

# FEDERAL MAGISTRATES COURT OF AUSTRALIA

*FWO v MACQUARIE BUSINESS SERVICES P/L & ANOR* [2011] FMCA 287

INDUSTRIAL LAW — Contraventions of two Individual Transitional Employment Agreements and *Workplace Relations Act 1996* (Cth) – further contraventions of *Workplace Relations Regulations 2006* (Cth) – declarations, damages and penalties sought – Statement of Agreed Facts and Matters relied upon – penalties imposed.

*Corporations Act 2001* (Cth)

*Fair Work Act 2009* (Cth), s.701

*Superannuation Guarantee (Administration) Act 1992* (Cth)

*Workplace Relations Act 1996* (Cth), ss.235, 351, 717, 718, 719, 722 and 728

*Workplace Relations Regulations Act 2000* (Cth), reg.14.4, 14.5, 19.4, 19.5, 19.11, 19.12 and 19.13

*Salandra v Risborg Services Pty Ltd & Ors* [2008] FMCA 76

*Olsen v Sterling Crown Pty Ltd* [2008] FMCA 1392

*FMEU v Cole & Allied Operations Pty Ltd (No. 2)* [1999] FCA 1714

*Cotis v Pow Juice Pty Ltd* [2007] FMCA 140

*Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7

*Cotis v MacPherson* [2007] FMCA 2060

*Jones v Hanssen Pty Ltd* [2008] FMCA 291

*Kelly v Fitzpatrick* [2007] FCA 1080

*Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543

*Yardley v Betts* (1979) 22 SASR 108

*R v Thompson* (1975) 11 SASR 217

*Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8

Applicant: FAIR WORK OMBUDSMAN  
First Respondent: MACQUARIE BUSINESS SERVICES  
PTY LTD  
Second Respondent: JOSEPH BERNARD KRAWCZYNSKI  
File Number: ADG 202 of 2009  
Judgment of: Simpson FM  
Hearing date: 13 April 2010  
Date of Last Submission: 13 April 2010  
Delivered at: Adelaide  
Delivered on: 28 April 2011

**REPRESENTATION**

Counsel for the Applicant: Mr G. Edmonds-Wilson  
Solicitors for the Applicant: Hunt & Hunt  
Counsel for the Respondents: Mr N. Oliveri  
Solicitors for the Respondents: Windevere Bellman

## DECLARATIONS AND ORDERS

- (1) It is declared that, on numerous occasions on and from about 7 July 2008 until on or about 21 November 2008, the first respondent contravened an individual transitional employment agreement (“ITEA”) in relation to its employee, Mr Chen-Ting Chen (“the Chen ITEA”) in that it failed to comply with the following provisions of the Chen ITEA and *Workplace Relations Act 1996* (Cth) (“the Act”):
  - (a) Clause 2 of Schedule 1 of the Chen ITEA (in relation to the payment of wages);
  - (b) Clause 2 and Clause 51.4 of Schedule 1 of the Chen ITEA (in relation to the payment of Superannuation contributions);
  - (c) Clause 2a of the Chen ITEA (in relation to the frequency of payment of wages);
  - (d) Clause 2 and Clause S3.2 of Schedule 3 of the Chen ITEA (in relation to the payment of a car allowance); and
  - (e) Clause 18 of the Chen ITEA and s.235(2) of the Act (in relation to the payment of untaken accrued annual leave upon cessation of employment).
  
- (2) It is further declared that, on numerous occasions on and from about 7 July 2008 until on or about 21 November 2008, the first respondent contravened an ITEA in relation to its employee, Ms Miu-Han Julie Leung (“the Leung ITEA”) in that it failed to comply with the following provisions of the Leung ITEA and the Act:
  - (a) Clause 2 of Schedule 1 of the Leung ITEA (in relation to the payment of wages);
  - (b) Clause 2 and Clause 51.4 of Schedule 1 of the Leung ITEA (in relation to the payment of Superannuation contributions);
  - (c) Clause 2a of to the Leung ITEA (in relation to the frequency of payment of wages);

- (d) Clause 18 of the Chen ITEA and s.235(2) of the Act (in relation to the payment of untaken accrued annual leave upon cessation of employment).
- (3) It is further declared that, on numerous occasions on and from about 7 July 2008 until on or about 21 November 2008, the first respondent contravened provisions of the *Workplace Relations Regulations 2006* (“the Regulations”) in respect of each of the employees, namely, regulations 19.4(1); 19.11(3); 19.12(1); 19.13(1) and 19.5(1) (in relation to the keeping of employment records).
- (4) It is further declared that on and from about 7 July 2008 until on or about 21 November 2008, the second respondent was involved, within the meaning of s.728 of the Act, in each of the contraventions referred to in orders 1, 2 and 3 hereof in that he aided, abetted, counselled or procured each of the contraventions and, in addition, has, by his acts or omissions, directly or indirectly, been knowingly concerned in or party to each of the contraventions.
- (5) Pursuant to s.719(5) of the Act, the first respondent is ordered to pay the following sums to the persons mentioned herein by way of compensation for the loss or damage suffered by each of them as a result of the contraventions of the relevant ITEA referred to in orders 1 and 2 hereof:
- (a) The sum of \$10,911.24 (ten thousand, nine hundred and eleven dollars and twenty four cents) in respect of the employee Mr Chen together with interest pursuant to s.722(1) of the Act at the rate of 5% per annum on the whole or any part of the said sum that remains unpaid calculated from 7 July 2008 until payment; and
- (b) The sum of \$8,931.28 (eight thousand, nine hundred and thirty one dollars and twenty eight cents) in respect of the employee Ms Leung together with interest pursuant to s.722(1) of the Act at the rate of 5% per annum on the whole or any part of the said sum that remains unpaid calculated from 7 July 2008 until payment.
- (6) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$2,500.00 (two thousand, five hundred dollars) in relation to

the contraventions of s.717(a)(i) of the Act as declared in Order 1(a) hereof.

