JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and OUD [2018] WASAT 119
MEMBER	**:**	PRESIDENT, JUSTICE J C CURTHOYS MR M ANDERSON (SENIOR SESSIONAL MEMBER) MS K LANG (SENIOR SESSIONAL MEMBER)
HEARD	**:**	19, 20 and 21 SEPTEMBER 2018
DELIVERED	**:**	5 NOVEMBER 2018
FILE NO/S	**:**	VR 110 of 2017
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND NICHOLAS NEIL PETER OUD Respondent

Catchwords:

Disciplinary proceedings - Legal practitioner - Professional misconduct - Unsatisfactory professional conduct

Legislation:

Legal Profession Act 2008 (WA), s 228(1), s 228(3), s 228(3)(b), s 403, s 438
Legal Profession Regulations (2009) WA, reg 41(2), re 41(6), reg 45

Result:

Practitioner guilty of professional misconduct
Practitioner guilty of unsatisfactory professional conduct

Category: B

Representation:

Counsel:

Applicant	:	Mr P Yovich
Respondent	:	Mr RI Viner and Mr DJ Garnsworthy

Solicitors:

Applicant	:	Francis Burt Chambers
Respondent	:	Francis Burt Chambers

Case(s) referred to in decision(s):

Briginshaw v Briginshaw (1938) 60 CLR 336
Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Legal Profession Complaints Committee and Wells [2014] WASAT 112
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
Legal Professional Complaints Committee and Park [2017] WASAT 89
NOM v Director of Public Prosecutions (2012) 38 VR
Rayney and Legal Practice Board of Western Australia [2016] WASAT 7
Rejfek v McElroy (1965) 112 CLR 517

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 On 8 June 2017 the Legal Complaints Committee (the Committee) filed an application against Nicholas Neil Peter Oud, a legal practitioner.

2 The application alleged six Grounds - Five Grounds in Annexure A and one Ground in Annexure B as follows:

ANNEXURE - A

GROUND 1

That the practitioner, NICHOLAS NEIL PETER OUD (practitioner) between 23 March 2016 and 30 March 2016, in connection with acting for Mr Colin Oxlade and/or Dr Peter Fiore, or alternatively Irongrow Corporation Pty Ltd (Irongrow), in respect of a proposed purchase of platinum, engaged in professional misconduct within the meaning of sections 403 and 438 of the *Legal Profession Act 2008 WA* (Act) in that his conduct fell short, consistently or by a substantial degree, or both, of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, by disbursing from the firm's trust account $300,000 (CSG loan funds) which had been received into trust on behalf of Credit Solutions Group Pty Ltd (CSG) for use in connection with the purchase of the platinum, in circumstances where:

1. the practitioner undertook to CSG not to deal with, transfer, move or use the CSG loan funds without the expressed written consent of Mr David Cacciola on behalf of CSG, and Mr Oxlade (**the undertaking**);

2. the practitioner disbursed the CSG loan funds without the expressed written consent of Mr Cacciola, and contrary to purported written consents he had received;

3. in releasing the CSG loan funds:

   (a) the practitioner acted in reckless disregard or with reckless indifference as to whether he was in breach of his undertaking by doing so;

   (b) alternatively, the practitioner was grossly careless in failing to ensure that the release of the CSG loan funds was not in breach of the undertaking.

GROUND 2

That the practitioner in March and April 2016 engaged in unsatisfactory professional conduct within the meaning of sections 402 and 438 of the Act in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner by failing to keep his firm's trust records in a way that disclosed the true position in relation to withdrawals from trust of the CSG loan funds, in that the trust records did not accurately record the names of the persons who received the funds and the names or BSB numbers of the bank accounts into which the funds were paid as required by Regulation 45 of the *Legal Profession Regulations 2009* (**Regulations**) and section 228(3)(b) of the Act.

GROUND 3

That the practitioner in March and April 2016 engaged in unsatisfactory professional conduct within the meaning of sections 402 and 438 of the Act in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner by failing to deliver to CSG's solicitor Mr Paul Reese the original receipt made out by the practitioner for the receipt of the CSG loan funds into his trust account when requested to do so by Mr Reese by emails sent to the practitioner on 22 March 2016 and 28 April 2016, in breach of Regulations 41(2) and 41(6) of the Regulations.

GROUND 4

That the practitioner in or about April 2016 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act in that his conduct would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence in responding to an email from Mr Reese requiring the CSG loan funds to be returned from the practitioner's firm's trust account to Mr Reese's trust account, when the practitioner sent a series of emails to Mr Reese on 28 and 29 April 2016 which:

1. did not disclose the fact that he no longer retained the CSG loan funds in his firm's trust account;

2. implied that the practitioner did retain the CSG loan funds and was in a position to return the CSG loan funds to Mr Reese's trust account,

and which conveyed the impression that the CSG loan funds were retained in his firm's trust account and were available to be returned to Mr Reese's trust account when, in truth, the practitioner had disbursed the CSG loan funds and was not in a position to effect the return of the

CSG loan funds to Mr Reese's trust account, and which impression the practitioner permitted to remain uncorrected in circumstances where:

(a) the practitioner knew the emails were misleading in a material respect;

(b) alternatively, the practitioner was recklessly indifferent as to whether the emails were misleading in a material respect;

(c) further alternatively, the practitioner was grossly careless as to whether the emails were misleading in a material respect.

GROUND 5

That the practitioner on 9 May 2016 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act in that his conduct would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence by conveying an offer from Mr Oxlade to Mr Reese to repay the CSG loan funds that was contingent upon Mr Reese withdrawing a complaint he had made to the Applicant against the practitioner in relation to the practitioner's breach of his undertaking with respect to the CSG loan funds.

Onus and standard

3 The Committee bears the onus of proof. In ***Legal Profession Complaints Committee and Wells*** [2014] WASAT 112 at [8] and [9] the Tribunal stated:

> The Committee bears the onus of proof. It is to the civil, not criminal standard that the principles of *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*) apply. That is, while needing to be proved only on the balance of probabilities, the nature and seriousness of the allegations are relevant to the question whether the issues are proved to the reasonable satisfaction of the Tribunal and the process by which reasonable satisfaction is attained.
>
> By reason of the nature of the allegations, the Tribunal must feel an actual persuasion of the occurrence or existence of the relevant facts in determining whether or not the case against the practitioner is made out: *Medical Board of Western Australia and Wright* [2010] WASAT 48 at [31]; and see *Medical Board of Western Australia and Bham* [2006] WASAT 190 at [144].
>
> (See also ***Rejfek v McElroy*** (1965) 112 CLR 517 (***Rejfek***))

4 In ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***) at 362, Dixon J, as he then was, observed '[i]n such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences'.

5 The standard of proof required in a civil case where serious allegations are made was stated in ***Rejfek*** where Barwick CJ, Kitto, Taylor, Menzies and Windyer JJ observed at 521 that:

> The 'clarity' of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. …
>
> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused.

6 In ***NOM v Director of Public Prosecutions*** (2012) 38 VR 618 at [124], the Victorian Court of Appeal stated:

> … mere mechanical comparison and probabilities independent of a reasonable satisfaction will not justify a finding of fact. The fact finder must feel an actual persuasion of the occurrence or existence of the fact in issue before it can be found. Where, as in the present case, the standard of proof is to be applied to circumstantial evidence, satisfaction as to a reasonable and definite inference is required.

7 All findings made by the Tribunal are on the balance of probabilities applying the ***Briginshaw*** approach.

8 In making its findings in relation to Mr Oud's conduct the Tribunal is particularly conscious of the seriousness of such allegations.

Purposes of Part 13 of the Legal Profession Act 2008 (WA)

9 Section 401 of the *Legal Profession Act 2008* (WA) (LP Act) provides that the purposes of Part 13 'Complaints and discipline' are:

> (a) to provide for the discipline of the legal profession in this jurisdiction, in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally;
>
> (b) to promote and enforce the professional standards, competence and honesty of the legal profession;

(c) to provide a means of redress for complaints about lawyers.

Professional misconduct

10 'Professional misconduct' is defined by s 403 of the LP Act inclusively 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.

Unsatisfactory professional conduct

11 Section 402 of the LP Act provides:

> 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.

The authorities

12 In ***Legal Professional Complaints Committee and Park*** [2017] WASAT 89 (***Park***) the Tribunal stated at [27]-[33]:

> 27 Courts and tribunals rely heavily on practitioners in reaching their decisions.

28 Practitioners must be scrupulously honest and accurate.

29 Misleading conduct may be dishonest, reckless or careless. The end result of misleading conduct is that a court may not reach a proper decision. Dishonest conduct is obviously the most serious.

30 Deliberately misleading a court or tribunal has a potentially corrosive effect on the administration of justice because the court or tribunal may proceed on an incorrect basis. Carelessly misleading a court or tribunal has the same potentially corrosive effect on the administration of justice because the court or tribunal may proceed on an incorrect basis. It is therefore imperative that practitioners ensure that evidence presented to the court is accurate. This is particularly so where it is their own evidence. The fact that a court or tribunal may not actually be misled does not reduce the seriousness of misleading conduct.

31 In *Legal Profession Complaints Committee and Bower* [2017] WASAT 47, in relation to dishonest conduct, the Tribunal stated at [15]:

> In *Legal Profession Complaints Committee and Barber* [2015] WASAT 99 at [26]-[27], the Tribunal accepted the Committee's submissions as to the principles in relation to a practitioner's duty of disclosure. These are set out below:
>
> > Nevertheless, it is a basic precept of the legal profession that lawyers owe a duty of honesty and candor to the court. It is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceal from the court facts which ought to be drawn to the judge's attention, or knowingly permit a client to deceive the court: *Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)* (1997) 18 WAR 190 at 193; *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at [6], [12], [13], [23], [66] [67]; *Vogt v Legal Practitioners Complaints Committee* [2009] WASCA 202 at [61]; *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115 at [100].
> >
> > The duty not to mislead the court is of fundamental importance in the due administration of justice, and is paramount and overrides any duty to the client: *Kyle v Legal Practitioners Complaints Committee* (supra) at [19], [23], [66].

It is a breach of that duty for a lawyer to produce a witness statement that the lawyer knows to be false or if the lawyer knows that the witness does not believe the statement to be true in all respects. The duty to correct a false witness statement continues after it is filed. *Kyle v Legal Practitioners Complaints Committee* (supra) at [13], [23].

Although expressed in terms of a duty to the 'court', there is no question that duty applies with equal force to proceedings in the Tribunal: see eg *Clyne v The New South Wales Bar Association* (1960) 104 CLR 186 at 200 (see also definition of 'court' in the Professional Conduct Rules in force at the relevant time).

The duty not to 'mislead' the court or tribunal is not limited to positive lies or misstatements. Half-truths, implying a false state of affairs, the creating of a misleading impression, or allowing the client to mislead the court will also be a breach of the duty: *Kyle v Legal Practitioners Complaints Committee* (supra) at [12], [23]; *Vogt v Legal Practitioners Complaints Committee* (supra) at [48]; *Forster v Legal Services Board* [2013] VSCA 73 at [161].

A practitioner's duty is not merely to not deceive the court or tribunal. He or she must be fully frank in what he or she does before it. This obligation takes precedence over the practitioner's duty to the client, to other practitioners and to himself or herself*: Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408 at 447.

Similarly, *In Re Thom* (1918) 18 SR (NSW) 70, Cullen CJ (with whom the other two members of the Full Court agreed) said (at 74 - 75):

> 'It is of the greatest importance than any mere casuistry in the presentation of evidence should be strictly avoided by those entrusted with the responsible duties of a legal practitioner. It is perhaps easy by casuistical reasoning to reconcile one's mind to a statement that is in fact misleading by considering that the deponent is not under any obligation to make a complete disclosure. By this means a practitioner may be led into presenting a statement of fact which, although it may not be capable of being pronounced

> directly untrue in one particular or another, still presents a body of information that is misleading, and conceals from the mind of the tribunal the true state of facts which the deponent is professing to place before it. For that reason it is proper on such an occasion as this to express condemnation of any such casuistical paltering with the exact truth of the case.'

32 In *Jemielita v The Medical Board of Western Australia* (unreported, WASC, Library No 920584, 13 November 1992), Justice Owen stated:

> [T]he concept of gross carelessness involves unacceptable conduct without any intentional wrong doing on the part of the practitioner. It also suggests that the practitioner is unable to give the care required or is indifferent to the need for such care notwithstanding that he may have the intellectual and technical ability to supply the care that is required.
>
> …
>
> [T]he concept of 'carelessness' may not be endemic to the practitioner's affairs generally. It may be limited to individual, perhaps sporadic,incidents[.]

33 In *A Practitioner v The Medical Board of Western Australia* [2005] WASC 198 at [88], Justice Kenneth Martin, then siting as a Commissioner, stated:

> [I] reiterate that where appropriate, a finding of improper conduct of a serious enough kind, or indeed even gross carelessness of a serious enough kind, may well justify the most severe disciplinary sanction[.]

13 In ***Khosa v Legal Profession Complaints Committee*** [2017] WASCA 192 at [43], Buss P stated:

> In *Legal Profession Complaints Committee v Detata* [2012] WASCA 214, Martin CJ (Pullin & Murphy JJA agreeing) expounded at length on the importance of legal practitioners performing their undertakings. It is convenient to reproduce what his Honour wrote on that occasion:
>
> > The importance of legal practitioners performing their undertakings cannot be overstated. The practice of giving, and relying upon, undertakings given by legal practitioners is widespread and serves an important public purpose. The circumstances in which undertakings are given and relied

upon are many and varied. In some cases an undertaking will be proffered and received as a substitute for strict or timely performance of an obligation, perhaps arising under a contract or under a statutory provision. In other cases, the undertaking might be given in order to provide a form of security to the person to whom it is proffered - for example, an undertaking that an executed document will be held in escrow until certain conditions are met, or that legal proceedings will not be instituted if certain conditions are met, or that funds or other property will be retained by the practitioner until certain conditions are met. In all of these circumstances, the usual effect of the proffer and acceptance of the undertaking will be to obviate the need to commence or to continue legal proceedings. This serves the public interest by preserving the limited resources of the parties and the courts.

Undertakings will often be proffered and received in the course of legal proceedings - for example, in relation to interlocutory procedures. The provision of undertakings in those circumstances serves the public interest by reducing or averting interlocutory disputes.

Undertakings by legal practitioners are a common feature of commercial and property transactions in which legal practitioners are engaged. In some cases, a party might complete a transaction before all relevant conditions are satisfied in reliance upon an undertaking by a practitioner to the effect that he or she will cause a particular condition to be satisfied. In this context, the proffer and acceptance of undertakings by legal practitioners improves the efficiency and expedition of commercial and property transactions and thereby serves to lubricate the wheels of commerce, trade and finance: see *Rubik Financial Ltd v Herskope* [2010] WASC 343; *In the Matter of a Solicitor 'L'* (Unreported, VSC, LPA 3 of 1989, 17 - 21 June 1989).

Undertakings can only serve these purposes and thereby further the public interest if they are accepted and relied upon. In some circumstances, a practitioner may proffer an undertaking in terms which makes it clear that the undertaking is only that of the client and not the practitioner. In such a case, the obligation of performance will fall upon the client, not the practitioner. However, this is not such a case. In this case, the undertaking was expressly and unequivocally given in terms which bound both Mr Detata's client, Mr Detata and the firm by which he was employed.

The proffer of an undertaking binding upon a legal practitioner and his or her firm can be expected to enhance the reliability of the undertaking, and thereby the prospect that it will be accepted

> and relied upon by the party to whom it is proffered. In this way, the proffer of an undertaking binding upon a legal practitioner enhances the achievement of the various purposes to which I have referred, and thereby enhances the public interest. It is therefore vital that legal practitioners perform their undertakings, regardless of whether the undertaking was proffered in error or oversight, irrespective of any change in circumstances, no matter how radical, and irrespective of any hardship to the legal practitioner concerned (see *Bhanabhai v Auckland District Law Society* [2009] NZHC 415 [59] - [64] (Priestley, Heath and Winkelmann JJ).
>
> Further, it is vital for the maintenance of public confidence in the integrity of the legal profession and its practitioners, and for the maintenance of the confidence which practitioners have in dealing with each other, that performance of their undertakings be enforced: see (*Rubik Financial Ltd*).
>
> For these reasons, the obligation of a legal practitioner to perform his or her undertaking is a solemn obligation of the utmost importance [48] - [54].

14 In ***Rayney and Legal Practice Board of Western Australia*** [2016] WASAT 7 (Rayney), the Tribunal stated at [17]-[20]:

> Fitness to practise law requires that the practitioner must command the personal confidence of clients, fellow practitioners and judges see: *In re Davis* (1947) 75 CLR 409 (*In re Davis*) at 420; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 at [46]; *Dixon v Legal Practice Board of Western Australia* [2012] WASC 79 (*Dixon*) at [19].
>
> Unprofessional conduct includes conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, which includes, but is not confined to, conduct which occurs in the course of legal practice (*Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at [61]).
>
> The assessment of fitness and propriety in legal practitioners involves a range of broad public interest considerations. The relevant interests are the interests of the public, the interests of the Court and the maintenance of the high reputation and standards in the legal profession (*Dixon* at [27]).
>
> In *Prothonotary of the Supreme Court of New South Wales v Da Rocha* [2013] NSWCA 151 (*Prothonotary*) the Court stated at [29]:
>
> > In *Foreman*, the Court of Appeal indicated that in determining whether someone is a fit and proper person to be a solicitor the relevant considerations may include: the protection of the

> public against similar conduct, the character of the solicitor, and the effect which an order will have on the understanding (within the profession and amongst the public), of the standard of behaviour required of solicitors, the effect upon relationships which must exist between solicitors and the circumstances surrounding the impugned conduct.

15 In ***Legal Profession Complaints Committee v Brickhill*** [2013] WASC 369, the Full Court stated at [21]:

> Integrity and honesty are essential characteristics expected of a practitioner, and therefore, the court has generally taken a very serious approach when dealing with dishonesty by a practitioner: *Brennan* [15]; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 [47] (Martin CJ, EM Heenan and Jenkins JJ); *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 [22] - [23] (Steytler P, Wheeler and McLure JJA agreeing); *Kyle v Legal Practitioners Complaints Committee* [1999] WASCA 115; (1999) 21 WAR 56 [69] (Parker J); *Re Maraj* (25) (Malcolm CJ, Kennedy and Franklyn JJ agreeing). In *Barristers' Board v Darveniz*a, Thomas JA observed that:
>
> > [T]he quality most likely to result in striking off is conduct which undermines the trustworthiness of the practitioner, or which suggests a lack of integrity or that the practitioner cannot be trusted to deal fairly within the system which he or she practices [33].

The requisite intent

16 In ***Giudice v Legal Profession Complaints Committee*** [2014] WASCA 115 (***Giudice***), Martin CJ stated at [8]:

> As this court has pointed out [*Fidock v Legal Profession Complaints Committee* [2013] WASCA 108] when a practitioner provides information or makes a statement to a court which is false or misleading, there are (at least) three categories of case in which that conduct will constitute either professional misconduct or unsatisfactory professional conduct. First, the practitioner might know that the statement or information is false or misleading. Second, the practitioner might have a reckless disregard to the question of whether the statement or information 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 or information 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[.]

Mr Oud as a witness

17 Before turning to consider the specific evidence, a number of general comments can usefully be made about this matter. Firstly, the documentation largely speaks for itself. For example, in relation to the allegations in the Committee's Annexure B, Mr Oud wrote a letter to the Federal Magistrates Court in Adelaide asserting he had cleared funds in his trust account when he did not. The documentation is clear. Secondly, Mr Oud was a totally unsatisfactory and evasive witness. His explanations for his actions when asked to explain his actions and various documents were simply implausible. It is difficult to understand why this application went to a hearing other than that Mr Oud totally lacks insight.

18 It is useful to start with an example of Mr Oud's evasiveness.

19 At page 90 of Exhibit A, there is an email from Mr Oxlade to Mr Oud sent at 9.02 am on 29 March 2016 which reads in part 'This is the one relating to John's bankruptcy'.

20 Mr Yovich for the Committee asked a simple question as to that part of the email. The following exchange took place:

> **YOVICH, MR**: Okay. Now, Mr Oud, I want to take you to page 90 of the book of documents and that is the second page of an email chain, is it not? You can see the 2 at the bottom? --- Mmm.
>
> And on that page 90 there are two emails, aren't there? --- Yes.
>
> The earlier of the two is dated 29 March 2016 at 9.02 am. If you go to page 90 for now, we will do an exhibit at a time. Do you see email from Mr Oxlade to you? --- I do, yes.
>
> And it says:
>
> > This is the one relating to John's bankruptcy.
>
> Correct. Those are the first words of the email, aren't they? --- I'm sorry. I'm just trying to read the email. Just give me a second, please.
>
> I don't need you to read the email. I'm just asking you to read the words I've spoken:

> This is the one relating to John's bankruptcy -
>
> are the first words of Mr Oxlade's email to you, correct? --- No, I don't - I don't - I'm not - necessarily agree that to be the case.
>
> All right. So let's explore that then:
>
> On 29 March 2016 at 9.02 am, Colin Oxlade wrote -
>
> Do you see those words? --- Yes.
>
> Immediately below that are the words:
>
> This is the one relating to John's bankruptcy.
>
> Correct? --- Yes.
>
> That is how his message to you starts, isn't it? --- No.
>
> Are there invisible words that are part of his message that we don't see on the page, Mr Oud? --- I had no knowledge of what it says there, but - but it is what it is.
>
> Well, Mr Oud, come on.
>
> **HIS HONOUR**: Mr Oud, look at the email. What does it say? --- Okay. Sure.
>
> When you can't answer the simplest of questions as to what it says on the page - you're a lawyer. You ought to be aware what inferences this tribunal will draw from that? --- Okay.
>
> **YOVICH, MR**: So let's back to the beginning of this line of questioning, Mr Oud. The first words of the message from Colin Oxlade to you at 9.02 am on 29 March '16 are:
>
> This is the one relating to John's bankruptcy –
>
> aren't they? --- Yes.
>
> (ts 99-100, 20 September 2018)

21 What should have been a simple 'Yes' to Mr Yovich's question turned into a protracted exchange. That exchange is illustrative of Mr Oud's general evasiveness when giving evidence.

Persons and entities

22 The Table below sets out the relevant particulars of the persons and various entities who are referred to in the evidence and their involvement in the circumstances of this case:

Nicholas Neil Peter Oud	Standpoint Legal	Legal practitioner and sole practitioner; $20,000 loan from Mr Oud to Dr Fiore paid to Mr Oxlade through his company Ox Corp Pty Ltd. $20,000 paid to Mr Oud from Kathryn McKelt
Ms Guthrie	Standpoint Legal employee	Mr Oud's external bookkeeper
Mr Belden Namah	Siniwok Limited (Siniwok) (name of Mr Namah's bank account)	Seller of the platinum bars from New Guinea
Irongrow Corporation Pty Ltd	Irongrow	Purchaser of the platinum bars/the borrower and guarantor of the loan from CSG (principal loan amount of loan being $632,316.55)
Mr John Buckby	Irongrow	A director of Irongrow
Avro Gold Pty Ltd	Avro	Not a registered company or business Mr Fiore 'acting' on behalf of Avro. $300,000 deposited from Avro to Siniwok
Dr Peter Fiore	Avro	'Acting' on behalf of Avro Gold Pty Ltd' – a non-registered company/business Business partner of Mr Oxlade 'retained' Mr Oud to assist with purchase of platinum bars
Kathryn McKelt		Dr Fiore's partner/girlfriend Received $100,000 of loan funds into her bank account from Mr Oud's trust account; Deposited $20,000 into Mr Oud's business account
Mr Colin Oxlade	Irongrow	Business partner of Dr Fiore

		Negotiator of the loan from CSG on behalf of Irongrow Retained Mr Oud to facilitate the funding from CSG Release of $75,000 of loan funds from Mr Oud's trust account into Mr Oxlade's bank account Owner of Ox Corp Pty Ltd to which Mr Oud paid $20,000 as a loan to Dr Fiore Received $10,000 of the remaining loan funds from Mr Oud's trust account
Mr Rishi Levi	Levi loan	A further $300,000 loan supposedly raised by Mr Oxlade (a backup loan to the CSG loan to pay for contingencies that might arise in connection with the purchase of platinum)
Credit Solutions Group Pty Ltd	CSG	Financier
Mr David Cacciola	CSG	Managing Director and representative of CSG
Mr Nick Tan	CSG	An associate of Mr Cacciola
Mr Paul Reese	CSG's solicitor	Solicitor – Director of Summers Partners
Ox Corp Pty Ltd	Mr Oxlade's company	The third party through which Mr Oud stated he paid a loan of $20,000 to Dr Fiore
Mr Orlando Maiolo		Received $115,000 into his account from Mr Oud's trust account from the remaining loan funds
Mr Jaydeep Biswas		Associate to Dr Fiore and Mr Oxlade involved in negotiations with CSG to negotiate an agreement in relation to repayment of the loan
John and Jennifer Warming		Parties in a bankruptcy proceeding filed by a creditor in the Federal Circuit Court in Adelaide
ICBC Capital Pty Ltd	ICBC – a Liquidated company owned by Mr and Mrs Warming.	The company Mr Oud purported to act for in letter addressed to Federal

		Magistrates Court in Adelaide

Mr Oud's legal practice

23 Mr Oud was admitted to legal practice in Western Australia on 2 March 1995 (Committee's statement of facts and contentions (SFC) para 1).

24 At all material times, Mr Oud was an Australian legal practitioner within the meaning of s 5(a) of the LP Act (SFC para 2)

25 At all material times Mr Oud carried on business as a sole practitioner under the registered business name 'Standpoint Legal' (Mr Oud's further amended statement of facts and contentions in relation to Annexure A (Oud ASFC) para 2).

Sale of the platinum bars and the Credit Solutions Group Pty Ltd loan (CSG loan)

26 The Committee's application in general terms relates to the financing of the purchase of platinum bars from Papua New Guinea.

27 In or about mid-February 2016, Dr Peter Fiore retained Mr Oud's firm to assist with the purchase of a quantity of platinum bars each weighing 36 troy ounces (approximately 1kg) from Mr Belden Namah in Papua New Guinea. No later than 22 February 2016, M Oud was informed by Dr Fiore that he was acting on behalf of Avro Gold Pty Ltd (Avro). Mr Oud did not investigate the status of Avro. In fact, there was no registered company or business with that name (SFC para 3; Oud ASFC para 3).

28 Neither Mr Oud personally nor his firm entered into a formal costs agreement with Dr Fiore and created no other document evidencing this retainer (SFC para 4; Oud ASFC para 4; ts 111, 20 September 2018). The significance of this is that it raises an issue as to Mr Oud's motivation in doing the work.

29 Dr Fiore told Mr Oud that Mr Namah required $300,000 to be paid by Avro as an initial part payment of the purchase price for the platinum bars before delivery of the platinum bars to Dr Fiore in Australia (SFC para 5; Oud ASFC para 5).

30 On 19 February 2016, $95,000 and $155,000 were deposited into the firm's trust account by two Commonwealth Bank of Australia bank cheques. They were recorded as received from 'Avro Gold'. On 22 February 2016, a further sum of $50,000 was deposited into Mr Oud's firm's trust account and recorded as having been received from 'Avro Gold (SFC para 6; Oud ASFC para 6).

31 Later on 22 February 2016, on Dr Fiore's instructions, Mr Oud transferred the total of the sums received from Avro, being $300,000, to Mr Namah's nominated bank account in the name of Siniwok Limited (Siniwok) (SFC para 7; Oud ASFC para 7).

32 The Committee alleged that:

> On 3 March 2016, [Mr Oud] met with Dr Fiore and Mr Colin Oxlade. [Mr Oud] understood Mr Oxlade to be a business associate of Dr Fiore, who was negotiating a loan of $300,000 on behalf of Irongrow Corporation Pty Ltd (Irongrow) with Credit Solutions Group Pty Ltd (CSG), in relation to the platinum purchase (CSG loan).

(SFC para 8)

33 Mr Oud submitted that:

> 1) [He] understood the purpose of the meeting was for Dr Fiore to introduce [him] to Mr Oxlade, who [he] was told had flown in in from Adelaide;
>
> 2) [He] did not know as at 3 March 2016 that Mr Oxlade was negotiating the CSG loan.

(Oud ASFC para 8)

34 Whether Mr Oud knew that Mr Oxlade was negotiating the loan is largely irrelevant. The important factor is that Mr Oud was made aware of the relationship between Dr Fiore and Mr Oxlade.

35 The Committee alleged at para 9 of its SFC:

> [Mr Oud], Dr Fiore and Mr Oxlade discussed, relevantly, what had to be done to make arrangements to bring Mr Namah and his associates to Australia in order to finalise the purchase of the platinum from Mr Namah. The arrangements discussed included obtaining the CSG loan.

36 Mr Oud denied para 9 of the SFC, and said that he played no part in any discussions during the meeting on 3 March 2016, and, in

particular, played no part in any discussions concerning the CSG loan (Oud ASFC para 9).

37 Nothing turns on Mr Oud's denials. Whether or not Mr Oud took part in the discussion, he plainly had knowledge of what was discussed at the meeting because he was present.

38 The Committee alleged at para 10 of its SFC:

> Under the terms of the arrangement being negotiated with Mr Namah, Mr Namah or his representatives would bring the 50 platinum bars to Australia for quality testing once he had received proof that $300,000 was being held in a solicitor's trust account for the purposes of purchasing the platinum.

39 Mr Oud denied having any detailed knowledge of the negotiations with Mr Namah; but otherwise admitted para 10 of the SFC in fac (Oud ASFC para 10).

40 Once again Mr Oud's denial is largely irrelevant. Although he denies any 'detailed knowledge of the negotiations' in SFC para 10, the paragraph in fact does not allege any detailed knowledge.

41 The Committee alleged at para 11 of its SFC:

> On 4 March 2016, Mr Oxlade sent [Mr Oud] an email suggesting that [Mr Oud] act for him in relation to the platinum purchase. [Mr Oud] agreed to act for Mr Oxlade on his own behalf or alternatively on behalf of Irongrow, to 'facilitate' the funding from CSG for the purchase of the platinum from Mr Namah.
>
> (Exhibit A page 227)

42 The email was addressed to Dr Fiore and Mr Oud. The email states, amongst other things 'Why can't Nick [Mr Oud] work with the lender's solicitors to get this done? … Tell me how we can make this work for all of us!'.

43 Mr Oud admitted he received the email from Mr Oxlade on 4 March 2016 but denies each allegation in para 11 of the SFC (Oud ASFC para 11).

44 The Tribunal accepts that the email is equivocal. However, at some stage, Mr Oud was retained by Mr Oxlade as is evident from Mr Oud's response to SFC 12. Further, on 14 March 2016, Mr Oud

sent an email to Mr Reese, the solicitor for CSG stating 'I confirm I act for Colin Oxlade' (Exhibit A page 324).

45 The Committee alleged at para 12 of its SFC:

> [Mr Oud] did not enter into a formal costs agreement with Mr Oxlade, and created no other document evidencing this retainer.

46 Mr Oud admitted para 12 of the SFC, but said further that his involvement in the matter was limited to his agreeing on 22 March 2016 to hold the sum of $300,000 upon terms (Oud ASFC para 12; see also ts 112, 20 September 2018). Again, the significance of the absence of a retainer raises an issue as to Mr Oud's motivation in doing the work or in this case, holding the $300,000 in his trust account.

47 The Committee alleged at para 13 of its SFC:

> Mr Oxlade sent an email to [Mr Oud] and Dr Fiore on 4 March 2016 at 8.10 am [Australian Western Standard Time], in which Mr Oxlade said that his clients had provided at least $150,000 of the money that he had transferred to Siniwok on 22 February 2016 for the purchase of the platinum from Mr Namah.
>
> (Exhibit A page 227)

48 The email states, amongst other things '… I have put $150k of my [Oxlade's] client's money into this and he completely f - - - - ed us around at the start'.

