# FEDERAL COURT OF AUSTRALIA

## BCI Finances Pty Limited (in liq) v Binetter (No 4) [2016] FCA 1351

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| File number: | SAD 5 of 2015 |
| Judge: | **GLEESON J** |
| Date of judgment: | 18 November 2016 |
| Catchwords: | **CORPORATIONS** – directors' duties – scheme for purpose of evading or avoiding liability to pay income tax – companies did not benefit from participation in scheme – whether directors breached duties – whether breach of duties resulted in tax liabilities – whether other respondents knowingly participated in breaches of duty |
| Legislation: | *Corporations Act 2001* (Cth)<br>*Evidence Act 1995* (Cth)<br>*Foreign Evidence Act 1994* (Cth)<br>*Income Tax Assessment Act 1936* (Cth)<br>*Income Tax Assessment Act 1997* (Cth)<br>*Taxation Administration Act 1953* (Cth)<br>*Law Reform (Miscellaneous Provisions) Act 1944* (NSW) |
| Cases cited: | *Allco Funds Management Ltd (Receivers and Managers Appointed) (In Liquidation) v Trust Company (RE Services) Ltd (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)* [2014] NSWSC 1251<br>*Angas Law Services Pty Ltd (in liq) v Carabelas* [2005] HCA 23; (2005) 226 CLR 507<br>*Australian Competition and Consumer Commission v Advanced Medical Institute Pty Ltd (No 2)* [2005] FCA 1357; (2005) 147 FCR 235<br>*Australian Securities and Investments Commission v Hellicar* [2012] HCA 17; (2012) 247 CLR 345<br>*Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; (2009) 75 ACSR 1<br>*BCI Finances Pty Limited v Commissioner of Taxation* [2012] FCA 855; (2012) 89 ATR 861<br>*Beach Petroleum NL v Johnson* [1993] FCA 392; (1993) 43 FCR 1<br>*Belmont Finance Corporation v Williams Furniture Ltd (No 2)* (1980) 1 All ER 392<br>*Bilta (UK) Ltd (in liq) v Nazir* [2015] UKSC 23; [2016] AC 1; [2015] 2 WLR 1168 |

*Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384

*Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969

*Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71

*Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* [2010] NSWSC 233; (2010) 77 ACSR 410

*Chan v Zacharia* [1984] HCA 36; (1984) 154 CLR 178

*Commissioner of Taxation v Firth* [2002] FCAFC 95; (2002) 120 FCR 450

*Commissioner of Taxation v Radilo Enterprises Pty Ltd* [1997] FCA 22; (1997) 72 FCR 300

*Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753; (2012) 89 ATR 357

*Coshott v Prentice* [2014] FCAFC 88; (2014) 221 FCR 450

*Daniels v Anderson* (1995) 37 NSWLR 438; (1995) 118 FLR 248

*Department of Health v Arumugam* [1988] VR 319; (1988) 30 ALR 117

*Deputy Commissioner of Taxation v Austin* [1998] FCA 1034; (1998) 28 ACSR 565

*Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91; (2003) 57 NSWLR 113

*Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109

*Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471

*Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922; (1989) 89 ATC 4540

*Ex parte Ferguson; Re Alexander* (1944) 45 SR (NSW) 64

*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89

*Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181; (2014) 87 NSWLR 435

*Greenhalgh v Arderne Cinemas Ltd* [1951] Ch. 286; [1950] 2 All E.R. 1120

*Grimaldi v Chameleon Mining NL* [2012] FCAFC 6; (2012) 200 FCR 296

*Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367

*Hitch v Stone* [2001] EWCA Civ 63, [2001] S.T.C. 214

*Ho v Powell* [2001] NSWCA 168; (2001) 51 NSWLR 572

*In re Halt Garage (1964 Ltd)* [1982] 3 All ER 1016

*John Alexander's Clubs Pty Ltd v White City Tennis Club Limited* [2010] HCA 19; (2010) 241 CLR 1

*Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298

*Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722

*Krstic v Brindley* [2006] NSWSC 1414

*Lewincamp v ACP Magazines Ltd* [2008] ACTSC 69

*Lewis v Nortex Pty Ltd (In Liq); Lamru Pty Limited v Kation Pty Limited* [2005] NSWSC 482

*Li v The Herald and Weekly Times Pty Ltd* [2007] VSC 109; (2007) ATR 81-887

*Macleod v The Queen* [2003] HCA 24; (2003) 214 CLR 230

*Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449

*Mills v Mills* [1938] HCA 4; (1938) 60 CLR 150

*Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389

*O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262

*Parker v Paton* (1941) 41 SR (NSW) 237

*Paul's Retail Pty Ltd v Sporte Leisure Pty Ltd* [2012] FCAFC 51; (2012) 202 FCR 286

*Permanent Building Society (in Liq) v Wheeler* (1994) 11 WAR 187; (1994) 12 ACLC 674; (1994) 12 ACSR 109

*Peters' American Delicacy Co Ltd v Heath* [1939] HCA 2; (1939) 61 CLR 457

*Pilmer v The Duke Group Ltd* [2001] HCA 31; (2001) CLR 165

*R v Cuenco* [2007] VSCA 41; (2007) 16 VR 118

*Re Hampshire Land Co* [1896] 2 Ch 743

*Re Marseilles Extension Railway Co Ex p. Credit Foncier and Mobilier of England* (1871) LR 7 Ch App 161

*RHG Mortgage Ltd v Ianni* [2015] NSWCA 56

*Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy* [1988] FCA 266; (1988) 18 FCR 449

*Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246

*Sheahan v Thompson (No 2)* [2015] NSWSC 871

*Simmons v New South Wales Trustee and Guardian* [2014] NSWCA 405

*Smithton Ltd v Naggar* [2014] EWCA Civ 939; [2015] 1 W.L.R. 189

*Snook v London & West Riding Investments Ltd* [1967] 2 QB 786

*Spies v The Queen* [2000] HCA 43; (2000) 201 CLR 603

*Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A*

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| | *Firm)* [2009] UKHL 39; [2009] 1 A.C. 1391<br>*Target Holdings Ltd v Redferns* [1996] AC 421<br>*Texxcon Pty Ltd v Austexx Corporation Pty Ltd* [2011] VSC 203<br>*Thomson v Golden Destiny Investments Pty Limited* [2015] NSWSC 1176<br>*Tobin v Ezekiel* [2012] NSWCA 285; (2012) 83 NSWLR 757<br>*Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125; (1996) 9 ANZ Insurance Cases 61-385<br>*Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333<br>*United Group Resources Pty Ltd v Calabro (No 5)* [2011] FCA 1408; (2011) 198 FCR 514<br>*Wardley Australia Limited v The State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514<br>*Whitton v Regis Towers Real Estate Pty Ltd* [2007] FCAFC 125; (2007) 161 FCR 20<br>Austin RP and Ramsay IM, *Ford's Principles of Corporations Law* (16th ed, LexisNexis Butterworths, 2014)<br>Hayne, KM. "Directors Duties and a Company's Creditors" (2014) 38 MULR 795<br>Heydon JD, *Cross on Evidence* (10th ed, LexisNexis Butterworths, 1970) |
| Date of hearing: | 21 August 2015, 1, 2, 3, 4, 7, 9, 28 and 29 September 2015 |
| Registry: | New South Wales |
| Division: | General Division |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Corporations and Corporate Insolvency |
| Category: | Catchwords |
| Number of paragraphs: | 1030 |
| Counsel for the Applicant: | Mr JE Marshall with Mr JA Arnott, Mr B Mostafa and Ms C O'Neill |
| Solicitor for the Applicant: | Cosoff Cudmore Knox (Agent: Clayton Utz) |
| Counsel for the First, Fifth, Seventh and Ninth Respondents: | Mr ID Faulkner SC with Mr T Hollo |

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| Solicitor for the First, Fifth, Seventh and Ninth Respondents: | Hoffmann & Koops |
| Counsel for the Second and Third Respondents: | Mr S Golledge with Mr D Krokmalik |
| Solicitor for the Second and Third Respondents: | Brown Wright Stein |
| Counsel for the Fourth, Eighth and Tenth Respondents: | Mr DL Williams SC with Mr DL Cook and Mr ML Rose |
| Solicitor for the Fourth, Eighth and Tenth Respondents: | Polczynski Lawyers |
| Counsel for the Sixth Respondent: | Mr A Archibald QC with Mr CD Freeman |
| Solicitor for the Sixth Respondent: | ClarkeKann Lawyers |

# ORDERS

**SAD 5 of 2015**

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| **BETWEEN:** | **BCI FINANCES PTY LIMITED (IN LIQUIDATION) (ACN 055 988 531)**<br>First Applicant |
| | **E.G.L. DEVELOPMENT (CANBERRA) PTY LIMITED (IN LIQUIDATION) (ACN 008 517 646)**<br>Second Applicant |
| | **LIGON 268 PTY LIMITED (IN LIQUIDATION) (ACN 051 824 081)** (and others named in the Schedule)<br>Third Applicant |
| **AND:** | **GARY ROBERT BINETTER IN HIS CAPACITY AS THE LEGAL PERSONAL REPRESENTATIVE OF THE LATE EMIL BINETTER**<br>First Respondent |
| | **MARGARET BINETTER IN HER CAPACITY AS THE LEGAL PERSONAL REPRESENTATIVE OF THE LATE ERWIN BINETTER**<br>Second Respondent |
| | **MARGARET BINETTER** (and others named in the Schedule)<br>Third Respondent |
| **JUDGE:** | **GLEESON J** |
| **DATE OF ORDER:** | **18 NOVEMBER 2016** |

**THE COURT ORDERS THAT:**

1. The proceedings against the third and fifth respondents be dismissed.

2. The matter be listed for hearing of submissions on orders to give effect to these reasons, and on the question of costs, on a date to be fixed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## INDEX

## GLEESON J:

1 The applicants are four companies formerly associated with the families of Erwin and Emil Binetter, two brothers who came to Australia from Eastern Europe as refugees in 1950. Erwin and Emil Binetter are now both deceased.

2 After an extensive audit by the Australian Taxation Office ("ATO") which commenced in about July 2006 ("tax audit"), the Commissioner of Taxation ("Commissioner") issued notices of assessment, amended assessment and penalty assessment to the various applicants between December 2009 and July 2010 ("revised assessments"). In the case of the second applicant ("EGL" or "EGL Development"), the revised assessments go back as far as the year ended 30 June 1992. In order to issue revised assessments going back so far in time, the Commissioner was required to form the opinion that there had been fraud or evasion.

3 After several years disputing the revised assessments, the applicants went into liquidation. The joint and several liquidators of each of the applicants are John Sheahan and Ian Russell Lock ("liquidators").

4 The liquidators claim that the applicants are entitled to the monetary relief from the respondents, quantified principally by reference to the tax liabilities arising from the revised assessments. Claims for relief are also made with respect to the costs of the winding up of the applicants and there are claims for ancillary relief in the nature of charging orders over various identified assets. The claims totalled over $120 million as at 27 September 2015.

5 In their opening submissions, the liquidators stated that the claims are primarily made on the basis of rights to equitable compensation.

6 The claims are pleaded in a second further amended statement of claim filed 7 September 2015 ("statement of claim"). In summary, claims are based on allegations of:

(1) breach of fiduciary, common law, equitable and or statutory duties owed to the various applicants by various respondents who were directors of the applicants at various times; and

(2) knowing participation by other respondents in the breaches of duty by the director respondents.

7 The alleged breaches by the director respondents concern the applicants' dealings with two banks in Israel: the Bank Hapoalim in the case of the first applicant ("BCI" or "BCI Finances") and the Israel Discount Bank ("IDB") in the case of the other applicants.

8 The liquidators' case is based on a complex analysis of the transactions between the applicants and the two Israeli banks, and on the factual context in which those transactions took place from 1988. In summary, the liquidators argue that the respondents participated in a scheme for the purpose of evading or avoiding liability to pay income tax. The alleged scheme involved, as an important element, using funds in Switzerland or Israel (sometimes referred to as "offshore deposits") as security for advances from the Israeli banks of amounts equivalent to the offshore deposits. The liquidators contend that the respondents' conduct in participating in the scheme led the applicants to incur the liabilities which arose when the revised assessments were issued. Those liabilities comprise income tax, penalties and interest incurred under the *Income Tax Assessment Act 1936* (Cth) ("ITAA 1936"), the *Income Tax Assessment Act 1997* (Cth) ("ITAA 1997") and the *Taxation Administration Act 1953* (Cth)

("TAA"). In summary, the liabilities arose from the disallowance of deductions for interest expenses claimed to have been paid to the Israeli banks and the inclusion of amounts transferred from the Israeli banks to the applicants as part of the applicants' assessable income.

