SUPREME COURT OF QUEENSLAND

CITATION:	*Jawhite Pty Ltd v Trabme Pty Ltd & Ors* [2018] QSC 174
PARTIES:	**JAWHITE PTY LTD** **ACN 106 661 287** (Applicant) **v** **TRABME PTY LTD** **ACN 154 609 159** (First Respondent) **BOEDRY PTY LTD** **ACN 154 609 882** (Second Respondent) **TRENT ANDREW RYAN** (Third Respondent) **VESTWELL PTY LTD** **ACN 106 478 808** (Fourth Respondent) **ADAM BOLAND** (Fifth Respondent) **MARK EDWARDS** (Sixth Respondent)
FILE NO/S:	S No 2310 of 2014
DIVISION:	Trial
PROCEEDING:	Application and counter-claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	20-24 March 2017, 27-30 March 2017, 15 June 2017, 29-31 January 2018, 1-2 February 2018, 5-9 February 2018, 16 March 2018
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the appropriate orders, and costs.**
CATCHWORDS:	CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – OPPRESSIVE OR UNFAIR CONDUCT –

WHAT CONSTITUTES – CONDUCT OF OR RELATING TO DIRECTORS – where the Applicant and Third Respondent contracted with the Fourth, Fifth, and Sixth Respondents to merge their respective real estate businesses – where the First and Second Respondents constituted the merged business entities – where the Applicant was a shareholder of the merged business – where the Third Respondent was a shareholder, director, and employee of the merged business – where the Applicant and Third Respondent claimed the conduct of the Fifth and Sixth Respondents, whom were also shareholders and directors of the merged business, was oppressive – where the Fifth and Sixth Respondents had terminated the Third Respondent's employment as CFO of the merged business – where the Fifth and Sixth Respondents prevented access by the Third Respondent to information relating to the merged business and that business' premises – where the Fifth Respondents arranged for the relocation of the business premises to a property beneficially owned by the Fifth Respondent – whether that conduct was oppressive – where the Applicant and Third Respondent commenced negotiations to sell their shares in the merged business – where the Fifth and Sixth Respondents required corrections to the recording of assets, namely the rent roll, before providing consent to the sale – where the proposed sale did not proceed – whether the conduct of the Fifth and Sixth Respondents in relation to the sale was oppressive –where the Fifth and Sixth Respondents requested further security and financial contributions by the Applicant and/or Third Respondent – whether these requests were reasonable – where the Fifth and Sixth Respondents' gave instructions for the use of the Second Respondent's money to pay for legal costs incurred in defending the interests of the First, Second, Fourth, Fifth, and Sixth Respondent in these proceedings – whether this use of funds was appropriate

CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERS' REMEDIES AND INTERNAL DISPUTES – PROCEEDINGS ON BEHALF OF COMPANY BY MEMBER – STATUTORY DERIVATIVE ACTION – where payments from the funds of the merged business were made to the Fourth, Fifth, and Sixth Respondents – where the payments were recorded as directors' expenses, management fees, interest payable on a loan, and other amounts – where the payments included an amount paid in respect of a boat purchase by the Fifth Respondent – whether these payments were improper payments

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – DUTIES INVOLVING CONFLICTS OF INTEREST – MISUSE OF COMPANY FUNDS – where the Third Respondent caused the Applicant, and other entities in which he had an interest, to be paid funds from the merged business – where the Third Respondent transferred monies held in trust by the First Respondent to the general account of the Second Respondent, resulting in the trust account of the First Respondent being overdrawn – where the Third Respondent then reimbursed the trust account – whether the Third Respondent misappropriated the funds of the merged business

TRADE AND COMMERCE – OTHER REGULATION OF TRADE OR COMMERCE – RESTRAINTS OF TRADE – GENERALLY where the Third Respondent engaged in transactions to sell properties, not the subject of the merged business, to potential clients of the merged business – where those contracts of sale stated the Third Respondent was to receive commission – where no commission was in fact received – whether the Third Respondent breached restraint of trade obligations in respect of the merged business

EQUITY – EQUITABLE REMEDIES – EQUITABLE COMPENSATION – OTHER CASES – where the finance facilities of the merged business were due for renewal – where the Applicant and Third Respondent refused to provide further security or capital to renew those facilities – where the Applicant and Third Respondent had obligations to do so – whether loss or damage has been suffered

Corporations Act 2001 (Cth), s 232, s 233

Harding Investments Pty Ltd v PMP Shareholdings Pty Ltd (No 2) [2011] FCA 567, cited

HNA Irish Nominee Ltd v Kinghorn (No 2) (2012) 290 ALR 372, considered

Re Spargos Mining NL (1990) 3 WAR 166, approved

Tomanovic v Global Mortgage Equity Group Pty Ltd [2011] NSWCA 104, cited

Wayde v NSW Rugby League Limited [1985] 180 CLR 459, applied

COUNSEL:	N Shaw for the Applicant and Third Respondent Each of the 1st, 2nd, 4th, 5th and 6th Respondents appeared on their own behalf
SOLICITORS:	S Nutley for the Applicant and Third Respondent Each of the 1st, 2nd, 4th, 5th and 6th Respondents appeared on their own behalf

Background

[1] Prior to January 2012, the third respondent operated a real estate agency under the Elders franchise at Redcliffe in the State of Queensland. The third respondent purchased the franchise in November 2007 through the applicant. During the same period, the fifth and sixth respondents, through the fourth respondent, operated real estate agencies at Redcliffe and Acacia Ridge under the Ray White franchise.

[2] In late 2011, the third, fifth and sixth respondents agreed to merge the real estate businesses operated by the applicant and the fourth respondent. Central to that merger was the rent rolls of the applicant and the fourth respondent. Those rent rolls remained the property of the applicant and the fourth respondent respectively, but the merged business acquired the right to manage those rent rolls.

[3] The merged business, conducted by the first and second respondents. It operated real estate agencies at Redcliffe and Acacia Ridge, under the Elders franchise commenced operation in January 2012. Some months later, the merged business acquired the rent roll of an agency conducted under the Elders franchise at Springwood. The merged business moved to Springwood from Acacia Ridge. The third and fifth respondents were based at Redcliffe. The sixth respondent was based at Springwood.

[4] Ownership of the shares in the first and second respondents was based on an independent valuation of the rent rolls of the applicant and the fourth respondent. Those valuations were determined from information provided by the applicant and the fourth respondent. After receipt of those valuations, the shareholdings were determined to be 34% to the applicant and 66% to the fourth respondent.

[5] Within the first 12 months of its commencement, differences emerged between the third, fifth and sixth respondents as to the conduct of that business. Steps were taken to address those issues. Those steps included the allocation of designated functions for the third, fifth and sixth respondents. Despite those steps, distrust continued between the respective parties. Ultimately, the third respondent was terminated from his employment with the merged business. Shortly thereafter, the third respondent resigned as a director of the first and second respondents and commenced this proceeding.

[6] Prior to trial, receivers were appointed to the first and second respondents.

Pleadings

[7] The applicant initially commenced this proceeding against the first and second respondents. The applicant's claim was defended by those respondents, who instituted a counter-claim against the applicant and third respondent. The fourth, fifth and sixth respondents were later joined as parties.

[8] In their most recent Statement of Claim, the applicant and the third respondent alleged:

(a) The fifth and sixth respondents, as directors of the first and second respondents, engaged in conduct which excluded the third respondent and the applicant from management and use of funds and resources of the merged business.

(b) The fifth and sixth respondents operated the merged business without proper regard for the interests of the applicant as a shareholder and unit holder and in order to benefit their own interests in preference to the applicant's and the third respondent's interests as a whole.

(c) The fifth respondent gave the third respondent a new employment agreement which reduced the third respondent's salary and thereafter purported to suspend, and then terminate the third respondent's employment on improper grounds.

(d) Thereafter the third respondent was prevented from attending any premises maintained by the merged business, denied access to documents and information retained by the merged business and denied receipt of any distribution, wages or return from the merged business.

(e) The fifth and/or sixth respondents failed and refused to provide relevant information to the applicant and/or the third respondent, notwithstanding requests.

(f) The fifth and/or sixth respondents refused to consent to a sale of the applicant's shares in the merged business.

(g) The fifth and/or sixth respondents purported to issue new share capital and request further security and financial contribution from the applicant and/or the third respondent without proper grounds.

(h) The fifth and/or sixth respondents caused the records of the second respondent to be altered to reflect a loan by it to the applicant when there was no such loan.

(i) The second respondent occupied other premises, notwithstanding the existence of a lease of a property beneficially owned by the third, fifth and sixth respondents.

(j) The fifth and sixth respondents gave instructions for the use of the second respondent's money to pay legal costs for the purposes of advancing the interests of the fourth, fifth and sixth respondents as against the interests of the applicant and the third respondent. Such instructions were not given in order to protect any legitimate interest of the first or second respondents in this proceeding.

[9] The applicant and third respondent claimed this conduct resulted in the affairs of the first and second respondents being conducted in a manner contrary to the interests of its members as a whole and was oppressive, unfairly prejudicial and discriminatory against the applicant and the third respondent. Such conduct was carried out contrary to duties owed by the second respondent to the applicant as a consequence of which the applicant has suffered loss and damage.

[10] The applicant also claimed the conduct of the fourth, fifth and sixth respondents was misleading and deceptive and in breach of duties owed by the fifth and sixth respondent to the first and second respondents as a consequence of which the first and second respondents have suffered loss and damage.

[11] In their most recent defence, the first, second, fourth, fifth and sixth respondents:

(a) Denied they engaged in oppressive conduct, or in misleading and deceptive conduct or in breach of any duties.

(b) Alleged the third respondent failed to perform his duties of employment, as a consequence of which he was demoted.

(c) Alleged an investigation revealed the third respondent had performed his duties negligently and was otherwise engaged in serious misconduct necessitating his suspension and subsequent termination as an employee of the second respondent.

(d) Alleged the management of the first and second respondents after the third respondent's termination, was in accordance with the unit holders' agreement and in the best interests of the first and second respondents.

[12] By way of counter-claim, the first, second, fourth, fifth and sixth respondents alleged:

(a) The applicant and the third respondent engaged in misleading and deceptive conduct in misrepresenting the valuation of the applicant's business for the purposes of creation of a merged business, resulting in the first, second, fourth, fifth and sixth respondents suffering loss and damage.

(b) The third respondent acted contrary to his director's duties to the first and second respondents and misappropriated company funds.

(c) The applicant and the third respondent re-directed company funds and misappropriated trust funds and engaged in unauthorised transactions.

(d) The applicant and third respondent acted in breach of their restraint of trade undertakings to the second respondent by inducing, soliciting or procuring business from the second respondent.

(e) The applicant and the third respondent failed to provide security in accordance with their obligations in respect of the operation of the merged businesses and failed to contribute capital and repay loans in accordance with such obligations.

[13] In reply, the applicant and third respondent denied any misleading and deceptive conduct, breach of duty or breach of contractual obligations, misappropriation of funds or any other unauthorised transactions.

Evidence

Third respondent

[14] In the latter half of 2011, the third respondent had an informal discussion with the sixth respondent about the market and their businesses in general. They briefly discussed a

possible merger of their real estate businesses. The sixth respondent said his business partner, the fifth respondent, was in Redcliffe that day. The sixth respondent returned to the third respondent's office later that day indicating interest in a merger.

[15] The third, fifth and sixth respondents had a number of meetings. It was clear the businesses were similar. An agreement in principle was reached to merge businesses. The merged business would have offices at Redcliffe and Acacia Ridge. Internally, there would be a manager of sales, a manager of property management within Redcliffe and a manager of the Acacia Ridge office. It was agreed the merged business would operate under the Elders franchise.

[16] The third respondent scheduled a meeting with his solicitor, Rod Holloway and his accountant, Peter Di Tommaso. Holloway suggested a separation between the licensed entity and the operating entity in order to keep assets away from liabilities. The licensed entity would hold the corporate license and be the franchisee. That entity was the first respondent. The operating entity was the second respondent.

[17] The third, fifth and sixth respondents agreed that for the first three months, the merged business would employ all employees of the previous businesses, to ensure continuity of staff, particularly in property management. The third respondent's wife, would continue to do some work in the merged businesses. The third respondent's salary would be split between the third respondent and his wife, for taxation purposes. The third respondent said this arrangement was beneficial to the merged business. His wife was undertaking 15 to 20 hours work, particularly in relation to family properties owned by the third respondent's wife and members of her family, without receiving any additional wages. . Both the fifth and sixth respondents agreed that arrangement was fine.[1]

[18] The third, fifth and sixth respondents agreed the merged business would take on the liabilities of the previous businesses for equipment to be used in the merged business. The fourth respondent owned all of the possessions in its office. The applicant owned all of its possessions, apart from a photocopier. The third respondent did not believe the merged business would therefore need finance requirements for office equipment or fit out. There was a discussion about vehicles. Both the fifth and sixth respondents were leasing their vehicles. It was agreed the merged business would pay for fuel, insurance and servicing of the vehicles, but not leasing requirements.[2]

[19] In November 2011, the third respondent was emailed a spreadsheet listing the financial commitments for the fourth respondent so that a proposed cash flow could be sent to the National Australia Bank and Westpac Bank for their lending consideration for the merged business. The third respondent discussed the contents of the spreadsheet with the fifth and sixth respondents prior to the merger. The third respondent subsequently found out there were other agreements being met out by the second respondent. The third respondent never authorised payment of these additional agreements.

[20] After the discussions were completed, the third respondent instructed Holloway to prepare documents for acceptance by the fifth and sixth respondents. Those documents

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1 T1-67/24.
2 T1-70/15.

included a management agreement for the first respondent to manage the rent rolls of the applicant and the fourth respondent. This procedure was to prevent the need for new management agreements, negating capital gains tax implications from the transfer of the rent rolls and any associated stamp duty costs. The management agreement prepared by Holloway, was sent to the legal representatives for the fifth and sixth respondents, Wallace Davies Solicitors. The document was adopted without any changes.

[21] The third respondent signed a lot of documents at the time, but could not specifically remember signing the management agreement. Holloway also prepared a shareholders agreement for the second respondent, which was sent to the fifth and sixth respondents' solicitors. The third respondent believed it was signed by all parties towards the end of December 2011. There was also prepared a unit trust deed, a unit holders' agreement and constitutions for both the first and second respondents.

[22] Both the applicant and the fourth respondent used the same valuer, Gil Wright & Associates, to value their respective rent rolls. Gil Wright provided separate valuations for the fourth respondent's rent rolls at Redcliffe and Acacia Ridge, for the applicant's rent roll at Redcliffe, and for the proposed merged rolls. This latter valuation was sought because a merger of the entities would result in savings in business expenses. After receipt of these valuations, it was agreed the shareholding ratio for the merged business would be 34% to the applicant and 66% to the fourth respondent.

[23] The applicant and fourth respondent had current liabilities with Westpac and the National Australia Bank respectively. The third, fifth and sixth respondents agreed to use Westpac as financier for the merged business, which borrowed $1.8m, using the rent rolls of the applicant and the fourth respondent as security. There was a requirement for the parties to provide additional security. The third respondent provided his residence as security.

[24] Two separate loans were established, one for $1.2M and another for $600,000. There was a benefit in having some of the money fixed and the balance variable. Of the money advanced, $1.2m was paid to National Australia Bank on account of the fourth respondent, and $600,000 was paid to Westpac on account of the applicant. The applicant used its money to pay down its overdraft facility. The fourth respondent used its money to repay a commercial bill facility.

[25] The merging of the separate rent rolls had to be undertaken mechanically before the commencement of the merged business, as the applicant and the fourth respondent used different management software programs. Staff were located in the Ray White Redcliffe office from late November / early December 2011, to manually enter the applicant's rent roll into the software program. By the start of the merged business, one software program was being used to manage the combined rent rolls.

[26] The merged business commenced operation on 2 January 2012. The third, fifth and sixth respondents agreed on each being paid $75,000 per year together with $5,000 per annum director's expenses to cover home or out of office expenses. Those payments were initially made into the parties' personal accounts, despite the payments being made under a contractor invoice from the applicant and the fourth respondent to the merged

business. Due to the tax implications of that arrangement, the contractor arrangement ceased towards the end of 2012. Thereafter, they were paid as employees.

[27] Each director had their own individual responsibility for parts of the merged businesses. Whilst hiring of staff was a joint responsibility of the third, fifth and sixth respondents, the decision to hire staff on a replacement basis was more or less within their respective area of responsibility. All financial and management decisions would be made by the board of directors.

[28] The initial arrangement lasted until approximately May 2012, when the merged business agreed to purchase the rent roll of Elders Springwood. The purchase price was again set after a valuation of the rent roll by Gil Wright. The third respondent's responsibilities shifted to include management of that process. After settlement of that purchase, in August 2012, the third respondent undertook responsibility for sourcing new premises for the merged Acacia Ridge/Springwood offices. At this time, the fifth respondent moved into having responsibility for both sales and property management at Redcliffe. The sixth respondent was licensee of the merged Springwood and Acacia Ridge offices, overseeing sales, property management and all staff matters.

[29] In about June 2012, the merged businesses contracted to purchase a property at 303 Oxley Avenue Margate. The fifth respondent suggested its purchase. The property fitted their requirements. It had a 22 car park at the rear, would fit the merged business and was on a prominent road, increasing the potential for signage. The third respondent conducted all negotiations with the vendor. The third respondent subsequently executed a lease on that property with the merged business,[3] both as landlord and as tenant. Neither the fifth or sixth respondents were in the office, and the lease needed to be returned to the bank. The fifth and sixth respondents were given copies of the lease. They discussed the rent to the paid for the term of the lease. It was to remain fixed for that term. The administration of the merged business was to be run out of that central location.

[30] To purchase the property, the third, fifth and sixth respondents formed a corporate superannuation fund. The third respondent had responsibility for the fit-out of those new premises and ensuring it was ready for operation at the time of the planned move from their old Redcliffe premises between Christmas 2012 and New Year 2013. The third respondent also undertook responsibility for the administration of financials during that period. At that same time, the fifth respondent's responsibilities increased to include property management and sales for both Redcliffe and Springwood. The sixth respondent remained as licensee overseeing sales of Springwood.

[31] In September 2012, Sandy Dartnall, who had administered the accounts since commencement of the merged business, provided the third respondent with a folder of information. Within that folder were agreements for a number of fourth respondent equipment hires, which had not been disclosed to the third respondent. Dartnall told him the fifth respondent had told her to set up the direct debits. These amounts were not included in the cash flow projections provided to potential financiers.

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[3] Exhibit 150.

[32] The third respondent raised these amounts with the fifth and sixth respondents. He was told if they were not in the agreed amounts, to put them on their director's account. Dartnall was instructed by the sixth respondent to keep a spreadsheet of those amounts. That spreadsheet was never produced to the third respondent, or recorded in MYOB. The third respondent made complaints about this all through 2012 and 2013. It was agreed the fourth respondent would repay back to the second respondent, a total of $36,226.56. A cheque for $33,000 was paid. The balance was still outstanding.

[33] Around the start of September 2012, at the time of the merger of the Acacia Ridge and Springwood rent rolls, Sandy Dartnall was spending more time in those offices to assist in that merger. The third respondent saw the need for someone to take control of the financials of the business. He took over that responsibility. When he did so, there was not one bank reconciliation that matched MYOB transactions to the bank statement. Cheques did not appear in MYOB. An accountant came to the same conclusion.

[34] The financial administration of the merged business had been a complete mess. The property management records were not up to date or current. It was a near impossible task to determine the actual cash flow and the position of the business. They were provided with no financial reports. The only way to keep track of its performance was by looking at the bank account for the first six months. An audit had revealed the merged business had lost management of a number of rental properties.

[35] The third respondent set about trying to correct the records. It required a rebuild of the MYOB accounts. It caused significant problems with the BAS period in September 2012. By April/May 2013, the accounts were beginning to reflect the true position of the business. The third respondent was sending each director a profit and loss statement for each month as well as quarterly reports from the end of December 2012. Westpac as their financier required a number of reports within 28 days of the end of each BAS period, including full financial status of the rent roll profit and loss for the year.

[36] The third respondent's understanding was that anything that would have a financial implication on the business and change its projected cash flow had to be a unanimous decision between all directors and unit holders. That was in accordance with the written agreements. However, a number of sales staff were employed without input from the third respondent. The third respondent was concerned at this time because during the merger of the two offices at Redcliffe some management of properties had been lost. He could see the same thing happening at Springwood. They were carrying all of the staff from the Acacia Ridge office and Elders Springwood. The merged business was currently operating outside of the benchmark for real estate businesses in terms of salaries for property management.

[37] The third respondent raised his concerns with the fifth respondent in early 2013. The fifth respondent believed it was all about cost for value. The third respondent's position was that the business had to work within its limitations. The merged business was not "exactly swimming in money".[4] On a number of occasions, the fifth respondent gave members of staff a wage rise. The third respondent would find those increases had been granted when staff made complaints of being paid incorrectly. The third respondent

[4] T2-15/32-33.

was at that stage processing the payroll. The third respondent did not agree with the wage rises. Wage increases should have been joint decisions.

[38] In late 2012, the fifth respondent used funds from the second respondent to purchase a boat. The third respondent spoke to the fifth respondent in January 2013 about recovering those funds. The fifth respondent said he would repay the sum advanced, less $5,000 to represent his director's expenses. The fifth respondent said the sixth respondent had no issues with that and he had "all voting rights moving forward" for the sixth respondent.[5] The sixth respondent never told the third respondent he had given his voting rights to the fifth respondent.

[39] Whilst the third respondent had no objections to the business advancing the money for the boat initially, he objected to the fifth respondent not repaying the whole sum back. The fifth and sixth respondents had already claimed the $5,000 agreed between the parties as a yearly director's entitlement as part of personal expenditure claimed from the business in its first calendar year. Some $15,000 to $17,000 was allocated in MYOB as being spent on directors' expenses by the fourth respondent. It was allocated in MYOB against the fourth respondent's loans.

[40] After the MYOB accounts had been rebuilt, towards the end of 2012, the third respondent sent a spreadsheet to the other directors in relation to directors' expenses. He also sent a spreadsheet towards the start of 2012, setting out pre-merged commissions for each office, as well as a list of set up costs on top of the normal operation costs. He sent numerous emails in relation to directors' expenses. He was concerned monies were being used for personal use.

[41] In an email dated 9 March 2013, the fifth respondent asked whether the third respondent wanted the matter evened up "through the directors' payments?"[6] The third respondent subsequently allocated a sum of $3,136 to himself. The bookkeeper made that entry, after discussions with him. He indicated it should be entered as director's equalisation payment. The bookkeeper entered it as franchise fees.

[42] In January 2013, there had been discussions about restructuring the management roles so that staff had an identifiable reporting structure. A staff survey had raised significant issues in the conduct of the merged business. The survey idea originated from the fifth respondent. It was carried out by an independent officer of Elders. All staff members were asked a series of questions. Elders collated those responses on an anonymous basis. Many negative issues were raised about the third, fifth and sixth respondents.

[43] The third, fifth and sixth respondents met with Allan Dawson, the State franchise manager for Elders Real Estate, and Brendon Whipps, the National franchise manager, in March 2013. The March meeting arose as a means by which Elders could assist a mediation type process to resolve internal management issues. The meeting lasted about 40 minutes. The third respondent did not know the meeting was being recorded by the fifth respondent on his telephone. He accepted the transcript was "pretty accurate".[7]

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5 T2-24/30.

6 T5-57/30 [Exhibit 98].

7 T2-34/12-15.

[44] The third respondent was unhappy the meeting had been recorded by the fifth respondent. He did not think it was the right thing to do. In any event, what was said at the meeting had no bearing on what was to be done going forward. The third respondent felt he had received a dressing down from the fifth respondent. His body language "would have been a true reflection of [his] thoughts of the meeting".[8] His response to Whipps' questions were in not consistent with his thinking at that time. However, he did not say anything at the meeting to indicate these were his thoughts.

[45] The third respondent thought the meeting was a set up by the fifth respondent, who had previously spoken to Whipps and Dawson about specific issues within the business. An issue raised by Whipps in the meeting was processing of pays. None of that had been part of the survey in terms of performance. The third respondent took the meeting to be an attack on his ability. He thought the sixth respondent had the same feelings. The third respondent did not think it was Whipps' place to tell them what to do.

[46] One of the reasons he was angry was that the meeting was all about the staff and not about the directors and unit holders. The third respondent accepted he was recorded as saying the message to be given was that there was a united front, with the directors to present how the business would be structured so that everyone knew who to report to, what their duties were and where the business was heading. However, at no stage did the third respondent agree there was going to be one person.

[47] Whilst Whipps expressly said at the meeting "if you don't want one decision maker, now is the time to have the conversation", to which the third respondent responded "okay, well, yeah," they were to go away and formulate a management plan. His agreement was responding to that proposal, not one decision maker.[9] Even if there was one decision maker in terms of how the business operated internally, there was still a need for a structure. That was what needed to be agreed in the next seven days.

[48] A difference of opinion arose between the third and fifth respondents as to the true outcome of that meeting. The fifth respondent interpreted the outcome as being an agreement that one person would have all the say in the business. That was in accord with Whipps' suggestion at the meeting. The third respondent disagreed with that approach. It was not consistent with the unitholders or shareholders agreements. The fifth respondent took it upon himself to prepare a proposed structure. The third respondent agreed to go ahead with the process as the issues needed to be sorted out.

[49] In April 2013, the third, fifth and sixth respondents met to discuss a structure. The fifth respondent asked the third and sixth respondents whether everyone was still wholeheartedly 100 percent behind the business. They each answered yes. The third respondent was surprised as he expected the sixth respondent to say he was ready to sell.[10] By that stage, the third and fifth respondents had communicated regularly about different structures and different cash flow positions. A cash flow was handed to each person. There were job descriptions for the CEO and CFO positions.

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8 T2-36/15.
9 T7-50/45.
10 T2-29/25.

[50] All three agreed that a structure would be taken on board and used for the business. The fifth respondent was to assume the position of CEO on a salary of $115,000 per annum. The third respondent was to assume the position of CFO on a salary of $85,000 per annum. The sixth respondent would become the sales manager at Springwood, to be paid on a debit/credit basis where he would receive a wage together with bonuses for sales performance. Superannuation was to be on top of each of those salaries.

[51] The third respondent provided a template for duties for a CEO which he obtained from a job placement website. Part of the role of CEO was employing and terminating staff, but the CEO had to operate within the unit holders' agreement. Adding new staff and replacement would still need all directors to agree. The position did not give the CEO unilateral financial control of the business. The third respondent's recollection was that it was actually discussed that this duty was still subject to the requirement that every director agree.[11]

[52] After the third, fifth and sixth respondents commenced to work in their new position descriptions, they were paid the newly agreed salaries. The third respondent discussed with the fifth respondent the need to trim excess staff. The third respondent was concerned that by the end of May there would not be enough money to pay the BAS and superannuation liabilities for the first quarter. His concerns were confirmed by a financial health check undertaken by an independent firm, Haines Norton, in May 2013. Their recommendations "were nearly exactly the same".[12] None of these concerns were being addressed in the business.

[53] The third respondent had tabled a number of financial considerations at the April meeting. People needed to be removed and other staff placed on a sales commission basis. Those financial considerations were not discussed then as the fifth respondent closed the meeting. The third respondent thereafter requested numerous meetings between the directors. All of those requests were disregarded by the fifth and sixth respondents. There was always an excuse as to why a meeting could not be held between them.

[54] After the fifth respondent commenced as CEO, the fifth respondent prepared a proposal for a financial health check by the independent firm, Haines Norton. That proposal, sent by email dated 7 May 2013, contained different duties to those agreed to by the third, fifth and sixth respondents at the meeting in April 2013. The email set out duties that were part of the duties in the previous proposal for the CFO. The third respondent undertook some of the duties under the title of 'operations manager'.

[55] By May 2013, the third respondent was in negotiations with Mark Gibbons to buy the applicant, thereby acquiring its shares in the merged business. The third respondent was introduced to Gibbons by the fifth respondent in late 2012. At that time, the third respondent understood the sixth respondent's share of the business would be bought by Gibbons, who would be a passive investor. The fifth respondent said the sixth respondent did not want to be part of the merged business. The third respondent never spoke to the sixth respondent about his position at that time.

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11 T7-52/24.

12 T2-42/3.

[56] The third respondent advised his bank of the possibility of the sale of the applicant, in an email dated 19 May 2013, raising the transfer of personal securities.[13] This email was sent at the start of negotiations. The third respondent believed an agreement would be reached in terms of price and contractual arrangements. On that basis, the third respondent suggested to the fifth and sixth respondents that he would not attend a planned meeting to be held on 31 May 2013.

[57] In the middle of May 2013, the third respondent was removed as CFO by the fifth respondent who said he would no longer be paid that salary. If he wished to remain working in the business he would be employed on a debit credit sales person basis, being paid $45,000 per year. The fifth respondent said the third respondent was being removed as CFO as he was not performing the role correctly. The BAS had been recorded incorrectly and there were many issues in relation to staff being paid incorrectly.

[58] It was alleged the third respondent had lodged an incorrect BAS statement for the first quarter. The third respondent said the BAS statement was lodged through the accountant's office. The third respondent accepted the financial health check had raised a suggestion the BAS may have been incorrect but said he was never told in what way it was actually wrong. He had a discussion with their bookkeeper. He contended the MYOB records correctly recorded those items. The bookkeeper said they had not been recorded correctly. All of these conversations occurred after his removal as CFO.

[59] The payroll issues stemmed from the third respondent not being made aware of changes to salary arrangements. Staff were being employed without a signed employment agreement. The third respondent was not being told the basis for that employment. He was required to obtain the necessary details to allow payment through MYOB. It made his position impossible in terms of paying staff correctly or at all. He had raised these concerns with the fifth respondent who disregarded them.

[60] The third respondent told both the fifth and sixth respondents the decision to remove him as CFO was not fair and there was no justification. Even if there were a litany of underpayments, or no payments, and significant errors in the BAS lodgements and activity statements, it was not proper for the fifth and sixth respondents to remove him as CFO. A number of those errors were out of his control. They were not his mistakes. The third respondent expected they would follow the normal path of talking to an employee about performance. That was what had been done with all staff in the merged business previously. The third respondent was not afforded that opportunity.

[61] Despite that indication, in the second last week of May 2013 the third respondent was sent a new workplace agreement by which he was to be employed on a debit/credit sales basis on a salary of $45,000 per annum. He was told if he did not sign that agreement he would not be paid. The third respondent refused to sign the workplace agreement. In his view, all three directors had to agree on directors' workplace agreements. He sent back an amended agreement. Terms were never agreed and he did not ever sign a workplace agreement. After two weeks he was paid again on the basis of a salary of $45,000 per year. He did not ever agree to receive that reduction in salary. That salary

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[13] Exhibit 137.

did not include any payment to the third respondent's wife. The fifth respondent banned her from working in either of the offices at the start of May 2013.

[62] The third respondent told the fifth respondent he was forcing him to get a second job, which he did in the first week of July 2013, working for a house builder selling new home builds. The fifth respondent said "two-thirds of the company had voted this way and that's what was going to happen."[14] The third respondent said that was not the way the business was to be conducted by them. The fifth respondent replied the majority had spoken. The fifth respondent adopted the same approach to the sixth respondent, who was placed on a commission only agent basis. The sixth respondent complained about that position towards the end of May 2013. The fifth respondent indicated the sixth respondent had agreed to the new arrangement.

[63] By email dated 24 May 2013, the third respondent expressed his dissent to the proposal that all financial decisions be made by someone without unanimous support of all directors. As a business owner, he was not happy with that scenario. If someone wanted to make all the decisions, they could be the sole owner and buy him out under his terms. At the time that email was sent, his pay had been stopped the previous day. After that email the fifth and sixth respondents came back to try and assist in the sale of his shares.

[64] The third respondent would not sell to the fifth or sixth respondents. He made a threat that if the share sale to Gibbons did not go through, there would be dire consequences for the merged business, including the fifth and sixth respondents. The threat included withdrawal of his security, which could have caused the company to fail. He was protecting his family at that stage. The security could have been replaced at the bank.