49 Mr Oud admitted receiving the email identified in para 13 of the SFC and said further that is the same email identified in para 11 of the Committee's SFC but did not admit the contents of that email to be true (Oud ASFC para 13).

50 Paragraph 13 of the SFC does not allege that the contents of the email are true.

51 The Committee alleged at paras 14-16 of its SFC:

> 14. On 9 March 2016, Siniwok sent 2 samples of platinum to [Mr Oud's] firm for quality testing, which were received by [Mr Oud's] firm at an unknown date after that time and passed on to Dr Fiore.
>
> 15. By email sent on 10 March 2016 at 6:13 am, Mr Oxlade sent [Mr Oud] a copy of a letter of offer from CSG dated 3 March

> 2016 in which CSG offered to lend to Irongrow $632,316.55 (of which $300,000 was the actual loan sum and the rest was interest and fees to be prepaid) for a term of 3 months (the loan). [Exhibit A page 449; The letter of offer appears in Exhibit A at page 263]
>
> 16. In the above email, Mr Oxlade also told [Mr Oud] that he had raised another $300,000 (Levi loan) from Mr Rishi Levi.

52 The letter of offer dated 3 March 2016 referred to '$300,000 net to Lawyer Trust Account'.

53 Mr Oud admitted paras 14, 15 and 16 of the SFC but said that he did not read the letter of offer from CSG at the time, or at any time prior to 9 May 2016 at the earliest (Oud ASFC para 14).

54 Mr Oud's defence rests largely on his contention that he did not read emails or that he read only selective parts of emails and other documents (see below).

55 The Committee alleged at para 17 of its SFC:

> [Mr Oud] understood that the Levi loan was to be a 'back-up' loan to the CSG loan, to pay for contingencies that might arise in connection with the purchase of the platinum bars from Mr Namah.

56 Mr Oud denied each allegation in para 17 of the SFC, and said that he understood, based on what he had been told by Mr Oxlade, that the Levi loan was to be used for other expenses (Oud ASFC para 15).

57 The Committee alleged at para 18 of its SFC:

> By a later email sent on 10 March 2016 at 1:35 pm, Mr Oxlade told [Mr Oud] that Mr Levi was instructing his Singapore investor to send the Levi loan funds direct to [Mr Oud's] trust account.
> [Exhibit A page 550]

58 Mr Oud admitted receiving the email identified in para 18 of the SFC, but not the truth of its contents (Oud ASFC para 16). Once again, para 18 of the SFC does not allege the contents of the email to be true.

59 The significance of the loan from Mr Rishi Levi (Levi loan) is that from at least mid-March 2016, Mr Oxlade had stated that funds would be coming from Mr Levi, funds which never came.

60 Mr Oud asserts that he relied on the provision of funds from the Levi loan as the basis for the letter to the Federal Magistrates Court referred to in Annexure B.

61 The Committee alleged at para 19 of its SFC:

> On or about 11 March 2016, Irongrow executed documents with CSG to give effect to the loan. The security to be provided for the loan included:
>
> 1) a mortgage over land in Queensland owned by Irongrow;
>
> 2) a personal property security charge over Irongrow;
>
> 3) possession of 20 kg of platinum (platinum bars).
>
> (Exhibit A pages 267-309)

62 A copy of the documents were attached to an email sent to Mr Oud and Dr Fiore on 13 March 2016 (Exhibit A pages 261-309).

63 Mr Oud did not admit para 19 of the SFC and denied having any knowledge of the terms of the CSG loan at any material time (Oud ASFC para 17).

64 Mr Oud's contention relies on an acceptance by the Tribunal that Mr Oud did not read the email on the attachment that was sent to him.

65 Paragraph 39 of Mr Oud's statement (Exhibit K) states:

> After the event, I have read the loan in detail but as mentioned the terms of the loan were not my concern at the time and I did not turn my mind meaningfully to them. I have noted after the event that the loan memorandum provided that security for the loan would include a mortgage over real property; a charge over the assets of the Irongrow and that the CSG would take possession of 20 kg of platinum in lien until the facility was discharged. The memorandum referred to a principal loan amount of $632,316.55 on which interest would be paid at the rate of 30% per month. There was also a fee of $46,000 in Legal fees which were paid to Mr Paul Reese's firm Summers Partners. I did note at the time that these figures were extraordinarily high and probably illegal. (ABOD p. 261).

66 In the course of cross-examination, Mr Oud admitted that he had read the key terms of the loan 'at the time' (ts 153-155, 20 September 2018). It is clear from the context of the cross-examination that 'at the time' refers to about the time when the documents were sent to him with a covering email, that is, 13 March 2016. Mr Oud's contention

that he did not have knowledge of the terms of the CSG loan at any material time is rejected by the Tribunal. The Tribunal finds that Mr Oud did know the terms of the loan at least to the extent of its key terms.

67 In relation to three emails being sent to Mr Oud, the Committee alleged at paras 20-22 of its SFC:

> By email sent on Saturday 12 March 2016 at 12.09 pm to [Mr Oud], Mr Oxlade said that he expected the Levi loan funds to be available 'Monday morning'.
>
> [Exhibit A page 254]
>
> By email sent on Sunday 13 March 2016 at 11.07 am to [Mr Oud], Mr Oxlade said that he was going to Sydney '*in the morning for the "other" $300K from Rishi*'.
>
> [Exhibit A page 261]
>
> By email sent on Tuesday 15 March 2016 at 7.06 am to [Mr Oud], Mr Oxlade referred to the Levi loan funds, which he said had '*been confirmed this morning. Money getting sent from Dubai late this afternoon via Swift (MT 103) to [the practitioner's] Trust Account*'.
>
> [Exhibit A page 326]

68 Mr Oud admitted receiving each of the emails identified above by the Committee, but not the truth of their contents (Oud ASFC para 18). The Committee does not allege the truth of the contents of the email.

69 The Committee alleged at paras 23 and 24 of its SFC:

> On 20 March 2016, a bank in the United Arab Emirates issued a Swift MT103 for 202,150 euros (approximately AUD$300,000) to be sent to Mr Oxlade's Commonwealth Bank account (**MT103**). The MT103 was expressed to be subject to the condition, '*Sender to reconfirm before [beneficiary] to be credited*'.
>
> [Exhibit A page 458]
>
> Mr Oxlade forwarded a copy of the MT103 to [Mr Oud] in an email on 25 March 2016 at 6.56 am, as an attachment to an email he had sent to Dr Fiore earlier the same day in which, amongst other things, he asked Dr Fiore to lend him $2-3,000 to '*cover [him] for a few days*'.
>
> [Exhibit A pages 456-458]

70 These emails are an early indication of the reliability of Mr Oxlade's statements about the provision of funds from Mr Levi.

71 Mr Oud admitted having received a document to the effect stated in para 23 by the email from Mr Oxlade identified in para 24 of the SFC, and:

> 1) said that he believed the contents of that document to be true at the time; but
>
> 2) did not admit the authenticity of that document nor that its contents are true.
>
> (Oud ASFC para 19)

72 Mr Oud's further response was:

> In further answer to paras 15, 18, 20, 21, 22 and 24 of the Committee's SFC, Mr Oud said that he did not read the entirety of the email chains forwarded to him by Mr Oxlade at any relevant time due to their length.
>
> (Oud ASFC para 20)

73 Mr Oud's response in para 20 of his ASFC is entirely evasive. It enables him to have read what suits him and to have not read a document when it does not suit him. Such evasive responses only harm Mr Oud's case. In any event, for reasons explained below, the Tribunal does not accept that Mr Oud only read selected parts of the email chain.

74 The series of emails referred to in paras 18 (of 10 March 2016), and 20 to 24 (20 March 2016), establish a long (10 day) gap between Mr Oxlade's initial advice that funds were being sent out and the issue of Swift MT103 (20 March 2016).

75 The Tribunal notes that none of the email chains are particularly long.

The undertaking

76 At para 25 of its SFC the Committee submitted:

> On or about 14 March 2016, Mr Oxlade instructed [Mr Oud] to liaise with Mr Paul Reese, the solicitor for CSG, on the terms and conditions for the release of the loan funds.

77 As to para 25 of the SFC, Mr Oud:

1) admitted that by email dated 14 March 2016 sent at approximately 2.21 pm, Mr Oxlade requested him contact Mr Reese;

(Exhibit A pages 320-321)

2) said further that by email sent at approximately 2.34 pm that day, he requested that Mr Reese contact Mr Oxlade regarding any written assurances Mr Reese required.

(Exhibit A page 323)

(Oud ASFC para 21)

78 It is apparent from the preceding email in the chain (copied to Mr Oud) that David Cacciola of CSG wanted Paul Reese and Mr Oud to liaise over the terms and conditions of the release of funds. The email from Mr Oxlade to Mr Oud stated ' … Please contact Paul [Reese] and get this done please!' (Exhibit A pages 320-321).

79 At paras 26-28 of its SFC the Committee submitted:

26. Despite those instructions, Mr Oxlade himself put a proposal to Mr David Cacciola, the representative of CSG, in an email sent on 15 March 2016 at 9.16 am, which was copied to [Mr Oud]. The proposal provided, relevantly, that [Mr Oud] would receive the loan funds into his firm's trust account and agrees not to transfer, move or utilise any of those funds without the expressed written permission of Mr Cacciola on behalf of the lender.

[Exhibit A page 328]

27. In an email sent to Mr Cacciola on the morning of 16 March 2016, Mr Oxlade said, among other things, '*Nicholas will not agree to you giving instructions to him unless you are a client of his firm*'.

[Exhibit A pages 332-222]

28. Mr Cacciola responded to Mr Oxlade by email sent on 16 March 2016 at 11.47 am, which he copied to [Mr Oud] among others, saying that apart from the platinum bars the property being offered as security had no value as far as the lender was concerned, and setting out proposed terms for the loan including

> a requirement that [Mr Oud] to agree to receive the loan funds into his trust account and agree by way of an undertaking not to transfer, move or utilise the loan funds without the expressed written permission of Mr Cacciola on behalf of the lender.
>
> [Exhibit A page 401]

80 The email sent by Mr Cacciola at 2.47 pm (Eastern Standard Time), 11.47 am (Western Standard Time) stated:

> Good Evening, Colin [Oxlade] In response to your email.
>
> We can only take into account 80% of the value of the property, So there is no equity in the property.
>
> Please note the cars have two charges over them, The business has no good will.
>
> The only Value is in the Bars being offered.
>
> As per the letter of offer. I can have approve for the transfer of funds to the lawyers trust account on the following Provisions.
>
> 1. Nicholas Oud / Standpoint Lawyers agree to receive the funds into his Trust Account on behalf of Credit Solutions Group. This is to show proof of funds to the platinum providers and to get the platinum flown to Australia from overseas.
>
> 2. Nicholas Oud / Standpoint Lawyers agree via the way of a undertaking that they will not to transfer, move or utilise any of the said funds without the expressed written permission of David Cacciola on behalf of the lenders.
>
> 3. On arrival of the bars, they will be tested in the presence of CSG by a mutually approved tester.
>
> 4. On the supply / provision of the final test results and to the lenders satisfaction, the $300K shall be released from Nicholas Oud / Standpoint Lawyers Trust Account and paid in full to the Platinum suppliers contemporaneously with 20 bars of the tested platinum handed to the lenders / representative (David Cacciola).
>
> 5. The 20 bars (or platinum to the final value of the loan payout in full) shall be full and final payment of the loan.
>
> 6. The lenders and / or its representative may purchase the balance of the platinum bars (35 bars minimum) at an agreed price and TTfunds to the nominated bank account of the platinum facilitators at exchange.

Best Regards,

David Cacciola
Managing Director

(Exhibit A page 401/336)

81 Mr Oud admitted receiving the emails as set out in paras 26, 27, and 28 of the Committee's SFC, but not the truth of their contents, and said further that in the email identified in para 26 stated, in effect, that the only thing lacking was agreement between Mr Cacciola and Mr Oud as to the process to release the funds proposed to be deposited to his trust account (Oud ASFC para 22).

82 At paragraph 48 of Mr Oud's statement (Exhibit K) he stated:

> An important distinction needs to be explained in respect to the circumstances in which the undertaking was given and that is that all of the terms as conditions upon which the funds were to be released were negotiated between Mr Reese and Mr Oxlade. I was not privy to these negotiations and was only obliquely aware that there were other conditions certainly not the detail. As afore mentioned the scope of the retainer was specifically limited to the basis upon which the parties agreed that funds were to be accepted and then disbursed from my trust account in which I gave a solicitor's undertaking. I was approached mid negotiation as a potential resolution between the parties. Mr Reese may have thought (wrongly) that I was aware of these other conditions; however, this was not the case. I only concerned myself with the specific basis upon which I gave the undertaking period.

83 The Committee alleged in para 29 of its SFC:

> By email sent to Mr Cacciola on 16 March 2016 at 6:08 pm (copied to Mr Reese among others), [Mr Oud] said that he could not legally comply with those conditions for the reason set out in an earlier email, being Mr Oxlade's email to Mr Cacciola referred to in paragraph 27 [of the SFC].

(Exhibit A pages 346-347)

84 In paras 30 and 31 of its SFC the Committee alleged:

> 30. Following a telephone conversation with Mr Reese and further email exchange with him, [Mr Oud] told Mr Reese in an email sent on 16 March 2016 at 6:24 pm that if Mr Reese was insisting that he agree to the proposed term that the matter was 'at an end'. In an email sent at 6.57 pm the same day [Mr Oud] told Mr Reese that he no longer acted for Mr Oxlade in respect of the matter.

[Exhibit A page 351]

31. After what he described as lengthy discussions with Mr Oxlade, [Mr Oud] sent an email to Mr Cacciola on 17 March 2016 at 12:26 pm in which he said that he had agreed to continue to represent Mr Oxlade on behalf of Irongrow, and that he would agree to a term saying that he and the firm '*agreed via the way of an undertaking that they will not transfer, move or utilise any of the loan funds without the expressed written permission of David Cacciola and Colin Oxlade on behalf of the lenders'*.

[Exhibit A page 365]

85 Mr Oud admitted paras 30 and 31 of the SFC, save that he was acting as a sole practitioner (Oud ASFC para 24).

86 In Mr Oud's statement at paras 67-68 (Exhibit K) he stated:

At 9:17 am on 17 March 2016,1 emailed Mr Cacciola and advised him that after lengthy discussions with Mr Oxlade, I had agreed to continue to act *'for him*' on the basis that the undertaking be amended to read (ABOD p.365)

'2. Nicholas Oud/Standpoint Lawyers agree via the way of an undertaking that they will not)transfer, move or utilise any of the said funds without the expressed written permission of David Cacciola and Colin Oxlade on behalf of the CSG.

Procedurally speaking, this would involve any written instruction to be countersigned by Mr Oxlade who then forwards to me to action. I believe that this procedure will maintain my fiduciary duty that I have to my client as I will deal with his instruction directly and not from a third party whom I am not accountable to.'

I was prepared to give an undertaking on the terms of his email, because it required the authority of Mr Oxlade (in addition to Mr Cacciola) to release the funds. The terms upon which I was prepared to agree to hold the money on trust were as per my email only. I was very detailed and specific about this condition, because it was the only condition that concerned me. This is evidenced by the fact that I set out in detail how it work "procedurally. The terms upon which I held the money did not include the 'terms and conditions' cut and pasted to the bottom of the email to Mr Reese. I was purely concerned with the undertaking that I gave. I paid no attention nor was I aware of the other conditions because they were not of concern to me nor were they raised or discussed with me. This was established right at the outset when I contacted Mr. Reese at 2.34pm on 14 March 2016 (ABOD p.323).

87 The email from Mr Oud stated:

> Dear David
>
> For reasons elucidated in an earlier email, legally I cannot comply with these conditions.
>
> Yours sincerely
>
> Nicholas Oud
> Solicitor
>
> (Exhibit A pages 400-401)

88 Mr Oud's email is part of the email chain and comes immediately after Mr Cacciola's email of 16 March 2016 at 2.47 pm (Exhibit A page 401/336).

89 Mr Oud admitted para 29 of the SFC but said that the condition to which he referred was the condition that he not transfer, move or utilise any of the funds without the expressed written permission of Mr Cacciola, because he was unwilling to accept instructions from Mr Cacciola while he was acting for Mr Oxlade.

90 In fact, in his email Mr Oud does not refer to a 'condition' but to 'conditions' in the plural, a clear reference to the six conditions set out in the 2.47 pm email.

91 The following exchange took place in cross-examination:

> **YOVICH, MR**: And you did read this email [Exhibit A page 328] when you got it? --- No.
>
> You didn't? --- No.
>
> 336 [401]? --- When I say I didn't read it, I didn't read it with any – like it had any particular effect because, at that point - - -
>
> We will get there, Mr Oud? - - - --- they're suggestions that have been thrown up and they're primarily directed to Dr Fiore. I just happened to be cc'd in on these emails.
>
> Okay. 336 [401]? --- What page are you referring to?
>
> 336 [401]. 16 March, Cacciola to Oxlade, copied to you and others. See it? --- Yes.
>
> The six numbered conditions, three of which I had got through in the previous email, are in there again, aren't they? --- Yes.
>
> And the fourth one:

> On the supply/provision of the final test results and to the lenders' satisfaction, the 300k shall be released from Nicholas Oud, Standpoint Lawyers, trust account and paid in full to the platinum supplier.

Right? --- I see that, yes.

And you read that at the time you got it? --- No.

Okay? --- Not with any detail. I may have glanced at it, but - - -

Don't worry, Mr Oud. We will get there. 341. Do you see the bottom of 341? --- Yes.

An email – the email from Cacciola to Oxlade, to which you were copied; correct? --- Yes.

Setting out those conditions? --- Yes.

Three of which referred specifically to things that you were to do? --- Right.

Your email:

> Dear David, for reasons elucidated in an earlier email, legally, I cannot comply with these conditions.

Correct? --- That's what I said, yes.

And you couldn't have said that unless you had read the conditions, could you? --- Well, I just read them and they were involving me personally, but I didn't look at them at any specific detail. I just said - I'm - I got the general gist of it. They wanted me to - to give all these assurances of which I couldn't and wasn't prepared to do. So did I - - -

And so - - - ? --- Did I specifically go through and look at each question, analyse it, take it in, think what it was about, interpolate it, all the - no, I didn't. No, I didn't. I - I - I was being copied in essentially in emails of these people having discussions without me being present about a possibility of a range of different scenarios. Now, when I got around to - to - to putting the question to me about this, I'm saying, 'No, I'm not prepared to do any of this'. It's not - not – not my - not my premise, not my business. These are the premise and the business of Colin Oxlade, and I can't give any assurances like that. It's not - it's not - it's not for me to do.

Page 346 [401], Mr Oud. Email from Mr Reese to you and to Mr Cacciola; yes? --- Yes.

Copied to various people, including Colin Oxlade? --- Yes.

Continuing:

> Dear Nicholas, this deal seems frustrated and cannot work. No security is being offered in exchange for our client's money. In other words, your clients want an unsecured loan.

He goes on:

I think you will find - - -

? --- But that's a statement. That's not necessarily correct.

Mr Oud, I haven't finished my question:

> I think you will find that it is not accurate that you cannot hold funds in your trust account and not release the funds without David's consent. Frequently this happens in conveyancing transactions -

etcetera. Did you read this email? --- I - I read the email from Reese and trying – because at this stage we had moved on to a discussion about the holding of the trust – it was - it was specifically in relation to - they were honing in on - specifically in relation to the trust funds.

And Mr Reese goes on to say:

> My understanding of the loan was that your clients required the money in your trust account to show the PNG people that you had the money for the platinum.

Did you read that - - - ? --- I didn't focus in or didn't pay any attention to that because it wasn't my premise.

Mr Oud, how are you able to get an email and only notice parts of it? --- Because I'm focusing on what my specific role in this is. I wasn't involved in the broader sphere of things. My – my part of the platinum deal was in the first part of the platinum deal, then this whole condition arose in respect of the loans. They were having discussions amongst – and you heard before the evidence given by - by Reese that they were having their own discussions over and above all this, of which I was just cc'd on emails with the suggestions that I hadn't agreed to.

Mr Oud, you knew all through this process that unless you gave an undertaking about the funds that the loan would not happen, didn't you? --- I knew that they would - that they wanted a

> undertaking from a solicitor, and I wasn't prepared to give it - agree to any of this because they weren't part of my premise.
>
> (ts 159-162, 20 September 2018)

92 Mr Oud's evidence that he did not read all of a short email of less than a page is simply not credible. His own email refers to 'conditions', not a 'condition'. Mr Oud's evidence is rejected by the Tribunal. Mr Oud read the entire email and knew of each of the conditions 1 to 6.

93 The undertaking given by Mr Oud appears from the following email exchange:

> Tuesday, 22 March 2016 1:25 PM
>
> Paul,
>
> I agree to comply with the undertaking stipulated below.
>
> 1 am instructed that it is very important that the funds are in my account today. Please RTGS funds immediately and email me a copy of the receipt of the transfer of the funds forthwith.
>
> If there is any issue with doing this please ring me.
>
> Regards,
>
> Nicholas Oud | Solicitor & Principal | Standpoint Legal
>
> Tuesday, 22 March 2016 1:18 PM
>
> Dear Nick,
>
> Please provide a solicitors undertaking as follows:
>
> Nicholas Oud and Standpoint Lawyers irrevocably agree to hold on trust in the Standpoint Lawyers Trust Account for Credit Solutions Group Pty Ltd the amount of $300,000.00 (funds) and undertake to not deal with, transfer, move or utilise any of the funds without the expressed written consent of David Cacciola and Colin Oxlade jointly.
>
> Kind regards,'
>
> Paul Reese | Director
> Summer Lawyers
>
> (Exhibit A page 422)

94 At para 32 of its SFC the Committee alleged:

> Following further communications, final terms and conditions agreed to by Mr Oxlade, Mr Cacciola and [Mr Oud] on 22 March 2016 were as follows:
>
> '1. Nicholas Oud/Standpoint Lawyers agree to receive the funds into his Trust Account on behalf of Credit Solutions Group. This is to show proof of funds to the platinum providers and to get the platinum flown to Australia from overseas.
>
> 2. Nicholas Oud and Standpoint Lawyers irrevocably agree to hold on trust in the Standpoint Lawyers Trust Account for Credit Solutions Group Pty Ltd the amount of $300,000.00 (funds) and undertake to not deal with, transfer, move or utilise any of the funds without the expressed written consent of David Cacciola and Colin Oxlade jointly.
>
> 3. On arrival of the bars, they will be tested in the presence of CSG by a mutually approved tester.
>
> 4. On supply/provision of the final test results and to the lenders satisfaction, the $300K shall be released from Nicholas Oud/Standpoint Lawyers Trust Account and paid in full to the Platinum suppliers contemporaneously with 20 bars of the tested platinum handed to the lenders/representative (David Cacciola).
>
> 5. The 20 bars (or platinum to the final value of the loan payout in full) shall be full and final payment of the loan.'

95 Save that Mr Oud agreed to the condition stated in para 2 of the terms and conditions set out in the SFC at para 32, Mr Oud denied each allegation in para 32 and said that he had no knowledge at any material time of or involvement in the negotiation of the other terms there set out (Oud ASFC para 25).

96 Mr Oud was aware of all of the conditions for the reasons stated above. Mr Oud was aware of the importance of the platinum bars being tested before the $300,000 would be authorised for release from Mr Oud's trust account.

Receipt and transfer of the CSG loan funds

97 In paras 33-36 of its SFC the Committee alleged:

> 33. By email sent on 22 March 2016 at 1:25 pm to Mr Reese, [Mr Oud] agreed to comply with the undertaking as set out in

paragraph 2 of the above terms and conditions and told Mr Reese that he was instructed that it was very important that the funds were in his account that day.

[Exhibit A page 422]

34. By email sent on 22 March 2016 at 1:38 pm to Mr Reese, [Mr Oud] provided details of his firm's trust account to enable the loan funds to be electronically transferred into that account.

[Exhibit A page 428]

35. On 22 March 2016, [Mr Oud] received $300,000 into his firm's trust account from Mr Reese's firm on behalf of CSG (CSG loan funds).

[Exhibit A page 431]

36. Later on 22 March 2016, Mr Oxlade telephoned [Mr Oud] and told him that Mr Cacciola had agreed to the CSG loan funds being used. Mr Oxlade instructed [Mr Oud] to transfer $75,000 to him and $100,000 to a bank account in the name of Dr Fiore's partner, Kathryn McKelt. Mr Oxlade described these transactions to [Mr Oud] as a partial reimbursement for funds already sent to Mr Namah. Mr Oxlade said he would send to [Mr Oud] an authorisation signed by Mr Cacciola and him the next day.

98 Mr Oud admitted paras 33, 34, 35, and 36 of the SFC, and said further that he told Mr Oxlade on 22 March 2016 that he could not release the funds until he had received a written authority signed by both Messrs Oxlade and Cacciola (Oud ASFC para 26).

99 The Committee alleged at para 37, 38 and 39 of its SFC:

37. By email sent on 23 March 2016 at 9:19 am to [Mr Oud], Mr Oxlade said, relevantly:

'Per attached. Of the $175K please TT $75K to;

Colin G Oxlade – Commbank

BSB: [details given]

…

Balance of funds ($100K) as per previously agreed.'

[Exhibit A page 451]

> 38. Attached to that email was a letter addressed to [Mr Oud] and dated 23 March 2016, which was purportedly signed by Mr Oxlade and Mr Cacciola and which said:
>
> > RE: AUTHORITY TO PAY - IRONGROW $300K LOAN
> >
> > Per the agreed terms and conditions of the above mentioned loan, which settled into your Trust Account yesterday, please take this formal letter as instructions for the following payments(s)
> >
> > $AUD 175 000.00 for previous expenses/advances to Belden Namah directly relating to the PNG Platinum deal.
> >
> > [Exhibit A page 450]
>
> 39. On 23 March 2016 [The First 23 March Authority]:
>
> > 39.1 at 2:05 pm, [Mr Oud] transferred $75,000 from his firm's trust account to Mr Oxlade's Commonwealth Bank of Australia account;
> >
> > 39.2 at 2:09 pm, [Mr Oud] transferred $100,000 from his firm's trust account to Kathryn McKelt's Commonwealth Bank of Australia account.

100 There is little or no evidence that payments to Colin Oxlade and Kathryn McKelt were a reimbursement for previous expenses/advances to Belden Namah. At best Mr Oxlade stated in an email that he had advanced his client's funds for the original purchase (see para 13 of the Committee's SFC).

101 Mr Oud admitted paras 37, 38, 39 of the SFC set out above and said further that he made the transfers set out in para 39 of the SFC on the basis of Mr Oxlade's instructions of 22 March 2016 (Oud's ASFC para 27). Any transfers by Mr Oud should have been on the basis of a written authority not on the basis of Mr Oxlade's instructions alone.

102 The following exchange took place in cross-examination:

> **YOVICH MR**: All right. And the next morning you were given this authority by Mr Oxlade, weren't you? --- That's right.
>
> And it said:
>
> > Per the agreed terms and conditions of the abovementioned loan, which settled into your trust

> account yesterday, please take this formal letter as instructions for the following payment: A$175,000 for previous expenses/advances to Belden Namah directly related to the PNG platinum deal.

? --- Yes.

Right? So if this authority was true, it authorised the payment of $175,000 to Belden Namah? --- No. No, that's where you're wrong.

Okay. It authorised the payment of $175,000 for expenses directly relating to the platinum deal? --- No. It was expenses that I've – that's what my initial – my initial retainer was, was to send up this $300,000.

So - - - ? --- That $300,000 had to be repaid. So these were funds that were paid back to those people who that sent that $300,000 up. So they were reimbursements to those people who sent the money up there.

So did this authority require the $175,000 to be paid to any particular person? --- Well, I was directed, verbally - - -

No, no. Listen carefully to my question, Mr Oud? --- No.

Okay? --- Well, wait – wait on.

No, no? --- Sorry. Wait up.

I will repeat it? --- No. Sorry. Sorry.

I will repeat the question so we're entirely clear. This is important. Listen carefully to my question, Mr Oud. Did this document authorise the payment of $175,000 to any particular person? --- This document of itself doesn't say to particular people. No.

Does this document authorise the payment of $175,000 to anyone at all? --- No, it doesn't.

Does this document authorise the payment of $175,000 for anything other than expenses/advances directly relating to the PNG platinum deal? --- They were expenses and advances that were pre-advanced. They were pre-advanced. They were a repayment. What the - - -

The question - - - ? --- Whoever - - -

> My question is this: does this document authorise the payment of $175,000 for anything other than previous expenses/advances directly relating to the PNG - - - ? --- I – the - - -
>
> - - - platinum deal? --- I don't agree with the premise of that question.
>
> Right. I'm just asking you - - - ? --- But your question - - -
>
> - - - whether - - -? --- doesn't make sense.
>
> So is your answer, 'No, it does not'? --- No. I don't understand your question, because it doesn't make sense.
>
> Does this document say, in your mind, anything at all about what should happen to the $175,000? ---Yes, it does.

103 Mr Oud admitted that the purported authorities did not authorise payment to anyone. The exchange continued:

> Does it say that it should be paid to Belden Namah? --- No.
>
> Does it say that it should be paid to Colin Oxlade? --- No.
>
> Does it say that it should be paid to Kathryn McKelt? --- By implication it – it says - - -
>
> Does it say - - - ? --- By implication it says 'payment to Colin Oxlade and Kathryn McKelt'.
>
> By implication? --- Yes.
>
> And you know that because you knew, independently of the document, that that's what Mr Cacciola wanted? --- No, it didn't – it didn't matter what Mr – the – the undertaking didn't – was silent as to who the moneys had to be paid to.
>
> The undertaking expressly said that the funds would only be paid with the express written submission of Mr Cacciola? --- No. That – I totally disagree with your interpretation of that. It's not expressed. 'Expressed' means the action of sending, and that's the way that I understood it to be. Expressed as in I expressed - - -
>
> What does 'written' mean? --- Pardon?
>
> What does 'written' mean? --- Written and send is a letter in the form of a letter or an email.
>
> And so if I say – if I send you an email – if I were David Cacciola and I sent you a letter saying, 'You must pay

> $175,000 to Colin Oxlade', were – did that letter permit you - - - ? I was ---

104 Mr Oud again demonstrates his evasiveness:

> Listen to my question. Did that email – that letter permit you to pay $175,000 to Paul Yovich;'Yes' or 'No'? --- I disagree with your question.
>
> **HIS HONOUR:** Well, don't worry about disagreeing with the question, just answer it.
>
> **YOVICH, MR**: Answer it? --- Okay. Repeat the question then.
>
> If Mr Cacciola sent a letter, and Colin Oxlade co-signed it, saying, 'Pay $175,000 to Peter Fiore' and instead you paid it to Paul Yovich, would you have been complying with the terms of the letter? --- If I paid it to you, no.
>
> If you paid it to yourself? --- No.
>
> How could you know, from the letter – so the letter - - - - - -Because I knew - - -
>
> The letter provided - - - ? --- I knew.
>
> - - - who you were allowed to pay the money to? --- I knew that the payments were made by Fiore and whoever he – funded him. So those - - -
>
> You knew that because Oxlade told you? --- No. Because I was a participant in that pay. I – I was – that was the whole purpose of the initial retainer was that I would assist in the facilitation of the initial $300,000 to – to go to Belden Namah. That was my first retainer.
>
> And so when - - - ? --- So that money didn't come from nowhere. That money had to be repaid.
>
> When - - - ? --- Right? So that money was being repaid. So when they say the $175,000 had to be repaid it was for people that had – that had incurred that expense or expenses relevant to sending that money up to – to Oxlade – to – to Namah.
>
> So it's not true to say that this letter permitted Mr Oxlade to do what he wanted with the funds? --- Sorry. Can you repeat that question?
>
> So it's not true to say that this letter permitted Colin Oxlade to do what he wanted with the $175,000? --- I don't understand your question.