**The Commissioner's proceedings?**

9 Mr Williams SC, who appeared as senior counsel for the fourth, eighth and tenth respondents ("Andrew Binetter parties") submitted that the proceedings should be characterised as the Commissioner's proceeding. He noted that the common denominator in respect of the applicants is that all of them have outstanding tax assessments following the tax audit. Mr Williams SC also noted that the revised assessments had led to extensive litigation between the applicants and the Commissioner before both this Court and the Administrative Appeals Tribunal ("AAT").

10 Mr Williams SC argued that the liquidators were appointed by or at the insistence of the Commissioner; the only creditor of the applicants (apart from related parties) is the Commissioner; the applicants are funded in this proceeding by the Commissioner; the applicants have been indemnified in respect of their costs (or a substantial part) in this proceeding by the Commissioner; the Commissioner has given an undertaking to the Court (by way of security for costs in respect of any adverse costs order); and the Commissioner has given security for the undertaking as to damages in relation to freezing orders made in the proceeding.

11 Mr Williams SC submitted that the Court should not be "distracted" by the "interposition" of the applicants or the liquidators between the Commissioner and these claims.

12 For their part, the liquidators emphasised that it was not necessary for them to show that the revised assessments by which the applicants incurred liabilities are correct. Their case was that the revised assessments are conclusive evidence of the due making of the assessments and that the amounts and particulars in the notices of assessment are relevantly correct: cf. ss 175 and 177 ITAA 1936.

## PARTIES

### Applicants

#### *BCI*

13 BCI was incorporated on 1 May 1992. Its registered office was at 883 Rawson Road, Rose Bay, New South Wales, the home address of Erwin and Margaret Binetter, from 17 October 1996. BCI's principal place of business was at that address from 30 June 1994.

14 Erwin Binetter died on 25 August 2009. His widow, Margaret Binetter, in her capacity as legal personal representative of the late Erwin Binetter, is the second respondent. Margaret Binetter is also the third respondent. Erwin and Margaret Binetter are the parents of Andrew Binetter, the fourth respondent and Michael Binetter, the sixth respondent. They are also the parents of Ronald Binetter, who gave unchallenged affidavit evidence on behalf of the applicants. I accept Ronald Binetter's evidence.

15 According to BCI's amended appeal statement ("BCI's tax appeal statement") filed in Federal Court proceedings NSD 626 of 2011 ("BCI's tax appeal"), at all material times BCI carried on business as a financier "on lending funds it obtained to other entities who used the funds for business purposes".

16 BCI was:

(1) placed in administration under the provisions of Pt 5.3A of the Corporations Act on 5 March 2014;

(2) wound up by resolution of its creditors passed pursuant to s 439C of the Corporations Act on 23 April 2014; and

(3) wound up by order of this Court made on 27 August 2014.

*Directors of BCI*

17 Erwin Binetter was a director of BCI from 4 May 1992 until his death on 25 August 2009.

18 Erwin's brother, Emil Binetter was a director of BCI from 4 May 1992 to 22 November 2012. Emil Binetter died on 17 December 2014. His son, Gary Binetter, in his capacity as legal personal representative of the late Emil Binetter, is the first respondent. Gary Binetter is also the fifth respondent.

19 An ASIC search shows that Margaret Binetter, Andrew Binetter and Gary Binetter were also directors of BCI, from 25 January 1994. There is a minute of a meeting of the directors of BCI held on 25 January 1994, which records the consents to these appointments.

20 There is a document entitled "Authority for Operations" which identifies the signature of persons authorised to operate an ANZ Bank account in the name of BCI. The document refers to an authority form dated 17 May 1993. There is an undated letter signed by Erwin and Emil Binetter which is probably the authority form. That letter requests that ANZ open a Swiss franc currency account for BCI. It lists Michael, Erwin, Emil, Gary and Andrew Binetter as individuals authorised to arrange transfer of fund by telephone and/or facsimile and purports to attach a list of authorised signatories and specimen signatures. The letter identifies Michael Binetter's title as "authorised person", and Erwin, Emil, Gary and Andrew Binetter each as "director". The "Authority for Operations" also identifies Erwin, Margaret, Gary and Andrew Binetter as holding the office of "director", while Michael Binetter is said to hold the office of "authorised signatory". Each of Erwin, Emil, Margaret, Andrew, Gary and Michael Binetter provided specimen signatures on the "Authority for Operations".

21 Despite these documents, I do not find that Margaret, Andrew and Gary Binetter were directors of BCI prior to the date recorded on the ASIC search. In my view, it is more likely that the documents were prepared in anticipation of their subsequent appointment as directors.

22 The liquidators allege that Michael Binetter was a "de facto" or "shadow" director of BCI from no later than 20 May 1993. That is, the liquidators allege that Michael Binetter was not formally appointed as a director of BCI, but that he was a person who acted at all times in the position of a director of BCI and/or a person in accordance with whose instructions or wishes the other directors of BCI were accustomed to act within the definition of para (b) of "director" in s 9 of the Corporations Act.

23 Michael Binetter is or was a solicitor, specialising in commercial tax law. Having regard to his professional background, I infer that he deliberately accepted the role of "authorised person" in connection with BCI and sought to avoid being appointed or identified as a director of BCI.

24 Although they each held the role of director of BCI from January 1994, the evidence does not suggest that either Margaret or Gary Binetter played an active role in the management of

BCI. As will appear below, Erwin, Emil, Andrew and Michael Binetter were actively involved in the management of BCI at various times.

*Shareholders of BCI*

25 At all relevant times, the shareholders of BCI were Erwin and Emil Binetter.

26 In the absence of any evidence to the contrary, I infer from the initial directorships and the shareholdings of BCI that Erwin and Emil Binetter caused the incorporation of BCI.

***EGL***

27 EGL was incorporated on 20 June 1975. Its registered office was at 883 Rawson Road, Rose Bay from 28 October 1996 to 14 October 2014.

28 According to the statement of facts, issues and contentions filed by EGL in AAT proceedings 1704 to 1709 of 2011 ("EGL's SOFIC"), the business of EGL was that of a finance company. There is no evidence that the nature of its business changed over the period of relevance to this case.

29 The Andrew Binetter parties did not dispute that the sole activity of EGL, from December 1988, was to operate as an intermediary in relation to transactions with IDB.

30 EGL was wound up in insolvency by order of the Supreme Court of New South Wales ("Supreme Court") on 2 March 2015 on the application of the Deputy Commissioner of Taxation.

*Directors of EGL*

31 Emil Binetter was a director of EGL from 31 January 1990 to 28 September 2001.

32 Erwin Binetter was a director of EGL from 18 July 1975 until his death on 25 August 2009.

33 Again, there is ample evidence that Erwin and Emil Binetter were actively involved in the management of EGL.

34 Andrew Binetter was a director and secretary of EGL from 28 September 2001 until at least 20 April 2012. He was actively involved in the management of EGL from around the time of his appointment as a director of EGL.

35 Gary Binetter was a director of EGL from 16 October 1996 to 28 September 2001. As for BCI, the evidence does not suggest that Gary Binetter played an active role in the management of EGL.

36 Michael Binetter was a director of EGL from 16 October 1996 to 28 September 2001. Thereafter, the liquidators allege, he was a "de facto" or "shadow" director of EGL.

*Shareholders of EGL*

37 The shareholders of EGL were the seventh respondent ("Milgerd" or "Milgerd Nominees") and the eighth respondent ("Erma" or "Erma Nominees").

38 Milgerd is a combination of the names Emil and Gerda. At all relevant times, the shares in Milgerd were held by Emil Binetter and Gerda Binetter, Emil Binetter's wife.

39 Erma is a combination of the names Erwin and Margaret. At all relevant times, the shareholders of Erma were Erwin Binetter (or his estate) and Margaret Binetter.

***Ligon 268***

40 The third applicant ("Ligon 268") was incorporated on 22 April 1991. The company was incorporated, at the suggestion of Erwin Binetter, to be the trustee of the Bankstown Eye Trust. This trust was associated with Ronald Binetter, an ophthalmic surgeon. The paperwork for the incorporation of the company and the establishment of the trust, was arranged by Michael Binetter and presented to Ronald Binetter for signing.

41 In about 1998 or 1999, Ligon 268 expanded its activities to include lending funds to companies associated with Erwin Binetter.

42 The registered office of Ligon 268 was at 883 Rawson Road, Rose Bay from 16 July 1991 to 14 October 2014.

43 Ligon 268 was wound up in insolvency by order of the Supreme Court on 2 March 2015 on the application of the Deputy Commissioner of Taxation.

44 Ligon 268 conducted the administration of Ronald Binetter's medical practice. Ronald Binetter paid the costs incurred by Ligon 268 along with a 15% service fee. Ronald Binetter's income came from his surgical practice and he was not a signatory on Ligon 268's bank accounts. When his practice became successful, he lent money to Ligon 268 at the request of Erwin Binetter.

*Directors of Ligon 268*

45 Erwin Binetter became a director of Ligon 268 on 6 September 1991 and ceased to be a director on his death on 25 August 2009.

46 Andrew Binetter was a director and secretary of Ligon 268 from 30 June 1992.

47 Michael Binetter was a director of Ligon 268 from 5 July 1991 to 30 June 1992. Thereafter, the liquidators allege, he was a "de facto" or "shadow" director of Ligon 268.

48 Ronald Binetter was appointed as a director of Ligon 268 on 5 July 1991 and ceased to be a director on 27 March 1992, at his request.

49 On the available evidence, the affairs of Ligon 268 were primarily managed by Erwin Binetter and Andrew Binetter at various times.

*Shareholders of Ligon 268*

50 The shareholders of Ligon 268 were Erwin Binetter and Michael Binetter, with Michael Binetter owning 9 of the 10 issued shares.

***Binqld***

51 The fourth applicant ("Binqld" or "Binqld Finances") was incorporated on 12 March 2006. From incorporation until 12 December 2010, Binqld had its registered office at 883 New South Head Road, Rose Bay. This appears to be an alternate address for the home of Erwin and Margaret Binetter.

52 A file note of a meeting between Michael Binetter and Mark Douglass, lawyer, on 26 October 2007, records that Binqld was set up to "buy Emil's shares on our side".

53 However, in an affidavit affirmed by Andrew Binetter in AAT proceedings 275 to 277 of 2011 ("Binqld tax appeal"), Andrew Binetter stated that Binqld was "specifically set up for the purposes of borrowing money from IDB and then on-lending it to other entities for the purposes … outlined in" para 22 of his affidavit. Paragraph 22 states:

> Therefore in the second half of 2005, the following were the funding needs of the Binetter entities:
>
> (a) Ligon 158 required funds to start the construction work on the Pagewood premises;
>
> (b) Ligon 158 and Ligon 237 required funds to increase their investment in the Nudie business;

(c) Tamarama Fresh Juices needed to purchase equipment for the Nudie and Tamarama business;

(d) Funds to be paid to Winmar, which was the nominee for a partnership of investors, to enable Winmar as nominee to pay up its obligations concerning the investment in an Investec fund in Australia. Ligon 158 was one of the partners in that partnership.

54 The Pagewood premises mentioned by Andrew Binetter were premises owned by Ligon 158 and located at Corish Circle, Pagewood. Those premises were destroyed by fire in May 2004. According to Andrew Binetter, records destroyed in the fire included records of EGL, Ligon 158, Erma and BCI.

55 The Nudie juice business (described in more detail below) operated from the Pagewood premises, as did the business of Tamarama Fresh Juices, which owned the equipment located at the premises and supplied product manufactured to the Nudie juice business's specifications. Michael Binetter also maintained an office from which he practised as a solicitor at the Pagewood premises from 1997 to at least October 2007.

56 Andrew Binetter's affidavit evidence demonstrates that a substantial purpose for the establishment of Binqld was to obtain funds from IDB, to fund and invest in the Nudie juice business.

57 In his affidavit, Andrew Binetter also stated:

> At all times the only income-producing activity of Binqld was on-lending as referred to in this affidavit. The only receipt of Binqld was the interest payments received and any ancillary interest on bank accounts. The only assets of Binqld are the debts from on-borrowers of loans.

