JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE and ROBERTSON [2023] WASAT 127
MEMBER	**:**	JUDGE K GLANCY, DEPUTY PRESIDENT MR D AITKEN, SENIOR MEMBER MR R POVEY, MEMBER
HEARD	**:**	11, 12 MAY 2023 AND 26 JUNE 2023
DELIVERED	**:**	19 DECEMBER 2023
FILE NO/S	**:**	VR 46 of 2021
BETWEEN	**:**	LEGAL SERVICES AND COMPLAINTS COMMITTEE Applicant AND JOHN ANDREW ROBERTSON Respondent

Catchwords:

Vocational regulation – Legal practitioner – Allegation of professional misconduct – whether practitioner acting or purported to act or caused his firm to act or to purport to act as the solicitor of record when not authorised to do so – whether practitioner knowingly, misled another practitioner or the Court by making statements he knew to be false intending to mislead – whether practitioner was recklessly indifferent as to whether statements were misleading and as to whether others would be misled by them – Findings of professional misconduct

Legislation:

Corporations Act 2001 (Cth), s 437A, s 440, s 444A, s 440D, s 444A, s 444D, s 444D(1)(b), s 444E, s 440E(3)
Legal Profession Act 2008 (WA), s 402, s 403, s 403(1)(a), s 404, s 428(1), s 438(1), s 438(2), s 442
Legal Profession Uniform Law Application Act 2022 (WA), s 57(1), s 260, s 269, s 402, s 403, s 438(1)

Result:

The Practitioner is guilty of professional misconduct

Category: B

Representation:

Counsel:

Applicant	:	P Cahill SC and N Pope
Respondent	:	J Taylor SC and A Mossop

Solicitors:

Applicant	:	Legal Services and Complaints Committee
Respondent	:	Moray & Agnew Lawyers

Cases referred to in decision(s):

Angus v Clifford [1891] 2 Ch 449
Fidock v Legal Profession Complaints Committee [2013] WASCA 108
Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Kyle v Legal Practitioners' Complaints Committee [1999] WASCA 115
Le Lievre v Gould [1893] 1 QB 491
Legal Profession Complaints Committee and Chang [2019] WASAT 67
Legal Profession Complaints Committee and Goldsmith [2022] WASAT 43
Legal Profession Complaints Committee and Goldsmith [2022] WASAT 43 (S)

Legal Services and Complaints Committee and Lourey [2023] WASAT 77
Palmer v Dolman [2005] NSWCA 361
Wright v David John Neale Lemon as executor of the estate of Michael John Maynard Wright [No 2] [2021] WASC 159

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The Legal Services and Complaints Committee (**LSCC** or **Applicant**) applied, on 18 June 2021, for a finding by the State Administrative Tribunal (**Tribunal**) that John Andrew Robertson (**Practitioner**) engaged in professional misconduct pursuant to s 438(1) of the *Legal Profession Act 2008* (WA) (**LP Act**). The LSCC seeks that the Tribunal impose a penalty under s 438(2) of the LP Act and an order that the Practitioner pay the Applicant's costs of the proceeding.

2 These reasons for decision deal only with the question of whether the Practitioner is guilty of professional misconduct or unprofessional conduct (which is an alternate finding open to us under s 442 of the LP Act).

3 The Applicant identified six grounds upon which it says we could make findings that the Practitioner's conduct amounted to professional misconduct. Those Grounds were set out in Annexure A to its application.

4 The allegations arise from the Practitioner's involvement in a particular Supreme Court Proceeding (**SC Proceeding**) in which he acted for the First and Second Defendants (**First Defendant** and **Second Defendant**). In the course of the SC Proceeding, the First Defendant was placed into administration and subsequently entered into a deed of company arrangement (**DOCA**). The effect of those matters was, in summary, that the Plaintiff in the SC Proceeding (**Plaintiff**) could not continue the SC Proceeding against the First Defendant without the consent of the relevant administrator or leave of the Court and that the Practitioner and his firm, Williams + Hughes (**Firm**), could only continue to represent the First Defendant with the consent of the relevant administrator, and then, was required to act on that administrator's instructions.

5 The Plaintiff did not obtain the consent of the administrator to continue the SC Proceeding against the First Defendant. Nor did it obtain the leave of the court to do so.

6 The Practitioner did not obtain the consent of the relevant administrator to act in the SC Proceeding (although that would only have been necessary had the Plaintiff obtained the consent of the

administrator or leave of the court to continue the SC Proceeding against the First Defendant).

7 As the SC Proceeding progressed, the Practitioner took various steps that, on their face, appeared to mean that he was acting on behalf of the First Defendant. We set them out in detail later in these reasons.

8 In Ground 1, the LSCC alleges that the Practitioner engaged in professional misconduct by causing his firm to act as solicitors on the record for the First Defendant and acting as solicitor and counsel for the First Defendant in the SC Proceeding without the authority or instructions of the administrators.

9 When the Plaintiff's solicitor and counsel and the court eventually raised the issue with the Practitioner, he offered explanations which the LSCC allege amount to knowingly or, alternatively, recklessly misrepresenting to the court and a fellow practitioner his conduct in the SC Proceeding in that he said that he had known, since he became aware of the appointment of the administrator and DOCA:

(i) that the SC Proceeding could no longer continue against the First Defendant;

(ii) that he no longer acted for the First Defendant; and

(iii) anything he had done that may have conveyed a different impression was done inadvertently.

10 The LSCC says that the Practitioner's explanations were not truthful and that each occasion on which he conveyed that state of mind to the court or to a fellow practitioner amounted to professional misconduct or unsatisfactory professional conduct.

11 The Practitioner offers various explanations for the things he did that conveyed an impression that he was acting for the First Defendant and denies that he acted for, or purported to act for, the First Defendant after he became aware of the fact that the First Defendant was in administration and had entered into the DOCA. He also denies that his communications, which form the basis of Grounds 2 – 6, were false or misleading in any respect.

Outcome

12 For the reasons which we set out below, we are satisfied that the allegation in each Ground has been made out. We have also found that the conduct in each case constitutes professional misconduct.

The statutory regime

13 The proceedings were commenced by the Applicant by a referral to the Tribunal under s 428(1) of the LP Act. The referral to the Tribunal took place on 18 June 2021. Since that time the LP Act has been repealed by s 260 of the *Legal Profession Uniform Law Application Act 2022* (WA) (**Application Act**) which commenced on 1 July 2022.

14 Nevertheless, this application is still to be determined under the LP Act for reasons which were set out in ***Legal Profession Complaints Committee and Goldsmith***[1] at [6] – [35].

15 Section 57(1) of the Application Act established the Legal Services and Complaint Committee (**LSCC**). Section 269 of the Application Act provides that the LPCC continues under the Application Act as the LSCC. Accordingly, while the matter continues under the LP Act, the Applicant is, since the commencement of the Application Act, properly named the LSCC.

16 Section 438(1) of the LP Act provides that the Tribunal 'has jurisdiction to make a finding that an Australian legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct'. Section 442 provides that the Tribunal may find a practitioner guilty of unsatisfactory professional conduct even though the referral alleged professional misconduct.

The definitions of unsatisfactory professional conduct and professional misconduct

17 Section 402 and s 403 of the LP Act contain non-exhaustive definitions of the terms 'unsatisfactory professional conduct' and 'professional misconduct', respectively.

18 Section 402 of the LP Act states as follows:

[1] ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 (S). While the decision in that matter was set aside, and the matter remitted to the Tribunal, for there was no criticism of this aspect of the Tribunal's reasoning.

For the purposes of this Act —

> ***unsatisfactory professional conduct*** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

19 Section 403 of the LP Act states as follows:

> (1) For the purposes of this Act —
>
> professional misconduct includes —
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.
>
> (2) For the purpose of finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission or for the grant or renewal of a local practising certificate.

20 Section 404 of the LP Act identifies, without limiting s 402 or s 403, conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct.

21 The position in Western Australia is that the two limbs of the common law test of professional misconduct, which were articulated in ***Kyle v Legal Practitioners' Complaints Committee***,[2] (but with reference to 'unprofessional conduct', which we now call professional misconduct) still apply as separate bases for a finding of professional misconduct. That position was recently explained in detail by the Tribunal in ***Legal Services and Complaints Committee and Lourey***.[3] We adopt that reasoning without repeating it.

[2] ***Kyle v Legal Practitioners' Complaints Committee*** [1999] WASCA 115.
[3] ***Legal Services and Complaints Committee and Lourey*** [2023] WASAT 77.

22 In Ground 1, the Applicant alleges that the Practitioner's conduct amounts to professional misconduct as defined in s 403(1)(a) of the LP Act and as described in the second limb of the ***Kyle*** test. In Grounds 2 – 6 the Applicant alleges that the Practitioner's conduct constitutes professional misconduct as defined in s 403(1)(b) of the LP Act and as described in both the first and second limbs of the ***Kyle*** test.

The burden and standard of proof

23 We adopt what the Tribunal said about the burden and standard of proof in the following passage of ***Legal Profession Complaints Committee and Chang***:[4]

> The Committee bears the onus of proof in relation to the allegations of professional misconduct it makes against the practitioner. The civil standard of proof ('on a balance of probabilities') applies together with the *Briginshaw* approach, which requires clear and cogent evidence to be adduced by the Committee and for the Tribunal to feel an actual persuasion of the occurrence or existence of relevant facts before it can find the practitioner guilty of professional misconduct (or unsatisfactory professional conduct). The *Briginshaw* approach applies in disciplinary proceedings, because of the nature and seriousness, and potential consequences, of allegations of wrongdoing (or incompetence) made in such proceedings. As Dixon J said in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361 – 362:
>
>> 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.

24 In these reasons, when we express ourselves to be satisfied, and make a finding, we do so on the balance of probabilities and on the basis of evidence which we regard as clear and cogent, having regard to what was said in ***Briginshaw***.

[4] ***Legal Profession Complaints Committee and Chang*** [2019] WASAT 67 (***Chang***) at [8].

Inferences

25 The Applicant's case is based on inferences. In this case, where we are asked to draw an inference of serious misconduct from circumstantial evidence, we must:

(a) consider the weight to be given to the united force of all of the circumstances taken together;

(b) apply the standard of proof at the final stage in the reasoning process;

(c) weigh the inference to be drawn from the proved facts against realistic possibilities as distinct from possibilities that might be regarded as fanciful; and

(d) find the allegation is not proved where there are competing possibilities of equal likelihood or where the choice between them can only be resolved by conjecture.[5]

The evidence

26 The Applicant called no witnesses and tendered no affidavit evidence. Rather, its case was based entirely on the documents tendered in evidence and inferences that it submitted should be drawn from them.

27 The Practitioner gave evidence in his case. His witness statement dated 13 March 2023[6] and his supplementary witness statement dated 24 April 2023[7] stood as his evidence-in-chief. He was cross-examined at length, but not re-examined.

28 In addition, the Practitioner tendered a witness statement from Mr Christopher Zelestis KC dated 3 April 2023.[8] Mr Zelestis KC was not cross-examined on his affidavit.

29 The Practitioner also tendered documents on which his case relies.[9]

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[5] ***Legal Profession Complaints Committee and Goldsmith*** [2022] WASAT 43 at [31] citing ***Palmer v Dolman*** [2005] NSWCA 361 at [41].
[6] The Practitioner's Witness Statement of 13 March 2023 was admitted as Exhibit 7.
[7] The Supplementary Witness Statement dated 24 April 2023 was admitted as Exhibit 8.
[8] Exhibit 9.
[9] Respondent's Bundle of Documents dated 1 September 2022 (Volumes 1 and 2) (Exhibit 4); Respondent's Supplementary Bundle of Additional Documents dated 24 April 2023 (Exhibit 5); Respondent's Amended

The Practitioner

30 We are satisfied of and make the following findings of fact in relation to the Practitioner.

31 The Practitioner was admitted to practice in Western Australia in 2004.[10]

32 At the time of the incidents the subject of the complaint, the Practitioner was an Australian legal practitioner within the meaning of s 5(a) of the LP Act.[11]

33 At the time of the incidents, the subject of the complaint, the Practitioner, was a legal practitioner director of the Firm. He was appointed to that position at the Firm in 2014.[12]

34 The Practitioner commenced work at the Firm in approximately 2009 and practised in civil litigation and general commercial work. Since his appointment as a director of the Firm, his work largely has focussed on civil litigation, property law, and wills and estates.[13]

35 At the time the impugned conduct took place, the Practitioner had a busy practice and, as is regrettably all too common in the law, often worked 12 – 14 hour days and on weekends and rarely took annual leave. In addition to the legal work undertaken on behalf of client, his role at the Firm encompassed business development and supervision of more junior practitioners, and involvement in the general administration of the Firm.[14]

Credibility of the Practitioner

36 The Practitioner's credibility is in issue in this proceeding. This is because the allegations made against the Practitioner are denied by him. Those allegations concern his state of knowledge or state of mind at particular times.

Response to the Applicant's Statement of Facts and Contentions dated 27 January 2022 (Exhibit 6); Bundle of Documents produced in response to the summons dated 8 May 2023 (Exhibit 10).

[10] Exhibit 1, para 1.1.

[11] Exhibit 1, para 1.1.

[12] Exhibit 7, para 5.

[13] Exhibit 7, para 5.

[14] Exhibit 7, para 6.

37 The Practitioner submits that, in evaluating the explanations given at the hearing as to what he believed at an earlier point in time, we should have regard to the following statement:[15]

> Memory is a reconstructive process that is susceptible to distortion. Memory distortions can result from external information such as documents relating to a particular matter. Memory distortions can also occur simply with the passage of time and repeated recounting of events. This is partly because over time memories typically become less highly detailed and specific and more broad and generalised as the information is repeatedly retrieved and re-encoded.
>
> A witness is subject to memory biases. This reflects people's natural bias to 'fill in the gaps' with memory, which are often inaccurate accounts of actual events. Moreover, memories can be lost or altered. If the content of a memory is updated at the time of retrieval, memory distortion can occur of which the witness may be unaware.

38 The effect of that observation is that the fact that although a witness may have erred in recounting their state of mind at an earlier time, it does not necessarily mean that they did so deliberately or even with a reckless disregard for the truth.

39 However, in this case, the central issue was whether the Practitioner understood, from the time he learned of the appointment of administrators to the First Defendant in 2017, and of the fact that the First Defendant had entered into the DOCA, that the SC Proceeding no longer continued against the First Defendant and that he no longer acted for the First Defendant or whether he took no account of those matters when he took certain actions in that proceeding.

40 The Practitioner's inability to recall certain matters is not directed at his memory of the central issue, but to explanations he offered for things he said and did that look, to an outside observer, as if he did not know that the SC Proceeding did not continue against the First Defendant. When asked why he wrote, or did, or said certain things the Practitioner frequently said he could not recall what he had in mind in making the statement. The Practitioner says we should bear in mind that memory often fails with time and that we should find that the Practitioner was being honest when he said he could not remember certain things, rather than find that in doing so he was being dishonest or obfuscating.

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[15] ***Wright v David John Neale Lemon as executor of the estate of Michael John Maynard Wright [No 2]*** [2021] WASC 159 at [205] – [206] (Le Miere J).

41 We observed the Practitioner give evidence. We observed that, at times he became very frustrated with the cross-examination and that resulted in him appearing to argue with the Applicant's counsel. While that is regrettable, it is also understandable given the circumstances in which the Practitioner found himself giving evidence. It did not influence our view of the honesty, accuracy and reliability of his evidence.

42 We accept that on many issues, the Practitioner gave honest evidence.

43 We also accept that it can be difficult, many years after an event, to explain what one knew, or thought, or why one took certain actions. We accept that that issue had some bearing on the Practitioner's evidence.

44 We do, however, find that, in the end, the Practitioner's efforts to explain the conduct which is relied upon to establish Ground 1 was simply not plausible. We set out our reasons for finding particular evidence to be implausible where we refer to that evidence elsewhere in these reasons.

45 We also find that, on occasions, the Practitioner gave two or more explanations for his conduct which were inconsistent. We also set out our reasons for that finding where we refer to that evidence elsewhere in these reasons.

46 We also find that the Practitioner's denials must be rejected when they are considered against the united force of all of the contemporaneous evidence of the actions he took in the SC Proceeding and the contemporaneous communications he had with the other parties about the SC Proceeding, even having regard to the standard of proof which applies.

47 Further, we found that the Practitioner's explanation for the contents of the emails he sent and the affidavits he filed after 17 July 2019, which are the basis for the allegations in Grounds 2 – 6, must be rejected. While the Practitioner accepted that aspects of them could have been written with more clarity and could be thought to be misleading, he said there was nothing in them that was written with the intention to mislead. We have found his statement that the communications reflected the true state of his knowledge to be false having regard to the united force of all of the circumstantial evidence taken together.

Background to the alleged conduct

48 We turn then to the background to the allegations made against the Practitioner. In relation to those matters we are satisfied and make the following findings of fact.

49 In September 2016, Satterley Property Group Pty Ltd (**Plaintiff**) commenced proceedings in the Supreme Court of Western Australia against Ironbridge Holdings Pty Ltd (**First Defendant**), its director Mr Ian Wallace (**Second Defendant**), Mr Nicholas Wallace (**Third Defendant**), Leveque Group Pty Ltd (**Fourth Defendant**) and Piara Landholdings Pty Ltd (**Fifth Defendant**). The claim made by the Plaintiff was that the First and Second Defendant had engaged in misleading and deceptive conduct to sell a parcel of land to the Fifth Defendant which was a developer linked to the Third Defendant.

50 Fletcher Law acted for the Plaintiff and briefed Mr Penglis SC to act as counsel for the Plaintiff.[16]

51 Initially, all of the defendants were represented by DLA Piper and a combined defence was filed on behalf of each of the First to Fifth Defendants.

52 On 27 January 2017, the Firm filed a notice of change of solicitors to act for the First and Second Defendants and the Practitioner assumed day to day conduct of the proceeding on behalf of those defendants.

53 Also on 27 January 2017, Chalmers Legal Studio commenced acting for the Fifth Defendant.

54 On or about 21 July 2017, the First Defendant was placed into administration. Mr Neil Cribb and Mr Greg Dudley of RSM Australia were appointed as administrators.

55 On 15 September 2017, the First Defendant entered into the DOCA, pursuant to s 444A of the *Corporations Act 2001* (Cth) (**Corporations Act**). The administrators then became the DOCA administrators.

56 The Plaintiff was a creditor of the First Defendant and accordingly became bound by the terms of the DOCA.

[16] Mr Penglis was appointed Senior Counsel in November 2018 while the SC Proceeding was ongoing. We have referred to Mr Penglis as Mr Penglis SC throughout these reasons.

Relevant Corporations Act provisions

57 Four provisions of the Corporations Act are important in this proceeding and were important in the SC Proceeding. They are s 437A, s 440D, s 444D and s 444E. Because of their importance in this matter, we turn now to set them out in full.

58 Section 437A provides as follows:

437A Role of administrator

(1) While a company is under administration, the administrator:

(a) has control of the company's business, property and affairs; and

(b) may carry on that business and manage that property and those affairs; and

(c) may terminate or dispose of all or part of that business, and may dispose of any of that property; and

(d) may perform any function, and exercise any power, that the company or any of its officers could perform or exercise if the company were not under administration.

(2) Nothing in subsection (1) limits the generality of anything else in it.

Note: A PPSA security interest in property of a company that is unperfected (within the meaning of the Personal Property Securities Act 2009) immediately before an administrator of the company is appointed vests in the company at the time of appointment, subject to certain exceptions (see section 267 of that Act).

59 The effect of s 437A of the Corporations Act was that, from the date the administrators were appointed, they assumed control of the First Defendant's business, property and affairs.

60 Section 440D of the Corporations Act provides as follows:

440D Stay of proceedings

(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:

(a) with the administrator's written consent; or

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

(2) Subsection (1) does not apply to:

(a) a criminal proceeding; or

(b) a prescribed proceeding.

61 The effect of s 440D of the Corporations Act was that the SC Proceeding could not be proceeded with against the First Defendant except with the administrators' consent or with the leave of the Supreme Court.

