[2017] WASAT 47

JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
ACT	**:**	LEGAL PROFESSION ACT 2008 (WA)
CITATION	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE and BOWER [2017] WASAT 47
MEMBER	**:**	JUSTICE J C CURTHOYS (PRESIDENT) MS M CONNOR (MEMBER) MR M HARFORD (SENIOR SESSIONAL MEMBER)
HEARD	**:**	24 AND 25 JANUARY 2017 AND 6 FEBRUARY 2017
DELIVERED	**:**	17 MARCH 2017
FILE NO/S	**:**	VR 31 of 2016
BETWEEN	**:**	LEGAL PROFESSION COMPLAINTS COMMITTEE Applicant AND RONALD WILLIAM BOWER Respondent

Catchwords:

Professional misconduct - Inactive cases list - Misleading client - Misleading court - Delay - Incompetence

Legislation:

District Court Rules 2005 (WA), r 37(1), r 38, r 38(1), r 44, r 44(2), r 45, r 45(4)
Legal Profession Act 2008 (WA), s 5(a), s 401, s 401(b), s 402, s 403, s 438, Pt 13

Result:

Practitioner found to have engaged in professional misconduct

Summary of Tribunal's decision:

The Legal Professional Complaints Committee alleged that a legal practitioner and the principal of a legal firm, Corser & Corser, engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in relation to the practitioner's handling of the files of two clients during proceedings in the District Court of Western Australia.

The allegations against the practitioner in relation to the two clients involved delays on the practitioner's and the legal firm's part, and the practitioner's efforts to conceal those delays. In particular, serious allegations were made concerning the practitioner's conduct in relation to four affidavits filed at the District Court during the proceedings of these two matters, three of those affidavits having been filed by an employee of Corser & Corser and one by the practitioner.

The Tribunal determined that the practitioner engaged in professional misconduct and that the practitioner had an actual knowledge that the contents of the affidavits and his communications with his clients were false and misleading and that the practitioner had a subjective intent to deliberately mislead his clients and the District Court of Western Australia.

Category: B

Representation:

Counsel:

Applicant	:	Ms PE Cahill SC and Mr N Pope
Respondent	:	Mr G McIntyre SC and Mr R Cywicki

Solicitors:

Applicant	:	Legal Profession Complaints Committee
Respondent	:	N/A

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

Briginshaw v Briginshaw (1938) 60 CLR 336
Giudice v Legal Profession Complaints Committee [2014] WASCA 115
Legal Profession Complaints Committee and Barber [2015] WASAT 99
Legal Profession Complaints Committee and Wells [2014] WASAT 112
Legal Profession Complaints Committee v Brickhill [2013] WASC 369
NOM v Director of Public Prosecutions (2012) 38 VR 618
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 The Legal Professional Complaints Committee (Committee) alleged that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) (the LP Act), in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence in relation to his handling of the files of two clients, Mr Mahendra Pal and Settlers House Pty Ltd (Settlers House).

2 The Committee filed its application on 11 March 2016. The allegations against Mr Bower in relation to Mr Pal were set out at Annexure A to the application. The grounds in relation to Settlers House were set out in Annexure B to the application.

3 In a large part, the allegations against Mr Bower in relation to both Mr Pal and Settlers House involve delays on Mr Bower's and Corser & Corser's part and Mr Bower's efforts to conceal those delays.

The Committee's grounds

4 The Committee filed its application on the following grounds:

Annexure A - Ground 1

> THAT the practitioner RONALD WILLIAM BOWER [Mr Bower] in about April 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the *Legal Profession Act 2008* (Act), in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by causing, alternatively permitting, an affidavit to be prepared, sworn and filed in District Court of Western Australia proceedings CIV 256 of 2010 (proceedings) in circumstances where:
>
> a. [Mr Bower] knew the affidavit to be false or misleading in a material respect;
>
> b. [Mr Bower] intended that the District Court be misled by the affidavit;

c. alternatively to a and b, [Mr Bower] was recklessly indifferent to whether the affidavit was false or misleading in a material respect and to whether the District Court was misled by the affidavit.

Annexure A - Ground 2

THAT [Mr Bower] in about August 2010 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act, in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by deliberately, alternatively recklessly, permitting an e-mail sent to a client, Mr Mahendra Pal, about the status and progress of the proceedings to remain uncorrected in circumstances where:

a. [Mr Bower] knew the e-mail to be false or misleading in material respects;

b. [Mr Bower] intended that Mr Pal be misled about the true status and progress of the proceedings;

c. alternatively to a and b, [Mr Bower] was recklessly indifferent to whether the e-mail was false or misleading in material respects and to whether Mr Pal was misled about the true status and progress of the proceedings.

Annexure A - Ground 3

That [Mr Bower] between about November 2010 and May 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act, in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by sending e-mails to Mr Pal, about the status and progress of the proceedings in circumstances where:

a. [Mr Bower] knew the e-mails to be false or misleading in material respects;

b. [Mr Bower] intended to mislead Mr Pal about the true status and progress of the proceedings;

c. alternatively to a and b, [Mr Bower] was recklessly indifferent to whether the e-mails were false or misleading in material respects and to whether Mr Pal was misled about the true status and progress of the proceedings.

Annexure A - Ground 4

THAT [Mr Bower] between about May 2010 and April 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act, in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by failing to take reasonable steps as the principal of the law firm retained by Mr Pal in respect of the proceedings to ensure that the proceedings were progressed without undue delay.

Annexure A - Ground 5

THAT [Mr Bower] between about June 2010 and November 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act, in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by failing to take reasonable steps as the principal of the law firm retained by Mr Pal in respect of the proceedings to ensure that:

a. Mr Pal was given timely, accurate and complete information about the significant developments and progress in the proceedings;

b. Further or alternatively to a., Mr Pal was informed:

    i. that a representative of the law firm did not appear at a directions hearing held in the proceedings on 30 July 2010 and that consequently the court had made a costs order against Mr Pal;

    ii. whether there was any basis for Mr Pal to apply to the court to have that costs order set aside or varied;

    iii. that the law firm had not complied with the directions made by the court for the filing of pleadings;

    iv. that the proceedings had become inactive on about 20 November 2010 and why;

    v. of the consequences of the proceedings having become inactive.

Annexure A - Ground 6

THAT [Mr Bower] in about July 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act, in that his conduct

fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by issuing an invoice to Mr Pal which included fees charged for work undertaken in applying to the District Court pursuant to Rule 45 of the District Court Rules 2005 to, in effect, order that the proceedings were no longer inactive in circumstances where the proceedings had become inactive because of undue delay by the law firm retained by Mr Pal in respect of the proceedings, of which [Mr Bower] was the principal.

Annexure B - Ground 1

THAT the practitioner RONALD WILLIAM BOWER [Mr Bower] in about May 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the Legal Profession Act 2008 (Act), in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by omitting to inform, or not attempting to inform, the District Court that two affidavits sworn and filed in District Court of Western Australia proceedings CIV 2534 of 2009 were or may be false or misleading in material respects in circumstances where:

a. [Mr Bower] knew the affidavits to be false or misleading in a material respect or in material respects;

b. [Mr Bower] intended that the District Court be misled by the affidavits;

c. alternatively to a and b, [Mr Bower] was recklessly indifferent to whether the affidavits were false or misleading in a material respect or material respects, and to whether the District Court was misled by the affidavits.

Annexure B - Ground 2

THAT [Mr Bower] in about May 2011 engaged in professional misconduct within the meaning of sections 403 and 438 of the Act, in that his conduct fell short, consistently and by a substantial degree, of the standard of professional conduct observed and approved by members of the legal profession of good repute and competence, and would be reasonably regarded as disgraceful or dishonourable to practitioners of good repute and competence, by swearing to an affidavit and causing it to be filed in District Court of Western Australia proceedings CIV 2534 of 2009 in circumstances where

a. [Mr Bower] knew the affidavit to be false or misleading in material respects;

b. [Mr Bower] intended that the District Court be misled by the affidavit;

c. alternatively to a and b, [Mr Bower] was recklessly indifferent to whether the affidavit was false or misleading in material respects, and to whether the District Court was misled by the affidavit.

Onus and standard

5 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***))

6 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'.

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

> The 'clarity' of the proof required, where so serious a matter as fraud is to be found, is an acknowledgment that the degree of satisfaction for which the civil standard of proof calls may vary according to the gravity of the fact to be proved. …
>
> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of

> probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused.

8 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.

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

10 In making its findings in relation to Mr Bower's conduct in relation to affidavits filed at the District Court, the Tribunal is particularly conscious of the seriousness of such allegations.

Purposes of Part 13 of the LP Act

11 Section 401 of the LP Act provides that the purposes of Pt 13 - Complaints and discipline are:

> The purposes of this Part are as follows -
>
> (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

12 '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

13 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

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

Fitness to practise law requires that the practitioner must command the personal confidence of clients, fellow practitioners and judges - see: *In re Davis* (1947) 75 CLR 409 (*In re Davis*) at 420; *Legal Profession Complaints Committee v Bachmann* [2011] WASC 309 at [46]; *Dixon v Legal Practice Board of Western Australia* [2012] WASC 79 (Dixon) at [19].

Unprofessional conduct includes conduct that would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competence, which includes, but is not confined to, conduct which occurs in the course of legal practice (*Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at [61]).

The assessment of fitness and propriety in legal practitioners involves a range of broad public interest considerations. The relevant interests are the

interests of the public, the interests of the Court and the maintenance of the high reputation and standards in the legal profession (*Dixon* at [27]).

In *Prothonotary of the Supreme Court of New South Wales v Da Rocha* [2013] NSWCA 151 (*Prothonotary*) the Court stated at [29]:

> In *Foreman*, the Court of Appeal indicated that in determining whether someone is a fit and proper person to be a solicitor the relevant considerations may include: the protection of the public against similar conduct, the character of the solicitor, and the effect which an order will have on the understanding (within the profession and amongst the public), of the standard of behaviour required of solicitors, the effect upon relationships which must exist between solicitors and the circumstances surrounding the impugned conduct.

15 In ***Legal Profession Complaints Committee 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 0or 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.'

16 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

17 In ***Giudice v Legal Profession Complaints Committee*** [2014] WASCA 115, 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[.]

18 Where the Tribunal has made findings as to Mr Bower's knowledge and intent below, the Tribunal has found actual knowledge by Mr Bower and a subjective intent by Mr Bower to mislead his client and the Court.

A practitioner's duty of honesty

19 As the authorities set out above make clear, when a practitioner provides information or makes a statement to a court which is false or misleading in the absence of special circumstances, he/she would ordinarily expect to be found to have engaged in professional misconduct.

20 Section 401(b) of the LP Act makes it clear that the promotion and enforcement of honesty is an important purpose of Pt 13 of the LP Act. That purpose exists not only in the interests of the administration of justice but also the protection of clients. Accordingly, honesty to clients is an important aspect of a practitioner's duty. Integrity and honesty are essential characteristics expected of a practitioner. Honesty to a client by a practitioner is part of a practitioner's conduct which preserves the integrity of the legal system within which a practitioner operates.

21 Depending on the circumstances, a practitioner who breaches his or her duty of honesty to a client by providing information or making a

statement to a client which is false or misleading may constitute professional misconduct. The likelihood of a finding of professional misconduct is increased when the practitioner provides information or makes a statement to a client to conceal the practitioner's own default or that of the firm for which he or she is responsible.

District Court Rules 2005 (WA) - Entry for Trial and Inactive Cases

22 As at 31 July 2007, the *District Court Rules 2005* (WA) (DCR) relevantly provided:

> 38. Plaintiff failing to enter case for trial, consequences
>
> (1) If the plaintiff does not enter the case for trial on or before the date for entry for trial in the timetable applicable to the case, the relevant registry must send each party a Form 2 (Notice of default (entry for trial)).
>
> (2) At any time after receiving a Form 2, a party, other than the plaintiff, may enter the case for trial.
>
> (3) Rule 37(3), with any necessary changes, applies if a party other than the plaintiff enters the case for trial.
>
> (4) If a party other than the plaintiff enters the case for trial, then, for the purposes of completing Form 1, all other parties (including the plaintiff) are to be taken to be available to attend a pre-trial conference on any date unless notice to the contrary is filed prior to when the date of the pre-trial conference is set.
>
> (5) If under subrule (2) a case is entered for trial at a time when, by virtue of the Form 2 sent to the parties and rule 44(2) the case is inactive, the case ceases to be inactive.
>
> (6) Subrules (2) and (5) do not prevent the plaintiff from complying with rule 44(1) or applying to the Court under rule 45.
>
> 44. Notice of default, effect of disobedience to
>
> [Notice of default entry for trial]
>
> (1) If a Form 2 is sent in relation to a case, the plaintiff must, on or before the date specified in the form (which must be at least 14 days after the date of the form), enter the case for trial.

(2) If a plaintiff does not obey a Form 2, the case becomes inactive.

45. Inactive cases, consequences

(1) This rule applies if a case is inactive under rule 44(2).

(2) The plaintiff must not file a Form 1 to list the case for trial or any other document (other than an application under subrule (3)) without the leave of the Court.

(3) Within 21 days after the date specified in a Form 2, the plaintiff must apply for leave to list the case for trial or to be excused from doing so.

(4) If -

(a) no application is made under subrule (3): or

(b) on an application made under subrule (3), leave is refused or the plaintiff is not excused,

a party that is not in default may apply for judgment in that party's favour to be entered without a trial.

(5) If the Court grants leave on an application made under subrule (3) and is satisfied that there is no reason for the case to be inactive, it must order that the case is no longer inactive.

The evidence

23 Three volumes of documents prepared by the Committee were admitted into evidence as Exhibits A, B and C. A further document was admitted as Exhibit E.

24 Mr Bower's witness statement was admitted into evidence as Exhibit D. Mr Bower gave oral evidence and was cross-examined.

Mr Bower's evidence

25 Mr Bower denied that he endeavoured to conceal his and Corser & Corser's delay from his client and from the Court.

26 Mr Bower was an entirely unsatisfactory witness. He made assertions without any factual basis. He was evasive. In the majority of cases, the concessions made by him were made only after persistent questioning by Cahill SC. A less experienced counsel than Cahill SC

would probably not have wrung the concessions out of Mr Bower. His demeanour reflected a high level of uneasiness in answering questions. The Tribunal did not find him to be a credible witness.

The inactive cases list and Mr Bower's letter of 30 March 2011

27 In a letter from Mr Bower to Professor Skerritt dated 30 March 2011, requesting a medical report in support of an application to take the Settlers House matter off the inactive cases list, Mr Bower stated:

> …
>
> There are two District Court cases that Mr Savas has been handling which have fallen behind in compliance with procedural time-limits, with potentially seriously adverse consequences for the clients concerned.
>
> …
>
> Request for urgent response
>
> As a result of the imminence and seriousness of the potentially adverse consequences upon the two cases which the delays have caused, I request that you reply at your earliest convenience.
>
> ….
>
> (Exhibit B pages 354-355)

28 This statement was made by Mr Bower long before any issue was raised about his conduct. There could be no clearer indication of the fact that Mr Bower regarded a matter going on the inactive cases list as having potentially serious consequences and the importance of an application to remove a matter from that list.

29 Despite what Mr Bower stated in his letter to the Committee and in his evidence before the Tribunal, Mr Bower's letter of 30 March 2011 contradicts those statements. The statement made by Mr Bower in his letter of March 2011 reflects his true understanding of the seriousness of a matter going on the inactive cases list and the need to remove it from the inactive cases list.

Mr Bower's practice

30 Mr Bower was admitted to legal practice in Western Australia on 23 December 1983.

31 At all relevant times Mr Bower was:

a) an Australian legal practitioner within the meaning of s 5(a) of the LP Act and;

b) the sole principal of the law firm Corser & Corser.

32 Mr Kerry Savas was a practitioner employed by Corser & Corser. He held the title of 'associate'.

33 Mr Savas became involved in the conduct of the two files the subject of this application in about mid 2010 when Mr Bower was going on leave. His involvement ceased no later than 30 March 2011, although he did swear affidavits relating to his previous involvement in the files thereafter.

34 Other employees of Corser & Corser during the relevant periods were:

- Chau Savas;
- Travis King;
- Andrew Cameron;
- Hugh Reynoldson;
- Michelle Collins;
- Amy Hackett;
- Leslie Bower; and
- Andrew Bower.

35 Apart from Kerry Savas and Chau Savas who were sufficiently senior to have the day-to-day conduct of matters, the other employees were either junior practitioners or law clerks (T:36; 24.01.17).

Mr Bower's supervision of employees

36 At an early stage in his evidence, Mr Bower explained that his supervision:

> .. took the form of - well, one form of supervision was what a former partner of mine called 'management by walking around'. This wasn't a big practice. There were - there was myself and a small number of professional people located in a close physical proximity, so that I - I informed myself of what people were dealing with, and checked on - asked them how things were going, basically, depending on what they

> working on. Also we operated then, as we do now, a single diary, a computerised diary, for everything that was relevant to client work - appointments with clients, appointments with witnesses, appointments with council, court appointments, deadlines.
>
> Court deadlines you included in that?
>
> Yes, and - yes, and others, like limitation periods. Of course, that kind of system is dependent on human input, but that was part of the - the management system that I had in place, which had been there for years. It just was a - it happened to be that in those two years, I didn't have any partners. I had meetings with practitioners individually and in - as a group from time to time to find out what was going on in terms of - well, usually, my - my question was, is everything being attended to as and when it needs to be? My personal approach to practice has always been that if a client provides instructions, then unless it's critically urgent, the - a practitioner should resolve to deal with it within a week, simply as a - as a practice, a consciously adopted means of managing yourself and your time. I think the practitioners then working for me knew that. We also had, and still do use, electronic time recording, which took the form of - it was a kind of regulation or management tool as much as anything else.
>
> So you checked how much time people were spending working?
>
> Well, it - yes, I could look it up in the computer system and - - -
>
> And presumably you would have done that reasonably regularly for time management and budgetary purposes?
>
> Yes. Well, I was going to say that - - -
>
> At least monthly?
>
> Absolutely, yes and - yes quite right.
>
> (T:35-36; 24.01.17)

37 When it was put to Mr Bower that between 30 September 2010 and mid-November 2010, he must have checked Mr Savas' time records on at least two occasions, he stated that if the firm issued invoices in that period, he would have looked at it but not otherwise (T:85; 24.01.17). The Tribunal notes that the latter answer was a substantial retreat from 'absolutely' checking how much time people were spending 'at least monthly' to when he issued invoices but not otherwise checking. The Tribunal finds that Mr Bower did check how much time people were spending, at least monthly.

The organisation of these reasons

38 In order to help explain Mr Bower's conduct, the Tribunal has dealt with the Pal matter and the Settlers House matter separately. It is important to appreciate that in fact the two matters were handled by Mr Bower and Corser & Corser over a substantially similar time period. They are factually intertwined, partially in relation to Mr Bower's knowledge of the inactive cases list and Mr Savas' performance.

The Pal matter

39 From about 12 November 2009, Corser & Corser was retained by Mr Pal in relation to a dispute with Mr Pal's previous employer, Fairstar Resources Limited (Fairstar) arising from the termination of Mr Pal's contract of employment. Mr Bower initially had the day-to-day conduct of the file (T:41; 21.01.17).

40 Mr Bower accepted that it should have been a fairly simple matter (T:43; 21.01.17). On 12 November 2009, Corser & Corser sent a letter of demand to Fairstar (Exhibit A pages 11-12).

41 Fairstar was represented by Mr Ross Gillon of Lawton Gillon. Mr Gillon, on behalf of Fairstar responded to the letter of demand by telephoning Mr Bower on 2 December 2009 (Exhibit A page 21).

42 On 2 December 2009, Corser & Corser invoiced Mr Pal for $780.20 (Exhibit A pages 16-17).

43 On 11 December 2009, Lawton Gillon replied in writing to the letter of demand with an offer of settlement (Exhibit A pages 24-25). There were various exchanges of telephone calls and emails. The parties did not reach agreement. Given the Christmas/summer break, it cannot be said that Fairstar and Lawton Gillon had employed delaying tactics.

44 Mr Bower accepted that once he resolved to commence proceedings, his objective was to commence proceedings and prosecute them with minimum possible delay to force Fairstar to the bargaining table (T:43; 24.01.17; Exhibit A page 63).

45 The Tribunal notes that on 24 February 2010, the District Court had issued a default notice to Corser & Corser because of its failure to enter the Settlers House matter for trial by 23 February 2010 (Exhibit B page 60). Almost from the commencement of the Pal court proceedings, Mr Bower was well aware of the inactive cases list by reason of the Settlers House matter.

46 Corser & Corser filed a writ of summons on 29 January 2010 to commence District Court of Western Australia proceedings CIV 256 of 2010 on behalf of Mr Pal as plaintiff (Pal Action).

47 On 29 July 2010, Corser & Corser invoiced Mr Pal in the amount of $512.20 for disbursements only (Exhibit A page 51).

48 A directions hearing was held on 5 March 2010 at which the following orders were made (Exhibit A page 60):

> 1. The Plaintiff to file and serve a Statement of Claim by 19 March 2010;
>
> 2. The defendant to file and serve a Defence by 9 April 2010;
>
> 3. A further pre-trial conference is ordered for 21 April 2010 at 9.30 am;
>
> 4. Directions hearing adjourned until 21 April 2010 at 9.30 am for a mention; and
>
> 5. Costs be in the cause.

49 Corser & Corser filed a statement of claim, on time, on 19 March 2010 (Exhibit a pages 65-69).

50 Corser & Corser filed an amended statement of claim on 22 March 2010 (Exhibit A pages 78-82).

51 On 7 April 2010, Corser & Corser invoiced Mr Pal for $2,745.77.

52 Fairstar filed its defence, two days early, on 7 April 2010. This was despite the filing of an amended statement of claim. Mr Bower did not suggest that there was any delay by Fairstar in filing its defence (T:46; 24.01.17).

53 The District Court issued a case management timetable on 7 April 2010 which fixed the following dates:

EVENT	DATE FOR COMPLIANCE
Entry for Trial	5 August 2010
Pre-trial Conference	14 September 2010
Listing Conference	24 October 2010

Trial	22 January 2011
Judgment	2 April 2011

54 Mr Bower's evidence was that he would have noted this timetable (T:47; 24.01.17).

55 On 8 April 2010, Mr Pal sent an email to Mr Bower stating 'I would like you to attend my case' (Exhibit A page 95). Mr Bower accepted that he understood that Mr Pal would want him to remain in charge of the case and take responsibility (T:48; 24.01.17).

56 Mr Bower became aware that there was a pre-trial conference on 21 April 2010 from the diary (Exhibit A page 103). On 13 April 2010, Mr Bower enquired of Mr Savas as to why a pre-trial conference had been listed before entry for trial (Exhibit A page 100).

57 Mr Bower attended the pre-trial conference with Mr Savas on 21 April 2010. The action was not resolved and the action was listed for a directions hearing on 17 May 2010 (Exhibit A page 109). The listing of the pre-trial conference of 21 April 2010 had no significant effect on the progress of the matter. There is no basis for suggesting otherwise. The case management timetable issued on 7 April 2010 fixed the entry trial date on 5 August 2010, that is, within the standard 120 days.

58 Following the pre-trial conference, Fairstar made a further offer. The letter of offer, as one would expect, identified what Fairstar saw as problems with Mr Pal's case (Exhibit A pages 112-118). It is difficult to imagine a case where, at some stage, a party would not seek to identify weaknesses in the opposing party's case to that party. Suggesting weaknesses in the other party's case does not constitute delaying tactics.

59 Mr Savas first became involved in the Pal matter on around 17 May 2010 (T:42, 45; 24.01.17; Exhibit C page 5).

60 At the directions hearing held in the Pal Action on 17 May 2010, attended by Mr Savas on behalf of Corser & Corser, the District Court ordered (17 May order) that:

> 1) Mr Pal exchange [with Fairstar] any minute of proposed amended statement of claim by 18 June 2010 [paragraph 1];

2) A further directions hearing in the matter be listed for 25 June 2010 at 2:30 pm [paragraph 2]; and

3) The costs of the directions hearing be in the cause [paragraph 3].

(Exhibit A pages 122-123)

61 By email dated 18 May 2010, Mr Savas, informed Mr Bower of the contents of the 17 May order.

62 In Mr Savas' email to Mr Bower in relation to his attendance on 17 May 2010, he asked Mr Bower if he required anything further from him (Exhibit A page 122). Mr Bower responded to that email on 19 May 2010. The email relevantly stated:

> …
>
> Question: who can examine these issues, to (1) draft a settlement proposal that addresses Ross Gillon's arguments, and (2) draft an amended statement of claim. [I should have another look thru the file to remind myself of what I was planning to amend, but if there is any strength in Gillon's argument that some items are simply unlawful and unenforceable, then we need to amend the statement of claim to take them into account.]
>
> …

(Exhibit A page 121-122)

63 It is clear that Mr Bower knew the contents of the 17 May order, despite raising the question of who should examine those issues. He also noted that he should have another look through the file. Mr Bower failed to do anything about the draft amended statement of claim at that time.

64 Mr Savas was on annual leave from 24 to 26 May 2010.

65 Mr Bower accepted that as the person with the day-to-day conduct of the file, it was his responsibility to ensure that the proposed amended statement of claim was exchanged by 18 June 2010 (T:53; 24.01.17). It was not.

66 On 31 May 2010, Corser & Corser invoiced Mr Pal for $349.13 (Exhibit A page 127).

67 Mr Savas' next recorded involvement in the Pal matter was on 1 June 2010 'Drafting letter of response and demand regarding offer' (Exhibit C page 5).

68 On 2 June 2010, Mr Pal accepted Mr Bower's recommendation of a counteroffer of $160,000 (Exhibit A page 129).

69 On 3 June 2010, Mr Bower sent Lawton Gillon a counteroffer of $160,000 (Exhibit A page 131-132).

70 On 4 June 2010, Lawton Gillon wrote to Corser & Corser reminding them that the minute of proposed amended statement of claim was to be filed by 18 June 2010 (Exhibit A page 134). At that time, Mr Bower had the day-to-day management of the Pal matter.

71 Lawton Gillon's letter is inconsistent with any intention on their part to delay the matter. To the contrary, it is evidence that Lawton Gillon wished the orders to be adhered to by Corser & Corser (see below).