> All right. Mr Oud, what I'm going to suggest to you is that, even if this letter represented what David Cacciola actually permitted, you didn't do what the letter said? --- As I explained to you, Mr Yovich - - - -
>
> Is your answer to my question 'no'? --- No. I'm answering your question.
>
> I'm just asking you whether you agree or disagree. You disagree? --- I'm – please, Mr Yovich. I mean – don't put words into my mouth. I'm answering your question.
>
> No, Mr Oud. You're answering a different question? --- No. I'm not. I'm answering your question.
>
> I want - - - ? --- Now I've forgotten your question, so you can repeat it, please.
>
> I will ask a different question. Mr Oud, did the letter on the – that letter – page 82 – permit you to do anything other than pay $175,000 to Belden Namah? --- That's incorrect.
>
> Other than by checking orally with Mr Cacciola - - - ? --- This has got nothing to do with Belden Namah. This is to do with the people that paid the expenses to Belden Namah.
>
> Other than – and it didn't matter what Cacciola's letter said, you could figure out who the money was to be paid to? --- There was – I was told who to pay the money to.
>
> By Oxlade? --- That's right.
>
> But not by Cacciola? --- But it wasn't required by both. That was the whole point of getting a letter.
>
> And the same is true of the second letter? --- Absolutely.

105 Mr Oud relied only on Mr Oxlade. His explanation that a payment to an unidentified party could constitute compliance with the terms of the undertaking is fanciful. The exchanged continued:

> So you were aware – you were not aware, you say, when you released the funds, that there was any possibility that you were doing it without Mr Cacciola's actual written permission? --- No. I believe that he had signed and agreed to the recent funds expressed as he had sent written consent. I got that. I was directed where to send those funds. That's the basis upon which I did that. I relied on that.

> And you didn't check with Cacciola to see that it was correct? --- There was no need to check. That would defeat the whole purpose of getting written consent. That would defeat the whole purpose of me not being accountable to two masters. I would not have agreed to the undertaking in the first place if I had to do that.

106 Mr Oud's statement amounts to a contention that he was authorised to act contrary to the express terms of his undertaking. That is fanciful. Again Mr Oud is driven to such statements because he was aware that he had acted contrary to the terms of the undertaking.

107 The exchange continued:

> All right? --- I was very specific about the - - -
>
> Can I - - - ? --- No. I haven't finished yet. I was very specific about the undertaking, Mr Yovich.
>
> Yes? --- Very specific. Because I didn't want to be in a position where I was accountable to two people.
>
> All right? --- I was going to agree to this, and if it had said Mr Oud had to then check with Mr Cacciola about who the funds went to, then I wouldn't have agreed to the undertaking.

108 The only way Mr Oud could have avoided being accountable to two people was to avoid giving the undertaking. The exchange continued:

> All right. I understand your position on that. In what way would a letter saying 'pay $75,000 to Colin Oxlade and pay $100,000 to Kathryn McKelt' have been problematic for you? If the letter had said that, that would have been all right, wouldn't it? --- I don't know where you're going with that, Mr – I don't understand. What are you putting to me? A hypothetical?
>
> Yes. The question is this: if - - -
>
> **VINER, MR**: Well, if it's a hypothetical, it's not a proper question.
>
> **HIS HONOUR**: It is a proper question. It's an entirely proper question. It's cross-examination.
>
> **YOVICH, MR**: Thank you, your Honour. If the letter had said 'pay $75,000 to Colin Oxlade for expenses relating to the platinum deal; pay $100,000 to Kathryn McKelt for expenses relating to the platinum deal', that wouldn't have been a problem

for you, would it? That wouldn't have caused you to be serving two masters, would it? --- I'm not – sorry. I'm not - - -

HIS HONOUR: The question - - - ? --- Yes.

- - is very simple – very self-evident? --- And I'm not understanding it, so - - -

Well - - -

YOVICH, MR: So is it your proposition that, if the letter contained specific instructions as to who to pay the money to, you would be in a conflict of interest situation? --- I would have relied on that and done it.

And it didn't? --- It didn't but – it didn't say that but it wasn't specified as part of the undertaking that it did. If it was – and I'm not going to repeat myself.

Okay? --- But if it did, then I would have acted – I wouldn't have accepted his undertaking because I just – well, no. I wouldn't have accepted that undertaking but it would have met that. But it was – it didn't say who the money had to be – it just said 'as long as I had the express written consent of both parties'.

And the express written consent of both parties was capable of specifying who it was to be paid to, wasn't it? --- Well, what do you mean 'capable'?

Well, it could have. The express consent could have said 'pay this money to this person and that money to that person'? --- Well, it just didn't.

No? --- But it didn't - - -

And so you had no awareness of the possibility that you were doing what Mr Oxlade had permitted but not what Mr Cacciola had permitted? --- I had no reason to doubt the veracity of this letter. I had no – as far as I would know, I got a letter, it met the terms of the undertaking, and I acted upon that letter in good faith.

(ts 181-187, 20 September 2018)

109 The 23 March Authorisation did not authorise payment to Mr Oxlade or to Kathryn McKelt. It authorised payment to Belden Namah. Despite this Mr Oud released the funds.

110 The Tribunal finds that the funds were released by Mr Oud to Mr Oxlade and Ms McKelt in breach of the terms of the undertaking.

111 Mr Oud also submitted that unbeknownst to him:

a) the signature purporting to be the signature of Mr Cacciola on the document referred to in para 38 of the SFC: 'Authority to pay - Irongrow $300K Loan' was not signed by Mr Cacciola; and

b) Mr Oxlade had fraudulently forged Mr Cacciola's signature.

(Oud ASFC para 27A)

112 In para 41 of its SFC the Committee alleged:

> [Mr Oud] did not check with either Mr Reese or Mr Cacciola whether he was authorised to transfer the money to persons other than Mr Namah. Mr Cacciola had not in fact signed the authority purportedly signed by him, and had not in any other way consented to the transfer of the funds to Mr Oxlade or to Ms McKelt.

113 Mr Oud admitted para 41 of the SFC but stated further that:

1) he did not know at the time that Mr Cacciola had not in fact signed the authority purportedly signed by him nor consented to the transfer of funds to Mr Oxlade and Ms McKelt.

2) he accepted the authority identified in para 38 of the SFC, believing, based on:

   i) what he was told by Mr Oxlade on 22 March 2016 set out in para 36 of the SFC; and

   ii) the email sent on 23 March 2016 set out in para 37 of the SFC, that Mr Cacciaola had signed that authority; and that

3) he had no reason to think otherwise.

(Oud ASFC para 29)

114 Mr Oud had never seen Mr Cacciaola's signature. Mr Oud knew that the payment was inconsistent with the agreed terms. The purported letter was on Mr Oxlade's letterhead. The 'authorised' payments were not consistent with the terms of his undertaking.

115 Further, the platinum had not been tested and Mr Oud knew as a result of reading the conditions, that $300,000 would be released on supply/provision of the final test results. (Exhibit E pages 12-35 para 35). Although the provision of the test results was not a condition of the undertaking, the absence of the test results alerted Mr Oud to a problem.

116 Mr Oud had every reason to question the First 23 March Authority (see also SFC para 50 below).

117 On 24 March 2016, $20,000 was paid into Mr Oud's business account by way of a bank cheque. The funds were deposited by Kathryn McKelt (Exhibit G).

118 Mr Reese's evidence was:

> 44. Somewhere around this time I telephoned Nicholas. I recall asking him where the CSG loan funds had gone and on what authority he had released them given David did not provide any authority.
>
> 45. Nicholas told me that he did not know David had not in fact signed the documentation authorising the release of the CSG loan funds from his trust account. He said Mr Oxlade had duped him.
>
> 46. I asked him why did he not contact me as David's solicitor to check before he took any steps. I also asked him what had been his role in the release of the CSG loan funds. He said he had nothing to do with it. I asked him directly if he had received any benefit from the release of those funds and he initially said he did not. However, later in the telephone discussion he told me that he had got $20,000 out of the $300,000 held in his trust account. He told me he had dealt with Mr Oxlade before and that Mr Oxlade owed him this amount of money and he was 'taking money he was owed'.
>
> 47. I recall saying to him that he was conflicted, that he got a personal gain out of the funds that he released, and the call got heated. I recall he said he was making attempts to get the money paid back and the call ended when I questioned whether attempts were really being made.

(Exhibit F pages 16-17 paras 44-47)

119 In cross-examination, Mr Reese maintained his position. Mr Reese said 'Mr Oud told me that he took $20,000 out of the $300,000 that was in his trust account (ts 90-91, 20 September 2018).

The Tribunal does not find that Mr Reese was saying that the $20,000 came directly out of the trust account but rather that Mr Oud received $20,000 of that $300,000. In fact, $20,000 was paid from the $300,000 to Ms McKelt and then by her to Mr Oud.

120 Mr Oud's explanation of the payment of $20,000 appears when he is explaining a telephone conversation with Mr Reese on 9 May 2016. He stated:

> 113. I told him that 'I did receive $20,000 at about this time but that this was a payment was part repayment of a loan for an unrelated matter.'
>
> 114. At or about this time $20,000 was transferred by Ms. McKelt into my account. When I enquired with Dr Fiore about it, he confirmed that this was a repayment of the monies I had lent him.
>
> 115. I was unaware that this payment had been made until it had been transferred into my account by Ms McKelt.
>
> 116. It occurred to me at the time that this was a portion of the funds from the Platinum loan funds, but I thought nothing of it because the funds had been legitimately loaned.
>
> 117. The circumstances of the loan to Fiore and repayment were as follows was as follows:
>
> 118. I loaned $20,000 to Fiore on 2 September 2015 who instructed me to transfer it to a third party Ox Corp Pty Ltd. (see annexure a copy of Domestic Telegraphic Transfer Receipt dated 12 November 2015 (RSBOD p.8-10) and copy of ANZ Bank Statement dated September 2016 (RSBOD p.11).
>
> 119. At the time I loaned the funds to Dr Fiore I had no knowledge of the company to which the funds were transferred or who the directors of that company were.

(Exhibit K paras 113-119)

121 As is obvious from the multiple emails received by Mr Oud from Ox Corp Pty Ltd sent by Mr Oxlade – Mr Oxlade is Ox Corp Pty Ltd. Whatever Mr Oud didn't know in September 2015, he certainly knew in March 2016 (see also ts 144, 20 September 2018).

122 It was put to Mr Oud in cross-examination that he had a financial interest in the loan from CSG proceeding:

YOVICH, MR: Now, you say you had no personal stake of a financial nature in the success of the loan? --- No.

Or in the loan at all? --- No.

On 22 March Mr Reese sent you an email confirming that the transfer had taken place, didn't he? --- Yes.

And you – and sending you a TT transfer, a telegraphic transfer confirmation? --- I think he did, yes.

Yes. And I will take you to page 440. See the middle of the page, email from you to Mr Reese, 22 March, 5.17 pm? --- Yes.

'Paul, please email me receipt of TT of funds?' --- Yes.

Mr Reese replied, a minute later – and we know it's a minute later because we've got Western Standard Time 2.18, but it's one minute, 'Attached. Please provide a trust receipt.' Do you see that? So he did - - -? --- Where is that, sorry?

Top of page 440. Yes? --- Yes.

So he did send you what you asked for; correct? --- Yes.

And you could look in your trust account and see that the funds were there; correct? --- Yes.

And you forwarded or sent an email – you forwarded, bottom of page 439, 5.27 pm, from Nicholas to Colin Oxlade, Confirmation of Settlement Procedures? --- Yes. Where is that, sorry?

That's the subject of the email? --- Yes. Yes. Draft email.

Yes. Yes. And then we look up the page, 22 March 2016 at 3.10 pm, so now Western Time – the 5.27 is Eastern Time? --- Whereabouts, sorry? What page?

Same page, 439. Are you there? --- Yes.

So email from Colin Oxlade, wrote, 'Should be straight in within an hour? Otherwise it will be in overnight.' Yes? --- Yes.

'Colin Please advise who to send invoice to.' Thanks, Nick.' That's you to Colin? Yes.

Three minutes after his email; yes? --- Yes.

What invoice? --- What is it - I would be guessing, but I presume it would be my invoice.

For your fees? --- Yes.

So you had no financial stake in the success of the transaction? No.

But you sent your invoice three minutes after Mr Oxlade's email? --- No, I was going to be – I was going to be paid.

Were you paid? --- No. No, I wasn't paid in the end, no. I haven't been paid. I don't think I even issued the invoice in the end.

All right. 4.44, top of the page, in response to your email who to send the invoice to, 'Make it out to ICBC Capital Pty Ltd. I will have it paid tomorrow?' ---- Yes. I didn't send an invoice in the end.

Okay? --- But the job, as far as I was concerned, has been completed.

So you had a right to be paid? --- Generally speaking that's how it works, isn't it?

But you weren't paid? --- No, I wasn't – I haven't – I wasn't paid, no.

Well, why is that? --- Well, I didn't issue the invoice. I haven't issued the invoice.

So two days later you got paid back Dr Fiore's loan out of some of these loan proceeds? --- That was a loan. That was independent. I wasn't aware of that.

And a week later you asked Mr Oud for $10,000 - sorry, Mr Oxlade to put $10,000 in your account? --- I've already said to you - you - I've already said to you, Mr Yovich, that that $10,000 - there's no – nothing in relation - they were a counter cost for a completely different matter.

(ts 163-165, 20 September 2018)

123 In cross-examination, the following further exchange took place:

YOVICH, MR: No. Now, that sum of – that $20,000 loan, you say, was eventually repaid - - - ? --- It was.

- - - on 24 March 2016 - - -? - - - Yes.

- - - by depositing into your account of $20,000 - - -? --- That's right.

- - - about which you've provided evidence to the tribunal? --- Yes.

And you say that you didn't know that that repayment was going to be made until after it had been paid? --- That's correct.

And you didn't know until Mr Fiore told you? --- I – I queried – because I put two and two together when I checked my general account and I put two and two together. I rang him and he told me that was repayment for the - - -

(indistinct)? --- (indistinct)

So, effectively, Mr Oud – so what you're saying is that the loan was repaid and Mr Fiore didn't even tell you that the loan had been repaid until you asked him? --- That's correct.

And he told you that it had come out of Kathryn McKelt's account? --- It did. Kathryn paid it, yes.

Yes. And Kathryn McKelt's account was the account into which you had deposited $100,000 the day before at Mr Oxlade's direction? --- That's right.

So when – you just found out, you say, that Ms McKelt had paid the $20,000 and that the day before she paid $100,000 or you paid $100,000 into her account, you concluded that the $20,000 had come from that $100,000? --- No. It was a few days after. I checked my account.

But you made that conclusion a few days after at the latest? No. When I – it was three or four days later.

All right. By the end of March 2016, you knew that's where the money come from? --- Because I had rang him and said - - -

I didn't ask why. I just asked when? - - - Yes.

Okay. So when you spoke to Paul Reese in the conversation that he has given evidence about this morning - - - ? --- Yes.

- - - and you – and the subject of getting $20,000 out of the CSG loan funds is raised - - - ? --- Yes.

- - - that's what you say you told him? --- No. He said to me, and I – I recall vividly – he said to me, 'I rang up' – should I put the context in place or I will tell you what he said?

No. I don't want – that's not (indistinct)? --- Okay. He said to me basically – I was upset. I was – I said, 'Could I have off-the-record discussion with you'. I felt being – or his words were

> duped – that that the signatures are being forged. And he said to me, 'Well, you're okay because you didn't get any money of it'. All right. And I said, 'Well, I did receive $20,000', but I immediately qualified that. But that was – and I said, 'That was money that was repaid to me as a result of money I had loaned'.
>
> All right. So you say that's what happened in the conversation? - - -Yes.
>
> You deny that Mr Reese's recollection of the conversation - - - ? --- That's wrong.
>
> - - - is accurate? --- That's wrong.
>
> Okay? --- And I will tell you why. Can I tell you why.
>
> No. However, your evidence is that within a few days of receiving that $20,000, but not before you received it, you realised that Dr Fiore had arranged to repay you a loan you had made to him six months before? --- **I was expecting to get that money back (indistinct) before then**.
>
> Had you raised it with Dr Fiore? --- About the payment?
>
> Yes? --- Yes, of course.
>
> You said to him to him, 'Where's my 20 grand?' --- Yes.
>
> Had you said that him on 23 March? --- Had I said it to him at 23 March?
>
> On 23 March? --- No.
>
> Had you said it to him on 22 March? --- **No. I basically written it off by that stage.** [Tribunal emphasis added]

124 Was Mr Oud expecting to get the money back or had he written it off?

125 The exchange continued:

> How long before you were actually repaid was the last time that you say you asked Dr Fiore to repay you? --- It was months before.
>
> All right. So at the time that he engaged you to do the platinum business in February, he owed you $20,000? --- It was unrelated. It was a personal loan.

It doesn't matter, Mr Oud. Just answer my question. At the time you agreed to act for him - - - ? --- Yes.

- - - in relation to the platinum purchase, he still owed you $20,000? --- That is correct. Yes.

And when you (indistinct) did you ask him for $20,000? --- No.

And you didn't do a cost agreement with him? --- I had cost agreements in the past.

And you didn't do a cost estimate for him? --- Not in this instance.

And you agreed to act for him on the basis that you would get paid when the platinum deal got through? --- Because he was aware that - - -

But, Mr Oud - - - ? --- Okay.

That was yes/no question? --- Yes/no – yes. That's correct. Yes.

Now, Mr Oud, so you had a financial interest in the success of the platinum deal, didn't you? --- No. That's not correct.

Because if the platinum deal didn't go through, you could not expect to get paid, could you? --- The expectation is that I would be paid in any event.

By a man who still owed you $20,000, correct? --- He did owe me $20,000. That's right.

The status of which loan you had written off? --- By that point, I had, yes.

And when – and your evidence is that when Mr Fiore arranged to repay you, he didn't tell you in advance that he was going to? --- Can I just qualify something I just said?

…

YOVICH, MR: The question was your evidence is that when Mr Fiore – or Dr Fiore – actually repaid the loan, he didn't tell you that he was going to? --- No. It appeared in my account. That's correct.

And he didn't you he had done so until after you rang him and queried it? --- I rang him because I put two and two together and I thought that's the repayment of my loan.

And so the answer to my question is yes? --- Could you put the question again, please.

He didn't tell you that he had repaid the loan until you queried it with him? --- That's correct. Yes.

That's nonsense, isn't it, Mr Oud? --- No.

That's just not the way people act in the real world, I put to you? --- Well, I'm – I'm telling you that's exactly what happen.

When you loaned Dr Fiore the money, that money came from the standpoint legal general account, didn't it? --- Yes. That's correct.

And at the time that you loaned Dr Fiore that money, that account was $80,000 in the red, wasn't it? --- I have to check. I don't recall.

All right. You've produced it in the supplementary book of documents so we won't go there. When you loaned him the $20,000 you didn't charge him interest? --- No, I didn't.

You had to pay extra interest on the overdraft of your general account? --- It was a – an – did I charge – did I pay interest – I did pay interest; yes.

But you didn't pass that onto Dr Fiore? --- It was incorporated as part of the loan that I would receive that back as part of – the interest would have been paid back.

So he didn't in fact pay back the loan in full? He paid the principal but not any interest? --- Because I anticipated - - -

Not because – once again - - - ? --- No, he paid back – he just paid back the original. I was glad to get my money back, to be honest.

Right. And so this man for whom you were – you had written off a debt, you were glad to get any money back – not all of it – you were happy to act for on the basis of a platinum deal that may or may not succeed? --- Yes, because I acted in the past. I - - -

And you were expecting to get paid - - - ? --- I was expecting to get paid.

- - - against this history? --- Yes. Yes, I was.

> And you didn't raise with him being paid prior to withdrawing the $100,000 and paying it to the girlfriend; correct? --- No, I didn't.
>
> (ts 144-148, 20 September 2018)

126 Repayment of the loan of $20,000 on which Mr Oud was paying overdraft interest was important to him. Mr Oud's account that Dr Fiore repaid the loan without telling him is implausible. Mr Oud did have a final stake in the funds being released because it meant that the loan would be repaid. As Mr Reese stated, Mr Oud had said he was 'taking money he was owed'. Mr Oud had transferred the $20,000 he loaned to Dr Fiore to Ox Corp Pty Ltd. He was dealing with Colin Oxlade of Ox Corp Pty Ltd in that transaction.

127 The Committee alleged at para 40 of its SFC:

> On or around 28 March 2016 [Mr Oud] caused the transfers of funds from the firm's trust account on 23 March 2016 to be recorded in the firm's trust ledger for Mr Oxlade as two separate payments to Mr Namah of $75,000 and $100,000 respectively, even though neither amount was transferred to Mr Namah.

128 Mr Oud said that on or about 28 March 2016 he caused the transfers of funds made on 23 March 2008 to be recorded in his trust ledger for Mr Oxlade, but said that:

> a) his instructions to his bookkeeper were that both transfers be recorded in his trust ledger for Mr Oxlade as 'Belden Namah Reimburse expenses/advances paid';
>
> b) he believed at the time, based on what he had been told by Mr Oxlade on 22 March 2016, those descriptions to be accurate; and
>
> c) otherwise denies each allegation in para 40 of the SFC.
>
> (Oud ASFC para 28)

129 There is no rational basis for Mr Oud's alleged belief that those entries in the trust ledger were accurate. The payments were not made to Belden Namah. The trust ledger should have recorded payments of $75,000 to Mr Oxlade and $100,000 to Kathryn McKelt. Of course, if the trust ledger had stated to whom the payments were in fact made, it would have been inconsistent with the terms of the First 23 March Authority.

130 At paras 42-46 of its SFC the Committee alleged:

> 42. By email sent on 29 March 2016 at 11:21 am to [Mr Oud], Mr Oxlade said, relevantly:
>
> > 'Per attached …… Going both ways!',
> >
> > [Exhibit A page 464]
>
> and attached to the email was a letter addressed to [Mr Oud] and dated 29 March 2016 which was purportedly signed by Mr Oxlade and Mr Cacciola which said:
>
> > 'RE: AUTHORITY TO PAY – IRONGROW $300K LOAN
> >
> > Per the agreed terms and conditions of the above mentioned loan, which settled into your Trust Account yesterday, please take this formal letter as instructions for the following payments(s)
> >
> > $AUD 25 000.00 for previous expenses/advances to Belden Namah directly relating to the PNG Platinum deal.'
> >
> > [Exhibit A page 463 – the First 29 March Authority]
>
> 43. Later on 29 March 2016, Dr Fiore hand delivered to [Mr Oud] a letter addressed to [Mr Oud] and dated 29 March 2016 which was purportedly signed by Mr Oxlade and Mr Cacciola and said:
>
> > 'RE: AUTHORITY TO PAY – IRONGROW $300K LOAN
> >
> > Per the agreed terms and conditions of the above mentioned loan, please take this formal letter as instructions for payment.
> >
> > Please pay the remainder of the funds as discussed, so that the purchase of the PNG Platinum deal is finalised.'
> >
> > [Exhibit A page 531 - the Second 29 March Authority]
>
> 44. Dr Fiore told [Mr Oud] that the letter he had hand delivered was an 'updated' letter, and that it was necessary because there were additional expenses incurred to date which had not been accounted for and needed to be reimbursed.
>
> 45. [Mr Oud] spoke to Mr Oxlade, in Dr Fiore's presence on speaker phone, and Mr Oxlade also said that the second letter dated 29 March 2016 was an 'updated' letter, and that he should ignore

> the letter referred to in para 42 [of the Committee's SFC]. Mr Oxlade instructed [Mr Oud] to deal with the remaining CSG loan funds by transferring $10,000 to Mr Oxlade and $115,000 to Orlando Maiolo.
>
> 46. On 30 March 2016:
>
> 46.1 at 1:22 pm, [Mr Oud] transferred $10,000 from his firm's trust account to Mr Oxlade's Commonwealth Bank of Australia account;
>
> 46.2 at 1:33 pm, [Mr Oud] transferred $115,000 from his firm's trust account to Orlando Maiolo's Macquarie Bank Limited account.

131 Mr Oud admitted paras 42, 43, 44, 45 and 46 of the SFC and said further:

> 1) he accepted the authority identified in para 43 of the SFC believing, based on what he was told by Dr Fiore as set out in para 44 and Mr Oxlade as set out in para 45 of the SFC, that Mr Cacciaola had signed that authority; and that
>
> 2) he had no reason to think otherwise.
>
> (Oud ASFC para 30)

132 For the reasons stated above, Mr Oud had every reason to doubt the authorisation (see also SFC para 50 below). Mr Oud had not had any discussions with Mr Cacciaola. He was completely dependent on what one party, Mr Oxlade told him.

133 The Second 29 March Authority did not authorise payment to Mr Maiolo. The Second 29 March Authority did not authorise payment to Mr Oxlade. It did not specify to whom payment was authorised. No discussion took place with Mr Cacciaola - there was no oral authority let alone any written authority consenting to payment to Mr Oxlade or Mr Maiolo.

134 There is no evidence as to who Mr Maiolo was; whether he had any involvement in the platinum purchase or why a payment had been made to him.

135 At para 47 of its SFC the Committee alleged:

> On or around 7 April 2016 [Mr Oud] caused the transfers of funds from the firm's trust account on 30 March 2016 to be recorded in the firm's trust ledger for Mr Oxlade as two separate payments to Mr Namah of $115,000 and $10,000 respectively, even though neither amount was transferred to Mr Namah.

136 Mr Oud said that on or about 7 April 2016 he caused the transfers of funds made on 23 March 2008 to be recorded in his trust ledger for Mr Oxlade, but says that:

a) his instructions to his bookkeeper were that both transfers be recorded in his trust ledger for Mr Oxlade as 'Belden Namah Reimburse expenses/advances paid';

b) he believed at the time, based on what he had been told by Mr Oxlade on 22 March 2016 and the attachment set out in para 38 of the SFC, dated 23 March 2016 purportedly signed by Mr Cacciola, those descriptions to be accurate; and

c) otherwise denies each allegation in para 47 of the SFC.

137 Even if Mr Oud gave those instructions on 7 April 2016, they were inaccurate in that the trust ledger did not identify the persons to whom payment had actually been made. The trust ledger should have identified payments to Mr Oxlade and Mr Maiolo. It was Mr Oud's responsibility to ensure that the trust ledger entries were accurate. He cannot shift blame to his bookkeeper. There was nothing to stop him issuing instructions to correct the trust ledger.

138 The Committee alleged at para 48 of its SFC that:

> [Mr Oud] did not check with either Mr Reese or Mr Cacciola whether he was authorised to transfer the money to persons other than Mr Namah or at all. Mr Cacciola had not in fact signed either the authority referred to in para 40 [of the Committee's SFC] or the authority delivered by Dr Fiore purportedly signed by him, and had not in any other way consented to the transfers of funds [Mr Oud] made on 30 March 2016.

139 Mr Cacciola confirmed that the signature was not his (Exhibit E paras 35-38).

140 Mr Oud admitted para 48 of the SFC but said further that he believed at the time that Mr Cacciola's signatures on the authorities presented to him were genuine, and that he had had no reason to believe

those signatures to have been forged or that Mr Cacciola had not authorised the transfer of funds Mr Oud had made (Oud ASFC para 32)

141 Again Mr Oud had every reason to doubt the validity of the authorities (see also para 50 of the SFC below).

142 The same considerations apply to those payments as stated above. The Tribunal finds that Mr Oud did not check with Mr Cacciola or Mr Reese.

143 Mr Oud further submitted in respect of paras 36 to 48 of the SFC, that Mr Oxlade acted fraudulently with intent to deceive by the following actions:

In regard to para 36 of the SFC:

i) Mr Oxlade made the statement referred to that Mr Cacciola had agreed to the CSG Loan Funds being used; and

ii) instructed Mr Oud to transfer $75,000 to him and $100,000 to a bank account in the name of Dr Fiore's partner Kathryn McKelt and described these transactions to [Mr Oud] as a partial reimbursement for funds already sent to Mr Namah.

In regard to paras 37 and 38 of the SFC:

i) Mr Oxlade sent the email on 23 March 2016 at 9:19 am to Mr Oud with the attachment; and

ii) forged Mr Cacciola's signature on the attachment.

In regard to paras 42 and 43 of the SFC:

i) Mr Oxlade sent the email on 29 March 2016 at 11:20 am to Mr Oud with the attachment;

ii) forged Mr Cacciola's signature on the attachment; and

iii) forged Mr Cacciola's signature on the letter dated 29 March 2016;

In regard to para 45 of the SFC:

i) Mr Oxlade told Mr Oud the second letter dated 29 March 2016 was an 'updated letter' and for Mr Oud to ignore the first letter referred to in para 42 of the SFC; and

(ii) instructed Mr Oud to deal with the remaining CSG loan funds by transferring $10,000 to Mr Oxlade and $115,000 to Orlando Maiolo.

(Oud ASFC para 32A)

144 The allegations do not allege that Mr Oud knew that Mr Cacciola's signature had been forged. The allegations made against Mr Oxlade are of reckless disregard, reckless indifference and gross carelessness.

145 Mr Oud further submitted that as a consequence of being deceived by the actions of Mr Oxlade, (referred to in Oud ASFC para 32A above), and not knowing the purported signatures of Mr Cacciola had been forged by Mr Oxlade, Mr Oud:

a) made the transfers of funds (referred to in the SFC para 39);

(b) had the said records made in the firm's trust ledger for Mr Oxlade (referred to in the SFC para 40);

(c) did not check with either Mr Reese or Mr Cacciola whether he was authorised to transfer the monies to persons other than Mr Namah (referred to in the SFC para 41);

(d) made the transfers of funds (referred to in the SFC para 46);

(e) had the said records made in the firm's trust account ledger (referred to in the SFC para 47);

(f) did not check with either Mr Reese or Mr Cacciola whether he was authorised to transfer the money to persons other than Mr Namah or at all (referred to the SFC para 48).

(Oud ASFC para 32B)

146 Mr Oud's actions were not solely a consequence of Mr Oxlade's fraud. They were a consequence of his failure to heed the warning signs or to discuss the terms of his undertaking.

147 In addition, Mr Oud submitted that in the course of its investigation into the matters the subject of paras 36 to 49 of the SFC, the Committee had in its possession a letter signed by Mr Cacciola on the basis of which, together with the documents Mr Oud has particularised below, the Committee formed the belief that the purported signatures of Mr Cacciola on each of the attachments referred to in paras 38 and 42 of the SFC and the letter referred to in para 43 of the SFC, had been forged by Mr Oxlade and he had committed a criminal offence (OUD ASFC para 32C):

> Particulars of basis of [Mr Oud's] belief
>
> (a) Email chain ending with email Belden Namah to Practitioner and Peter Fiore 17 February 2016.
>
> (b) Standpoint Legal trust account receipt AVRO Gold 19 February 2016.
>
> (c) Email chain ending with email Rova Olemau to Practitioner 19 February 2016.
>
> (d) Email chain ending with email Belden Namah to Practitioner and Peter Fiore 19 February 2016.
>
> (e) Email chain ending with email Belden Namah to to Practitioner and Peter Fiore 19 February 2016.
>
> (f) Standpoint Legal trust account receipt AVRO Gold 22 February 2016.
>
> (g) ANZ Telegraphic Transfer to Siniwok Limited 22 February 2016.
>
> (h) Email Rova Olemau to Practitioner 24 February 2016.
>
> (i) Letter of Offer from Credit Solutions Group 3 March 2016.
>
> (j) ANZ Statutory Trust Account Statement 8 March 2016.
>
> (k) Standpoint Legal Final Report 9 March 2016.
>
> (l) Email chain ending with email Colin Oxlade to David Cacciola 17 March 2016 (5:27am).

