JURISDICTION	:	STATE ADMINISTRATIVE TRIBUNAL
ACT	:	LEGAL PROFESSION ACT 2008 (WA)
CITATION	:	LEGAL PROFESSION COMPLAINTS COMMITTEE and METAXAS [2018] WASAT 28
MEMBER	:	PRESIDENT, JUSTICE J C CURTHOYS SENIOR MEMBER C WALLACE MR P DE VILLIERS (MEMBER)
HEARD	:	24 AND 25 JANUARY 2018
DELIVERED	:	26 APRIL 2018
FILE NO/S	:	VR 124 of 2017
BETWEEN	:	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND ARTHUR METAXAS Respondent

Catchwords:

Professional misconduct - Failure to take all necessary steps to ensure proper factual basis - Notice of appeal - Oral submissions to Court of Appeal

Legislation:

Legal Profession Act 2008 (WA), s 401, s 401(b), s 402, s 403, s 428(1), Pt 13

Result:

Practitioner engaged in professional misconduct

Category: B

Representation:

Counsel:

Applicant : P Cahill SC with C Patterson
Respondent : A Schlicht

Solicitors:

Applicant : Legal Profession Complaints Committee
Respondent : Metaxas & Hager

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

Briginshaw v Briginshaw (1938) 60 CLR 336
Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Huntingdale Village Pty Ltd (Receivers and Managers Appointed) v Korda [2015] WASCA 101
Huntingdale Village Pty Ltd (Receivers and Managers Appointed) v Korda [2015] WASCA 101 (S)
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
Lloyd v Faraone [1989] WAR 154
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 30 June 2017, the Legal Profession Complaints Committee (the Committee) made an application to the Tribunal pursuant to s 428(1) of the *Legal Profession Act 2008* (WA) (LP Act) in relation to a practitioner Arthur Metaxas. Mr Metaxas was admitted to the legal profession in December 1975.

2 On 4 September 2009, Huntingdale Village Pty Ltd (Receivers and Managers appointed) and others (the Westpoint Companies) filed proceedings against Perpetual Nominees Ltd and Korda and Winterbottom and others (the Receivers) in COR 223 of 2009. A statement of claim was filed by the Westpoint Companies in COR 223 of 2009.

3 On 18 May 2010, Mr Metaxas' firm Metaxas and Hager took over the conduct of the Westpoint Companies cases (Exhibit C page 713). Mr Metaxas had the personal carriage of the matter from 2010 and throughout the relevant period.

4 The Committee's application arises out of a hearing of an application for security for costs in COR 223 of 2009 at first instance before Le Miere J on 21 and 23 May 2014 at which Mr Metaxas appeared, the filing of a notice of appeal prepared and filed by Mr Metaxas against Le Miere J's decision, CACV 79 of 2014, and other submissions made to the Court of Appeal in those proceedings.

5 On 23 January 2018, the Committee submitted a minute of Amended Annexure A to its application. The Ground set out in the application was:

> That the practitioner, Arthur Metaxas between about 23 July 2014 and about 17 March 2015 engaged in professional misconduct within the meaning of sections 403 and 438 of the *Legal Profession Act 2008* (WA) (Act) in that his conduct of an application for leave to appeal and of an appeal to the Court of Appeal substantially or consistently fell short of the standard of competence that a member of the public is entitled to expect of a reasonably competent legal practitioner because the Mr Metaxas failed to take all necessary steps to ensure that there was a proper factual basis for:
>
> (a) a proposed ground of appeal;
>
> (b) oral submissions made to the Court of Appeal in support of the application for leave to appeal and the appeal.

6 The complaint about Mr Metaxas' conduct does not relate to the hearing before Le Miere J but to the grounds he set out in the notice of appeal and in oral statements to the Court of Appeal.

Onus and standard

7 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 but 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*))

8 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'.

9 The standard of proof required in a civil case where serious allegations are made was stated in ***Rejfek v McElroy*** (1965) 112 CLR 517 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.

10 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.

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

12 In making its findings in relation to Mr Metaxas' conduct in relation to the grounds of appeal and the oral statements to the Court of Appeal, the Tribunal is particularly conscious of the seriousness of such allegations.

Purposes of Part 13 of the LP Act

13 Section 401 of the 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

14 '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

15 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

16 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[.]

17 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.

18 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 Darveniza*, 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

19 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[.]

The duty to take all necessary steps

20 As the Court of Appeal stated in ***Huntingdale Village Pty Ltd (Receivers and Managers Appointed) v Korda*** [2015] WASCA 101 (***Huntingdale Village***) at [39]:

> As advocacy is a human process, it is inevitable that inadvertent mistakes will be made by counsel from time to time. However, counsel's duty to not mislead the court carries a positive and correlative responsibility to take all necessary steps to ensure that there is a proper factual basis for submissions put to the court. The terms of proposed ground 2 and the oral submissions put in support of that ground represent a significant departure from that duty.

The oral submissions

21 The Committee submitted that:

> In terms of a failure to take all necessary steps to - this contemplates that a practitioner has to do more than just act honestly but actually has to objectively go some way to ensure the reliability of the information that is put before the court because of the importance of a court having the confidence that the information before it is reliable that it is being asked to adjudicate upon is terribly important to the effective administration of justice.
>
> A failure to discharge the responsibility, therefore, can be and should be viewed just as seriously as the intentional or reckless elements.
>
> (ts 11-12, 24 January 2018)
>
> - - - factually, here - and that's an important point. What I was trying to convey - and perhaps I went too far in a submission to say they are - it is just as serious. My intention was to convey the notion that failure to take necessary steps is a serious matter because of its potential effect on the administration of justice. Whether or not it is just a serious as an intention or a reckless misleading, I accept your Honour's question that hangs over that.
>
> (ts 13, 24 January 2018)

> - - - or a tribunal was. Yes. In any event, the - we say that if one is distinguishing between reckless - and your Honour has put it as careless misleading- we say, not taking the necessary steps to adhere strictly to the formulation of the Court of Appeal, the - we respectfully agree that factually in a particular given case it might be difficult to distinguish between the two, but the tests are quite different. One doesn't have the Giudice test of having to attend to the question of whether or not there was an awareness that the statement might not be true and a conscious disregard of that risk.
>
> Here, instead, in a no-necessary steps environment, the test, we say, is an objective one and doesn't include an element of mental intent at all - and, more importantly, a practitioner can be (indistinct) with conduct that attracts a disciplinary sanction in circumstances where they may be convinced of their honest belief as to a proper foundation, but they have not done all that is necessary to ensure that is so - and that really is the essence of the case that we put today.
>
> (ts 14, 24 January 2018)

22 The Tribunal accepts the Committee's submissions that intention is not relevant in determining whether there is a breach of the duty to take all nececcsary steps to ensure the reliability of the information, that is, the ***Giudice*** test does not apply. The test is objective.

Mr Metaxas' contention

23 Mr Metaxas' counsel submitted:

> So to say that there was no factual basis for making that assertion or allegation in the appeal, it's just simply wrong and for these charges to get to first base, it has to be shown that what the respondent was doing had no factual basis. He didn't have to prove that he's right, even though he offers his own opinion to the appeal. That's not necessarily relevant, as my learned friend quite rightly points out, nor does the tribunal need to trouble itself with it. The high jump bar is much lower than that.
>
> He only has to show that there was a factual basis of what he was contending was present. Now, in respect of this ground, which is the failure to give reasons issue, there was he only has to show that there was a factual basis of what he was contending was present. Now, in respect of this ground, which is the failure to give reasons issue, there was - because there was no factual - no reasons given for the vacation of the previous orders and he didn't oppose it, it can't be implicitly asserted that he opposed it and one queries what relevance that has to a charge of professional misconduct.
>
> (ts 47, 24 January 2018)

24 The Tribunal rejects the submission that Mr Metaxas only had to establish that there was a factual basis for what he was contending. The duty is to ensure that the facts are accurate.

The history of COR 223 of 2009

25 COR 223 of 2009 was related to another action commenced by the Westpoint Companies - COR 173 of 2009. The history of those two matters to 2 August 2010 is set out in the affidavit of Ms Kirsty Sutherland sworn on 2 August 2010 (Exhibit C pages 639-719). COR 173 of 2009 was prioritised for hearing by the Court. COR 223 of 2009 was to await the outcome of COR 173 of 2009.

26 On 25 June 2010 the Receivers filed an application for security for costs in COR 223 of 2009 (Exhibit C pages 212-215). The application was supported by an affidavit of Mr Carl Ellinghaus sworn on 20 December 2010 (Exhibit C pages 720-765).

27 Paragraph 22 of Mr Ellinghaus' affidavit stated:

> The receivers seek orders that the filing of further affidavits in support of and in opposition to the security for costs application be dispensed with until further order to enable the extant disallowance and joinder applications to be determined in the meantime, as such determination will affect the scope of the security sought and the further evidence to be filed in support of the security for costs application.

28 A minute of proposed orders relating to the further conduct of the security for costs application was attached to the Ellinghaus affidavit (Exhibit C pages 762-763).

29 The application for security for costs in COR 223 of 2009 together with a number of related matters was listed for directions before Le Miere J on 21 December 2010 (Exhibit C pages 27-54). Le Miere J accepted the Receivers' submissions that the application for security for costs should not be decided pending the outcome of related matters (Exhibit C pages 39-41).

30 The application for security for costs then went into a long hiatus.

31 On 4 April 2014 the Westpoint Companies filed a re-amended statement of claim (Exhibit C pages 216-321). The relief sought by the Westpoint Companies in the re-amended statement of claim was:

> **Part V Relief**

306 The plaintiffs claim against Perpetual:

306.1 an order that Perpetual discharge the Charges;

306.2 an order that Perpetual assign the Charges and any other securities held by it in respect of the Loan Agreement to Paragon, alternatively to each plaintiff jointly;

306.3 orders that the first defendant cause the second and third defendants to do the things set out in paragraphs 307.2 and 307.3;

306.4 such other orders as the Court considers appropriate: and

306.5 costs.

307 The plaintiffs claim against the Receivers:

307.1 An enquiry into the conduct of the Receivers pursuant to section 423 of the *Corporations Act* 2001, and as part of the inquiry, orders compelling the second and third defendants to provide the plaintiffs with:

(a) a complete itemisation of costs and expenses, including legal costs, in respect of each receivership within 14 days; and

(b) copies of any terms of engagement or costs agreements concerning the costs of the Receivers and any lawyers costs concerning any of the receiverships within 7 days.

307.2 Orders pursuant to sections 423, 434 or 1324 of the *Corporations Act* 2001, alternatively section 87 of the *Trade Practices Act 1974*, alternatively section 12GD of the *Australian Securities and Investments Commission Act* 2001 alternatively section 23 of the *Federal Court of Australia Act* 1976 that the second and third defendants be removed as receivers of each plaintiff and that they give up possession and control of the property of each plaintiff.

307.3 Alternatively to 307.2:

(a) orders that the second and third defendants certify the amount remaining due to the first defendant under the Charges;

(b) orders that, within such time as the court deems appropriate, the second and third defendant pay to the first defendant from the proceeds of the receiverships the amount certified to be due under the Charges;

(c) orders that, upon such payment, the second and third defendants be removed as receivers of each plaintiff and that they give up possession and control of the property of each plaintiff.

~~D~~ ~~Alternatively, orders that the first defendant cause the second and third defendants to do the things sot out in paragraphs B or C.~~

~~E~~ ~~Orders that the first defendant discharge the Charges.~~

~~F~~ ~~Orders that the first defendant assign the Charges and any other securities held by it in respect of the Loan Agreement to Paragon, alternatively to each plaintiff jointly.~~

307.4 An order that the Receivers repay to each plaintiff all remuneration and expenses charged in respect of the relevant receivership for the period commencing 23 January 2008 or such other date as the Court deems appropriate.

307.5 An order that the Receivers otherwise account to the Borrowers and the Guarantors ~~each plaintiff and the fourth defendant~~ for any remuneration unreasonably charged or expenses unreasonably incurred during the course of the relevant receivership.

307.6 Damages at law and pursuant to section 82 of the Trade Practices Act 1974 and section 12GF of the Australian Securities and Investments Commission Act 2001.

307.7 An order pursuant to section 1317H of the Corporations Act 2001 that the Receivers compensate the Borrowers and the Guarantors ~~alternatively, the plaintiffs~~, for the damage suffered by them as a result of the Receivers' contraventions of sections 180 and 181.

307.8 Interest on any monies ordered to be paid by the Receivers to the Borrowers and the Guarantors at 6% per annum from such dates as the Court thinks fit to the

date of judgment pursuant to section 32 of the Supreme Court Act.

307.9 Such other orders as the Court considers appropriate.

307.10 Costs.

32 The Tribunal has set out the relief sought by the Westpoint Companies in the re-amended statement of claim to place some of the statements in the transcript of the hearing before Le Miere J referred to below in context. In particular, Mr Metaxas proposed to reduce the scope of the relief sought by the Westpoint Companies from that set out above.

The hearing of 21 and 23 May 2014 before Le Miere J

33 The application for security for costs was revived in April 2014, seemingly in response to the re-amended statement of claim of 4 April.

34 The application for security for costs was heard before Le Miere J on 21 and 23 May 2014 (Exhibit C pages 440-613). Mr Metaxas appeared for the Westpoint Companies and Mr Thompson appeared for the defendants.

35 Mr Thompson identified two applications for determination by His Honour. Firstly, an application from costs arising out of the 'disallowance application'. The disallowance application related to the costs of a successful application by the Receivers' for the costs of resisting previous amendments to the statement of claim. It is not relevant for present purposes. Secondly, an application for security for costs in relation to the Westpoint Companies re-amended statement of claim filed on 4 April 2014.

36 Much of the first day of hearing, 21 May 2009, was taken up with the 'disallowance application'.

37 The Court turned to the application for security for costs in the mid-afternoon of 21 May 2014 (Exhibit C page 521). At about 4 pm on 21 May 2014 the matter was adjourned to 23 May 2014.

38 Mr Thompson criticised the form of the further re-amended statement of claim filed on 4 April 2014. He stated:

> THOMPSON, MR: … Can I say something about the new pleading. The new pleading - and I don't propose to subject the new pleading to anything like a strike out application or anything of that nature, but there are a couple of matters that need to be said about the new

pleading, just so your Honour has a flavour of whether this is a case which has reasonable prospects of success or not.

The first thing I would mention to your Honour - yes, sorry. Mr Feutrill quite rightly reminds me that what I'm saying is that we're not making the strike out application now. It may be that it, depending on how matters unfold, an application to strike out might be made down the track.

LE MIERE J: I thought it had been made.

THOMSON,MR: In respect of the new pleading?

LE MIERE J: Yes. No.

THOMSON,MR: No, I don't think it has.

METAXAS,MR: And you're out of time.

THOMSON, MR: Well, your Honour will see that in which this litigation unfolds, there are things to be said one way or the other about timing issues.

LE MIERE J: Well, it hasn't been made.