72 Corser & Corser:

a) did not comply with paragraph 1 of the 17 May order;

b) did not apply to the District Court for an extension of time within which to file and serve an amended statement of claim; and

c) filed and served an amended statement of claim on about 19 August 2010.

73 Mr Savos did not record any time on any file on June 4, 7, 8, 9, 11 or 15 of 2010.

74 On any view, Mr Bower was responsible for substantial delays in the Pal and Settlers House matters (see below) before Mr Savas had the day-to-day carriage of the matters.

75 On Monday 14 June 2010, Mr Bower went on annual leave and carriage of the matter was transferred to Mr Savas. At the time, Mr Bower went on leave, he had not prepared or caused to be exchanged the proposed amended statement of claim despite the fact that it was due by 18 June 2010 (T:53; 24.01.17). Until this time, Mr Bower had carriage of the matter.

76 Mr Bower accepted that as principal of the firm, he retained overall oversight of the matter and responsibility for it (T:54; 24.01.17).

77 Mr Bower's evidence was that his oversight of the Pal matter after Mr Savas took over the day-to-day carriage was to talk to Mr Savas about

what was happening and to obtain his advice, and ensure that Mr Savas was dealing with the matter appropriately. Mr Bower stated that when he asked for advice from Mr Savas he did so in the context of the 'wall-like attitude' that the other side had manifested while he was attending with the file himself. He stated that he obtained information from Mr Savas as to the priority he was giving to the matter and the progress he was making, or not, depending on what was actually happening between the parties in the proceedings (T:53, 56-57; 24.01.17).

78 Mr Bower accepted that in order to ascertain the progress of the matter, he checked the central diary and had regard to the time recording (T:55-56; 24.01.17).

79 Mr Bower's evidence was that he would have communicated to Mr Savas the need to exchange the proposed amended statement of claim in an informal way by talking to him over the preceding days and referred to what needed attention (T:57; 24.01.17).

80 There was no documentary evidence to show that any steps had been taken by Mr Bower to prepare a minute of proposed amended statement of claim to exchange with Lawton Gillon or that Mr Bower communicated to Mr Savas the need to prepare and exchange that document by 18 June 2010 (T:57; 24.01.17).

81 On 15 June 2010, Corser & Corser invoiced Mr Pal for $493.68 (Exhibit A page 135).

82 On 24 June 2010, Mr Pal emailed Mr Bower stating that he 'presumed [Mr Bower] will attend to [Mr Pal's] case tomorrow' (Exhibit A page 137). Mr Bower did not respond to that email.

83 Mr Savas did not record any time on any file on 30 June 2010, nor on 12, 15 or 16 July 2010.

84 On 19 July 2010, Mr Bower received an email from Mr Pal which, relevantly and in substance, sought information about the significant developments and progress in the proceedings to that date and how the proceedings were to be progressed by Corser & Corser in the future. Mr Bower did not respond to that email (Exhibit A page 138). This was the first of many occasions in which Mr Pal complained to Mr Bower about a lack of communication.

85 On 21 July 2010, Mr Bower's office manager sent Mr Savas an email, copied to Mr Bower, stating '[Mr Pal] said that he had left several

messages for you to call him or email him but he hadn't heard anything back. He said that he is still very uneasy about things and would like to be contacted' (Exhibit A page 139). This was the second occasion in which Mr Pal had complained to Mr Bower about a lack of communication.

86 The District Court held another directions hearing in the Pal Action on 30 July 2010 at which there was no appearance on behalf of Mr Pal. It was not apparent from the evidence what led to the listing of 30 July 2010.

87 Mr Bower returned to work from leave on 30 July 2010 (T:58; 24.01.17).

88 Just after Mr Bower returned from leave, that is, from August 2010, Mr Savas only had two or three matters to deal with because Mr Bower had relieved Mr Savas of all but the Pal matter and the Setters House matter and possibly one other because of Mr Savas' unexplained ill health and absences (T:75-76; 24.01.17). It was obvious from Mr Bower's own actions that he was concerned about Mr Savas' performance.

89 Mr Bower's evidence was that on about 30 July 2010, he believed he had a conversation with Mr Savas to the effect that the minute of proposed amended statement of claim had been filed on or about 18 June 2010 (T:59; 24.01.17). There is no documentary record of any such conversation.

90 Lawton Gillon faxed a letter dated 30 July 2010, which relevantly informed Corser & Corser of the orders made by the Court at that day's directions hearing, namely that:

a) Fairstar was to serve a minute of proposed amended defence and counterclaim by 20 August 2010;

b) the directions hearing was adjourned to 3 September 2010 at 2.30 pm; and

c) Mr Pal was to pay Fairstar's costs of 30 July 2010 with liberty to apply.

(Exhibit A page 140)

91 Mr Bower's evidence was that he must have received that letter at that time but that he did not remember reading that letter when he was going through the material in the days before the Tribunal hearing

(T:58; 24.01.17). However, he later resiled from that admission. He 'suspected' that the 30 July 2010 directions hearing, referred to in Lawton Gillon's letter of 30 July 2010 'just didn't come to my attention (T:61; 24.01.17).

92 Corser & Corser did not inform Mr Pal, either promptly or at all:

1) that it had not complied with the 17 May order;

2) that there had been no appearance on his behalf at the directions hearing on 30 July 2010;

3) of the orders made by the District Court at the 30 July directions hearing;

4) in particular, that the District Court had ordered Mr Pal to pay Fairstar's costs of 30 July 2010;

5) whether there was any basis for Mr Pal to apply to the District Court to have that costs order set aside or varied.

93 Had Mr Pal been informed that a court order had been made against him, he would obviously have been alarmed at Corser & Corser's, and in particular, Mr Bower's handling of the file. Given that the order created a costs liability for Mr Pal, the only reason not to inform Mr Pal was to conceal it from him so as to avoid Mr Pal's inevitable questions.

94 On 6 August 2010, Mr Bower received an email from Mr Pal which, again, relevantly and in substance, complained about a lack of communication from Corser & Corser about the Pal Action since 1 June 2010 and sought information about the significant developments and progress in the proceedings to that date and how the proceedings were to be progressed by Corser & Corser in the future. This was the third occasion on which Mr Pal had complained about the lack of communication.

95 Mr Pal's email of 6 August 2010 stated, 'With this note I am asking you to please look into the matter and inform me ASAP about the case, what has been done to date, and future line of action'. Mr Bower did not respond to that email (Exhibit A page 143).

96 The costs order of 30 July 2010 was a significant development. There is no question that Mr Bower should have informed Mr Pal.

97 Mr Bower's evidence was that he spoke to Mr Savas about his concern that this kind of message was coming in. He said Mr Savas assured him that he was attending to what needed to be done on the matter (T:59-60; 24.01.17). There is no documentary record of such a conversation.

98 By this point, Mr Bower knew that neither he nor Mr Savas had communicated with Mr Pal since 1 June 2010, a period of over two months. Mr Bower had been on leave and Mr Savas had the day-to-day carriage of the matter for most of that time. Mr Bower knew, by reason of Mr Pal's emails, that Mr Savas was not communicating with Mr Pal. Allied with Mr Bower's concerns about Mr Savas' performance that led him to relieve Mr Savas of all but two or three files, Mr Bower had concerns about Mr Savas' handling of the file at the time.

99 Mr Bower conceded that on or about 6 August 2010, he must have appreciated that the entry for trial milestone was sometime in early August 2010 (T:65; 24.01.17). Mr Bower later sought to resile from that admission (T:66; 24.01.17). When pressed, Mr Bower then conceded that he would have been aware of the date of entry for trial via the central diary (T:67; 24.01.17). This is but one example of Mr Bower's evasiveness in answering questions.

100 Mr Bower accepted that at some point he must have become aware that the amended statement of claim had not been filed (T:60-61; 24.01.17).

101 On 12 August 2010, Corser & Corser received a notice from the District Court dated 6 August 2010, advising of a default in the entry for trial and requiring entry by 21 August 2010 (Exhibit A page 145).

102 At this point in his cross-examination, Mr Bower again raised his proposition that the delay by Corser & Corser was due to the conduct of Lawton Gillon. The following exchange took place:

> You didn't wish to disclose to him that the 30 July directions hearing had resulted in a costs order against him because of a non-attendance by your firm? - - - No. I'm - I'm sure if I knew that that had occurred I would remember it, and I don't. And I - I suspect that that just didn't come to my attention. As to giving, or responding to Mr Pal's email, I didn't - it's not correct to say that I didn't want to respond because I didn't want to tell him that something hadn't been filed that should have been. My - I - I - I suspect that - well, probably my immediate response would have been to remonstrate with Mr Savas and say, 'Well, we're going to get this done', once I have discovered that it hadn't occurred, and - or, however, may I say

> this. All of this occurred in - in the background of the fact that this case was always going to be, sort of, an unhappy one. That is, the other side was pretty feisty and if deadlines weren't met, then it may have been because there had been quite vigorous interactions between the parties, be it about settlement or - or - - -
>
> You've got no basis for saying that in relation to the amended statement of claim, have you, Mr Bower? - - - No, not specifically, but my own - - -
>
> Well - - - ? - - - My - - -
>
> Not at all? - - - Well, no, I don't - I don't, with respect, agree. I had - I had had some months of involvement and I had experienced, personally, the - the style of activity and expression engaged in by the lawyers on the other side in - and in - and the party in the mediation that had occurred at the court, and I - and Mr Pal repeatedly described to us the - the unpleasantness of the relationship. And so when, from time to time, I spoke to Mr Savas and he assured me that things were in order, I - I took that to mean things are in order in the context of the - of a, sort of, difficult relationship between the parties.
>
> (T:61-62; 24.01.17)

103 The Pal writ had been issued on 29 January 2010. The Pal Statement of claim was filed on 19 March 2010. Fairstar had filed its defence two days early. It was Corser & Corser who failed to comply with paragraph 1 of the 17 May order, despite being reminded by Lawton Gillon. Lawton Gillon attended the directions hearing on 30 July 2010 which Corser & Corser failed to attend. Lawton Gillon informed Corser & Corser of the orders made. There is simply no evidence to support Mr Bower's assertion that Lawton Gillon's conduct had anything to do with Corser & Corser's delay. Lawton Gillon was doing everything required of it by the Court. The failure to comply with the entry for trial date was entirely Corser & Corser's failure. There is no evidence to suggest a 'difficult relationship'.

104 Mr Bower ultimately conceded that there was nothing Lawton Gillon could have done to cause the two month delay by Corser & Corser in the minimal amendments to the statement of claim (T:63; 24.01.17).

105 Mr Bower then made the completely baseless proposition that 'it wasn't beyond the realms of possibility that the practitioner in my firm [Mr Savas] had been, somehow, persuaded to postpone the filing of the amended statement of claim' (T:63; 24.01.17).

106 Mr Bower accepted that there was nothing in the file to support that proposition (T:63; 24.01.17).

107 When asked by the Tribunal to give an example of the difficulties he was experiencing with Lawton Gillon, Mr Bower gave a convoluted and rambling response. He was unable to explain how Mr Savas could have been persuaded by Lawton Gillon to 'slow down' in the face of Mr Pal's instructions to proceed (T:63-65; 24.01.17).

108 Mr Bower's evidence that the delay was attributable to Lawton Gillon was deliberately untrue. The evidence was given to divert attention from his failures and delays in the Pal matter.

109 In a letter to the Committee dated 12 June 2013 (Exhibit C pages 39-42) Mr Bower stated:

> …
>
> Mr Pal's case was then placed on the District Court's inactive list. This occurs solely by operation of the court's computer program. It does not occur as a result of any judicial or administrative consideration of the proceedings. The assumption is often made by those not involved in the proceedings that because no step has been taken on the court record for 12 months, there must be nothing happening between the parties; but that is often wrong. In the present case this firm was attending to Mr Pal's action in the period leading up to the placement of the action on the inactive list.
>
> It is preferable for solicitors who are handling cases that are likely to be treated as inactive to apply to the court for the extension of time periods so that the 'inactive' listing does not occur. The reason to attend to this is because it is an inconvenient nuisance to have to apply to remove the case from the inactive list. There is no risk that a case which is moved onto the inactive list, but in which the parties have actually been active despite the absence of 'on the court record' activity for 12 months, being kept on the inactive list so that the parties cannot proceed with the case. This is borne out by the decided cases; and in addition, the court's judges and registrars are no doubt aware that the fact that the 'inactive list' rules whereby the court computer moves cases to the inactive list with no judicial input could never be permitted to prevent a litigant from proceeding with his or her action.
>
> In Mr Pal's case Mr Savas did not apply for the extension of the deadline so as to avoid the case being placed on the inactive list. That was a mistake on his part, in my view, because it forced us to make the necessary application, which was a distraction which took a small period of time to be resolved.
>
> …

110 Mr Bower was cross-examined about the proposition in his letter (T:67-70; 24.01.17).

111 Mr Bower gave evidence that:

> I am strongly of the view that those applications are never, in my experience, difficult to - to resolve in favour of the party wanting to get the case off the - off the inactive list. So long as they can explain what the delay has been, why, and express the intention to get on with things in the future, then the court will - - -
>
> And the second thing, and also that it's not opposed with good reason? - - - Yes, but I think it's a long time since anyone seriously tried to oppose one of those.
>
> (T:70; 24.01.17)

112 Mr Bower's statement simply does not sit with the fact that as at 19 July 2010, Corboy Legal had sent a letter to Corser & Corser that it was not prepared to provide consent to the entry for trial milestone (Exhibit B pages 99-100, and see below). The Settlers House matter in fact became inactive on 31 July 2010. The history of the Settlers House matter, set out below, shows that there were significant difficulties in getting that matter off the inactive cases list.

113 Mr Savas did not record any time on any file on 22 and 25 July and 13 August 2010.

114 On 19 August 2010, Corser & Corser sought to file an amended statement of claim (Exhibit A pages 151-155).

115 On 19 August 2010, Corser & Corser also sent the amended statement of claim to Lawton Gillon and relevantly stated:

> In circumstances where the District Court has issued a notice of default for entry for trial dated 6 August 2010 and your client intends to file and serve a Defence and Counterclaim, we propose the parties execute a minute of consent orders which provides your client with whatever time it requires amend its pleading and extends the entry for trial milestone.
>
> (Exhibit A page 156)

116 The purport of the letter was that the need for an extension was because of the need for Fairstar to file a counterclaim. There was no mention of the Court's subsequent orders of 30 July 2010.

117 On 22 August 2010, Mr Savas sent Mr Pal an email (the 22 August email), the contents of which relevantly stated:

> I am writing to you to provide an update regarding … [the Pal Action].
>
> On 17 May 2010 the Court made orders regarding the progress of this matter towards trial including an entry for trial date, a latest date for the filing of your amended Statement of Claim, [Fairstar's] amended Defence and any Counterclaim [Fairstar] may wish to bring ... Your part except for the entry of the matter for trial has been done.
>
> Mr Ross Gillon told me last Friday that his Client's counterclaim would be ready within approximately 14 to 21 days. Once we receive the counterclaim we will provide you with a copy and advise you regarding its contents and regarding any action that may be necessary. Certainly if the counterclaim introduces any new matters there will need to be the relevant disclosures given by [Fairstar] and you will have the opportunity to check those disclosures.
>
> In these circumstances the mentioned timeline for entry for trial and completion of pleadings must be extended by approximately 21 days and we propose to do that by way of agreement between the parties so as to negate the need for an extra Court appearance and extra costs.
>
> (Exhibit A page 162)

118 Mr Savas forwarded a copy of the 22 August email to Mr Bower, and Mr Bower received that copy shortly after the 22 August email was sent to Mr Pal. Mr Bower accepted that he read it on or about 22 August 2010 (T:70; 24.01.17). Mr Bower plainly received it because he saw fit to reply to Mr Savas, 'Oh what a feeling … Ma-hen-dra!' (Exhibit A pages 159-160).

119 Mr Bower conceded that as at 22 August 2010, he knew that the defence had been filed on 7 April and that the matter had not been entered for trial. He also conceded that he must have appreciated that the 17 May order had not been complied with (T:74-75; 24.01.17).

120 The Tribunal rejects Mr Bower's evidence that when he read the email of 22 August 2010, he had forgotten that order 1 of the 17 May orders had not been complied with and that there had been a failure to appear on 30 July 2010.

121 Mr Bower knew of the two month delay in the filing of the amended statement of claim as at 22 August 2010.

122 Mr Bower conceded that paragraph 18 of his witness statement (Exhibit D) where he stated that:

> I had no reason at that time to be concerned about what he [Mr Savas] had told me, about how he was conduction the Pal matter may be inaccurate or incomplete, or that he may not have been properly conducting the matter.

123 was erroneous (T:75; 24.01.17).

124 Mr Bower conceded that the statement that Mr Pal's 'part except for the entry for trial has been done' could not be correct because Mr Pal had not given discovery (T:83-84; 24.01.17).

125 The email of 22 August was misleading because it concealed the true position from Mr Pal. The email failed to disclose to Mr Pal the significant delays in the proceedings and that those delays had been caused by Corser & Corser breaching orders. In addition, there were positive misrepresentations as set out below.

126 The Committee alleged that the content of the 22 August email was false or misleading, or both, in that:

1) the email represented that the amended statement of claim had been filed in compliance with the 17 May order;

2) the true position in relation to the filing of the amended statement of claim was that Corser & Corser:

    a) did not comply with paragraph 1 of the 17 May order;

    b) did not apply to the District Court for an extension of time within which to file and serve an amended statement of claim; and

    c) filed and served an amended statement of claim on about 19 August 2010;

3) the email represented that the 17 May order provided for the time by which the Pal Action had to be entered for trial;

4) the true position was that the terms of the 17 May order were as set out above, that is, that Mr Pal exchanged any minute of proposed amended statement of claim by 18 June 2010;

5) the email represented Mr Pal had not defaulted in any procedural requirement imposed by the District Court with respect to the conduct of the Pal Action;

6) the true position was that at 22 August 2010, Mr Pal:

   i) had defaulted in compliance with paragraph 1 of the 17 May order;

   ii) had not appeared (through his legal representative) at the directions hearing on 30 July 2010; and

   iii) had not entered the Pal Action for trial within 120 days of the filing of the defence as required under r 37(1) of the DCR;

7) the email represented that the only reason why the dates by which the matter was to be entered for trial and pleadings closed needed to be extended was because Fairstar had not yet filed its counterclaim;

8) the true position was that an additional reason why those dates need to be extended was because:

   i) Corser & Corser had not complied with paragraph 1 of the 17 May order and had not filed an amended statement of claim until 19 August 2010;

   ii) Corser & Corser had not taken all reasonable steps on behalf of Mr Pal to make the Pal Action ready to be entered the matter for trial within 120 days of the filing of the defence.

   (Committee's Amended Statement of Facts and Contentions Annexure A (CSFC Annexure A) paragraph 16)

127 Mr Bower contended that on a proper construction of the email, there were no representations that:

1) the amended statement of claim had been filed in compliance with the 17 May order;

2) Mr Pal had not defaulted in any procedural requirement by the District Court with respect to the conduct of the Pal Action; and

3) the only reason why the dates by which the matter was to be extended for trial and pleadings closed needed to be extended was because Fairstar had not filed its counterclaim.

(Bower substituted response to CSFC Annexure A (BSRA paragraph 5)

128 The Tribunal rejects Mr Bower's contentions.

129 The Tribunal finds the contents of the 22 August 2010 email were false and misleading as alleged by the Committee.

130 The Committee alleged that it is to be inferred that Mr Bower knew the 22 August email to be false or misleading in material respects, alternatively, he was recklessly indifferent to whether the 22 August email was false or misleading in material respects, because:

1) Mr Savas by an email dated 18 May 2010 had informed Mr Bower of the contents of the 17 May order;

2) Mr Bower had received an e-mail from Mr Pal dated 6 August 2010 which stated, relevantly and in substance, that Mr Pal had not received a substantive communication from Corser & Corser about the Pal Action since 1 June 2010;

3) Mr Bower was aware that Mr Savas had frequently been absent from work between May and July 2010;

4) the file maintained by Corser & Corser in relation to the Pal Action (the Pal file) contained at that time, relevantly, the following documents:

   i) the letter from the defendant's solicitors dated 30 July 2010;

   ii) the Notice of Default dated 6 August 2010;

5) the Pal file indicated that Corser & Corser had not yet prepared or filed an amended statement of claim.

(CSFC Annexure A paragraph 18)

131 Whether or not Mr Bower had inspected the file, he conceded in cross-examination that he was, in effect, aware of the procedural history of the Pal file.

132 Mr Bower admitted that:

1) he had been made aware of orders having been made on 17 May 2010;

2) he had received an email from Mr Pal dated 6 August 2010;

3) he was aware that Mr Savas had frequently been absent from work between May and July 2010; and

4) the Pal file contained a letter from Fairstar's solicitor dated 30 July 2010 and a Notice of Default dated 6 August 2010.

(BSRA paragraph 7)

133 Mr Bower otherwise denied the allegations made in in relation to the 22 August email and further stated:

5) the contents of the email accorded with advice that he received from Mr Savas concerning the Pal file;

6) he was not aware at that time that Mr Savas's absences from work had affected Mr Savas's conduct concerning the Pal file; and

7) he relied on the advice received from Mr Savas and by reason thereof did not consider it necessary to carry out an inspection of the documents on the Pal file to ascertain the accuracy of information provided by Mr Savas.

(BSRA paragraph 7)

134 The Tribunal finds that Mr Bower knew the 22 August email to be false and misleading in material respects as alleged by the Committee.

135 In the circumstances referred to above, the Committee alleged that Mr Bower:

1) made no attempt to inform Mr Pal that the 22 August email was false and misleading;

2) made no attempt to inform Mr Pal of the true position;

3) intended that Mr Pal be misled by the 22 August email about the true status and progress of the Pal Action; and

4) alternatively to CSFC paragraph 19.3, was recklessly indifferent as to whether or not Mr Pal was misled by the 22 August email about the true status and progress of the Pal Action.

(CSFC Annexure A paragraph 19)

136 Mr Bower denied each and every allegation and stated further:

1) the contents of the email accorded with advice that he received from Mr Savas concerning the Pal file;

2) he was not aware at that time that Mr Savas' absences from work had affected Mr Savas' conduct concerning the Pal file; and

3) he relied on the advice received from Mr Savas and by reason thereof did not consider it necessary to carry out an inspection of the documents on the Pal file to ascertain the accuracy of information provided by Mr Savas.

(BSRA paragraph 8)

137 The Tribunal finds that Mr Bower:

1) made no attempt to inform Mr Pal that the 22 August email was false or misleading;

2) made no attempt to inform Mr Pal of the true position; and

3) intended that Mr Pal be misled by the 22 August email about the true status and progress of the Pal Action.

138 On 27 August 2010, Lawton Gillon served a minute of proposed amended defence, set-off and counterclaim on Corser & Corser which was handed up to the court at the directions hearing on that day (Exhibit A pages 166-170).

139 Lawton Gillon had responded within eight days of receiving the minute of amended statement of claim on 19 August 2010. Lawton Gillon responded with commendable alacrity. There is and was no basis for believing that Lawton Gillon was employing delay tactics.

140 At a directions hearing held in the Pal Action on 27 August 2010, the District Court ordered (the 27 August order) that:

> 1. the Minute of Proposed Amended Defence, Set Off and Counterclaim handed up on 27 August 2010 do stand as the Amended Defence, Set off and Counterclaim;
>
> 2. within 21 days of the date of this order the plaintiff do file and serve any defence to counterclaim;
>
> 3. the timetable within which the action be conducted be adjusted such that the date of entry for trial be extended to 1 November 2010;
>
> 4. the directions hearing be adjourned sine die;
>
> 5. the costs be in the cause.
>
> (Exhibit A page 175)

141 By an email dated 27 August 2010 to Mr Pal, copied to Mr Bower, Mr Savas attached a copy of Fairstar's amended defence and counterclaim (Exhibit A pages 164-170).

142 By a further email of 27 August 2010, copied to Mr Bower, Mr Savas informed Mr Pal of the orders made that day (Exhibit A page 178).

143 Mr Bower conceded that in late August/early September, he must have been aware that the reply and defence to counterclaim had to be filed by 18 September 2010 (T:80; 24.01.17).

144 Mr Savas did not record any time on any file on 1 or 2 September 2010.

145 On 3 September 2010, Mr Bower and Mr Savas met with Mr Pal from 2.45 pm to 4.30 pm (Exhibit A page 184).

146 Mr Savas did not record any time on any file on 8 or 9 September 2010.

147 By an email dated 9 September 2010 to Mr Bower, Mr Pal relevantly requested that the Mr Bower 'personally look into the case … and see that communication with me at Corser & Corser is improved' (Exhibit A page 185). This was the fourth occasion on which Mr Pal had complained about communication problems.

148 By an email dated 13 September 2010, Mr Bower sent an email to Mr Pal that relevantly stated (Exhibit A page 188):

> I will review all of our court documents and identify any parts where we need to, or could benefit from the introduction of additional detail so as to state as completely and accurately as possible the case claiming your total salary to the value of $270,000.00 and the additional details mentioned in your email dated 9 September 2010.
>
> Please also be assured that I will ensure that appropriate information and advice is provided to you in a timely way, in relation to the progress of the case.

149 Mr Bower conceded that he would have done the things he referred to in the first paragraph above of his email of 13 September 2010 (T:82; 24.01.17).

150 Mr Bower conceded that, as a result of looking back at the court documents, at that time, it was very clear to him that the amended statement of claim was two months overdue when it was filed and the defence to counterclaim had to be filed by 18 September 2010.

151 Mr Savas did not record any time on any files on 13, 21, 24, 27, 28 and 29 September 2010 or 1, 4, 8, 19, 20, 27 or 28 October 2010. Mr Bower knew that Mr Savas was having substantial work performance problems.

152 On 30 September 2010, Corser & Corser invoiced Mr Pal for $3,373.50 (Exhibit A pages 198-189). It was obvious to Mr Bower from the preparation of his bills that Mr Savas had spent only about eight hours on the file.

153 It appears, from Exhibit A page 200, that at some time in October 2010, Corser & Corser prepared a draft of the defence to counterclaim.

154 Corser & Corser:

1) did not comply with paragraph 2 of the 27 August order;

2) did not apply to the District Court for an extension of time within which to file and serve the defence to counterclaim; and

3) did not complete the preparation of a reply to amended defence and defence to counterclaim (reply and defence to counterclaim) until about 3 December 2010.