- (7) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$2,500.00 (two thousand, five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order (2)(a) hereof.
- (8) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$2,500.00 (two thousand, five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order 1(b) hereof.
- (9) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$2,500.00 (two thousand, five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order (2)(b) hereof.
- (10) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$1,000.00 (one thousand dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order 1(c) hereof.
- (11) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$1,000.00 (one thousand dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order (2)(c) hereof.
- (12) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$1,000.00 (one thousand dollars) in relation to the contravention of s.717(a)(i) of the Act as declared in Order 1(d) hereof.
- (13) Pursuant to s.719(4)(b) of the Act the first respondent shall pay a penalty of \$1,000.00 (one thousand dollars) in relation to the contraventions of ss.235(2) and 717(a)(i) of the Act as declared in Order 1(e) and (2)(d) hereof.
- (14) Pursuant to s.846(2)(g)(ii) of the Act the first respondent shall pay a penalty of \$750.00 (seven hundred and fifty dollars) in relation to the contravention of the civil remedy provision of regulation 19.4(1) of the Regulations as declared in Order 3 hereof.

- (15) Pursuant to s.846(2)(g)(ii) of the Act the first respondent shall pay a penalty of \$750.00 (seven hundred and fifty dollars) in relation to the contravention of the civil remedy provision of regulation 19.11(3) of the Regulations as declared in Order 3 hereof.
- (16) Pursuant to s.846(2)(g)(ii) of the Act the first respondent shall pay a penalty of \$750.00 (seven hundred and fifty dollars) in relation to the contravention of the civil remedy provision of regulation 19.12(1) of the Regulations as declared in Order 3 hereof.
- (17) Pursuant to s.846(2)(g)(ii) of the Act the first respondent shall pay a penalty of \$750.00 (seven hundred and fifty dollars) in relation to the contravention of the civil remedy provision of regulation 19.13(1) of the Regulations as declared in Order 3 hereof.
- (18) Pursuant to s.846(2)(g)(ii) of the Act the first respondent shall pay a penalty of \$750.00 (seven hundred and fifty dollars) in relation to the contravention of the civil remedy provision of regulation 19.5(1) of the Regulations as declared in Order 3 hereof.
- (19) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$500.00 (five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order 1(a) hereof.
- (20) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$500.00 (five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order (2)(a) hereof.
- (21) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$500.00 (five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order 1(b) hereof.
- (22) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$500.00 (five hundred dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order (2)(b) hereof.

- (23) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$250.00 (two hundred and fifty dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order 1(c) hereof.
- (24) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$250.00 (two hundred and fifty dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order (2)(c) hereof.
- (25) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$250.00 (two hundred and fifty dollars) in relation to the contraventions of s.717(a)(i) of the Act as declared in Order 1(d) hereof.
- (26) Pursuant to s.719(4)(a) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$250.00 (two hundred and fifty dollars) in relation to the contraventions of ss.235(2) and 717(a)(i) of the Act as declared in Order 1(e) and (2)(d) hereof.
- (27) Pursuant to s.846(2)(g)(i) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$200.00 (two hundred dollars) in relation to the contravention of the civil remedy provision of regulation 19.4(1) of the Regulations as declared in Order 3 hereof.
- (28) Pursuant to s.846(2)(g)(i) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$200.00 (two hundred dollars) in relation to the contravention of the civil remedy provision of regulation 19.11(3) of the Regulations as declared in Order 3 hereof.
- (29) Pursuant to s.846(2)(g)(i) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$200.00 (two hundred dollars) in relation to the contravention of the civil remedy provision of regulation 19.12(1) of the Regulations as declared in Order 3 hereof.
- (30) Pursuant to s.846(2)(g)(i) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$200.00 (two hundred dollars) in relation to the contravention of the civil remedy

provision of regulation 19.13(1) of the Regulations as declared in Order 3 hereof.

- (31) Pursuant to s.846(2)(g)(i) of the Act and the declaration in Order 4 herein, the second respondent shall pay a penalty of \$200.00 (two hundred dollars) in relation to the contravention of the civil remedy provision of regulation 19.5(1) of the Regulations as declared in Order 3 hereof.
- (32) The penalties referred to in orders 6 to 31 hereof shall be paid to the Commonwealth.



**FEDERAL MAGISTRATES  
COURT OF AUSTRALIA  
ATADELAIDE**

**ADG 202 of 2009**

**FAIR WORK OMBUDSMAN**  
Applicant

And

**MACQUARIE BUSINESS SERVICES PTY LTD**  
First Respondent

And

**JOSEPH BERNARD KRAWCZYNSKI**  
Second Respondent

**REASONS FOR JUDGMENT**

**Introduction**

1. I have before me an application by the Fair Work Ombudsman seeking declarations of contraventions of certain workplace laws, orders for the payment of damages and interest to the two employees affected, and the imposition of penalties.
2. Macquarie Business Services Pty Ltd, was incorporated on 31 July 1998. It conducted its operations from premises at Wayville in South Australia carrying on the business of business broking and property management. The company is now in voluntary liquidation.
3. At all relevant times until the winding up of the first respondent, the second respondent was a director of it and its senior manager responsible for the management of employees including matters relating to employees' terms of employment.

4. On 7 July 2008, the first respondent employed Ms Miu-Han Julie Leung (“Ms Leung”) and Mr Chen-Ting Chen (“Mr Chen”) (“the employees”).
5. As is fully admitted in the Statement of Agreed Facts and Matters, the first respondent was guilty of a number of contraventions of workplace laws which resulted in the employees not receiving their wages, not receiving the benefit of the employer’s compulsory contribution to superannuation, not receiving their accrued annual leave entitlements when their employment ceased and, in the case of Mr Chen, failing to receive the car allowance that he was supposed to receive.
6. In the four months that these employees were employed by the first respondent, the first respondent underpaid Mr Chen the sum of \$10,911.24 (ten thousand, nine hundred and eleven dollars and twenty four cents) and in Ms Leung’s case, the sum of \$8,931.28 (eight thousand, nine hundred and thirty one dollars and twenty eight cents). They each received nothing.