THOMSON, MR: Yes. That's right. But can I make these points just briefly about the new pleading. If I can just take your Honour to paragraph 19, which is the subject of some comments in your Honour's reasoning in the previous decision. Paragraph 19G has been removed, and the strike out was directed at paragraph 19G, but I'm not sure if your Honour has paragraph 23 of your reasons on the strike out application. In that, your Honour says in respect of paragraph 19G, that:

> The pleading formulates the receiver's duty as the positive duty to act in the interests of the companies. Such a formulation of a receiver's duty goes beyond a duty to act in good faith, without fraud, and without wilfully or recklessly sacrificing the interests of the company, and is not a duty recognised by the general law. Giogla is not authority for the proposition that the receiver owes a positive duty to act in the interests of the companies.

So your Honour has said expressly that there is no positive duty to act in the interests of the companies. Notwithstanding that it's not been the subject of a particular application previously, your Honour perceives paragraph 19B of the pleading - it is in the same formats it was previously, but while we would accept that there is a duty to exercise powers and discharge duties in good faith, the rest' of that subparagraph seems directly inconsistent with your Honour's statement of principle at paragraph 23 of the judgment. It alleges a positive duty to act in the best interests of the company.

Some other matters I should raise are, your Honour did not, as I have said before, disallow any aspect of the relief paragraphs at part 5 and following. Those appear to have been wholly picked up and retained within the pleading, and - this is at paragraphs 306 and following - and therefore there are claims for relief which are based upon the Trade Practices Act, the Australian Securities and Investments Commission Act. There are claims for damages under section 82 of the Trade Practices Act, claims for orders under section 1317H the Corporations Act, claims asking for the removal of the receivers. All of those are matters that seem to go well beyond the scope of an inquiry, and as far as I can detect, there are no other references to the Trade Practices Act, the Australian Securities and Commission Act, or the Corporations Act in section - in reference to section 1317H, contained in the remainder of the pleading. So, once more, the scope of the pleading is somewhat difficult to pin down.

My friend has said that there is a formula that is used, or was used, in the last pleading. A similar formula may have been adopted in this pleading - or formulaic approach. If I can take your Honour to an example of the formulaic approach mark 2. If your Honour can go to page 23, for example. This is contained in part I of the statement of claim, which is related to the Huntingdale receivership. There are other parts that relate to the receiverships for the other companies, the other five plaintiffs, or the other four plaintiffs. And the formula appears to be - to plead a number of charges from invoices which are listed in paragraph 73A through to. 73M. The amounts involved, your Honour will perceive, are not large in this instance. Your Honour will also notice that the amounts seem to relate to the months of January and - - -

LE MIERE J: Which paragraph are you on?

THOMSON, MR: 73A and following.

LE MIERE J: 73A.

THOMSON, MR: I'm using a clean version of the - - -

LE MIERE J: That's why the page numbers are different.

THOMSON, MR: Yes, that might be - that might be the problem.

LE MIERE J: Yes. Okay.

THOMSON, MR: Your Honour will see that there are allegations about invoices and services provided. I was saying that they occur in the months of January through March 06. One might infer that either there was nothing else that was wrong, or that potentially the invoices that were provided in the middle of last year still have not generated anything more that could or ought to be pleaded beyond about March 06. The amounts involved are comparatively small in this

> instance. And then there is - in effect, this global allegation that occurs in paragraph 75, which says:
>
> > By reason of the facts, matters, acts, and things pleaded in part I above, there should be an inquiry into the conduct of the receivers as regards whether they charged and were paid excessive or unreasonably incurred fees or disbursements in relation to Huntingdale and the sale or settlement of the Huntingdale centre, whether the manner in which the receivers accounted for their fees was contrary to section 421B.
>
> And then if the - 76 says:
>
> > If upon inquiry it is found that there was excessive or unreasonably incurred fees, those amounts should be repaid.
>
> The point that I seek to make is that, in substance, there has been no allegation in a proper form of a duty, a breach of duty, and then a basis for an inquiry based upon that. Now, I just make those points because much was made by Mr Metaxas in the submissions, that this is a sure-fire winner of a case.
>
> (Exhibit C pages 526 - 529)

39 Mr Thompson's criticisms of the re-amended statement of claim must have struck home because at the commencement of the hearing on 23 May 2014 Mr Metaxas stated:

> I undertake to file an amended statement of claim making clear that the other relief is dependent upon an order being made for an enquiry, because we don't see how these matters can be said to progress or can be - the application will not have been brought under section 423 except if it was made for an enquiry so I will undertake to file an Affidavit - and amended pleading within seven days.
>
> (Exhibit C page 540)

40 Seven days would have been 30 May 2014.

41 The following exchange subsequently took place:

> LE MIERE J: So I still haven't got completely clear in my mind the amendment that you propose; will it be to - will there be any allegations of breaches of the Trade Practices Act?
>
> METAXAS, MR: No.
>
> LE MIERE J: That will simply go?
>
> METAXAS, MR: Yes. This is about overcharging.

LE MIERE J: All right.

METAXAS, MR: Overcharging and charging improperly and failing to act diligently in relation to the conduct of the solicitors; in other words, not really taking any efforts to scrutinize what was happening as regards the legal costs.

LE MIERE J: So the - what you intend is to set out the factual allegations - - -

METAXAS, MR: Yes.

LE MIERE J: - - - of overcharging.

METAXAS, MR: Yes.

LE MIERE J: And that's it?

METAXAS, MR: Well, it's beyond overcharging; it's charging when you had no entitlement as well.

LE MIERE J: Yes.

(Exhibit C pages 541-542)

42 It is clear from this exchange that it was Mr Metaxas' intention to reduce the scope of the statement of claim. Since the application for security for costs was based on a statement of claim which was wider in scope, an amendment to the statement of claim as proposed by Mr Metaxas had the potential to reduce the amount awarded in an application for security for costs compared to the statement of claim as it then stood.

43 Later on the following exchange took place:

LE MIERE J: If things did proceed in that way then security for costs on that approach would be ordered for the first stage only.

METAXAS, MR: If they were ordered at all, yes.

LE MIERE J: Well, that's what you're addressing me about, I assume?

METAXAS, MR: Yes. I - what we say fundamentally is the proposition that given the nature of the application we should now be speculating about what is required for the second stage is just - it's just unproductive. It involves this massive amount of speculation about what will the nature of the allegations be and what will be the receiver's response to the allegations?

LE MIERE J: If I was to make an order for security for costs and if it was confined on what I think you're saying to me, to this first stage, and if an inquiry was then ordered presumably the receivers would then come back again and apply for security for costs for the next stage; now, there might be argument about that, but that would have to be then the next stage, would it not?

METAXAS, MR: I agree.

LE MIERE J: I see.

METAXAS, MR: And that's the only logical way this can be done because otherwise we're just - I mean in applications for security for costs where I have been involved, and there haven't been many, but there is a bill of costs put up, but it goes beyond mere speculation about the nature of the proceeding and what might be required. There is usually some definition to the claim by a statement of claim in the defence.

LE MIERE J: Now, a problem then that immediately arises is that you're asking that the security for costs application be considered on the basis of the proceeding proceeding in a way in which, on the current orders and pleadings, it's not proceeding.

METAXAS, MR: No. I'm not, with respect. Your Honour has made the order that the matter proceed with pleadings, if unless - - -

LE MIERE J: Yes. You don't intend to - - -

(Exhibit C pages 544-545)

LE MIERE J: Now, that's where I thought what you're saying to me is that you are proposing to change things so that it goes back into the application for an inquiry only.

METAXAS, MR: Well, that's what it will be. I will file an amended statement of pleading within seven says to make that - put that beyond doubt that it's just an application for an inquiry.

LE MIERE J: And Mr Thompson, you want to say something?

THOMPSON, MR: Well, I certainly do, your Honour. This is part of the difficulty about the security for costs application that we've experienced at every stage throughout, to pin down what is exactly the nature and scope of the dispute. Now, it's all very well for my friend to say you can now adjudicate this application on the basis of some hypothetical statement of claim which I will provide to you in the future; it's not satisfactory from our point of view because we have provided affidavit evidence and estimates of costs.

> LE MIERE J: Mr Thompson, I - Mr Metaxas will have to have another go at this, but subject to Mr Metaxas persuading me otherwise, where I saw - where I see this going is that I would have to adjourn the application to enable Mr Metaxas to make the amendment that is outlined so that both the receivers and the court could then see precisely what the ambit of the application is.
>
> It does seem to me that it does or is likely to make a significant difference to the proceeding if it is limited in the way in which Mr Metaxas has indicated and it would - Mr Metaxas - put it in terms of an undertaking but even leaving that to one side, Mr Metaxas informing the court that the plaintiffs intend to amend their case to limit it in the way which he has said, I think it would be quite wrong for the court to then persist in hearing and determining a security for costs application on the basis that it's a much bigger, wider hearing.
>
> (Exhibit C pages 547-548)

44 At this point Mr Metaxas had made it clear that the claim was essentially limited to a claim for an inquiry. It was clear that His Honour regarded it as appropriate to proceed to deal with the application for security for costs on the basis of the proposed limited scope of an inquiry.

45 Further, in Exhibit C at page 549, Mr Metaxas said:

> METAXAS, MR: Well, the amendment that we would make is that the prayer for relief would be amended to plead only the plaintiff's claim, an order for an inquiry into the conduct of the receivers pursuant to section 423 of the Corporations Act as regards the conduct of the receivers pleaded above.

46 The following exchange later took place:

> LE MIERE J: Well, it does seem to me if that's the change that is to be made, unless Mr Thomson persuades me otherwise, I would have thought that does or should change the receiver's approach to it. Mr Thomson might tell me in a minute, he might tell me "no" in which case we can just carry on but on the face of it, if that's the way things were to proceed then the burden of producing evidence and argument on the receivers at this first stage would be less than they have contemplated till now and the ambit of the hearing and argument would be less than they and I have contemplated until now. That would then cause them to need to reconsider their costs estimates, I would have thought.
>
> METAXAS, MR: Well, with respect, in my submissions I said at paragraph 27 the costs in any event should be confined to stage one of the two stage process. The receiver's application seeks costs as if an order for inquiry had been made. It has not been made. If an order for

> inquiry is conceded then that should be stated, otherwise it just looks like the receivers are resorting to oppressive conduct.
>
> LE MIERE J: The problem I had with that when I read it was that - and I think we're going back to where we went a while ago - I have understood the statement of claim not to be confined to an application for an inquiry and so things we were identifying earlier - damages under the Trade Practices Act so I have understood, and I assume from what has been said from the receivers that they've understood, the hearing would not be simply what you're calling the stage one inquiry but rather would be a trial in the ordinary sort where one determines whether or not there have been breaches of fiduciary duties, whether or not there has been breaches of the Trade Practices Act and so on.
>
> METAXAS, MR: Your Honour, with respect, if the receivers want to put something else up on quantum they can do that in the next two weeks or something. Really, there's no reason why I shouldn't proceed, I wouldn't have thought. Of course your Honour needs to hear from my learned friend **but I would have thought I should complete my submissions**. **If the receivers want to put something else in on quantum they can do so but the proposition that we should all go away and come back just because there's going to be an amended draft bill prepared seems to me to be unnecessary.**
>
> LE MIERE J: All right. Mr Thomson?
>
> (Exhibit C pages 561-562; Tribunal bold emphasis added)

47 It is plain from this exchange that it is for the Receivers to put up further evidence. Mr Metaxas clearly informed the Court that he should complete his submissions.

48 The following exchange also took place:

> LE MIERE J: What I'm considering doing is this: is to direct first that you file a further amended statement of claim, which insofar as it seeks an inquiry in regard to the conduct of the receivers, specifies the conduct of the receivers which should be inquired into. (2) For you to continue your submissions today, to give both sides leave to file further submissions after receiving your amendment. And liberty to either party to apply to relist the matter for further argument if they wish to conduct further argument, having received your amendment.
>
> METAXAS, MR: Well, I don't have a difficulty with that proposed - your Honour's proposal, except that in order that we file a pleading - I take it your Honour is saying pleading - everything we intend to plead would require an enormous effort, because what we have to do - otherwise we get met with complaints that we lack precision in our

allegations, we have to plead every instance where we think we've been improperly charged.

LE MIERE J: Well, I've understood you to be saying to me that you say that to obtain an order for an inquiry you have to establish only sufficient reason for an inquiry to be made, which Mr Thomson then says should identify matters in relation to which the receivers have not faithfully performed their functions and so on within the terms of section 423. And specifying the matters in relation to which you want the conduct inquired. It seems to me then it's a matter for you what you plead, bearing in mind that you will have to make out a sufficient case for there to be an inquiry into the aspects of - the conduct of the receivers which you seek to be inquired into.

(Exhibit C page 566)

49 Later, the following exchange took place:

THOMPSON, MR: And then there will be some decision that your Honour makes which perhaps won't resolve the issues in a clear way between the parties, just because of the way that the matter has evolved before the court. That's the difficulty. So our submission is your Honour should follow what we would submit is an orthodox approach: give him leave to re-plead, allow a reasonable time, but on the assumption that, you know, there are people working on this so it may be a month. He's had 11 months or so or 10 months with the invoices. We will make a new application when we see the pleading, but we should have indemnity costs for this part.

METAXAS, MR: With respect, things that my learned friend said I was saying I didn't say.

LE MIERE. J: All right. I propose as follows - I don't want to spend the rest of the day arguing about what we should argue about. I propose as follows, that - order that the plaintiffs file and serve a further amended statement of claim on or before a certain date, stating amongst other things the conduct of the receivers in regard to which an inquiry should be ordered.

Secondly, the parties have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim on or before a certain date. Thirdly, each party have leave on or before a certain date to apply for a further oral hearing of the application for security for costs. Fourthly, if no party applies for a further oral hearing, the application for security for costs may be determined without any further oral hearing. **So I propose then you should continue and complete your submissions.**

METAXAS, MR: Please, your Honour.

LE MIERE J: Mr Thomson has made submissions, the matter has proceeded this far, in my view the most efficient - or least inefficient way of now dealing with the matter is to complete the submissions, that the plaintiffs make the submissions on the basis that they wish. Insofar as they are predicated upon an amended pleading, that amended pleading will have to be filed within a certain time. Each party may then put on any further evidence and submissions in light of that.

I have in mind that the receivers may either stick with what they've got or, if they see fit, put on some further evidence whether in relation to the costs of the changed scope of inquiry if there is one, or otherwise, and each party may then put on any further written submissions in relation to that matter. If any party considers that further oral hearing is required - and that would include for the making of some further application or further directions, then they may request it within a certain, time and we will deal with it. So the first step in relation to these directions is how long you would need to put on that - or want to put on that further pleading, Mr Metaxas.

METAXAS, MR: Well, I think 20 June, your Honour, is a Friday and I'm going away for a week after 20 June. So if I could have until 20 June.

LE MIERE J: Yes. Now, I've put it in terms of the parties have leave to file and serve any affidavits and submissions in relation to that further amended statement of claim on or before - I had in mind putting a period after that but, of course, in your case you can probably do it by 20 June anyway, wouldn't you? Because there's nothing further you would be receiving. I don't have in mind that yours are responsive to anything the receivers put on - - -

METAXAS, MR: Sorry - - -

LE MIERE J: - - - rather you can put, if you see fit - - -

METAXAS, MR: Sorry. Is it your Honour's intention that these are affidavits in respect of the application for security for costs?

LE MIERE J: Yes.

METAXAS, MR: Sorry.

LE MIERE J: This is all in relation to security for costs.