155 Corser & Corser did not enter the Pal Action for trial by 1 November 2010 (CSFC Annexure A paragraph 26).

156 The District Court:

1) issued a Notice of Default on 4 November 2010 pursuant to r 38(1) of the DCR; and

2) stated in that notice, in substance, that unless Mr Pal entered the Pal Action for trial on or before 19 November 2010, the matter would become inactive.

(Exhibit A page 208)

157 The notice was received by Corser & Corser on 29 November 2010 (Exhibit A page 248).

158 Mr Savas did not record any time on any file on 8, 9, 10, 11, 15, 17, 21, 22, 23, 24, 29 or 30 November 2010.

159 Corser & Corser did not enter the Pal Action for trial by 19 November 2010 and consequently the matter became inactive pursuant to r 44 of the DCR. Whatever excuse might be made for Mr Bower, by reason of the fact that Corser & Corser received the notice after the matter had been entered on the inactive list, he must have and did know that the entry for trial date was looming from the fact that the orders of 27 August were known to him and that he inspected the file shortly after 13 September 2010 for the purposes of drafting the reply and defence to counterclaim.

160 Between 13 September 2010 and 24 November 2010, Corser & Corser made no attempt to inform Mr Pal generally of any significant developments or progress in the Pal Action.

161 Mr Bower claimed that during this period, he had spoken to Mr Savas and obtained assurance that the Pal matter was proceeding appropriately (T:85; 24.01.17). Given the fact that the timesheets show

that Mr Savas was not recording any time on any file on multiple occasions and his absences on sick leave, Mr Bower could not have relied on such assurances. Further casting doubt on these assurances were Mr Pal's multiple complaints about Corser & Corser's failure to communicate and the continuing defaults in complying with the case timetable and the District Court's orders. Mr Bower's evidence was that in late July/early August, he had reduced Mr Savas' case load to two or three files. Further, he conceded that paragraph 18 of his witness statement (Exhibit B) was erroneous. Mr Bower knew that the Pal matter was not proceeding appropriately, including that there were significant delays in preparing the matter and complying with orders and the court timetable.

162 Mr Bower conceded that he was alerted from at least 30 September 2010 that the defence to counterclaim had not been filed (T:87; 24.01.17).

163 On 24 November 2010, Mr Pal emailed Mr Bower stating 'Since long I haven't heard from you on the subject matter. I would appreciate info on progress?' (Exhibit A page 209). This was the fifth occasion on which Mr Pal had complained about the lack of communication from Corser & Corser.

164 Mr Bower appeared to seek to justify the delays on the basis that Mr Pal was aware of them (T:4; 25.01.17). There is a world of difference between being aware of delays and the true reason for the delays.

165 On 25 November 2010, Mr Bower requested from Mr Savas 'the procedural position at present and I will report to Mr Pal' (Exhibit A page 211).

166 Mr Bower conceded that, to his knowledge, the reply and defence to counterclaim was more than two months overdue for filing (T:89; 24.01.17).

167 By an email sent on 25 November 2010 at 3.21 pm, Mr Savas informed Mr Bower, in substance, that he (Mr Savas) had not yet completed, filed or served the reply and defence to counterclaim (Exhibit A page 213).

168 Mr Bower sent an email to Mr Andrew Cameron and Mr Savas stating 'I will email Mr Pal on the basis of Kerry's [Mr Savas] info' (Exhibit A page 216).

169 At paragraph 21 of Mr Bower's witness statement (Exhibit E), he stated that he relied entirely on Mr Savas' email as to the progress of the matter.

170 On 25 November 2010 at 4.02 pm, Mr Bower sent Mr Pal an email (the 25 November email) the contents of which relevantly stated:

> Dear Mr Pal
>
> What has been occurring in recent weeks is that the two sides have been serving pleadings on each other.
>
> Specifically, our amended statement of claim led to [the defendant] filing a defence, set-off and counterclaim.
>
> We are drafting the appropriate response to that document, which is known as a Reply and Defence to Counterclaim.
>
> That document will be completed in about 24 hours, so that we intend to email it to you for you to check, during Friday 26 November.
>
> …
>
> Beyond this stage of the case, the next step is for each side to reveal the relevant documents which they possess or control, so that the other party can inspect them and obtain copies of [sic] they want them.
>
> Other optional pre-trial processes might also be used, depending on presently unidentifiable developments.
>
> The court imposes a timetable for the action to be 'entered for trial' meaning that we must certify in writing to the court that the case is procedurally ready for trial; that step leads to the court listing a compulsory settlement conference at the court, to see whether the action can be resolved by negotiation and agreement. This exercise will no doubt be to some extent a re-run of the attempt we previously made, in meetings at the court. However the next time it takes place [the defendant] will be much closer to having to face a trial if it does not settle with you.

(Exhibit A page 222)

171 Once again, the 25 November 2010 email concealed the true position from Mr Pal, and included positive misstatements by Mr Bower.

172 The Committee alleged that the content of the 25 November 2010 email was false or misleading, or both, in that:

1) the email represented that sometime in the few weeks before 24 November 2010, Lawton Gillon had served a pleading in the Pal Action on Corser & Corser;

2) the true position was that Lawton Gillon had not served any pleading in the Pal Action on Corser & Corser since 27 August 2010;

3) the email represented that sometime in the few weeks before 24 November 2010, Corser & Corser had served a pleading in the Pal Action on Lawton Gillon;

4) the true position was that Corser & Corser had not served any pleading in the Pal Action on Lawton Gillon since about 19 August 2010;

5) the email represented that Mr Pal had not to that point defaulted in any procedural requirement imposed by the District Court with respect to the conduct of the Pal Action;

6) the true position was that at 25 November 2010, Mr Pal:

    i) had defaulted in compliance with paragraph 1 of the 17 May order;

    ii) had not appeared (through his legal representative) at the directions hearing on 30 July 2010;

    iii) had not entered the Pal Action for trial within 120 days of the filing of the defence;

    iv) had not complied with paragraph 2 of the 27 August order; and

    v) had not entered the Pal Action for trial by 1 November 2010 in accordance with the milestone set by paragraph 4 of the 27 August order;

7) the email represented that the Pal Action remained active;

8) the true position was that the Pal Action had become inactive pursuant to r 44 of the DCR;

9) the email represented that Mr Pal was at that time permitted in the Pal Action to:

   i) file and serve the reply and defence to counterclaim that Corser & Corser was preparing;

   ii) seek and give discovery; and

   iii) avail himself of other pre-trial processes;

10) the true position was that, by the operation of r 44 of the DCR, Mr Pal was not permitted to do those things without the leave of the Court.

(CSFC Annexure A paragraph 32)

173 Mr Bower denied those allegations and stated further that on a proper construction of the email there were no representations that:

1) sometime in the few weeks before 24 November 2010, Corser & Corser had served a pleading in the Pal Action on the Defendant's solicitors;

2) Mr Pal had not at that point defaulted in any procedural requirement imposed by the District Court with respect of the conduct of the Pal Action; and

3) the Pal Action remained active.

4) that Mr Pal was at that time permitted in the Pal Action to:

   a) file and serve the reply and defence to counterclaim that Corser & Corser was preparing;

   b) seek and give discovery; and

   c) avail himself of other pre-trial processes.

(BSRA paragraph 14)

174 The Tribunal finds that the content of the email of 25 November 2010 was false and misleading as alleged by the Committee.

175 The Committee alleged that when Mr Bower made the representations above, he acted recklessly, not caring whether Mr Pal was misled because:

1) Mr Bower had received an email from Mr Pal dated 6 August 2010 which stated, relevantly and in substance, that Mr Pal had not received a substantive communication from Corser & Corser about the Pal Action since 1 June 2010;

2) Mr Bower knew that Mr Savas had frequently been absent from work between May and 25 November 2010 and had frequently not recorded any times on any file;

3) Mr Bower had sent Mr Pal the email dated 13 September 2010 referred to in paragraph 24 above;

4) Mr Bower had just received from Mr Savas the email of 25 November 2010;

5) Mr Bower had read and knew the content of the email from Mr Savas to him dated 18 May 2010 informing him of the contents of the 17 May order;

6) Mr Bower had read and knew the contents of the letter from Lawton Gillon dated 30 July 2010 and the amended statement of claim;

7) Mr Bower knew the contents of the email dated 27 August 2010 from Mr Savas to Mr Pal informing him of the contents of the 27 August order and the amended defence and counterclaim;

8) Mr Bower knew the file indicated that the Pal Action had not been entered for trial by 1 November 2010; and

9) a competent practitioner would in those circumstances reasonably conclude that there was a possibility, if not likelihood, that:

    i) the District Court had issued or would shortly issue a Notice of Default pursuant to r 38(1) of the DCR; and

ii) the Pal Action was inactive, or would shortly become inactive, pursuant to r 44 of the DCR.

(CSFC Annexure A paragraph 33)

176 Mr Bower admitted the allegations asserted in CSFC paragraphs 33.1 to 33.6 but denied paragraph 33.

177 Mr Bower further stated:

1) that the email accords with the verbal advice and written advice in an email dated 25 November 2010 received from Mr Savas concerning the Pal file;

2) he was not aware at that time that Mr Savas' absences from work had affected Mr Savas' conduct concerning the Pal file; and

3) he relied on the advice received from Mr Savas and by reason thereof did not consider it necessary to inspect the documents on the Pal file to ascertain the accuracy of verbal and written advice provided by Mr Savas.

(BSRA paragraphs 15-16)

178 As at 25 November 2010, Mr Bower had not actually received notice from the District Court that the Pal matter had been placed on the inactive cases list. He did not become aware of that until about 29 November 2010 when Corser & Corser received notice that the matter would be placed on the inactive cases list. However, Mr Bower was aware when the matter needed to be entered for trial and the consequence of a default, that is, that it would be placed on the inactive cases list.

179 In relation to those statements related to whether the matter was in the inactive cases list, Mr Bower made those statements with a reckless disregard as to whether the statements were false or misleading. He knew that it was likely that the Pal matter had been placed on the inactive cases list but he chose not to make any enquires as to whether it was still active.

180 Mr Bower's contention that a period of nearly three months could amount to a 'few weeks' is untenable. Mr Bower intended to mislead Mr Pal as to the lack of progress on the matter.

181 Not only was Mr Bower aware of Mr Savas' absence in May and July, but he was also aware of:

a) Mr Savas' frequent absences from work due to the small office and physical proximity of the staff; and

b) Mr Savas' repeated failure to enter any time on any file due to Mr Bower's regular checking of the timesheets.

182 The Tribunal finds that when Mr Bower made the representations above, he acted recklessly, not caring whether Mr Pal was misled because:

1) Mr Bower had received an email from Mr Pal dated 6 August 2010 which stated, relevantly and in substance, that Mr Pal had not received a substantive communication from Corser & Corser about the Pal Action since 1 June 2010;

2) Mr Bower knew that Mr Savas had frequently been absent from work between May and 25 November 2010 and had frequently not recorded any times on any file;

3) Mr Bower had sent Mr Pal the email dated 13 September 2010;

4) Mr Bower had just received from Mr Savas the email of 25 November 2010;

5) Mr Bower had read and knew the content of the email from Mr Savas to him dated 18 May 2010 informing him of the contents of the 17 May order;

6) Mr Bower had read and knew the contents of the letter from Lawton Gillon dated 30 July 2010 and the amended statement of claim;

7) Mr Bower knew the contents of the email dated 27 August 2010 from Mr Savas to Mr Pal informing him of the contents of the 27 August order and the amended defence and counterclaim.

8) Mr Bower knew the file indicated that the Pal Action had not been entered for trial by 1 November 2010; and

9) a competent practitioner would in those circumstances reasonably conclude that there was a possibility, if not likelihood, that:

i) the District Court had issued or would shortly issue a Notice of Default pursuant to r 38(1) of the DCR; and

ii) the Pal Action was inactive, or would shortly become inactive, pursuant to r 44 of the DCR.

183 On 25 November 2010, Mr Pal sent an email to Mr Bower thanking him for his email explaining the state of the subject matter and proposed future line of action (Exhibit A page 224). Given the actual 'state of the subject matter' and the true position of the file, if Mr Pal had been aware he would definitely not have thanked Mr Bower.

184 On 26 November 2010, Mr Bower sent an email to Mr Savas 'Mr Pal is our pal' (Exhibit A page 227).

185 On 1 December 2010, Mr Bower emailed Mr Pal:

> I have become aware that this firm did not email to you the document which I had assured you would be emailed to you during last Friday. I apologise for that failure. I have dispensed justice internally, to redress the failure.

(Exhibit A page 235)

186 Mr Bower's 'dispensing justice' was to speak to Mr Savas (T:5; 25.01.17).

187 By this stage, at the very least, Mr Bower knew that simply speaking to Mr Savas was totally ineffective and, in fact, Mr Bower conceded that by 1 December 2010 he was very much alive to the issue of Mr Savas' failure to comply with time limits and progress the matter (T:5; 25.01.17).

188 Mr Savas did not record any time on any file on 1 December 2010.

189 On Thursday 2 December 2010, Mr Pal instructed Mr Bower to file the reply to defence and counterclaim (Exhibit A page 238).

190 On 2 December 2010, Corser & Corser invoiced Mr Pal for $780.20 (Exhibit A pages 16-17).

191 Mr Savas was on sick leave for the working days from 2 to 17 December 2010 inclusive.

192 Having regard to the actions taken on the file during Mr Savas' absences on sick leave, Mr Bower must have had the day-to-day carriage of the Pal file.

193 On 3 December 2010, Mr Pal requested Mr Bower to instruct senior counsel (Exhibit A page 241).

194 On 3 December 2010, Mr Bower informed Mr Pal that he (Mr Bower) would need to prepare a 'statement of personal evidence' (Exhibit A page 249).

195 On about 3 December 2010, Mr Bower wrote to Lawton Gillon:

1) enclosing a copy of the reply and defence to counterclaim that the practitioner had prepared on about 1 December 2010;

2) referring to the Notice of Default issued by the District Court on 4 November 2010 pursuant to r 38(1) of the DCR; and

3) in substance, seeking their consent to an order that the Pal Action no longer be inactive.

(Exhibit A page 248)

196 Mr Bower conceded that by 3 December 2010, he had learnt that the Pal matter had been placed on the inactive list (T:6; 25.01.17). Mr Bower agreed that at this point he should have informed Mr Pal that the matter was inactive and that he had sought the other party's consent to remove it from the inactive cases list (T:7; 24.01.17).

197 Mr Bower should also have informed Mr Pal that his email of 25 November 2010 was misleading.

198 On 8 December 2010, Corser & Corser received a notice dated 3 December 2010 from the District Court which stated:

> On 3 December 2010 you filed on behalf of the plaintiff 'Plaintiff's Reply to Amended Defence and Defence to Set-Off and Counterclaim'.
>
> Unfortunately due to a breach of the Entry for Trial Milestone this matter has become inactive on 1 November 2010, and therefore we cannot, at this stage, accept any document filed by the plaintiff.

> To re-activate this matter you must comply with Rule 45 of the District Court Rules 2005, which requires you to lodge an application for leave to reactivate the matter or file consent orders.

(Exhibit A page 365)

199 It was put to Mr Bower that he endeavoured at all times to hide from Mr Pal the fact that his matter had been placed on the inactive list and that he was applying to have it placed on the active cases list. Mr Bower denied this and stated:

> I had a strong belief that matters - if a matter went onto the inactive list, it wasn't a serious problem because they are, my experience, almost always - well, in fact, in my experience, always restored to the active list. And so that wasn't a big issue for me. What was the big issue was the defaults that were occurring. The fact that it went onto the inactive list didn't, in my mind, make a big difference to it - - -

(T:7; 25.01.17)

200 The fact was that by early December 2010, Mr Bower was again reminded that being placed on the inactive cases list was a serious problem. In the Settlers House matter, Corboy Legal had issued a chamber summons returnable on 23 September 2010 seeking judgment pursuant to r 45(4) of DCR (Exhibit B pages 104-108).

201 The Tribunal again notes Mr Bower's letter to Professor Skerritt of 30 March 2011.

202 Mr Bower's evidence as to why he had not informed Mr Pal that the case was on the inactive cases list and an application would need to be made to the Court was because:

> I think I probably would have thought, well, I won't trouble Mr Pal with the - with a - with a - a dissertation on the active and inactive list process and - and what it actually involves in terms of being a - a fairly straightforward process to remove it from the list and also I would confess that at that time, I had a - I didn't like the - the fact that matters would go onto the inactive list without regard to what might have actually been going on in cases and that you then had to make the application and it would sort of routinely be granted. It just seemed to me that it was a process that had - probably introduced with good intention but, in practice, it was - it was - well, the effect of it really was that a matter came on, people had to apply by summons and the effect was that you would have a directions hearing. So I saw it as a - as an aspect of dealing with procedure and I must have decided that I wouldn't trouble Mr Pal with the details of that. I - I think the bottom line is that I didn't regard the fact that

> any matter went onto the inactive list as being a - a fundamental - that is to say, in reality, a major issue. If it was - if I thought that - if I knew from experience or otherwise was aware that when a matter fell onto the inactive list, it was really a big problem, then obviously I would tell my client just as I would with any other significant matter that might come to my attention. But I did regard the inactive list process as being no threat to - to anyone's - to any plaintiff's case.
>
> (T:8-9; 25.01.17)

203 The proposition that it required a dissertation to explain to Mr Pal that his case was on the inactive cases list and that it would require an application to remove it is ludicrous. A very simple explanation is contained in the District Court default notices. Mr Bower could only have advanced the ludicrous proposition that it required 'a dissertation' because he was trying to fabricate some explanation for his failure to inform Mr Pal, other than what he was in fact trying to do which was to hide that information from Mr Pal.

204 Mr Savas did not record any time on any file on 20 December 2010. Mr Savas was on sick leave on 21 December 2010.

205 Mr Savas took annual leave from 29 to 31 December 2010.

206 Mr Savas was only present on 23 and 24 December 2010. It is probably that he was in no fit state to do any work in that period. Mr Bower clearly had the day-to-day carriage of the file throughout December 2010.

207 On 29 December 2010, Mr Bower sent a draft statement of evidence to Mr Pal (Exhibit A page 250). The draft statement stated 'My solicitors filed my reply and defence to counterclaim on 1 December 2010' (Exhibit A page 305).

208 Mr Bower conceded that he knew by 3 December 2010 that the reply and defence to counterclaim had been received for filing. It was disingenuous on Mr Bower's part to send a witness statement to Mr Pal saying that '[m]y solicitors filed my reply and defence to counterclaim on 1 December 2010'. Mr Bower is fortunate that Mr Pal's witness statement was not filed in that form.

209 Mr Savas did not record any time on any file on 3 January 2011.

210 On Monday 3 January 2011, Mr Pal, in response to an email from Mr Bower on 29 December 2010, sent an email in the following terms:

Dear Mr Bower

I trust you had a fun filled festive break. I have gone over the document. Some of the points you have asked me to attend to are a bit beyond my thinking about the relevance with case and thus information may not be what is needed. Anyway, as usual, I trust your judgement.

Please inform; I have no record of the documents you cited for the following:

- My solicitors filed my amended statement of claim dated 13 **What Month and document (Your point 47)**
- August 2010 on 19 August 2010, What? (Your point 48)
- Fairstar's solicitors subsequently filed its amended defence, set-off and counterclaim as handed up in chambers on 27 August 2010 (Your point 49). **I do have a document from Mr Savas CIV 256 of 2010 dated August 2010**.
- My solicitors filed my reply and defence to counterclaim on **1 December 2010**, (Your point 50), I can't find any document.

(Exhibit A pages 251-252)

211 On 4 January 2011, Mr Bower sent an email which stated:

I am now attaching a copy of the Amended Statement of Claim dated 13 August 2010.

I am also attaching a copy of your Reply and Defence to Counterclaim dated 1 December 2010.

Also attached is an amended version of the statement of evidence. Please note the corrections made to paragraphs 47 and 48 (as they were) and my additional wording at the end of the document.

Please insert the remaining information to complete the statement of evidence, and email it back to me. (Original emphasis)

(Exhibit A page 251)

212 The following exchange took place between Cahill SC and Mr Bower concerning Mr Bower's email of 4 January 2011:

It would have been very simple for you to say, 'The matter hasn't been entered for trial. It has gone onto the inactive list but no need to worry because it's going to be a very simple directions hearing for us to get it back on. In the meantime, we can't file your reply and defence to counterclaim'? - - - I agree.

Easy to say those things? - - - Yes. Yes.

The reason you didn't was because you didn't want Mr Pal to know about the delay within your office that had rendered the matter inactive, isn't that so? - - - No, I disagree.

And you well knew at the time that it was important for Mr Pal to understand that the document that you had provided to him had not in fact been filed. That is something he would have liked to have known. You accept that? - - - Yes.

And you accept that it is something, in the position of the client, that he was entitled to know? - - - Yes.

A month down the track, this document had still not been accepted for filing? - - - That's correct.

And he was entitled to know the reason for that? Well, obviously yes, Mr Bower?- - - Yes. I don't - - -

And the reason you didn't was because you were trying to hide your firm's own failings. Your failings and those of Mr Savas'. Isn't that so? - - - No, I disagree.

…

You accept that the matter was now grossly delayed by Mr Savas' conduct and your failure to address those delays yourself? - - - I do accept that.

…

(T:10-11; 25.01.17)

213 Corser & Corser did not inform Mr Pal, either promptly or at all:

1) that it had not complied with paragraph 2 of the 27 August order;

2) that it had not entered the matter for trial by 1 November 2010;

3) that the District Court had:

   i) issued a Notice of Default on 4 November 2010 pursuant to r 38(1) of the DCR; and

   ii) stated in that notice, in substance, that unless Mr Pal entered the Pal Action for trial on or

before 19 November 2010, the matter would become inactive;

4) that it had not entered the matter for trial by 19 November 2010;

5) that the matter had consequently become inactive pursuant to r 44 of the DCR;

6) of the effect of r 44 of the DCR; and

7) that Corser & Corser was precluded by the operation of r 44 of the DCR from filing the reply and defence to counterclaim without the leave of the District Court.

214 On 5 January 2011, Corser & Corser invoiced Mr Pal for $2,309.12 (Exhibit A pages 306-307).

215 On 6 January 2011, Mr Savas telephoned Lawton Gillon to enquire as to Fairstar's response to the Corser & Corser letter of 3 December 2010. Lawton Gillon advised the defendant was 'away' and they would get back to him on the issue (Exhibit A pages 337-338 and 374).

216 Mr Savas took sick leave on 13 and 14 January 2011.

217 On 19 January 2011, Corser & Corser sought Lawton Gillon's consent to remove the case from the inactive cases list and extend the entry for trial milestone (Exhibit A pages 319, 337 and 375).

218 On 28 January 2011, Mr Savas telephoned Lawton Gillon and was advised that they did not yet have a response from Fairstar in relation to the proposed orders (Exhibit A pages 337 and 376).

219 On 29 January 2011, Corser & Corser invoiced Mr Pal for disbursements in the amount of $512.20 (Exhibit A page 51).

220 Mr Savas did not record any time on any file on 2, 4, 9, and 10 February 2011.

221 On 10 February 2011, Mr Pal sent an email to Mr Bower which he relevantly stated:

> … However, despite my email I haven't heard from your office any info on the progress of my case. It has been more than a year since I handed over my case to you. Please let me know the progress. In case you feel that it's

> not in Corser & Corser's field of expertise or you are too busy and can't give time, please let me know.
>
> (Exhibit A page 321)

222 This was the sixth complaint from Mr Pal about the lack of communication.

223 Mr Bower understood from Mr Pal's email that he was dissatisfied with the service he was getting and that he had been for some time. In his 14 February email Mr Bower sought to reassure Mr Pal that the matter was in good hands and should remain with his firm (T:11; 25.01.17).

224 Mr Savas did not record any time on any file on 11 February 2011.

225 Mr Bower conceded that the Pal matter was now grossly delayed by Mr Savas' conduct and his failure to address those delays himself (T:11; 25.01.17).

226 Mr Savas was on sick leave on 14 February 2011.

227 On 14 February 2011, Mr Bower sent Mr Pal an email (the 14 February email), the contents of which relevantly stated:

> Dear Mr Pal
>
> I understand your concern with the time which this case is taking. I share your concern. Many cases take similar periods of time to reach the stage which your case is now positioned, in procedural terms. This is not to say that I am comfortable with the pace of such cases. I do not think anyone is comfortable at the time that these cases can take.
>
> The time consumed is a product of a number of factors: in your case the main influence has been the fashion in which the defendant company has conducted its response. Another factor has been the desire on the part of the District Court itself to provide its time and resources to attempt to mediate a settlement of the case.
>
> The defendant company's motives and corporate character are well known to you, and you have clearly informed us of the nature of that issue, from the outset of our involvement on your behalf. We have done everything possible to confine the effects of that character to the minimum, so far as it has been able to be used by the defendant company to cause delay, but the court's procedural system is not very effective in combating the efforts of ill-willed parties who are committed to causing delay and wasted expense.
>
> At present we are preparing an application to the court for orders effective to impose a timetable on the future management of the case towards a trial.

> We are doing this after going through the mandatory exercise of writing to (the defendant's solicitor) and also speaking to him about the desired timetabling orders, and having had no response from (him). The application to the court will be filed during this week and will be likely to be dealt with by the court in about 14 days' time. The court will inevitably make orders timetabling the remaining pre-trial steps in the case. By that date it is quite possible that (the defendant's solicitor) will have been instructed to consent to appropriate orders being made. If he opposes them, we expect that the court will make the necessary orders, anyway.
>
> …
>
> At the present time we must await the outcome of the application we are about to make to the court for timetabling orders.
>
> …
>
> (Exhibit A page 320)

228 Mr Bower conceded that he was trying to convey to Mr Pal that the delay was not out of the ordinary (T:11; 25.01.17).

229 Mr Bower conceded that in the second paragraph of his email he was trying to identify the main cause of the delay (T:12-13; 25.01.17).

230 Mr Bower conceded that his intention was to convey to Mr Pal that the main reason for the delay had been the manner in which Fairstar conducted its defence (T:13; 25.01.17). There was simply no basis for that statement (see T:14-16; 25.01.17). It was blatantly untrue. Despite this, Mr Bower refused to concede that his statement about Fairstar's conduct of the defence was a lie (T:13; 25.01.17).

