty of recovery of the debt before it is appropriate to compromise the claim: *Mercantile Investment and General Trust Co v International Co of Mexico* [1893] 1 Ch 484 at 489, 491"

728. As to Mr Fiorentino's third point, the fact that the obligations were intended by the parties to be effected shortly after execution of the Deed is irrelevant. The question is whether the Deed imposed obligations on a party which might be discharged by performance more than three months after the agreement was entered into. We consider that it did. Accordingly, approval was required under s 477(2B). We also reject Mr Fiorentino's assertion that the three months period only applied to financial obligations.

729. Accordingly, in entering into the Deed of Release, Mr Fiorentino did not fail to comply with s 477(2A), but failed to comply with s 477(2B).

730. However, in relation to the breach of s 477(2B), we find it difficult to understand why we should find that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator in failing to obtain court approval for a Deed which simply required directors and a related party to assist him in the completion of the administration. We believe that s 477(2B) is directed at a very different issue, namely preventing liquidator from being sidetracked by entering into agreements which might prevent the expeditious winding up of the company.

Findings on Contentions 8 to 14

731. On the basis of the reasoning set out above, we set out our precise findings in relation to Contentions 8 to 14.

732. As regards Contention 8 we consider:

(a) that Mr Fiorentino failed to investigate properly the affairs of ERB including the Business Sale Agreement as an uncommercial transaction or related party transaction;

(b) that Mr Fiorentino's conduct involved a lack of the diligence required by section 130.1b) of the Compiled APES 110 and/or the degree of care and diligence required by s 180 of the Act;

(c) that the evidence does not establish that Mr Fiorentino's failures involved an absence of good faith;

(d) Accordingly, that Contention 8 is established. However, we base this finding on our acceptance that the matters in sub-paragraph 8(a) and (b) are established.

733. As regards Contention 9, we consider:

(a) Mr Fiorentino failed to inform creditors of key information relevant to the utility of funding the liquidators in taking action in relation to the suspected uncommercial transaction and the available remedies, including the matters referred to in paragraph 608(b), (d) and (f) above;

(b) the Report was not clear, relevant and focused in relation to this issue;

(c) notwithstanding this, we are not satisfied that this was contrary to the requirements of Clause 13.4 of the Code, which is really directed to reports relating to remuneration;

(d) Mr Fiorentino's conduct involved a lack of the diligence required by section 130.1(b) of the Compiled APES 110 and/or the degree of care and diligence required by section 180 of the Act;

(e) that the evidence does not establish that Mr Fiorentino's failures involved an absence of good faith;

(f) that Contention 9 is established However, we base this finding on our acceptance that the matters in sub-paragraph 9(ii) and (iii) are established.

734. As regards Contention 10:

(a) Mr Fiorentino failed to carry out an adequate investigation into the deposit of $300,000;

(b) Mr Fiorentino's conduct involved a lack of the diligence required by section 130.1(b) of the Compiled APES 110 and/or the degree of care and diligence required by section 180 of the Act;

(c) Contention 10 is established.

735. As regards Contention 11, we consider:

(a) that Mr Fiorentino entered into the Deed of Settlement and Release without properly assessing the strength of ERB's claims against BWI and the directors under the indemnity claim and the uncommercial transaction claim, without properly ascertaining the true indebtedness of BWI and/or the directors to ERB, without properly assessing which remedies were in the best interests of creditors and without properly investigating and assessing the financial capacity of BWI and the Directors;

(b) that Mr Fiorentino's conduct involved a lack of the diligence required by section 130.1b) of the Compiled APES 110 and/or the degree of care and diligence required by s 180 of the Act;

(c) the evidence does not establish that Mr Fiorentino's failures involved an absence of good faith;

(d) that Contention 11 is established. However, we base this finding on our acceptance that the matters in sub-paragraphs 11(a), (b), (c) and (i) and (ii) are established.

736. As regards Contention 12, we consider:

(a) There was no failure to comply with s 477(2A);

(b) Accordingly, Contention 12 is not established.

737. As regards Contention 13, we consider:

(a) Mr Fiorentino failed to comply with s 477(2B);

(b) Accordingly, Contention 13 is established However, we base this finding on our acceptance that the matter in sub-paragraph 13(a), (b), (c) and (i) are established.

738. As regards Contention 14, we consider:

(a) that Mr Fiorentino ought to have obtained legal advice prior to entering into the Deed of Settlement and Release regarding the strength of ERB's claims, the potential amount recoverable from BWI, the financial capacity of BWI and the Directors to meet those claims and the terms of any release;

(b) that Mr Fiorentino entered into the Deed of Settlement and Release without obtaining advice on these matters;

(c) that Mr Fiorentino's conduct involved a lack of the diligence required by section 130.1b) of the Compiled APES 110 and/or the degree of care and diligence required by s 180 of the Act;

(d) the evidence does not establish that Mr Fiorentino's failures involved an absence of good faith;

(e) Accordingly, Contention 14 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 14(a) and (b) are established.

Do Contentions 8 to 14 establish that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

739. As to Contention 8 (failure to properly investigate the Business Sale Agreement), we consider that this failure was a significant failure in relation to a key issue in the liquidation and that Mr Fiorentino's failure in this regard, in itself, involved a failure adequately and properly to carry out or perform the duties of a liquidator.

740. As to Contention 9 (failure to inform creditors of relevant matters), again, we consider that this failure was a significant failure in relation to a key issue in the liquidation and

that Mr Fiorentino's failure in this regard, in itself, involved a failure adequately and properly to carry out or perform the duties of a liquidator.

741. As to Contention 10 (failure to properly investigate the source of the $300,000 deposit) we consider that Mr Fiorentino's failure to investigate what appeared to be a highly unusual transaction, involved a failure adequately and properly to carry out or perform the duties of a liquidator.

742. As to Contention 11 (entering into the Deed of Settlement and Release without proper investigations), we consider that the matter was a significant failure in relation to a key issue in the liquidation and that Mr Fiorentino's failure in this regard, in itself, involved a failure adequately and properly to carry out or perform the duties of a liquidator.

743. As to Contention 12, we have found that that Contention is not established.

744. As to Contention 13, whilst we have found that Contention 13 is established, we do not consider that that matter, in itself, establishes that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator. In other words, we do not consider that in failing to obtain court approval in relation to a Deed which, in effect, required directors and a related party to assist him in the finalisation of the winding up, Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator in the context of s 1292.

745. As to Contention 14 (entering into the Deed of Settlement and Release without legal advice) we consider that Mr Fiorentino's failure in this regard was a serious one. There was no reason why the Deed needed to be executed immediately. Mr Fiorentino was aware that the Deed would result in the loss of the indemnity in relation to external liabilities, in particular, the liability to the OSR, so that, in effect, a phoenix transaction would be perfected, with unsecured creditors effectively facing a total loss. Mr Fiorentino's failure to obtain legal advice in these circumstances was a serious failure of judgment and a serious failure to exercise care and diligence. In itself, it constituted a failure by Mr Fiorentino to carry out or perform adequately and properly the duties of a liquidator.

746. Dealing with the Transfer of Assets allegations together, we are satisfied, on the basis of the matters which have been established in relation to Contentions 8 to 14, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator.

(e) General Conduct issues – Contentions 15 to 25

(i) Contention 15

747. Contention 15 relates, in substance, to the alleged failure by Mr Fiorentino to include, in his Declaration of Relevant Relationships prior to the first creditors meeting, reference to an alleged relationship with ERB, on the basis that he had advised Mr Hammoud and/or Bastas in relation to the transfer of ERB's business prior to its liquidation.

Matters upon which ASIC specifically relies in support of Contention 15

748. The matters upon which ASIC relies in support of Contention 15 are as follows. Most matters are made out on the documents and admitted by Mr Fiorentino. We will specifically deal with any exceptions below. Except as otherwise noted below, we accept that the factual allegations in the following section are made out on the evidence.

749. In early 2008 Mr Fiorentino met with Messrs Hammoud and Moini to discuss the possible liquidation of ERB (under its then name Ella Rouge Beauty Pty Ltd).

750. At the meeting referred to in the preceding paragraph, Mr Fiorentino advised Hammoud, *inter alia*:

(a) to liquidate ERB;

(b) about the liquidation process and how the liquidation would proceed;

(c) he would retain his business post liquidation;

(d) the OSR would be listed as an unsecured creditor and the company's debts would be dissipated in the event of a liquidation;

(e) to change the name "*Ella Rouge Beauty Pty Limited"* to "*ERB International Pty Limited*", and to register the new Ella Rouge Beauty to avoid anyone taking the name; and

(f) the liquidation would cost a flat sum of $50,000.

751. We note that we have already made findings as to Mr Fiorentino's advice at paragraph 115 above.

752. On 24 January 2008, Hamiltons' personnel created an internal document titled "ERB International Pty Limited, Program for Creditors Voluntary Winding Up, January 2008".

753. On 24 January 2008, and prior to the company changing its name to ERB International Pty Ltd, Mr Bastas issued an invoice to Mr Hammoud in the name of "ERB International Pty Ltd".

754. On the facts set out in paragraphs 749 to 753 above, ASIC asserted that it can be inferred that the meeting referred to in paragraph 749 and 750 was held on, or prior to 24 January 2008, and that further to that meeting, Mr Fiorentino instructed a Hamiltons' employee to create the document referred to in paragraph 752.

755. On 5 March 2008, Mr Fiorentino met with Messrs Hammoud and Bastas ("5 March 2008 Meeting") during which Mr Fiorentino and Mr Bastas disagreed regarding the course of action for ERB, where:

(a) Mr Fiorentino advised and recommended ERB be put into liquidation and advised *inter alia*:

(i) it was the only way ERB could avoid its liability to the OSR;

(ii) that as part of the liquidation process, ERB should sell its business to another company and that Messrs Hammoud and Bastas needed to work out the assets and liabilities of ERB; and

(iii) Mr Hammoud should retain a lawyer to prepare the contract for sale; and

(b) Mr Bastas, however, advised and recommended against the liquidation of ERB and advised *inter alia:*

(i) it would not result in ERB avoiding the OSR debt;

(ii) it would result in the sale of the business being reversed; and

(iii) Mr Hammoud should negotiate with the OSR and find a solution for ERB to pay its liability.

(Mr Fiorentino denies this allegation. In relation to this allegation, we deal with these matters in paragraph 794 below).

756. As result of the disagreement referred to in the preceding paragraph, during the 5 March 2008 meeting Mr Fiorentino sought and obtained legal advice from Mr Svehla. (Mr Fiorentino denies this and says that any advice was proffered to GPL. We do not consider that this distinction relevant in the context of the essential issue involved in this Contention).

757. By way of teleconference Mr Fiorentino received the Pre-Liquidation 5 March 2008 Legal Advice from Mr Svehla, and was aware that:

(a) the company could not transfer its assets and leave payroll tax liabilities behind and needed to have an agreement in place for the new company to meet the payroll tax liability; (Mr Fiorentino denies this) alternatively

(b) the sale of assets had to be for proper commercial value. (Mr Fiorentino admits this). We find that Mr Svehla gave advice which indicated these two alternatives and refer to paragraph 794 below.

758. On 13 March 2008, and by email of that date, Mr Fiorentino received the 13 March 2008 Email from Mr Bastas advising, *inter alia*:

(a) he (Mr Bastas) had adjusted the accounts prepared by the internal accountant for the franchising and the transfer of assets to the Shanel Family Trust;

(b) he was in the process of finalising the contract for the transfer of the assets; and

(c) their discussions were obviously extremely confidential.

759. Accompanying the 13 March 2008 Email were the 13 March 2008 ERB Financial Statements, being unsigned financial statements of ERB for the periods:

(a) 1 July 2006 to 30 June 2007;

(b) 1 July 2007 to 29 February 2008; and

(c) 1 July 2007 to 31 March 2008.

760. In the circumstances, from about 13 March 2008, Mr Fiorentino knew, or ought to have known, that:

(a) after 29 February 2008 but before 31 March 2008, all assets apart from $51,028.19 cash had been transferred out of ERB; and

(b) ERB's payroll tax liability of $464,246.45 had been left behind after the transfer of its assets. (This is denied by Mr Fiorentino. We have found that Mr Fiorentino reviewed these accounts at the time. He knew or ought to have known from his review of the accounts that the accounts disclosed these matters).

761. On 19 March 2008, Messrs Fiorentino, Hammoud and Bastas met for around 2 hours from which it can be inferred that they had detailed discussions regarding the proposed liquidation of ERB. (This is denied by Mr Fiorentino).

762. On 28 March 2008, and after the Business Sale Agreement was executed, ERB changed its name to ERB International Pty Limited.

763. On 2 April 2008, Messrs Fiorentino and Hamilton were appointed joint liquidators of ERB by its shareholders (and directors) Mr Hammoud and Ms Issa.

764. On 2 April 2008, Mr Fiorentino received the following records:

(a) ERB Company Register;

(b) executed copy of the Business Sale Agreement dated 28 March 2008; and

(c) the 2 April 2008 ERB Financial Statements, being financial statements for the following periods:

(i) 1 July 2007 to 29 February 2008; and

(ii) 1 July 2007 to 31 March 2008.

(Mr Fiorentino admits these matters save for what appears in (b) above, asserting that he does not know the date of execution of any agreement but was provided with an agreement dated 28 February 2008 and that the books and records of ERB reflected this).

765. ASIC alleged that by this time, if not before, Mr Fiorentino knew, or ought to have known:

(a) BWI paid no cash consideration to ERB for the purchase of ERB's business; and

(b) the payroll tax liability had not been paid by either ERB or BWI and that the OSR was an unsecured creditor in the liquidation.

(This is admitted by Mr Fiorentino).

766. On 2 April 2008, Mr Fiorentino sent the 2 April 2008 Notice to creditors advising of a meeting of creditors to be held on 16 April 2008.

767. A document headed "Declaration of Relevant Relationships of Liquidators (Pursuant to Section 506A of the Corporations Act) ("DIRRI") accompanied the 2 April 2008 Notice.

768. ASIC alleged that in the circumstances above and for the purposes of section 60(2) of the Act, Mr Fiorentino had a relevant relationship with ERB and Mr Hammoud within the preceding 24 months, in that prior to the entry into the Business Sale Agreement, Mr Fiorentino had been consulted by and/or advised or obtained advice for Mr Hammoud and/or Mr Bastas in relation to:

(a) the change of name of ERB and registration of the new Ella Rouge Beauty to avoid anyone taking the name;

(b) the transfer or sale of the business of ERB prior to its liquidation; and/or

(c) OSR being left as an unsecured creditor in the liquidation of ERB.

(Mr Fiorentino denies these allegations).

769. Mr Fiorentino signed the DIRRI, dated 2 April 2008, declaring he had no reason to believe that there were any relevant relationships which resulted in him having a conflict of interest or duty.

Issue for determination - Contention 15

770. The issue for determination is whether, in the conduct of his liquidation of ERB, Mr Fiorentino had a relevant relationship with ERB and Mr Hammoud which he failed to disclose to creditors in the DIRRI.

771. In answering this question, it is appropriate to consider the purposes of relevant provisions of the Corporations Act, and what proper professional practice required to be done to enable those purposes to be achieved. We are also entitled to have regard to published codes of the professional bodies as we may find that professional standards are set by, or alternatively reflect in such codes.

772. We note that ASIC alleged that Mr Fiorentino's failure amounted to:

(a) a breach of clauses 6.8.1(b) and 6.14(b) of the Code; and/or

(b) a failure to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) a breach of s 506A(2) of the Act.

773. Mr Fiorentino's general response to Contention 15 was that he had no contact with ERB until his first introductory meeting on 28 February 2008 and, thereafter, only minimal contact prior to his appointment. He asserted that he had no relevant relationship to disclose nor had he done anything which gave rise to a conflict.

774. The starting point in the consideration of this issue is s 506A(2) of the Act (introduced into the Act with effect from 31 December 2007) which provides:

"**506A Declarations by liquidator—relevant relationships**

(1) **Scope.** This section applies if the liquidator of a company is required to convene a meeting under section 497.

(2) **Declaration of relevant relationships**. Before convening the meeting, the liquidator must make a declaration of relevant relationships.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) **Notification of creditors.** The liquidator must:

(a) give a copy of each declaration under subsection (2) to as many of the company's creditors as reasonably practicable; and

(b) do so at the same time as the liquidator gives those creditors notice of the meeting.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) **Declarations must be tabled at the meeting.** The liquidator must table a copy of each declaration under subsection (2) at the meeting.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) **Updating of declaration.** If:

(a) at a particular time, the liquidator makes a declaration of relevant relationships under subsection (2) or this subsection; and

(b) at a later time:

(i) the declaration has become out-of-date; or

(ii) the liquidator becomes aware of an error in the declaration;

the liquidator must, as soon as practicable, make a replacement declaration of relevant relationships.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) **When copy of replacement declaration tabled.** The liquidator must table a copy of a replacement declaration under subsection (4):

(a) if:

(i) there is a committee of inspection; and

(ii) the next meeting of the committee of inspection occurs before the next meeting of the company's creditors;

at the next meeting of the committee of inspection; or

(b) in any other case—at the next meeting of the company's creditors.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) **Defence.** In a prosecution for an offence constituted by a failure to include a particular matter in a declaration under this section, it is a defence if the defendant proves that:

(a) the defendant made reasonable enquiries; and

(b) after making these enquiries, the defendant had no reasonable grounds for believing that the matter should have been included in the declaration."

775. Section 506A applied to Messrs Fiorentino and Hamilton as liquidators of ERB because, in the circumstances of the present case, they were required to convene a meeting under s 497 (and this does not appear to be a matter of any controversy). Thus, before convening the meeting on 2 April 2008, Messrs Fiorentino and Hamilton were required to make a declaration of relevant relationships and thereafter to provide the declaration to creditors, to table it at the meeting and keep it updated.

