In the matter of an application by Deo [2005] NTSC 58

PARTIES:	IN THE MATTER OF: THE LEGAL PRACTITIONERS ACT AND: IN THE MATTER OF AN APPLICATION BY: DEO, Sanwant Singh FOR ADMISSION AS A LEGAL PRACTITIONER OF THE SUPREME COURT OF THE NORTHERN TERRITORY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LP 28 of 2003
DELIVERED:	29 September 2005
HEARING DATES:	5-9 and 15 September 2005
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

Legal Practitioners (Northern Territory) – application for admission to practise – application opposed by the Law Society of the Northern Territory – procedure for application for admission as a Legal Practitioner – whether court is satisfied that the applicant is of good fame and character and a fit and proper person to be admitted to practise – burden of proof rests on the applicant except where the Law Society objects to an application and asserts the existence of facts adverse to the application – limited disclosure knowingly conveyed a

misleading impression to the Court – applicant displayed a lack of candour compounded by unconvincing evidence – application for admission as a Legal Practitioner is refused.

The Legal Practitioners Act 1974 (NT), s 13(a), and s 15.
The Legal Practitioners Admission Rules, r 9.

Wentworth v New South Wales Bar Association (1992) 176 CLR 239 at 251; *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655 at 681; *In Re Davis* (1947) 75 CLR 409, followed.
Re Hampton [2002] QCA 129; *Thomas v Legal Practitioners Admissions Board* [2005] 1 Qd R 331 at 334 paras [26] – [27], applied.

REPRESENTATION:

Counsel:

Applicant:	J Reeves QC, G Clift & D De Silva
Respondent:	C McDonald QC, R Bruxner & C Bicheno

Solicitors:

Applicant:	De Silva Hebron
Respondent:	Ward Keller

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

In the matter of an application by Deo [2005] NTSC 58
No. LP 28 of 2003

IN THE MATTER OF:
THE LEGAL PRACTITIONERS ACT
AND:

IN THE MATTER OF AN APPLICATION BY:

SANWANT SINGH DEO

FOR ADMISSION AS A LEGAL PRACTITIONER OF THE SUPREME COURT OF THE NORTHERN TERRITORY

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 29 September 2005)

Introduction

[1] This is an application for admission to practise as a legal practitioner of the Supreme Court of the Northern Territory. The application is opposed by the Law Society and the Full Court directed that the application be heard and determined by a single Judge.

[2] The application for admission was filed on 22 August 2003. Section 13(a) of the Legal Practitioners Act 1974 ("the Act") requires the Legal Practitioners' Admission Board ("the Board") to make a report in writing to

the Court stating whether, in the opinion of the Board, "the applicant is of good fame and character and a fit and proper person to be admitted to practise." In a report dated 21 November 2003 the Board reported to the Court that although the applicant had completed both the academic and practical requirements for admission, he was not entitled to be admitted to practise because he did not satisfy the conditions specified in s 13(a).

Principles

[3] Section 15 of the Act provides that the Law Society is entitled to object to an application for admission and to be heard on the hearing of the application. Rule 9 of the Legal Practitioners Admission Rules guides the Court's consideration of the application and is in the following terms:

> "9. **Consideration of application by Court**
>
> If, after considering an application for admission and the report made by the Board, the Court is satisfied the applicant -
>
> (a) is of good fame and character and a fit and proper person to be admitted to practise;
>
> (b) has completed the relevant academic and practical requirements for admission specified by Division 2 or in a direction under Division 3; and
>
> (c) has otherwise complied with these Rules.
>
> the Court may admit the applicant to practise as a legal practitioner of the Court and direct the Registrar to enter the applicant's name on the Roll."

[4] The only questions in issue are whether the court should be satisfied that the application is of good fame and character and a fit and proper person to be admitted to practise. While the applicant's past conduct is relevant to a determination of these critical issues, and for that reason evidence as to past conduct is admissible, the question is not whether the applicant was in the past a fit and proper person to be admitted to practise but whether he is, today, of good fame and character and a fit and proper person to be admitted. The burden rests on the applicant to satisfy the Court of those matters, but where the Law Society has objected to the application and, in support of the objection, asserts the existence of facts adverse to the application, the burden rests upon the Law Society to satisfy the Court of the existence of those adverse facts.

[5] The responsibility resting on the Court is a heavy one. As Deane, Dawson, Toohey and Gaudron JJ pointed out in a joint judgment in *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 251:

> "… the right to practise in the courts is such that, on an application for admission, the court concerned must ensure, so far as possible, that the public is protected from those who are not properly qualified and, to use the language of s.4(2) of the Act, from those who are not "suitable … for admission"."

[6] A similar view was expressed many years earlier by Isaacs J in *Incorporated Law Institute of New South Wales v Meagher* (1909) 9 CLR 655 at 681. Although his Honour was speaking in the context of an application for re-

admission, the following observations are apposite to all applications for admission:

> "The errors to which human tribunals are inevitably exposed, even when aided by all the ability, all the candour, and all the loyalty of those who assist them, whether as advocates, solicitors or witnesses, are proverbially great. But, if added to the imperfections inherent in our nature, there be deliberate misleading, or reckless laxity of attention to necessary principles of honesty on the part of those the Courts trust to prepare the essential materials for doing justice, these tribunals are likely to become mere instruments of oppression, and the creator of greater evils than those they are appointed to cure. There is therefore a serious responsibility on the Court – a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential. It is not a question of what he has suffered in the past, it is a question of his worthiness and reliability for the future."

[7] As will appear later in these reasons, there were matters related to the past conduct of the applicant relevant to his application for admission which the applicant was obliged to disclose to the Court. In these circumstances, the candour of the applicant in pursuing his application and in disclosing previous conduct relevant to the application is a matter of importance: *In Re Davis* (1947) 75 CLR 409; *Re Hampton* [2002] QCA 129; *Thomas v Legal Practitioners Admissions Board* [2005] 1 Qd R 331.

[8] In *Hampton* an applicant for admission failed to disclose circumstances adverse to his application. De Jersey CJ, with whom Moynihan SJA and White J agreed, said ([26-27]):

> "Of considerable additional concern, is the feature that the applicant did not initially disclose these significant matters to the Board when making his application. He certainly should have been aware of the

> seriousness of the Board's approach to such applications, and the seriousness of the court's ultimate determination of them. An applicant for admission is obliged to approach the Board, and later the court, with the utmost good faith and candour, comprehensively disclosing any matter which may reasonably be taken to bear on an assessment of fitness for practice.
>
> The adverse aspects to which I have referred would not have emerged but for what has become known as a "whistleblower's" letter of objection. In these situations the court cannot allow the legitimacy of its endorsement, or otherwise, of a person as fit to practise, to depend on such intervention. By taking a strong line in a case like this, the court must take the opportunity to emphasize the primacy of the pro-active obligation of an applicant to make candid, comprehensive disclosure. If it emerges an applicant has not, in some significant respect, been frank with the court, then the application should ordinarily be rendered doubtful at least."

[9] In addition to agreeing with the Chief Justice, White J added the following observations ([36-37]):

> "To me, the troubling feature of the applicant's conduct has been his failure to appreciate the need to be frank with the Board about his suspension and the conduct which led to it. Had he made candid disclosure then he would have been in a better position to advance the testimonials from the legal professionals with whom he has worked and who attest to his legal ability and competence.
>
> His failure to disclose his past demonstrates want of understanding of the high degree of trust which the court, of necessity, must repose in a person whom it endorses as a fit and proper person to practise the profession of solicitor. It is his want of understanding of this against the background of his past that raises present doubts about his fitness for practice."

[10] The remarks of de Jersey CJ in *Thomas* are also relevant. The Court was concerned with an applicant who disclosed a plea of guilty to a "debt charge", but failed to disclose full details of the convictions including particulars that charges of fraudulent misappropriation were involved. In

the context of a question concerning lack of candour and a submission by the applicant that the only purpose of requiring candid disclosure could be to ensure that the Legal Practitioners Admissions Board had all the information it required to make a fully informed decision, de Jersey CJ said (334):

> "That is not so. By making candid and comprehensive disclosure of relevant information an applicant demonstrates a proper perception of his or her duty and will thereby seek to demonstrate his or her good character. It is not a sufficient answer to say, as was said, that the Board ended up with all relevant information. The significant feature is that it was furnished only gradually and then only in response to express and repeated requests from the Board."

Evidence

[11] The applicant is now aged 44 years. In 2000 he commenced his legal studies and successfully qualified for the degree of Bachelor of Laws. On 22 May 2003 the applicant was admitted to that degree.

[12] In support of his application for admission, the applicant filed an affidavit dated 25 August 2003 which he stated was "by way of full disclosure". The affidavit referred to an undertaking previously given by the applicant to the Australian Securities and Investments Commission ("ASIC"):

> "12. By way of full disclosure to the Supreme Court of the Northern Territory I state as follows:
>
> A. <u>Undertaking provided to ASIC</u>
>
> (i) I was a practicing accountant and registered company auditor in partnership and conducted accounting, tax and auditing services for reward. Cleanthous and Deo was

started as a Partnership between Mr Cleanthous and myself in April 1993.

(ii) On 30 April 1999, ASIC issued a notice requiring me to provide to ASIC documents relating to the Balangarri Aboriginal Corporation's audited financial statements for the financial year ended 30 June 1998.

(iii) I handed all of the requested files to ASIC.

(iv) On 5 October 1999, Deloitte Touche Tohmatsu completed its investigation into the matter on behalf of ASIC and provided a report containing its factual findings.

(v) In December 1999, I responded to Deloitte Touche Tohmatsu's report in a lengthy and detailed position paper that was forwarded to ASIC by my solicitors, Kliger Partner.

(vi) On 21 December 1999, ASIC and I agreed to the terms of an enforceable undertaking whereby I agreed to attend professional development training and further agreed that my audit files would be reviewed by an independent auditor and chartered accountant, Mr Bob Cowling, prior to me signing audit reports as a registered company auditor. I complied fully with that undertaking.

(vii) Bob Cowling reviewed the audit files and stated on 5 February 2001:

"*The result of my reviews was that I was satisfied with the quality of the audit work performed by Mr Deo and concurred with his signing the audit papers for the relevant papers*". Annexed to this Affidavit and marked with the letter "G" is a true copy of Bob Cowling's letter dated 5 February 2001 to P. Bracken and Lowndes Lambert (my insurance broker at that time).

(viii) On 15 July 2003, I am informed by David Weinberger of Kliger Partners, my solicitor, and verily believe that

Mr Cowling provided a facsimile to Mr Weinberger with respect to his review of my audit files during the calendar year 1 January 2000 to 31 December 2000. In that facsimile he states:

"*Mr Deo has been diligent in respect of those audits ensuring that the work papers were of high standard and the spirit and letter of the accounting standards has been met*". Annexed hereto and marked with the letter "H" is a true copy of Mr Cowling's 15 July 2003 facsimile.