231 Mr Bower refused to accept that it was he and Mr Savas who were the main cause of the delay (T:13; 25.01.17). This is inconsistent with his concessions shortly before (only by two pages of transcript) that 'the Pal matter was now grossly delayed by Mr Savas' conduct and his failure to address those delays himself'. It is rather difficult to maintain a consistent story when not telling the truth.

232 Mr Bower also sought to attribute the delay to 'the desire on the part of the District Court itself to provide its time and resources to attempt to mediate a settlement of the case'. Mr Bower conceded that the District Court's intervention was limited to the pre-trial conference of 21 April 2010 (T:17; 25.01.17). That was nine months ago. It did not affect the date of the entry for trial. The District Court was not in any way

responsible for the delay. Mr Bower's statement was blatantly untrue. Mr Bower then again conceded that from July 2010, Corser & Corser was the main cause of the delay (T:17; 25.01.17).

233 Mr Bower conceded that despite the statement in his email that 'we are preparing an application to the court for orders effective to impose a timetable on the future management of the case towards a trial', it was 'first and foremost an application to restore the matter to the active cases list' (T:18: 25.01.17).

234 Mr Bower accepted that in his letter of 3 December 2010 (Exhibit A page 248) to Lawton Gillon, what he was seeking was for the action to be restored to the active list and an extension of the entry for trial date and that he did not seek any other timetabling directions (T:19; 25.01.17).

235 Despite the email stating that Corser & Corser had spoken to Lawton Gillon about the desired timetabling orders, there was no record of any such contact. Again, that statement was blatantly untrue. Mr Bower's statement that 'it [the email] says we had spoken to him so we must have done that' completely lacks credibility (T:19; 25.01.17). The same email stated what was plainly untrue, namely that Lawton Gillon was the main cause of the delay.

236 Equally untrue was the statement that 'we have done everything possible to confine the effects of that character to a minimum'.

237 Mr Bower continued to maintain that it was inevitable that the matter would be restored to the active cases list without difficulty (T:20; 25.01.17).

238 On 1 February 2011, Travis Keen had sent a memorandum to Mr Bower in the Settlers House matter advising that Corboy Legal had 'twice applied to take advantage of the fact that entry for trial date had passed' (Exhibit B pages 210-211).

239 Mr Bower was therefore well aware that an opposing party could oppose, and had opposed a matter being restored to the active cases list.

240 Mr Bower's statement that he thought that the restoration to the active list would 'just go through administratively' (T:20; 25.01.17), flies in the face of the problems he was encountering with the Settlers House matter.

241 Mr Bower gave evidence that this was during a period when 'the District Court did not like to deal with these matters by consent' (T:21; 25.01.17). Given that Mr Bower knew that the District Court did not like to deal with those matters by consent, Mr Bower's reported attempts, by Mr Savas, to obtain Lawton Gillon's consent to the orders so that an application supported by affidavit would not be required, further suggests that Mr Bower was trying to conceal the true delay in the conduct of the case and its consequences from Mr Pal.

242 Significantly, Mr Bower failed to state that the reply and defence to counterclaim had not, in fact, been accepted for filing.

243 The email of 14 February 2011 stands on its own as being misleading and deceptive. However, it also reflects a process of cover up and deception by Mr Bower that began with Mr Bower's failure to say anything to Mr Pal about Mr Savas' email of 22 August 2010 and his persistent failure to communicate the true position to Mr Pal.

244 The Committee alleged that the content of the 14 February email was false or misleading, or both, in that:

1) the email represented that the delay in the Pal Action to that point was not exceptional or undue;

2) the true position was that the delay in the Pal Action could not reasonably be described as either exceptional or undue or both because, without good reason:

   a) Mr Pal had not complied with paragraph 1 of the 17 May order;

   b) the amended statement of claim had not been filed until about 19 August 2010;

   c) Mr Pal had not entered the Pal Action for trial within 120 days of the filing of the defence;

   d) Mr Pal had not complied with paragraph 2 of the 27 August order;

   e) Mr Pal had not entered the Pal Action for trial by 1 November 2010 in accordance with the milestone set by paragraph 4 of the 27 August order;

f) the preparation of the reply and defence to counterclaim had not been completed until about 3 December 2010;

3) the email represented that the delay in the Pal Action to that point had not been caused or contributed to by Corser & Corser, but had been primarily caused by the deliberate conduct of the defendant;

4) the true position was that the delays in the Pal Action to that point, as set out in CSFC paragraph 2 above were primarily caused by Corser & Corser;

5) the email represented that Mr Pal had not to that point defaulted in any procedural requirement imposed by the District Court with respect to the conduct of the Pal Action;

6) the true position was that Mr Pal;

a) had not complied with paragraph 1 of the 17 May order;

b) had not entered the Pal Action for trial within 120 days of the filing of the defence;

c) had not complied with paragraph 2 of the 27 August order; and

d) had not entered the Pal Action for trial by 1 November 2010 in accordance with the milestone set by paragraph 4 of the 27 August order;

7) the email represented that Corser & Corser had used its best endeavours to mitigate the delays caused by the defendant's conduct;

8) that was not true;

9) the email represented that a further contributing cause of the delay in the Pal Action to that point was the desire of the District Court to involve itself in mediation to attempt to settle the matter;

10) that was not true;

11) the email represented that Corser & Corser was applying to the District Court for timetabling directions;

12) the true position was that Corser & Corser needed to apply to the District Court for leave or for an order that the Pal Action was no longer inactive, before any application could be made for timetabling directions;

13) the email represented that the Pal Action remained active;

14) the true position was that the Pal Action had become inactive pursuant to r 44 of the DCR;

15) the email represented that Mr Pal was permitted at that time to apply in the Pal Action for timetabling directions; and

16) the true position was by the operation of r 44 of the DCR, he was not permitted to do so without the leave of the District Court.

(CSFC Annexure A paragraph 37)

245 Mr Bower admitted the allegations asserted in CSFC Annexure A paragraphs 9 and 11 but otherwise denied each and every allegation asserted in CSFC Annexure A paragraph 37 and further stated that on a proper construction of the email there were no representations that:

1) the delay in the Pal Action to that point was not exceptional or undue;

2) that the delay in the Pal Action to that point had not been caused or contributed to by Corser & Corser, but had been primarily caused by the deliberate conduct of Fairstar;

3) that Mr Pal had not to that point defaulted in any procedural requirement imposed by the District Court with respect to the conduct of the Pal Action;

4) that Corser & Corser had used its best endeavours to mitigate the delays caused by Fairstar's conduct,

5) that the Pal Action remained active; and

6) that Mr Pal was permitted at that time to apply in the Pal Action for timetabling directions.

(BSRA paragraph 19)

246 The Tribunal finds that the 14 February 2011 email was false and misleading as alleged by the Committee.

247 The Committee alleged that it is to be inferred that when Mr Bower made the representations pleaded in CSFC Annexure A paragraph 37 above, he intended to mislead Mr Pal, alternatively, he acted recklessly, not caring whether Mr Pal was misled because:

1) Mr Bower knew that the Pal Action at that time was inactive;

2) Mr Bower knew that the reply and defence to counterclaim had not been completed until early December 2010;

3) the Pal file at that time contained, relevantly, the following documents:

a) the email from Mr Savas to the practitioner dated 18 May 2010 informing him of the contents of the 17 May order;

b) the letter from Lawton Gillon dated 30 July 2010;

c) the amended statement of claim;

d) the email dated 27 August 2010 from Mr Savas to Mr Pal informing him of the contents of the 27 August order.

e) the amended defence and counterclaim;

f) the Notice of Default dated 4 November 2010;

g) an email from the practitioner to Mr Pal dated 1 December 2010;

h) a letter from Kacey Dunsborough of the District Court to Corser & Corser dated 3 December 2010

regarding Corser & Corser's attempt to file the reply and defence to counterclaim on that date; and

i) the (unfiled) reply and defence to counterclaim;

4) the file also indicated that the delays in the Pal Action to that date had been primarily caused by Corser & Corser;

5) the file did not indicate that:

i) the delays in the Pal Action to that date had been caused or contributed to by the deliberate conduct of Fairstar;

ii) the delays in the Pal Action to that date had been caused or contributed to by the desire of the District Court to involve itself in mediation to attempt to settle the matter; and

iii) Corser & Corser was in the process of applying to the District Court for timetabling directions;

6) he was aware that Mr Savas had frequently been absent from work between May and November 2010; and

7) Mr Pal had expressed over several months in emails to Mr Bower his concerns about a lack of communication from Corser & Corser informing him of the status and progress of the matter.

(CSFC Annexure A paragraph 38)

248 Mr Bower admitted the allegations asserted in CSFC Annexure A paragraphs 1, 2, 3, 6 and 7. Mr Bower otherwise denied the allegations and further stated:

1) he provided a precis and opinion as to the slow progress of the proceedings rather than a comprehensive factual analysis;

2) at the time of writing the email, he was of the view that the placement of the action in the inactive list was a procedural step which would not adversely impact upon

> the substantive merits of the action nor delay the advancement of the action. By reason thereof he did not turn his mind to the requirements of r 44 of the DCR; and
>
> 3) at the time of writing the email, he considered the contents of the email to be accurate and as such did not consider it necessary to carry out an inspection of the documents on the Pal file.
>
> (BSRA paragraphs 20-21)

249 The file contained the information, but more importantly, Mr Bower knew personally of the information contained in the file.

250 The Tribunal finds that Mr Bower intended to mislead Mr Pal as alleged by the Committee. Further, the Tribunal finds that Mr Bower had actual knowledge of the contents of the file.

251 On 15 February 2011, Mr Savas did not record any time on any file.

252 On 16 February 2011, Mr Savas telephoned Lawton Gillon and was advised that they did not yet have a response from Fairstar in relation to the proposed orders (Exhibit A pages 337-338 and 377).

253 On 16 February 2011 at 12.48 pm, Mr Bower sent Mr Pal an email (the first 16 February email) which relevantly stated:

> …
>
> Another duty is to keep the client informed of what is going on in the case. In your case I must confess that I imagined I was awaiting your response to the decision made by (senior counsel) and his recommendation that we brief another barrister. But at the same time we were preparing the application for timetabling orders. We should have notified you of that sooner.
>
> …
>
> As to timing, my present estimate is that we will be able to have a trial of this case in about 4 to 6 months from now if the case is not settled by negotiation and agreement before then. I base that estimate on what I think (the defendant) will do to obfuscate and delay, and the extent to which the court procedures and rules will be effective to partially limit that sort of conduct from (the defendant). I'm also allowing for the usual period which elapses between when a trial date has applied for and the trial commences. This fact is determined by the level of existing business being dealt with by the court at any point in time.

…

(CSFC paragraph 39; Exhibit A page 322)

254 Mr Bower's evidence was that he thought that there was a realistic possibility of the Pal matter being entered for trial within the next four to six months (T:23; 25.01.17). That statement flew in the face of the fact that the matter to date had been 'greatly delayed' and that the pleadings had not closed, discovery had not been given and a pre-trial conference post entry was likely (T:23; 25.01.17). Mr Bower had not had any discussions with Lawton Gillon about the length of trial or their availability for trial (T:25; 25.01.17). In cross-examination, the following exchange took place:

> You certainly didn't do it here. You did everything to cover up your potential exposure, didn't you? - - - I understand that it - that that is how you view it and with some concern, I could see the basis of your assertions, Ms Cahill, in these documents but I can tell you it wasn't my plan. It wasn't my intention. I admired Mr Pal as an interesting mature aged professional man and I wanted to deal with him - and I was appalled that a - a case which we've started on where I thought I really know how to deal with this man very well turned into one default after another. But I believe he knew that that was - and I think he appreciated that that was occurring and as matters developed or as these - as the case progressed or didn't, I think it was quite apparent to him that some of the delay was caused, particularly … from June onwards, by my firm. I'm sure he knew that and - but as to the estimate of when the trial may take place, maybe it was a bad estimate but I gave it to him honestly and it must have been what I thought was happening in the District Court at the time and based on how much time I thought the trial might take and so on.

(T:24-25; 25.01.17)

255 Mr Bower's proposition that Mr Pal appreciated that 'the delay, was caused, particularly from June onwards, by my firm' has no factual basis. Mr Bower had done nothing to alert Mr Pal to the fact that the delays were a result of Corser & Corser's delay. His email of 14 February 2011 did precisely the opposite. Mr Bower knew that his estimation of four to six months was misleading.

256 Mr Bower stated that the estimate of four to six months was intended to encompass deliberate delay on Fairstar's part (T:25; 25.01.17). If Mr Bower's evidence is accepted, it makes his estimate even more implausible given the extent to which he maintained Lawton Gillon had deliberately delayed the action. The only possible basis for truth in that statement was that Fairstar had not delayed at all and therefore

no allowance needed to be made for any delay by Fairstar. That was clearly not the purport of what Mr Bower said.

257 Mr Bower continued to maintain that he had a basis for his conclusion that Fairstar were seeking to delay. Once again he could offer no plausible basis for that proposition (T:25; 26.01.17).

258 The Committee alleged that the content of the first 16 February email was false or misleading, or both, in that:

1) the email represented that Corser & Corser had been preparing an application to the District Court for timetabling directions;

2) the true position was that Corser & Corser had not been preparing any such application and needed to apply to the District Court for leave or for an order that the Pal Action was no longer inactive before any application could be made for timetabling directions;

3) the email represented that the Pal Action remained active;

4) the true position was that the Pal Action had become inactive pursuant to r 44 of the DCR;

5) the email represented that Mr Pal was permitted at that time to apply in the Pal Action for timetabling directions;

6) the true position was that by the operation of r 44 of the DCR, he was not permitted to do so without the leave of the District Court;

7) the email represented that there were reasonable grounds for Mr Bower's estimate that there could be a trial of the Pal Action within four to six months; and

8) the true position was that the estimate lacked reasonable grounds because at that point in time:

    a) pleadings in the matter had not yet closed;

    b) the discovery process had not been commenced;

    c) Mr Pal needed to apply to the District Court for leave or for an order that the Pal Action was

no longer inactive before the matter could progress further;

d) trial counsel had not been retained on behalf of Mr Pal;

e) Mr Bower had made no inquiries as to the availability within the next four to six months of witnesses who might potentially give evidence for Mr Pal;

f) Mr Bower had made no enquiries of Fairstar as to the availability within the next four to six months of its counsel and witnesses; and

h) Mr Bower had made no enquiries of the District Court as to the availability of a judge within the next four to six months to hear the Pal Action.

(CSFC Annexure A paragraph 40)

259 Mr Bower admitted CSFC Annexure A paragraphs 40.1 and 40.7 but otherwise denied paragraph 40 and further stated:

1) on a proper construction of the email there were no representations that:

a) the Pal Action remained active; and

b) Mr Pal was permitted at that time to apply in the Pal Action for timetabling directions;

2) at the time of drafting the email Corser & Corser were formulating an application for directions which included an order that the action be made active;

3) at the time of drafting the email, he was of the view that the placement of the action in the inactive list was a procedural step which would not adversely impact upon the substantive merits of the action nor its procedural advancement. By reason thereof he did not turn his mind to the requirements of r 44 of the DCR; and

4) his estimate of four to six months was based on his assessment that:

   a) the principal issues at trial as crystallized by the pleadings were small in number;

   b) the number of documents to be discovered and adduced at trial was not large;

   c) Mr Pal was to be the principal witness at trial and a draft statement of his evidence had been prepared;

   d) Mr Bower was to be counsel; and

   e) he was aware through general knowledge that the District Court was listing cases at that time in three to four months for trials of short duration;

5) at the time of writing the email, he considered the contents of the email to be accurate and as such did not consider it necessary inspect the documents on the Pal file.

(BSRA paragraph 23)

260 The Tribunal finds that the first 16 February 2011 email was false and misleading as alleged by the Committee, although Mr Bower had not briefed counsel for trial. It is likely that Mr Bower intended to do the trial himself.

261 The Committee alleged that it is to be inferred that when Mr Bower made the representations pleaded in CSFC Annexure A paragraph 40 above, he intended to mislead Mr Pal, alternatively, he acted recklessly, not caring whether Mr Pal was misled because:

1) the Pal file at that time contained, relevantly, the Notice of Default dated 4 November 2010 and a letter from Kacey Dunsborough of the District Court to Corser & Corser dated 3 December 2010 regarding Corser & Corser's attempt to file the reply and defence to counterclaim on that date;

2) the file did not indicate that Corser & Corser was preparing an application to the District Court for timetabling directions;

3) of the matters referred to in paragraphs 40.7 and 40.8 above.

(CSFC Annexure A paragraph 41)

262 Mr Bower did not make a response to CSFC Annexure A paragraph 41 in BSRA. The Tribunal has proceeded on the basis that he denies paragraph 41.

263 The Tribunal finds that when Mr Bower made the representation referred to in paragraph 40 he intended to mislead Mr Pal.

264 On 16 February 2011 at 2.53 pm, Mr Pal sent an email to Mr Bower which relevantly stated:

> Many thanks for your email. I appreciate your sentiments and comments. From my side when I did not hear from you after 19 Jan, I started thinking about the likely reasons of not receiving response to my emails. … As you know well prompt communication with Corser & Corser had been an issue right from the first hearing. …
>
> Finally, I would like to know (your assessment) about the time and likely result of the case.

265 On 16 February 2011 at 4.30 pm, Mr Bower sent Mr Pal a further email (the second 16 February email) the contents of which relevantly stated:

> …
>
> The problem is that the same system is available for fairly straight-forward cases like yours and for cases such as the Bell litigation - the longest and longest case ever dealt with by WA courts.
>
> A party responding to a smaller, simpler case can avail itself of procedures more suited for the large, corporate-commercial disputes, to delay the smaller, less complicated case. That is what [the defendant] has been doing. The Court has limited capacity to regulate such abuse because it cannot be seen to be cutting a party out from 'procedural fairness' or to be pre-judging a case.
>
> There is also a limit to the courts' resources.

(CSFC Annexure A paragraph 42; Exhibit A page 326)

266 In the second 16 February email, Mr Bower again advanced the proposition that the delay was as a result of Lawton Gillon's actions. He conceded that he was intending to convey that the delay was due to Lawton Gillon's delaying tactics (T:27; 25.01.16). Once again Mr Bower was unable to point to any specific conduct on Lawton Gillon's part. Mr Bower sought to rely on something non-specific that Mr Savas had told him but he failed to mention that in his witness statement (T:25-32; 25.01.17).

267 In Mr Bower's witness statement (Exhibit D) he stated at paragraph 29:

> At the time of composing the second email of 16 February 2011 (ABD, Vol 1, p326) I had been involved in negotiations with the Defendant's solicitors in an endeavour to settle the case informally, which negotiations were wholly unsuccessful. The negotiations included a conference at the District Court on 22 April 2010. I formed the view that the settlement negotiations were delaying tactics employed by the Defendant, over which the Court had no control. It was on the basis of that experience and that view that I expressed the views I did in the email of 16 February 2011. I was not intending, by the way in which I expressed myself in the email, to state anything which was false or misleading or expressing myself in that way without caring whether Mr Pal was misled.

268 As Mr Bower conceded in cross-examination, he could have had as many settlement negotiations as he liked without delaying the matter (T:30-31; 25.01.17). However, he refused to concede that the settlement negotiations did not affect his capacity to get on with the matter (T:31; 25.01.17).

269 If Mr Bower genuinely believed that Fairstar/Lawton Gillon were delaying, then the logical response would have been to press on by filing Mr Pal's documents on time and enforcing compliance by Fairstar in the event of any defaults. Mr Bower singularly failed to do so.

270 The Committee alleged that the content of the second 16 February email was false or misleading, or both, in that:

1) the email represented that the delay in the Pal Action to that point had been primarily caused by the deliberate conduct of the defendant;

2) the true position was that the delay in the Pal Action to that point had been primarily caused by Corser & Corser;

3) the email represented that a further contributing cause of the delay in the Pal Action to that point was the unwillingness or incapacity of the District Court to mitigate the effect of the defendant's deliberate delay; and

4) that was not true.

(CSFC Annexure A paragraph 43)

271 Mr Bower denied CSFC Annexure A paragraph 43 and further stated that on a proper construction of the email:

1) There were no representations in the e-mail:

a) that the delay in the Pal Action to that point had been primarily caused by the deliberate conduct of Fairstar; and

b) that a further contributing cause of the delay in the Pal Action to that point was the unwillingness or incapacity of the District Court to mitigate the effect of Fairstar's deliberate delay.

(BSRA paragraph 25)

272 The Tribunal finds that the second 16 February 2011 email was misleading as alleged by the Committee

273 The Committee alleged it is to be inferred that when Mr Bower made the representations pleaded in CSFC Annexure A paragraph 43 above, he intended to mislead Mr Pal, alternatively, he acted recklessly, not caring whether Mr Pal was misled because:

1) the Pal file at that time indicated that the delays in the Pal Action to that date had been primarily caused by Corser & Corser;

2) the file did not indicate that the delays in the Pal Action to that date had been caused by the deliberate conduct of Fairstar; and

3) the file did not indicate that a further contributing cause of the delay to that point was the unwillingness

> or incapacity of the District Court to mitigate the effect of the defendant's deliberate delay.

(CSTC Annexure A paragraph 44)

274 Mr Bower denied CSFC Annexure A paragraph 44 and further stated that he had been involved in negotiations with Lawton Gillon in an endeavour to settle the case informally which negotiations were wholly unsuccessful. These negotiations included a conference at the District Court on 22 April 2010. Mr Bower formed the view that the settlement negotiations were delaying tactics employed by Fairstar over which the Court had no control (BSRA paragraph 26).

275 The Tribunal finds that Mr Bower intended to mislead Mr Pal when he made the representations pleaded in CSFC Annexure A because of his personal knowledge of the matter rather than because of what the file indicated.

276 Mr Savas did not record any time on any file on 17, 21-23 and 25 February 2011.

277 In about February 2011, Ms Ronelia de Villiers sent a memorandum to Mr Bower which stated:

> Regarding: Court Documents to Re-Activate Matter on Pal File
>
> Instructions
>
> I was asked to:
>
> 1) Peruse through File;
>
> 2) Read Rule 45 DCR and comply with this rule;
>
> 3) Draw up a draft affidavit in Kerry's [Mr Savas'] name; and
>
> 4) Draw up a chamber summons
>
> Affidavit
>
> Include in affidavit the following clauses:
>
> 1) Orders were made 27/08/2010
>
> 2) Refer to Order
>
> 3) Unable to comply with the order
>
> 4) Reasons:

- The counterclaim raised new issues not previously referred to in the action by the defendant.

- It took until 3 December for us to obtain sufficient instruction to enable us to settle the plaintiff's proposed amended reply and defence to counterclaim.

5) This length of time was required due to the facts asserted in paragraphs 25 to 31 and paragraph 35 of the counterclaim in relation to which I concluded that I needed to conduct a thorough investigation of the asserted facts and circumstances and to obtain a detailed proof from the plaintiff as to those matters, which I did.

(Exhibit A page 331)

278 A draft affidavit for Mr Savas and draft consent orders were annexed to the memorandum (Exhibit A pages 332-336).

279 Mr Bower conceded that he must have read the memorandum from Ms de Villiers.

280 The following exchange took place in cross-examination in relation to Ms de Villiers' memorandum:

> Okay. Have a look at the next one:
>
> > It took until 3 December for us to obtain sufficient instructions to enable us to settle the plaintiff's proposed amended reply and defence to counterclaim.
>
> ? - - - Yes.
>
> That's not true. You took the instructions on 3 September. It took until 3 December to draft the jolly thing. You knew that. You knew that because you had been there on 3 September and taken the instructions - - - ? - - - Yes.
>
> - - - and you were the one that drafted the reply and defence to counterclaim? - - - I do - I do - I realise I did that.
>
> So you, above anybody in the firm, knew that there were no further instructions required between September and December? - - - I don't - I can't agree with that. It seems, to me, to be quite possible that somebody, perhaps me, identified the need to - - -
>
> You're speculating? - - - I am.
>
> Point to the file where you can see instructions that were required, sought and then obtained after 13 September? - - - I don't think I can produce that.

It didn't happen? - - - Well, I'm not so sure about that. I mean - - -

Well, there's no basis for this, to your knowledge, is there? - - - I can't say to you either I or someone identified a particular issue on which we needed to seek further instructions. But - but if that's what her document says, then it seems to me to be quite a plausible and possible thing. We - in my experience I often need to go back to - - -

You were the one - - -? - - - Yes.

- - - who had prepared the reply and defence to counterclaim? - - - I did.

You knew? - - -Well, I know - I recall that I prepared it. Whether I - whether I personally chased up Mr Pal about any details or - or someone else did, I don't remember now. But if - if that was advocated as something to be covered in an affidavit, then I would think it's accurate.

Now, number 5:

> This length of time was required due to -

and you refer to paragraphs - sorry, Ms de Villiers refers to paragraphs in the counterclaim:

> ... in relation to which I concluded -

the 'I' being a reference to Kerry Savas at that time -

> that I needed to conduct a thorough investigation of the asserted facts and circumstances and to obtain a detailed proof (indistinct) to those matters, which I did.

? - - - I see that.

And none of that was true. There was no statement of evidence commenced until after the reply and defence to counterclaim had been served, and then only for the purposes of Mr Dharmananda's advice, not for the purpose of that pleading, and that you knew? - - - Well, I am not sure I knew it at the time.

Well, you did, Mr Bower, because you were the one that prepared the reply and defence to counterclaim, and you were the one that prepared the statement of evidence? - - - I don't know that I was the only one that did that.

(T:34-36; 25.01.17)

281 Mr Savas did not record any time on any file from 1 to 4 March, from 9 to 10 March and on 14 March 2011.

282 Mr Bower sent a letter dated 16 March 2011 to Lawton Gillon repeating the enquiry as to whether Fairstar would consent to orders to restore the matter from the inactive list and extend the entry for trial milestone (enclosing a minute of consent orders for this purpose). The letter stated that if Fairstar did not agree to the orders or if a response was not received within seven days Corser & Corser would apply to the Court to seek these orders. The enclosed minute contained an order that Mr Pal file and serve his Reply to Amended Defence and Defence to Set-off and Counterclaim by 21 March 2011. Corser & Corser stated that this document had been served on Lawton Gillon on 3 December 2010 after it had been filed with the Court but because the matter was inactive at this stage, the document was returned to Corser & Corser by the Court after filing (Exhibit A pages 337-338).