776. We note that the section involves serious obligations and that a failure to comply with its requirements amounts to an offence. Further, we note that an erroneous belief of the absence of a relationship (following reasonable inquiries) is only relevant *as a defence in the case of prosecution*. In other words, the obligation to make disclosure appears to be one of strict liability.

777. Section 9 of the Act states that "declaration of relevant relationships" has the meaning given in s 60. Relevantly, s 60(2) provides:

"(2) In this Act, a ***declaration of relevant relationships***, in relation to a liquidator of a company, means a written declaration:

(a) stating whether any of the following:

(i) the liquidator;

(ii) if the liquidator's firm (if any) is a partnership—a partner in that partnership;

(iii) if the liquidator's firm (if any) is a body corporate—that body corporate or an associate of that body corporate;

has, or has had within the preceding 24 months, a relationship with:

(iv) the company; or

(v) an associate of the company; or

(vi) a former liquidator, or former provisional liquidator, of the company; or

(vii) a former administrator of the company; or

(viii) a former administrator of a deed of company arrangement executed by the company; and

(b) if so, stating the liquidator's reasons for believing that none of the relevant relationships result in the liquidator having a conflict of interest or duty. "

778. We note that the Board recently considered the purpose and requirements of administrators' DIRRIs in *ASIC v Fernandez* [02/VIC13 – 29 October 2013]. At [213], the Panel noted the underlying rationale for requiring administrators' DIRRIs was the need to provide creditors with relevant information:

> "213. A key step in the administration process is the opportunity, at the first meeting of creditors, to consider whether to remove an administrator and substitute another. Creditors will often have limited information relevant to that decision. The provision will not be meaningful if information relevant to the decision is withheld from those empowered to make the decision. "

779. We note, further, that administrators' DIRRIs received some recent consideration *ASIC v Franklin* [2014] FCA 68. At [15] and following, Davies J referred to the explanatory memorandum relating to the introduction of the provisions requiring DIRRIs and said:

> **"[15]** The explanatory memorandum stated that it was proposed "to address concerns about the independence of administrators by requiring administrators to declare any "relevant relationships" which "will allow creditors to make a more informed decision about whether to replace the administrator": at [4.71]. Paragraphs [4.72] and [4.73] state:
>
> > '4.72 The declarations will be provided to creditors with the notice of the first meeting of creditors. The categories of relationship that an administrator is required to declare are targeted around those parties that have the power to initially appoint an administrator. While conflicts may arise due to relationships with other parties, it

considered that a relationship with these parties would pose a particular concern for creditors, and as such the administrator should be required to disclose them and explain why they do not amount to a conflict of interest or duty. While a conflict may not arise at law, the existence of such a relationship may be one factor for creditors to take into account when considering whether to replace the administrator. A key theme of the reforms in this Bill is to provide creditors with better information and more power to manage external administration processes.

4.73 The question of whether a 'relevant relationship' exists between an administrator and another person will be a matter of fact and degree. *However, the term should be interpreted in light of the object of the provision to alert the creditors to relationships that may not give rise to a conflict, but which may be relevant in considering whether to replace the administrator*. This would include relationships where a conflict might be perceived to exist in the absence of full disclosure. It does not require the disclosure of trivial interpersonal connections.'

[16] The legislation enacted gives effect to that policy by imposing the duty on administrators to disclose relationships, whether or not they are potentially disqualifying, coupled with the duty to provide reasons as to why those relationships do not, in the administrator's view, result in a conflict of interest or duty. The declaration thus provides an important safeguard for creditors, if only because *they are entitled to assume that any professional, personal or business relationship between the administrator or his/her firm and the company or its associates will be disclosed to them*." (emphasis added)

780. In our view, the issues in the present case are analogous to those arising in relation to administrators' DIRRIs. We note that the Explanatory Memorandum to which Davies J referred in *ASIC v Franklin* continued, at paragraph 4.76, as follows:

> "4.76. In light of the changes to the process for commencing creditors' voluntary liquidation, included at Part 3 of Schedule 1 of this Bill, stakeholders have raised concerns that similar concerns about the independence of liquidators may arise in relation to that proceeding. Accordingly, the requirement to disclose relevant relationships has been extended to liquidators in a creditors' voluntary liquidation. The requirement to disclose indemnities has not been extended to liquidators, given the different nature of that proceeding."

781. Thus, in the present case, the first item on the agenda at the 16 April 2008 meeting of creditors was to consider whether to retain the liquidators appointed by the members. In order for creditors to have given meaningful consideration to that issue, they needed information relevant to that question.

782. Section 506A, read with s 60, rather assumes that a liquidator providing a DIRRI will have considered whether or not he or she has a conflict and will have determined that question in the negative; it is to be assumed that a conflicted liquidator would not

accept the appointment in the first place. Nevertheless, it must be the case that s 506A applies even where a liquidator has decided to take the appointment where he or she *does* have a conflict. No doubt, in such a case, it would be difficult or impossible for the liquidator to provide valid reasons for a belief of absence of conflict (s 60(20)(b)). But the liquidator must nonetheless provide a DIRRI.

783. The critical matter upon which the requirement to disclose depends is the existence of a "relationship".

784. We were not referred to any authority which specifically addresses the meaning of "relationship" in the context of liquidators' DIRRIs.

785. Mr Russell submitted that the Act was deliberately ambiguous in referring to *any* "relationship" and not limiting the concept to a business relationship or personal relationship. He submitted that the concept had to be understood in the light of the purpose of the section, namely to promote transparency and to require disclosure of any matter which could constitute a conflict of interest or duty or a perception thereof. He submitted that whilst attendance by a liquidator at meetings with a director or other officers might not, in itself, constitute a "relationship" for the purposes of the section, here, the circumstances went beyond merely introductory meetings, to an involvement by the liquidator in strategy concerning the potential liquidation of ERB and the retaining of counsel to advice in that regard.

786. As already indicated, the meaning of "relationship" in s 506A must be considered in the light of the objects which the section was designed to serve. Those objects are to ensure disclosure of information which will permit the creditors to understand any material connection (whether or not involving a conflict) between the liquidator and the company, which may affect their decision to confirm the liquidator's appointment.

787. Having said that, the term "relationship" was specifically used in the section, rather than some wider concept such as "contact". Thus, there must be a sufficient association between the liquidator and the company (or other party) to warrant the description of a "relationship". This would ordinarily require some active involvement by the liquidator rather than merely passive contact. Whether contact amounts to "a relationship" requiring disclosure will depend upon the nature and extent of the contact and the role played by the liquidator.

788. It is entirely normal for contact of an introductory and informational kind to occur between a liquidator and the company or its directors prior to a winding up, particularly in the case of a voluntary winding up. For instance, directors will often meet the liquidator to explore the appropriateness of winding up. The liquidator may outline the process and the likely consequences of a winding up. There may be some discussion concerning alternative options. In our view, such contact would not normally constitute a "relationship" for the purposes of the section. Such contact is of a neutral kind and bound up with a foreshadowed liquidation. It does not involve a liquidator taking an active role in the company's or directors' affairs, except with regard to the liquidation itself. Creditors would expect contact of this sort and would not regard it as a matter relevant to their choice of liquidator. But if a liquidator becomes more deeply involved in the company's internal pre-liquidation affairs and provides any significant advice about how the company could organise its pre-liquidation affairs, this is likely to constitute a relevant "relationship".

789. Turning to 6.8.1b) and 6.14b) of the Code, these provide, relevantly:

(a) **Clause 6.8** "Practitioners must not take an appointment if they have had a Professional Relationship with the insolvent during the previous two years. The purpose of this restriction is to avoid any perception of a lack of independence of the Practitioner. This is referred to as the 'two year rule'.

…

6.8.1 b) **Pre-appointment advice**. It is common for Practitioners to give advice to the insolvent (individual or company) about the insolvency process and options available to the insolvent prior to taking a formal appointment**.** This will not be a risk to independence, providing that the advice given by the Practitioner is restricted to:

- the financial situation of the debtor;
- the solvency of the debtor/company;
- consequences of insolvency; and
- alternative courses of action in the case of insolvency; and
- in the case of companies, the advice must be to the company."

(b) **Clause 6.14** (**Declaration of Independence and Relevant Relationships and Indemnities (DIRRI)**)

"Disclosure of interests or relationships that create a lack of independence, or a perception of a lack of independence, does not remedy or cure the situation. The provision of a DIRRI is a process for identifying relationships that are not threats to independence, but need to be disclosed to creditors to ensure transparency. Declarations of relevant relationships and declarations of indemnities are required under the Corporations Act in certain instances. It is intended that the provision of a DIRRI in the template prepared by the IPA meets, and goes beyond, those statutory requirements.

…

For all corporate and personal insolvency appointments (excluding receiverships and members' voluntary liquidations), at the earliest practical opportunity, the Practitioner **must** provide to creditors a DIRRI comprising:

a) A Declaration of Independence that the Practitioner

- has undertaken a proper assessment of risks to independence;
- has determined that the assessment identified no real or potential risks to independence; and
- is not otherwise aware of any impediments to taking the Appointment.

b) A Declaration setting out prior personal and business relationships of the Practitioner, or Firm with

- the insolvent;
- an associate of the insolvent;
- former Practitioner of the insolvent;
- a person who has a charge on the whole of or substantially the whole of, the insolvent's property in the preceding 24 months.

The schedule **should** contain a concise summary of each relationship.

The Practitioner **must** state:

- why the relationships disclosed do not preclude acceptance of the appointment i.e. they are not excluded by law or by the Code; and
- that there are no known prior professional or other relationships that require disclosure."

790. These provisions of the Code raise a similar question to the one raised by s 506A, namely, what is intended by the reference to "relationship" (or, in the case of the Code, a "personal and business relationship").

791. In our view, the answer is the same in both cases, and we refer to our views in paragraph 774 to 788 above.

792. Did a "relationship" exist in the present case of the type alleged by ASIC?

793. We should state, at the outset, that we do not find that each of the factual allegations on which ASIC bases this allegation, have been made out.

794. As already stated, in relation to Mr Fiorentino's involvement prior to liquidation we have already found:

(a) That as at about January 2008, Mr Hammoud was concerned about ERB's financial problems and in particular, the unpaid OSR debt;

(b) Mr Bastas was advising Mr Hammoud and was proposing a restructure involving the transfer of the business to a new company, but on the basis that the debts including the OSR would be paid;

(c) That Mr Hammoud approached Mr Moini in about January or February 2008. His main concern was to keep his business;

(d) Mr Moini suggested that Mr Hammoud consult Mr Fiorentino about liquidating ERB, as Mr Fiorentino had achieved a solution for Mr Moini when he had liquidated one of Mr Moini's companies, whilst permitting him to retain his business;

(e) Mr Moini and Mr Hammoud went to see Mr Fiorentino and they discussed ERB's inability to pay the OSR debt and Mr Hammoud's desire to explore liquidation as a means of retaining his business. Mr Fiorentino advised Mr Hammoud that he could transfer the business to a new company and that he should liquidate ERB;

(f) Mr Hammoud later consulted Mr Bastas, who was against the idea of liquidation because he believed that a liquidator would be able to reverse the transfer of business;

(g) On 5 March 2008, Mr Bastas, either alone or together with Mr Hammoud, met Mr Fiorentino to debate the issue. Mr Bastas maintained his view that that if the business was transferred leaving debts, and ERB went into liquidation, the whole transfer would be reversed by the liquidator. During the course of this meeting, Mr Fiorentino rang Mr Svehla who advised that the transfer of business to a new company could be effectuated, provided, either, that the new company took over the obligations to the OSR or that the new company paid a proper commercial value for the assets;

(h) The effect of Mr Fiorentino's advice was that ERB should be liquidated, that as a precursor to liquidation, ERB should sell its business to another company, that Messrs Hammoud and Bastas needed to work out the assets and liabilities of ERB and that Mr Hammoud should retain a lawyer to prepare the contract for sale;

(i) Mr Hammoud decided to proceed with liquidation and Mr Bastas proceeded to prepare the accounts and, either alone or with the assistance of a solicitor, drafted the Business Sale Agreement.

795. We do *not* find that Mr Fiorentino expressly advised Mr Hammoud that the OSR would be listed as an unsecured creditor and the company's debts would be dissipated in the event of a liquidation. Although we find that Mr Fiorentino advised that ERB's business should be transferred and ERB put into liquidation we do *not* find that he advised Mr Hammoud that this was the only way ERB could avoid its liability to the OSR.

796. Otherwise, we generally accept the matters upon which ASIC relies in support of this Contention, in particular:

(a) That on 13 March 2008, Mr Fiorentino received the 13 March 2008 Email from Mr Bastas, informing him about the progress of the preparation of accounts and the drafting of the contract for transfer of assets, and attaching the financial statements from ERB disclosing that after 29 February 2008 but before 31 March 2008, all assets apart from $51,028.19 cash had been transferred out of ERB and that ERB's payroll tax liability of $464,246.45 had been left behind after the transfer of its assets;

(b) That in his 13 March 2008 email, Mr Bastas asked Mr Fiorentino for his thoughts and noted that their discussions were "extremely confidential";

(c) That on 19 March 2008, Messrs Fiorentino, Hammoud and Bastas met for around 2 hours from which it can be inferred that they had reasonably detailed discussions regarding the proposed liquidation of ERB;

(d) That on 2 April 2008, Messrs Fiorentino and Hamilton were appointed joint liquidators of ERB and Mr Fiorentino received the ERB Company Register, an executed copy of the Business Sale Agreement dated 28 March 2008 and the 2 April 2008 ERB Financial Statements, being financial statements for the following periods 1 July 2007 to 29 February 2008 and 1 July 2007 to 31 March 2008;

(e) That by this time, Mr Fiorentino knew that BWI had paid no cash consideration to ERB for the purchase of ERB's business and that the payroll tax liability had not been paid by either ERB or BWI and that the OSR was an unsecured creditor in the liquidation.

797. In our view, the nature and extent of Mr Fiorentino's contact and involvement with ERB and Messrs Hammoud and Bastas prior to his appointment was such as to amount to a "relationship" for the purposes of s 506A or a "business relationship" for the purposes of cl 6.14 of the Code, so as to require him to disclose this in the DIRRI of 2 April 2008. In our view, Mr Fiorentino had a relationship which arose from his advising or obtaining advice for Mr Hammoud and/or Mr Bastas in relation to the transfer of the business of ERB prior to its liquidation.

798. We consider that this was a "relationship" which was required to be disclosed because Mr Fiorentino went beyond providing neutral information concerning the liquidation process. He advised ERB and Mr Hammoud and actively proposed a course of action which went beyond liquidation in a significant respect, namely the transfer of ERB's assets to a related third party. It was advice, the primary purpose of which was to deal with Mr Hammoud's concerns rather than those of ERB. Mr Hammoud and Moini came to see Mr Fiorentino for advice about how Mr Hammoud could save "his" business. They did not come to Mr Fiorentino for advice about the obligations of directors of an insolvent company or the process of liquidation. Mr Hammoud had no interest in simply liquidating ERB. Mr Fiorentino knew this and did not purport to give advice which was limited to this course.

799. The nature of Mr Fiorentino's advice to ERB and Mr Hammoud was of a significant kind in the context of a potential liquidation. The transfer of the company's assets to a related third party prior to liquidation is a classic manoeuvre for advancing the interests of directors or shareholders over the interests of creditors. Such a transaction has, at least, the clear potential to impact interests of creditors.

800. The fact that a liquidator has, prior to being appointed, advised a director in relation to the transfer of the company's business to a related third party, will, as a general proposition, amount to a relationship with the director which needs to be disclosed in the DIRRI. We consider that Mr Fiorentino had such a relationship in the present case, particularly having regard to the nature of the advice and the extent of his pre-liquidation dealings with Messrs Hammoud, Bastas and Moini.

801. We note that Mr Fiorentino's dealings with Messrs Hammoud, Moini and Bastas were not minimal or restricted to a discussion of the options for an insolvent company. He

gave initial advice to Messrs Moini and Hammoud that a transfer of business followed by liquidation was possible. He subsequently pressed that view notwithstanding Mr Bastas' opposition. It seems clear that Mr Fiorentino was the person who suggested that Mr Svehla ought to be contacted to provide support for his view[28]. He was aware of and discussed the progress of the transfer during March.

802. Moreover, the particular circumstances of the present case add to the significance of Mr Fiorentino's involvement. Mr Fiorentino knew from the outset that ERB owed a substantial debt to the OSR which Mr Hammoud said it could not meet. Mr Fiorentino may not have advised that the transfer of assets and liquidation was a way for ERB to avoid liability to the OSR, but he advocated the transfer of assets and liquidation knowing this matter. In these circumstances, on the one hand, there appeared to be no point in a transfer of the assets and *all* liabilities to a third party and on the other, a transfer of the assets and all liabilities except the OSR debt appeared to be illegitimate.

803. In short, Mr Fiorentino's dealings went beyond a liquidator's normal pre-liquidation involvement (assessing the company's position and recommending liquidation or discussing alternatives to liquidation). He took an active role in advocating a pre-liquidation transaction which was inherently likely to impact the liquidation, particularly, the interests of unsecured creditors (as, in fact, it did).

804. Mr Fiorentino ought to have stated in the DIRRI that he had a relationship with ERB in the past 24 months, by reason of having given advice to ERB in the transfer of its assets to a related third party, prior to liquidation, knowing that the transaction may not be legitimate.

805. Had Mr Fiorentino declared his relationship, he could have attempted to articulate a basis for denying any conflict of interest and duty. We doubt whether he could have done so. It was, on the face of things, strongly arguable that the transfer of the business gave rise to a claim by ERB against Mr Hammoud for preferring his own interests to those of ERB. It was at least arguable that Mr Fiorentino was knowingly involved in Mr Hammoud's breach of duty. Thus, in accepting the role of liquidator, Mr Fiorentino arguably had a conflict between his duty, as liquidator, to pursue persons involved in the transfer of assets and his personal interest in avoiding that course of action, having advised that ERB should transfer its business.

806. In the circumstances, we consider that Mr Fiorentino failed to act in accordance with the provisions of s 506A and cl 6.14(b) of the Code.