[65] The third respondent also made a threat to terminate sales people who worked for the merged business. Most of the sales people by that stage had been employed without his knowledge. Whilst he believed the hiring and firing of employees was to be by a unanimous decision of directors, he was entitled to threaten to terminate a volume of the sales force because the business was not meeting its financial commitments and some action needed to be taken immediately. He had an entitlement to terminate the staff, without giving notice, because they were all within their probationary period.

[66] The third respondent agreed he was at that time asking for more money himself. He was only asking for the same level of money as was paid to him previously. He accepted that in an email at that time he had indicated that "what staff think is of little consequence to me". Those staff did not have to make financial decisions for the business. They did not have directors' financial exposure. His house was on the line.

[67] The third respondent later received a copy of a signed workplace agreement for the fifth respondent from Sandy Dartnall, asking the third respondent to sign off on it. It included two bonus payment structures. One was based on revenue generated through sales commission, the other through property management fees. The third respondent refused to sign the fifth respondent's workplace agreement. He sent an email indicating he completely opposed it. It did not make sense financially for the business at that time. The contents of that agreement had not been discussed or agreed to by directors. He

[14] T2-46/20.

only discussed and agreed on the terms of the salary. There was no discussion about bonuses.

[68] The third respondent did not get a chance to see that workplace agreement before it was signed by the fifth respondent. He was not consulted for his input in relation to that agreement, or the agreements for himself and the sixth respondent. The third respondent did not ever pay any of the bonuses to the fifth respondent in accordance with that agreement. He had been removed from the position as CFO. Dartnall was processing all pays at that stage. He does not know if bonuses were paid to the fifth respondent.

[69] The third respondent subsequently saw the sixth respondent's workplace agreement. It had been signed by the sixth respondent. It was in line with what had been the financial considerations discussed between the parties. The third respondent never agreed to the sixth respondent being employed on this basis. He would have been agreeable to it had all other financial considerations that were agreed in April been met.

[70] The third respondent constantly asked for a directors' meeting to discuss the directors' workplace agreements. By late May or early June 2013 this was a priority. No meetings ever occurred as they were continuously postponed, with the fifth or sixth respondents not making themselves available. There was never a directors' meeting at which those arrangements were approved by the directors.

[71] In June 2013, a dispute arose with Dartnall who contended gross wages included superannuation. The third respondent said superannuation was on top of the gross salary figure. Subsequent to this dispute, there was a meeting of the directors on 18 June 2013. By that time, the third respondent had reached what he understood to be a concluded sale agreement with Gibbons, who was to buy the applicant. At this meeting, the fifth and sixth respondents both said they would give their permission for the sale to Gibbons. The franchisor had already given permission, as required in the franchise agreement.

[72] A share sale agreement was prepared as was a restraint of trade document. The third respondent's entities would receive around $330,000 for the rent roll component. After plant and equipment and restraint of trade was taken into account, the sale price was around $400,000.[15] That price was working on a 2.35 multiplier. It was reduced from 2.5 following due diligence by Gibbons. There was to be an adjustment to allow for the third respondent to contribute $8,000 for the applicant's share of an outstanding tax liability of the second respondent, from the first BAS quarter. There was no discussion about a $600,000 loan to the applicant from the second respondent.

[73] The deed of restraint document was signed in July 2013. His solicitor sent it to Gibbons' legal representative. The third respondent's entity "Sport be in it", did not receive any compensation for signing the deed of restraint agreement. It would have received $20,000 by way of consideration for that restraint, as part of the purchase price. The restraint applied both to the third respondent, and his wife.

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[15] T4-11/31.

[74] On 13 August 2013, the fifth respondent sent a notice suspending the third respondent's employment with the second respondent. The third respondent responded that there was no power to suspend him. By subsequent notice, the third respondent was informed of the termination of that employment. After his termination, he no longer had access to the MYOB file or to any other business records of the first and second respondents. He was denied access to emails and to the premises. He was paid only some of his outstanding superannuation. He was owed leave entitlements.

[75] The notices of suspension and termination raised a number of issues in relation to the third respondent's work performance and other conduct. The fifth respondent accused the third respondent of having committed a criminal act, relating to a contract for the sale of a property at Prince Edward Parade, Redcliffe. It was alleged the third respondent obtained a financial benefit from that sale at the expense of the second respondent. The third respondent denied ever receiving a commission for the sale of that property.

[76] The third respondent said during an inspection of a property he had listed for sale at Margate, a potential buyer indicated they were not interested in that property, but were looking for an apartment. The third respondent was aware of an apartment at Prince Edward Parade, Redcliffe. The owner was a friend. The third respondent contacted the owner. The prospective buyers went through the property and made an offer. The vendor wanted $815,000 in the hand. He told the third respondent he could charge whatever commission he wanted on top of that, but if he did not achieve the price, he was not in a rush to sell.

[77] The third respondent spoke to the buyers. They would not pay a cent above $815,000. Ultimately, the buyers and vendors alone came to an agreement about price. Documents were signed and the property proceeded to settlement. The third respondent accepted he was listed as the agent on the contract. He had prepared an Appointment to Act document, hoping he would be able to sell it and obtain commission. However, no commission had been paid and all proceeds for the sale were forwarded to the seller. The third respondent said he obtained email confirmation from the conveyancers that no commission was payable.

[78] The fifth respondent also accused the third respondent of failing to perform his duties properly in relation to a dispute the fourth respondent had for an equipment agreement with Quick Fund. A credit default notice had been given to the fifth and sixth respondents. The fifth respondent alleged the third respondent had falsely indicated to them he would rectify the dispute and had engaged solicitors for that purpose. The third respondent said he sought some advice from Holloway but never told the fifth respondent that Holloway was acting on behalf of the fourth respondent.

[79] The fifth respondent also accused the third respondent of having misrepresented the size, quantity and quality of the applicant's rent roll prior to the merger with the consequence that the applicant had improperly received a greater share of the merged business. Properties had been included on the rent roll which did not have management agreements or which did not generate management fees.

[80] The third respondent said Gibbons' due diligence of the applicant's rent roll identified 41 clients who were found not to have management agreements. The merged business had been collecting fees from those properties over the previous 18 months. New agreements were sent to those clients, who were still clients of the merged business. By 20 August 2013, all but five or six had returned those new signed agreements. Of the remaining clients, four were overseas and two were on holidays within Australia. All indicated they would sign when they returned back home.

[81] The third respondent said when the applicant first purchased its business in 2007, he did not check whether all management agreements were there. Part way through ownership of the business, he employed some high school students to transfer the paper based records into an electronic format. They did not get it "100% right".[16] They did not tell him of any properties where there were no management agreements. It was not until June 2013, when due diligence started for Gibbons' purchase, that he became aware there were properties that did not have management agreements.

[82] The properties identified as not generating management fees were family properties. When Gil Wright was preparing its valuation, the third respondent gave its employee a printout of a list of vacated properties. He also spoke to her about properties that were not collecting fees. That employee came back later for a print out for every rental transaction for November 2011. She matched those figures to the bank account to make sure the management fee on that report matched the income going through the bank account. The properties on the rent roll that were not generating management fees and were not vacant, were family properties. They were highlighted in that November report. There was the property address, the rent paid and beside it $0 in terms of management fee collection. That report was included in the valuation document.

[83] As a result of these discrepancies, the fifth respondent requested 1.75% of the applicant's shareholding be transferred to the fourth respondent, without any exchange of money, before any sale to Gibbons. The third respondent asked whether the fourth respondent had any missing management agreements. The third respondent knew there were missing management agreements and that there were others that had not been completed correctly. The third respondent was never given information about the true position from the fourth respondent's side.

[84] The agreed sale to Gibbons did not proceed despite the initial verbal consent of the fifth and sixth respondents. The original support for the sale of the applicant's shares to Gibbons was withdrawn in August 2013. The fifth and sixth respondents' decision changed around 13 August 2013. On that date, the fifth respondent indicated that any sale which unfairly saddled him with liabilities and commitments would not be the subject of agreement. The fifth respondent was making a lot of accusations and was not prepared to accept the third respondent's answers to those allegations.

[85] The third respondent received the final version of the agreement. Gibbons had signed the document. The third respondent did not sign the document. There were no further discussions with Gibbons. There were discussions between the third, fifth and sixth respondents about de-merging the businesses. The third respondent did not think it was

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[16] T3-11/35.

possible. There were many outstanding issues in the demerger proposal. It was proposed the rent rolls would be split, based on unit holding. The third respondent saw a problem. There were a lot of variables. The easiest solution was a sale of his interest to Gibbons. It was the quickest way to get stability.

[86] The third respondent had been given the opportunity to purchase the shares of the fifth and sixth respondents for a sum less than he was prepared to take from Gibbons. He rejected that offer. He did not write back at any stage to offer a de-merger. He was still negotiating with Gibbons who signed the share sale agreement on 20 August 2013. He did not know at that stage the fifth and sixth respondents were refusing to consent to the sale of the shares to Gibbons.

[87] One week after the third respondent's termination as an employee, he sent a letter resigning as a director of both the first and second respondents. The letter, dated 23 August 2013 but signed on 28 August 2013, gave no reason for resigning as a director. The third defendant did not think it was prudent to remain a director when he no longer had any influence over the decisions made in the merged business.

[88] Subsequent to his termination, the fifth and sixth respondents accused the third respondent of misappropriating funds from the merged business. The third respondent recalled generating an invoice for $1,435, paid by the second respondent to the applicant. It was to reimburse advertising fees paid by the applicant prior to the merger. That amount was incorrect, as was the purpose. The amount should have been over $1,800 in repayment of deposits made by the applicant to Crown Pools in respect of a property that was a mortgagee in possession sale.

[89] Some other payments made to the third respondent were monies due to Mark Andrew, a friend who previously owned Re/max. Andrew worked at Elders Redcliffe when it was owned by the applicant. During that period, the third respondent lent Andrew money to meet day-to-day living expenses whilst Andrew was going through a sale of his business and health issues. The third respondent put him in a unit and paid his rent. He also paid medical and other expenses. All of these expenses were paid prior to the merger of the businesses. At the time of trial, Andrew owed the third respondent close to $40,000.

[90] Mark Andrew had an employment agreement with the applicant, as a commission only sales agent. He continued to work as a commission only agent within the merged business. He did not complete an employment agreement with the merged business. None of the sales agents completed new agreements. They continued under the old agreements within the merged business. There was no meeting of the unit holders in which it was agreed to employ Andrew. There was no meeting about any sales staff.

[91] Mark Andrew had a real estate agent's license. That license had conditions on it as he was a current bankrupt. Andrew was not allowed to operate a trust account. His license was in the office window and had that condition on it. The third respondent believed Andrew was operating under an ABN and would have invoiced any payments. Business cards were ordered for Andrew as part of the merged business. Andrew attended the office of the merged business. He was mentioned as 'no ongoing costs' in the cash flow

forecast as he was a commission-only agent. The percentage of commission he was entitled to was written as 60% beside his name.

[92] Andrew secured a listing for the auction of a property at Scarborough. Commission was payable by the Public Trustee pursuant to a signed Appointment to Act. Some of that commission was paid as a listing for Andrew. That amount, $6,000, was paid from the second respondent's account into the third respondent's account, in repayment of Andrew's debt. Andrew said "Trent, just pay it into your account".[17]

[93] The third respondent accepted there was a difficulty with that arrangement, in that the amount paid to Andrew would have been subject to tax and being disclosed to the Australian Taxation Office, but instead was paid directly to the third respondent in a personal arrangement between him and Andrew. The third respondent did not, at any stage, receive any kind of invoicing from Andrew for that work.

[94] A similar arrangement occurred in respect of commission owed to Andrew for a property at Biarra Street. After the settlement of that property, the third respondent processed a claim for commission based on an invoice dated 18 May, 2012. He thought there was $6,000 in the trust account by way of deposit, which could be used for the commission. He transferred $6,000 from the trust account. In fact only $5,000 was being held in trust. A reconciliation revealed the $1,000 discrepancy. It was transferred from the general trading account. None of that amount was paid into the third respondent's account or the accounts of related entities.[18]

[95] Andrew was also appointed to sell three properties in Anzac Avenue, Redcliffe. The contracts involved call options. The third respondent never received commission on that sale.[19] The transactions never proceeded to settlement. The fifth respondent made a complaint to the Office of Fair Trading alleging a secret commission had been paid to Andrew. The complaint was dismissed by that Office.

[96] There was also a payment of $4,000 to an entity called "Aeolus". It was paid in error. It was brought to the third respondent's attention by the fifth respondent, after the third respondent's termination as an employee. The third respondent could not do anything to fix the transaction at that stage, as he did not have access to the financial records. The third respondent was a shareholder of Aeolus, and it was set up under his banking arrangement. He paid other amounts to it from time to time from his own accounts. That payment, on 3 October 2012, was intended to go to a contractor about to commence work on the fitout of the new Margate office. The payment was for gyprock. The contractor completed the work, but did not ever bring up payment. He was named 'Ted'. The third respondent did not know his last name. He did not have any of the invoices he had received from Ted. The third respondent did not think he had actually been invoiced until after the delivery of that material. The third respondent accepted he had previously said an invoice had been given to him in advance.[20] The bank details for 'Ted' may have been in his bank profile, if he already had the invoice.[21]The third

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17 T3-15/40.
18 T3-31/45.
19 T3-28/25.
20 T7-18/30.
21 T7-20/15.

respondent arranged for a few contractors to undertake the work. He obtained their bank details up front and put them into the system. Aeolus never raised that payment.

[97] There was another trust account transaction involving $855 in cash. Andrew asked if he could be advanced money against a forthcoming commission. The third respondent gave Andrew $855 cash he had received from a client in payment of rent. A cheque was drawn to replace that cash into the trust account. The third respondent reflected he should not have undertaken that transaction. He provided instructions by email for the bookkeeper to make the MYOB entry as a contractor payment. The third respondent accepted a contractor needed a signed employment agreement.

[98] There was another transfer to the third respondent's entity, "Sport Be in It", for $1,104, in March 2012. It was repayment of a franchise fee owing to the applicant. At the time of the merger, the applicant's franchise account with Elders was in credit. Elders had transferred the amount across to the first respondent at his request. The third respondent obtained confirmation from Elders as to the outstanding fee. The sum of $1,104 represented a combination of the transfer for $636 and the benefit of the difference taken up by the new business.[22] The third respondent discussed the reimbursement with the fifth and sixth respondents.

[99] There was a further transaction where $3,136 was paid to the third respondent and recorded as a franchise fee. The third respondent undertook that transaction in December 2012, in order to equalise the payments of $5,000 director expenses received by the fifth and sixth respondents. The third respondent spoke to both the fifth and sixth respondents about that equalisation. Neither disagreed with it. The bookkeeper incorrectly reported it as a franchise fee. It should have been allocated against director expenses.

[100] There were other payments made around this time in repayment of monies owing to the applicant, or by way of superannuation. The third respondent processed some of those payments. Dartnall processed the other payments on his instructions. He gave her the account number and explained the situation.[23] In 2012, all internet payments were made using his customer token.

[101] The third respondent did not arrange for any repayment of those monies. By that stage, there was ongoing dispute and animosity between the parties. The first and second respondents were entitled to the return of the money, but he was owed wages, superannuation and other monies.[24] The third respondent accepted he alone made the determination he was owed those monies. He took a claim to the Fair Work Ombudsman that he subsequently withdrew without a determination.

[102] The third respondent also listed a property at Deception Bay for old friends. He did not sell it as his employment was terminated during the listing period. The fifth respondent refused to transfer it, despite written authority from both sellers. The property was sold

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22 T7-23/15.
23 T6-102/30.
24 T7-20/40.

by Harcourts Redcliffe. The principal of that business was an old friend of the seller. Harcourts Redcliffe collected the commission.

[103] The third respondent denied ever asking clients to take business away, or ever attempting to take business away from the merged business. Whilst a number of properties changed management agreements after he left his employment with the second respondent, he did not ask any of the owners of those properties to take management of the properties away from the second respondent. All were properties that had been on the applicant's rent roll prior to the merger. All were earning commissions. He thought all of them were subject to a written management agreement.

[104] After his resignation as a director, the third respondent saw financials for the second defendant, which indicated a number of loans with the National Australia Bank. At no time whilst he was a director of the second respondent, did he sign any application forms for a loan with that Bank. These accounts also revealed loan accounts for the applicant and the fourth respondent. Those loan accounts had not previously appeared on any balance sheets. There was also missing unit holder loan accounts.

[105] Subsequent to his resignation as a director, the third respondent received a letter from Westpac advising that the lending facilities for the merged business were due to expire. He also received a letter from the fifth respondent asking that he provide a proposal to Westpac. The third respondent refused as he was not in a position to make any proposal without knowing the trading position. He had requested, but not been provided with a set of financials. At no stage did he receive a facility agreement or requirements from Westpac with a request he sign them in relation to any ongoing financial facilities.

[106] The third respondent and applicant were also served with a notice to contribute capital. They were later advised that their rights as a unitholder were suspended as a consequence of a failure to comply with that notice to contribute capital to the business. The third respondent failed to provide such capital as he had never received any financials. In March or April 2014, the third respondent also refused a request to make a financial contribution to the first and second respondents due a legal matter involving a former employee. He was not prepared to make a contribution without details of the financial position of the business which were again refused.

[107] The third respondent subsequently was sent a request for repayment of a loan to the applicant in the sum of $600,000. That amount related to the component of initial funding received by the applicant. At no time when he had access to the financial records of the first and second respondents was the sum of $600,000 shown as a loan to the applicant. There was never any discussion about those funds being a loan. That money was transferred to the applicant in consideration of management of its rent roll by the merged business.[25]

[108] In January 2014, the merged business moved from the Margate premises into a property on Redcliffe Parade owned by the fifth respondent and Gibbons. At that time, there was two months' rent unpaid on the Margate premises. The fifth respondent suggested the lease be terminated, but the third respondent refused to agree. The third respondent

[25] T2-78/35.

wanted rent to be paid for the remainder of the lease period. No meeting of directors was ever held to put the issue to a vote.

[109] In 2014, it was negotiated that Gibbons would pay out the third respondent's component of the corporate super fund which owned the Margate premises. In August 2014, Gibbons paid $51,000 dollars. The third respondent was not paid those funds, although he was removed as a trustee of the superannuation fund. In March 2015, $50,000 was withdrawn from that superannuation fund and paid into the second respondent's trading account, to pay a tax debt. That $50,000 was allocated in the second respondent's financials as a loan from the third respondent.

[110] In cross examination, the third respondent accepted Westpac provided a loan facility, plus a business overdraft and equipment finance. The third, fifth and sixth respondents agreed the $1.8M loan facility should be split as two facilities. They chose the amounts. One became a fixed rate interest, the other variable. The accountant recorded the management rights over the respective rent rolls of the applicant and the fourth respondent in the assets. The loans were recorded within the liabilities. Di Tommaso was the accountant for the merged business until his services were terminated in August 2013. Di Tommaso provided verbal advice in a number of meetings with the third, fifth and sixth respondents.

[111] The third respondent's salary of $75,000 was split with his wife, each being paid $37,500. That arrangement was set up in MYOB by Dartnall, when the merged business commenced operation. His wife received no other payments. His wife did not ever sign a workplace agreement. A workplace agreement was only needed to be signed for sales people and property management people.[26] His wife had an administrative role, primarily reporting to him. The third respondent discussed with the fifth respondent in December 2011, the fact that his wife's family properties would not pay management fees in the merged business. He did not have any email communications to that effect.

[112] The third respondent accepted Dartnall sent him a spreadsheet of the fourth respondent's expenditure for its business in November 2011. Whilst the title of the spreadsheet was 'Property Management Expenditure Breakdown', he read it as representing the full expenses, as it contained details of shop lease payments for the Redcliffe and Acacia Ridge premises, as well as insurance and other items. There was no split between the sales and property management business. The third respondent stopped some of these payments. It had been agreed only equipment to be used within the merged business would be taken up by the new entity.

[113] The third respondent accepted it was within his charter of duties to organise the entities and the license with the Office of Fair Trading. A trust account could not be opened without an appointed auditor. It may well be that Di Tommaso's name was on the application for the corporate license. If the auditor must be party to all forms lodged prior to the approval being given, Di Tommaso was appointed auditor. Di Tommaso provided information required to perform a trust account audit in April 2013. The third respondent gave that information and a floppy disk to Shelley Hewitt. The third respondent was removed from his duties as CFO around the middle of May 2013.

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[26] T4-35/24-25.

Thereafter, he had no administrative tasks in respect of that audit. The accountant or auditor was responsible directly to the Office of Fair Trading for that audit to be completed on time.

[114] The third respondent said a number of employees were employed in the merged business without his approval.

[115] The third respondent's understanding of the unit holders' agreement was that the employment of any staff required the unanimous approval of all unit holders. He accepted that interpretation meant that unless everybody agreed, it would be possible for the workforce to shrink substantially. The third respondent accepted he was preventing the fifth and sixth respondents from employing replacement staff. The third respondent did not agree with the type of sales person they wanted to recruit. It was imperative to have experienced, well qualified agents with an established sales result. Haines Norton specifically said it was not a time to employ people with no experience in real estate in the area they were working, and no area of influence.

[116] The third respondent raised removing the sixth respondent in an email communication.[27] That removal would have required the unanimous support of all directors. At that time, the third respondent had presented cash flow forecasts and financial considerations which indicated the business needed immediate action to reduce its expenditure. The third respondent was not suggesting the sixth respondent's employment be terminated; the sixth respondent was prepared to work as a commission-only agent. At a subsequent meeting between directors, the sixth respondent indicated he did not want that arrangement. He was prepared to be employed as sales manager of the Springwood office, being paid a 50/50 split of the commission as a debit/credit type scenario.

[117] The third respondent tabled this suggestion as part of the terms of the current cash flow position of the merged business. At that stage, the merged business was not in a position to continually employ people. It could not meet its financial commitments to the ATO. If his suggestions had been accepted, it would have reduced the cash flow expense to the merged business, giving it an extra $35,000 in cash flow, which would more than have covered the GST component required for the January/March 2013 BAS period.

[118] The third respondent accepted he sent an email, in response from a request from Marlene Jones, that the contract on Prince Edward Parade, Redcliffe was "not one of ours". The contract was not through the merged business. The third respondent had introduced the buyer to an off market property. The contract was settled without the performance of an agent. The deposit was paid directly to the seller's conveyancer. The third respondent accepted the buyer had been met by him at an inspection of a property that was advertised for sale, through the merged business, and that the contract was printed on forms for the exclusive use of the first and second respondents. He altered that document to change the seller's agent's details to his own name. In doing so, he had to delete the pro-forma company details prior to printing it. He used company software to produce that document.

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[27] Exhibit 88, T4-52/35.

[119] The form 27C "Agent's disclosure to buyer", was also printed on a form that was the exclusive property of the first and second respondents. The purpose of that form was a selling agent's disclosure to the buyer of any financial benefit that would be entitled to the sale's agent. On its face, that document said commission of $8,100 would be payable to the third respondent. His signature appeared in the selling agent's disclosure part of the form. However, commission would only be payable by a vendor of a property, if there was an appointment to act as an agent. The third respondent did not ever fill out a Form 22A, appointment of agent for the property.

[120] It was not an offence for him to show the property to a buyer without a proper appointment as agent. It was open to him to present the property to a buyer, negotiate the sale, enter into a contract for sale, all before a correct appointment to act was executed, because no agent was appointed for the property. He agreed he had not done any other transactions like this for the merged business.

[121] The third respondent did not inform the fifth or sixth respondents, or any other staff member of the first and second respondents, of this transaction prior to entering into it. There was a significant amount of pressure between the three of them. Further, the transaction was done at 7.30 at night. The third respondent received a telephone call from the buyer as he was driving home from work. The buyer wanted to see the property that day. The property was vacant and the third respondent had keys for that property.

[122] The third respondent said he did not receive payment of any commission for the sale of that property. The contract did not proceed in that form. It was re-contracted afterwards, although the third respondent did not have any evidence of a re-contract of that property.[28] The contract amount was $810,000, which was less than the minimum price he said the seller was prepared to accept. He could not specify the ultimate settlement price.[29] The third respondent had a written agreement with the seller within the next day that no commission was to be paid. The third respondent's understanding was that new documentation was prepared, after the seller returned from overseas, by his conveyancer and the buyer's conveyancer.

[123] The third respondent told Conveyancing Works the contract involved a private sale, negotiated by him for a friend, as vendor. The third respondent subsequently sent an email to Conveyancing Works, requesting a copy of the seller's written authority for the release of the contract details to a third party. He had done so at the request of his legal representatives. He declined to give evidence as to the nature of that enquiry. He was concerned about the merged business finding out about the contract, because "they were thinking that I was going to make money from it."[30] He accepted, at face value, it looked like he had made money from that listing.

[124] Elders sent an email to all directors, raising concerns in relation to the Prince Edward Parade contract and other contracts. The third respondent sent Elders an email from Conveyancing Works. That email communication simply confirmed his advices to

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[28] T5-18/25.
[29] Exhibit 91.
[30] T5-23/27.

Conveyancing Works that no commission was applicable. The third respondent said there was a subsequent email from Conveyancing Works, which was not part of the evidence, that confirmed no commission was payable on the transaction. The third respondent offered to pay Elders, the amount it would receive, as a consequence of commission having been received on that transaction. The third respondent did not ever offer to pay the amount of the commission back to the merged business.

[125] The correspondence with Elders occurred after a Notice of Breach and Revenue Default had been sent by Elders to the merged business. The alleged breach was of the competition clause within the franchise agreement, and a failure to provide Elders with a monthly report of business activities, including all transactions. Elders requested a full commission's history back to the start of the franchise and whether any commissions had been earned outside of the reported amounts.[31]

[126] The third respondent sent Whipps a detailed response to that notice. He did not mention in that response that he was employed as a sales consultant for a house builder. He did not consider Whipps' request for details of any other activities to have included that job. The third respondent did not need a real estate license for that work. The third respondent had already informed Whipps he had a second job, in a telephone conversation. He also verbally informed the fifth and sixth respondents during a meeting in the office.

[127] The third respondent accepted that Whipps requested an explanation as to why commission was not payable when the contract on Prince Edward Parade expressed the intent to earn commission. His response to that email[32] did not deal with the Prince Edward Parade property. He did respond to Whipps in respect to that property. He could not explain why his response was not included in that email chain, when Whipps expressly asked for a response in relation to that particular contract. It may be that his response was a new email.

[128] His employment with the house builder was not in contravention of the shareholders agreement. His work did not involve selling real estate or property management, or leasing or selling commercial property. He was selling new home builds, on land owned by the home owner. It was purely a build contract. The entry into the contract for Prince Edward Parade could constitute a breach, if it included conduct which did not include receiving financial gain.[33] His employment with the house builder also did not breach the unit holders' agreement. The work he did for the builder was performed out of normal business hours, and at weekends, usually by email. He used a separate email set up through the house builder. He would use his own mobile phone from time to time.

[129] The third respondent accepted the equipment agreement, the subject of the dispute with Quick Fund, was disclosed prior to the merger. He did not see the actual agreement prior to the commencement of the merged business. It was only in September or October 2012 he became aware of the terms of that agreement. Some of that equipment was used in the merged business. He did not stop payment of the Quick Fund facility for

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31 Exhibit 92, T5-25/25.
32 [Exhibit 36].
33 T5-34/25.

that equipment.[34] The third respondent did not ever tell the fifth and sixth respondents he would be able to have that agreement cancelled at low, or little cost.

[130] The third respondent accepted there were email communications between the third, fifth and sixth respondents about being able to cancel agreements at low or little cost. He accepted the fifth respondent gave him authority, on behalf of the fourth respondent, to deal with Quick Fund in March 2013.[35] He did not contact Quick Fund, in his capacity as CFO. He did so, on behalf of the fourth respondent.

[131] The third respondent accepted that in his communications with Quick Fund, he told them he had been in contact with a solicitor and the ACCC. He could not recall the outcome of those discussions. He was removed as CFO around the same time as his last email to Quick Fund. He did not look after the matter after his removal.[36] At that time, Quick Fund had listed a credit default. The third respondent had spoken to Holloway about the matter, but only informally. At that time he was discussing a number of matters with Holloway. He never told the fifth respondent he engaged Holloway to act on the fourth respondent's behalf. It was not his responsibility.[37]

[132] The third respondent accepted that in an email dated 19 July 2013, he indicated to the fifth respondent he would follow up Holloway again, or that he could organise another solicitor to act as Holloway "has indicated to me he is extremely busy at the moment". By this stage, he had indicated that if the fourth respondent wished to pursue it legally, they needed to take on another solicitor. The third respondent accepted that in an earlier email he had indicated the matter was being corrected and he had had discussions with Holloway. At that time, he still did not have a copy of the agreement in a legible form, a point of contention with Quick Fund. What had been sent to Dartnall in August 2012, was not a full copy of the agreement.

[133] The third respondent did not accept he lodged the BAS statements for the quarters ended September 2012, December 2012 and March 2013. Whilst he took over administration of the accounts in August or September 2012, he did not commence the CFO role until April 2013. In August 2012, he was managing the merger of the Acacia Ridge and Springwood rent rolls. After that, he was allocated the duty of organising the move to the Margate premises. In February/March 2013, they were still re-building the MYOB file.

[134] The third respondent accepted he had responsibility for finance. He did not accept he did not do a very good job in undertaking that responsibility. He provided all of the invoices and bank statements to the accountant. He did not prepare the information that went to the ATO. He did not see the BAS statements before they were lodged by the accountant, although as the person responsible for finances, he ought to have seen them. The statements were lodged electronically through the accountant's office. Nobody had to sign it on behalf of the merged business.

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34 Exhibit 94, T5-38/35.
35 T5-40/20.
36 Exhibit 96, T5-42/20.
37 T5-44/25.

[135] The last return was not due to be lodged until 28 May 2013 but was lodged on 7 May 2013. The MYOB file was up to date by then. He was, at that stage, meeting with the bookkeeper and accountant on a weekly basis. They did not ever highlight any of these issues with him. The last BAS statement lodged was definitely incorrect. The second one also did not appear to be correct, but there was not a complete MYOB file at that time. The amount of the understatement was becoming progressively worse and resulted in a significant shortfall.[38] Some of the BAS information was lodged without his knowledge.

[136] The third respondent denied deliberately understating the tax position so as to give a false picture when trying to sell his interest to Gibbons. He was not sure whether he was in discussions with Gibbons at that time. As part of his agreement with Gibbons, he agreed to pay his component for the outstanding ATO debt. The third respondent provided Gibbons with the ATO integrated account for the applicant and its associated entity "Sport Be in It". They were the two entities being purchased by Gibbons.

[137] Dartnall was undertaking the MYOB administration from April 2012 to September 2012. Any mistake in relation to superannuation lodgement details was her fault. The accountant did not prepare or provide that return. Any reporting failures in respect to the BAS statement, for the period up to September 2012 was a consequence of the incorrect information inputted by Dartnall. Subsequent BAS statements and superannuation guarantee statements were not Dartnall's fault. They were the fault of the accountant.

[138] The third respondent raised with the fifth respondent, by email dated 30 January 2013, the need for the budget to be adjusted to allow for superannuation on their salaries. When the MYOB was originally set up, the third respondent was being paid a salary, but the remaining directors were not being paid as employees. If the directors were being paid a salary, superannuation had to be paid on that salary. The amount of $75,000 agreed to be paid to the third respondent was never agreed to be inclusive of superannuation.

[139] The third respondent accepted there had been a complaint he had underpaid staff. The third respondent denied there were continual errors. The third respondent was not aware that numerous staff were discussing the merged business' inability to pay their wages correctly. Staff may have been talking amongst themselves. On one occasion, the wrong payslip was sent to different employees. There was an error in calculating the pay of another staff member. He simply entered the wrong pay figure into the MYOB. It was rectified immediately. The third respondent accepted that at one point Dawson raised the non-payment of staff wages as being potentially damaging to their brand. The third respondent did not see it as damaging to Elders' brand.