58 Binqld was wound up in insolvency by order of the Supreme Court on 2 March 2015 on the application of the Deputy Commissioner of Taxation.

*Directors of Binqld*

59 Andrew Binetter was a director and secretary of Binqld from 12 April 2006. The available evidence shows that Binqld was principally managed by him.

60 The liquidators allege that, at all times, Michael Binetter was a "de facto" or "shadow" director of Binqld.

*Shareholder of Binqld*

61 At all times, Michael Binetter was the sole shareholder of Binqld.

**Respondents**

62 The roles of the first to sixth respondents as directors of the applicants are identified above.

63 Milgerd was incorporated on 4 November 1971. Emil Binetter was a director of Milgerd from 4 November 1971 until 22 November 2012. Gerda Binetter was a director from 4 November 1971 to 19 February 2003. Gary Binetter was a director of Milgerd from 18 January 1993. Milgerd appears to have been principally managed by Emil Binetter.

64 Erma was also incorporated on 4 November 1971. Erwin Binetter was a director of Erma from 4 November 1971 until his death. Margaret Binetter was also a director of Erma from 4 November 1971. Andrew Binetter was a director from 17 April 1996. The liquidators allege that Michael Binetter was a "shadow" director of Erma during an unspecified period. Both Erwin and Andrew Binetter participated in the management of Erma.

65 The ninth respondent ("Ligon 159") was incorporated on 26 February 1988. Emil Binetter was a director of Ligon 159 from 9 May 1988 until 22 November 2012. Gerda and Gary Binetter were directors from 9 May 1988. As at January 2015, the shareholders of Ligon 159 were Gary Binetter, as well as his sisters, Debbie and Lisa Binetter. In the absence of evidence that Gerda or Gary Binetter participated actively in the management of Ligon 159, it is more likely than not that Ligon 159 was principally managed by Emil Binetter.

66 The tenth respondent ("Ligon 158") was also incorporated on 26 February 1988. Erwin Binetter was a director of Ligon 158 from 6 July 1991 until his death. Margaret Binetter was also a director of Ligon 158 from 6 July 1991. Andrew Binetter was a director from 9 May 1988. As with Erma, the liquidators allege that Michael Binetter was a "shadow" director of Ligon 158 during an unspecified period.

67 The shareholders of Ligon 158, as at January 2015, were Erwin, Margaret, Andrew, Michael and Ronald Binetter, as well as Peter Binetter, the fourth son of Erwin and Margaret Binetter.

***General observations concerning the respondents and their activities in Australia***

68 The respondents were represented by four sets of lawyers. I will refer to Gary Binetter as legal personal representative of the late Emil Binetter, Gary Binetter in his own right, Milgerd and Ligon 159 as the "Gary Binetter parties"; Margaret Binetter as legal personal representative of the late Erwin Binetter and Margaret Binetter in her own right as the "Margaret Binetter parties" and Andrew Binetter, Erma and Ligon 158 as the "Andrew Binetter parties". Michael Binetter was separately represented.

69 The respondents adduced no oral evidence in this proceeding, but the evidence tendered by the liquidators included affidavits made by Emil, Margaret, Andrew and Gary Binetter in tax appeal proceedings brought by the various applicants.

***Erwin and Emil Binetter***

70 All causes of action subsisting against each of Erwin and Emil Binetter have survived against their respective estates: *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 2(1).

71 According to an affidavit affirmed by Andrew Binetter, Erwin and Emil Binetter conducted a shoe manufacturing business at Marrickville, Sydney until around 1990. At some time, they commenced investing in property and property development. As appears below, by the time of BCI's incorporation in 1992, the brothers appear to have amassed a portfolio of property investments which they valued in the several millions of dollars. Erwin and Emil Binetter engaged in numerous joint business ventures. Examples are the shoe manufacturing business, and the joint ownerships and directorships of BCI and EGL.

72 Gary Binetter gave evidence, in an affidavit affirmed on 20 December 2012 in tax appeal proceedings brought by Civic Finance Pty Ltd (in liquidation) and Advance Finances Pty Ltd (in liquidation), to the effect that, in about 1997, Emil and Erwin Binetter had decided to separate their business dealings. However, Emil and Gary Binetter continued to be directors of EGL until September 2001 and Erwin and Emil Binetter were directors of BCI until their respective deaths.

***Erwin Binetter***

73 Erwin Binetter died in August 2009 at the age of 85. By April 2004, he had been diagnosed with dementia according to medical reports which were in evidence. Ronald Binetter gave evidence of accompanying Erwin Binetter on a trip to Israel in 2003, during which he observed his father to be physically unwell and showing early signs of vascular dementia and memory loss. According to Ronald Binetter, Erwin Binetter told him that the purpose of the trip was to talk to the banks.

74 Ronald Binetter also gave an account of conversations with Erwin Binetter in around 2007 or 2008 in which Erwin Binetter said:

> When Nudie is sold, there will be millions of dollars in profit and I will give you a percentage of my share.

75 Ronald Binetter's evidence was that, based on these conversations, he trusted his father. I infer that Ronald Binetter did not consider that Erwin Binetter lacked mental capacity at the time of the conversations, to the point where Ronald Binetter did not place trust in him. Thus, although I accept that Erwin Binetter was diagnosed with dementia, I do not find that he lacked mental capacity to make decisions affecting various of the applicants at any point in time prior to his death.

***Gary Binetter***

76 Between 1986 and 2007, Gary Binetter was employed as a flight steward with Qantas Airways. ASIC searches show that he had an address in Double Bay, in Sydney, while he was a director of BCI and EGL. In more recent times, Gary Binetter has lived in Israel.

***Michael Binetter***

77 According to Ronald Binetter, Michael Binetter worked at law firms including Speed & Stracey, Andersen Legal, Kevin Munro & Associates and, as of 15 July 2015, operated his own law firm called Binettervale Lawyers. In more recent times, Michael Binetter has resided in New York.

***The Nudie juice business***

78 In May 1990, Erwin Binetter set up a company called Tamarama Fresh Juices Pty Ltd and appointed himself and Andrew Binetter as its directors. The company bought a business called Tamarama Fresh Juices, which operated from Marrickville. According to Andrew Binetter, Erwin Binetter arranged the funding to buy this business and, in about 1992, to buy out a competitor to increase the scale of the juice operation.

79 Between 1990 and 1993, the juice business tripled in size. To accommodate it, Erwin Binetter organised the purchase of the Pagewood premises. The premises were owned, at least by July 2003, by Ligon 158.

80 Andrew Binetter was appointed a director of Nudie Pty Ltd from about 31 October 2002. Ligon 158 is a shareholder in Nudie Pty Ltd, and also a shareholder in Nudie Foods Pty Ltd.

81 The Nudie brand was launched in January 2003. From July 2003, the Nudie juice business was carried out from the Pagewood premises.

82 In May 2004, Andrew Binetter was appointed a director of Nudie Foods Pty Ltd.

83 On 12 July 2004, Andrew Binetter was appointed a director of Nudie Foods Australia Pty Ltd. Andrew Binetter became the Chief Operating Officer of the Nudie juice business in October 2004, and the Chief Executive Officer in March 2005.

84 According to an affidavit affirmed by Andrew Binetter in the Binqld tax appeal, in 2005 Erwin Binetter expressed the view that "[w]e should take every opportunity to increase our interest in Nudie so that we can effectively control Nudie". Thereafter, according to Andrew Binetter, steps were taken to achieve that end.

85 In this affidavit, Andrew Binetter recounted how he had described the Nudie juice business to IDB bank officers in late 2005 as follows:

> 28. … In March 2005 I was appointed CEO of the Nudie fruit juice business. The juice business has really taken off in Australia. Nudie was the No. 1 new company start-up in 2004 as voted by Australian Business Review Weekly Magazine, which is the Australian equivalent of Forbes Magazine. We are getting a lot of good financial press in the Australian Business media. We have even been in discussion with a Richard Branson company with a view to acquiring it. Nudie is being sold in more than 4,000 shops in Australia including major supermarket chains. Nudie employs more than 100 people.
>
> 29. … CHAMP, who are Australia's largest private equity business owned by Castle Harlan in New York in 2004 invested an initial investment of $5.5 million in the Nudie business. This investment values the business Nudie at $29 million.
>
> 30. … The fire at the factory in May 2004 where the Nudie business was being run from set the Nudie business back but we are rebounding from this set back.
>
> 31. The fire destroyed all the equipment used to manufacture the juices for the Nudie and Tamarama business but Nudie outsourced the manufacture to various premises around Australia. But we need to get back into the Pagewood premises and manufacture the juice there, which will be more profitable for Nudie. My father wants to set up a new company to borrow monies from your bank so that it can on lend to Ligon 158, so that Ligon can rebuild the Pagewood premises so that Nudie can get back into its premises. Also we want to borrow money so that Ligon 158 and Ligon 237 can increase their investments in the Nudie Group business. Currently we own about 27.5% of Nudie, but my father wants to take control of Nudie because as you can see it is a growing business. Tamarama Fresh Juices had the equipment for the juice business at the Pagewood factory which was also destroyed in the fire. A loan is also needed so Tamarama can buy equipment for Nudie and the Tamarama business to be kept at the Pagewood premises.
>
> 32. … My father also wants to borrow monies to invest in the Investec Fund, it is a private equity fund run by David Gonski. As you know he is a South African born Jewish Australian who is regarded as one of the best business minds in Australia. He is Chairman of Investec. David has invited my father to invest alongside him in the Fund. Also the Binetter entities may need funding for other business purposes.

86 In late December 2014, the Nudie juice business was sold for approximately $80 million.

***"Binetter Entities"***

87 The statement of claim defines, as the "Binetter Entities", Erwin and Emil Binetter together with the third to tenth respondents. The expression "Binetter Entities" is used in the pleading of the fiduciary duties allegedly owed to the applicants by their various directors. The use of the collective description "Binetter Entities" reflects the liquidators' case that the respondents were collectively responsible for giving effect to a single scheme in which the respondents had agreed to participate from December 1988 or, alternatively, November 1993. The evidence did not support such a simple analysis. Rather, the evidence was that different respondents participated to different extents in the conduct to which the applicants pointed as evidence of the scheme, and the giving effect to the scheme. This is not surprising because the events on which the applicants relied spanned from 1988 to the present, that is, a period of over 25 years.

88 On the other hand, there is evidence that the affairs of the applicants were treated as "family" affairs, in which family members had an interest.

89 For example, in 2003, either Michael or Andrew Binetter told Ronald Binetter that they needed to discuss loans with the Israeli banks. Ronald was asked to come along so he could look after Erwin Binetter, who was not well. The fact that Ronald was asked and agreed to make this trip supports a conclusion that the dealings with the Israeli banks were for the ultimate benefit of Michael, Andrew and Ronald Binetter as well as their father. Erwin, Michael, Andrew and Ronald Binetter travelled to Israel to meet with Bank Hapoalim.

90 According to Ronald Binetter, sometime in the late 2000s, Michael Binetter said to him:

> Tax assessments have been received for a couple of the family companies. They are large tax assessments and they include Ligon 268.

91 Ronald Binetter gave evidence of a conversation with Andrew Binetter, around the time of Erwin Binetter's death (that is, in August 2009), to the following effect:

> Ronald: What are the assessments about?
>
> Andrew: They've assessed us for taxes on the basis that we have loans. They say that those loans are based on deposits we have with banks overseas and that's the basis of the assessments.
>
> Ronald: We do have money overseas.
>
> Andrew: We have money overseas and it is used as part of the security for the loans.

92 This conversation must have taken place after the issue of the revised assessments to one or more of the applicants. As noted earlier, revised assessments were issued to BCI and Binqld in December 2009.

93 In about August or September 2010, at a "family meeting", Andrew Binetter said to Ronald Binetter:

> We need to go overseas again, Ron and you need to come with us …
>
> Michael and I are in charge of our dispute with the tax office. If we cannot travel, because we have our passports taken, then we need you to know where we go.

94 In October 2010, Andrew, Michael and Ronald Binetter took a complicated trip to Switzerland and Israel, apparently for the purpose of protecting or promoting shared financial interests. First, they flew to Frankfurt, Germany. One of Andrew or Michael said to Ronald:

> We are going to Zurich but we don't want an entry stamp into Zurich. We will fly into Frankfurt, then we will hire a car and we will drive from Frankfurt to Zurich.