### **Material relied upon**

7. The applicant relied on the following material:
  - Affidavit of Mr Chen sworn and filed on 7 December 2009;
  - Affidavit of Ms Leung sworn on 4 December 2009 and filed on 7 December 2009; and
  - Affidavit of Brenda Helen Rolls sworn on 7 December 2009 and filed on 8 December 2009.
8. The respondents relied on the affidavit of the second respondent, Joseph Bernard Krawczynski, sworn on 10 April 2010 and filed on 12 April 2010 (excluding paragraph 101 and subparagraph 116.2 which were objected to by the applicant on the basis that they contained inadmissible information).
9. The parties have been able to reach agreement about a number of matters. A Statement of Agreed Facts and Matters (“the Statement”) was filed on 29 March 2010. The Statement was in the following terms:

## ***The Application***

1. On 27 July 2009, the Applicant filed an Application and Statement of Claim (**SOC**) in this Court. The Applicant alleged that:

1.1 The First Respondent (**MBS**) contravened the terms of two Individual Transitional Employment Agreements (**ITEAs**) resulting in the underpayment of two former employees of MBS, Mr Chen-Ting Chen (**Mr Chen**) and Ms Miu-Han Julie Leung (**Ms Leung**) (collectively, **the Employees**) who were employed by MBS between about 7 July 2008 and 21 November 2008 (**Period of Employment**);

1.2 MBS contravened several record keeping provisions of the Workplace Relations Regulations 2006 (Cth.) (**WR Regulations**) in relation to the employment of the Employees; and

1.3 The Second Respondent (**Mr Krawczynski**) was involved in the underpayments and record keeping contraventions by MBS.

2. In summary, the Applicant seeks the following orders:

2.1 Orders under section 719(5) and section 722(1) of the Workplace Relations Act 1996 (Cth.) (**WR Act**) that MBS pay to the Employees the amounts of loss or damage respectively suffered by the Employees as a result of the contraventions of Mr Chen's ITEA (**Chen ITEA**) and Ms Leung's ITEA (**Leung ITEA**) by MBS with interest;

2.2 Orders under section 719(1) of the WR Act, imposing pecuniary penalties on the Respondents for contraventions of the Chen ITEA, the Leung ITEA and section 235(2) of the WR Act.

2.3 Orders under Regulation 14.4 of the WR Regulations, imposing pecuniary penalties on the Respondents for contraventions of the WR Regulations alleged in the SOC.

## ***Admitted Contraventions***

3. MBS admitted (by letter from its Solicitors to the Workplace Ombudsman dated 29 April 2009) that the Employees had not

- been paid wages, a car allowance and/or commission (which MBS said the Employees were never entitled to), and MBS' Solicitors quantified the Employees' unpaid entitlements at \$ 21,400.64 gross.*
4. *MBS, by its Points of Defence, admits to contravening the following provisions in respect of Mr Chen:*
    - a. *Clause 2 and Schedule 1 of the Chen ITEA (in relation to payment of wages);*
    - b. *Clause 2 and Clause S1.4 of Schedule 1 of the Chen ITEA (in relation to the payment of superannuation contributions);*
    - c. *Clause 2(a) of the Chen ITEA (in relation to the frequency of payment of wages);*
    - d. *Clause 2 and Clause S3.2 of Schedule 3 of the Chen ITEA (in relation to the payment of a car allowance); and*
    - e. *Clause 18 of the Chen ITEA and section 235(2) of the WR Act (in relation to the payment of untaken accrued annual leave upon cessation of employment).*
  5. *MBS, by its Points of Defence, admits to contravening the following provisions in respect of Ms Leung:*
    - a. *Clause 2 and Schedule 1 of the Leung ITEA (in relation to the payment of wages);*
    - b. *Clause 2 and Clause S1.4 of Schedule 1 of the Leung ITEA (in relation to the payment of superannuation contributions);*
    - c. *Clause 2(a) of the Leung ITEA (in relation to the frequency of payment of wages); and*
    - d. *Clause 18 of the Leung ITEA and section 235(2) of the WR Act (in relation to the payment of untaken accrued annual leave upon cessation of employment).*
  6. *The contraventions of the Chen ITEA, the Leung ITEA and section 235(2) of the WR Act by MBS set out above resulted in underpayments in wages and entitlements to the Employees totalling \$10,911.24 in respect of Mr Chen and \$8,931.28 in respect of Ms Leung.*

7. *MBS, by its Points of Defence, also admits to contravening the following provisions of the WR Regulations in respect of the Employees:*
  - a. *Regulation 19.4(1);*
  - b. *Regulation 19.11(3);*
  - c. *Regulation 19.12(1);*
  - d. *Regulation 19.13(1); and*
  - e. *Regulation 19.5(1).*
8. *MBS offered (by letter from its Solicitors to the Workplace Ombudsman dated 29 April 2009) to pay the Employees' unpaid entitlements by instalments. The instalment plan proposed by MBS was as follows:*
  - a. *To make a lump sum payment of \$2,500 to each of Chen and Leung;*
  - b. *That on the 10<sup>th</sup> day of each calendar month, commencing on 10 June 2009, MBS deposit a sum of \$500.00 per month into each of Chen and Leung's nominated bank accounts, until their respective entitlements have been met; and*
  - c. *That MBS forward the funds withheld on account of income tax to the Australian Taxation Office in the ordinary course of business.*

*Both Chen and Leung rejected the proposed instalment plan. The WO advised MBS of this by the Final Notices concerning Chen and Leung dated 25 May 2009.*

9. *Mr Krawczynski admits to his involvement, within the meaning of section 728 of the WR Act, in the contravention of the provisions, set out in paragraphs 4, 5 and 7 above, by MBS.*

### ***The Parties and the Employees***

10. *The Applicant is a Fair Work Inspector pursuant to section 701 of the Fair Work Act 2009 and a person with standing to bring these proceedings.*
11. *At all relevant times, MBS was a body corporate pursuant to the Corporations Act 2001.*