(ix) I am still a registered company auditor and registered tax agent."

[13] In his affidavit of 25 August 2003 the applicant did not disclose all relevant information concerning the circumstances leading to the undertaking. Nor did the applicant annex a copy of the undertaking. The applicant referred only to the issuing of a notice by ASIC requiring him to provide documents relating to the audited financial statements of the Balangarri Aboriginal Corporation ("Balangarri") for the financial year ended 30 June 1998 and to an investigation and report in October 1999 by Deloitte Touche Tohmatsu ("Deloitte"). In particular the applicant did not disclose the following assertions by ASIC which are set out in the undertaking:

"1.4 ASIC received a complaint in January 1999 concerning the conduct of the audit by Mr Deo of Balangarri for the financial year 1997/98.

1.5 ASIC investigated the complaint and concluded that Mr Deo conducted the audit while having a conflict of interest with the chief executive officer of Balangarri and that Mr Deo had failed to perform the audit to a number of Australian Auditing Standards."

[14] Further information as to the background to the undertaking was provided to the Court in the applicant's affidavit dated 8 September 2003. Annexed to that affidavit were copies of three documents to which the applicant had referred in his affidavit of 25 August 2003, namely, the Deloitte report dated 5 October 1999, the applicant's position paper and the undertaking.

[15] The Deloitte report dealt in detail with the applicant's conduct of the Balangarri audit for the financial year ended 30 June 1998. The opinion was expressed that the applicant had not complied with 26 auditing standards in the conduct of the audit. In addition, the Deloitte report referred to "ethical requirements" with which an auditor is required to comply and to the understanding of the author of the report that this question was the subject of further investigation. The report stated that "we have not investigated Professional Independence as we understand this is the subject of further inquiry".

[16] In his affidavit of 8 September 2003, having referred to the Deloitte report, the applicant repeated the statement made in his affidavit of 25 August 2003 that in December 1999 through his solicitors he "responded" to the report "in a lengthy and detailed position paper". That position paper was annexed to the affidavit of 8 September 2003.

[17] Although not explained in the affidavit of 8 September 2003, the applicant's December 1999 position paper was not limited to the Deloitte report concerning the audit. It also responded to allegations concerning a conflict

of interest made in October 1999 by ASIC in a draft application for cancellation of the applicant's registration as a company auditor. The draft application had been provided by ASIC to the applicant in October 1999 in order to give the applicant an opportunity to comment on allegations set out in the draft application, including the assertion of conflict of interest.

[18] In his affidavit of 8 September 2003 the applicant did not mention the draft application by ASIC. He annexed the undertaking which referred to a conflict of interest with the Chief Executive Officer of Balangarri. He also annexed his position paper which contained a section concerned with the allegation of conflict of interest under the heading:

> "B. ALLEGATIONS IN RESPECT OF JADEMOUNT INVESTMENTS PTY LTD"

[19] The draft application by ASIC to which Part B of the applicant's position paper responded was first revealed to the Court as an annexure to an affidavit of the applicant dated 24 September 2003. In order to understand the context of the applicant's response in the position paper, it is necessary to set out details of the draft application.

[20] Included in the draft application was an assertion that the firm of Cleanthous and Deo were the appointed auditors of Balangarri from June 1996 "until their dismissal on 13 January 1999". Part C of the draft application was headed: "BACKGROUND TO THE APPLICATION". The first three paragraphs of Part C included allegations that a Mr Curnow was the Chief

Executive Officer of Balangarri and that during his employment Mr Curnow had business interests, including the business of importing of cement from Indonesia through his private company Jademount Investments Pty Ltd ("Jademount"). Paragraph 4 of the Background stated:

> "4. ASIC contends that the auditor and Mr Curnow were business partners."

[21] The draft application contained two sections of "contentions". The second contention alleged that the applicant had failed to perform his audit responsibilities in accordance with professional auditing standards. Contention numbered 1 concerned the conflict of interest and was in the following terms:

> "
>
> CONTENTION #1
>
> MR DEO MAINTAINED A BUSINESS RELATIONSHIP WITH THE CHIEF EXECUTIVE OFFICER OF BALANGARRI WHILE AT THE SAME TIME BEING ITS APPOINTED AUDITOR
>
> 1. Under the Auditing Guidance Statements, AUP 32 regarding auditor independence, an auditor is required not only to be independent, but also to appear to be independent.
>
> 2. Jademount Investments Pty Limited ("Jademount") is controlled by Mr Curnow and throughout the relevant period was run from the premises of the client without the consent of Balangarri. (Attachment A).
>
> 3. ASIC contends that the auditor was actively involved in the business of Jademount throughout the relevant period. ASIC relies on the following evidence to support this contention:

i) On 16 September, 1998 Mr Curnow faced the auditor a letter in relation to the purchase of Indonesian cement in which he proposes that he pay for the cement and associated costs such as pallets, packing, loading, etc and Mr Deo's "group" pay for the freight and storage. (Attachment B)

ii) A senior staff member of Balangarri has provided evidence that she was told by Mr Curnow (in response to a concern about the accounts) "not to worry about the audit report. Sonny (the auditor) and I are in business together" (Attachment C)

iii) A facsimile addressed to Sonny Deo (the auditor) of "Jademount Investments" sent from PT Wiharta Karya Agung of Indonesia and dated 14/01/99. (Attachment D)."

[22] In support of the contention that the applicant was actively involved in the business of Jademount during the relevant period, reference was made in the draft application to a facsimile transmission from Mr Curnow to the applicant dated 16 September 1998. The facsimile was on Jademount letterhead addressed to "Sonny Deo, Cleanthous and Deo, fax (08) 89180444". It was in the following terms:

"Sonny,

INDONESIAN CEMENT

1. This is the proposal that I am putting to you so that we can better organised the future of the cement trade.

2. With the wet season approaching, all of the cement imported must go into sheds immediately after arrival. You have the sheds.

3. Further, Northern Cement are seriously considering ordering bagged cement (bulkabags and 40kg bags) in units above 2000 tonnes per order on the basis that that is sufficiently large to attract freight discounts. They do not have storage and they need it stored for use. Again, you have the sheds.

4. I attach a breakdown matrix on the costs of cement by the tonne for bulkabag and for pallet cement and have expressed it in dollars/tonne. It should be noted that a pallet carries 1.2 tonnes and the price per tonne has been calculated to include the proportional cost per pallet.

5. The next shipment is 800 tonnes – 600 tonnes in bulkabags and 200 tonnes in pallets (167 pallets x 1.2 tonnes) and is due to load on 1 October 1998.

6. I propose that I pay for the cement and all associated necessaries – pallets, packing, loading etc – and your group pay for the freight and storage. The freight is $US40 per tonne. A single truck with a HIAB can be hired by the day and that will take care of all removal from the wharf. To hire it by the tonne is not a good idea.

7. The cement will be sold by Jademount to Two Creeks on arrival. Jademount will sell the cement and arrange shipment as agent for Two Creeks. Of the funds received from sale, the split should be immediate based on the percentage investment in the cement.

8. I see little value in selling anything to Stirrup as the exchange rate means that this is unlikely to be a profitable sale. The current profit is in selling outside of Darwin as I can make a better deal on the freight prices. Selling the whole load to two creeks means that I can honestly say that the whole load is sold.

9. Bulk cement will soon become available via containers ex-Kupang, but that will only serve to allow for bulk sale to specified customers outside of Darwin. Northern cement have clearly indicated that there will be a price war on bulk cement in Darwin.

10. The trick is to get to two shipments a month with the majority of sales outside Darwin and then move into Type G ex-Singapore.

Regards,

Kevin
16 September 1998"

[23] Accompanying the facsimile transmission of 16 September 1998 was a document headed "Cement Costs".

[24] It is common ground that the facsimile number on the transmission was incorrect and that the applicant did not receive the transmission.

[25] The draft application also referred to a facsimile transmission dated 14 January 1999 addressed to "Mr Sonny Deo" of "Jademount Investments Pty Ltd".

[26] Contrary to the impression conveyed in the affidavits of 25 August and 8 September 2003, it was in the context of both the Deloitte report and the draft application by ASIC that the applicant provided his position paper to ASIC. The first 24 pages responded the allegations of breaches of 26 auditing standards. Part B of the position paper comprising approximately one page referred to allegations in respect of Jademount which were contained in the draft application by ASIC. As it is the position of the Law Society that the applicant was not entirely frank in this section of the position paper, it is appropriate to set out this section in full:

"B. ALLEGATIONS IN RESPECT OF JADEMOUNT INVESTMENTS PTY LTD

- Sanwant Deo ("Deo") is a shareholder and was formerly a director of Jademount Investments Pty Ltd ("Jademount").

- Kevin Curnow ("Curnow") is a shareholder and director of Jademount and was formerly the Chief Executive Officer of BAC.

- Deo acquired his share in Jademount on or about 23 November 1998.

- On the same day Deo also became a director of Jademount which position he held just over 1 week resigning on 1 December 1998 before he was asked to prepare a special report on the accounts of BAC.

- On 22 February 1999 Deo again became a director of Jademount which position he again resigned on 22 June 1999.

- On 22 June 1999 Deo also resigned of his position as secretary of Jademount which position he had held since 15 June 1999.

- At no stage has Deo been acting as auditor of BAC and a director of Jademount. Deo has been, and does remain, a shareholder in Jademount. Although Deo has attempted to sell his share in Jademount his efforts have been without success.

- On 24 November 1998 Deo opened a business bank account for Jademount. The account was opened by Deo with his then partner Leo Cleanthous.

- The attached statements for the account numbered 015-901 3517-30072 show that transactions on the account only took place after 24 November 1998 after Deo had ceased acting as auditor of BAC.

- Deo's involvement in auditing BAC through the firm of Cleanthous & Deo was terminated on 2 October 1998 (this termination was confirmed on 13 October 1998).

- Although Cleanthous & Deo were requested to carry out a special review which request was accepted by facsimile of 4 December 1998 this did not constitute acting as auditor and in any event the appointment to carry out the review was subsequently revoked in early January 1999.

- Having ceased acting as auditor of BAC Deo took an appointment as director of Jademount. When requested to carry out a special review of BAC Deo resigned as director and was only re-appointed director once the appointment to carry out the special review was revoked.

- Deo did not receive the fax dated 16 September 1998 from Mr Curnow and had no involvement with Jademount until such time as Cleanthous & Deo was not acting as auditor of BAC."

[27] The applicant asked this Court to take into account his response to the allegations made by ASIC found in his position paper. As to contention 1 in the draft application, in para 10 of his affidavit dated 24 September 2003 the applicant stated that "Section B of the response answers contention 1 on page 4 of [the draft application]".