95 In Zurich, Andrew, Michael and Ronald Binetter visited UBS and Bank Hapoalim. One of Andrew or Michael introduced Ronald Binetter to a banker at Bank Hapoalim.

96 After visiting Zurich, the three brothers travelled to Tel Aviv where they arrived on 31 October 2010. On 1 November 2010, they visited IDB. At IDB, they met a banker. One of Andrew or Michael introduced Ronald Binetter to her. Andrew and Michael participated in a lengthy meeting which Ronald Binetter left after about 30 minutes.

97 That night, after dinner, the brothers met Baruch Etzion. Mr Etzion was a former employee of Bank Hapoalim. The meeting was brief and the conversation was social and mostly between Andrew and Michael Binetter and Mr Etzion.

98 On 2 November 2010, the brothers flew back to London. On 3 November 2010, they flew to Lyon and drove to Geneva. After lunch at Geneva, they went to the offices of Bank Hapoalim. Andrew and Michael Binetter left Ronald Binetter at the reception for about 15 or 20 minutes and, when they returned, one of them introduced Ronald Binetter to a young banker. Andrew Binetter said: "We just want you to know where the bank is and how to get there".

99 Finally, there is correspondence from Ligon 268 to IDB dated between November 2000 and May 2006 which is marked with file names that each included the words "family affairs".

**Dealings with the Australian Taxation Office ("ATO")**

100 The dealings between various of the respondents on behalf of the applicants and the ATO over the period from 1988 to the present can be divided roughly into the following periods, which overlap to some extent:

(1) The period during which the applicants lodged annual income tax returns upon which the Commissioner issued assessments;

(2) The period of the audit of entities associated with members of the families of Erwin and Emil Binetter, including the applicants;

(3) The period during which the applicants disputed the revised assessments issued following the audit.

101 As part of their case, the liquidators contended that the directors of the applicants "deliberately set out to conceal from, and therefore mislead, the Commissioner as to the precise, correct and true nature of the transactions entered into by BCI with Bank Hapoalim and by EGL, Ligon 268 and Binqld with IDB". This submission reflects a case which did not always focus on the conduct of individual respondents.

102 During the second and third periods, the applicants were represented by the lawyer Mark Douglass in their dealings with the ATO. There is evidence that Andrew and Michael Binetter both gave instructions to Mr Douglass or staff of his law firm on the basis of which he dealt with the ATO on behalf of the various applicants. Generally, there was no evidence that Mr Douglass acted on the direct instructions of any of Emil, Erwin, Margaret or Gary Binetter.

103 In closing submissions, Mr Williams SC acknowledged, in very general terms, that there was conduct in the course of the tax appeal proceedings that no one would suggest was honourable conduct. However, he argued, the Court does not need to make detailed findings about the respondents' conduct after the commencement of the tax appeal proceedings because that conduct is "legally inconsequential".

104 On behalf of the liquidators, Mr Marshall SC argued that lies allegedly told by Andrew, Emil and Gary Binetter in affidavits in the tax appeal proceedings were relevant to the factual question of the ownership of offshore deposits that secured advances from the Israeli banks to the applicants. First, it was submitted that alleged lies by Andrew Binetter about the existence of a deposit provide a basis to infer that he was in a position to control the deposits. As set

out below, I have found that Andrew was one of the members of the Binetter family who was in a position to control deposits that formed security for advances made by the Israeli banks to the various applicants. Even assuming that Andrew Binetter told the relevant lies, I do not accept that this evidence adds weight to this finding.

105 Second, it was submitted that the alleged lies assist to prove one of the components of the alleged scheme, namely that the existence of the deposits would not be disclosed. Andrew Binetter conceded that none of the respondents ever disclosed the deposits to the Commissioner. There is no evidence that any of the respondents ever had any intention to disclose the existence of the deposits to the Commissioner. Putting aside the question of the alleged scheme, there can be no serious doubt that the dealings between the Israeli banks and BCI and EGL were documented in a manner that was intended by the applicants to conceal the existence of the deposits. (The position of Ligon 268 and Binqld is different because there was minimal evidence of the terms of their dealings with IDB.) It is not necessary to make findings about the alleged lies to fortify that conclusion. Judgment writing should not be "a process that is oppressive and that produces unnecessary prolixity": *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389 at [2] (Allsop P, McColl JA agreeing).

**Israeli banks**

***Bank Hapoalim Israel***

106 The liquidators contended that Bank Hapoalim is a banking corporation organised and existing under the laws of the State of Israel which, at all times material to this action, acted through its central bank at 50 Rothschild Boulevard, Tel Aviv, Israel. In BCI's tax appeal statement, BCI referred to Bank Hapoalim as an entity with which BCI had entered into loan agreements in 1993, the duration of one of which was subsequently extended in about 1997 and in 2006.

107 There are documents obtained from Bank Hapoalim and other documents from which I infer that Bank Hapoalim was carrying on a business of banking in Israel, which included the provision of loans.

*Baruch Etzion*

108 Mr Etzion made a statutory declaration dated 16 December 2009, in which he described himself as a lawyer admitted in Israel and a former Deputy General Manager of the Central Branch of Bank Hapoalim in the period 1985 to 1999. From 1999 to his retirement on

31 December 2001, Mr Etzion worked in the legal department of Bank Hapoalim. On 4 October 2011, Mr Etzion affirmed an affidavit in BCI's tax appeal.

109 Mr Etzion was not called as a witness in this proceeding, however, the liquidators tendered the statutory declaration and the affidavit. The evidence of Deborah Huber, set out in detail below, strongly suggests that Mr Etzion had been corrupted by one or more members of the Binetter family. Ms Huber is the wife of Ronald Binetter. She gave evidence following the grant of a certificate under s 128 of the *Evidence Act 1995* (Cth) and was not cross-examined. I accept Ms Huber's evidence.

110 As set out in more detail below, Mr Etzion first met Erwin and Emil Binetter in about 1992. He was introduced to them by Mr Loew-Beer of IDB, Mr Etzion claimed to have been in charge of the "credit/loan department for major customers of the Bank" and, in that role, dealt with the "loans" given by Bank Hapoalim to BCI.

111 After their first meeting, Mr Etzion met Erwin and Emil Binetter occasionally in Israel over several years. The meetings occurred in his office at the bank. In November 1997, Mr Etzion was introduced to Andrew Binetter by Erwin Binetter – again, in Mr Etzion's office in Israel.

112 The liquidators submitted that Mr Etzion was deployed on behalf of BCI to give evidence of fact as well as "expert" evidence to bolster the case of BCI in BCI's tax appeal. Mr Etzion purported to give evidence of the banking practices of Bank Hapoalim. More significantly, in my view, Mr Etzion gave evidence of requesting "a list of assets so that we can see what the security will be" and evidence of the security for the "loans" to BCI without reference to the now admitted overseas cash deposits. In the light of those deposits, that evidence was plainly misleading. Andrew and Michael Binetter met with Mr Etzion in November 2010, after the revised assessments were issued. Andrew and Michael Binetter were in charge of the family's tax disputes. It is likely that Andrew Binetter and Michael Binetter gave instructions to BCI's lawyers for this misleading evidence to be served in BCI's tax appeal. I find that they knew that the evidence was misleading at the time that it was served.

113 Mr Etzion also gave expert evidence of Israeli banking practices in support of tax appeal proceedings brought by Rawson Finances Pty Ltd ("Rawson Finances"), a company associated with Erwin and Andrew Binetter. The Andrew Binetter parties did not dispute that the effect of Mr Etzion's evidence was that transactions with Israeli banks and in the amounts and of the type that were the subject of those proceedings were not unusual and did not

require security other than personal guarantees. Such evidence would be irrelevant and misleading if the relevant transactions did, in fact, involve the provision of additional security such as cash deposits.

***Bank Hapoalim Switzerland***

114 The liquidators contended that each of Bank Hapoalim (Switzerland) Limited, Bank Hapoalim (Schweiz) and Banque Hapoalim (Suisse) SA was, and together were, banks carrying on the business of banking in Switzerland from an office at 33 Stockerstrasse Zurich, Switzerland (together, "Bank Hapoalim Switzerland") as part of and/or in conjunction with, the banking business operated by Bank Hapoalim. The written correspondence between Bank Hapoalim Switzerland and Bank Hapoalim supports an inference to this effect.

***Israeli Discount Bank Limited***

115 The liquidators contended that IDB is a banking corporation organised and existing under the laws of the State of Israel which, at all times material to this action, acted from a branch at 16 Mapu Street, Tel Aviv, Israel.

116 In EGL's SOFIC, EGL referred to IDB as an entity with which EGL had entered into loan agreements in 1988 and 1993.

117 In its statement of facts, issues and contentions ("Ligon 268's SOFIC") filed in AAT proceedings 1721 to 1730 of 2011 ("Ligon 268's tax appeal"), Ligon 268 referred to IDB as an entity with which Ligon 268 had entered into loan agreements between about May 1998 and April 2006.

118 In its further amended statement of facts, issues and contentions ("Binqld's SOFIC") filed in the Binqld tax appeal, Binqld referred to IDB as an entity with which Binqld had entered into loan agreements in 2006 and 2007.

119 It was not in dispute that IDB carried on a business of banking in Israel, which included the provision of loans.

120 Hagai Peled and Fernanda Barisaac were representatives of IDB with whom some of the respondents had dealings.

**PRINCIPLES CONCERNING FACT FINDING**

***Failure to give evidence***

121 None of Margaret, Andrew, Gary and Michael Binetter gave evidence. The documentary evidence demonstrates that many of the relevant facts were matters about which Andrew, Gary or Michael Binetter could have given evidence.

122 Where a plaintiff has the onus of proving a matter, and "relevant facts are peculiarly in the knowledge of the defendant or where the defendant has the greater means to produce evidence relating to those facts", then if the plaintiff provides sufficient evidence from which the matter may be inferred, "the defendant then comes under an evidential burden, or an onus of adducing evidence": *Krstic v Brindley* [2006] NSWSC 1414 at [26].

123 Where a fact is peculiarly within the knowledge of a party to litigation, slight evidence of that fact may suffice to prove the fact unless that evidence is explained away by the party with the knowledge of the fact: *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367 at 375; *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at [121]; *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; *Ex parte Ferguson; Re Alexander* (1944) 45 SR (NSW) 64 at 67, 70.

124 A failure by respondents to deny or explain facts when it was in the respondents' exclusive power to do so allows increased strength or weight to be given to primary facts favourable to the applicants and allows inferences favourable to the applicants to be more confidently drawn: *United Group Resources Pty Ltd v Calabro (No 5)* [2011] FCA 1408; (2011) 198 FCR 514 at [75]-[76]. The silence of a party may serve to resolve a doubt or an ambiguity regarding the existence of a fact, especially where the facts are peculiarly within the knowledge of the silent party: *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125; (1996) 9 ANZ Insurance Cases 61-385 at 142.

125 All evidence "is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted": *Coshott v Prentice* [2014] FCAFC 88; (2014) 221 FCR 450 at [80], quoting *Blatch v Archer* (1774) 1 Cowp 63 at 65; 98 ER 969 at 970. This maxim also bears upon the appropriateness of deciding whether a fact has been proved when only limited evidence is available. In *Ho v Powell* [2001] NSWCA 168; (2001) 51 NSWLR 572 at [14]–[15], Hodgson JA (with whom Beazley JA agreed) said:

> [I]n deciding facts according to the civil standard of proof, the court is dealing with two questions: not just what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision …
>
> In considering the second question, it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so …

126 In *RHG Mortgage Ltd v Ianni* [2015] NSWCA 56, McColl JA (with whom Sackville AJA agreed) said (at [76]):

> The circumstances for drawing a *Jones v Dunkel* inference are found where the uncalled witness is "a person presumably able to put the true complexion on the facts relied on [by a party] as the ground" for any inference favourable to the plaintiff: *Jones v Dunkel* (at 308) per Kitto J; *Australian Securities and Investments Commission (ASIC) v Hellicar* [2012] HCA 17; (2012) 247 CLR 345 (at [168]) per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

127 In the passage from *Australian Securities and Investments Commission (ASIC) v Hellicar* (2012) HCA 17; (2012) 247 CLR 345 to which McColl JA was referring, the High Court emphasised that a missing witness will only be significant where the evidence which such a person is expected to give would (not might) elucidate a particular matter in issue.