(m) Email chain ending with email Paul Reese to practitioner 22 March 2016 (2:19pm).

(n) Standpoint Legal trust ledger for Colin Oxlade.

(o) Standpoint Legal trust account receipt 22 March 2016.

(p) Practitioner's file note of telephone conversation with Colin Oxlade 22 March 2016.

(q) Email Colin Oxlade to practitioner 23 March 2016 (9:19 am) with attached Authority.

(r) ANZ Telegraphic Transfer to Kathyrn McKelt 23 March 2016.

(s) ANZ Telegraphic Transfer to Colin Oxlade 23 March 2016.

(t) Email chain ending with email Colin Oxlade to practitioner 29 March 2016 (1:51pm) with attached Authority.

(u) Authority addressed to practitioner 29 March 2016.

(v) Practitioner's file note of meeting/telephone conversation with Dr Fiore and Colin Oxlade 29 March 2016.

(w) ANZ Telegraphic Transfer to Orlando Maiolo 30 March 2016.

(x) ANZ Telegraphic Transfer to Colin Oxlade 30 March 2016.

(y) Standpoint Legal trust account bank statements 8 March 2016 to 6 May 2016.

(z) Letter of Confirmation dated Brisbane May 5, 2016 signed by David Cacciola as Managing Director of Credit Solutions Group Pty Ltd stating:

> 'I, David Cacciola, Sole Director and Secretary of Credit Solutions Group Pty Ltd have at no time provided written consent or any other consent to Nicholas Oud and Standpoint Lawyers to release the $300,000 that was deposited into the Standpoint Lawyers trust account on behalf of Credit Solutions Group Pty Ltd.'

(Oud ASFC para 32C)

148 Mr Oud further submitted:

32E. In furtherance of the [Committee's] resolution and on or about 14 February 2017, [the Committee] wrote to the Western Australian Police notifying the Police of its belief that

> Mr Oxlade had committed a criminal offence by his apparent forgery of Mr Cacciola's signature on each of the attachments and letter referred to in paragraphs 38, 42 and 43 of the [Committee's SFC].
>
> 32F. The [Committee] did not disclose to [Mr Oud] Mr Cacciola's letter particularised in paragraph 32C [of the Committee's SFC] until disclosed to [Mr Oud's] Senior Counsel by letter to him dated 23 February 2018.
>
> 32G. Despite requests made by Senior Counsel on behalf of the [Mr Oud], [the Committee] has refused to disclose the notification by the [Committee] to the Police of its suspicion after investigation that Mr Oxlade had committed an offence by his apparent forgery of Mr Cacciola's signature on each of the attachments and the letter referred to in paragraphs 38, 42 and 43 of [the Committee's SFC].

149 Paragraphs 32C to 32G of Mr Oud's ASFC are entirely irrelevant. They can only have been pleaded to deflect attention from Mr Oud's conduct.

150 The Committee alleged in its SFC at para 49 and Mr Oud admits (Oud ASFC para 33 that:

> 49. After the transfers of monies referred to in paragraphs 39 and 46 [of the Committee's SFC], no monies remained in the firm's trust from the CSG loan funds.

151 At para 50 of its SFC the Committee alleged:

> 50. [Mr Oud] did not verify with either Mr Reese or Mr Cacciola any of the instructions he had received from Mr Oxlade or Dr Fiore as to the transfer of the CSG loan funds prior to effecting each transfer of the CSG loan funds from his firm's trust account in circumstances where:
>
> 1) [Mr Oud] was aware that clients of Mr Oxlade and Dr Fiore had paid part or all of the $300,000 paid to Siniwok on 22 February 2016, but in respect of which only two samples of the platinum had been received;
>
> 2) [Mr Oud] knew that CSG regarded possession of the platinum bars as the only security for the loan of the CSG loan funds;
>
> 3) [Mr Oud] knew that CSG's position of requiring security over the CSG loan funds and their limited use as 'proof of funds' had not changed between 15 and 22 March 2016 when the terms of the transfer of the

CSG loan funds into [Mr Oud's] trust account were finalised and where [Mr Oud] received the first letter of authorisation for release of the CSG loan funds on 23 March 2016;

4) the second letter of authorisation dated 29 March 2016 did not identify any person or persons to whom the monies were to be paid or the amounts to be paid to each person, and was inconsistent with the first letter of authorisation of that date;

5) Mr Reese did not refer to any of the CSG loan funds being released or seek confirmation of the release of any of those funds when he emailed [Mr Oud] on 25 March 2016 requesting a copy of the firm's trust ledger showing receipt of the CSG loan funds;

6) Mr Oud was given two different reasons by Mr Oxlade and Dr Fiore for the release of the CSG loan funds the subject of the purported authorisations [Mr Oud] received on 29 March 2016;

7) at no time prior to releasing the CSG loan funds on 30 March 2016 did [Mr Oud] have any evidence that the platinum deal was proceeding as stated in the letter of authorisation hand delivered by Dr Fiore on 29 March 2016.

152 The Committee's SFC at para 50 correctly states the facts based on the proper inferences and conclusions to be drawn from the facts alleged above. The Tribunal finds the facts as set out in para 50 of the Committee's SFC.

153 Mr Oud responded that he does not plead to matters of argument, innuendo or conclusion contained in or arising from the matters pleaded in the particulars of paras 50.1 to 50.7 of the SFCs save to:

1) admit that only 2 samples of platinum had been received; denies each allegation in para 50.1 of the SFC; says that he believed from the information given to him by Dr Fiore in or about February 2016 that the payment of $300,000 to Belden Namah was as a deposit to secure the transaction, so that the platinum was not sold to other parties; and that Mr Namah was to bring the balance of the platinum with him when he travelled to Australia;

2) denies that he had any knowledge of CSG's position or the other terms and conditions of the loan, and therefore denies each allegation in paras 50.2 and 50.3 of the SFC;

3) does not admit the letters of authorisation are inconsistent, but otherwise admits para 50.4 of the SFC; and says that he accepted the explanations given to him by Dr Fiore and Mr Oxlade as to why there was a second letter of authorisation, having no reason to think that they were untrue;

4) admits para 50.5 of the Committee's SFC, but says that there was nothing in that email which required an answer to the effect alleged;

5) as to para 50.7 of the Committee's SFC:

a). he was told by Dr Fiore that the platinum transaction was proceeding;

b) he had no other reason to believe that the transaction was not proceeding; and that

c) the authorities presented to him by Mr Oxlade and Dr Fiore were consistent with that belief.

154 The allegations in the SFC at para 50 are not matters of argument or innuendo. They are inferences and conclusions that are correctly drawn from the facts.

Trust records

155 At paras 51-56 of its SFC the Committee alleged and Mr Oud admitted (Oud ASFC para 35):

51. On 28 March 2016 [Mr Oud's] external bookkeeper MG (practitioner's bookkeeper) emailed [Mr Oud] to ask for the details of withdrawals from the firm's trust account so that she could enter the details into the firm's trust accounting records.

52. Relevantly, [Mr Oud's] bookkeeper requested [Mr Oud] to provide details of the withdrawals from the firm's trust account on 23 March 2016 for $100,000 and $75,000 respectively, referred to in paragraph 39 [of the Committee's SFC].

53. Pursuant to Regulation 45 of the *Legal Profession Regulations 2009* (WA) (Regulations), a law practice must keep 'required particulars' of each withdrawal of trust funds by electronic funds transfer. Those required particulars must include, for a payment to an authorised deposit-taking institution (ADI), the name or BSB number of the ADI and the name of the person receiving the benefit of the payment.

54. [Mr Oud] responded to [his] bookkeeper by email on 28 March 2016 with the following details for both of the withdrawals made on 23 March 2016:

> '16011 – Oxlade, Colin – re-imbursement of previous expenses/advances to Belden Namah directly relating to the PNG Platinum Deal.'
>
> [Exhibit A page 197]

55. By email sent on 6 April 2016, [Mr Oud's] bookkeeper requested [Mr Oud] to provide details of the withdrawals from the firm's trust account on 30 March 2016 for $115,000 and $10,000 respectively, referred to in paragraph 46 [of the Committee's SFC]

[Exhibit A page 198]

56. [Mr Oud] responded to [his] bookkeeper by email on 7 April 2016 with the following details for both of the withdrawals made on 30 March 2016:

> '16011 – Oxlade, Colin – re-imbursement of previous expenses/advances to Belden Namah directly relating to the PNG Platinum Deal.' [Exhibit A page 198]

156 The evidence of Mr Oud's bookkeeper, Ms Guthrie was:

29. In my 28 March 2016 email sent at 9.55 pm (ABOD 197) I sought details for trust transactions for the trust account statements and ledger for the following withdrawals:

    a. on 23 March 2016 ('EB 16263 TO 281689") for a withdrawal of $100,000;

    b. on 23 March 2016 ('EB 16263 TO 281655') for a withdrawal of $75-000; and

    c. on 2-1. March 2016 (Cheque 01007 for a withdrawal of $309).

    The 'EB' I refer to in my email is a bank created number and has no particular meaning to me. I used it only to identify the

individual withdrawals as they appeared from the bank trust account statement. It was essentially a 'copy and paste' exercise.

30. Nick's reply email sent 28 March 2016 at 10.11 pm provided the information I requested by way of completing information in the text of my email in response to each of the queried withdrawals. This is shown in my email sent 9.55 pm as:

    a. where I had listed the 23 March 2016 $100,000 withdrawal he added *'16011 - Oxlade, Colin - reimbursement of previous expenses/advances to Belden Namah directly relating, to the PNG Platinum Deal*' (the italics show Nick's additions);

    b. where I had listed the 23 March 2016 $75,000 withdrawal he added *'16011 Oxlade, Colin - reimbursement of previous expenses/advances to Belden Namah directly relating to the PNG Platinum Deal*' (the italics show Nick's additions); and

    c. where I had listed the 21 March 2016 matter, he added the file number, client name, and the fact it was for a filing fee for a probate application.

31. Nick's reference to '16011' is to his file number and his reference to 'Oxlade, Colin' is to his client. On the basis of his description that the monies were *'reimbursement of previous expenses/advances to Belden Namah directly relating, to the PNG Platinum Deal*' I entered into ATOM that the monies were paid to 'Belden Namah' and the purpose was 'Reimburse expenses/advances paid' which I slightly abbreviated from his description as there is minimal space for description.

…

39. The trust account ledger also records transfers on 30 March 2016 (posted by me on 7 April 20-16) to 'Belden Namah' as, payee of $115,000 and $10,000 respectively as referred to in paragraph 21(c) above and the BSB and account numbers are the same as the 23 March 2016 transactions as I had no further information to enter in that respect. I have entered the 'purpose' of the transaction as was stated by Nick in his 28 March 2016 email sent 10.11 pm, which I have slightly abbreviated to 'Reimburse expenses/advances paid' for 23 March and then 'Reimburse expenses/advances relating to PNG Platinum Deal' for the 30 March 2016 transactions.

40. I have been shown an email from me to Nick sent 6 April 2016 at 9.04 pm (ABOD 198) in which I requested that he provide details of the trust transactions which occurred on

30 March 2016 for the sums of $115,000 ('EB 16452' TO 285722') and $10,000 ('EB; 16452 TO 285699').

41. I have been shown an email sent by Nick to me on 7 April 2016 at 3.12 pm (ABOD 198) in which he provided the details of the transaction which shows in the text of my email, namely:

a. Re the 30 March $115,000 withdrawals, he added '*16011 - Oxlade, Colin - reimbursement of previous expenses/advances to Belden Namah directly relating to the PNG Platinum Deal*' and

b, For the 30 March 2016 $10,000 withdrawal he added *'16011 - Oxlade, Colin - reimbursement of previous expenses/advances to Belden Namah directly relating to the PNG Platinum Deal*'.

(Exhibit C pages 9-10 paras 29-31 and pages 13-14 paras 39-41))

157 The Committee alleged at para 57 of its SFC:

57. Based on the information provided by [Mr Oud], [his] bookkeeper entered into the firm's trust records that each withdrawal made on 23 and 30 March 2016 was to:

'Belden Namah

BSB 111111

A/C no: 123456.'

158 Mr Oud denied para 57 of the SFC and said further that:

1) Mr Oud's trust account records were maintained by a bookkeeper;

2) Mr Oud did not instruct the bookkeeper to enter the record as she did;

3) by email sent on 25 March 2016 at 8.47 am Mr Oud requested the bookkeeper to issue a trust receipt for the $300,000 received into his trust account for

'Details are:

File no: 16011

Client: Colin Oxlade

> Address: [address details]
>
> Notation: Funds deposited by Credit Solutions Group Pty Ltd as deposit for purchase of Platinum from PNG'
>
> [Exhibit A page 195]

4) Mr Oud's bookkeeper emailed the receipt to Mr Oxlade the same day.

(Oud ASFC para 36)

159 Ms Guthrie's' evidence was:

> Following Nick providing that information to me I created a trust receipt for the deposit of $300,000 (ABOD 638). I then by email sent 28 March 2016 at 9.57 pm (ABOD 153) sent that receipt to him.

(Exhibit C page 8 para 27)

160 Mr Oud's response in ASFC para 36(3) and 36(4) above is irrelevant. The request for a receipt related to the deposit of the $300,000 not the withdrawal.

161 At para 58 of its SFC the Committee alleged:

> 58. None of the payments were made to Mr Namah and the trust records did not record the details of the BSB and account numbers for each of the recipients of the withdrawals, the details of which were known to [Mr Oud].

162 As to para 58 of the SFC, Mr Oud admits he knew the BSB and the account numbers for each of the recipients of the payments made from his trust account, but said that he did not provide those details to his bookkeeper as she had access to those details and he was not requested to do so. Mr Oud submitted that due to inadvertence, he did not verify at the end of the month that BSB and account numbers were inserted in the trust records (Oud ASFC para 37).

163 The responsibility for correct trust account records rests with Mr Oud not with his bookkeeper. The fact that Mr Oud's trust records were maintained by Ms Guthrie is irrelevant to Mr Oud's compliance with the legislation.

164 In any event, the trust accounts did not accurately reflect that payments had been made to Ms McKelt ($100,000) and Mr Maiolo

($115,000). Mr Oud's instructions to his bookkeeper were not a correct record of the person to whom the payments were made (see above).

165 Ms Guthrie's evidence was:

> 14. Prior to moving to the ATOM software (see paragraph 20) Nick occasionally provided to me by reply email BSB and account details when T requested them. However, he suddenly just stopped doing so. Following the change to ATOM I had on occasions asked Nick for BSB and account numbers but he never provided those details, which I assumed he often didn't have on hand as the replies were in the evenings. This is solely for Trust as that is the only client-related information recorded in the trust accounting package used by Nick.
>
> 15. As a result of his repeated failure to provide the BSB and account details I -stopped asking him for them and instead used the .same series of random numbers to enter each of the relevant ATOM fields (see paragraph 35 below). I made inquiry of the Legal Practice Board about whether it was permissible for me to do this and was informed that it was as long as the lawyer had the relevant information on his or her file, which I then advised Nick. I had and have no access to his client files so I do not know if he has kept that information on them or not.
>
> 16. In the week following the end of each month, I would do a reconciliation of the trust account and would follow up Nick for any information I required by email. I would post originals of the end of month trust reports and receipts to Nick.

(Exhibit C pages 4-5 paras 14-16)

166 Ms Guthrie was an honest witness. The Tribunal finds that Ms Guthrie did ask for a BSB and account numbers and Mr Oud did not provide them. The Tribunal finds that Ms Guthrie did not have access to the BSB and account numbers.

167 The Committee alleged at para 59 of its SFC:

> 59. As a result of the details entered into the trust records, the trust records did not accurately record all the required particulars set out in Regulation 45 of the Regulations such the firm's trust records did not disclose the true position in relation to the withdrawal of those trust funds as required by section 228(3)(b) of the Act.

168 Mr Oud admitted para 59 of the SFC subject to what he submitted in Oud ASFC paras 36 and 37.

169 Mr Oud did not comply with his obligations in s 45 of the LP Regulations and s 228(3)(b) of the LP Act.

Requests for information about the funds and their return

170 At paras 60-65 of its SFC the Committee submitted:

> 60. By email sent to [Mr Oud] on 22 March 2016, being the date the CSG loan funds were transferred into [Mr Oud's] firm's trust account, Mr Reese asked [Mr Oud] to provide a trust receipt for the CSG loan funds. [Exhibit A page 435]
>
> 61. Pursuant to Regulation 41(2) of the Regulations, after receiving trust money a law practice must make out a receipt.
>
> 62. Pursuant to Regulation 41(6) of the Regulations, an original receipt must be delivered, on request, to the person from whom trust money that is required to be paid into a general trust account was received.
>
> 63. By email sent on 25 March 2016, being two days after the first tranche of the CSG loan funds was transferred out of the [Mr Oud's] firm's trust account, Mr Reese asked [Mr Oud] to provide him with a copy of his firm's trust ledger showing receipt of the CSG loan funds. [Exhibit A page 452]
>
> 64. [Mr Oud] did not respond to the emails from Mr Reese of 22 and 25 March 2016.
>
> 65. [Mr Oud] says that on or about 28 March 2016, he caused [his] bookkeeper to prepare a trust receipt for the receipt of the CSG loan funds, and that he sent a copy of the trust receipt to Mr Oxlade. [Mr Oud] did not send a trust receipt to Mr Reese. [Exhibit A page 153]

171 Mr Oud admitted paras 60-65 of the SFC and says further that as reflected in his instructions to his bookkeeper referred to in (Oud ASFC para 36.3), he believed at the time that his obligation was to provide a receipt to his client, whom he perceived to be Mr Oxlade, and that he did not owe the same obligation to Mr Reese's firm or his client; and he did not respond to Mr Reese's correspondence dated 22 and 25 March 2016 because he believed that, once the CSG loan funds had been advanced on the basis of the written authorities presented to him purportedly signed by Mr Cacciola, the CSG loan had been made (Oud ASFC para 39).

172 Mr Oud was informed by Ms Johnson of the Committee of his obligation to provide a trust receipt to CSG no later than about 4 pm on 4 May 2016.

173 The Committee alleged at para 80 of its SFC and Mr Oud admitted (Oud ASFC para 42) that:

> 80. At no time did the practitioner provide a trust receipt for the CSG loan funds to Mr Reese.

174 Mr Oud never provided a receipt to CSG or to Mr Cacciola or to Mr Reese.

175 On 5 May 2016, Ms Johnson sent an email (Exhibit A pages 16-17) to Mr Oud. She stated:

> I have been shown an email I sent to Mr Oud on 5 May 2016 at 10.56 am (ABOD 16-17), shortly after my discussions with both Mr Oud and Mr Reese, the contents of which are consistent with my recollection. In that email I summarised what Mr Oud had told me, which was inconsistent over the two days, including the discrepancy between him saying the funds would be there when he provided the trust ledger and the trust account balance in the Board's TAI report which showed that the funds were paid out of trust shortly after he received them from Summer Lawyers. In light of what I regarded to be very serious concerns about his conduct, I suggested he consider speaking to senior counsel.

(Exhibit D page 7 para 21)

176 Ms Johnson's file note was:

TA to Nicholas Oud	Standpoint Legal Pty Ltd	4.5.16	10.39am
9225 4664		0404 844 413	
Left message to return call.			
TA from Nicholas Oud		4.5.16 4 mins	12.47pm FJ.

FJ introduced herself and enquiry.

FJ noted Legal Profession Regulations 2009 regulation 41.

NO agreed to immediately provide trust receipt to Paul Reece and apologise for not doing so earlier. Cc LPCC.

Money NO received instructions from his client in relation to the trust monies.

NO will <u>not</u> provide trust statement to LPCC and/or PL.

NO would not confirm whether monies remained in trust.

NO to speak to his client and revert to FJ later today.

TA to Paul Reece Summers Legal 4.5.16 1pm

02 9799 8557

Left message to return call. PR is meeting until 4pm (EST) FS.

Who is <u>David Cacciola</u>?

TA to Paul Reece Summers Legal 02 9799 8557 4.5.16 2pm 10 mins

Advised above conversation with NO.

David Cacciola is PR's client. DC says he has not provided written instructions to NO to release/use trust money. DC awaits confirmation from Perth Mint product is platinum not tin. DC cannot understand why NO needs to take his client's instructions prior to providing a trust statement. PR and DC are suspicious NO has released/used trust money contrary to undertaking.

PR to forward DC email confirming he hasn't provided written instructions to NO.

FJ.

(Exhibit D Annexure B; Tribunal emphasis in bold)

177 The following exchange took place in cross-examination:

> **YOVICH, MR**: What's incorrect? --- I believed there was a general obligation upon me to provide trust account receipts.
>
> All right, Mr Oud? --- I did produce a trust account receipt and I sent it to my client. I did not – as it turned out I mistakenly sent it to my client when I should have sent it to Mr Reese and that's the discussion I had with Ms Johnson.
>
> And Ms Johnson corrected your misapprehension, didn't she? --- Yes, she did.
>
> She told you that you were obliged by law to provide a trust account receipt to Mr Reese? --- That's right.

> And you promised to do it? --- No, that's incorrect.
>
> So after Ms Johnson told you that you had a legal obligation to do it, you didn't promise to do it? --- No, she didn't – she didn't say that I should do that. She – I rose the fact that I had made a mistake and I should have sent it to my client but she had – at no point did she tell me, 'Can you please send one off to Mr Reese?' In hindsight, 20/20 vision, I should have taken the extra step and sent one to Mr Reece but once I acknowledged my fact I thought well, okay, I've rung – I've acknowledged that. Next time this type of situation arose I would send one out.
>
> But you won't correct this one; that's your evidence? --- I won't what, sorry?
>
> You won't correct the mistake you made on this occasion? That was what you had resolved? --- I – because I – because I gave an explanation.
>
> 'I've had a mistake pointed out to me - - - ? --- I gave an explanation to Ms Johnson. I told her, 'Listen, I – ' – she said, 'Well, you should have sent one to Reece' and I said, 'Okay. I – I was under the misapprehension I did send one. I sent it to my client' and that was it.
>
> (ts 151-152, 20 September 2018)

178 It is inconceivable that Mr Oud could have believed that he was under no obligation to provide a receipt to the person who provided the funds. His explanation that he was not under an obligation to provide a trust receipt to CSG because Mr Oxlade was 'his client' is preposterous.

179 The Tribunal prefers Ms Johnson's evidence to Mr Oud's. The Tribunal finds that Mr Oud did agree to provide a trust receipt to Mr Reese; and Ms Johnson did tell Mr Oud he was under an obligation to provide a receipt.

180 At paras 66-78 of its SFC the Committee alleged and Mr Oud admitted (Oud ASFC para 40.1):

> 66. On 4 April 2016 at 9.09 pm, [Mr Oud] was copied in to an email from Mr Cacciola to Dr Fiore, Mr Oxlade, and Mr John Buckby, a director of Irongrow, in which Mr Cacciola said that he had not received a call back from either Mr Oxlade or Dr Fiore for 'days now', and that if he did not receive a call by close of business on 5 April 2016 he would be passing the file over to Mr Reese for enforcement. [Exhibit A page 468]

67. On 5 April 2016 at 3.32 pm, [Mr Oud] forwarded Mr Cacciola's email of 4 April 2016 to Mr Oxlade and asked, relevantly, '*Correct me if I'm wrong but is there something wrong here??*' [Exhibit A page 469]

68. On 5 April 2016, [Mr Oud] spoke to Mr Oxlade, who told him to ignore Mr Cacciola's email. Later the same day [Mr Oud] spoke to Dr Fiore, who asked him to provide a 'status update' and accordingly [Mr Oud] responded to Mr Cacciola by email later on 5 April 2016 informing him that Mr Namah was anticipated to be in Australia '*mid next week to conduct business'*. [Exhibit A page 470-471]

69. Mr Nick Tran, an associate of Mr Cacciola, responded to [Mr Oud] on 9 April 2016 confirming that if the platinum bars were not in custody of CSG by 20 April 2016 the CSG loan funds must be returned to Mr Reese's firm's trust account. Mr Tran also said that CSG had been told that the CSG loan funds were required urgently and would only be required for a maximum of 2 weeks. [Mr Oud] did not respond to Mr Tran's email.

70. By email sent on 18 April 2016 to Dr Fiore, which was also copied to [Mr Oud], Mr Cacciola asked whether there were further updates on whether the platinum transaction was proceeding and said that he required the $300,000 to be transferred back to their lawyer's trust account on Wednesday (20 April 2016). [Mr Oud] did not respond to this email. [Exhibit A page 472]

71. By email sent on 28 April 2016 at 7:59am AEST (4.59 am AWST) to [Mr Oud] (the 7.59 am Reese email**)**, Mr Reese referred to [Mr Oud's] failure to respond to his email sent on 25 March 2016, and required the CSG loan funds to be returned to his firm's trust account. Mr Reese also said that if [Mr Oud] failed to respond that he would be reporting a potential trust breach to the WA Law Society (or equivalent). [Exhibit A page 473]

72. [Mr Oud] responded to Mr Reese by an email on 28 April 2016 at 9:24 am, saying '*As per the agreement reached between the parties please provide me with express written consent of both parties jointly*.' At the time he sent that email, [Mr Oud] knew that the CSG loan funds were no longer retained in his firm's trust account. [Exhibit A page 502]

73. Mr Reese responded to [Mr Oud] by email on 28 April 2016 at 9:26 am stating, '*We wrote to you a number of weeks ago requiring you to provide us with a copy of our (sic) trust ledger. Please do so immediately*.' [Exhibit A page 488]

74. [Mr Oud] responded to Mr Reese by email on 28 April 2016 at 9:32 am stating that he would seek instructions from his client and revert to him once he had done so. [Exhibit A page 502]

75. [Mr Oud] sent a further email to Mr Reese on 28 April 2016 at 3:25 pm stating, relevantly:

> 'I have sought instructions from client and advise that he has agreed to return the $300,000.00 to you on the proviso that you forego any interest or setup costs.
>
> He further says that the delay in getting the platinum from PNG arose at the outset when the funds were delayed a week in getting them transferred.'
> [Exhibit A page 501]

76. At the time that he sent this email, [Mr Oud] knew that he did not have the CSG loan funds in his trust account. He did not tell Mr Reese that he no longer had the CSG loan funds in his firm's trust account.

77. Mr Reese responded to [Mr Oud] by email on 28 April 2016 at 3:44 pm saying, relevantly:

> 'Your client does (sic: does not) act for the borrower or the guarantor and therefore cannot make demands on the Credit Provider. The terms of the agreement between the Credit Provider and the borrower and guarantor remain.
>
> …
>
> We once again demand that you provide us with the following:
>
> 1. Trust receipt for the $300,000 we transferred to your account; and
>
> 2. Current trust ledger showing that the $300,00 (sic) still remains within your trust account'.
>
> [Exhibit A page 501]

78. [Mr Oud] responded to Mr Reese by email on 29 April 2016 at 11.47 am, saying that he had been endeavouring to get further instructions from his client without success, and that he would revert once he had instructions. He again did not tell Mr Reese that he did not have the CSG loan funds in his trust account. [Exhibit A page 500]

181 In relation to the SFC at paras 66-78, Mr Oud further submitted that:

a) he knew the funds were not in his trust account at all times after 29 March 2016, but on the basis of the attachments and letter referred in paras 38, 42 and 43 of the SFC, believed until receipt of the email set out in para 71 that the disbursement of the funds had been authorised by and was known to Mr Cacciola;

b) thereafter, on the basis of verbal instructions given by Mr Oxlade on 29 March 2016 he believed that Mr Oxlade would repay the funds he had obtained as conveyed to Mr Reese by Mr Oud's email referred to in the SFC at para 75.

(Oud ASFC para 40)

182 Neither of these sub-paragraphs explains the implied representations that the funds were still in Mr Oud's trust account.

183 The Committee alleged at para 79 of its SFC:

> 79. [Mr Oud's] emails sent on 28 April 2016 at 9.24 am and 3:25 pm and on 29 April 2016 at 11.47 am in response to Mr Reese's email sent on 28 April 2016 requesting the return of the CSG loan funds (the 28 and 29 April 2016 emails) were misleading in that:
>
> 79.1 they did not disclose that [Mr Oud] no longer retained any of the CSG loan funds in the firm's trust account;
>
> 79.2 they implied that [Mr Oud] did retain the CSG loan funds in the firm's trust account, when, in truth, [Mr Oud] had disbursed the CSG loan funds and was not in a position to return the CSG loan funds to Mr Reese's trust account.

184 Mr Oud submitted:

a) that his email set out in the SFC at para 72 reflected his belief at the time that he required the authority of both Messrs Cacciola and Oxlade to respond to Mr Reese;

b). says that his email set out in para 75 of the SFC reflected his instructions from Mr Oxlade to the effect that Mr Oxlade would return the funds; and

3) otherwise denies each allegation in para 79 of the SFC.

(Oud ASFC para 41)

185 In cross-examination the following exchange took place:

> **YOVICH, MR**: You respond at 11.24 am and look at page 502, bottom of the page? --- Yes.
>
> And your response was, 'Dear Paul, as per the agreement reached between the parties, please provide me with express written consent of both parties jointly'? --- Yes.
>
> Now, that was a reference to your undertaking? --- That's correct, yes.
>
> And your undertaking required you not to release the funds from your trust account without that condition being met? --- Yes.
>
> It was not a condition that applied to anything other than you; correct? --- Yes.
>
> It did not apply if Mr Oxlade had the money and was being asked to send it back; correct? ---That's right.

186 Mr Oud's response makes it clear that he knew that the undertaking no longer applied once the funds were released. Therefore, referring to the undertaking implied that the funds were still in the trust account at a time when Mr Oud had already released the funds from his trust account. This was misleading.

187 The exchange continued:

> So that email, by invoking the condition of your undertaking, implied that the funds were still in your trust account, didn't it? --- No. I was under the impression, all along, that these funds had been released – that – released with – because the – I've got written authority, so - - -

188 Mr Oud is evading the question. The exchange continued:

> We will come to that. Mr- - - ? --- Well, you're – you're interrupting me, Mr Yovich. I haven't had a chance to finish my statement.
>
> What's your answer? Your next email is from Mr Reese to you, page 502 further up the page. 9.26 am:

> Nicholas, we wrote to you a number of weeks ago requiring you to provide us with a copy of our trust ledger. Please do so immediately.

Do you see that? --- Yes.

You responded:

> I will seek instructions from my client and revert to you further once I have done so.

Correct? --- That's right.

Go back to page 501. You then say in an email later on 28 April:

> I have sought instructions from client and advise that he has agreed to return the 300,000 on the proviso that you forego any interest for setup costs, etcetera.

Right? --- Yes.

Mr Reese replied to that email and his email starts at the bottom of page 500 but the bulk of it's on page 501. Right? --- Yes.

And you were paying careful attention to these emails, weren't you? --- Don't patronise me. I was paying attention. Yes,

…

HIS HONOUR: - - - your evidence has been that you didn't pay attention to emails. So for Mr Yovich to ask in this instance if you did is not patronising you? --- Very well.

YOVICH, MR: Now, then Mr Reese sent you a further email at the top of page 501:

> Dear, Nicholas. Thank you for your email. Your client does not act for the borrower or the guarantor –

and so on:

> The terms of the agreement between the credit provider and the borrower and guarantor remain.

Do you see that? Do you see that line? --- I'm – I'm reading it. Yes, I do.

You read that at the time? --- Yes.

Continuing:

> The credit provider has made simple demands upon you, having placed a large sum of money in your trust account.

You saw that. You read that at the time? --- Yes.