[28] In an affidavit dated 26 August 2005 the applicant said the position paper was prepared by his solicitors in accordance with his instructions and submitted to ASIC. According to the applicant, ASIC subsequently contacted the applicant and proposed that the matter be resolved on the basis of his entering into an enforceable undertaking. The applicant agreed to that course and a draft undertaking was provided by ASIC.

[29] The draft undertaking contained the assertion that the applicant was appointed auditor for the period June 1996 until his dismissal in January 1999. In a reply containing suggestions as to amendments, the applicant's

solicitors forwarded a draft background document which included the statement that Cleanthous and Deo were appointed auditors "for the period June 1996 until termination of appointment in January 1999".

[30] In his affidavit of 26 August 2005 the applicant said he instructed his solicitors to agree to the undertaking in the terms ultimately given. The applicant said that in agreeing to give the undertaking in that form he realised that he was "either expressly or implicitly accepting that":

> "(a) I was the auditor of Balangarri Aboriginal Corporation ("BAC") for the whole of the period 1 June 1996 to 13 January 1999;
>
> (b) During the latter part of the period I had a business relationship with Mr Curnow and this constituted a conflict of interest for my role as auditor of BAC;
>
> (c) It was wrong for me to act as auditor of BAC whilst having this conflict of interest; and
>
> (d) Anything I put to the contrary in my response to ASIC would be negated by me giving the undertaking."

[31] The undertaking was signed by the applicant on 21 December 1999. It was primarily concerned with restrictions on the applicant's practice as an auditor and acknowledgments by the applicants that ASIC could issue a media release and refer publicly to the contents of the undertaking. For present purposes, the relevant part of the undertaking is found in the background set out in the undertaking as follows:

"1. BACKGROUND

1.1 Mr Deo, at the relevant time a partner of the firm of Cleanthous & Deo, was the appointed auditor of the Balangarri Aboriginal Corporation ("Balangarri") for the period June 1996 until the termination of his appointment in January 1999.

1.2 Under the Corporations Law ASIC is responsible for the registration of company auditors.

1.3 Under the Corporations Law ASIC maintains a register of company auditors and has sole standing to apply to the Companies Auditors and Liquidators Disciplinary Board for the deregistration or discipline of auditors.

1.4 ASIC received a complaint in January 1999 concerning the conduct of the audit by Mr Deo of Balangarri for the financial year 1997/98.

1.5 ASIC investigated the complaint and concluded that Mr Deo conducted the audit while having a conflict of interest with the chief executive officer of Balangarri and that Mr Deo had failed to perform the audit to a number of Australian Auditing Standards.

1.6 Mr Deo acknowledges the concerns of ASIC and has offered to enter into this undertaking."

[32] Paragraph 1.1 of the Background contained the statement that the applicant was appointed auditor of Balangarri for the period June 1996 until the termination of his appointment in January 1999. That statement is to be contrasted with the statement in the applicant's position paper that his involvement in auditing Balangarri terminated on 2 October 1998. The applicant explained in evidence that although he believed his appointment as auditor ceased on 2 October 1998, he accepted the ASIC interpretation that

because he subsequently undertook a special financial review of Balangarri he was, for the purposes of the law, the auditor until his appointment to conduct the review was terminated on 13 January 1999.

[33] The applicant said in his affidavit of 26 August 2005 and during his oral evidence that he has learnt from his experience with the Balangarri audit and the ASIC action against him. He maintained that he has also learnt from the training he undertook as part of the obligations under the undertaking. In addition, the applicant has studied a number of subjects in connection with his law degree dealing with ethics and the professional obligations of a legal practitioner. He has worked as a law clerk for a legal firm in Darwin. According to the applicant, from all of his experiences and studies he is now acutely aware of his professional obligations to his clients and will in the future be careful to avoid any situations of conflict of interest.

[34] The applicant was cross-examined about his state of mind in August 2003 when he filed the application and the first affidavit in support of the application. In order to understand the significance of some of the evidence to which I am about to refer, it is necessary to appreciate the following aspects of the appellant's case:

- The applicant denies that he was in a business relationship with Mr Curnow or Jademount before 23 November 1998. In particular he denies that he was in a business relationship with Mr Curnow or Jademount

while appointed auditor of Balangarri, including the period in September 1998 when he carried out the 1997-1998 audit of Balangarri.

- The applicant admits that in September 1998 when he carried out the audit, and subsequently while he was still the auditor of Balangarri, he pursued a business relationship with Mr Curnow and Jademount and assisted Mr Curnow and Jademount in connection with the business of that company.

- In 1998 the applicant believed that although he was the auditor of Balangarri, it was permissible for him to pursue a business relationship with Mr Curnow and Jademount and to assist Mr Curnow and Jademount in connection with Jademount's business. In the mind of the applicant in 1998, such pursuit and assistance did not create an inappropriate relationship or a conflict of interest.

- In 1998 the applicant drew a distinction between pursuing a business relationship and an actual business relationship with Mr Curnow and Jademount. At the time he was the auditor of Balangarri in 1998, the applicant believed it would inappropriate to be in an actual business relationship with Mr Curnow and Jademount.

- The applicant now admits that by pursuing the business relationship and assisting Mr Curnow and Jademount at a time when he held the appointment as auditor of Balangarri he was in an inappropriate

relationship with Mr Curnow and Jademount which created a conflict of interest.

[35] As to his first affidavit dated 25 August 2003, the applicant agreed in cross-examination that he intended to bring to the attention of the Court matters which might have a bearing upon the decision of the Court with respect to his application for admission to practise. As to what the Court should know about the undertaking, the applicant said that the Court should be aware he had a conflict with a client and that his papers had been reviewed by Deloitte. He thought it was also important to bring to the attention of the Court the review of his performance by Mr Cowling.

[36] The applicant agreed that he did not mention the conflict of interest in his affidavit of 25 August 2003, but added there was mention of ASIC taking his working papers. Pressed further, the applicant agreed that he should have elaborated more about the conflict in his August 2003 affidavit.

[37] The applicant said in evidence that he could not recall whether it occurred to him that the Court might be interested to know that the undertaking was given in circumstances where ASIC was threatening to cancel his registration as an auditor and added that he disclosed what he thought needed to be disclosed. Asked if it occurred to him that the Court might be interested to know that one of the reasons ASIC had threatened to apply to cancel his registration was an allegation that while auditing Balangarri the applicant had been in a business relationship with that Corporation's Chief

Executive Officer, the applicant replied "Yes, I'd say so." The questioning continued:

> "Q. It did occur to you that the Court might be interested?
>
> A. No, it did not occur to me, why should it?
>
> Q. Do you agree now that you should have put it in, is that your evidence?
>
> A. No, I said no, when I thought that conflict of interest, put all those things in there.
>
> Q. You should have put all those things in there, is your evidence that that's something that you thought to do at the time but omitted to do or is that something that you now acknowledge you should have done but didn't enter your mind then?
>
> A. I acknowledge that I should have done it in my mind then. I should elaborate more.
>
> Q. … Is your evidence that it was your state of mind on 25 August 2003 when you affirmed this affidavit, that the fact that ASIC had threatened to apply to strike you off was something that you thought should be brought to the Court's attention.
>
> A. Yes, but I didn't think of it that way.
>
> Q. You didn't think of it that way?
>
> A. Well, yeah, I should have elaborated more, like I said, in my paragraphs.
>
> Q. What was the purpose of disclosing this material, that is, the events of the past, the undertaking? What did you see as the purpose of that disclosure?
>
> A. It was to give full disclosure of what transpired, your Honour.

Q. Why did you need to do that?

A. To be candid so that the Court can see that I have not left anything out. I do admit that I could have phrased all these paragraphs much better or even elaborated more but at that time it did not cross my mind that my paragraphs were not as good as they could be.

Q. Did it occur to you, Mr Deo, that the Court might be interested to know that although you denied the allegation that ASIC had made against you about you being in a business relationship with their Corporation's Chief Executive Officer, that although you denied that, it was in fact the case that you had been in a wholly inappropriate relationship with the Corporation's Chief Executive Officer whilst you were Balangarri's auditor?

A. At that time I believed, my belief, when I did the response, that I was not the auditor.

Q. I'm not asking you about the response, we'll get to that a bit later.

A. Okay.

Q. I'm asking you about your state of mind when you swore this affidavit …

Q. Mr Deo, when you affirmed this affidavit, did it occur to you that the Court might be interested to know that it was, in fact, the case that while you were Balangarri's auditor you had been in a wholly inappropriate relationship with the Corporation's Chief Executive Officer?

A. Yes.

Q. It did occur to you that the Court might be interested to know that?

A. I would say yes, but I did not put it in. I just put the undertaking in.

Q. You didn't put the undertaking in, did you?

A. No, no, I explained in the undertaking, that's true.

Q. And your explanation of your undertaking really didn't touch at all upon the question of conflict of interest, did it?

A. No, it did not. Like I said, I could have elaborated on my paragraphs."

[38] The evidence continued for a short time and I then sought clarification from the applicant:

"Q. Mr Bruxner asked you whether it occurred to you when preparing the affidavit of 25 August that the Court might be interested to know that while you were auditor you had been in a wholly inappropriate relationship with the CEO of the Corporation.

A. Yes.

Q. Did I understand you to say, "Yes", that that did occur to you at the time you affirmed that affidavit?

A. No, it did not occur to me at that time. But what I'm saying I could have elaborated more in these paragraphs to put everything in there. I was under the impression that putting this disclosure as it is would have sufficed.

Q. When did it first occur to you that the Court might be interested to know while you were auditor you had been in an inappropriate relationship with the CEO of the Corporation? When did that first occur to you?

A. Your Honour, it would have occurred to me from the start, but like I said, I did not elaborate well enough. I should have disclosed a lot more than what I did, elaborating the paragraphs."

[39] Later in the applicant's evidence I questioned the applicant as to why all of the material was not attached to the first affidavit of 25 August 2003 and why, when additional material was annexed to the affidavit of 8 September 2003, it did not include the draft ASIC application. The applicant gave the following evidence:

> "Q. Mr Deo, there's just another topic I wanted to ask you about before we finish. You'll recall in your affidavit of 25 August 2003, that you attached reports from – I forget who it was now – a person who'd been overseeing your work as an auditor? Mr Bob Cowling?
>
> A. That's right, yes? Yes, sir.
>
> Q. They were reports favourable to your work, is that right?
>
> A. Yes, sir.
>
> Q. Could you tell me why you did not attach as well more material relating to the background, such as the Deloitte's report, the draft ASIC application, your response, the undertaking – why you didn't attach some or any of those documents.
>
> A. Well, your Honour, I have to be honest with you, that when I prepared this document, I showed it to a partner in De Silva Hebron, before it was settled, right – I apologise that I could have done better. I could have written everything together and put everything in one – one shot, which I didn't. Then Ms Porter did not tell me that I – that I'd missed it. I would have done it all in one time, to save me doing three affidavits.
>
> Q. What made you decide to subsequently provide additional material by way of annexures?
>
> A. I believe I had a phone call from the Registrar asking for information.