12. *At all relevant times, MBS operated a business in the industry of business broking and property management (**Business**), and the Directors actively involved in the Business were Ian Gordon Rankine (**Mr Rankine**) (who had been appointed a Director on 3 August 1998), who was MBS's Managing Director, and Mr Krawczynski (who had been appointed a Director on 20 February 2001).*

13. *Mr Chen:*

- a. *Was employed by MBS from about 7 July 2008 to on or about 21 November 2008 to perform work in the Business;*
- b. *Was employed by MBS as a salesperson;*
- c. *Was required by the Chen ITEA to give MBS a period of notice of one week of his intention to terminate his employment;*
- d. *Did not return to work after giving notice of his intention to end his employment relationship with MBS on 21 November 2008; and*
- e. *Owes MBS a sum equivalent to one week's pay at his Basic Periodic Rate of Pay, namely \$492.86 for failure to give one week's notice of his intended resignation to MBS, which sum has been offset from the total amount owing to Mr Chen by MBS as set out in paragraph 6 above.*

14. *Ms Leung:*

- a. *Was employed by MBS from on or about 7 July 2008 to on or about 21 November 2008 to perform work in the Business;*
- b. *Was employed by MBS as a salesperson;*
- c. *Was required by the Leung ITEA to give MBS a period of notice of one week of her intention to terminate her employment;*
- d. *Did not return to work after giving one week's notice of her intention to end her employment relationship with MBS on 21 November 2008; and*

- e. *Owes MBS a sum equivalent to one week's pay at her Basic Periodic Rate of Pay, namely \$492.86, for failure to give one week's notice of her intended resignation to MBS, which sum has been offset from the total amount owing to Ms Leung by MBS as set out in paragraph 6 above.*
15. *On or about 8 August 2008, Mr Rankine suffered a stroke, as a result of which Mr Rankine became medically unfit for work and:*
  - a. *Mr Rankine did not actively return to work in the Business during the remainder of the period of Mr Chen and Ms Leung's employment, or thereafter; and*
  - b. *Mr Krawczynski became MBS's Managing Director as and from 9 August 2008, because of Mr Rankine's medical condition.*
16. *At all relevant times, Mr Krawczynski:*
  - a. *Was a director of MBS; and*
  - b. *Was a senior manager with MBS, and responsible for the management of employees of MBS including matters relating to the terms of employment of employees of MBS.*
17. *On 10 September 2009, Mr Rankine ceased to be a Director of MBS.*

***The terms of employment of the Employees***

18. *During the Period of Employment, the employment of each of the Employees by MBS was governed respectively by:*
  - a. *A Training Contract; and*
  - b. *An ITEA.*
19. *The Employees' Training Contracts took effect on or about 7 July 2008, and specified an operative term of one calendar year.*
20. *At all material times from 21 July 2008, the Employees were each respectively party to an ITEA with MBS being an ITEA which, under section 351 of the WR Act:*
  - 20.1 *Bound MBS as the employer; and*

20.2 Bound the Employees respectively as employees.

**Terms of the ITEAs**

21. Each of the ITEAs provided:

- a. That the employee was employed as from 7 July 2008 (clause 6.1);
- b. That the employee's wages and related matters were as provided in Schedule 1 thereof (clause 2);
- c. That for the duration of the period of traineeship the employee's wages would be payable for the employee's guaranteed hours at the pay scale specified in Option A of clause S1.1.1 of Schedule 1 thereof;
- d. That the employee's entitlement to commissions were as provided for in Schedule 2 thereof (clause 2);
- e. That the employee would, in addition to the employee's wages, also receive commission which will be regarded as incentive payments (Option A of clause S.1.1.1 of Schedule 1);
- f. By Schedule 2 thereof for the definition of and means of calculation of the commission payable to the employee thereunder, including providing in clause S2.1.4 for the keeping by MBS of a commission account/statement for the employee;
- g. That the employee's allowances were as provided in Schedule 3 thereof (clause 2);
- h. That wages will be paid weekly or fortnightly (clause 2(a));
- i. That the employee's tenure of employment will be full time (clause 7);
- j. That the employee's specified hours will be 38 hours each week (clause 16.2);
- k. That superannuation contributions will be paid by MBS as required under the Superannuation Guarantee (Administration) Act 1992 (SGAA) (clause S.1.4 of Schedule 1);



- l. That superannuation contributions will be paid on the ordinary time earnings, as defined in the SGAA, of the employee (clause S.1.4 of Schedule 1);*
- m. That the employee's entitlement to annual leave will be in accordance with the WR Act and WR regulations (clause 18.1);*
- n. That the employee was required to provide himself or herself with a suitable, reliable and presentable motor vehicle to carry out the employee's work-related duties (clause 30.1); and*
- o. That if the employee was paid a wage, and whilst not on paid or unpaid leave, the employee will also receive the award car allowance of \$110 per week for a trainee which will be paid no less frequently than monthly (clause S3.2).*

### ***The Underpayments***

- 22. Pursuant to Clause 2 and Schedule 1 of the ITEAs, the minimum hourly rate of pay for each of the Employees was:*
  - a. \$12.45 per hour from 21 July 2008 to 30 September 2008;*
  - b. \$12.97 per hour from 1 October 2008 until the cessation of their employment on or about 21 November 2008.*
- 23. During the whole of the Period of Employment, MBS failed to make any payment of wages to either of the Employees in respect of their employment.*

### ***Superannuation***

- 24. Pursuant to Clause 2 and Clause S1.4 of Schedule 1 of the ITEAs, MBS was required to make superannuation contributions in respect of the employment of the Employees based on the ordinary time earnings, within the meaning of the SGAA, respectively of the Employees.*
- 25. During the whole of the Period of Employment, MBS failed to make any superannuation contributions in relation to the Employees.*

### ***Frequency of payment***

26. Pursuant to clause 2(a) of the ITEAs, the Employees were entitled to be paid wages by MBS at a frequency not less than weekly or fortnightly.
27. For the duration of the Period of Employment, MBS did not make any payment to either of the Employees in respect of their employment, and thereby by omission failed to pay wages with the frequency required by clause 2(a) of the ITEAs.