METAXAS, MR: I thought you meant in support of the application for an inquiry.

LE MIERE J: No. No.

METAXAS, MR: No, just for security of costs. Yes.

> LE MIERE J: And the reason I raise that is because it might be - it might not be, but it might be that receivers might say, "Well, that change the scope of the inquiry, our costs would be different, here's an estimate of what those costs might be."
>
> METAXAS, MR: Yes. Yes. In that case - - -
>
> LE MIERE J: They may not, they may choose to put on submissions which say, 'Well, this doesn't change anything' or may choose to put on submissions which say something else.

(Exhibit C pages 569-571; Tribunal bold emphasis added)

50 It is clear from the exchange between His Honour and Mr Metaxas that the reference to the affidavits being related to 'security for costs' is in contradistinction to the application for an inquiry. It is not a statement by His Honour that there is an open invitation to file further submissions relating to the security for costs. The affidavit and submissions relate to the impact the further amended statement of claim may have on the application for security for costs.

51 Mr Metaxas' reliance upon this exchange as basis for a contention that the security for costs was part heard is misplaced. (See Respondent's Outline of Submissions paras 4 to 4 (second)).

52 The exchange continued:

> METAXAS, MR: Yes. In that event, 20 June for me.
>
> LE MIERE J: 20 June. And another two weeks after that, Mr Thomson, for you to - - -
>
> THOMSON, MR: I'm entirely unavailable in July.
>
> METAXAS, MR: Sorry, are you - sorry, is your Honour asking my learned friend what date he wants to file the affidavits and submissions in reply?
>
> LE MIERE J: Yes, so some time after 20 June.
>
> METAXAS, MR: Yes.
>
> LE MIERE J: Do you have any time after 20 June, Mr Thomson, that would enable you to do it?
>
> THOMSON, MR: Well, I have a three day trial in the following week and then I'm on leave for three weeks and then I'm back and doing a two week trial. So perhaps if we were to say 4 July, really, to deal with it. Mr Feutril may well be involved.

> LE MIERE J: All right. And then I have in mind, say, another seven days after that in which either side might ask for an oral hearing.
>
> THOMSON, MR: Yes.
>
> METAXAS, MR: 11 July?
>
> LE MIERE J: 11 July.
>
> METAXAS, MR: Please, your Honour.
>
> LE MIERE J: **All right. So you can complete your submissions now, Mr Metaxas**.
>
> (Exhibit C page 571; Tribunal bold emphasis added)

53 Having been invited by His Honour to complete his submissions, Mr Metaxas then addressed His Honour in Exhibit C at pages 571-600. He concluded with the words 'so please the court, they're my submissions'. This exchange makes it clear that, except for any matters arising from the amendments to the statement of claim and any impact that might have on the security for costs application, the matter was complete. Save for matters arising from the amendment it would be a waste of judicial resources to have matters not related to the foreshadowed amendment part heard. It would have made far more sense to adjourn the entire hearing.

54 Mr Thompson then addressed His Honour. At page 613, His Honour stated 'All right. Well, I will reserve my decision, thank you, on the basis of the directions I made this morning'.

55 It is difficult to understand how Mr Metaxas could come away from the hearing with any misconception as to what the orders were and the basis upon which his Honour had made the orders.

56 The Associate's Record of the orders made by His Honour on 23 May 2014 (noted as 21 May 2014 in the Associate's Record) was:

> The plaintiffs file and serve a further amended statement of claim on or before 20 June 2014 stating, amongst other things, the conduct of the Receivers in regard to which an inquiry should be ordered.
>
> The parties have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim on or before 4 July 2014.
>
> Each party have leave on or before 11 July 2014 to apply for a further oral hearing of the application for security for costs.

> If no party applies for a further oral hearing the application for security for costs will be determined without any further oral hearing.
>
> (Exhibit C page 775)

57 The Associate's Record accurately reflects the orders made as set out in the transcript. The only error in the Associates Record is that the orders were made on 23 May 2014 not 21 May. Nothing turns on this as the precise date on which the orders were made is irrelevant. The transcript shows that they were made on 23 May 2014. Mr Metaxas received a copy of the Associate's Record on 20 June 2014 from the Receivers' solicitors (Exhibit C page 779). Mr Metaxas made no objections to the Associate's Record of the orders pronounced by His Honour upon receiving a copy of that Record by email on 20 June 2016. If Mr Metaxas believed those orders to be incorrect, it was open to him to have the orders corrected by communicating with the Associate. The fact that Mr Metaxas did not seek to correct the Associate's Record indicates that he was not under any misconception as to what the orders were.

58 Mr Metaxas' submission that the Associate's Record did not accurately reflect His Honour's orders are not supported by an examination of the relevant transcript and of the Associate's Record. (Respondent's Submissions para 16).

59 The contention that 'in reality and substance [the Westpoint Companies] were not able to consider the judgment prior to the formal making of orders' (Respondent's Submissions para 8) is simply wrong.

60 Initially, His Honour's Associate gave notice that His Honour intended to hand down his decision on 26 June 2014 but at the request of Mr Metaxas this was changed to 2 July 2014 (Exhibit A pages 767-777).

61 On 20 June His Honour's Associate sent an email to the parties:

> Dear Parties
>
> I refer to the below emails of Mr Metaxas.
>
> I confirm that the reserved decisions in relation to the above matter will now be handed down by the Court on Wednesday, 2 July 2014 at 9.15am.
>
> Any minutes of proposed orders should therefore be prepared for presentation to the Court on the above date.

> Advanced copies of the decisions will be available for collection from the Supreme Court reception at level 15, 111 St Georges Terrace on Tuesday, 1 July 2014 at 2.00pm.
>
> Kind regards
>
> (Exhibit C page 776)

62 Mr Metaxas' submissions that the Westpoint Companies were denied the opportunity to file further evidence, is incorrect. (Respondent's Submissions paragraph 14-15). The Westpoint Companies lost the opportunity because of their failure to comply with the order for the filing of an amended statement of claim.

63 The date of the email was the date by which the Westpoint Companies were to file a further statement of claim.

64 The Tribunal notes that the fact that His Honour may have nominated a date for the drafting of the decision does not mean that His Honour has decided the matter. The Tribunal does not accept Mr Metaxas' submission that it is a 'fair assumption' that because His Honour nominated a date, being 2 July 2014, to hand down the decision in respect of security of costs, that the decision had therefore already been drafted as at 20 June 2014, that is, when the Associate informed the parties of the listing. His Honour still had 11 days to draft the decision.

65 Despite being given notice that the decision was being handed down on 2 July 2014, Mr Metaxas did not indicate that he intended to take any further steps pursuant to the orders of 23 May 2014, save for filing a further statement of claim on 26 June 2014. Importantly, he did not indicate that he intended to take any steps to apply for a further oral hearing of the application for security for costs nor that he wished to make any submissions. There was nothing to stop Mr Metaxas from requesting His Honour to defer making final orders at a point so that he could seek leave to file further affidavits and submissions or to seek to make a further oral application.

66 On 26 June 2014 the Appellants filed and served a further re-amended statement of claim.

67 On 1 July 2014 at 2.00 pm, advanced copies of the decision (see [2017] WASC 217 Exhibit C page 193) were available for collection from the Supreme Court reception at level 15, 111 St Georges Terrace.

68 An email was sent to Mr Metaxas by the solicitors for the Receivers on 2 July 2014 at 8.45 am attaching a minute of proposed orders.

69 The Receivers' minute of proposed orders was:

> THE COURT ORDERS THAT:
>
> Interlocutory process for security for costs filed 20 December 2010
>
> 1. By 16 July 2014, the plaintiffs provide security for the second, third and fifth defendants' (the Receivers) costs of the action up to the close of pleadings in the sum of $150,000 by payment of that amount into court, the provision of an unconditional bank guarantee from an Australian trading bank in favour of the Receivers or by some other means agreed by the Receivers.
>
> 2. If the plaintiffs fail to provide security pursuant to Order 1, the proceedings be stayed until the plaintiffs provide the security or further order of the Court.
>
> 3. Subject to the plaintiffs' compliance with Order J, the Receivers file their defence by 17 November 2014.
>
> 4. The Receivers have liberty to apply for further security for costs after the pleadings are closed.
>
> Costs of disallowance application heard on 28 August 2013
>
> 5. The plaintiffs and Mr Norman Phillip Carey do jointly and severally pay the Receivers' costs of their application to disallow the amendments to the re-amended statement of claim and any reserved costs to be taxed.
>
> 6. Pursuant to section 280(2) of the *Legal Profession Act 2008* (WA) the costs the subject of Order 5 be taxed in accordance with item 10 of the Supreme Court Scale of Costs 2012 set out in Table B of the *Legal Practitioner (Supreme Court) (Contentious Business) Determination 2012* (Determination) with the following limits substituted for the limits fixed in the scale:
>
> a. the limit of the time allowed for the performance of the work be removed;
>
> b. the maximum hourly and daily rates allowed in respect of each fee earner set out in Table A of the Determination shall be increased by 50%; and

> c. the costs (inclusive of GST and counsel fees but exclusive of other disbursements) shall not exceed $50,000.
>
> Other orders
>
> 7. Orders 2 to 4 (inclusive) made on 23 May 2014 be vacated.
>
> 8. The plaintiffs and Mr Norman Phillip Carey do jointly and severally pay the Receivers' costs of the application for security for costs and the costs of the application for Receivers' costs of the disallowance application, fixed in the sum $20,000 to be paid within 14 days of this order.
>
> (Exhibit C pages 783-784)

70 COR 223 of 2009 was called on before Le Miere J on 2 July 2014. Mr Metaxas appeared for the Westpoint Companies. Given that Mr Metaxas appeared it is difficult to say that he had no notice of the decision. It is even more difficult for Mr Metaxas to argue this when he requested that the date for handing down of the decision be changed from 26 June 2014 to 2 July 2014. On the application for security for costs His Honour determined that the Westpoint Companies should give security for the Receivers' costs up to the close of pleadings in the sum of $150,000. The Receivers were able to apply for further security for costs after the pleadings had closed and proceedings were stayed until security was provided by payment into Court, by provision of a bank guarantee or some other means agreed by the Receivers. His Honour then published his reasons.

71 The following exchange took place at the hearing:

> LE MIERE J: All right. I will just ask my associate. Can you find the orders?
>
> METAXAS, MR: This is for the filing of the statement of claim of claim - - -
>
> FEUTRILL, MR: Yes.
>
> METAXAS, MR: - - - and affidavits?
>
> FEUTRILL, MR: Your Honour made some directions relating to the filing of an amended statement of claim - - -
>
> LE MIERE J: Yes.
>
> FEUTRILL, MR: - - - and then giving the parties leave to file and serve affidavits and submissions after that, addressing the security of the costs

application. The way I understand your Honour's reasons is that because you've ordered security up to the close of pleadings, to some extent that has rendered the necessity for additional affidavits and submissions beyond that point - - -

LE MIERE J: Yes.

FEUTRILL, MR: - - - moot.

LE MIERE J: Yes.

FEUTRILL, MR: So we've proposed that those orders simply be - - -

LE MIERE J: Yes.

LE MIERE J: All right.

FEUTRILL, MR: And then the last order obviously is one that may be of some controversy.

LE MIERE J: All right. Well, I will come back to that perhaps. I will see if - what - if there's any difference in relation to 1 to 7. Mr Metaxas.

METAXAS, MR: Please, your Honour. Well, as I said to my learned friend, I would have thought the appropriate order B in 1 is along the lines of the plaintiffs claim be stayed until the plaintiff pays $150,000 into court or provides a bank guarantee in that amount from an Australian trading bank. That's my understanding of the usual order for security for costs. And then paragraph 2 is unnecessary. Paragraph 3 is unnecessary. Paragraph 4 is fine.

LE MIERE J: Well, just coming back. So paragraph 1 say that the order should be the proceedings be stayed until - - -

METAXAS, MR: Plaintiff pays.

LE MIERE J: - - - the plaintiff provides security. So then 2 becomes unnecessary. Well, 3 is - - -

METAXAS, MR: Well, the action is stayed.

LE MIERE J: I see. Yes. So then if and when - - -

METAXAS, MR: Payment is made.

LE MIERE J: - - - the payment is in, then the parties will have to come back for directions.

METAXAS, MR: If appropriate.

LE MIERE J: What do you mean?

METAXAS, MR: Well, in the sense that the rules provide a time within which the defence is to be filed. If - if it's necessary to amend that time they would come before your Honour.

LE MIERE J: Yes. All right.

METAXAS, MR: Can I raise with your Honour, now, while we're dealing with paragraph 1 - paragraph - - - .

LE MIERE J: Yes. Did you say something about the form of the security as well?

METAXAS, MR: I said $150,000 in cash or by provision of a bank guarantee from an Australian trading bank.

LE MIERE J: Well, yes. I suppose - well, I've added the words or by some other means agreed by the receivers to give you an - - -

METAXAS, MR: Yes.

LE MIERE J: - - - extra option if you - - -

METAXAS, MR: If it please the court. In the reasons for decision on the application for security for costs, your Honour said at paragraph 43 of your reasons - sorry, is that the right reasons - sorry, I'm looking at the wrong reasons. No. It is paragraph 43. It's that last sentence. Your Honour said that the limit should be raised to 50,000 for the application to disallow the amendments to the statement of claim and having regard to that decision the amount of security should include an amount of 70,000 for costs incurred to date. So that plus 80,000 inclusive of counsel fees is the - how the 150 is comprised. So the issue that I seek some clarification in respect of is if the costs are taxed in respect of the application to disallow the amendments to the statement of claim, and let's for the purpose of the exercise say they are allowed at $50,000, my client on the basis of the orders proposed has provided security for that amount but then has to pay that amount as well. And I was just wondering whether that was your Honour's intention.

LE MIERE J: I see what you mean. No, it wasn't the intention that they should both pay the amount and give security for that amount.

(Exhibit C pages 617-619)

72 At page 627 Le Miere J said:

LE MIERE J: So order 1 will be amended by deleting the words 'by 16 July 2014' and inserting the words 'the proceedings be stayed until'. Orders 2, 3 and 4 - sorry, 2 and 3 are deleted. 4 will become 2.5 will become 3 and have added to it the words 'and the costs so taxed be paid out of the security provided pursuant to order 1, and in default of the provision of such security, be paid by the plaintiffs and

> Norman Phillip Carey'. Order 6 will be in the same terms. Now, order 7 - Mr Metaxas.

73 There was then discussion of proposed order 7, that is, the vacating of Orders 2-4 of the Orders of 23 May 2014. :

> LE MIERE J: Yes. Yes. All right. Order 7, Mr Metaxas.
>
> METAXAS, MR: And then so we come to 7. Well, I must say that when we adjourned on 23 May I thought we were coming back to complete the application but it seems that we're not. So that's probably appropriate - - -
>
> LE MIERE J: Yes.
>
> METAXAS, MR: - - - on that basis. And that brings us to paragraph 8.
>
> LE MIERE J: All right. I'll hear from Mr Feutrill.
>
> FEUTRILL, MR: Yes, your Honour. So I don't know if your Honour has had the opportunity - - -
>
> LE MIERE J: Yes.
>
> FEUTRILL, MR: I don't think I need to dwell on this for too great a time. The position we're adopting on this is that - to approach it from a - on a broadbrush approach, that the Consolidated Practice Directions indicate that costs should really be, where possible, be fixed and paid on a set date. We don't want to have to go through the process we have already been through on this disallowance on an application for costs. So what we've - - -
>
> LE MIERE J: So you don't want to go through what?
>
> FEUTRILL, MR: The process for applying for a special costs order, having affidavits filed, and so - it becomes interminable. So what we're suggesting, your Honour, is that this should be dealt with - - -
>
> (Exhibit C page 629)

74 Clearly Mr Metaxas had ample opportunity to make submissions on the terms of the orders. Mr Metaxas agreed that the terms of order 7 were appropriate. At that stage he did not say that his client had been denied procedural fairness.