128 As to the significance to be given to the failure to adduce the evidence, that is explained in *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298 itself where it was said (at 308) per Kitto J (and see also at 312 per Menzies J, and at 320-321 per Windeyer J) that:

> [A]ny inference favourable to the plaintiff for which there was ground in the evidence might be more confidently drawn when a person presumably able to put the true complexion on the facts relied on as the ground for the inference has not been called as a witness.

129 This aspect of the principle is summarised in *Cross on Evidence*, where it is stated (at [1215]) that:

> [T]he rule [in *Jones v Dunkel*] only applies where a party is "'required to explain or contradict"' something. What a party is required to explain or contradict depends on the issues in the case as thrown up in the pleadings and by the course of evidence in the case. No inference can be drawn unless evidence is given of facts "'requiring an answer"'.
>
> (Citations omitted).

130 Thus, there must be some existing basis in the evidence before the Court to support the inference which the party relying on the principle seeks to have drawn before the absence of evidence from the opponent takes on any significance.

131 In *Paul's Retail Pty Ltd v Sporte Leisure Pty Ltd* [2012] FCAFC 51; (2012) 202 FCR 286, the Full Federal Court (Jacobson, Yates and Katzmann JJ) said (at [95]):

> The purpose of the rule is to enable the tribunal of fact to more readily draw an inference "fairly to be drawn from the other evidence" if a witness able to contradict that inference has not been called: *State Bank (NSW) v Brown* (2001) 38 ACSR 715 at [17]-[18] per Spigelman CJ. Such an inference is drawn, if at all, once all the evidence in the case is in. Before that can happen, there must first be an available inference against the party on the evidence: *Manly Council v Byrne* [2004] NSWCA 123 per Campbell J, Beazley JA and Pearlman AJA agreeing at [54].

132 In *Department of Health v Arumugam* [1988] VR 319; (1988) 30 AILR 117 at 330, Fullagar J said:

> If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required. It can enable already available inferences to be drawn against dishonest explainers with greater certainty, but that is all.

***Destruction or suppression of evidence***

133 If a litigant (or their agent) does anything which tends to suggest a lack of confidence in that litigant's position in litigation, this is a matter that can be taken into account and lead to an inference that the facts essential for the litigant to maintain his position are lacking: *Li v The Herald and Weekly Times Pty Ltd* [2007] VSC 109; (2007) ATR 81-887 ("*Li v Herald and Weekly Times*") at [305]–[306].

134 Examples of such conduct include "the destruction of, or failure to produce, important relevant documents, particularly incriminating ones, and the subornation of a witness or the fabrication of evidence" as well as recourse to lies: *Li v Herald and Weekly Times* at [306], [309]; *Tobin v Ezekiel* [2012] NSWCA 285; (2012) 83 NSWLR 757 at [60]–[62]. Statements by a litigant that he is unable to recollect an event or the details thereof may, in combination with other evidence, evidence a consciousness of liability*: R v Cuenco* [2007] VSCA 41; (2007) 16 VR 118 at [20].

135 The inference to be drawn depends on the consciousness that is demonstrated by the litigant's conduct. Conduct, including bribery or destruction of evidence, may be such as to suggest a consciousness that the litigant's case is generally weak. Conduct such as the failure to produce a specific document or witness may indicate a weakness of a specific part of the case: *Li v Herald and Weekly Times* at [307].

***Inferring knowledge from holding office as a director?***

136 On behalf of the liquidators, Mr Marshall SC made a submission that the directors' knowledge of the offshore deposits could be inferred from the fact that they held the office of directors. It was not clear whether he sought to have a wider submission that knowledge of a director as to the company's activities could be inferred from the fact of holding office as a director.

137 I do not accept that there is a general proposition as to the inferences of knowledge that may be drawn from the fact that a person holds office as a director. In my view, this must depend upon the circumstances of the case and, in particular, any evidence about the director's participation in the management of the company. I do not accept that the decision in *Texxcon Pty Ltd v Austexx Corporation Pty Ltd* [2011] VSC 203 supports a broader proposition.

138 A director's continuing obligation to keep informed about the activities of the corporation (*Daniels v Anderson* (1995) 37 NSWLR 438; (1995) 118 FLR 248 ("*Daniels*") at 503) does not permit a general inference as to knowledge, not least because the relevant director may not have complied with that obligation.

## THE LIQUIDATORS' CASE

### The alleged scheme involving Israeli banks

139 The liquidators' case was based on the premise that the respondents participated in a "scheme" involving Israeli banks, for their benefit and, ultimately, to the detriment of the applicants. The scheme was allegedly implemented by four sets of transactions, involving:

(1) BCI and Bank Hapoalim;

(2) EGL and IDB;

(3) Ligon 268 and IDB; and

(4) Binqld and IDB.

140 The statement of claim pleads the scheme, its purposes and its result as follows:

> 20. From a date no later than December 1988, or alternatively from a date no later than November 1993, each and all of Emil Binetter, Erwin Binetter, Margaret Binetter, Andrew Binetter, Gary Binetter, Michael Binetter, Milgerd Nominees, Erma Nominees, Ligon 159 and Ligon 158 (together, '"**the Binetter Entities**'") agreed to participate in a scheme ('**the scheme involving Israeli banks**') whereby:

20.1 a company would be incorporated in Australia by the Binetter Entities, or a company would be acquired by the Binetter Entities ('**an Australian finance company**');

20.2 an Australian finance company would purport to enter into a transaction with an Israeli Bank;

20.3 the transaction between the Israeli Bank and the Australian finance company would be documented by the Binetter Entities or some of them so as to give the appearance that the transaction comprised a loan of funds from the Israeli Bank to the company, which was secured only by guarantees given by the Binetter Entities or some of them;

20.4 funds held or controlled by the Binetter Entities with banks or other entities outside of Australia ('**offshore funds**') equal to the amount of the purported loan from the Israeli Bank to the Australian finance company would be deposited with the Israeli Bank so as to constitute security to the Israeli Bank for the advance of funds to the Australian finance company (described as a 'back-to-back' arrangement) and interest would accrue on the offshore funds to the ultimate benefit of the Binetter Entities or some of them ('**offshore income**');

20.5 each and all of Emil Binetter, Erwin Binetter, Michael Binetter, Andrew Binetter and Gary Binetter would, in their own capacities, in their capacities as directors of the Australian finance company and, or, in their capacities as directors of the companies compromising the Binetter Entities, sign documents and have communications with the Israeli Bank by documentation:

20.5.1 to give the appearance of a loan from the Israeli Bank on terms as to interest, interest payments and repayment, which was secured by guarantees only; and

20.5.2 to conceal the offshore funds, the offshore income and the back-to-back arrangement;

20.6 funds received from the Israeli Bank would then be advanced by the Australian finance company under the control of the Binetter Entities to one or more of Milgerd Nominees and, or, Erma Nominees, at a purported rate of interest and on terms which matched the purported rates of interest and terms of the purported loan from the Israeli Bank;

20.7 in turn, the funds purportedly so loaned to Milgerd Nominees and, or, Erma Nominees would be further advanced by Milgerd Nominees to Ligon 159, or by Erma Nominees to Ligon 158, at terms and at rates of interest which match the terms and rates of interest of the purported loan and purported terms and purported rates of interest;

20.8 the funds further so advanced to Ligon 159 or Ligon 158 or to both would be used by Ligon 159 and by Ligon 158 in furtherance of business activities to earn income including, through investments and further advances, in property investments, in commercial retail investments, in commercial and residential property developments, in residential real estate investments, in nursing home businesses, and in fruit juice businesses; and

20.9 the Australian finance company which had purportedly borrowed monies from the Israeli Bank would declare, in its income tax return, as income, the interest from the monies which it had on-loaned directly or indirectly to one or more of Milgerd Nominees, Erma Nominees, Ligon 159 and, or, Ligon 158 and would claim, as a deductible expense under the *Income Tax Assessment Act 1936* (Cth) against that income, an amount equal to the purported rate of interest which was purportedly payable to the Israeli Bank.

21. The purposes of the scheme involving Israeli banks were to:

21.1 allow the Binetter Entities to have the benefit in Australia of offshore funds, while the offshore funds accrued offshore income;

21.2 conceal the offshore funds and offshore income from the Commissioner of Taxation in Australia ('**the Commissioner**');

21.3 interpose the Australian finance companies between the Binetter Entities and the Israeli Banks;

21.4 arrange a situation whereby the Australian finance company and the Binetter Entities or some of them could claim deductible expenses in connection with the use by them in Australia of the offshore funds; and

21.5 thereby evade or, alternatively, avoid liability to pay income tax to the Commissioner.

22. As a result of the scheme involving Israeli banks:

22.1 the Australian finance companies incorporated or acquired by the Binetter Entities to enter into the purported loan transactions with Israeli banks claimed deductions for interest in each of their income tax returns for each financial year;

22.2 the Australian finance companies were exposed to a risk of audit by the Commissioner and a risk that the Commissioner would issue them with assessments or amended assessments which disallowed the interest expenses claimed as deductible expenses; and

22.3 the Binetter Entities acted so as to benefit those entities to the detriment of the Australian finance companies.

141 The liquidators' case was the scheme was implemented using each of the applicants as an "Australian finance company". The liquidators contended that the applicants could not ever have benefitted from the scheme and it should be inferred that they were never intended to. The liquidators acknowledged that the applicants derived significant interest income from the scheme, but argued that this was not a benefit because the interest income was always matched by an equivalent, or substantially equivalent expense paid to one of the Israeli banks.

***Scheme***

142 The "scheme" as pleaded is the type of arrangement or course of conduct that might be described as a scheme within the meaning of Part IVA of the ITAA 1936. In that context, "scheme" is defined very broadly to mean:

> (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied and whether or not enforceable, or intended to be enforceable, by legal proceedings; and
>
> (b) any scheme, plan, proposal, action, course of action or course of conduct.

143 I am doubtful that the liquidators' characterisation of the relevant arrangements or course of conduct as a scheme significantly advanced their case.

***Purposes of the scheme***

144 In competition legislation, the "purpose" of an arrangement means the effect which is sought to be achieved. The purpose of an arrangement will typically be inferred from the nature of the arrangement, the circumstances in which it was made and its likely effect: *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109, particularly in the absence of evidence to the contrary from the parties to the arrangement.

145 I understood the liquidators' case on the purposes of the scheme to be directed to the states of knowledge of the various participants in the scheme.

***Summary of conclusions about the alleged scheme***

146 On the evidence set out below, I find that Erwin and Emil Binetter agreed to participate in a scheme involving EGL and IDB and, subsequently, BCI and Bank Hapoalim, broadly to the effect of the alleged scheme, although it will be necessary to be precise about the elements of the scheme that are supported by the evidence.

147 In particular, the scheme, as initially implemented, involved:

(1) "back-to-back" arrangements by which funds, in the control of Erwin and Emil Binetter, deposited outside of Australia ("offshore deposits") were used as security for advances of funds by the Israeli banks to the various applicants;

(2) providing funds obtained pursuant to the "back-to-back" arrangements to various of the corporate respondents to assist in their business activities in Australia;

(3) documenting the arrangements between the applicants and the Israeli banks so as to permit the applicants, if required, dishonestly to produce documents purportedly evidencing the arrangements but which did not disclose the offshore deposits;

(4) lodging income tax returns on behalf of EGL and BCI which would declare no, or no significant, taxable income, because any income disclosed would be offset by substantially equivalent amounts claimed to be deductible expenses and generally (but not always) referable to payments to the Israeli banks, described in contemporaneous records as payments of interest to the Israeli banks.

148 I also find that Milgerd, Erma, Ligon 159 and Ligon 158 were parties to the scheme from its inception. I do not find that Margaret Binetter agreed to participate in or facilitate a scheme of the kind alleged, or in any scheme to avoid or evade income tax. I find that each of Andrew and Michael Binetter agreed to participate in or took steps to facilitate the scheme at various times.

149 Ligon 268 and Binqld subsequently entered into transactions with IDB that involved the key elements of the scheme set out above. Ligon 268's income tax returns were affected by its role as trustee of the Bankstown Eye Trust, but it did not disclose any significant taxable income from its activities as a lender of funds obtained from IDB.

150 Following from the conclusion that the scheme involved documenting the transaction in a manner which would not reveal the existence of the offshore deposits, I find that those who arranged the documentation intended to conceal the existence of the offshore deposits and any income earned from the deposits, principally by seeking to ensure that the applicants' records would create the false impression that the terms of the transactions were not affected by the deposits.