62 Section 444D of the Corporations Act provides as follows:

444D Effect of deed on creditors

(1) A deed of company arrangement binds all creditors of the company, so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)

(2) Subsection (1) does not prevent a secured creditor from realising or otherwise dealing with the security interest, except so far as:

(a) the deed so provides in relation to a secured creditor who voted in favour of the resolution of creditors because of which the company executed the deed; or

(b) the Court orders under subsection 444F(2).

(3) Subsection (1) does not effect a right in relation to an owner or lessor of property has in relation to that property, except so far as:

(a) the deed so provides in relation to an owner or lessor of property who voted in favour of the resolution of creditors because of which the company executed the deed; or

(b) the Court orders under subsection 444F(4).

(3A) Subsection (3) does not apply in relation to an owner or lessor of PPSA retention of title property of the company.

Note: Subsection (2) applies in relation to an owner or lessor of PPSA retention of title property of the company. Such an owner or lessor is a secured creditor of the company (see section 51F (meaning of PPSA retention of title property).

(4) Section 231 does not prevent a creditor of the company from becoming a member of the company as a result of the deed requiring the creditor to accept an offer of shares in the company.

63 Section 444E of the Corporations Act provides as follows:

444E Protection of company's property from persons bound by deed

(1) Until a deed of company arrangement terminates, this section applies to a person bound by the deed.

(2) The person cannot:

(a) make an application for an order to wind up the company; or

(b) proceed with such an application made before the deed became binding on the person.

(3) The person cannot:

(a) begin or proceed with a proceeding against the company or in relation to any of its property; or

(b) begin or proceed with enforcement process in relation to property of the company;

except:

(c) with the leave of the Court; and

(d) in accordance with such terms (if any) as the Court imposes.

(4) In subsection (3):

property of a company includes:

(a) any PPSA retention of title property of the company; and

(b) any other property used or occupied by, or in the possession of, the company.

Note: See sections 9 (definition of property) and 51F (PPSA retention of title property).

64 The effect of s 444E(3) of the Corporations Act was that, from the date of the DOCA, the SC Proceeding could not proceed against the First Defendant except with the leave of the Supreme Court or other court as defined in s 58AA of the Corporations Act.

Relevant DOCA terms

65 Some of the terms of the DOCA were also crucial in both the SC Proceeding and are important to the determination of this proceeding. At this point, we make relevant findings in relation to the terms of, and effect of, the DOCA about which we are satisfied.

66 The DOCA relevantly provided that from the date it commenced:

1. The administrators continued to remain in control of the First Defendant's business, property and affairs;[17] and

2. The SC Proceeding could not be proceeded with against the First Defendant except with the administrators' written consent or with the leave of the Supreme Court.[18]

Continuation of the background to the alleged conduct

67 Returning then to the factual background, we are satisfied of and make the following additional findings of fact.

68 At no time before 7 August 2019 did:

(a) the administrators consent to the SC Proceeding continuing against the First Defendant.

(b) the Supreme Court grant leave for the SC Proceeding to continue against the First Defendant.

(c) the administrators authorise or consent to the Firm or the Practitioner continuing to act in the SC Proceeding on behalf of the First Defendant.

(d) the administrators give the Firm or the Practitioner any instructions with respect to the conduct of the SC Proceeding.

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[17] Exhibit 2.21.
[18] Exhibit 2.21.

69 On 11 October 2017, the Practitioner informed the other parties to the SC Proceeding that the First Defendant had been placed into administration and had subsequently entered into a DOCA. He did so by sending an email in the following terms:[19]

> Before the parties start considering the proposed orders can you note, and can we update the court record that, the First Defendant is subject to:
>
> - The appointment of administrators (Neil Cribb and Greg Dudley or RSM); and
>
> - A deed of company arrangement (and thus the administrators are not deed administrators).
>
> This should be reflected in the court header of the action.
>
> Thank you.

70 The DOCA was attached to a witness statement of Mr Ian Wallace (the Second Defendant) dated 21 March 2018, which was filed in the SC Proceeding on that same day.[20]

71 On 26 June 2019, the Practitioner filed an affidavit in the SC Proceeding which was said to be filed on behalf of the First and Second Defendants in support of an application to amend the name of the First Defendant in the action to 'Ironbridge Holdings Pty Ltd CAN 009 341 011 (Receivers and Managers Appointed) (Subject to a Deed of Company Arrangement)' to reflect the fact that the First Defendant was in administration and subject to a DOCA.[21]

72 Mr Neil Cribb wrote to the solicitor for the Plaintiff on 19 July 2019 informing her, among other things, that the administrators first became aware of the SC Proceeding on 17 July 2019.[22]

73 At no time before 19 July 2019 did the Plaintiff seek the consent of the administrators to continue the SC Proceeding against the First Defendant. The Plaintiff sought that consent on 19 July 2019.[23] The administrators refused to give their consent.[24]

[19] Exhibit 2.10.
[20] Exhibit 2.21.
[21] Exhibit 2.75; Exhibit 2.76; Exhibit 2.77 and Exhibit 2.78.
[22] Exhibit 2.109.
[23] Exhibit 2.108.
[24] Exhibit 2.109.

74 On 22 July 2019, the Practitioner swore an affidavit in support of his application to the Supreme Court for leave for the Firm to cease acting for the First Defendant in the SC Proceeding.[25]

75 The application was heard and granted on 7 August 2019.[26]

Relevant events in the SC Proceeding and Communications the subject of Grounds 2 – 6

76 In order to resolve the allegations made against the Practitioner it is necessary to set out in considerable detail many of the steps which were taken in the SC Proceeding. It is also necessary to make findings of fact in relation to some communications which occurred between the parties, and between parties and the court about the SC Proceeding.

77 As to those matters, we are satisfied and make the following findings of fact.

78 On 13 September 2016, the Plaintiff issued a writ against the First to Fifth Defendants.[27]

79 On 7 October 2017, a combined defence was filed on behalf of all of the defendants by DLA Piper, who at that time, acted for them all.[28]

80 On 27 January 2017, the Firm filed a Notice of change of representation to act for the First, Second, Third and Fourth Defendants.[29]

81 On 6 February 2017, the Firm rendered a combined invoice to the First, Second, Third and Fourth Defendants.[30]

82 On 2 March 2017, DLA Piper filed a Notice of change of representation so that it once again acted for the Third and Fourth Defendants in the proceeding.[31]

83 On 10 March 2017, the Firm rendered an invoice to the First, Second, Third and Fourth Defendants.[32]

[25] Exhibit 2.111.
[26] Exhibit 2.128, pages 96 – 113.
[27] Exhibit 2.1.
[28] Exhibit 2.2.
[29] Exhibit 2.5.
[30] Exhibit 7, pages 47 – 50.
[31] Exhibit 2.6
[32] Exhibit 7, pages 51 – 53.

84 On 18 April 2017, the Firm rendered an invoice to the First and Second Defendants.[33]

85 On 17 July 2017, a Minute of Consent Orders dated 17 July 2017 (**MOCO 1**) in which the parties sought orders for a trial of a preliminary issue, among other things, was signed by the parties.[34] The Firm signed MOCO 1 as solicitors for the First and Second Defendants.

86 On 17 July 2017, Justice Banks-Smith made orders in terms of MOCO 1.[35]

87 On 10 October 2017, the Plaintiff's solicitor circulated as an attachment to an email to the parties, a proposed Minute of Consent Orders extending time for compliance with programming orders made earlier in the SC Proceeding and seeking orders permitting the filing of expert evidence.[36] The email and the proposed Minute of Consent Orders are addressed to the Practitioner, to the solicitor at DLA Piper who was acting for the Third and Fourth Defendants and to solicitors at Chalmers Legal Studio who were, by then, on the record as acting for the Fifth Defendant.

88 As we have found, at [69], on 11 October 2017 the Practitioner sent an email to the parties in which he informed them that an administrator has been appointed to the First Defendant and that the First Defendant has entered into the DOCA.

89 On 30 October 2017 at 2.50 pm, the Practitioner sent an email to the other parties' solicitors attaching a proposed Minute of Consent Orders asking 'Can the attached orders be agreed?'[37] The genesis of the email was an email received by the parties from the Associate to Justice Banks-Smith which was sent at 1.33 pm on 30 October 2017, in which the Associate referred to the hearing listed for the following day and asked the parties to indicate what was intended to be dealt with at the hearing and what orders the parties propose by way of a Memorandum of Consent Orders or a Minute of Proposed Orders.[38] There were no signing clauses on that proposed Minute of Consent Orders circulated by the Practitioner.

[33] Exhibit 7, pages 59 – 62.
[34] Exhibit 2.9.
[35] Exhibit 2.23.
[36] Exhibit 4.3.
[37] Exhibit 4.4.
[38] Exhibit 4.4.

90 On 30 October 2017 at 3.07 pm, after receiving correspondence from the other parties regarding the proposed Minute of Consent Orders, the Practitioner sent them another version of the Minute of Consent Orders which had been amended to have regard to the other parties' positions. This version had signing clauses for the parties that identify that the Firm was to sign the Minute of Consent Orders for the Second Defendant. There is no provision for any firm to sign the Minute of Consent Orders on behalf of the First Defendant.[39]

91 The Minute of Consent Orders which was in fact signed and filed in the SC Proceeding was in slightly different terms to those which were set out in the draft version circulated at 3.07 pm. The signed version circulated by the Practitioner by email at 5.31 pm on 30 October 2017 (**MOCO 2**)[40] includes a signing clause which, by its terms, identifies that the Firm signed as solicitors for the First and Second Defendants.[41]

92 On 31 October 2017, Justice Banks-Smith made orders in terms of the signed MOCO 2.[42] Order 12 was an order vacating the directions hearing and relisting it for a date to be fixed not before 2 February 2018.

93 On 3 February 2018, the parties agreed to the terms of a Minute of Consent Orders extending the time for the filing of witness statements and other trial documents (**MOCO 3**). The Firm signed MOCO 3 as solicitors for the First and Second Defendants.[43] A signed copy was sent by email to the Plaintiff's solicitor by the Practitioner.[44]

94 On 15 February 2018, orders were made by the Supreme Court in terms of MOCO 3.[45]

95 On Friday 9 March 2018, the Plaintiff's solicitor emailed the Practitioner and asked whether his clients intended to file any witness statements in the SC Proceeding.[46] They were due to have been filed on 8 March 2018.

[39] Exhibit 4.5.
[40] Exhibit 4.6.
[41] Exhibit 2.13; and Exhibit 4.6,
[42] Exhibit 2.14.
[43] Exhibit 4.7.
[44] Exhibit 4.7.
[45] Exhibit 2.27.
[46] Exhibit 4.8.

96 The Practitioner replied by email six minutes later saying:[47]

> I confirm that we have a statement from Mr Wallace that he will file by Monday next week.
>
> I trust your client will indulge our client until then. (*our underlining*)

97 The promised witness statement was not filed on Monday, 12 March 2018 as had been anticipated. On 15 March 2018, the Plaintiff's solicitor wrote to the Practitioner inquiring as to when she could 'expect to receive his client's witness statement' (*our underlining*).[48]

98 The Practitioner responded by email a short time later[49] apologising and stating:

> I apologise as I had to take on a trial at the last minute from Mon-Wed this week.
>
> I am waiting for the client to approve the statement. Can we agree to Monday, 19.3.18? (*our underlining*).

99 On 20 March 2018 at 12.17 pm, the Plaintiff's solicitor emailed the defendants' solicitors in the flowing terms:[50]

> We were served with the witness statements of the third and fourth defendants on 9 March 2018 and the witness statements of the fifth defendant on 16 March 2018.
>
> We have been advised by Mr Robertson that the first and second defendants intend to file a witness statement in these proceedings. We have not yet been served with a copy of the same.
>
> Pursuant to the current programming orders, our client is required to file its responsive statements by 23 March 2018. Our client will not be in a position to do so in the present circumstances.
>
> Please advise whether your respective clients take objection to our client filing its responsive statement by the date that is two (2) weeks from the date that our office is served with the witness statement of the first and second defendants (*our underlining*).

[47] Exhibit 4.10.
[48] Exhibit 5.10.
[49] Exhibit 4.10.
[50] Exhibit 4.11.

100 On 20 March 2018 at 1.34 pm, the Practitioner replied by email saying:[51]

> We are expecting our client to call in tomorrow to sign his statement.
>
> There is no objection from our client to the proposal below (*our underlining*).

The reference to 'the proposal below' in that email was self-evidently a reference to the proposal in relation to the filing of the plaintiff's responsive witness statements.

101 On 21 March 2018, the Practitioner caused to be filed the witness statement of Mr Wallace.[52] The document is said to have been filed on behalf of the Second Defendant. In the court heading, the First Defendant is identified as 'Ironbridge Holdings Pty Ltd (ACN 009 341 011) (Receivers and Managers Appointed) (Subject to a Deed of Company Arrangement).

102 In his witness statement, Mr Wallace states that he is a director of the First Defendant and that the First Defendant is subject to a DOCA. The DOCA was exhibited to Mr Wallace's witness statement.

103 On 10 April 2018, the Firm issued an invoice to the Second Defendant only.[53]

104 On 24 April 2018, the Practitioner responded by email to an email from the plaintiff's solicitor stating:[54]

> On the point of "there is currently no defence filed by the first and second defendant in these proceedings" – can you please note:
>
> - The first defendant is subject to a DOCA and the court record ought be amended to reflect this;
> - The second defendant has filed a defence jointly with defendants 1-4 (see attached) – when all parties were represented by the same lawyers; and
> - The second defendant does not intend to file any other defence.

105 On 25 April 2018, the Practitioner caused to be signed by the Firm, a Memorandum of Consent Orders dated 20 April 2018

[51] Exhibit 4.11.
[52] Exhibit 2.21.
[53] Exhibit 7.
[54] Exhibit 2.26.

(**MOCO 4**).[55] The signing clause identifies that the Firm signed as solicitors for the First and Second Defendants.[56] Orders were made by Justice Derrick in accordance with MOCO 4.[57]

106 On 9 May 2018, the Practitioner filed the Second Defendant's response to the Plaintiff's objections to witness statement filed on behalf of the Second Defendant.[58]

107 On 9 May 2018, the Practitioner filed the Second Defendant's objections to admissibility of the evidence contained in four witness statements.[59] In each case the Second Defendant adopted the objections taken by the Third and Fourth Defendants.

108 No such document was filed on behalf of the First Defendant.

109 On 14 May 2018, the Practitioner filed the Second Defendant's Notice of proposed documentary tender.[60] The signature clause refers only to the Second Defendant.

110 No such document was filed on behalf of the First Defendant.

111 On 31 May 2018, the parties filed a Memorandum of Consent Orders dated 29 May 2018 (**MOCO 5**).[61] The signature clause identifies that MOCO 5 was signed by the Firm as solicitors for the First and Second Defendants.

112 On 1 June 2018, the court made orders in terms of MOCO 5.[62]

113 On 13 June 2018, the Firm rendered an invoice to the Second Defendant.[63]

114 On 25 June 2018, the Practitioner sent an email to the other parties' solicitors in which he referred to his client in the singular stating:[64]

[55] Exhibit 4.13.
[56] Exhibit 4.13.
[57] The orders were not exhibited in the proceeding, although the Applicant's chronology indicates that they were made on 1 May 2018. Nothing turns on that issue.
[58] Exhibit 2.28.
[59] Exhibit 2.29; Exhibit 2.30; Exhibit 2.31; and Exhibit 2.32.
[60] Exhibit 2.33.
[61] Exhibit 4.15.
[62] Exhibit 2.39.
[63] Exhibit 7, para 34 and pages 109 – 111.
[64] Exhibit 4.16.

> We confirm our client would also like orders to be included to deal with the parties' access to the DOH documents.
>
> Can this be included with the minute of orders?

115 On 26 June 2018, in anticipation of a case management hearing which had been listed for the following day, the parties agreed and signed a Minute of Consent Orders dated 25 June 2018 (**MOCO 6**).[65] MOCO 6 is signed for the Firm as solicitors for the First and Second Defendants. The email by which the signed MOCO 6 was returned to the Plaintiff's solicitor for filing was sent by the Practitioner.[66] MOCO 6 had been drafted and circulated for signing by the Plaintiff's solicitors.[67]

116 On 26 June 2018, Justice Archer made orders in terms of MOCO 6 and the case management hearing was vacated.[68]

117 On 6 July 2018, the Plaintiff's solicitor sent an email to the other parties in which she circulated the list of documents the Plaintiff intended to tender at trial, stating that she had received such lists on behalf of the Second Defendant and the Third and Fourth Defendants and asking when the Fifth Defendant's list would be provided.[69] No mention was made of the First Defendant in the letter.

118 On 16 July 2018, the parties agreed and signed another Minute of Consent Orders vacating a directions hearing scheduled for 18 July 2018 and relisting it for 22 August 2018 (**MOCO 7**).[70] MOCO 7 is dated 13 July 2018. It is said to be signed by the Firm on behalf of the First and Second Defendants. The email by which the copy of MOCO 7 signed by the Firm was sent to the other parties was sent by the Practitioner on 16 July 2018.[71]

119 On 7 August 2018, another Minute of Consent Orders was agreed by the parties (**MOCO 8**).[72] MOCO 8 dealt with the issue of documents which had been subpoenaed from the Housing Authority. MOCO 8 was signed by the Firm as solicitors for the First and Second

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65 Exhibit 4.17.
66 Exhibit 4.17.
67 Exhibit 4.17.
68 Exhibit 2.41.
69 Exhibit 4.18.
70 Exhibit 4.19.
71 Exhibit 4.19.
72 Exhibit 4.20.

Defendants. The Practitioner emailed the Minute of Consent Orders to the other parties.[73]

120 On 15 August 2018, Justice Archer's Associate sent an email to the solicitors for the parties in which she made an inquiry of the parties about a possible amendment to MOCO 8. The orders were set out with the proposed amendments identified in bold type. The Associate asked whether the proposed amended orders reflected what the parties had intended in MOCO 8.[74]

121 On 20 August 2018, the Practitioner responded to the Associate's email advising her that 'the Second Defendant confirms that the orders are as intended in the bold font'.[75]

122 On 20 August 2018 at 4.23 pm, the Associate to Justice Archer emailed the Practitioner informing him that her Honour would make orders in terms of MOCO 8 (as amended), asking whether the parties wished to have the (then) upcoming directions hearing vacated and informing them that the Plaintiff's solicitor had confirmed that she had no objection to the hearing being vacated.[76]

123 On 21 August 2018, the Practitioner responded to the Associate's email stating that the Second Defendant would like the directions hearing vacated.[77] No mention was made of the First Defendant.

124 On 20 August 2018, Justice Archer made orders in terms of the amended MOCO 8.[78]

125 On 24 August 2018, the Practitioner wrote to the solicitors for the other parties and the solicitor for the Housing Authority informing them that the Firm was instructed that the Second Defendant withdraws its objection to the Housing Authority's claim for privilege in relation to the subpoenaed documents.[79]

126 On 24 August 2018, the Firm signed a Minute of Consent Orders as solicitors for the First and Second Defendants seeking orders vacating previously made orders concerning the hearing of the Housing

[73] Exhibit 4.20.
[74] Exhibit 4.21.
[75] Exhibit 4.21.
[76] Exhibit 4.22.
[77] Exhibit 4.23.
[78] The orders were not exhibited in the proceeding. However, Exhibit 2.46 is an email from Justice Archer's Associate to the parties confirming that her Honour would make orders in terms of MOCO 8.
[79] Exhibit 4.24.

Authority's objections to subpoenaed documents (**MOCO 9**).[80] The email by which MOCO 9 was circulated to the other parties' solicitors was sent by the Practitioner.[81]

127 On 4 September 2018, the Practitioner signed yet another Minute of Consent Orders (**MOCO 10**) which was said to be signed by the Firm as solicitors for the First and Second Defendants.[82] The Practitioner sent the email circulating it for signing by the other parties.[83]

128 On 17 September 2018, the Practitioner sent an email to the other parties' solicitors in which he refers to his client in the singular stating, among other things:

> We confirm that our client agrees that the parties should be seeking trial dates.