75 Nothing Mr Metaxas did or stated gives support to a contention that the Westpoint Companies 'were then preparing an additional affidavit to be filed as to the reasonable allowance for fees to deal with employee entitlements' or that the Westpoint Companies 'intended to adduce

additional evidence in support of their submission that the Receivers had canvassed [the Westpoint Companies'] impecuniosity' (Exhibit C page 155). Indeed, Mr Metaxas' actions and statements are completely inconsistent with such a contention.

76 Finally at page 637 of Exhibit C, His Honour asked 'All right. Anything else? All right. Thank you. We will adjourn'.

77 The Tribunal does not accept Mr Metaxas' submissions that the contention that the security for costs application was not complete but part heard was supported by Counsel for the Receivers. (Respondent's Outline of Submissions 4 (second)).

78 As the Court of Appeal notes below, by reason of Mr Metaxas' failure to file the statement of claim on time, the balance of the orders did not come into effect. Strictly there was no need to vacate those orders. The fact that counsel for the Receivers sought to vacate the orders because they were 'moot' does not amount to support for the contention that the security for costs application was part heard.

79 The Westpoint Companies filed a Notice of Appeal against Le Miere J's decision on 15 July 2014 (Exhibit C pages 134-136).

80 The grounds of appeal were filed on 23 July 2014 and signed by Mr Metaxas (Exhibit C pages 142-150). The grounds of appeal relevantly stated:

> 1. The learned Judge erred in the exercise of a discretion to order that security for costs be provided as sought in the first respondents ("receivers") application filed 20 December 2010 ("Application") by reason of the errors affecting the decision making process set out in grounds 2 to 8 below so that the orders should be set aside and the Application be determined according to law.
>
> 2. The learned Judge erred in law in depriving the appellants of a right to be heard and denying the appellants procedural fairness insofar as:
>
> 2.1 after part hearing the Application on 21 May 2014 His Honour ordered that:
>
> (a) the appellants file and serve a further amended statement of claim by 20 June 2014;
>
> (b) the appellants and the receivers have leave to file and serve any affidavits and submissions

in relation to the further amended statement of claim by 4 July 2014;

(c) each of the appellants and the receivers have leave until 11 July 2014 to apply for a further oral hearing of the Application;

(d) if neither the appellants nor the receivers applied for a further oral hearing then the Application would be determined without any further oral hearing;

2.2 on 24 June 2014 the appellants filed and served a second further re-amended statement of claim;

2.3 on 2 July 2014, without prior notice to the appellants, His Honour published reasons for decision on the Application, made orders requiring the appellants to pay security for the receivers costs and vacated the orders made 21 May 2014 in 2.1(b), (c) and (d) above;

2.4 no reasons were given for the variation of the orders made on 21 May 2014; and

2.5 the appellants were denied the opportunity to adduce additional evidence in support of their submissions that the receivers had caused the appellants impecuniosity.

81 The Westpoint Companies' submissions relevantly states:

Ground 2

24 The receivers' applications for a special costs order on the disallowance application and the Application both came on for hearing on 21 May 2014. In the course of submissions by counsel for the appellants there was an exchange as regards whether the Application was for more than an inquiry and there had been discussion earlier that day between His Honour and counsel for the receivers as regards whether the appellants would be making further amendments to make additional allegations.

25 Counsel for the appellants informed His Honour that additional matters would be pleaded and that he would file an amended pleading to make clear, if there was any doubt, the relief sought. His Honour then ordered that:

25.1 the appellants file and serve a further amended statement of claim by 20 June 2014;

25.2 the appellants and receivers have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim by 4 July 2014;

25.3 each of the appellants and the receivers have leave until 11 July 2014 to apply for a further oral hearing of the Application;

25.4 if neither the appellants nor the receivers applied for a further oral hearing then the Application would be determined without any further oral hearing.

26 On 24 June 2014 the appellants filed and served a second further re-amended statement of claim pursuant to the orders made 21 May 2014.

27 On 2 July 2014, without prior notice to the appellants, His Honour published reasons for decision, made orders requiring the appellants to pay security and vacated the orders made 21 May 2014 in 25 above.

28 The appellants were then preparing an additional affidavit to be filed as to the reasonable allowance for fees to deal with employee entitlements. The appellants also intended to adduce additional evidence in support of their submission that the receivers had caused the appellants impecuniosity.

29 His Honour offered no reasons for amending the orders. The failure to give reasons is an error of law: *Lloyd v Faroane* [1989] WAR 154 at 163.

(Exhibit C pages 154-155)

82 There was an error in para 2.2 of the grounds and at para 25 of the submissions in that the date should be 26 June and not 24 June but nothing turned on this.

83 The appeal was heard before a Court of Appeal comprising the Chief Justice, Newnes & Murphy JJA on March 2015.

84 In the course of the hearing before the Court of Appeal the following exchange took place in relation to Ground 2.3:

MURPHY JA: There's 2.3. What do you say about that?

METAXAS, MR: 2.3. Well, sorry, when I say without prior notice, the parties were given advance copy of the judgment.

MARTIN CJ: Well, they were told on 20 June that the decision was going to be delivered then.

> METAXAS, MR: But not what the decision was.
>
> MURPHY JA: No, but you were given notice of - - -
>
> METAXAS, MR: Given notice of the hearing.
>
> MURPHY JA: - - - that reasons would be published, were you?
>
> MARTIN. CJ: You were told that on 20 June by email from his Honour's Associate.
>
> (Exhibit C page 28)

85 It is difficult to understand Mr Metaxas' proposition that he was not given notice of the hearing. Plainly he was. To state in the grounds of appeal and in his submissions that he was not given notice, when he requested that the proposed date for delivery of the reasons be extended and then to compound it by re-stating it to the Court of Appeal in oral argument, was plainly misleading by Mr Metaxas.

86 The preposition that the 'term' without prior notice to the Appellants was superfluous to the matters on appeal (Respondent's Submissions para 9) is simply wrong on any examination of the grounds at the transcript before the Court of Appeal.

87 The exchange continued:

> METAXAS, MR: Yes. But we didn't know what the - - -
>
> MARTIN CJ: And you didn't say, no, don't do that, we've got more to go, did you?
>
> METAXAS, MR: No, I didn't. And I didn't have to, with respect?
>
> MURPHY JA: Well, what do you mean by the words, 'without prior notice'?
>
> METAXAS, MR: Well, because we didn't know what the decision was, and have the capacity to communicate the effect of the decision to our client, so that we can be - could be instructed. And the proposition that I've somehow waived my client's objection to this process by not saying to his Honour, excuse me, I think you've made an error, and in the manner that's - - -
>
> (Exhibit C page 832)

88 By 1 July 2014, Mr Metaxas knew what the decision was. If he had any plans to make an application to make further submissions and affidavits in accordance with orders 2 or 3 from the hearing at first

instance there was nothing to stop him applying for the matter to be adjourned so that he could obtain further instructions. In any event, he did not need further instructions to raise the issue of procedural fairness before His Honour. If Mr Metaxas in fact believed that he had been denied procedural fairness because the process contemplated by the orders of 23 May was incomplete, he could have raised the matter before His Honour. His failure to do so is indicative of the position that he did not have any belief, or any reason to believe that there had been a breach of procedural fairness.

89 The exchanged continued:

> NEWNES JA: Sorry, what was the error?
>
> METAXAS, MR: The error was that his Honour decided the case before the time for further documents to be filed had elapsed.
>
> MARTIN CJ: No, he didn't.
>
> METAXAS, MR: He did.
>
> MARTIN CJ: He decided the case on 2 July, and the time for the filing of further documents had elapsed.
>
> METAXAS, MR: The orders - - -
>
> MARTIN CJ: It elapsed on 20 June.
>
> METAXAS, MR: No, the orders also gave the parties leave to file further submissions by a later date.
>
> NEWNES JA: In relation to the further amended statement of claim, but the further amended statement of claim wasn't filed in accordance with the order.
>
> METAXAS, MR: Well, it was filed four days later, with respect.
>
> MARTIN CJ: Six days late.
>
> NEWNES JA: Without leave.
>
> METAXAS, MR: Six days later.
>
> NEWNES JA: Without leave, and it wasn't in compliance with the order so - - -
>
> METAXAS, MR: Well - - -
>
> MARTIN CJ: The correspondence sent - - -

NEWNES JA: The second paragraph - sorry.

MARTIN CJ: I'm sorry.

METAXAS, MR: Yes.

NEWNES JA: The second paragraph didn't come into operation.

(Exhibit C page 833)

90 Mr Metaxas offered no explanation for not seeking leave to extend the time for the filing of the statement of claim. The second order made on 23 May did not come into operation unless the further amended statement of claim was filed by 20 June. It was filed on 26 June 2014 without leave.

91 The following exchange took place:

MARTIN CJ: But you can't come along and complain about his Honour sticking to a timetable, of which you were well aware, when you didn't. That's the point. He told you on 20 June the decision was going to be delivered. You knew that. You knew that the amended statement of claim had to be filed that day and you went to Vietnam on holiday. And then you come along to this court and you complain about denial of procedural fairness.

METAXAS, MR: The order - - -

MARTIN CJ: It just seems - utterly extraordinary, Mr Metaxas.

METAXAS, MR: With respect, the order made - the Associate's record for 21 May records that each party had leave, on or before 11 July, to apply for a further oral hearing of the application for security for costs. That wasn't confined to issues raised by the new affidavits, or the new pleading.

MURPHY JA: And no application was made.

METAXAS, MR: Well, because on 2 July his Honour recalled the orders and cancelled them.

MURPHY JA: But did you make an application on 2 July?

METAXAS, MR: No.

MURPHY JA: Why not?

METAXAS, MR: Because his Honour had decided the case, and if - - -

MARTIN CJ: Yes, but he told you on 20 June he was going to decide the case on 2 July - - -

METAXAS, MR: With respect - - -

MARTIN CJ: - - - and you did nothing - - -

METAXAS, MR: No.

MARTIN CJ: - - - except go to Vietnam.

METAXAS, MR: No, he didn't tell me he was going to decide the case on 2 July - I'm sorry, 2 July - I retract that. I'm sorry.

MARTIN CJ: That's not right.

METAXAS, MR: That's correct. I accept what your Honour says.

MARTIN CJ: So you were told - - -

METAXAS, MR: Yes.

MARTIN CJ: - - - so that's why it's extraordinary that, this ground of appeal, would assert that without prior notice to the appellants the decision came down, because you were told - - -

METAXAS, MR: No, it's without prior notice of the terms of the decision.

MARTIN CJ: Well, that's not what the ground of appeal says.

METAXAS, MR: Well, that's how it should be understood. What this is - it's not - - -

MURPHY JA: Judges don't tell you the terms of their decision before handing it down.

METAXAS, MR: No. So when I went to court on 2 July - - -

MURPHY JA: You couldn't read this sentence as a complaint that the judge didn't tell you the terms of his decision before he handed it down. You could only read it on the basis that you weren't told that the decision was being handed down. And that's just false, isn't it?

(Exhibit C page 834-836)

92 Mr Metaxas evaded an answer to Justice Murphy's question 'And that's just false, isn't it?'.

93 Mr Metaxas advanced the extraordinary proposition that ground 2.3 in its terms was inaccurate and that it was 'intended to mean' something other than what the words of ground 2.3 disclosed.

94 The following exchange then took place:

> METAXAS, MR: We were told the decision was being handed down and we were given an advance copy of the judgment the day before, on the usual terms, that we can't communicate the decision to our clients until one hour before the hearing.
>
> MURPHY JA: Well, that's not what 2.3 says.
>
> METAXAS, MR: Well, that's what 2.3 is intended to mean. We didn't know the terms of the decision - - -
>
> MURPHY JA: But you never know that.
>
> METAXAS, MR: No. And when we go - - -
>
> MURPHY JA: So how could you ever read this statement - - -
>
> METAXAS, MR: And when I go to court - - -
>
> MURPHY JA: - - - as suggesting that?
>
> METAXAS, MR: With respect, when I go to court and the judge says, I've decided the case on this, and this and this ground, it's not my place to stand up and say, I think your Honour's made an error, and I think we should start again.
>
> MARTIN CJ: But, Mr Metaxas, this seems to be the true position - - -
>
> METAXAS, MR: Yes.
>
> (Exhibit C page 836)

95 The following exchange then took place. That exchange made clear what Le Miere J's orders were intended to achieve:

> MARTIN CJ: - - - on 20 June an affidavit - I'm sorry, an email was sent by his Honour's Associate at 9.30 in the morning to all parties saying, reserve decision to be handed down next Wednesday at 9.15.
>
> METAXAS, MR: Yes.
>
> MARTIN CJ: You didn't go back and say, oh, no, that's terrible. I want a further hearing. I want further submissions. I want to put on this and that and the other. You went back and said, I'm overseas.
>
> METAXAS, MR: Yes.
>
> MARTIN CJ: And then you corrected the dates. I'm overseas from the 29th - 1st to the 29th. And then the Associate took that into account and said, all right, the decision will be delivered on 2 July.
>
> METAXAS, MR: Yes.

MARTIN CJ: And you didn't go back and say, oh, don't do that because we want to put on further affidavits, or further submissions, or we want a further hearing. You just said, okay. And now you say well that's because you thought you we're going to win - - -

METAXAS, MR: No. No.

MARTIN CJ: - - - and now you complain that you weren't told that you were going to lose.

METAXAS, MR: No, no. With respect, I had no idea what the decision would be, and - - -

MARTIN CJ: Well, if you had something more to say, then was the time to say it, Mr Metaxas, and you didn't.

METAXAS, MR: Well, no. With respect, your Honours are being unnecessarily harsh, in circumstances where his Honour had decided the case and we had no opportunity - reasonable opportunity - to decide what we should do about the matter. And, with respect, you don't go.to court and argue with the judge that, I'm sorry, you've made an error here. You've forgotten something. I am not in - it is not appropriate for me to tell his Honour that he has overlooked something in the orders he has made, particularly when his attention is specifically directed to the orders made, and he recalls the orders and cancelled them.

NEWNES JA: Well, the only thing that you've directed us to that you say was overlooked was the oral - leave for further oral hearing. But it seems to me that order in itself has got to be read in its context. He wasn't inviting you to come along and have another go on the material that you've already addressed him on.

METAXAS, MR: No. The hearing - - -

NEWNES JA: That was, surely, to apply for a further oral hearing arising out of any amended statement of claim, affidavits and submissions filed in relation to it, wasn't it?

METAXAS, MR: No.

NEWNES JA: That's the obvious way you would read it.