807. ASIC also alleged that Mr Fiorentino's failure to disclose the relationship constituted a failure to act diligently as required by section 130.1b) of the Compiled APES 110. We consider that a liquidator acting with the diligence required by s 130.1b) would have made disclosure in the circumstances of the present case and, to that extent, this aspect of Contention 15 is made out. However, we base our findings primarily on the matters already discussed.

[28] Mr Svehla appears to have been used by Mr Fiorentino on a number of matters since 2000: Ex 8 paras 11 and 12.

Finding on Contention 15

808. For the above reasons, we consider that Contention 15 is established. We base this finding on our acceptance that the matters in sub-paragraph 15(a) (6.14(b)), (b) and (c) are established.

Does Contention 15 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

809. Whilst a failure to make disclosure will not always justify a failure to carry out or perform adequately and properly the duties of a liquidator (for example where, despite the best efforts of the liquidator to ascertain the existence of a relationship, he or she remains unaware of it) in our view, in many circumstances it will. The obligation is a serious one with potentially significant consequences for the proper conduct of a liquidation.

810. We consider that the failure in the present case was in respect of an important connection which involved significant consequences for the liquidation. Mr Fiorentino failed to disclose to creditors that he had advised in relation to the decision by Mr Hammoud to transfer ERB's assets to a related party, a matter which was to assume significance in the liquidation and a matter which created divided loyalties (or at least the appearance of divided loyalties) for Mr Fiorentino. It made it difficult (if not impossible) for him to fulfil his duties to provide all relevant information to creditors in relation to whether the Business Sale Agreement should be challenged and/or to decide whether it was appropriate to enter into the Deed of Settlement and Release with ERB and BWI. We are satisfied that in failing to make the disclosure, Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator.

(ii) Contention 16

811. Contention 16 concerns alleged failures by Mr Fiorentino in authorising the payment by ERB of $297 for the pre-liquidation advice provided by Mr Svehla.

Matters upon which ASIC specifically relies in support of Contention 16

812. ASIC also relied specifically on the following matters in support of the allegations in Contention 16.

813. On 7 April 2008, Deloitte formally advised Mr Fiorentino they intended conducting a wage inspection of ERB.

814. On 16 April 2008, the first meeting of creditors of ERB was held during which the creditors resolved, *inter alia*, that the liquidators appointed by the members remain as liquidators and the remuneration of the liquidators be capped at $60,000 GST exclusive.

815. Around 24 April 2008, and further to Mr Fiorentino's instructions, ERB paid Mr Svehla $297 for the Pre-Liquidation 5 March 2008 Legal Advice.

Issue for determination - Contention 16

816. The issue for determination is whether, by authorising payment by ERB of $297 for the Pre-Liquidation 5 March 2008 Legal Advice, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of s 501 of the Act, in that Mr Fiorentino failed to apply the property of ERB in satisfaction of its liabilities equally; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

817. In his written submissions, Mr Russell submitted that we ought to find that Mr Fiorentino knowingly and wrongly authorised the payment of Mr Svehla's invoice. However that submission was not open as this was no part of ASIC's particularised case. ASIC's case was, explicitly, a case asserting lack of diligence.

818. Mr Russell went on to submit that the liability was one incurred by Mr Fiorentino in providing advice to ERB (Mr Hammoud) and Mr Bastas and that it was not a liability of ERB or incurred by the Respondent in the course of the liquidation of ERB.

819. We do not need to dwell on this allegation.

820. The evidence concerning the true liability is not clear. Whilst it seems clear that Mr Fiorentino must have suggested that Mr Svehla should be contacted[29], it does not follow that Mr Fiorentino retained him or that he was liable to pay for the advice. We were not taken to any evidence of the discussions between Mr Fiorentino on the one hand and Messrs Hammoud and Bastas on the other, regarding the specifics of the retainer of Mr Svehla and liability for payment for the advice. However, the entity to whom the advice was directed was ERB. The advice was not provided for the benefit of Mr Fiorentino. The fact that Mr Svehla sent an invoice to Mr Fiorentino may well have come about because his advice was sought urgently over the phone and without a proper brief.

821. Accordingly, we are not satisfied that the allegations necessary to support this Contention are made out.

822. Even if they are, in the absence of any allegation of a conscious decision to make an unauthorised payment, we are left with an allegation that Mr Fiorentino made a careless mistake in making a $297 payment to Mr Svehla out of the assets of ERB, in respect of what may well have been a pre-liquidation liability of ERB.

823. Thus, we do not consider that this matter can, in itself, lead to us being satisfied that Mr Fiorentino has failed to carry out or perform adequately and properly the duties of a liquidator by authorising payment. Section 1292 contemplates a "failure" of some significance: *Davies v Australian Securities Commission*, (1995) 59 FCR 221 at 233.

[29] We infer this because Mr Svehla appears to have been used by Mr Fiorentino on a number of matters since 2000: Ex 8 paras 11 and 12.

The Contention is not put forward as part of a pattern of carelessness or lack of diligence (cf *ASIC v Topp* [06/NSW13 – 15 April 2014]).

Finding on Contention 16

824. For the above reasons, we consider that Contention 16 is not established.

(iii) Contention 17

825. Contention 17 alleges that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator by advising Mr Hammoud and/or BWI in connection with a notice of demand issued by the OSR to BWI.

Matters upon which ASIC specifically relies in support of Contention 17

826. ASIC relies upon the following specific matters in support of Contention 17. Many of these matters are supported by the documentary evidence and admitted by Mr Fiorentino. We will deal with any exceptions. Except as specifically noted below, we find that the factual allegations contained in the following section are made out on the evidence.

827. On 24 April 2008, Mr Fiorentino received the 24 April 2008 Legal Advice from Mr J Hamilton by which he was advised and was aware, *inter alia*, that:

(a) the Business Sale Agreement purportedly caused BWI, a related party, to take over the obligations to meet all creditors of ERB with the value of the assets matching the value of the creditor obligations meaning no cash price was paid;

(b) the Business Sale Agreement was scant in details;

(c) the Business Sale Agreement was not stamped with duty;

(d) the Business Sale Agreement was most likely an Uncommercial Transaction;

(e) in the event of an Uncommercial Transaction, the remedies available to him included:

(i) Enforcing the agreement and claiming a right of indemnity; and

(ii) Setting aside the Business Sale Agreement and claiming:

1. The payment of money; or

2. Avoiding the Business Sale Agreement; or

3. Varying the terms of the Business Sale Agreement; and

(f) all the old pre-sale creditors of ERB would be entitled to prove in the liquidation; and

(g) that there was a possible claim for an indemnity under the Business Sale Agreement.

We note that Mr Fiorentino denied sub-paragraphs (a) and (d) above. We agree that these sub-paragraphs do not paraphrase the advice with complete accuracy. In particular, the advice does not state that the Business Sale Agreement was "most likely" an Uncommercial Transaction, but, in substance, indicates that this was a possibility which would need to be investigated. However, otherwise, the thrust of the allegations above is substantially correct and, in any event, we will consider the actual terms of the letter in determining whether Contention 17 is made out.

828. By email dated 28 April 2008, Deloitte advised Mr Fiorentino of its wage audit findings, and attached summaries which listed the following wages as having been under-reported by ERB:

(a)	18 June 2004 to 18 June 2005	$2,957,267.00
(b)	18 June 2005 to 18 June 2006	$3,584,091.00
(c)	18 June 2006 to 18 June 2007	$3,013,530.00.

829. In the circumstances, ASIC alleged that by 28 April 2008 at the earliest, Mr Fiorentino knew, or ought to have known that the Directors may have been guilty of an offence under a law of the Commonwealth in relation to:

(a) entering into the Business Sale Agreement in circumstances where insufficient consideration was paid by BWI to ERB and the liability to the OSR was not transferred to BWI in breach of ss 184(1)(a) and (c) of the Act; and

(b) making false and misleading statements to a licensed insurer by understating the actual wages paid by ERB in breach of sections 164 and 173A of the Workers Compensation Act 1987.

(Mr Fiorentino denies this allegation).

830. By a Notice of Demand dated 16 May 2008, the OSR demanded from BWI the sum of $205,133.99, being outstanding payroll tax (including penalties and interest) owed by ERB for the period 1 July 2005 to 30 June 2006, by reason that:

(a) ERB and BWI constituted a group for the purposes of sections 106I(2)(c)(i) and 106I(d) of the *Taxation Administration Act 1996*; and

(b) ERB is jointly and severally liable with BWI for the payment of that amount pursuant to section 16LA of the *Payroll Tax Act 1971* and section 45 of the *Taxation Administration Act 1996*.

831. By an email between Mr Fiorentino and Mr J Hamilton dated 21 May 2008, *inter alia*:

(a) Mr Fiorentino stated that he had been informed by Mr Hammoud *inter alia* that:

(i) the OSR had issued a Notice of Demand to BWI dated 16 May 2008;

(ii) the OSR had given BWI two (2) weeks to accept an offer of $200,000 to settle the matter; and

(iii) Mr Hammoud wanted to set the amount of the demand off against the purchase price of the business;

(b) Mr Fiorentino stated that he did not think Mr Hammoud could set the amount of the demand off against the purchase price; and

(c) Mr Fiorentino sought Mr J Hamilton's advice on the interpretation of the powers of the *Payroll Tax Act* on a transmission of business.

832. On 21 May 2008, Mr Fiorentino had a telephone conversation with Mr Dinaro of the OSR, in and during which *inter alia*:

(a) Mr Fiorentino objected to the grouping notice the OSR had issued to BWI;

(b) Mr Fiorentino advised the OSR it could not go after a grouped company after a company was liquidated/sold and that BWI was a shelf company at the time of the grouping; and

(c) Mr Dinaro suggested, and Mr Fiorentino said he would fax same, that Mr Fiorentino put a submission in for the OSR's perusal.

833. On 22 May 2008, Mr Fiorentino advised Mr Hammoud (and Mr Bastas) that they could bring it to the OSR's attention that:

(a) BWI was only a Trustee and could be changed at any time and wound up if necessary;

(b) BWI was only a shelf company during the 2005-2006 year and therefore the grouping was nonsense;

(c) ERB was in liquidation because it was insolvent and not because it had been trying to avoid paying payroll tax; and

(d) the OSR was not the only creditor or major creditor in the liquidation.

834. By email dated 29 May 2008 to Mr Hammoud and copied to Mr Fiorentino, Mr Bastas sought approval to an attached letter to the OSR so that he could send it.

835. By email dated 31 May 2008, Mr Fiorentino advised Messrs Bastas and Hammoud *inter* alia that:

(a) the letter to the OSR was okay;

(b) as the Notice of Demand was against BWI not expressly as Trustee, they may be better off changing the Trustee by resolution before a new demand was issued against BWI in its capacity as Trustee of the trading trust; and

(c) BWI could change and sell its name for $1 to a new entity.

836. Around that time, Mr Bastas sent the letter to the OSR dated 29 May 2008.

837. ASIC alleged that by Mr Fiorentino's conduct referred to in paragraphs 832 to 835 above, Mr Fiorentino was not acting in the bests interests of all creditors in that he:

(a) facilitated or encouraged BWI to breach its obligations to ERB under the Business Sale Agreement to pay all liabilities (Clauses 1 (Definition of "*Business*"), 2, 11 and 13);

(b) represented the interests BWI against the interests of a creditor of ERB [OSR];

(c) advised or encouraged BWI not to pay the OSR, when the payment by BWI to the OSR would have reduced the amount claimed by unsecured creditors proving in the liquidation and increased the potential dividend to creditors; and

(d) facilitated or encouraged the removal of BWI as trustee of the Shanel Family Trust and thus distancing the trust assets from any claim that may be brought by the OSR or any other potential claimant, including ERB or its liquidators, against BWI;

and in doing so:

(i) Mr Fiorentino acted outside his capacity or role as liquidator of ERB; and

(ii) Mr Fiorentino acted in direct conflict to the interests of ERB's creditors.

(These allegations are largely denied by Mr Fiorentino, although he admits sub-paragraph (i) above).

838. ASIC alleged that the actions of Mr Fiorentino referred to in paragraphs 832 to 835 were prejudicial to the interests of ERB's creditors. This allegation is denied by Mr Fiorentino.

Issue for determination - Contention 17

839. The issue for determination is whether, by advising Mr Hammoud and/or BWI in connection with the Notice of Demand to BWI, Mr Fiorentino:

(a) acted in breach of Clause 2.5 of the Code (fiduciary obligation to all creditors); and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of section 220 of the Compiled APES 110; and/or

(d) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(e) acted in breach of s 181(1)(a)of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

840. We should also note that ASIC, in submissions, asserted that Mr Fiorentino's conduct "had the effect of ensuring that the payroll tax liability remained with ERB". This goes further than the case alleged in the SOFAC and seeks to raise a question of some

complexity, on which we were not addressed, namely, whether, but for Mr Fiorentino's conduct, the OSR would actually have recovered from BWI. To determine this question would require us to find that BWI was, in fact and law, liable for ERB's obligation, or, at the very least, that Mr Fiorentino's actions were the material cause for the OSR not pursuing BWI. It is neither possible nor appropriate for us to consider these issues. ASIC's case, as pleaded, goes no higher than an assertion that Mr Fiorentino was not acting in the bests interests of all creditors because:

(a) He advised or encouraged BWI not to pay the OSR, *when the payment* by BWI to the OSR would have reduced the amount claimed by unsecured creditors proving in the liquidation and increased the potential dividend to creditors; and

(b) He facilitated or encouraged the removal of BWI as trustee of the Shanel Family Trust and thus distancing the trust assets *from any claim that may be brought by the OSR or any other potential claimant, including ERB or its liquidators, against BWI*.

841. In other words, it was not a part of ASIC's case that BWI was, in fact and law, liable for the OSR debt. ASIC's case was, in substance, that there was a claim (implicitly a *bona fide* claim on reasonable grounds) by the OSR against BWI which, if paid, would have reduced the amount claimed by unsecured creditors and that Mr Fiorentino's attempts to undermine that claim amounted to a breach of the Code, etc.

842. In his general response to this Contention, Mr Fiorentino asserted that he did not provide advice to BWI as alleged. He asserted that, rather, he facilitated contact with the OSR to try and resolve an issue which threatened the ability of BWI to meet its obligations under the Business Sale Agreement with ERB. Mr Fiorentino asserted that, as such, BWI not being a creditor of ERB, his actions were not prejudicial to the interests of ERB's creditors.

843. It is appropriate to deal with Mr Fiorentino's general response at the outset:

(a) We reject the assertion that Mr Fiorentino simply "facilitated contact with the OSR to try and resolve an issue". Mr Fiorentino's actions involved active attempts to undermine the OSR's claim against BWI. Whilst purporting to act as the liquidator of ERB, he made a direct approach to the OSR challenging the OSR's claim against BWI and gave advice to BWI and assisted BWI in its submission to the OSR, seeking to bolster BWI's case;

(b) The assertion that the OSR claim against BWI "threatened the ability of BWI to meet its obligations under the Sale Agreement" is not elaborated in the Response. We assume that Mr Fiorentino meant that if the OSR had proceeded against BWI, BWI might have repudiated the Business Sale Agreement or alternatively, BWI might not have had sufficient funds to pay the claim, would have been forced into liquidation itself and would have been unable to honour its agreement to be liable for ERB's pre-sale liabilities. We make the following observations:

(i) *As to repudiation*, the fact (if it was the fact) that BWI had a statutory obligation to pay the OSR claim provided no basis for BWI to repudiate

the Business Sale Agreement. At best, BWI may have had an entitlement to be indemnified by ERB in respect of any payment which it made directly to the OSR, (although we doubt this, in view of the fact that, *prima facie*, the intention of the Business Sale Agreement was that *BWI would indemnify ERB* in relation to its pre-sale liabilities);

(ii) *As to liquidation*, there is no evidence that Mr Fiorentino had any or any adequate basis for thinking that BWI would liquidate rather than meet the claim. There was good reason to think that Mr Hammoud would do what was necessary to protect his business and pay the claim, or enter into a compromise, as Mr Bastas had advised him to do, a few months earlier. (The real problem for Mr Fiorentino, in this event, would have been the embarrassment resulting from the fact that Mr Bastas' advice as to the best course for ERB had been proved correct);

(iii) In any event, Mr Fiorentino's assertion that the OSR's claim against BWI threatened the ability of BWI to meet its obligations under the Business Sale Agreement is illogical. BWI's only outstanding obligation under the Business Sale Agreement was to indemnify ERB in relation to its liabilities. The only significant liability in issue at this time was the claim by the OSR[30]. Thus, Mr Fiorentino's assertion is circular: it amounts to the proposition that a direct claim by the OSR against BWI for its debt threatened BWI's ability to meet its obligation to pay indemnify ERB for the OSR claim.

844. We turn to consider the case put forward by ASIC.

845. In our view, subject to our observations in paragraphs 840 to 841 above, the assertions in paragraphs 317 to 320 of the SOFAC (see paragraphs 832 to 835 above) are made out.

846. The conclusory allegations in paragraphs 322 to 324 of the SOFAC contain characterisations which are overlaid by other characterisations making the allegations hard to follow and involving many alternative potential findings. Thus, it is alleged:

(a) *By Mr Fiorentino's conduct* in paragraphs 317 to 320 of the SOFAC, Mr Fiorentino was not acting in the best interests of all creditors

(b) *In that* he acted as set out in paragraphs 322(a) to (d)of the SOFAC;

(c) *And in doing so*

(i) Mr Fiorentino acted outside his capacity or role as liquidator of ERB (paragraph 322(i)); and

(ii) Mr Fiorentino acted in direct conflict to the interests of ERB's creditors (paragraph 322(ii));

[30] As at 16 April 2008, the creditors to whom Mr Fiorentino gave notice were the OSR (for $464,246), the ATO (for $56,294) and the directors (for $2,152,199). The latter amount was embodied in the purchase price of nil in the Sale Agreement so were not subject to the indemnity (see "Loans" on page 19 of the Sale Agreement and "Net Assets" in the 31 March 2008 accounts, and the RATA dated 2 April 2008).