Q. Sorry, a phone call from who?

A. I could be wrong – I think it was from the Registrar.

Q. Which registrar?

A. Ms Margaret Rischbeith – I can't pronounce the name. Yes, Ms Rischbeith? I believe, your Honour – because I could be wrong there because I did not take file notes.

Q. You then filed an affidavit on 8 September, to which you annexed the Deloitte report, your position paper ---?

A. Yes sir.

Q. And the undertaking?

A. Yes sir.

Q. Is there any reason why you did not attach to that affidavit, the draft ASIC application?

A. I thought that was sufficient at the time, your Honour. I thought that.

Q. Do you agree that in the affidavit of 8 September you did not mention the draft ASIC document?

A. Yes I do, your Honour.

Q. Is there any reason why you did not mention it, in the affidavit?

A. I do not have a reason, your Honour, but I never tried to mislead anyone, your Honour.

Q. In the affidavit – sorry, the draft application was first annexed to your affidavit of 24 September. What prompted you to annex it to that affidavit?

A. That, I can't remember, your Honour. Once again, I should have written file notes. I can't remember whether I was prompted or not – I cannot say.

Q. Could I ask you to look at para 4 of your affidavit of 8 September? Do you see in para 4, you annexed your position paper, and you say – referring to the position paper – 'Annexed to this affidavit and marked with the letter 'B' is a true copy of Sanwant Singh Deo's response to Deloitte Touche Tohmatsu's report'. Do you see that?

A. Yes sir.

Q. Your response contained two parts. Part A, relating to the audit itself …?

A. Yes sir.

Q. And Part B, relation to Jademount?

A. Yes sir.

Q. Part B, as I understand your evidence, was in fact a response to the ASIC draft report?

A. Yes, contention 1, sir.

Q. The contention 1, correct. Part B was not actually, as I understand your evidence, a response to the Deloitte report?

A. No, it wasn't.

Q. Are you able to tell me why you described your response in para 4, which included Part B, as a 'response to the Deloitte

report', when Part B was actually a response to the draft ASIC application?

A. Your Honour, I think it was just badly written, and I apologise for that. It should be more – I should have elaborated more – a bit more information than that."

[40] During cross-examination the applicant agreed that when he put his position paper before the Court in the affidavit of 8 September 2003 he did not say that the position paper required elaboration or clarification in any respect. The applicant was asked whether he intended the Court to accept that what was set out in the position paper was true. It is appropriate to set out the relevant passages of the applicant's evidence concerning this aspect:

"Q. When you put your position paper before the Court in that affidavit you didn't, in that affidavit, say that there was any respect in which the position paper required elaboration or clarification, did you?

A. No.

Q. Because you intended the Court to accept that what was in the position paper was true?

A. No, I wanted the Court to know that that was my response to the questions raised by Deloittes.

…

Q. But in putting it before the Court, you did not, you were saying, intend the Court to accept that everything in the position paper that you were saying was the truth?

A. It was the truth, that's my – that was my response at the time.

Q. I'm sorry, there may be a misunderstanding, Mr Deo, it's important so I'll ask the question again?

A. Mr Bruxner, those were the questions asked by ASIC and Deloittes in 1999. I responded to them and that was my position. For full disclosure that's what I did, this was the questions they asked, this is what my response was.

Q. You say for full disclosure, that was for full disclosure to ASIC or to the Court?

A. To the Court, I mean, that's why I put the papers in there.

Q. You say it was your position in 1999, those were your words just then?

A. Well, yeah, to respond to ASIC.

Q. Yes, and so you were saying that it was still your position, was it, at the time that you swore the affidavit?

A. No, I'm saying that this was the response I put in for ASIC, right, since then when I signed the undertakings my views changed.

Q. I'm still confused, sorry, Mr Deo. I asked you whether when you put the position paper before the Court, you intended the Court to accept the facts in the position paper as truth. What is your answer to that question?

A. My answer to the question is that was the response I gave in 1999 to questions asked.

Q. So you're saying that you don't now stand by that response in every respect, is that what you're saying?

A. What do you mean, I don't stand by my response?

Q. I'll approach it this way, I'll ask you the question once more.

A. If you could make it clearer.

Q. I'm trying Mr Deo. Is it your evidence today in this Court, that the facts that you state in the position paper are the truth?

A. Yes, sir, at the time in 1999 that was my truth. That's why I put it in.

Q. At that time it was the truth, so at the time meaning December 1999?

A. Yes.

Q. I'm not asking you about December 1999, I'm asking you about today?

A. Yeah.

Q. I'm asking you whether your evidence is that what you say in the position paper is the truth?

A. Yes.

Q. That's your evidence today?

A. My evidence is that the evidence I put in 1999 to be true. Mr Bruxner, I am -

Q. Mr Deo I …

A. I am trying to clarify it for you."

[41] The questioning continued and the appellant repeated that the facts set out in the bullet points of his position paper were true and notwithstanding his belief that he was no longer the auditor after 2 October he signed the

undertaking which said he was the auditor until 13 January 1999.

Eventually, the appellant gave the following evidence:

> Q. I'm sorry, Mr Deo, the other question Mr Bruxner asked you was whether when you filed the affidavit containing this position paper you intended that the Court take those bullet points as the truth of the facts stated in the bullet points?
>
> A. That's my belief, apart from the belief that I was the auditor.
>
> Q. Leaving aside the belief about the auditor, the belief is not in the bullet point, did you intend the Court to accept that what was set out in the bullet points was the truth?
>
> A. Yes, as far as I understood, yes."

[42] The last bullet point of the applicant's position paper included the statement that the applicant had "no involvement with Jademount until such time as Cleanthous and Deo was not acting as auditor of BAC". As I have said, it is the applicant's case that he had an involvement with Mr Curnow and Jademount in September 1998 while he was acting as auditor of Balangarri, but only to the extent of pursuing a business relationship and assisting Mr Curnow and Jademount. The applicant said that in 1999 when he stated in his position paper that he had "no involvement" while acting as auditor he had in mind the allegation that he was in an actual business relationship. He used the words "no involvement" as meaning no involvement in an actual business relationship.

[43] The issue of whether it occurred to the applicant at the time he presented his position paper to the Court he should have clarified the statement in the last

bullet point that he "no involvement" because it was potentially misleading, was not directly put to the applicant in cross examination. After I raised this matter with counsel, the applicant was recalled.

[44] The applicant said that when he annexed his position paper to his affidavit of 8 September 2003 he wanted to make full disclosure to the Court as to what had happened. As to whether he checked the position paper to see if it reflected his view in 2003 before he annexed it to his affidavit, the applicant gave the following evidence:

> "Q. At the time that you annexed the material, did you go through that material to check whether it was true and correct as to your view of the situation in 2003?
>
> A. No I did not check.
>
> Q. Why did you not check?
>
> A. Because I was there to put all the material out there, I believe that by putting everything out there I was disclosing everything truly.
>
> Q. You changed that view subsequently?
>
> A. Yes, I did.
>
> Q. And when did you change that view?
>
> A. I changed that view in my affidavit of 20 January 2005."

[45] The applicant said that prior to preparing his affidavit of 20 January 2005 he went through the particulars provided by the Law Society. He said those

particulars caused him to go through the material in his earlier affidavits. In that process he realised that he had to make his view quite clear as between pursuing a business and an actual business "so that the courts understood where I was coming from".

[46] Subsequently the applicant agreed with the proposition that through the particulars provided by the Law Society he was put on notice that the Law Society took issue with his claim that he had no involvement with Jademount prior to 23 November 1998.

[47] In addition to the question of whether he checked the position paper before annexing it to the affidavit of 8 September 2003, the applicant was asked about his intention when he annexed the position paper to his affidavit:

> "Q. Did you intend, when you presented the response to the Court through the affidavit, to convey that as at 2003 what was said in the response was true?
>
> A. Your Honour, I cannot answer that request. All I can say is I put the papers in there. I did not check anything to see whether – I wasn't trying to mislead anyone."

[48] During the applicant's evidence it was readily apparent that he frequently had difficulty in fully comprehending the nature of the questions and what was being asked of him. However, making full allowance for that aspect of the applicant's personality and his way of thinking, in a number of respects I found significant areas of the applicant's evidence evasive and unconvincing.

[49] At the time the applicant made his application in 2003 to be admitted to practise he was inexperienced in legal matters. He was not, however, a person lacking experience generally such as a young student completing a law degree with little experience in the workforce or of matters relating to the Court. The applicant was then aged 41 years. He was a qualified accountant and an experienced auditor. In making the application for admission, the applicant was not under misapprehension as to what was required of him by way of disclosure to the Court. He was well aware of the need for full and frank disclosure of any material concerning his previous activities that might be of relevance to the Court when considering his application for admission.

[50] In his first affidavit of 25 August 2003 the applicant purported to make full disclosure, but he failed to do so. Scant information was provided as to the circumstances leading to the undertaking. The information the applicant chose to convey to the Court carried with it the implication that the undertaking was concerned only with the quality of the audit work. There was no hint in the applicant's description of the undertaking that ASIC had a concern about a conflict of interest or that the applicant had, on his own evidence, been involved in an inappropriate relationship with the Chief Executive Officer of the Corporation being audited at the time the applicant conducted the audit.

[51] The applicant's evidence as to his state of mind when he presented the affidavit of 25 August 2003 in support of his application for admission was

far from convincing. The applicant was evasive as to whether it occurred to him that the Court might be interested in knowing of both the ASIC concerns and the fact that he had been in an inappropriate relationship with Balangarri's Chief Executive Officer while holding the appointment as Balangarri's auditor. After vacillating on a number of occasions, the applicant eventually acknowledged "it would have occurred to [him] from the start" that the Court might be interested to know of the inappropriate relationship. Notwithstanding that he appreciated the relevance of such information to the Court, the applicant was unable to satisfactorily explain why the necessary information was not conveyed to the Court in the affidavit of 25 August 2003.

[52] In substance, while admitting he should have elaborated, the applicant claimed that he disclosed what he thought needed to be disclosed. If that was the applicant's state of mind, it discloses a serious lack of judgment and appreciation of his duty of candour.

[53] I am satisfied that the applicant's failure to provide relevant information in his affidavit of 25 August 2003 was not due to a lack of experience or lack of a proper appreciation that the material was relevant and should have been included in his disclosure to the Court. I reject the suggestion implied in one answer given by the applicant that he relied on a partner of a legal firm in this regard. I am satisfied that in presenting the first affidavit of 25 August 2003 the applicant made a deliberate choice to provide limited information about the circumstances attending the undertaking. The

applicant deliberately sought to avoid disclosing other more adverse material which the applicant perceived might have had a negative impact upon his application for admission. I am satisfied that the applicant knew that in order to make full and frank disclosure he was required to inform the Court that when he acted as an auditor in 1998 he failed to comply with the appropriate standards of behaviour for an auditor because, through an inappropriate relationship with the Chief Executive Officer of Balangarri, he placed himself in a conflict of interest while performing the 1997-1998 audit of Balangarri. The applicant purported to make full disclosure well knowing that he was not doing so.