[140] The third respondent said an email sent by him on 10 February 2013, in which he spoke about not paying staff, was sent after the fifth respondent had not repaid the monies for the boat purchase, and he had arranged for the overdraft to be temporarily extended to $150,000 to ensure the merged business was in a position to pay its staff. He spoke

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38 T7-9/39.

about not paying staff because he has "occasionally been known to have a sense of humour".[39]

[141] The third respondent accepted the documentation supplied by him to Gil Wright included properties owned by his wife's family that had not been charged fees by the applicant prior to December 2011. The information supplied to Gil Wright was that those properties were earning fees in December 2011. The figures about commission were input by his staff. At that stage, he had not had an opportunity to speak with the fifth and sixth respondents about whether fees would be charged on those family properties. He later spoke to the fifth and sixth respondents about his wife working for no salary in return for no fees being charged to those properties. The fees then stopped on 28 December 2011.

[142] The third respondent did not accept Gil Wright would have relied on that information. Gil Wright asked if there were family properties that earned fees and he said 'no'. He was asked to show the transactions where rent was being processed for those properties where no fees had been accrued, and he provided a rent payment ledger from 1 July 2011 to November 2011. That ledger revealed individual rent payments for every tenant for every property and the figure for management fees was zero. Gil Wright looked at the trading account bank statements and matched those figures back to the ledger.

[143] The third respondent denied the reason he changed the fees in the documents was to increase the valuation of his share of the merged business. The third respondent refunded the money that had been charged, by way of management fees, back to the applicant on 24 January 2012. By that stage, there had been a discussion about no fee for no salary. Some of those reimbursements were recorded incorrectly.

[144] There were other properties listed as active tenancies in the information supplied to Gil Wright, which were in fact not receiving rental payments. Even if a property had not had tenants for months, the property would be included if it had a management agreement. A valid Appointment to Act document remained in place. If the properties still had a current tenant attached to it, but was not receiving rent, it may not have appeared on the vacant properties report provided to the valuer. In order to make a property inactive, it was necessary to tick two tabs to de-activate the property in the property management software. Otherwise the property remains an active property.

[145] After the merged business commenced, some of the owners of properties with signed management agreements with the applicant, did not want to deal with anyone who had been at Ray White Redcliffe. The management of those properties changed to other entities. Some owners did not inform the third respondent of that position prior to the merger. He was told after notice had been given of the merged business. The third respondent did a mail out to every landlord in early December, advising of the merger.

[146] The day prior to providing its valuation of the applicant's business, Gil Wright forwarded an email stating there was an anomaly with the income earned and the stated income. The email requested he go through the list of properties and confirm "if there

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[39] T6-48/25.

are any properties that should not be listed on this list".[40] He did not respond to the request to go through the list of properties. He spoke to Gil Wright on the telephone stating that what would come would be a full run down of every rental payment collected. The third respondent could not take properties off the system. Those that were vacant and undergoing renovations, still had a valid management agreement in place.

[147] Three employees performing some property management duties for the applicant, came over to the merged business as well as a receptionist. The third respondent was also performing some property management duties. The information provided to Gil Wright was that there were two property managers, a business development officer and a reception administration role which was shared between two people. Gil Wright's valuation stated he had advised there were "three property managers employed, one of whom has now left and has not been replaced due to the pending merger with Ray White Redcliffe".[41] He did not know why Gil Wright had not included part time staff as they had all of his wage records and a staff list.

[148] Gil Wright's report referred to the current staffing ratio, on the basis of their being two property managers, as they halved the properties under management to refer to a ratio of 177 properties per property management staff and said this ratio was different to the norm. In his view, Gil Wright was aware three staff members were required for the business. Overstatement of the properties earning management fees and understating the staff involved in the property management would not have had a material effect on Gil Wright's valuation. Some of those matters would have had an impact, but not all of them.

[149] The third respondent accepted that, as part of his explanation for payments to Mark Andrew, he had referred to Andrew being entitled to the payment, as another agent in the office had a buyer for the particular property and "was paid for the introduction of the buyer to the property". At that time he was going on memory. He was not allowed in the office and it was 14 months after settlement of the property. He was not sure now whether that was correct information.

[150] The amount paid in repayment of Andrew's debt, was based on Andrew's entitlement to 60% of the gross commission. That commission was reported in the return to the franchisor. That was the amount he agreed with Andrew as part of the pre-existing workplace agreement. A copy of the workplace agreement was saved on the third respondent's server when his employment was terminated, but he had not been able to retrieve it and now did not have a copy. The workplace agreement related to any listing received by Andrew. If it was merely a referral, he was entitled to 20%.

[151] The third respondent accepted that in evidence in chief, he said his access to electronic services was shut down on the day of his termination as an employee of the first and second respondents. He agreed he had subsequently sent emails to Elders Corporate after his termination. His wife signed an employment agreement to work at Elders

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40 Exhibit 117.

41 T6-87/40.

Everton Park. His email access was reinstated at that time because he was going to work for them as well. That employment ultimately did not proceed.[42]

[152] An email he sent on 26 August 2013, after his termination, was signed off with his footer as Elders Redcliffe, not Everton Park as his emails were switched back on at Everton Park with his Elders Redcliffe signature intact.[43] The third respondent accepted that on 9 September 2013, he was contacted by Elders requesting confirmation he was no longer a director of the franchisee before they disabled his electronic services. The third respondent said Elders Redcliffe could itself disable access from within the office and did so prior to that date.

[153] The third respondent credited an amount to his self-managed superannuation fund for superannuation payments to him and his wife around the time he was removed as CFO. The third respondent wrote out the cheques himself. This was the only time he paid himself superannuation. He did not inform his fellow directors at the time because there was a lot of animosity. He only took a small component of that entitlement.

[154] No superannuation was paid initially, as they were receiving payments as contractor payments. At the start, the fifth and sixth respondents were paid directly, into their individual bank accounts. Those payments placed the merged business at risk of a debt exposure to the ATO on the basis they were payments as a salary. Di Tommaso attended a meeting in which it was agreed they would change to salary employees. It was explained why the payments should not be made directly to the fifth and sixth respondents. Once each were employed as salary employees, they were each paid superannuation.

[155] The third respondent said payments were also commenced in October 2012 to both the applicant and the fourth respondent following a joint decision by all directors to pay each entity yearly, $1,000 per percentage share of their ownership of the second respondent. It was intended to be a pre-dividend expenditure to the unit holders, to be paid into the unit holders' account on a monthly basis. The payment was based on a prospective cash flow forecast of an operating profit of around $190,000 per year. It was decided that $100,000 of that sum would be disbursed to unit holders.

[156] The payments were out of the unit trust pursuant to the unit holding agreement, not the constitution of the second respondent. The third respondent wanted to stop making payments at various times, due to cash flow problems. These sums were not paid as director's fees. If they had been paid as director fees, they would have been paid individually to each director and have become a taxable liability for their income. They were recorded as loans against the unit holding entities in the company's financials, with the amount to be deducted down at the time of a trading profit.[44]

[157] The third respondent produced a proposal for the April 2013 meeting, in which he had raised the need for sufficient profit "for directors/shareholders dividends" to be maintained. His intention by this proposal was that the dividends paid to unit holders be

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42 T7-3/6 [Exhibit 124].
43 T7-4/15 [Exhibit 125].
44 T7-37/35.

maintained in a way that ensured retention of the proposed profit level. Whilst the proposal was not discussed "in full" at the meeting,[45] all directors agreed to continue the payment of this amount. He advised Dartnall to treat those fees as they were already recorded within MYOB, when she took over as CFO.

[158] The third respondent objected to the fourth respondent being paid director/management fees after he had resigned as a director because the payments were never set up as director/management fees. All unit holders needed to be paid proportionally. No monies were being paid to the applicant.

[159] The third respondent said from about early October 2012, he was constantly seeking meetings with the fifth and sixth respondent. Those meetings were refused on the basis they could not attend or it was not convenient. The third respondent accepted he was meeting with the fifth respondent nearly every day, but said there needed to be director's meetings so all three could discuss issues. There were times when there were regular meetings, but the fifth and sixth respondents refused to meet in respect of the financials. The third respondent accepted that situation was completely inconsistent with his evidence that he could not get a meeting from October 2012.

[160] The third respondent accepted his pleadings denied he had refused to be employed on terms offered after his removal as CFO because no offer of employment was made. That denial related to the fact that no offer had been signed by him. An offer was made and he refused to accept those terms. The agreement offered him an annual salary of $50,000 per annum, paid weekly, offset against commissions.[46] The wage being put into his account was reflective of a figure of $45,000 per year. He did not raise that difference at the time. He was given no choice. He did not accept that pursuant to the agreement, superannuation was part of the $50,000 paid in advance of commissions.

[161] Under that agreement, he could earn significantly more than $50,000. However, being offered that agreement was oppressive conduct because he was being forced by his fellow directors to be paid a weekly amount that would not sustain his family's needs. There were no guarantees he would earn more under the commission structure. It depended on sales made by him. Further, whilst the applicant was at that time also receiving $34,000 per year, there was no guarantee the payments would continue in the future.

[162] The third respondent did not accept the value of properties included in the valuation that had never earned any fees after the merger of the businesses, came to a total of $83,623. The figure was $29,469, which would result in about .22% decrease in the applicant's shareholding and a subsequent increase in the fourth respondent's shareholding.[47] The value of the fourth respondent's missing management agreements, was admitted by the fifth respondent to be $34,503.

[163] The third respondent did not accept that after his departure from the merged business, he took any of its managed properties. The owners of those properties exercised a right

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45 T7-39/10.
46 [Exhibit 136], T7-58/43.
47 T7-80/20.

to terminate the management agreements. Those properties were managed by other agencies. He managed four properties owned by his father-in-law. The third respondent delivered to the office of the merged business a letter signed by his father-in-law and mother-in-law, requesting those properties be no longer managed by the merged business. He subsequently collected file documents in respect of some of those properties.

[164] The third respondent subsequently made a complaint to the Office of Fair Trading that the merged business had not transferred management of properties to him in accordance with the owner's instructions. His complaint was in relation to the provision of keys, information and other relevant documentation to do with the properties. His complaint included a complaint about the collection of fees for management of the properties after cessation of the property management arrangement. The third respondent was appointed to manage four to six properties before he left the third respondent's employ and afterwards 12. Although his complaint referred to about 28 properties, some related to a registered boarding house, which was in fact one residence. He undertook tasks in respect of some properties whilst he was still an employee of the merged business.

[165] The third respondent denied acting in competition with the second respondent. They all became self-managed properties, managed by his father-in-law personally. The third respondent was collecting the information. He accepted his complaint to the Office of Fair Trading asserted he had taken over their management personally, sometime between 1 August 2013 and 1 October 2013, not that the owners had undertaken self-management. The third respondent was not receiving payment for that management.

[166] The third respondent accepted that on 26 August 2013, he sent an email containing the Elders Redcliffe footer indicating the owners of the Coman Street property wanted the third respondent to look after the sale listing and wanted it assigned to Elders Everton Park. That property was the subject of an exclusive agency agreement with Elders Redcliffe. However, a clause in the appointment to act document allowed the owners of the property to assign the agency agreement to another party.

[167] The third respondent accepted that in his pleading he denied ever refusing to provide further guarantees or security in respect of the merged business. When Westpac asked him to renew the facility, he advised he would not be in position to provide any guarantees or security unless he knew the trading position of the merged business.[48] He did not tell Westpac he would not execute any new documents to extend the facilities. He ultimately advised Westpac he would not be renewing the facilities. He was not prepared to stake his financial responsibilities if he did not have that information.[49]

[168] The third respondent accepted that after the termination of his employment, he returned to the office on 1 October 2013, to collect some property management files. He had a quite heated conversation with the fifth respondent at that time. He made a threat towards the fifth respondent. He denied abusing staff or using foul language in front of staff and clients. The fifth respondent told him he had no entitlement to be in the office and said he was to be allowed back in the office "over his dead body". The third

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48 T8-3/25. [Exhibit 148]

49 Exhibit 149, T8-6/25.

respondent told the fifth respondent he had a right to be on the premises as he was one of the owners of the property. All he needed to do was provide an entry notice. He accepted he did not ever provide such a notice.

[169] The third respondent next entered the property around March 2014. He denied entering the property on 24 August 2013 and taking away a computer. It is possible he may have attended the office on that date to drop keys back. On the occasion he did return those keys, it was a Saturday and there was one staff member present. The fifth respondent lodged a complaint with the Redcliffe Police in around December 2013 in relation to a number of matters, including the theft of money. He was interviewed by police who asked questions about whether he had entered or broken into the premises of the merged business.

[170] The fifth respondent also accused the third respondent of remotely accessing the merged business' server and removing information from it. The third respondent denied ever doing those acts. The third respondent had asked Dartnall for access to the server so he could retrieve the applicant's information prior to the merger. It was his intention that information be deleted from the system. He denied making arrangements to have the information deleted from the company's server. The third respondent had no explanation for the deletion of that information from the company's server.

[171] The third respondent did not accept the Margate premises were not suitable premises. There was an occasion where the roof leaked significantly, but there was no requirement to replace computers. The property was suitable until somebody put holes in the roof. He denied Elders recommended the merged business move from those premises.

Fifth Respondent's evidence

[172] The fifth respondent was approached by the sixth respondent in late 2011 about a discussion with the third respondent concerning a potential merger of their businesses. At that time, the fourth respondent's franchise agreement was nearing its five year anniversary. The fifth and sixth respondents had discussed the possibility of a merger with another office. The fifth and sixth respondents met with the third respondent. Discussions remained primarily between the third and fifth respondents.

[173] Initially, the discussions centred around a 50/50 split for any merged business. Later, it appeared it would be around two thirds/one third, with the final split to be determined by valuation. New entities would be set up with the shares being held by the respective previous entities. This arrangement arose because the assets held on a rent roll are fluid. Properties are sold and there are other types of growth. It was agreed the existing properties would remain with the same entities. The new entity would execute any new agreements. Management would evolve into the new entity over many years.

[174] The merged business was financed by Westpac. A facility of $1.8M was established, serviced by the rent rolls. Finance was allocated generally in accordance with the unit holdings. $1.2M went to extinguish the fifth and sixth respondents' debt with the National Bank. $600,000 went to extinguish the debt of the third respondent. There was

no discussion about how those amounts would be shown in the accounts of the new entity.

[175] Remuneration was agreed at $75,000 per annum, per person. The fifth and sixth respondents wanted the cost of vehicles included in the business expenses. The third respondent was adamant vehicles not be included and they eventually agreed the vehicles would remain in the fourth respondent's name. The merged entity was to pay for any existing agreements, if the goods were being used by that merged entity. Any remaining equipment was the responsibility of the party who had entered into the agreement. The merged entity would use the fourth respondent's premises at Redcliffe. All staff from both entities would be kept, at least initially.

[176] The third respondent was to manage the rent roll at Redcliffe. He was also to be responsible for merging the rent rolls and for administration of the merged business. The fifth respondent was responsible for both sales teams and the sales side of the business. He was to provide the sixth respondent with some support around sales training. The sixth respondent was to be the principal lessee of the Acacia Ridge office and to look after the rent roll and sales people at that office.

[177] Gil Wright undertook valuations of the respective businesses. The fourth respondent provided information as requested by Gil Wright in respect of its rent roll, including details of any of the properties that were associated properties. Gil Wright expressly stated they performed the valuations on the basis of the accuracy of that information. The fifth and sixth respondents did not perform due diligence. They relied upon the relationship they were about to enter into with the third respondent. Gil Wright's valuation would be a check and balance. If there was anything wrong with the third respondent's business, it would be highlighted in the valuation.

[178] The fourth respondent did not have its own independent legal advisors for the merger. The fifth respondent sought advice from Holloway. The sixth respondent also spoke to Holloway. The third respondent had introduced Holloway to the fifth and sixth respondents. The third respondent introduced them to Di Tommaso, who was helpful. He attended meetings and gave advice. The fourth respondent's accountants, at that time, were located at Springwood. The fifth and sixth respondents agreed Di Tommaso would be the best accountant.

[179] Holloway was responsible for preparing documentation for the merged business. Those documents included a unit holders' agreement. Pursuant to that agreement, they jointly and severally covenanted with each other that they would be just and faithful to each other, and open and honest. The fifth respondent's understanding was that if money was required by the unit trust, that money would be contributed on an equal basis by the unit holders. Similarly, when funding was required for management.

[180] The fifth respondent knew that from time to time the unit holders would not agree on all items. In those cases, it would be a vote of the parties to make decisions on the general day-to-day running of the business. In the case of disagreement, there was access to external advice from the franchise group. Dawson had agreed to be their business advisor. There was no specific discussion between the parties as to what was to happen

if there was disagreement between them as to day-to-day decisions. Each director had their own department to run and that director was given responsibility to look after that area.

[181] There had been a discussion about the applicant and the fourth respondent being paid a certain amount per year, per their share-holding. It was agreed that amount would be $1,000 per share, to be received for, in effect, being an owner of the business. At some point later in 2012, it was agreed between the third, fifth and sixth respondents that $5,000 would be paid to the fourth respondent and $2,833 be paid to the applicant. Those sums were to be treated as loans against future profits, but were in effect an equity distribution. They were a one-off type of arrangement. It had been agreed by directors that a monthly fee was to be paid to the directors. He did not know how it was treated in the books.

[182] Whilst the agreement was that all three would be paid $75,000 per annum, for duties performed in the merged business, that sum was initially paid as a contractor fee to the applicant and fourth respondent. In the case of the fourth respondent, the payment was made into the individual bank accounts of the fifth and sixth respondents. The advice of their accountant was they could take that sum in lieu of a shareholders wage from the fourth respondent. It was not being paid as a salary from the second respondent. As a result, no superannuation was payable.

[183] Statutory declarations were signed by each of them to the effect they were not employees of each other. These declarations were for the purposes of superannuation and were undertaken on the advice of Di Tommaso. After the third respondent took over responsibility for payroll and other payments, he suggested the fifth and sixth respondent needed to be paid as a salary, rather than as a fee to the fourth respondent. That arrangement persisted until after the meeting with Whipps in March 2013.

[184] Towards the end of 2012, the fifth respondent believed the roles had become very unequal. He was putting in a lot more work. Significant issues had risen after the acquisition of the Springwood rent roll. Tension developed between the directors. There were complaints from staff that basis services were not available. In mid to late October 2012, the fifth respondent told the third respondent that the fifth respondent needed to take responsibility for the operation of the rent rolls in both offices, as well as the duty of sales manager at Redcliffe.

[185] The third respondent at that time had been undertaking responsibility for the merger of the Acacia Ridge and Springwood offices. It had been generally completed, although not satisfactorily. The fifth respondent's understanding was the third respondent would return to Redcliffe to look after the administration, accounts and various duties in property management. The third respondent agreed to those splits. There was no discussion about changes in salary or allowances. The sixth respondent's role was to concentrate more on the sales aspect of the Springwood office. He would also provide some assistance in the property management area.

[186] At this time, it was also determined that Redcliffe would become the administration centre of the merged business. The fifth respondent had responsibility for the

centralisation of that material in the Redcliffe office. The third respondent had responsibility for finance and accounts in relation to the whole merged business. The third respondent was doing the payrolls and any kind of administration roles associated with accounts and franchise reporting. Those roles continued through Christmas and into the New Year.

[187] The perceived imbalance in the roles caused further angst between directors in early 2013. Discussions ensued in relation to the equality of what was being performed by each director. There was also an escalation of issues with staff not being paid. The merged business was losing managements at an alarming rate. It was the view of the directors that if something drastic was not done, the business would not remain around for too much longer.

[188] In about mid-January 2013, a staff survey had been commissioned at the suggestion of the third respondent. That survey was supported by all parties and the franchisor. Dawson's understudy performed the staff survey. It became the catalyst for the meeting with Whipps in March 2013. It was not, however, the sole cause. The franchisor's head office had received complaints directly from staff about non-payment of wage and other matters. Part of the reason Dawson instructed that the staff survey be undertaken was because of concern about the effect on the Elders brand.

[189] The survey results were damning, particularly in respect of the third and sixth respondents. The fifth respondent wrote to both the third and sixth respondents expressing his disappointment and anger. He knew the franchisor would want to discuss the contents further with them. The sixth respondent took it heart. He was quite upset and contrite. He looked to improve the way he conducted himself in the business. The third respondent took a different view. He thought the survey was not accurate and that some of the contents in relation to him were not fair.

[190] A meeting was arranged with Whipps in March 2013. The fifth respondent expected Whipps would discuss the survey. Whipps concentrated on the need for all the directors to "pull our socks up and run a more professional outfit".[50] There needed to be a better organisational chart, so that staff had someone to report to and from whom to take direction. There was a lot of confusion amongst staff. Whipps was strongly pushing for a single decision maker to be installed into the merged business. It was possible the fifth respondent had discussed that proposal with Whipps before the meeting. The fifth respondent told Whipps the payroll issues were the fault of the third respondent.

[191] The fifth respondent had had daily discussions with the third respondent about the need for an organisational rearrangement, from the time of the survey up until the meeting with Whipps on 15 March 2013. In his view, an agreement was reached in the March meeting that they would have a single decision maker. It was further agreed that directors would have better clarity of their roles within the merged business. The fifth respondent was to come back with a complete proposal for the consideration of the other directors. Shortly after the meeting, the fifth respondent requested a proposal from the third and sixth respondents as to the future direction of the merged business. The fifth respondent wanted to be as inclusive as possible and he wanted a united front.

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50 T8-81/36.

However, it was necessary for immediate action. For that reason, he set the deadline of seven days.

[192] A meeting was held on 18 April 2013. Agreement was reached for the fifth respondent to be CEO, the third respondent to be CFO and operations manager and for the sixth respondent to be sales manager, Springwood. The CFO would encompass operations manager for both offices. The third respondent would do the payroll and be involved in all matters of administration. The third respondent's responsibilities did not massively change. The structure was more about setting in stone who was to do what in the merged business. There was agreement on what duties were to be undertaken within each role.

[193] Agreement was reached that the position of CEO would attract a salary of $120,000 per annum, with an expense account of $10,000 per annum and some vehicle considerations. The CFO role was to attract a salary of $85,000 per year, with a $10,000 expense account. The third respondent's combined role was to be paid somewhere in the order of $110,000 to $115,000 per annum, exclusive of superannuation. The sixth respondent's role was to attract a salary of $50,000 per year, to be advanced as debit/credit together with a bonus structure based on performance.

[194] The third respondent started paying them according to the agreement, although the third respondent was being paid on an equal split between himself and his wife. At that stage, the third respondent's wife was performing duties in the business. The roles were not formalised into written employment agreements. That was an oversight on the fifth respondent's part. Months later, the third respondent sent an email saying he disagreed with the component of bonuses for the CEO. He did not disagree with the wage, or the car allowance, or anything else.

[195] It soon became apparent that the merged business was not working properly. A lot of issues remained, particularly with payroll. It was causing carnage with staff, who constantly complained about it, both verbally and in writing. The "water cooler discussion"[51] was that they could not get the payroll right from week to week. There had been no issues with payroll when Dartnall had responsibility for it. The fifth respondent asked the third respondent if he could take that one duty off him. The third respondent refused to be relieved of that responsibility. He wanted to continue to do the payroll.

[196] The continual mistakes and ongoing complaints reached the point where the fifth respondent, as CEO, had to act. Staff were expecting steps to be taken to rectify the issues. The sixth respondent had spoken to the fifth respondent about difficulties he was having with payroll. At about that time, the merged business had commissioned a financial health check report from Haines Norton. They flagged an issue with the BAS statement. It appeared from it that income receipts were down substantially.

[197] The third respondent had had responsibility for the MYOB system for the merged business from September 2012. During that time he mishandled taxation matters. The merged business' income from September 2012, was misreported significantly on a

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51 T8-83/33.

decreasing scale for three quarters. The fifth and sixth respondent's knew something was wrong. The merged business did not seem to be paying enough tax, considering the income from the property management department alone, let alone any sales.[52]

[198] After consultation with the sixth respondent, the fifth respondent made a decision that the third respondent could no longer be CFO or manage the payroll, which was part of the operations manager role. The fifth respondent felt a strong sense of responsibility to get the payroll and reporting issues to both the franchise and the tax office corrected. The fifth respondent told the third respondent he was being relieved as CFO and operations manager due to a range of issues which the fifth respondent could no long abide. He told the third respondent he was giving those duties to Dartnall.

[199] The fifth respondent concluded the third respondent was not suitable for the CFO role for a range of reasons. The payroll had become "an absolute joke". People were not getting paid. The tax position had been misreported to the ATO, to the tune of hundreds of thousands of dollars. There were numerous anomalies starting to turn up in the accounts. There were discrepancies in the trust account. Both the fifth and sixth respondents had grave concerns about the way the third respondent was conducting the accounts.

[200] The fifth respondent considered there had been a meeting of the directors, in that he and the sixth respondent discussed the third respondent's demotion. The sixth respondent was very much in favour of demoting the third respondent. The third respondent did not agree and opposed it. The third respondent thought he was not being treated fairly. He wished to be bought out of the merged business. This discussion occurred around 16 May 2013.

[201] The fifth respondent thought it would be in the best interests of the merged business if the third respondent focussed on listing and selling real estate. He had extensive contacts in the area and had been selling real estate for a number of years. It was proposed the third respondent be offered a sales role, being paid a retainer, the same as the sixth respondent, as well as the director fees and expense account. The fifth respondent did not believe this would be a disadvantage to the third respondent. Employment on a commission basis allowed him to achieve an attractive income by listing and selling real estate.

[202] The third respondent made a number of counter proposals, all involving more money. The sixth respondent did not agree with those proposals. If the third respondent was earning extra money with no responsibilities attached to it, the sixth respondent should receive the same. The fifth respondent was attempting to maintain the agreed budget. He felt the money being paid was fair and adequate. It provided incentives for the directors to perform their sales duties to take the merged business forward. It was part of the Haines Norton report that directors sell more real estate for the betterment of the merged business.

[203] When the fifth respondent did not agree to the third respondent's counter proposal it became an unpleasant place to work. There were a range of discussions and meetings

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52 T14-47/10.

with the franchisor. The third respondent continually refused to agree to any kind of performance related agreement. Workplace agreements were tabled for both the third and sixth respondents. The third respondent did not sign his agreement, although he did start to perform the duties of a salesperson. Dartnall prepared the workplace agreement for signature by the third respondent, on the fifth respondent's instructions.

[204] The fifth respondent signed his own employment agreement on 12 June 2013. His signature was witnessed by Dartnall. She signed a lot of documents on behalf of the merged business. Dartnall did not sign his agreement because the fifth respondent knew the third respondent would not approve its terms. It had not been altered from what was approved in April. It was only formalising that arrangement. The provision of bonuses based on performance had been agreed to by the third respondent, although the fifth respondent had not ever been paid those performance based bonuses. The agreement provided for a bonus of 10% in relation to property management growth. In April 2013, there had been a discussion of a bonus of 5%. The third respondent also had not agreed to a bonus of 10% of gross income property management.[53]

[205] The fifth respondent instructed Dartnall, by email dated 20 June 2013 that if the third and sixth respondents' workplace agreements had not been returned by the next day, she was not to pay the third or sixth respondents. The third respondent's payments ceased for two weeks. At that time, the sixth respondent complained that he had not been paid in the early weeks of April. The sixth respondent agreed to the terms of his workplace agreement.

[206] The fifth respondent's concern in paying the third respondent was that there was no scope of works or accountability. It was in the best interests of the merged business to make sure every paid person had a value proposition to offer that business. The fifth respondent had to show some leadership in order to achieve the outcomes that had been agreed between the third, fifth and sixth respondents. The sixth respondent agreed with the fifth respondent's position.

[207] Around this time, the third respondent entered into negotiations with Gibbons for the purchase of the applicant and its shares of the merged business. The fifth respondent believed a deal had been reached but that deal did not go to completion. A number of issues arose during due diligence. It was at that time the fifth respondent discovered there had been a number of properties in the Gil Wright valuation of the applicant's business that were not earning fees, despite being marked on valuation as earning fees. There were also properties on the valuation marked as earning different fees. A number of properties did not have management agreements at all.

[208] The fifth respondent confronted the third respondent about those disclosures. The third respondent took action straight away in relation to the unsigned management agreements. New agreements were sent to landlords. It was a requirement of Gibbons that these agreements be met because they were the applicant's managed properties. However, a major issue for the fifth and sixth respondents was misrepresentation of the value of the applicant's rent roll. The valuation was overstated, giving them exposure to their financier, as they could be outside their lending covenants.

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53 T11-93/19.

[209] Part of the arrangement was that Gibbons would replace the third respondent's security, an absolute requirement of Westpac. The fifth and sixth respondents' view was that unless something was done about the misrepresentation of the applicant's rent roll, it would lead to problems, as Westpac was likely to require additional security which would have "scuppered the deal anyway".[54]

[210] The fifth and sixth respondents were very supportive of the sale. They had introduced the buyer and had decided to work together towards a sale. However, consent was not going to be given until rectification of the misrepresentation by way of compensation to the fourth respondent. The fifth respondent was keen to expedite the third respondent's exit from the merged business, but could not justify doing so at the expense of being dishonest with his incoming business partner.

[211] The fifth respondent asked for the misrepresentation to be rectified before any sale to Gibbons. The third respondent sought to argue equity, rather than the terms of the misrepresentation.[55] The third respondent came back by email with an assertion that after allowance was made for the fourth respondent's properties that did not come over, the split of the unit holders should be 66.4% to the fourth respondent and 33.6% to the applicant. The fifth respondent did not accept those calculations were correct.

[212] In early August 2013, it was discovered the third respondent had acted for a seller in a transaction which, in the determination of the fifth and sixth respondents, was a breach of the franchise agreement. A facsimile had been received from a conveyancing company, asking whether the merged business was holding a deposit for a property at Prince Edward Parade. As the contract was not on their system, the administration officer sought a copy of the contract. The contract was written on Elders Redcliffe paperwork, with the company details being liquid papered out and the third respondent having hand written in his own details. The contract documentation included a form 27C, which showed commission of $8,100 was to be paid to the third respondent.

[213] The fifth respondent considered this a serious matter. All staff were emailed asking whether they knew anything about that transaction. If the third respondent had advised them then of the contract, they could have had discussions around it, even though the agreement still would have been a breach of their franchise agreement. Instead, the third respondent wrote back stating "it was not one of ours and that he had contacted the solicitor and cleared it up".[56] In the fifth respondent's view, an offence had been committed and a lie had been told to cover it up.

[214] The sixth respondent was overseas and the fifth respondent was unable to speak with him for a number of days. The fifth respondent decided to confront the third respondent. At about the same time, the fifth respondent received confirmation from Holloway that he had not been engaged by the third respondent to manage a Quick Fund debt, in relation to which the fourth, fifth and sixth respondents received a default credit notice.

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54 T12-43/35.
55 T13-40/5.
56 T8-86/43.

[215] As a consequence of the Prince Edward Parade contract, the franchisor issued a breach notice. Correspondence with Whipps included explanations by the third respondent, a copy of which was received by the fifth respondent. That correspondence included a query by the third respondent as to why the contract had been released to a third party, which release led to the second respondent finding out about the contract.[57]

[216] The fifth respondent spoke to the sixth respondent by telephone, whilst he was in America. The fifth respondent told the sixth respondent about the Prince Edward Parade deal. He also mentioned the Quick Fund matter and that quite substantial misrepresentations had been made by the third respondent to Gil Wright in the valuation of the applicant's rent roll. The sixth respondent agreed to suspend the third respondent.

[217] The fifth respondent suspended the third respondent's employment, pending a full investigation of all of those matters. By that time, Dartnall and their newly appointed bookkeeper had taken over the accounts. Some anomalies had been reported to the fifth respondent that required further investigation. They were quite suspicious, although the fifth respondent did not mention them to the third respondent at the time of his suspension.

[218] The fifth respondent believed it was in the best interests of the merged business that the third respondent be away from the business at that time. The fifth respondent advised the third respondent of his suspension. The third respondent argued against it. The sixth respondent arrived back in the country not long after and wrote to the third and fifth respondents expressing disappointment in the third respondent's conduct.