Continuing:

> Your reluctance to provide us with any records of: (1) receipt of the money into your trust account; and, (2) the current balance of the credit provider's funds within your trust account causes the credit provider great concern. We once again demand that you provide us with the following: (1) trust receipt for the $300,000 we transferred to your account; and, (2) current trust ledger showing that the $300,000 still remains within your trust account.

You read that at the time you got it, didn't you? --- Yes.

That email made it 100 per cent crystal clear that Mr Reese believed that the money was still in your trust account, didn't it? --- I don't comment in relation to that. No.

Are you saying that when you read that you didn't know whether Mr Reese believed - - - ? --- I – I - - -

- - - the money was still in your trust account? --- I believed that I had been given authority and that – I didn't believe – I didn't believe – this is why I didn't trust any of these characters, to be honest, and I didn't believe that what I knew was the case and what I was – of the mind of the case. I had received a proper authority releasing those funds. They were immediately – including Reese – asking for this money back within days of it going into my account. And I was told by my client that the money was there. It was a – and it has been – come out in evidence that it was for a three month loan period. They couldn't just turn around and demand the money back. When I got these emails it – it – when I got these emails about them threatening I then thought 'hang on a tick'. The – I'm being put in a position here. I need to find out – maybe I've been lied to. And that's where my – my – I – I started saying – well, I finally woken up and smelt the coffee, so to speak, and realised that I've been – I've been lied to here. And – and – and I – I was getting on to my client and saying, 'What the hell is going on?'

Instead of simply doing one of two things, Mr Oud. Here is one thing that I suggest you could have done. You could have provided those written authorities to Mr Reese with an email saying, 'Hang on a second. Your client authorised the release of

> these funds and here's the documentary proof'? --- That didn't occur to me. I wanted the answers from my client because you've got to – you have to understand, Mr Yovich, that I was of the apprehension up until this period of time that they had a three month loan in place, that it was – that I was told that they didn't have to pay it back. They were paying these exorbitant moneys in respect to it. That Reese couldn't just change his mind and demand the funds back. And those moneys were – were – were there and – and to be payable at the end of the three month loan. I was of the belief I had doubly discharged my duty and my undertaking.

189 The propositions put by Mr Yovich were absolutely correct. Mr Oud's answer was evasive. The exchange continued:

> And it would, Mr Oud, have been the simplest thing in the world to have said all of that to Mr Reese, wouldn't it? --- Because I – I wanted - - -
>
> But you didn't, did you? --- No. Because I didn't – I – I – I didn't have a very good working relationship with Reese.

190 The fact that Mr Oud may not have had a very good working relationship with Mr Reese is irrelevant to Mr Oud's duty not to mislead a fellow practitioner.

191 The exchange continued:

> Did you think that not telling him these things improved - - - ? --- No. I did – I – I thought it would be important to understand for my client. That's why I sought instructions from my client. What – and I challenged him 'what's going on?'
>
> And he didn't tell you? --- Well, he did tell me that it – he did tell me he – in a roundabout sort of way. I got this email saying they had just taken the funds.
>
> Now - - - ? --- And then I realised, 'Hang on a tick. I've been duped here. I'm an idiot. I should have seen it coming but I didn't'.
>
> And on 29 April 2016 when it was entirely open to you to say those things in an email clarifying the apparent apprehension of Mr Reese that you still had the funds that you didn't? --- My focus turned immediately from realising that I had been lied to to getting my guy to pay back the funds. He – he – he has obviously lied to me. He has – he forged emails – forged signatures and – and – and lo and behold, these – he has got it –

they – they need to – to – to fix this situation. They need to give back the money that they've fraudulently taken.

You knew that by 28 April? --- That – what's the significance of 28 April? I – at 28 April I – I had been – obviously smelt a rat. And that's where I went and got – and I said, 'What the hell is going on?' to my client. I said, 'What's – what – what's going on? I've – I've – I've got – I released these funds under an – under the belief that I had been given a – an authorised letter. Is that not the case?'

Mr Oud, you first raised this issue with your client on 4 April, didn't you? --- On 4 April?

Go back to page 101? --- No. What page? Sorry.

101. That's when Mr Cacciola first said in an email to Mr Fiore which was copied to you:

> Peter and Colin, I have tried to contact you for days now. If I don't receive a call back by close of business on Tuesday, 5 April I will pass the file over to Paul Reese for enforcement.

? --- But - - -

That's an email you got? --- - - - once again, these are operational things. Right. I've been - - -

Mr – all right. Mr Oud? --- I've been cc'd - - -

Mr Oud, I just want you to answer the question I asked? --- I

- - -

I do not want you to give the tribunal an essay. The question is a yes/no question. Did you get that email? --- I was cc'd it.

Did you read it? --- Yes. I would have read it.

Did you – go to page 102 – on the next day ask Colin Oxlade:

> Correct me if I'm wrong but is there something wrong here?

? --- Well, I was referring to the fact that that's when he gave - - -

The question is did you send that email? --- Show me where – the email you're referring to.

> 102? --- 102. 'When you wanted' – well, I'm – I'm just querying why he's asking that.
>
> Did you send that email to - - - ? --- Yes. I did. Yes, I did; yes.
>
> Okay. Did you send that email to Mr Oxlade because you thought something might be wrong? --- No.
>
> Well - - - ? --- Well – well, listen, yes. I – I – I - - -
>
> You - - - ? --- I questioned him, 'Why are they saying this?' Yes.
>
> And he told you to ignore them, didn't he? --- He told me – yes. That's correct.
>
> And you did ignore them, didn't you? --- On the basis that I – he – of the explanation he gave me.
>
> Is the answer yes or no? --- Yes.
>
> You didn't say to them, 'I have authority from you', did you? --- No. Because - - -
>
> Because you knew those authorities were bogus? --- That's absolutely incorrect.
>
> At any time you could have at least tried to shut these people up by telling them that the funds had been dispersed according to authorities you had been given? --- I had been given an explanation by Colin Oxlade that they had borrowed the funds and they were paying exorbitant interest and that they had a three month loan period. Once they - - -

192 Mr Oud evaded answering the question because, of course, he could have solved the whole problem by giving a copy of the alleged authorities to Mr Reese. Mr Oud's failure to do so is a damning indictment.

193 The exchange continued:

> So they could do what they wanted? --- Once they had agreed to release the funds, they couldn't just demand those funds back. And that made perfect sense to me.
>
> And so you didn't consider - - -
>
> **HIS HONOUR**: That may be so, Mr Oud. But why didn't you send the copy – it still doesn't answer Mr Yovich's question which is why didn't you send a copy of the authority to Mr Reese? --- It didn't even occur to me, to be honest.

194 The Tribunal finds that Mr Oud's answer that it did not occur to him to send a copy of the authority to Mr Reece is a lie.

195 The exchange continued:

> **YOVICH, MR**: I have another suggestion for you, Mr Oud. I'm sure you will not agree with it, but my suggestion to you is you didn't send it to Mr Reese because you wanted to hide things from him? --- That's absolutely incorrect.
>
> You wanted to mislead? --- No.
>
> And you did mislead him, all the way up to and including 28 April, about where the funds were? --- That's incorrect.
>
> And you did that on purpose, didn't you? --- I deny that.
>
> And when you got Mr Reese's email on 28 April saying, 'Prove to us that the funds are still in your account', the easiest thing in the world would have been to say, 'The funds are no longer in my account', and you should know that, you were silent on it? --- No. That's not correct.
>
> All right. Now - - - ? --- My – my primary focus, as I've said to you all along - - -
>
> You've answered my question, Mr Oud? --- I didn't want to be accountable to two masters.

(ts 166-172, 20 September 2018)

196 Mr Oud's claim that he needed Mr Cacciola's or CSG's authority to respond to Mr Reese, CSG's solicitor, is ludicrous. Mr Oud's belief, if it existed, that Mr Oxlade would return the funds does not justify an implied representation that the funds were still in Mr Oud's trust account.

197 Mr Oud knew that the funds were not in his trust account. He knew that the email was misleading. The Tribunal finds that Mr Oud's emails were intended to mislead Mr Reese into believing that the funds were still in Mr Oud's trust account. Mr Oud's subjective intention was to mislead Mr Reese. Mr Oud was subjectively aware that the emails were false and misleading.

Withdrawal of complaint

198 At paras 81-84 of its SFC the Committee submitted:

81. On 4 May 2016, Mr Reese contacted the Legal Profession Complaints Committee (Committee) concerning [Mr Oud's] failure to respond to his requests for a trust receipt and the trust ledger in respect of the CSG loan funds. The Committee contacted [Mr Oud] the same day to inform him of that contact and to make enquiries of him regarding the CSG loan funds.

82. Some time between 4 and 9 May 2016, Mr Oxlade and Dr Fiore and their associate Mr Jaydeep Biswas (Mr Biswas), became aware either that Mr Reese had foreshadowed reporting [Mr Oud] to the WA Law Society (or equivalent) or that the Committee had been in contact with [Mr Oud]. During that time, Mr Biswas attempted to negotiate an agreement with CSG in relation to repayment of the loan.

83. In an email sent on 9 May 2016 at 9.04 am from Mr Oxlade to Dr Fiore and [Mr Oud], Mr Oxlade set out proposed terms for the repayment of the loan. Mr Oxlade suggested that [Mr Oud] send an email to Mr Reese with the proposed settlement terms, which included a condition that Mr Reese confirmed contact with the Law Society (sic: Committee) and the formal withdrawal of the complaint.

    [Exhibit A page 510]

84. [Mr Oud] sent an email to Mr Reese on 9 May 2016 at 3.51 pm, in which [he] said that he understood that discussions had taken place between Mr Cacciola, and Mr Biswas. [Mr Oud] then said, relevantly:

    > 'It has been agreed that loan funds are to be repaid by Mr Oxlade within 48 hours directly into Mr Cacciola's nominated account contingent upon you immediately sending an email sent (sic) to the Legal Practitioners (sic) Complaints Committee withdrawing your complaint and explaining the confusion that occurred in the terms discussed.
    >
    > I am further advised that the remaining balance of the loan (interest, fees and charges) shall be under the terms and conditions of the loan (3 months).'
    >
    > [Exhibit A pages 510-511]

199 Mr Oud admitted paras 81, 83 and 84 of the SFC and says further that:

1) the email identified in para 84 of the SFC was sent at 3.51 pm after Mr Oud had received the email from Mr Oxlade referred to in para 83 of the SFC;

2) the email reflected what Mr Oud believed on the basis of the said email from Mr Oxlade sent at 9.04 am had occurred between Messrs Cacciola and Biswas; and

3) Mr Oud then received an email sent by Mr Reese at 4.03 pm on 9 May 2016 copied into Mr Cacciola, Mr Oxlade and Mr Biswas setting out terms for payment of the $300,000 including the statement that 'Should the above terms be complied with, my client will withdraw their complaint';

[Exhibit A page 511]

4). Mr Oud did not suggest or initiate the request that the complaint against him be withdrawn.

(Oud ASFC para 43)

200 Mr Cacciola's evidence was:

I do not now recall the precise matters, but recall receiving a phone call saying that if we retracted the complaint about Mr Oud, then CSG would get a pay out of the loan. I cannot now recall if that discussion was with Mr Biswas or another person. There was some negotiation going on to try to get the CSG net loan funds back and I recall saying to Paul to just hold off with the complaint as Mr Oxlade was making an offer which I was waiting to see in writing, and that we should wait and see what happened with that. In the end nothing was achieved and CSG's money was never returned

(Exhibit E page 15-16 para 44).

201 Ms Johnson's evidence was:

In his 6 May 2016 email (ABOD 18) and in response to my query as to the trust funds, Mr Oud advised that the borrower and lender were communicating about the loan funds - and that an imminent resolution was anticipated. He further noted that the *'confusion surrounding this issue has been clarified*' and advised that the lender would be sending an email explaining 'what actually in fact occurred' such that the complaint to the Committee would come to an end.

(Exhibit D page 8 para 23)

202 In cross-examination the following exchange took place:

YOVICH, MR: There's no (indistinct) on page 580, Mr Oud? --- There is. In – in the email there, he spelt Reese's name in the email that he sent on the – the – 508, the third last paragraph.

I know that. I'm not asking you about that. I'm asking about the email that you sent, which is email you marked J and said to the LPCC on 12 July 2016:

> I was given instructions by Colin Oxlade to send an email, as dictated to me, to Mr Reese, a copy of which is attached hereto and marked J.

? --- So what's the question?

The question is that Mr Oxlade, who you by this time realised had lied to you and duped you, told you to do something and you did it? My major concern, as I told you before, was once I realised I had been duped, was to do everything possible to make sure these people were paid back their money.

And - - - ? --- Because it was their money. It was not – it's not – it wasn't other people's money. They lied.

And the confusion that you describe in your email at page 580 - - - ? --- Is it my – is – yes, the confusion. Yes.

This is what Mr Oxlade said for you to say? --- I can't recall whether – I – I don't – I don't believe he said – he used those words – confusion – no.

So those were your words? --- Which – sorry – which page are you referring to?

580.

VINER, MR: 580. Yes. 580.

YOVICH, MR: So is this email in your words? --- Yes. I was still of the belief that they had sent it – you've got to understand - - -

Mr Oud, different question. My question is: is this email one that you composed or that someone else composed and you sent? Let me read.

Please do? --- I sent this email to Reese. Yes.

And you sent it to him in order to hopefully get the deal done for the $300,000; correct? --- What deal done? What are you talking about?

> The money returned? That was the primary reason. Yes.
>
> And your primary reason was to get yourself out of a possible investigation by the LPCC? --- Well - - -
>
> Whether or not you had done anything wrong? --- The primary reason is not to – was to get the money repaid. That's correct. Well, it was the - - -
>
> And the removal of any complaint against you was just a fortunate by-product that was not your idea? --- Mate, it was the fact that I had been reported. Yes. But it wasn't my – it was based on a lie that – I take that word back – a fraudulent act committed on the part of Oxlade – presumably, Oxlade – that he forged those signatures.
>
> And the first suggestion that the matter be resolved this way that you heard about was on 9 May? --- When I got that letter – that email – that's right.
>
> That's the 508 email? --- Yes. The email saying – from Oxlade to everybody about what Biswas had negotiated.
>
> And your email to the LPCC on 6 May at 10 am in which you said that you expected the borrower and the lender would 'resolve the confusion about the issues between you' was something different? --- I described it as confusion. The fact of the matter is that they had lied and taken the money and it needed to go back.
>
> And the fact of the matter was that you wanted the complaint dropped – that was your bit of – your condition for the loan funds being - - - ? --- No. No. No. It wasn't.
>
> (ts 179-180, 20 September 2018)

203 Mr Oud sent the email containing the terms concerning the withdrawal of the complaint.

204 Mr Oud further submitted that:

a) He does not know and cannot admit para 82 save to refer to the email from Mr Oxlade referred to in para 83 of the SFC and the email sent by him to Mr Reese copied into Mr Cacciola, Mr Oxlade and Mr Biswas referred to in para 84; and

b) By 9 May 2016 and the exchange of emails which occurred that day Mr Oud formed the belief that

> Mr Oxlade must have acted fraudulently in presenting to him the authorities purportedly signed by Mr Cacciola and instructing Mr Oud to pay out the $300,000 as directed by him.

(Oud ASFC paras 43A and 43B)

205 Mr Oud sent the email and he knew the terms of the email.

Ground 1

206 At paras 85-92 of its SFC in relation to Ground 1 of Annexure A, the Committee alleged:

> 85. [Mr Oud] undertook not to disburse any of the CSG loan funds without the 'expressed written consent' of Mr Cacciola as well as that of Mr Oxlade. The importance of this undertaking to CSG for the protection of CSG's interests was or should have been evident to [Mr Oud] from the information referred to in paras 3 to 23 and 26 to 32 [of the Committee's SFC], and from all Mr Oud's dealings with Mr Oxlade to that point.
>
> 86. Necessarily implicit in the performance of this undertaking was the requirement that [Mr Oud] only disburse loan funds consistently with the terms of any expressed written permission from Mr Cacciola.
>
> 87. On 23 March 2016 [Mr Oud] received what purported to be an expressed written consent signed by Mr Cacciola to disburse $175,000 *'for previous expenses/advances to Belden Namah directly relating to the PNG Platinum deal'*. [Mr Oud] made no attempt to contact Mr Cacciola to verify that he had genuinely given this consent, nor to clarify whether the funds were to be disbursed directly to Mr Namah or to another entity.
>
> 88. Instead, [Mr Oud] relied on oral instructions from Mr Oxlade to disburse the funds in the manner set out in para 40 [of the Committee's SFC] without checking with either Mr Reese or Mr Cacciola that Mr Cacciola gave his consent at all or to the disbursement of the funds in the manner Mr Oxlade instructed [Mr Oud] to disburse the funds.
>
> 89. On 29 March 2016 [Mr Oud] received what purported to be two further and different expressed written consents signed by Mr Cacciola to disburse, ultimately, the remaining $125,000 of the CSG loan funds. Again, [Mr Oud] made no attempt to contact either Mr Reese or Mr Cacciola to verify that he genuinely had given either of these consents, nor to clarify why

the terms of the consent had changed, nor to clarify how or to whom the funds were to be disbursed.

90. [Mr Oud] disbursed the CSG loan funds without the actual consent of Mr Cacciola in reckless disregard as to whether he was in breach of his undertaking.

91. Alternatively, he was grossly careless in failing to ensure that the release of the CSG loan funds was not in breach of the undertaking.

92. [Mr Oud's] conduct in releasing the CSG loan funds in the circumstances described above is professional misconduct in that it was conduct that involved a consistent and substantial failure to reach a reasonable standard of competence and diligence.

207 In relation to Ground 1 of Annexure A, Mr Oud's response was:

1) Mr Oxlade fraudulently deceived Mr Oud into disbursing from the firm's trust account the CSG loan funds, $300,000, received from Credit Solutions Group Pty Ltd.

Particulars of fraudulent deception

(a) Mr Oxlade fraudulently forged Mr Cacciola's signature on:

(i) the attachment to the email sent by Mr Oxlade to Mr Oud referred to in para 38 of the Committees SFC;

(ii) the attachment to the email sent by Mr Oxlade to Mr Oud referred to in para 42 of the Committee's SFC; and

(iii) a letter delivered to Mr Oud by Dr Fiore referred to in para 43 of the Committees SFC; and

(b) by the attachments referred to in paras 38 and 42 of the SFC and the letter referred to in para 43 and his instructions to the practitioner as set out in para 36 of the SFC, Mr Oxlade fraudulently deceived Mr Oud into making disbursements of the sum of $300,000 to:

(i) Mr Oxlade - $75,000;

(ii) Ms McKelt - $100,000;

(iii) Belden Namah - $25,000;

(iv) Mr Oxlade - $10,000; and

(v) Mr Orlando Maiolo - $115,000;

(c) in acting on the authorities bearing the apparent signature of Mr Cacciola there was no reason for Mr Oud not to accept that Mr Cacciola's signature was other than genuine;

(d) Mr Oud believes and the Committee suspects Mr Oxlade committed criminal offences by forging the purported signatures of Mr Cacciola on the basis of which Mr Oud acted to disburse the $300,000 CSG loan funds; and

2) In the circumstances, Mr Oud's conduct was neither unsatisfactory professional conduct nor professional misconduct.

(Oud ASFC paras 44 and 45)

208 Mr Oxlade's fraud would have been obvious if Mr Oud had taken even the most basic steps of checking with Mr Cacciola or Mr Reese. Mr Oud failed to do so. The reasons why Mr Oud should have been alerted to the validity of the authorities are detailed above. He should not have released the funds.

209 The Tribunal finds that Mr Oud acted in reckless disregard as to whether he was in breach of the undertaking.

210 The authorities make clear the importance of a solicitor's undertaking. Mr Oud knew that his undertaking was central to the loan funds transfer taking place. Mr Oud's conduct in releasing the funds in the circumstances would be regarded as disgraceful or disreputable by lawyers of good repute. Mr Oud was more concerned with the repayment of his $20,000 loan than he was with honouring the terms of his undertaking. Mr Oud's conduct amounted to professional misconduct as alleged in SFC para 92.

211 The Tribunal finds that Mr Oud subjectively recklessly disregarded whether the authorities were valid or not. He was wilfully indifferent to the truth of the authorities despite the clear warnings as set out above.

212 The Tribunal finds that:

1) Mr Oud undertook not to disburse any of the CSG loan funds without the 'expressed written consent' of Mr Cacciola as well as that of Mr Oxlade. The importance of this undertaking to CSG for the protection of CSG's interests was or should have been evident to Mr Oud from the information referred to in paras 3 to 23 and 26 to 32 of the Committee's SFC, and from all Mr Oud's dealings with Mr Oxlade to that point.

2) Necessarily implicit in the performance of this undertaking was the requirement that Mr Oud only disburse loan funds consistently with the terms of any expressed written permission from Mr Cacciola.

3) On 23 March 2016 Mr Oud received what purported to be an expressed written consent signed by Mr Cacciola to disburse $175,000 'for previous expenses/advances to Belden Namah directly relating to the PNG [Papua New Guinea] Platinum deal'. Mr Oud made no attempt to contact Mr Cacciola to verify that he had genuinely given this consent, nor to clarify whether the funds were to be disbursed directly to Mr Namah or to another entity.

4) Instead, Mr Oud relied on oral instructions from Mr Oxlade to disburse the funds in the manner set out in para 40 of the Committee's SFC without checking with either Mr Reese or Mr Cacciola that Mr Cacciola gave his consent at all or to the disbursement of the funds in the manner Mr Oxlade instructed Mr Oud to disburse the funds.

5) On 29 March 2016 Mr Oud received what purported to be two further and different expressed written consents signed by Mr Cacciola to disburse, ultimately, the remaining $125,000 of the CSG loan funds. Again,

Mr Oud made no attempt to contact either Mr Reese or Mr Cacciola to verify that he genuinely had given either of these consents, nor to clarify why the terms of the consent had changed, nor to clarify how or to whom the funds were to be disbursed.

6) Mr Oud disbursed the CSG loan funds without the actual consent of Mr Cacciola in reckless disregard as to whether he was in breach of his undertaking.

7) Mr Oud's conduct in releasing the CSG loan funds in the circumstances described above is professional misconduct in that it was conduct that involved a consistent and substantial failure to reach a reasonable standard of competence and diligence.

Ground 2

213 At paras 93-96 of its SFC the Committee submitted in relation to Ground 2 of Annexure A:

93. A law practice is required in accordance with section 228(1) and (3) of the Act to keep, in the form of a permanent record, trust records in relation to the trust money received by the practice, in accordance with the Regulations and in a way that at all times discloses the true position in relation to trust money received for or on behalf of any person.

94. On 28 March 2016 [Mr Oud] failed to ensure, in his role as the sole legal practitioner director of the law practice, that withdrawals from the firm's trust account made by electronic funds transfer on around 23 March 2016 of sums of $100,000 and $75,000, were properly disclosed in the firm's trust records in circumstances where:

94.1 Regulation 45 requires that a law practice keep 'required particulars' of each withdrawal of trust funds by electronic funds transfer, where the "required particulars" must include for a payment to an authorised deposit taking institution (ADI), the name or BSB number of the ADI and that name of the person receiving the benefit of the payment;

94.2 On 23 March 2016:

a) at 2.05 pm [Mr Oud] transferred $75,000 from his firm's trust account to Mr Oxlade's Commonwealth Bank of Australia account;

b) at 2.09 pm [Mr Oud] transferred $100,000 from his firm's trust account to Ms Kathryn McKelt's Commonwealth Bank of Australia account;

94.3 The transfer of these funds was recorded in the firm's trust ledger for Mr Oxlade as two separate payments to Mr Namah of $75,000 and $100,000;

94.5 The Commonwealth Bank is an ADI within the meaning of the Regulations;

94.5 Based on information provided to her by [Mr Oud] as set out in paragraphs 54 to 56 [of the Committee's SFC], [Mr Oud's] bookkeeper entered into the firm's trust records that each of the two withdrawals from the firm's trust account were payments to Mr Namah with the BSB and account details set out in paragraph 57 [of the Committee's SFC], when in fact neither payment was made to Mr Namah and the trust records did not record the details of the BSB and account numbers for each of the recipients of the withdrawals, namely Mr Oxlade and Ms McKelt, the details of which were known to [Mr Oud];

and, as a result of the correct details of the names and BSB and account numbers of each of the recipients not being recorded in the trust records, the firm's trust records did not accurately record all the required particulars set out in Regulation 45, such that the firm's trust records did not disclose the true position in relation to the withdrawal of those trust funds as required by section 228(3)(b) of the Act.

95. On 7 April 2016 [Mr Oud] failed to ensure, in his role as the sole legal practitioner director of the law practice, that withdrawals from the firm's trust account made by electronic funds transfer on around 30 March 2016 of the sums of $10,000 and $115,000 were properly disclosed in the firm's trust records in circumstances where:

95.1 Regulation 45 requires that a law practice keep 'required particulars' of each withdrawal of trust funds by electronic funds transfer, where the 'required particulars' must include for a payment to an ADI, the name or BSB number of the ADI and that name of the person receiving the benefit of the payment;

95.2 On 30 March 2016:

a) at 1.22 pm [Mr Oud] transferred $10,000 from his firm's trust account to Mr Oxlade's Commonwealth Bank of Australia account;

b) at 1.33 pm [Mr Oud] transferred $115,000 from his firm's trust account to Orlando Maiolo's Macquarie Bank Limited account;

95.3 The transfer of these funds was recorded in the firm's trust ledger for Mr Oxlade as two separate payments to Mr Namah of $10,000 and $115,000;

95.4 The Commonwealth Bank and the Macquarie Bank are ADIs within the meaning of the Regulations;

95.5 Based on information provided to her by [Mr Oud] as set out in paragraphs 55 to 56 [of the Committee's SFC], [Mr Oud's] bookkeeper entered into the firm's trust records that each of the two withdrawals from the firm's trust account were payments to Mr Namah with the BSB and account details set out in paragraph 57 [of the Committee's SFC], when in fact neither payment was made to Mr Namah and the trust records did not record the details of the BSB and account numbers for each of the recipients of the withdrawals, namely Mr Oxlade and Mr Maiolo, the details of which were known to [Mr Oud];

and, as a result of the correct details of the names and BSB and account numbers of each of the recipients not being recorded in the trust records, the firm's trust records did not accurately record all the required particulars set out in Regulation 45, such that the firm's trust records did not disclose the true position in relation to the withdrawal of those trust funds as required by section 228(3)(b) of the Act.

96. [Mr Oud's] conduct referred to in paragraphs 94 and 95 [described above] constituted unsatisfactory professional conduct within the meaning of sections 402 and 438 of the Act in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner, particularly where the practitioner had given an undertaking that the funds would only be disbursed with the expressed written consent of the lender of the funds and in accordance with the terms of that consent.

214 In relation to Ground 2 of Annexure A Mr Oud's response was:

1) Mr Oud accepts that his trust account records did not correctly record the identity of the persons who

received the payments made from his trust account on 23 and 30 March 2016 nor the BSB and account numbers for each of the recipients of those payments, as required by reg 45 of the LP Regulations and s 228(3)(b) of the LP Act.

2) When advising his bookkeeper on recording in his trust account payments of the CSG loan funds Mr Oud believed proper entries were being made but inadvertently failed to verify that proper entries for bank account details of the recipients of payments had been recorded as required by the LP Regulations and the LP Act.

3) Mr Oud admits that his conduct in failing to ensure that the required account details were kept constituted unsatisfactory professional conduct.

(Oud ASFC paras 46-48)

215 The Tribunal finds that Mr Oud's conduct constituted unsatisfactory professional conduct.

216 The Tribunal finds that:

1) A law practice is required in accordance with s 228(1) and s 228(3) of the LP Act to keep, in the form of a permanent record, trust records in relation to the trust money received by the practice, in accordance with the LP Regulations and in a way that at all times discloses the true position in relation to trust money received for or on behalf of any person.

2) On 28 March 2016 Mr Oud failed to ensure, in his role as the sole legal practitioner director of the law practice, that withdrawals from the firm's trust account made by electronic funds transfer on around 23 March 2016 of sums of $100,000 and $75,000, were properly disclosed in the firm's trust records in circumstances where:

a) Regulation 45 requires that a law practice keep 'required particulars' of each withdrawal of trust funds by electronic funds transfer, where the

'required particulars' must include for a payment to an authorised deposit taking institution (ADI), the name or BSB number of the ADI and that name of the person receiving the benefit of the payment;

b) On 23 March 2016:

i) at 2.05 pm Mr Oud transferred $75,000 from his firm's trust account to Mr Oxlade's Commonwealth Bank of Australia account;

ii) at 2.09 pm Mr Oud transferred $100,000 from his firm's trust account to Ms Kathryn McKelt's Commonwealth Bank of Australia account;

c) The transfer of these funds was recorded in the firm's trust ledger for Mr Oxlade as two separate payments to Mr Namah of $75,000 and $100,000;

d) The Commonwealth Bank is an ADI within the meaning of the Regulations;

e) Based on information provided to her by Mr Oud as set out in paras 54 to 56 of the Committee's SFC, Mr Oud's bookkeeper entered into the firm's trust records that each of the two withdrawals from the firm's trust account were payments to Mr Namah with the BSB and account details set out in para 57 of the Committee's SFC, when in fact neither payment was made to Mr Namah and the trust records did not record the details of the BSB and account numbers for each of the recipients of the withdrawals, namely Mr Oxlade and Ms McKelt, the details of which were known to Mr Oud;

and, as a result of the correct details of the names and BSB and account numbers of each of the recipients not

being recorded in the trust records, the firm's trust records did not accurately record all the required particulars set out in Reg 45, such that the firm's trust records did not disclose the true position in relation to the withdrawal of those trust funds as required by s 228(3)(b) of the LP Act.

3) On 7 April 2016 [Mr Oud] failed to ensure, in his role as the sole legal practitioner director of the law practice, that withdrawals from the firm's trust account made by electronic funds transfer on around 30 March 2016 of the sums of $10,000 and $115,000 were properly disclosed in the firm's trust records in circumstances where:

a) Regulation 45 requires that a law practice keep 'required particulars' of each withdrawal of trust funds by electronic funds transfer, where the 'required particulars' must include for a payment to an ADI, the name or BSB number of the ADI and that name of the person receiving the benefit of the payment;

b) On 30 March 2016:

i) at 1.22 pm [Mr Oud] transferred $10,000 from his firm's trust account to Mr Oxlade's Commonwealth Bank of Australia account;

ii) at 1.33 pm [Mr Oud] transferred $115,000 from his firm's trust account to Orlando Maiolo's Macquarie Bank Limited account;

c) The transfer of these funds was recorded in the firm's trust ledger for Mr Oxlade as two separate payments to Mr Namah of $10,000 and $115,000;

d) The Commonwealth Bank and the Macquarie Bank are ADIs within the meaning of the Regulations;

e) Based on information provided to her by Mr Oud] as set out in paras 55 to 56 of the Committee's SFC, Mr Oud's] bookkeeper entered into the firm's trust records that each of the two withdrawals from the firm's trust account were payments to Mr Namah with the BSB and account details set out in para 57 of the Committee's SFC, when in fact neither payment was made to Mr Namah and the trust records did not record the details of the BSB and account numbers for each of the recipients of the withdrawals, namely Mr Oxlade and Mr Maiolo, the details of which were known to Mr Oud;

and, as a result of the correct details of the names and BSB and account numbers of each of the recipients not being recorded in the trust records, the firm's trust records did not accurately record all the required particulars set out in Reg 45 of the LP Regulations , such that the firm's trust records did not disclose the true position in relation to the withdrawal of those trust funds as required by s 228(3)(b) of the LP Act.

4) Mr Oud's conduct referred to in paras 94 and 95 described above in the Committee's SFC constituted unsatisfactory professional conduct within the meaning of s 402 and s 438 of the LP Act in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner, particularly where the practitioner had given an undertaking that the funds would only be disbursed with the expressed written consent of the lender of the funds and in accordance with the terms of that consent.