[54] The applicant's lack of candour in August 2003 was compounded by his failure to annex the draft ASIC application to his affidavit of 8 September 2003. He chose to annex the Deloitte report together with his position paper and conveyed the misleading impression that his position paper was a response to the Deloitte report only. In his affidavit of 25 August 2003 the applicant spoke of the investigation by Deloitte on behalf of ASIC and the provision by Deloitte of a report containing its factual finding. The applicant then stated:

> "In December 1999, I responded to Deloitte Touche Tohmatsu's report in a lengthy and detailed position paper that was forwarded to ASIC by my solicitors, Kliger Partners."

[55] The statement that the position paper was a response to the Deloitte report was repeated in Paragraph 4 of the affidavit of 8 September 2003:

> "4. In December 1999, I responded to Deloitte Touche Tohmatsu's report in a lengthy and detailed position paper that was forwarded to ASIC by my solicitors, Kliger Partners. Annexed to this Affidavit and marked with the letter "B" is a true copy of Sanwant Singh Deo's response to Deloitte Touche Tohmatsu's report."

[56] The applicant failed to convey to the Court in his affidavit of 8 September 2003 that the true purpose of Part B of his position paper concerning Jademount was to reply to the allegations in the draft ASIC application. There was no mention of that draft application in the affidavits of 25 August and 8 September 2003.

[57] Again, I found the applicant's answers as to why he failed to include the draft application entirely unconvincing. The applicant was unable to explain that failure other than to say that he thought the material provided was sufficient. In addition the applicant could not advance a reason for not mentioning the draft application in his affidavit of 8 September 2003. I reject the applicant's evidence that it was just a matter of poor expression or bad writing which led to his statements in the affidavits of 25 August and 8 September 2003 that his position paper was a response to the Deloitte report.

[58] I am satisfied that in his affidavit of 8 September 2003 the applicant again endeavoured to minimise the amount of adverse material disclosed to the Court. He deliberately chose not to annex the draft application to which Part B of his position paper was directed because he was concerned that the

contents of that document would reflect adversely upon his application for admission.

[59] Counsel for the applicant submitted that through the affidavits of 25 August and 8 September 2003, coupled with the annexures, the applicant made sufficient disclosure. In essence counsel contended that by annexing the position paper and undertaking to the affidavit of 8 September 2003, the applicant made sufficient disclosure because the Court and the Law Society were put on notice of the essential allegation concerning the conflict of interest and that it involved the business operated by Mr Curnow through Jademount. The draft ASIC application was mere detail and was not required in order to make full disclosure.

[60] The applicant's position paper disclosed that allegations existed in respect of Jademount. In essence the position paper stated that although the applicant was a shareholder in Jademount, at no stage did he act as auditor of Balangarri while holding the position of Director of Jademount. Although reference was made to the facsimile transmission of 16 September 1998, such reference would have made little sense to a reader who was not provided with the draft ASIC application. Finally, the very broad assertion was made in the last bullet point of the position paper that the applicant had "no involvement" with Jademount until his firm ceased to be the appointed auditor of Balangarri.

[61] Against that background, a reader of the undertaking without knowledge of the draft application would become aware of ASIC's position that the applicant was the auditor of Balangarri throughout the relevant period and until termination of his appointment in January 1999. Secondly, the undertaking discloses that ASIC received a complaint concerning the conduct of the audit. Thirdly, the reader would understand that from the investigation of the complaint ASIC had drawn the conclusions that the applicant "conducted the audit while having a conflict of interest with the Chief Executive Officer of Balangarri" and "had failed to perform the audit to a number of Australian Auditing Standards".

[62] The undertaking does not contain an admission that the ASIC allegations or conclusions were true. It states that the applicant "acknowledges the concerns of ASIC and has offered to enter into this undertaking".

[63] In my opinion, uninformed by any knowledge of the draft application, a Judge or a legally trained reader on behalf of the Law Society would appreciate from the undertaking and position paper that the ASIC investigation concerned an allegation that the applicant conducted the audit of Balangarri while having a conflict of interest by reason of a relevant connection with the Chief Executive Officer of Balangarri through mutual shareholding and directorships of a company called Jademount. Such readers would also understand that:

- Although the applicant maintained in his position paper that he was not a director of Jademount while he held the position as auditor, ASIC asserted to the contrary and the applicant signed an undertaking acknowledging ASIC's position.

- The applicant agreed that he remained a shareholder of Jademount after resigning his directorship and while conducting the special review of Balangarri.

- The applicant maintained in his position paper that he had "no involvement with Jademount" until he ceased to be the auditor, but that it was the position of ASIC acknowledged by the applicant in the undertaking that the applicant remained the appointed auditor until January 1999 which encompassed the short period from 23 November 1998 to 1 December 1998 during which the applicant was a director of Jademount.

- ASIC concluded that the applicant conducted the 1997-1998 audit of Balangarri while having a conflict of interest through connection with the Chief Executive Officer of Balangarri and that the applicant acknowledged the concerns of ASIC in that regard.

[64] From a reading of the position paper and undertaking, the nature of the conflict of interest to which ASIC referred is not readily apparent. It could have related to the applicant's shareholding and short period of directorship

while holding the position as auditor and conducting the audit for the 1997-1998 financial year.

[65] The ASIC draft application contained additional information as to the allegations by ASIC concerning the nature of the business operated by Mr Curnow and Jademount and as to the applicant's involvement in that business. Allegations were set out under the heading "Background to the application" that "Mr Curnow had business interests including the business of importing cement from Indonesia through his private company Jademount" and that the applicant and Mr Curnow were "business partners". Against that background contention 1 purported to identify evidence to support the proposition that the applicant was "actively involved in the business of Jademount throughout the relevant period". By reference to an earlier paragraph in the background section, ASIC identified the relevant period as from 1 July 1997 to January 1999.

[66] It might be said that as the draft application only contained information as to the nature of the prior misconduct alleged by ASIC, in order to comply with the duty of full disclosure it was not necessary for the applicant to disclose the draft application. However, uninformed by the draft application, the Court would have been unaware of any suggestion that the applicant was actively involved in the business of Jademount or that he was a business partner of Mr Curnow. The Court would have been left with only the applicant's more favourable version as to his involvement which was limited to the assertions contained in the applicant's position paper. At the least, it

was necessary for the Court to be informed of ASIC's allegations as to the nature of the relationship in order to determine whether resolution of any conflict was necessary through the taking of evidence relevant to a determination of the nature of the prior misconduct. Uninformed as to the nature of the prior misconduct, the Court is not fully informed of facts directly relevant to an assessment as to whether the applicant is now of good fame and character and a fit and proper person to be admitted to practise.

[67] There is an additional feature of relevance. By annexing his position paper to the affidavit of 8 September 2003 the applicant chose to put before the Court his response to the allegations contained in ASIC's draft application. Having chosen that course, rather than convey the impression that the position paper was a response to the Deloitte report, it was incumbent upon the applicant to disclose to the Court the allegations to which he had responded in his position paper.

[68] In some circumstances, the failure of an applicant to disclose relevant material might be excused on the basis of an erroneous but understandable error of judgment. In other circumstances it may be assessed that, strictly speaking, disclosure of the particular information was not required. In all of these situations, however, of particular importance is the applicant's motivation for not making the disclosure. In the circumstances under consideration, I am satisfied that the applicant omitted the draft application from his affidavit of 8 September 2003 in a continuation of his attempt to minimise the adverse material disclosed to the Court.

[69] Finally, irrespective of the view taken as to whether it was, strictly speaking, necessary to disclose the draft application, the significance of the unsatisfactory evidence given by the applicant in this regard remains. In his evidence on this aspect the applicant demonstrated a continuing and disturbing lack of candour.

[70] In his affidavit of 24 September 2003, the applicant stated that the position paper answered contention 1 of the draft application. However, as to whether he intended to convey to the Court that the responses contained in the bullet points were true at the time the position paper was annexed to his affidavit of 24 September 2003, the applicant was again unresponsive and evasive in answer to plain questions. Initially the applicant said he did not intend the Court to accept the statements in the position paper as true. Pressed on the issue, the applicant was repeatedly evasive. Eventually, during the period he was under cross-examination, the applicant admitted that he intended to convey to the Court that the responses in the position paper were true. However, when recalled, the applicant said he was unable to answer the question as to whether in presenting the position paper to the Court in 2003 he intended to convey, as at 2003, that what was said in the position paper was true.

[71] In addition to unconvincing evidence about the truth of the position paper in general, the applicant's evidence was also unconvincing in respect of the last bullet point of the position paper in which he stated that he had "no involvement with Jademount" until he ceased to be the auditor of

Balangarri. Read literally, that statement was in conflict with the applicant's evidence that he had an involvement to the extent of pursuing a business relationship with Jademount and Mr Curnow and assisting that business while he was the appointed auditor of Balangarri. It was in this context that the applicant was recalled for further examination and gave evidence that when he annexed the position paper to his affidavit of 8 September 2003 he did not check to ensure that as at 2003 the facts asserted in the position paper remain true.

[72] In giving evidence that he did not check the position paper in September 2003, the applicant denied an attempt to mislead the Court through the statement in the last bullet point that he had "no involvement with Jademount" until he ceased to be the appointed auditor of Balangarri. The applicant's evidence carried with it the implication that in presenting the position paper to the Court in September 2003, the applicant did not turn his mind to whether the statements contained in the position paper were true as at September 2003.

[73] I am unable to form a concluded view as to whether the applicant checked the position paper before annexing it to his affidavit of 24 September 2003. If he did not check it or did not turn his mind to whether the statements in the position paper were true as at September 2003, such a failure would amount to a significant failure by the applicant to discharge the responsibility of ensuring that what was put before the Court was true and not misleading.

[74] Although I am unable to determine whether the applicant checked the position paper before annexing it to his affidavit, I reject the implication in the evidence given when the applicant was recalled that the applicant did not turn his mind to the truth or otherwise of the statements in the position paper when annexing it to his affidavit of 24 September 2003. As I have said, prior to the applicant being recalled, although his position changed and his evidence was evasive, the applicant eventually acknowledged that he intended the Court to accept the statements in his position paper as true. It was only when recalled after attention was drawn to the statement in the last bullet point that the applicant said he could not answer whether he intended to convey that the responses in the bullet points were true as at September 2003. I am satisfied that the applicant was endeavouring to present his misconduct in 1998 in the best possible light and, in furtherance of that purpose, he annexed the position paper to his affidavit of 24 September 2003 with the intention that the Court accept that the statements contained in the position paper were true as at September 2003.