[219] The fifth respondent's email suspending the third respondent referred to three specific matters. First, the Prince Edward Parade contract. The criminal act the fifth respondent was referring to was stealing from the merged business. The third respondent was being paid commission in breach of the franchise agreement and in breach of the unit holders' agreement. A breach of the franchise agreement would not be a criminal act. However, in his opinion and "in the opinion of nearly anybody else who works in the real estate industry" "if you steal a lead, you steal something out of a business and you get paid for it, without running it through the company, that's theft."[58]

[220] The third respondent had met a buyer at an open house for a merged business property. He took them to another property and sold it to them, whilst he was an employee of the merged business. It was fundamentally against everything that is widely accepted in the industry as being reasonable practice. The 'criminal act' was that the third respondent set out to earn commission that should have come to the merged business. The form 27C clearly showed he was to be paid commission of $8,100.

[221] Second, the Quick Fund Dispute. The third respondent told the fifth respondent he had spoken to Holloway in respect of the fourth respondent's dispute with Quick Fund. The third respondent gave the impression he and Holloway were handling the matter. The fifth respondent accepted the third respondent could not formally engage a lawyer for the fourth respondent, as only the fifth and sixth respondents were its directors.

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57 T11-70/45, [Exhibit 36, p. 9].
58 T11-56/15.

[222] Third, the third respondent had misrepresented the applicant's rent roll, thereby acquiring an additional 1.75% of the first and second respondents. At the time he made that claim, the fifth respondent had access to the valuation provided by Gil Wright. That valuation set out the information relied upon by Gil Wright. The fifth respondent made the assertion of misrepresentation on the basis of information obtained as a consequence of the negotiations the third respondent was having with Gibbons to sell the applicant. When that information was compared with the Gil Wright valuation, discrepancies started to come out.

[223] The fifth respondent's concern included properties that were being managed that did not have documentation. The fifth and sixth respondents wanted that rectified for obvious reasons. They did not however attribute a monetary value to that discrepancy. It was ultimately rectified by the third respondent. The equity variation came from adding up the actual value of the business on the basis of the fee income, comparing that to Gil Wright's valuation and working out the difference mathematically. There were some non-earning properties on the part of the fourth respondent which were offset against what he considered to be non-earning properties on the part of the applicant. The difference between the non-earning properties of the fourth respondent and the non-earning properties of the applicant, were factored in the determination of an adjustment of 1.75%.

[224] The fourth respondent had not misrepresented any of its properties at the time of valuation. There are properties on any rent roll which are inactive, as you are awaiting to close off a file. There was only a very minor amount of properties on the fourth respondent's rent roll that fell into that category. The applicant had a huge amount. The applicant also had represented it was earning fees from properties when it was not, or that it was earning a larger fee than it was in fact earning from that property. There were no such properties in that latter category on the fourth respondent's rent roll.

[225] Misrepresentation of the applicant's rent roll was relevant to the third respondent's employment in the merged business. If the third respondent was prepared to manipulate information, he was prepared to misrepresent himself as a fit and proper person to be holding a real estate license and be a representative of the merged business. His honesty was important to his appointment. All three issues demonstrated the third respondent's dishonesty. They could no longer have the third respondent conducting himself as an employee and having access to the finances of the merged business.

[226] The fifth respondent decided to suspend the third respondent, in part, on the basis of the Quick Fund matter, but predominantly as a consequence of the Prince Edward Parade contract. That was "the most egregious".[59] Holloway's email came just prior to the suspension. It confirmed the third respondent had been misleading the directors of the merged business in relation to the Quick Fund matter which had caused serious financial ramifications for the fourth, fifth and sixth respondents. Holloway had never been instructed to do anything on that file.

[227] Shortly thereafter, the fifth respondent received an email from Bruce Siebenhausen of the Real Estate Employer's Association. Siebenhausen had received a complaint from

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[59] T12-12/44.

the third respondent about his suspension. The fifth respondent contacted Siebenhausen who, after being given information, advised there was no provision for the fifth respondent to suspend an employee. If he needed to be removed from the business, he must be the subject of termination. Seibenhausen advised they should be terminating the third respondent for serious gross misconduct. The fifth respondent did not give Seibenhausen a copy of the unit holders' agreement. They were not terminating the third respondent as a director of the unit holder. The fifth respondent did not seek legal advice on this issue.

[228] The fifth respondent considered the third respondent had breached clause 15.2.2 of the unit holders' agreement, but did not comb through the unit holders' agreement before notifying the third respondent of his termination. All of those agreements were still unsigned, although they were binding from 2011. There was no meeting or resolution of the Board to terminate the third respondent. Both he and the sixth respondent agreed with that course. Termination could be made by majority decision.

[229] The fifth respondent had previously said, in an email of 7 June 2013, that the terms and conditions of employment had to be agreed to by the other directors. The fifth respondent believed that to be prudent. The third respondent's agreement needed unanimous approval but the fifth respondent did not believe the decision to end that agreement required unanimous approval.

[230] The fifth respondent sent the third respondent an email terminating his employment.[60] There was no separate correspondence between the third, fifth and sixth respondents seeking the third respondent's explanation setting out reasons for considering termination of his employment. The third respondent had provided explanations to the franchisor, which were not accepted. The fifth respondent and sixth respondents did not accept the third respondent's explanations.

[231] After the third respondent's termination, other issues arose. It was discovered the third respondent had paid himself superannuation. There were a number of other payments which were considered suspicious. Another issue was the provision of workplace agreements. Issues also arose in relation to a number of properties. Notice was received of termination of management agreements for properties owned by the third respondent's in-laws. That correspondence was hand delivered by the third respondent.

[232] The fifth respondent had not excluded the third respondent from management of the merged business. The third respondent was terminated as an employee, not as a director. The third respondent chose to resign as a director. He had had full access to the financials up until that resignation. The fifth respondent accepted that on the day of the termination the third respondent requested he be presented with all of the financial figures of the business and directors' spending. The third respondent had access to all that information through MYOB. He was free to view it remotely at any time.

[233] The fifth and sixth respondents decided to terminate Di Tommaso, as accountant. They were dissatisfied predominantly with the BAS situation. It had also been recently discovered that the trust account had not been audited and the merged business would

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60 Exhibit 35.

receive a fine. A new accountant, engaged to take over the accounts, discovered an issue on the balance sheet in relation to the recording of the loan funds, paid to the applicant and the fourth respondent on commencement of the merged business. The new accountant sent an email to Di Tommaso asking why those funds were not treated as loans to the applicant and the fourth respondent. Di Tommaso replied they were in a rush to produce the accounts and the balance sheet had not yet been corrected.

[234] As the second respondent had not purchased the rent rolls of the applicant and the fourth respondent, the deductibility of those loans rested with the applicant and the fourth respondent. The new accountants gave advice there needed to be amendments to the balance sheet to reflect the true nature of the disbursement of those loans. The money paid to the applicant was recorded as a loan, on the basis of that advice. There was no loan documentation between the second respondent and the applicant. It was a book entry. There was no predetermined period for repayment of that loan, other than that set out in the loan agreements by Westpac.

[235] Demand was made on the applicant to repay the $600,000 it received at the commencement of the merged business. In accordance with the unit holders' agreement, all covenanters are to provide security for the finance facilities. The third respondent refused to honour those obligations whilst retaining the benefit of the money advanced at the commencement of the merged business. The applicant should be required to repay it. No demand was made to the fourth respondent for repayment of its loan of $1.2M as its directors were still guaranteeing the finance facilities.

[236] By letter dated 4 December 2014, the applicant and the third respondent were given notice of financial contribution under the unit holders' agreement. That notice recorded the fourth respondent had contributed $280,509.42 as working capital since March 2014. It requested the applicant and the third respondent contribute $102,000 as working capital. Monies had been contributed by the fifth and sixth respondents personally as well as from loans obtained from AUPNG pursuant to loan agreements.

[237] There was a signed loan agreement by which the second respondent was liable to pay money back to AUPNG. There was an oral agreement between the fifth and sixth respondents and Gibbons, whereby the fifth and sixth respondents promised, on behalf of the fourth respondent, to repay the money back to AUPNG. The interest rate payable on an AUPNG loan of 20% was loosely based on a credit card interest rate. The second respondent could not borrow money from anywhere due to the ongoing dispute. Its financier had pre-empted the position, telling the fifth respondent not to ask for any money. They did not seek to obtain any unsecured finance from someone else. It was a term of their loan agreements with Westpac that they not secure other funding, by encumbering any of the second respondent's assets.

[238] The third respondent was given the option of lending the merged business money at the same rate. Di Tommaso and Brent Charlton spoke to the third respondent at that time. The fifth respondent did not attempt to disclose to the third respondent the merged business' intention to enter into the agreement with AUPNG. The fifth respondent did not believe the third respondent was going to contribute in any way, and saw little point. The merged business needed money. The business could not go to Quick Fund as they were already in default.

[239] AUPNG took out a loan facility with Suncorp. The fifth respondent may have helped Gibbons complete that application. The second respondent agreed to service AUPNG's commitment to Suncorp from the fees it received on behalf of AUPNG. Some of the money advanced, pursuant to the AUPNG loan, was used to pay legal expenses. The merged business "dragged money from everywhere".[61] There was money provided by the fifth respondent, the sixth respondent, Gibbons and AUPNG. The loan was not specifically to pay legal fees.

[240] The monies provided by the fifth and sixth respondents as well as by loan from AUPNG, were loans to the fourth respondent, who contributed the funds to the second respondent. The fifth respondent did not know whether those funds had been recorded in the second respondent's accounts as a loan from the fourth respondent. The fourth respondent was ultimately responsible for repayment of the loans back to AUPNG. Both he and the sixth respondent had given assurances that Gibbons would be paid back that money. Gibbons expects them to repay that money.

[241] The fifth respondent decided to terminate the lease of the Margate premises in January 2014. The sixth respondent was in agreement. They initially wanted to sell the Margate premises and have the money repatriated back into their individual superannuation funds. After it became apparent they were not going to be able to sell it for close to what it was purchased for, the fifth and sixth respondents resolved, as 66% ownership, to re-let the property. During this process the third respondent threatened to lodge caveats to prevent the sale of the property.

[242] The third respondent also asserted the second respondent could not terminate the lease unilaterally as tenant. The lease agreement was not executed properly. It was signed by the third respondent, as both landlord and tenant, without presenting it to the fifth and sixth respondents. Those things meant there was not a binding lease in place. They were free to act in the best interests of the merged business. The building had been broken into and there had been a number of occurrences of behaviour, some of which had been reported to police. The franchisor had also suggested they move premises.

[243] The merged business moved to premises owned by Dolphin Property Group Pty Ltd. Both the fifth respondent and Gibbons were shareholders and directors of Dolphin. They remain directors but are no longer shareholders. There was no inherent conflict of interest in deciding to lease the premises from a company owned and controlled by him and Gibbons. Those premises had a higher rent initially.

[244] In May 2014, it was agreed between the third, fifth and sixth respondents and Gibbons, that the third respondent's self-managed super fund interest in the Margate property would be rolled over to Gibbons, who would replace the third respondent in the corporate superannuation fund. Gibbons was to pay approximately $51,000 into the fund, with the third respondent's superannuation fund to receive that sum. In June 2014, the third respondent resigned his directorship of that fund, at which time the fifth respondent was to pay the money into the third respondent's self-managed superannuation fund.

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61 T14-11/45.

[245] The money was paid directly to the Australian Taxation Office, and recorded as a loan from the third respondent to the second respondent. The third respondent had not agreed to any such loan. The fifth respondent recorded the monies as a loan at the time as there was evidence the third respondent had taken money out of the merged business and paid it to himself in superannuation and not recorded it correctly. The fifth respondent accepted he had not undertaken those matters correctly. For that reason, after commencement of Magistrates Court proceedings, the monies were repaid with interest, to the third respondent's self-managed superannuation fund. The fifth respondent did not know it was unlawful, until he received communication from the ATO.

[246] In cross examination, the fifth respondent agreed the third respondent prepared a submission to the bank for the purposes of finance of the merged business which asserted the fifth respondent had had advice from legal and financial advisors. The fifth respondent did not go back to the third respondent and say they had in fact used the same solicitor. The fifth respondent did not see the need as Holloway was acting for all parties in the merger. He and the sixth respondent did not want to engage solicitors until they had agreed terms generally. He took some advice from his accountant. The fifth respondent could not recall whether Holloway forwarded any documentation to the solicitors, Wallace Davies, for review.

[247] The split of ownership of the new entities was dependent upon the valuations of Gil Wright. The fifth respondent accepted that based on the amounts of management fees, it was roughly going to be a two-thirds / one-third but the valuations played a big part in the final determination. The fifth respondent accepted he had stated in an email, prior to the Gil Wright valuation, that the approximate split would be 66/34%.[62]

[248] The fifth respondent accepted he recorded the March meeting without telling the other participants. The fifth respondent recorded the meeting because there had been a history, in previous discussions, of parties leaving with a different interpretation on what had been discussed between them. The fifth respondent wanted an accurate record of the meeting to alleviate that concern.

[249] Once the directors agreed to the changed roles, the fifth respondent was in charge of the merged business. His role, as CEO, was to report to the Board of Directors. In that sense, the board of directors was effectively in charge of the business. However, day-to-day decisions to do with sales staff and property management staff fell within the ambit of the CEO. Major strategic decisions were the ambit of the Board of Directors. The list of duties of the position of CEO were discussed and agreed to on that basis. The third respondent agreed to the CEO's duties being in accordance with the proposal put forward by the fifth respondent. Although there was never a resolution of the Board of Directors formally minuting the roles of CEO, CFO and of the sixth respondent, the Board had appointed him CEO. The Board of Directors did not meet on a monthly basis in a formal sense. They met from time to time as they worked closely together.

[250] The fifth respondent accepted the unit holders' agreement required unanimous agreement to enter into, amongst other things, employment agreements for a term of more than 12 months or a financial commitment of $10,000 or more. The fifth

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62 Exhibit 10.

respondent did not specifically consider those provisions during any discussions with the third respondent concerning his employment. The unit holders' agreement also provided that board meetings could be called by any one of the three directors. The fifth respondent denied he refused to hold those meetings. Meetings were held from time to time. The third respondent was working in the same office every day. They were able to have discussions at any time.

[251] The fifth respondent had authority as CEO to demote the third respondent and to alter his payments. The fifth respondent did not do so in order to exclude the third respondent from the merged business. The agreement that all three would be paid a salary, was on the basis all parties would be contributing equally to the business. It was very clear from the staff survey that that was not occurring and for that reason changes were made. Initially, that involved an increase in payments to the third and fifth respondents. Ultimately, the third respondent was demoted from his position as CFO, as he was not performing the role. Someone else had to perform that role.

[252] The fifth respondent took external advice verbally from Wallace Davies Solicitors about whether the third respondent's conduct in the Prince Edward Parade transaction constituted a criminal act. The advice sought was whether the third respondent had committed a criminal act by diverting a buyer to another property with his name on the contract. He took copies of the documentation with him when he saw Wallace in his office at Redcliffe. Wallace gave him "the term stealing as a servant"[63] in relation to Prince Edward Parade "along with the other matters we found later". Wallace did not speak to the third respondent and obtain his side of the story. At the time the fifth respondent received that advice, the fifth respondent had a copy of the contract and of the emails where the third respondent had been given an opportunity to explain what had happened and had said "no, that's not one of ours". That was essentially a lie to cover it up.

[253] The third respondent was working for the merged business, being paid as a sales person. He met the buyer at one of their open houses and was obliged to do all items of business, being listing or selling activity, through the merged business, both legally and morally.[64] The merged business had purchased contract agreements which were constantly updated so that they did not have to continuously change the format. A sales person accessed the relevant software and filled in the details on line before printing the contract. At the bottom of the contract were the words "This is the property of Elders Redcliffe, under license number X". The third respondent used that document and liquid papered out the merged business' details at the top and wrote in his own details. It still had the license information at the bottom.

[254] The fifth respondent accepted that in August 2013, the fifth respondent forwarded an email to Whipps, Dawson and Edwards, which contained a proposal for a de-merger. That proposal did not appear in the email giving notice of the third respondent's suspension. A lot changed in that time period. They found out about the theft of money as well as numerous irregularities. Prior to any meaningful de-merger, those matters needed to be the subject to determination. There was no responses to his email trail. He

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63 T11-59/20.

64 T11-60/15.

did speak to Dawson by telephone, who was "pretty outraged" about the third respondent's conduct.[65]

[255] The fifth respondent accepted the third respondent specifically drew attention to a requirement that there be a meeting of directors to approve his dismissal. The fifth respondent's response was that "66.6% of the company is an approval of your dismissal. A meeting was not required in this instance."[66] The share holders' agreement allowed the managing director to make such a decision. The fifth respondent was, in a sense, that person, although he had never been appointed managing director and there had been no meeting of shareholders or directors to approve a person becoming managing director.

[256] Clause 9.4.1 of the unit holders' agreement provided covenants that the directors would employ themselves diligently in the business and be just and faithful to each other. The third respondent had not been just and faithful to them. He misled them and stole money on numerous occasions. The fifth respondent also relied on clause 9.2.2 of that agreement which allowed for decisions to be made by a simple majority of vote of those directors representing the unit holders only. The fifth respondent accepted the third respondent did not vote on any decision to terminate his employment.

[257] Clause 15.2 also gave the trustee, in its sole discretion, power to terminate the employment of a covenanter who was guilty of any breach of the terms of the agreement. The third respondent had breached the terms of the agreement, giving them power to terminate his employment. He accepted that at the time of the notice of suspension and termination he had not relied on any particular clause of the agreement for that power.

[258] The fifth respondent accepted that on 6 August 2013 the third respondent's legal representatives had written indicating that until the matter was resolved, the third respondent should continue to be paid $75,000 per annum; that any payments to the fourth respondent cease; that no staff be hired or terminated without all three directors unanimously agreeing and that expenses over $10,000 needed to be given prior approval. The fifth respondent did not accept that was "a reasonable holding pattern".[67] They had discovered theft of money. The third respondent was already employed by another company, the existence of which employment had not been disclosed to the fifth or sixth respondents. The merged business could not afford to pay someone $75,000 who "essentially was going to be working for a competitor or sitting at home on the couch".[68]

[259] The fifth respondent put forward a proposal that he and the sixth respondent could be brought out of the business for $375,000 each. The fifth respondent considered the situation impossibly deadlocked and the only way out was to go their separate ways. The de-merger position was not subsequently pursued, because once it became clear there was misrepresentation, it was difficult to sever, particularly as they were jointly

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65 T12-8/33.
66 T12-18/10.
67 T12-29/34.
68 T12-29/42.

and severally liable for the money borrowed from Westpac. It would have been difficult to say "we will take our debt, you take your debt and we will go away – you go away".[69]

[260] The fifth respondent accepted each of the directors had responsibilities to ensure the merged business was not operating insolvent. However he did not consider it practical for the third respondent to have any control over operating the business at that time. The third respondent could not be relied upon as he had put the merged business in a predicament, such as misreporting their tax position and giving them a huge tax debt. There were a range of other issues. They could not have had an efficient agreement between the three directors, even in relation to a unanimous agreement to hire or terminate staff.[70]

[261] The fifth respondent made a complaint to the Office of Fair Trading about the Prince Edward Parade contract and the Anzac Avenue transaction. He also made a complaint to the franchisor that the conduct was a breach of the franchise agreement. If he did not report it to the franchisor, he and the sixth respondent might be seen as complicit in that breach. The third respondent's conduct exposed the first respondent to the merged business being pursued for a breach of the franchise agreement.

[262] After termination, the fifth respondent discovered a number of payments made to the third respondent or entities associated with him. The fifth respondent accepted that in a later email, he stated that if the third respondent did not make restitution to the company for the monies that had been received by him, the company would issue shares to raise the required capital. Money was needed to pay the tax office and superannuation. The merged business was short of cash flow. The capital raising never occurred, as the fifth and sixth respondents were advised the unit holders' agreement took precedence over the constitution. That agreement prevented an issuing of further shares without unit holders' approval.

[263] At around the same time, the fifth respondent was refusing a request by the third respondent to receive a copy of the unit trust deed. They were getting stone-walled. It was time for a swap of information. The fifth respondent subsequently indicated, by email, that they were happy to provide the requested documents. The third respondent was provided with a copy of the trust deed after the commencement of proceedings and the making of an order by consent on 28 March 2014.

[264] The fifth respondent accepted that as part of defending proceedings brought by a former employee, to wind up the second respondent, an independent report was prepared on information provided by the accountant for the first and second respondents. No asset was listed in those accounts as being a loan owed by the applicant or the fourth respondent. Further, the management rights for the rent rolls for Acacia Ridge, Redcliffe and Springwood were carried as assets of the second respondent. The independent accountant expressly queried the treatment of those assets in his report, noting that the assets were in fact owned outside of the merged business. Those entries

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69 T12-33/3.
70 T12-34/6.

were corrected by the accountants for the second respondent at the end of the 2013 financial year.

[265] After the third respondent's resignation as a director, the fifth respondent instructed Dartnall to pay $5,500 including GST to the fourth respondent each month and to not pay anything to the applicant. They were director's fees. The third respondent resigned as a director, so he was not entitled to the fees. Prior to the third respondent's resignation as a director, the third respondent had been notified the applicant would not be paid its director's fee, having regard to the items of theft that had been found. No director's fees would be paid until that theft was redressed.

[266] The fifth respondent accepted he and his wife were shareholders of Boland Real Estate Pty Ltd, which owned one share in AUPNG, a company in which Gibbons owned 300,000 shares. AUPNG was a client of the merged business, which managed a rent roll owned by AUPNG in a similar way to the rent rolls of the applicant and fourth respondent. The AUPNG rent roll was purchased from Century 21 Underwood. The fifth respondent assisted Gibbons with the negotiation for that purchase. The fifth respondent was unable to explain why his name was recorded in a 2014 tax return for AUPNG as its public officer. He was not an officer of AUPNG.

[267] There was a written management agreement between AUPNG and the first and second respondents. AUPNG paid a monthly fee. That was sufficient to cover the costs of providing the service to AUPNG. The second respondent could make additional fees out of the arrangement, such as sales commissions, letting fees and sundry income. The second respondent also collected commissions and other fees on behalf of AUPNG, which were deposited into the second respondent's account. The monthly fees would be deducted from those amounts, with the balance being retained by the second respondent, in effect, on trust for AUPNG. The arrangement with AUPNG was in the best interests of the second respondent. The receivers of the second respondent believed it was a good deal.[71]

[268] AUPNG was not established to "suck all of the profit out of" the first and second respondents.[72] It was not established to divert business from the second respondent. The only monies the second respondent paid AUPNG, was in repayment of any of the loan agreement, or pursuant to the management agreement.

[269] The number of properties on the AUPNG rent roll had dropped significantly between 28 February 2014 and December 2016. The decrease had slowed significantly but it had shrunk more since December 2016. There was a lot of volatility in the management fees earned by AUPNG from its rent roll. The second respondent's income had also declined in recent times. Whether the expenses had dropped and the overall net profit had increased, despite the payment of receiver's fees. The appointment of receivers had "re-invigorated" the fifth respondent in a lot of ways.[73] He had been freed up to list and sell properties. Some non performing sales staff had also been let go. The very reason its sales income has improved is by bringing in new sales people, mentoring them and

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71 T13-55/30.
72 T13-57/1.
73 T13-71/25.

giving them the time, which is contrary to the approach the third respondent wanted to adopt for the merged business.

[270] The second respondent's financial statements for the year ended 30 June 2016, had been prepared by Kay on the fifth and sixth respondents' instructions. Under financial liabilities, unsecured, there were listed loans to AUPNG. They could relate to money AUPNG was owed under the management agreement, or for equipment, or that had been loaned for legal and other expenses. The financial accounts also contained under intangible assets an entry for legal expenses, which possibly was to represent the prospect of recovery of legal fees under a costs order in this proceeding.

[271] The bank statements for the merged business recorded entries by way of deposit as "AUPNG Boedry Loan". That represented money deposited into the second respondent's business overdraft account, by AUPNG, for a loan. Whilst the second respondent paid principal and interest repayments off the Suncorp loan, that was effectively a payment by the second respondent to AUPNG, in lieu of money it owed AUPNG each month. It was paid only the amount needed to meet the repayment of the Suncorp facility.

[272] The agreement reached with Gibbons was that whatever monies were loaned by AUPNG to the second respondent would be repaid at some time. It has not been agreed to give Gibbons any other benefit out of this arrangement. The fifth and sixth respondents had discussed with Gibbons, securing an interest in the company down the track. If they owed him a certain amount of money, depending on the value of the merged business, repayment may be worked out by a share transfer arrangement. The debt would be repaid by providing a shareholding commensurate to the debt. Gibbons would not receive a portion of the business for nothing.

[273] The fifth respondent accepted he had estimated legal expenses at $50,000 to $100,000. They were ultimately charged over $300,000. The proceeding was initially commenced against the first and second respondents. It ran for some 15 months before the fourth respondent was even added as a respondent. The first and second respondents defended themselves against the proceedings brought by the applicant. Around the time the fourth respondent was added to the proceeding, the respondents became self-represented. There was not much expenditure of legal fees thereafter.

The sixth respondent

[274] The sixth respondent obtained his real estate license in about 2004. In about June 2005, he and the fifth respondent purchased their first rent roll at Acacia Ridge, through the fourth respondent. Prior to real estate, the sixth respondent had been employed in the banking industry in Australia and Papua New Guinea. At the end of his banking career he was specialising in international operations and treasury.

[275] In about June 2011, the sixth respondent had a discussion with the third respondent about a merger of their businesses, in the context of a discussion about tough times in the market. The sixth respondent mentioned this conversation to the fifth respondent. They discussed who to use as a franchisor, the establishment of a shared office, and how

the shareholding was to be set up. The third respondent indicated the applicant had half the managements of the fourth respondent and that it should have one third and they should have two thirds of the merged business.

[276] Valuations were undertaken of the respective rent rolls. Gil Wright accessed the office server and other information. They would undertake random checks on management. They would do comparisons with other similar rent rolls. They could see how many staff the business had and looked at their business records. Just about every bank uses Gil Wright as a valuer for rent rolls. The sixth respondent relied on Gil Wright. He was mainly interested in the multiplier. The sixth respondent never considered the information in the valuations might be inaccurate.

[277] Legal advice was sought about the structure. Ultimately, it was agreed to establish the first and second respondents, with ownership being 34% in the name of the applicant and 66% in the name of the fourth respondent. The first respondent was a holding company. Holloway prepared the relevant agreements, including the unit deed. At no stage did Holloway suggest the sixth respondent receive legal advice. The sixth respondent considered Holloway was acting for all parties, including himself.

[278] Finance for the merged business was obtained from Westpac. A facility of $1.8M was advanced which was used to extinguish debt under the fourth respondent's name of $1.2M and $600,000 under the name of a company associated with the applicant. The different amounts were broken up because of the amount to be paid to the fourth respondent and the applicant. That money was not paid to the applicant and the fourth respondent, by way of purchase of their rent rolls. Those assets remained in the name of the applicant and fourth respondent. The amounts were to be treated as loans.

[279] Existing expenses were to be carried forward into the new operation. If they were an operational expense, they would be met by the merged business. The merged business utilised two motor vehicles owned by the fourth respondent. The sixth respondent was using one. The other was used by the Redcliffe office. The sixth respondent understood one motor vehicle was paid for by the fourth respondent, with the other being paid out of the second respondent's account.

[280] There was a period of time after the merger when the applicant and the fourth respondent were still paying bills, or receiving commissions. There was a transfer of funds to rectify those payments. Prior to those transactions being undertaken, a spreadsheet was considered by the third, fifth and sixth respondents. At no stage did the third respondent raise with the sixth respondent that these transactions had been made without his knowledge or authority. The sixth respondent also denied that staff members received pay increases without the third respondent's knowledge. He was not aware of any staff member being employed without the knowledge of the third respondent.

[281] When the merged business commenced, they each had clearly defined roles. His role was as principal license holder for the Acacia Ridge office. The third respondent was in charge of the property management area and administration. The fifth respondent was leading the sales team. Day-to-day decisions were the responsibility of the respective director. Decisions about hiring or firing were made by the director in charge of that

area.[74] The sixth respondent made all the day-to-day decisions in respect of Acacia Ridge.

[282] The unit trust provided that decision making was to be binding, by way of a simple majority vote of directors. He was not aware of any decision being made where there was not a majority of directors that voted on it. A decision for the acquisition of a building by the second respondent, would require a majority vote. However, if one person did not agree, it was unlikely they would sign loan documentation so the merged business would not be able to borrow the money in any event. Accordingly, big purchases, or major decisions were likely to require unanimity.

[283] The unit holders' deed contained covenants between owners, that they be just and faithful to each other in all transactions, relating to the unit trust. To the best of his knowledge he had been just and faithful to all other unit holders. The sixth respondent no longer believes the third respondent entered into the agreement with the utmost good faith to each other.

[284] Within three months of commencement of the merged business it was obvious things were not running well. There were issues at both offices. There were problems with arrears and cash flow. As a result of these concerns, the fifth respondent became more involved with the property management area as well as sales, whilst the third respondent concentrated on administration.

[285] Soon thereafter, negotiations were entered into to purchase the rent roll of Elders Springwood. The merger of that rent roll was an absolute shambles. They lost a lot of managements due to mismanagement and movement of the business premises to Springwood. There were many problems with equipment, including phones and fax machines. The fit out was not correct. The signage was not done. The tenants were not advised of the move. The post office box was not moved, meaning mail that was legally required to be opened, was not dealt with in accordance with their obligations. The third respondent was in charge of those matters.

[286] Thereafter, the third respondent was moved into a predominantly administration role. It was felt that was in the best interests of the merged business. At that time, they were looking into owning their own building and looking after their own accounts. There was a need for someone in a more administration role, as opposed to a hands on sales role. All three were still expected to sell real estate.

[287] By that stage, the fifth respondent had virtually taken over responsibility for property management, with the sixth respondent responsible for the Springwood office. The sixth respondent felt isolated at Springwood. He did not think the administration was being handled well. There were property management issues all over the place. A staff survey undertaken in late 2012, or early 2013 revealed morale was terrible, as was the culture. There were overlapping leadership issues. Confidential information was being leaked about staff. It was not a great place to work.

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[74] T15-17/30.

[288] The independent survey was undertaken by the franchisor. The results "weren't pretty".[75] Personally, it affected the sixth respondent greatly. His assessment was that the third, fifth and sixth respondents all took on board the survey comments as fair and accurate. Everyone was apologetic and knew they had to change their attitude to move forward. The sixth respondent was removed from the property management area. It was felt it was better for him not to be involved in that area.

[289] The franchisor expressed concerns about the survey. A meeting was held with Whipps who said they had to undertake some serious soul searching to consider if they wanted to remain in partnership together. Whipps said they had to stand in a united front behind a leader. The sixth respondent's impression was that all three agreed with that position. All three agreed the fifth respondent would be the CEO and they would stand behind him. All three agreed the fifth respondent would make the decisions.

[290] After that meeting, the third, fifth and sixth respondents agreed on the roles each was to undertake in the merged business. The sixth respondent was to be responsible for sales at Springwood, being paid $50,000 in advance of commission, with $10,000 for additional expenses. The fifth respondent was to be CEO, being paid $110,000 to $120,000 with $10,000 expenses and a vehicle as he would be travelling more miles. The third respondent was to be CFO, being paid $75,000 to $85,000, with $10,000 expenses.

[291] Haines Norton were engaged around this time to undertake a financial health check. They made recommendations from a management point of view. There was a meeting with Haines Norton after delivery of their report, attended by the fifth and sixth respondents. The sixth respondent was "quite cranky", the third respondent did not attend, as he was the CFO of the merged business. They had paid $5,000 for the report and it was important. The sixth respondent was in favour of implementing their recommendations.