Ground 3

217 In relation to Ground 3 of Annexure A the Committee alleged at paras 97-100 of its SFC:

97. On 22 March 2016, after the deposit of the CSG loan funds into [Mr Oud's] trust account, Mr Reese asked for a receipt for the trust monies received by the law practice.

98. On 28 April 2016 Mr Reese again asked for a receipt for the trust monies received by the law practice, as well as confirmation that the funds were still in his firm's trust account.

99. Mr Oud ignored the first request, and responded to the second request by saying that he was seeking instructions from his client, that he had not been able to get those instructions and that he would respond when he did so, in circumstances where

    99.1 pursuant to Regulation 41(2) of the Regulations the law practice of which he was the sole legal practitioner director was required to make out a receipt after receiving those monies; and

    99.2 pursuant to Regulation 41(6) of the Regulations the law practice was required to deliver on request to the person from whom the trust money was received the original receipt.

100. Mr Oud's failure to comply with Mr Reese's requests in a timely manner or at all was a breach of Regulations 41(2) and 41(6) and constituted a failure to reach a reasonable standard of competence and diligence, so as to amount to unsatisfactory professional conduct pursuant to sections 402 and 438 of the Act.

218 In relation to Ground 3 of Annexure A Mr Oud's response was:

1) Mr Oud accepts that he was obliged to provide a trust account receipt to Mr Reese in a timely manner but excuses his conduct as set out in the following contentions.

2) Mr Oud further refers to:

    a) his repeated position that he did not wish to be responsible to both Credit Solutions Group Pty Ltd, as lender and a client, and Mr Oxlade, on behalf of Irongrow as a client, regarding the release of the $300,000 proposed to be deposited by Credit Solutions Group Pty Ltd to his trust account;

    b) in relation to the first request by Mr Reese, his understanding at the time that he was obliged to provide a trust account receipt only to his

client, Mr Oxlade, and says that he did provide a receipt to Mr Oxlade on 25 March 2016;

c) in relation to Mr Reese's second request, his belief on the basis of his contention in 50.1 and the terms of his undertaking as set out in paragraph 25 herein that he was required to obtain both Mr Cacciola's and Mr Oxlade's consent to the provision of the receipt to Mr Reese.

3) In all of the circumstances, Mr Oud does not admit that he failed to provide a trust account receipt to Mr Reese in circumstances which constituted unsatisfactory professional conduct.

(Oud ASFC paras 49-51)

219 Mr Oud's failure to provide a receipt to Mr Reese was inexcusable. He had a clear legal obligation to do so. The Tribunal rejects his response that he did not wish to be responsible to both parties; that has nothing to do with providing a receipt.

220 Mr Oud could not possibly have believed that he was obliged to provide a receipt only for his client. CSG deposited the money. There was absolutely no reason that Mr Oud required any consent let alone the consent of two parties to provide a receipt for the deposit of the funds. On what possible basis could Mr Oud believe that he could not provide a receipt to CSG's solicitor, Mr Reese? Mr Oud's failure to ever provide a copy of the recept to CSG or Mr Reese, even after he had been informed of his legal obligation by Ms Johnson of the Committee only emphasises Mr Oud's disregard of his obligations. All Mr Oud had to do was forward Ms Guthrie's email.

221 Mr Oud's conduct was unsatisfactory professional conduct.

222 The Tribunal finds that:

1) On 22 March 2016, after the deposit of the CSG loan funds into Mr Oud's trust account, Mr Reese asked for a receipt for the trust monies received by the law practice.

2) On 28 April 2016 Mr Reese again asked for a receipt for the trust monies received by the law practice, as well as confirmation that the funds were still in his firm's trust account.

3) Mr Oud ignored the first request, and responded to the second request by saying that he was seeking instructions from his client, that he had not been able to get those instructions and that he would respond when he did so, in circumstances where

a) pursuant to reg 41(2) of the LP Regulations the law practice of which he was the sole legal practitioner director was required to make out a receipt after receiving those monies; and

99.2 pursuant to reg 41(6) of the LP Regulations the law practice was required to deliver on request to the person from whom the trust money was received the original receipt.

4) Mr Oud's failure to comply with Mr Reese's requests in a timely manner or at all was a breach of reg 41(2) and reg 41(6) of the LP Regulations and constituted a failure to reach a reasonable standard of competence and diligence, so as to amount to unsatisfactory professional conduct pursuant to s 402 and s 438 of the LP Act.

Ground 4

223 At paras 101-106 of its SFC the Committee alleged in relation to Ground 4 of Annexure A:

101. After [Mr Oud] received on 4 April 2016 the email from Mr Cacciola referred to in para 67 [of the Committee's SFC], he knew or ought to have known that Mr Cacciola was unaware that [Mr Oud] had disbursed the CSG loan funds.

102. Between the time that he received that email and the time he received the 7.59 am Reese email on 28 April 2016, [Mr Oud] did not make any inquiries with Mr Cacciola or Mr Reese in relation to the CSG loan funds.

103. In the 7.59 am Reese email, and in his later email on 28 April 2016, Mr Reese required the CSG loan funds to be returned to

CSG. [Mr Oud] sent the three emails referred to in paragraphs 74 to 80 [of the Committee's SFC]; knowing that:

103.1 he had on 23 March 2016 and 30 March 2016 disbursed the CSG loan funds;

103.2 he had done so after receiving what purported to be signed consents to do so from Mr Cacciola;

103.3 he was not in a position to return the CSG loan funds to Mr Reese's trust account.

104. In the three emails referred to above, [Mr Oud]:

104.1 failed to refer to the fact that he had on 23 March 2016 and 30 March 2016 disbursed the CSG loan funds;

104.2 failed to refer to the purported signed consents he had received;

104.3 said that his client agreed to return the CSG loan funds upon certain conditions being met.

105. By doing so, [Mr Oud] conveyed the false impression that the CSG loan funds were retained in his firm's trust account and permitted that impression to remain uncorrected where he:

105.1 knew the emails were misleading in a material respect;

105.2 alternatively, was recklessly indifferent as to whether the emails were misleading in a material respect;

105.3 alternatively, was grossly careless as to whether the emails were misleading in a material respect.

106. [Mr Oud's] conduct in so doing constituted professional misconduct within the meaning of sections 403 and 438 of the Act, in that it would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence.

224 In relation to Ground 4 of Annexure A Mr Oud's response was:

1) Paragraph 101 of the SFC is denied. Mr Oud repeats paragraph 44 of Oud ASFC and further says in the prior belief that the $300,000 had been disbursed with the written consent of Mr Cacciola, Mr Oud directed a

proper inquiry to his client Mr Oxlade as referred to in paragraph 67 of the Committee's SFC;

2) In respect of para 102 of the SFC:

   a) he advised Mr Reese by the email sent at 9.24 am on 28 April 2016 referred to in para 72 of the SFC that the 'parties' meaning the parties to the CSG Loan and Mr Oxlade had reached an agreement as communicated by Mr Oud's email;

   b) between 4 April 2016 and 28 April 2016 that Mr Reese knew or ought to have known his client, Mr Cacciola, was in discussion with the parties to the CSG Loan concerning the disbursement of the $300,000;

   c) he properly directed his inquiry to his client Mr Oxlade by his email sent on 5 April 2016 at 3.32 pm referred to in para 67 of the Committee's SFC.

3) In respect to paragraphs 103, 104, 105 and 106 of the SFC, Mr Oud's response was:

   a) Mr Oud denies that by his alleged conduct he conveyed the false impression, as alleged in para 105 of the SFC or acted recklessly or with gross carelessness in a manner which constituted professional misconduct as alleged in para 106 of the SFC;

   b) Mr Oud at all relevant times believed on reasonable grounds that he had received the written consent of Mr Cacciola to the release and disbursement of the $300,000 as required by his undertaking to Mr Reese contained in Mr Reese's email sent to the practitioner on 22 March 2016 at 1.18 pm referred to in para 25 herein;

   c) Mr Oud advised Mr Reese by his email sent at 3.25 pm on 28 April 2016 that Mr Oxlade

> agreed to return the $300,000 on the conditions set out in that email. Implicit in that statement was the disclosure of the fact that the funds had been paid to Mr Oxlade or at his direction, consistent with Mr Oud's belief that Mr Cacciola had given his written consent to the disbursement of the $300,000 from Mr Oud's trust account.

(Oud ASFC paras 52-54)

225 Mr Oud's conduct seeking the consent pursuant to the undertaking when he knew the funds had been released conveyed the false impression that the funds were retained in the trust account. The emails were misleading in a material respect. Mr Oud's conduct amounts to professional misconduct.

226 Mr Oud conveyed the false impression that the CSG loan funds were retained in his firm's trust account and permitted that impression to remain uncorrected where he knew the emails were misleading in a material respect.

227 Mr Oud's conduct in so doing constituted professional misconduct within the meaning of s 403 and s 438 of the LP Act, in that it would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence.

228 The authorities make it clear that a practitioner has an obligation to deal honestly with fellow practitioners. Mr Oud breached that obligation.

229 The Tribunal finds that Mr Oud's conduct and communication with Mr Reese as set out above were false and misleading when he knew that his conduct and communication were false and misleading and it was his subjective intent to engage in conduct and communication that were false and misleading.

230 The Tribunal finds that:

1) After Mr Oud received on 4 April 2016 the email from Mr Cacciola referred to in para 67 of the Committee's SFC, he knew or ought to have known that

Mr Cacciola was unaware that Mr Oud had disbursed the CSG loan funds.

2) Between the time that he received that email and the time he received the 7.59 am Reese email on 28 April 2016, Mr Oud did not make any inquiries with Mr Cacciola or Mr Reese in relation to the CSG loan funds.

3) In the 7.59 am Reese email, and in his later email on 28 April 2016, Mr Reese required the CSG loan funds to be returned to CSG. Mr Oud sent the three emails referred to in paras 74 to 80 of the Committee's SFC; knowing that:

    a) he had on 23 March 2016 and 30 March 2016 disbursed the CSG loan funds;

    b) he had done so after receiving what purported to be signed consents to do so from Mr Cacciola; and

    c) he was not in a position to return the CSG loan funds to Mr Reese's trust account.

4) In the three emails referred to above, Mr Oud:

    a) failed to refer to the fact that he had on 23 March 2016 and 30 March 2016 disbursed the CSG loan funds;

    b) failed to refer to the purported signed consents he had received; and

    c) said that his client agreed to return the CSG loan funds upon certain conditions being met.

5) By doing so, Mr Oud conveyed the false impression that the CSG loan funds were retained in his firm's trust account and permitted that impression to remain uncorrected where he knew the emails were misleading in a material respect.

6) Mr Oud's conduct in so doing constituted professional misconduct within the meaning of s 403 and s 438 of

the LP Act, in that it would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence.

Ground 5

231 In relation to Ground 5 of Annexure A the Committee alleged at paras 107-109

> 107. In the email dated 9 May 2016 and referred to in paragraph 83 [of the Committee's SFC], [Mr Oud] conveyed to Mr Reese an offer that his client Mr Oxlade repay the CSG loan funds if, and by implication only if, Mr Reese withdrew a complaint he had made to the Legal Profession Complaints Committee against [Mr Oud], and told the Committee that the complaint had arisen out of a misunderstanding.
>
> 108. [Mr Oud's] conduct in sending the email dated 9 May 2016 had a tendency to subvert the authority of the Committee.
>
> 109. [Mr Oud's] conduct in acting in a manner that had a tendency to subvert the authority of the Committee constituted professional misconduct within the meaning of sections 403 and 438 of the Act, in that it would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence.

232 In relation to Ground 5 of Annexure A Mr Oud responded:

> 1. In respect of para 107 of the SFC Mr Oud's email to Mr Reese sent on 9 May 2016 at 3.51 pm was sent in circumstances where:
>
> a) Mr Oxlade had fraudulently presented documents bearing Mr Cacciola's purported signature to the practitioner to obtain the release of the $300,000 held by Mr Oud upon trust;
>
> b) an associate of Mr Oxlade, Jaydeep Biswas, had negotiated the return of the funds with Mr Cacciola;

c) the negotiated terms on which that was to be done included a term that Mr Reese withdraw the complaint to the Committee;

and Mr Oud had played no part in the negotiations by Mr Biswas identified by Mr Oxlade.

2) Mr Oud's email was not an offer made by the Mr Oud. Mr Oud conveyed to Mr Reese advice he had received from Mr Oxlade that an agreement had been reached between Messrs Biswas and Cacciola for the repayment of the CSG Loan funds which included a term agreed between them that the complaint by Mr Cacciola to the Committee would be withdrawn.

3) By the email from Mr Reese to Mr Oud on 9 May 2016 at 4.03 pm referred to in paragraph 43.3 of Oud ASFC, Mr Reese proposed, as a term of settlement between the parties to the CSG Loan and Mr Oxlade that should the $300,000 be paid on the terms set out in the email that Mr Cacciola would withdraw his complaint to the Committee;

4) Mr Oud denies his conduct subverted or had a tendency to subvert the authority of the Committee as alleged in paras 108 and 109 of the SFC or otherwise contravened s 403 and s 438 of the LP Act.

233 Mr Oud was under no obligation to convey an offer to withdraw the complaint. He took no steps to advise his clients that it was inappropriate. It was his intent to have the complaint withdrawn.

234 Mr Oud's conduct had a tendency to subvert the authority of the Committee and constituted professional misconduct.

235 The Tribunal finds that:

1) In the email dated 9 May 2016 and referred to in para 83 of the Committee's SFC, Mr Oud conveyed to Mr Reese an offer that his client Mr Oxlade repay the CSG loan funds if, and by implication only if, Mr Reese withdrew a complaint he had made to the Legal Profession Complaints Committee against

Mr Oud, and told the Committee that the complaint had arisen out of a misunderstanding.

2) Mr Oud's conduct in sending the email dated 9 May 2016 had a tendency to subvert the authority of the Committee.

3) Mr Oud's conduct in acting in a manner that had a tendency to subvert the authority of the Committee constituted professional misconduct within the meaning of s 403 and s 438 of the LP Act, in that it would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence.

Annexure B

GROUND

That the practitioner NICHOLAS NEIL PETER OUD (**practitioner**) between 29 March 2016 and 3 April 2016 inclusive, in connection with a creditor's petition in respect of John and Jennifer Warming (**Mr & Mrs Warming**) filed in the Federal Circuit Court in Adelaide ADG453/2015 (**creditor's petition**), engaged in professional misconduct within the meaning of sections 403 and 438 of the *Legal Profession Act 2008* (WA) (**Act**) in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by preparing and sending:

1. a letter addressed to the Federal Circuit Court in Adelaide dated 29 March 2016 (**the 29 March 2016 letter**) that contained the following statements (together, **the 29 March 2016 statements**):

    (a) that the practitioner acts for ICBC Capital Pty Ltd (**ICBC**), which statement was false and misleading as, in truth, the practitioner did not then and never had acted for ICBC, and ICBC at that time was in liquidation;

    (b) that the practitioner is currently holding $300,000.00 cleared funds in his trust account, which statement was

false and misleading as, in truth, the practitioner was holding $138,662.80 in his trust account as at 29 March 2016;

(c) that his client was aware of current bankruptcy proceedings against Mr and Mrs Warming listed in the Adelaide Registry, and was prepared to assist the Debtors' position, which statement was false and misleading as, in truth, the practitioner did not and never had acted for ICBC, and he had no instructions to that effect;

(d) that the practitioner had been instructed to release upon settlement of a pending commodity transaction a minimum of $200,000.00 to permit satisfaction of the petition amount, which statement was false and misleading as, in truth, the practitioner did not have any funds in trust at that time which were subject to such instructions;

2. a letter to solicitors Cowell Clarke dated 3 April 2016, which he knew was intended to be used by Mr Warming in connection with the hearing of the creditor's petition scheduled for 4 April 2016, that referred to the 29 March 2016 letter and contained the following statements (**together, the 3 April 2016 statements**):

(a) that his reference to ICBC Capital Pty Ltd was a 'cut and paste error', and that he was in fact holding the trust funds (being a reference to the $300,000.00 referred to in the 29 March 2016 letter) on behalf of Irongrow Corporation Pty Ltd/Mr John Buckby, a company unrelated to ICBC, which statement was false and misleading as, in truth, the practitioner was not at that time holding any trust funds on behalf of Irongrow Corporation Pty Ltd/Mr John Buckby;

(b) that the substance of the 29 March 2016 letter was otherwise correct, which statement was false and misleading as, in truth, the 29 March 2016 statements were all untrue,

in circumstances where, when making the 29 March 2016 statements and the 3 April 2016 statements, the practitioner:

(i) well knew each of the 29 March 2016 statements and the 3 April 2016 statements was false and misleading and had the potential to mislead the Federal Circuit Court and/or the party which had presented the creditor's petition and/or Mr & Mrs Warming's solicitors, Cowell Clarke;

(ii) alternatively, acted with reckless disregard as to whether or not each or any of the 29 March 2016 statements and the 3 April 2016 statements was false and misleading and had the potential to mislead the Federal Circuit Court and/or the party which had presented the creditor's petition and/or Cowell Clarke.

The statements of facts and contentions by the parties in relation to Annexure B

236 In its statement of facts and contentions in regards to Annexure B (SFC-B) the Committee referred to paras 3 to 41 inclusive of Annexure A to this application as background to the events outlined below and submitted at paras 4 to 8 of SFC-B:

> 4. By email sent on Monday 28 March 2016 at 6:06 am to Mr Oxlade with the subject title 'Freer' (Freer email), Mr Warming:
>
> 4.1 says that the sheriff will be evicting Mr Mark Freer's mother and father in the morning failing a last minute solution;
>
> 4.2 says that $100,000 would likely stop the eviction;
>
> 4.3 says that he is aware that [Mr Oud] holds $300,000 in trust which he believes is specifically for platinum;
>
> 4.4 asks Mr Oxlade to speak to Mr John Buckby, the director of Irongrow, to get his authority to use $100,000 of those funds, to be repaid once the MT103 clears;
>
> 4.5 if such authority is received, asks if Mr Oxlade could get confirmation that day on [Mr Oud's] letterhead saying he currently holds $100,000 in trust he can release immediately.
>
> [Exhibit A pages 565-566]
>
> 5. By a further email sent on 28 March 2016 at 2:31 pm to Mr Oxlade with the subject title 'Warming Bankruptcy – URGENT!!' (Warming bankruptcy email), Mr Warming:
>
> 5.1 refers to the bankruptcy proceedings against him and his wife being at 'critical point';
>
> 5.2 says that he and his wife have been ordered to file and serve an affidavit tomorrow (29 March 2016) to oppose the petition;

5.3 says that the 'the current registrar is tough' and the matter returns to Court on Monday 4 April 2016;

5.4 says that he hopes funds will arrive to resolve the claims against him that week;

5.5 says that he is going to try to resolve the matter for $200,000, but says that he has no credibility due to past failed attempts;

5.6 asks Mr Oxlade to get [Mr Oud] to send a letter tomorrow morning on [Mr Oud's] letterhead in terms that he sets out in that email, so that he can include the letter in the affidavit he has to file.

6. By email sent on 28 March 2016 at 5:23pm to Mr Warming in response to the Freer email (the Freer response), Mr Oxlade responds with details of the monies he is expecting to receive in the near future, relevantly including:

6.1 $300,000 from the MT103 which he says should clear by close of business tomorrow (29 March 2016);

6.2 around $500,000 being his share of the platinum deal with Mr Namah which he says will be transacted 'Thur/Fri'(31 March/1 April 2016), and states in relation to the CSG loan funds in the practitioner's trust account:

6.3 that he does not think they can 'blatantly misrepresent' the funds, as they are for a specific purpose;

6.4 suggests that 'given we don't need them until Thursday we could show them (but not use them)' (meaning the CSG loan funds) until he (Mr Oxlade) can put 'other funds in the [practitioner's trust] account';

6.5 asks Mr Warming to draft the letter he wants from [Mr Oud] telling him to 'be careful about how and what we say'.

[Exhibit A pages 564-565]

7. Mr Oxlade then sent a further email to Mr Warming on 28 March 2016 at 5:27 pm in response to the Warming bankruptcy email, in which he refers to the Freer response as outlining the source of funds and states that he will get [Mr Oud] to prepare the letter set out in the Warming bankruptcy email in the morning.

> 8. Mr Oxlade forwarded the Freer email and the Freer response on to [Mr Oud] on 28 March 2016 at 7:45 pm stating:
>
> > 'First email with the history and need for a letter before 10 am tomorrow (Adelaide time).'
> >
> > [Exhibit A page 563]

237 In his proposed further amended statement of facts and contentions in relation to Annexure B (Oud ASFC-B), Mr Oud referred to paras 3 to 29 of Oud ASFC in which he responded to Annexure A of the Committee's application and submitted:

> 1) he admitted receiving the emails set out in para 4 to 6 and 8 of the Committee's SFC-B, but denied having read the email chain which formed part of each email at any material time.
>
> 2). he does not know and cannot admit para 7 of the Committee's SFC-B.
>
> (Oud ASFC-B paras 4 and 4A)

238 Once again Mr Oud relies on his alleged failure to read the email chain.

239 The Committee alleged at para 9 of its SFC-B and Mr Oud admitted (Oud ASFC-B para 5) that:

> [Mr Oud] replied to this email from Mr Oxlade by an email sent on 29 March 2016 at 8:13 am, in which he asked Mr Oxlade to confirm that the MT103 would be transferred into his trust account 'today'. [Exhibit A page 563]

240 Mr Oud's evidence was that the first time he had any knowledge or awareness of Mr Warming was when Mr Oxlade telephoned him on the morning of 29 March 2016 (ts 113-114, 20 September 2018; Exhibit A page 56).

241 The fact that Mr Oud did not know Mr Warming and even have any awareness of him raises serious questions as to Mr Oud's motivation. It was obviously not because of any prior relationship with Mr Warming.

242 At para 10 of its SFC-B the Committee alleged:

> By email sent on 29 March 2016 at 9:02 am to [Mr Oud], Mr Oxlade on-forwarded the Warming bankruptcy email and his response to it on 28 March 2016 at 5:27 pm and said:
>
> > 'This is the one relating to John's Bankruptcy ……. Great Southern Plantation where we are offering $200K to wipe out $3m in a failed MIS!'
>
> Mr Oxlade did not respond to [Mr Oud's] email inquiry seeking confirmation that the MT103 funds would be transferred to [Mr Oud's] account that day. [Exhibit A page 558]

243 Mr Oud admitted receiving the email set out in para 10 of the SFC-B, but denies having read the email chain which formed part of it at any material time (Oud ASFC-B para 6).

244 Once again Mr Oud relies on his alleged failure to read the email chain.

245 At para 11 of its SFC-B the Committee alleged:

> By email on 29 March 2016 at 14.27 pm [Mr Oud] responded to the above email by saying that 'I am as always happy to assist … However, the love is going only one way! You were supposed to have $10K deposited in my account and have those shares issued' and asked Mr Oxlade to 'attend to' those matters.
>
> [Exhibit A page 558]

246 Mr Oud admitted para 11 of the SFC-B, and says further that the reference to the deposit of $10,000 to his trust account and the issue of shares related to the basis on which Mr Oud was prepared to act for Astra Far East Pte Ltd, a company he believed to be controlled by one of Mr Oxlade's associates.

247 Mr Oud denied that he was saying that he was happy to assist Mr Oxlade but that he wanted something in return. Mr Oud claimed that he was referring to something else (ts 101-102, 20 September 2018).

248 Mr Oud subsequently admitted that he wanted Mr Oxlade to deposit $10,000 into Mr Oud's account (ts 102, 20 September 2018).

249 The following exchange took place:

> **YOVICH MR**: Because in return for you doing him this favour in relation to the Warming bankruptcy, you wanted him to do something that he had to do? --- That's not – that's not true.

So they were completely unrelated - - -? --- That's right.

- - - although they were in the same email? --- Yes.

And your offer of assistance was not contingent on Mr Oxlade putting the $10,000 into your account? --- Most certainly not.

You would have helped him anyway? --- Well, it was – I did assist in providing that letter, yes. But I – they - - -

Not the – not my question? ---They are two separate issues.

Two separate issues that you put in the same email - - -? --- That's right.

- - - and asked him, and said to him at the end:

Thanks for your support.

? --- That was just the – that was just a – a – it was – it was (indistinct) because he was – he had – I had – he was supposed to have done something in relation to something else, and he hadn't done it.

And you were taking this opportunity, when he was asking you for a favour about an unrelated matter, to remind him of a thing that he had to do for you; is that your evidence?---Well, I was reminding him that that was an agreement we had, yes.

And that you wanted him to fulfil that agreement; correct? --- Well, that was the intended – intention that he said he was going to do. That's correct.

I'm not asking about his intention, I'm asking about your intention, Mr Oud. Your intention was to remind him that he owed you $10,000; correct? --- He didn't owe me $10,000.

Or that he had to put $10,000 into your account? --- They were going to be funds on account of work to be – anticipated to be done. They were - - -

So you wanted him to - - -? --- They were trust funds.

250 Mr Oud had a financial interest in the funds being deposited into his trust account.

251 The exchange continued:

You wanted – and were they deposited? --- No.

So at this stage, you knew that Mr Oxlade had a tendency to promise to do things and not do them? --- That's not correct.

Just this one thing, then - - -? --- No. There was – there was - - -

- - - that he had promised to do and hadn't done it?---There was only one other instance where I agreed to act on a case-by-case business for him in relation to a matter, and it – on that basis, these funds were going to be deposited on account of costs for anticipated work.

Okay. And so at page 89 of the (indistinct) document, you see the first page of this email chain; correct? --- It is, that's correct.

Which is the most recent of the emails; correct? --- That's correct.

And this is an email from Mr Oxlade to you on 29 March - - -? ---Yes.

- - - at 1.51, which appears to be earlier than your email, but that may be because he's in a different time zone? --- Probably. Yes.

And it's plainly a reply to your email because it says 're: Warming bankruptcy, urgent'; correct? --- Yes.

It has an attachment, being a payment authority letter to – that's the title of the attachment? --- That's right.

And it says – the email says:

> Per attached, going both ways!

Correct? --- Yes, it does. Yes.

Which is a direct reference to your email, 'the love is going only one way'; correct? --- I presume so, yes.

Yes. It refers to Ian Nathaniel, which you had referred to in the – your previous email; correct? --- Yes.

It refers to Oxlade buying all of the shares back, which is a reference to shares that you wanted to have issued in your previous email; correct? --- No, that's not correct.

It's completely different, unrelated shares, is it? --- Well, I – I – well, I can't say whether they're related or not. I don't - - -

Okay? --- I haven't drawn that – that (indistinct)

> At the time that you got the email, you didn't think, 'What are those shares that he's talking about', though, did you? --- No, I didn't think that (indistinct)
>
> You assumed that they were the shares that you had referred to in your email? --- No.
>
> You didn't have any – you didn't think about it at all? --- No, I didn't.
>
> Okay. Because it didn't matter to you whether Mr Oxlade kept his side of the bargain. You were going to help him in relation to Mr Warming anyway; correct? --- There was no relation between these two matters.
>
> Okay? --- They were – they were distinct matters.
>
> Okay. And so the fact that his email ends with:
>
> N.B. Letter for John Warming, please?
>
> is also coincidental?---He is cross- he is cross-pollinating the various issues here. There was – I was acting in relation to one specific matter, and he was – I was just reminding him that he had to do what he said he was going to do.
>
> In the context of him asking you for a favour? --- And he was – he was – this – no, no, it wasn't in the context of doing a favour. It wasn't in the context of a favour. It – it was – he had been harassing me to get these letters done to – for – for John Warming.
>
> Had he? --- Yes.

252 The email's content makes it plain that the issues were related. Mr Oud's answer is calculated to avoid the obvious implication arising from the email. It was a quid pro quo.

253 The exchange continued:

> But this was not the first communication about John Warming that he had with you; correct? --- I had – I had a telephone conversation with him.
>
> And you've made a file note of that telephone conversation? --- No, I didn't make a file note.
>
> Not a file note of that one. All right. So this email on page 90, that he sends you about John's bankruptcy – go back to page 90? --- Yes.

Which says, "This is the one relating to John's bankruptcy", he's alluding to something he has already discussed with you; is it? --- No, I don't believe so.

All right. So this is the first communication he has had with you about John's bankruptcy? --- No. It was discussed with me about – on the phone, about getting a letter done for Warming.

All right. So his statement, "This is the one relating to John's bankruptcy" was not a surprise to you because you knew about John's bankruptcy from before this email was sent? --- Only one – I had a conversation with him, I believe, yes.

Okay. And your email in response did not, in any way, say or imply that you were prepared to help Mr Oxlade in relation to Warming, but you wanted something out of it? --- No. It wasn't – there were – I stress this point, that there were unrelated issues.

You've made - - -? --- I was just merely using the opportunity to point out to him that I had be doing work in relation to another matter, and that he said that there was going to be funds put into my account for anticipated work to be done.

I see? --- And those funds hadn't been transferred to my account, as he had alluded to.

Okay. Now - - -? --- This Warming – this Warming matter was just – was something else that he had requested assistance in regard to.

Okay. And attached to his email on page 89 is a document called Payment of Authority Letter to; correct? --- What page are you referring to?

89? --- Yes, but what letter are you – okay. Sorry.

His email, and the attachment? --- There is an attachment there. I can see that. Yes.

Yes. Now, you described that attachment in your letter of 12 May 2016 to the committee, to which this email chain was an attachment; correct? --- Yes.

And you say, at page 27 of the book of documents, go back to that, "Attached hereto, marked 'I' is a copy of the covering email and letter of authorisation." Do you see that bit in the middle paragraph? --- On page - - -

27? ---Yes.

> And so the letter of authorisation comes at the end of the email chain at page 93, doesn't it? --- There was an attachment with the letter, yes.
>
> Yes. And you knew, on 12 May 2016, what that attachment was, don't you – didn't you? --- I told him.
>
> No, no. It's about what you told the committee? --- Sorry, I'm not – I'm not sure what your question is, sorry. Can you repeat it?
>
> All right. My question is this: the document on page 93, which you sent to the committee as part of this attachment I is the payment authority letter that was attached to Mr Oxlade's email, which is on page 89, isn't it? --- Yes, it is. Wait up. No. No, it's not.
>
> No, it's not. Well, that's what you told the committee in your letter of 12 May 2016? --- Well, then I've been – I've been confused and it's not – it's not the letter.
>
> (ts 103-107, 20 September 2018)

254 The following exchange took place:

> **YOVICH, MR**: Now, Mr Oud, the upshot of the events of 29 March in relation to the remaining CSG funds was that you got what you were told was the final authorisation letter, which is the document on page 94? --- The final authorisation letter to disburse the funds, yes.
>
> That letter did not say how much to pay to whom? --- No.
>
> You got that information from Mr Oxlade? --- I did, yes.
>
> And that information was that Mr Oxlade was to be paid $100,000? --- Correct.
>
> And Mr Maiolo was to get about $115,000? --- That's right.
>
> And it was a sheer coincidence that emails between you and Mr Oxlade on 29 March referred to you needing Mr Oxlade to deposit $10,000 into your trust account; correct? --- I didn't draw any connection at the time; correct.
>
> And, in particular, you didn't say, 'I want $10,000, and you can pay it out of that 125'? --- There is no connection between that.
>
> It's just a coincidence? --- Absolutely.
>
> (ts 103-107, 20 September 2018)

255 The Tribunal does not accept that it was just a coincidence. Mr Oud did not know Mr Warming. There was absolutely no reason to agree to send the letter other than as a favour to Mr Oxlade, in return for Mr Oxlade paying $10,000 to him.