(d) his actions were prejudicial to the interests of ERB's creditors;

(e) Mr Fiorentino:

(i) acted in breach of Clause 2.5 of the Code (fiduciary obligation to all creditors); and/or

(ii) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(iii) acted in breach of section 220 of the Compiled APES 110; and/or

(iv) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(v) acted in breach of s 181(1)(a)of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

847. We do not propose to undertake a literal analysis which tracks through every permutation of these allegations. The essential allegation is that by reason of his actions as alleged in paragraphs 317 to 320 of the SOFAC (see paragraphs 832 to 835 above), Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator because his actions involved:

(a) A breach of a duty to exercise powers and discharge duties in good faith in the best interests of ERB;

(b) A failure to act with diligence or reasonable care and diligence;

(c) A breach of the duty to avoid conflict or breach of other fiduciary duty.

Failure to exercise powers and discharge duties in good faith in the best interests of ERB

848. It is indisputable that liquidators are subject to the statutory obligation under s 181(1)(a) to exercise their powers and discharge their duties in good faith in the best interests of the company[31]. In our view, in acting as set out in paragraphs 317 to 320 of the SOFAC (see paragraphs 832 to 835 above), Mr Fiorentino did not act in good faith in the best interests of ERB. We rely upon the following matters:

(a) ERB's interests, in the context of a liquidation, embodied the interests of creditors, in particular, their interests in maximising recovery of their debts (cf *Angus Law Services Pty Limited (in liq) v Carabelas* (2005) 226 CLR 507 at [67]);

(b) Mr Fiorentino knew, at the time:

(i) that the OSR was the main external creditor of ERB[32];

[31] They are also, at least arguably, subject to an equivalent equitable obligation, see *Du Boulay v Worrell* [2009] QCA 63 at [32]*ff*.
[32] See footnote 691 above.

(ii) that ERB had no cash assets with which to pay the OSR;

(iii) that it was in the OSR's interests to recover its claim, whether from BWI or otherwise;

(iv) that if BWI paid the OSR direct, this would be consistent with the Business Sale Agreement, which *prima facie* required BWI to take over ERB's liabilities;

(v) That if BWI paid the OSR direct, this would reduce the number of ERB's creditors and the demands upon any available assets;

(c) We reject the proposition that the OSR claim against BWI was contrary to the interests of ERB's creditors or threatened the ability of BWI to meet its obligations under the Business Sale Agreement, for the reasons set out in paragraphs 843 above.

849. In short, it was in the best interests of ERB's creditors that the OSR claim be paid (including by BWI), both because the OSR was a creditor of ERB and this was directly in the OSR's interests and because such payment would reduce the level of creditors in ERB's liquidation. Mr Fiorentino had no business, as ERB's liquidator, in seeking to dissuade the OSR from making its claim against BWI directly or in seeking to assist BWI to come up with defences to the claim.

850. Thus, objectively, Mr Fiorentino's actions were clearly not in the best interests of ERB. Mr Fiorentino has not given evidence as to his actual state of mind. However, we consider, in the circumstances outlined above, that any assertion by him that he actually believed his actions were in the best interests of ERB would have been irrational. On this basis, we infer that he had no genuine belief to this effect (cf *Wayde v NSW Rugby League* (1985) 180 CLR 459 at 469-470).

Breach of duty to act with diligence or reasonable care and diligence

851. ASIC alleged that Mr Fiorentino failed to act diligently as required by section 130.1b) of the Compiled APES 110 and did not exercise his powers and discharge his duties with the degree of care and diligence required by s 180 of the Act.

852. Having made a finding that Mr Fiorentino failed to act in good faith in the best interests of ERB, it is not appropriate, in addition, to characterise his conduct as negligent: cf *Legal Profession Complaints Committee v Detata* [2012] WASCA 214 at [23].

853. However, if we are wrong in our finding that Mr Fiorentino failed to act in good faith in the best interests of ERB, we would have found that Mr Fiorentino failed to exercise appropriate diligence and the reasonable care and diligence required by s 180. It seems to us that if a finding of lack of good faith was not open (because Mr Fiorentino actually believed that his actions were in the best interests of ERB), this would indicate that he had failed to undertake an adequate investigation of the facts and circumstances, did not possess an adequate understanding of the proper role of a liquidator and/or failed to exercise reasonable care and diligence in deciding to take the action which he undertook. Mr Fiorentino's actions were significant, as they

undermined the interests of ERB and its creditors in a way which had the potential to have a serious impact upon the liquidation.

854. Accordingly, had we not found that Mr Fiorentino failed to act in good faith in the best interests of ERB, we would have found that Mr Fiorentino failed to exercise appropriate diligence or the reasonable care and diligence required by s 180.

Breach of duty to avoid conflict or breach of other fiduciary duty

855. ASIC alleged that Mr Fiorentino acted in direct conflict to the interests of ERB's creditors. ASIC alleged that this was in breach of clause 2.5 of the Code and s 220 of the Compiled APES 110.

856. We do not consider that it is necessary or appropriate to characterise Mr Fiorentino's conduct in this way. Mr Fiorentino's actions do not clearly involve conflict principles and we prefer to rest our finding on his failure to act in good faith in the interests of ERB.

857. As to clause 2.5 of the Code, the thrust of that clause is that the position occupied by liquidators, including their power and control of assets, and their position as "officers" of companies "combine to create a complex web of fiduciary responsibilities" and that liquidators "owe a fiduciary responsibility to the parties involved" in their appointments. Clause 2.5 is general and descriptive in nature and does not purport to articulate or define particular fiduciary obligations of liquidators.

858. As to section 220 of the Compiled APES 110, this is a lengthy section and ASIC invokes a specific element of the section in support of Contention 17. Section 220 covers matters such as taking reasonable steps to identify circumstances that could pose a conflict of interest, evaluating the significance of any threats, considering and applying safeguards to eliminate or reduce threats, taking all reasonable steps to manage conflicts and avoid adverse consequences, and not accepting, or resigning from, engagements in the case of conflict. We do not consider that these matters were directly applicable to the conduct complained of in the present case.

859. As to the general equitable principle concerning conflicts, there is no question that liquidators are fiduciaries vis-à-vis the company and owe fiduciary duties to the company, including the duty to avoid placing themselves in a position where their personal interests conflict with their duties and the duty not to pursue their personal interest where it conflicts with interests of the company: *Corporate Affairs Commission v Harvey* [1980] VR 669 at 695; *Re ACN 008 664 257 Pty Ltd (in liq)* (2004) 49 ACSR 443 at [35]; *Burns Philp Investment Pty Ltd v Dickens (No 2)* (1993) 31 NSWLR 280 at 283; *Re Krejci as liquidator of Eaton Electrical Services Pty Ltd* (2006) 58 ACSR 403 at [9]. In the context of a liquidation, the interests of the company embody, primarily, the interests of creditors: *Angus Law Services Pty Limited (in liq) v Carabelas* (supra) and see *Timbercorp Securities Limited v WA Chip & Pulp Co Pty Ltd* [2009] FCA 901 at [8].

860. Here, there was no suggestion that Mr Fiorentino had placed himself in a position where his *personal* interest conflicted with his duty to ERB or with ERB's interests; there was no suggestion that Mr Fiorentino preferred or pursued *his own* interests when they conflicted with the interests of ERB or its creditors. The allegation was that

by advocating the interests of a third party, BWI, he acted in a way which was in conflict with the interests of ERB or its creditors. In our view, it is not clear that such conduct amounts to a breach of the equitable conflict rules. We prefer to base our findings on lack of good faith. That finding involves a very similar issue to the one raised here: an allegation that Mr Fiorentino failed to act in good faith in the interests of ERB is not dissimilar to an allegation that Mr Fiorentino acted in conflict with the interests of ERB.

Finding on Contention 17

861. For the above reasons, we consider that Contention 17 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 17(e) is established.

Does Contention 17 establish, in itself, that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator?

862. On the basis of our finding in relation to Contention 17(e) alone, we consider that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator. Such a finding would ordinarily follow from a finding that a liquidator failed to act in good faith in the best interests of the company in relation to any substantial matter. The significant nature of Mr Fiorentino's actions certainly justify that finding in the present case. He undertook an active role in undermining the interests of ERB and its creditors and in assisting BWI, in way which had the potential to have a serious impact upon the liquidation.

(iv) Contention 18

863. Contention 18 involves an allegation concerning deficiencies in the 23 September 2008 report. In substance, it alleged that Mr Fiorentino failed to disclose material matters in the Report.

Matters upon which ASIC specifically relies in support of Contention 18

864. The matters upon which ASIC specifically relied in support of Contention 18 are as follows. Many of these matters are supported by the documentary evidence and admitted by Mr Fiorentino. We will deal with any exceptions. Except as specifically noted below, we find that the factual allegations contained in the following section are made out on the evidence.

865. On 21 August 2008, Mr Brian Noble of Clayton Utz, acting for Westfield, advised Mr Fiorentino that the lessors of the various Westfield centres agreed to an assignment of shop leases from ERB to BWI, on terms contained in an enclosed deed of covenant, and requested the liquidators of ERB to sign the deed.

866. The deed of covenant referred to in the preceding paragraph provided *inter alia*:

(a) the parties to the deed were named as BWI (as Assignee), Perpetual Trustee Company Ltd and Westfield Management Ltd as responsible entity of the Bondi Junction Trust (as Lessor), ERB (as Assignor) and Mr Hammoud and Ms Issa (as Guarantor and New Guarantor);

(b) the Lessor consented to the assignment of the Lease by ERB to BWI from the Assignment Date (which is not defined) – clause 8;

(c) ERB, subject to the Retail Leases Act, remained liable and was not released from any of its obligations under the Lease, in respect of any breach before and after the Assignment Date – clause 4; and

(d) ERB would pay to the Lessor, on or before the Assignment Date, the amount required to be paid pursuant to the Contribution Deed – clause 9.

867. In the circumstances, from about 21 August 2008, if not before, Mr Fiorentino knew that:

(a) Westfield was a creditor of ERB; and

(b) none of the leases had been assigned to BWI.

Mr Fiorentino denies sub-paragraph (a) but admitted sub-paragraph (b).

868. By email dated 10 September 2008, Mr J Hamilton advised Mr Fiorentino, *inter alia*, to hold a settlement meeting with BWI to try to settle ERB's claim.

869. On 16 September 2008, Messrs Fiorentino, Hammoud and Moini met to discuss the indemnity proceeds recoverable by ERB, at which time Mr Fiorentino:

(a) advised Mr Hammoud he needed a lawyer; and

(b) recommended Mr Pateman, whom Mr Hammoud then retained.

870. As a result of the meeting referred to in the preceding paragraph, Mr Fiorentino agreed:

(a) in return for payment by BWI of $80,351.89 to the liquidators, BWI be given a period of 3 months to develop a proposal - namely a Deed of Company Arrangement (“DOCA”) - which would result in a more favourable outcome to creditors in the Liquidators' opinion than in the winding up the company; and

(b) for the duration of the 3 month period, the liquidators would not take any action against BWI or Mr Hammoud.

871. By email dated 18 September 2008, Mr Fiorentino (via Effie) advised Mr J Hamilton to speak to Mr Pateman as his clients were no longer going to make the payment referred to in sub-paragraph (a) of the preceding paragraph, nor propose a DOCA.

872. By email dated 18 September 2008, Mr J Hamilton advised Mr Fiorentino:

(a) that ERB was legally obliged to assign the leases under the sale contract which should have occurred at completion of the Business Sale Agreement;

(b) to advise Clayton Utz that "*ERB sold all its assets to BWI, apparently under a written agreement dated 28 February 2008*"; and

(c) that a disclaimer of the leases would put ERB in breach of the Business Sale Agreement and might create a set off to ERB's claim for indemnity from BWI given the obligation to assign was pre-liquidation.

Mr Fiorentino denied sub-paragraph (c), but we find that Mr J Hamilton's email of 18 September 2008 stated, in substance, what is set out in sub-paragraph (c).

873. On 19 September 2008, and further to Mr Fiorentino's instructions, Mr J Hamilton advised Mr Slinger of Clayton Utz, *inter alia*, that:

(a) the leases appeared to be of no practical value to ERB;

(b) ERB could disclaim the leases which would crystallise Westfield's claim as a creditor; but

(c) commercially, it appeared to be in ERB's interests to assign the leases to BWI provided ERB would not be committing itself to provable claims for future breaches by BWI;

(d) the liquidator required the deletion of certain clauses in the Deed of Covenant (of 21 August 2008) to ensure that ERB was not liable for future breaches; and

(e) the liquidator required the addition of a clause in the Deed by which BWI indemnified ERB for any lease obligations arising post 28 February 2008 and up to the assignment date.

874. On 23 September 2008, Mr Fiorentino sent the 23 September 2008 Notice and Report to creditors advising of a meeting of creditors to be held on 8 October 2008.

875. In the 23 September 2008 Report Mr Fiorentino advised creditors, *inter alia*:

(a) between 2 April 2008 and 21 September 2008, he had realised $95,517.86 from debtor realisations and refunds;

(b) he estimated receipt of a further $1,871,897.69 in funds; and

(c) he estimated valuation fees to be in the order of $5,000.

Mr Fiorentino admits this allegation, but states that the figure of $5,000 was a typographical error for $50,000.

876. ASIC alleged that in the 23 September 2008 Report, Mr Fiorentino:

(a) incorrectly reported that he did not have the funds available to engage a valuer to undertake a valuation of the business;

(b) failed to adequately disclose the following relevant and material information to creditors:

(i) the Business Sale Agreement was executed on or about 28 March 2008 but had been backdated to 28 February 2008;

(ii) the substance of the 24 April 2008 Legal Advice, including:

1. the remedies available to the liquidators in relation to the suspected Uncommercial Transaction, including the option of setting aside the Business Sale Agreement; and

2. the actions he had been advised to take to properly investigate the suspected Uncommercial Transaction, including obtaining a market valuation at the time of sale to assess the fairness of the consideration paid by BWI for the business; and

(iii) whether he intended upon receipt of further funds to obtain a market valuation of ERB; and

(c) failed to disclose the following relevant and material information to creditors:

(i) he had advised the OSR that BWI did not have to pay the OSR liability which was transferred from ERB to BWI pursuant to the Business Sale Agreement;

(ii) the findings of Deloittes' wage audit;

(iii) various shop leases had not been assigned from ERB to BWI pursuant to the Business Sale Agreement;

(iv) Westfield was a creditor of ERB; and

(v) the outcome of settlement discussions he had conducted with BWI and Hammoud in relation to ERB's indemnity claim.

Mr Fiorentino denies the allegations in this paragraph.

Issue for determination - Contention 18

877. The issue for determination is whether, in the conduct of his liquidation of ERB, Mr Fiorentino incorrectly reported and/or failed to disclose and/or failed adequately to disclose relevant and material information to creditors in the 23 September 2008 Report, in the manner particularised above. ASIC alleges that Mr Fiorentino thereby:

(a) acted in breach of Clause 13.4 of the Code; and/or;

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(d) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

878. The allegations in Contention 18 were not elaborated in submissions and the gravamen of the complaint is elusive. In substance, it is said that a variety of matters ought to have been disclosed, but it not clear why. The reference to section 130.1b), s 180 and

s 181(1)(a) does not assist because these are simply general obligations to exercise care and diligence and act in good faith. The reference to Clause 13.4 of the Code appears misdirected as this clause deals with disclosure in relation to remuneration.

879. The meeting convened for 8 October 2008 was a meeting convened under Part 5.5 of the Act. The meeting was a meeting of the creditors for the purpose of ascertaining their wishes under s 479, (see s 506) and for the purposes of passing a resolution fixing the liquidators' remuneration under s 499.

880. The Act and Regulations do not prescribe any form of Report in the case of a meeting of creditors convened for the purposes of ascertaining their wishes. However, in the case of a meeting convened for the purposes of fixing remuneration, s 499(7) provides:

> "(7) Before remuneration is fixed under subsection (3) by resolution of the creditors, the liquidator must:
>
> (a) prepare a report setting out:
>
> (i) such matters as will enable the creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and
>
> (ii) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and
>
> (iii) the costs associated with each of those major tasks; and
>
> (b) give a copy of the report to each of the creditors at the same time as the creditor is notified of the relevant meeting."

881. Thus, the adequacy of the Report, insofar as it addressed issues of remuneration, is substantially affected by the requirements of s 499(7). However, we note that Contention 18 does not allege a failure to disclose information relevant to remuneration. This is specifically dealt with in Contention 20.

882. We do not consider that it is appropriate for us to engage in any critical analysis of the Report beyond what is set out in the SOFAC. Accordingly, we consider each matter as follows:

(a) Mr Fiorentino incorrectly reported that he did not have the funds available to engage a valuer to undertake a valuation of the business.

This allegation appears to proceed on the assumption that Mr Fiorentino had already realised $95,517.86 from debtor realisations and refunds, estimated receipt of a further $1,871,897.69 in funds and estimated valuation fees to be in the order of $5,000. However, Mr Fiorentino asserted, albeit only in his Response, that this was a typographical error for $50,000. This sounds expensive for a valuation of the assets of the business but $5,000 sounds a little cheap, considering the nature of the business. Ultimately, we are not really in a position to know whether Mr Fiorentino had funds available to carry out a valuation, and do not consider that this allegation is material in the scheme of things. We consider that far more substantial criticisms can be made of Mr Fiorentino in relation to his investigation of the Business Sale Agreement and his

communications with creditors and we refer to our findings in relation Contentions 8 and 9 above.

(b) Mr Fiorentino failed to adequately disclose to creditors that the Business Sale Agreement was executed on or about 28 March 2008 but had been backdated to 28 February 2008.

We do not consider that this was a major issue in the scheme of things. We repeat our observations in (a) above concerning the more substantial criticisms which can be made of Mr Fiorentino.