[292] There had been agreement that unit holders would be paid $1,000 a share per annum. They were, in effect, directors' fees, but were called different things at one stage for tax or other reasons. It was actually suggested by the third respondent, at a time when the third respondent was in charge of paying accounts. The sixth respondent thought the applicant and fourth respondent were paid this amount until early 2014.

[293] After the third respondent became CFO, "it was a disaster".[76] Staff's accounts were not being paid. Agreements were not being met. The taxation position was misrepresented, causing significant difficulties further down the line. The problem was widespread. The sixth respondent could not remember a staff member not having a problem with their pay. On occasions, the sixth respondent was not paid for weeks. There were occasions when he received an incorrect payment.

[294] The sixth respondent had seen communications by employees in which the failure to pay was specifically raised with the third respondent. There was more than one occasion. Whilst Dartnall was looking after pays, they were 99.9% correct. When the

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75 T15-27/37.
76 T15-36/39.

third respondent was looking after pays they had an accountant, a director and a bookkeeper and there was still significant problems. The sixth respondent offered to take over the pays. The third respondent was vehemently against allowing him near the books. The sixth respondent regretted agreeing to the appointment of the third respondent as CFO.

[295] Everyone was talking about it. There were inferences that the merged business was not able to pay their staff. There was an inference about favouritism. The third respondent raised in email communications, in response to the complaints of staff about non-payment of wages, that he had been given incorrect information. The sixth respondent did not accept that explanation. These staff had previously been paid and their pay had ceased at some stage. The correct information must have been available initially for them to receive their pay.

[296] The explanation given by the third respondent for non-payment of the sixth respondent's wages also was not true. The merged business had been paying him previously. His account details had not changed. The third respondent had the sixth respondent's bank account details and tax file number. Whilst for some period he and the fifth respondent were being paid effectively as contractors, with the payment being made to the fourth respondent, at times the payment to the fourth respondent actually went into the sixth respondent's own personal account

[297] Two staff members resigned because they were not being paid their salary. The sixth respondent was furious. Morale was so poor and it was wasting so much time. The sixth respondent felt he was being hung out to dry at Springwood because staff were not being paid. An employee complained to the franchisor about non-payment of his superannuation. The employee had been given the sixth respondent's payslips. That was a great breach of confidence. There were many and varying issues about payments.

[298] The sixth respondent wrote an email saying if it was not sorted out he was coming to Redcliffe "to bang some heads".[77] A basic premise of an employer/employee relationship, is that the employee is paid on time. People have bills and rent to pay. It was horrific. The sixth respondent was corresponding with the third respondent daily about these issues, in quite terse terms. By that stage the franchisor was also involved, asking what was going on. It was a conversation "around the water cooler".[78] They had to make drastic changes.

[299] The fifth and sixth respondents decided to remove the third respondent as CFO. Dartnall was put in charge of the pays. She had previously looked after them and they had never had a problem. If they had not taken action they would have had staff walk out. The third respondent had been given too many chances to rectify the problems. They should have acted a lot earlier.

[300] The fifth and sixth respondents spoke to the third respondent and said "You know mate, you've got to go. You just cannot do the pays anymore."[79] The third respondent agreed

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77 T15-37/35.
78 T15-38/6.
79 T15-38/22.

to his removal as CFO. There was not any agreement about what other position he would have in the merged business. It was agreed he could not be CFO or look after the pay of staff. As far as the sixth respondent could remember, the only attendees at the meeting were the third, fifth and sixth respondents.

[301] The sixth respondent did not know whether the third respondent ultimately signed a new workplace agreement for a $50,000 debit/credit sales position. The sixth respondent thought it a great idea in the best interests of the merged business. The third respondent was a bit of an identity on the Peninsular. He had a lot of contacts. They needed expertise in certain areas that would generate income. The third respondent would probably earn more money doing that role. Thereafter, the third respondent seemed very busy, but the sixth respondent did not see too much income.

[302] In May or June 2013, the sixth respondent discovered a Quick Fund equipment agreement had not been met. Both the fifth and sixth respondents were given credit default notices because of non-payment. The third respondent reassured him and the fifth respondent the matter was being controlled by him and Holloway.[80] He was never told by the third respondent that Holloway was not acting for them. He found out when Dartnall contacted Holloway, who said he did not know anything about it at all. The sixth respondent was very unhappy.

[303] The sixth respondent subsequently found out about multiple form 20A's signed by the third respondent, lodged with the Residential Tenancy Authority. They related to different owners. These forms allowed a person to act on a property management to collect rent and be paid a fee. The form was printed "ADL forms for exclusive use for Customs Realty Pty Ltd t/as Customs Realty". The sixth respondent did not know Customs Realty

[304] If the sixth respondent had been aware the third respondent was entering into those types of agreements, he would have taken steps. It involved receiving ongoing commission, outside of the merged business. Some of the properties had been on their rent rolls. The third respondent was soliciting and intending to make money outside the merged business. To act in that way was not acting in the best interests of the merged business. There were "so many things wrong, on so many levels".[81]

[305] The forms were dated between 16 June and 16 July 2013. At that time, the third respondent was working as a sales person for the merged business, being paid the same arrangement as the sixth respondent. Under that arrangement the sales person would earn a minimum, guaranteed, of $50,000. The maximum income was unlimited. The third respondent was also receiving an extra $10,000 for expenses, plus his director's fees of $34,000, in accordance with the unit holding.

[306] In early August 2013, the sixth respondent travelled to the United States for a holiday. Whilst there, the fifth respondent told him they had found out from a property conveyancing company that a property had been sold by the third respondent outside the merged business. The contract was on their forms, which is probably why the

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80 T15-49/10.

81 T15-42/26.

conveyancing company contacted the merged business. All agents had said they did not know about the property. After that denial, the paperwork was obtained and it was found the third respondent was the sales person, but not through the merged business.

[307] The sixth respondent was informed there was commission listed on the documentation. It was a classic example "of what you would do if you were trying to avoid, or trying to secure money outside of who you were working for, and I had serious concerns. It is stealing."[82] In real estate, people earn money from sales. Any employee is contracted to put all sales through the real estate agency. The franchisor is entitled to franchise fees. The merged business was entitled to its share of the commission. There were taxation implications. It was not in the best interests of the business. It was also "illegal".[83]

[308] The sixth respondent suggested that pending a further investigation, the third respondent be suspended immediately and not be allowed back into the office, unless they were supervised visits. The sixth respondent was concerned the third respondent might be removing information from their server to inhibit the investigation.

[309] The third respondent was not happy about that suspension. The third respondent approached the real estate equivalent of a union, seeking advice on whether he could be suspended from his position. The fifth respondent was contacted by that organisation and advised they could not suspend the third respondent without pay.

[310] After the sixth respondent returned to Australia on 18 August 2013, a decision was made by the fifth and sixth respondents to dismiss the third respondent from his employment with the merged business. He had no problems in agreeing to the dismissal of the third respondent. By that stage, the fifth respondent had received advice the third respondent could not be suspended from his employment. He either had to be kept on board or dismissed. The sixth respondent voted for dismissal. With his banking background "you steal money, you lose your job as an employee".[84]

[311] The sixth respondent sent the third respondent a terse, lengthy email. The sixth respondent did not accept the third respondent's explanation he negotiated a private sale for no commission. If an agent had agreed not to receive commission, it would be crossed out and initialled on the contract. If you leave it on the document, the agent could ask for that money. The contract had no crossing out of commission. At no stage did the vendor, buyer or either solicitor say there was no commission.

[312] The sixth respondent rejected a suggestion the third respondent's statement "it's not one of ours", was indicating he knew something about the matter. It was inaccurate in any event, as the documentation was on the second respondent's forms, so "it was one of ours"[85]. The statement "it's not one of ours", meant the third respondent knew nothing about it. His response was "a smoke screen".[86]

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82 T15-47/26.
83 T15-47/21.
84 T15-50/24.
85 T17-81/10.
86 T17-81/17.

[313] They had a duty to find out why someone thought they were holding money in the trust account. The sixth respondent did not make any enquiries with the parties to the contract. The third respondent had had ample opportunity to explain himself. It was only after they had discovered his name on the contract that he started offering explanations and saying he was not taking a commission. The third respondent had been given ample opportunity to admit there was a contract. Instead, the third respondent had gone to Holloway and sought details of who had let the information out about the contract. The third respondent had also written an email stating that no commission was to be charged, even though it was listed on the documentation, and that he never intended to take that commission, even though he had solicited it.

[314] The third respondent's conduct was not just receiving commission. He was using company equipment and company forms. He was working outside the merged business. It raised concerns there were other transactions in which the merged business had not received the commission. Even if the sixth respondent had been satisfied that the third respondent had not received a commission, he would still have had concerns about the transaction. If you made a mistake and you owned up to it, things would be looked at differently. The third respondent did not admit anything.

[315] The sixth respondent was also concerned about the franchisor's position. The franchisor made their money from commissions earned by the business. For that reason, they contacted Elders. Otherwise, it would have looked like the fifth and sixth respondents were avoiding paying franchise fees. It was not appropriate to simply let the matter go. The sixth respondent had been told by the franchisor at one stage, that you are always allowed to make an honest mistake, but if you try to hide it, you are in trouble. He had also come from a banking background, where hiding the mistake was worse than admitting an error. If they had not come clean they could have been "kicked out", and there could have been a full audit. The repercussions were just too dramatic.

[316] The grounds for the third respondent's suspension from his employment were substantiated by evidence. They were not false or fabricated or designed to engineer his removal from the merged business. The fifth and sixth respondents had a duty to protect the merged business and the shareholders. They had to remove the third respondent on that basis. The sixth respondent could not put up with the theft.

[317] Within a week of being terminated as an employee, the third respondent resigned as a director of the first and second respondents. He did so without discussion with the fifth and sixth respondents. No pressure had been placed on the third respondent. The third respondent had been removed by them as an employee only. The sixth respondent was hoping he would remain as a director so they could have some discussions. The third respondent showed no remorse or contrition. Instead, he started litigation.

[318] After the third respondent's resignation as a director, the merged business required more money. The fifth and sixth respondents discussed issuing new shares to obtain that money. There was a process in the unit holders' agreement for issuing new shares. That agreement required a 75% majority. As the third respondent refused to agree, the proposal did not proceed.

[319] The fifth and sixth respondents discovered the merged business' tax position had been misreported to the ATO. There were also issues in relation to the applicant's rent roll and other issues involving the general accounts. Money had been removed from those accounts without the knowledge of the fifth and sixth respondents. Entries had been made which were not factual. Money had been removed from the trust account. There were payments without the issue of an invoice.

[320] The third respondent had also paid himself superannuation. At the commencement of the merged business, the third, fifth and sixth respondents agreed not to be paid superannuation. They each signed a declaration that they were not working for each other. One of the reasons given to him to sign that statutory declaration was that a director working in the business could forego superannuation, as opposed to being a straight employee, to whom the business would be legally obligated to pay superannuation.

[321] It was also discovered that after the removal of the third respondent as CFO, the third respondent had secured a cheque book and written cheques. In the sixth respondent's view, those transactions were theft. Monies had been taken which the third respondent had tried to cover up by creating accounts in the MYOB, calling them different things. If that had happened in a bank, you would be sacked.

[322] The sixth respondent was never aware of any arrangement for the employment of Mark Andrew. If he had been an agent working for the second respondent, the license would have been in the window. Whenever he was at Redcliffe, no license for Andrew appeared in its window. Any payment of commission to Andrew was without consent. If the second respondent was paying someone commission, there were other obligations, such as taxation. You cannot "just give someone a sling".[87]

[323] The sixth respondent did not accept that payments made to entities associated with the third respondent, were mistaken payments. With his extensive banking experience, it was not plausible to suggest that direct transfers were undertaken mistakenly. You need to insert certain details for such transfers. It also had to be accounted for in MYOB, which ought to have picked up any mistake. The sixth respondent did not believe there was a contractor named Ted. That person never came back and asked for payment, and $4,000 was an odd amount to be paying a tradesman. There was no GST component. These payments were theft.

[324] The explanation for the payment of $855.00 cash, was also not plausible. You could not take cash and replace it with a cheque. The monies were trust monies. Such a transaction was illegal. It needed to be properly accounted for in the trust account. The suggestion of errors in relation to the franchise accounts added to the suspicion. The franchisor never came back and admitted having made such an error. The money was moved from one account to another account improperly.

[325] The sixth respondent consented to the sale of the applicant to Gibbons. The sixth respondent had known Gibbons for a long time. He classed him as a very good friend. He had never been in business with Gibbons. Gibbons was looking to broaden his

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87 T16-39/33.

interests in other markets and wanted to be involved in real estate. The sixth respondent believed a contract was issued, in which the price originally started as $300,000 and was changed to $350,000 or $400,000. Gibbons asked for a due diligence period. There was to be prepared a valuation by Gil Wright. Ultimately, Gibbons signed a contract for the purchase of the applicant. The third respondent did not sign that contract. The sixth respondent consented to the sale of the applicant to Gibbons.

[326] It was not appropriate for the fifth and sixth respondents to just do whatever was necessary to make a sale happen, so the third respondent was out of the business. That was "just wrong on so many levels".[88] If the fifth and sixth respondents knowingly did something to jeopardise their new business partner, or willingly assisted the third respondent to "con" someone else, that could constitute conspiracy. It would not be right and would probably be found to be illegal. You would just be "kicking the tin down the road". [89] The fifth and sixth respondents would probably be sitting in court with Gibbons.

[327] There was manipulation of the applicant's rent roll. Properties were not actually being managed and figures were changed to inflate what was being charged in respect of other properties. Those figures were misrepresented by the third respondent to not only get a better multiplier, but also to indicate the properties were earning more money than was the case actually. That never happened in respect of the fourth respondent's rent roll.

[328] The purchase of the business premises at Margate, was "another brilliant idea".[90] It was thought they would be able to make a quick $1M, whilst moving the merged business into premises owned by themselves. The merged business moved out of those premises for a range of reasons. The franchisor believed they were in the wrong location. They did not have parking out of the front of the building. The refurbishment had not been done well. The premises were not suited for what was trying to be achieved by the merged business. The property had been broken into at least twice and things removed from the property, including a computer. The property had sprung a leak.

[329] After consultation with the franchisor, it was recommended they move back to their previous location. Those premises were now being used by someone else, but there were premises available two doors up. Those premises were owned by Dolphin Property Group. The sixth respondent was aware of the fifth respondent's 25% shareholding in that entity. He did not object to moving into those premises. The rent was on commercial terms. It was in the best interests of the merged business.

[330] Since the commencement of litigation, the second respondent had undertaken management of a rent roll owned by AUPNG, which was incorporated in October 2013, for the purposes of buying a rent roll from Century 21. The shares of AUPNG were primarily owned by Gibbons or his wife. The sixth respondent did not know why he and his wife had one share out of 300,003 shares in AUPNG. They gained no benefit.

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88 T15-56/23.
89 T15-56/37.
90 T15-60/10.

[331] There was an opportunity for Gibbons to buy a rent roll cheaply. An agreement was negotiated by the fifth respondent for the second respondent to manage that rent roll for a fee. The rent roll agreement has been commercially profitable for the second respondent which is geared to manage a certain amount of properties. Managements were being removed from its own rent rolls behind their backs. Other managements were lost in highly suspicious circumstances. Apart from management commission, the second respondent picked up levy fees and postage, as well as selling properties off that rent roll, the commission for which went directly to the second respondent. The sixth respondent hoped AUPNG did not go away.

[332] In addition to that arrangement, AUPNG had lent the second respondent money to purchase equipment. Due to the litigation, the fourth, fifth and sixth respondents were unable to secure finance from anyone. Westpac had turned their backs on them. They needed money to continue running the merged business. An agreement was reached with AUPNG for the loan of monies with a 20% per annum interest rate. That agreement was not excessive. They had previously purchased equipment through finance, where the interest rate had been more than 20%.

[333] In 2014, the finance facilities with Westpac were due to expire. The fifth and sixth respondents were advised that documentation had been prepared to extend the loan. John Robinson, the bank officer, had personally contacted the third respondent. Robinson advised then that the third respondent had refused to sign any documentation and the third respondent's wife had refused to sign a further guarantee. The fifth and sixth respondents were forced to sign the documentation without the third respondent's signature. It was either re-negotiate the facility or sign the documentation. Otherwise, they would be forced to sell the merged business. The third respondent would have frustrated any sale. It was in the best interests of the merged business that they sign that documentation.

[334] The third respondent was obliged to continue his commitment to that finance. He was still a shareholder. Further, the third respondent had benefited from the initial facility as $600,000 had been paid to the applicant's associated entity. There was still a loan outstanding from the applicant to the second respondent in respect of that money. A breach and default notice was served on the third respondent in respect of non-provision of security for the loan of $600,000. The new accountant had queried the structure of the balance sheet and in particular, the payment of $1.2M to the fourth respondent and $600,000 to the applicant. The second respondent had not purchased the rent rolls of the applicant and the fourth respondent, calling into question the deductibility of these loans. It was correct, in the circumstances, to request the repayment of that $600,000.

[335] It was proper to use the second respondent's money to defend the proceeding brought by the applicant and third respondent. That proceeding initially was only commenced against the first and second respondents. They had to defend themselves. By the time the sixth respondent was joined as a respondent, they were representing themselves. The sixth respondent, at one point, put in money personally to assist in the payment of legal fees.

[336] In cross examination, the sixth respondent said he could only remember taking legal advice from Holloway during the merger discussions. It could be the case that

documents were sent to Wallace Davis for review. During those discussions it was agreed the rent rolls would remain in the name of the applicant and fourth respondent, but be managed by the first and second respondents. Consistent with those discussions, neither the applicant not the fourth respondent could take their managements out of the merged business. They formed part of the merged business' security.

[337] During the merger discussions, the parties had worked on a probable one third/two third split between the applicant and the fourth respondent, based on the number of management agreements and income. The Gil Wright valuations were to confirm that split. It was also agreed that liabilities for any equipment used in the merged business would be paid by the merged business, provided that liability had been disclosed to the other party prior to the merger. All other liabilities remained the responsibility of the applicant and the fourth respondent respectively. There was to be some adjustment if there was a double-up of equipment. Any contracts signed by the applicant or the fourth respondent for ongoing equipment which was superfluous to the needs of the merged business were to be serviced by the second respondent.

[338] The creation of the two facilities, one for $1.2M and one for $600,000 at the commencement of the merged business, may have related to the one loan being a variable loan rate, with the other being a fixed rate. However, the sixth respondent denied $600,000 was to be variable to allow for extra payments so that the third respondent and his wife could release their security over their house. The applicant had responsibility to pay back $600,000 and the fourth respondent had responsibility to pay back $1.2M.

[339] It was reasonable to only demand repayment of the $600,000 from the applicant. The fourth, fifth and sixth respondents had not refused to sign any documentation to secure those loans. It was the third respondent and his wife who refused to sign that documentation. That was the sole reason for the issuing of a demand for repayment of the $600,000 by the applicant.[91]

[340] There were discussions between the third, fifth and sixth respondents about treating the payment of $1.2 m and $600,000 as loans. It was always a loan. There was no specific discussion as to when that money would be repaid by the applicant and the fourth respondent. The sixth respondent accepted that up until 2013, these amounts were not recorded as loans on the merged business' balance sheet. Those balance sheets were reconstructed on the advice of the new accountant, who decided that was the appropriate treatment of those amounts.

[341] There was no resolution of the board of directors of the second respondent to terminate the third respondent's employment. No board meeting was called for that purpose. There was nothing the third respondent could say at a board meeting. His deception from the outset impacted on the sixth respondent's decision to support the termination of the third respondent's employment.[92] The third respondent tried to hide the contract from them until there was nowhere to go. His explanation then became that he was doing it for no money. If the third respondent had shown some remorse or contrition, it

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91 T16-59/15.
92 T17-86/30.

is possible they may have been able to work out, in an amicable manner, their concerns in general. However, the third respondent would not have been able to satisfy their concerns in relation to the Prince Edward Parade contract. There was nothing that would have satisfied the sixth respondent it was appropriate for the third respondent to stay as an employee of the merged business. However, remaining as a shareholder of the merged business, was a different matter.

[342] Prior to the third respondent's suspension and subsequent termination, the third respondent's solicitors had written to them with a series of complaints, including that the fifth and sixth respondents were not considering the opinions or suggestions of the third respondent in the management of the business. That letter referred to the unit holders' agreement. The sixth respondent accepted that in those circumstances, he should have considered the unit holders' agreement before taking steps to suspend or terminate the third respondent's employment. However, directors' agreements did not need unanimous director approval. The third, fifth and sixth respondents had agreed they would have a united front behind the fifth respondent as CEO. They had agreed the CEO would make the decisions. If someone was not making those decisions, things would have fallen apart. They had tried to manage the merged business by committee. It was not working and someone had to be the decision maker. The situation had changed from what was set out in the unit holder agreement.

[343] The sixth respondent accepted that at the time the third respondent resigned as a director, he had had his pay cut against his will and he was not participating in business decisions generally. The sixth respondent did not accept that meant the third respondent could not discharge his duties as a director. He was able to freely discharge those duties. The third respondent still had remote access to the MYOB file.

[344] The third respondent's contract of sale of the applicant to Gibbons was conditional upon the consent of the first and second respondents to the sale. Both he and the fifth respondent verbally gave that consent to the third respondent. Whilst they subsequently indicated they would not consent, unless they were compensated for what they considered to be the third respondent's misrepresentations about the value of the applicant's rent roll, it never got to the stage of consent because the third respondent never signed the contract, which had been signed by Gibbons.

[345] The sixth respondent's concern in relation to the misrepresentation of the applicant's rent roll was that it may impact on the security value. Westpac had been given incorrect information from which it had assessed its security requirements. It would have had an impact on the multiplier. He had not gone back and looked at Westpac's lending criteria in relation to the valuation of its security. Westpac did not require another valuation when he and the fifth respondent signed documents to roll over the facility.

[346] Notice had been given to the third respondent and the applicant for a financial contribution in 2014 because the fourth respondent had contributed an amount of $280,000 to the second respondent. Those monies were paid by either the fifth and sixth respondent or AUPNG. In hindsight, the monies from AUPNG should not have been paid directly into the second respondent. They ought to have been loaned to the fourth respondent and then paid to the second respondent as shareholder loans. That was the effect of the transaction with AUPNG.

[347] The sixth respondent had no role in how the AUPNG arrangements were recorded in the books of the second respondent. He did not have access to his financial records and did not input any information. The shareholder loans were used for a range of different expenses, including legal expenses. The reference to $304,000 legal expenses as an asset in the 2016 financial report for the second respondent, was a reference to legal fees being owed to them as the consequence of this dispute.[93]

[348] The $1,000 per percentage per annum, agreed to be paid to the applicant and the fourth respondent, was initially paid on a monthly basis. The payment was made by way of a director payment, although it was calculated in a particular way. If they were to be paid as a form of dividend, it would have been necessary to declare a profit and a dividend. They were not equity distributions, treated as loans. These payments were made to the fourth respondent, not the sixth respondent personally.

Other evidence

[349] Trevor Connolly, a developer and uncle to the third respondent's wife, owned 42 investment properties. He believed the properties were still managed by the merged business. Connolly understood he was charged commission for that management. The third respondent had never asked him to take properties away from the merged business. He would be surprised to learn the merged business had received a written termination of the management of those properties.

[350] At the time Blair managed the rent roll for Century 21, there were approximately 114-117 properties. Most of her time at Elders Springwood, was spent working on the rent roll that had come from Century 21. Blair resigned a few months after starting at Elders Springwood, due to ill health. She did not know what happened to her team. Blair did not enjoy her time working for Elders Springwood. Everything that could go wrong, did go wrong. She spoke to the fifth respondent about her concerns. She was disappointed by the whole experience.[94]

[351] Mark Andrew had known the third respondent for about 10 or 11 years. They developed a very good business working relationship. The third respondent lent Andrew money over a two or three year period to pay rent and expenses when the sale of Andrew's real estate business failed to settle and he ended up losing everything. It was never charity. It was always on the understanding the third respondent would be repaid out of Andrew's life insurance, or out of a real estate deal. Andrew estimated he was loaned in the order of $45,000 to $46,000. He made small payments from time to time. Andrew would split any commission, paying half to the third respondent in repayment of his debt.

[352] Andrew worked part time for Elders Redcliffe, when it was operated by the third respondent. After the merged business moved to the Margate premises, he attended those premises on three or four occasions. During that time, he received commission in respect of the sale of particular properties. One property was Benson Parade, Kippa-Ring. The vendors were friends of his wife. They had passed away within the space of three months. They had a son, aged 20 years. Andrew sold the property through Elders

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93 T18-12/45.
94 T4-24/14.

on behalf of the Public Trustee. The commission was split between Andrew and the third respondent.

[353] Another property transaction involved a client from Perth who owned three adjoining investment properties in Anzac Avenue, Redcliffe. As a potential development site, Andrew suggested a 'put and call' option on the property, as he and the third respondent had somebody who was willing to undertake that transaction. The fifth respondent advised the vendor that was not the best way to sell the properties. As a result, the properties were withdrawn from sale. They sold it through another agent and ended up losing $180,000. Andrew did not receive any commission.

[354] The third respondent lent Andrew some cash against advanced commission for medical expenses. Andrew telephoned the third respondent asking for a loan of a couple of hundred dollars. The third respondent had the money in an envelope, ready for Andrew.

[355] In cross examination, Andrew said he worked part time permanently. To that extent, he could be said to be an employee as he was not working for any other agency. Andrew conducted open house inspections on behalf of the merged business. He conducted such inspections for Benson Parade. He could not recall any other specific properties. Anzac Avenue was a development site, so no open house was done.

[356] Andrew did not ever have an employment contract with the merged business. Andrew had a real estate license at that time. As long as he had nothing to do with the trust account, he was legally able to sell property. Andrew had previously been bankrupt. That did not affect having a sales person's license. Andrew would pay tax on monies earned, if he earned in excess of the minimum amount required. At the time he was earning a minimum amount which did not require the payment of tax.

[357] Andrew would also refer properties to the third respondent. On occasions, he would receive a referral fee of 20%. Andrew would tell the third respondent to take a proportion of that referral fee to pay off his outstanding loans. Under that arrangement, Andrew was receiving an allowance, rather than commission. That was why he did not consider himself an employee. The third respondent was helping him out, giving him a sense of self-worth. Andrew's contacts were of some use to the third respondent in return. The fifth and sixth respondents benefited as well.

[358] Peter Di Tommaso, the accountant for the merged business from its commencement until approximately August 2013, produced two balance sheets from the back up copy of the merged business MYOB file. The first was to 21 August 2013. The second was to 26 August 2013.[95] He had access to that file until he ceased his engagement as the merged business' accountant. The balance sheets recorded three entries, two for management rights and one for rent roll Springwood at cost.

[359] The latter entry was in that form because the Springwood rent roll had been purchased by the merged business. The rent rolls of the applicant and the fourth respondent were treated differently as the merged business only acquired management rights. If the

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95 Exhibits 99 and 100.

second respondent had actually purchased those rent rolls, they would have been shown at cost, like the rent roll for Springwood. That different entry would not have altered their value. Di Tommaso understood the value of the merged business was represented by two thirds being the fourth respondent's rent roll and one third being the applicant's rent roll.

[360] In cross examination, Di Tommaso confirmed he had been the trust account auditor for the applicant prior to the commencement of the merged business. He became the accountant for that merged business but did not ever perform an audit of the merged business. It would have been implied he was going to be the auditor, but he did not recall signing any documentation with the Office of Fair Trading to that effect. He did not ever recall receiving any instructions to audit the accounts of the merged business.

[361] Di Tommaso accepted he issued an invoice in April 2013, [96] to the merged business, for performing an audit. He did not remember performing that audit but accepted the fee charged would be consistent with a very simple audit. He had received email correspondence from the fifth respondent asking questions about that audit. He did not respond as he was "a busy man and it didn't seem a great deal of urgency at the time".[97] As an experienced professional auditor, you would normally take the opportunity to clear up any discrepancies. The merged entity was fined for the non-lodgement of an audit, but Di Tommaso said "it happens".[98]

[362] Di Tommaso was aware that of the $1.8M borrowed by the second respondent, the fourth respondent was paid $1.2M and the applicant was paid $600,000. He was involved in setting those items out in the balance sheet, but was "a bit in the dark" as to how it was all going to operate as he had not seen a signed unit holders' agreement. The loan had to be shown as a liability as the second respondent owed that sum to Westpac. Normally, if in the course of a business someone received the benefit of $600,000 to reduce a debt, the $600,000 having been provided by the merged entity, the merged entity's balance sheet would have an asset and a liability.

[363] Di Tommaso accepted he lodged the BAS statement for the merged business in the quarters ending September 2012, December 2012 and March 2013. They showed a consecutive drop in sales income from $558,000 to $332,134, to $164,406. In hind sight, such a fall would be a reason to be concerned, but "mistakes happen".[99] There was a responsibility for making sure the BAS statement was accurate, but he did not audit the merged business, and businesses have large fluctuations. These changes were not fluctuations; they were going in a decidedly downward trend.

[364] John Robertson a relationship manager at Westpac, was responsible for the bank requirements of the first and second respondents. He first became aware of a potential merger between the applicant and the fourth respondent in late 2011. At that time he was the bank manager for the third respondent, who he had known for six or seven

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96 Exhibit 101.
97 T6-13/45.
98 T6-14/35.
99 T6-22/21.

years. Robertson met the third, fifth and sixth respondents in late 2011 to discuss the merger of their businesses into one entity.

[365] The applicant's existing facility was $600,000 and the fourth respondent's existing facility was $1.2M. The parties were using a bank panel valuer to assess their respective businesses and what the businesses would look like as a merged entity. Westpac placed much reliance on that bank panel valuer. If the information in the valuation was not correct it would impact on the security position of the borrowing entity.

[366] Westpac agreed to advance monies to the merged business. Those facilities were drawn down at settlement in early 2012. Some of the facilities were for two years. At the conclusion of that two year period, Westpac wrote to the third, fifth and sixth respondents asking for a further proposal to extend those facilities. Robertson specifically recalled sending an email to the third respondent. The third respondent said he and his wife would not be signing any documents. Westpac ultimately renewed the facility in early 2014 without any guarantees from the third respondent or the applicant.

[367] Robertson was aware of a proposed sale of the applicant to Gibbons in 2012. As long as the business was operating profitably and met guidelines, there would be no objection to that sale. If a sale had progressed, Westpac would have required a new valuation and have undertaken a new assessment of the security position. Had Westpac become aware the security it held was not as stated, it would either have asked for repayment or for additional security. If the sale to Gibbons had proceeded, it would have been necessary to release the third respondent and his wife from their securities. That would not occur unless the business had sufficient assets or some other property was provided to make up the shortfall.

[368] In cross examination, Robertson accepted he spoke to the third respondent after the request for proposals for an extension of the facilities. The third respondent said he was not being given any information about the business and could not formulate a proposal for that reason. Westpac would not have sent loan documents for the new facility to the third respondent or his wife in 2014 because they were not going to sign those documents.

[369] Michelle Hewitt was employed as a property manager in the merged business. She has worked in property management for over 10 years, running a portfolio of properties as well as overseeing property management staff. Prior to the merger she was a property manager for the fourth respondent at its Redcliffe office. At that stage, she did not have any managerial responsibilities.

[370] After the commencement of the merged business, extra staff came in from the applicant's former business. All the owners, tenants and properties from the applicant's database were entered into the fourth respondent's database so as to form one database. Everybody had access to that database, including the third, fifth and sixth respondents. To the best of Hewitt's recollection, the third respondent did log in to that database. At the time of the merger, he was manager of a rental department and heavily involved in communicating with owners and tenants. He was also undertaking some management himself, particularly his family's properties.

[371] The applicant's trust account was always in a negative balance. A positive adjustment had to be made to make it up. The negative balance was discovered almost immediately upon commencement of the merged business. The fourth respondent's trust account was closed quickly after the merger but it took months to close the applicant's trust account, as it was not adding up. The third respondent told Hewitt not to worry about it, they would sort it out. She was not concerned at the time because he was her boss. There were no similar issues with the fourth respondent's trust account. To date, they had been unable to find the exact problem.