151 Based on the elements of the scheme, I find that its purposes, and the purposes of those respondents who participated in it, included the following:

(1) to allow various of the respondents to have the benefit in Australia of the funds comprising the offshore deposits, without transferring those funds to Australia;

(2) to interpose the applicants between various of the respondents and the Israeli banks;

(3) to arrange a situation whereby each of the applicants treated transfers of funds from the Israeli banks as loan funds and the applicants and various of the respondents claimed, as deductible interest expenses, amounts said to be liabilities to the Israeli

banks, on the basis of documentation which, if produced by an applicant to the ATO, would enable the applicant to conceal dishonestly important aspects of the transactions with the Israeli banks (particularly, the existence of the offshore deposits and the recipient or recipients of interest paid on the offshore funds, but also the true quantum of payments made to the banks in consideration of their respective participations in the arrangements); and

(4) to thereby evade liability to pay income tax to the Commissioner or to assist others to evade their tax liabilities.

152 As for the results of the scheme, I find that they included the following:

(1) the applicants claimed deductions for overseas interest expenses in each of their income tax returns for the income years in respect of which the Commissioner ultimately issued the revised assessments;

(2) each of the applicants was exposed to a risk that, in the event of a tax audit, the Commissioner would issue them with revised assessments which disallowed the interest expenses claimed as deductible expenses (and which treated as assessable income certain amounts received by the applicants from the Israeli banks), because the applicants would not produce documents and provide information to explain the totality of the relevant transactions and, therefore, would not substantiate the claimed deductions;

(3) each of the applicants was exposed to a risk of that, in the event of a tax audit, the Commissioner would impose penalties and issue assessments requiring payment of interest on primary tax liabilities (including general interest charge and shortfall interest charge), because the documents and information supplied to support the interest expenses would not explain the totality of the relevant transactions and would cause ATO officers to strongly suspect, as was the case, that the advances from the Israeli bank were the subject of a security by way of a back-to-back deposit which may affect the correct tax treatment of both the advances and the claimed interest expenses; and

(4) various of the respondents, in implementing the scheme, acted so as to benefit various of the respondents to the detriment of the applicants.

153 Thus, the scheme (and the individual transactions undertaken in pursuance of the scheme) operated to the benefit of various of the respondents but, if revealed, would operate to the

detriment of the applicant companies. Such detriments would include liabilities to pay income tax for which the relevant applicant company would not otherwise have been liable, liabilities to pay penalties on assessments issued by the Commissioner and liabilities to pay interest including shortfall interest charges and general interest charges.

**The liquidators' legal characterisation of transactions pursuant to the scheme**

***Loans***

154 In *Commissioner of Taxation v Rawson Finances Pty Ltd* [2012] FCA 753; (2012) 89 ATR 357 at [20], Edmonds J explained:

> The essence of a loan of money from A to B is a corresponding contemporaneous obligation on the part of B to repay the money transferred from A to B: *Commissioner of Taxation v Radilo Enterprises Pty Ltd* [1997] FCA 22; (1997) 72 FCR 300 at 313 per Sackville and Lehane JJ; *Commissioner of Taxation v Firth* (2002) 120 FCR 450 at [73] per Sackville and Finn JJ. Absent that obligation, the transfer of the money from A to B is something else – a gift, a payment by direction, a payment or repayment of an anterior obligation – but it is not a loan. The obligation of repayment is not proved by subsequent payment of the same amount, let alone a different amount, from B to A; that may be explicable by reference to another obligation or circumstance having nothing to do with the original payment from A to B. Rather, the obligation of repayment is proved by the terms of the contract under which the money was transferred from A to B.

155 In *Commissioner of Taxation v Radilo Enterprises Pty Ltd* [1997] FCA 22; (1997) 72 FCR 300 at 313, Sackville and Lehane JJ explained the concept of a loan as follows:

> A loan involves an obligation on the borrower to repay the sum borrowed. The matter is put this way by Dr Pannam:
>
> > "A loan of money may be defined, in general terms, as a simple contract whereby one person (the lender) pays or agrees to pay a sum of money in consideration of a promise by another person (the borrower) to repay the money upon demand or at a fixed date. The promise of repayment may or may not be coupled with a promise to pay interest on the money so paid. The essence of the transaction is the promise of repayment.
> >
> > As Lowe J put it in a judgment delivered on behalf of himself and Gavan Duffy and Martin JJ: '"Lend" in its ordinary meaning in our view imports an obligation on the borrower to repay.' [*Ferguson* v *O'Neil* [1943] VicLawRp 3; [1943] VLR 30 at 32.] Without that promise, for example, the old *indebitatus* count of money lent would not lay. Repayment is the ingredient which links together the definitions of 'loan' to be found in the *Oxford English Dictionary*, the various legal dictionaries and the text books. In essence then a loan is a payment of money to or for someone on the condition that it will be repaid.'
>
> C L Pannam, *The Law of Money Lenders in Australia and New Zealand* (1965), at 6. See also *Brick and Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] VicRp 68; [1992] 2 VR 279, at 321-323, per Ormiston J.

156 A similar definition of loan was given in *Commissioner of Taxation v Firth* [2002] FCAFC 95; (2002) 120 FCR 450 at [73] per Sackville and Finn JJ.

157 The respondents' case was that the various advances from the Israeli banks to the applicants were loans. In the absence from evidence on behalf of the Israeli banks, and in the absence of oral evidence from any of the respondents themselves, I am not satisfied as to the precise terms upon which any of the advances were made. In particular, without knowing the terms on which the admitted offshore deposits secured the advances, I am not satisfied that I should rely on any of the documents which purport to evidence loan arrangements at face value. It is quite possible that the terms of those documents are affected, or even contradicted, by the terms on which the admitted offshore deposits secured the advances. It is also possible, as Mr Etzion said, that the "financial source" of the advances was funds owned by some entity associated with the Binetters. Without understanding more about the true facts, I am unable to reach a conclusion about whether this possibility would affect the characterisation of the advances as loans.

***"Back-to-back" loans***

158 The concept of a "back-to-back" loan was said, by the liquidators, to be central to their case. The liquidators' opening submissions described, as a "back-to-back" transaction, a transaction whereby funds under the control of the respondents and deposited with banks in Switzerland and in Israel were used to procure the advance of funds by the Israeli banks to the applicant companies.

159 As noted earlier, the ATO summarised "back-to-back loans" as:

> An Australian taxpayer, with funds offshore, accesses this money by 'borrowing' it through an international promoter or directly. The funds may be used for working capital and the interest claimed as a deduction which continues to "top-up" the offshore funds.

160 This description contains an element which is different from the description of a "back-to-back" transaction in the applicants' opening submissions: it suggests that the transaction involves a purported loan of funds which, in truth, are the taxpayer's own funds. It raises a question about whether a "back-to-back loan" is a species of loan or whether it has characteristics which are different from a loan.

161 The Andrew Binetter parties contended that the liquidators' expert evidence demonstrated how "back-to-back" transactions were part of the ordinary banking practices of Bank

Hapoalim and how the "back-to-back" nature of the BCI transaction (involving third party security) was entirely unremarkable. The evidence of Mr Ben Zeev, an Israeli banker and long term employee of Bank Hapoalim, was that in cases where the collateral (or security) for a loan is a deposit of money, the loan will be described as a "back-to-back loan". In particular, back-to-back loans are where the loan matches the deposit in terms of the maturity date. If the loan term is for five years, then the deposit will also be given a five year term and "applicable" interest rate. The deposit will have to be at least the same size as the loan. The deposit for the back-to-back loan will also be in the same currency as the loan because otherwise the bank would be exposed to foreign exchange risk.

162 Whether "back-to-back" transactions are part of the ordinary business practices of Bank Hapoalim is beside the point, as evidenced by the efforts made, on the part of various of the respondents, to characterise the advances made by the Israeli banks to the applicants as loans secured by personal guarantees and not by cash deposits. As noted earlier, in an effort to avoid the ATO discovering the "back-to-back" nature of the transactions, Michael Binetter took steps to procure the destruction of Bank Hapoalim's files.

163 Although not evidence of the actual terms of the transactions between BCI and Bank Hapoalim, in March 2015, Mr Etzion gave the following answers in the course of an examination:

> Q. What are the extent of the details that you know about who deposited and when, in the deposits in trust, in Bank Hapoalim in Switzerland, in regards to the loans that the Company took?
>
> A. I am a man of Bank Hapoalim and not a man of Bank Hapoalim (Switzerland), but as it seems to me, if I remember correctly, someone who is close to them, in my opinion not Emil and Erwin themselves, deposited the trust in Switzerland. When Bank Hapoalim Tel-Aviv required, for the purpose of strengthening collateral, a bank guarantee from the Bank in Switzerland, Emil and Erwin refused. They did not want a bank guarantee that connected Bank Hapoalim (Switzerland) with Bank Hapoalim in Tel-Aviv.
>
> Q. You say that you think that the loans were promised by a deposit in trust.
>
> A. I did not say it. I said that according to my understanding and my recollection, it was done in this way: the money was deposited in Bank Hapoalim in Switzerland, I suppose.
>
> In my opinion, Bank Hapoalim in Switzerland deposited a trust in order to give loans to Bank Hapoalim in Tel-Aviv. It asked Bank Hapoalim in Tel-Aviv to also be responsible for it. This has created a security system that I wanted to prepare.
>
> …

> Q. Did you know that the arrangement with the Company was back-to-back loans?
>
> A. At that time, certainly.
>
> Q. Do you mean on 15/10/09?
>
> A. Yes.
>
> Q. Please confirm that according to the terms of the loan from 1993, the loans taken by the Company were secured by trusts.
>
> A. I cannot confirm this because I have not seen a document that represents it. It could be, but I have not seen a document. I know that the financial source of these loans was a trust which in my opinion was guaranteed.

164 Mr Etzion's evidence suggests that the transactions between BCI and Bank Hapoalim were aptly described as "back-to-back loans" and involved accessing funds offshore which were the "financial source" of the loans.

165 In answer to the question "Can you explain the arrangement of back-to-back?", Mr Etzion said:

> There is a financial back to back and a security back to back. Back to back means you deposit a trust in order to get a loan. In both cases you deposit a trust to get a loan. In a financial back to back, the conditions of the deposit are adapted to the terms of the loan but the trust is not used as collateral for the loan. It is the physical source of the loan funds. In a security back to back loan, the money is also used as collateral.

166 I have addressed the admissibility of this evidence below. In my view, the evidence illustrates the opacity of the arrangements between BCI and Bank Hapoalim and the necessity to understand the totality of the arrangements pursuant to which the payments were made in order to determine whether the advances from Bank Hapoalim to BCI were loans.

167 Based upon the respondents' concessions and on the evidence including the evidence of Mr Ben Zeev (set out below) concerning the nature of a "back-to-back loan", I find that each transfer of funds from Bank Hapoalim or IDB to one of the applicants, identified in the chronological findings of fact below, was a transfer pursuant to an arrangement that included the provision, by or on behalf of the relevant applicant, of a deposit, in an amount at least equivalent to the amount of the funds transferred to the relevant applicant, over which the relevant bank had rights.

168 If more is needed to demonstrate the significance of the characterisation of the relevant transactions as "back-to-back", there is the observation of BCI's proposed expert witness on Israeli banking practices, Ms Lusthaus. When she saw a Hebrew bank statement from BCI

dated 15 October 2009, which included the words "back-to-back", she told BCI's lawyer (by email dated 6 November 2013):

> Eli and I have started to go through the material, and we have a problem that might be quite serious.
>
> In tab 42 there is a statement by the Bank in relation to the loans. There is a page in Hebrew which is a statement of the loans. The problem we see is under the heading of Loans, it is written as follows: Loans
>
> > Back to back; constant rate … (the first loan)
> >
> > Back to back; constant rate … (the second loan)
>
> The wording of back to back seems to indicate that the loans were secured, even if informally, by deposits. That is the usual meaning in Hebrew of the term "back to back".
>
> If that is the case, we think that it changes the whole picture.

169 One reason why it might be relevant to know if a transaction is a "back-to-back" transaction is that this may affect the pricing of the transaction, because the risk of such a transaction to the party advancing funds is different from the risk of a standalone transaction. As Mr Ben Zeev noted "when the loan is fully collateralised by cash the exposure to the Bank is very low. If the borrower defaults then the Bank is able to access the deposit". More particularly, it is possible that the terms of collateral transactions affect the correct identification of the expenses incurred under a transaction in gaining or producing assessable income. For example, terms about payment of interest on the so-called "loan" might be affected by terms about payment of interest by the relevant bank in respect of the "back-to-back" deposits. However, it is not possible to reach any conclusion without knowing all of the terms of the relevant arrangements.