129 On 18 September 2018, a Minute of Consent Orders seeking entry for trial (**MOCO 11**) was signed by the Practitioner on behalf of the Firm as solicitors for the First and Second Defendants.[84] The Practitioner sent a copy of MOCO 11 signed by the Firm to the other parties by email on that date.[85]

130 On 18 September 2018, Justice Archer made orders in terms of MOCO 11.[86]

131 On 5 October 2018, the Practitioner sent an email to Mr Abbott, of counsel, informing him that the Firm would like to brief him on the matter and asking whether he would have any conflict in acting for the Second Defendant.[87] The relevant parts of that email are as follows:

> Can you please check to see if you have any conflict to act in this as counsel for the Second Defendant, Ian Wallace. …
>
> It is a claim nobody expected to go to trial but we are now being asked to have trial counsel confer about the length of the trial and other matters.
>
> …

[80] Exhibit 4.25.
[81] Exhibit 4.25.
[82] Exhibit 4.26.
[83] Exhibit 4.26.
[84] Exhibit 4.28.
[85] Exhibit 4.28.
[86] Exhibit 2.55.
[87] Exhibit 4.29.

> The First Defendant is subject to a DOCA and taking no part.
>
> … .

132 On 16 October 2018, the Practitioner signed a Minute of Consent Orders where the signing clause refers to the Firm as solicitors for the First and Second Defendants (**MOCO 12**).[88] MOCO 12 sought orders vacating the directions hearing which was listed for 17 October 2018 and extending the time for entry for trial.

133 On 17 October 2018, Justice Archer made orders in terms of MOCO 12.[89]

134 On 1 November 2018, the Associate to Justice Archer emailed the parties' solicitors regarding the relisting of a directions hearing.[90]

135 In response to that email, the Practitioner sent an email to the Associate, which was copied to the other parties' solicitors, in which he advised the Associate that relisting the directions hearing on 14 November 2018 was acceptable to the Second Defendant.[91] No mention was made of the First Defendant.

136 On 12 November 2018, the Practitioner sent a brief to counsel.[92] In that brief he said, relevantly:

> We act for the (sic) Mr Ian Wallace in the above action.
>
> Ironbridge, (Ian's company and) the seller of the land in the transactions, is subject to a DOCA and taking no part in the action.

137 On 27 November 2018, the Associate to Justice Archer advised the parties that the trial of the preliminary issue was listed for 14 – 27 August 2019.[93]

138 On 6 December 2018, the Firm sent an invoice to the Second Defendant.[94] No invoice was sent to the First Defendant.

139 On 15 January 2019, a Minute of Consent Orders dated 7 January 2019 (**MOCO 13**) for among other things, an extension of time for

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[88] Exhibit 2.57.
[89] Exhibit 2.60.
[90] Exhibit 4.30.
[91] Exhibit 4.30.
[92] Exhibit 7, pages 124 – 125.
[93] Exhibit 2.70.
[94] Exhibit 7, pages 112 – 115.

entry for trial was signed by the Practitioner identifying that the Firm acted as solicitors for the First and Second Defendants.[95]

140 On 3 April 2019, the Practitioner circulated, by email to the other parties' solicitors,[96] the Second Defendant's Supplementary Informal List of Documents in response to a request for specific document.[97]

141 On 26 June 2019, the Practitioner swore an affidavit in support of the amendment to the name of the First Defendant under O 21 r 5 of the Rules of the Supreme Court (**RSC**) which was filed on that same date.[98] In the affidavit, the Practitioner deposed that he had the day-to-day conduct of the matter, that receivers and managers had been appointed to the First Respondent on 7 April 2017, that on about 21 July 2017 Ironbridge had appointed administrators and that, on 15 September 2017, Ironbridge had entered into a DOCA and still remained subject to that DOCA. In paragraph eight of his affidavit the Practitioner said that the affidavit was sworn in support of the application to change the name of the First Defendant to 'Ironbridge Holdings Pty Ltd ACN 009 341 001 (Receivers and Managers Appointed) (Subject to a Deed of Company Arrangement)' under RSC O 21 r 5.

142 On 26 June 2019, the Practitioner sent a copy of his affidavit to Justice Archer's Associate and to the solicitors for the other parties.[99] In that email he stated:

> Can we attend to a housekeeping matter of the correct name details of the First Defendant.
>
> It is in receivership and administration and the court record should reflect this.
>
> Please see the attached affidavit that has been lodged.
>
> Can you amend the details of the First Defendant?

143 On 28 June 2019, the Associate responded to the Practitioner's email advising that Justice Archer had requested that he file a Minute of

[95] Exhibit 2.72.
[96] Exhibit 4.31.
[97] Exhibit 4.31.
[98] Exhibit 2.75.
[99] Exhibit 2.76 and Exhibit 2.77.

Consent Orders reflecting the change in the First Respondent's position.[100]

144 On 28 June 2019, the Practitioner prepared and filed a Minute of Consent Orders to change the name of the First Defendant (**MOCO 14**) as per Justice Archer's request.[101] It was expressed to be filed on behalf of the First and Second Defendants. The copies of MOCO 14 which are exhibited in the proceedings are not signed by any parties. Nevertheless, the agreed chronology filed on 23 June 2023 indicates that MOCO 14 was filed. We are prepared to proceed on the basis that MOCO 14 was signed by the parties.

145 In any event, on 28 June 2019, Justice Archer made orders changing the name of the First Defendant in terms sought in MOCO 14.[102]

146 On 1 July 2019, the Associate emailed the extracted orders to the parties' solicitors and advised them that Justice Archer was expecting their (by then) overdue Agreed List of Issues and a minute of proposed orders in preparation for a directions hearing which was listed for 3 July 2019.[103]

147 On 2 July 2019, the Associate sent an email to the parties' solicitors.[104] In that email she informed them that Justice Archer would like the agreed communication, which the parties had earlier foreshadowed being sent to the court, to address the following matters:

(a) why the First and Second Defendants had not been involved in producing an Agreed List of Issues;

(b) why the Agreed List of Issues had not been filed; and

(c) when the Papers for the Judge would be filed.

148 Later on 2 July 2019, the Plaintiff's solicitor sent an email to the solicitors for the defendants[105] seeking approval to respond to the Associate informing the court:

[100] Exhibit 2.77.
[101] Exhibit 2.78 and Exhibit 4.32.
[102] Exhibit 2.79.
[103] Exhibit 4.33.
[104] Exhibit 4.34.
[105] Exhibit 4.34.

1. That the First and Second Defendants had been involved in producing the Agreed List of Issues; and

2. That she had been informed by the solicitor for the First and Second Defendants that their clients adopt the position of the Third and Fourth Defendants.

149 On 2 July 2019, the Practitioner responded to the Plaintiff's solicitor's email stating '[t]his is OK with the 1st + 2nd Defendants'.[106]

150 On 3 July 2019, a directions hearing was held before Justice Archer. The transcript of the directions hearing is an exhibit in the proceeding.[107] The Practitioner announced his appearance as follows:[108]

> May it please the court, your Honour. I appear for Ironbridge and for Mr Wallace.

151 On 6 July 2019, the Practitioner sent an email to the solicitors for the other parties confirming that the First and Second Defendants were adopting the List of Issues prepared on behalf of the Third and Fourth Defendants.[109]

152 On 8 July 2019, the Practitioner circulated a minute of amended defence which was expressed to be a document prepared on behalf of the First and Second Defendants.[110] This document, although circulated to the parties, was never filed in the SC Proceeding.

153 On 9 July 2019, the Firm rendered an invoice to the Second Defendant.[111] No invoice was issued to the First Defendant.

154 On Thursday 11 July 2019, the Practitioner, Mr Penglis SC, and Mr Hancy (who was counsel for the Third and Fourth Defendants) attended a conference regarding the pleadings and the preparation of the list of legal and factual matters in issue.

155 Following that hearing, on 11 July 2019, Mr Penglis SC sent an email to the Practitioner, Mr Hancy and Mr Ferrett.[112] In that email Mr Penglis SC set out the text of a draft letter which he proposed to

[106] Exhibit 4.34.
[107] Exhibit 2.81, pages 1 – 28.
[108] Exhibit 2.81, page 2.
[109] Exhibit 2.82.
[110] Exhibit 2.84.
[111] Exhibit 7, pages 116 – 118.
[112] Exhibit 2.85.

send to the Associate by the Plaintiff's solicitors in which the Practitioner is referred to as the solicitor for the First and Second Defendants. It said that the parties would provide the Court with their proposed amended pleadings the next day, that no major disputes were anticipated and that the parties' view was that the strategic conference scheduled for the following Monday morning should still proceed.

156 On 12 July 2019, the Associate the sent an email to the parties' solicitors asking for a list of appearances in advance of the strategic conference scheduled for 15 July 2019.[113]

157 In response to the Associate's email, the Plaintiff's solicitor asked the parties to notify her of appearances so that she could compile one complete list and provide it to the Associate.[114]

158 In response to the Plaintiff's solicitor's email, the Practitioner sent an email stating:[115]

> I will appear for the First and Second Defendants.

159 The Plaintiff's solicitor informed the Associate by email of various matters including that the Practitioner would appear for the First and Second Defendants at the strategic conference on 15 July 2019.[116]

160 The strategic conference was in fact held before Justice Archer on 16 July 2019. The transcript of that hearing was tendered in the proceeding.[117] At the strategic conference the Practitioner announced that he appeared on behalf of the First and Second Defendants.[118]

161 In the course of that strategic conference, the Practitioner informed the Court that Mr Wallace intended to retain the Firm only up until the point in time when all trial directions are complied with, following which he intended to appear in person. The Practitioner explained:[119]

> It's a question of costs, your Honour. It's a long trial which Mr Wallace is unable to fund.

[113] Exhibit 4.35.
[114] Exhibit 4.35.
[115] Exhibit 4.35.
[116] Exhibit 2.88.
[117] Exhibit 2.91, pages 29 – 46.
[118] Exhibit 2.91, page 31.
[119] Exhibit 2.91, page 39.

162 Following that comment, Mr Penglis SC made the following observation which, in our view, makes it abundantly clear that he did not understand that the position was that the Plaintiff's action could not, at that point in time, proceed against the First Defendant. He said:[120]

> Your Honour, there's a further issue about that if I may interrupt. And it's all very well for Mr Wallace to represent himself, but First Defendant is a corporation - - -
>
> …
>
> - - - and he can't represent without leave of the court a corporation. In the circumstances I will be opposing for reasons I can go into. It would be inappropriate for him to be representing the corporation. So there's another issue there.

163 In reply, the Practitioner made the following submission:[121]

> I will just talk to that. The company is actually in receivership and subject to a DOCA. So the company has got a completed deed of company arrangement which the control has been returned to Mr Wallace, but the claim in this matter is effectively captured by the deed of company arrangement. So it's difficult to see how this – is prejudice because there's very little that that company is doing.
>
> It's not trading. It's just subject to a DOCA which is effectively dealing with an interest in some property in Victoria, the substance of which Mr Wallace is looking to deal with through the other trial proceedings in Victoria.

164 Justice Archer responded to that submission by asking the Practitioner whether he resisted the proposition that Mr Wallace required leave to represent the First Defendant. The Practitioner replied:[122]

> I don't resist that proposition and there would have to be an application filed.

165 Justice Archer then made an order requiring the Second Defendant to file its application to act for the First Defendant by noon on 22 July 2019, requiring the Second Defendant and the Plaintiff to file submissions in relation to the application and requiring unavailable

[120] Exhibit 2.91, pages 39 – 40.
[121] Exhibit 2.91, page 40.
[122] Exhibit 2.91, page 40.

dates for a special appointment to deal with the matter to be provided by 4 pm on 22 July 2019.[123]

166 The Practitioner asked whether, if the Plaintiff was not resisting the application, her Honour would still require submissions. Justice Archer responded that she would still need some form of written submissions and references to relevant authorities so as to understand the basis for the application.[124]

167 Her Honour then asked the Practitioner whether there was anything else he needed to raise and he responded as follows:[125]

> No. That's everything from the first and second.

168 On 16 July 2019, the orders made by Justice Archer at the strategic conference were extracted.[126] Orders 15 and 16 were the orders in relation to the Second Defendant's application to act for the First Defendant.

169 On 17 July 2019 at 9.14 am, the Practitioner sent an email to the Plaintiff's solicitor and to Mr Penglis SC attaching a Minute of Consent Orders and stating:[127]

> Regarding the application for W+H to get off the record for the First Defendant (Ironbridge), we do not actually need to apply because the action is stayed by reason of s 444E of the Corporations Act.
>
> Nobody, to my knowledge has applied for leave to continue the action against Ironbridge and thus by continuing the action against Ironbridge without leave – it is an abuse of process.
>
> In the event your client applied for leave to continue the action against Ironbridge it would be unlikely to get the leave based on the authorities.
>
> I attach my affidavit sworn 26.7.19 [sic].[128] As you can see in the DOCA, the definition of "Creditor" is wide and your client has not been excluded from the DOCA. In the result your client's claim against Ironbridge can only ever result in being admitted to proof to participate in the DOCA when the time for that comes. That time has not come and the DOCA has some time to run.

[123] Exhibit 2.91, page 40.
[124] Exhibit 2.91, page 41.
[125] Exhibit 2.91, page 42.
[126] Exhibit 2.92.
[127] Exhibit 2.95.
[128] The Practitioner's affidavit was sworn on 26 June 2019.

> As you know Ian Wallace can choose to represent himself at any stage of proceedings. He does not need the leave of the trial judge. He can file a notice to this effect whenever he chooses to do so.
>
> This all makes Archer J's orders 16 and 17 [sic] of yesterday redundant. Can you consider these issues and confirm you agree?
>
> If you do, then can you have your instructor sign the minute and I will circulate it and confirm we have agreed the orders and that we will raise it with the Associate before the orders from yesterday are extracted.

170 The Minute to which the Practitioner referred were orders vacating orders 15 and 16 of the orders made on 16 July 2019. When the Practitioner received the extracted orders which were sent by the Associate at 9.54 am on 17 July 2019, the Practitioner amended the Minute of Consent Orders seeking to vacate the orders to correctly refer to orders 15 and 16.[129]

171 On 17 July 2019 at 12.12 pm, by email sent to the Plaintiff's solicitors and copied to the other parties, [130] the solicitors for the Fifth Defendant sent a letter asking the Plaintiff to confirm whether the administrators had ever consented to the continuation of the action against the First Defendant and stating that, if not, leave of the court is required pursuant to s 440D of the Corporations Act. The Fifth Defendant's solicitors foreshadowed the possibility of raising the issue with the court.[131]

172 At 12.28 pm on 17 July 2019, the Practitioner sent an email to the solicitors for the other parties stating:[132]

> I believe the section of the Corporations Act is 444E as Ironbridge is subject to a DOCA.

173 On 17 July 2019 by email sent at 6.01pm, the Practitioner wrote to the administrators in the following terms:[133]

> Gents
>
> As I understand it you have known about the action.
>
> The action had been progressing at a slow pace until it ramped up this year when trial dates were set.

[129] Exhibit 4.38.
[130] Exhibit 4.39.
[131] Exhibit 4.39.
[132] Exhibit 4.40.
[133] Exhibit 4.46.

I have found documents on a cursory review of our DMS where we have told Satterley's lawyers about the DOCA and the Deed. Two such examples are attached.

We were on the record before the DOCA, during the process of the DOCA and since the DOCA. Our instructions from Ian on and from administration and the DOCA were from Ian in his personal capacity.

It is not apparent why Satterley would want to continue this action against Ironbridge/the Deed administrators - when it has known that Ironbridge was in administration and that it was subject to a DOCA.

I will try to confer with Stephen before he gets more hot under the collar about this matter and I will report back to you.

174 On 18 July 2019, the Practitioner filed an Amended Defence of the Second Respondent[134] and served it on the other parties by email sent at 12.24 pm.[135]

175 On 18 July 2019, Mr Penglis SC wrote a letter to the Practitioner in the following terms:[136]

John

Thank you for your email.

I apologise for not replying sooner, but I have been in conference all morning.

I am sorry that you feel that I am being combative. I am not. Rather, I am trying to understand exactly what has happened and don't want any misunderstandings down the track. Also, as I've said, given the nature of the issue, it is appropriate that our communications be in writing. I have also said that, once I know what the facts are, before making any application, I will speak to you.

The position is that, in your email dated 11 October 2017, you advised of the appointment of Administrators and of the Deed of Company Arrangement. It did so requesting "can we update the Court record" and 'header of the action" to reflect that fact. You did not advise that you no longer represented the first defendant or that it would be necessary for us to obtain leave of the Court to proceed on the basis that the Administrators did not consent to the Action proceeding.

Thereafter, not only have you remained on the record for the First Defendant, you have taken steps in the action on behalf of the first

[134] Exhibit 2.84.
[135] Exhibit 2.104.
[136] Exhibit 2.105.

defendant. Moreover, at no time has any objection been raised to the Action proceeding against the first defendant (that is, not until this week).

In this regard it is not correct for you to suggest that you have not taken any step in your capacity as solicitor for the first defendant since the appointment of Administrators and subsequent to the DOCA. On many occasions (see your emails to, amongst others, Bushra Tariq dated 30 October 2017, 3 February 2018, 25 April 2018, 7 August 2018, 16 October 2018, 15 January 2019) you have signed consent orders as solicitors for both defendants. You have recently appeared before Archer J (twice) on behalf of both defendants. Moreover, even as recently as 2, 6 and 12 July you have sent emails expressly on behalf of the First and Second Defendants.

What I want to know is whether you are now telling us that, notwithstanding all of the above, you have not held instructions from the Administrators to act for the First Defendant and that, moreover, the Administrators have not been kept aware that this Action has continued to proceed against, *inter alia*, the first defendant?

I also want to know why, in all the circumstances, you have raised the section 444D/444E point now (as opposed to any time previously in the last 22 months)?

I need to know the facts so that I can advise my client what to do.

May I please have your urgent reply.

…

176 On the same day, the Practitioner sent an email in reply.137 This is the email which is the subject of the allegation in Ground 2. That email said as follows:

Thank [sic] you for your email.

I refer to your paragraph:

- 4 and respond as follows:
    - I agree I did not give your instructors or the other parties advice on the effect of Administration and the DOCA.
    - I do not accept it is my place to provide advice to other lawyers. It is presumed those lawyers know the law.

[137] Exhibit 2.106.

    - If the inference is I have caused other lawyers to fall into error by my silence, then I do not accept that inference is open.

    - I assumed it was common cause that the action against the First Defendant was at an end by the operation of s 444D of the Corporations Act.

- 5 as follows:

    - Up until the emails this month, each of the emails you have referred to dated 30 October 2017, 3 February 2018, 25 April 2018, 7 August 2018, 16 October 2018 and 15 January 2018 – all relate to consent orders prepared by others. I accept that this should have made clear that we acted only for the second Defendant and that the emails and appearances this month were incorrect.

    - When you say I have remained on the record for the first defendant I have been operating on the basis that the first defendant was playing no further part in the action and that this was accepted because of notice of external administration and the DOCA. I had understood this trite legal position was known and accepted by the parties however I did not think to raise it with anyone because of the assumption that the target for your client's claim was Mr Wallace and not the pre or post DOCA Ironbridge.

    - The position did come to a head this week when I raised getting off the record for both defendants. I did not raise s 444D or s 444E with the court on 16.7.19, however I raised it with you the next day when I was considering the application for Mr Wallace to represent Ironbridge - which is unnecessary because of the effect of s 444D.

    - Your last sentence of this paragraph asserts that the onus is on me to advise you of the need to obtain the courts leave to proceed against the deed administrators (not the cleansed or new post DOCA version of Ironbridge). Is this your contention? Again I had thought your target was Mr Wallace and not trying to look behind a DOCA to get at what assets and undertaking of Ironbridge that is contained in that DOCA.

- 6 as follows:

  - As noted above the emails between 30.10.17 – 15.1.19 contain consent orders prepared by others and I accept a lack of attention to the detail therein.

  - I will correct the record with the court about the two July 2019 appearances by an email to the Associate at the conclusion of our conferral. I also apologise for the error of referring to the first defendant in the July 2019 emails.

- 7 as follows:

  - I do not have instructions from the DOCA administrators to act for the First Defendant.

  - I never had instructions from the DOCA administrators to act for the First Defendant.

  - I do not act for the DOCA Administrators.