(c) Mr Fiorentino failed to adequately disclose that the 24 April 2008 Legal Advice advised on the remedies available to the liquidators in relation to the suspected Uncommercial Transaction, including the option of setting aside the Business Sale Agreement and the actions he had been advised to take to properly investigate the suspected Uncommercial Transaction, including obtaining a market valuation at the time of sale to assess the fairness of the consideration paid by BWI for the business.

In the Report, Mr Fiorentino referred to having received legal advice and identified some of these issues including the possibility of setting aside the agreement, that this would depend in part on whether a fair value was ascribed to the assets transferred and that he did not have funds to undertake a valuation. We do not regard any omissions in relation to these specific complaints as truly material. We have dealt with the broader and more substantial criticisms which can be made of Mr Fiorentino in relation to this Report in Contention 9 above.

(d) Mr Fiorentino failed to adequately disclose whether he intended upon receipt of further funds to obtain a market valuation of ERB.

We do not consider that this was a major issue in the scheme of things. We repeat our observations in (c) above concerning the more substantial criticisms which can be made of Mr Fiorentino in relation to this Report.

(e) Mr Fiorentino failed to disclose that he had advised the OSR that BWI did not have to pay the OSR liability which was transferred from ERB to BWI pursuant to the Business Sale Agreement.

We consider that this allegation is correct but misdirected. We have found that Contention 17 (Mr Fiorentino's attempts to undermine the OSR's claim against BWI) has been made out. We have found that he did not act in good faith in the best interests of ERB in this regard. We doubt whether his failure to report this matter amounts to a further ground for complaint.

(f) Mr Fiorentino failed to disclose the findings of Deloittes' wage audit.

We agree but do not consider that this was a major issue in the scheme of things.

(g) Mr Fiorentino failed to disclose that the various shop leases had not been assigned from ERB to BWI pursuant to the Business Sale Agreement and that Westfield was a creditor of ERB.

We accept that the fact that the leases had not been formally assigned and that Westfield was at least a contingent creditor were matters of some significance, but as with other allegations in this Contention, the real problem was Mr Fiorentino's failure to recognise Westfield as a creditor and provide Westfield with notice of the meeting.

We have dealt with this complaint in Contentions 1 and 2. Had he done so, creditors would have been aware of this matter. We do not consider that the allegation demonstrates an additional deficiency in Mr Fiorentino's performance of his duties.

(h) Mr Fiorentino failed to disclose the outcome of settlement discussions he had conducted with BWI and Hammoud in relation to ERB's indemnity claim.

We agree with this assertion and agree that this was an important matter which ought to have been disclosed. However, we have dealt with this as part of the broader and more substantial complaint in Contention 9.

883. In all the circumstances, only limited aspects of the allegations in Contention 18 are made out.

884. We have some difficulty with Contention 18, as it lacks focus. It relies upon a variety of disparate criticisms which are not tied together to establish some ultimate complaint, for example, a complaint that the creditors were not properly informed about matters relevant to the resolutions to be considered by the meeting. A more focussed complaint is set out in Contention 9.

885. The fact that a report to creditors does not disclose particular information is not, *per se*, a breach of duty or a reason to find that a liquidator has failed to carry out or perform adequately and properly the duties of a liquidator. We believe that it is important, in allegations of this type, to identify why the non-disclosure is said to be a matter of significance which can justify such findings. No allegation is made in Contention 18 as to the particular purpose of the report and/or why the achievement of that purpose was hampered by the alleged deficiencies. It is inappropriate for us to attempt to articulate such a case, particularly where the matter has proceeded in the absence of Mr Fiorentino.

Finding on Contention 18

886. Whilst the form of the 23 September 2008 Report is far from satisfactory, in all the circumstances, we consider that Contention 18, as particularised, is not established. Further, we do not consider that the various omissions set out in Contention 18 justify a conclusion that Mr Fiorentino failed to carry out or perform adequately and properly the duties of a liquidator. As is apparent from our discussion above, the main reasons for these findings are that the criticisms do not clearly fit together to establish an ultimate complaint about the Report and, insofar as particular elements of the Contention are made out, these are more appropriately dealt with under other Contentions.

887. For the above reasons, we consider that Contention 18 is not established.

(v) Contention 19

888. Contention 19, again, relates to the 23 September 2008 Report to Creditors. ASIC alleged that the Report was not clear, concise and succinct, and contained excessive and irrelevant information.

889. ASIC alleged that in providing such a report, Mr Fiorentino

(a) acted contrary to Clauses 8.1, 8.2 and 13.4 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

890. Mr Fiorentino generally denied the allegations in Contention 19, although he admitted that the heading "*The Australian Laser Clinic Pty Limited (in liquidation)*" was included and stated that this was a typographical error. He also admitted that the RATA had been included twice.

Issue for determination - Contention 19

891. We refer to each of the matters upon which ASIC relied below:

(a) *Unclear and confusing information: an estimate of funds available for distribution of $1,924,848.45 without clearly explaining the contingencies on which the estimate was based.*

Whilst criticisms can be made of the clarity of the report, we consider that there was a reasonable explanation of the contingencies upon which the estimate was based, and we rely upon the following matters:

- At page 5, Mr Fiorentino set out his estimated realisable value of assets available of $1,924,848.45. That was said to be made up of Sundry Debtors of $688,354.52, Claim against purchaser under Business Sale Agreement of $964,246.45 and recovery of preferences of $270,000.00.

- On page 6, Mr Fiorentino dealt with Sundry debtors of $688,354.52, made up of five items (Trade Debtors of $53,902.54, ATO $210,452.11, GuildSuper of $180,000.00 BWI of $146,693.14 and Mr Hammoud and Ms Issa of $97,306.53). The contingencies affecting each of these was discussed on the following pages (Trade Debtors at p 7, ATO at page 10, GuildSuper at page 8, BWI at page 8 and Mr Hammoud and Ms Issa at page 10).

- On pages 8-9, Mr Fiorentino refers to the claim against the purchaser under the Business Sale Agreement, including the contingencies affecting that claim, particularly at the top of page 9.

- On pages 21-22, Mr Fiorentino refers to the recovery of preferences of $270,000.00, indicating that it was very recently identified and indicating that he intended to make demand once all the supporting documentation had been received.

- On page 22-23, Mr Fiorentino again refers to the various items in connection with the need for public examinations.

(b) *Unclear and confusing information: an estimated dividend to creditors of 75 cents in the dollar without clearly explaining the variables on which the estimate was based*.

The estimate is set out on pages 11-12. The estimate is based upon estimated realisable value of assets available of $1,924,848.45, but that is expressly stated to be based upon the matters raised by Mr Fiorentino in paragraph 3 (i.e. including the uncertainties and contingencies discussed above). Subject to that, the dividend of 75 cents appears to be a matter of mathematics, ie, $1,924,848.45 less costs of the winding up of $468,331.85, leaving $1,499,083.70, out of which priority debts to employees of $500,000 would be paid, resulting in 75 cents in the dollar for other unsecured creditors.

(c) *Unclear and confusing information: a statement that there were no offences which required reporting to ASIC yet the Report subsequently referred to offences committed by the Directors which were reportable to ASIC*.

We agree that Mr Fiorentino stated on page 14 that he was unaware of any offences under the Act and yet, on page 15 stated that there was an offence under s 286(2) of the Act;

(d) *Unclear and confusing information: a document with the heading "The Australian Laser Clinic Pty Limited (in liquidation)" which appeared to relate to another matter*.

This appears to be a typographical error and it was not suggested that it was actively misleading.

(e) *Duplication of information as follows: accounting information that was deemed unreliable by Mr Fiorentino - reported excessively within the body of the Report and also attached as an annexure*.

The reference to this material in the body of the report involved analysis. It could have been dealt with in a more contained manner.

(f) *Duplication of information as follows: the RATA was attached to the 23 September 2008 Notice, set out in full twice in the body of the Report and was also attached as an annexure.*

It may not have been necessary to reproduce the RATA twice, but the first occasion is the unadorned RATA and the second occasion is the RATA with additional columns and commentary.

(g) *Irrelevant information as follows (i) a 10 page detailed listing of books and records (ii) copies of company tax returns; and (iii) detailed accounting records*.

We agree that this material was unnecessary.

892. In our view, whilst the Report was too long, had too many bulky annexures, could have been much better and more clearly expressed, we do not accept Contention 19 as

a whole. We do not agree with some of the main criticisms. Others are not matters of substance.

893. We do not consider clause 13.4 relevant to the complaints alleged. We do not consider that the deficiencies in the report justify a finding that Mr Fiorentino failed to act with the diligence required by section 130.1b) of the Compiled APES 110 or acted in breach of section 180 of the Act.

Finding on Contention 19

894. For the above reasons we consider that Contention 19 is not established.

(vi) Contention 20

895. In Contention 20, ASIC alleged that in the 23 September 2008 Report, Mr Fiorentino advised creditors that the liquidators were seeking approval of:

(a) $198,561.91 (excluding GST) in remuneration for the period 2 April 2008 to 21 September 2008; and

(b) a sum of $100,000 without further approval of creditors,

but failed to:

(i) provide sufficient, concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of his remuneration;

(ii) provide an adequate description for the major tasks he had performed, or he was likely to perform; and

(iii) set out the costs associated with each of those major tasks.

896. ASIC alleged that by failing to set out these three matters, in circumstances where he was seeking creditor approval for both retrospective and prospective remuneration, Mr Fiorentino:

(a) acted in breach of Clause 20.2 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of s 499(7)(a) of the Act; and/or

(d) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

897. Mr Fiorentino denied the allegation, in general terms.

898. In our view, the starting point in a consideration of this issue is s 499(7)(a) of the Act. We have already set out that subsection above. In short, it requires that prior to the

fixing of remuneration by resolution of creditors, the liquidator must prepare a report (and provide it to creditors) setting out

(a) such matters as will enable the creditors to make an informed assessment as to whether the proposed remuneration is reasonable; and

(b) a summary description of the major tasks performed, or likely to be performed, by the liquidator; and

(c) the costs associated with each of those major tasks.

899. The sub-section sets out three requirements, although these may overlap. In our view, the most important requirement is that in sub-para (a): the report must contain such matter *as will enable* creditors (who may be laypeople) to *make an informed assessment* as to whether the proposed remuneration is *reasonable*. That requirement, read together with the requirements in sub-paras (b) and (c), means the report must provide material and meaningful information in a digestible and comprehensible form, to enable creditors to assess reasonableness. The liquidator must exercise discrimination in presenting the information.

900. In the present case, there was no separate "report" as such. The issue was dealt with in Sections 16 and 17 of the 23 September 2008 Report.

901. In our view, sections 16 and 17 of the 23 September 2008 Report did not satisfy the requirements of s 499(7)(a). These sections consisted of the following:

(a) A statement that the remuneration for which approval was sought had been calculated on a time based costing using the hourly rates charged by Hamiltons, a schedule of which was attached;

(b) A table which is extremely cryptic in the following form:

"Page	Task	Hours	Charge
1	Assets	1.90	863.69
1	Assets – Realisation	107.20	48,727.89
2	Attendances	36.00	14,825.14 etc …."

(c) A further table simply listing employees with their hours and total dollar charge;

(d) A reference to a 45 page annexure being a MYOB schedule of time spent by employees on specific matters;

(e) A list purporting to set out the major tasks performed in the liquidation to date and the breakdown of the remuneration for each of them. In fact:

(i) Although the list contains a column heading entitled "Remuneration", there is no breakdown of remuneration set out under that column.

(ii) As to the list of tasks, there are 21 matters set out, many of which are generic descriptions (e.g. "attendances on directors, creditors and others", "drawing documents", "letters and emails" etc).

(f) A list of the tasks yet to be undertaken;

(g) An explanation of how disbursements are charged and a cryptic table listing a description of disbursements and costs per unit.

902. In our view, the 23 September 2008 Report would not enable creditors to make an informed assessment about whether the proposed remuneration was reasonable. The Report consisted largely of raw and cryptic detail. Further, the Report did not contain a "summary description" of the "major tasks performed" and the "costs associated with each of those major tasks". As indicated, despite the fact that the report purported to do so, there was no indication at all of the costs associated with any major tasks. Moreover, the "major tasks" referred to were matters such as "drawing documents" and "letters and emails". This is not the type of "major task" to which s 499(7) is directed.

903. In our view, the 23 September 2008 Report did not comply with s 499(7)(a) of the Act.

904. As indicated above, ASIC also asserted that in failing to:

(a) provide sufficient, concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of his remuneration;

(b) provide an adequate description for the major tasks he had performed, or he was likely to perform; and

(c) set out the costs associated with each of those major tasks

Mr Fiorentino acted in breach of clause 20.2 of the Code.

905. The three requirements referred to are requirements of s 499(7) of the Act, rather than Clause 20.2 of the Code. Clause 20.2 of the Code sets out the form of a "Recommended Report" but there was no allegation that Mr Fiorentino failed to comply with that form (except to the extent that that form embraces the three requirements already dealt with). In the circumstances, we do not consider that this allegation adds anything to the failure to comply with s 499(7).

906. ASIC also alleged that the failure to satisfy the three requirements constituted a lack of diligence contrary to s 180 and a failure to exercise powers and discharge duties with the degree of care and diligence required by s 180 of the Act. Again, we consider that the three requirements are specific requirements of s 499(7) and a failure to satisfy those requirements is properly dealt with by our finding in relation to that section, rather than seeking to characterise that failure by reference to lack of diligence or negligence.

Finding on Contention 20

907. For the above reasons we consider that Contention 20 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 20(iii) is established.

(vii) Contention 21

908. Contention 21 alleged that Mr Fiorentino failed adequately to account to creditors in the 30 April 2009 Report regarding his acts and dealings and the conduct of the winding up of ERB.

Matters upon which ASIC specifically relies in support of Contention 21

909. The matters upon which ASIC specifically relies in support of Contention 21 are set out in the following paragraphs. The primary factual allegations are admitted and we find these are made out.

910. On 14 January 2009, ERB, Mr Fiorentino and Hamilton as Liquidators of ERB, Hammoud, Issa and BWI as Trustee for the Shanel Family Trust entered into the Deed of Settlement and Release pursuant to which *inter alia*:

(a) BWI, Hammoud and Issa paid $60,000 to ERB; and

(b) each of ERB and the liquidators on the one hand and BWI, Hammoud and Issa on the other hand mutually released the other from all suits, actions and demands relating to the Business Sale Agreement and the affairs of ERB.

911. On 30 April 2009, Mr Fiorentino sent the 30 April 2009 Notice and Report to creditors advising of a meeting of creditors to be held on 15 May 2009 for the purpose of considering the attached Report of the Liquidators and to, *inter alia*:

(a) inform creditors of continuing investigations being undertaken by the liquidators into the affairs of ERB which encompassed, among other matters, whether the employees of ERB taken over by BWI were owed any entitlements by ERB and whether ERB had lease liabilities;

(b) if thought fit resolve to fix the remuneration of the liquidators in the sum of $183,943.00 excluding GST for the period 8 October 2008 to 29 April 2009; and

(c) if thought fit resolve that the remuneration of the liquidators be fixed on a time basis based upon Hamiltons Scale of Fees to be paid as and when incurred at the discretion of the liquidators in the first instance not to exceed the sum of $100,000.00 without further approval by a meeting of creditors.

912. In the 30 April 2009 Report, Mr Fiorentino advised creditors, *inter alia:*

(a) between 2 April 2008 and 29 April 2009, he had realised $511,371.60 from debtor realisations and refunds;

(b) the liquidators had incurred $401,940.62 in remuneration (excluding GST) and had been paid $317,975.80 (excluding GST);

(c) ERB had paid $64,971.50 in legal fees;

(d) since at least 1 July 2001, there had been repeated systemic failure by ERB to pay its true workers compensation and payroll tax (OSR) liabilities; and

(e) there had been systemic non reporting of the true financial position of ERB.

913. ASIC alleged that in the 30 April 2009 Report Mr Fiorentino failed to adequately account to creditors regarding his acts and dealings and the conduct of the winding up of ERB, including *inter alia*:

(a) why the estimated return to creditors had reduced from 74.94 cents in the dollar as at 21 September 2008, to 14.2 cents in the dollar;

(b) what investigations the liquidators had undertaken since 23 September 2008 that had resulted in them forming the view that "*BWI did not pay sufficient consideration to ERB for the transfer of ERB's business pursuant to the Business Sale Agreement*"; and

(c) in relation to the Deed of Settlement and Release, why the liquidators had not:

(i) informed creditors of their intention to enter into it;

(ii) sought creditor or court approval prior to entering into it; and

(iii) provided creditors with any details regarding the basis upon which they had formed the view that *"the financial position of the Directors of the Company was not of substance*"; and

(d) further, how the Deed of Settlement and Release affected ERB's claims against:

(i) the Directors of $97,306.53;

(ii) BWI of $146,693.14; and

(iii) BWI of $4,719,862.77 (Right of Indemnity) less $50,000 received from BWI on 8 April 2008.

Mr Fiorentino denies these allegations.

Issue for determination - Contention 21

914. The issue for determination is whether by failing to account to creditors in the 30 April 2009 Report regarding his acts and dealings and the conduct of the winding up of ERB, in the manner alleged by ASIC, Mr Fiorentino:

(a) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(b) acted in breach of s 508(2) of the Act; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(d) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

915. In our view, the starting point for a consideration of this issue is s 508(2) of the Act. That section provides:

"Section 508(1) & (2) (Annual obligations of liquidator--meeting or report)

(1) If the winding up continues for more than 1 year, the liquidator must:

(a) in the case of a members' voluntary winding up-convene a general meeting of the company; or

(b) in the case of a creditors' voluntary winding up:

(i) convene a meeting of the creditors; or

(ii) prepare a report that complies with subsection (3), and lodge a copy of the report with ASIC;

within 3 months after the end of the first year beginning on the day on which the company resolved that it be wound up voluntarily and the end of each succeeding year.