[75] As to the last bullet point in particular concerning "no involvement" with Jademount until he ceased to be the auditor of Balangarri, earlier in the bullet points the applicant plainly stated that his involvement as auditor was terminated on 2 October 1998, which termination was confirmed on 13 October 1998. Notwithstanding the submissions of counsel for the applicant that when the applicant spoke of "no involvement" he was referring to a period in November 1998, I am satisfied that when he prepared

the position paper the applicant intended to state that he had no involvement with Jademount until after 2 October 1998. In this context it should not be overlooked that when the applicant stated he had "no involvement" until he ceased acting as auditor, in the same bullet point he stated he did not receive the facsimile transmission of 16 September 1998.

[76] As I have said, the applicant gave evidence that when he stated in his position paper that he "no involvement" with Jademount until after he ceased to be the auditor, he had in mind no involvement by way of an actual business relationship. I find that evidence unconvincing. There is nothing ambiguous about the statement. In the context of stating that he did not receive the facsimile transmission of 16 September 1998, there was no impediment to the applicant advising ASIC that he had no involvement by way of an actual business relationship, but he had been involved to the extent of pursuing a relationship and assisting Mr Curnow and Jademount. The response was prepared by the applicant's solicitors in accordance with the applicant's instructions. No evidence has been led to suggest that the solicitors misunderstood the instructions or were responsible for creating a misleading impression solely by reason of inadequate language.

[77] I am satisfied that when the applicant stated in his position paper that he had "no involvement" with Jademount, the applicant was well aware that the statement would convey the impression that he had no involvement whatsoever with Jademount prior to 2 October 1998. The applicant chose not to advise ASIC that although he was not involved in an actual business

relationship prior to 2 October 1998, he had a limited involvement with Jademount and Mr Curnow.

[78] Significantly for present purposes, I am satisfied that when the applicant annexed the position paper to his affidavit of 24 September 2003, he was well aware that the position paper contained the statement that he had "no involvement" with Jademount until he ceased to be the auditor of Balangarri. The applicant intended that the Court accept as the truth that the applicant had no involvement whatsoever with Jademount until after 2 October 1998. In this way the applicant knowingly conveyed a misleading impression to the Court.

[79] It was not until the filing of the affidavit dated 20 January 2005 that the applicant acknowledged to the Court that prior to 2 October 1998, and while he held the position as auditor, he was involved with Jademount and Mr Curnow. That affidavit was filed by the applicant in response to particulars from the Law Society alleging an involvement prior to 2 October 1998. In that affidavit the applicant stated that at the time he conducted the audit in September 1998 he was "pursuing the possibility of entering into a business relationship with Curnow and/or Jademount". The applicant also stated:

> "The pursuit of a possible business relationship with Curnow and/or Jademount, was, until in or about 8 to 10 September 1998, confined to attempting to attract Curnow and/or Jademount to become clients of Cleanthous Deo.
>
> …

> During the 1998 BAC audit field trip and sometime during the period 8 to 10 September 1998 I did have discussions with Curnow about the Indonesian cement venture. Initially those discussions were directed to my goal of enticing Curnow and/or Jademount to become a client of Cleanthous Deo, but, during the course of such discussions we moved to discussing my then business partner, Leo Cleanthous ("Cleanthous") and myself possibly entering into a business relationship with Curnow and/or Jademount … ."

[80] The applicant then provided details of the discussions about the possible business relationship. He also stated that during an audit field trip he translated a letter written to Mr Curnow. In addition he interpreted a telephone conversation for Mr Curnow with a person involved in a cement bulkbag manufacturer in Indonesia.

[81] In his affidavit of 20 January 2005, the applicant acknowledge that his "conduct in negotiating for a possible business relationship with Curnow and/or Jademount" during the time he conducted the Balangarri audit in September 1998 "amounted to a conflict of interest". In addition the applicant stated that he "recognised this conflict" when he signed the undertaking.

[82] There was a further feature of the applicant's relationship or involvement with Mr Curnow or Jademount which the applicant acknowledged in his affidavit of 20 January 2005 placed him in a position of conflict of interest while conducting the audit in September 1998. It involved the incorporation on 28 September 1998 of a company known as "Two Creeks". This was the entity identified in the facsimile transmission of 16 September 1998 as the purchaser of cement imported by Jademount.

[83] As I have said, it is common ground that the applicant did not receive the facsimile transmission of 16 September 1998. The applicant gave evidence that as at 16 September 1998 he was unaware of the identity of Two Creeks. He said that if he had received the facsimile transmission of 16 September 1998 he would not have understood the reference to Two Creeks. According to the applicant, although prior to 16 September 1998 he had discussed with Mr Curnow the business of importing cement operated by Jademount, there had been no discussion as to how costs of importing and on selling might be met. In particular, there was no reference to Two Creeks prior to 16 September 1998.

[84] At the time of incorporation of Two Creeks on 28 September 1998, the applicant was a director and shareholder together with Ms Carole Barberis (Mr Curnow's wife), Mr Cleanthous (the applicant's partner), Mr Kuen Chau (a friend of Mr Cleanthous) and Mr Arnold Von Senden (a friend of the applicant).

[85] The applicant acknowledged that his partner, Mr Cleanthous, prepared the application for incorporation. The applicant said he suggested directors and shareholders of different nationalities as a means of creating a multicultural Board of Directors. Mr Curnow chose the name and the applicant understood the company was created as a vehicle through which to pursue any business opportunities that might arise in the future. There was nothing special in mind. As far as the applicant was aware, Two Creeks was

unconnected with the business venture of importing cement using Jademount.

[86] The applicant's connection with Two Creeks also involved a bank account. In a facsimile transmission to Mr Curnow dated 28 September 1998, the applicant stated:

> "Kevin,
>
> The bank account is Deo Leo Investment Pty Ltd, Two Creeks P/L bank account yet to be opened. For the time being we will use our investment arm.
> The Bank is [Bank named].
> A/C No: [number given].
> If you have any problems give me a call.
> Cheers
> Sonny"

[87] The applicant said in evidence that Mr Curnow wanted to open a bank account, but as Two Creeks was in the process of being incorporated the necessary paper work was not available and the applicant suggested the use of the account of the investment arm of his partnership. According to the applicant, although from his perspective there was nothing in mind for Two Creeks at that time, it was Mr Curnow's idea to open an account. As he sat in the witness box the applicant assumed that Mr Curnow must have said there was a business opportunity around the corner.

[88] The applicant also admitted assisting Mr Curnow with respect of prices of imported cement. In a facsimile transmission dated 23 September 1998 from Mr Curnow to the applicant on Jademount letterhead, Mr Curnow wrote:

"Sonny

SINGAPORE CEMENT

Attached are two faxes from Pan Malaysia Singapore and Perkins Shipping.
Someone in Pan Malaysia is trying to be a complete idiot. The landed price Darwin is therefore A$363/tonne. The freight rate is OK (high, but OK at A$123/tonne) but the purchase price per tonne is a joke. Is there any way of checking this price out in Singapore? …"

[89] The applicant agreed that he received the facsimile transmission and rang family friends in Malaysia to check the prices. He told Mr Curnow of the prices.

[90] As to the extent of the relationship with Mr Curnow at this time, the applicant said in evidence that he was still trying to establish a business relationship. He was out to impress Mr Curnow. It was not until 23 November 1998 when he became a Director of Jademount that the actual business relationship was established.

[91] In his affidavit of 20 January 2005, the applicant not only acknowledged that the pursuit of the business relationship and the holding of the directorship and shareholding in Two Creeks placed him in a conflict of interest, he said he recognised in December 1999 when he entered into the undertaking that these activities amounted to a conflict of interest. In other words, from December 1999 the applicant has known and accepted that his

conduct in pursuing the business relationship and in holding the positions in Two Creeks was inappropriate and constituted a conflict of interest.

[92] Notwithstanding that these activities amounting to a conflict existed in September 1998 while he was conducting the audit of Balangarri, and notwithstanding that since December 1999 the applicant has accepted that these activities amounted to a conflict of interest, in September 2003 the applicant chose to put before the Court as representing the truth his statement in the last bullet point of the position paper that he had "no involvement with Jademount" until after he ceased to be the auditor. Not only did the applicant have an extensive involvement with Jademount while the appointed auditor of Balangarri, he knew in September 2003 that the involvement amounted to a conflict of interest and was a matter of direct relevance to the Court in considering his application for admission.

[93] As I have said, I am satisfied that in September 2003 the applicant intended to convey to the Court that he had no involvement of any relevant type with Mr Curnow or Jademount while holding the appointment of auditor of Balangarri. In September 2003 the applicant sought to avoid disclosing to the Court his significant involvement and inappropriate relationship with Mr Curnow and Jademount during the conduct of the 1997-1998 audit of Balangarri.

[94] From a consideration of all the evidence, I am satisfied that from the outset of his application for admission the applicant has displayed a lack of

candour. The applicant had no choice but to disclose the public undertaking he had given to ASIC, but he sought to avoid disclosing the full extent of the material he perceived to be adverse to his application. This lack of candour is compounded by the unconvincing evidence given by the applicant which I am satisfied demonstrates a continued lack of candour with this Court.

[95] In addition to challenging the applicant's statement that he had no involvement with Jademount until he ceased to be the auditor of Balangarri, it is the case for the Law Society that the applicant was not truthful in his 1999 position paper, and has not been truthful in his evidence, when he stated that while holding the appointment as auditor he was not in an actual business relationship with Mr Curnow and Jademount. In support of that submission counsel referred to the involvement of the applicant in Two Creeks, particularly in connection with the bank account, and to the applicant's admitted assistance to Mr Curnow in respect of the purchase price of cement.

[96] In all the circumstances, while I recognise the force of the submissions for the Law Society, I am unable to make a positive finding that as at September 1998 the applicant had entered a business relationship with Mr Curnow or Jademount. On the other hand, I am unable to make a positive finding in favour of the applicant that his relationship extended no further than pursuing a business relationship and assisting Mr Curnow and Jademount in the manner he described. The applicant's evidence was unsatisfactory to

such an extent that I do not have sufficient confidence in his reliability to accept his evidence in this regard.

[97] The Law Society challenged a further aspect of the applicant's evidence which related to his professed belief that his appointment as auditor ceased on 2 October 1998. The applicant said in evidence that he was told by Mr Curnow on that date that he was no longer the auditor and his termination was confirmed at the subsequent Annual General Meeting of Balangarri on 15 October 1998. It was the case for the applicant that believing he was no longer the auditor from 2 October 1998, when subsequently asked in December 1998 to undertake an interim audit he recognised that he could not undertake an audit while not appointed auditor. In that situation it was the applicant's idea to avoid the difficulty by undertaking a special review. Having agreed to undertake the special review, the applicant resigned as a Director of Jademount.