  - I have not kept the DOCA Administrators aware of this action continuing against the First Defendant as I did not believe it was continuing against them. That is why I have filed no court documents for the First Defendant.

  - When I briefed Mr Abbott of counsel I told him that Ironbridge was taking no part in the action.

  - As an aside the DOCA administrators have no concern about the post DOCA Ironbridge as it has been returned to the directors to run the company that remain under the control of its directors and receivers KordaMentha. If you combine this with s 444D of the Act then your client cannot maintain the claim against Ironbridge. Your client's claim against the post DOCA Ironbridge should be dismissed.

- 8 as follows:

  - As noted above I was giving notice of coming off the record for both defendants.

  - A review of s 444E and s 444D confirmed there was no need to come off the record for Ironbridge as the claim against it is misconceived and should be dismissed.

  - For the last 22 months I assumed your client's target was Mr Wallace and the other defendants.

> - I reiterate what can your client possibly hope to achieve by joining the DOCA Administrators to this action and proceeding against them?
>
> - I press the questions to you that are in my email of 10.04 today.
>
> If your client is now contemplating an action to join the DOCA administrators you will need to confer with them. I again request we confer as we need to update the position to the court including that we regard orders 15 and 16 of Archer J's orders of 16.7.19 to be redundant and that we will not be making an application in the terms proposed or at all.
>
> I am content to provide all emails in our chain and all of the attachments that we both rely on for the Court to review.
>
> regards.

177 On 19 July 2019, the Plaintiff sought the consent of the administrators to continue with the SC Proceeding against the First Defendant. That request was refused.[138]

178 On 22 July 2019, the Practitioner filed an application for an order that the Firm cease to act for the First Defendant and an affidavit sworn by the Practitioner in support of that application.

179 The substantive part of that affidavit which was sworn and filed by the Practitioner said as follows: [139]

> (1) I am a director of Williams + Hughes (**W+H**), the Solicitors for the First and Second Defendants and have the day to day conduct of this mater.
>
> (2) Save where otherwise appears, the contents of this affidavit are true to my own knowledge. Where a fact is true to the best of my own information and belief, that fact is stated, and the source of the information and belief is identified in the text.
>
> (3) I swear this affidavit in support of the Chamber Summons for an order that W+H cease to act as solicitors for the First Defendant (**Ironbridge**).
>
> (4) I confirm that Ironbridge:

[138] Exhibit 1, pages 476 – 479.
[139] Exhibit 2.111.

4.1 appointed Messers Neil Cribb and Greg Dudley of RSM Partners as Ironbridge's administrators on 21 July 2017;

4.2 signed a deed of company arrangement (**DOCA**) appointing Messrs Cribb and Dudley as the DOCA administrators on 15 September 2017. Attached and marked **JAR1** is a copy of the DOCA and an ASIC Search of Ironbridge.

(5) From the date of at least 21 July 2017, I ceased taking instructions from anyone at Ironbridge. I gave written notice of the DOCA to the Plaintiff's solicitors by email dated 11 October 2017.

Attached and marked **JAR2** is a copy of my email dated 11 October 2017.

(6) I confirm I have had no contact with and taken no instructions from Messrs Cribb and Dudley in their capacity as administrators of Ironbridge. The reasons for that include:

6.1 I regarded W+H's retainer with Ironbridge to be at an end as at 21 July 2017; and

6.2 Ironbridge was under a statutory stay, under s 444E(3) of the Corporations Act 2001 (Cth), by which it was impermissible that the Plaintiff could continue this action against Ironbridge without the leave of the Court. No such application for leave under s 444E(3) of the Corporations Act was ever filed by the Plaintiff.

(7) In the result, W+H's role as solicitors on the record for Ironbridge is redundant since at least 21 July 2017 and I understand from Messrs Cribb and Dudley in the capacity as DOCA administrators – are unfunded.

Attached and marked **JAR3** is a letter I was copied into from Mr Cribb dated 19 July 2017 to the Plaintiff's solicitors in which the DOCA administrators set out their position in response to a letter from the Plaintiff's solicitors that I have not seen.

(8) I have searched the eCourts portal today to confirm W+H have not already been removed from the record for Ironbridge.

(9) I swear this affidavit in support of the orders in W+H's chamber summons of today's date to be removed as solicitors on the record from Ironbridge.

180 On 22 July 2019, the Plaintiff brought an application for leave to proceed against the First Defendant and for the costs of the application to be paid by the Firm.[140]

181 On 22 July 2019, the Practitioner also wrote to the Associate to Justice Archer.[141] The substantive part of that letter stated:

> I refer to what I believe are my two and only appearances in Court for this action on 3 July 2019 and 16 July 2019.
>
> It has come to my attention that I incorrectly announced my appearances as counsel for the First Defendant (**Ironbridge**) and the Second Defendant (**Mr Wallace**). This was an error because I had been operating on the assumption that Williams + Hughes' (**W+H**) retainer for Ironbridge ended, on or about 21 July 2017, when Ironbridge appointed Messrs Neil Crabb and Greg Dudley of RSM Australia Partners as Ironbridge's administrators. I confirm I have had no contact with Messrs Cribb and Dudley regarding this action. The further reasons for my assumption that W+H's retainer with Ironbridge was at an end include that:
>
> 1. Ironbridge then signed a deed of company arrangement on 15 September 2017; and
>
> 2. Ironbridge has been (and remains) under a statutory stay of this action under s 444E(3) of the *Corporations Act 2001* (Cth) – and Plaintiff did not apply for leave to proceed against Ironbridge after being given notice of the appointment of the administrators and the DOCA by me on 11 October 2017.
>
> I respectfully ask that the Court correct the record of my appearances on 3 July 2019 and 16 July 2019 to reflect that I only appeared for Mr Wallace. I apologise to the Court for the error of incorrectly announcing my appearances on these two recent dates in error.
>
> It has been brought to my attention that I have signed consent orders dated 30 October 2017, 3 February 2018, 25 April 2018, 7 August 2018, 16 October 2018 and 15 January 2019 – all said to be on behalf of the First Defendant and Second Defendant. These consent orders were prepared by other parties and only some of them have been extracted as they were all dealt with administratively. I apologise to the Court for the lack of attention to detail of signing these consent orders without deleting reference to the 'First Defendant'.
>
> I confirm that W+H have filed an application to come off the record for Ironbridge under RSC Order 8 rule 7 and that the application is awaiting a listing date before Her Honour, Justice Archer.

[140] Exhibit 4.58.
[141] Exhibit 2.112.

182 Also on 22 July 2019, the Practitioner wrote to Mr Penglis SC in the following terms:[142]

> Dear Steven
>
> …
>
> I refer to your email dated 18 July 2019.
>
> I confirm I have discussed the ethical aspects of this matter with Senior Counsel.
>
> I refer to the letter from Neil Cribb of RSM Australia Partners dated 19 July 2019, a joint and several administrator of the deed of company arrangement of the First Defendant (**Ironbridge**). As you can see from Mr Cribb's letter, I have had no involvement with the DOCA administrators – since and after they were appointed DOCA administrators of Ironbridge. They were also unaware of this action and have played no part in it whatsoever.
>
> As a matter of Law (*as I understood it*) my firm's (**W+H**) retainer with Ironbridge ended when DOCA administrators were appointed to Ironbridge on 15 September 2017 – which was when different parties took control of Ironbridge and did not instruct me to act. Your instructors were given notice of the appointment of the DOCA administrators on 11 October 2017.
>
> The requirement of your client to apply for leave to proceed against Ironbridge, under s 444E(3) of the Corporations Act, is not something the DOCA administrators could ever consent to, or waive, without leave of the Court. I refer you to paragraph [5.3A.0515] of the Australian Corporation Law Principles & Practice where it states, relevantly:
>
> > A deed of company arrangement binds the company, its officers and members and the deed's administrator: s 444G. None of them may make or prosecute an application for the winding up of the company, <u>nor may they take or proceed with any action against the company or its property otherwise than with the court's leave and on such conditions as it may impose: s 444E</u>. (emphasis added).
>
> The reason for this is obvious. Only the court can weigh the impact on creditors and condition the leave – not the administrators nor anyone acting for them.
>
> I accept I have inadvertently signed programming orders prepared by your instructors on 20 October 2017, 3 February 2018, 25 April 2018, 7 August 2018, 16 October 2018 and 15 January 2019. I apologise for

[142] Exhibit 2.113.

the lack of attention to detail in signing those consent orders without scoring through reference to the First Defendant. As you know each substantive court document W+H has filed in this action, post appointment of the DOCA administrators (e.g. witness statements and pleadings), has been filed only on behalf of the Second Defendant (**Mr Wallace**). I confirm I have only ever taken and acted for and on the instructions of Mr Wallace after the appointment of the DOCA administrators.

I also acknowledge that – at the two and only court appearances I have ever made in this action (that both occurred this month) – I incorrectly announced my appearance on behalf of the First and Second Defendant. I will correct this oversight with the Court immediately and request that the Court record be updated to reflect my two appearances were only on behalf of Mr Wallace.

W+H have not filed an application to come off the record for Ironbridge (**Application**). The Application refers to W+H's retainer ending upon the appointment of the DOCA administrators and in the supporting affidavit I depose to:

- having had no contact with the DOCA administrators;
- taking no instructions from the DOCA administrators after their appointment; and
- not disclosing (or updating) details of this action to the DOCA administrators.

If you maintain I have acted for the DOCA administrators without proper authority, after I file the Application, then I will file a supplementary affidavit attaching this letter and your response and raise your assertion with the Court – including my apology for signing consent orders with a lack of attention to detail and incorrect announcement of the two and only appearances I have ever made in this action (both of which occurred this month).

I remain of the view that W+H remaining on the record for Ironbridge, me signing consent orders incorrectly or the erroneous announcements (this month) of my two and only appearances in this action – will have no impact on the principles of law that are relevant to your client's application for leave to proceed against Ironbridge under s 444E(3) of the Act.

Yours sincerely.

183 The words in the above quote, which were inserted by the Practitioner after consideration of the draft as amended by Mr Zelestis KC, have been italicised for identification.

184 On 24 July 2019, the Associate to Justice Archer sent an email to the parties regarding applications and other issues.[143]

185 On 25 July 2019, the Practitioner swore an affidavit in response to Justice Archer's direction to explain the Second Defendant's breach of a direction to file a response to the Plaintiff's Chronology.[144]

> 1. I am a director of William & Hughes Pty Ltd (**W+H**).
>
> 2. Save where otherwise appears, the contents of this affidavit are true to my own knowledge. Where a fact is true to the best of my information and belief, that fact is stated, and the source of the information and belief is identified in the text.
>
> 3. I refer to the Court's direction for me to explain the lapse of the Second Defendant (**Mr Wallace**) regarding filling or agreeing a chronology by 19 July 2019. The direction is based on the orders of The Honourable Justice Archer dated 22 January 2019 and 16 July 2019 (collectively **Trial Directions**). Attached marked **JAR1** is a copy of the Trial Directions.
>
> 4. At the outset, I confirm W+H began assisting Mr Wallace to set up a profile for himself to act in person through e-lodgement when he made the decision to terminate W+H's retainer in the week commencing 15 July 2019. That process ended in Mr Wallace trying to comply with CT Help Desk advice on Friday 19 July 2019. The process appears to be complete however, Mr Wallace ended up fax filing his notice of change of representation on 24 July 2019.
>
> 5. On 18 July 2019 I sent an email to the solicitors for the Plaintiff to confirm Mr Wallace agreed with the chronology of events agreed between the Plaintiff, Third Defendant and Fourth Defendant (**P34 Chronology**). Attached and marked **JAR2** is a copy of that email.
>
> 6. The Plaintiff and Third and Fourth Defendants exchanged further emails regarding the P34 Chronology and I did not detect those emails or confer with the Plaintiff's solicitors or the Third and Fourth Defendants solicitors regarding the P34 Chronology nor was I asked for Mr Wallace's response to a dispute that occurred between the Plaintiff's solicitors and the Third and Fourth Defendant's solicitors. Attached and marked **JAR3** are copies of those emails. The Plaintiff then filed the P34 Chronology on 19 July 2019 without further reference to me and it is folio 143 on the court record.

[143] Exhibit 2.120.
[144] Exhibit 2.123.

> 7. I confirm Mr Wallace agrees with the P34 Chronology. I have talked to Mr Wallace and he is willing to file that document (i.e. the P34 Chronology) with a title "Second Defendant's Chronology" which will of course add an identical document to the Court record with only a different title.
>
> 8. I have provided Mr Wallace with the Trial Directions and will be assisting in hand over of court documents in an orderly format for him to represent himself. W+H remains available to assist Mr Wallace and the Court for Mr Wallace to conduct his defence efficiently.
>
> 9. I swear this affidavit in response to the direction of the Honourable Justice Archer of 24 July 2019.

186 On 2 August 2019, the Firm filed an outline of submissions in support of an application for it to be removed from the record for the First Defendant.[145] Those submissions refer to the appointment of the administrators to the First Defendant and the fact that it had entered into a DOCA. They state, inter alia:

(a) that the Firm did not seek and has no solicitor-client relationship with the administrators;

(b) that the administrators do not consent to the continuation of the action against them as DOCA administrators;

(c) that the administrators do not intend to appear in the action;

(d) that the administrators will abide by the decision of the court in the action;

(e) that it is important for a solicitor to remove themselves from the court record once they cease to act for a party and that as the Firm cannot fulfill its obligation to Ironbridge as the administrators' solicitors without a retainer, the Firm ought to be removed from the record as Ironbridge's solicitors;

(f) that while the Firm remains on the record it could be assumed to be acting for Ironbridge but that any such assumption is subject to the statutory stay of the action under s 444E of the *Corporations Act 2001* (Cth) (**Corporations Act**) where no application for leave to proceed was ever made by the Plaintiff despite notice to the plaintiff's solicitors of the deed of company arrangement on 11 October 2017; and

[145] Exhibit 4.72; Exhibit 4.73; Exhibit 4.74; Exhibit 4.75; Exhibit 4.76 and Exhibit 4.77.

(g) that the Firm relies on the affidavit of the Practitioner for the required proof that it has not acted for Ironbridge since at least the date Ironbridge appointed administrators.

187 On 2 August 2019, the Firm also filed an outline of submissions in opposition to the Plaintiff's application that the Firm pay the costs of the application for leave to proceed against the First Defendant.[146]

188 On 5 August 2019, the Practitioner swore and filed and affidavit in opposition to the Plaintiff's application that the Firm pay the Plaintiff's costs of its application for leave to proceed against the First Defendant.[147]

189 That affidavit relevantly stated:

> 1. I am a director employed by Williams + Hughes (W+H).
>
> 2. I swear this affidavit in opposition to the Plaintiff's application for costs of its application under ss. 440D(1)(b) and / or 440E(3) of the Corporations Act against W+H.
>
> 3. The contents of this affidavit are true to my own knowledge.
>
> 4. I refer to my affidavit sworn 22 July 2019 relating to W+H's application to be removed from the record for the First Defendant (**Ironbridge**).
>
> 5. The reason why W+H did not apply to get off the record for Ironbridge before it filed the application dated 22 July 2019 is that I had assumed that it was common cause between the parties to this action that:
>
> 5.1 Ironbridge was in insolvent administration;
>
> 5.2 Ironbridge was subject to a DOCA (as I had notified the plaintiffs solicitors on 11 October 2017) and the plaintiff required leave of the Court to proceed with its action against Ironbridge; and
>
> 5.3 Ironbridge was taking no further part in the proceedings.
>
> 6. On 18 July 2019, I emailed Mr Penglis SC. This email forms part of attachment BT-1 to the affidavit of Ms Tariq affirmed and filed on 22 July 2019. The contents of my email dated 22 July 2019 to Mr Penglis SC (attachment BT-1), insofar as the

[146] Exhibit 2.126.
[147] Exhibit 2.128, pages 96 – 112.

> email contains my explanation for W+H remaining on the record for Ironbridge, is true and correct.

190 On 7 August 2019, the Practitioner's application for an order that the Firm cease to act for the First Defendant and the Plaintiff's application for leave to proceed against the First Defendant were heard before Justice Archer. Her Honour made the order sought by the Practitioner and refused the Plaintiff's application.[148]

The consultations between the Practitioner and Mr Zelestis KC – factual findings

191 The Practitioner gave evidence which we accept that he approached Mr Zelestis KC (who at that time was a QC but to whom we will refer as KC) to seek advice after being counselled by Mr Penglis SC that he should take advice from senior counsel about how to proceed as a result of criticisms which were being levelled at him by Mr Penglis SC about his conduct.[149] We find that he did so.

192 Mr Zelestis KC's witness statement, setting out his recollection of their communications about the matter was tendered by consent and without Mr Zelestis KC being cross-examined.[150]

193 Mr Zelestis KC has no independent recollection of the dates on which conversations occurred or the entirety of what was said or the precise words spoken in their telephone discussions. He was generally able to recall the effect of what was said. Insofar as he was able to identify dates in his statement, they were based on the dates of email communications they had.

194 We accept Mr Zelestis KC's unchallenged account of his communications with the Practitioner and make the following findings about it.

195 Prior to dealing with the Practitioner about this matter, Mr Zelestis KC had had some dealings with him when he was a practising lawyer at Francis Burt Chambers and the Practitioner was a partner at the Firm.

196 In July 2019, the Practitioner approached Mr Zelestis KC and asked for assistance with respect to a problem which had arisen concerning his conduct in relation to a matter.

[148] Exhibit 2.128, pages 596 – 612.
[149] ts 141 – 142, 12 May 2023.
[150] Exhibit 9.

197 They spoke about the matter several times.

198 In their first conversation, the Practitioner told Mr Zelestis KC that he had been acting for a company and a director of the company who were defendants in proceedings and a problem had arisen from the fact that he had continued to hold his firm out as representing the company after he had become aware that the company had executed a DOCA.

199 Mr Zelestis KC said words to the effect: Once you heard about the DOCA presumably you knew that you were no longer acting for the company. The Practitioner responded with words to the effect: 'yes, I did'.[151]

200 Mr Zelestis KC then asked him why he continued to hold his firm out as acting for the company and the Practitioner responded with words to the effect: 'Nothing substantial needed to be done except for the other defendant for whom I was still acting. I just overlooked the fact that administrators had been appointed'.[152]

201 The Practitioner asked for his assistance in responding to an email to Mr Penglis SC and Mr Zelestis KC agreed to help him. Mr Zelestis KC advised him to provide a complete explanation for his conduct and said anything less would make matters worse. The Practitioner responded that he understood.[153]

202 On 20 July 2019, the Practitioner sent to Mr Zelestis KC by email, a copy of the email dated 18 July 2019 from Mr Penglis SC, his proposed draft reply and some other documents.[154]

203 On 22 July 2019, Mr Zelestis KC sent an email to the Practitioner with a version of the draft reply marked up with some suggested changes. With Mr Zelestis KC's edits, the letter read (NB: we have

[151] Exhibit 9, paras 7 – 8.
[152] Exhibit 9, para 10.
[153] Exhibit 9, para 12.
[154] Those documents are attached to Exhibit 9 as CLZ1. They are:
(i) email dated 20 July 2019 Practitioner to Mr Zelestis KC;
(ii) email dated 18 July 2019 from Mr Penglis SC to Practitioner;
(iii) letter from Administrator to Plaintiff's solicitor dated 19 July 2019;
(iv) Minute of Amended Statement of Claim dated 12 July 2019;
(v) Amended defence of the Second Defendant pursuant to the orders of The Honourable Justice Archer made 16 July 2019; and
(vi) dated 18 July 2019.

indicated the additional words which were proposed by Mr Zelestis KC by placing them in *italics*):[155]

> Dear Steven
>
> …
>
> I refer to your email dated 18 July 2029.
>
> I confirm I have discussed the ethical aspects of this matter with Senior Counsel.
>
> I refer to the letter from Neil Cribb of RSM Australia Partners dated 19 July 2019, a joint and several administrator of the deed of company arrangement of the First Defendant (**Ironbridge**). As you can see from Mr Cribb's letter, I have had no involvement with the DOCA administrators – since and after they were appointed DOCA administrators of Ironbridge. They were also unaware of this action and have played no part in it whatsoever.
>
> As a matter of Law *(as I was aware at the time)* my firm's (**W+H**) retainer with Ironbridge ended when DOCA administrators were appointed to Ironbridge on 15 September 2017 – which was when different parties took control of Ironbridge *and did not instruct me to act*. Your instructors were given notice of the appointment of the DOCA administrators on 11 October 2017.
>
> The requirement of your client to apply for leave to proceed against Ironbridge, under s 444E(3) of the Corporations Act, is not something the DOCA administrators could ever consent to, or waive, without leave of the Court. I refer you to paragraph [5.3A.0515] of the Australian Corporation Law Principles & Practice where it states, relevantly:
>
>> A deed of company arrangement binds the company, its officers and members and the deed's administrator: s 444G. None of them may make or prosecute an application for the winding up of the company, nor may they take or proceed with any action against the company or its property otherwise than with the court's leave and on such conditions as it may impose: s 444E. (emphasis added)
>
> The reason for this is obvious. Only the court can weigh the impact on creditors and condition the leave – not the administrators nor anyone acting for them.
>
> I accept I have inadvertently signed programming orders prepared by your instructors on 20 October 2017, 3 February 2018, 25 April 2018, 7 August 2018, 16 October 2018 and 15 January 2019. I apologise for

[155] Exhibit 9, pages 41 – 42.

the lack of attention to detail in signing those consent orders without scoring through reference to the First Defendant. As you know each substantive court document W+H has filed in this action, post appointment of the DOCA administrators (e.g. witness statements and pleadings), has been filed only on behalf of the Second Defendant (**Mr Wallace**). I confirm I have only ever taken and acted *for and* on the instructions of Mr Wallace after the appointment of the DOCA administrators.