(2) The liquidator must lay before a meeting convened under paragraph (1)(a) or subparagraph (1)(b)(i) an account of:

(a) the liquidator's acts and dealings; and

(b) the conduct of the winding up;

during that first year or that succeeding year, as the case may be.

916. ERB was placed into liquidation on 2 April 2008. Accordingly, a meeting pursuant to s 508 was required before the end of June 2008. By his notice dated 30 April 2009, Mr Fiorentino convened a meeting for 15 May 2009. He was required to "lay before that meeting an account of his or her acts and dealings and of the conduct of the winding up during that first year".

917. The purpose of the section was discussed by Barrett J (as he then was) in *Re Love* (2003) 44 ACSR 367 at 370, where his honour said:

"The purpose and operation of s 508

[10] The object of each annual meeting required by s 508 (that is, the meeting of members and the meeting of creditors) is stated in the section itself. It is that the liquidator should "lay before" the meeting

"an account of his or her acts and dealings and of the conduct of the winding up during" the particular year. …

[11] Implicit in any provision that a report or accounts or any other document be "laid before" a meeting by a particular person are three clear expectations: first, that the person concerned will be in attendance at the meeting; second, that the document in question will be then and there in the possession of those present at the meeting or, at least, readily available to those of them who wish to have it; and third, that the content of the document and matters arising from it may be discussed by those present in the hearing of the person who has laid it before the meeting. Part of that process of discussion may be an opportunity for those present to direct questions to the person concerned, although probably without any implied obligation upon that person to answer any such questions. …

…

[13] Unless and until other means are adopted by statute, those involved in the administration of companies must recognise and respect the need to afford to members or creditors (or both) the opportunity for informed consultation intended to be secured by provisions requiring that meetings be held and that particular documents be laid before those meetings. Such an opportunity is something to which all relevant members or creditors have a statutory right. The right exists in support of their common interest in responsible administration. And, where a particular officer or official is required to lay before the meeting an account of his or her administration, the meeting serves as a medium for communication both by and to the officer or official and a means by which accountability is enhanced."

918. His Honour's view as to the purpose of s 508 informs the requirements for the report (or account) required by the section. It is a report aimed at facilitating informed consultation of creditors and accountability of the liquidator for his or her acts and the conduct of the liquidation. It is implicit within s 508 that the report to be laid before creditors will provide the information necessary to facilitate such consultation and accountability.

919. Do the matters upon which ASIC rely establish a failure to comply with s 508(2)? We note that ASIC relied upon those matters "inter alia". However, ASIC did not point to any additional matters, and it is inappropriate for us to go beyond the particulars in the SOFAC. We shall consider each of the matters in turn:

(a) *Failure adequately to account in relation to why the estimated return to creditors had reduced from 74.94 cents in the dollar as at 21 September 2008, to 14.2 cents in the dollar*;

We consider that the Report failed to provide an adequate account about this matter, and that it was an important matter to deal with in the context of an account by the liquidator as to the conduct of the liquidation. We note that the content of the Report may be summarised as follows:

- Section 1. Updated report on the company's insolvency (11 pages). This was a verbose discussion of the law of insolvency and the

company's financial position from 2001 to 2008, including reference to 18 Tables and 9 Graphs (most of which were said to be in the course of preparation) dealing with a wide variety of historical and reconstructed financial information. The point of the discussion is not articulated nor it any clear conclusion stated;

- Section 2. The Claim against BWI and the Deed of Settlement (4 pages). This set out a discussion concerning the compromise with BWI (discussed in more detail below).

- Section 3. Investigations whether the employees, leasing and trade creditors taken over by BWI remain creditors of ERB (1 page). This referred to the liquidator's ongoing investigations about whether the employees and other creditors of ERB (prior to the Business Sale Agreement) remained creditors of ERB. (We note that this suggests that Mr Fiorentino had apparently considered it appropriate to give up all claims against BWI in January 2009, without knowing the extent to which BWI had taken over ERB's creditors).

- Section 4. Assignment of Leases (two paragraphs). This referred to the liquidator attending to assignment of leases, the aim of which was to "significantly reduce the liability of the Company to Westfield as landlord". (We note, again, that this suggests that Mr Fiorentino had apparently considered it appropriate to give up all claims against BWI in January 2009, without having finalised this issue).

- Section 5. Counsel advice re status of former employees (two paragraphs). This noted that the liquidator was seeking advice about the ERB's liability to past employees of ERB.

- Section 6. The extent to which GBS and GIO are creditors of the ERB for unpaid workers compensation insurance (half page).

- Section 7. Claim against GuildSuper (1 page). This referred to a settlement with GuildSuper whereby the liquidator had received $73,225.00 from that company and a potential additional claim for $53,716 plus interest.

- Section 8. Claim against the OSR (1 page). This referred to dealings between the liquidator and the OSR seeking recovery from the OSR of $330,863 as a preference.

- Section 9. Liquidators Remuneration (4 pages). This purported to be a report in relation to remuneration in support of the resolution for fixing of the liquidators remuneration.

- Section 10. Disbursements (1 page).

The report cannot properly be described as an account of the liquidators' acts and dealings and of the conduct of the winding up during that first year and, in particular, there is no clear summary of the key events in the winding up or the

real problems and achievements in the conduct of the winding up. The report should have summarized the important matters in the history of the winding-up from commencement. If the report was to provide information to creditors to facilitate accountability, it should have presented an outline of the position at the start of the winding up, how this had changed, what had been achieved and how much it had cost. In this case, such a report would have revealed the matters referred to in paragraph (a) above.

There was no adequate account of estimated returns to creditors and how these had come about.

The Summary of Receipts and Payments attached to the Notice of meeting showed that $511,000 had been received in the liquidation ($163,902 from the directors and BWI, $73,225 from GuildSuper and $217,543 as a tax refund) and that $448,883 had been paid out (substantially $382,086 in liquidator's remuneration and $64,971 in legal fees) resulting in cash at bank of $62,487.

It showed estimated future receipts of $365,462, made up substantially of the preference claim against the OSR. It also showed estimated future liquidators remuneration of $218,861 and estimated future legal fees of $40,700. The balance of about $120,000 was estimated to provide a 14.26 cents in the dollar dividend to the admitted creditors totalling $834,963.00.

No doubt a creditor, armed with the 23 September 2008 Report might have been able to speculate that the reduction in the proposed dividend was due to the compromise with BWI. But that matter was nowhere adequately explained in the Report.

(b) *Failure adequately to account in relation to what investigations the liquidators had undertaken since 23 September 2008 that had resulted in them forming the view that "BWI did not pay sufficient consideration to ERB for the transfer of ERB's business pursuant to the Business Sale Agreement"*;

We consider that the Report failed to provide an adequate account about this matter. It is a matter which ought to have been dealt with in connection with a proper analysis of the considerations affecting the decision to enter into the compromise.

(c) *Failure adequately to account in relation to the Deed of Settlement and Release, why the liquidators had not (i) informed creditors of their intention to enter into it; (ii) sought creditor or court approval prior to entering into it; and (iii) provided creditors with any details regarding the basis upon which they had formed the view that "the financial position of the Directors of the Company was not of substance*".

We consider that the Report failed to provide an adequate account about these matters. They were matters which ought to have been dealt with to facilitate informed consultation and accountability with regard to the decision to enter into the compromise.

(d) *Failure adequately to account in relation to how the Deed of Settlement and Release affected ERB's claims against (i) the Directors of $97,306.53 (ii) BWI of $146,693.14; and (iii) BWI of $4,719,862.77 less $50,000 received from BWI on 8 April 2008.*

We consider that the Report made it clear that the Deed of Settlement had the effect that all claims against BWI and the directors had been released in consideration of the payment of the sum of $60,000, resulting in a total payment of $163,902 from BWI and the directors.

920. Accordingly, we consider that Mr Fiorentino failed to account to creditors in the 30 April 2009 Report regarding his acts and dealings and the conduct of the winding up of ERB in the manner required by s 508(2).

921. We consider that Mr Fiorentino's conduct is appropriately characterised as lacking in diligence as required by section 130.1b) of the Compiled APES 110 and lacking the reasonable care and diligence required by s 180 of the Act.

Finding on Contention 21

922. We consider that Contention 21 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 21(a) to (c) are established.

(viii) Contention 22

923. Contention 22 alleged that the 30 April 2009 Report was not clear, concise and succinct and contained excessive and irrelevant information including.

Matters upon which ASIC specifically relies in support of Contention 22

924. ASIC alleged that the 30 April 2009 Report:

(a) was not clear, concise and succinct and contained excessive and irrelevant information including:

(i) extensive references to case law and statutes regarding the law of insolvency without providing any clarification of their significance in the liquidation of ERB; and

(ii) references to 15 Tables and 9 Graphs which:

1. were not included in the 30 April 2009 Report;

2. were described as "*presently being finalised*" or "*presently being prepared*";

3. added no meaning or clarification; and

4. if completed, were never provided to the creditors.

925. ASIC alleged that by providing the 30 April 2009 Report to Creditors which was not clear, concise or succinct, and contained excessive and irrelevant information, Mr Fiorentino:

(a) acted contrary to Clauses 8.1, 8.2 and 13.4 of the Code; and/or

(b) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(c) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

926. Whilst ASIC used the word "including" when referring to the particulars in sub-paragraphs (a)(i) and (ii) above, it is inappropriate for us to go beyond those particulars.

927. In our view, the Report did not meet the standards which are prescribed in clauses 8.1 and 8.2 of the Code. The discussion of insolvency was completely inappropriate, both in terms of its nature and extent. The reference to numerous tables and graphs, most of which were said to be being finalised was also inappropriate. The entire section was confusing and apparently pointless. Being the first section of the report and excessively long, it might very well have caused creditors to switch off, without reading any other part of the report.

928. We do not consider clause 13.4 relevant to the complaints alleged.

929. In our view, the report was not prepared with the diligence required by section 130.1b) of the Compiled APES 110 or the care and diligence required by s 180 of the Act.

Finding on Contention 22

930. We consider that Contention 22 is established, although we do not consider clause 13.4 of the Code as relevant.

(ix) Contention 23

931. Contention 23 alleged that the 30 April 2009 Report was an insufficient report for the purposes of seeking creditor approval of Mr Fiorentino's remuneration.

Matters upon which ASIC specifically relies in support of Contention 23

932. ASIC alleged that in the 30 April 2009 Report, Mr Fiorentino advised creditors the liquidators were seeking approval of:

(a) $183,943.00 excluding GST in remuneration for the period 8 October 2008 to 29 April 2009; and

(b) a sum of $100,000 without further approval of creditors.

but failed to:

(i) provide dedicated commentary setting out specific reasons for the variance between Mr Fiorentino's initial prospective remuneration and the subsequent increase in the remuneration, both incurred and prospective;

(ii) provide sufficient concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of his remuneration;

(iii) provide an adequate description for the major tasks he had performed, or he was likely to perform; and

(iv) set out the costs associated with each of those major tasks.

Issue for determination - Contention 23

933. The issue for determination in Contention 23 is whether Mr Fiorentino failed, in the 30 April 2009 Report, to set out:

(a) sufficient, concise and meaningful information to enable creditors to make an informed assessment of the reasonableness of his remuneration;

(b) an adequate description for the major tasks he had performed, or he was likely to perform; and

(c) the costs associated with each of those major tasks,

and, in circumstances where he was seeking creditor approval for both retrospective and prospective remuneration, Mr Fiorentino thereby:

(i) acted in breach of Clause 20.2 of the Code; and/or

(ii) failed to act diligently as required by section 130.1b) of the Compiled APES 110; and/or

(iii) acted in breach of s 499(7)(a) of the Act; and/or

(iv) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section.

934. As with the 23 September 2008 report, the 30 April 2009 report contains sections dealing with Remuneration and Disbursements. The 30 April 2009 Report is in a very similar form to the earlier report and, for the reasons set out in relation to that report (see Contention 20 above) we find that the 30 April 2009 Report would not enable creditors to make an informed assessment about whether the proposed remuneration was reasonable. In our view, the 30 April 2009 Report did not comply with s 499(7)(a) of the Act.

935. We also repeat our conclusions in relation to Clause 20.2 of the Code, section 130.1b) of the Compiled APES 110 and s 180 of the Act as we did in relation to the 23 September 2008 report.

Finding on Contention 23

936. We consider that Contention 23 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 23(iii) is established.

(x) Contention 24 – not pressed

937. Contention 24 was not pressed.

(xi) Contention 25

938. Contention 25 relates to an alleged failure to lodge a section 533 Report.

Matters upon which ASIC specifically relies in support of Contention 25

939. ASIC relies upon the following matters in support of Contention 25.

940. On 22 September 2010, ASIC advised Mr Fiorentino of various concerns it had identified pursuant to a Remuneration Review ASIC had conducted in mid 2010 of ERB, including that Mr Fiorentino may have breached section 533 of the Act.

941. On 9 March 2011, Mr Fiorentino attempted to lodge a section 533 Report with ASIC, in which he reported suspected criminal and civil, breaches by the Directors, including:

(a) ss 180, 181, 182 and 183 of the Act:

(b) s 590(1)(c)(ii) & (d) of the Act; and

(c) s 184(1)(a) & (c) of the Act.

942. ASIC alleged that, in circumstances, as early as 30 April 2009, Mr Fiorentino had formed his view of the Directors' possible criminal and civil breaches referred to in the previous paragraph. Mr Fiorentino denies this.

943. ASIC alleged that Mr Fiorentino was required pursuant to sections 533(1)(a) and (c) of the Act respectively to have lodged a section 533 Report with ASIC no later than 30 October 2009, being 6 months after 30 April 2009. Mr Fiorentino denies this.

Issue for determination - Contention 25

944. The issue for determination in Contention 25 is whether, by failing to lodge a section 533 report with ASIC in circumstances where he had identified possible breaches of the Act by the Directors, and had formed the view that ERB would be unable to pay its unsecured creditors more than 50 cents in the dollar, Mr Fiorentino:

(a) acted in breach of s 533(d) of the Act; and/or

(b) acted in breach of s 180 of the Act, in that he did not exercise his powers and discharge his duties with the degree of care and diligence required by that section; and/or

(c) acted in breach of s 181(1)(a) of the Act, in that he did not exercise his powers and discharge his duties in good faith in the best interests of ERB.

945. Mr Fiorentino's general response to Contention 25 is that little comes from these reports and that very few prosecutions are pursued by ASIC against directors. He stated that he recognised that he should have filed the report earlier than he did, in accordance with the section. He stated that having filed the report in March 2011, there would seem to be no significant consequences flowing from the delay.

946. Section 533 of the Act provided:

"533 Reports by liquidator

(1) If it appears to the liquidator of a company, in the course of a winding up of the company, that:

(a) a past or present officer or employee, or a member or contributory, of the company may have been guilty of an offence under a law of the Commonwealth or a State or Territory in relation to the company; or

(b) a person who has taken part in the formation, promotion, administration, management or winding up of the company:

(i) may have misapplied or retained, or may have become liable or accountable for, any money or property of the company; or

(ii) may have been guilty of any negligence, default, breach of duty or breach of trust in relation to the company; or

(c) the company may be unable to pay its unsecured creditors more than 50 cents in the dollar;

the liquidator must:

(d) as soon as practicable, and in any event within 6 months, after it so appears to him or her, lodge a report with respect to the matter and state in the report whether he or she proposes to make an application for an examination or order under section 597; and

(e) give ASIC such information, and give to it such access to and facilities for inspecting and taking copies of any documents, as ASIC requires."

947. Mr Fiorentino accepts that he ought to have lodged the report earlier than he did. He has not identified the date upon which he ought to have lodged the report, although he appears to deny that it was as early as ASIC alleged (i.e. as early as April 2009). However, the report which he purported to lodge appears to rely upon matters set out in his reports to creditors dated 23 September 2008 and 30 April 2009. Further, most of the activity in the liquidation had taken place by 30 April 2009. In those circumstances, we accept ASIC's assertion that the matters on which he reported would have "appeared" to him by 30 April 2009. In the circumstances, he was obliged to lodge the report as soon as possible thereafter and, in any event, by October 2009.

948. We accept that Mr Fiorentino failed to comply with s 533(d) of the Act and that this involved a failure to exercise his powers and discharge his duties with the degree of care and diligence required by s 180. On the evidence before us, we are not in a position to conclude absence of good faith, as opposed to negligence.

Finding on Contention 25

949. For the above reasons we consider that Contention 25 is established. However, we base this finding on our acceptance that the matter in sub-paragraph 25(a) and (b) are established.

(xii) Conclusion on General Conduct issues.

950. We have found that Contentions 15 and 17 are made out and, in themselves, justify a finding that Mr Fiorentino has failed to carry out or perform adequately and properly the duties of a liquidator. In addition, we have found that Contentions 20 to 23 and 25 were made out. Those findings confirm an overall finding that Mr Fiorentino, by acting or failing to act in the manner established in relation to Contentions 15, 17, 20 to 23 and 25, failed to carry out or perform adequately and properly the duties of a liquidator within s 1292 of the Act.

(f) Contention 26

951. Contention 26 alleged that Mr Fiorentino is not a fit and proper person to remain registered as a liquidator on account of failing to disclose a prior criminal conviction in his Form 908 statement.

952. Contention 26 presents a number of issues.

953. The key questions are:

(a) whether Contention 26 is an allegation that Mr Fiorentino was dishonest and, if so, whether a case of dishonesty is sufficiently particularised;

(b) if dishonesty is properly pleaded and particularised, whether the evidence adduced by ASIC establishes dishonesty;

(c) does a finding that Mr Fiorentino was dishonest in deliberately not disclosing his conviction support a finding that Mr Fiorentino is not a fit and proper person;

(d) is the alternative case of failure to take reasonable steps to ensure the veracity of the statement made out;

(e) does the alternative case of failure to take reasonable steps to ensure the veracity of the statement support a finding that Mr Fiorentino is not a fit and proper person.

(i) Is Contention 26 an allegation of dishonesty and if so, is it sufficiently particularised?