[98] In challenging the applicant's evidence that as from 2 October 1998 he believed he was no longer the auditor, the Law Society relied upon two facsimile transmissions on Balangarri letterhead addressed to the applicant and dated 17 November 1998. The transmissions apparently emanated from Mr Joe Thomas and Ms Sandy Thomas who were identified in the transmissions as "councillors" of Balangarri.

[99] The facsimile transmission apparently from Ms Sandy Thomas was a single page transmission stating:

"Dear Sonny

INTERIM AUDIT

We confirm that we have arranged with you for an interim audit to be conducted commencing 30 November 1998."

[100] The applicant said he could not recall whether he received the transmission from Ms Thomas on 17 November 1998. He said he had read the transmission, but he was not sure when he read it. The applicant said he read the letter, but ignored it. As to the statement that an arrangement had been reached for an interim audit to be conducted, the applicant said he was not party to such an arrangement.

[101] The transmission from Joe Thomas comprised a two page letter and a three page statutory declaration by an employee of Balangarri, Ms Pamela Linklater. The letter appears to have been signed on behalf of Mr Thomas. The applicant initially said that at the time of receiving the transmission he thought it had been written by Mr Curnow:

"Q. When you received that letter Mr Deo, did you have a belief as to who may have written it on behalf of Balangarri?

A. My belief was it had been Kevin Curnow.

Q. Is that a belief you held at that time?

A. Yes."

[102] The evidence I have cited was given shortly before a morning break. After the break the applicant repeated in the following passages his evidence that

he believed at the time he read the letter it was probably written by Mr Curnow:

> "Q. Mr Deo before the break you indicated in relation to the longer of the two letters that you received it?
>
> A. Yes.
>
> Q. And you read it?
>
> A. Yes.
>
> Q. That you believed at the time that it was probably from Mr Curnow?
>
> A. Yes.
>
> Q. But that you ignored it?
>
> A. Yes"

[103] The statutory declaration by Ms Linklater detailed conversations between her and a Mr Mervyn Sullivan in respect of a review undertaken by Mr Sullivan of matters associated with the financial records of Balangarri. A copy of that statutory declaration was annexed to an affidavit of the applicant dated 1 December 2003. The annexed copy bears a facsimile imprint from Balangarri dated 17 November 1998. On the basis of that imprint the applicant accepted that he received the two page letter and the accompanying statutory declaration on 17 November 1998.

[104] The two page letter included the following statements:

"1. Attached is the Statutory Declaration from Pam Linklater.

2. It was solely because of what she reported that you as our Auditor and Ron Carter as our Accountant received a report of what was said.

…

5. As Auditor, please contact Mr Carter immediately and advise us formally as to what we should do in order to protect our position given that we are extremely unhappy about what has occurred to date."

[105] As to the references in the letter to the applicant being the auditor of Balangarri, the applicant said he took this to be a reference back to the 1996-1997 and 1997-1998 years. Notwithstanding the request for advice, according to the applicant he did not do anything in response because he was not the auditor.

[106] The applicant said that he was particularly interested in the statutory declaration by Ms Linklater because it related to his concerns that defamatory statements had been made about him. Referring to the five pages, namely, the two pages of the letter and the three pages of the statutory declaration, the applicant gave the following evidence:

"Q. I take it, also, that you read those entire five pages when you received them on 17 November 1998?

A. Yes I did.

Q. You've said in one of the affidavits that you've filed in this matter, Mr Deo, that you ignored the contents of the two pages or the first two pages of that five page transmission?

A. Yes.

Q. You agree that you said that in an affidavit?

A. Yes I did.

Q. Does that remain your evidence, that …

A. Yes.

Q. … you ignored that letter?

A. Yes I did ignore this letter.

Q. So you read the letter, but you ignored it?

A. Yes I did."

[107] The applicant having said without qualification that he read the two page letter on 17 November 1998, counsel later returned to the topic in further cross-examination and the applicant's evidence changed as to the reading of the letter:

"Q. Mr Deo before the break you indicated in relation to the longer of the two letters that you received it?

A. Yes.

Q. And you read it?

A. Yes.

Q. That you believed at the time that it was probably from Mr Curnow?

A. Yes.

Q. But that you ignored it?

A. Yes.

Q. The same in relation to the second of the two letters that you are not sure whether you received it on the 17th and read it on the 17th?

A. That's right.

Q. Although you do acknowledge that you received it?

A. Yes I do.

Q. And once again you say that you ignored it?

A. That's right. Mr Bruxner, the longer letter I'm not sure that I read it on the 17th either.

Q. Sorry, so your evidence before was that you did read it on the 17th but now your not – now your saying your not 100 percent sure?

A. I received it on the 17th like the date says, right, the date there but I can't be certain whether I read it on the 17th or after that.

Q. All right. Your evidence was earlier that in fact you did read it when you received it as I recall. You're changing?

A. No, I said it could have – I could have received it on the 17th but it got read after that. When it comes to my tray or.

Q. But it was a fax that was marked urgent about a subject matter that you were very interested in?

A. That's right.

Q. And it attached a document that you had in fact requested?

A. That's right.

Q. I'm suggesting to you that in every likelihood you read it on the day that you received it.

A. Can I answer it? The reason I said the likelihood I could not have read it on the 17th because I left for Kupang on the 18th and I might not be in the office around that time.

Q. All right, so it's just possible is it that you didn't see the letter until you got back?

A. Possible. That's right."

[108] The applicant went on to say that he ignored the letter because he had previously been told on two occasions by Mr Curnow that he was no longer the auditor. The first was on 2 October 1998 and the second was about 15 October following the AGM. The applicant said he accepted on 2 October that he had lost the job.

[109] The cross-examination then moved to conversations between the applicant and Mr Sullivan which are discussed later in these reasons, after which the cross-examiner took the applicant back to the facsimile transmissions of 17 November 1998. The applicant said that whenever he got around to reading the transmissions it did not occur to him to follow them up with anyone. He did not contact Mr Curnow or anyone at Balangarri to ask what it was all about and to suggest there had been a mistake because he was not the auditor. According to the applicant, anything that occurred after 1 July had

nothing to do with him so he ignored the letter. Notwithstanding that Mr Curnow was his friend and that he believed Mr Curnow wrote the letter of 17 November 1998, he did not seek to raise the issue with Mr Curnow.

[110] Counsel returned to the question of when the applicant read the two page letter of 17 November 1998:

> "Q. Sorry – it is your evidence now that you read that letter when you came back from Kupang [21 November 1998]?
>
> A. Yes, like I said.
>
> Q. Well, I'm sorry, as I understood your evidence before it was that you were not sure?
>
> A. I was not sure when I received this, but it was most probably 17 November but I did not read it until some other time. I left for Kupang on 18 November so the only thing I can make assumption is that I would have read it when I got back.
>
> Q. Why do you assume you did not read it on the 17th?
>
> A. Because I would have gone home early to pack my bags to get everything ready to go off.
>
> Q. Would you mind just having a look at the affidavit – there's an attachment to your affidavit of 1 December, that's the statutory declaration of Pamela Linklater, it's attached to your affidavit of 1 December, annexure F. Have you got that?
>
> A. Yes.
>
> Q. Turn it upside down. The facsimile impression – do you see the facsimile impression on the bottom of the page?
>
> A. Yes.

Q. Does that suggest if that – it depends on whether the facsimile machine is accurate of course, but that suggests it was sent at 10.15 in the morning, is that right?

A. That's correct.

Q. Are you saying that you would have been home before then?

A. Your Honour, I – I know went back in the afternoon, but I know I was doing a lot of things during the day, I may not have read this at all. If I read it I would have responded.

Q. You would have?

A. Yes I would have responded.

Q. If you had read it you would have responded, that's what you've just said?

A. Yes to the statutory declaration."

[111] After further questions confirming the applicant's view in 1998 that pursuing a business relationship was not wrong, but being in a business relationship would have been, and in the context of the applicant's evidence that the actual business relationship did not commence until 23 November 1998 two days after he got back from Kupang, the applicant gave the following evidence:

"Q. Given that that was your state of mind, both on 17 and 21 November 1998 – and I suggest to you that that was yet another factor, that should have made it critically important to you, to take action, in terms of disabusing these misconceptions in the 17 November letters. What do you say to that?

A. I ignored them, simply because by the time I got back from Kupang, I'd already made up my mind that we were going to join Jademount."

[112] The evidence to which I have referred was given on 7 September 2005. Counsel returned to the topic on 8 September 2005. In particular counsel explored further the issue of the applicant's belief that it was Mr Curnow who wrote the two page letter. The further questions were asked in the context of cross-examination about a statement by the applicant in an affidavit that he could not explain why Joe Thomas and Sandy Thomas regarded him as Balangarri's auditor. Counsel put to the applicant that despite being unable to explain why they regarded him as the auditor, the applicant saw fit to volunteer in an affidavit a possible reason behind the correspondence. The applicant acknowledged that the reason advanced in his affidavit of 20 January 2005 for Joe Thomas and Sandy Thomas referring to him as the auditor was an assertion that those persons were illiterate. The applicant agreed that he sought to back up his assertion that they were illiterate by referring to transcript from a Four Corners story concerning Mr Curnow and Balangarri. He also agreed that in the affidavit he concluded his discussion about this issue by saying it was highly possible that Joe and Sandy Thomas did not know what they were saying. In addition, the applicant agreed with the proposition that in volunteering these possible reasons it was his intention to lend some weight to his claim to have ignored the two letters.

[113] It was in this context that counsel returned to the evidence given previously by the applicant that at the time he received the two page letter he believed it was written by Mr Curnow:

> "Q. You told us yesterday, Mr Deo, when you read the longer of the two letters, whether it was before or after you went to Kupang, it was your belief that the letter had been written by Mr Curnow?
>
> A. That's right.
>
> …
>
> Q. Your belief at the time that you swore the 20 January affidavit was the same belief that you had at the time when you read the longer of those two letters and that was the belief that Mr Curnow had written the longer of those two letters?
>
> A. Not at that time, the only reason I believed this time was because I saw the signature "for". That was my belief that was written by Kevin Curnow.
>
> . …
>
> Q. Right. I'm sorry, I'm not quite clear. I understood you to tell me yesterday that you believed that the letter was written by Kevin Curnow?
>
> A. That's right.
>
> Q. And is that the belief you had when you saw it in November 1998?
>
> A. No, I did not have the belief then. I only had the belief when I saw this when I was going through my documents.
>
> Q. When was that?

A. It would have been proceeding for this trial.

…

Q. So you are saying to me, that when you swore the – when you completed the affidavit of 20 January, it had not occurred to you that Mr Curnow was the writer of that letter?