I also acknowledge that - at the two and only court appearances I have ever made in this action (that both occurred this month) - I incorrectly announced my appearances on behalf of the First and Second Defendant. I will correct this oversight with the Court immediately and request that the Court record be updated to reflect my two appearances were only on behalf of Mr Wallace. W+H have now filed an application to come off the record for Ironbridge (Application). The Application refers to W+H's retainer ending upon the appointment of the DOCA administrators and in the supporting affidavit I depose to:

- having had no contact with the DOCA administrators;
- taking no instructions from the DOCA administrators after their appointment; and
- not disclosing (or updating) details of this action to DOCA administrators.

If you maintain I have acted for the DOCA administrators without proper authority, after I file the Application, then I will file a supplementary affidavit attaching this letter and your response and raise your assertion with the Court - including my apology for signing the consent orders with a lack of attention to detail and the incorrect announcement of the two and only appearances I have ever made in this action (both of which occurred this month).

I remain of the view that W+H remaining on the record for Ironbridge, me signing the consent order incorrectly or the erroneous announcements (this month) of my two and only appearances in this action - will have no impact on the principles of law that are relevant to your client's application for leave to proceed against Ironbridge under s 444E(3) of the Act. Yours sincerely.

204 At some stage, probably after Mr Zelestis KC had sent his email on 22 July 2019, but possibly in the course of their initial discussion, Mr Zelestis KC also indicated to the Practitioner that, given that he had known all along what the consequences of the DOCA were, that fact should be made clear in his response. The Practitioner responded that he agreed.

205 The Practitioner's account of the discussion he had with Mr Zelestis KC was given in his supplementary witness statement dated 24 April 2023[156] and in the evidence he gave in cross-examination. His evidence about their interaction was consistent with that given by Mr Zelestis KC.

206 In his evidence-in-chief, the Practitioner said that he informed Mr Zelestis KC that Ironbridge had been placed into administration and had entered into a DOCA, and that he had informed the parties of that at the time.[157] It is accepted that he did not tell the parties of the fact that First Defendant had been placed into administration at the time it was placed in administration. The first time the Practitioner told the parties of the administration was when he informed them that the First Defendant had entered into the DOCA, which was approximately two months after it had been placed into administration. In making that distinction we make no criticism of the Practitioner's evidence on that point. With the benefit of hindsight, it is easy to see how a matter may be more clearly or accurately conveyed. In this case, we accept that the Practitioner was endeavouring to convey to Mr Zelestis KC the fact that, at about the time the time the DOCA was entered into, he had informed the parties of the fact that the First Defendant had entered into administration and subsequently a DOCA.

207 The Practitioner's evidence was that he said to Mr Zelestis KC words to the effect that Ian Wallace, the director of Ironbridge, was named as co-defendant or accessory to Ironbridge's alleged misleading and deceptive conduct so the action continued against him while Ironbridge played no further part.[158]

208 The Practitioner was asked in cross-examination whether he had intended to convey with those words, the understanding that the SC Proceeding was continuing against the First Defendant, although the First Defendant was not actively defending it. The Practitioner denied that was what he had intended to convey to Mr Zelestis KC saying:[159]

> No. I - I had never had that – that that state of mind. That, to me, is just illogical and nonsensical.

[156] Exhibit 8.
[157] Exhibit 8, para 125.3.
[158] Exhibit 8, para 125.3.
[159] ts 143, 12 May 2023.

He said he had been intending to convey to Mr Zelestis KC that the action had not continued. He said that that was exactly what he thought at the time and ever since.[160]

209 In his witness statement, the Practitioner says that he told Mr Zelestis KC that either he or his staff had signed six Minutes of Consent Orders that dealt with routine programming matters and he had failed to notice that the signature block referred to the Firm as acting for the First and Second Defendants, that he had made two court appearances before Justice Archer where he had erroneously announced his appearance for the First and Second Defendants and that the signing of the consent orders and the announcing of his appearances were errors arising from a lack of attention to detail, that the appearances came after an approximately six month period of dormancy, and that anything substantive filed on the action after 2017 had been filed on behalf of the Second Defendant only.[161] We accept that evidence and find that he did tell Mr Zelestis KC those things.

210 In cross-examination, the Practitioner accepted that he had not told Mr Zelestis KC that he had provided to the parties a Minute of Amended Defence on 8 July 2019 that purported to plead a case on behalf of the First Defendant.[162] His explanation for not doing so was:[163]

> I don't think I knew about that at the time.

It is difficult to understand how it could be that the Practitioner did not know in mid July 2019, at the time he spoke with Mr Zelestis KC, about something he himself had done earlier in that same month. The Practitioner endeavoured to explain his answer by saying that he had been focussed on what was being said against him, (i.e. that he had filed the consent orders and announced that he appeared for the First Defendant). He said that although he had circulated the Minute of Amended Defence, he had not actually filed it.

211 He also agreed in cross-examination that he had not told Mr Zelestis KC that he had engaged substantively with the court in respect of the First Defendant's defence on 3 July 2019, but said he had

[160] ts 143, 12 May 2023.
[161] Exhibit 8, paras 125.4 – 124.8.
[162] ts 143 – 144, 12 May 2023.
[163] ts 143, 12 May 2023.

not done so because he did not believe that he had engaged substantively with the court about that issue.[164]

212 The Practitioner agreed in cross-examination that he did not tell Mr Zelestis KC, that on 16 July 2019, he had not objected to the court making directions for the filing of any application for leave for the Second Defendant to represent the First Defendant at the trial. He said he had not done so because 'that misconceived notion was raised by Mr Penglis SC and was supported with vigour by the trial judge'.[165]

213 He firmly rejected the suggestion, put to him in cross-examination, that the real reason he did not tell Mr Zelestis KC of those additional matters was that it had already dawned on him, as a result of his research and the exchanges with Mr Penglis SC, that he had been acting for the First Defendant without instructions from the administrators. He said:[166]

> We had not been acting, and I had done anything with those consent orders that were prepared by the parties in error, and the appearances were made in error.

214 The Practitioner also rejected the suggestion that by the time he contacted Mr Zelestis KC he had already determined to set up the false position that he had always assumed that his retainer was at an end and that the SC Proceedings was stayed against the First Defendant.[167]

215 When asked whether he accepted that he did not give a full and frank account of the background to Mr Zelestis KC he said:[168]

> I didn't go into the minutia of the detail. I also didn't tell him that I had briefed Geoff Abbott, I don't think. I don't think I told him everything, because it was a reasonably brief call to just convey the – the substance of it.

216 From the evidence given by Mr Zelestis KC, and the Practitioner himself, we are satisfied, and we find, that the Practitioner did not inform Mr Zelestis KC that, on 8 July 2019, he had prepared a Minute of Amended Defence on behalf of the First and Second Defendant which he circulated to the other parties and also that he did not explain to Mr Zelestis KC the details of his appearances before Justice Archer

[164] ts 144, 12 May 2023.
[165] ts 144, 12 May 2023.
[166] ts 144, 12 May 2023.
[167] ts 144, 12 May 2023.
[168] ts 144, 12 May 2023.

on 3 July 2019 and 16 July 2019. It is also apparent from the evidence which the Practitioner gave in cross-examination, and we find that, although the Practitioner informed Mr Zelestis KC that in some cases his staff signed the MOCOs, he in fact did so himself.

217 It follows that we are satisfied, and we find, that the Practitioner did not give Mr Zelestis KC a full account of the actions which he had taken in the SC Proceeding which might have been seen to convey to others an impression that he was acting for the First Defendant after the administrator had been appointed.

218 Mr Zelestis KC accepted the Practitioner's account of his understanding of the effect of the First Defendant being placed into administration and subsequently entering into a DOCA. The fact that the Practitioner told Mr Zelestis KC something does not make it true. The fact that Mr Zelestis KC did not consider that the Practitioner had done anything seriously wrong does not assist our resolution of the matter. Mr Zelestis KC clearly took the Practitioner at his word. Mr Zelestis KC may have taken a different view if all of the facts were known to him.

219 If the Practitioner had given Mr Zelestis KC a fulsome account of the actions that point to him having acted for the First Defendant after it was placed in administration and after the DOCA was entered into, it may have reinforced in us a feeling that what he said about his understanding at the relevant time was true.

220 However, we find it difficult to accept that a Practitioner whose conduct was being called into question, and who had been concerned enough to seek ethical guidance from a senior counsel would not have given a full account of that conduct to the senior counsel, even if only particular conduct had at that point been identified by those criticising him.

221 The fact that the Practitioner did not give a full account, in our view, tells against a finding that he was being honest in his communications with Mr Zelestis KC about his knowledge at the relevant time. We find to the contrary.

Ground 1

222 The Applicant alleges by Ground 1 that between 11 October 2017 and 5 August 2019 the Practitioner engaged in professional misconduct by:

1. Causing the Firm to purport to act as the solicitor of record for a defendant to SC Proceedings when the Firm was not authorised to do so and had no instructions to do so; and

2. Purporting to act as solicitor and counsel for a defendant to the SC Proceeding when he was not authorised and had no instructions to do so.

The Applicant's submissions

223 The Applicant contends that the Practitioner took steps in the SC Proceeding on behalf of the First Defendant as if the Firm were instructed by the administrators. The Applicant points to the following conduct by the Practitioner as evidence that he did so act:

1. signing 13 Minutes of Consent Orders on behalf of the First Defendant;

2. writing to the solicitors for the other parties in the SC Proceeding expressly holding himself out as acting for the First Defendant;

3. applying to the court to change the name of the First Defendant to reflect that it was in administration;

4. appearing at a directions hearing on 3 July 2019 and substantively engaging with the court on the topic of the First Defendant's pleaded case;

5. adopting, on behalf of the First Defendant, a list of issues in the SC Proceeding which had been prepared on behalf of the Third and Fourth Defendants;

6. amending the First Defendant's defence on 8 July 2019;

7. informing counsel for the other parties to the SC Proceeding at a conference that the Firm intended to 'sort out the pleading for the Second Defendant and then to apply to get off the record for all of the parties represented'; and

8. appearing before the court at a strategic conference on 16 July 2019 and acceding to the proposition put by Mr Penglis SC that he would have to apply for leave for the Second Defendant to represent the First Defendant at trial and

consenting to orders programming the foreshadowed application.

224 The Applicant submits that the obvious and only compelling inference to be drawn from the facts is that, from the commencement of the administration of the First Defendant, the Practitioner:

1. purported to continue to act for the First Defendant and did not act inadvertently or mistakenly in that regard;

2. assumed the proceeding continued against First Defendant;

3. did not have the administrator's authority or instructions to act for the First Defendant in the SC Proceeding;

4. purportedly on behalf of the First Defendant, did the minimum to comply with court directions so that, while the First Defendant continued to purport to defend the Plaintiff's claim, it would not be in a position to substantively participate at the trial of that proceeding; and

5. could not have understood or assumed that the other parties to the SC Proceeding were proceeding on the basis that the action did not continue against the First Defendant.

The Practitioner's submissions

225 The Practitioner submits that we cannot make the inference contested for by the Applicant in light of all of the evidence.

226 In essence, the Practitioner says that he knew generally that the SC Proceeding could not continue against the First Defendant after the administrators were appointed, although he did not know precisely why until after he returned to his office after the strategic conference before Justice Archer on 16 July 2019 when he reviewed the Corporations Act. In his evidence, the Practitioner referred to that state of knowledge (i.e. his understanding that the SC Proceeding could not continue against the First Defendant once it was in administration without knowing why) as his 'general understanding'.[169] He says that he announced his appearances for the First and Second Defendants erroneously. He says that all but one of the MOCOs which he signed had been prepared by the Plaintiff's solicitors and the remaining one, by the Fifth Defendant. He says he signed each one indicating that the

[169] ts 117, 12 May 2023.

Firm had acted for the First and Second Defendant in error. He gave evidence that he was very busy with work and the administrative responsibilities that came with being a partner at the Firm and did not pay attention to that detail. He says that he regarded the SC Proceeding as a 'sham' which would never make it to trial and that he was primarily concerned to do as little as possible other than get the matter to a position where Mr Wallace could act for himself at trial.

227 The Practitioner submits that the fact that the only substantive documents which he prepared and filed in the SC Proceedings were documents filed on behalf of the Second Defendant only and that, and the fact that after the First Defendant was placed into administration he did not invoice the First Defendant for any work demonstrates that he did not purport to act for First Defendant or cause the Firm to purport to act for the First Defendant in the SC Proceeding after 11 October 2017.

228 The Practitioner says that the conduct upon which the Applicant seeks the Tribunal to reach the opposite conclusion was the result of an unfortunate error, which occurred in highly unusual circumstances which included the perpetuated 'extraordinary error' by the Plaintiff's legal representatives to fail to seek leave to proceed against the First Defendant when they became aware it was in external administration, with neither the parties or the court having appreciated the error for some time.

229 The Practitioner submitted that we should find that he was an honest witness who was doing his best to explain conduct that occurred 4 – 6 years ago and that there is no basis upon which we could reject his explanation. It is submitted that his evidence was corroborated in significant respects by documents and in the evidence of Mr Zelestis KC.

230 The Practitioner submits that the inferences sought to be relied upon by the Applicant are not the only reasonable inferences available on the evidence and in some cases, the only reasonable inference available in fact supports the Practitioner.

Resolution

231 We have already found that from the time the First Defendant was placed into administration on 17 July 2017 until 5 August 2019 the Practitioner:

(a) did not have any authority or instructions from the administrators of the First Defendant for the Firm to act as solicitors on the record for the First Defendant in the SC Proceeding; and

(b) took steps which on their face appeared as if he was causing the Firm to act as solicitors on the record for the First Defendant and acting as solicitor and counsel for the First Defendant in the SC Proceeding.

232 We find that, given his experience in insolvency litigation, the Practitioner had knowledge that actions do not proceed against companies which are in administration. However, we do not accept that he ever applied that knowledge to the SC Proceeding before 17 July 2019.

233 We do not accept the Practitioner's evidence that from September 2017 he understood that the SC Proceeding could not continue against the First Defendant.

234 Nor do we accept the various explanations he gave in his evidence for the many things he did that signalled to the contrary. That is, we reject his evidence that he had the general understanding in relation to the SC Proceeding.

235 We find that the only inference reasonably open, when consideration is given to the united force of all of the circumstances taken together and weighing the inference against other realistic possibilities, is that the Practitioner did not understand that the SC Proceeding was stayed against the First Defendant from the time it was placed into administration, even bearing in mind the evidentiary threshold explained in ***Briginshaw***. We come to that view because the combined force of the following considerations lead us to the opposite conclusion.

236 **First consideration**. Although the Practitioner's evidence was that he was busy and had not prepared the Minutes of Consent Orders which were prepared and circulated for signing by other parties and had simply overlooked the error in the signing clause, the number of times he signed Minutes of Consent Orders as solicitor for the First and Second Defendant (being 14) tells against his explanation that he knew that he was not acting for the First Defendant at the time. That is, the number of times this conduct occurred and the length of time over which it occurred tends against the conclusion that it was done in error.

237 **Second consideration**. The fact that the Practitioner appeared at hearings before the Court and announced that he appeared for the First and Second Defendant on two occasions tells against the Practitioner's evidence that he had, at the time of each hearing, an appreciation that he was no longer acting for the First Defendant and that his reference to the First Defendant on each occasion was merely an inadvertent misstatement. We note that on 3 July 2019, the Practitioner actually announced that he appeared for 'Ironbridge and Mr Wallace', specifically identifying each defendant.[170]

238 **Third consideration**. The number of occasions on which the Practitioner indicated in emails he sent to other parties, that particular things were 'agreeable to' or 'ok with' the First Defendant, tells against those statements in the emails being simply mistakes rather than a reflection of his belief that he was continuing to act for the First Defendant in the SC Proceeding.

239 **Fourth consideration**. The Practitioner's failure to clarify with the Plaintiff's solicitor that the action was stayed against the First Defendant when it must have been apparent to him, from the Plaintiff's solicitor's repeated communications that the Plaintiff's solicitors and counsel regarded him as acting for the First Defendant, compels against a finding that the Practitioner understood that he was not.

240 The Practitioner gave evidence that, having informed the Plaintiff's solicitors of the fact of the administration, he believed that they, and similarly Mr Penglis SC, would have had at least the same general understanding, that he had about the consequences of the administration upon the action against the First Defendant.[171] We do not accept that the Practitioner believed that the Plaintiff's lawyers appreciated that the SC Proceeding was no longer continuing against the First Defendant in light of the evidence which, we find, makes it clear that the Plaintiff had not understood that the SC Proceeding was not continuing against the First Defendant. That evidence included, among other things, the numerous Minutes of Consent Orders which the Plaintiff's solicitors prepared which had signing clauses indicting that the Firm was to sign as solicitors for the First and Second Defendants, and the fact that the Plaintiff's solicitor communicated with

[170] Exhibit 2.81.
[171] ts 101 – 103 and 116 – 118, 12 May 2023.

the parties (including the Practitioner) in terms that referred specifically to the First Defendant.[172]

241 In light of those things, we find that the Practitioner's evidence as to his belief in a common understanding between them is simply implausible.

242 Additionally, the Practitioner's evidence that he believed they had a common understanding is contradicted by other evidence he gave about the issue. Four examples make that point.

243 First example. The Practitioner appeared to accept in cross-examination that he and the Plaintiff had a different appreciation of the effect of the administration in the following exchange:[173]

> … They were - they were of one mindset. I was of another mindset. I had told them repeatedly about the DOCA. They didn't feel inclined to inquire, I didn't feel inclined to say anything further. I was in the process of trying to extricate myself as solicitor on the record for Ian Wallace.
>
> You didn't feel inclined to say anything further: what do you mean by that?---Because of the volume of material that was coming on – these were generating, by this time, something in the order of 30 – 30 emails a day or more, and I was already receiving in the order of 100 emails a day from my practice.
>
> But Mr Robertson, if you genuinely thought that the proceeding against the first defendant was not continuing, one email would have stopped those emails in relation to the first defendant?---They wouldn't have stopped the emails in relation to the second defendant.

244 Second example. In cross-examination the Practitioner gave evidence that he did not turn his mind to whether they had a common understanding that the action was not continuing against the First Defendant. When asked whether he understood at the time that the Plaintiff thought the SC Proceeding was continuing against the First Defendant he said he did not:[174]

> No, it's not what I had in my head at the time. I didn't even turn my mind to what they were thinking other than I assumed when I told them about the administration and the DOCA that they would have at least the level of knowledge that I had, that I've referred to as a general understanding of the insolvency laws.