256 At para 12 of its SFC-B the Committee alleged:

> Mr Oxlade responded to the above email at 11.21 am on 29 March 2016 attaching a document titled 'Payment Authority Letter 2' (March 2016) and saying 'I am buying all the shares back and will have proof of funds this week to show them.'
>
> [Exhibit A page 557]

257 Mr Oud admitted the email set out in para 12 of the SFC-B was sent, but denied knowledge of its contents (Oud ASFC-B at para 8).

258 The Tribunal rejects Mr Oud's plea that he did not know its contents.

259 In regards to the letter sent to the Adelaide Registry of the Federal Magistrates Court on 29 March 2016, the Committee alleged at paras 13, 14 and 15 of its SFC-B:

> On 29 March 2016, [Mr Oud] cut and pasted Mr Warming's draft letter referred to in para 5.6 [of the Committee's SFC-B] onto his letterhead and, after making some amendments and additions, signed and faxed the letter direct to the Federal Circuit Court in South Australia (29 March 2016 letter).
>
> The 29 March 2016 letter's contents, including its date and address, were as follows:
>
> '29 March 2016
>
> Federal Magistrates Court
> Adelaide Registry
> Level 5
> Roma Mitchell Commonwealth Law Courts Building
> 3 Angas Street
> Adelaide SA 5000
>
> By facsimile: 08 82191001
>
> Dear Sir
>
> Creditors Petition John and Jennifer Warming ADG453/2015
>
> I act for ICBC Capital Pty Ltd.

> I confirm that I am currently holding $300,000.00 cleared funds in my trust account to be released shortly upon settlement of a pending commodity transaction.
>
> My client is aware of current bankruptcy proceedings against John and Jennifer Warming listed in the Adelaide Registry in the above proceeding and client is prepared to assist the Debtors position for reasons both personal and commercial.
>
> Accordingly, I have been instructed to release upon settlement (scheduled within 14 days, likely earlier) a minimum of $200,000.00 to permit satisfaction of the Petition amount and to then negotiate a resolution of all claims maintained by the Petitioning Creditor.
>
> Yours sincerely'

[Mr Oud] had made three additions or changes to the letter from the text of Mr Warming's draft letter that he had cut and pasted from the email he received containing that draft:

1 he had added the date;

2 he had added the facsimile number for the Adelaide Registry of the Federal Magistrates Court; and

3 he had changed the third paragraph of the letter by changing it from two sentences in the Warming draft to one sentence, by deleting the full stop and the word 'Our' and adding the conjunction 'and' before the word 'client'.

[Exhibit A page 562]

260 In regards to his letter to the Federal Magistrates Court dated 29 March 2016, Mr Oud responded as follows:

1) There was no connection between the $300,000 referred to in Mr Oud's letter to the Federal Magistrates Court dated 29 March 2016 and the $300,000 deposited to his trust account by Credit Solutions Group Pty Ltd which was the subject of Annexure A of the Committee's application.

2). As at March 2016, Mr Oud understood that Mr Oxlade was attempting to obtain a loan of $300,000 from an international financier Rishi Levi (the Rishi Loan).

3) The Rishi Loan, as Mr Oud understood it based on what he was told by Messrs Oxlade and Fiore, was to

be a 'back-up loan' to pay for contingencies that might arise in respect to the purchase of the platinum the subject of Annexure A of the Committee's application.

4) About mid-morning on 29 March 2016 Mr Oxlade telephoned Mr Oud and asked him if he had read his email (about his lawyer mate John Warming), which Mr Oxlade had sent Mr Oud the night before. Mr Oud said that he had not, and that all he had received was an email with the heading 'Freer'. Mr Oud said that he sent an email to Mr Oxlade in response to that email that morning.

5) Mr. Oxlade then told Mr Oud that the email contained a draft letter that he wanted Mr Oud to send a letter on his behalf to assist Mr Warming's stave off bankruptcy proceedings. Mr. Oxlade said to Mr Oud that once the Rishi Loan settled he was prepared to release some of the Rishi Loan funds to bail him out.

6) Fraudulently and with intent to deceive Mr Oud, Mr Oxlade:

   a) told Mr Oud that that the funds had been sent and they would hit Mr Oud's account overnight and that these funds would be used to assist Mr Warming. Mr Oud said he did not know Mr Warming.

   b) sent the Freer email and the Freer Response to Mr Oud;

   c) led Mr Oud to believe ICBC Capital Pty Ltd was one of his solvent companies;

   d) had caused Peter Fiore to send to Mr Oud an email sent by Mr Oxlade on 25 March 2016 at 4.17 am (SA time) attaching a copy of an MT 103 international bank transfer showing the transmission of the sum of $300,000, which Fiore sent to Mr Oud by an email on 25 March 2016 at 9.26 am, fraudulently intending Mr Oud to rely upon the MTR and believe that the MTR funds would be deposited in his trust

account at the time the Federal Magistrates Circuit Court opened proceedings in the Warming bankruptcy hearing next morning.

7) Relying upon the truth of the statements by Mr Oxlade referred to in para 14 of the Committee's SFC-B, on 29 March 2016 at 5.20 pm WST in the belief that it was Mr. Oxlade's intention to assist Mr Warming with the settled Rishi Loan funds and that those funds would be deposited into his trust account at the time his letters would be read by the Federal Magistrate in Adelaide in the Warming bankruptcy proceedings, Mr Oud cut and pasted (with minor amendments) the draft letter referred to in para 13 of the Committee's SFC-B onto his letter head and urgently faxed it to the Federal Circuit Court Registry, in Adelaide.

8) Mr Oud admits paras 14 and 15 of the Committee's SFC-B and says further that the amendment referred to in para 15.3 namely deleting the full stop and the word 'Our' and adding the conjunction 'and' before the word 'client' provides weight to Mr Oud's contention that the letter was drafted in haste, because the purported amendments mean that the paragraph does not make sense.

(Oud ASFC-B paras 9-16)

261 Mr Oud was remarkably evasive when it came to whether or not he had read the email from Mr Oxlade. The email that Mr Oud subsequently cut and pasted from that email and sent to the Federal Circuit Court:

> And so then you read the email; correct? --- (indistinct)
>
> After Mr Oxlade said to you that he had sent an email about Mr Warming's bankruptcy - - -? --- Yes.
>
> - - - which contained a letter that he wanted you to send, did you read the email that Mr Oxlade had sent you? --- I presume so.
>
> Because it would make no sense for you not to read the email, would it? --- Well, I can't – I'm not really sure. I'm unsure what your (indistinct)

For one thing, Mr Oud, you don't have to follow me, Mr Oud; you just have understand my questions and answer them? --- But I'm not – I'm not – perhaps I'm not – I'm not zoned into what you're saying because I can't understand it.

You don't have to understand why I'm asking questions (indistinct)? --- I'm not asking – I'm not understanding - - -

After – my question is this – after you got Mr Oxlade's email did you read it? --- Well, I can't recall.

Okay. Mr Oxlade told you that it contained a letter he wanted you to send; correct? --- If that's what I put in my statement then it's correct.

And you put that in your statement two weeks ago, didn't you? --- Well, if it's written there; yes.

You wrote your own statement, didn't you? --- Of course.

And your recollection of events hasn't changed in the 13 days since you wrote it and filed it, has it? --- No, my recollection has not changed; no.

In fact that was the second version of that statement; the first one was 29 August, wasn't it? --- If you say so.

Okay. So in order to find out what letter Mr Oxlade wanted you to send for Mr Warming you would have to read the email that contained a letter, wouldn't you?---Not necessarily.

And – well, you would have to find the letter in the email chain, wouldn't you? --- Well, I cut and pasted the letter so - - -

And in order to cut and paste the letter you would have had to know where it was; correct? --- Well, I would have had to find the email to – yes.

And in order to find the letter in the email you would have had to read the email, wouldn't you? --- Not necessarily.

Otherwise you wouldn't know what to cut and paste? --- Well, it's fairly obvious there – it was a letter there cut and pasted.

And in order to find out why you were being asked to do this, you would have to read the email, wouldn't you? --- That's not correct; no.

No? You did not want to be informed about the reason for the email? --- It's not – no. It's not that I didn't want to be informed. It's just - - -

262 Mr Oud's assertion that he did not read the email which contained the letter he cut and pasted from is disingenuous.

263 The exchange continued:

> You did not consider - - -? --- Mr Oxlade sent a lot of emails to me that were chain emails that were sometimes 20-25 pages long. I didn't – when I read the first email, it said it contained a letter that – a letter in there. I
>
> would have found that email. It doesn't necessarily mean that I read the email. In fact, I'm almost certain that I didn't read the email - - -
>
> This email chain at the time that Mr Oxlade sent it to you was three pages? --- But, as I was saying to you, Mr Oxlade would send not just emails like this. He would – this one in particular – but all his emails were 25 pages long, often containing irrelevant material that I didn't read. No.
>
> All his emails were 25 pages long? --- Most of them were chain emails. Most of them were chain emails.
>
> This one is three pages, Mr Oud? --- I did not read it. In answer to your question, I did not read it. I just cut and pasted the letter.

264 The Tribunal rejects Mr Oud's evidence that he did not read the email chain on the basis that it was too long. The chain was three pages. The Tribunal finds that Mr Oud did read it. The exchange continued:

> And in doing so – you did read the letter that you cut and pasted, didn't you? --- Well, I did read it but not with any great detail – not enough detail, in hindsight. I admit that.
>
> You say – in fact, you – before you sent it, you actually changed it, didn't you? --- I made minor variations but I always do that.
>
> And in order to do that, you need to read the letter, don't you? --- But I scanned it. I'm not saying that I didn't read the letter.
>
> Okay? --- I didn't read it enough – the degree of accuracy – I focused on parts of the letter rather than the whole of the letter.
>
> So the letter that you were about to send to the Federal Magistrates Court in Adelaide under your signature and on your letterhead, you only read parts of? --- I'm saying that I didn't read it in enough detail – I didn't – I was focused on part of the letter – not the whole of the letter. In my mind at the time, I specifically noted that the payment was going to be made

> within 14 days of – and it was concomitant or dependent upon the commodity transaction being completed.

265 The letter is short. Mr Oud's evidence that he did not read the whole of the letter is preposterous. Indeed it is impossible to imagine how he could not read the whole letter. It was a letter he was sending with his name to the Federal Magistrates Court. Mr Oud lied when he said he did not read the entire letter which he had cut and pasted and made corrections to.

266 The exchange continued:

> Mr Oud, at the time that you sent the letter, you did not know who ICBC Capital were, did you? --- Right. No. I did not.
>
> You knew, however, that you didn't act for any entity called ICBC Capital, didn't you? --- That's correct.
>
> You did not have any retained from ICBC or Oxlade in relation to the Warming bankruptcy, did you? --- But I had no reason to believe that - - -
>
> My question was - - -? --- I just want to answer – go back to your first question.
>
> My question was this - - -
>
> HIS HONOUR: No. No. Mr Oud, I'm getting tired of having to tell you to answer the questions. It's not hard? --- But I wanted to answer the previous question. That's all.
>
> Answer the question. Did you – the question is clear. Just answer it?---In relation to ICBC Capital, I did not believe – I believed it to be one of Warming's and I put that in one of my statements - - -
>
> YOVICH, MR: Mr Oud, I don't care.
>
> HIS HONOUR: No. That's not the question, Mr Oud.
>
> THE WITNESS Can you repeat the question, please?
>
> HIS HONOUR: Answer the question.
>
> YOVICH, MR: At the time of the letter, you did not act for ICBC Capital? --- No. I did not.
>
> You have never acted for ICBC Capital? --- No.

> So when you said 'I act for ICBC Capital' in the letter, that was untrue? --- Yes. It is untrue.

267 Mr Oud never acted for ICBC Capital. His statement that he did was admittedly untrue.

268 The exchange continued:

> And you knew it was untrue when you sent it? --- That is – I would say that I wasn't – I did – when I copied the letter, I didn't read it with enough veracity. I regret doing that. I strongly regret - - -
>
> My question – you knew - - -? --- Can I say – answer your question? I'm answering your question.
>
> YOVICH, MR: No.
>
> HIS HONOUR: You're not - - -
>
> YOVICH, MR: You're not answering my question. Mr Oud, when you said – when you wrote "I act for ICBC Capital Proprietary Limited", you knew that it was untrue; correct? Because you did not act for ICBC Capital? --- Right. No. I did not act for ICBC Capital.
>
> And so you knew that that part of the letter was untrue? --- I say that – I knew after the event that that's untrue. I didn't pay attention at the time that it was true or not. I didn't and that was my mistake.
>
> So you did not care whether it was true or not? --- It's not that I didn't care.
>
> You did not turn your mind to whether it was true or not? --- No. It's just that I was negligent in doing so (indistinct)
>
> HIS HONOUR: Well - - -
>
> YOVICH, MR: All right. I will move on.

269 The Tribunal finds that Mr Oud knew that the statement that he acted for ICBC Capital was untrue when Mr Oud sent the letter.

270 The exchange continued:

> HIS HONOUR: - - - you can leave that to the panel, Mr Oud, as to (indistinct)? --- I presume – I'm not trying to use legal words. I'm saying – what I'm saying is I cut and pasted something in a rush, in a hurry, under duress, in certain circumstances. I was

focusing on one particular part of the letter. I admit that parts of the letter, in hindsight, were incorrect. I should have done better than what I did. What you're saying – at the time, I did not – no. I did not act for ICBC Capital.

YOVICH, MR: Now, having said all of that, Mr Oud, are you confident that the tribunal understands that that's your evidence? --- What do you mean by that?

Having said all of that, do you need to tell the tribunal that again? --- If you're being facetious, I don't appreciate it.

Not at all, Mr Oud. I'm just wanting to make sure that, when I ask you another question, you don't feel the need to repeat what you've just said because the tribunal already understands it?--- Please don't badger me.

VINER, MR: I object. I object to – I object to that – to the (indistinct)

HIS HONOUR: What do you object to, Mr Viner?

VINER, MR My learned friend is haranguing the witness with that comment.

HIS HONOUR: No. He's not haranguing the witness. This is a witness who, for the last hour, has persistently failed to answer the most simple of questions, which are obvious on the documentation, and it started off with "this

is the one range of John's bankruptcy". When the witness – any witness, let alone a legal practitioner – conducts himself like that and counsel cross-examining him tries to pin him down, that's not haranguing. What is happening is he's not answering the questions. He has been asked – we've now had a monologue from him and Mr Yovich is, as I understand it, simply trying to prevent another monologue. I have – and I'm sure the other members of the tribunal have no problems with that and, perhaps over lunchtime – you're not normally supposed to speak to your witness - - -

VINER, MR: No. I'm very conscious of my professional obligation.

HIS HONOUR: - - - but you might remind him of the duty to answer questions because I'm plainly not getting through to him and I'm a Supreme Court Justice. So, hopefully, a silk of your longstanding might get through to him. Mr Yovich.

YOVICH, MR: Thank you, your Honour. As at the time that you cut and pasted and edited the letter, you knew you did not act for ICBC Capital, didn't you? --- That's correct. Yes.

You also knew that, as at the time that you cut and pasted and sent this letter, you did not currently hold $300,000 cleared funds in your trust account, did you? --- That's correct.

To be used or released for any purpose; correct? --- I did not hold them at that time. No.

No? --- But I - - -

But you (indistinct) just said that you did? --- Yes. I can't even give you an explanation because you don't want to hear it.

I'm not asking for an explanation. Just – I'm just asking you to confirm the simple fact that you said that you held those cleared funds; correct?---That's correct. Yes.

When you knew that you did not; correct? --- At the time that I sent the letter, that's correct. Yes.

And in your letter to the LPCC on 12 July 2016 at page 192 of the documents – paragraph 35 – you said, at the representation, about $300,000 cleared funds being in your account – quote – did not reflect the discussions you had had with Oxlade before you sent the letter; correct?---Sorry. I'm just reading it.

Okay. Have you found those words? I'm pretty sure I've got them right. Just paragraph 35 and those words? --- I see.

Do you see those words ?--- I'm reading it. I'm sorry I'm not as quick as you.

That's all right? --- I see those words.

All right. And when you wrote those words to the LPCC, those words were true? Correct? --- That's correct.

And you go on in paragraph 35 to say:

Nor did it reflect my actual belief and understanding at the time that the letter was sent.

Correct? --- Yes.

So you knew, when you sent the letter, that that key part of it was untrue; correct? --- Yes. It – well, when you say 'untrue' – yes. Okay.

271 Mr Oud admitted he did not currently held $300,000 cleared funds when he sent the letter.

> Yes. And you knew that, if anyone read that letter, they would be misled if they believed it was true; correct? --- No.
>
> No. You thought that someone who read a letter from a solicitor would not believe it's true?---Well, if someone read it was true, then they would believe that – can you repeat that question. Sorry, sir.
>
> Certainly. You knew that if someone read the letter and believed that you were telling the truth they would be misled. Correct? --- At what point in time are you saying this? At the time?
>
> At the time that they read the letter? --- At the time that they – they read the letter I anticipated the funds were going to be in the account.
>
> That's not my question? --- Okay.
>
> If someone read the letter they would be misled because at the time you wrote the letter the money was not there? --- No.
>
> No. Because you've referred to this in your witness statement, haven't you? What you've effectively said is, 'I expected by the time anyone read the letter the following morning it would have become true'? --- That's right. That's correct.
>
> Okay. But if someone read it that night they would have been misled? --- Yes.
>
> And heaven forbid that people in court registries and judicial officers sometimes work after hours, don't they? --- Please don't talk to me in that way, please.
>
> Is the answer to my question - - -? --- I'm not a child. I – I - - -
>
> Is the answer to my question true or not? --- Well, I – I – is true? It's possible, yes, that's true.
>
> All right. And in any event, in order to be sure that no one would be misled all you had to do was say what the truth was which was that you anticipated that there would be $300,000 in cleared funds in your account that night; is that correct? --- That would be – that would have been a prudent course of action. Yes.

272 The 28 March 2016 was Easter Monday. The 29 March 2016 was a Tuesday. Mr Oud's statement that he expected the funds to be in the account overnight does not make the letter true. Letters are read on the basis of the facts at the time they are sent. In any event the letter was dated 29 March 2016, not 30 March 2016, the following day. The Tribunal does not accept Mr Oud's evidence. Mr Oud lied to the Federal Magistrates Court in his letter. The exchange continued:

> That would have been telling the truth, wouldn't it, Mr Oud? --- It wasn't my intent to deceive anybody. I did so copy and paste. I should have read the letter correctly.
>
> You did read the letter. You knew what it said and you knew it wasn't true. Correct? --- I – I deny that I intended to mislead or deceive anybody.
>
> I know you deny that but you read the letter before you sent it and you knew its contents were not true in that respect. Correct? --- That's not a true statement that reflects – accurately reflects the situation.
>
> Now, if the funds did not go into the account overnight then the letter would continue to be untrue, wouldn't it? --- That's correct. Yes.
>
> And the funds did not go into the account that night, did they? --- No. They did not.
>
> And the next morning you knew that the funds had not gone into the account overnight, didn't you? --- No, I was told that they didn't arrive; no.
>
> So you did know that they hadn't gone into the account? --- That's correct. Yes.
>
> So you knew then that anyone who read the letter that morning would be misled? --- I didn't – well, that's correct. Yes.
>
> And so you knew that your letter, which had started out untrue, was still untrue? --- No, because events of the situation overtook the matter at that point.
>
> That's not an answer to the question, Mr Oud. My question was you knew that the letter that you had written, which was untrue when you wrote it, was still untrue the next morning? --- I did – I'm trying to answer this question.
>
> Is the answer 'yes'? --- Well, if – if that was the case then yes, yes. That's correct. Yes.

> And it was the case, wasn't it? --- Well, yes.

273 The fact that Mr Oud did nothing on the morning of Wednesday 30 March 2016 when he knew the funds were not in his account evidences that he did not believe that the funds would be in his account. If he had a genuine belief that the funds would be in, he would have contacted the Court. He did not.

274 The exchange continued:

> And you knew it was the case, wasn't it? --- Well, I did know. Yes.
>
> And you know that the Legal Profession Conduct Rules require that a lawyer who misleads a court even innocently and finds out they've misled the court has to correct that as soon as they find out. Correct? --- I understand that. Yes.
>
> And you understood that in March 2016, didn't you? --- Well, I would have understood that. Yes.
>
> Yes. And you didn't correct the error, did you? --- I didn't have an opportunity.
>
> You had an opportunity, didn't you? --- No.
>
> All you had to do was send an email saying what the truth was? --- I - - -
>
> Correct? --- What had happened – can I say what happened?
>
> No. My question was - - -
>
> HIS HONOUR: Might as well, because I don't understand your answer.
>
> YOVICH, MR: - - - all you had to do - - -
>
> HIS HONOUR: You've sent a letter. The letter was sent by email, was it? --- That's right. Fax. Fax.
>
> By fax. So you didn't have an opportunity. Why didn't you have an opportunity? Was the fax machine not working or - - -? --- No, no.
>
> - - - was there some – was there a communications problem? --- No. There was no communications problem.
>
> All right. All right. So I'm puzzled? --- Okay.

275 Mr Oud offered no explanation at the time or at all as to why he 'did not have an opportunity' to correct the error. There is no evidence that he took any steps to correct the error at the time. The following exchange demonstrates that Mr Oud had no basis for a belief that the funds would be deposited overnight.

> We probably all are? --- Well, I'm getting confused of what actually happened now.
>
> YOVICH, MR: Well, I will move on to the next thing. What I'm asking now about the source of your belief that the $300,000 was going to be in there overnight. Now, the person who told you that was Mr Oxlade. Correct? --- Yes. That's correct. Yes.
>
> And he told you that in the telephone conversation? --- Yes.
>
> And he told you the source of those funds was the Rishi loan? --- That's right.
>
> Now, this was not the first time you've heard about the Rishi loan, was it? --- No.
>
> In your letter to the committee of 12 July at page 189 – if you can go to that. You said at paragraph 20 that Mr Oxlade told you once the Rishi loan settled he was prepared to release some of the Rishi loan funds to bail Mr Warming out?---That's right.
>
> And he said that, 'The funds had been sent and they would hit my account overnight'? ---Yes.
>
> And these were the funds that you were relying upon to turn your false letter into a true letter? --- That's correct. Yes.
>
> Okay. Now, you've told us in your witness statement that you did not read Mr Oxlade's email chain until all these events were over and in preparation for the hearing, in essence? --- Yes. That's correct.
>
> You didn't read it at the time? --- Yes. That's correct. Yes.
>
> And in your witness statement you say that that evidences the dishonest nature of Mr Oxlade, in your mind. Correct? --- I'm not following. Sorry.
>
> All right. You say in your email – in your witness statement, I think, that the email evidences the dishonest nature of Mr Oxlade? --- Because there's discussions there - - -
>
> I didn't ask why - - -? --- Yes.

- - - but it does, obviously? --- Yes.

And Mr Oxlade sent you that whole email chain, didn't he? --- He did, yes.

He was apparently prepared for you to read it? --- No.

No. He wasn't. He sent it to you in the express expectation that you wouldn't read it, did he? --- There was – I can't comment why he sent the – I can't comment on that. Sorry.

But - - -? --- I certainly did not read it.

- - - when a person sends you an email it is reasonable to assume that they expect you to read it - - -?---No. That's where - - -

- - - as a general proposition?--- - - - you have to be specific here. When I get an – no. The - - -

Just answer the general proposition? --- I'm – I am answering your question.

Do you agree with the general proposition - - -? --- No. I disagree with that – that statement.

All right. So what your evidence is is that as a general proposition when someone sends you an email they shouldn't expect that you would read it? --- There's an expectation that you read the first email. Yes.

And when a person sends you an email chain they are certainly prepared for you to read the whole email chain, aren't they? --- I don't – I – I don't think there's an intention there for that to happen.

If they positively don't want you to read a whole email chain they won't send you the whole email chain? --- I think that that's – you're implying things that just can't be inferred.

Okay? --- I would say – I would go further than that and say that when – I always read the emails that I get. I rarely - - -

Except Mr Oxlade? --- - - - if never – no matter what email I get I don't past the email that I'm being dealt with. And this was the case in this instance.

276 Mr Oud's evidence that he only read the first email in a chain is another lie. An email in an email chains is, in general, often difficult to understand without reading the previous email or emails.

277 The exchange continued:

Well, let's now talk about communications about the Rishi loan, Mr Oud. Go to page 549 of the book of documents, if you would, please? --- Yes.

Now, Mr Oxlade is emailing you. Correct? --- Yes.

On 10 March 2016? --- That's right.

And he says in that email a number of things, one of which is:

…and overlaying all of this is another 300K I raised from Rishi Levi going in today.

Do you see that - - -? --- Yes.

- - - part of the email? You read that? --- Yes.

So on 10 March 2016 Mr Oxlade is saying that he has raised $300,000 from Rishi Levi and it was going in that day? --- That's what it says. Yes.

And that's sent at 6.13 am on 10 March. So it's going in on 10 March. Correct? --- Yes.

It didn't go in on 10 March though, did it? --- No.

Well, that's just – let's just make one thing clear. $300,000 from Rishi Levi never went into your trust account ever, did it? --- No. It didn't.

Okay. Go to page 550. Later on that day, Mr Oxlade sends you another email letter – email - - -? --- Yes.

- - - the third line of which says:

Rishi instructing his Singapore investor to send direct your trust account.

Correct? --- Yes.

And that's the $300,000, isn't it? --- That would be, yes.

Okay. And it didn't go in then; correct? --- I don't think it says that – he says it's sending the process.

All right. Page 551. Mr Oxlade emails you again a couple of hours later on 10 March - - -? --- Yes.

- - - saying:

Still pushing for Rishi tonight.

?---Sure.

So the Rishi money was still coming in, but it hadn't come in? ---That's right.

553. 12 March. Email from Mr Oxlade to you? --- Yes.

The first part of it is about the Irongrow loan? --- (indistinct) it's not – is it to me? It's not to me.

Colin Oxlade to Nicholas - - -? --- It is. Yes, it is. Sorry.

It's all right. The first part of it is about the John Buckby Irongrow, 300k? --- Yes.

The second paragraph is about him contacting Cacciola; yes? --- Yes.

The third paragraph is:

On the Rishi Levi front, he has arranged 300k for me and I need to get to Sydney tonight –

etcetera, etcetera? --- Yes.

Continuing:

... and these funds will be available Monday morning.

And as you see from the top, this is an email sent on the Saturday? --- 'Not guaranteed yet'.

Yes? --- 'But I will call - - -'

Continuing:

These funds will be available. Waiting for his call to guarantee the funds.

? --- 'Not guaranteed yet, but I'm waiting for his call to guarantee the funds'.

Yes? --- Yes.

You read all that at the time? --- Yes, I would have read that.

Okay. So then we go to page 527? --- We're going back, are we?

So not in time. Do you see this is your file note? --- Yes.

13.3.2016. So that's the day after the last email I just said? --- Yes.

Colin says:

Loan from Rishi has been negotiated. A few things still to finalise.

? --- Yes.

Continuing:

These funds were to make up the rest of the deposit on a platinum.

? --- Yes.

Continuing:

Best not for me to contact him because it may upset applecart.

? --- Yes.

That's what Oxlade said to you? --- Yes.

Continuing:

Will keep me informed.

ie, Oxlade will keep you informed? --- That's right.

You didn't think it was suspicious that Mr Oxlade didn't want you to contact Mr Levi? --- No, not at all.

All right? --- Not at all.

But he's still promising that the Rishi funds are coming? --- Yes, that's correct.

Now go to page 554. Tuesday 15 March? --- Yes.

Email from Mr Oxlade to you and Peter Fiore? --- Yes.

And paragraph – this email you would have read because it was an email, regardless of whether there was a chain; correct? --- It was the first email, yes.

Yes. Which it appears to be. Go down four paragraphs to the one starting:

Very straight forward. Wait for me to get to Sydney and do another 300k with Rishi, which has been confirmed this morning.

See that? --- Yes.

Continuing:

Money getting sent from Dubai late this afternoon via SWIFT to Nick's trust account of which I have control over.

? --- Yes.

Okay. So on 15 March, Mr Oxlade is promising that the money from the Rishi loan will be getting to your trust account that afternoon, isn't he? --- Yes.

Also at the bottom of the email, he says:

I need 3k to get to Sydney for a few days to get this 300k done tonight and some basic walking-around money.

Do you see that? --- Yes.

So Mr Oxlade needs to borrow money for his basic living expenses? --- I can't comment in relation to that.

That's what he's asking for, yes? --- Not from me.

All right. Did you draw any conclusions from that about Mr Oxlade's solvency? --- No.

Or his financial reliability? --- No, I didn't.

Or about whether the money would be in your trust account the following day? --- No.

So that email did not lead you to believe that the $300,000 would be in your trust account late this afternoon? --- No.

And it wasn't in your trust account that afternoon, was it? --- No.

Page 556 is the SWIFT transfer - - -? --- Yes.

- - - which you got on the 20th - - -?---Yes.

- - - which says at the bottom:

Sender to reconfirm before BEN to be credited.

See under Conditions? --- I see that, yes.

And the sender is the person sending the money? --- I presume so.

And the BEN is the beneficiary? --- That's right.

And this means that the sender has to reconfirm before the beneficiary will get credited? --- I can see that it says that.

And if we go to page 555, which is an email from Fiore dated 25 March forwarding to you a copy of the MT103 SWIFT transfer - - -?---That's right.

- - - and an email from Mr Oxlade saying:

Given this will clear over the next few days - - -

? --- That's right.

Continuing:

...and I am settling on the (indistinct) platinum next week with you, do you have two to three k left out of your advance to cover me for a few days.

?---I can't comment on any of that.

I'm not asking you to comment; I'm just asking you to read what's written there? --- I – yes, I read that. Yes.

And you did read it when Mr Fiore sent it to you? --- Well, not – not necessarily. Not necessarily, no.

You were passionately interested in these funds arriving in your account, weren't you? --- Not – not – I wasn't interested in – in Colin Oxlade's personal circumstance.

You did not turn your mind at all - - -? --- No.

- - - to Mr Oxlade's financial reliability at any point? --- No, I did not.

Okay. So, then, against the background of all of those messages about the Rishi loan, your evidence is that on 29 March when Mr Oxlade called you and said that the Rishi loan funds would settle that night, you believed him? --- On the basis of that SWIFT, yes.

Despite all of the – well, the SWIFT had been sent - - -? --- It takes – it takes - - -

- - - days ago? --- It takes time to get that done. It doesn't - - -

> Despite Mr Oxlade saying on 15 March:
>
> Money getting sent from Dubai late this afternoon via SWIFT.
>
> ? --- The – the SWIFT copy is – is – is more persuasive than anything Mr Oxlade might say.
>
> And the SWIFT copy was dated 20 March - - -? --- That's right. And - - -
>
> - - - 2016? --- That's right. And these – these international SWIFTs follow a process, of my understanding, where it – it can take anywhere up to two weeks for the funds to be transferred.
>
> So the SWIFT dated 20 March - - -? --- Yes.
>
> - - - about which Mr Oxlade said on 25 March it will settle in a few days, led you to believe that 100 per cent of the money would be in your account overnight on 29 March? --- Because, as I said - - -
>
> And that's why – that's your evidence. That's what you believed? --- I believed that, yes.
>
> It wouldn't settle on the 30th or the 31st; it would settle that night? --- No. I believed it was going to be there overnight, yes.

278 The Tribunal rejects Mr Oud's evidence that he believed the funds would be there overnight. There was a history of Mr Oxlade promising funds that did not arrive on time or at all.