A. Not at that time, your Honour.

Q. Mr Deo, my note may be wrong, but I have a note that yesterday when you told me that you did nothing in response, you also said to me that in the context of doing nothing in response, that you believed, back in November 1998, that it was Mr Curnow, who'd written the letter. Did you say that to me yesterday or have I misrecorded that?

A. No, what I meant was, when I believe when I was proceeding with this trial, that's when I believed that written by Kevin Curnow.

…

Q. Anyway, if you did say yesterday that you believed in November 1998, that if Mr Curnow wrote it, are you now telling me that's not correct?

A. In 1998 I did not check the – for until proceedings, that's when I looked at it and looked at the signatures and all and then I saw I believe it was written by Kevin Curnow. Until then I didn't scrutinise anything else.

Q. So you didn't have a close look at the two letters at the time that you prepared the affidavit of 20 January 2005?

A. I – then but did not check the signatures or the (inaudible)."

[114] In all the circumstances, I did not admit the letters of 17 November 1998 as business records to be used as evidence of the truth of the statements

contained in the letters. In addition, I declined to admit the letters as evidence that in mid November 1998 Balangarri or members of the Balangarri Council regarded the applicant as Balangarri's auditor. The letters were admitted for the purposes of an assessment of the applicant's reaction to assertions that he was the auditor.

[115] In my view the reaction, or more correctly the lack of reaction, by the applicant does not assist the submission of the Law Society. On the assumption that the applicant did not regard himself as the auditor in November 1998, given the complicated history of this matter there might be many reasons why the applicant would not bother to respond to the assertions contained in the letter. In addition, as counsel for the applicant pointed out, if the applicant believed he was the auditor it is unlikely that he would not have responded or taken some steps to give the advice sought in the two page letter from Mr Thomas.

[116] Of significance to the applicant's application, however, is the applicant's evidence when confronted about this issue during cross-examination by counsel for the Law Society. In summary, initially the applicant plainly stated that he formed the belief that the letter had been written by Mr Curnow at the time he first read the letter. He then faced considerable cross-examination about why he ignored the letter, following which he was cross-examined about volunteering an explanation in an affidavit of 20 January 2005 that Joe Thomas and Sandy Thomas were illiterate and did not know what they were saying. It was an explanation the applicant agreed

he advanced in order to lend some weight to his claim to have ignored the two letters. In that context the applicant's evidence changed as to when he formed the belief that Mr Curnow wrote the two page letter. He said it had not occurred to him when he completed the affidavit of 20 January 2005 that Mr Curnow was the writer of the letter.

[117] I am satisfied that the applicant shifted ground in his evidence because he appreciated that a belief that the two page letter was written by Mr Curnow might be perceived as inconsistent with the explanation he advanced in his affidavit of 20 January 2005. I am satisfied that the applicant was keenly interested in the two page letter and that his initial evidence that he formed the belief that it was written by Mr Curnow at the time he read the letter is the accurate evidence. I reject the applicant's subsequent testimony that he only formed that belief when he went through the documents in preparation for the trial and did not entertain that belief at the time he completed the affidavit of 20 January 2005.

[118] I also found entirely unconvincing the evidence of the applicant that he did not read the two page letter until he returned from his trip to Kupang. There was no hesitation in the applicant's initial evidence that he read the two page letter and accompanying statutory declaration when he received them on 17 November 1998. The applicant is an intelligent person and I am satisfied that as the cross-examination developed he could see that his failure to respond to the assertion that he was Balangarri's auditor as at 17 November 1998 might have been perceived as a factor contrary to his

case. I am also satisfied that as a consequence of the line taken in cross-examination, the applicant shifted ground in an endeavour to bolster his position. First, the applicant said he may not have read the letter on 17 November 1998. Secondly, the applicant shifted further to say that if he had read the two page letter on 17 November 1998 he would have responded, but he did not read it until his return from Kupang when he had already made up his mind to join the business of Mr Curnow and Jademount.

[119] It must be acknowledged that the applicant was relying upon the facsimile imprint on the statutory declaration in saying that he received the two page letter and accompanying declaration on 17 November 1998. There is no evidence to confirm the accuracy of the date recorded by the facsimile machine from which the transmission emanated. However, the significance of the applicant's willingness to shift ground in his evidence to suit his cause remains.

[120] As I have said, initially the applicant was prepared to state without hesitation that he read the two page transmission and accompanying statutory declaration when he received them on 17 November 1998. But when faced with a possible adverse inference from a failure to respond, the applicant was prepared to change his evidence in order to bolster his position. I reject the applicant's evidence that he now has a memory that he did not read the transmissions until his return from Kupang. The applicant was again less than frank with this Court and was prepared to tailor his

evidence to assist the cause of his application for admission as a legal practitioner.

[121] In the context of the applicant's state of mind or belief as to whether he was the auditor in November 1998, the applicant was also cross-examined about statements he was alleged to have made to Mr Sullivan during the course of Mr Sullivan's examination of the financial accounts of Balangarri ("the s 60 examination"). In an affidavit dated 12 August 2005, Mr Sullivan stated that on 22 October 1998 he informed Cleanthous and Deo of his appointment and role in undertaking a s 60 examination. The affidavit stated:

> "22. On the day I notified Cleanthous & Deo of my appointment Mr Deo and his employee Mr Nektarios Mastoros, visited my Cavenagh Street office to discuss the Section 60 Examination. During Mr Deo's visit he said words to the following effect:
>
> SD: "My only role is as the external auditor, Ron Carter is responsible for preparing the statutory accounts and the periodic accounts for ASIC.""

[122] Mr Sullivan also stated in the affidavit that during his s 60 examination he noted that the minutes of the Balangarri Annual General Meeting dated 15 October 1998 recorded a resolution appointing Mr Carter and not Mr Deo as Balangarri's auditor for the ensuing financial year to June 1999. He stated that he spoke to Mr Curnow and was told that the recording in the minutes was "bullshit" and a mistake and that Cleanthous and Deo were the auditors. According to Mr Sullivan, after explaining at some length that there had been difficulty surrounding the Annual General Meeting, Mr

Curnow said, “Why don’t you pull Sonny’s leg, call him and tell him that he is no longer the auditor.”

[123] The evidence of the conversation between Mr Sullivan and Mr Curnow was not admitted as evidence of the truth of any statement made by Mr Curnow. It was admitted for the purpose of explaining the context of a subsequent conversation that Mr Sullivan said occurred between him and the applicant.

[124] Against that background, Mr Sullivan’s affidavit continued:

> “30. I did telephone Mr Deo to ask about various matters relevant to my examination. During our discussion we had a conversation to the following effect:
>
> MS: “Oh, Sonny, I don’t really know why I’m asking you these questions now that you’re not Balangarri’s auditor?
>
> SD: I am the auditor
>
> MS: According to the minutes, Ron Carter was appointed auditor at the AGM.”
>
> 31. I recall that Mr Deo did not respond immediately but hesitated for a few moments and then went on to discuss other matters concerning the examination.
>
> 32. Mr Deo phoned me back about an hour or so later and we had a conversation to the following effect:
>
> SD: “Look about that matter – I’ve checked. It’s clearly a mistake I’m still the auditor and Ron Carter is still the external accountant”
>
> MS: “I know. It was a joke. Mr Curnow has explained to me what happened.””

[125] Cross-examined about the version in Mr Sullivan's affidavit, the applicant said he did not go to the office of Mr Sullivan to discuss the s 60 examination. He said he was doing an audit in Mr Sullivan's office. He said he did not recall the conversation, but could have said he was the auditor for the '97-'98 financial year. He said they had discussions about Mr Sullivan's s 60 examination and he would have spoken in those terms.

[126] As to the telephone conversation to which Mr Sullivan's affidavit refers, the applicant agreed that Mr Sullivan did advise him of the entry in the Annual General Meeting minutes to the effect that Mr Carter was appointed as the auditor. The applicant said he told Mr Sullivan he knew about it. According to the applicant he had no recollection of the rest of the conversation to which Mr Sullivan refers and he denied the suggestion that he telephoned Mr Sullivan subsequently and said he had checked it out and it was mistake.

[127] It is unnecessary to canvass the evidence of Mr Sullivan in detail. He was a very defensive witness who was extremely confident of the accuracy of his memory as to the conversations with the applicant. Mr Sullivan possessed that confidence notwithstanding that the conversations occurred nearly seven years ago and he did not make a note of any part of the conversations. In addition, although confident about the statements made by the applicant in their particular detail, Mr Sullivan was unable to recall other parts of the conversations in similar detail.

[128] There is obviously room for error, particularly in view of the context of the conversations and whether, if the statements were made, the applicant spoke in the past or present tense. In all the circumstances I am far from confident that Mr Sullivan has given a reliable account of the conversations. I am not satisfied that the applicant made statements to the effect that at the time of the conversations he was in fact or regarded himself as the auditor of Balangarri.

Conclusions

[129] In 1998 the applicant displayed a lack of judgment and a lack of appreciation of the requirement that an auditor be entirely independent of an organisation in respect of which he was conducting an audit. No dishonesty was involved. The applicant drew an artificial and erroneous distinction between "actual" involvement in a business as opposed to pursuing a business relationship and assisting another in the operation of the business. When confronted by ASIC, the applicant acknowledged the concerns of ASIC and entered into a public undertaking which required retraining and peer review.

[130] The applicant successfully complied with his undertaking. Since that time he has completed his legal studies and worked with a firm of solicitors. I have no doubt that the applicant now appreciates the meaning of a conflict of interest and recognises the legal and ethical requirement to avoid a conflict of interest.

[131] Notwithstanding the matters to which I have just referred, however, I am far from satisfied that the applicant is of good fame and character and a fit and proper person to be admitted to practise. As is apparent from these reasons, I am satisfied that the applicant has repeatedly displayed a lack of candour with the Court and over a significant period has sought to avoid placing before the Court material that he perceived might be adverse to his application, but which he knew would be regarded by the Court as of significance to the question whether he is a fit and proper person to be admitted to practise.

[132] Further, the applicant was willing to mislead the Court as to the nature of his involvement with Jademount and Mr Curnow at the time he conducted the 1997-1998 audit. His eventual disclosure of the nature of that involvement only occurred after the Law Society asserted the existence of an involvement in its particulars.

[133] Finally, I am satisfied that the applicant has demonstrated both a serious and reckless laxity in his approach to his application for admission to practise and a willingness to shift ground in his evidence in order to tailor his evidence for the purpose of assisting the cause of his application.

[134] In reaching these conclusions I have not overlooked the two affidavits advanced by the applicant in support of his character and fitness to practise. Notwithstanding the views of those deponents, a consideration of the

evidence in its entirety has led me to the firm conclusions to which I have referred.

[135] I am not satisfied that the applicant is of good fame and character and a fit and proper person to be admitted to practise. To the contrary, I am satisfied that the applicant is not, at this time, a person suitable for admission. The application for admission to practise is refused.