[172] See for example Exhibit 4.11, email of 20 March 2018 referred to at [99] above.
[173] ts 116, 12 May 2023.
[174] ts 117, 12 May 2023.

245 From that evidence, we understand the Practitioner to say that after informing the Plaintiff of the fact of administration and DOCA, he never considered what the Plaintiff was thinking vis-a-vis the First Defendant even though, as we have found, the communications which he was receiving from them can only have been understood as communicating a belief that they considered that the SC Proceeding was continuing against the First Defendant.

246 Third example. In explaining why, despite having received communications that appeared on their face to indicate that the Plaintiff was proceeding on the basis that the First Defendant was still involved in the action, he did not correct the obvious misunderstanding, the Practitioner gave the following evidence:[175]

> You are receiving emails from the plaintiff's solicitors, which on their face, indicate to you that the plaintiff is proceeding on the basis that the first defendant is still involved in the action; would you agree?---It appears that way.
>
> And that's what you understood at the time?---I don't know what I understood at the time. All I know is I've told them and told them repeatedly about the DOCA and the administration and - including that the record should have been updated to reflect that. And in the face of that, they keep sending those emails referring to the first defendant. I - I just didn’t think anything turned on it. But I can't recall, actually, this email or, you know, giving it significant consideration about what they were doing.
>
> Can I just take you up on your evidence you didn't think anything turned on it; is that truthful evidence, Mr Robertson?---I didn't think anything turned on me telling them anything further. I've told them of the administration and the DOCA.
>
> And I suggest that the only circumstance in which nothing would turn on it is if you continued to assume that the action continued against the first defendant?---No. I don't agree with that.
>
> If you genuinely thought that the matter didn't continue, then I suggest to you you must have appreciated that something needed to be said?---No. I - I didn't appreciate that I needed to go and get another set of lawyers, that are involved in civil litigation, a lesson on the insolvency law or tell them anything further than the company is in administration and subject to a DOCA.

[175] ts 118 – 119, 12 May 2023.

> Do you accept that it would be to your - to the first defendant's advantage to have these - the persistent attempts to include it in the action?---I don't act for the - - -
>
> - - - stop?---I don't act for the first defendant.
>
> And that's what you thought at the time?---Correct.
>
> …
>
> And so it was irrelevant to you whether the first defendant had to continue to be exposed to this or not; is that right?---I don't think I say that it's irrelevant to me. But I wasn't acting for the first defendant. I wasn't acting for Ironbridge at the time because I thought the proceedings were not continuing against Ironbridge, What you're saying is if I had – had given them a lecture or a lesson on the insolvency laws, I would have needed to have – first of all, I would have needed to go on and educated myself on s 444E and s 444D and then educated them on that. And then it may have resulted in, you know, the reference to the first defendant being excised, but it wouldn't have stopped the emails coming at the rate of 30-odd emails a day in circumstances where I'm trying to assist Ian Wallace to fix his pleadings so he could act for himself.

247 From that evidence, we understand the Practitioner to say that after informing them of the administration and DOCA he never considered what the Plaintiff was thinking vis a vis the First Defendant despite the communications he was receiving, making it clear they considered that the SC Proceeding was continuing against the First Defendant.

248 Fourth example. The Practitioner also gave yet another explanation for why he did not correct the Plaintiff's obvious misunderstanding when asked why he said nothing after receiving an email dated 12 July 2019,[176] in which the Plaintiff's solicitor had indicated she understood that the Practitioner would appear for both the First Defendant and the Second Defendant at the strategic conference then scheduled for 15 July 2019;[177]

> And in any event, I – I didn't read that email with the clarity which I'm now reading it and noticed that it's referring to both or what turned on it, even, at the time.

249 Rather, we find the compelling inference from the evidence he gave about this issue was that he did not appreciate the Plaintiff was

[176] ts 116, 12 May 2023.
[177] ts 116, 12 May 2023.

mistaken because he himself believed that the SC Proceeding continued against the First Defendant at that time.

250 In the end, having regard to the whole of the evidence, before us as to the parties communications about this issue, and to Practitioner's evidence, we find that, if the Practitioner himself understood that the SC Proceeding was not continuing against the First Defendant, the fact that the Plaintiff's lawyers did not share that understanding would have been apparent to him and we reject his evidence that he believed they shared a common understanding of the effect of the administration and DOCA upon the First Defendant's involvement in the SC Proceeding.

251 From those examples, we find that the Practitioner's evidence as to whether he believed the Plaintiff held the same understanding as he professes to have held was inconsistent and we reject his evidence that he thought they shared a common understanding. The inconsistency of his evidence on this issue caused us to reject his evidence that he thought the parties shared a common understanding. It also caused us to doubt his credibility more generally.

252 **Fifth consideration**. The fact that the Practitioner wrote to the other parties on 6 July 2019 indicating that the First and Second Defendants were adopting the list of issues prepared by the Third and Fourth Defendants[178] indicated that he did not appreciate at the time that the SC Proceeding was not continuing against the First Defendant.

253 **Sixth consideration**. The Practitioner's explanation for engaging Justice Archer on 3 July 2019 about the First Defendant's defence despite knowing at that time that the proceeding was not continuing against the First Defendant was unsatisfactory and unconvincing.

254 When the Practitioner was cross-examined about why he engaged about the defence rather than tell her Honour that the action was not proceeding against the First Defendant because it was in administration and subject to a DOCA, the Practitioner offered what we found to be unconvincing and implausible explanations. He said that he could not recall why he had done certain things or what he was thinking at the time and explained that he had already informed the court about the DOCA and that his focus was on his client.[179] He also gave evidence that he responded as he did because he had done no preparation for the 3 July 2019 hearing because he 'was not expecting

[178] Exhibit 2.82.
[179] ts 102 – 103, 12 May 2023.

to be saying anything', he 'did not know what the hearing would entail', and that he was 'expecting to be off the record for Mr Wallace'.[180] After offering those explanations, the following exchange then took place between the Applicant's counsel and the Practitioner:[181]

> Why didn't you just tell her it's not necessary for you to know what the first defendant admits or not because the action isn't continuing?---
>
> First of all, as I said, a company works through its directors. Mr Wallace was a [sic] accessory, so it may have required evidence about what Mr Wallace did in his capacity as a director. But in any event, I had not prepared and wasn't expecting to be fielding questions about the pleadings in this matter which was - I regarded as being a sham. And, number two, by reason of the fact that Ian Wallace was intent on representing himself at the trial of the action in the unlikely event that it proceeded. Because, everyone was of the view that it was imminently going to be abandoned by the plaintiff. Because, it was being run for a collateral purpose.
>
> I suggest to you plainly the reason why you accepted the proposition put to you by her Honour that the pleading on behalf of the first defendant needed to be reviewed, was because you understood that the time that the proceeding continued against the first defendant?---No. That's not correct. It's a result of not having prepared and not having reviewed - the - the paragraph that her Honour was looking at.

255 While we accept that the Practitioner may have had difficulties in recalling precisely what was in his mind in 2017, we do not accept lack of preparation to be a plausible explanation for the way in which he responded to Justice Archer about the pleadings. It would not require any particular preparation to enable the Practitioner to articulate an apparently long held appreciation that the Plaintiff's action could not proceed against the First Defendant.

256 In our view, the only reasonable inference open, having regard to all of the facts, is that the Practitioner engaged with Justice Archer about the First Defendant's pleading rather than saying no amended defence was necessary since the action could not continue against the First Defendant, was because he did not understand that the SC Proceeding was stayed against the First Defendant at the time.

257 **Seventh consideration**. In our view, the Practitioner would not have then prepared a Proposed Amended Defence on behalf of the First Defendant and circulated it to the parties on 8 July 2019 if he had

[180] ts 111, 12 May 2023.
[181] ts 111, 12 May 2023.

known that the action was unable to continue against the First Defendant. The fact that he did so, indicates that he regarded himself to be acting for the First Defendant at that time.

258 We find that the Practitioner's explanation for preparing and then circulating the Proposed Amended Defence while at the same time knowing that action did not continue against the First Defendant to be implausible.

259 In his evidence-in-chief, the Practitioner said he prepared the Proposed Amended Defence because he understood that the judge had ordered it. He gave evidence that he did not recall in detail preparing the document but believed that he did so, with the help of his assistant, by converting the original defence filed for the First to Fourth Defendants from PDF to Word format and then making further changes. He also gave evidence that he remembered being concerned with making minimal changes to the pleading and with excising references to the Third and Fourth Defendants.[182] His evidence was that, having reviewed the metadata, he believed that he made amendments to the original defence before 6 July 2019 by hand and then further amended the document by hand on 8 and 16 July 2019.[183]

260 We set out in full the evidence he gave about the issue in cross-examination:[184]

> Let's go to page 398 of the applicant's book, please, and we will see the minute of amended defence. You've had time to think about this now; this is five days later. You had time to think about the position?---I can assure you, I gave this matter very little thought. In all the matters that I was running, which would be in the order of probably a hundred or more matters. Getting more than a hundred emails a day and receiving emails from this adding to those emails maybe another 30 emails a day in a matter that we were looking to get off the record for. I - I would have given this very little thought at all.
>
> So your evidence to the tribunal is her Honour having asked you to review your defence, you gave it only cursory attention?---My evidence to the tribunal is that we were in the process of implementing Mr Wallace taking steps to act for himself, and Mr Wallace's position was categorically that his defence rode on the back of his son's defence, the third and fourth defendants', and he was going to rely on the wisdom of counsel, Mr Hensey [sic]. He didn't need to have representation for himself. Furthermore, Ian Wallace was in such

[182] Exhibit 7, para 100.
[183] Exhibit 7, para 101.
[184] ts 112 – 114, 12 May 2023.

personal financial difficulty that even if they had secured a judgment against Ian Wallace, it would have been valueless.

So you sat down to prepare this minute and prepared it on behalf of the first and second defendants. You don't dispute that?---I don't dispute that, in the way it was prepared was a conversion from a PDF version that had come across from DLA Piper. We didn't have the Word version. The conversion is done by people more skilful than myself. Formatting that needs to be done after the conversion because some of the early conversion programs were not as reliable, and the time spent would have been to format the paragraphs without really delving into the detail and trying to do the very bare minimum, always in the knowledge that the claim was a sham and it would never end up going to trial, because it was being run for a collateral purpose.

But the decision to change the wording of "the defendants" just as a generic group to the "first and second defendants" and to exercise the third and fourth, that was your decision?---That was my decision, and it was done in error. It was done instructing my assistant to have the first go at it after it's converted, and then I've, you know, just on the conversion the formatting without paying significant attention to it.

In relation to paragraph 20 that Archer J took you to specifically, at page 408 of the book, you - your decision was to amend that to an admission about the third defendant's conduct on behalf of the first and second defendants, yes?---It is on behalf of the first and second defendants, and it refers to "as agent for the first defendant," because self-evidently, couldn't be the agent of the director.

Yes, but quite clearly, the only reason that you amended the defence in this way was because you understood at the time that the proceeding continued against the first defendant?---No, that's not correct. It was just - it was an error that was carried over from the six-month hiatus of the action, and my mind was on, basically, Ian Wallace taking over and acting in person.

So if we go to 397 in the book, please, this is where you provide the minute to the other parties to the proceedings, which you described as housekeeping minutes. You see that?---I do.

You understood that what you were doing was just regularising the defence on behalf of the first and second defendants?---I was just putting the defence in order so Ian Wallace could effectively represent himself. I don't think I properly turned my mind to the position of Ironbridge at the time, and my objective was to effectively leave the pleading – to do the minimum on the pleading, and leave Ian to represent himself at the hearing.

I suggest to you that if you genuinely thought that the proceeding didn't continue against the first defendant at that time, you would have

> amended the defence to reflect that and then explained that position clearly in this email to the solicitors for the other parties?---No, I don't agree, it's just an error. I'm sorry.
>
> Paragraph 100 of your witness statement, please, your main witness statement. In relation to this minute, you say in the last sentence:
>
> I remember being concerned with making minimal changes and excising references to the third and fourth defendants.
>
> More accurately, what you were doing was this, wasn't it: excising references to admissions and denials and positive pleas made by the third and fourth defendants?---Possibly. I really – I really don't know. I would have to go and examine the paragraphs.
>
> …
>
> So when you say you are intent on making minimal changes to the defence, you're not suggesting that it would have been a significant matter to do exactly the same thing for the first defendant?---No.
>
> Instead, you consciously retained the first defendant in this pleading, didn't you, this minute, because - - -?---No.
>
> - - - you understood the proceeding continued against it?---No, that's not correct.

261 We accept the Practitioner's evidence that amendments were made with the help of his assistant and in the manner described in his evidence. We also accept his evidence that he was concerned with making minimal changes and that he was most concerned with Ian Wallace taking over. However, we do not find that those matters provide a convincing explanation for why the Practitioner would have pleaded a defence on behalf of the First Defendant if he genuinely understood, at that time, that the SC Proceeding did not continue against the First Defendant.

262 **Eighth consideration**, The fact that on 16 July 2019 the Practitioner acceded to Justice Archer's proposition that Mr Wallace would need leave to represent the First Defendant in the SC Proceeding and accepted without comment her Honour's criticism that the First and Second Defendants had not complied with orders that required them to file documents (including a List of Issues) tells against him having an understanding that the action did not continue against the First Defendant.

263 The Practitioner's explanations for not telling Justice Archer that the SC Proceeding was not continuing against the First Defendant and that, therefore, the First Defendant could not file documents in the proceeding were that:

(a) he was of the mindset that her Honour would have had a general understanding of the law;[185]

(b) he was of the mindset that before long Mr Wallace would be acting in person and he 'won't have to deal with any of these issues as it goes to trial';[186]

(c) he had no desire to be at the hearings 'other than to do the very minimum to set Ian [Wallace]'s pleading up so he could act in person';[187]

(d) he was not preparing for the hearings to any degree;[188]

(e) he had already told the parties of the administration and DOCA;[189]

(f) he is not the sort of person who would cut across the experienced practitioner and the judge who seemed to know what they were talking about when he was not prepared for the hearing;[190] and

(g) he was left feeling something 'was not quite right' but he 'wanted to go and look it up'.[191]

264 When it was suggested in cross-examination that, if he had genuinely thought at the time that the action was not continuing against the First Defendant he could and would have just said "I have been proceeding on the basis until now that the action is not proceeding against the first defendant", the Practitioner's evidence was as follows:[192]

> With the benefit of hindsight, I would like to have said something like that, but I was taken by Mr Penglis' forceful interjection, the trial judge

[185] ts 120, 12 May 2023.
[186] ts 120, 12 May 2023
[187] ts 120, 12 May 2023.
[188] ts 120, 12 May 2023
[189] ts 122, 12 May 2023.
[190] ts 122, 12 May 2023.
[191] ts 123, 12 May 2023.
[192] ts 123 – 124, 12 May 2023.

> basically picking – immediately picking up on that and running with it, and then leaves me in a position with a general understanding of the insolvency law, not wanting to cut across, you know, Mr Penglis, who I've never had dealings with before and I had no – I've never appeared before Archer J before. So I didn't know whether it was me, or whether it was them, but I needed to have recourse to references in the Corps Act, which I would do when I got back to the office, and - - -
>
> … I don't know what more to say, but, you know if I had said something to the effect, you know "I don't act for them", I might not he here, but it is what it is'.

265 The Practitioner's evidence was that the approach taken by Mr Penglis SC and Justice Archer left him confused and he was only operating on a general understanding of insolvency law, so, rather than say anything at the time, he just agreed with them and went immediately back to his office to check the true position when the hearing concluded.[193]

266 While we might have accepted that evidence if the appearance on that occasion had been the only evidence relied upon by the Applicant of the Practitioner purporting to act on behalf of the First Defendant after the administrators were appointed, in the face of all of the other things the Practitioner did or failed to do, which, indicate that he thought he was acting for the First Defendant, we find that explanation to be implausible.

267 **Ninth consideration**. The fact that on 18 July 2019, the Practitioner filed an amended defence on behalf of the Second Defendant, in which all the pleas made on behalf of the First Defendant in earlier pleadings had been removed, suggests that he did not understand when he prepared and circulated the earlier Minute of Proposed Amended Defence, (in which pleas were still made on behalf of the First Defendant), that the action was not continuing against the First Defendant.

268 **Tenth consideration**. The fact that on 7 August 2019, the Practitioner was equivocal in his answers to Justice Archer's questions about the state of his knowledge between 21 July 2017 and 17 July 2019 tells against him holding an understanding during that time that the SC Proceeding did not continue against the First Defendant throughout that time.

[193] ts 126, 12 May 2023.

269 On 7 August 2019, the Practitioner's application for orders that the Firm cease to act for the First Defendant was heard. So too was the Plaintiff's application for leave to proceed against the First Defendant. In support of his own application, the Practitioner had sworn and filed an affidavit dated 22 July 2019. [194]

270 In the course of the hearing regarding the application for an order that the Firm cease to act for the First Defendant, her Honour asked the Practitioner various questions about his affidavit of 22 July 2019 and his letter to the court of that same date and about the state of his knowledge between 21 July 2017 and 17 July 2019. Because this exchange is very important, we have set it out in full.[195]

ARCHER J:	Look, I know it has been dealt with in the subsequent pleading and I'm not interested in that. I'm interested in exploring with you why you were engaging with me about the first defendant's pleading.
ROBERTSON, MR:	Okay. I will tell you, because what happened was is I did not, at that stage, appreciate the operation of s 440EEE or 44 - or EEE.
ARCHER J:	444E. Yes.
ROBERTSON, MR:	I did not appreciate that until I went back to my office and then looked at the possibility of having to apply in relation to Mr Wallace acting for himself as a director.
ARCHER J:	Yes.
ROBERTSON, MR:	And it then came to me the operation of section 444E and that this should not have been - we should not have been doing anything in relation to the company. There's no need to, because it's subject to a statutory stay.
ARCHER J:	Okay.
ROBERTSON, MR:	So that was my understanding - - -
ARCHER J:	That makes perfect sense.
ROBERTSON, MR:	Yes.

194 Exhibit 2.128, pages 101 – 107.
195 Exhibit 2.128, pages 103 – 106.

ARCHER J: Can I say that makes perfect sense that that occurred to you after 3 July and after 16 July.

ROBERTSON, MR: Well, more so 16 July - - -

…

ARCHER J: Can I just say I accept that it occurred to you after 16 July, I accept that, and that explains your exchanges on the 3rd and the 16th.

ROBERTSON, MR: Yes, your Honour.

ARCHER J: It does not explain why you swore in your affidavit, "I regarded the retainer to be at an end as at 21 July 2017", and gave the clear impression to the court that you considered you no longer acted from that point, whereas, in fact, the truth of the matter is that you hadn't thought about 444E until after the 16th.

…

ARCHER J: My concern is, is that your affidavit is, on its face, misleading, and the email that you sent to Mr Penglis is also misleading, and I want to give you an opportunity to explain why.

ROBERTSON, MR: Well, perhaps that should say, "I now regard Williams + Hughes' retainer with Ironbridge to be at an end as at 21 July", your Honour.

ARCHER J: Yes, it should have said that.

ROBERTSON, MR: Yes.

ARCHER J: And it seems to me, in light of the other correspondence that you have sent, that you were intending to give the impression that you had had that view since July 2017. You were seeking to give the false impression that you had always known that you didn't act for the first defendant any more.

ROBERTSON, MR: No. I think I've actually said that either in correspondence with - look, I would have to check what was actually said to Mr Penglis, but - - -

ARCHER J: All right. Do you have a copy of Ms Tariq's affidavit?

ROBERTSON, MR: I do.

ARCHER J: All right. I invite you to go to page 5 of that, your email of 18 July. You see under the first bullet point 4 and respond as follows - I'm sorry - page 5.

ROBERTSON, MR: Yes, I have that, your Honour.

ARCHER J: About halfway down there's a solid bullet point and then there are four open bullet points.

ROBERTSON, MR: Yes, your Honour.

ARCHER J: The fourth of those:

I assumed it was common cause that the action against the first defendant was at an end.

And then the next solid bullet point, the second open bullet point:

> I have been operating on the basis that the first defendant was playing no further part in the action and that this was accepted because of notice of external administration in the DOCA. I understood this trite legal position was known and accepted by the parties, however I did not think to raise this with anyone, Etcetera. That was false, it appears.