954. An allegation of dishonesty must be made "clearly and without ambiguity": *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37 at 63 (Latham CJ).

955. In *Fortescue Metals Group Ltd v Australian Securities and Investments Commission* (2012) 247 CLR 486; (2012) 291 ALR 399; [2012] HCA 39, the High Court said, at [26]:

> "[26] … It is fundamental, and long established, that if a case of fraud is to be mounted, it should be pleaded specifically and with particularity *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 697, 701, 704 and 709; *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285. A pleading of fraud will necessarily focus attention upon what it was that the person making the statement intended to convey by its making. And the pleading must make plain that it is alleged that the person who made the statement knew it to be false or was careless as to its truth or falsity. If an alternative case of misleading or deceptive conduct is to be advanced, it is necessary to identify that claim as separate from the allegation of fraud."

956. Whilst this statement was made in relation to an allegation of deceit, it is clear that the principle applies generally to allegations of dishonesty. The rule requiring dishonesty to be pleaded clearly and with particularity is a general rule of practice: *Banque Commerciale SA (En liquidation) v Akhil Holdings Ltd* (1990) 169 CLR 279 per Mason CJ and Gaudron J at 285; *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, at 268. It is not restricted to courts of strict pleading: *Minister for Crown Lands v Tweed Byron Aboriginal Land Council* (1990) 71 LGRA 201. The rule is applicable to disciplinary tribunals, see for example: *Puryer v Legal Services Commissioner* [2012] QCA 300 at [16]-[22].

957. The requirements for clarity and particularity "do not require that the word 'fraud' or the word 'dishonesty' must necessarily be used … The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is fact relying on the alleged dishonesty of the transaction, this will be fatal": Buckley LJ in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250, at 268.

958. Cases alleging dishonesty may be based upon inference. However, if a case is based upon inference, the matters said to give rise to the inference must be particularised. As Lord Millet said in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 186:

> "It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved."

959. In order to consider whether Contention 26 alleged dishonesty and/or adequately particularises such a case, it is necessary to set out the Contention 26, as particularised, in full:

> "**CONTENTION 26**
>
> 364. On 7 July 2011, Fiorentino was convicted of an offence, committed on 2 May 2011, pursuant to section 195(1)(A) Crimes Act NSW 1900 (Destroy or Damage property) (Tabs 208, 209, 210)**.**
>
> 365. At the proceedings referred to in the preceding paragraph, Fiorentino was directed to enter into a good behaviour bond for 2 years pursuant to section 9(1) of the Crimes (Sentencing Procedure) Act 1999, with probation and parole supervision.
>
> 366. On 11 November 2011, Fiorentino lodged his "*Form 908 – Annual Statement by liquidat*or" with ASIC, required by section 1288 of the Act (**Annual Statement**) (Tab 211).
>
> 367. The Annual Statement was for the period 11 October 2010 to 10 October 2011.
>
> 368. The Annual Statement referred to in the preceding paragraph contained a number of questions including:
>
> "Were you convicted of any offences, other than a traffic offence, during the period of the statement?"
>
> 369. Fiorentino answered "*no*" in response.
>
> 370. In declaring in his Annual Statement that he had not been convicted of an offence, in circumstances where Fiorentino knew, or failed to take reasonable steps to ensure the veracity of that statement, Fiorentino may have:
>
> a) acted in breach of section 1308(2) of the Act; and/or
>
> b) acted in breach of section 1308(4) of the Act."

960. As to whether a case of dishonesty is clearly alleged, we note that there is no express allegation of dishonesty. That does not matter if the language otherwise used makes a sufficiently clear allegation of dishonesty. In our view, the only matter which could be regarded as an allegation of dishonesty is the allegation in paragraph 370 of the SOFAC, which states "In declaring in his Annual Statement that he had not been convicted of an offence, in circumstances where Fiorentino *knew*, or failed to take reasonable steps to ensure *the veracity of that statement*, Fiorentino may have acted in breach of section [1308(2) and/or (4)] of the Act" (emphasis added).

961. The phrase "knew, or failed to take reasonable steps to ensure the veracity of that statement" means, literally, as a first alternative, that Mr Fiorentino "knew the *veracity* of that statement". We expect that the phrase was intended to read "knew of the *falsity* of the statement" but it is an unfortunate error in the critical allegation, if the case is to be understood as a case alleging dishonesty.

962. Moreover, we are troubled by the use of the phrase "Fiorentino *may* have" acted in breach of section 1308. This appears to imply that the facts go no higher than showing a possible breach and that the facts are consistent with Mr Fiorentino *not* having acted in breach of the section. Section 1308(2) provides that a person commits an offence when he or she makes a relevant statement "*that to the person's knowledge* is false or misleading in a material particular". In these circumstances, there is ambiguity in the assertion that "In declaring … that he had not been convicted of an offence, in circumstances where Fiorentino knew … the [falsity] of that statement, Fiorentino *may* have … acted in breach of section 1308(2) of the Act."

963. We note that the submissions in support of Contention 26 refer to the relevant requirement of a fit and proper person here is the need to be "honest" (see paragraph 373 of the SOFAC), but they do not go on to allege that Mr Fiorentino was dishonest and, in any event, allegations of dishonesty are required to appear in the pleading and particulars, not in the submissions.

964. The first question (whether a case of dishonesty was clearly alleged) is informed by a consideration of the second question (whether any allegation of dishonesty is fully particularised) and we turn to consider that issue.

965. The only matters which could constitute particulars of dishonesty are the matters set out in paragraphs 364 to 370 of the SOFAC. Do these matters provide particulars of the allegation that Mr Fiorentino was dishonest and specifically, particulars of an allegation that he knew of the falsity of the statement in the Annual Statement? We bear in mind the High Court's observation in *Fortescue* that any pleading of dishonesty will necessarily focus attention upon the person's state of mind.

966. The substance of the allegations in paragraphs 364 to 370 of the SOFAC are as follows:

(a) *Para 364*. This alleged that Mr Fiorentino was convicted of an offence committed on 2 May 2011 pursuant to s 195(1)(A) of the Crimes Act NSW 1900 – (we assume that this is a reference to s 195(1)(a)). We note that this says nothing about Mr Fiorentino's knowledge that he was convicted;

(b) *Para 365*. This alleged that "at the proceedings referred to in the preceding paragraph, Mr Fiorentino was directed to enter into a good behaviour bond". This does not advance the question of knowledge of *conviction*. In fact, it rather suggests that Mr Fiorentino was only informed that he was required to enter into a good behaviour bond;

(c) *Para 366-369*. These paragraphs relate to Mr Fiorentino's lodgement of his Form 908, in which he answered "no" in relation to the question "Were you convicted of any offences, other than a traffic offence, during the period of the statement". They establish that Mr Fiorentino made an incorrect statement, but do not advance the question of his knowledge of that matter;

(d) *Para 370* states "In declaring in his Annual Statement that he had not been convicted of an offence, in circumstances where Fiorentino knew, or failed to take reasonable steps to ensure the veracity of that statement, Fiorentino may have acted in breach of section [1308(2) and/or (4)] of the Act" (emphasis

added). Here, even assuming, in ASIC's favour, that the allegation will be read as an allegation that Mr Fiorentino knew of the *falsity* of the statement, the paragraph does not provide particulars of the allegation, i.e. the basis upon which it is said that Mr Fiorentino knew of the falsity.

967. We note that three documents are referred to in paragraph 364 of the SOFAC, which appear to be annexed as proof of the allegation in that paragraph, i.e. that Mr Fiorentino was convicted. It may be suggested that they constitute particularisation of knowledge of falsity. However, we do not consider that the annexation of these documents amounts to proper particularisation of the allegation. Paragraph 364 of the SOFAC says nothing about knowledge of falsity. In any event, we note:

(a) The first document is the Court Attendance notice, which attaches the Court Orders. However, the Court Orders say nothing about a conviction and, indeed, might be read by a layperson as suggesting that there was no conviction, because the box adjacent to "Conviction" is not ticked;

(b) The second document is a Bond to comply with conditions. This document states on the front page (amongst other things) "The offender is convicted and is directed to enter into a good behaviour bond…". There is a separate section which sets out "Conditions". On the back of this document is a statement signed by a prescribed officer which states "I explained the bond conditions and witnessed the offender's signature". Just above that statement is a statement "I accept the bond", and, apparently, Mr Fiorentino's signature. However, below this signature is another section headed "What will happen if you don't comply" and states:

"You may have to appear before the court again, and the court may:

- Take no action
- Change the bond conditions
- Cancel the bond *and convict and sentence you*". (emphasis added)

Clearly this document establishes that Mr Fiorentino must have understood the Bond conditions and that he accepted the Bond, but it is not clear that he would have read and understood what appears on the first page, and in particular, the statement that "the offender is convicted". Moreover, if he had read the second page (which he signed) he might have been left with the impression that he had not been formally convicted and that this might only occur if he did not comply with the Bond. Indeed, even if he had read the front page, the statement appearing on the back of the page might have caused him to think that there was no formal conviction at that stage. No evidence was adduced as to what actually happened at the time Mr Fiorentino signed the Bond form or the normal practice in Local Courts when a Bond is prepared and signed;

(c) The third document is a Facts Sheet which does not really advance the issue of knowledge.

968. We have doubts about whether Contention 26 makes a clear allegation of dishonesty, but even if it does, we do not consider that any such allegation is adequately particularised because the basis upon which ASIC alleged that Mr Fiorentino "knew … the [falsity] of the statement" is not articulated.

(ii) Assuming dishonesty is properly pleaded and particularised, does the evidence adduced by ASIC establish dishonesty?

969. Even if we are wrong about the sufficiency of the particulars, is there a sufficient basis for finding dishonesty?

970. In our view, the critical issue is whether Mr Fiorentino *knew* that he had been convicted of an offence and whether he believed that to be the case at the time he completed the Form 908.

971. There is no direct evidence that Mr Fiorentino knew or was informed that he had been convicted. Are there objective facts which permit us to infer that he did know or was informed (cf *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at 169–170)?

972. We need to bear in mind the *Briginshaw* approach. In *Briginshaw v Briginshaw*[33] Dixon J said (at 368-9):

> "Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find."

973. Does the evidence adduced by ASIC support a conclusion of knowledge of the conviction, and a deliberate decision not to refer to it, or is that evidence susceptible to some other "not improbable explanation"?

974. In written submissions, Mr Russell submitted that in Mr Fiorentino's Form 908 statement

> "the Respondent falsely answers [no] to the question of whether he had been convicted of any offence, other than a traffic offence, in the period. There is nothing to suggest that the Respondent was anything other than deliberate in his answer. It may be inferred in the circumstances that the Respondent wished to conceal the fact of his conviction. Those matters by themselves suggest a lack of honesty on the Respondent's part that shows he is not a fit and proper person to remain registered as a liquidator."

975. In oral submissions, Mr Russel further submitted that we would infer that Mr Fiorentino was dishonest in failing to disclose the conviction because:

[33] (1938) 60 CLR 336.

(a) by this time he was being investigated by ASIC in relation to the remuneration review which heightened the failure to disclose the criminal conviction;

(b) it was intentional because there was nothing to suggest it was unintentional. One would expect a liquidator would carefully fill out the form 908 statement.

976. These submissions all proceed on the assumption that Mr Fiorentino was aware of the conviction, which is the critical question.

977. In our view, the evidence adduced by ASIC is not sufficient for us to conclude that Mr Fiorentino knew that he had been convicted and deliberately did not disclose the conviction. There is no direct evidence that Mr Fiorentino was informed that he had been convicted. The Court orders are ambiguous about whether there was a formal conviction. The Bond Form also contains ambiguity. There is no evidence that Mr Fiorentino read the first page of the Bond form but even if he did, the second page could have caused him to conclude that there was no formal conviction at that stage. It is more likely that he would have read the second page (as he signed that page) and if he only read the second page we consider it likely that he would have concluded that he had not been formally convicted.

978. We note that Mr Fiorentino's Response dealt specifically with this matter. In his Response, Mr Fiorentino admitted that he had been convicted and that he answered "no" to the question whether he had been convicted on his Form 908. However, he denied he knew of the conviction. In his general Response, he stated the following things:

(a) On the advice he was given at the time, he understood that because he did not challenge the charge (the complainant being his wife who did not wish to pursue it and it being a very minor charge) and because he only received a bond as a consequence, that in fact he had not been formally convicted;

(b) Although he signed the relevant bond notice, he does not recall reading the front page at the time;

(c) He unreservedly apologised for the error and says that he did not intend to misled ASIC or any other persons and had not considered the matters relevant or applicable to the questions as posed on the ASIC form;

(d) He regrets these errors.

979. Of course, in view of his absence from the hearing, no actual evidence was tendered by Mr Fiorentino in support of these assertions. Moreover, Mr Fiorentino did not expose himself to cross-examination by ASIC on these assertions. Accordingly, we cannot proceed on the basis that there is evidence of these matters before us. However, it is clear that an issue raised by Mr Fiorentino was whether he had ever been informed that he had been convicted, as opposed to being informed of the Bond.

980. Regardless of the matter raised by the Response, we are not satisfied, in the context of an allegation of dishonesty, that Mr Fiorentino knew that he had been convicted (as opposed to knowing that he had been required to execute a bond). At the very least, we consider that the evidence adduced by ASIC is susceptible to another, not improbable explanation, namely that Mr Fiorentino was not actually told that he had

been convicted, and assumed that he had received a bond rather than a formal conviction. Mr Fiorentino is not a criminal lawyer and it is not to be inferred that he was aware of the legal technicalities which governed the process and that he ought to have been aware that if he had received a bond, he would also have been convicted.

(iii) Does a finding that Mr Fiorentino was dishonest in deliberately not disclosing his conviction support a finding that Mr Fiorentino is not a fit and proper person, having regard to the nature of the conviction?

981. This question does not arise.

(iv) Is the alternative case that Mr Fiorentino is not fit and proper due to a failure to take reasonable steps to ensure the veracity of the statement established?

982. As indicated above, ASIC alleged that in declaring in his Annual Statement that he had not been convicted of an offence, in circumstances where Mr Fiorentino failed to take reasonable steps to ensure the veracity of that statement, and Fiorentino may have acted in breach of section 1308(2) or (4) of the Act.

983. This matter appears to be the basis of an alternative case in support of Contention 26, which does not involve an allegation of dishonesty.

984. In our view, the evidence adduced by ASIC shows that:

(a) Mr Fiorentino knew that he had been *charged* with an offence under s 195(1)(a) of the Crimes Act 1900;

(b) Mr Fiorentino was convicted of the offence;

(c) Four months later, he lodged his Form 908 statement in which he incorrectly answered "no" to the question whether he had been convicted of any offences other than traffic offences during the period of the statement.

985. We have accepted, in relation to ASIC's allegation of dishonesty, that there is a not implausible inference that Mr Fiorentino misunderstood the position, but Mr Fiorentino has adduced no evidence and we have made no positive finding to that effect. In the circumstances set out in the previous paragraph, (and in the absence of any positive finding of belief) we consider that Mr Fiorentino failed to take reasonable steps to ensure the veracity of the statement.

986. However, we consider that there is a significant difference between dishonestly not disclosing a conviction and failing to take reasonable steps to ensure the veracity of a statement. This is not an allegation showing a want of probity or an allegation showing fundamental incompetence. We do not consider that ASIC has established, by reason of the evidence adduced in support of Contention 26, that Mr Fiorentino is not a fit and proper person to remain registered as a liquidator.

(v) Finding on Contention 26

987. We consider that Contention 26 is not established.

H. Overall Conclusion

988. We have found, in relation to the Proxy Issue, that Contentions 1 to 5 are made out. We have found, in Contentions 4 and 5, that Mr Fiorentino acted dishonesty. We have found that each of Contentions 1 to 5, in themselves, justify a finding that Mr Fiorentino has failed to carry out or perform adequately and properly the duties of a liquidator.

989. We have found, in relation to the Transfer of Assets allegations, that each of Contentions 8 to 11 and 14 have been established and, in themselves, justify a finding that Mr Fiorentino has failed to carry out or perform adequately and properly the duties of a liquidator.

990. We have found, in relation to the General Conduct issues, that each of Contentions 15 and 17 are made out and, in themselves, justify a finding that Mr Fiorentino has failed to carry out or perform adequately and properly the duties of a liquidator. In addition, we have found that Contentions 20 to 23 and 25 were made out. Those findings confirm an overall finding that Mr Fiorentino, by acting or failing to act in the manner established in relation to General Conduct Contentions, failed to carry out or perform adequately and properly the duties of a liquidator within s 1292 of the Act.

991. In all the circumstances, our findings justify an overall finding that Mr Fiorentino has failed to carry out or perform adequately and properly the duties of a liquidator within s 1292 of the Act.

I. Appropriate orders

(a) Sanctions hearing.

992. On 23 May 2014, ASIC and Mr Fiorentino were provided with a copy of the Panel's findings (Section A to H above) and were informed that there would be a further hearing as to the appropriate sanctions. On the same day, the parties were informed that they would have an opportunity to adduce evidence and make submissions at that further hearing and that they should inform the Board as to an appropriate date for hearing. ASIC nominated a range of dates after 13 June 2014. Mr Fiorentino agreed to the hearing taking place on those dates.

993. On 28 May 2104, the parties were informed that the Sanctions Hearing was to take place on 17 June 2014. ASIC was directed to file and serve any evidence and submissions by 10 June 2014 and Mr Fiorentino was directed to file and serve any evidence by 13 June 2014.

994. ASIC filed written submissions in accordance with the directions. Mr Fiorentino filed no evidence or submissions.

995. The Sanctions Hearing took place on 17 June 2014.

(b) ASIC's submissions.

996. ASIC submitted that the relevant principles to be considered in determining appropriate sanctions were appropriately set out in *ASIC v Dean Willcocks* (12 April 2006), paras 12, 13 and 14 of *ASIC v McVeigh* (19 January 2010), and paras 352-363, 369 and 382 of *ASIC v Fernandez* (29 October 2013).