METAXAS, MR: No. Because the hearing on - the hearing before his Honour had not concluded when it was adjourned.

(Exhibit C pages 836-838)

96 A discussion then followed as to whether Mr Metaxas had completed his submission concerning the Receivers' security for costs applications subject to any further amendments of the statement of claim:

NEWNES JA: On the material that was then before his Honour.

METAXAS, MR: That's - yes. That's my recollection.

MARTIN CJ: Where do we find that?

METAXAS, MR: Well, the transcripts in the book.

MARTIN CJ: Right. Well, you need to take us to that, I think.

THOMSON, MR: His Honour's decision on this point is in the green book 1 at page 223 to 224.

MARTIN CJ: 2 - - -

THOMSON, MR: 23 to 224.

MARTIN, CJ: Thank you.

METAXAS, MR: At page 223 - - -

MARTIN CJ: Yes.

METAXAS, MR: - - - his Honour said:

> I propose as follows – I don't want to spend the rest of the day arguing about what we should argue about. I propose as follows that: order that the plaintiff's file and serve a further amended statement of claim -

On or before a certain date, stating amongst it:

> Second, the parties have leave to file affidavits -

Etcetera. The hearing had not concluded.

MARTIN CJ: But the affidavits and submissions plainly, when you look at the terms in which his Honour announced the orders, they were related to the further amended statement of claim.

NEWNES JA: Well, after (d) his Honour says - I don't understand this in the context of what you've just said:

> Mr Thomson's made submissions. The matter has proceeded this far. In my view, the most efficient or least efficient way of dealing is to complete the submissions. That the plaintiffs make the submission on the basis they wish, and then insofar as they are predicated on an amended pleading, that amended pleading will have to be filed within a certain time -

And so forth. So - - -

METAXAS, MR: And the concluding passage:

> Each party may then put on any further evidence and submissions in light of that.

NEWNES JA: Yes.

METAXAS, MR: So it wasn't confined:

> I have in mind the receivers may either stick with what they've got or, if they see fit, put on some further evidence, whether in relation to the costs of the changed scope of the inquiry; if there is one, or otherwise. And each party may put on any further submissions in relation to that matter.

MARTIN, CJ: Well, you then went on to put on submissions with respect to the security for costs, didn't you?

METAXAS, MR: No.

MARTIN CJ: Well, wasn't that what his Honour invited you to do at the bottom of page 223?

METAXAS, MR: At the bottom of 223 - - -

MARTIN CJ:

> Plaintiffs make the submissions on the basis that they wish.

METAXAS, MR: Well, what I'm saying is - - -

MARTIN CJ:

> Insofar as they're predicated on amended pleading, that amended pleading will have to be filed.

METAXAS, MR: What I'm saying is, that the additional evidence and submissions was not confined to an amended pleading. The parties had liberty at large to put on additional submissions and evidence.

MARTIN CJ: Well - - -

NEWNES JA: Well, that's not as how I understand it.

MARTIN CJ: What are the submissions at - for example, at page 44 - 227 of the appeal book directed to?

METAXAS, MR: Sorry, 237?

MARTIN CJ: 227.

METAXAS, MR: At margin note.

MARTIN CJ: Well, anywhere on that page. What are you addressing the court about? What is the issue?

METAXAS, MR: Anything to do with the application.

MARTIN CJ: The application for security.

METAXAS, MR: Yes.

MARTIN CJ: So you did complete your oral submissions in relation to the application for security that day.

METAXAS, MR: I completed - well - - -

MARTIN CJ: As his Honour suggested you should at the bottom of page 223. And if you go to - the clear example of that is at 233, line (d).

> The obligation is on the receivers to press the application.

Now, that's all about the application for security for costs, isn't it?

METAXAS, MR: Yes.

MARTIN CJ: So you did as his Honour suggested. You went and put everything that you could in relation to the application for security. The matter went off on the basis that if there was to be an amended statement of claim that would impact upon the application for security, people could apply for a further oral hearing in relation to the consequences of the application of the amended statement of claim.

But there was no amended statement of claim within the time directed by the judge, and so there was no occasion for a further oral hearing.

METAXAS, MR: With respect, we completed our submissions to a point that I think finishes at about page 254 of the transcript - 254, I'm sorry, in the book.

MARTIN CJ: 250 - - -

METAXAS, MR: Four.

MARTIN CJ: Yes.

MURPHY JA: And you concluded with the words, "So if it please the court, they're my submissions."

METAXAS, MR: Yes. To that point, on the basis of - - -

MARTIN CJ: Well, to that point - that is, embracing anything other than - everything other than anything arising out of the amendment.

> METAXAS, MR: No. At that point, on the basis that his Honour said earlier, that the parties could file additional submissions and affidavits.
>
> (Exhibit C pages 838-841)

97 Mr Metaxas' assertion to the Court of Appeal that it was open for him to file affidavit and submissions on matters other than those arising out of the amendment after the completion of the hearing on 23 May 2014 is not supported by the transcript.

98 A further exchange took place at Exhibit C page 863:

> MARTIN CJ: Yes.
>
> THOMSON, MR: - - - probably they're the only points I need to draw to your Honours' attention.
>
> MARTIN CJ: Thank you, Mr Thompson. Mr Metaxas, any submissions in reply?
>
> METAXAS, MR: Yes, very briefly. The submission - sorry, I've misplaced the yellow book. There it.is. The transcript of the proceedings when judgment was delivered at page 31 I think it is of the yellow book, my statement was with respect factual. I must say when we adjourned I thought we were coming back to complete the application, but it seems that we're not, so that's probably appropriate. I did not consent to the order. All I said is in light of the reasons for decision that his Honour had published, that was the appropriate order to- be made. It was hardly appropriate for me to say, 'I think you've made an error and we should cast aside the reasons for decision and complete the hearing'. His Honour - - -
>
> MARTIN CJ: Well, the time to say that was on 20 June when you were told the decision was going to be delivered. If you wanted to be further heard that was the time to say it and you didn't. You went on holiday.
>
> METAXAS, MR: No. This was on the - date the reasons were published.
>
> MARTIN CJ: I know, but the point I'm making, Mr Metaxas, is if you wanted to be further heard, the time to assert that right was on 20 June when you were told by the judge's associate that the decision was going to be delivered, and you didn't ask to be further heard.
>
> METAXAS, MR: I didn't ask to be further heard because I had no idea what decision his Honour was making, and I certainly hadn't assumed that his Honour was proposing to dismiss the application. I didn't know what decision his Honour was making until I got back and got the reasons for the decision the day before the hearing and then they were embargoed till an hour before the hearing. If it please your Honours.

> MARTIN CJ: Yes, all right. We will reserve our decision and publish our reasons as soon as we can. The court will now adjourn.

99 Mr Metaxas asserts that he did not consent to the orders. What is absolutely clear is that Mr Metaxas did not oppose the orders.

100 Mr Metaxas submitted that there is no basis for the allegation that Ground 2.4 was premised on an implied factual assertion that the order was made over his opposition. (Respondent's Submissions paras 12-13). The submission in support of the grounds of appeal cited ***Lloyd v Faraone*** [1989] WAR 154 at 163 (***Lloyd v Faraone***). ***Lloyd v Faraone*** is a case where it was held to be an error of law not to state reasons. However, the proposition applies where there is a disputed issue of fact that is unresolvable and therefore needs to be determined. It is not an authority for a proposition that a Judge is under an obligation to give reasons where an order is by consent or not opposed. A submission that reasons were required, implicitly submits that the terms of the orders were opposed. Yet they were not opposed.

101 ***Huntingdale Village*** was published by the Court of Appeal on 27 May 2015.

102 In ***Huntingdale Village*** at [15]-[40] the Court of Appeal stated:

> **Ground 2**
>
> 15 Ground 2 is in the following terms:
>
> The learned Judge erred in law in depriving the appellants of a right to be heard and denying the appellants procedural fairness insofar as:
>
> 2.1 after part hearing the Application on 21 May 2014 His Honour ordered that:
>
> (a) the appellants file and serve a further amended statement of claim by 20 June 2014;
>
> (b) the appellants and the receivers have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim by 4 July 2014;
>
> (c) each of the appellants and the receivers have leave until 11 July 2014 to apply for a further oral hearing of the Application;

(d) if neither the appellants nor the receivers applied for a further oral hearing then the Application would be determined without any further oral hearing;

2.2 on 24 June 2014 [sic] the appellants filed and served a second further re-amended statement of claim;

2.3 on 2 July 2014, without prior notice to the appellants, His Honour published reasons for decision on the Application, made orders requiring the appellants to pay security for the receivers [sic] costs and vacated the orders made 21 May 2014 in 2.1(b), (c) and (d) above;

2.4 no reasons were given for the variation of the orders made on 21 May 2014; and

2. the appellants were denied the opportunity to adduce additional evidence in support of their submissions that the receivers had caused the appellants impecuniosity.

16 Because of the allegations contained within this proposed ground, it is necessary to recount the course of the hearing and determination of the application for security for costs in some detail.

17 As we have noted, the Receivers applied for security for their costs on 20 December 2010. However, the application did not come on for hearing until 21 May 2014. The reasons for the delay in the hearing of the application will be considered in the context of the various grounds of appeal which assert that the application should have been dismissed because of delay.

18 Because there was insufficient time available to complete the hearing of the application for security on 21 May 2014, the hearing was adjourned until 23 May 2014. At the commencement of the hearing on that day, counsel for the Westpoint companies proposed to file an amended statement of claim modifying the relief sought against the Receivers and specifying in detail the manner in which their charges were said to be excessive. The amendments were said to be relevant to the question of whether the proceedings brought against the Receivers would be heard in a series of stages - the first being limited to ascertaining whether an inquiry into their conduct was warranted. If and to the extent that the foreshadowed amendments to the statement of claim supported the proposition that the proceedings against the Receivers would be heard in a series of stages, they were obviously relevant to the application for security for costs, and in particular to the question of

whether any security should be ordered to be provided in a series of stages.

19 There was then a lengthy interchange between counsel for the Westpoint companies and the primary judge in relation to the nature and effect of the proposed amendments to the statement of claim. At the conclusion of that interchange the primary judge expressed the tentative view that if changes were made to the statement of claim of the kind foreshadowed by counsel, the Receivers would have to be given the opportunity to adduce further evidence with respect to the likely cost of defending the proceedings, given the potential impact which the amendments would have upon those costs. In that context, counsel for the Westpoint companies submitted:

> METAXAS, MR: Your Honour, with respect, if the receivers want to put something else up on quantum they can do that in the next two weeks or something. Really, there's no reason why I shouldn't proceed, I wouldn't have thought. Of course your Honour needs to hear from my learned friend but I would have thought I should complete my submissions. If the receivers want to put something else in on quantum they can do so but the proposition that we should all go away and come back just because there's going to be an amended draft bill prepared seems to me to be unnecessary.

20 Counsel for the Receivers then put submissions to the effect that the amendment to the statement of claim which had been foreshadowed by counsel for the Westpoint companies could potentially have a significant impact upon the Receivers' costs of defending the proceedings. After further debate between counsel with respect to the ambit and effect of the foreshadowed amendments to the statement of claim, the primary judge stated to counsel for the Westpoint companies:

> LE MIERE J: What I'm considering doing is this: is to direct first that you file a further amended statement of claim, which insofar as it seeks an inquiry in regard to the conduct of the receivers, specifies the conduct of the receivers which should be inquired into. (2) For you to continue your submissions today, to give both sides leave to file further submissions after receiving your amendment. And liberty to either party to apply to relist the matter for further argument if they wish to conduct further argument, having received your amendment.

21 Counsel for the Westpoint companies responded that he did not have any difficulty with the proposal, although if the revised pleading was to provide particulars of all overcharging by the Receivers, more time would be required to amend the pleading. Counsel for the Receivers responded to the proposal by submitting that the application for security for costs then before the court should be resolved on the basis that the Receivers receive their costs of the application on an indemnity basis, and that the question of security for costs should be reconsidered after the proposed amended statement of claim had been filed and served. The primary judge then ruled in the following terms:

> LE MIERE J: I propose as follows, that - order that the plaintiffs file and serve a further amended statement of claim on or before a certain date, stating amongst other things the conduct of the receivers in regard to which an inquiry should be ordered.
>
> Secondly, the parties have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim on or before a certain date. Thirdly, each party have leave on or before a certain date to apply for a further oral hearing of the application for security for costs. Fourthly, if no party applies for a further oral hearing, the application for security for costs may be determined without any further oral hearing. So I propose then you should continue and complete your submissions.
>
> …
>
> Mr Thomson has made submissions, the matter has proceeded this far, in my view the most efficient - or least inefficient way of now dealing with the matter is to complete the submissions, that the plaintiffs make the submissions on the basis that they wish. Insofar as they are predicated upon an amended pleading, that amended pleading will have to be filed within a certain time. Each party may then put on any further evidence and submissions in light of that.
>
> I have in mind that the receivers may either stick with what they've got or, if they see fit, put on some further evidence whether in relation to the costs of the changed scope of inquiry if there is one, or otherwise, and each party may then put on any further written submissions in relation to that matter. If any party considers that further oral hearing is required – and that would include for the making of some further application or further

> directions, then they may request it within a certain time and we will deal with it.

22 The primary judge then asked counsel for the Westpoint companies to nominate a time by which the amended statement of claim would be provided. Counsel suggested 20 June because 'I'm going away for a week after 20 June'. Counsel for the Receivers then nominated 4 July as the date by which any further submissions or affidavits might be provided in response to the amended statement of claim, and the primary judge then ruled that either party might request a further oral hearing within seven days after that date - namely, by 11 July 2014. He then invited counsel for the Westpoint companies to complete his submissions, which counsel then did by addressing various aspects of the application for security. Counsel concluded, 'So please the court, they're my submissions'. Counsel for the Receivers then presented substantial submissions in reply after which the primary judge observed:

> I will reserve my decision, thank you, on the basis of directions I made this morning.

23 During the afternoon of 20 June 2014, the solicitor for the Westpoint companies (who had appeared as counsel at the hearing on 23 May 2014) sent an email to the solicitors for the Receivers noting that the amended pleading and further affidavits were due that day. The email stated:

> I am flying out tomorrow for a week. I will try and complete them before I leave which may mean you won't have them until the middle of next week.
>
> I will be back in my office on 30 June 2014.

The solicitor acting for the Receivers responded by email observing that the previous email was unclear, and inquiring whether the amended pleading was proposed to be served by the middle of the following week (being 25 June) or the middle of the week after Mr Metaxas returned to his office (being 2 July). Mr Metaxas responded by email to the effect that the amended pleading would be provided on 25 June.

24 On 25 June 2014, Mr Metaxas sent an email to the solicitor acting for the Receivers advising that he had sent to his client what he expected to be the document that would be filed or close to it, and that the document would be filed the next day, as he had holiday commitments which would preclude an earlier filing. The amended pleading was in fact filed and served on 26 June 2014.