ROBERTSON, MR: Look, I'm struggling with that proposition, because although I didn't know the section of the Corps Act that actually said the action was stayed, it was my understanding at the time that the action could not go any further against the company and administration.

ARCHER J: Well, then we go full circle back to why were you engaging with me about the first defendant's pleading on 3 July, if, at that point, you knew that the action was stayed against the first defendant, and why did you seek to make an application that the second defendant represent the first defendant, if, at that time, you knew that the action against the first defendant was stayed.

ROBERTSON, MR: Because I didn't appreciate the full context of what it actually meant, your Honour. I mean, I'm quite willing to accept that there was something that I didn't seem quite right with the first defendant being involved in civil proceedings when it was subject to a DOCA. What that was, I didn't know the law on that point sufficiently to be able to point to the statutory stay or to point to the section of the Corps Act that would have explained that. So it's an ignorance of the law and the full operation of it, but it's an understanding of it, from experience in civil proceedings, that companies in administration don't often litigate.

ARCHER J: Let me put to you what it appears to me to be the position, based on all of the objective material that I have.

ROBERTSON, MR: Please.

ARCHER J: It didn't occur to anybody, including you, that when the DOCA was executed, that the plaintiff would need leave to proceed.

ROBERTSON, MR: I think that's fair.

ARCHER J: And that's why on 3 and 16 July you came to court and said you acted for both defendants, because at that point you thought that you did.

ROBERTSON, MR: But, with respect, your Honour, my understanding was that the first defendant would not be playing any further part. I didn't expect it to be - having to be formally - Williams + Hughes to be formally removed from the record or that there would be anyone who would have any desire to continue. As I've said to Mr Penglis, what possible reason would you have for continuing against a company in administration?

ARCHER J: All right. Well, Mr Robertson, I will continue with what it appears to me and give you a full opportunity. You appreciate what I'm doing now is giving you an opportunity to provide me with a satisfactory explanation.

ROBERTSON, MR: I do appreciate that, but I do think the circumstances of it are a little unusual that I'm being effectively put to having to try and recall, in circumstances where I'm appearing on an application for Williams + Hughes to be removed from the record.

ARCHER J: In which you filed an affidavit which - - -

ROBERTSON, MR: Has a word in it which - - -

ARCHER J: - - - appears to be - well - and also the letters that you wrote to similar effect, wanting the record to be correct but to reflect the fact that you didn't act for the first defendant. It's not just your affidavit. It's the weight of the material. You also had counsel file submissions on your behalf in relation to another matter, which I assume that you were involved in, and those submissions also repeated the idea that this was all completely trite.

ROBERTSON, MR: Well - - -

ARCHER J: But I've given you an opportunity. Can I say that my concern is that the affidavit was potentially misleading. It seems to me, from all of the materials, that it had not occurred to you that the plaintiff would need leave. It had not occurred to you that you no longer could act for the first defendant without instructions from the administrators, in the first instance, prior to the execution of the DOCA, and that's why you attended court on 3 and 16 July and behaved in the way that you did.

I feel that you've given - I've given you an opportunity to explain, I'm not satisfied with your explanation, and I will be considering what I need to do about that. But if you want to have a further opportunity now to explain, you have the floor.

ROBERTSON, MR: I think the word in the affidavit at paragraph 6.1 should read, "I now regard WHs retainer with Ironbridge to be at an end as at 21 July." In regards to exchanges of correspondence with Mr Penglis, to the extent that it conveys the fact that I was always aware of the operation of section 444E, that may be something that should be corrected with Mr Penglis to the extent that that is relevant.

Now, I'm quite happy to do that with Mr Penglis, to take that up with him and to explain that. There has certainly been a lot of discussion about that behind the scenes, your Honour. I don't know how much further I can take it, other than the fact that all I can say is I knew that there was something that prevented a company from being involved in civil proceedings when it was in administration and subject to a DOCA.

I had, when I appeared before you and the matter was raised by Mr Penglis in the context of applying to get off the record for both defendants and Mr Penglis indicated that he would be objecting, my recollection of that is that I did not know at that time - and I think it would have been quite obvious that I did not know because I didn't sort of recite anything to say anything about a stage during the course of that hearing - that I was aware, to the extent that I could say to Mr Penglis at the time, you know, "There's no way you can proceed without leave", because I just didn't have that level of knowledge of it.

I went back to the office and I was relooking at the context of Mr Wallace applying - to give him advice on applying to represent Ironbridge when it became obvious through the research that there was no need, because the company was subject to a statutory stay. And when we looked further into it, it became obvious that that particular stay was even more onerous than a stay on a company in administration and a company in liquidation. It's not one that could be waived which was being put to me by Mr Penglis, that by us remaining on the record - - -

ARCHER J: You don't need to tell me about the law in relation to the operation of the Corporations Act. I'm just interested in your explanation for the affidavit.

ROBERTSON, MR: Well, it goes to the explanation. That's basically what was ascertained. And to the extent of then mispresented that in the exchanges with Mr Penglis, then, you know, for that, I'm apologetic to Mr Penglis and to the court, and for the word that's in the affidavit "I regarded", because I can see where your Honour is coming from, where it should have been "I now regard". And, your Honour, I'm happy to correct that in a further affidavit to say that that paragraph should now read, "I now regard W+H's retainer with Ironbridge to be at an end as at 21 July."

ARCHER J: And then in your letter to the court dated 22 July 2019, do you have a copy of that?

ROBERTSON, MR: I don't have a copy of that, your Honour. I'm sorry.

ARCHER J: All right. I will just read out to you the second paragraph of that:

> It has come to my attention that I incorrectly announced my appearances as counsel for the first defendant, Ironbridge, and the second defendant, Mr Wallace. This was an error, because I have been operating under the assumption that Williams + Hughes' retainer for Ironbridge ended on or about 21 July 2017.

ROBERTSON, MR: Well, that's probably inaccurate too, your Honour.

271 While the Practitioner tried to explain to Justice Archer, and to us, that he had answered her question about his knowledge with the statement 'I believe that's right', because he was trying to cast his mind back to what he had known in 2017, in our view, this is not a matter that he would have any difficulty remembering. Either he knew all along that after administrators had been appointed that he did not act for the First Defendant, or he did not. His explanation for what can only be regarded as an equivocal answer was then, and remains, implausible.

272 Further, despite the Practitioner's attempt to explain to Justice Archer that he always knew that the SC Proceeding could not continue after the administrators were appointed, the statements made in their

exchange about why he continued to engage with her about the First Defendant's defence when 'he apparently knew that the action was stayed against it, which was that he did not appreciate the full context of what it meant' is implausible.

273 **Eleventh consideration**. It is beyond doubt that the letters and the contents of the affidavits the subject of Grounds 2 – 6 convey the meaning that the Practitioner had understood, from the time he became aware that the First Defendant had entered into administration, that s 440D and s 444E of the Corporations Act operated such that the actions could no longer continue against the First Defendant without either the consent of the administrators or leave of the court. The Practitioner referred to the position as 'trite'.[196] Indeed, in his email to Mr Penglis SC of 18 July 2019 (the subject of Ground 2), he expressly says he knew it at the time. He acknowledged both before Justice Archer and in his evidence in this Tribunal that he did not know that those sections operated as a statutory stay of the SC Proceeding against the First Defendant. His reconciliation of that admitted lack of knowledge with his statements that he at no time acted for the First Defendant after it was placed into administration was that, although he did not know why the action did not continue, he had a general understanding that there was an 'impediment' to proceedings continuing against a company which was in administration.

274 The Practitioner's attempt to distinguish between his general understanding and his later understanding (being specifically knowledge of the relevant sections of the Corporations Act) was, in our view, confused and confusing. Further, that explanation needs to be considered in light of his area of practice. According to the Practitioner's evidence, which we accept, in 2017 insolvency was one of his areas of practice.[197] The Practitioner's evidence was that in 2017, between 5 to 10 percent of his practice would have been litigious work on instructions from an insolvency practitioner on behalf of an insolvent company or individual. He also gave evidence that about 5 percent of his practice at that time would have been transactional and advisory work for companies or individuals who were insolvent.[198] He gave evidence that he was generally familiar with the fact that litigation could not continue against a company when it was in external administration. In our view, given his experience in insolvency, the Practitioner's evidence that before 17 July 2019 he held only the

[196] Exhibit 2.128, pages 603 – 606 and our finding at [274].
[197] Exhibit 8 and ts 51, 11 May 2023.
[198] ts 56 – 57, 11 May 2023.

general understanding of a matter he subsequently described as 'trite' law is implausible.

275 **Twelfth consideration**. That the Practitioner did not appreciate from the time he learned of the appointment of administrators and the existence of the DOCA that the SC Proceeding was unable to continue against the First Defendant until 17 July 2019, is consistent with the explanation he gave to Mr Zelestis KC, for having continued to hold the Firm out as acting for the First Defendant if he in fact held that knowledge. As we have found, he explained to Mr Zelestis KC that he had 'just overlooked' the fact that administrators had been appointed because there was nothing substantial to be done except for the other defendant for whom he was still acting. While Mr Zelestis KC's evidence was that he could not recall the precise words spoken by the Practitioner, it is our view that words which convey the meaning that he had overlooked the fact that administrators had been appointed are not nearly the same words one would speak to explain that one had simply overlooked that the signing clause on a Minute of Consent Orders referred to the Firm as acting for both the First and Second Defendants. Nor would the impression of overlooking be conveyed in the same terms one would use to explain that one had simply misspoken when announcing an appearance by naming the wrong party.

276 We acknowledge that there are some matters that support the Practitioner's evidence that he did know at the relevant time that the SC Proceeding was unable to continue against the First Defendant. However, we do not accept that any of them, either alone or in combination, lead to the existence of a realistic possibility that he truly held that understanding or knowledge when they are weighed against the facts that compel the opposite conclusion.

277 The fact that the Practitioner did not invoice the First Defendant after it went into administration might indicate that he did not regard it to be his client after that time. But the more compelling inference in our view is that he was aware that it had no funds and was not taking any further active part in the SC Proceeding and, therefore, that the work done by the Practitioner on the matter was either attributed to the Second Defendant, or not charged for where it concerned the First Defendant.

278 The Practitioner also points to the fact that the letter, in which he asked Mr Abbott if he would be available to act as counsel for the Second Defendant in the SC Proceeding, was accompanied by the

statement that the First Defendant was subject to a DOCA and taking no part in the action, establishes that the Practitioner knew at that time that the First Defendant was no longer his client. In our view, a statement that the First Defendant is taking no part in the action is not the same as a statement that the Plaintiff could no longer proceed against the First Defendant and that the Practitioner did not act for it. Rather, it is consistent with the position that the First Defendant was not taking any active part in defending the action.

279 Additionally, the fact that there were occasions on which the Practitioner, in correspondence with the parties, referred to his 'client' in the singular does not lead us to find that there is a realistic possibility that the Practitioner understood that he did not act for the First Defendant.

280 The fact that the Practitioner referred to his client in the singular in correspondence on 9 March 2018 does not lead us to find that the Practitioner understood that his only client at the time was the Second Defendant. This is because Mr Wallace was his client and the use of the word 'client' may have been meant to mean no more than 'Mr Wallace' in the context where it was Mr Wallace who was both a director of the First Defendant and the Second Defendant in his own right whose witness statement was being prepared.

281 Similarly, the reference by the Practitioner to 'his client' in the singular in the email of 15 March 2018 does not, of itself, persuade us that that the Practitioner understood that he was only acting for the Second Defendant at that time. Again, an inference equally open is that he was using the words 'the client' as shorthand for 'Mr Wallace' as a director of the First Defendant and as the Second Defendant.

282 The Practitioner also relies on the fact that on 20 and 21 August 2018 and 1 November 2018 he communicated with the court on behalf of the Second Defendant only. But, in our view that, of itself, or in combination with the other matters to which he points, does not persuade us that the Practitioner knew he was not acting for the First Defendant in light of all of the matters that indicate that he thought he was acting for the First Defendant.

283 The Practitioner also relies on the email of 24 April 2018, in which he referred to the First Defendant being subject to a DOCA and informed the parties that the Second Defendant had previously filed a joint defence with the other defendants and 'did not intend to file a

further defence'. He says that the emails support his evidence that he understood that he was not acting for the First Defendant after it was placed into administration and the DOCA had been entered into. In our view, had that been the state of his understanding, he would have said so rather than expressing himself in the way he did. There is a very significant difference between intending not to file a further defence and being unable to do so.

284 In support of his position, the Practitioner also points to the occasions on which substantive steps were taken in the SC Proceeding only on behalf of the Second Defendant. They are the filing of documents on behalf of only the Second Defendant on 9 May 2018, 14 May 2018 and 3 April 2019. We do not find that those matters compel a reasonable inference that he knew the action was not continuing against the First Defendant at the time he filed those documents. They are equally consistent with the position that the First Defendant was not taking any active part in the proceeding.

285 This is not, in our view a case where there are competing possibilities of equal likelihood. From the facts as we have found them, having regard to the united force of all of the circumstances taken together, and bearing in mind the principle set out in ***Briginshaw***, we find that the only realistic possibility is that contended for by the Applicant; that is that the Practitioner did regard himself as continuing to act for the First Defendant and both caused his Firm to act as solicitors on the record for the First Defendant and himself to act as solicitor and counsel for the First Defendant in the SC Proceeding until 7 August 2019.

Characterisation of the conduct

286 Having determined that the Practitioner:

(a) caused the Firm to act as the solicitor on the record for a defendant in the SC Proceeding when the Firm was not authorised and had no instructions to do so; and

(b) purported to act as solicitor and counsel for a defendant in the SC Proceeding when he was not authorised and had no instructions to do so.

we must determine whether that conduct constituted professional misconduct or, if not, unsatisfactory professional conduct.

287 The Practitioner submits that if we find that he did purport to act for, or cause the Firm to act for, the First Defendant, the Practitioner had nothing to gain by the conduct, and that the errors which he made are not so substantial that we could find they amounted to professional misconduct. The Practitioner submits that such a finding would be a gross over-reaction to the alleged conduct.

288 It is an important aspect of the lawyer-client relationship that a lawyer is permitted only to act on behalf of a client with the client's authority and in accordance with the client's proper, lawful and competent instructions and is not permitted to hold themselves out as acting for a client when that is not the case.

289 We accept that in this case that the Practitioner did not engage in that conduct in order to deliberately mislead anyone or to obtain some kind of advantage for himself. His error, in failing to appreciate that he ceased to be retained to act for the First Defendant, was an error that appears also to have been made by the Plaintiff.

290 Further, it is not said that any material harm was occasioned to anyone by reason of the error, and we accept that no material harm was done.

291 We find that the Practitioner's conduct was the result of insufficient consideration being given to the implication of the fact of administration upon the SC Proceeding in circumstances where:

(i) the Practitioner was extremely busy;

(ii) held the view that the action was a sham which would not proceed to trial and was therefore deserving of little attention;

(iii) where he did not believe the First Defendant was the target of the action; and

(iv) the Practitioner was primarily concerned to do as little as possible to get to a position where Mr Wallace would act for himself.

292 As we have already identified, professional misconduct as defined in s 403(1)(a) of the LP Act includes conduct involving a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence while unsatisfactory professional conduct as defined in s 402 of the LP Act includes conduct occurring in connection

with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

293 In this case, the Practitioner purported to act for the First Defendant in the SC Proceeding for a significant period of time. In that respect, the conduct might be regarded as a consistent failure to reach or maintain a reasonable standard of diligence or competence. On the other hand, it can also be regarded as one error, repeated in the one case, in quite unusual circumstances.

294 That notwithstanding, we find that causing the Firm to act or to purport to act as the Practitioner did over an extended period of time was a substantial failure to maintain a reasonable standard of competence and diligence. Practitioners of reasonable competence and diligence would be expected to ensure they know for whom they act after becoming aware of the fact that their client had entered into administration and then a deed of company arrangement. And this is especially so for a practitioner working in the area of insolvency.

<u>Grounds 2 – 6</u>

295 After the Plaintiff's legal representatives, and subsequently the court, came to appreciate that the SC Proceeding was unable to continue against the First Defendant, the Plaintiff's solicitor, Mr Penglis SC, and the court raised the issue with the Practitioner. His responses, made almost two years after the First Defendant had first been placed into administration, are the basis of Grounds 2 – 6.

296 We set out next the details of Grounds 2 – 6.

Ground 2

297 Ground 2 is an allegation that the Practitioner, on about 18 July 2019, engaged in professional misconduct by preparing and sending an email to another practitioner in circumstances where:

1. the Practitioner knew that the email contained statements that were misleading; and

2. the Practitioner intended the other Practitioner to be misled by those statements; or

3. alternatively to (1) and (2), the Practitioner was recklessly indifferent as to whether the statements were misleading and as

to whether the other Practitioner would be misled by those statements.

Ground 3

298 Ground 3 is that, on about 22 July 2019, the Practitioner engaged in professional misconduct by preparing and sending a letter to the Associate to Justice Archer of the Supreme Court in circumstances where:

1. the Practitioner knew that the letter contained statements that were misleading; and

2. the Practitioner intended the court to be misled by those statements; or

3. alternatively to 1 and 2, the Practitioner was recklessly indifferent as to whether the statements were misleading and as to whether the court would be misled by those statements.

Ground 4

299 Ground 4 is an allegation that, on about 22 July 2019, the Practitioner engaged in professional misconduct by swearing an affidavit and causing it to be filed in the Supreme Court in circumstances where:

1. the Practitioner knew that the affidavit contained statements that were misleading; and

2. the Practitioner intended the court to be misled by those statements; or

3. alternatively to 1 and 2, the Practitioner was recklessly indifferent as to whether the statements were misleading and as to whether the court would be misled by those statements.

Ground 5

300 Ground 5 is an allegation that on about 22 July 2019 the Practitioner engaged in professional misconduct by preparing and sending a letter to another practitioner in circumstances where:

1. the Practitioner knew that the letter contained statements that were misleading; and

2. The Practitioner intended the other practitioner to be misled by those statements; or

3. alternatively to 1 and 2, the Practitioner was recklessly indifferent as to whether the statements were misleading and as to whether the other practitioner would be misled by those statements.

Ground 6

301 Ground 6 is an allegation that, on about 5 August 2019, the Practitioner engaged in professional misconduct by swearing an affidavit and causing it to be filed in the Supreme Court in circumstances where:

1. the Practitioner knew that, the affidavit contained statements that were misleading; and

2. the Practitioner intended the court to rely on those statements; or

3. alternatively to 1 and 2, the Practitioner was recklessly indifferent as to whether the statements were misleading and as to whether the other court would be misled by those statements.

Resolution of Grounds 2 – 6

302 The Applicant's case in relation to Grounds 2 – 6 relies on inferentially proving that, prior to 18 July 2019, the Practitioner believed the SC Proceeding continued against the First Defendant although the First Defendant would not substantively defend that proceeding after the appointment of administrators.

303 The Applicant must also prove that the Practitioner swore affidavits or sent correspondence in circumstances where he knew the statement in the relevant affidavit or correspondence was misleading and that he intended to mislead the court or Mr Penglis SC (as the case requires) or alternatively that he was recklessly indifferent as to whether each particular statement was misleading and as to whether the court or Mr Penglis SC (as the case requires) would be misled by it.

304 The Practitioner submits that his evidence in cross-examination was consistent with his witness statements, honest and consistent with contemporaneous documents. The Practitioner submits that he was a witness who openly admitted his mistakes and acknowledged what he

could have done better and that he was genuinely confused about the gloss which the Applicant was putting on his mistakes. The Practitioner submits that there is no aspect of his evidence from which the Tribunal could find that he was not a credible witness and, that when taken as a whole, his evidence provides a foundation for inferences that are at least as equally open as those contended for by the Applicant and in many cases, are more likely than those contended for by the Applicant. The Practitioner submits that in that circumstance the Applicant could never meet the onus and burden it bears in this case.

305 The Practitioner submits that even if the Tribunal accepts that the Practitioner has erred in recounting in evidence as to what his state of mind was some years earlier, that does not prove knowing or reckless disregard for the truth and that, even if his own evidence is rejected, the inferences supportive of his case cannot be displaced on the documentary evidence.