[372] After a few months it became obvious that things were quite messy on the applicant's side of the business, particularly rent arrears. The fourth respondent had an absolute zero tolerance to rent arrears. The third respondent's response "was just totally beyond" her.[100] Instead of issuing notices to a tenant who was significantly behind in the rent, the third respondent would calculate the outstanding rent, add it on top of the rent and have the tenant sign a new agreement at a higher rent to start them back at zero. It was "like his way of doing a payment plan….. it was very odd".[101] Her impression was it was not uncommon. When she questioned that method, she was told "no, no, this is what we do".[102]

[373] There was not much leadership in the Redcliffe office. In early 2013, a staff survey asked general questions about management. The survey was undertaken confidentially. After the results of the survey, Hewitt noticed a change in the roles of the third, fifth and sixth respondents. The third respondent became effectively operations manager. He had responsibility for paying staff. Hewitt became aware of problems with staff not being paid on time, or not being paid the right amount. There was discussion in the office. It affected staff morale. Those problems existed for the whole time the third respondent was dealing with pays. Changes also occurred in the Redcliffe office towards the end of the third respondent's employment. As things started to be uncovered, from mid-2013 the third respondent would come into the office less often. An audit was being undertaken at the time which brought things to a head.

Hewitt became aware of negotiations between the third respondent and Gibbons to purchase the third respondent's shares in the merged business. Hewitt was asked by the fifth respondent to do something of a due diligence on that portion of the rent roll being purchased by Gibbons. She undertook that task by first starting with the list of properties on an excel spreadsheet. She cross referenced those properties in respect of commission, rent and whether there were current management agreements. Anomalies were detected with properties not receiving rent or incorrect management fees. As a result, Hewitt referred to the list of properties contained in the Gil Wright valuation for the applicant's rent roll at the time of the merger.[103]

[374] A full audit revealed there were management fees that were not being paid in respect of properties at the time of the merger. The ledgers showed that management fees were not being collected in the history, but were added on for the purpose of the valuation. There were also properties that were not being managed at the time of the valuation and

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100 T17-8/24.
101 T17-8/39.
102 T17-9/10.
103 Exhibit 265.

in a couple of cases, sometime before that valuation. Hewitt came to the conclusion some of these properties were not being charged fees because they were family, but were misrepresented in the valuation because there was a price on them that should not have been in the valuation. These family properties were taken from the merged business after the third respondent stopped working for it.

[375] The properties fell into a number of categories. First, the family properties that were not being charged fees at all, but were represented as being charged fees. Second, properties which were no longer being managed by the merged business. They should not have been included in the valuation, or an adjustment made for them. Third, properties where fees were being received, but there were no management agreements. That was an administrative matter, but it did affect the valuation. If you did not have all documentation for a property, you were not legally allowed to manage that property, or to charge a fee for it. Fourth, properties where the fees being charged prior to the valuation were increased for the purposes of that valuation. Hewitt did a calculation of the value of these properties, based on the management fee, times the rent, utilising the same multiplier as for the valuation. The valuation would have been less than the final figure.

[376] The third respondent went through a process of correcting the missing management agreements. For the majority of the properties, management agreements were re-signed in the name of the first respondent, although there were still some outstanding at the end of that process. Those properties continued to earn fees during the time the third respondent was having them signed or re-signed up. During that process there were also some management forms found to be missing for properties previously managed on the fourth respondent's rent roll. Those were also fixed up in that process.

[377] Hewitt said after the third respondent's employment was terminated, he sent emails advising he was taking over the management of specified properties. The third respondent collected documentation and keys in relation to all those properties around October 2013. The third respondent was telling Hewitt he was managing the properties. Hewitt did not receive written notification from the owners of the properties to hand over that information. It was based on emails and other correspondence from the third respondent. Hewitt did not ever see signed management agreements. The third respondent never provided her with a lessor's written consent.

[378] In late 2013, an issue arose with the merged business' server. Files to do with sales completely disappeared from the server. Investigations revealed a laptop had logged in around the time the files were deleted and it was most likely responsible for the deletion of those files. There was nothing that had become corrupt or that would otherwise explain those files going missing.

In cross examination, Hewitt said she had no direct responsibility for the management of the AUPNG rent roll, as it was run from the Springwood office. She generated a report and spreadsheet at the start of each month, of how much management fees had been collected for each property managed or owned by AUPNG, which was then sent off to accounts. Hewitt did not ever prepare any accounts to AUPNG. The number of properties managed under that rent roll had gone down since AUPNG purchased the rent roll. Over that time, there had been other properties put onto the rent roll. They

were 12 or 13 properties owned by a family entity related to Gibbons, who transferred them over to the AUPNG rent roll. It was not unusual for properties to come off and go back onto a rent roll. Properties sell, owners move, and managements are lost due to mismanagement.

[379] The process Hewitt undertook when auditing the applicant's rent roll included looking at the fourth respondent's properties prior to the merger to identify properties that had not earned commissions after the merger. There were a couple of properties that had been accidentally put into the valuation. It was agreed there was a need for an adjustment on the fourth respondent's side as well. That adjustment was different. It was not misappropriation. She did not undertake a calculation of the value of those properties, but did recall preparing spreadsheets, like she had for the other spreadsheets.

[380] Hewitt was responsible for providing rent roll information to Brookes, for the purposes of an expert report in this legal proceeding. Brookes asked her to remove family owned properties. She removed two properties from the Springwood rent roll owned by the fifth respondent's mother and father. She removed other properties on the instructions of Brookes, being properties on the rent roll, the management of which had been lost prior to August 2013. Hewitt undertook a similar process for the Redcliffe rent roll. A number of properties were removed for the family owned reason. Most were related to the third respondent's interests. There were three properties related to the fifth or sixth respondents, and also a property jointly owned by the superannuation funds of the third, fifth and sixth respondents.

[381] In her experience, it would be unusual for rent rolls to contain properties that had been vacant for a month or two. Two to three weeks is more common. A property will remain sitting on a rent roll if there is rent owing for the tenant, or if the property is being renovated and the owner is going to hand it back to rent out afterwards. In that event, the property would be made inactive and be assumed to have been lost unless it was going to be retained after the renovations. If another agent took over management of the property, she would set it as being lost, when they actually originally took the property. If there is an outstanding disbursement of funds on the owner file, you cannot make it inactive. Properties can remain listed as active when the management has been lost. People may make the tenant inactive but not make the property or owner inactive. Hewitt did quite a bit of tidying up of the rent rolls when those matters came to her attention.

[382] Brendon Whipps was employed as business development manager for Elders Real Estate in Queensland. Whipps subsequently became the National Franchise Manager for Elders Real Estate. Whilst in that position he became aware of a merger of the businesses, operated by the third, fifth and sixth respondents. He understood the merged business would be using the Elders brand.

[383] Whipps recalled there were serious discussions about the positions of the directors of that merged business. Elders had commissioned a staff survey, which revealed staff issues. Whipps had a meeting with the third, fifth and sixth respondents. The purpose of the meeting was to bring the directors together to try to give them some direction in the business. There were disputes as to who was responsible for what functions of that business. Following that meeting, there were some further discussions.

[384] In about August 2013, Whipps became aware of a concern from Elders that the appropriate sales were not being recorded by the merged business. The fifth and sixth respondents had advised the franchisor of a contract with the third respondent's personal details on it, not those of the merged business. A notice of breach and remedy was issued by the franchisor, for the purposes of determining whether there was correct reporting of sales. The issuing of a breach notice was a reasonably serious action by the franchisor. He would expect the recipient of such a notice to remedy the breach. If the franchisor was not advised of conduct in breach of the franchise agreement, and it subsequently became aware of that conduct, the franchisor would hold all directors responsible for that breach.

[385] The contract documentation in relation to the Prince Edward Parade transaction was not a normal transaction. The agent would normally be the entity operating the merged business. It was principally for that reason the breach notice was issued by the franchisor. The franchisor would have required clarification as to why the sale had occurred, whether the merged business had a part in it, and were there franchise fees payable in the ordinary course. Whipps recalled receiving by email, an explanation from the third respondent. Whipps did not accept that explanation.

[386] In cross examination, Whipps did not accept it was common for an individual agent to complete the selling agent's disclosure declaration, rather than do so on behalf of the corporate entity. Such an arrangement was unusual. If the name of the merged business had been inserted into the contract instead of the third respondent's name, Whipps would expect the authorised signatory to be for the merged business, as per its office policies.

[387] Bruce Siebenhausen, the Secretary/Treasurer of the Real Estate Employers' Association, an organisation representing real estate employers, gave advice to members of the association on industrial relations issues. In that role, Siebenhausen received an email from the third respondent in August 2013. He responded to that communication but did not have any recollection of the matter. He corresponded with the fifth respondent by email after the initial contact with the third respondent. He gave some advice to the fifth respondent in relation to suspension and termination of employment.

[388] Mark Gibbons has known the fifth and sixth respondents for approximately 20 years. In early 2013, he was introduced to the third respondent. Shortly thereafter, he commenced negotiations with the third respondent to buy the applicant. Gibbons arranged for a specialist real estate business to undertake a valuation of the applicant's rent roll. The price was going to be determined by a multiplier, based on the number of properties, rather than a value as previously discussed with the third respondent.

[389] A contract was prepared by the third respondent's lawyer and sent to Gibbons' lawyer. Gibbons signed the contract on 20 August 2013. He did not proceed further with the contract as he never heard from the third respondent again, by email, telephone or through correspondence. Gibbons had signed the contract in front of his solicitor, who witnessed his signature. As far as he is aware, his solicitor never heard from the third respondent.

[390] Gibbons owned most of the shares in AUPNG. A company associated with the sixth respondent had one share and a family trust associated with the fifth respondent had another share. Gibbons at that stage was a non-resident of Australia, having lived his adult life in Papua New Guinea. They were people he could trust in case something needed to be done when he was out of the country. The partners of the fifth and sixth respondents were appointed directors of AUPNG because he considered them trustworthy people. He did not know why the fifth respondent would be listed as a public officer for AUPNG.

[391] AUPNG was formed in October 2013 for the purposes of purchasing a rent roll from Century 21 Underwood. The fifth respondent assisted him in the negotiations for the purchase of that rent roll. Gibbons undertook due diligence in relation to that purchase. AUPNG entered into an agreement with the second respondent for management of that rent roll. The agreement provided for a fee to cover their costs and a percentage profit. That agreement remains in place to this day. When receivers were appointed to the first and second respondents, they discussed that agreement with Gibbons. After a review, the receivers were happy to continue that arrangement.

[392] AUPNG loaned in the vicinity of $400,000 to the second respondent. Technically, it was responsible for its repayment but Gibbons expected the fifth and sixth respondents to account for that money. They had had a number of conversations to that effect. Gibbons accepted he had been very generous to supply such credit to the second respondent. Gibbons had been good friends with the fifth and sixth respondents for a long time. He was in a position to provide funds to assist them. Both the fifth and sixth respondents had an obligation to repay those monies. There had been no other agreement entered into between Gibbons and the fifth and sixth respondents in relation to that money.

[393] The loan monies comprised a number of different things. First, there was a loan for $83,000 for a server and other office equipment. Second, there was a loan of over $100,000 in relation to a "holiday" on AUPNG receiving its income or fees from the rent roll. Third, there was a general loan of money from AUPNG into the second respondent to assist in cash flow. AUPNG had taken out a loan facility with Suncorp for the purposes of advancing money to the second respondent. Suncorp paid the money to AUPNG, not the second respondent.

[394] The general loan was for $244,000. Although it was recorded as being for legals, that money was loaned generally. The second respondent could spend it as it saw fit on expenses. Gibbons did not have specific discussions with either the fifth or sixth respondents about loaning money for legal fees. He was aware they needed money for legal fees. He may have had a discussion with the second respondent's then legal representatives, in relation to loaning money for payment of legal fees.

[395] Gibbons did not think there would be any return until the present proceeding had resolved in court. In the long term, Gibbons was trying to bolster AUPNG's rent roll. At some point, he was hoping to receive the income from that rent roll and be able to enter into some arrangement for the repayment of those loans, over a period of time.

[396] In cross examination, Gibbons agreed he was told by the fifth respondent that the third respondent had misrepresented certain things about the applicant's rent roll during the merger of their businesses. Gibbons was not aware an audit process was being conducted on the rent roll. He was also not aware the fifth and sixth respondents had suspended the third respondent's employment. Gibbons was told by the fifth respondent that the third respondent's employment had been terminated with the second respondent after Gibbons had signed the sale contract. The fifth respondent said there were issues suspected in respect of breach of policies at Elders or breach of the partnership agreement.

[397] Gibbons accepted that for some time the second respondent had been paying repayments on the loan facility AUPNG obtained from Suncorp. AUPNG had put a holiday on receipt of its fees from the rent roll. As AUPNG was not getting an income, Gibbons contacted the fifth respondent and asked that the second respondent at least pay monies necessary to service that loan. Those payments could be deducted off the income, with the balance outstanding to be added to the loan. Gibbons did not want the second respondent to fail because it was managing his rent roll asset. When the rent roll was transitioned from Century 21 a lot of managements were lost. He wanted to avoid having to move his rent roll again, as the same thing may happen.

[398] Gibbons and the fifth and sixth respondents had advanced cash amounts to the second respondent. Those monies were loaned individually and personally. He could not explain why they had been added to AUPNG's loan. When he and the fifth and sixth respondents loaned monies individually, they did so on a one third each basis. He denied there had ever been a discussion that he would take one third of the merged business.

[399] Steven Kay, is the current auditor of the first respondent, and until its receivership, the accountant for the second respondent. He also is the accountant for the fourth respondent and AUPNG. He first became the accountant for those entities in about 2014. He could not explain why the fifth respondent was recorded as the public officer on AUPNG's tax return. Gibbons was its public officer, major shareholder and directing mind. He controlled 300,001 of the 300,003 shares. Gibbons was the person he contacted for any information in relation to AUPNG. He had not seen any involvement by the fifth or sixth respondents in its management.

[400] Kay had undertaken audits of the first respondent's trust account in 2014, 2015 and 2016. He identified a number of anomalies or discrepancies in his first audit. There was a deficiency in respect of unreconciled transactions. When he tracked back the discrepancy, he discovered it arose from the commencement of the merged business. The items came from the applicant's previous trust account. They were not reconciled at that stage. When the two trust accounts were merged, they remained unreconciled after that point. That discrepancy ought to have been identified and reconciled correctly at the time of the merger. He was surprised the previous auditors did not highlight it at some stage. He did query the former auditor, but did not receive any answers to his questions. It was now too difficult to go back and find out how those transactions could have been reconciled.

[401] In recent times, monies had been loaned to the second respondent by the fifth and sixth respondents or by AUPNG, in order to keep that entity afloat. He had prepared a report in relation to those loans for the purposes of calculating capital contributions from unit holders. Those amounts were accurate representations of the sums deposited into the second respondent's account. Kay also made an entry in the 2016 business records of the second respondent in respect of intangible assets of $304,328.64. Those assets related to legal expenses. He quarantined that amount into a capital item on the balance sheet, so that their deductibility could be determined at a later date. It was a holding entry.

[402] Another entry in those accounts, in respect of a loan for $50,000 to the third respondent, was in relation to a superannuation liability. That liability had since been paid to the third respondent's super fund. There was also a loan from AUPNG for $244,968.85. That represented contributions made to the second respondent by AUPNG in the form of a loan. The second respondent was short of cash flow and could not pay its bills. AUPNG was assisting to pay those bills.

[403] Since his appointment as accountant, the trading performance of the second respondent had declined significantly. There had been a big fall in its income and profitability since the departure of the third respondent. In his view, it related to some overstaffing, poor revenue results in some years due to a churn of sales staff and non-performance of other sales staff. There were also general trading conditions. Kay had not ever seen evidence of money being transferred from AUPNG, or the second respondent, to the fifth and sixth respondents, other than wages. No money or other benefits had been transferred to the spouses of the fifth and sixth respondents. He was not aware of any improper withdrawal of funds from the second respondent to AUPNG.

[404] In cross examination, Kay said it was his decision to quarantine the sum of $304,328.64. Legal expenses are very difficult expenses to treat, particularly as a tax expense. It is not always clear cut whether it is deductible. The safer option is to carry it in the balance sheet until it is determined whether it is deductible. If it is determined that some or all of that amount is to be properly deductible against income, there would be a carry forward tax asset. The $50,000 loan to the third respondent was recorded as a liability, rather than an asset, because that sum should have been paid out to the third respondent's superannuation fund. That had occurred since those accounts.

[405] The entry in relation to loan funds of approximately $280,000 was prepared after consideration of deposits in the bank statements. Not all of those sums were received from AUPNG. The balance came from the fifth and sixth respondents personally. Kay accepted he had previously confirmed in a letter that that sum represented monies contributed by unit holders of the Boedry Unit Trust. He had been advised the monies were sourced by the unit holders. AUPNG was not a unit holder. Gibbons was generously providing funds to allow the second respondent to continue trading, on the understanding those funds would be repaid in due course.

[406] Sandra Dartnall is currently the officer manager in charge of property management at the second respondent's Springwood office. Initially, Dartnall was employed by the fourth respondent as property manager. The rent roll at that time was approximately 350 properties in the Redcliffe office and probably 300 at the Acacia Ridge office. Dartnall

was employed by the fourth respondent as its administrator at the time it merged with the applicant's business. Her role included payroll, employment agreements, data entry and reports. She also undertook overseeing of the property management income.

[407] Dartnall was asked to supply documentation to Gil Wright for the valuation of the fourth respondent's rent roll prior to the merger. That documentation included the profit and loss statements, the rent roll list, staff expenses and an office inventory. They had to disclose what properties were getting rental monthly, if they were owned by any of the directors and any other relevant information. The information covered both the Redcliffe and Acacia Ridge offices. Dartnall included every expense of the fourth respondent relevant to the merged entity. There were adjustments to take out expenses that were not relevant. Those expenses were paid by the fourth respondent. The trust accounts were transferred over at the time of the merger.

[408] Prior to the merger, Dartnall was instructed by either the fifth or sixth respondent to send a spreadsheet to the third respondent setting out, amongst other things, the fourth respondent's financial commitments. It contained a breakdown of expenditure, wages and property management income.

[409] The fourth respondent's bank account still had some direct debits going through it at the time of the merger. They were eventually transferred to the second respondent's account. The fourth respondent had paid some expenses for the merged business. An adjustment was made at a later date to account for these expenses and any income, as initially the fourth respondent's trust accounts were being used for the payment of rents and sales commission. The applicant also received an adjustment for any expenses or income.

[410] A schedule was prepared as to the adjustments necessary in respect of each entity. Cheques were drawn by the fourth respondent and the applicant. The third respondent signed the cheques for the applicant. Money was first deposited into the second respondent. Time was given for those cheques to clear before cheques were written out of the second respondent. All of the sums, were recorded in the accounting records of the second respondent. GST was attached to those sums that needed to be claimed back. The third respondent was present when all of the cheques were written out.

[411] In around April/May 2012, Dartnall's role changed in the merged business. A rent roll at Springwood was being purchased and the third respondent was to organise a move to new premises at Springwood. Dartnall moved to the Acacia Ridge office to undertake some administrative duties. On occasions, she helped the third respondent with some work agreements. Dartnall also had some involvement with preparation of the BAS statement for the September 2012 quarter. She did not have any involvement in preparation of the BAS statements for the December 2012 and March 2013 quarters. The BAS itself was prepared by the accountant. The figures were sent to the accountant for that purpose.

[412] The merger of the Acacia Ridge and Springwood rent rolls was atrocious. The office did not have phones or internet. Nothing worked. They lost a lot of managements due to that merger. It was very disruptive. Morale was low. Staff were appalled to be given

second hand computers. They had the third respondent's children's names, or something attached to them. When the situation was eventually rectified, a range of mail had been missed, including rates notices. There was interest on those rate notices that the merged business had to cover. There were also court documents resulting in missed court appearances, in respect of bond money.

[413] Shortly after that situation had been rectified, Dartnall participated in a confidential staff survey, undertaken by an external person from the franchisor. Soon after that staff survey, the directors were given more defined roles. The fifth respondent became the CEO. The sixth respondent was the sales manager, responsible for the Springwood office. The third respondent was the CFO and operations manager.

[414] At that stage, Dartnall was still working in the Springwood office. Dartnall became aware staff were not being paid or were not being paid the correct amount. Dartnall was receiving telephone calls from staff as Dartnall used to prepare the pays. One staff member asked her "have I done something wrong, I haven't been paid".[104] There was a pay dispute with one of the property managers at Springwood. She was still awaiting her final payment, some three weeks after she left. That staff member was threatening to take the merged business to Fair Work. There was property management assistant, who was paid about $200 below what she should have been paid per week. There a staff member who had given the third respondent her bank account details. On three occasions, her payment was returned. That staff member ended up leaving because they could not get her payment correct.

[415] Dartnall did not get paid the correct wages sometimes. There was "a stuff around with my pay increase at one stage".[105] The non-payment of staff was a hot topic "around the water cooler". Staff would go "well, who's not going to get paid this week?"[106] Staff complained to the third respondent. Dartnall complained to the fifth respondent, who spoke to the third respondent. Shortly after these issues arose, Dartnall became CFO of the merged business. Dartnall was brought back to the Redcliffe office.

[416] Dartnall did a hand over with the third respondent. There were bills being emailed to the third respondent's account, which he would send on to Dartnall. They discussed directors' fees. The third respondent told her how they were worked out and when and how they were to be paid. The handover was not uncomfortable. The third respondent was simply letting her know where everything was up to and where to find things.

[417] At that time the merged business also employed an independent bookkeeper. The bookkeeper started doing audits to make sure the accounts were up to date and compliant. A GST audit revealed the BAS was incorrect. Audits were undertaken in relation to superannuation and all of the accounts. During the audit process, the bookkeeper emailed Dartnall to say that somebody had opened the bank reconciliation area of MYOB and made changes which had put out the bookkeeper's audit. The only people who had full access were the bookkeeper, Dartnall and the accountant. The directors had 'view only' access. They could look at the accounts, but not change them.

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105 T19-41/20.
106 T19-41/30.

[418] Dartnall emailed the directors to advise that changes had been made to MYOB. The only response she received back from the directors, was from the third respondent. He said he had not made any alteration in MYOB, but a bank cheque had been entered incorrectly into MYOB, which had to be corrected. The third respondent sent the email on 11 June 2013. The alteration occurred around that time. It was apparent from the third respondent's explanation he knew what had been changed. The third respondent had referred to the entry needing to be a bank cheque, because it was a loan. That indicated he had gone in and changed that amount without authorisation and without telling anyone.

[419] Di Tommaso still had full access until 11 June 2013. Dartnall removed him from full access at that time for the very reason that alterations had been made in the MYOB system. The whole point of having an independent bookkeeper was so that "stuff did not happen". It was only at that stage Dartnall realised some people still had access. She arranged to lock them out to make sure everyone only had 'view only'. After that change, each of the directors could still view MYOB, including the third respondent.

[420] The third respondent's access to MYOB ceased in September 2013. Dartnall confirmed the third respondent had MYOB access up until September 2013, by obtaining a report from the MYOB system. The report recorded the third respondent's access was removed from 10 September 2013. He had had access on a 'read only' basis from 24 May 2013. Prior to that date, the third respondent had full access. The fifth and sixth respondents also could have had full access, but never took up the invitation.

[421] Later, the bookkeeper prepared a letter for submission to the bank. The bookkeeper said she found that income and expenditure was not allocated GST codes and the BAS statements had been incorrectly reported to the ATO. There were also loan accounts not set up on the balance sheet. All of these matters needed to be fixed up. This letter was tabled to the directors of the merged business.

[422] Throughout that relevant period, the third respondent was responsible for MYOB. The third respondent never asked Dartnall about these difficulties. Dartnall did not know about the difficulties until they were found by the bookkeeper. After the shortfall to the ATO was raised, the third respondent contacted his accountant and a payment plan was set up with the ATO for about $8,000 per month to redress the shortfall.

[423] Dartnall said it was not correct the third respondent did not know about the employment of sales staff. The third respondent prepared workplace agreements and pays. The third respondent had been responsible for wages from September 2012. Most of these issues arose between October 2012 and May 2013 when Dartnall, again, took over responsibility for pays. Dartnall did not have any responsibility for these pay increases, or for the failure to pay those people in accordance with their entitlements.

[424] When Dartnall took over as CFO, the third respondent told her he had the dispute with Quick Fund under control and he and his solicitor were dealing with it. Dartnall asked for a copy of the letter written by Holloway for her file. The third respondent could not give her anything. Dartnall spoke to Quick Fund who said they had never received anything from the third respondent, or his solicitor. That person had been promised

documents and had received nothing. He was "basically getting the run around".[107] Dartnall asked how the matter could be resolved between them. Subsequently, it did settle.

[425] The delay in finalisation of the Quick Fund matter was not due to the third respondent having been given an illegible copy of the Quick Fund contract. When Dartnall left her position in 2012 there was a folder with legible copies of the agreement. The third respondent took possession of that folder. She recalled obtaining all loan agreements for him because he wanted to sight every single loan agreement held by the fourth respondent.

[426] Dartnall said when the Redcliffe office was based at the Margate premises, those premises had as a tenant, the Kebab shop. They paid their rent to the third respondent in cash, which was banked into the superannuation fund that owned the premises. Dartnall undertook an audit of those payments, including when rent was banked into their account. There was a shortfall of around $2,000. Dartnall sought an explanation from the third respondent. He said when the rent was collected in cash, the third respondent paid that money into the second respondent's account and the second respondent would then transfer the rent over. This as a very unusual way of dealing with rent. Any rent, be it in cash or otherwise, should be paid into the trust account, before being disbursed elsewhere.

[427] In June 2013, Dartnall and Hewitt started conducting due diligence on the applicant's rent roll, in preparation of a share sale. Both of them checked and compared together, management fees and rentals, including the last time the property or owner had receive income, or the last time a tenant had paid rent. They accessed the property list provided by Gil Wright. That document, dated 13 December 2011, was contained as an annexure to that valuation. There were properties which had been included in the valuation, that were not receiving rent or were not tenanted at the time. Those properties included properties owned either by the third respondent or associated family members. They were recorded on the property list as receiving fees when they were not in fact doing so. There were other discrepancies. One discrepancy was the listing of properties for rent on the same day, with different owners in different locations. Dartnall believed that report to be false.

[428] After the third respondent's termination, Dartnall received an email from him asking her to delete files off the merged business' server. The third respondent provided a list of files, including the sales file for the applicant. The day after receiving that instruction, the merged business' server was compromised and that file was missing. Dartnall did not delete it from the system. Within that sales folder was contained the sales trust ledgers, which were required by the merged business. An examination revealed an unknown user had logged on at night. The information removed included information the third respondent had requested be deleted from the server. There were other items also deleted, but the sales trust file was the main item.

[429] After the merged business was given a notice of breach by the franchisor, Dartnall undertook an audit to ensure there were no other sales that had not been declared as part

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of franchise fees. The audit did not reveal any such sales, but did reveal other amounts and transactions which were suspicious. One of the suspicious transactions was for $6,000, through the second respondent's general account. The bank statement recorded "Mark Andrew - $6,000", with a subsequent entry "Mark Andrew – error". Dartnall's enquiries revealed the payment went to Aeolus Pty Ltd. The third respondent was a shareholder of that company.

[430] Mark Andrew had never been an employee of the merged entity. Dartnall had never seen him come into its offices. She had never heard him spoken of as an employee. He had never been on their books. She had never seen a contract, or anything to do with Mark Andrew and the merged business. She did not recall his name ever being advertised on the website of the merged business. She knew he had worked for Elders Redcliffe when it was owned by the applicant. He may have been on its old Elders website.

[431] Dartnall sought information from the third respondent about that transaction. The third respondent advised, by email, that Andrew had referred the particular property to him. The commission payable for the sale of that property was paid to the entity associated with the third respondent as a repayment of a loan. Dartnall did not accept the third respondent's explanation. The transaction had not been placed in MYOB. No tax had been paid on it. Nobody knew about it until she had found it. At no stage had the third respondent discussed this transaction with her as part of the handover when she became CFO.

[432] A further difficulty was that $6,000 had been transferred out of the applicant's sales trust account when that account held only $5,000. As a consequence, the ledger in the sales trust account was overdrawn. A few days later, $1,000 was deposited back into that trust account as a cash deposit. It was titled "bank error" or "error". None of these transactions were recorded in the accounts of the second respondent. The third respondent later admitted he had put that cash deposit back into the account. Dartnall denied the third respondent had mentioned it to her at the end of month reconciliation, saying he had arranged for $1,000 to be paid back at that time. Dartnall did not know anything about the transaction until she started to undertake her audit, much later.

[433] On 3 January 2014, Dartnall found a similar transaction involving $4,000 had occurred on 3 October 2012. An enquiry with the bank revealed the payment had also been made to Aeolus. The fifth respondent sought clarification in respect of that transaction. The third respondent did not reply to that request. The $4,000 payment was recorded in the accounts as minor capital expenses. Dartnall was not aware of any minor capital expenses, although she was aware the third respondent had later given an explanation that it was monies paid to a plasterer. There was another suspicious transaction involving $600, paid out of the second respondent's account into the account of Sport Be in It. The payment had been undertaken using the third respondent's token.

[434] Dartnall undertook a bank trace of a payment made on 5 June 2012, from the second respondent's account for $4,294.50. It had been paid to the account of Sport Be in It. The third respondent said it was monies he was paid by Andrew in respect of loans. There was another transaction identified by Dartnall, relating to $855 in cash received from one of the commercial tenants. The third respondent had collected the cash and

replaced it with a cheque written on the second respondent's cheque account and payable to the Elders rental trust account. The withdrawal was recorded in the MYOB software as being for computer maintenance. Dartnall was never able to locate any invoice to support a payment for computer maintenance. The entries were, at that stage, being made by the third respondent, or on his instructions. Dartnall did not make that entry in the MYOB system. The third respondent gave a subsequent explanation that Andrew owed him money.

[435] Further transactions were later identified after when the third respondent had been given an opportunity to disclose anything else that had been taken or misrepresented in the MYOB accounts. One of those transactions related to a sum of $3,136, recorded in MYOB as franchise fees. The third respondent said it was an equalisation for the applicant. No substantiation was given for that explanation. The third respondent had never identified this transaction to Dartnall. She had identified it during her investigation into franchise fees for the purposes of responding to the breach notice.

[436] There were other transactions identified involving monies being paid out of the second respondent's account to the third respondent. In respect of one of those amounts, the third respondent had initially told Dartnall they were in response to monies he had paid himself in 2011, when in fact those invoices had been paid in 2012 by another entity. There were also two cheques written out of the second respondent's account to the third respondent's superannuation fund. There was no notation as to what those payments were for, but the payments were credited to an account in the name of the third respondent and his wife. The third respondent informed Dartnall they were for superannuation. To the best of her knowledge, the third respondent did not have an agreement entitling him to superannuation. There was a proposed workplace agreement that did include superannuation payments, but that had not been signed by the third respondent.

[437] On about 1 October 2013, the third respondent came into the office to collect documents in relation to properties he had given notice he was now going to manage, instead of the second respondent. The third respondent "caused quite a scene".[108] He made serious threats against the fifth respondent. Dartnall contacted police in relation to that threat. No action was subsequently taken by police.

[438] In cross examination, Dartnall accepted she was responsible for maintaining accounts and the MYOB from the commencement of the merged business until the end of August/early September 2012. Her responsibility included uploading day-to-day payments and seeking authorisation for those payments from a director. There were three authorisation tokens available for the second respondent's bank account. A payment could not be made without that token. Generally the tokens of the third and sixth respondents were used for that purpose. Dartnall did not think the fifth respondent ever authorised payments.

[439] When Dartnall ceased in her role as office manager in or about September 2012, the third respondent took over those duties, including responsibility for day-to-day payments. At that time, the third respondent said he had engaged a bookkeeper,

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Amanda Connolly. Dartnall did not ever meet Amanda Connolly. She had never had any correspondence with her. Dartnall believed she was a relation of the third respondent's wife. Throughout this time Di Tommaso was the merged business' accountant.