**Non payment of car allowance to Mr Chen**

28. Pursuant to Clause 2 and Schedule 3 Clause S3.2 of the Chen ITEA, Mr Chen was entitled to be paid by MBS the car allowance referred to therein being an allowance based on or arising under the Real Estate Award (SA) of \$110 per week at intervals no less frequent than monthly.
29. At all material times during the Period of Employment, Mr Chen:
  - a. Was entitled to be paid a wage or salary by MBS pursuant to Clause S1.1.1 of Schedule 1 to the Chen ITEA;
  - b. Was not entitled to be paid by MBS pursuant to a commission-only arrangement pursuant to Clause S1.1.1 of Schedule 1 to the Chen ITEA;
  - c. Was not absent from his employment on paid or unpaid leave; and
  - d. Was required by MBS to use his own motor vehicle in the course of his normal duties and did so.
30. Mr Chen was employed by MBS for a total of nineteen completed weeks.
31. During the whole of the Period of Employment, MBS failed to make any payment to Mr Chen in respect of his car allowance entitlement as required by Clause 2 and Schedule 3 Clause S3.2 of the Chen ITEA.

**Annual leave upon termination of employment**

32. Pursuant to Clause 18 of the ITEAs, and section 235(2) of the WR Act, upon termination of their employment, the Employees were each entitled to be paid the Employees' Basic

*Periodic Rate of Pay by MBS for each hour (pro-rated for part hours) of their respective untaken accrued annual leave.*

33. *MBS failed to pay the Employees' their untaken accrued annual leave entitlement (amounting to \$758.17) upon termination of their employment.*

**Total Underpayment Amounts**

34. *MBS underpaid the Employees a total amount of \$19,842.52 which remains wholly outstanding to the Employees.*

**Commission**

35. *The FWO does not allege that the Employees were entitled to any commission after deduction of off-sets and debits (as provided for in Schedule 2 of the ITEAs).*

**Record Keeping Obligations of MBS**

36. *Under Regulation 19.4(1) of the WR Regulations, MBS was, as the employer of the Employees, required to make, or cause to be made, a record in accordance with Divisions 3 and 4 of Part 19 of the WR Regulations relating to the employee.*
37. *Division 3 of Part 19 of the WR Regulations (**Division 3**) prescribes the content of the record which an employer is required to make, or cause to be made, under Regulation 19.4(1).*
- a. *By Regulation 19.11(3) if the employee is entitled to be paid, inter alia, an incentive-based payment, a bonus, or another monetary allowance or separately identifiable entitlement, the record relating to the employee must contain details of the payment, bonus, allowance or entitlement;*
  - b. *By Regulation 19.12(1), if the employee is entitled to leave, the record relating to the employee must contain details of the accrual of that leave, any leave taken by the employee, and the balance of the employee's entitlement to that leave from time to time;*
  - c. *By Regulation 19.13(1), if the employer is required to make superannuation contributions for the benefit of the employee, the record relating to the employee must contain the following:*

- i. *The amount of the contributions made;*
  - ii. *The dates on which the contributions were made;*
  - iii. *The name of any fund to which the contributions were made; and*
  - iv. *The basis on which the employer became liable to make the contributions.*
38. *Under Regulation 19.5(1) of the WR Regulations, the record which MBS was, as the employer of the Employees, required to make, or cause to be made under Regulation 19.4, relating to the employee must be in a condition that allows a workplace inspector to determine the employee's entitlements and whether the employee is receiving those entitlements.*

***Record Keeping Contraventions of MBS***

39. *MBS contravened:*

- a. *Regulation 19.11(3) in that it did not have a record relating to the Employees' entitlements to commission in accordance with the ITEAs or details of how such entitlement was calculated including any offsets or deductions from that entitlement under the ITEAs. This obligation applied irrespective of whether or not the Employees qualified for commission payments in a given period;*
- b. *Regulation 19.12(1) in respect of the Employees in that it did not have records relating to the Employees containing details of the accrual of annual leave by during the Period of Employment and the balance of the annual leave entitlement of the Employees from time to time during the Period of Employment;*
- c. *Regulation 19.13(1) in respect of the Employees in that it did not have a record relating to the Employees containing details of the amount of superannuation contributions made in respect of the Employees in relation to the Period of Employment or the dates on which the contributions were made, the name of any fund to which the contributions were made, or the basis on which MBS became liable to make the contributions;*
- d. *In consequence, of the contraventions of the WR Regulations set out in paragraphs (a) to c above,*

*Regulation 19.4(1) was also contravened on each occasion that each of Regulations 19.11(3), 19.12(1) and 19.13(1) were contravened, in that MBS failed to make, or cause to be made, during the Period of Employment a record in accordance with Division 3 relating to the Employees; and*

- e. Regulation 19.5 of the WR Regulations in that it failed or omitted to make, or cause to be made, a record in accordance with Division 3, as the records in relation to the Employees were not in a condition that allowed a workplace inspector to determine, from the records, the entitlements of Mr Chen and Ms Leung respectively under the ITEAs and whether the Employees had received those entitlements in respect of the Period of Employment.*

### ***Number of contraventions by MBS***

#### ***Contraventions of Applicable Provisions by MBS***

- 40. Under sections 717, 718, and 719(1) of the WR Act, all of the contraventions set out at paragraphs 4 and 5 above of the ITEAs and WR Act in respect of the Employees are contraventions of an 'applicable provision' for the purposes of imposing penalties pursuant to section 719(1) of the WR Act.*

#### ***Chen ITEA***

- 41. Under Section 719(2) of the WR Act (subject to sub-section (3)), the following contraventions of the Chen ITEA arose out of a single course of conduct, as each contravention involved an ongoing failure or omission by MBS to comply with the requirements of the Chen ITEA:*