283 Mr Savas was on sick leave for half a day on 21 March 2011.

284 Mr Savas did not record any time on any file on 22, 24 and 25 March 2011. Mr Savas did not turn up to work on 23 March 2011.

285 On 28 March 2011, the Pal matter timesheet records an entry for Mr Hugh Reynoldson, a junior solicitor:

> Conference with Ronald Bower re application; searching for affidavit of Kerry Savas in support; review of file to consider evidence needed in support of application (35 minutes)[.]

(Exhibit C page 6)

286 On 29 March 2011, Mr Pal sent an email to Mr Bower which relevantly stated:

> It's been more than a month since we exchanged information. I would appreciate your comments on the progress.

(Exhibit A page 340)

287 This was the seventh occasion in which Mr Pal had complained to Mr Bower about a lack of communication from Corser & Corser.

288 On 30 March 2011, Mr Bower relieved Mr Savas of the day-to-day conduct of the matter (T:41; 25.01.17).

289 On 30 March 2011, Mr Bower wrote a letter to a psychiatrist to obtain evidence in support of the application to remove the case from the inactive cases list and extend time. Mr Bower's letter was annexed

to the Savas affidavit (Exhibit A page 362). Mr Bower's letter relevantly stated:

> …
>
> There are two District Court cases that Mr Savas has been handling which have fallen behind in compliance with procedural time-limits, with potentially seriously adverse consequences for the clients concerned.
>
> I understand from Mr Savas that these two instances of non-compliance with procedural timetables arose as a result of the symptoms from which Mr Savas is suffering and that in particular, Mr Savas has experienced the following symptoms, nearly every day since October 2010:-
>
> 1. Difficulty concentrating on, and decision-making in work-related matters;
> 2. Depressed mood and irritability;
> 3. Mental tension and anxiety;
> 4. Markedly diminished interest in almost all activities;
> 5. Decreased appetite;
> 6. Weight loss;
> 7. Insomnia;
> 8. Fatigue and loss of energy;
> 9. Feelings of worthlessness and inappropriate guilt.
>
> Mr Savas describes these factors as having prevented him from keeping up with the procedural timetables in the two abovementioned cases.
>
> …
>
> <u>Your advice</u>
>
> Please may I request that you kindly provide written advice as to the symptoms which you have identified in Mr Savas, and whether, in your opinion, those symptoms are likely to have been the cause, or to have played a significant role in Mr Savas's inability to comply with procedural timetables on two of the cases he has been handling.
>
> I would also appreciate your advice on whether it could be that as a result of his medical condition Mr Savas has been unable or reluctant to fully appreciate and confront the scale and extent of the limits on his capacity to efficiently attend to work duties.

> Request for urgent response
>
> As a result of the imminence and seriousness of the potentially adverse consequences upon the two cases which the delays have caused, I request that you reply at your earliest convenience.
>
> It would be of greatest assistance to me if I could obtain your reply before 2.00 PM on Friday 1 April 2011; however, if you are unable to reply by then, I will await your advice.
>
> Intended use of medical advice
>
> My intention is to place your letter of advice (with a copy of this letter) before the court in which the two delayed cases are being conducted, in support of an application for an extension of time within which to comply with outstanding procedural steps. I do not anticipate that you would be required to personally attend court in relation to your advice.
>
> …

(Exhibit A pages 362-363)

290 On 31 March 2011, Mr Bower sent Mr Pal a further email (the 31 March email) the contents of which relevantly stated:

> Dear Mr Pal,
>
> Corser & Corser is in the process of preparing and filing an application to the Court for procedural orders that will procedurally program the case to trial.
>
> …
>
> The application will be heard on a date to be fixed by the court and notified to us within a few days of the documents being delivered to the Court. I expect the outcome to be that the court will issue orders setting dates by which remaining pre-trial steps, if either party wishes to avail themselves of them, to be completed. These orders will also set a period, but not a specific date (which will be provided later) for the next (and final) conference of the parties to see whether the case can be settled by agreement.
>
> …
>
> If the case proceeds as I expect, then there ought to be a trial in about August 2011.
>
> …

> I think that either at the point of the final compulsory conference, or at a point perhaps a few days prior to the commencement of the trial, we will receive a sensible offer from [the defendant].
>
> However, if that does not transpire, I continue in the view that you will have substantial success at trial, and that you will obtain a judgment for a substantial sum, with interest and costs.
>
> …

291 (Exhibit A page 339)

292 Mr Bower conceded that the application in fact sought orders for the case to be removed from the inactive cases list and for an extension of the existing timetable (T:38; 25.01.17).

293 Mr Bower sought to explain his statement that 'the court will issue orders setting dates by which remaining pre-trial steps, if either party wishes to avail themselves of them, to be completed':

> What I - what I was - what I seemed to have had in mind - and interpreting my own terminology - is that one side or the other might say in the - in a - at the hearing, 'Look, we want an order. We want a direction for some interlocutory step', and they would raise that, because they thought it would be suitable to their conduct of their client's case. These orders will also set a - so that's what I think I'm referring to. I'm sure that's what - - -

(T:39-40; 25.01.17)

294 Mr Bower agreed that he was across the contents of the file by 31 March 2011 (T:40; 25.01.17).

295 A further timesheet entry for Mr Reynoldson on 31 March 2011 records:

> Conference with Ronald Bower re affidavits in support of application (9 minutes)[.]

296 An entry by Mr Bower in the timesheet on 31 March 2011 records:

> Attendance to details of application in chambers for preparing orders and email reply to Mr Pal (19 minutes)[.]

(Exhibit C page 6)

297 When cross-examined about his involvement in the conduct of the file, Mr Bower denied that he had the day-to-day carriage of the matter. Mr Bower claimed that he was initially involved in the file (T:41-42;

25.01.17). However one wishes to characterise Mr Bower's involvement, it is clear that, at the very least, by 31 March 2011, Mr Bower was aware of what was happening on the file. He reviewed the application and the affidavit before they were filed (T:43; 25.01.17).

298 The 31 March 2011 email concealed from Mr Pal that the matter was on the inactive cases list and had been for some months. It misrepresented the position to Mr Pal.

299 The Committee alleged that the content of the 31 March email was false or misleading, or both, in that:

1) the email represented that the Pal Action remained active;

2) the true position was that the Pal Action had become inactive pursuant to r 44 of the DCR;

3) the email represented that Corser & Corser was in the process of preparing an application to the District Court for timetabling directions;

4) the true position was that Corser & Corser was in the process of preparing an application to the District Court:

5) for, in substance, an order that the Pal Action was no longer inactive; and

6) for timetabling directions should that application be granted;

7) the email represented that there were no pre-trial steps that must be completed by either or both parties before the Pal Action was ready to be entered for trial; and

8) the true position was that, at the least, Corser & Corser required the defendant to give discovery before the Pal Action was ready to be entered for trial.

(CSFC Annexure A paragraph 46)

300 Mr Bower admitted CSFC Annexure A paragraph 46.3 but otherwise denied the allegations asserted in paragraph 46. Mr Bower further stated that on a proper construction of the email there were no representations in the email that:

1) the Pal Action remained active; and

2) there were no pre-trial steps that must be completed by either or both parties before the Pal Action was ready to be entered for trial.

(BSRA paragraph 28)

301 The Tribunal finds that the content of the 31 March email was false and misleading as alleged by the Committee.

302 The Committee also alleged that it is to be inferred that when Mr Bower made the representations pleaded in CSFC Annexure A paragraph 46 above, he intended to mislead Mr Pal, alternatively, he acted recklessly, not caring whether Mr Pal was misled because:

1) Mr Bower knew that the Pal Action at that time remained inactive;

2) the Pal file at that time contained, relevantly:

   a) the Notice of Default dated 4 November 2010;

   b) a letter from Kacey Dunsborough of the District Court to Corser & Corser dated 3 December 2010 regarding Corser & Corser's attempt to file the reply and defence to counterclaim on that date;

   c) a copy letter from Corser & Corser to Lawton Gillon dated 16 March 2011; and

   d) a minute of consent orders prepared by Corser & Corser dated 15 March 2011;

3) Mr Bower had by that time instructed an employee of Corser & Corser, Ms de Villiers, to prepare a draft application for, in substance, an order that the Pal Action was no longer inactive; and

4) the file also indicated that discovery had not been given by either party.

(CSFC Annexure A paragraph 47)

303 Mr Bower admitted CSFC Annexure A paragraphs 47.1, 47.2, 47.3 and 47.4, but otherwise denied the allegations asserted in paragraph 47. He further stated:

> 1) at the time of writing the email, he was of the view that the placement of the action in the inactive cases list was a procedural step which would not adversely impact upon the substantive merits of the action nor delay the advancement of the action. By reason thereof he did not turn his mind to the requirements of r 44 of the DCR; and
>
> 2) at the time of writing the email, he considered the contents of the email to be accurate and as such did not consider it necessary to carry out an inspection of the documents on the Pal file.
>
> (BSRA paragraph 29)

304 Mr Bower knew what the procedural position was on the Pal file. He did not need to inspect the file to do so. Mr Bower intended to mislead Mr Pal in the email of 31 March 2011.

305 Despite the urgency of the matter, Mr Bower did not apply for an order to the effect that the Pal Action was no longer inactive (the application to reactivate) until 18 April 2011. This was a month after Mr Bower's letter of 16 March to Lawton Gillon threatening to do so within seven days.

306 Corser & Corser's chamber summons filed on 18 April 2011 sought the following orders:

> 1. The action no longer be inactive;
>
> 2. The plaintiff file and serve its reply to amended defence and defence to set-off and counterclaim by 27 April 2011;
>
> 3. The defendant file any Reply to the Plaintiff's defence to set-off and counterclaim by 11 May 2011;
>
> 4. The parties provide discovery on oath by 25 May 2011;
>
> 5. The plaintiff enter the action for trial by 22 June 2011; and
>
> 6. The costs be in cause.
>
> (Exhibit A pages 385-386)

307 On 18 April 2011 at 5.58 pm, Mr Bower sent an email to Mr Pal which relevantly stated:

> Our application for orders as to procedural steps in this action is at the Court, awaiting a hearing date.
>
> I expect to hear from the Court as to the date it has fixed for the application, prior to Thursday evening this week. However the matter is in the hands of the Court so that if we do not hear from it by then, we will have to wait until after the Easter public holidays to receive the hearing date.
>
> …

(Exhibit A page 341)

308 Mr Bower agreed to Mr Pal's request that Mr Bower attend on the hearing (Exhibit A page 342). The email to Mr Pal did not state that the chamber summons had only been filed on the same day, 18 April 2011 (Exhibit A page 378).

309 On about 18 April 2011, Mr Savas swore an affidavit in support of the application to reactivate (Savas affidavit) (Exhibit A pages 354-361).

310 The Savas affidavit relevantly stated:

> …
>
> 3. Between about May 2010 and late March 2011 I had sole conduct of this matter. Prior to 18 May 2010, Ronald Bower, the principal of Corser & Corser had sole conduct of the matter. I returned conduct of the matter to Mr Bower in late March 2011.
>
> …
>
> 8. In about January 2011 I sought medical assistance in relation to these symptoms and advised Ronald Bower, the principal of Corser & Corser, of my condition.
>
> 9. I did not seek medical assistance regarding my symptoms or inform my employer of these symptoms until this time because I did not understand that I was suffering from a medical problem nor did I understand the severity of this problem until recently.
>
> 10. As a result of seeking this medical assistance I have been diagnosed with bi polar disorder and am receiving care from Professor Paul Skerritt.

11. Upon notifying Mr Bower of my condition, he wrote to Professor Skerritt requesting a report in relation to my condition. Attached hereto and marked 'KS-1' is a true copy of a letter from Corser & Corser to Professor Skerritt dated 30 March 2011.

12. On 31 March 2011 Corser & Corser received a report from Professor Skerritt in relation to my condition. Attached hereto and marked 'KS-2' is true copy of that report.

13. I am currently on leave from my work at Corser & Corser due to my condition. I continue to see Professor Skerritt in relation to this condition.

…

16. After 17 September 2010 I experienced further difficulty in preparing the defence to counterclaim caused by the Plaintiff's overseas travels, which occurred between 17-24 September and 5-15 October 2010. During these periods I was unable to obtain the instructions that I required from the Plaintiff to complete the defence to counterclaim. I believe that this inability to obtain instructions, combined with the symptoms that I was suffering as a result of my condition described above, contributed to significant further delay in my preparation of the Plaintiff's defence to counterclaim.

…

22. I verily believe that, as a result of my condition described in paragraphs 6 to 13 above, I overlooked the need to alert others at Corser & Corser of the need to attend to filing the Plaintiff's defence to counterclaim in accordance with the orders of Registrar Harrnan made on 27 August 2010. I initially believed that 1 would be able to attend to preparing this document on time. When 1 then became in default of the Registrar's Order, I believed that 1 would be able to complete the defence to counterclaim with little further delay but, as a result of my condition, I found that I was unable to complete this document without the significant delay that ultimately occurred.

…

25. At the time that I received the notice I was unable to enter the matter for trial as the pleadings for the matter had not closed and discovery of documents had not occurred. Because I received the notice when the matter had already become inactive, I was also unable to apply to the Court to extend the entry for trial milestone.

(Exhibit A pages 355-359)

311 Mr Bower knew the contents of the affidavit because he had the day-to-day carriage of the matter at that time.

312 Mr Savas did not have sole conduct of the matter from between about May 2010 and late March 2011. As the cross-examination of Mr Bower makes clear 'sole conduct' is an unusual term to use (T:43-46; 25.01.17). Mr Bower was involved in a conference with Mr Savas and Mr Pal to take instructions to draft the reply and defence to counterclaim and Mr Bower drafted it (T:46; 25.01.17) and was otherwise involved in the matter as set out above and below. In particular, Mr Bower had the day-to-day carriage of the matter through December 2010 because Mr Savas was absent for all but three days.

313 Mr Savas' statement that after 17 September 2010, he experienced difficulty in preparing the defence to counterclaim caused by Mr Pal's overseas trip of 17 to 24 September and 5 to 15 October 2010 was plainly wrong because no instructions were taken from Mr Pal between 3 September 2010, when the conference with Mr Pal took place and when Mr Bower drafted the reply and defence to counterclaim. The reply and defence to counterclaim was filed on 1 December 2010 before being rejected by the Court. Mr Pal's 17 days absence overseas had no impact on drafting the reply and defence to counterclaim. Mr Bower drafted it without any input from Mr Pal after 3 September 2010.

314 Mr Bower stated in evidence that, he had no reason to challenge Mr Savas' statement that he had sole conduct. Mr Bower in fact knew it to be untrue because he drafted the reply and defence to counterclaim (T:47; 25.01.17).

315 The fact that Mr Savas did not refer to Mr Bower's role in the drafting of the reply and defence to counterclaim in his affidavit further reinforces the fact that the object of the Savas' affidavit was to avoid disclosing Mr Bower's involvement in the Pal matter to the Court.

316 The Committee alleged that the content of the Savas affidavit was false or misleading, or both, in a material respect in that:

> 1) it stated that Mr Savas had the sole conduct of the Pal Action between 18 May 2010 and late March 2011; and
>
> [The above statement was made following paragraph 3 of the Savas affidavit which stated:

Between about May 2010 and late March 2011 I had sole conduct of this matter. Prior to 18 May 2010, Ronald Bower, the principal of Corser & Corser had sole conduct of the matter. I returned conduct of the matter to Mr Bower in late March 2011.]

[Note inserted by Tribunal]

2) the true position was that Mr Bower had been involved in the conduct of the Pal Action during that period, in that Mr Bower had:

    1) supervised Mr Savas in the latter's conduct of the proceedings;

    2) by an email to Mr Savas dated 19 May 2010 given Mr Savas some guidance about the conduct of the proceedings;

    3) in June 2010 prepared a without prejudice offer to settle the proceedings which he discussed with Mr Pal by email and then sent to Lawton Gillon;

    4) received email communications about the proceedings as referred to in CSFC Annexure A paragraphs 6, 17 (from Mr Savas on 18 May 2010 and a copy of 22 August 2010 by Mr Savas) and paragraph 23 (9 September 2010 from Pal) above;

    5) met with Mr Pal on about 3 September 2010 to obtain instructions in relation to the proceedings;

    6) sent an email to Mr Savas on 25 November 2010 at 8.48 am requesting Mr Savas, in substance, to advise him of the status of the proceedings;

    7) received an email communication from Mr Savas sent on 25 November 2010 at 3.21 pm in which Mr Savas advised him of the status of the proceedings;

    8) sent an email to Mr Savas on 25 November 2010 at 3.33 pm requesting Mr Savas to send a copy of Fairstar's pleadings to Mr Pal;

9) written to Mr Pal in relation to the proceedings as referred to in CSFC Annexure A paragraphs 24 (13 September 2010), 31 (25 November 2010), 36 (14 February 2011), 39 (16 February 2011), 42 (16 February 2011) and 45 (31 March 2011) above;

10) on 1 December 2010 drafted the reply and defence to counterclaim;

11) sent an email to Mr Pal on 1 December 2010 attaching the draft reply and defence to counterclaim;

12) signed the reply and defence to counterclaim dated 3 December 2010;

13) written a letter to Lawton Gillon as referred to at CSFC Annexure A paragraph 34 (3 December 2010) above;

14) between 23 December 2010 and 4 January 2011 drafted a statement of evidence of Mr Pal; and

15) between 29 December 2010 and 17 January 2011 corresponded with Mr Pal by email regarding obtaining advice from senior counsel and the contents of Mr Pal's draft statement of evidence;

3) it stated, in substance, that Mr Pal's travel overseas between 17 and 24 September 2010 and 5 and 15 October 2010 contributed to the delay until 3 December 2010 in filing the reply and defence to counterclaim; and

4) that was not true.

(CSFC Annexure A paragraph 50)

317 Mr Bower admitted CSFC Annexure A paragraphs 50.2.2 to 50.2.15 but otherwise denied the allegations asserted in paragraph 50 and further stated that:

1) in or about May of 2010 he delegated the day-to-day conduct of the Pal Action to Mr Savas, in particular the

procedural requirements of the action and periodically was briefed by Mr Savas and other legal practitioners working on the file as to the progress of the action;

2) upon learning of Mr Savas' medical condition on or about 30 March 2011 and the effect of such medical condition on Mr Savas' ability to perform his duties as a legal practitioner, he relieved Mr Savas of the day-to-day conduct of the action;

3) upon reflection, the terminology used to describe Mr Savas' involvement with the action is better described as 'day-to-day conduct' rather than 'sole conduct' given the nature of Mr Savas' delegated authority as detailed in [BSRA paragraph 31.1 above]; and

4) upon its proper construction the use of the terminology 'sole conduct' was neither false in so far as it infers an intention to mislead nor was it capable of misleading the Court.

(BSRA paragraph 31)

318 The Tribunal finds that Mr Bower's use of the expression 'sole conduct' was intended to lead the Court to the conclusion that Mr Bower had no involvement in the Pal matter when Mr Savas had the conduct.

319 The Tribunal finds that the Savas affidavit was false and misleading as alleged by the Committee in paragraph 50.

320 The Committee also alleged that Mr Bower caused, alternatively, permitted the Savas affidavit to be sworn by Mr Savas, filed in the District Court and served on Lawton Gillon in circumstances where Mr Bower knew that the affidavit was false or misleading, or both, in a material respect, alternatively, was recklessly indifferent to whether it was false or misleading, or both, in a material respect, because:

1) Mr Bower instructed an articled clerk employed by Corser & Corser, Mr Reynoldson, to prepare the Savas affidavit;

2) Mr Bower reviewed and settled the Savas affidavit before it was sworn by Mr Savas and then filed and served;

3) Mr Bower knew of the matters referred to in CSFC Annexure A paragraph 50.2 above (his involvement in the Pal Action); and

4) Mr Bower knew from his involvement in the conduct of the matter as referred to in CSFC Annexure A paragraph 50.2 above, that the statement in the affidavit referred to in CSFC Annexure A paragraph 50.3 above (Mr Pal's overseas travel) was not true.

(CSFC Annexure A paragraph 51)

321 Save to say that Mr Reynoldson was a legal practitioner, Mr Bower admitted CSFC Annexure A paragraphs 51.1 and 51.2 but otherwise denied the allegations asserted in CSFC Annexure A paragraph 51 and further stated that upon reading the affidavit prior to it being filed, he was satisfied that the contents of the affidavit were accurate (BSRA paragraph 32).

322 The Tribunal finds that Mr Bower knew that the affidavit was false and misleading as alleged above by the Committee. In making this finding the Tribunal is conscious that misleading the Court is far more serious than misleading a client.

323 On 26 April 2011, Mr Pal emailed Mr Bower requesting a copy of 'the procedural steps' outlined in the application to the Court (Exhibit A page 379).

324 On the Pal application to reactivate, the District Court made orders on 10 May 2011 (the 10 May order) that:

55.1 The action no longer be inactive [paragraph 1];

55.2 [Mr Pal] file and serve its reply to amended defence and defence set-off and counterclaim by 13 May 2011 [paragraph 2];

55.3 [Fairstar] file any reply to [Mr Pal's] defence set-off and counterclaim by 3 June 2011 [paragraph 3];

55.4 The parties provide discovery on oath by 24 June 2011 [paragraph 4];

55.5 [Mr Pal] enter the action for trial by 22 July 2011 [paragraph 5];

55.6 Costs be in the cause [paragraph 6].

(CSFC Annexure A paragraph 55; Exhibit A page 388)

325 Corser & Corser filed Mr Pal's reply to amended defence and counterclaim on 10 May 2011 (Exhibit A pages 389-391).

326 On 12 May 2011 Mr Bower sent Mr Pal an email that informed him of paragraphs 2 to 5 of the 10 May order, but did not inform him of paragraphs 1 and 6 (CSFC Annexure A paragraph 55; Exhibit A page 393):

> I am setting out below the orders recently made by the District Court Registrar at my request, with the objective of getting this case moving.
>
> 1. the plaintiff file and serve its reply to amended defence and defence to set-off and counterclaim by 13 May 2011;
>
> 2. the defendant file any reply to the plaintiff's defence to set-off and counterclaim by 3 June 2011;
>
> 3. the parties provide discovery on oath by 24 June 2011;
>
> 4. the plaintiff enter the action for trial by 22 July 2011; and
>
> The only aspect of these orders that you need be concerned with is number 3, which requires each side to list all of their documents relevant to the case and to verify the completeness of the list in an affidavit, by 24 June 2011.

327 The Committee alleged that it is to be inferred from Mr Bower's conduct as referred to in CSFC Annexure A paragraph 56 above that in omitting to inform Mr Pal of paragraph 1 of the 10 May order, Mr Bower intended to mislead Mr Pal that the Pal Action had always remained active when the true position was that between about 20 November 2010 and 10 May 2011, the Pal Action had become inactive pursuant to r 44 of the DCR (CSFC paragraph 57).

328 Mr Bower admitted that the omission of order 1 was deliberate because it was Mr Bower's intention to inform Mr Pal of the matters that he knew Mr Pal wanted to know (T:52; 25.01.17).

329 The omission of order 1 (using the numbering in the email), that is, that action no longer be inactive sits oddly with Mr Bower's statement in his email that 'the only aspect of those orders that you need to be concerned with is number 3'. Either orders 2 and 4 should have been omitted or order 1 should have been included.

330 Mr Bower made this statement despite the fact that he agreed that he should have informed Mr Pal of the fact that his matter was on the inactive cases list (T:54; 25.01.17).

331 As Cahill SC submitted in closing:

> You can't have it both ways. If the practitioner perceived this as bad news upon which he did not wish the client to focus, that necessarily carried with it it was bad news because it had some import to the matter and that is a very significant admission that the practitioner has made.
>
> (T:24; 06.02.17)

332 The email of 12 May 2011 was not a broadly correct description of what was happening (T:17; 06.02.17). It is not the task of legal practitioners to focus only on the 'good news', particularly when the 'bad news' concerns the practitioner's conduct (T:15; 06.02.17).

333 The Tribunal find that Mr Bower intended to conceal from Mr Pal that his matter had been on the inactive cases list. The calculated omission of order 1 was intended to conceal the fact from Mr Pal. The Tribunal has found each of the individual allegations proved. The Tribunal also notes that the individual acts reinforce the fact that Mr Bower persistently sought to mislead Mr Pal as to the procedural status of his file over a long period.

334 By notice dated 23 June 2011, Corser & Corser were advised by the District Court that they were yet again in breach of the entry for trial date and requested entry by 8 July 2011, otherwise the matter would become inactive (Exhibit A page 407).

335 On 28 June 2011, Corser & Corser again sought Lawton Gillon's consent to extend the date for entry to trial (Exhibit A pages 429-430).

336 Mr Pal's affidavit of discovery was not sworn and filed until 1 July 2011 (Exhibit A pages 448-457).

337 Fairstar's affidavit of discovery was sworn on 12 July 2011 and filed on 12 July 2011 (Exhibit A pages 461-470).

338 By a tax invoice dated 18 July 2011, Corser & Corser charged Mr Pal professional fees for the preparation of the application to reactivate and the Savas affidavit.

339 The invoice of 18 July 2011 (Exhibit A pages 475-477) nowhere refers to the fact that there was an application to remove the matter from the inactive cases list.

340 On 4 October 2011, Mr Pal sent an email to Mr Bower which relevantly stated:

> I trust this finds you in the best of health and spirit. Next month it will be 2 years since we met and discussed my case. I know you are a very busy man and still have imparted a great deal to the case. I will be leaving for overseas this weekend and would highly appreciate it, if I could collect my case file with documents sometime tomorrow or latest by 10 am Thursday.