997. In summary, ASIC submitted that the principles were as follows:

(a) The principal purpose of the proceedings is protective rather than punitive and the guiding principle is the protection of the public;

(b) The protection of the public includes ensuring that those who are unfit to practise do not continue to hold themselves out as fit to practise;

(c) The protection of the public includes deterrence;

(d) It also includes the maintenance of a system under which the public can be confident that practitioners will know that breaches of duty will be appropriately dealt with and that the regulatory regime applicable to liquidators is effective in maintaining high standards of professional conduct;

(e) The impact of the Board's orders on the practitioner is to be given limited consideration, as the prime concern of the Board is the protection of the public;

(f) Relevant matters include the Respondent's recognition and acceptance of breaches of duty, attitude to compliance generally and willingness to improve. Genuine acceptance of failure, contrition and remorse are necessary prerequisites to rehabilitation;

(g) If a respondent is considered not to be fit and proper, suspension is not appropriate unless the Board could be confident that the respondent would be fit and proper after the period of suspension.

998. ASIC submitted that our findings (in Sections A to H above) demand that Mr Fiorentino's registration as a liquidator be cancelled. ASIC submitted that those findings meant that Mr Fiorentino was not fit and proper to remain registered as a liquidator and there was nothing to suggest that, after a period of suspension, Mr Fiorentino would be fit and proper to be registered as a liquidator.

999. ASIC relied upon the whole of our findings but placed particular emphasis upon the following aspects of our findings:

(a) As regards Contentions 1 and 2, the failure by Mr Fiorentino to give the relevant notices to Westfield and the employee creditors had the effect of excluding potentially the largest number and value of ERB creditors from the meetings;

(b) As regards Contentions 3, 4 and 5, the Board had found that Mr Fiorentino did not act in good faith in the best interests of ERB, that he was reckless in so acting and that he used his position dishonestly with the intention of gaining an advantage for himself. The effect of Mr Fiorentino's conduct was that the

"creditors approval" of his remuneration was no more than a sham. Pursuant to that "approval", Messrs Fiorentino and Hamilton paid themselves remuneration of $56,042.33[34]. There was no more serious a finding against a liquidator that he or she has acted dishonestly in order to secure an advantage to himself or herself and this, of itself, demanded cancellation of Mr Fiorentino's registration;

(c) As regards Contentions 6, 7, 8 and 10, the effect of our findings were that Mr Fiorentino failed to investigate properly the most significant dealing of ERB in the context of ERB's liquidation and possible recoveries for the benefit of unsecured creditors;

(d) As regards Contentions 11 and 14, the findings were that Mr Fiorentino entered into the Deed of Settlement and Release without making proper relevant assessment and without obtaining proper relevant advice;

(e) As regards Contention 17, our findings were that Mr Fiorentino did not act in good faith in the best interests of ERB and, indeed, took an active role in undermining the interests of ERB and its creditors;

(f) As regards Contentions 9, 15, 20, 21, 22, 23 and 25, our findings were to the effect that Mr Fiorentino failed properly to report or inform creditors or ASIC of significant matters concerning the liquidation of ERB;

(g) The effect of our findings was that the administration of ERB by Mr Fiorentino either completely failed or miscarried in a serious way;

(h) In the light of our findings, community expectations, (which demand that there be upheld a system under which the public can be confident that there is a regulatory regime in place which is effective in maintaining consistently high standards of professional conduct across the industry and that meaningful sanctions be imposed), required that Mr Fiorentino's registration be cancelled;

(i) There was no evidence that Mr Fiorentino accepted our findings as to breaches of duty or failures and there was no evidence that Mr Fiorentino had any genuine contrition or remorse for his conduct;

(j) If Mr Fiorentino's registration were to be cancelled, this would not prevent Mr Fiorentino from applying at some later time to be registered and it will be up to ASIC, the regulator, to determine that application on its merits.

1000. We note that ASIC relied upon the findings of another Panel in *ASIC v Hamilton* (3 April 2014). The Hamilton matter involved an Application to the Board by ASIC against Mr William Hamilton in relation to similar matters to the present Application. The hearings were conducted separately and we were not referred to the Hamilton decision prior to the Sanctions Hearing. Mr Fiorentino consented to the Panel reading the Hamilton decision in relation to the question of sanctions.

[34] ASIC tendered correspondence showing that Mr Fiorentino had attempted to repay his "share" of the remuneration.

(c) Mr Fiorentino's submissions.

1001. Mr Fiorentino made oral submissions at the Sanctions Hearing.

1002. His key submissions, to the extent that they had any bearing on the question of appropriate sanctions, were to the following effect:

(a) There was relevant material which ASIC should have put forward to the Board. The Board has made its determinations on assumed facts which were totally incorrect;

(b) He intended to assist the new liquidator of ERB in recovering assets which the director took from ERB, namely $609,000 which went to BWI and $2m which went to the director;

(c) the books and records did not disclose the Westpac Bank account which the money was put through and the internal accountants themselves did not know about these transactions. The general ledger did not show that the money came from ERB. The description "ERB" on a bank statement does not necessarily mean that the money came from ERB;

(d) the Board's decision was not based on all matters put forward. It did not take into account the expert evidence from Mr Tony McGrath;

(e) the case had been a huge cost on Mr Fiorentino and he had spent the last few years of his life dealing just with this matter;

(f) He was not really interested in being a liquidator that much anymore because he had lost a lot of faith in ASIC;

(g) If we saw fit to put forward a media release, he would do the same and put forward all the experiences he had had with ASIC, information to which we were not privy;

(h) He had been very successful in the past and had received a lot of praise from several judges including Justice Santow, who took his work and used it as an example for other liquidators;

(i) He was the preferred expert in restoring companies to the register. Some of his work in this respect had been the best and classified so by ASIC and others in the profession;

(j) He is probably one of the few liquidators which had paid creditors in full including interest, in one of his first jobs with Bill Hamilton, which gave him his reputation as being very effective, and he was actually sought after to join some major firms, which he refused on the basis that he had a lot of respect for Bill Hamilton;

(k) The 9.30 am 15 May 2009 ERB meeting was not done through dishonesty but he was not on the ball because this job was the worst job in his life and his attention was not focussed at that point, so a lot of errors took place;

(l) As to the DIRRI, there was no prior relationship to be disclosed. There was a stuff-up by his counsel who did not understand on the phone call that the business had already been transferred;

(m) ASIC had been very selective in taking anything in the s 19 transcripts which suited them and leaving out everything which did not support their contentions. The people they relied upon sought to minimise the potential criminal exposure of their involvement;

(n) He and Bill Hamilton had made precedent law in Australia many times. He was the preferred liquidator for General Electric. He had taken on the Labor Party and the Victorian Government;

(o) The Panel's assumptions in the Determination were totally incorrect. He said "and there is a lot more to come. But you do your job, I'll do mine and, believe me, I'll do nothing else because I don't need to be a liquidator. I can resign from being a liquidator. I was just having fun with it, but if you attack my reputation, believe me mate, you'll be here for the – you guys, all of you. Okay, you do your job, I'll do mine. We'll see what the judges have got – and the judges are nice people";

(p) He attacked ASIC saying "ASIC haven't got a clue what they're doing because ATO – ITSA which you know hopefully will replace ASIC in the future, they know the difference". And when asked as to how this went to Sanctions he said "Because when you take my licence off me as you will, right, you have to bear in mind what I have to say in that respect, and what I have to say to you is that I shouldn't be losing my licence after 30 years of doing so much for the community and a pillar of the community in many ways";

(q) He said that he had a lapse on this job because of the meeting at 9.30 and instead of 10.00 am but "you should really look at those jobs that I've done before you come and sit in my judgment".

(r) When asked whether he had any submissions in relation to the question of publicity of the decision, he said "Yes. You do that and this will never end. I'm willing to resign as a liquidator because I – I've done so much for ASIC but obviously they don't take that into account but I don't mind handing my ticket in but – because I've got much better things to do really you know. But you try to publicise anything you think like that and we'll just make it public and we go through the courts, we go through the media. You see what media support you get and see what I get. See how much damage you're going to do yourself" and later "Now you want to go there? Well you go there mate. I'm looking forward to me playing with you and the media and the courts. That's my job, mate. I have one job only. This will be the job of my lifetime – capisce?";

(s) He said that he was a top student when he came to Australia and said "But anyway, I've got some powerful connections and I'm not an idiot, okay, as you make me out to be. I have beaten and proven, you know – beaten some people that were very clever, you know, and then I'll be talking about that. Okay, that's pretty much it, you know. It's not going to end here."

(d) ASIC's submissions in reply.

1003. In reply, ASIC noted that Mr Fiorentino had sought to blame a number of other parties in relation to the matter and that his submissions were evidence that he did not accept the panel's findings as to his breaches of duty and failure of his conduct and that he had absolutely no contrition or remorse for his conduct.

(e) What, if any, sanctions should be imposed?

1004. The function being performed by the Board in exercising powers under s 1292 was described by the Full Court of the Federal Court in *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2006) 233 ALR 37 at page 47 as follows:

> "The purpose or object of the inquiry undertaken by the board, in exercising the power conferred by s 1292(2), is not the ascertainment or enforcement of any legal right, but the determination whether, in the view of the board, taking into account past failures of duties, a defeasible right should continue into the future. No punishment is imposed by reason of any conclusion that duties or functions have not been carried out or performed adequately and properly. Rather, upon being satisfied of past failures of duty, the board is empowered to deal with the continued existence of a statutory right. …. The question of the adequacy and propriety of the carrying out or performance is to be judged by the board by making an evaluative or subjective determination. Having made that evaluative or subjective determination, the board will consider whether the rights of the registered liquidator as to the future are to be changed by the exercise of the power under s 1292(2) in the light of all the considerations before it that are considered relevant."

1005. We accept, in general terms, the summary of applicable principles advanced by ASIC as set out in paragraph 997 above. It is well established that the principle which guides the Board in exercising powers is protection of the public and that this involves two aspects: first, protection of the public from the actions of a person who has been found not to have performed as required by s 1292 and, secondly, protection of the public by encouraging other liquidators to adhere to proper standards (see the decision of this Board in *ASIC v McVeigh* at paragraph [12] and cf *Queensland Law Society Incorporated v Carberry* [2000] QCA 450 at [37]*ff*).

1006. Where a finding is made that a person is not a fit and proper person, there needs to be some reason why suspension, rather than cancellation, would be the appropriate order. As Reynolds JA said in *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 at 76:

> "An order for suspension must be based upon a view that at the termination of the period of suspension the practitioner will no longer be unfit to practice because, subject to any limitation imposed on the issue of a practising certificate, his name will then be on the roll of solicitors and he may resume his practice."

1007. Here, our findings were not expressly under the "fit and proper person" head in s 1292. Nevertheless, findings under the first head of s 1292 will often, if not usually,

suggest that the person is not a fit and proper person to remain registered as a liquidator: *Davies v Australian* Securities *Commission*, (1995) 59 FCR 221 at 233.

1008. In our view, Mr Fiorentino's failings were significant and extensive. The findings are at least of equivalent weight to a finding that Mr Fiorentino is not a fit and proper person and they warrant cancellation of his registration. By analogy with the reasoning in *McNamara*, the seriousness of the findings mean that we should not consider suspension unless we are of the view that, at the termination of a particular period of suspension, Mr Fiorentino would be fit to practise. We have no basis for thinking this and, indeed, his almost total rejection of our findings and unrepentant approach suggests that he does not intend to reform his standards or practices and believes that he has no reason to do so.

1009. We also note the approach endorsed by Dixon CJ in an analogous area in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 286 where his Honour said: "I may add, too, that I think that it is open to the Supreme Court to suspend a barrister from practice … But, even so, it is probably a better course in most cases where room exists for the belief that time may give the barrister a title to resume his place at the Bar to allow him to re-apply at a subsequent time and offer positive evidence of the grounds upon which he then claims to be re-admitted."

1010. In all the circumstances, we consider that our findings, as a whole, require cancellation.

1011. Our finding in respect of Contention 4 (that Mr Fiorentino, in accepting proxies at the 15 May 2009 creditors meeting, used his position dishonestly with the intention of directly gaining an advantage for himself) is a very serious finding which, in itself, justifies cancellation rather than suspension (cf *Law Society of New South Wales v McNamara* (1980) 47 NSWLR 72 and *Queensland Law Society Inc v Carberry* [2000] QCA 450).

1012. There are a number of other serious findings:

(a) We have found, in respect of Contentions 1 and 2, that Mr Fiorentino failed to give notice of the September 2008 and 15 May 2009 creditors meetings to the employee creditors and Westfield creditors, being persons who were, or at least appeared to be, substantial external creditors of the company. The failure is particularly striking in view of the fact that Mr Fiorentino purported to rely upon proxies from these very creditors at the 15 May 2009 meeting, to have his remuneration approved;

(b) We have found, in respect of Contentions 6, 8 and 10, that Mr Fiorentino failed to properly investigate the affairs of ERB in a number of key respects, in circumstances where the need for investigation and the steps required were obvious. Mr Fiorentino's obligation to investigate the affairs of the company properly was one of his key functions. His failure facilitated the completion of a phoenix transaction;

(c) We have found, in respect of Contentions 11 and 14, that Mr Fiorentino entered into the Deed of Settlement and Release without properly assessing the position and without obtaining legal advice. The Deed was drafted and

executed over the course of one day in January 2009, when his legal advisers appeared to be on holiday and when there was no need for urgency. The Deed provided a very great benefit to BWI and ERB's directors with no meaningful benefit to ERB's creditors. The Deed effectively ensured that the OSR (and other unsecured creditors) would receive nothing from the liquidation;

(d) We have found, in respect of Contention 17, that Mr Fiorentino failed to act in good faith in the best interests of ERB when he sought to undermine the OSR's efforts from making its claim against BWI directly and when he assisted BWI in its defence of the OSR claim.

1013. Our findings in respect of all Contentions show that Mr Fiorentino's failures were both serious and extensive. They involved a number of different aspects of the liquidation of ERB and involved dishonesty, lack of good faith, lack of competence and failure to comply with statutory provisions. We do not consider that Mr Fiorentino should retain his registration in the light of these findings. The serious and extensive nature of Mr Fiorentino's failings make suspension inappropriate. Moreover, there is no reason to think that Mr Fiorentino would be fit to resume practice after any particular period of suspension.

1014. In terms of any consequences for Mr Fiorentino, we note that it is an inevitable consequence of cancellation that a respondent will lose the ability to practise as a liquidator and thus, a source of livelihood. Notwithstanding this consequence, we consider that cancellation is the proper sanction in all the circumstances of the present case. We note, in any event, that Mr Fiorentino submitted that he was not really interested in being a liquidator that much anymore.

1015. Many of Mr Fiorentino's submissions asserted that there were errors and erroneous assumptions in our decision (see paragraph 1002(a), (c), (d), (k), (l), (m), (o) and (q) above). These submissions were simply irrelevant. We have made our findings and there is no basis for Mr Fiorentino to seek to go behind them on the question of sanctions. Mr Fiorentino had his chance to adduce evidence and make submissions at the Hearing in February, but chose not to. We note that he chose not to, notwithstanding that the matter was ready to proceed at the original hearing on 18 November 2013 and, more than two weeks prior to that date, Mr. Fiorentino had formed the view that he would need to represent himself at that hearing with the assistance of Mr Tatar and intended to do so (see paragraph 19 of his Affidavit of 18 November 2013).

1016. As to his other submissions, a number involved assertions by Mr Fiorentino as to his own skill and standing in the profession (see paragraph 1002(h), (i), (j) and (n)). We can give this little weight, having regard to the fact that Mr Fiorentino did not support these assertions by affidavit either from himself or anyone else, and despite the fact that he was provided with the opportunity to do so. In any event, the matters raised were random and imprecise assertions about his ability and reputation and hardly provided a proper and meaningful basis for concluding that cancellation was inappropriate.

1017. Another group of submissions involved threats against the Board and ASIC if we made orders including orders for publication (see paragraph 1002(g), (o), (p), (r) and (s)). Such threats were reprehensible. They certainly could have no impact upon our

decision as to the appropriate sanctions to be ordered, save to the extent that they confirmed that Mr Fiorentino did not accept his failings and had no remorse.

1018. Other than this, Mr Fiorentino's submissions amounted to submissions that he intended to help the new liquidator of ERB, that the case had been a huge cost on him and that he was not really interested in being a liquidator (1002(b), (e) and (f)). None of these matters change our view that cancellation is the proper sanction in the circumstances. His intention to assist the new liquidator is commendable and appropriate but can have no real impact on the question of sanction in the light of all the other circumstances. The fact that the case has been a huge cost to him is a matter for which he is primarily to blame. The cost has arisen substantially due to his conduct in the liquidation and his conduct of the proceedings. The fact that Mr Fiorentino has no real interest in being a liquidator is not a matter which provides any reason to refuse cancellation.

J. Decision and orders

1019. For the reasons set out above, we have decided to exercise our power under s 1292 of the Act to cancel the registration of Pino Fiorentino as a liquidator.

1020. Normally, an order would come into effect at the end of the day on which a notice of the decision is given to a respondent under s 1296(1)(a), see s 1297(1)(a). However, it is usual, in the case of liquidators, to delay the effect of orders to permit liquidators to make arrangements for the hand over of matters.

1021. No submissions were made by either party as to any appropriate period for delaying the effect of the order in the present case. It is not clear whether Mr Fiorentino has any ongoing administrations. Out of an abundance of caution, we will order that the order for cancellation will come into effect fourteen days after the date hereof.

1022. Within fourteen days of the date hereof, formal notice of this Decision will be given to Mr Fiorentino under s 1296(1)(a) of the Act, a copy of that notice will be lodged with ASIC under s 1296(1)(b) and the Board will cause to be published in the Gazette a notice in writing setting out the Decision.

1023. We order:

(a) That the registration of Pino Fiorentino as a liquidator be cancelled;

(b) That this order will come into effect 14 days after the date hereof.

Howard Insall SC 24 June 2014
Panel Chairperson