- 41.1. Clause 2 and Schedule 1 (in relation to the payment of wages);*

- 41.2. Clause 2 and Clause S1.4 of Schedule 1 (in relation to the payment of superannuation contributions);*

- 41.3. Clause 2(a) (in relation to the frequency of payment of wages); and*

- 41.4. Clause 2 and clause S3.2 of Schedule 3 (in relation to the payment of a car allowance).*

*Accordingly, the above contraventions constitute four single contraventions of the respective clauses of the Chen ITEA.*

42. *The contravention of Clause 18 of the Chen ITEA (in relation to the payment of untaken accrued annual leave upon cessation of employment) by MBS constitutes a single contravention in respect of Mr Chen.*

***Leung ITEA***

43. *The following contraventions of the Leung ITEA arose out of a single course of conduct, as each contravention involved an ongoing failure or omission by MBS to comply with the requirements of the Leung ITEA:*

- 43.1. *Clause 2 and Schedule 1 (in relation to the payment of wages);*
- 43.2. *Clause 2 and Clause S1.4 of Schedule 1 (in relation to the payment of superannuation contributions); and*
- 43.3. *Clause 2(a) (in relation to the frequency of payment of wages)*

*Accordingly, the above contraventions constitute three single contraventions of the respective clauses of the Leung ITEA.*

44. *The contravention of Clause 18 of the Leung ITEA (in relation to the payment of untaken accrued annual leave upon cessation of employment) by MBS constitutes a single contravention in respect of Ms Leung.*

***WR Act***

45. *The two contraventions of section 235(2) of the WR Act in respect of both Chen and Leung arose out of a course of conduct undertaken by MBS in respect of both Employees, and therefore, constitute a single contravention.*

***Total number of contraventions of applicable provisions***

46. *Accordingly, for the purpose of imposing pecuniary penalties for the admitted contraventions of the 'applicable provisions' of the WR Act and ITEAs by MBS during the whole Period of Employment there is a total of eight single contraventions of the relevant applicable provisions in respect of the Employees.*

### **Grouping of contraventions**

47. For the purposes of imposing penalties for the admitted contraventions of the 'applicable provisions' of the ITEAs and the WR Act, the Court is entitled to group each of the following contraventions to avoid punishing MBS multiple times for the same conduct:

47.1 The two separate contraventions of Clause 2 and Schedule 1 of the Chen ITEA and the Leung ITEA (in relation to the payment of wages) can be grouped;

47.2 The two separate contraventions of Clause 2 and Clause S1.4 of Schedule 1 of the Chen ITEA and the Leung ITEA (in relation to the payment of superannuation contributions) can be grouped;

47.3 The two separate contraventions of Clause 2(a) of the Chen ITEA and the Leung ITEA (in relation to the frequency of payment of wages) can be grouped; and

47.4 The two separate contraventions of Clause 18 of the Chen ITEA and the Leung ITEA, and the single contravention of section 235(2) (all three contraventions relating to the payment of untaken accrued annual leave upon cessation of employment) can be grouped.

### **Contraventions of civil remedy provisions by MBS: WR Regulations**

48. Under Regulations 19.4(4), 19.11(6), 19.12(4), 19.13(2) and 19.5(3) of the WR Regulations, each of the contraventions of the WR Regulations, set out at paragraph 7 above, are contraventions of civil remedy provisions, for the purposes of imposing penalties pursuant to Regulation 14.4 of the WR Regulations.

49. Under Regulations 14.5(1) and 14.5(2) of the WR Regulations, each of the contraventions of the WR Regulations in respect of the records of Mr Chen and Ms Leung arose out of a single course of conduct, as each contravention involved an ongoing failure or omission by MBS to keep and maintain records in accordance with regulation 19.4(1) of the WR Regulations in respect of both Employees.

50. Accordingly, for the purpose of imposing pecuniary penalties for the admitted contraventions of the civil remedy provisions of the WR Regulations by MBS during the whole Period of Employment, there is a total of five single contraventions of the relevant civil remedy provisions in respect of the Employees.

***Involvement of Second Respondent in Contraventions***

51. Mr Krawczynski was involved in the contraventions of MBS in that he:

- a. Entered into each of the ITEAs for and on behalf of MBS;
- b. Knew of the terms on which the Employees were employed by MBS;
- c. Knew that MBS was not paying and had not paid the Employees their respective entitlements under the ITEAs;
- d. Omitted to cause MBS to remedy the non-payment of wages and other entitlements to which the Employees were entitled under the ITEAs despite requests having been made by the Employees; and
- e. Knew of the manner in which MBS kept records in relation to its employees, and knew that MBS did not keep records of the type which constitute contraventions of the WR Regulations by MBS.

***Agreed Summary of Matters to be determined by the Court***

52. The parties agree that the relief to be granted or the matters to be determined by the Court are:

- a. The making of a declaration that MBS contravened the Chen ITEA, the Leung ITEA and section 235(2) of the Act as set out in paragraphs 4 and 5 above;
- b. The making of a declaration that MBS contravened the WR Regulations as set out in paragraph 7 above;
- c. The making of a declaration that Mr Krawczynski was involved in the contraventions set out in paragraphs 4, 5 and 7 above;



- d. *The making of an order pursuant to section 719(5) of the Act requiring MBS to pay to Mr Chen the amount of loss or damage that Mr Chen has suffered as a result of the contraventions of the Chen ITEA set out in paragraph 6 above;*
  - e. *The making of an order pursuant to section 719(5) of the Act requiring MBS to pay to Ms Leung the amount of loss or damage that Ms Leung has suffered as a result of the contraventions of the Leung ITEA set out in paragraph 6 above;*
  - f. *The making of an order pursuant to section 722(1) of the Act for interest in respect of monies to be paid to the Employees under section 719(5) of the Act; and*
  - g. *The determination by the Court of the quantum of penalty to be imposed on the Respondents respectively in respect of the contraventions set out in paragraphs 4, 5 and 7 above.*
10. On the basis of this very detailed and comprehensive Statement of Agreed Facts and Matters and the affidavit evidence that has been placed before me, I have no difficulty in finding that the declarations and orders for damages sought by the applicant should be made. There will be orders accordingly.
  11. I now address the question of penalty.
  12. I find that there is a total of eight separate contraventions of applicable provisions of the Chen ITEA, the Leung ITEA and the Act, and that there are five separate contraventions of the civil remedy provisions of the Regulations. Thirteen penalties are required in relation to each respondent. These 13 contraventions are each arrived at as a result of numerous contraventions that are treated as a single contravention as a result of the ‘course of conduct’ provisions contained in the legislation.<sup>1</sup> I do not accept that I can group the contraventions as suggested in paragraph 47 of the Statement as the breaches of the Chen ITEA and the Leung ITEA are not the same “applicable provision”. They are similar provisions in different ITEA’s.