25 In the meantime, on 20 June 2014, the associate to the primary judge advised the parties by email that the reserved decision in relation to the application for security for costs would be delivered on 25 June 2014. Mr Metaxas responded by email advising that he would be overseas on that day and requested that the delivery of the decision await his return. In response, the associate to the primary judge advised the parties by email, also on 20 June 2014, that the reserved decision would be delivered on 2 July 2014. At no time between the provision of that advice and delivery of the reserved decision on 2 July 2014 did Mr Metaxas request any opportunity to provide further submissions or affidavits relating to the impact which the proposed amended statement of claim would have upon the application for security for costs. Nor were any such submissions or affidavits provided prior to delivery of the reserved decision - the only document which was filed and served on behalf of the Westpoint companies was the amended statement of claim, and that document was filed outside the time directed by the court and without leave or an extension of time within which to file that document.

26 In accordance with the protocol relating to the delivery of reserved decisions, on 1 July 2014 reasons for the primary judge's decision were provided to the parties. On the morning upon which the reserved decision was delivered, the solicitors for the Receivers provided to the solicitors for the Westpoint companies a minute of the orders which they proposed. Included within that minute was a proposed order numbered 7 which provided that the orders made on 23 May 2014 with respect to the filing of further submissions and affidavits dealing with matters arising from any amendments to the statement of claim and empowering the parties to request a further oral hearing of the application for security for costs be vacated.

27 Mr Metaxas appeared on behalf of the Westpoint companies at the time the reserved decision was delivered. Prior to delivery of the decision he made no complaint with respect to the procedure which had been followed, nor did he request any further time within which to file any further submissions or affidavits.

28 After delivery of the reserved decision, debate occurred by reference to the minute of orders which had been prepared by the solicitors for the Receivers. The primary judge asked Mr Metaxas for his response to proposed order 7. He replied:

> METAXAS, MR: And then so we come to 7. Well, I must say that when we adjourned on 23 May I thought we were coming back to complete the application but it seems that we're not. So that's probably appropriate on that basis and that brings us to paragraph 8.

29 It can thus be seen that every aspect of proposed ground 2 is affected by error. In relation to item 2.1, the orders listed in that paragraph were not made on 21 May 2014, but on 23 May 2014 and, more significantly, the application was not part-heard. Rather, the hearing of the application was completed consistently with the submission made by counsel for the Westpoint companies to that effect. Orders were made which would have enabled further materials to be filed, and perhaps a further hearing to occur limited to addressing any consequences flowing from the proposed amendment to the statement of claim. However, the statement of claim was not amended within the time directed by the court.

30 Turning to item 2.2 of the proposed ground, the amended statement of claim was not filed and served on 24 June 2014, but on 26 June 2014. This error is not of great significance.

31 The assertion in item 2.3 to the effect that the reserved decision on the application for security for costs was published on 2 July 2014 without prior notice to the Westpoint companies is not correct. During oral argument counsel sought to justify the assertion with the proposition that the paragraph should be read as asserting that the primary judge did not give prior notice of the terms of his decision. However, there is no way the words used in the proposed ground can be construed in that way and even if they were, the assertion remains incorrect, as the reasons for decision were provided to the solicitors for the Westpoint companies on the day prior to their publication.

32 The assertion in item 2.4 of the proposed ground to the effect that no reasons were given for the variation of the orders relating to the provision of additional materials flies in the face of counsel's express acknowledgement, during the hearing on 2 July 2014, that he understood the reasons for the revocation of the orders, and that the revocation of those orders was 'probably appropriate'.

33 Item 2.5 of the proposed ground asserts that the Westpoint companies were denied the opportunity to adduce additional evidence in support of their submission that the Receivers had caused their impecuniosity when, in fact, no such opportunity was ever to be provided, as it is clear that provision was only made for additional materials relating to the consequences of the foreshadowed amendments to the statement of claim. There had never been any suggestion during the hearing of the application for security that the parties were to be at liberty to provide additional materials at large, nor were there any orders to that effect. Nor is there any evidence to the effect that any additional evidence with respect to the cause of the Westpoint companies' impecuniosity was ever prepared or tendered to the court, in a

context in which the solicitor for the Westpoint companies was given more than 10 days notice of the delivery of the reserved decision, and made no complaint with respect to the timing proposed, nor was any request made to adduce further evidence.

34 The oral submissions advanced on behalf of this ground during the hearing of the application for leave by counsel who had appeared before the primary judge similarly misstated what had occurred during that hearing. Counsel submitted that the orders that were made enabling the parties to file further submissions and affidavits, and to apply for a further hearing, were not confined to issues raised by the new pleading. That assertion is not correct. It is directly contrary to the rulings made by the primary judge and the express terms of the orders which he made. In that context, counsel for the Westpoint companies sought to draw a distinction between the written record of the orders made, contained in the associate's record of the proceedings, and an order extracted under the Rules. That distinction is disingenuous not only because under current practice, in the absence of an extracted order, the associate's record maintained in the records of the court provides the best evidence of the orders made by a court, but also because the terms of the associate's record in this case correspond exactly with the terms of the orders pronounced by the primary judge in open court, although counsel for the Westpoint companies submitted, again incorrectly, that the transcript showed that the orders were not so limited.

35 Counsel for the Westpoint companies also submitted that the hearing of the application for security had not concluded when it was adjourned on 23 May 2014. That assertion is also not correct, as the transcript clearly reveals. In fact it was counsel for the Westpoint companies who submitted that the hearing should be completed, against a contrary submission presented by counsel for the Receivers.

36 Counsel for the Westpoint companies also denied that after the primary judge announced the orders that would be made with respect to the proposed amended statement of claim and any matters consequential to it, he proceeded to complete his submissions in relation to the application for security. The assertion implicit in this denial is not correct, as is his further assertion that the parties could file additional submissions and affidavits at large.

37 Further, counsel's assertion that 'the additional material was not confined to … the proposed amended pleading' is contrary to the orders enunciated orally by the primary judge, and which were recorded in writing in both the transcript and the associate's record, and which were reproduced as part of proposed ground

> 2. The order made expressly limits any further affidavits and submissions to those relating to the further amended statement of claim.
>
> 38 Counsel's assertion that the hearing was adjourned part-heard is also incorrect - as we have noted, at the conclusion of the hearing the primary judge announced that he had reserved his decision subject to the orders he had made with respect to the provision of further material arising from the foreshadowed amendments to the statement of claim. It is quite clear from the transcript of the hearing that, in accordance with the submission put by counsel for the Westpoint companies, the hearing of the application was concluded save for any issues arising from the foreshadowed amendments to the statement of claim. In the event, because the statement of claim was not amended within the time directed by the court, the orders made for the provision of additional materials had no application.
>
> 39 As advocacy is a human process, it is inevitable that inadvertent mistakes will be made by counsel from time to time. However, counsel's duty to not mislead the court carries a positive and correlative responsibility to take all necessary steps to ensure that there is a proper factual basis for submissions put to the court. The terms of proposed ground 2 and the oral submissions put in support of that ground represent a significant departure from that duty.
>
> 40 As the factual premises upon which ground 2 is based are false, it is entirely without substance.

103 The Tribunal respectfully agrees with the Court of Appeal's reasons and conclusion as to Ground 2.

104 Subsequently the Court of Appeal made an indemnity costs order against Mr Carey and the Westpoint Companies in ***Huntingdale Village Pty Ltd (Receivers and Managers Appointed) v Korda*** [2015] WASCA 101 (S) (***Huntingdale Village (S)***) (Exhibit C pages 895-903). In ***Huntingdale Village (S)*** at [13]-[15] the Court of Appeal stated:

> 13 The written submissions filed and served by the receivers succinctly and accurately characterise our earlier decision in these terms:
>
> > [T]he application for leave to appeal was doomed from the outset because there was no ground for contending that the appellants would suffer substantial injustice if the decision of the primary court were not reversed

> …
>
> …
>
> (a) ground 1 served no point or purpose and should not have been included;
>
> (b) the factual premise upon which ground 2 was based was false and it was entirely without substance;
>
> (c) there was no substance in any of proposed grounds 3, 4, 5 or 7 of the appeal;
>
> (d) proposed ground 6 was misconceived;
>
> (e) proposed ground 8 … was based upon submissions that were incomprehensible and nonsensical … Otherwise, the proposed ground was misconceived;
>
> (f) no error of the character required by *House v The King* was identified in argument in support of the proposed ground 9 …
>
> 14 It should be clear from our reasons that this is one of those cases in which the applicants and Mr Carey, properly advised, should have known that they had no chance of succeeding either in obtaining the grant of leave to appeal or in succeeding upon the appeal if leave was granted.
>
> 15 This is not a case in which either the facts or the applicable principles of law were uncertain in any respect. Nor is this a case in which characterisation of the application for leave to appeal as hopeless and inevitably doomed to failure could be described as unduly harsh or improperly influenced by hindsight.

105 Further at paragraphs [16]-[18] the Court of Appeal in ***Huntingdale Village (S)*** stated:

> 16 As we have mentioned, Mr Carey has sworn an affidavit in opposition to the application made against him. In that affidavit, Mr Carey deposes that the appeal was instituted and prosecuted by the applicants on the basis that their lawyer, Mr Metaxas, had advised him that the appeal had merit. He further deposes that Mr Metaxas advised him, 'in a robust manner, words to the following effect: "You have to appeal, otherwise you are giving them a blank cheque"'. Mr Carey deposes that as a consequence

> of those words being spoken he 'considered the decision to institute the appeal to be beyond question'.
>
> 17 There are two reasons why this evidence provides no answer to the application for costs against Mr Carey. First, the assessment of whether costs should be awarded on an indemnity basis because the proceedings had no prospect of success is undertaken on an objective basis by reference to an assumption that proper legal advice had been given in relation to the proceedings. The actual legal advice given is irrelevant. Were it otherwise, difficult questions would arise with respect to the waiver of legal professional privilege and in relation to possible conflicts of interest between the lawyer providing the advice and the client. Further, it would be wrong in principle for liability for indemnity costs to depend upon the competence or otherwise of the legal advisors engaged.
>
> 18 Second and in any event, it appears from Mr Carey's affidavit that the advice which he received from Mr Metaxas was given in the most general of terms, and appears to have been based more upon the consequences of failure rather than the merits of the appeal itself. If Mr Carey received more detailed or considered advice prior to instructing the commencement of the application for leave to appeal, he does not depose to it. The commencement of appellate proceedings on the basis of such general and non-specific advice can only be characterised as rash and foolhardy.

106 The failure by Mr Metaxas to provide detailed and considered advice is consistent with his assertion that 'you have to appeal otherwise you are giving a blank cheque' explains why Ground 2 lacked any substance filed by Mr Metaxas.

The Committee's application and Mr Metaxas' responses

107 In order to ensure that the Tribunal has dealt with the matters raised by Mr Metaxas in his statement of issues, fact and contentions it is useful to set out the Committee's application and Mr Metaxas' responses where relevant.

Mr Metaxas:

> Mr Metaxas admitted paragraph 2 of the Committee's application.
>
> (Exhibit B page 1)

The Committee:

3. Relevantly, on 20 December 2010 certain of the defendants in the Westpoint proceedings (the Receivers) applied for security for their costs of the Westpoint proceedings (application for security for costs).

(Exhibit A page 1)

Mr Metaxas:

3. Paragraph 3 of the [Committee's] statement of facts and contentions is admitted and [Mr Metaxas] says further that:

   3.1 the application which became COR 223 of 2009 was commenced by 5 companies ('WP Companies') in the Federal Court in Melbourne on 4 September 2009;

   3.2 on 16 November 2009 the Federal Court made an order that the application be transferred to the Supreme Court of Western Australia;

   3.3 on 2 December 2009 Le Miere J made orders by consent, namely,

      (a) by 9 December 2009 the WP Companies file and serve a statement of claim;

      (b) by 22 December 2009 the defendants to the application file and serve their defences;

   3.4 on 9 December 2009 the WP Companies filed and served a statement of claim;

   3.5 in February 2010 Perpetual Nominees Ltd (being the first defendant) filed and served its defence to the statement of claim;

   3.6 the application for security for costs filed by Mark Korda, David Winterbottom and Oren Zohar ('Receivers') on 20 December 2010 came on for hearing on 21 December 2010 when it was adjourned to 15 February 2011 after which it was not pressed until April 2014;

   3.7 at par. 22 of his reasons for decision in *Huntingdale Village Pty Ltd v Perpetual Nominees Ltd* [No. 2][2014] WASC 217 Le Miere J stated that the application 'was, in effect, stayed pending the

resolution of COR 147 of 2010' which was not correct; and

3.8 what was correct was that the Receivers elected not to press the application.

(Exhibit B pages 1-2)

108 As explained above, Le Miere J's statement in [22] of his reasons is correct, contrary to Mr Metaxas' response in para 3.8.

The Committee:

4. The application for security for costs was heard before Le Miere J on 21 and 23 May 2014. Mr Metaxas was counsel for the Westpoint companies at the hearing.

(Exhibit A page 2)

Mr Metaxas:

4 Paragraph 4 of the [Committee's] statement of facts and contentions is admitted. Also heard on 21 May 2014 was the application by the Receivers for special costs in respect of the application to disallow amendments to the statement of claim (heard 28 August 2013) and in respect of which reasons for decision were published 26 September 2013: *Huntingdale Village Pty Ltd v Perpetual Nominees Ltd* [2013] WASC 352. The sequence of hearings on 21 May 2014 was:

4.1 first, the application for a special costs order in the application to disallow amendments to the statement of claim in which Norman Carey was represented by ML Coulson was heard on 21 May and submissions on that application were completed by about 2:48 PM that day; and

4.2 second, the application for security for costs was heard on 21 and 23 May from about 10:30 AM to about 12:50 PM and then on 23 May from about 2:20 PM to about 3:14 PM.

(Exhibit B page 2-3)

The Committee:

5. In the course of the hearing on 23 May 2014, Le Miere J, in substance and effect, made the following directions:

5.1. the Westpoint companies file and serve a further amended statement of claim on or before 20 June 2014 stating, amongst other things, the conduct of the Receivers in regard to which an inquiry should be ordered;

5.2. the parties have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim on or before 4 July 2014;

5.3. each party have leave on or before 11 July 2014 to apply for a further oral hearing of the application for security for costs;

5.4. if no party applies for a further oral hearing, the application for security for costs will be determined without any further oral hearing.

(the 23 May 2014 directions)

(Exhibit A page 2)

Mr Metaxas:

5. As to paragraph 5 of the [Committee's] statement of facts and contentions the respondent says:

5.1 the matters stated by [Committee] are based upon the Associates Record dated 26 May 2014 of the orders stated to have been made 21 May 2014 and not 23 May 2014;

5.2 the transcript of the hearing on 23 May 2014 as attached to the affidavit of Stephanie Puris sworn 3 October 2014 recorded Le Miere J as having said at t/s 436:

> All right. I propose as follows - I don't want to spend the rest of the day arguing about what we should argue about. I propose as follows, that - order that the plaintiffs file and serve a further amended statement of claim on or before a certain date, stating amongst other things the conduct of the receivers in regard to which an inquiry should be ordered. Secondly, the parties have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim on or before a certain date. Thirdly, each party have leave on or before a certain date to apply for a further oral hearing of the

> application for security for costs. Fourthly, if no party applies for a further oral hearing, the application for security for costs may be determined without any further oral hearing. So I propose then you should continue and complete your submissions.