279 The exchange continued:

> And when it wasn't overnight, you still believed it would be there? --- Until told otherwise, I believed it was coming, yes.
>
> And we will get to you being told otherwise in a moment, but on the 30th it didn't arrive; correct?---No, it wasn't there. No.
>
> So your letter to the Federal Magistrates Court was still untrue? --- Yes.
>
> And you didn't correct it?---No, I didn't correct it.
>
> And on the 31st, the money hadn't arrived?---Can I just vector in. When was Easter around that point? Is – is that Easter? I'm just curious.
>
> 30 March was a Wednesday?---Right. And is that prior to Easter or after Easter?

After? --- After Easter.

And the 31st was a Thursday – of March – and the money still wasn't there; correct? -- -Correct.

And your letter was still untrue? --- That's right.

And you took no steps to correct it? --- No, I didn't.

And the same was true on 1 April, the Friday; correct? --- Yes.

And then on 3 April you changed part of what that letter had said after calls from – it was Oxlade and Warming; correct? --- Yes.

And that's when you sent the letter to Cowell Clarke? --- That's right.

Because it had been pointed out to you that ICBC was in liquidation? --- Yes. Well - - -

And so you had to change that lie? --- I reject – it – it's not a lie.

So it was the truth? --- Well, it wasn't a lie.

(ts 117-134, 20 September 2018)

When you were working for ICBC Capital? --- It wasn't a lie.

280 At para 16 of its SFC-B the Committee alleged and Mr Oud admitted (Oud ASFC-B para 16A) that:

> In an email sent to Mr Oxlade on 29 March 2016 at 5:25 pm and copied to Mr Warming and Dr Fiore, [Mr Oud] confirmed that he had sent the 29 March 2016 letter.
>
> [Exhibit A pages 567-568]

281 At para 17 of its SFC-B the Committee alleged:

> The 29 March 2016 letter contained statements that were false and misleading in that:
>
> 1 [Mr Oud] did not act for, and had never acted for, ICBC, which was in liquidation as at 29 March 2016;
>
> 2 as at 29 March 2016, the firm did not hold $300,000 in cleared funds in its trust account;
>
> 3 as at 29 March 2016, the firm did not have instructions from ICBC to release a minimum of $200,000 (once the platinum deal

> was settled) to satisfy the amount owing under the creditor's petition.

282 Mr Oud admitted para 17 of the SFC-B above but denied intentionally deliberately making false and misleading statements when he faxed the letter (Oud ASFC-B para 17).

283 At paras 18-20 of its SFC-B the Committee alleged:

> 18. On 30 March 2016, [Mr Oud] transferred the remaining CSG loan funds ($125,000) out of the firm's trust account, leaving an overall total of $13,662.80 in the firm's trust account.
>
> 19. By email sent to Mr Oxlade on 30 March 2016 at 10.58 pm, [Mr Oud] enquired as to the position with the MT103, and saying '*give me the black & white please*'.
>
> 20. On 31 March 2016, [Mr Oud] spoke to Mr Oxlade who told him that he had decided to cancel the Levi loan because it was too expensive, and that he intended to use the CSG loan funds to assist Mr Warming once the platinum deal had settled.

284 Mr Oud admitted para 18-20 above except to say the loan was not with 'Levi' but 'Rishi' and says further that the fact that that he was actively following up the transfer of the funds into his trust account to ensure that Mr Oxlade could meet his commitment to assist Mr. Warming as was Mr Oud's understanding that it was always Mr Oxlade's intention (Oud ASFC-B para 18).

285 At para 21 of its SFC-B the Committee alleged:

> [Mr Oud] took no steps to inform the Federal Circuit Court of the true position with respect to the matters referred to in paragraph 17 [of the SFC-B] above.

286 Mr Oud admitted para 21 but said that the period after the letter was sent over the Easter holiday period provided limited opportunity to take steps to inform the Federal Circuit Court (Oud ASFC para 19).

287 The letter was not sent over the Easter holiday period.

288 At para 22 of its SFC-B the Committee alleged:

> Mr Warming sent an email to [Mr Oud] (copied to Mr Oxlade) on Friday 1 April 2016 at 11.24 am, in which he told [Mr Oud] that his bankruptcy hearing was on the following Monday, that '*it seems*' ICBC had been wound up and that there may have been a mix up, and saying that this had caused major problems. In the email Mr Warming asked

> [Mr Oud] to '*clarify and if necessary send a corrective email*'. He asked for an urgent response and said that [Mr Oud] could call Mr Oxlade if need be.
>
> [Exhibit A page 570]

289 Mr Oud admitted receiving the email referred to in the SFC-B para 22 on Friday, 1 April 2016 but said that he did not recall reading the email at the time and did not act on it nor did he know of any problems caused by ICBC. Mr Oud said further that on the weekend of 2 and 3 April 2016 that he was holidaying in the South West of Western Australia it being part of the Easter/School holidays. He says that he was not contactable on either day. Mr Oud says that over that period he had a number of missed calls from Mr Oxlade and a message to send a corrective letter to rectify incorrect statements that were contained in the letter dated 29 March 2016. Mr Oud said that he did not receive the messages to call Mr Oxlade until Sunday evening 3 April 2016 and due to the urgency of the request he went straight to the office to deal with this request after travelling five and a half hours from the Bridgetown, South Western Australia. Upon reaching the office (on the way to another private function that he was late for), Mr Oud said he telephoned Mr Oxlade and informed him that he was in a rush, because he had another commitment to get to (Oud ASFC-B paras 20-22). The fact that Mr Oud may have been in a rush is irrelevant.

290 At para 23 of its SFC-B the Committee alleged:

> On 3 April 2016, [Mr Oud] spoke to Mr Oxlade regarding the reference to ICBC in the 29 March 2016 letter, and Mr Oxlade dictated a letter to him for him to send to Cowell Clarke.

291 Mr Oud admitted para 22 and 23 of the SFC-B and said that Mr Oxlade did not dictate a prepared letter to him but believing Mr Oxlade and relying upon what he told him, he typed the letter to Mr Warming's solicitors while Mr Oxlade was on the phone.

292 At para 24 of its SFC-B the Committee submitted and Mr Oud admitted in relation to the Cowell Clark letter (Oud ASFC-B para 24) that:

> On 3 April 2016, [Mr Oud] prepared and sent a letter to Cowell Clarke in the terms as dictated by Mr Oxlade (3 April 2016 letter), which said:
>
> *'Dear Sirs*

Creditors Petition: John and Jennifer Warming ADG453/2015

I refer to my correspondence to the Court dated 29 March 2016 ('my Letter').

It has been drawn to my attention that in my Letter I referred to the company ICBC Capital Pty Ltd. This was an administrative error caused by cutting and pasting from earlier correspondence.

The trust funds are in fact held on behalf (sic) Irongrow Corporation Pty Ltd/Mr John Buckby an unrelated company.

The substance of my Letter is otherwise correct.

I apologise for the confusion this error has caused.

Yours sincerely'

[Exhibit A pages 576-577]

293 At para 25 of its SFC-B the Committee alleged:

> The 3 April 2016 letter contained statements that were false and misleading in that [Mr Oud] was not holding any trust funds on behalf of Irongrow/Mr John Buckby in his firm's trust account, and in that it said that the substance of the 29 March 2016 letter was otherwise correct, when it was not.

294 Mr Oud denied that the statements contained in the Cowell Clarke letter were deliberately false and misleading as alleged in para 25 of the SFC-B. Mr Oud relied upon the honesty and truth of Mr Oxlade's instructions (Oud ASFC-B para 25).

The Federal Court Registry letter

295 In regards to the Federal Court Registry letter of 29 March 2016, the Committee submitted the following contentions at paras 26-38 of its SFC-B that:

> 26. [Mr Oud] knew when he sent the 29 March 2016 letter that he did not act for ICBC in any capacity, and that he never had.
>
> 27. [Mr Oud] knew when he sent the 29 March 2016 letter that he was not holding $300,000.00 cleared funds in his trust account on behalf of ICBC or at all.
>
> 28. [Mr Oud] knew when he sent the 29 March 2016 letter that he did not have instructions or authority from ICBC or any other person or entity to release any money then in his trust account to

permit satisfaction of any of the debts of either Mr or Mrs Warming.

29. [Mr Oud] knew or believed when he sent the 29 March 2016 letter that it would be read by all or some of the following people:

    29.1 a judicial officer of the Federal Circuit Court;

    29.2 creditors of Mr and Mrs Warming who had brought bankruptcy proceedings against them;

    29.3 solicitors acting for those creditors;

    29.4 solicitors acting for Mr and Mrs Warming.

30. [Mr Oud] knew or believed when he sent the 29 March 2016 letter that its contents, which he knew were false, were material to the bankruptcy proceedings against Mr and Mrs Warming.

31. [Mr Oud] also knew or believed when he sent the 29 March 2016 letter that some or all of the people who read the letter would or might rely on its contents as being true.

32. [Mr Oud], in the 29 March 2016 letter, sought to mislead anyone who read the letter, and particularly the Federal Circuit Court in Adelaide, Mr and Mrs Warming's creditors and any solicitors acting for the creditors, in order to help Mr and Mrs Warming avoid or delay the legal consequences of the bankruptcy petition against them, by representing that he had cleared funds in his trust account that were available to Mr and Mrs Warming to satisfy their creditors' claims.

33. Alternatively, [Mr Oud] was at least recklessly indifferent as to the truthfulness of the contents of the 29 March 2016 letter and as to the consequences of sending it to the Federal Circuit Court in Adelaide under his signature and on his firm's letterhead.

34. [Mr Oud's] conduct in so doing, whether knowingly or recklessly:

    34.1 constituted a substantial departure from the standards of conduct reasonably expected of a practitioner;

    34.2 fell short, by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence;

34.3 would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence;

so as to constitute professional misconduct.

35. On 3 April 2016, when he sent the 3 April 2016 letter, [Mr Oud] knew that his reference in the 29 March 2016 letter to ICBC had caused 'major problems' in relation to Mr and Mrs Warming's bankruptcy.

36. [Mr Oud] also knew that he was not holding any trust funds on behalf of Irongrow/Mr John Buckby in his firm's trust account, that the total amount of funds in his trust account was nowhere near $300,000, and that he was not authorised to release any money in his trust fund in satisfaction of debts owed by Mr and Mrs Warming.

37. The contentions set out at paragraphs 29 to 34 [of the Committee's SFC-B] apply equally to the 3 April 2016 letter, and [Mr Oud] engaged in professional misconduct when he sent the 3 April 2016 letter to Cowell Clarke.

38. [Mr Oud's] conduct in sending the 29 March 2016 letter and the 3 April 2016 individually and cumulatively constitute professional misconduct.

296 In relation to the Federal Court Registry letter of 29 March 2016, Mr Oud contended that:

1) He was duped by the fraudulent and deceitful conduct of Mr Oxlade in writing and sending the Federal Court Registry letter;

2) He continued to be duped by Mr Oxlade into believing he was transmitting or causing to be transmitted into his trust account funds which would satisfy the representation Mr Oxlade caused Mr Oud to make in the Federal Registry letter;

3) Notwithstanding that he was duped by Mr Oxlade as aforesaid, Mr Oud admitted in hindsight he should have better turned his mind to the content of the Federal Court Registry letter and considered it in a meaningful way. If he had done so, the inaccurate statements contained therein would have been

corrected or at the very least clarified thus ameliorating the discrepancies contained therein; and

4) Notwithstanding that he was duped by Mr Oxlade, Mr Oud admitted he negligently failed to give due care and attention to the content of the letter.

(Oud ASFC-B paras 26-28 and 28A)

297 Mr Oud was not duped by Mr Oxlade. It was Mr Oud who knew that he did not have cleared funds in his trust account. It was Mr Oud who knew of the history of Mr Oxlade's promises. It was Mr Oud who took no steps to advise the Court that the funds had not arrived.

298 Mr Oud further contended that at the time he faxed the letter to the Federal Court Registry, he was of the belief that the Rishi Loan funds were on the way, as Mr Oxlade had forwarded to him a copy of a document showing a MT103 international bank transfer showing this to be the case and that these funds would be in his trust account prior to the letter being received by the Federal Court Registry. In sending the letter to Federal Court Registry, Mr Oud contended that he did so in the belief that:

1) ICBC Capital Pty Ltd was one of Mr. Oxlade's solvent companies;

2) at least $300,000 of funds were going to be deposited in his trust account overnight before the letter would have been read by the Federal Court Registry it being faxed to the Registry in Adelaide after it had closed;

3) that the release of the funds was dependent upon the settlement of the platinum transaction; and

4) that Mr. Oxlade had a genuine intention to make funds available to assist Mr. Warming.

(Oud ASFC-B paras 29 and 30)

299 Mr Oud contended that he did not seek to mislead anyone who read his letter to the Federal Court as alleged in para 32 of the SFC-B or send it recklessly and indifferently to its truthfulness as alleged in paras 33 and 34 of the SFC-B (Oud ASFC-B para 31).

300 The Tribunal finds that Mr Oud knew the contents of his letter to the Federal Magistrates Court was false and misleading. Mr Oud was subjectively aware that the contents of the letter were false and misleading. Mr Oud's subjective intent was to make false and misleading statements when he faxed the letter.

The Cowell Clarke letter

301 In relation to the Cowell Clarke letter of the 3 April 2016, Mr Oud contended that:

> 1) he was further duped by the fraudulent conduct of Mr Oxlade into writing and sending the Cowell Clarke letter;
>
> 2) having been duped by Mr Oxlade, Mr Oud nevertheless accepted that his actions in typing the Cowell Clarke letter while it was being dictated over the phone were similarly careless and negligent; and
>
> 3). being duped by Mr Oxlade's fraudulent conduct, he was led to believe and he understood at the time that it was Mr Oxlade's intention to assist Mr Warming with his bankruptcy from funds that were imminently to be deposited in Mr Oud's trust account, initially from the Rishi Loan, and then the settlement funds from the Irongrow / Platinum deal (but not the $300,000 which had been borrowed from Credit Solutions Group Pty Ltd.
>
> (Oud ASFC-B paras 32-34)

302 In conclusion, Mr Oud contended that there were other mitigating circumstances occurring, at the time of sending the Federal Court Registry letter and the Cowell Clarke letter which when considered together with Mr Oxlade's fraudulent conduct should be regarded as extenuating, namely, that he was tired, stressed, time pressured; it was the Easter holiday period; he was dealing with serious personal family issues in respect to his eldest daughter and was not in a proper state of mind to have made considered judgments about Mr Oxlade's conduct and his urgent requests that he write the letters that Mr Oud did to the Federal Magistrates Court and Cowell Clarke. (Oud ASFC-B para 35)

303 In cross-examination the following exchange took place:

YOVICH MR: And when it wasn't overnight, you still believed it would be there? --- Until told otherwise, I believed it was coming, yes.

And we will get to you being told otherwise in a moment, but on the 30th it didn't arrive; correct? --- No, it wasn't there. No.

So your letter to the Federal Magistrates Court was still untrue? --- Yes.

And you didn't correct it? --- No, I didn't correct it.

And on the 31st, the money hadn't arrived? --- Can I just vector in. When was Easter around that point? Is – is that Easter? I'm just curious.

30 March was a Wednesday? --- Right. And is that prior to Easter or after Easter?

After? --- After Easter.

And the 31st was a Thursday – of March – and the money still wasn't there; correct? --- Correct.

And your letter was still untrue? --- That's right.

And you took no steps to correct it? --- No, I didn't.

And the same was true on 1 April, the Friday; correct? --- Yes.

And then on 3 April you changed part of what that letter had said after calls from – it was Oxlade and Warming; correct? --- Yes.

And that's when you sent the letter to Cowell Clarke? --- That's right.

Because it had been pointed out to you that ICBC was in liquidation? ---Yes. Well - - -

And so you had to change that lie? --- I reject – it – it's not a lie.

So it was the truth? --- Well, it wasn't a lie.

When you were working for ICBC Capital? --- It wasn't a lie.

That falsehood? --- I admitted that that – that was incorrect, I think, yes.

But you didn't find out that you had been caught in it until the Sunday? --- I was relying on what Colin Oxlade - - -

Right? --- - - - told me.

And when you were told something different you changed it? --- I – I did. Well, I did, because I was told by Warming. Yes.

But you didn't change the lie about the $300,000.

VINER, MR: Well, I object to my learned friend using the word 'lie'.

YOVICH, MR: You did not change - - -

VINER, MR: It's not professional to do that.

HIS HONOUR: Well - - -

YOVICH, MR: You did not change the statement about the $300,000.

HIS HONOUR: Just a minute, Mr Yovich. He's entitled to put that it's a lie.

YOVICH, MR: I will rephrase, your Honour. I think the tribunal gets it.

HIS HONOUR: I mean, the untruth – because it is being put in this case is, without question, that this was a deliberate untruth, which constitutes a lie.

VINER, MR: Well, with respect, I would have to check the application that "lie" does carry the connotation that it's an intentional untruth, as distinct from the fact that something is not true.

HIS HONOUR: Yes. You're quite right.

VINER, MR: That's the point of my objection.

YOVICH, MR: And that, indeed, is our case. And on 3 April you sent the Cowell Clarke letter? --- I did send the letter, yes.

And in that letter you said that the balance of the letter you sent to the Federal Magistrates Court was true, didn't you? --- That's correct. Yes.

And by then Mr Oxlade had told you that he wasn't even pursing the Rishi loan any more because it was too expensive, hadn't he? --- He told me that. Yes.

He told you that before you sent the Cowell Clarke letter; correct? ---I would have to check the sequence of events, but I believe so.

And he told you that the platinum deal would be settling soon and there would be ample money from that; correct? --- That's right.

And you knew that the Federal Court – the letter to the Federal Court said there was $300,000 cleared funds in your account; correct?---When I say I knew, I - - -

You sent the letter? --- - - - I don't necessarily agree with that statement.

You hadn't forgotten, had you, what you said? --- Forgotten in what sense?

Forgotten the letter that you had sent on 29 March? --- I wasn't – I – I wasn't focusing on that. That's the point I was trying to make.

You were not focusing on the contents of the letter that you were reaffirming was true when you sent the Cowell Clarke letter. Is that your evidence? --- I was – I was still of the belief that – that the – the funds were going to be there.

That's not what the letter said, was it?

HIS HONOUR: So what page is that again, the Cowell Clarke letter, Mr Yovich?

YOVICH, MR: 576 - - -

HIS HONOUR: Thank you.

YOVICH, MR: - - - in one of the places, your Honour.

HIS HONOUR: Yes.

YOVICH, MR: So let's go to that then.

HIS HONOUR: It's all right. Well, I (indistinct)

YOVICH, MR: I will make sure Mr Oud has got it. I don't want to be unfair to him.

HIS HONOUR: (indistinct)

YOVICH, MR: Do you see that letter at 576? ---Yes, I do.

Written by you? --- It was – it was dictated to me, yes.

You wrote it; correct? --- I did write it. Yes.

You signed it? --- That's correct.

Sent it Cowell Clarke Solicitors? --- I did.

You refer to your previous letter of 29 March 2016; correct? --- I do.

You correct the error about ICBC Capital? --- Yes.

You say the trust funds are in fact held on behalf of Irongrow and Mr Buckby? --- I said that, yes.

And the trust funds - - -? --- Well – yes.

That's what the letter says that you wrote and signed? --- Well, it was dictated to me, yes. And I – I wasn't – yes. That's - - -

Yes? --- That's correct. Yes.

But you wrote down the words that were dictated to you, didn't you? ---I did.

Knowing that there were no trust funds in your account for Irongrow; correct? --- At that point in time, no, there were no trust funds.

And you then say – or the letter then says, which you wrote and did not change, 'The substance of my letter is otherwise correct', didn't you? --- That's what I've just – if that's what it says there. Yes.

And you said it there, because you typed it? --- Yes, as dictated to me.

And when you typed it you knew the words you were typing? --- Well, I typed it. Yes.

And when you typed it you knew the words you were typing, didn't you? --- Well, that's a loaded question. Did I know the – I knew I was typing those words, yes.

Thank you. And you knew those words were untrue? --- Well, I was aware that – that there was no funds in my trust account at that point. Yes.

And therefore the words were untrue? --- Well, by definition of that they're untrue. Yes.

You said that you did not intend to mislead or deceive anyone? --- No.

But you expected the letter to be read; correct? --- I expected the letter to be read. Yes.

You've said in correspondence with the committee that you felt the reason for sending it was that you felt for someone in Mr Warming's position; correct? --- That's why I agreed to send this – the letter, because of the mistakes that were in the first one.

And therefore that, in sending the letter, your motivation was to help Mr Warming; correct? --- My – my motivation was to express the fact that Colin Oxlade was going to help Mr Warming.

And that you were helping Mr Oxlade help Mr Warming by sending this letter as a solicitor? --- I was just correcting – well, I – I was correcting a letter that – that had mistakes in it. I didn't refer back to the other letter. I should have. It's a debacle. I should have done that.

You wanted people who read your letter to believe it was true, didn't you? --- Well, did I want people to believe that it was true? My intention was to correct it – to correct the mistakes in the other letter.

And therefore that people reading the letter would say, 'There are mistakes in the earlier letter. If we put those aside, this letter is true'? --- There were funds going to be made available. Yes.

Uh-uh? --- That's what I believed at the time.

Answer to a different question, Mr Oud. Your letter says the trust funds are in fact held by you; correct? --- Yes.

And the substance of your previous letter, which says the trust funds are in your account, is otherwise correct. That's what the letter says? --- It says that. Yes.

And you knew it said that? --- Well, I knew that – that there were funds coming into my trust account. I believed that to be the case.

Different question. You knew that the letter had said they were there, didn't you? --- I believed that they were going to be there, yes.

(ts 134-139, 20 September 2018)

304 Further, Mr Oud's letter to Cowell Clarke was untrue. The Tribunal finds that Mr Oud knew the contents of his letter to be false and misleading. Mr Oud was subjectively aware that the contents were false and misleading. Mr Oud's subjective intent in writing the letter to Cowell Clarke was to mislead Cowell Clarke to believe that he held $300,000 in his trust account when in fact Mr Oud did not hold $300,000 and he knew he did not.

305 Mr Oud's conduct was entirely reprehensible. He knowingly misled a court. He continued to mislead the court when the funds had not arrived. He breached a fundamental duty which overrode any duty to his client. He misled his fellow practitioners.

306 No practitioner could have any confidence in Mr Oud's word.

307 The Tribunal finds that Mr Oud between 29 March 2016 and 3 April 2016 inclusive, in connection with a creditor's petition in respect of John and Jennifer Warming filed in the Federal Circuit Court in Adelaide ADG453/2015, engaged in professional misconduct within the meaning of s 403 and s438 of the LP Act in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by preparing and sending:

1) a letter addressed to the Federal Circuit Court in Adelaide dated 29 March 2016 that contained the following statements:

   a) that Mr Ouds acts for ICBC, which statement was false and misleading as, in truth, Mr Oud did not then and never had acted for ICBC, and ICBC at that time was in liquidation;

   b) that Mr Oud is currently holding $300,000.00 cleared funds in his trust account, which statement was false and misleading as, in truth, Mr Oud was holding $138,662.80 in his trust account as at 29 March 2016;

   c) that his client was aware of current bankruptcy proceedings against Mr and Mrs Warming listed in the Adelaide Registry, and was

prepared to assist the Debtors' position, which statement was false and misleading as, in truth, Mr Oud did not and never had acted for ICBC, and he had no instructions to that effect;

d) that Mr Oud had been instructed to release upon settlement of a pending commodity transaction a minimum of $200,000.00 to permit satisfaction of the petition amount, which statement was false and misleading as, in truth, the practitioner did not have any funds in trust at that time which were subject to such instructions;

2) a letter to solicitors Cowell Clarke dated 3 April 2016, which he knew was intended to be used by Mr Warming in connection with the hearing of the creditor's petition scheduled for 4 April 2016, that referred to the 29 March 2016 letter and contained the following statements:

(a) that his reference to ICBC was a 'cut and paste error', and that he was in fact holding the trust funds (being a reference to the $300,000.00 referred to in the 29 March 2016 letter) on behalf of Irongrow Corporation Pty Ltd / Mr John Buckby, a company unrelated to ICBC, which statement was false and misleading as, in truth, Mr Oud was not at that time holding any trust funds on behalf of Irongrow Corporation Pty Ltd / Mr John Buckby;

(b) that the substance of the 29 March 2016 letter was otherwise correct, which statement was false and misleading as, in truth, the 29 March 2016 statements were all untrue,

in circumstances where, when making the 29 March 2016 statements and the 3 April 2016 statements, Mr Oud well knew each of the 29 March 2016 statements and the 3 April 2016 statements was false and misleading and had the potential to mislead the

> Federal Circuit Court and/or the party which had presented the creditor's petition and/or Mr and Mrs Warming's solicitors, Cowell Clarke;

308 It was put to Mr Oud that his evidence was deliberately dishonest by counsel for the Board.

309 The way in which the proceedings were run means that Mr Oud was on notice that there was a risk of finding of dishonest evidence being made and used by the Board in determining what final order should be made and Mr Oud had an ample opportunity to deal with the prospect of such a finding.

310 The Tribunal finds that Mr Oud was a deliberately dishonest witness.

Orders

> 1. The Tribunal finds that Nicholas Neil Peter Oud behaved in a way that constitutes professional misconduct and/or unsatisfactory professional conduct for the purposes of the *Legal Profession Act 2008* (WA) in six of the grounds as alleged by the Legal Profession Complaints Committee as follows:
>
> **Annexure A**
>
> **Ground 1**
>
> That Nicholas Neil Peter Oud (the practitioner) between 23 March 2016 and 30 March 2016, in connection with acting for Mr Colin Oxlade and/or Dr Peter Fiore, or alternatively Irongrow Corporation Pty Ltd (Irongrow), in respect of a proposed purchase of platinum, engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell short, consistently or by a substantial degree, or both, of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner, by disbursing from the firm's trust account $300,000 (CSG loan funds) which had been received into trust on behalf of Credit Solutions Group Pty Ltd (CSG) for

use in connection with the purchase of the platinum, in circumstances where:

(1) the practitioner undertook to CSG not to deal with, transfer, move or use the CSG loan funds without the expressed written consent of Mr David Cacciola on behalf of CSG, and Mr Oxlade (the undertaking);

(2) the practitioner disbursed the CSG loan funds without the expressed written consent of Mr Cacciola, and contrary to purported written consents he had received;

(3) in releasing the CSG loan funds the practitioner acted in reckless disregard or with reckless indifference as to whether he was in breach of his undertaking by doing so.

Ground 2

That Nicholas Neil Peter Oud (the practitioner) in March and April 2016 engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner by failing to keep his firm's trust records in a way that disclosed the true position in relation to withdrawals from trust of the CSG loan funds, in that the trust records did not accurately record the names of the persons who received the funds and the names or BSB numbers of the bank accounts into which the funds were paid as required by reg 45 of the *Legal Profession Regulations 2009* (WA) and s 228(3)(b) of the *Legal Profession Act 2008* (WA).

Ground 3

That Nicholas Neil Peter Oud (the practitioner) in March and April 2016 engaged in unsatisfactory professional conduct within the meaning of s 402 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner by failing to deliver to CSG's solicitor Mr Paul Reese the original receipt made out by the practitioner for the receipt of the CSG loan funds into his trust account when requested to do so by Mr Reese by emails sent to the practitioner on 22 March 2016 and 28 April 2016, in breach of reg 41(2) and reg 41(6) of the *Legal Profession Regulations 2009* (WA).

Ground 4

That Nicholas Neil Peter Oud (the practitioner) in or about April 2016 engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence in responding to an email from Mr Reese requiring the CSG loan funds to be returned from the practitioner's firm's trust account to Mr Reese's trust account, when the practitioner sent a series of emails to Mr Reese on 28 and 29 April 2016 which:

(1) did not disclose the fact that he no longer retained the CSG loan funds in his firm's trust account;

(2) implied that the practitioner did retain the CSG loan funds and was in a position to return the CSG loan funds to Mr Reese's trust account,

and which conveyed the impression that the CSG loan funds were retained in his firm's trust account and were available to be returned to Mr Reese's trust account

when, in truth, the practitioner had disbursed the CSG loan funds and was not in a position to effect the return of the CSG loan funds to Mr Reese's trust account, and which impression the practitioner permitted to remain uncorrected in circumstances where the practitioner knew the emails were misleading in a material respect.

Ground 5

That Nicholas Neil Peter Oud (the practitioner) on 9 May 2016 engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct would be reasonably regarded as disgraceful and dishonourable by practitioners of good repute and competence and, to a substantial degree, fell short of the standard of professional conduct observed by members of the profession of good repute and competence by conveying an offer from Mr Oxlade to Mr Reese to repay the CSG loan funds that was contingent upon Mr Reese withdrawing a complaint he had made to Legal Profession Complaints Committee against the practitioner in relation to the practitioner's breach of his undertaking with respect to the CSG loan funds.

Annexure B

Ground

That Nicholas Neil Peter Oud (the practitioner) between 29 March 2016 and 3 April 2016 inclusive, in connection with a creditor's petition in respect of John and Jennifer Warming (Mr & Mrs Warming) filed in the Federal Circuit Court in Adelaide ADG453/2015 (creditor's petition), engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence and would be reasonably regarded as disgraceful or dishonourable

to practitioners of good repute and competence, by preparing and sending:

(1) a letter addressed to the Federal Circuit Court in Adelaide dated 29 March 2016 (the 29 March 2016 letter) that contained the following statements (together, the 29 March 2016 statements):

(a) that the practitioner acts for ICBC Capital Pty Ltd (ICBC), which statement was false and misleading as, in truth, the practitioner did not then and never had acted for ICBC, and ICBC at that time was in liquidation;

(b) that the practitioner is currently holding $300,000.00 cleared funds in his trust account, which statement was false and misleading as, in truth, the practitioner was holding $138,662.80 in his trust account as at 29 March 2016;

(c) that his client was aware of current bankruptcy proceedings against Mr and Mrs Warming listed in the Adelaide Registry, and was prepared to assist the Debtors' position, which statement was false and misleading as, in truth, the practitioner did not and never had acted for ICBC, and he had no instructions to that effect;

(d) that the practitioner had been instructed to release upon settlement of a pending

commodity transaction a minimum of $200,000.00 to permit satisfaction of the petition amount, which statement was false and misleading as, in truth, the practitioner did not have any funds in trust at that time which were subject to such instructions;

(2) a letter to solicitors Cowell Clarke dated 3 April 2016, which he knew was intended to be used by Mr Warming in connection with the hearing of the creditor's petition scheduled for 4 April 2016, that referred to the 29 March 2016 letter and contained the following statements (together, the 3 April 2016 statements):

(a) that his reference to ICBC Capital Pty Ltd was a 'cut and paste error', and that he was in fact holding the trust funds (being a reference to the $300,000.00 referred to in the 29 March 2016 letter) on behalf of Irongrow Corporation Pty Ltd /Mr John Buckby, a company unrelated to ICBC, which statement was false and misleading as, in truth, the practitioner was not at that time holding any trust funds on behalf of Irongrow Corporation Pty Ltd / Mr John Buckby;

(b) that the substance of the 29 March 2016 letter was otherwise correct, which statement was false and misleading as, in truth, the

29 March 2016 statements were all untrue,

in circumstances where, when making the 29 March 2016 statements and the 3 April 2016 statements, the practitioner well knew each of the 29 March 2016 statements and the 3 April 2016 statements was false and misleading and had the potential to mislead the Federal Circuit Court and/or the party which had presented the creditor's petition and/or Mr & Mrs Warming's solicitors, Cowell Clarke;

2. The Legal Complaints Committee is to file and serve its written submissions on penalty and costs by 19 November 2018.

3. Mr Nicholas Neil Peter Oud is to file and serve his written submissions on penalty and costs by 3 December 2018.

4. Subject to any further order of the Tribunal, the question of penalty and costs is to be dealt with entirely on the documents.

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

MDM
ASSOCIATE TO JUSTICE CURTHOYS

5 NOVEMBER 2018