Ground 2 - email to Mr Penglis SC of 18 July 2019

306 We have found, and the Practitioner accepted in his evidence,[199] that prior to 17 July 2019, he did not understand that the action against the First Defendant was stayed specifically by the operation of s 440D of the Corporations Act. We have also found that, while as a practitioner with experience in insolvency, the Practitioner would have known that proceedings do not continue against companies which are in administration, without approval of the administrator or the court (as the case requires), but he did not consider the application of the law to the SC Proceeding and had not appreciated that the Plaintiff was unable to proceed against the First Defendant. Accordingly, we also find that the assertion in his email to Mr Penglis SC dated 18 July 2019, that he thought that it was common cause that s 444D of the Corporations Act operated to bring the action to and end against the First Defendant was not true. He did not appreciate it. It was so very clear from the Plaintiff's lawyers' communications that until 16 July 2019 they did not appreciate that from the time it was placed into administration that the SC Proceeding was stayed as against the First Defendant. The Practitioner could not have thought they understood the true position.

307 It therefore follows that we also find that suggestion in the email that the announcing of his appearances and the signing of the MOCOs

[199] See for example in cross-examination at ts 139, 12 May 2023 that before 16 July 2019 of the section number of the Corporations Act that applied or how it operated.

was the result of a lack of attention to detail was false and misleading because his statement regarding his knowledge was untrue.

308 In the face of the finding that he did not appreciate that the SC Proceeding was unable to proceed against the First Defendant until 16 or 17 July 2019, we cannot accept the Practitioner's denials of the suggestion that his intention in writing the email in the terms he did, was to deflect criticism that he had intended to mislead the Plaintiff. Rather we find that his intention in writing the email was precisely that.

309 We have found the allegation in Ground 2 proven.

Ground 3 – letter to Associate of 22 July 2019

310 We have set out the letter which the Practitioner wrote to the Associate on 22 July 2019 at [181].

311 We have already found that, at the time the Practitioner announced his appearances, he did not assume that his retainer for Ironbridge had come to an end. We therefore find that his statement to that effect in the letter to the Associate of 22 July 2019 was false and misleading.

312 We have found that the Practitioner did not understand that a statutory stay, brought about by operation of s 444E of the Corporations Act, had come into effect upon it entering into administration. It follows, therefore, that we find that the letter of 22 July 2019 was false and misleading in so far as it indicated that at the time he announced his appearances on 3 July 2019 and 16 July 2019 he understood that s 444E of the Corporations Act had brought his retainer to an end.

313 Further, we find that in so far as the Practitioner's letter represented that he had signed the MOCOs on behalf of the First and Second Defendants as a result of a 'lack of attention to detail' (because at the time he signed he knew that he was not acting for the First Defendant), it was also false and misleading.

314 We find that the Practitioner's intention in making those statements in the email was to mislead the court and deflect criticism of his earlier conduct.

Ground 4 – affidavit of 22 July 2019

315 We have set out the content of the affidavit at [179].

316 We have already found that the Practitioner did not appreciate that his retainer to act for the First Defendant in the proceedings had come to an end. To the extent that the affidavit indicated that he regarded the Firm's retainer with Ironbridge to be an end as at 21 July 2017 and that he had not taken instructions from the administrators for that reason, we find that it was false and misleading.

317 We have also found that the Practitioner did not understand that 'Ironbridge was under a statutory stay, under s 444E(3) of the Corporations Act by which it was impermissible that the Plaintiff could continue this action against Ironbridge without the leave of the court'. His affidavit says that this was a reason why he did not take instructions from the administrators. We find that to be false and misleading because the affidavit intends to convey that his understanding of the effect of s 444E of the Corporations Act was in fact the reason he did not seek instructions from the administrators, when he did not have that understanding.

318 We find the Practitioner made those statements intending to mislead the court. There is no other explanation open on the facts as we have found them.

Ground 5 – the letter to Mr Penglis SC of 22 July 2019

319 We have set out the content of the letter at [182].

320 As will be apparent from comparing the letter with the draft which had been amended by Mr Zelestis KC and returned to the Practitioner, (which we have set out at [203]), the Practitioner changed the first of Mr Zelestis KC's proposed additions from '(as I knew at the time)' to '(as I understood it)'. He was not asked about why he made that change or whether he thought the two statements were different. We find that the letter intended to convey to the reader that the Practitioner knew at the time he notified the parties about the First Defendant being in administration and subject to a DOCA, that the effect was that the SC Proceeding was stayed against the First Defendant. That was untrue.

321 It follows from our earlier finding that the Practitioner did not understand that his retainer had come to an end when the administrators were appointed, that we also find that the statement in the letter that that was his understanding at the time was false and misleading.

322 It also follows that we find that the statement in the letter announcing that he appeared for the First and Second Defendants and

the signing of the MOCOs on behalf of the First Defendant (and the Second Defendant) were the result of inadvertence, or lack of attention to detail, were also false and misleading, because we have found he did not have appreciation that the action was stayed against the First Defendant at the time he took those actions.

323 Again, we find that the reason for making the misleading statements was to avoid criticism of his conduct in purporting to act for the First Defendant after it had entered into administration and the DOCA when he was no longer able to do so.

Ground 6 August 2019 affidavit

324 Ground 6 relates to the affidavit prepared and sworn by the Practitioner on 5 August 2019 in opposition to the Plaintiff's application that the firm pay the costs of its application under s 444D(1)(b) and/or 440E(3) of the Corporations Act. We have set out the content of the affidavit at [189].

325 We have already found that the contents of the email from the Practitioner to Mr Penglis SC dated 18 July 2019 was misleading in certain respects. It must follow from that conclusion, that the Practitioner's statement in the affidavit that 'insofar as the email contains my explanation for W+H remaining on the record for Ironbridge, it is true and correct' is itself false and misleading.

326 We have also found that the state of the Practitioner's knowledge was not as he set it out in the letter to the Associate of 22 July 2019 which was attached to his affidavit of 5 August 2019 as attachment JAR1. It must therefore follow, and we find, that the statement in that affidavit that the contents of that letter were true and correct was also false and misleading.

327 Again, the only purpose for making the misleading statements in the affidavit was to deflect criticism of his earlier conduct.

Characterisation of the conduct

328 As part of determining whether the making of the false and misleading representations the subject of Grounds 2 – 6, amount to professional misconduct or unsatisfactory professional conduct, we must determine whether the Practitioner made the false and misleading representations knowingly or, alternatively, with reckless disregard to the question of whether the statement was false and misleading or

whether the Practitioner was careless or negligent in making the representations.

Meaning of reckless disregard, negligence and carelessness

329 Where it is alleged that a practitioner has provided information or made a statement which is false or misleading there are, three categories of case in which that conduct will constitute either professional misconduct or unsatisfactory professional conduct. They were identified by the Court of Appeal in ***Giudice v Legal Profession Complaints Committee*** in the following terms:[200]

> First, the Practitioner might know that the statement or information is false or misleading. Second, the practitioner might have reckless disregard to the question of whether the statement is false or misleading, and third, the practitioner might be negligent or careless. Because the first two categories will only apply, if assessed subjectively, the practitioner is either aware that the statement is false or misleading, or wilfully indifferent to its truth, in the absence of special circumstances one would ordinarily expect a finding of either category of conduct to be characterised as a substantial departure from the standards of conduct reasonably expected of a practitioner such as to constitute professional misconduct, within the taxonomy of the Act. In cases falling within the third category – that of negligence or carelessness – whether or not the practitioner's conduct is either unsatisfactory professional conduct or professional misconduct will depend upon the nature and degree of negligence or carelessness involved.

330 In assessing whether a practitioner has made a statement with reckless disregard for the truth or falsity of the statement, it is necessary for the Tribunal to find, as a fact, that the practitioner wilfully disregarded the truth or falsity of the relevant statement, put another way, had closed their mind to the question of whether it was true or false.

331 Whether a practitioner has made a statement with reckless disregard as to the truth or falsity of the statement 'that fact must be found with reference to a subjective assessment of the practitioner's actual state of mind – in the words of the older cases 'not caring in the [practitioner's] own heart and conscience whether it was true or

[200] ***Giudice v Legal Profession Complaints Committee*** [2014] WASCA 115 (***Giudice***) at [8] citing ***Fidock v Legal Profession Complaints Committee*** [2013] WASCA 108 (***Fidock***).

false'.[201] In that context, 'not caring' is not the same as 'not taking care'.[202]

332 A practitioner will have recklessly disregarded whether a statement is true or false where:

1. The practitioner was aware, at the time the statement was made, that there was a risk of the statement being untrue or false; and

2. The practitioner consciously disregarded that risk.[203]

333 But even where the Tribunal reaches that conclusion, that is not the end of the matter, because the Tribunal must then consider:

> Whether it should be concluded that, in all of the circumstances, the [practitioner] had engaged in professional misconduct, or alternatively, unsatisfactory professional conduct.[204]

334 The issue of what knowledge must be proved in order to establish that a practitioner was recklessly indifferent to whether a statement was false or misleading was considered by the Court of Appeal in ***Giudice***.

335 In ***Giudice***, the Tribunal had found that a solicitor who caused a client's affidavit to be sworn, filed and served in court proceedings, when that affidavit contained a false statement, had committed an act of unsatisfactory professional conduct because he had prepared the affidavit with reckless disregard for the truth or falsity of the statement. On appeal, the Court of Appeal held that in disciplinary proceedings, a reckless disregard for whether a statement is false or misleading involves a subjective assessment as to the practitioner's state of mind. The Court of Appeal found that the Tribunal had erred because its reasoning suggested that it had assessed the practitioner's statement of mind on an objective basis; that is what he should have known, rather than on the basis of his actual state of mind.

336 As the members of the court in ***Giudice*** acknowledged,[205] the term 'reckless' is capable of bearing different meanings, and its meaning in any given case will be determined by the context in which the term is used.[206]

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[201] ***Giudice*** at [2] and [44] (Martin CJ) and [130] (Edelman J).
[202] ***Giudice*** at [45] (Martin CJ) citing ***Angus v Clifford*** [1891] 2 Ch 449 at [470] – [471].
[203] ***Giudice*** at [95] (Buss JA).
[204] ***Giudice*** at [98] (Buss JA).
[205] ***Giudice*** at [42] (Martin CJ); at [81] (Buss JA), at [130] (Edelman J).
[206] ***Giudice*** at [42] – [44] (Martin CJ), at [81] – [82] Buss JA; at [130] (Edelman J).

337 Martin CJ observed that in disciplinary proceedings of the present kind, an allegation of reckless disregard of the truth by a legal practitioner will only be made out if it is established that the practitioner's actual state of mind was that of indifference to the truth of the relevant statement,[207] or 'not caring in the man's own heart and conscience whether it was true or false'.[208] The Chief Justice noted that the Tribunal had made 'no express finding to the effect that at the time the practitioner settled [the relevant paragraph] of the client's affidavit he was indifferent to its truth or falsity, in the sense that he did not care whether it was true or false'.[209] His Honour concluded that unless such a finding was implicit in the Tribunal's reasons, it could not be concluded that the Tribunal had correctly addressed and answered 'the critical question which it was required to answer'.[210]

338 Edelman J agreed with Martin CJ that the allegation of recklessness was an allegation of subjective recklessness 'in the sense of the practitioner being indifferent to the truth of the statement or 'not caring in the [practitioner's] own heart and conscience whether it was true or false'.[211]

339 Buss JA agreed that the assessment required was a subjective one. His Honour gave a more expansive analysis of what that subjective assessment required. His Honour concluded that 'a reckless disregard or indifference involves, at least, a subjective element of actual and conscious disregard of or indifference to the risks created by the conduct'.[212] In the context of the allegation that the practitioner had recklessly disregarded whether the statement in his client's affidavit was true or false, Buss JA considered that that allegation comprised two subjective elements:[213]

> The appellant will have recklessly disregarded whether the statement was true or false if:
>
> (a) the appellant was aware, when he settled the statement … that there was a risk that the statement was untrue or false; and
>
> (b) the appellant consciously disregarded the risk.

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[207] ***Giudice*** at [44] (Martin CJ) referring to ***Fidock***.
[208] ***Giudice*** at [44] (Martin CJ) quoting ***Le Lievre v Gould*** [1893] 1 QB 491 at [501] (Bowen CJ).
[209] ***Giudice*** at [46] (Martin CJ).
[210] ***Giudice*** at [46] (Martin CJ).
[211] ***Giudice*** at [130] (Edelman J).
[212] ***Giudice*** at [87] (Buss JA).
[213] ***Giudice*** at [94] – [97] (Buss JA).

> Those elements are subjective in that they are concerned with the appellant's actual state of mind.
>
> The notion of 'conscious disregard' by the appellant of the risk, being the second element, connotes that the appellant wilfully or deliberately shut his eyes to, or excluded from contemplation, the risk that the statement was untrue or false.

Resolution

340 We have already found that the only available inference from all of the contemporaneous evidence of the Practitioner's conduct of the SC Proceeding from the time he learned that the First Defendant was in administration and had entered into a DOCA until 17 July 2019, is that, throughout that time the Practitioner's real understanding was that the First Defendant would not play any further part in the SC Proceeding because it had no money and was not the target of what he regarded to be sham proceedings. That is, we have already found that the Practitioner did not have his asserted general understanding that there was an impediment to the SC Proceeding continuing against the First Defendant.

341 It follows from the fact that the Practitioner did not, between learning of the First Defendant being in administration and subject to the DOCA and 16 July 2019, appreciate that the SC Proceeding did not continue against the First Defendant that when he wrote the emails and letters, swore the affidavits the subject of Grounds 2 – 6, he knew that they contained false and misleading statements which were intended to convey to their readers that he did have that appreciation.

342 The *Legal Profession Conduct Rules 2010* (**Conduct Rules**), which applied at the time of these events, (Conduct Rules 5 and 6) set out the fundamental duties of, among others, Australian lawyers engaged in legal practice in Western Australia at the time. Those Conduct Rules provide as follows:

> 5. **Paramount duty to the court and the administration of justice**
>
> 5.1 A practitioner's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty including, but not limited to a duty owed to a client of the practitioner.
>
> **6. Other fundamental ethical obligations**
>
> 4.1 A practitioner must —

(1) act in the best interests of a client in any matter in which the practitioner represents the client; and

(2) be honest and courteous in all dealings with clients, other practitioners and other persons involved in a matter where the practitioner acts for a client; and

(3) deliver legal services competently and diligently; and

(4) avoid any compromise to the practitioner's integrity and professional independence, and

(5) comply with these rules and the law.

343 Conduct Rule 34 also bears upon this matter. It concerns a practitioner's duty to the court. It relevantly provides:[214]

(1) A practitioner must not deceive or knowingly or recklessly mislead the court.

(2) A practitioner must correct misleading statements made to the court as soon as possible after the practitioner becomes aware that the statement was misleading.

344 Conduct Rule 37 deals with a practitioner's obligations in communications with opponents. Relevantly, it provides:[215]

(1) A practitioner must not knowingly make a false or misleading statement to an opponent in relation to a matter (including its compromise).

(2) A practitioner must take all necessary steps to correct any false or misleading statement unknowingly made by the practitioner to an opponent as soon as possible after the practitioner becomes aware that the statement was false or misleading.

345 Even absent reference to the Conduct Rules, it is well understood that one of the fundamental obligations of legal practitioners is to act with honesty and candour with the court and with other practitioners at all times. Not only is dishonesty a breach of the Conduct Rules but it is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct for the purposes of the LP Act.

[214] Conduct Rules, r 34.
[215] Conduct Rules, r 37.

346 In this case, because we have found that the Practitioner's impugned communications the subject of Grounds 2 – 6 were deliberately intended to convey false impressions as to his state of knowledge and a false impression as to why he had taken certain actions in the litigation, we can only find that each constitutes an act of professional misconduct.

347 In our view, the lack of candour on each occasion is conduct in connection with the practice of the law that may justify a finding that the Practitioner is not a fit and proper person to engage in legal practice and therefore is misconduct of the kind in s 403(1)(b) of the LP Act.

348 It is also undoubtedly conduct that:

(1) fell short, to a substantial degree, of the standard of conduct observed and approved by members of the profession of good repute and competence; and

(2) would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence.

Proposed orders

349 We propose making the following orders as a consequence of our findings:

1. The Practitioner is guilty of professional misconduct within the meaning of s 403 of the *Legal Profession Act 2008* (WA) by between 11 October 2017 and 5 August 2019 the Practitioner:

   (a) caused his firm to purport to act as the solicitor of record for a defendant to Supreme Court proceedings when the firm was not authorised to do so and had no instructions to do so; and

   (b) purported to act as solicitor and counsel for a defendant to the Supreme Court proceedings when he was not authorised and had no instructions to do so.

2. The Practitioner is guilty of professional misconduct within the meaning of s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

   (a) to a substantial degree fell short of the standard of professional conduct observed and approved by

members of the profession of good repute and competence; and

(b) would reasonably be regarded as disgraceful and dishonourable by practitioners of good repute and competence,

by, on about 18 July 2019, preparing and sending an email to another practitioner in circumstances where:

(c) the Practitioner knew that the email contained statements that were misleading; and

(d) the Practitioner intended the other practitioner to be misled by those statements.

3. The Practitioner is guilty of professional misconduct within the meaning of s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

(a) to a substantial degree fell short of the standard of professional conduct observed and approved by members of the profession of good repute and competence; and

(b) would reasonably be regarded as disgraceful and dishonourable by practitioners of good repute and competence,

by, on about 22 July 2019, preparing and sending a letter to the Associate to Justice Archer of the Supreme Court in circumstances where:

(c) the Practitioner knew that the letter contained statements that were misleading; and

(d) the Practitioner intended the Court to be misled by those statements.

4. The Practitioner is guilty of professional misconduct within the meaning of s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

(a) to a substantial degree fell short of the standard of professional conduct observed and approved by

members of the profession of good repute and competence; and

(b) would reasonably be regarded as disgraceful and dishonourable by practitioners of good repute and competence,

by, on about 22 July 2019, swearing an affidavit and causing it to be filed in Supreme Court proceedings in circumstances where:

(c) the Practitioner knew that the affidavit contained statements that were misleading; and

(d) the Practitioner intended the Court to be misled by those statements.

5. The Practitioner is guilty of professional misconduct within the meaning of s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

(a) to a substantial degree fell short of the standard of professional conduct observed and approved by members of the profession of good repute and competence; and

(b) would reasonably be regarded as disgraceful and dishonourable by practitioners of good repute and competence,

by, on about 22 July 2019, preparing and sending a letter to another practitioner in circumstances where:

(a) the Practitioner knew that the letter contained statements that were misleading; and

(b) the Practitioner intended that the other practitioner would be misled by those statements.

6. The Practitioner is guilty of professional misconduct within the meaning of s 403(1)(b) of the *Legal Profession Act 2008* (WA) and which conduct:

(a) to a substantial degree fell short of the standard of professional conduct observed and approved by

members of the profession of good repute and competence; and

(b) would reasonably be regarded as disgraceful and dishonourable by practitioners of good repute and competence,

by, on about 5 August 2019, swearing an affidavit and causing it to be filed in a Supreme Court proceeding in circumstances where:

(c) the Practitioner knew that the affidavit contained statements that were misleading; and

(d) the Practitioner intended the Court to rely on those statements.

350 Before making the orders, we will give the parties an opportunity to be heard in relation to their terms.

Orders

The Tribunal orders:

1. The parties are to confer about the proposed orders set out in paragraph [349] of the reasons for decision and to inform the Tribunal by 22 January 2024 if they consider that any amendments are required in order to properly reflect the findings of the Tribunal set out in the reasons for decision.

2. If the Tribunal receives notice that the parties consider that the proposed orders need to be amended, then the matter will be listed for a directions hearing.

3. The parties are to confer about orders to be made to programme the matter for a hearing of the issues of penalty and costs.

4. Following conferral, the parties are to file in the Tribunal, by 22 January 2024, an agreed Minute of Proposed Orders or, failing agreement, each party is to file their own Minute of Proposed Orders, programming the matter to a hearing of the issues of penalty and costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS
Associate to Judge Glancy

19 DECEMBER 2023