(Exhibit A page 508)

341 Little did Mr Pal know how poorly Mr Bower had dealt with his case.

342 On 22 December 2011, Mr Pal's new solicitor, Lawton Lawyers, sent a letter to Corser & Corser which relevantly stated:

> We are instructed that in the period from November 2009 and July 2011, Corser & Corser charged our client the sum of $21,468.12 for work undertaken. We raise the following issues with work performed and charged for by your firm:
>
> 1. The pleadings prepared by Mr Kerry Savas contain errors which require amendment. That is, the pleadings are not consistent with the instructions provided by Mr Pal to Mr Savas.
>
> 2. Fairstar Resources made an offer to settle the matter in December 2009 which amounted to a sum of approximately $125,000. We note that the maximum value of the claim is $143,157.86 and not the sum of $193,236.83 claimed in the statement of claim. We cannot find any note on the file indicating that your office advised Mr Pal to accept the offer made in December 2009. It may be arguable that it was negligent not to advise Mr Pal to accept this offer, or at least make a reasonable counter offer.
>
> 3. The invoices rendered by your firm contain several entries for work completed in relation to 'preparing the matter to meet entry for trial', and drafting a statement of evidence of Mr Pal. There is, however, no evidence on file that this work has been completed.
>
> 4. An Application to reactivate the matter was made by your firm on 18 April 2011. We note that the Application was supported by an Affidavit of Mr Kerry Savas. The Affidavit states that certain

> milestones were missed due to a medical condition of Mr Savas, who had sole conduct of Mr Pal's matter during the relevant period. Mr Savas deposes that Mr Pal was not the cause of the missed milestones, but that the delays were caused by your firm. However, we note that Mr Pal was charged the sum of $2,588.75 for work associated with the Application.
>
> We are of the view that Mr Pal would be justified in seeking a taxation of all invoices rendered by your firm and would succeed in obtaining a significant reduction of the invoices rendered.
>
> As Mr Pal has paid all invoices rendered by your firm, any taxation would result in your firm reimbursing Mr Pal.
>
> It appears arguable that the health issues deposed to by Mr Savas resulted in a general mismanagement of the matter on behalf of Mr Pal.
>
> For commercial reasons only and in order to avoid the time and costs for both parties of a taxation of all Corser & Corser invoices, Mr Pal will accept payment in the sum of $10,000.00 being a refund of fees already paid.
>
> …
>
> (Exhibit A pages 510-511)

343 Mr Bower responded on 9 February 2012. His letter relevantly stated:

> …
>
> I do not wish to enter into dispute with Mr Pal. I would mention that in my estimation Mr Pal received a great deal of professionally performed service from this firm, for which I thought the fees invoiced were more than fair. However, if Mr Pal is aggrieved and wishes to receive a partial refund, I would prefer to resolve his concerns on that basis rather than remain in dispute with him.
>
> Your letter proposed that a sum of $10,000.00 should be returned to Mr Pal. I am enclosing this firm's cheque payable to your trust account for $5000.00 as a part-payment of a larger sum which I hope we can agree upon. Please present the enclosed cheque for payment without prejudice to Mr Pal's right to continue to discuss with me the balance that I should pay. I propose that the further payment should be $7500.00. Please let me know whether that is suitable to Mr Pal.
>
> (Exhibit A page 512)

344 Mr Bower's witness statement (Exhibit D) was to the effect that as soon as the charges were drawn to his attention, he appreciated his error and arranged a refund. He maintained that position at the hearing (T:58; 25.01.17).

345 Nowhere does Mr Bower concede any error on his part in his correspondence. To the contrary, he maintained the point that Mr Pal 'received a great deal of professionally performed service from this firm, for which I thought the fees invoiced were more than fair'.

346 The Tribunal does not accept that the charges were an error on his part.

347 Mr Bower's agreement to making payment was essentially that it was a commercial settlement he 'did not wish to remain in dispute with [Mr Pal]' (T:57; 25.01.17).

348 Although Mr Bower paid $5,000 on 9 February 2012, the final payment of $2,500 was not made until 22 March 2012, three months after the error was drawn to Mr Bower's attention.

349 On 9 March 2012, Mr Bower wrote to Lawton Lawyers. The letter relevantly stated:

> …
>
> 1. The pleadings were not prepared by Mr Savas, but by the writer. They were prepared in detailed conformity with Mr Pal's instructions. There may have been a typographical error which required correction, and for which no charge was made. Other amendments were of the usual origin: as issues became clearer in the course of the action, and in consultation with Mr Pal, amendments were made. Your paragraph seems to assume that amendments only arise from errors made by practitioners who do not follow their client's instructions. That is wrong, and does not apply to the present case.
>
> 2. All aspects and developments in the action were dealt with in complete conformity with instructions provided by Mr Pal to the writer, after all appropriate advice was provided to him. It is a matter of opinion as to the correct total value of Mr Pal's claim. The writer repeatedly explained in detail to Mr Pal the scope for debate about the correct figure. He will recall the writer advising him that there were aspects of his case which were weaker than other aspects, and his request for the writer to explain that advice. The advice related to this, and other issues. The advice was

> provided more than once. If you think there possibly has been negligence, please be very specific as to the basis of the assertion.
>
> 3. The work was performed and properly charged for. There is one entry, and not several, for 'preparing the matter to meet entry for trial'. We made a number of drafts on Mr Pal's statement of evidence. We enclose a copy of the final draft, incorporating substantial details entered into it by Mr Pal. We apologise for leaving the document out of the file which we delivered to you, if that is what has occurred. Mr Pal would have the document in his personal computer system.
>
> We repeat our earlier proposal that to avoid a time-consuming costs taxation exercise, and without any admissions, your client should accept the sum of $7,500.00 to resolve his concerns about the costs invoiced to him by this firm. Please advise whether Mr Pal is content to finalise the matter on that basis.
>
> (Exhibit A pages 514-515)

350 Mr Pal accepted $7,500 and Corser & Corser's cheque for the remaining balance of $2,500 which was sent under cover of letter of 22 March 2012 to finalise the matter.

351 The Tribunal finds that Mr Bower deliberately charged for work which he knew he was not entitled for because the need to remove the matter from the inactive cases list arose because of delay on Corser & Corser's part.

352 The Committee alleged that in the circumstances referred to in CSFC Annexure A paragraphs 7, 25, 26, 30 and 48, Mr Bower failed to take reasonable steps as the principal of Corser & Corser to ensure that:

1) pleadings were filed on behalf of Mr Pal in the Pal Action within the time limits ordered by the District Court; and

2) further or alternatively to the statement in the above paragraph, there was no undue delay by Mr Bower's law firm in the preparation and filing of pleadings on behalf of Mr Pal in the Pal Action;

3) the Pal Action was entered for trial without undue delay; and

4) an application was made to the District Court promptly after 20 November 2010 for an order that the Pal Action was no longer inactive.

(CSFC Annexure A paragraph 53)

353 In closing submissions, Mr McIntyre SC effectively conceded that Mr Bower had unreasonably delayed (T:17; 06.02.17).

354 The Tribunal finds the Committee's allegations in CSFC Annexure A paragraph 53 proven.

355 There can be no question that Mr Bower failed to take reasonable steps. The delays were inexcusable.

356 The Committee alleged that in the circumstances referred to in CSFC Annexure A paragraphs 14, 18, 23, 24, 29, 32, 35, 37, 40, 43 and 46, Mr Bower failed to take reasonable steps as the principal of Corser & Corser to ensure that:

1) Mr Pal was given timely, accurate and complete information about the significant developments and progress in the Pal Action; and

2) further or alternatively to the statement in the paragraph above, Mr Pal was informed:

a) that a representative of Corser & Corser did not appear at a directions hearing held in the proceedings on 30 July 2010 and that consequently the District Court had made a costs order against Mr Pal;

b) whether there was any basis for Mr Pal to apply to the District Court to have that costs order set aside or varied;

c) that Corser & Corser had not complied with the directions made by the District Court for the filing of pleadings;

d) that the Pal Action had become inactive on about 20 November 2010 and why;

e) of the consequences of the proceedings having become inactive; and

f) of the effect of r 44 of the DCR.

(CSFC Annexure A paragraph 54)

357 Save to admit that with the benefit of hindsight that he could have taken further steps to progress the Pal Action, Mr Bower denied CSFC Annexure A paragraphs 53 and 54 and further stated that he took reasonable steps as the principal of Corser & Corser in respect of the conduct of the Pal Action by:

(i) delegating the performance of its procedural requirements to Mr Savas, reasonably believing that Mr Savas possessed legal knowledge and expertise appropriate to the task and the capacity to perform the task in a timely manner having regard to his other work responsibilities;

(ii) periodically obtaining information from Mr Savas as to his on-going appropriate attention to the procedural requirements of the Pal Action;

(iii) accepting such information from Mr Savas as and when it was received in circumstances where he had no basis to doubt its accuracy;

(iv) providing to Mr Savas the services of other Corser & Corser solicitors and an articled clerk to assist him in his performance of his responsibilities in respect of the Pal Action, being Mr Reynoldson, Travis Keen, Aimee Hackett, Chan Savas and himself (solicitors) and Michelle Collins (articled clerk) all of whom assisted Mr Savas from time to time; and

(v) relieving Mr Savas of responsibility for the procedural aspects of the Pal Action when the practitioner became aware of the nature and effect of Mr Savas' illness.

(BSRA paragraph 34)

358 Mr Bower's evidence was:

… the way I interpret ground 4 it says 'failing to take reasonable steps to ensure'. Well, I suppose no practitioner can - practitioner can ensure and

> know the outcome of the arrangements that he puts place for work to be performed within his firm until they happen, but what I'm saying in paragraph 36 is I consider that I did all appropriate things to provide for the expeditious and quality performance of Mr Pal's instructions and to a large extent I was led to believe that it was happening. Then as I conceded, and it can't be denied, that my arrangements being put in place didn't work very well and when I - but then I've - I hope I've described how I've attempted to remedy those things, but the net result was that it turned out that Mr Savas was unwell. It is possible to say, and I agree, that I could have done different things. I could have terminated Mr Savas and put a completely different person on the case or there are a range of things that I - we can now say that I could have done and I would probably agree with them, but when it was happening I was dealing with it as I thought was appropriate. The firm was busy. Mr Savas didn't have a great work load because although I didn't really know what was going on, I was conscious that he was frequently absent and as I say, he was - he assured me and reassured me, including when he committed lapses. By March or April 2011 the matter was inactive and it was - it hadn't progressed as well as it might have and as well as everyone here today would have - would expect, I think, but I'm trying to say that it occurred despite my endeavours to manage that matter and everything else that the firm was dealing with at the time.
>
> (T:50-51; 25.01.17)

359 In closing submissions, Mr McIntyre SC effectively conceded that Mr Bower had failed to communicate with Mr Pal (T:19; 06.02.17).

360 The Tribunal finds the Committee's allegations in CSFC Annexure A paragraph 54 proven.

361 There can be no question that Mr Bower failed to communicate with Mr Pal. The failure to properly inform Mr Pal, Mr Pal's frequent request for information and Corser & Corser's failure to reply and when they did reply, providing false and misleading information, are all cogent evidence of Mr Bower's failures.

The Settlers House matter

362 From not later than August 2009, Corser & Corser was retained by Settlers House to act in relation to a dispute arising from a construction contract to which Settlers House was a party.

363 The director of Settlers House who dealt with Corser & Corser was Mr David Mullins.

364 In relation to that dispute, Corser & Corser:

a) filed a writ of summons on 26 August 2009 to commence District Court of Western Australia proceedings CIV 2534 of 2009 on behalf of Settlers House as plaintiff (Settlers House Action) against Rocca Enterprises Pty Ltd and Giovanni Rocca (the Roccas) (Exhibit B pages 1-7); and

b) was at all relevant times the firm of solicitors on the court record for Settlers House in the Settlers House Action.

365 Jackson McDonald entered an appearance for the Roccas on 7 September 2009 (Exhibit B page 10).

366 Corser & Corser filed a statement of claim on 9 October 2009 (Exhibit B pages 15-21).

367 On 20 October 2009, Corser & Corser invoiced Settlers House for $10,875.14 (Exhibit A pages 23-24).

368 The Tribunal notes that these invoices covered a number of Settlers House matters. What is significant is the time Mr Savas spent on the Settlers House matter in the District Court.

369 The Roccas filed a defence and counterclaim on 26 October 2009 (Exhibit B pages 25-30).

370 The District Court issued a case management timetable dated 27 October 2009 which provided:

EVENT	DATE FOR COMPLIANCE
Entry for Trial	23 February 2010
Pre-trial Conference	4 April 2010
Listing Conference	14 May 2010
Trial	12 August 2010
Judgment	21 October 2010

371 On 1 December 2009, Corser & Corser made a without prejudice settlement offer on behalf of Settlers House (Exhibit B pages 41-42).

372 On 24 February 2010, the District Court issued a notice of default to Corser & Corser because of the failure to enter the matter for trial by 23 February 2010. The notice indicated that unless it was entered by 11 March 2010, it would become inactive (Exhibit B page 60).

373 Until about June or July 2010, Mr Bower had the primary and day-to-day conduct of the Settlers House Action (T:61; 25.01.17). Therefore, Mr Bower was sufficiently across the procedural requirements to, for example, discuss with Mr Mullins the fact that the Settlers House particulars had not been filed (T:62-63; 25.01.17).

374 Mr Bower agreed that:

> … the extent of [his] involvement throughout the matter, even after Mr Savas assumed the day-to-day conduct, was greater than in the Pal matter for two reasons: (1) [his] involvement in related matters for Mr Mullins, and (2) simply because [he] were aware that Mr Savas wasn't dealing with the matter as expeditiously as he should, and (3) that [he was] trying to save the client from the consequences of its own delays [.]

(T:63; 25.01.17)

375 At a directions hearing held in the Settlers House Action on 6 April 2010 the District Court relevantly ordered (the 6 April order) that:

1) Settlers House file and serve any amended statement of claim by 20 April 2010 [paragraph 1];

2) The Roccas file and serve any amended defence and counterclaim by 27 April 2010 [paragraph 2];

3) Settlers House file and serve any reply to Roccas' amended defence or defence to the amended counterclaim by 4 May 2010 [paragraph 3];

4) Both parties file and serve particulars of damages claimed by 11 May 2010 [paragraph 4];

5) Both parties serve on each other a sworn list of discoverable documents by 11 May 2010 [paragraph 5];

6) The parties have leave to adduce expert evidence at the trial of the action [paragraph 6];

7) Settlers House serve on the Roccas any expert report or substance of expert evidence upon which Settlers House

> intended to rely at trial by 25 May 2010 [paragraph 7a]; and
>
> 8) The entry for trial milestone be extended to 15 July 2010.
>
> (Exhibit B pages 72-73)

376 On 11 May 2010, Allens Arthur Robinson, who had replaced Jackson McDonald as the Roccas' solicitor, sent a letter to Corser & Corser which relevantly stated:

> We refer to the above matter and the directions of the Court made 6 April 2010.
>
> On 30 April our Mr Corboy discussed with you your client's position in respect of filing an amended statement of claim, which you indicated your client intended to do.
>
> On 5 May we wrote to you by email asking for your response as to the state of your client's amended statement of claim and the corrected Deed. We have not received a reply.
>
> The directions required the plaintiff to file and serve any amended statement of claim by 27 April 2010. In your discussions with our Mr Corboy you indicated your client would file and serve its amended claim during the week beginning 4 May 2010.
>
> In order to avoid the likelihood of our clients incurring wasted costs if the defences are amended before your client amends it claim, could you please advise by close of business 12 May 2010 if your client intends to file and serve an amended statement of claim and when we would expect to be served with it?
>
> Should we not receive your reply by close of business 12 May 2010 we will seek our clients' instructions in respect of filing and serving amended defences. Should your client thereafter seek to amend its statement of claim we will seek, from your client, costs thrown away to be payable forthwith.
>
> (Exhibit B page 76)

377 Corser & Corser:

a) did not comply with paragraph 1 of the 6 April order;

b) as a consequence could not and did not comply with paragraphs 3 to 5 and 7a of the 6 April order;

c) did not apply to the District Court for an extension of time within which to file and serve an amended statement of claim;

d) did not apply to the District Court for an extension of time within which to comply with paragraphs 3 to 5 and 7a of the 6 April order.

378 On 12 May 2010, Corser & Corser briefed Mr Craig McIntosh, a barrister, to prepare an amended statement of claim. Mr McIntosh indicated that he would be able to prepare the amended statement of claim prior to 21 May 2010 (Exhibit B pages 80-81).

379 On 25 May 2010 Corser & Corser informed Allens Arthur Robinson that they expected to be able to file and serve the amended statement of claim by 28 or 31 May 2010 (Exhibit B page 83).

380 In about June or July 2010, Mr Savas assumed the day-to-day carriage of the Settlers House Action under the supervision of Mr Bower.

381 On 4 July 2010, Mr McIntosh emailed Mr Bower:

> I hope you are having an enjoyable time in the states and I sorry to disturb your holiday.
>
> I have not received any further instructions.
>
> Has this matter been settled or under control?
>
> If not, is there anything I can do? If so who shall I liaise with at your office.
>
> I have a feeling that matter needs to be entered for trial very shortly 10 July? (I can check my notes tomorrow).

(Exhibit B page 82)

382 The above date was 15 July 2010 but Mr McIntosh was substantially correct. Mr Bower knew of the need to enter the matter for trial.

383 On 9 July 2010, the Roccas changed solicitors to Corboy Legal (Exhibit B page 93).

384 By 15 July 2010, Corser & Corser were required to enter the matter for trial (6 April order).

385 On 15 July 2010 at 3.15 pm, Corser & Corser emailed Corboy Legal enclosing a letter:

> We refer to the telephone conversation between you and our Hugh Reynoldson on 14 July 2010 regarding the above matter.
>
> Having now contacted the District Court Registry, we confirm that trial entry for trial milestone expires today, 15 July 2010.
>
> We confirm that Mr Kerry Savas from our firm has conduct of this matter and that Mr Savas is currently interstate and unable to contact you. Mr Savas will return to our office on Monday 19 July 2010.
>
> In these circumstances, and due to the fact that the matter is not in a position where it is able to be entered for trial, we request that the entry for trial milestone be extended [to 26 August 2010] by consent and enclose consent orders for this purpose.
>
> If you consent to such an order being made please sign and return the enclosed memorandum.
>
> If the entry for trial milestone is not extended the matter will become inactive. It is not appropriate for the matter to become inactive where extensive delay of the matter has not occurred and where the parties have exchanged correspondence regarding outstanding procedural matters that must be dealt with prior to the matter being entered for trial.
>
> If you have not consented to these orders by 4:00 pm today we will apply to the Court for orders extending the entry for trial milestone.

(Exhibit B pages 95-97)

386 On 16 July 2010, the District Court:

a) issued a Notice of Default pursuant to r 38(1) of the DCR which was received by Corser & Corser on 19 July 2010; and

b) stated in that notice, in substance, that unless Settlers House entered the Settlers House Action for trial on or before 31 July 2010, the matter would become inactive.

(Exhibit B page 102)

387 Corboy Legal's reply to Corser & Corser's email on 19 July 2010 relevantly stated:

Directions in this matter were made by Deputy Registrar Hewitt on 6 April 2010. Your client was directed to file and serve any amendment to its statement of claim by mid April 2010. Out of abundance of caution and in order to avoid unnecessary costs, my clients have refrained from filing and serving amended defences because of the assurances made to me by your Mr Bower that your client intended to amend its statement of claim. Those assurances followed my written requests, face to face discussions and telephone conversations with Mr Bower. Those assurances were clearly expressed in your facsimile dated 25 May 2010 being the last correspondence received from your firm despite the messages I left with your reception for Mr Bower to return my calls. The facsimile also acknowledged your firm's tardiness in compliance with the directions of the Court.

The discussion last week involving your Messrs Savas and Reynoldson and myself included amongst other points, your and your client's failure to file and serve an amended statement of claim despite the assurances of Mr Bower and your desire to obtain an extension for the plaintiff to enter the matter for trial. I understand from the minute attached to your email that the extension sought is to 26 August 2010.

The fact of the matter is that because of your and your client's tardiness there has been no progress in this matter since the directions were made by Deputy Registrar Hewitt on 6 April 2010 and the defendants have been unable to comply with the Court's directions because of Mr Bower's assurances.

On Monday 12 July 2010, I was assured by your Mr Savas that I would receive correspondence from him, including a signed minute, to consider before he left for the Eastern States. The discussions with Mr Reynoldson on Wednesday 14 July 2010 covered the same ground.

I note your email dated 15 July 2010 was sent at 3.15 pm. The attached letter demanded that my client consent to your proposed order by 4.00 pm of the same day or an application would be made to the Court. Your demand was made with an expectation that you would receive an instantaneous response from my clients. Your expectation was unreasonable.

Further, your letter failed to provide reasons, satisfactory or otherwise for your client's delay in complying with the Court's direction in a timely manner. Therefore, I was unable to ascertain from you how this matter would move forward if my clients provided their consent. In the circumstances, you could not reasonably expect a considered response and in any event, the 45 minutes you provided for consideration of your demand meant that it was inevitable that time and events would superseded your request, even if my clients and I were in a position to peruse your demand last Thursday afternoon, which we were not.

> My clients reserve their rights with respect to your letter and the proposed application.
>
> …

(Exhibit B pages 99-100)

388 Corser & Corser did not enter the Settlers House Action for trial by 31 July 2010 and consequently the matter became inactive pursuant to r 44(2) of the DCR.

389 On 16 August 2010, Mr Bower, Mr Savas and Mr Mullins met to discuss the advice of counsel and the progress of the matter (Exhibit B page 135 paragraph 9).

390 On or about 15 September 2010, in the Settlers House Action the Roccas applied to the District Court pursuant to r 45(4) of the DCR for judgment in the action (Roccas' September Application) (Exhibit B page 103).

> 1. Judgment be entered against the plaintiff in respect of its claim against the first and second defendants.
>
> 2. The plaintiff does pay the first and second defendants' costs of defending the plaintiff's claim including any costs reserved to be taxed if not agreed.
>
> 3. The plaintiff does pay the first and second defendants' costs of this application in any event.

(Exhibit B pages 104-105)

391 The chamber summons was supported by an affidavit of Mr Corboy sworn on 8 September 2010 (Exhibit B pages 106-127).

392 On 15 September 2010, Mr Bower sent an email to Mr Reynoldson in the following terms:

> We need to file whatever we wish to file, such as amended statement of claim in the defence and counterclaim, urgently.
>
> Only when we have filed a suitable amended statement of claim in the counterclaim will Rocca consider settling.
>
> Des will settle for a sum owed to him to be paid plus something for costs. The sum concerned is a sum which he paid to an independent contractor after Rocca (as builder) failed to pay it and Des paid it to keep the contractor working on the project.

I will need to treat this as super-urgent.

[Mr Savas] and you and I should discuss it later today.

I am in KTA Thurs and Fri.

(Exhibit B page 129)

393 The 15 September 2010 email evidences that Mr Bower was well aware of the procedural status of the matter and the urgency of an application.

394 On about 21 September 2010, Corser & Corser applied to the District Court (the Settlers House September Application) for orders, amongst others but relevantly and in substance that:

a) the Settlers House Action no longer be listed as inactive;

b) the time for compliance with the orders the subject of paragraphs 4, 5 and 7a of the 6 April order be extended; and

c) the entry for trial milestone be extended to 16 December 2010.

(Exhibit B pages 131-132)

395 On 23 September 2010, the District Court heard the Roccas' September Application and the Settlers House September Application and made, relevantly and in substance, the following orders (the 23 September order):

1) Settlers House file and serve any amended reply and defence to counterclaim by 23 October 2010 [paragraph 2];

2) the Settlers House action be removed from the inactive cases list and the entry for trial milestone be extended to 18 January 2011 [paragraph 4];

3) both parties file and serve particulars of damages claimed by 8 November 2010 [paragraph 5];

4) both parties serve on each other a sworn list of discoverable documents by 22 November 2010 [paragraph 6];

5) Settlers House serve on the Roccas any expert report or substance of expert evidence upon which Settlers House intended to rely at trial by 22 November 2010 [paragraph 7a];

6) the matter be adjourned to a directions hearing on 18 January 2011; and

7) Settlers House to pay the costs of both the Defendants' September Application and the Settlers House September Application.

(Exhibit B pages 140-141)

396 Corser & Corser did not comply with the 23 September order in that it did not:

a) file and serve an amended defence to counterclaim by 23 October 2010 or at all;

b) file and serve particulars of damages claimed by Settlers House until, at the earliest, 27 May 2011;

c) file a sworn list of the discoverable documents of Settlers House until 2 May 2011;

d) serve on Corboy Legal until 2 May 2011 a substance of expert evidence upon which Settlers House intended to rely at trial; and

e) enter the matter for trial on or before 18 January 2011.

397 The Roccas filed and served their pleadings on 7 October 2010 (Exhibit B pages 142-158).

398 On 25 October 2010, Mr Bower sent an email to his secretary which relevantly stated:

> Within the last month we received an amended defence and counterclaim from Corboy, the solicitor for Rocca and his company.
>
> We are overdue to file and serve a Reply and Defence to Counterclaim.
>
> Depending on what we have previously filed, it might be an Amended Reply and Amended Defence to Counterclaim.

> Please locate the file and the Amended Defence and Counterclaim from Corboy.
>
> Please then ask Hugh or Andrew or [Mr Savas] to have a shot at a Reply and Defence to Counterclaim (Or Amended ...) in which we say the minimum - that is, probably not a great deal in a Reply to the Defence and as to the Counterclaim we deny the assertions made and say that the Rocca company is not entitled to the relief claimed or any relief.
>
> Please let me know who is going to be working on this today. Thanks.
>
> (Exhibit B page 162)

399 Again the 25 October 2010 email evidences that Mr Bower was clearly aware of the procedural status.

400 Mr Bower conceded that he 'was keeping a good eye on the procedural deadlines', 'at least on that day' (T:65; 25.01.17). The latter part of that answer was altogether too cute. Mr Bower was well aware of how the matter was progressing generally, not only on 25 October 2010.

401 Mr Bower's secretary forwarded that email to three of the firm's solicitors, Mr Savas, Mr Reynoldson and Mr Cameron.

> One of you's need to tell me TODAY who will be attending to this. I have printed off the 1st Defendant's Amended Defence and Counterclaim and 2nd Defendant's Amended Defence received from Corboy Legal on 7 October 2010.
>
> (Exhibit B page 162)

402 It is clear from the secretary's email that Mr Bower had imparted a sense of urgency to her.

403 On 8 November 2010, the Roccas filed their particulars of damages (Exhibit B page 163).

404 On 22 November 2010, the Roccas filed a draft of their discovery affidavit (Exhibit B pages 169-182).

405 On 15 December 2010, Corboy Legal wrote to Corser & Corser advising of Settlers House's default in relation to paragraphs 3 to 5 of the 23 September order (Exhibit B page 183).