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<sup>1</sup> See s.728 of the Act.

13. The maximum penalty that can be imposed for each of the eight contraventions of the Chen ITEA, the Leung ITEA and the Act is \$33,000 (thirty three thousand dollars) in relation to the first respondent and \$6,600 (six thousand, six hundred dollars) in relation to the second respondent. The maximum penalty that can be imposed for each of the five separate contraventions of the civil remedy provisions of the Regulations is \$5,500 (five thousand, five hundred dollars) in relation to the first respondent and \$1,100 (one thousand, one hundred dollars) in relation to the second respondent. The maximum penalty that could be imposed in this matter is therefore \$291,500.00 (two hundred and ninety one thousand, five hundred dollars) and \$58,300.00 (fifty eight thousand, three hundred dollars) in relation to the second respondent.
14. The factors that need to be considered in assessing the quantum of penalty have been considered in a number of cases.<sup>2</sup> Whilst a list such as the one that follows should not restrain me from considering any other factor that I consider relevant, the following list of factors are a helpful start:
- a) The nature and extent of the conduct which led to the breaches;
  - b) The circumstances in which the conduct took place;
  - c) The nature and extent of any loss or damage sustained as a result of the breaches;
  - d) Whether there has been similar previous conduct by the party;
  - e) Whether the breaches were properly distinct or arose out of the one course of conduct;
  - f) The size of the business enterprise involved;
  - g) Whether or not the breaches were deliberate;
  - h) Whether senior management was involved in the breaches;

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<sup>2</sup> See eg, *Salandra v Risborg Services Pty Ltd & Ors* [2008] FMCA 76; *Olsen v Sterling Crown Pty Ltd* [2008] FMCA 1392 at [34]; *FMEU v Cole & Allied Operations Pty Ltd (No. 2)* [1999] FCA 1714 [7, 8]; *Cotis v Pow Juice Pty Ltd* [2007] FMCA 140 at [49]; *Mason v Harrington Corporation Pty Ltd* [2007] FMCA 7 at [19-22, 36-37, 50, 59]; *Cotis v MacPherson* [2007] FMCA 2060 at [11]; *Jones v Hanssen Pty Ltd* [2008] FMCA 291 at [6]; *Kelly v Fitzpatrick* [2007] FCA 1080 at [14].

- i) Whether the party committing the breach had exhibited contrition for the breach firstly, by taking action to make reparation for any loss resulting from the breach whether or not there was a legal obligation to do so and second, in any other manner;
  - j) Whether the party committing the breach has taken corrective action to ensure that further breaches do not occur;
  - k) Whether the party committing the breach has cooperated with the enforcement authorities;
  - l) The need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements;
  - m) The need for specific and general deterrence;
  - n) If the party has admitted the breaches of the applicable provisions – that fact; and
  - o) If the party is an individual, the character, antecedents, age, means and physical or mental condition of the party.
15. I have taken into account the information contained in the affidavits of Mr Chen and Ms Leung. I find that the first respondent paid nothing to Mr Chen or Ms Leung during the entire periods of their employment. I also find that neither Mr Chen nor Ms Leung received any superannuation contributions. Each of the employees made requests of the second respondent for payment but to no avail. On 21 November 2008, Mr Chen and Ms Leung left their letters of resignation on the second respondent's desk. On 4 December 2008, they lodged their complaints with the Workplace Ombudsman.
16. The conduct of the respondents suggests a flagrant disregard of their obligations lead to the contraventions. The breaches were deliberate not accidental or inadvertent. The breaches continued for a 4 month period and only ceased when each of the employees tendered their resignation.
17. I accept the evidence contained in the affidavit of Mr Krawczynski of 12 April 2009. As with all the applicant's affidavits relied upon, Mr

Krawczynski's affidavit was tendered by consent and no cross-examination was sought by opposing counsel.

18. Mr Krawczynski says that he was 63 years of age and in reasonably good health. Unfortunately, Mr Krawczynski's wife of 43 years had been a long-time sufferer of a severe bi-polar disorder. More recently, her condition appeared to have worsened resulting in her having to be detained at psychiatric hospitals. She had not worked since about April 2008.
19. Mr Krawczynski says that he had a variety of occupations before commencing work for a business broker in 1989. He says that he later obtained a sales person's licence and a business broker's licence through the Real Estate Institute of South Australia. It is not clear to me when it is that Mr Krawczynski commenced employment with the first respondent but it is clear that he became a Director of the first respondent on 20 February 2001.
20. Mr Krawczynski says that the Managing Director of the first respondent, Mr Rankine, was responsible for employing Mr Chen and Ms Leung. The CVs of each of these new employees indicated that they were well educated and qualified. Mr Chen had a Bachelor of Business Administration from a Taiwanese university which he obtained in 1996, a Master of Commerce (Professional Accounting) Degree from the University of Queensland in 2000 and a Master of Information Technology from Queensland University of Technology in 2001. He became a Certified Practising Accountant in 2006 and obtained a Certificate to be a Property Agent's Representative from RMIT University in 2007. He had been working for various organisations in Australia from 1998 until his employment with the first respondent in July 2008.
21. Ms Leung attended the Church of England Camberwell Girls Grammar School in Melbourne until 1989 after which she obtained a Bachelor of Business (Accounting) Degree from Monash University in 1993, a Master of International Business (Strategy) Degree from the University of Melbourne in 2004 (she graduated as second in her class), a Diploma and Advanced Diploma of Financial Planning (for which she obtained a high distinction) from the Securities Institute of Australia and AXA Financial Planning Internal Education in 2006 and a

Certificate for becoming a Property Agent's Representative from RMIT (for which she again achieved a high distinction) in December 2007. She had a good work history which commenced in 1990 when she started work as a bookkeeper/junior accountant for a number of small businesses in Melbourne. Prior to commencing work with the first respondent, Ms Leung, was as a self employed funds manager.