5.3 and at t/s 436 there was the following exchange:

> METAXAS, MR: Sorry. Is it your Honour's intention that these are affidavits in respect of the application for security for costs?
>
> LE MIERE J: Yes.
>
> METAXAS, MR: Sorry.
>
> LE MIERE J: This is all in relation to security for costs.
>
> METAXAS, MR: I thought you meant in support of the application for an inquiry.
>
> LE MIERE J: No. No.
>
> METAXAS, MR: No, just for security for costs. Yes.
>
> LE MIERE J: And the reason I raise that is because it might be - it might not be, but it might be that receivers might say, 'Well, that change the scope of the inquiry, our costs would be different, here's an estimate of what those costs might me.'

5.4 by reason of the matters in 5.3 above it is clear that:

(a) Le Miere J intended that the further affidavits would be on any topic relevant to the application for security for costs not in relation to the further amended statement of claim as alleged by the [Committee]; and

(b) the Associates' Record was erroneous.

(Exhibit B pages 3-4)

109 For the reasons stated above, the Tribunal rejects Mr Metaxas' contentions in para 5.4, in particular, para 5.4(b) of his submissions.

The Committee:

6. Immediately prior to making the 23 May 2014 directions, Le Miere J stated to Mr Metaxas and counsel for the Receivers, in terms, that the purpose for providing in the directions for a possible further oral hearing was to address the consequences (if any) upon the application for security for costs of the further amendments to the statement of claim Mr Metaxas proposed to make.

(Exhibit A page 2)

Mr Metaxas:

6 As to paragraph 6 of the applicant's statement of facts and contentions [Mr Metaxas] repeats paragraphs 5.3 and 5.4 above and says further that the transcript recorded Le Miere J as having said:

> Mr Thomson has made submissions, the matter has proceeded this far, in my view the most efficient - or least inefficient way of now dealing with the matter is to complete the submissions, that the plaintiffs make the submissions on the basis that they wish. Insofar as they are predicated upon an amended pleading, that amended pleading will have to be filed within a certain time. Each party may then put on any further evidence and submissions in light of that. I have in mind that the receivers may either stick with what they've got or, if they see fit, put on some further evidence whether in relation to the costs of the changed scope of inquiry if there is one, or otherwise, and each party may then put on any further written submissions in relation to that matter. If any party considers that further oral hearing is required - and that would include for the making of some further application or further directions, then they may request it within a certain time and we will deal with it. So the first step in relation to these directions is how long you would need to put on that - or want to put on that further pleading, Mr Metaxas.

(Exhibit B page 4)

The Committee:

7. Immediately following the making of the 23 May 2014 directions, counsel for each party completed their oral submissions with respect to the application for security for costs.

(Exhibit A page 2)

Mr Metaxas:

7 Paragraph 7 of the [Committee's] statement of facts and contentions is denied. Le Miere J outlined the proposed orders at about 11:45 AM on 23 May 2014 and submissions were not completed until about 3:14 PM that day.

(Exhibit B page 4)

The Committee

8. At the conclusion of the hearing on 23 May 2014, Le Miere J reserved his decision on the application for security for costs on the basis of the 23 May 2014 directions.

(Exhibit A page 2)

Mr Metaxas:

8 Paragraph 8 of the [Committee's] statement of facts and contentions is admitted subject to the orders for the filing of the amended pleading, permitting either party to file further affidavits by 4 July 2014 and to apply, on or before 11 July 2014, for a further oral hearing.

(Exhibit B page 4)

The Committee:

9. On 20 June 2014 Mr Metaxas was advised by email from the Associate to Le Miere J that the reserved decision on the application for security for costs would be delivered on 2 July 2014.

(Exhibit A page 3)

Mr Metaxas:

9 Paragraph 9 of the [Committee's] statement of facts and contentions is denied and [Mr Metaxas] says further:

9.1 on 20 June 2014 at 10:46 AM the Associate to Le Miere J sent an email to the solicitors for the Receivers and to the respondent in which she wrote that reserved decisions would be handed down by the Court on 25 June 2014 at 9:15 AM;

9.2 at 9:51 AM that day [Mr Metaxas] informed the Court and the solicitors for the Receivers that [Mr Metaxas] was overseas from 21 to 29 June and requested that the delivery of reasons await his return;

9.3 later on 20 June 2014 the Associate to Le Miere J sent an email to the solicitors for the Receivers and to [Mr Metaxas] in which she wrote that reserved decisions would be handed down by the Court on 2 July 2014 at 9:15 AM; and

9.4 implicit in the emails from the Associate to le Miere J was that his Honour had written the reasons for decision in both of the applications referred to in 4.1 and 4.2 above notwithstanding that the time for filing of an amended pleading, being on or before 20 June 2014, had not elapsed; and

9.5 in the alternative to 9.4 above, the email was intended to refer only to reasons for decision in the application to disallow amendments to the statement of claim.

(Exhibit B page 5)

110 The Tribunal rejects Mr Metaxas' response for the reasons stated above. The Tribunal notes that His Honour's Associate's emails of 20 June 2014 refer to 'reserved decisions' not to a 'reserved decision' (Exhibit C page 777).

The Committee:

10. On 26 June 2014 the Westpoint companies filed and served a document in the Westpoint proceedings entitled Re-amended Statement of Claim, without leave or an extension of time being granted by the Court for the filing of that document.

(Exhibit A page 3)

Mr Metaxas:

10 Paragraph 10 of the [Committee's] statement of facts and contentions is admitted and [Mr Metaxas] says further that:

10.1 on Friday 20 June 2014 [Mr Metaxas] sent emails to the solicitors for the Receivers in which he stated, in effect, that:

(a) an amended statement of claim for the WP Companies was due to be filed 20 June 2014;

(b) he was flying out of Perth on Saturday 21 June 2014 for a week and would attempt to complete the document before he left Perth which might mean the document would not be filed until the middle of the week commencing 23 June 2014;

(c) he proposed to file the amended statement of claim on 25 June 2014;

10.2 on Friday 20 June 2014 the solicitor for the Receivers sent an email to [Mr Metaxas] in which he stated that if the amended pleading was not filed and served by 25 June 2014 they would raise the matter with the Court on 2 July 2014 so implicitly that delay would cause no prejudice;

10.3 on 25 June 2014 [Mr Metaxas] sent an email from Ho Chi Minh city to the solicitors for the Receivers informing them that the document to be filed had been sent to his client and would be filed on 26 June 2014.

(Exhibit B pages 5-6)

111 Mr Metaxas' response is no answer to the failure to comply with the timetable or to seek an extension from the Court.

The Committee:

11. On 1 July 2014 copies of the reasons for decision of Le Miere J with respect to the application for security for costs were made available to the parties' legal representatives.

(Exhibit A page 3)

Mr Metaxas:

11 Paragraph 11 of the [Committee's] statement of facts and contentions is admitted and the respondent says further that [Mr Metaxas] was not permitted to inform his client of the decision until 1 hour before the reasons were scheduled to be published.

(Exhibit B page 6)

112 The Tribunal notes that this was in accordance with the relevant Practice Directions and that there was nothing to prevent Mr Metaxas from seeking an adjournment to seek further instructions.

The Committee:

> 12. Mr Metaxas did not prior to 2 July 2014 request from the Court further time to file further affidavits or submissions on behalf of the Westpoint companies as contemplated by the direction referred to in paragraph 5.2 above.
>
> (Exhibit A page 3)

Mr Metaxas

> 12 Paragraph 12 of the [Committee's] statement of facts and contentions is admitted and [Mr Metaxas] says further that the time for the WP Companies to file and serve affidavits or submissions had not, as at 4 July 2014, expired.
>
> (Exhibit B page 6)

The Committee:

> 13. On 2 July 2014, and prior to Le Miere J publishing his reasons for decision with respect to the application for security for costs, the solicitors for the Receivers sent to Mr Metaxas by email a minute of proposed orders to be made by the Court consequent upon the delivery of Le Miere J's decision.
>
> (Exhibit A page 3)

Mr Metaxas:

> Mr Metaxas admitted paragraph 13.
>
> (Exhibit B page 6)

The Committee:

> 14. Relevantly, paragraph 7 of the minute proposed an order that the directions referred to in paragraphs 5.2-5.4 above be vacated.
>
> (Exhibit A page 3)

Mr Metaxas:

Mr Metaxas admitted paragraph 14.

(Exhibit B page 6)

The Committee:

15. On 2 July 2014 Mr Metaxas and counsel for the Receivers appeared before Le Miere J for publication of the reasons for decision with respect to the application for security for costs and the making of orders consequent upon those reasons.

(Exhibit A page 3)

Mr Metaxas:

Mr Metaxas admitted paragraph 15.

(Exhibit B page 6)

The Committee:

16. In the course of the appearance, Mr Metaxas stated to Le Miere J in response to a question about his attitude to paragraph 7 of the minute of proposed orders:

> And then so we come to 7. Well, I must say that when we adjourned on 23 May I thought we were coming back to complete the application but it seems that we're not. So that's probably appropriate …on that basis.

(Exhibit A page 3)

Mr Metaxas:

Mr Metaxas admitted paragraph 16.

(Exhibit B page 6)

The Committee:

17. On 2 July 2014 and subsequent to hearing from the parties, Le Miere J ordered with respect to the application for security for costs, amongst other things but relevantly and in substance:

    17.1. that the Westpoint proceedings be stayed until the Westpoint companies provided security for the

Receivers' costs of the action up to the close of pleadings in the sum of $150,000;

17.2. the directions referred to in paragraphs 5.2-5.4 above be vacated.

(Exhibit A page 4)

Mr Metaxas:

Mr Metaxas admitted paragraph 17.

(Exhibit B page 6)

The Committee:

18. On about 15 July 2014, Mr Metaxas filed an Appeal Notice in the Court of Appeal on behalf of the Westpoint companies, being CACV 79 of 2014 (appeal), seeking leave to appeal against the Le Miere J's decision of 2 July 2014.

(Exhibit A page 4)

Mr Metaxas:

Mr Metaxas admitted paragraph 18.

(Exhibit B page 6)

The Committee:

19. In about July 2014, Mr Metaxas prepared the Appellants' Case in the appeal, which included the Appellants' proposed grounds of appeal.

(Exhibit A page 4)

Mr Metaxas:

19 Paragraph 19 of the [Committee's] statement of facts and contentions is admitted. The Notice of Appeal was prepared 15 July 2014 and the Appellants' Case was prepared by about 22 July 2014 as at which dates [Mr Metaxas] did not have transcripts of the hearings on 21 May, 23 May and 2 July 2014.

(Exhibit B page 7)

113 Mr Metaxas must have received the transcript before the hearing before the Court of Appeal. There was no reason why at that point he could not have deleted Ground 2.

The Committee:

> 20. Mr Metaxas caused the Appellants' Case to be filed on 23 July 2014.
>
> (Exhibit A page 4)

Mr Metaxas:

> Mr Metaxas admitted paragraph 20.
>
> (Exhibit B page 7)

The Committee:

> 21. Relevantly, proposed ground 2 of the Grounds of Appeal stated as follows:
>
> > 2. The learned Judge erred in law in depriving the appellants of a right to be heard and denying the appellants procedural fairness insofar as:
> >
> > 2.1 after part hearing the Application on 21 May 2014 (sic) His Honour ordered that:
> >
> > (a) the appellants file and serve a further amended statement of claim by 20 June 2014;
> >
> > (b) the appellants and the receivers have leave to file and serve any affidavits and submissions in relation to the further amended statement of claim by 4 July 2014;
> >
> > (c) each of the appellants and the receivers have leave until 11 July 2014 to apply for a further oral hearing of the Application;
> >
> > (d) If neither the appellants not the receivers applied for a further oral hearing then the Application would be determined without any further oral hearing;
> >
> > 2.2 on 24 June 2014 the appellants filed and served a second further re-amended statement of claim;

2.3 on 2 July 2014, without prior notice to the appellants, His Honour published reasons for decision on the Application, made orders requiring the appellants to pay security for the receivers (sic) costs and vacated the orders made 21 May 2014 in 2.1(b), (c) and (d) above;

2.4 no reasons were given for the variation of the orders made on 21 May 2014; and

2.5 the appellants were denied the opportunity to adduce additional evidence in support of their submissions that the receivers had caused the appellant's impecuniosity.'

(Exhibit A pages 4-5)

Mr Metaxas:

Mr Metaxas admitted paragraph 21.

(Exhibit B page 7)

The Committee:

22. Proposed ground 2 lacked a proper factual basis in that:

22.1. Proposed ground 2.1 was premised on a factual assertion that the security for costs application was adjourned part-heard on 23 May 2014;

22.2. In actual fact, the hearing of the application for security for costs was completed on 23 May 2014 and Le Miere J reserved his decision on the basis of the 23 May 2014 directions;

22.3. Proposed ground 2.2 asserted as a fact that the Westpoint companies filed and served a second further re-amended statement of claim on 24 June 2014;

22.4. In actual fact, the Westpoint companies filed and served a second further re-amended statement of claim on 26 June 2014;

22.5. Proposed ground 2.3 was premised on factual assertions that:

22.5.1. Le Miere J published his reasons for decision with respect to the application for security for costs without prior notice to the Westpoint companies;

22.5.2. Le Miere J made the orders referred to in paragraphs 17.1 and 17.2 above without prior notice to the Westpoint companies;

22.6. In actual fact:

22.6.1. on 20 June 2014, the parties were advised by email from the Associate to Le Miere J that the reserved decision on the application for security for costs would be delivered on 2 July 2014;

22.6.2. copies of Le Miere J's reasons for decision in respect of the application for security for costs were made available to the parties' legal representatives the day prior to the publication of those reasons;

22.6.3. prior to the publication of the reasons for decision, Mr Metaxas received from the solicitor for the Receivers notice of the orders the Receivers proposed to seek consequent upon the reasons for decision, including proposed orders in the terms referred to in paragraphs 17.1 and 17.2 above;

22.6.4. Mr Metaxas was heard by Le Miere J as to the content and form of the orders to be made with respect to the application for security for costs, before those orders were made;

22.7. Proposed ground 2.4 was premised on an implicit factual assertion that the order referred to in paragraph 17.2 above was made by Le Miere J over the opposition of Mr Metaxas such that reasons for the making of the order were required to be given;

22.8. In actual fact, Mr Metaxas did not oppose the making of that order;

22.9. Proposed ground 2.5 asserted as a fact that the Westpoint companies were denied the opportunity to adduce additional evidence in support of their submissions that the Receivers had caused the Westpoint companies' impecuniosity;

22.10. In actual fact, the Westpoint companies had never sought the opportunity to adduce such evidence.

(Exhibit A pages 5-6)

Mr Metaxas:

Save as is admitted below paragraph 22 of the [Committee's] statement of facts and contentions is denied and [Mr Metaxas] says further:

22.1 as to par 22.1 - the effect of the orders made on 23 May 2014 was that the application would be part heard if further affidavits or submissions were filed;

22.2 as to par 22.2 - the hearing on 23 May 2014 was not completed if the WP Companies filed additional affidavits and submissions;

22.3 as to par 22.3 and 22.4 - the statement in ground 2.2 that the statement of claim was filed 24 June 2014 was an error as it was filed 26 June 2014;

22.4 as to par 22.5:

(a) the ground of appeal was prepared in the context of events known to the appellants and the respondents and was that the solicitors received the reasons on the 1 July 2014 and were only able to inform their respective clients after 8:15 AM on 2 July 2014;

(b) the effect of this was that the respondent's client had no notice, in effect, of the reasons and no opportunity to take advice and decide what if anything should be done which is what litigants do after receiving reasons for decision;

22.5 as to par 22.6:

(a) as to par 22.6.1 - the facts stated are correct but if the reasons in the application for security for costs were to be delivered then that meant that the decision was being made notwithstanding the orders made 23 May 2014;

(b) as to par 22.6.2 - this is agreed and it was never suggested otherwise;

(c) as to par 22.6.3 - this is agreed;

(d) as to par 22.6.4 - this is agreed and the transcript of 2 July 2014 included:

> METAXAS, MR: And then so we come to 7. Well, I must say that when we adjourned on 23 May I thought we were coming back to

> complete the application but it seems that we're not. So that's probably appropriate - - -
>
> LE MIERE J: Yes.