406 On 20 December 2010, the Roccas disclosed the substance of their expert evidence. The covering letter stated:

> I refer to the above matter and to the order of Registrar Hewitt made 23 September 2010.
>
> Paragraphs 7 and 8 of the order require the service or disclosure of any expert evidence that each party intends to rely on.
>
> The plaintiff has failed to served on the defendants any expert evidence or written disclosure of the substance of the expert evidence that the plaintiff intends to rely upon at trial in accordance with paragraph 7 of the order, or at all.
>
> I am instructed that the defendants will oppose any attempt by the plaintiff to adduce expert evidence prior to, or at trial, on the grounds that:
>
> 1. the defendants may suffer prejudice in not being afforded an opportunity to properly scrutinize such evidence in a timely manner as allowed for in the order;
>
> 2. the defendants may incur additional and unnecessary costs in preparing the defendant's expert reports; and
>
> 3. should the plaintiff seek leave to adduce expert evidence in the future further delay to these proceedings would occur.
>
> …
>
> (Exhibit B pages 183 and 185-189)

407 On 23 December 2010, Mr Bower met with Mr Mullins to prepare an offer of settlement (T:84; 25.01.17).

408 On 23 December 2010, Corser & Corser wrote to Corboy Legal, amongst other matters, making an offer of settlement (Exhibit B pages 190-193).

409 On 5 January 2010, Corser & Corser invoiced Settlers House for $7,398.89 (Exhibit A pages 194-195). Between 23 September 2010 and 5 January 2011, Mr Savas had recorded time on the file on only 23 September 2010 and 25 October 2010.

410 On 17 January 2011, Corboy Legal emailed the Roccas' proposed orders for the directions hearing on 18 January 2011, which included a springing order for failure by Corser & Corser to provide discovery (Exhibit A pages 197-198).

411 On 17 January 2011, Mr Bower sent an email to Mr Corboy advising that 'I think therefore that you can be quietly confident that your desired orders will be made' (Exhibit B page 298).

412 Mr Bower appeared at the directions hearing on behalf of Settlers House and did not oppose the making of the springing order.

413 In cross-examination, Mr Bower conceded that it was pointless to oppose the springing order based on his understanding of the procedural progress, or lack thereof, by Settlers House (T:65; 25.01.17).

414 At a directions hearing held in the Settlers House Action on 18 January 2011, the District Court relevantly:

> a) made a springing order to the effect that, unless Settlers House complied with paragraph 6 of the 23 September order by 25 January 2011, the Settlers House Action would be struck out and judgment would be entered for the Roccas (springing order) [paragraph 1];
>
> b) ordered that, upon compliance with the springing order, unless Settlers House entered the Settlers House Action for trial on or before 20 February 2011, the matter would become inactive [paragraph 2]; and
>
> c) ordered that the time within which Settlers House was to serve the substance of its expert evidence be extended to 14 February 2011 [paragraph 3A].
>
> (Exhibit B pages 203-204)

415 Mr Bower did not take any steps to prepare the list of discoverable documents and could not point to any documentary instructions to assign anyone else at Corser & Corser to do so (T:67; 25.01.17).

416 On 24 January 2011, Corser & Corser received a default notice from the District Court dated 19 January 2011, advising that if the matter was not entered for trial by 3 February 2011 the matter would become inactive (Exhibit A page 205). Mr Bower's secretary emailed the notice to Mr Bower (Exhibit A page 205).

417 Corser & Corser did not comply with paragraph 1 of the 23 September order by 25 January 2011.

418 On 1 February 2011 at 3.30 pm, Mr Travis Kean, an employee of Corser & Corser sent an email to Mr Savas and Mr Bower which relevantly stated:

> I received the File back off Ronelia last night before she went home. She informed me she did not find the amended statement of claim. She did find a Letter from the expert which she told me she discussed with Ron on Friday and she wrote a draft email for Ron to approve.
>
> Entry for trial is this THURSDAY.
>
> We have extended several times, Corboy (OPS) has twice applied to take advantage of the fact that Entry for trial date has passed.
>
> We need (from what I can work out and ignoring Scott Schedules):
>
> - Expert evidence, we have a letter but that is it, we need to file and serve;
> - Last Consent order stated we still need to file our Particulars of damage; and
> - There is discovery on file but no sworn affidavit of discovery or covering letter saying we have sent the unsworn discovery.
>
> Should we try to get consent orders signed to extend the date again? I have attached Draft Consent orders and covering letter for your information.
>
> Calendar is free tomorrow morning, should we book a time and discuss it then?

(Exhibit B pages 210-211)

419 Mr Bower conceded that he was on notice that the springing order had sprung (T:69; 25.01.17).

420 Mr Bower responded to Mr Kean at 3.37 pm with an email to say that he had not had a response from Mr Mullins, that they should send the expert report in its current form and meet the next day, Wednesday 2 February 2011 (Exhibit B page 210). Mr Bower conceded that all of the other programming steps had not been complied with. He conceded that as at 1 February 2011, he was aware that the orders relating to expert evidence, particulars and the plaintiff, Settlers House's expert evidence, particulars and discovery were in default (T:70; 25.01.17).

421 At 10 am on 2 February 2011, Mr Kean's file note records that he met with Mr Bower and Mr Savas and discussed the entry for trial and the arbitrary issues. As a result of the meeting, Mr Kean prepared a chamber summons to extend time (Exhibit A pages 217-218).

422 On 2 February 2011, Corser & Corser:

1) applied to the District Court (the Settlers House February Application) for orders, amongst others but relevantly and in substance that:

   a) Settlers House file and serve particulars of damages claimed by 1 March 2011;

   b) Settlers House serve a sworn list of discoverable documents by 8 March 2011;

   d) Settlers House serve on the Roccas any expert report or substance of expert evidence upon which Settlers House intended to rely at trial by 8 March 2011; and

   c) the entry for trial milestone be extended to 15 March 2011(Exhibit B pages 220-221); and

2) filed an affidavit sworn by Mr Savas on 2 February 2011 in support of the Settlers House February Application (Exhibit B pages 222-224).

423 Mr Savas' affidavit relevantly stated:

…

5. During the months October to December 2010 the sole director of the plaintiff was occupied with the imminent completion of the construction project, the substance of these proceedings.

6. From 11 November to 20 December 2010 I was absent from work on sick leave due to a serious medical condition.

7. On 10 January 2011 I returned to work on a full time basis but as I was still unwell had significant time off. I have only returned to work full time since 24 January 2010.

8. As a result of the matters described in paragraphs 5-7 herein the plaintiff failed to comply with its obligations under the programming orders made on 23 September 2010. Consequently the Plaintiff is unable to enter the matter for trial by the entry for trial deadline. I verily believe that the plaintiff's inability to meet the entry for trial milestone, while regrettable, could not have been avoided in these circumstances.

9. The Plaintiff is now in a position to comply with all programming requirements February 2011, in support of which this affidavit has been sworn.

(Exhibit B pages 223-224)

424 On 6 February 2011, Mr Bower received a letter from Corboy Legal dated 5 January 2011 which dealt with the District Court Action (Exhibit E).

425 Corboy Legal's letter relevantly stated:

> I also draw to your attention your client's continued tardiness with respect to the order of Registrar Hewitt made 23 September 2010 and subsequent correspondence from this office to you in that regard.

426 Mr Bower accepted that he read the letter and drafted a report and advice to Settlers House (Exhibit C page 16).

427 Mr Bower conceded that at least on 9 February 2011, he was aware that Settlers House was in default (T:76; 25.01.17). Plainly, he was aware on 3 February 2011 as a result of the meeting of 2 February 2011.

428 Mr Bower was aware that the orders needed to be compiled 'because otherwise in Mr Mullins' case it's going to be obliterated' (T:76; 25.01.17).

429 On 9 February 2011, Mr Bower sent an email to Mr Mullins which relevantly stated:

> Dear [Mr Mullins]
>
> Appreciating how busy you are, but nevertheless I need to monster you about these two topics.
>
> I emailed you a few days back requesting instructions.
>
> I will re-sent the email relating to these two.
>
> It is quite urgent that you help us with Rocca, in particular.
>
> Our question about Keytech is straight-forward. You may be able to respond without too much diversion of your concentration on the other, bigger issues.
>
> RSVP.

(Exhibit B page 228)

430 On 21 February 2011, Corboy Legal sent a letter to Corser & Corser, addressed to Mr Bower and Mr Savas, pointing out that what it regarded as deficiencies in Mr Savas' affidavit and the application. The letter relevantly stated:

1. The plaintiff's chamber summons and the supporting affidavit sworn by Kerry Savas filed 2 February 2011 and served on the defendants' solicitors 14 February 2011 are deficient in several respects.

2. The plaintiffs chamber summons was filed without conferral with the defendants and was filed absent the required Certificate of Conferral under Rule 22(2)(a).

3. The orders sought by way of the plaintiffs' chamber summons will not remedy the plaintiff's non-compliance with the order made by the Court on 18 January 2011.

4. Further, the Notice of Default served on the plaintiffs dated 19 January 2011 is the third such notice issued by the Court against the plaintiff. The previous Notices were dated 16 July 2010 and 24 February 2010. As you are aware the matter became inactive on 3 February 2011 because of the plaintiff's failure to enter the matter for trial.

5. The affidavit sworn by Mr Savas contains unsubstantiated facts and inadmissible evidence.

6. The plaintiff's inability to enter this matter for trial is largely due to the failure on the part of the plaintiff and/or it solicitors to comply with case management directions, made in this matter, in a timely manner, or at all, since the order of Deputy Registrar Hewitt made on 6 April 2010 and/or any of the subsequent orders made 23 September 2010 and 18 January 2011.

7. Upon a review of the court documents in this matter, I note that the affidavit sworn by Kerry Savas in support of the chamber summons as referred to above has remarkable similarity to previous affidavits sworn by Mr Savas in this matter in support of a previous application to remedy the plaintiffs failure to comply with case management directions. In particular, I note the affidavit of Mr Savas sworn 21 September 2010 at paragraph 13 he deposes:

> The net effect of factors including the seeking of advice from counsel with respect to amendments to pleadings, seven consecutive weeks of absence from the firm by the principal solicitor and that the sole director of the plaintiff was and is primarily completely occupied with the imminent completion of the project the subject of these proceedings resulted in the plaintiff not meeting the entry for trial milestone. Notwithstanding, I verily believe that the plaintiff's inability to meet the entry for trial milestone, while regrettable, could not be avoided in these circumstances.

8. The affidavit sworn by Kerry Savas and filed 2 February 2011 in support of the current application deposes at paragraph 5:

> During the months of October and December 2010 the sole director of the plaintiff was occupied with the imminent completion of the construction project the substance of these proceedings.

And at paragraph 8 deposes:

> ... I verily believe that the plaintiff's inability to meet the entry for trial milestone, while regrettable, could not be avoided in these circumstances.

9. I also refer to the springing order made Deputy Registrar Hewitt made 18, January 2011 and to the conversation I had with your Mr Bower after the hearing in which I was assured that the plaintiff would be in a position to provide discovery by 25 January 2011 in accordance with Paragraph 1 of the order.

10. The springing order Hewitt made 18 January 2011 has sprung.

11. The plaintiff's disregard for compliance with case management directions is self-evident. The plaintiff has made no attempt to comply with the orders of Deputy Registrar Hewitt made on 23 September 2010 and 18 January 2011.

12. The defendants place the plaintiff on notice that the defendants will oppose the orders sought by way the plaintiff's chamber summons and seek its costs of the action on an indemnity basis on the grounds that:

    a. the circumstances of the plaintiff's non-compliance with case management orders generally, demonstrates contumelious disregard for the orders of the Court;

    b. the circumstances which gave rise to the making of the springing order on 18 January 2011 were as a result of continued non-compliance by the plaintiff of the case management orders made by the Court;

    c. the fact that counsel for the plaintiff at the directions hearing on 18 January 2011 did not oppose the making of the springing order, which sprang without any attempt by the plaintiff to comply;

    d. the fact that after the directions hearing on 18 January 2011 Mr Bower on behalf of the plaintiff assured the writer that the plaintiff would comply with the springing order but the plaintiff has failed to comply with that assurance;

e. the inadmissibility of and the lack of credible sworn evidence in support of the plaintiff's application.

13. The defendants consider that the interests of justice do not require the Court to grant the order the plaintiff seeks. The plaintiff by its non-compliance has failed to produce evidence to demonstrate that it has a meritorious claim.

14. This letter is sent by way of conferral and the defendants reserve their rights to produce this letter at the hearing of the plaintiff's chamber summons and/or any subsequent hearing in support of it claim for indemnity costs.

(Exhibit B pages 237-239)

431 Corboy Legal's letter of 21 February 2011 was a devastating indictment of Corser & Corser's conduct of the Settlers House matter and Corser & Corser's application.

432 At a directions hearing held in the Settlers House Action on 24 February 2011 attended by Mr Kean, Mr Savas and Ms Feng at the District Court, the Court relevantly and in substance, ordered Settlers House to file any further affidavits in support of the Settlers House's February Application within 14 days (affidavits order) (Exhibit B pages 248-249).

433 Mr Bower conceded that he would have known that Mr Kean had attended the directions hearing with Mr Savas and Ms Feng (T:72-73; 25.01.17).

434 Mr Bower admitted that the reason for the order for further affidavits was because he had received the letter of 21 February 2011 from Corboy Legal criticising the adequacy of Mr Savas' affidavit of 2 February 2011 (T:71; 25.01.17). After reading that letter, Mr Bower could be in no doubt as to the procedural status of the file.

435 Mr Bower conceded that as at 24 March 2011, he knew the springing order had to be set aside (T:73-74; 25.01.17). He agreed that the springing order needed to be set aside by an application supported by an affidavit (T:74; 25.01.17).

436 On 14 March 2011, Mr Bower sent an email to Mr Mullins which relevantly stated:

[Mr Mullins]

> I appreciate that you are under a great deal of time-consuming pressure, but the Rocca case is heading towards a crisis if not a catastrophe because we have not been able to work on these questions and details with you. We urgently need to provide the particulars of your loss and damage in a form that complies with the court's procedural requirements. We need to confer with you to produce the required material, as a matter of urgency.
>
> We are also putting your building expert under a bit of pressure to come up with his detailed expert report on the defects in the slab, once again in the format demanded by the court rules.
>
> [Mr Savas] and I will be in the Pilbara for the next 2 days (Tuesday and Wednesday 15 and 16 March) but if you can put some time into this matter on Tuesday or Wednesday please contact Travis Kean who will be very pleased to meet with you and take the details from you.
>
> Please treat the matter as being urgent, despite all the other demands on your time and energy.

(Exhibit B page 251)

437 On 17 March 2011, Mr Corboy filed an affidavit in opposition to the Settlers House chamber summons filed on 2 February 2011 (Exhibit B pages 288-319).

438 On 28 March 2011, Corser & Corser sent a draft discovery affidavit to Mr Mullins seeking further instructions (Exhibit B pages 329-345).

439 On 29 March 2011, Corboy Legal wrote to Mr Bower at Corser & Corser relevantly stating:

> I refer to your letter dated 23 March 2011 and to the order of Deputy Registrar Harman made on 24 February 2011 at the hearing of your client's chamber summons. As you are aware your client failed to comply with the springing order made 18 January 2011 and that order has sprung.
>
> I note that at the hearing of your client's chamber summons on 24 February 2011, your Mr Savas indicated that your client intended to provide further affidavit evidence to support the orders sought in its chambers summons and indicated to the Registrar that the plaintiff would require 14 days to file the relevant documents. It was after my intervention that the time for filing affidavit evidence, in relation to your client's application, was extended to 21 days from the date of the hearing, being 17 March 2011. To my knowledge the plaintiff failed to file any evidence in time. You and your client have failed to comply with the Registrar's order made 24 February 2011.

> As you have acknowledged the defendants prepared two affidavits opposing your client's application. The affidavits were filed on 17 March 2011 and subsequently served by hand at your offices the following morning.
>
> Should you or your client file any affidavit evidence in respect of your client's application, I am instructed to object to that evidence being considered by the court on the grounds that any such affidavit would have come into existence after the defendants' affidavits were served on the plaintiff. I also refer to my letter to you dated 21 February 2011and to the objections raised in my letter to your client's application and supporting affidavit
>
> …

(Exhibit B page 346)

440 Mr Bower gave evidence that he did not want to impose his will as regards terminology used in affidavits. His evidence was that in relation to the Settlers House affidavits, he said to Mr Savas 'I don't want to confer with you as to what we put in our affidavits' (T:37; 24.01.17). Despite this, in his memo of 29 March 2011, Mr Bower gave Mr Savas very specific instructions as to what was to be included in Mr Savas' affidavit (T:75; 25.01.17).

441 Passages from this letter which were repeated in Mr Savas' affidavit are underlined by the Tribunal with the relevant paragraph number in M Savas' affidavit of 1 April 2011 (Exhibit B pages 351-353).

442 On 29 March 2011, Mr Bower sent a memo to Mr Savas which relevantly stated:

> I have considered the affidavits filed by both sides in the current application to extend time.
>
> I have also looked at your as-yet unsworn draft affidavit in the WP system.
>
> We will not discharge our onus of proof with the currently-filed affidavit as to your inability to attend to the file in compliance with the timetable. Your evidence is too brief, general and lacking in particulars. It is in the nature of brief statements of conclusions. It lacks original factual material.
>
> In particular, your affidavit evidence needs the following additional detail:
>
> 1. A medical certificate from a treating doctor, certifying that
>
> a. you are presently unwell in some identified manner that precludes you from attending efficiently to work duties; and which

b. certifies that that has been the position in the specific periods in which the procedural defaults arose.

The doctor's letter also needs to say

- the date when he first saw you as a patient in respect of the illness to which we attribute the inability to keep up with the timetable.
- That he is continuing to treat you.
- That he is seeing you on an approximately weekly or fortnightly basis or whatever the intervals are.
- That he is of the opinion that as a result of the symptoms of your illness, it is understandable that you may have mis-judged your capacity to perform work and to meet work-related deadlines in the period October 2010 to the present time [or whatever is the correct time period].

2. Specific statements from you to the effect that when you were absent due to ill health and the procedural deadlines were passing, you overlooked the need to alert others within the firm to the need to attend to the directions timetable. [10]

3. If it is correct, statements from you that you thought that you would be able to attend to the necessary work yourself within the time limits of the directions timetable, but that you found that you were unable to do so. [9]

4. Statements from you that you judged that you would be able to return to work promptly after first becoming unwell and that for that reason you did not notify me that you anticipated being absent from work for any appreciable extended period of days. [19]

There were periods within the overall period since October 2010 when neither Chau nor I knew where you were or how to contact you. I do not wish to refer to that, expressly, in my own affidavit.

But we need to cover the fact that neither you nor I did what was necessary to keep up with the timetable. It will be appropriate and sufficient if you provide detailed information as to your belief that you would not be absent for a lengthy period and that you could keep up with the timetable in this matter; and for me to say that I knew of nothing to indicate that you would not be able to do so.

I am therefore requesting you to urgently draft the appropriate affidavit and to equally urgently request a suitable letter from the doctor.

> As an alternative, please provide me with an executed written authority to seek a medical report and I will use it to request Dr P. S. to supply a report addressing the points mentioned above.
>
> I am quite sure that if we do not deal with this matter urgently and in this manner, we will lose the application and I will need to write a large cheque to Rocca and refund already-paid fees to [Mr Mullins], and also to notify Law Mutual about the matter. Obviously I wish to avoid all of those possible results.
>
> Please attend to these tasks before commencing anything else.
>
> Please complete these requests during Wednesday 30 March.
>
> (Exhibit B pages 348-349)

443 Mr Bower's attention was drawn to numbered paragraph 2 of his memo of 29 March 2011, which stated, ' … overlooked the need to alert others within the firm to the need to attend to the directions timetable'.

444 The clear implication of that statement is that others in Corser & Corser were unaware of the requirements of the directions timetable. Mr Bower knew that that statement was probably untrue.

445 Mr Bower admitted that he knew of the requirements of the directions timetable on 29 March 2011 but denied that it was misleading (T:77; 27.01.17).

446 Mr Bower's memo also stated 'But we need to cover the fact that neither you nor I did what was necessary to keep up with the timetable'.

447 Mr Bower accepted that he and Mr Savas were both involved in the matter and both had the capacity to influence compliance with the court timetable (T:78; 27.01.17).

448 Mr Bower also requested detailed information from Mr Savas as to 'your belief that you would not be absent for a lengthy period and that you could keep up with the timetable in this matter; and for me to say that I knew of nothing to indicate that you would not be able to do so'. Mr Bower denied the statement that he 'knew of nothing to indicate that [Mr Savas] would not be able to do so'. It was false. Mr Bower's knowledge of Mr Savas' repeated absences from work, his failure to record any time on any file as recited above in relation to the Pal matter and of Mr Savas' difficulties are set out in the Pal matter and it is unnecessary to repeat them here.

449 Mr Bower stated that Corser & Corser was a small office. Mr Bower knew Mr Savas was frequently absent.

450 Mr Bower denied that his statement, that if 'we don't deal with this matter urgently … I will need to write a large cheque to Rocca and refund already-paid fees to [Mr Mullins], and also to notify Law Mutual about the matter' was because of his concern that the delay and default was the responsibility of Corser & Corser (T:81; 25.01.17).

451 When it was put to Mr Bower that his statement in his memorandum about the delay being caused by Settlers House was not true, Mr Bower denied it. He sought to explain his statement in the memo on the basis that Mr Mullins would not want to pay his fees, in effect, that he would blame Corser & Corser despite in effect it not being Corser & Corser's fault (T:81; 25.01.17). That is simply not a believable explanation of Mr Bower's statement in his memo.

452 Mr Savas swore an affidavit on 1 April 2011 (the Savas April Affidavit), filed on 4 April 2011 which relevantly stated:

> …
>
> 4. I no longer have conduct of this matter, but have at all material times had the sole conduct of this matter, including the period 23 September 2010 to 23 February 2011.
>
> …
>
> 9. I believed that I would be able to attend to the orders of Registrar Hewitt dated 23 September 2010 within the times required, but found that I was unable to do so.
>
> 10. During my periods of absence from work due to ill health between 23 September 2010 and 17 January 2011 I overlooked the need to alert others at Corser & Corser of the need to attend to compliance with the directions timetable.
>
> 11. On 18 January 2011 this matter came before Registrar Hewitt for directions where a further directions timetable was ordered including a springing order against the Plaintiff.
>
> 12. I believed that I would be able to attend to the orders of Registrar Hewitt dated 18 January 2011 within the times required, but found that I was unable to do so, and I overlooked the need to alert others at Corser & Corser of the need to attend to compliance with the directions timetable.

> 13. Notwithstanding the symptoms I was experiencing and the fact that Professor Skenitt has prescribed me medications, I judged that I would be able to return to work promptly after first becoming unwell, and that for that reason I did not notify my principal Ronald Bower of my anticipated absences from work.

(Exhibit A pages 352-353)

453 Mr Bower knew the contents of the affidavit because he had the day-to-day carriage of the matter at that time.

454 The Savas April affidavit largely reflected Mr Bower's instructions in his memo of 29 March 2011.

455 Mr Bower denied that the reference to 'sole conduct' was a deliberate lie. Mr Bower sought to explain the expression on the basis that Mr Savas had the 'in-court conduct' of the matter (T:82; 25.01.17).

456 There is no basis for the expression 'sole conduct' being equivalent to 'in-court conduct'. Mr Savas did not have the sole conduct of the matter.

457 On 30 March 2011, Mr Bower relieved Mr Savas of the conduct of the Settlers House file (T:74; 25.01.17).

458 Corser & Corser:

a) did not comply with the affidavits order;

b) did not apply to the District Court for an extension of time within which to comply with the affidavits order; and

c) on or about 4 April 2011 filed a further affidavit sworn by Mr Savas in support of the Settlers House February Application, a copy of which is attached as Attachment B to Annexure B of the Committee's application (Savas April affidavit).

(Exhibit B pages 351-353)

459 Mr Bower's letter to Professor Skerritt was annexed to the affidavit (Exhibit B pages 354-355).

460 The Committee alleged that the contents of the Savas April affidavit was false or misleading, or both, in material respects in that:

1) it stated that Mr Savas had the sole conduct of the Settlers House Action at all material times, including the period 23 September 2010 to 23 February 2011;

2) the true position was that Mr Bower had been involved in the conduct of the Settlers House Action at times material to the Settlers House February Application including the period 23 September 2010 to 23 February 2011, in that Mr Bower had:

   2.1) primary day-to-day conduct of the matter during the period when the 6 April order was made and until June or July 2010;

   2.2) from June or July 2010 supervised Mr Savas in the latter's conduct of the matter;

   2.3) spoken regularly by telephone to Mr Mullins of Settlers House since the commencement of the matter to discuss the status of the matter;

   2.4) met with Mr Mullins of Settlers House to discuss the matter on 23 December 2010;

   2.5) on 23 December 2010 prepared a without prejudice offer in the matter that was sent to Corboy Legal;

   2.6) on 6 January 2011 perused a letter from the defendants' solicitor and drafted a report and advice to Settlers House;

   2.7) prepared for and attended at the directions hearing in the District Court on 18 January 2011; and

   2.8) discussed the status of the matter with Mr Savas and another lawyer employed by Corser & Corser, Mr Kean, on 2 February 2011;

3) it represented that between 23 September 2010 and 17 January 2011 neither the practitioner nor any other legal practitioner working at Corser & Corser was aware of the content of the 23 September order and the fact and extent to which the orders within it had not been complied with; and

4) the true position was that:

4.1) Mr Bower was aware by 25 October 2010 that Corser & Corser had not filed and served any reply or defence to counterclaim by 23 October 2010; and

4.2) Mr Bower was aware from his continuing involvement in the matter to that date as set out in CSFC Annexure B paragraph 21.2 above, that Corser & Corser had not otherwise complied with the 23 September order.