22. Both employees were clearly intelligent, well qualified and experienced people. They were obviously trusting of the respondents but, sensibly, resigned from their employment within a short period of time when their trust was abused.
23. On or about 8 August 2008, Mr Rankine suffered a stroke resulting in Mr Krawczynski becoming Managing Director of the first respondent. There was no-one else to take on the responsibility. Mr Rankine ceased being a Director of the first respondent on 10 September 2008. Mr Chen and Ms Leung resigned their employment on 21 November 2008.
24. Mr Krawczynski says that in 2008 the first respondent was in a poor financial position. He says that the first respondent made an operating loss of \$43,403 in the year ending 3 June 2008. It had assets of \$10,051 and liabilities of \$94,020. We now know, as previously mentioned in these reasons, that the first respondent has since been put into liquidation.
25. Mr Krawczynski says that he does not own any significant assets. He and his wife live in a house owned by their children. He estimates the furniture and household effects that they own to be worth approximately \$3,000 - \$5,000. He says that he drives a 2001 Holden Statesman with a value of between \$14,000 - \$15,000. There is a loan for the purchase of the car which still has \$22,000 owing.
26. I take into account the matters raised by Mr Krawczynski. It was most unfortunate that Mr Rankine had health issues on 8 August 2008. Those health issues are no excuse however for the failure of the first respondent to make the payments required.
27. The evidence before me of the financial position of the first respondent at the time these 2 employees were engaged suggests that they would

be unlikely to receive the payments that they were entitled to unless they were able to generate so much new business for the first respondent that funds became available. The respondents do not put forward any evidence to suggest that the employees would receive payment other than as a result of business created by the employees.

28. I take into account the fact that the employees have suffered significant loss or damage as a result of the first respondent's breaches.
29. So far as I am aware, the respondents have not been involved in any similar previous conduct. The penalty that I propose to impose will proceed on that basis.
30. I take into account that the 13 contraventions that we are here concerned with, all resulted from the first respondent doing nothing in relation to payment of these employees lawful entitlements and doing nothing to ensure that proper records in relation to the employees employment were kept.
31. It would appear that the first respondent's business enterprise was not large. It certainly was not profitable.
32. Neither respondent has demonstrated contrition nor is there any evidence that corrective action has been taken by either of them to ensure that further breaches do not occur.
33. I take into account that the respondents have pleaded guilty and agreed the many matters that are detailed in the Statement.
34. I accept that the penalty in this matter must reflect the need for both general and specific deterrence. In *Ponzio v B & P Caelli Constructions Pty Ltd* (2007) 158 FCR 543 [93], Lander J had this to say on the question of general deterrence:

*"In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend: Yardley v Betts [1979] 22 SASR 108. The penalty therefore should be of a kind that it would be likely to work as a deterrent in preventing similar contraventions by likeminded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the*

*section. However, the penalty should not be such as to crush the person upon whom the penalty is imposed or used to make that person a scapegoat. In some cases, general deterrence will be the paramount factor in fixing the penalty: R v Thompson [1975] 11 SASR 217."*

35. A little later in his reasons His Honour had this to say on the general topic of deterrence:

*"The penalty must recognise the need for deterrence, both personal and general. In regard to personal deterrence, an assessment must be made of the risk of re-offending. In regard to general deterrence, it is assumed that an appropriate penalty will act as a deterrent to others who might be likely to offend ... The penalty therefore should be of a kind that it would be likely to act as a deterrent in preventing similar contraventions by likeminded persons or organisations. If the penalty does not demonstrate an appropriate assessment of the seriousness of the offending, the penalty will not operate to deter others from contravening the section."<sup>3</sup>*

36. In considering the penalty, I must consider the principle of totality. I must " ... determine an appropriate level of penalty for each contravention, as if it were a separate offence and then ... look at the aggregate of those penalties in the light of the overall conduct of the (respondent), to form a view as to whether that aggregate was out of proportion to that overall conduct."<sup>4</sup> I am satisfied that the penalties that I have imposed satisfy the totality principle. There will be orders accordingly.

37. Taking all of the above matters into account, I am satisfied that, in relation to the first respondent, I should impose a total penalty of \$14,000.00 (fourteen thousand dollars) in relation to the eight contraventions of the ITEAs and the Act and a total penalty of \$3,750.00 (three thousand, seven hundred and fifty dollars) in relation to the five contraventions of the Regulations. The first respondent shall pay a total penalty of \$17,750.00 (seventeen thousand, seven hundred and fifty dollars).

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<sup>3</sup> *Ponzio (supra)* at [93].

<sup>4</sup> See *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* [2008] FCAFC 8 at para 23 and see also paras 18-25, 50-54 and 66-70.

38. In relation to the second respondent, I am satisfied that a total penalty of \$3,000.00 (three thousand dollars) in relation to the eight contraventions of the ITEAs and the Act and a total penalty of \$1,000.00 (one thousand dollars) in relation to the five contraventions of the Regulations is called for. The second respondent shall pay a total penalty of \$4,000.00 (four thousand dollars).
39. I make the orders to be found at the beginning of these reasons.

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**I certify that the preceding thirty-nine (39) paragraphs are a true copy of the reasons for judgment of Simpson FM**

Associate:

Date: 28 April 2011