22.6 as to par 22.7 - ground 2.4 was premised on the fact that the WP Companies had not consented to the orders made and conceding that the order was 'probably appropriate' was no more than acknowledging the order was consistent with the reasons then published;

22.7 as to par 22.8 - the respondent could not 'oppose' the making of the order in circumstances where Le Miere J had published reasons for decision, the order was appropriate to give effect to the reasons and Practice Direction 8.1(10) stated:

> The provision of an advance copy of reasons for decision is not to be taken as an invitation to challenge or address further argument in relation to the substantive issues determined in the published reasons, unless the advance copy specifically invites submissions on a particular topic or topics.

22.8 as to par 22.9 and 22.10 - on 2 July 2014 the time for the WP Companies to put on additional evidence had not expired.

(Exhibit B pages 7-8)

114 For the reasons stated above the Tribunal rejects Mr Metaxas' response. Nothing in Practice Direction 8.1(10) prevents Mr Metaxas from making submissions in relation to a matter of procedural fairness as opposed to the substantive issues determined in the published reasons.

115 If Mr Metaxas' submissions as to the effect of His Honour's orders as made on 23 May were correct, contrary to the Court of Appeal and this Tribunal's findings, then the substantive issues did not prevent Mr Metaxas raising an issue caused by the reasons of procedural fairness. Mr Metaxas' response reeks of ex post facto rationalisation.

The Committee:

23. It is to be inferred from the matters referred to in paragraph 22 above that in the course of preparing the Appellants' Case and before causing it to be filed, Mr Metaxas did not:

23.1. thoroughly and carefully review proposed appeal ground 2 for the purpose of ensuring that in all respects it had a proper factual basis;

23.2. further or alternatively to paragraph 23.1 above:

23.2.1. thoroughly and carefully review the transcript of the hearing before Le Miere J on 23 May 2014 for the purpose of ensuring that there was a proper factual basis for proposed ground 2.1;

23.2.2. carefully review the relevant part of Mr Metaxas file for the purpose of ensuring that the date of filing and service of the further re-amended statement of claim, as set out in proposed ground 2.2, was correct;

23.2.3. thoroughly and carefully review the relevant parts of Mr Metaxas's file and the transcript of the hearing before Le Miere J on 23 May 2014 and 2 July 2014 for the purpose of ensuring that there was a proper factual basis for proposed ground 2.3;

23.2.4. thoroughly and carefully review the transcript of the hearing before Le Miere J on 23 May 2014 and 2 July 2014 for the purpose of ensuring that there was a proper factual basis for proposed ground 2.4;

23.2.5. thoroughly and carefully review the relevant parts of Mr Metaxas's file, the 23 May directions and the transcript of the hearing before Le Miere J on 23 May 2014 and 2 July 2014 for the purpose of ensuring that there was a proper factual basis for proposed ground 2.5.

(Exhibit A pages 6-7)

Mr Metaxas:

23 Paragraph 23 of the [Committee's] statement of facts and contentions is denied and [Mr Metaxas] repeats paragraphs 3-10, 11, 12 and 22 above.

(Exhibit B page 8)

The Committee:

24. Subsequent to the filing and service of the Appellants' Case, the parties prepared and filed, amongst other things:

24.1. A Green Appeal Book that included a copy of the transcripts of the hearing of the application for security for costs held on 23 May 2014 and 2 July 2014;

24.2. A Yellow Appeal Book that included a copy of the Associate's Record dated 23 May 2014 with respect to the hearing of the application for security for costs.

(Exhibit A pages 7-8)

Mr Metaxas:

Mr Metaxas admitted paragraph 24.

(Exhibit B page 9)

The Committee:

25. On 17 March 2015, the Westpoint companies' application for leave to appeal and the appeal were heard by the Court of Appeal (appeal hearing).

(Exhibit A page 8)

Mr Metaxas:

25 Paragraph 25 of the [Committee's] statement of facts and contentions is admitted and [Mr Metaxas] says that for the reasons in the appeal leave should have been granted and the appeal allowed.

(Exhibit B page 9)

116 For the reasons stated above, the Tribunal rejects Mr Metaxas' contention that the Court of Appeal was wrong. It seems unlikely that a practitioner who asserts that a unanimous Court of Appeal decision was wrong would shrink from informing a Judge at first instance that his client had not been afforded procedural fairness.

The Committee:

26. Mr Metaxas appeared as counsel for the Westpoint companies at the appeal hearing and, during the course of the appeal hearing, made oral submissions to the effect that:

26.1. The direction made by Le Miere J referred to in paragraph 5.2 above was not confined to issues raised by the proposed amended pleading (ts30);

26.2. At the hearing on 23 May 2014 Le Miere J stated to counsel for the parties in terms that the additional affidavits and written submissions they were permitted to file and serve after the hearing were not confined to issues raised by the proposed amended pleading (ts38-9);

26.3. The transcript of the hearing on 23 May 2014 showed that the relevant direction made by Le Miere J regarding the opportunity to file further affidavits and submissions was not confined to issues raised by the proposed amended pleading (ts39);

26.4. The parties were at liberty after the hearing on 23 May 2014 to file and serve additional affidavits and written submissions without restriction as to the subject matter (ts37);

26.5. The hearing of the application for security for costs had not concluded when it was adjourned on 23 May 2014 (ts34);

26.6. He did not proceed on 23 May 2014 to complete his oral submissions in opposition to the application for security for costs after Le Miere J made the 23 May 2014 directions (ts35-7);

26.7. The hearing on 23 May 2014 was adjourned part-heard (ts41).

(Exhibit A page 8)

Mr Metaxas:

26 As to paragraph 26 of the [Committee's] statement of facts and contentions [Mr Metaxas] says:

26.1 as to par 26.1, the respondent repeats paragraphs 5.2, 5.3 and 5.4 above;

26.2 as to par. 26.2, the respondent repeats paragraphs 5.2, 5.3 and 5.4 above;

26.3 as to par. 26.3, the respondent repeats paragraphs 5.2, 5.3 and 5.4 above;

26.4 as to par. 26.4, the respondent repeats paragraphs 5.2, 5.3 and 5.4 above and says further that it goes without saying that any additional material had to be relevant to the application before the Court for security for costs;

26.5 as to par. 26.5, the respondent repeats paragraphs 5.2, 5.3 and 5.4 above and says that the hearing was adjourned on terms that permitted either party to apply for it to be re-listed and on that basis the respondent referred to the application as part heard;

26.6 as to par. 26.6:

(a) the allegation is denied and says further that at page 35 of the transcript the Chief Justice said:

> Well, you then went on to put on submissions with respect to the security for costs, didn't you?

and the respondent said 'No' on the basis that he understood the further written submissions to which reference was made in the passage he had just read from the transcript of 23 May 2014;

(b) at page 36 of the transcript the Chief Justice then referred to the oral submissions on 23 May 2014; and

26.7 as to par 26.7, the respondent repeats paragraphs 5.2, 5.3 and 5.4 above.

(Exhibit B pages 9-10)

117 For the reasons stated above, the Tribunal rejects Mr Metaxas' contentions.

The Committee:

27. The oral submissions referred to in paragraph 26 above lacked a proper factual basis in that:

27.1. The direction made by Le Miere J referred to in paragraph 5.2 above was expressly confined to the issues raised by the proposed amended pleading;

27.2. At the hearing on 23 May 2014 Le Miere J stated to counsel for the parties in terms that the additional affidavits and written submissions they were permitted to file and serve after the hearing were to be confined to issues raised by the proposed amended pleading;

27.3. The transcript of the hearing on 23 May 2014 showed that the relevant direction made by Le Miere J regarding the opportunity to file further affidavits and

submissions was confined to issues raised by the proposed amended pleading;

27.4. Based on the direction made by Le Miere J referred to at paragraph 5.2 above and the statements made Le Miere J in the course of the hearing on 23 May 2014, the parties were not at liberty after the hearing to file and serve additional affidavits and written submissions without restriction as to the subject matter;

27.5. Mr Metaxas proceeded on 23 May 2014 to complete his oral submissions in opposition to the application for security for costs after Le Miere J made the 23 May 2014 directions;

27.6. The hearing of the application for security for costs had concluded when it was adjourned on 23 May 2014 and had not been adjourned part-heard.

(Exhibit A page 9)

Mr Metaxas:

27 As to paragraph 27 of the of the [Committee's] statement of facts and contentions [Mr Metaxas] repeats paragraph 26 above.

(Exhibit B page 10)

The Committee:

28. It is to be inferred from the matters referred to in paragraph 27 above that:

28.1. In the course of preparing to appear at the appeal hearing Mr Metaxas did not thoroughly and carefully review the Appeal Books and in particular:

28.1.1. The copy of the transcript of the hearing of the application for security for costs held on 23 May 2014 and 2 July 2014 that was included in the Green Appeal Book; or

28.1.2. The copy of the Associate's Record dated 23 May 2014 with respect to the hearing of the application for security for costs that was included in the Yellow Appeal Book for the purpose of ensuring that the oral submissions

> he was to make to the Court of Appeal would in all respects have a proper factual basis.

(Exhibit A pages 9-10)

Mr Metaxas:

> 28 As to par 28 of the of the [Committee's] statement of facts and contentions [Mr Metaxas]:
>
> 28.1 repeats paragraphs 5.2, 5.3 and 5.4 above;
>
> 28.2 says as to par. 28.1.1, the respondent had read the transcript of the hearing on 23 May 2014 prior to the hearing; and
>
> 28.3 says as to par 28.1.2, there was no Associates Record dated 23 May 2014, the document attached and marked 'SAP-1' to the affidavit of Stephanie Alexandra Puris sworn 8 September 2014 was dated 26 May 2014.

(Exhibit B page 10)

The Committee:

> 29. Further, it is to be inferred from the matters referred to in paragraph 27 above that Mr Metaxas did not in the course of making his oral submissions to the Court of Appeal thoroughly and carefully consider the content of those submissions before making them for the purpose of ensuring that in all respects they had a proper factual basis.

(Exhibit A page 10)

Mr Metaxas:

> 29 As to paragraph 29 [Mr Metaxas] denies the allegation made and repeats paragraphs 5.2, 5.3 and 5.4 above.

(Exhibit B page 10)

Did Mr Metaxas take all necessary steps?

118 For the reasons stated above, it is clear that Mr Metaxas did not take all reasonable steps. It was clear from the hearing before Le Miere J that:

(a) The scope of any further affidavits or submissions was limited to matters arising from the amendments to the statement of claim;

(b) His Honour's orders laid down a clear timetable for any further affidavits and submissions predicated on Mr Metaxas' filing the amendments to the statement of claim by 26 June 2014;

(c) Mr Metaxas personally attended the hearings before Le Miere J on 21 and 23 May;

(d) Mr Metaxas knew that no application had been made to seek leave to extend the timetable;

(e) Mr Metaxas failed to raise any issue of error in the Associate's Record. The Tribunal notes that if he had any issue he could have sought to formally extract the orders;

(f) Mr Metaxas failed to raise any issue of procedural fairness before Le Miere J when advised of the date on which His Honour proposed to hand down his decision nor at the handing down of the decision;

(g) Mr Metaxas prepared the grounds of appeal without the benefit of transcript; and

(h) Mr Metaxas' failure to delete at least Ground 2 upon receiving the transcript.

119 The Court of Appeal's finding in ***Huntingdale Village*** at [39]:

> As advocacy is a human process, it is inevitable that inadvertent mistakes will be made by counsel from time to time. However, counsel's duty to not mislead the court carries a positive and correlative responsibility to take all necessary steps to ensure that there is a proper factual basis for submissions put to the court. The terms of proposed ground 2 and the oral submissions put in support of that ground represent a significant departure from that duty.

and the Court of Appeal's reasons encapsulates Mr Metaxas' failure to take all necessary steps to ensure that there was a proper factual basis for submissions put to the court.

120 Mr Metaxas' failure to do so represents a significant departure from his positive duty to take all necessary steps.

Did Mr Metaxas' breach of duty amount to professional misconduct?

121 Mr Metaxas submitted that:

> 17 None of the issues can amount to professional misconduct even if found to be correct.
>
> 18 [Mr Metaxas] was perfectly entitled to make argument on these issues and whilst the Court of Appeal was not persuaded by them, there was real factual basis for advancing such arguments.
>
> 19 What constitutes professional misconduct was described in *LPCC v Caine* as follows:
>
> > The common law concept of unprofessional conduct (sometimes expressed as professional misconduct, sometimes signifying more serious misconduct) is a conduct that would be reasonably regarded as disgraceful of dishonourable by practitioners of good repute and competence. See *Kyle v LPCC* [1999] WASCA 115.
>
> 20 Further, the standard of proof required is that of that espoused in *Briginshaw v Briginshaw*. The alleged conduct of [Mr Metaxas] falls well short of the standard required to make a finding of professional misconduct against him.
>
> (Respondent's Outline of Submissions)

122 As noted below in [32] and [33] of ***Park***:

> 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[.]

123 A breach of a practitioner's duty to take all necessary steps to ensure that there is a proper factual basis, may, if sufficiently egregious, constitute professional misconduct.

124 As the Tribunal stated in ***Rayney*** at [17]-[19]:

> 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]).

125 Courts and tribunals are heavily reliant upon information provided by practitioners in proceedings. They must be able to be confident that the information provided in submissions is scrupulously accurate.

126 Mr Metaxas' substantial departure from that standard amounts to professional misconduct. Despite Mr Schlicht's best efforts in a difficult case, contrary to Mr Metaxas' submissions there was no real factual basis for advancing the arguments.

Conclusion and orders

The Tribunal finds:

1. That the practitioner, Mr Arthur Metaxas between about 23 July 2014 and about 17 March 2015 engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that his conduct of an application for leave to appeal and of an appeal to the Court of Appeal substantially or consistently fell short of the standard of competence that a member of the public is entitled to expect of a reasonably competent legal practitioner because Mr Arthur Metaxas failed to take all necessary steps to ensure that there was a proper factual basis for:

    (a) a proposed ground of appeal;

    (b) oral submissions made to the Court of Appeal in support of the application for leave to appeal and the appeal.

2. The Legal Profession Complaints Committee to file and serve its written submissions on penalty and costs by 10 May 2018.

3. Mr Arthur Metaxas to file and serve his written submissions on penalty and costs by 24 May 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.

JUSTICE J CURTHOYS, PRESIDENT

26 APRIL 2018