(CSFC Annexure B paragraph 21)

461 Mr Bower admitted CSFC Annexure B paragraphs 21.1, 21.2.2, 21.2.3, 21.2.4, 21.2.5, 21.2.7 and 21.2.8, 21.4.1 and 21.4.2, but denied all of the allegations in paragraph 21. He further stated that:

1) in or about June or July 2010, he delegated the day-to-day conduct of the Settlers House Action to Mr Savas, in particular the procedural requirements of the action and periodically was briefed by Mr Savas and other legal practitioners working on the file as to the progress of the action. He periodically also conferred with the client as to the progress of the action;

2) upon learning of Mr Savas's medical condition on or about 30 March 2011 and the effect of such medical condition on Mr Savas' ability to perform his duties as a legal practitioner, he relieved Mr Savas of the day-to-day conduct of the action;

3) upon reflection, the terminology used to describe Mr Savas' involvement with the action is better described as 'day-to-day conduct' rather than 'sole conduct' given the nature of Mr Savas' delegated authority as detailed in paragraph 2.1 [correctly paragraph 3.1] herein;

4) that upon its proper construction the use of terminology sole conduct' was neither false in so far as it infers an intention to mislead nor was capable of misleading the court; and

5) that upon its proper construction the affidavit did not represent that between 23 September 2010 and 17 January 2011 neither he nor any other legal practitioner working at Corser & Corser was aware of the content of the 23 September order and the fact and extent to which the orders within it had not been complied with.

462 (Bower Substituted Response to Annexure B (BSRB) paragraph 3)

463 The Tribunal finds that the Savas April affidavit was false and misleading as alleged by the Committee. The Tribunal finds that Mr Bower knew that the Savas April affidavit was false and misleading. The Tribunal also finds that Mr Bower intended to mislead the Court.

464 On 8 April 2011, Corser & Corser invoiced Settlers House for $31,919.33. Between 6 January 2011 and 7 April 2011, Mr Savas recorded time spent on the file, on only 31 January, 24 February, 11 March and 30 March 2011.

465 On 8 April 2011, Mr Reynoldson sent an email to Mr Bower which relevantly stated:

…

[Mr Corboy] wishes to air his concerns about our filing of affidavits outside of the timetable ordered by the Court on 24 February 2011. He also wishes to enquire as to whether we plan to file further affidavits in relation to our chamber summons. If we do, his message is that this evidence will be opposed on the basis that it is being filed outside of the Court's timetable.

…

(Exhibit B page 371)

466 On 2 May 2011, Settlers House's affidavit of discovery was served (Exhibit B page 399).

467 On about 9 May 2011, the Roccas applied to the District Court for orders (the Defendants' May Application), relevantly and in substance that:

a) the Settlers House February Application for an extension of time to enter the matter for trial be dismissed;

b) the statement of claim in the Settlers House Action be struck out and judgment entered in favour of the Roccas;

c) Settler House pay the Roccas' costs of defending the Settlers House Action; and

d) Settlers House pay the costs of the Roccas' application on an indemnity basis.

(Exhibit B pages 432-433)

468 On 12 May 2011, Mr Bower sent an email to Mr Mullins which relevantly stated:

> The Court requires that you prepare and file your Particulars of Damage before you can enter the matter for Trial. This is a document detailing the loss and damage that Settlers House Pty Ltd has suffered.
>
> If we do not get the details and documentation for the loss and damage then:
>
> • the matter cannot be entered for trial;
>
> • which may result in your claim being struck out by the Court; and
>
> • the Defendants' counterclaims will most likely succeed.
>
> For your convenience, we enclose a copy of an email from Ronald Bower to Des Mullins dated 3 February 2011, whereby we have requested your instructions to assist us in completing the Particulars of Damage.
>
> Please provide a considered response to the abovementioned email and provide all documentation necessary to substantiate the loss and damage suffered by Settlers House Pty Ltd.
>
> If you have any queries, please do not hesitate to contact Mr Ronald Bower or Mr Travis Kean of our office.

(Exhibit B page 430)

469 On about 26 May 2011, Mr Savas swore and caused to be filed an affidavit in opposition to the Defendants' May Application (Savas May Affidavit) (Exhibit B pages 449-451). The affidavit relevantly stated:

> …
>
> 3. Ronald Bower relieved me of the conduct of this matter in early April 2011 following my diagnosis with bipolar disorder.

> 4. I appeared for the Plaintiff at the directions hearing for this matter on 24th February 2011 before Registrar Hewitt. Mr Ronald Bower had appeared at the earlier hearing on the 18th January 2011 because I was involved in another matter. At the hearing on the 24th February 2011 the Registrar ordered, that the Plaintiff file and serve any further affidavits within 14 days and the Defendants file any further affidavits within 21 days with the matter adjourned to a special appointment.
>
> 5. When I attempted to do the work to comply with the order made by Registrar Hewitt on the 24 February 2011, I found myself unable to maintain adequate focus on my work and to make any progress on completing the documents. I also found that I avoided the work as well as failing to alert my colleagues as to the fact that this task was overdue. I was unable to perform work on the documents during my frequent absences from work during this period.
>
> 6. I believe that my inability to comply with the orders made by Registrar Hewitt on the 24th February 2011 occurred as a result of the bipolar disorder I was suffering and its associated symptoms.
>
> 7. I verily believe that, as a result of my condition described above, I overlooked the need to alert others at Corser & Corser of the existence of and to comply with the orders of Registrar Hewitt made on 24 February 2011.
>
> 8. I initially believed that I would be able to comply with the orders made by Registrar Hewitt on the 24th February 2011. When the time for compliance passed, I then believed that I would be able to complete the work with little further delay but, as a result of my condition, I found that I was unable to do so.

470 Mr Bower knew the contents of the affidavit because he had the day-to-day carriage of the matter at that time.

471 Mr Bower accepted that paragraph 7 implied that he and others at Corser & Corser did not know that further affidavits had to be filed by 10 March 2011 (T:87; 25.01.17).

472 Mr Bower conceded that he was aware that Mr Kean had been to Court with Mr Savas on 24 February 2011 so paragraph 7 could not possibly have been a fair representation (T:87; 25.01.17).

473 Mr Bower conceded that Mr Savas did not need to alert other people at Corser & Corser because others knew about it (T:88; 25.01.17).

474 Mr Bower conceded that he told Mr Savas that he needed to say 'that he failed to alert others' in his affidavit (T:88-89; 25.01.17).

475 The Committee alleged that the content of the Savas May Affidavit was false or misleading, or both, in a material respect in that:

1) it represented that neither Mr Bower nor any other legal practitioner working at Corser & Corser was aware of the content of the affidavits order;

2) the true position was that Mr Kean had attended with Mr Savas at the directions hearing on 24 February 2011 and made a record of the affidavits order;

3) it represented that neither Mr Bower nor any other legal practitioner working at Corser & Corser was aware of the fact that the affidavits order had not been complied with; and

4) the true position was that:

a) Mr Bower had received a letter from the defendants' solicitor dated 29 March 2011 notifying him of the failure to comply with the affidavits order;

b) Mr Bower had received an e-mail on 8 April 2011 at 3.14pm from a lawyer employed by Corser & Corser, Mr Reynoldson, in which Mr Reynoldson referred to the fact that the affidavits order had not been complied with; and

c) Mr Bower had received a letter from the defendants' solicitor dated 28 April 2011 in which there was further reference to the fact that the affidavits order had not been complied with.

(CSFC Annexure B paragraph 24)

476 Mr Bower admitted CSFC Annexure B paragraphs 24.4.1, 24.4.2 and 24.4.3 but denied paragraph 24. He stated further that upon its proper construction the Savas May Affidavit did not represent that:

1) neither Mr Bower nor any other legal practitioner working at Corser & Corser was aware of the content of the affidavits order; and

2) upon its proper construction the affidavit was neither false in so far as it infers an intention to mislead nor was capable of misleading the Court.

(BSRB paragraph 6)

477 The Tribunal finds that the Savas May affidavit was false and misleading as alleged by the Committee. The Tribunal finds that Mr Bower knew that the Savas May affidavit was false and misleading as alleged by the Committee. The Tribunal finds that Mr Bower intended the Court to be misled by the Savas May affidavit.

478 On about 27 May 2011, Mr Bower swore and filed an affidavit in opposition to the Roccas' May Application (CSFC Annexure B paragraph 25) (Exhibit B pages 462-470). His affidavit relevantly stated:

…

3. I took the original instructions from the Plaintiff to initiate proceedings against the Defendants and consequently had the conduct of this file until on or about mid June 2010.

4. In about mid June 2010 I passed conduct of this matter to Mr Kyriakos Savas, an Associate of Corser & Corser, as I was to be overseas for the period from 14 June 2010 to 14 July 2010 and then interstate until the 27 July 2010 and therefore unavailable to handle conduct of the matter during this period.

5. At the Directions Hearing on the 18th January 2011 I appeared in this matter at the request of Mr Savas. Mr Savas was involved in another matter at the time of the hearing and therefore unavailable to attend. I received instructions from Mr Savas prior to appearing to the effect that he would be able to enter the matter for trial without delay. Mr Savas was a trusted member of my staff and I did not question his opinion of the readiness of this matter for trial.

6. The conduct of the matter remained with Mr Savas until this year when it became apparent that his illness was impairing his ability to work. I asked Mr Travis Kean, a restricted practitioner employed by Corser & Corser, to help Mr Savas with the matter at about the end of February 2011.

7. Towards the end of March 2011 I requested from Mr Savas an explanation as to his frequent days off work due to illness. He provided me with some information about symptoms he was

> experiencing, and said that he had become a patient of Professor Paul Skerritt.
>
> 8. On the 30 March 2011 I sent a letter requesting information about Mr Savas's illness from Professor Skerritt. Copies of this letter of request and his reply dated 31 March 2011 are attached to Mr Savas's affidavit sworn 1 April 2011.
>
> 9. After receiving the reply from Professor Paul Skerritt I immediately directed Mr Savas to take sick leave until he had in Professor Skerritt's opinion recovered sufficiently to return, to work.
>
> 10. It was then that I asked Mr Savas to swear an affidavit explaining the procedural situation of this action to the Court. This affidavit is Mr Savas's affidavit sworn 1 April 2011.
>
> 11. I then took over the conduct of the file from Mr Savas. Under my supervision Mr Travis Kean then took on the day to day running of the file. I was aware that Mr Kean had intermittently worked on the file under the supervision of Mr Savas, prior to April 2011.
>
> 12. On-the basis of my understanding of Professor Skerritt's written advice as to Mr Savas's illness I believe it was Mr Savas's illness which caused him to keep inadequate file notes and have frequent absences.
>
> 13. These factors prevented Mr Kean and me from ascertaining what was required immediately for the process of this action to comply with directions orders and the rules of the Court.
>
> …

479 Mr Bower accepted that in the Bower affidavit, what he was striving to convey to the Court was that he did not have any significant involvement in the matter up to 1 April 2011 (T:92; 25.01.17). That answer was deliberately untrue.

480 Mr Bower denied that his statement that he had no significant involvement was untrue but admitted that he knew all about the procedural position as at 18 January 2011 because he attended the directions hearing (T:92; 25.01.17).

481 Mr Bower accepted that the statement in paragraph 13 of the Bower affidavit related to 1 April 2011 when he took over the file from Mr Savas (T:93; 25.01.17).

482 Mr Bower, in effect, accepted that he was seeking to explain the delay between 1 April and 27 May 2011 in proceeding with the matter (T:93; 25.01.17).

483 Mr Bower was clearly aware on 23 March 2011 that affidavits needed to be filed (Exhibit B page 328). Similarly, Mr Bower knew from the letter of 28 March 2011 (Exhbit A page 329) that discovery was required.

484 Mr Bower conceded that as at March 2011, he also knew that expert reports and particulars were matters that needed to be attended to urgently (T:94; 25.01.17).

485 Mr Bower denied that this information was sufficient for him to ascertain what was required immediately (T:94; 25.01.17). That answer was deliberately untrue.

486 The Committee alleged that the content of Mr Bower's affidavit was false or misleading, or both, in a material respect in that:

1) it represented that Mr Bower had not had any, or any significant, involvement in the conduct of the Settlers House Action between about mid-June 2010 and early April 2011;

2) the true position was that Mr Bower had significant involvement in the matter between mid-June 2010 and early April 2011 as set out in paragraph 21.2 of Annexure A;

3) it represented that, when Mr Bower attended the directions hearing held by the District Court on 18 January 2011, he believed the matter could be entered for trial without delay;

4) the true position was that, from his involvement in the matter to that time, Mr Bower was aware that the matter could not be entered for trial without delay because Corser & Corser had not attended to preparing particulars of loss and damage, serving a sworn list of discoverable documents or obtaining expert evidence;

5) it represented that Mr Bower was unable to ascertain promptly that after 1 April 2011 what needed to be done in order to enter the matter for trial; and

6) the true position was that, from his involvement in the matter to 1 April 2011, the practitioner was aware as at that date that little if anything had been done to prepare particulars of loss and damage, to prepare a sworn list of discoverable documents or to obtain expert evidence.

(CSFC Annexure B paragraph 26)

487 Mr Bower admitted CSFC Annexure B paragraphs 26.1, and 26.3 but denied paragraph 26. He further stated:

1) he repeats paragraphs 2.1 and 2.2 [correctly paragraphs 3.1 and 2.1] herein and by reason thereof says that he did not have any significant involvement in the procedural conduct of the Settlers House Action between mid-June 2010 and March 2011;

2) upon its proper construction the affidavit did not represent that there were no interlocutory steps that needed to be undertaken before the action could be entered for trial;

3) at the time of swearing the affidavit he knew that certain interlocutory steps needed to be taken but did not know with precision the state of completion of the interlocutory steps;

4) he will rely on the wording used in the affidavit for its full terms and effect; and

5) upon its proper construction the affidavit was neither false in so far as it infers an intention to mislead nor was it capable of misleading the court.

(BSRB paragraph 8)

488 The Tribunal finds that Mr Bower's affidavit was false and misleading as alleged by the Committee.

489 The Committee alleged that Mr Bower did not inform, or attempt to inform, the District Court that the content of the Savas April affidavit

was or may be false or misleading, or both, in material respects (CSFC Annexure B paragraph 27). The Tribunal finds the allegation to be proven.

490 The Committee also alleged that it is to be inferred that from, at the latest, 27 May 2011, in omitting to inform, or in not attempting to inform the District Court that the contents of the Savas April Affidavit was or may be false or misleading, or both, in material respects, Mr Bower intended that the District Court be misled by the Savas April Affidavit or, alternatively, Mr Bower acted recklessly, not caring whether the District Court was misled because:

1) Mr Bower supervised Mr Savas' conduct of the Settlers House Action;

2) Mr Bower had asked Mr Kean to prepare the Savas April Affidavit;

3) from about 1 April 2011 Mr Bower had resumed the primary and day-to-day conduct of the Settlers House Action;

4) as a consequence, Mr Bower knew or ought to have acquainted himself with the content of the Savas April Affidavit before he prepared and swore his affidavit; and

5) by reason of the matters set out at CSFC Annexure B paragraphs 21.2, 21.4 and 28.4 above, Mr Bower knew or ought to have ascertained that the Savas April Affidavit was false or misleading, or both.

(CSFC Annexure B paragraph 28)

491 The Tribunal finds that Mr Bower knew the contents of the Savas April affidavit.

492 The Tribunal finds that Mr Bower intended that the District Court be misled by the Savas April affidavit.

493 The Committee alleged that Mr Bower did not inform, or attempt to inform the District Court that the contents of the Savas May Affidavit was or may be false or misleading, or both, in material respects (CSFC Annexure B paragraph 29). The Tribunal finds this allegation to be proven.

494 The Committee also alleged that it is to be inferred that from, at the latest, 27 May 2011, in omitting to inform, or in not attempting to inform, the District Court that the contents of the Savas April Affidavit was or may be false or misleading, or both, in material respects, Mr Bower intended that the District Court be misled by the Savas May Affidavit or, alternatively, Mr Bower acted recklessly, not caring whether the District Court was misled because:

1) Mr Bower supervised Mr Savas' conduct of the Settlers House Action;

2) Mr Bower supervised Mr Kean's conduct of the Settlers House Action;

3) from about 1 April 2011 Mr Bower had resumed the primary and day-to-day conduct of the Settlers House Action;

4) as a consequence Mr Bower knew or ought to have acquainted himself with the content of the Savas May Affidavit before he prepared and swore his Affidavit;

5) by reason of the matters set out at CSFC Annexure B paragraphs 24.4 and 30.4 above, Mr Bower knew or ought to have ascertained that the Savas May Affidavit was false or misleading, or both, in material respects.

(CSFC Annexure B paragraph 30)

495 The Tribunal finds that Mr Bower intended that the District Court be misled by the Savas May affidavit.

496 The Committee alleged that it is to be inferred from the matters set out in CSFC Annexure B paragraphs 21 to 30 above, that when Mr Bower swore his affidavit and then caused it to be filed, he intended to mislead the District Court or, alternatively, Mr Bower acted recklessly, not caring whether the District Court was misled.

497 The Tribunal finds that when Mr Bower swore his affidavit he intended to mislead the District Court.

498 On 22 June 2011, Registrar Hewitt ordered that Corser & Corser show cause why they should not indemnify Settlers House for the costs ordered to be paid (Exhibit B page 496).

Findings

Annexure A

Ground 1

499 The Tribunal finds that in about April 2011, Mr Bower caused an affidavit to be prepared, sworn and filed in District Court of Western Australia proceedings CIV 256 of 2010 in circumstances where:

a) Mr Bower knew the affidavit to be false and misleading in material respects; and

b) Mr Bower intended that the District Court be misled by the affidavit.

Ground 2

500 The Tribunal finds that in about August 2010, Mr Bower deliberately permitted an email sent to a client, Mr Pal, about the status and progress of the proceedings to remain uncorrected in circumstances where:

a) Mr Bower knew the email to be false and misleading in material respects; and

b) Mr Bower intended that Mr Pal be misled about the true status and progress of the proceedings.

Ground 3

501 The Tribunal finds that between about November 2010 and May 2011, Mr Bower sent emails to Mr Pal, about the status and progress of the proceedings in circumstances where:

a) Mr Bower knew the emails to be false and misleading in material respects; and

b) Mr Bower intended to mislead Mr Pal about the true status and progress of the proceedings.

Ground 4

502 The Tribunal finds that between about May 2010 and April 2011 Mr Bower failed to take reasonable steps as the principal of the law firm retained by Mr Pal in respect of the proceedings to ensure that the proceedings were progressed without undue delay.

Ground 5

503 The Tribunal finds that between about June 2010 and November 2011, Mr Bower failed to take reasonable steps as the principal of the law firm retained by Mr Pal in respect of the proceedings to ensure that:

1) Mr Pal was given timely, accurate and complete information about the significant developments and progress in the proceedings; and

2) Mr Pal was informed:

a) that a representative of the law firm did not appear at a directions hearing held in the proceedings on 30 July 2010 and that consequently the court had made a costs order against Mr Pal;

b) whether there was any basis for Mr Pal to apply to the court to have that costs order set aside or varied;

c) that the law firm had not complied with the directions made by the court for the filing of pleadings;

d) that the proceedings had become inactive on or about 20 November 2010 and why; and

e) of the consequences of the proceedings having become inactive.

Ground 6

504 The Tribunal finds that in about July 2011, Mr Bower issued an invoice to Mr Pal which included fees charged for work undertaken in applying to the District Court pursuant to r 45 of the DCR to, in effect, order that the proceedings were no longer inactive in circumstances where the proceedings had become inactive because of undue delay by the law firm retained by Mr Pal in respect of the proceedings, of which Mr Bower was the principal.

Annexure B

Ground 1

505 The Tribunal finds that in about May 2011, Mr Bower caused two affidavits to be prepared, sworn and filed in District Court proceedings CIV 2534 of 2009 that were false and misleading in circumstances where:

a) Mr Bower knew the affidavits to be false or misleading in material respects; and

b) Mr Bower intended that the District Court be misled by the affidavits.

Ground 2

506 The Tribunal finds that in that in about May 2011, Mr Bower, swore an affidavit and caused it to be filed in District Court proceedings CIV 2534 of 2009 in circumstances where

a) Mr Bower knew the affidavit to be false and misleading in material respects; and

b) Mr Bower intended that the District Court be misled by the affidavit.

Professional misconduct

507 In serving and filing a misleading affidavit and causing affidavits which Mr Bower knew to be false and misleading to be filed in the circumstances set out in each matter above, Mr Bower engaged in professional misconduct. These were clearly breaches of Mr Bower's duty of honesty to the District Court. His conduct involved a substantial failure to reach or maintain a standard of competence or diligence. The authorities make clear the importance of honesty to the court and the extent of that duty.

508 In giving false and misleading information to Mr Pal in circumstances in which Mr Bower was attempting to conceal his and Corser & Corser's defaults from Mr Pal in the circumstances set out above, Mr Bower engaged in professional misconduct (Annexure A, ground 2 and ground 3). The authorities make clear the importance of honesty and integrity of a practitioner which extends to dealings with clients.

509 By failing to take reasonable steps as the principal of Corser & Corser retained by Mr Pal in respect of the proceedings in the District Court to ensure that the proceedings were progressed without undue delay, Mr Bower engaged in professional misconduct. The delays were caused by Corser & Corser's failure to ensure that Mr Pal was in a position to comply with the orders and timetable of the District Court. The delays were serious and consistent. The delays were entirely the fault of Corser & Corser (Annexure A ground 4).

510 By failing to take reasonable steps as the principal of Corser & Corser retained by Mr Pal in respect of the District Court proceedings to ensure that Mr Pal was given timely, accurate and complete information about the significant developments and progress in the proceedings, Mr Bower engaged in professional misconduct.

511 Practitioners have a duty to respond to client's reasonable requests for information. Mr Pal's requests were persistent and they were persistently ignored. In any event, a practitioner is obliged to keep a client informed of progress or the lack thereof (Annexure A ground 5).

512 By issuing an invoice to Mr Pal which included fees charged for work undertaken in applying to the District Court pursuant to r 45 of the DCR to, in effect, order that the District Court proceedings were no longer inactive in circumstances where the proceedings had become inactive because of undue delay by Corser & Corser retained by Mr Pal in respect of the proceedings, of which Mr Bower was the principal, Mr Bower engaged in professional misconduct.

513 Practitioners cannot charge their clients for work which has been caused by their default. To do so is a serious breach of their professional duty (Annexure A ground 6).

Orders

1. The Tribunal finds that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that in about April 2011, Mr Ronald William Bower caused an affidavit to be prepared, sworn and filed in District Court of Western Australia proceedings CIV 256 of 2010 in circumstances where:

(a) Mr Ronald William Bower knew the affidavit to be false and misleading in material respects; and

(b) Mr Ronald William Bower intended that the District Court of Western Australia be misled by the affidavit.

2. The Tribunal finds that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that in about August 2010, Mr Ronald William Bower deliberately permitted an email sent to a client, Mr Mahendra Pal, about the status and progress of the proceedings to remain uncorrected in circumstances where:

(a) Mr Ronald William Bower knew the email to be false and misleading in material respects; and

(b) Mr Ronald William Bower intended that Mr Mahendra Pal be misled about the true status and progress of the proceedings;

3. The Tribunal finds that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that between about November 2010 and May 2011, Mr Ronald William Bower sent emails to Mr Mahendra Pal about the status and progress of the proceedings in circumstances where:

(a) Mr Ronald William Bower knew the emails to be false and misleading in material respects; and

(b) Mr Ronald William Bower intended to mislead Mr Mahendra Pal about the true status and progress of the proceedings.

4. The Tribunal finds that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) between about May 2010 and April 2011

in that Mr Ronald William Bower failed to take reasonable steps, as the principal of the law firm retained by Mr Mahendra Pal, in respect of the proceedings to ensure that the proceedings were progressed without undue delay.

5. The Tribunal finds Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that between about June 2010 and November 2011, Mr Ronald William Bower failed to take reasonable steps, as the principal of the law firm retained by Mr Mahendra Pal, in respect of the proceedings to ensure that:

    (i) Mr Mahendra Pal was given timely, accurate and complete information about the significant developments and progress in the proceedings;

    (ii) Mr Mahendra Pal was informed:

        (a) that a representative of the law firm did not appear at a directions hearing held in the proceedings on 30 July 2010 and that consequently the court had made a costs order against Mr Mahendra Pal;

        (b) whether there was any basis for Mr Mahendra Pal to apply to the court to have that costs order set aside or varied;

        (c) that the law firm had not complied with the directions made by the court for the filing of pleadings;

        (d) that the proceedings had become inactive on about 20 November 2010 and why; and

        (e) of the consequences of the proceedings having become inactive.

6. The Tribunal finds that in about July 2011, Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of

the *Legal Profession Act 2008* (WA) by issuing an invoice to Mr Mahendra Pal which included fees charged for work undertaken in applying to the District Court of Western Australia pursuant to r 45 of the *District Court Rules 2005* (WA) to, in effect, order that the proceedings were no longer inactive in circumstances where the proceedings had become inactive because of undue delay by the law firm retained by Mr Mahendra Pal in respect of the proceedings, of which Mr Ronald William Bower was the principal.

7. The Tribunal finds that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) that in about May 2011, Mr Ronald William Bower caused to be filed in the District Court of Western Australia, two affidavits in proceedings CIV 2534 of 2009 which were false and misleading in material respects in circumstances where:

   (a) Mr Ronald William Bower knew the affidavits to be false or misleading in material respects; and

   (b) Mr Ronald William Bower intended that the District Court of Western Australia be misled by the affidavits.

8. The Tribunal finds that Mr Ronald William Bower engaged in professional misconduct within the meaning of s 403 and s 438 of the *Legal Profession Act 2008* (WA) in that in about May 2011, Mr Ronald William Bower, swore an affidavit and caused it to be filed in District Court of Western Australia proceedings CIV 2534 of 2009 in circumstances where:

   (a) Mr Ronald William Bower knew the affidavit to be false and misleading in material respects; and

   (b) Mr Ronald William Bower intended that the District Court of Western Australia be misled by the affidavit.

9. The Legal Profession Complaints Committee to file submissions as to penalty and costs by 31 March 2017.

10. Mr Ronald William Bower to file submissions as to penalty and costs by 14 April 2017.

11. Penalty and costs to be determined on the documents unless otherwise ordered.

I certify that this and the preceding [513] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUSTICE J C CURTHOYS, PRESIDENT