[440] Dartnall never had responsibility for keeping the accounts of AUPNG. She had access to its MYOB files, but only for the purposes of obtaining a report. The bookkeeper looks after AUPNG's accounts. She only accessed those accounts to provide information for these proceedings. That was one of the reasons she had been granted access to that file.

[441] Dartnall witnessed the fifth respondent's employment agreement on 12 June 2013. Dartnall considered herself to be an authorised representative of the second respondent at the time she signed the document. She was authorised to sign all agreements as CFO. It was part of her job description. There was an email where the third respondent had said agreements could only be signed off by the CEO or CFO. Dartnall sent an email to the third respondent on the same date, requesting he sign off on it. The third respondent emailed back suggesting the agreement required the authority of all other directors and instructing the agreement not be implemented. Dartnall could not say whether she had countersigned the document after receiving that email. She did not recall whether she knew at the time she countersigned the document that the third respondent did not agree with its terms.

[442] The workplace agreement entitled the fifth respondent to superannuation, but Dartnall did not ever pay him superannuation when she was responsible for processing pays. The clause was a standard clause in all workplace agreements. It was her understanding from the start of her employment, as administrator back in 2012, that the directors did not get paid superannuation. The sixth respondent's workplace agreement was different. He was paid on a debit/credit commission basis, with superannuation included in the commission amounts. The superannuation component would be taken out of the commission and paid into his superannuation fund. Notwithstanding that agreement, the sixth respondent was only ever paid superannuation on one occasion in August 2013.

[443] Dartnall accepted the wages records for the second respondent indicated the sixth respondent was receiving a component by way of superannuation. The MYOB system calculated the superannuation component from the wages. Dartnall believed the records were in error when they recorded that the sixth respondent was being paid superannuation. She was told not to pay superannuation. Initially, both the fifth and sixth respondents were paid $75,000 per annum. No superannuation was deducted from that amount. That sum was originally allocated as monies paid to the fourth respondent, as a contractor payment. As a result, the payment was not run through the payroll of MYOB. The fifth and sixth respondents were not employees of the merged business at that stage. They were contractors.

[444] In about April 2013, their job description changed and they became subject to employment contracts. They were entered into the system as employees when the third respondent was CFO. When Dartnall assumed responsibility for the role as CFO, she undertook an audit and realised the sixth respondent was being paid superannuation. Her understanding that the fifth and sixth respondents would not be paid superannuation

was pursuant to an agreement between the directors. She accepted an employer was required to pay employees superannuation.

[445] Dartnall accepted that the MYOB records suggested an employee card was created for both the fifth and sixth respondents at the time of commencement of the merged business. Dartnall could not explain why that had taken place. There were no payment slips until April 2013. It may be that it was put into the records at that time for the purpose of the round robin payment, which included wages, but was stopped thereafter because the fifth and sixth respondents were being paid as contractors.

[446] Dartnall accepted the MYOB data was missing some information for a period in 2012. Dartnall left her position as administrator for the merged entity because it was said she had not done a very good job with the books. The third respondent took over and commissioned Amanda Connelly and the accountant to re-do the whole MYOB entries again. They recreated all those files. Dartnall did not know what happened to the backup for 2012. At that time she had finished as administrator and did not have access to that file anymore. She believed the accountant would have a copy on his system.

[447] Dartnall accepted that when she was in the position of administrator, she was given an email indicating the directors were to have a limit for expenses for $5,000 per annum and she was to start a spreadsheet for this purpose. Dartnall did not believe she ever created that spreadsheet. She already had a system set up in the fourth respondent's loan account. There was a loan account for the applicant. It was decided to use those accounts as a way to keep an eye on those transactions. She did not believe there would have been any reimbursement for those expenses. If there was a $5,000 limit, that would be expenses already paid for by the office. The loan accounts would reflect some of those expenses, but not necessarily all of them.

[448] Dartnall could not explain why the payment of $75,000 to the fifth respondent was recorded in the fifth respondent's loan account from 3 May 2012. Dartnall did not enter the accounts in that way. Dartnall always put the payments to the fourth respondent. The third respondent had re-done all of the MYOB records. She was not responsible for those entries.[109] Similarly, she was not responsible for entries in the sixth respondent's loan account. The reference to "move payments from two account to six", appeared to be an internal general journal entry. The journal entry was consistent with the payments having been made at one time and then being re-entered as if they had been paid to another entity.[110] It appeared the payment originally made was to the fourth respondent.

[449] Dartnall said an entry in the balance sheet of the Boedry Unit Trust for a NAB loan of $46,268 related to refurbishment of one of the offices. She was unable to explain why a balance sheet report prepared by Di Tommaso in March 2017 recorded only one refurbishment loan. The NAB refurbishment loan was a loan taken out by the fourth respondent. She could not recall if it was carried as a liability in the accounts of the second respondent, up until the third respondent left his employment in August 2013.

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110 T20-55/45.

[450] Dartnall said from the time she commenced as CFO in May 2013, she was advised by the third respondent to pay what she knew as director/management fees to the applicant and the fourth respondent, on the basis of $1,000 per share per annum. The third respondent did not instruct her as to how they were to be recorded in the accounts. Dartnall understood there were a couple of different ways in which they were recorded, depending on the bookkeeper. She always knew them as directors' fees, paid as directors. They were paid to the applicant and fourth respondent. After August 2013, she was instructed not to make the payments to the applicant by the fifth respondent. She was not given a reason at that time.

[451] Alan Dawson was Elders franchise manager for Queensland and Northern New South Wales in 2013. Dawson became aware of a proposed merger of the businesses of the applicant and the fourth respondent when he was contacted to say there was an opportunity for those businesses to merge under the Elders franchise. He had some involvement, more in an advisory or supportive role, in discussing the benefits of the merger on behalf of the franchisor.

[452] After the merger, there were signs it was not working well. The first sign was a lack of communication. Dawson received individual telephone calls from separate parties, rather than as a team environment. Dawson recalled attending meetings where there was a discussion about their inability to agree on roles. He gave some advice around that issue. Difficulties continued during the term of the franchise. Dawson left Elders in early 2016.

[453] Dawson could not recall attending a meeting with the third, fifth and sixth respondents in about April 2013. He had attended some meetings with the directors. There was a discussion about the roles of the directors, and in particular who was going to take on what particular role. There was a lot of head nodding, but not necessarily agreement thereafter.

[454] At one point, a breach notice was issued by the franchisor. It had been brought to its attention that potentially a property had been sold that was not recorded in the franchise return. The national franchise manager sent a breach notice on behalf of the franchisor in respect of the franchise fee on that particular sale.

[455] Peter Wallace, a solicitor, was contacted by the fifth respondent for advice in relation to some documents concerning a proposal that had been given to the fifth and sixth respondents. During discussions about those proposals on 3 September 2013, the fifth respondent raised allegations that a co-director had taken some monies from the merged business without the permission of the other directors. Wallace arranged for a further conference on 10 September 2013 to discuss that issue and other issues.

[456] At that subsequent conference, between Wallace, the fifth and sixth respondent, and an accountant, a number of matters were raised by the fifth respondent. Wallace formed some initial opinions but asked for further information. Wallace accepted he may well have expressed the initial opinion that the co-director may have engaged in "stealing as a servant".[111] Wallace did not give any formal advice in relation to that matter. He was

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awaiting further information. It was requested they prepare a full list of the amounts claimed to have been improperly taken by the third respondent.

[457] Paul Brookes, a licensed real estate agent, was commissioned to provide a valuation of the market-worth of the applicant and fourth respondent's rent rolls. Brookes reviewed the valuations prepared by Gil Wright prior to the merger. Gil Wright assessed a level of profitability based on the companies operating income and expenses and applied a capitalisation rate to come up with an estimated valuation. Brookes focussed on the particular income earned from the rent roll, leaving aside general operating profit and expenses and applied a multiplier to that average income. Gil Wright's multiplier was slightly less than that adopted by Brookes.

[458] Usually, any sale of a rent roll will contain a due diligence clause to allow a prospective purchaser to inspect records of the seller to satisfy themselves of various things, including whether properties on the rent roll are subject to properly completed management agreements and are earning management fees. A sale may also contain a retention clause, allowing for the retention of a certain amount of the purchase price in case managements are lost or properties cease earning income after the sale.

[459] If properties forming part of a rent roll are not subject to binding management agreements, a buyer of the rent roll cannot accept it on hand over. No payment should be made by the buyer in respect of that property. There are always a certain amount of properties that are vacant at the time of settlement. A purchaser would pay for those properties, but if it was still vacant at the end of the retention period, a full refund would be made to the purchaser, in respect of that property. There may be other reasons why the property is not earning income or is not tenanted, such as renovations, which could be dealt with under the retention clause. Brookes would expect a seller to disclose any unsigned agreements, or any properties not earning management income.

[460] Brookes' valuations were based on straight out calculations of the number of properties, rather than taking into account factors that may have impacted on why properties had been lost from management. Even large rent rolls lose a high number of properties for a variety of reasons. They can be due to bad management, changes in market place and the type of investor. For that reason, adding 20 to 60 properties back into the rent roll, would not have a significant impact on his estimation of the appropriate multiplier.

[461] Brookes' view was that the marketplace was a lot stronger in 2011 than it was in 2013. The combined rent roll also had a lot of properties closer together and therefore easier to manage. That was a major factor that changed value. Brookes took into account that the merged business had also purchased a rent roll at Springwood, which impacted on the overall combined rent roll. He took into account there were separate offices with two separate running expenses and that recent research suggests the breakeven number for managing properties was 1300.

[462] In preparing his first report, Brookes did not include any property addresses. He provided a subsequent report which bore little relationship to the properties that had been particularised in the pleadings. As a consequence, it was accepted by the applicant

that Brookes had directed himself not only to the wrong report, but also to figures for the misleading and deceptive conduct case, rather than the restraint case.

[463] In cross examination, Brookes said a purchaser of a rent roll would normally look at the location of the properties, the weekly rents, the management fees and, if they were in line with what they were used to, or what they had in their own business, would find them acceptable. A purchaser of a rent roll would place great reliance upon entities like Gil Wright ensuring the information obtained for the purposes of the valuation is correct. If the valuer did not check every single file and did not cross reference, it would be possible for a seller to put something in and put a rent to it, when in fact it was not a rent. An overvaluation could also occur through overstating income from various properties and from stating that there were less staff than was the case in reality.

[464] Brookes concluded there was a $93,000 over valuation of the applicant's rent roll at the time of the merger. Brookes would not normally include family owned properties in a valuation. One question always asked is "is this seller owned, or related properties in that rent roll". Staff owned properties also would be excluded from the rent roll. If the seller wanted continuation of those properties to be managed, they would be placed in a separate spreadsheet with a zero multiplier. They would transfer over to the buyer at no cost.

[465] Banks have strict rules around funding those particular properties. They are the first ones to go at the end of a retention period. The purchaser has not made any money out of them. That is why a zero multiplier applies to those sorts of properties. The inclusion of those types of properties would have an effect on income and the multiplier. Seller owned properties are normally at a lower multiplier and might be at a discount fee. How much it would impact on the valuation depends on how many properties there are of that nature on the rent roll. Properties on a rent roll that are earning zero fees are a liability.

[466] Eliah Lytras, a forensic accountant engaged as a joint expert, conducted a valuation of the merged business. Lytras' consideration of two receivers' reports did not reveal any matters that might significantly affect his earlier opinions. However, the information provided to him included inconsistencies and discrepancies in the accounts which lowered his confidence level in the accuracy of the data. In undertaking his valuation, Lytras adopted Brookes' value of the rent rolls. He also assumed the data in the merged business' accounts was accurate.

[467] In Lytras' opinion, the value of the merged business was affected by whether there was found to have been oppressive conduct. Lytras also undertook a valuation of the financial benefit or detriment to the merged business in the AUPNG management agreement. In undertaking that task he assumed a $72,000 annual remuneration package for the person operating the AUPNG account, with an assumption that after the initial three months, those tasks would be absorbed back into existing staff of the merged business. He accepted that assumption assumed a capacity in the merged business to undertake those duties. He did not examine the existence of that capacity. He was unaware of what other activities may have altered the ability to undertake that work.

[468] Lytras only gave consideration to the issues of oppressive conduct and derivative conduct. He was aware of a counter-claim of misleading and deceptive conduct but was told not to provide a valuation on the basis of that claim. If a finding was made that there was no oppressive conduct and no derivative action, but there was misleading and deceptive conduct, his report would be of no assistance in the value of the business.

Lytras said the merged business was carrying a lot of debt. However, it had a significant rent roll, which in the real estate industry, was a valuable asset. Leaving liquidity issues aside, the value of the business would depend upon the price achieved for that rent roll asset and what was left after repayment of debt.

Issues

[469] At the conclusion of the evidence some of the pleaded relief sought by the applicant and third respondent was no longer pressed, as were aspects of both their claim and the counter-claim, having regard to concessions made in evidence.

[470] The issues remaining for determination in the oppression action (apart from a legal issue as to whether orders may extend to a unit trust operated as a trustee by a company), are whether the following conduct, if found to have occurred in fact, constitutes oppression:

(a) The fifth respondent making decisions in relation to hiring new staff and giving pay rises to staff, without prior consultation with the third respondent;

(b) The authorisation of payments by the second respondent of expenses of the fourth respondent unrelated to the operation of the merged business;

(c) The presentation in or around May 2013 of an employment agreement to the third respondent that reduced his salary and an instruction that the third respondent be paid in accordance with his reduced salary;

(d) The fifth respondent's statement on 20 June 2013 that, if the third respondent did not sign and return the new employment agreement, he would no longer be paid wages;

(e) The purported suspension of the third respondent's employment on 13 August 2013, and the subsequent termination of that employment on 21 August 2013;

(f) Using false and fabricated grounds to justify that suspension and termination which were based on unsubstantiated evidence, denied by the third respondent, and designed to engineer his removal;

(g) The prevention, since 13 August 2013, of the third respondent attending the premises of the merged business, and denying him access to its documents and information and the receipt of any distribution, wages or return;

(h) The non-payment of $27,436.20 to the third respondent of unpaid wages, superannuation and entitlements for the period 18 April 2013 to 13 August 2013;

(i) The refusal by the fifth and sixth respondents to consent to a sale of the third respondent's interest in the merged business by Gibbons;

(j) The refusal of the fifth and sixth respondents to provide information to the third respondent, relating to the financial and trading position of the merged business, since the third respondent's resignation as a director;

(k) The threat to issue new share capital and a call for further security and for financial contribution on the part of the applicant;

(l) The creation of an alleged $600,000 loan to the applicant from the second respondent and the purported suspension of the applicant's rights under the unit holders' agreement for non-payment of that alleged loan;

(m) The relocation of the premises of the merged business from a property beneficially owned by the third, fifth and sixth respondents' superannuation funds to a property owned by an entity related to the fifth respondent;

(n) The payment of legal costs out of the funds of the second respondent to defend the oppression action;

(o) The continued improper use of the second respondent's funds for payments to the fourth respondent or interests associated with the fourth, fifth and sixth respondents, including matters relied upon in the derivative action.

[471] The issues remaining in the derivative action are whether the following conduct constitutes alleged breaches of director's duties by the fifth and sixth respondents:

(a) The entry into a management agreement with AUPNG that was uncommercial and the failure to collect on management fees owing under that management agreement;

(b) The payments referred to in the oppression action to interests associated with the fifth and sixth respondents;

(c) The relocation of the merged business as relied upon in the oppression action;

(d) The entry into a loan agreement with AUPNG at 20% per annum interest compounding monthly;

(e) The payment of legal costs relied upon for the oppressive action.

[472] The issues remaining for determination in the misleading and deceptive conduct counter-claim are:

(a) Whether the applicant and third respondent misrepresented the management fees on properties on the applicant's rent roll prior to the merger in that no management or lessee fees were raised in respect of properties represented as having generated management fees, or there were properties on the rent roll with no legal or binding management agreements in place, which were represented as being managed properties;

(b) Whether the fourth, fifth and sixth respondents relied upon any such representations;

(c) Whether any such representations artificially inflated the valuation of the applicant's rent roll, with the consequence that it obtained a greater shareholding in the merged business;

[473] The issues remaining in the misappropriation counter-claim was whether the applicant and third respondent had misappropriated the funds allegedly improperly received by them.

[474] The issues remaining in the restraint counter-claim are whether the applicant and third respondents acted in breach of their restraint of trade undertakings to the second respondent, pursuant to the shareholders agreement and the unit holders agreement, in that they induced, solicited or procured the transfer of clients for managed properties from the merged business, or otherwise competed with the merged business.

[475] The issues remaining in the equitable compensation counter-claims are:

(a) Whether the first, second, fourth, fifth and sixth respondents are entitled to equitable compensation for any failure by the applicant and/or third respondent to provide security for finance facilities renewed by the merged business on 19 February 2014.

(b) An alleged failure to contribute capital when called upon to do so;

[476] The failure to repay a loan of $600,000 repayable on demand by the applicant.

Findings

Generally

[477] The evidence advanced at trial was unnecessarily voluminous and confusing in its presentation. Much of it related to whether the third, fifth and sixth respondents were giving accurate and reliable accounts of their conduct throughout the operation of the merged business. That evidence also went to impugn the motivations for their conduct.

[478] Having carefully considered all of that evidence, I am satisfied the third respondent is neither credible nor reliable. Much of the third respondent's evidence was, at best, disingenuous. In respect of the Prince Edward Parade transaction, I am satisfied it was deliberately dishonest. I do not accept any of the third respondent's evidence, insofar as it relates to any issue remaining in contention in this trial.

[479] I find the circumstances in which the third respondent prepared the Prince Edward Parade contract was the subject of a false explanation by him at the time he was confronted by the fifth and sixth respondents and subsequently the franchisor. The third respondent persisted with that false explanation in evidence. The suggestion that his response to the Jones' request, to the effect "that's not one of ours", was a positive assertion he knew something about the property, was risible.

[480] A particular feature of the third respondent's evidence was his propensity to blame others for his own failings. As part of that process, he was prepared to reconstruct circumstances. That reconstruction included false explanations. For that reason, I do not accept the accuracy of any emails sent by the third respondent during his employment with the merged business and subsequently. This conclusion particularly impacts upon his evidence in relation to his performance as CFO. I accept the numerous complaints in relation to non-payment of, or incorrect payment of, wages stemmed from his incompetence. It was not due to his claimed lack of information, or incorrect information.

[481] By contrast, I found the fifth and sixth respondents generally credible. That does not mean all of their evidence was entirely accurate. One matter that particularly impressed me in relation to the evidence of the fifth and sixth respondents was the genuineness of their claims to have acted in the best interests of the merged business at all times. The sixth respondent particularly impressed me with his candidness.

Merged business

[482] There was ultimately little difference between the evidence of the third, fifth and sixth respondents as to the circumstances in which they agreed to the merger. I accept the applicant and the fourth respondent agreed to merge their businesses on the basis the respective shareholdings of that merged business would be 34% to the applicant and 66% to the fourth respondent. I accept this agreed shareholding was agreed, in reliance upon the valuations provided by Gil Wright.

[483] Pursuant to that arrangement, documentation was prepared by Holloway. It included a management agreement for the rent rolls of the applicant and the fourth respondent, a shareholders' agreement and a unit holders' trust deed and agreement. As events transpired, the contents of those documents assumed little significance in the practical operation of the merged business. They only assumed significance upon its breakdown.

[484] I accept it was agreed the disclosed, pre-existing expenses of the applicant and the fourth respondent's businesses, which related to equipment or items to be used by the merged business, would become the responsibility of the second respondent. I do not accept the third respondent's evidence that there were agreements held by the fourth

respondent which were not disclosed to him prior to the commencement of the merged business. I accept Dartnall's evidence that a spreadsheet was forwarded to the third respondent in November 2011, which contained details of those agreements.

[485] The fact that balance sheets, subsequently printed by Di Tommaso from backup files allegedly held by him from his time as accountant for the second respondent, contained different information does not cause me to doubt the accuracy of Dartnall's evidence. In any event, there is no legitimate reason why loans relating to the previous refurbishment of the Redcliffe and Acacia Ridge offices of the fourth respondent ought not to have been met by the second respondent. Those offices were used by the merged business. The Acacia Ridge office only moved after the merged business purchased a rent roll from Elders Springwood. The Redcliffe office only moved after the merged business agreed to re-locate to the Margate premises.

[486] After some initial teething problems, the merged business operated in accordance with the agreement reached between the third, fifth and sixth respondents, with each being paid the agreed $75,000 per annum plus expenses of $5,000. I accept it was also agreed that a sum of $1,000 per share, per annum would be paid to the applicant and the fourth respondent. I do not accept the third respondent's evidence that that $1,000 per share represented a return of capital or a dividend in advance of profit. I find this sum represented payment to those entities for director services provided to the merged business. Significantly, Dartnall, who had administrative responsibility for accounts, always understood those fees to be a form of directors' management fees.

[487] The operation of the merged business deteriorated in the latter part of 2012. I accept the meeting between the third, fifth and sixth respondents and Whipps in March 2013, was as a consequence of the breakdown in the efficient operation of that merged business. I do not accept the third respondent's evidence that he did not agree at that meeting to a proposal that there be one decision maker for the merged business going forward. The recording of that meeting, surreptitiously made by the fifth respondent, supports the conclusion that the third respondent accepted that proposition

[488] That conclusion is also supported by the third respondent's conduct subsequently. The third respondent agreed at the April 2013 meeting that the fifth respondent would be appointed CEO of the merged business. I find the third respondent's agreement included an acknowledgement that the fifth respondent would have overall management control. As the sixth respondent observed, there was no other basis for proceeding forward. That agreement, in April 2013, effectively changed the basis upon which the third, fifth and sixth respondents had originally agreed to operate the merged business.

[489] The original basis was that each would be employed full time within the organisation, make business decisions jointly, and have a hand in management of the enterprise. After the April 2013 agreement, the merged business was to be operated on the basis the fifth respondent had overall responsibility for the day-to-day operations of the merged business. His duties included responsibility for the employment and dismissal of staff, their terms and conditions and associated matters. The third respondent, as CFO and operations manager, had primary responsibility for the merged business' financial accounts, including the payment of staff.

[490] I find the third respondent performed his duties as CFO with a lack of competence, placing the merged business in serious financial difficulties. The third respondent was ultimately responsible for the provision of the information used for the lodgement of the BAS returns for the quarters ending December 2012 and March 2013. Those statements contained a serious underestimation of the merged business' obligations to the Australian Taxation Office. This understatement caused the merged business to have a significant liability to the ATO, necessitating a repayment plan.

[491] I do not accept the third respondent's explanation that these misstatements arose as a consequence of the accounts being in disarray, following Dartnall's removal as administrator of those accounts. Such an explanation may have had a relevance to the return lodged for the quarter ending September 2012. However, by the time the return had been lodged for the quarter ending March 2013, the third respondent had had responsibility for those accounts for six months. This conclusion is not altered by the failure of the fifth and sixth respondents to call the bookkeepers. The responsibility for these returns rested with the third respondent as CFO.

[492] I find the third respondent's lack of competence as CFO resulted in numerous staff being paid incorrectly or, on occasions, not at all. Email communications evidenced those complaints. The sixth respondent and Dartnall also gave direct evidence of an impact on their payments. I accept the incompetence of the third respondent as CFO was the basis for the decision by the fifth and sixth respondents to relieve him of the duties of CFO. There was ample basis for that decision. It was not unfair. It was in the best interests of the future operation of the merged business.

[493] I find the third respondent did accept he ought to be no longer responsible for the duties of CFO. The third respondent did not accept his appointment to another position, at a substantially reduced salary. Consistently with that position, he refused to sign a workplace agreement in those terms. I accept the fifth respondent at one point advised the third respondent that until he signed that agreement, he would not be paid in his new position. I accept that demand was made in the best interests of the merged business. In any event, within two to three weeks, the third respondent was paid in accordance with that new position.

[494] I accept that as part of due diligence undertaken by Gibbons for the purchase of the applicant, an audit of the applicant's rent roll revealed three significant anomalies. First, properties were said to be earning management fees when no such fees had been paid to the applicant's business prior to the valuation or to the merged business subsequently. Second, properties had an inflated management fee attached to them at valuation. Third, properties were included which did not have current signed management agreements.

[495] As to the first category, I find the third respondent deliberately provided false information to Gil Wright for the purposes of the valuation which ascribed management fees to family or related entity owned properties, when no such fees had been earned in the past or would be earned in the future. I do not accept the third respondent's evidence that he disclosed the true nature of these properties to Gil Wright. The contents of the valuation are inconsistent with such an assertion.

[496] Further, I do not accept the third respondent's evidence that he reached an agreement with the fifth respondent, after the merger, for these properties to be managed at no fee, in exchange for his wife working in the merged business. Had such an arrangement been raised with the fifth respondent, I am satisfied it would have brought to light the falsity of the information supplied to Gil Wright for the purposes of the valuation of the applicant's rent roll.

[497] As to the second category, I find the third respondent deliberately provided misleading information to Gil Wright for the purposes of increasing the valuation of the applicant's rent roll. As to the third category, I am not satisfied these properties were the subject of any deliberate misleading of Gil Wright for the purposes of the valuation. These properties continued to be managed by the merged business, for the nominated fee. Once the audit had identified these properties, the applicant immediately obtained signed management agreements. It is likely management agreements for these properties were overlooked during the valuation process.

[498] I accept a concluded agreement was reached between the third respondent and Gibbons for the sale of the applicant, subject to a valuation by Gil Wright of the applicant's rent roll. A contract was signed by Gibbons. I find the sale did not proceed because the third respondent did not sign that contract. Whilst the third respondent said that was because the fifth and sixth respondents had indicated they would not consent to the sale, I find the fifth and sixth respondents indicated the matters identified in the audit needed to be rectified before any sale. I do not accept this position was unreasonable. The information revealed during the audit was consistent with a deliberate misrepresentation of the nature and quality of the applicant's rent roll. If those issues were not addressed prior to the sale, the fifth and sixth respondents would have to raise them with Gibbons. That would only have created difficulties with their new partner.

[499] I do not accept that the position adopted by the fifth and sixth respondents was the reason for the failure of the sale of the applicant to Gibbons. Despite having a signed contract, the third respondent never communicated again with Gibbons, or Gibbons' solicitor. No explanation was provided to Gibbons for the third respondent's refusal to sign that contract. Those circumstances are consistent with the sale not having proceeded for other reasons, such as the audit resulting in a valuation which would produce a price unacceptable to the third respondent.

Termination

[500] The third respondent's conduct in the Prince Edward Parade transaction and the Quick Fund dispute formed the basis of the notice of suspension of his employment, sent by the fifth and sixth respondents in early August 2013, and the termination of that employment later in August 2013. Whilst there was no power to suspend the third respondent's employment, I am satisfied the grounds relied upon, as set out in the notice of suspension, were substantiated by evidence. That evidence amply justified the termination of that employment. Those grounds were not concocted to engineer the third respondent's removal from the merged business.

[501] In August 2013, the third respondent arranged for the unit sale at Prince Edward Parade, Redcliffe to a buyer introduced to the third respondent whilst undertaking an inspection of a property advertised for sale by the merged business. The third respondent prepared the relevant contractual documentation on forms for the exclusive use of the merged business, removing the reference to the merged business as agent, and inserting his own name. The signed documents acknowledged the payment of commission to the third respondent, as agent for the transaction.

[502] All of this conduct occurred without the knowledge and authority of the merged business. It only came to its attention as a result of a chance enquiry by the conveyancing service acting in the transaction. The third respondent's reply "No, It's not one of ours" to Jones' enquiries of all sales staff as to whether they had any knowledge of the transaction was deliberately given by him in an effort to deflect further investigation into this transaction. That conclusion is supported by the third respondent's response to further enquiry as to his involvement in the transaction, once the merged business had obtained a copy of the contract. His enquiry as to who had given permission for the release of the contract to the merged business is entirely consistent with a deliberate course of conduct, designed to prevent the merged business from becoming aware of the transaction.

[503] The Prince Edward Parade transaction was a serious breach of the third respondent's obligations of good faith and acting in the best interests of the merged business. By entering into this transaction, the third respondent diverted a potential commission from the merged business to himself. I do not accept the third respondent never intended to earn a commission. The contract gave the third respondent a contractual right to commission. No other contract has been produced to support his assertion that a subsequent contract was entered into between the vendor and the purchaser, which did not provide for the payment of commission. The only evidence that the transaction was based on no commission being payable, was the third respondent's own email communications subsequent to that transaction. The email from the conveyancing service merely repeated the third respondent's assertions to that effect.

[504] The third respondent's conduct in this transaction involved more than diverting a potential commission from the merged business. It placed the merged business at risk of a breach of its franchise agreement. He gave a false account to his fellow directors in an effort to disguise his misconduct. The falsity of those accounts is not explained by disputation between them at that time.

[505] Further, the third respondent used merged business forms and facilities in respect of a buyer introduced to him through a merged business listing. The sixth respondent saw it as "theft". The fifth respondent took a similar view. Significantly, he sought advice from Wallace. Whilst that advice was general and based on very limited information, Wallace accepted he likely used the words "stealing as a servant". These facts explain the expression 'criminal offence' in the suspension notice.

[506] The third respondent's conduct in respect of the Quick Fund matter also had been contrary to the interests of the merged business. It had resulted in one of its owners receiving a credit default as well as two of its directors. The third respondent falsely asserted he had sought legal assistance in relation to that dispute. I find the information

conveyed by the third respondent to the fifth respondent was consistent with an assertion that Holloway had been engaged to resolve that dispute. I find Holloway had never been engaged by the third respondent to act in that matter.

[507] I find the fifth and sixth respondents made the decision to terminate the third respondent's employment in good faith, and in the best interests of the merged business. Having regard to my earlier findings as to the agreement reached in April 2013, as to the role to be performed by the fifth respondent, I am satisfied the termination of the third respondent's employment fell within the fifth respondent's duties as CEO. In coming to that conclusion, it is significant to note the fifth and sixth respondents only sought to terminate the third respondent's employment. No steps were taken to have him removed as a director. It was the third respondent who voluntarily took that course, one week later.

[508] The third respondent tended his resignation as a director of the merged business by letter dated 23 August 2013. I find there was no legitimate reason for the third respondent to form the view, so soon as after his termination as an employee, that he must resign as a director. Up until that time the third respondent had access to the financial information of the merged business, albeit on a view only basis. That access was only withdrawn on 10 September 2013.

Post-termination

[509] In September 2013, after the applicant contacted Dartnall requesting certain files containing information of the applicant be returned and then deleted from the system, a person or persons unknown, remotely accessed the second respondent's server. A number of files were deleted, including the applicant's sales file. I accept it was in that context that a decision was made to deny the third respondent further access to the financial records of the second respondent.

[510] I find the decision to deny further access was made in the best interests of the merged business. I accept the sixth respondent's evidence that a reason for that decision was a concern other records could be deleted, in circumstances where there was a continuing investigation into what was said to be suspicious transactions by the third respondent. Those suspicious transactions had been identified by Dartnall as a consequence of a full audit being conducted of all of the second respondent's accounts.

[511] That audit identified a number of payments to entities associated with the third respondent, where the MYOB entry suggested a different recipient, or otherwise contained inconsistent information. The third respondent provided explanations for those payments. His explanation in respect of some, was that they related to commissions to which Andrew had an entitlement. Both the third respondent and Andrew gave evidence supportive of the third respondent's explanation.

[512] I do not accept their evidence in respect of these transactions. I accept the evidence of the fifth and sixth respondents and of Dartnall, that at no stage was Andrew an employee of the second respondent. In those circumstances, there was no basis upon which he had an entitlement to 60% of the commission from the sale of properties by

the second respondent. If he was properly entitled to a component of any commission for a referral of the property, it ought to have been paid to him directly, after allowance for tax. The subterfuge associated with these payments is inconsistent with legitimate payments.