***Sham***

*Role of sham in the liquidators' case*

170 The Andrew Binetter parties contended that the liquidators' factual case "proceeds from the foundational assertion that the loans which the applicants had with Israeli banks and in respect of which they claimed interest deductions were shams".

171 The word "sham" is used on four occasions in the statement of claim – once in connection with each of the applicants. In each case, the allegation is that the impugned transactions exposed the relevant applicant to a risk that the Commissioner would issue it with assessments or amended assessments which disallowed the interest expenses claimed by it as

deductible expenses and/or assessed the relevant applicant for income on the basis of a decision by the Commissioner that the impugned transactions were a sham. In each case, the allegation is made in the alternative to allegations that the Commissioner would issue such assessments or amended assessments on the basis of a decision that the impugned transactions were not for an income producing purpose, pursuant to s 99B or Part X or Part IVA of the ITAA 1936 or on any other basis.

172 The word "sham" is used twice in the liquidators' narrative, at paras 255 and 571. In each case, the Commissioner's conclusion of "sham" is recorded (concerning the transactions presented to it by BCI and Binqld) and it is asserted that the Commissioner's conclusion was correct and accurately described the true position.

173 The Gary Binetter parties contended that the applicants changed their position during the case on the question of sham. Ultimately, they said, the case appears to be that, on the materials given to the ATO, the Commissioner was entitled to conclude that the relevant transactions were a sham and to rely on that conclusion to issue the various revised assessments. The Gary Binetter parties argued that the notion of sham is apparent in allegations of "purported" transactions and in the allegations, in paras 197.1 and 197.2 of the statement of claim, that the "purported" transactions between BCI and Bank Hapoalim were a "device" and that the documentation prepared was "intended to create an appearance, which was false, to the effect that the purported Bank Hapoalim Transactions was a genuine commercial loan transaction between Bank Hapoalim and BCI".

*The liquidators' case on "purported" transactions*

174 The words "purport" and "purported" are first used in the statement of claim to describe elements of the alleged scheme.

175 Paragraph 20.2 refers to the purported entry into a transaction between an "Australian finance company" (which I will refer to as a "Binetter finance company") and an Israeli bank. However, it is clear from the succeeding paragraphs that it is not alleged that there was intended to be no transaction between those parties. For example, it is alleged in para 20.4 that "offshore funds "would be deposited with the Israeli bank so as to constitute security to the Israeli Bank for the advance of funds to" the Binetter finance company. Paragraph 20.2 alleges that one element of the scheme was that a Binetter finance company would claim to have entered into a transaction with an Israeli bank having certain features, when in truth it had entered into a transaction with the bank having one or more other features (such as the

provision of a cash deposit equivalent to the amount of the advance, as security for the advance).

176 It follows that I read the references to "the purported loan" in paras 20.4, 20.6 and 20.7 as references to a transaction which was or would be documented as a loan having particular terms but which, the liquidators contended, had different or other terms from the true transaction.

177 The alleged scheme refers to the advance of funds at "purported" rates of interest. As I understood the liquidators' case, it was that the rates of interest stipulated in the loan documentation were not rates for interest charges that were imposed by the bank as amounts that it would earn on the transactions but, rather, rates that were used to calculate the quantum of payments by the borrower to the bank wholly or partly for the benefit of an entity other than the bank, being an entity associated with one or more of the respondents.

*Is there a dichotomy between "back-to-back" transactions and sham?*

178 The Andrew Binetter parties contended that the very existence of a "back-to-back" loan is antithetical to an argument that the loans from the Israeli banks were shams. As noted above, I do not accept that the advances from the Israeli banks were loans. But, in any event, I do not accept the Andrew Binetter parties' contention.

179 The classic definition of sham, given by Diplock LJ in *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 ("*Snook*") at 802, is:

> … acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create. But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co. v. Maclure* and *Stoneleigh Finance Ltd. v. Phillips*), that for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived.

180 In *Hitch v Stone* [2001] EWCA Civ 63, [2001] S.T.C. 214 at [63], Arden LJ identified the following particular type of sham transaction:

> It is of the essence of this type of sham transaction that the parties to a transaction intend to create one set of rights and obligations but do acts or enter into documents which they intend should give third parties… or the court, the appearance of creating different rights and obligations.

181 In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55; (2004) 218 CLR 471 at [46] the High Court stated:

> "Sham" is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.

182 In *Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy* [1988] FCA 266; (1988) 18 FCR 449. At 454, the Full Court comprising Lockhart, Beaumont and Foster JJ, cited Diplock LJ's judgment in *Snook* and held:

> A "sham" is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.

183 In this case, I understand the alleged sham to be the documents relied upon by the applicants to justify their claims for interest expenses, and for the non-inclusion of monies advanced from the Israeli banks as income, where such documents were (it is alleged) a "false front" for the true transactions. The alleged true transactions included, as a critical element, offshore deposits equivalent to the amount of the advances as security for the advances. The alleged sham is not that the documents disguised advances of the applicants' own funds from Israel to Australia. If that were the allegation, then I would conclude that the applicants have not demonstrated a sham of that kind. In my view, the evidence does not permit the Court to reach a view about the true terms of the arrangements between the applicants and the banks because of the likelihood that the totality of the arrangements included one or more terms which affected, qualified or contradicted the terms recorded in the available documents.

184 I have no hesitation in concluding:

(1) The documents provided to the ATO by each of the applicants did not reveal the totality of the arrangements between the applicants and the Israeli banks because they did not reveal the arrangements concerning the offshore deposits, and those arrangements formed part of the arrangements between the applicants and the Israeli banks;

(2) The documents provided to the ATO by BCI and EGL were designed to conceal the totality of the arrangements between those applicants and the Israeli banks (whatever was the totality of those arrangements). This aspect of the design of the transactions is most painfully revealed by the communications between Bank Hapoalim and Bank

> Hapoalim Switzerland which show that those banks sought (without complete success) to maintain a separation between the documentation of the advances from Bank Hapoalim to BCI and the documentation of the so-called fiduciary deposits which secured the advances.

185 It follows that I accept the Commissioner's conclusion that the BCI and EGL documents were shams. I do not reach the same conclusion in relation to the Ligon 268 and Binqld documents because those applicants never purported to provide the ATO with a complete suite of the documents governing their respective transactions with the Israeli banks.

186 The Andrew Binetter parties put, as an apparently serious submission, that the applicants' directors went to extraordinary lengths to convince the Commissioner that the loans from Israeli banks were not shams but genuine transactions. They complain that "[t]heir protestations fell on deaf ears". As those protestations should have. Michael and Andrew Binetter went to extraordinary lengths to cause the applicants to contest the revised assessments while failing to disclose the existence of the deposits that "change[d] the whole picture". Michael Binetter (then a practising lawyer) went so far as to try to arrange the destruction of documents which might have disclosed the existence of the offshore deposits and the terms upon which those deposits secured the advances to the applicants.

187 The Andrew Binetter parties also put a submission that the liquidators' contention that the directors had concealed the use of offshore funds as security for the loans was a "red herring". It was put that the Commissioner must have believed, from an early point in time, that the loans were secured by offshore deposits. If the directors had provided proof of what the Commissioner had always believed to be the true position, the applicants' position would have been no different. I accept that there is no reason to suppose that, if the applicants had provided proof of the existence of offshore deposits, that would have satisfied either the Commissioner or a court in tax appeal proceedings that the revised assessments should be set aside.

**The offshore deposits and "back-to-back" arrangements**

188 Paragraph 20.4 of the statement of claim alleges, as an element of the scheme, that:

> [F]unds held or controlled by the Binetter Entities with banks or other entities outside of Australia ('**offshore funds**') equal to the amount of the purported loan from the Israeli Bank to the Australian finance company would be deposited with the Israeli Bank so as to constitute security to the Israeli Bank for the advance of funds to the Australian finance company (described as a 'back-to-back' arrangement).

189 The liquidators relied upon a document entitled "Applicants' Updated Narrative Statement of Facts and Contentions with responses of the respondents included" dated 30 September 2015 ("liquidators' narrative").

190 By the Gary Binetter parties' response to an earlier version of the liquidators' narrative, filed 26 August 2015, the Gary Binetter parties stated that they "do not dispute that part of the security for the loans" to each of BCI and EGL were "deposits".

191 By their "Further amended response to the applicants' amended narrative" dated 24 September 2015, the Margaret Binetter parties admitted that "there was an overseas cash deposit that, in part, secured the advance from Bank Hapoalim to BCI" but not that Margaret Binetter knew such a fact.

192 By the Andrew Binetter parties' "Further amended response to applicants' amended narrative statement of facts and contentions", those parties accepted:

> … for the purposes only of these proceedings that based on the evidence adduced by the applicants and absent evidence from them to the contrary, the court would find that:
>
> (a) each of the loans the subject of the proceedings was additionally secured by a third party cash deposit (but not that any of the Andrew Binnetter Respondents had knowledge of that fact at any relevant time);
>
> (b) the existence of a third party cash deposit as additional security for the loans was at no time disclosed to the Commissioner.

193 In his "Further response to amended narrative" dated 18 September 2015, Michael Binetter accepted that the applicants' evidence disclosed that:

(1) each of the loans the subject of the proceeding was additionally secured by a third party cash deposit (but not that he had knowledge of that fact at any relevant point in time); and

(2) the existence of a third party cash deposit as additional security for the loans was at no relevant time disclosed to the Commissioner by the borrowing company.

194 To be clear, it was not part of Michael Binetter's case that the deposits were disclosed to the Commissioner by some other person or entity.

195 The Andrew Binetter parties submitted that, in the light of the respondents' concessions, "the Court will find that each of the loans was the subject of a security by way of a back-to-back deposit".

196 Despite the carefully worded concessions set out above, and notwithstanding the documentary evidence that the Israeli banks described their advances to the applicants as "loans", I do not accept that these characterisations of the advances as "loans" is determinative without knowing the totality of the arrangements affecting the advances. In particular, the statements made by Mr Etzion, and set out above, lead me to conclude that I cannot take at face value communications between the applicants and the Israeli banks about their arrangements.

197 In particular, in the case of BCI, the existence of deposits in amount equivalent to the amount of funds transferred to BCI is confirmed by correspondence between Bank Hapoalim and Bank Hapoalim Switzerland, set out below. In the case of Ligon 268, the existence of a "deposit account" connected with Ligon 268 is shown by a bank statement for account no. 10627881 printed out on 23 July 2012.

198 The respondents have not divulged, either to the ATO or to this Court, the totality of the arrangements between the applicants and the Israeli banks. In saying this, I am not intending to make a finding that any of the respondents was under a legal obligation to do so or that any of the respondents was armed with sufficient knowledge to divulge the totality of the arrangements at any given time. However, I do infer (from the evidence below) that, to the extent that any of the respondents did not have such knowledge at any given time, he, she or it could have obtained that information and could have provided it to the ATO or to the Court.

***Knowledge of the offshore deposits as part of the relevant transactions***

199 In my view, once the evidence demonstrated that various of the director respondents participated in procuring advances from the Israeli banks, the evidentiary burden shifted to them to demonstrate that they did not know (or understand) the terms of financial transactions in which they were participating. That evidentiary burden was not discharged. Thus, I accept the liquidators' case that each such director knew that any advance which he procured, or assisted to procure, formed part of what the liquidators described as a "back-to-back" arrangement, being the arrangements that the respondents now concede to have been the fact.

200 As explained below, the knowledge of the various individual directors can be imputed to the companies of which they were directors. Thus, for example, facts known by Erwin Binetter about the terms of transactions involving BCI, can be taken to have been known by Erma and Ligon 158 as a result of his directorships of those companies.

***Source and ownership of the offshore deposits***

201 As noted above, Andrew and Ronald Binetter were in agreement that "we have money overseas". For the purposes of their discussion, this was apparently a sufficiently accurate description of the true state of affairs. Andrew told Ronald that this money was used "as part of the security for the loans" connected with the revised assessments.