[513] I find the sums in question were taken by the third respondent, without authority, for his own benefit. In the case of one of those payments, the third respondent withdrew $1,000 more than was held in trust in respect of the property. That withdrawal was itself the subject of an attempt at correction without proper identification of the circumstances in which the transaction had taken place. That attempt is consistent with my finding that the transaction was not a legitimate transaction undertaken for authorised purposes.

[514] Another of the transactions related to $855 in cash, paid to the third respondent by a tenant. The third respondent did not deposit that cash into the second respondent's trust account. He later wrote out a cheque in substitution for it. Such a transaction is completely inconsistent with the third respondent's obligations in respect of trust monies. The third respondent is an experienced real estate agent, well aware of those obligations. The circumstances of that transaction also satisfy me it an improper transaction. I find the third respondent took those monies without authority, for his own purposes.

[515] There were other payments for which the third respondent gave explanations which were false. In the case of the payment for $4,000, the third respondent said he incorrectly paid the money to an associated entity. The payment was intended to be made to a plasterer named, Ted. The third respondent was unable to specify Ted's last name. He could not identify any associated invoice. He accepted at no stage had the plasterer been paid, or sought such payment. A mere recitation of those facts, supports a conclusion that the third respondent's explanation was a false account. I find the third respondent took those monies without authority, for his own purposes.

[516] I am satisfied the other payments identified by the fifth and sixth respondent as having been made by the third respondent to himself or associated entities were unauthorised payments. I do not accept the third respondent's evidence as to these payments being made in reimbursement of monies owed to him, including for superannuation. They were made without authority, for his own personal use.

Oppression

[517] Section 232 and 233 of the *Corporations Act* provide:

CORPORATIONS ACT 2001 - SECT 232

Grounds for Court order

The Court may make an order under section 233 if:

(a) the conduct of a company's affairs; or
(b) an actual or proposed act or omission by or on behalf of a company; or

(c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either:

(d) contrary to the interests of the members as a whole; or

(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For the purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.

CORPORATIONS ACT 2001 - SECT 233

Orders the Court can make

(1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

(a) that the company be wound up;
(b) that the company's 's existing constitution be modified or repealed;
(c) regulating the conduct of the company's affairs in the future;
(d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;
(e) for the purchase of shares with an appropriate reduction of the company's share capital;
(f) for the company to institute, prosecute, defend or discontinue specified proceedings;
(g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
(h) appointing a receiver or a receiver and manager of any or all of the company's property;
(i) restraining a person from engaging in specified conduct or from doing a specified act;
(j) requiring a person to do a specified act.

Order that the company be wound up

(2) If an order that a company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:

(a) as if the order were made under section 461; and
(b) with such changes as are necessary.

Order altering constitution

(3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

(a) the order states that the company does have the power to make such a change or repeal; or
(b) the company first obtains the leave of the Court.

[518] For conduct to constitute oppression, within the meaning of those sections, there must be, objectively, unfairness or a lack of good faith in the actions of those who have controlled the affairs of the company in question. The objective criteria was explained in *Wayde v NSW Rugby League Limited* [1985] 180 CLR 459 and 473:

> *"The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which their decision would impose on a member on the other, would have decided that it was unfair to make that decision".*

[519] In undertaking that assessment, considerations such as whether there was a lack of reasonable commercial justification for the management decisions are relevant.[112] However, even if there is a strict legal entitlement to make the requisite decision, the oppressive remedy is enlivened if such enforcement is contrary to good faith or such relief is justified in good conscience.[113] In *HNA Irish*, Emmett J observed:[114]

> *"As a general proposition, the court may intervene to prevent persons in control of the affairs of a company from exercising strict legal rights, where that conduct would be unfair and contrary to matters in the contemplation of the parties when they became members."*

[520] For that reason, even conduct engaged in good faith may nevertheless amount to oppression, if that conduct is objectively unfair.[115]

[521] In the present case, the applicant and the third respondent rely on conduct engaged in both before the third respondent's termination of employment and subsequently including in the course of this litigation. Having considered all of the evidence, I am satisfied that none of the complained of conduct, considered objectively, constitutes oppression. In coming to that conclusion, I have considered the conduct both individually and collectively.

[522] First, I do not accept the fifth respondent made decisions in relation to the hiring of staff and the giving of pay increases, without prior consultation with the third respondent. The merger of the applicant and the third respondent's businesses initially involved an acceptance that each of the third, fifth and sixth respondents would have responsibility over their area of the merged business. Consultation between directors occurred on a daily basis, particularly between the third and the fifth respondents.

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112 *Re Spargos Mining NL* (1990) 3 WAR 166 at 189; *Harding Investments Pty Ltd v PMP Shareholdings Pty Ltd (No 2)* [2011] FCA 567 at [41]-[49].
113 *HNA Irish Nominee Ltd v Kinghorn (No 2)* (2012) 290 ALR 372.
114 Ibid at 490 [510].
115 *Tomanovic v Global Mortgage Equity Group Pty Ltd* [2011] NSWCA 104 at [217ff].

[523] Second, I do not accept the fifth and sixth respondents approved the authorisation of payments out of the second respondent's funds for expenses of the fourth respondent which were unrelated to the operation of the business. Those expenses were met by the second respondent in accordance with the agreement reached between the parties. Those expenses properly included ongoing facilities.

[524] In reaching this conclusion, I have had regard to Dartnall's evidence as to the circumstances in which the bookkeeper found that unauthorised alterations had been made to the MYOB system in or about June 2013. Dartnall raised the alteration immediately with the third respondent, who replied by email. That response was revealing in its content. It clearly indicated a knowledge of the nature and purported reason for an alteration to have been made to those accounts. I find that alteration was made on or about 11 June 2013 by the third respondent or at his instigation.

[525] That alteration could only have been made by accessing the MYOB system. Although the third respondent had 'read only' access to those accounts at that time, Di Tommaso still had full access to those accounts. Against that background, I do not accept the accuracy or validity of any financial records purportedly prepared by Di Tommaso from a copy of the MYOB system. Those records could have been altered in material ways. The third respondent showed, in his contact with the conveyancing service in respect of the Prince Edward Parade contract, a willingness to seek support for a false account of his conduct.

[526] Third, I accept the third respondent was relieved of his duties of CFO due to his poor performance in that role, which had directly and adversely affected the operations of the merged business. By this stage, the third, fifth and sixth respondents had agreed to the appointment of the fifth respondent as CEO of the merged business. His responsibility included decisions associated with the day-to-day operations of the merged business. Those decisions included removal of a CFO, who was performing that role incompetently, with a significant impact upon staff morale.

[527] Fourth, I accept the fifth and sixth respondents both determined it was in the best interests of the merged business for the third respondent to be employed in sales on a debit/credit commission basis on a salary of $50,000 per annum, inclusive of superannuation. That was a decision open to them, having regard to the agreement reached in April 2013. To interpret that agreement in a way which required such decisions to require unanimity, lacks commercial reality. It also ignores the basis for the decision to appoint the fifth respondent as CEO.

[528] The third respondent offered the merged business considerable advantages if he concentrated on the sale of real estate. He was well known in the area and had been effective as a sales person in the past. The terms of that employment ensured a minimum payment, with no limit on the amount the third respondent may earn in any given year. The offer of employment was on the same terms as the sixth respondent's employment at the Springwood office. It was a decision reasonable directors, in the position of the fifth and sixth respondents, would have made in the circumstances.

[529] The fifth respondent required the third respondent to sign an employment agreement before he would be paid wages by the merged business. That position was explained by the fifth respondent as being consistent with the merged business' obligation for all employees to be subject to a binding employment agreement. Whilst that may be so, the merged business had paid wages since April 2013, without the third, fifth and sixth respondents being subject to signed employment agreements. However, shortly thereafter the third respondent was paid wages, notwithstanding his refusal to sign that employment agreement. Against that background, I am not satisfied the fifth respondent's insistence, for a short period, that the third respondent sign the employment agreement before he be paid any wages, constituted oppression.

[530] Fifth, the grounds for the third respondent's suspension and termination of employment were not false and fabricated or unsubstantiated by evidence, or designed to engineer the third respondent's removal from the merged business. The third respondent engaged in conduct as a director of the merged business, which was completely contrary to the interests of that merged business. He expressly assured the fifth and sixth respondents that he had the dispute with Quick Fund in hand and had discussed the matter with Holloway. Those assertions were false. As a consequence of the third respondent's failure to ensure the dispute was resolved in a timely manner, the fourth, fifth and sixth respondents were the subject of credit defaults

[531] The third respondent also engaged in the Prince Edward Parade transaction, contrary to the interests of the merged business. The third respondent entered into that transaction for his own benefit, using documents for the exclusive use of the merged business which he altered to delete the pro-forma reference to the second respondent to insert his own name as beneficiary of any commission. When the contract came to the attention of the second respondent, the third respondent replied with deliberately untruthful statements, designed to divert further investigation in relation to that transaction.

[532] There was ample basis for the fifth and sixth respondents to conclude the third respondent had engaged in dishonest behaviour to the detriment of the merged business. I accept that reasonable directors, in the position of the fifth and sixth respondents would have reached that conclusion. Having regard to his disingenuous response to the specific request as to any knowledge he had of the transaction, I am satisfied any reasonable director in their position would likewise have rejected the truthfulness of the third respondent's assertions to the contrary.

[533] Whilst the fifth and sixth respondents did not have an entitlement to suspend the employment of the third respondent, the grounds relied upon for that suspension justified their decision to terminate his employment. That decision was not unfair. Reasonable directors in the position of the fifth and sixth respondent would have made that decision in all of the circumstances. The grounds for that termination were genuine.

[534] Sixth, the conduct of the fifth and sixth respondents in thereafter preventing the third respondent from attending the premises of the merged business and denying him access to information and documentation of that business, as well as any distributions, including unpaid wages, superannuation and other entitlements, was not unfair. Reasonable directors in the position of the fifth and sixth respondents would have made those decisions in the circumstances as they were in the best interests of the merged

business. By that stage the fifth and sixth respondents had clear evidence of that dishonesty.

[535] Further, the third respondent retained 'read only' access to the merged business accounts until his resignation as a director of the second respondent. Such an arrangement is inconsistent with the notion the fifth and sixth respondents were acting oppressively towards the third respondent. Once the third respondent resigned as a director, which was his decision alone, circumstances changed significantly.

[536] Shortly thereafter, the fifth and sixth respondents ascertained there had been a number of financial transactions involving the removal of funds from the second respondent to the third respondent, or entities associated with him, which were not authorised or properly disclosed in the financial accounts of the second respondents. Files had also been deleted from the server shortly after a request from the third respondent for their removal from the server.

[537] Having regard to the third respondent's past conduct, which had involved deliberate deception, a reasonable director in the position of the fifth and sixth respondents would form the conclusion it was not in the interests of the merged business for the third respondent to retain access to the financial records of the second respondent. Such a decision was neither unfair not unconscionable. They were made in good faith, in the best interests of the merged business at that time. Against that background, it was also reasonable that a decision was made not to pay the third respondent outstanding entitlements pending resolution of that dispute. That decision is not unfair. It was in the best interests of the merged business.

[538] Similarly, since the third respondent's resignation as a director, it was reasonable for the fifth and sixth respondents to have declined to pay the applicant the agreed $1,000 per share per annum, notwithstanding that the fourth respondent continued to receive payment. The applicant was no longer represented by a director in the merged business. Having regard to my finding that those payments represented a form of director's management fees, rather than a payment of dividends in advance, the refusal to pay those fees was not unfair or unconscionable. Those decisions do not amount to conduct constituting oppression in all of the circumstances.

[539] Finally, none of the decisions post termination, constituted oppressive conduct. Each of those decisions was a decision reasonably open to a director in the position of the fifth and sixth respondents. The first and second respondents consented to the third respondent's sale of the applicant to Gibbons. Whilst they subsequently raised concerns about that sale proceeding, pending resolution of their allegation of misrepresentation of the nature of the applicant's rent roll, that sale did not proceed because the third respondent did not execute the contract signed by Gibbons. I do not accept it was reasonable for the third respondent not to execute that contract.

[540] A reasonable director in the position of the fifth and sixth respondents would also have considered the need to issue new share capital and call for further security and financial contribution from the third respondent after he declined to renew his security obligations in respect of the Westpac facilities. His refusal to do so was unreasonable.

An entity associated with him had received a substantial benefit from those facilities, namely the payment of $600,000.

[541] I accept the third respondent expressly advised Robertson he would not be providing further security or guarantees and that his wife would withdraw her existing security. The third respondent also said he would not execute new documentation to extend the facility. This position placed the merged business in substantial jeopardy. The fifth and sixth respondents were required to provide further security to ensure a continuation of those facilities. Without that step the merged business would have failed due to a lack of ongoing finance. The third respondent had a contractual obligation to provide security pursuant to the terms of the unit holders' agreement. His failure to do so constituted a breach of that agreement.

[542] The merged business also required the input of additional funds due to liquidity problems. In circumstances where the fifth and sixth respondents, either personally or through the generosity of others, had provided additional funds, it was not unreasonable to consider calling for their fellow unit holder to contribute in a similar way.

[543] The subsequent, characterisation of the payment of $600,000 to an entity associated with the third respondent, as a loan, was reasonable. It accorded with the advice of the merged business' new accountant. As Kay observed, the second respondent did not acquire the rent rolls of either the applicant or the fourth respondent. Notwithstanding that situation, the second respondent distributed loan funds obtained by it at the commencement of the merged business to both the applicant and the fourth respondent. Those funds had never been properly accounted for in the accounts.

[544] It can hardly be oppressive conduct to attribute those funds as loan monies, in circumstances where, at the same time, a loan was shown to the fourth respondent in the sum of $1.2M. Each unit holder was treated in a similar way. It was an entry which a director, in the position of the fifth and sixth respondents, acting reasonably, would approve in the amended accounts.

[545] I am also satisfied a reasonable director, in the position of the fifth and sixth respondents, would have demanded repayment of that $600,000 loan. The applicant, through the third respondent, had withdrawn all security in relation to the facility provided by Westpac. That facility included the $600,000 received by an entity associated with the applicant. There was no requirement for a demand for repayment of the $1.2M to be made to the fourth respondent, as it had continued to supply the requisite security in accordance with its obligations pursuant to the unit holders' agreement.

[546] The applicant and the third respondent also relied upon the use of the second respondent's funds for various payments to the fourth, fifth and sixth respondents. Although the applicant and the third respondent pleaded that the fourth, fifth and sixth respondents had received the benefit of numerous payments, which were improperly made out of the second respondent's funds, they conceded in submissions that many of those payments could not be established to be improper payments. What remained in dispute primarily related to the ongoing payment to the fourth respondent of directors'

management fees and the payment of other expenses, including legal expenses in respect of this proceeding. The total sum remaining in dispute was $612,659.78.

[547] I have already found the payment of the director's management fees to the fourth respondent, but not the applicant, was not oppressive conduct. As to the legal fees, the legal proceeding instituted by the applicant initially was commenced solely against the first and second respondents. The legal costs were largely incurred by the first and second respondent in defence of the applicant's claim for oppression. Having regard to my findings, there was a legitimate basis for the first and second respondents to defend this proceeding. It was the duty of its directors to do so, as there was no substance to that claim. The use of merged business funds to pay those legal expenses was a decision a reasonable director, in the position of the fifth and sixth respondents, would have taken in all of the circumstances.

[548] There was a sound commercial basis for the second respondent to enter into the management agreement. AUPNG purchased a substantial rent roll. The agreement provided for the second respondent to earn management and other fees. The costs associated with the management of that roll could, to some extent, be subsumed in the second respondent's existing personnel. No factors were identified which satisfy me that the agreement entered into was other than on a commercial basis.

[549] In respect of the remaining payments, the applicant and third respondent rely substantially upon alleged uncommercial management and loan agreements entered into with AUPNG. I do not accept that AUPNG was established in order for the second respondent to enter into transactions to the detriment of the applicant and the third respondent. I accept Gibbons' evidence as to the establishment of AUPNG and of its independence from the fifth and sixth respondents. I find AUPNG was established by Gibbons to pursue genuine commercial opportunities. The involvement of the fifth and sixth respondents and their wives was solely for local directorships.

[550] Substantial financial demands were placed on the merged business as a consequence of the legal proceedings and the disruption to its ongoing business. The second respondent required a significant injection of funds to continue its operation. Those funds were provided by the fourth respondent through the fifth and sixth respondents personally, as well as by AUPNG. I find AUPNG provided those funds as loans for use by the second respondent, on the understanding the fifth and sixth respondents were ultimately responsible for the repayment of those funds by the second respondent.

[551] Some of the funds provided by AUPNG were the subject of a written loan agreement. Whilst the interest rate of 20% compounded monthly, may be higher than other forms of finance, I accept the evidence of the fifth and sixth respondents that as a consequence of the third respondent's refusal to provide ongoing security and guarantees for the second respondent's facilities with Westpac, the second respondent was unable to obtain funding through normal channels. The fourth, fifth and sixth respondents had also been the subject of a credit default, as a consequence of the outstanding Quick Fund dispute.

[552] In those circumstances, it was reasonable for the second respondent to seek alternate sources of funding. In coming to this conclusion, I have had regard to the entries in the

accounts of the second respondent suggestive of contributions by AUPNG as a unit holder. I am accept those entries incorrectly note AUPNG as unit holder.

[553] The loan agreed with AUPNG did not involve an interest rate which could properly be characterised as a penalty. It was, as the fifth respondent observed, less than the rate charged on a credit card. Those loans cannot properly be characterised as being so uncommercial that no reasonable director, in the position of the fifth and sixth respondents, could properly have entered into those agreements.

[554] I accept the loans provided by AUPNG for general expenses were provided on the basis the second respondent could use those funds as it saw fit. As part of that arrangement, AUPNG obtained a loan from Suncorp. I accept that loan was entered into by AUPNG as a commercial transaction. The fact the second respondent has been paying the interest payments associated with that loan is not unusual. In order to assist the second respondent, AUPNG deferred payment of funds it received in respect of a rent roll. Without those funds AUPNG would have to use other funds to meet those interest payments. The arrangement reached with the second respondent ensured that loan was serviced whilst leaving the remaining funds available for use by the second respondent.

[555] As to the remaining payments made to the fourth, fifth and sixth respondents for the reasons given in respect of the derivative action claim, those payments were made in the course of the ordinary operations of the second respondent. Each of those payments were payments a reasonable director, in the position of the fifth and sixth respondents would have approved in all of the circumstances. None of these payments were unfair or unconscionable.

[556] Finally, the applicant and the third respondent relied upon the decision of the fifth and sixth respondents to relocate the merged business from the Margate property, to a property beneficially owned by the fifth respondent and Gibbons. I accept the decision to move premises was made in good faith, in the best interests of the merged business. I accept the decision was made at the suggestion of the franchisor, having regard to its inappropriate location and following concerns in relation to the security of the Margate premises. The relocation to more prominent premises in the heart of the Redcliffe business area, was commercially sound.

[557] As the previous premises occupied by the fourth respondent were no longer available, it was not unreasonable for premises located two doors adjacent to be occupied by that merged business. Whilst those premises were beneficially owned by the fifth respondent, there is no basis to conclude the agreement entered into between the merged business and the owner of those premises, was other than on commercial terms. Further, the Margate premises were re-let on favourable terms.

[558] None of the conduct relied upon by the applicant and third respondent in support of the oppression claim, either individually or collectively, constitutes conduct which a reasonable director in the position of the fifth and sixth respondents would not have engaged in, having regard to all of the circumstances. That conduct was engaged in for the benefit of the merged business. It was not unfair or unconscionable conduct. The oppression claim fails.

Derivative action

[559] The claim for relief on the basis of a derivative action, was premised upon a finding that payments made from the second respondent's funds to the fourth, fifth and sixth respondents, or entities associated with them, were improper payments, not made in the operation of the merged business. By the conclusion of evidence, the applicant and the third respondent conceded that a number of those payments could no longer be pressed as part of the derivative action.

[560] The payments remaining in dispute were $5,000 outstanding from the fifth respondent's boat purchase; $13,198.41 that ought to have been paid by the fourth respondent in respect of pre-merged amounts; $27,623.37 advanced to the sixth respondent and his wife in excess of the proper allowance for director's fees; $113,048.00 paid for rental agreements of the fourth respondent; $77,300 director's management fees paid to the fourth respondent after the third respondent's termination; $38,150.81 interest paid under the AUPNG loan agreement; $38,340 loss due to the AUPNG arrangement and $300,000 for legal expenses in this proceeding.

[561] In respect of the payment of $5,000, I do not accept the payment was an improper payment. The third respondent consented to the loan of those funds. He accepted the fifth respondent had indicated the balance not repaid should be charged as director's expenses. If that did not occur it is a matter for the receiver. It does not follow the payment was an improper payment. It was initially approved by directors.

[562] In respect of the $77,300, I have found those payments made to the fourth respondent subsequent to the third respondent's termination were in accordance with the agreement entered into between the parties for the payment of directors' management fees. Those payments were not improper payments to the fourth respondent.

[563] As to the $13,198.41, I do not accept these sums remained outstanding after the round robin transaction. I accept Dartnall's evidence that the round robin payments were made after the third, fifth and sixth respondents had given consideration to the appropriate transactions to be the subject of such payments.

[564] As to the $27,623.37, the evidence does not satisfy me those payments were improper payments. Whilst they are an excess of the agreed $5,000 per annum per director, it does not follow they were payments not properly made in the course of the operation of the merged business. It will ultimately be a matter for the receiver to determine whether adjustments ought to be made in respect of those accounts.

[565] As to the $113,048, all agreements were disclosed as part of the merger arrangement. These payments were properly made in the operation of the merged business.

[566] As to the $38,150.81, pertaining to the AUPNG loan agreement, that the agreement was properly entered into in the course of the merged business. It was not an uncommercial transaction. These payments were properly made, for the benefit of the merged business.

[567] As to the $38,340, the management agreement entered into between the second respondent and AUPNG was a commercial arrangement for the benefit of the merged business. These payments were properly made in the operation of that business.

[568] Finally, as to the $300,000 legal costs, such payments were properly made in defence of a proceeding brought against the first and second respondents for oppression, a proceeding which has ultimately failed.

[569] As no improper payments were made for the benefit of the fourth, fifth and sixth respondents, the derivative action also fails.

Counter-claim

[570] The fourth, fifth and sixth respondents contend the applicant and the third respondent engaged in misleading and deceptive conduct prior to the merger, in that they provided rent roll documentation to Gil Wright in preparation of the valuation of its business which misrepresented the properties and management fees earned on that rent roll. As a consequence, the applicant's rent roll valuation was artificially inflated, causing it to obtain a greater shareholding in the merged business than was its entitlement.

[571] The inclusion of properties in the applicant's rent roll, which were not the subject of valid management agreements, was due to an oversight promptly rectified by the third respondent, when it was brought to his attention. There is no basis for a finding of misleading and deceptive conduct in relation to the inclusion of those properties.

[572] In respect of the properties misrepresented as earning management fees, that misrepresentation was a deliberate misrepresentation. The documentation provided to Gil Wright contained entries indicating that such properties did earn management fees when shortly prior to the process being undertaken, they had not received such fees and subsequent to the commencement of the merged business, they did not receive fees. Those records were deliberately altered by the third respondent, knowing and intending that it increase the applicant's share of the merged business.

[573] I accept both the fifth and sixth respondents relied on the accuracy of that information in accepting the contents of that valuation. The evidence does not, however, establish that the misrepresentations materially altered the share the applicant would otherwise have been entitled to in the merged business. Even prior to the valuation, the parties had indicated a likely split of the merged business in the proportion ultimately agreed. That suggests the shareholding was not mathematically tied to a precise allocation in accordance with the valuation.

[574] This conclusion is fortified by the fact that the agreement entered into between the parties did not include due diligence or a retention period, and the rent rolls remained the respective properties of the applicant and the fourth respondent. Further, the fourth respondent itself had properties included in its rent roll for the purpose of the valuation, which ought not to have been included in all of the circumstances. Whilst those properties were not deliberately misrepresented by the fourth respondent, they impact, to an extent, on the overall valuation of the fourth respondent's rent roll.

[575] Brookes gave evidence that inconsistencies in a small number of properties were unlikely to materially affect the overall value of a rent roll as properties come and go in the ordinary course of business. Significantly, that was the experience of the second respondent, after purchase of the Springwood rent roll, and of AUPNG, after the purchase of its rent roll.

[576] Against that background I am not satisfied the third respondent's misleading and deceptive conduct in respect of the applicant's rent roll materially altered what would have been the agreed shareholding in the event the fourth, fifth and sixth respondents were aware of those misrepresentations. The fourth, fifth and sixth respondents have not established there would have been an overall change in the agreed shareholding of the applicant and the fourth respondent.

Misappropriation and re-direction counter-claim

[577] It is alleged the applicant and third respondent misappropriated these funds from the second respondent: $1,435 paid to the applicant; $6,000 paid to Aeolus; $4,294.50 paid to Sports Be in It; $4,000 paid to Aeolus; $855 cash; $1,104 to Sports Be in It; $3,136.00 to the third respondent; $600 to the third respondent; $3,700.24 to the third respondent; $20,700 which ought to have been paid as commission on the sale of the Prince Edward Parade property; $11,700 which ought to have been paid as commission for the sale of the property at Coman Street, Deception Bay and $6,000 transferred from the second respondent's trust account.

[578] In respect of the $1,435, I do not accept the third respondent's evidence that that payment was intended to be a reimbursement for monies paid by the third respondent for pool works on a property, which he mistakenly recorded as reimbursing for advertising fees. I find the third respondent misappropriated the sum of $1,435 from the second respondent to the applicant. I do not accept the entry was erroneously recorded. I find the third respondent deliberately made a false entry in an effort to disguise that improper payment.

[579] In respect of the $6,000 paid to Aeolus and the $4,294.50 paid to Sports Be in It, I do not accept the applicant and the third respondent properly received those payments, at the direction of Andrew. I do not accept the evidence of the third respondent or of Andrew in relation to the purported arrangement that existed between them in respect of the payment of commission. I find the third respondent gave false evidence in respect of these transactions in an effort to disguise what were improper payments of the second respondent's funds to entities associated with the third respondent.

[580] In respect of the $4,000, the applicant and the third respondent accept that payment was made in error to Aeolus. As a result of that concession, there is no reason why that sum ought not to be repaid to the second respondent.

[581] In respect of the $855, I do not accept the third respondent's evidence that $855 in cash was paid to Andrew in advance of commission. I find this payment was an improper payment of the second respondent's funds.

[582] In respect of the $1,104, I do not accept the third respondent's evidence that this payment represented money owed by Elders in respect of franchise fees paid by the applicant prior to the commencement of the merged business, which had been applied to the second respondent's account in error. Elders expressly denied any such adjustment. I find the third respondent improperly paid that sum from the second respondent's funds.

[583] In respect of the $3,136, I do not accept the third respondent's evidence that the fifth and sixth respondents agreed to this payment by way of compensation for additional use of director expense accounts by the fifth and sixth respondents. I find the third respondent improperly paid funds from the second respondent's account for his own benefit.

[584] In respect of the $600, I do not accept the third respondent's evidence that this money was reimbursement for the purchase of postage stamps. I find the payment involved the improper use of the second respondent's funds for the benefit of the third respondent.

[585] As to the $3,700.24, the applicant and the third respondent contend this payment was for superannuation owed to the third respondent and his wife. The payment was made to their superannuation fund. There was a dispute, however, as to the entitlement of the third respondent and his wife to those superannuation payments. It is unnecessary to determine that dispute, as I am satisfied the payment made was made without authority. I accept the payment of $3,700.24 was an improper use of the second respondent's funds for the benefit of the third respondent and his wife.

[586] The alleged commissions of $20,700 relates to the Prince Edward Parade contract. However, the commission specified on that contract was $8,100. That sum should be paid by the applicant and third respondent to the second respondent as it was entitled to receive any commission on that sale.

[587] The alleged commission of $11,700 relates to the properly at Coman Street. Whilst I am satisfied the third respondent gave a false account in relation this property, I am not satisfied the third respondent, or any entity associated with the third respondent, in fact received commissions in respect of that property. There is also no evidence to establish the second respondent had an entitlement to any commission on that sale.

[588] In respect of the $6,000 trust account transfer, the applicant and the third respondent contend that sum was transferred from the first respondent's trust account to the second respondent's general account in payment of commission. The transaction was undertaken in error, simply to the extent that it occurred one day prior to settlement and involved a payment of $1,000 more than was actually held in trust. Having considered the evidence I am not satisfied the third respondent improperly received the sum of $6,000.

[589] In summary, I find the applicant and the third respondent misappropriated the sums of $1,435, $6,000, $4,294.50, $4,000, $855, $1,104, $3,136, $600, $3,724, and $8,100. They ought to refund those sums, totalling $33,248.50, to the second respondent.

Restraint counter-claim

[590] It is alleged the applicant and the third respondent acted in breach of their restraint of trade undertakings to the second respondent, pursuant to the shareholders agreement and the unit holders' agreement, by inducing, soliciting or procuring the transfer of clients from specified properties, managed by the merged business, or by competing with the merged business.

[591] Whilst the third respondent denied ever asking clients of the merged business to take their business away, or ever competing with the merged business, I do not accept his evidence in respect of these matters. The third respondent provided signed letters of instruction for the removal of the family owned properties from management by the merged business. He did so on the basis that he would be undertaking that management. I do not accept his evidence that those properties were self-managed. Connolly's evidence that he believed the properties were still being managed by the merged business is inconsistent with those properties being self-managed by Connolly.

[592] I find the third respondent did procure and arrange for the owners of properties subject to management by the third respondent, to remove their properties from its management, so that he may undertake the management of those properties. That conduct was in breach of the restraint clauses. It was, at the very least, soliciting orders for services similar to those provided by the merged business.

Equitable compensation counter-claim

[593] The first, second, fourth, fifth and sixth respondents claim equitable compensation for the failure of the applicant and third respondent to provide security for finance facilities renewed by the merged business with Westpac, for their failure to contribute capital and for their failure to repay the loan of $600,000.

[594] The applicant and third respondent wrongfully failed to provide security in accordance with their obligations under the unit holders' agreement. I do not accept the applicant and the third respondent were entitled to refuse provide such security without receiving financial information concerning the merged business. The obligations related to the facility of $1.8M, $600,000 of which had been paid to an entity associated with the applicant and the third respondent. They retained the benefit of those funds.

[595] I accept that as a consequence of that wrongful refusal, the merged business was required to provide additional security. There is, however, no evidence that the merged business, as a consequence of the provision of that additional security, suffered loss which ought properly to be the subject of compensation. Instead, the applicant and the third respondent ought to be required to provide the requisite security in accordance with their obligations.

[596] The call for financial contribution was based on a contention that the fourth respondent had contributed $280,509.42 as working capital for the merged business. The evidence established that a large proportion of that contribution was made by AUPNG. I accept, those funds were provided by AUPNG. However, those funds were, in truth,

contributions to the fourth respondent which it provided to the second respondent as working capital for the merged business. The applicant and the third respondent ought, in such circumstances, to provide a similar proportion of working capital, in accordance with their obligations under the unit holders' agreement. The notice given constituted a proper notice pursuant to the unit holders' agreement. The applicant should provide contribution in the sum of $102,000.

[597] In respect of the $600,000 loan, there is no evidence the merged business has suffered additional financial loss as a consequence of the failure to repay that loan to date. Accordingly, no basis has been established for the awarding of equitable compensation in relation to its non-payment.

Conclusions

[598] The applicant and third respondent have failed to establish that any of the claimed conduct constituted oppression. They have also failed to establish an entitlement to any of the sums, the subject of the derivative action. The claims of the applicant and the third respondent are dismissed.

[599] The remaining respondents failed to establish an entitlement to damages for misleading and deceptive conduct. They have established an entitlement to orders that the applicant and third respondent repay to the second respondent the sums misappropriated by them, as well as the capital contribution, the subject of proper notice. They have also established the applicant and third respondent acted in breach of their restraint of trade obligations, and improperly failed to provide the requisite security for the loan facility with Westpac.

[600] I shall hear the parties as to the appropriate orders, and costs.