*Ms Huber's evidence*

202 Ms Huber said that Michael Binetter had told an Israeli lawyer called Amiram Gicelter ("Mr Gicelter") that offshore funds, used to fund deposits to secure loans from Israeli banks, were derived from funds that Erwin and Emil Binetter took out of Australia. Ms Huber also gave evidence that, in a conversation with Mr Gicelter on 26 June 2012, Gary Binetter had described the offshore funds as "black money". In my view, Gary Binetter was intending to convey to Mr Gicelter that income tax had not been paid in Australia on the offshore funds.

203 It is convenient to set out the entirety of Ms Huber's relevant evidence at this point.

204 The context is that, on 5 March 2012, the Commissioner filed an interlocutory application in BCI's tax appeal seeking an order that a letter of request be sent to the judicial authorities of Israel to take evidence of an officer of Bank Hapoalim and an order that BCI take all reasonable steps to procure or obtain all or any documents in the possession, power or control of Mr Etzion.

205 Ronald Binetter and Ms Huber arrived in Israel for a vacation on 24 April 2012. During their vacation, they received a telephone call from Michael Binetter seeking Ms Huber's help to find a lawyer in Israel to assist in connection with the production of documents. Ms Huber speaks and writes Hebrew fluently: apparently, Michael Binetter did not.

206 Ms Huber located Mr Gicelter.

207 Shortly after, Ms Huber attended a meeting with Mr Gicelter and Michael Binetter in Tel Aviv. Before the meeting, Michael Binetter said to Ms Huber words to the effect:

> Deb, you have to come with me to the meeting with the lawyer. You speak Hebrew and I want you to be the client so that it cannot come back to me.

208 At the commencement of the meeting, Michael Binetter said to Mr Gicelter: "It's extremely important that Deborah is the client". This evidence is consistent with my conclusion that Michael Binetter took particular care as to the roles that he adopted in connection with the various respondents. At least on the occasion of the meeting with Mr Gicelter, Michael Binetter took this care in an effort to conceal misconduct on his part.

209 There was then a conversation to the following effect:

> Mr Gicelter said to Michael: What's the problem?
>
> Michael said: The Australian tax office has been carrying out an investigation called Operation Wickenby after they raided a tax accountant and seized his laptop. They found my name on his laptop.
>
> Mr Gicelter said: Have you done anything wrong?
>
> Michael said: Absolutely not! But the Australian tax office began investigating my family and issued amended assessments, which we have been fighting. One of the companies is in Court now. The assessments relate to allegations that the companies had back-to-back loans with Israeli banks. We are concerned about what might be in the bank files about "back to back" loans.
>
> Ms Huber asked: What's a back-to-back loan?
>
> Michael said to Ms Huber: The allegation is that loans which have been granted by Israeli banks are supported by cash deposits. Our position is that the loans were secured by a personal guarantee.
>
> Mr Gicelter said to Michael: Were they back-to-back loans?
>
> Michael said: Yes. The loans were secured by large cash deposits in Switzerland and Israel. But the cash deposits are held by a bank which has a separate banking licence, so they won't find it.
>
> …
>
> Mr Gicelter then said to Michael: Well, where did the money come from?
>
> Michael said: My father and his brother took the money out of Australia.
>
> At some point during the conversation, Michael also said: The bank in question is Bank Hapoalim. We have someone in Bank Hapoalim – a man called Baruch Etzion who we've been giving money and gifts to for many years and he has given evidence that it was quite normal practice to give loans secured by a personal guarantee alone. We have been giving Baruch presents and gifts so he will give the evidence that is correct for us.
>
> Michael then asked Mr Gicelter: Do you think an Israeli bank would produce our customer records if a Court ordered them?

> Mr Gicelter replied: I think they would. The days of Israeli banks protecting the secrecy of their customers are over – they now want to be part of the international banking community and will not do that anymore.
>
> After Michael had explained the above matters to Mr Gicelter, Mr Gicelter said: Well, what do you really want from me?
>
> Michael said: Can you find someone to give evidence to say that it was usual practice of Israeli banks to give unsecured loans?
>
> Mr Gicelter said: I could give that evidence.
>
> Michael then asked: I don't think that's going to be very useful.
>
> Michael then abruptly changed topic and said words to the effect of: Do you know anyone who could copy or destroy the file held by Bank Hapoalim on us?
>
> Mr Gicelter said: Possibly we do know somebody who could help you.
>
> After a discussion between Mr Gicelter and his colleagues in Hebrew, Mr Gicelter turned to Michael and said in English words to the effect of: "Yes, I think we know somebody who could help you, but we will have to check and get back to you".
>
> Subsequently, Mr Gicelter said: Well, we are not talking about hard copy files. This is 2012 and it is going to be electronic files. They would have to be accessed at night.
>
> Michael said: We want the files destroyed. If we only get a copy, we have no control over what is ultimately produced. I am particularly concerned about meetings where negotiations for the loans took place and whether there are any file notes of who attended those meetings.
>
> After this conversation, the meeting concluded with a discussion about costs and further communications. I can recall the conversation occurring to the following effect:
>
> Michael said: Should we discuss how much this will cost? Will it cost a lot of money?
>
> Mr Gicelter: I will get back to you about the cost once I know I can help you.
>
> Michael said: Deborah is to be the contact point. There is a Court deadline coming up for the production of documents. (Michael said the date, but Ms Huber could not recall what date he said.) The file needs to be accessed or destroyed before then.

210 In the absence of any evidence from Michael Binetter, in my view, the particular concern expressed by Michael Binetter in this conversation arose from facts including that he had participated in negotiations for loans with Bank Hapoalim on behalf of BCI and that he had attended meetings at which those negotiations were conducted on behalf of BCI.

211 After the meeting, Michael Binetter said to Ms Huber: "That's the first time that I've met a lawyer who really understands what we need".

212 At the request of Michael and Andrew Binetter, Ms Huber thereafter made telephone calls from Australia to Mr Gicelter asking about progress, to which Mr Gicelter responded: "It is a difficult matter but we have found the person".

213 Subsequently, Mr Gicelter requested payment of $3,000. After arranging this payment, Ms Huber received a telephone call from Michael Binetter asking her to attend a meeting at his house. At the meeting, Michael and Andrew Binetter asked Ms Huber to go back to Israel with Andrew Binetter for another meeting with Mr Gicelter. During that conversation, Michael Binetter said:

> I don't want to go back to Israel. But Andrew's going and it's important that you go as well. It's a critical matter.

214 Around this time, Mr Gicelter called Ms Huber and requested $60,000. Ms Huber then had the following conversation with Andrew Binetter:

> Ms Huber: Amiram says the price we have to pay for the man at Bank Hapoalim is $60,000.
>
> Andrew: I will arrange the payment.

215 Ms Huber had email communications with Mr Gicelter including one in which she said: "153,495NIS sent today will be in your account tomorrow".

216 This email confirmed a payment of Israeli shekels, which is probably a payment made in response to Mr Gicelter's request for $60,000. In response, Mr Gicelter sent the following message:

> Received. It's only 65% but he is starting to work…Therefor you must be in contact with me before you arrive to make sure he has it all.

217 In my view, this disgraceful episode demonstrates that Michael Binetter was participating (in a dishonest way) in the management of BCI's tax dispute which, by then was the principal business of BCI. In doing so, he was acting as a de facto director of BCI. It also supports a conclusion that Michael Binetter had previously participated in the management of BCI by taking part in the negotiation of the arrangements between BCI and Bank Hapoalim, which were the principal business of BCI. In that participation, he acted as a de facto director of BCI.

218 Ms Huber returned to Israel on 24 June 2012. She gave the following account of a conversation, during a meeting on 26 June 2012 in Israel which she attended with Andrew and Gary Binetter and Mr Gicelter:

| | |
|---|---|
| Gary: | Mark Douglass is a really good friend of mine and has said to me that there is nothing illegal about back to back loans. |
| Mr Gicelter: | Well, it depends on where the money has come from. |
| Gary: | You realise that it's black money we're talking about. |
| Mr Gicelter: | Yes I realise that. |

219 On the basis of Ms Huber's evidence, I find that the offshore deposits were proceeds of monies originally taken out of Australia by Erwin and Emil Binetter to one or more locations outside Australia.

*Other evidence about the source of the deposits*

220 Ronald Binetter gave evidence that Erwin Binetter had said to him, in the mid-2000s: "I have other loans from Israeli banks including Bank Hapoalim and Mizrahi Bank" and "I have money at the bank in Israel".

221 Documentary evidence, set out below, refers to the deposits. None of this evidence came from the applicants. It was mainly obtained by the ATO pursuant to a letter of request ordered to be sent to the judicial authorities of Israel pursuant to s 7 of the *Foreign Evidence Act 1994* (Cth): *BCI Finances Pty Limited v Commissioner of Taxation* [2012] FCA 855; (2010) 89 ATR 861.

*Conclusions about source of the offshore deposits*

222 Based on the evidence of Ms Huber and the documentary evidence, and the absence of any evidence from the respondents to the contrary, I find that the offshore deposits that secured each of the advances from Bank Hapoalim and IDB were probably located in Switzerland or Israel at all relevant times. They were funds that were accumulated by Erwin and Emil Binetter, were owned by them, and were available to them, and to the various applicants, to be used to obtain transfers of funds from the Israeli banks to the applicants in Australia.

223 The Andrew Binetter parties submitted that, in the absence of evidence as to the precise source of the deposits, "there was no rational, let alone proper, basis for the Commissioner to treat the advances made under the loans from the Israeli banks as the funds of the applicants or as income". I do not agree. First, I do not accept that the advances should be characterised as loans (within the meaning of Australian law) where the totality of the arrangements between the applicants and the Israeli banks has not been established. The Commissioner's power to issue a default assessment arose under s 167 of the ITAA 1936 because the

Commissioner was not satisfied with the returns that had been furnished. The Commissioner had good grounds not to be so satisfied because the information provided to support the income tax returns did not explain the totality of the relevant transactions. Once the Commissioner reached this view, he was empowered to make an assessment of the amount of income tax which, in his judgment, ought to be levied. That included treating the identified advances as income in the absence of cogent evidence about the true position, on the basis that they were inadequately explained receipts. It was then a matter for the taxpayer (as a person with knowledge of the true facts) to demonstrate, if it was the case, that the assessment was incorrect: cf. *Evans v Federal Commissioner of Taxation* (1989) 20 ATR 922; (1989) 89 ATC 4540 at 4545 (Hill J).

*Ronald Binetter's evidence about ownership of offshore funds*

224 I have referred to Ronald Binetter's evidence of a conversation with Andrew Binetter in which they agreed that "[w]e have money overseas".

225 I have also referred to Ronald Binetter's evidence of a conversation in which Andrew Binetter asked him to travel to Switzerland with Michael Binetter to learn how to get access to funds in Switzerland. In October 2010, the three of them travelled to Zurich and visited the offices of UBS and Bank Hapoalim. They next travelled to Tel Aviv where, on 1 November 2010, Ronald Binetter was introduced to a banker at IDB. The same evening, Ronald Binetter attended a meeting with his two brothers and Mr Etzion.

226 The three Binetter brothers then travelled to Geneva, where they visited another office of Bank Hapoalim. Michael and Andrew Binetter went into the offices without Ronald Binetter before coming out and introducing Ronald to a young banker.

227 Based on this evidence, and in the absence of evidence from Michael and Andrew Binetter, I find that, by at least October 2010, they each had an ownership interest in funds in Switzerland. There is no evidence that the position was any different at any earlier point from May 1993 when Bank Hapoalim first advanced funds to BCI.

228 As noted earlier, Michael Binetter told Mr Gicelter that the BCI advances were secured by "large cash deposits" in Switzerland and Israel, held by a bank with a separate banking licence.

*Respondents' submissions*

229 Mr Williams SC submitted that the Commissioner was either unable or unwilling to pursue the identity of the funds which he had long contended must have existed in an overseas account and must have been used as the countervailing security. He submitted that the Commissioner was unable or unwilling to pursue the identity of those funds or the "evasive taxpayers laying claim to those funds".

230 For their part, the respondents did not identify the offshore deposits with precision, or the beneficial owner or owners of the offshore deposits.

*Conclusions*

231 In the absence of any evidence from the respondents about a more complex or different position, each of Erwin, Emil, Andrew, Michael and Gary Binetter owned all or part of the offshore funds from which the offshore deposits were sourced at various times.

232 Those funds were originally accumulated by Erwin and Emil Binetter.

233 The ownership of Andrew, Michael and Gary Binetter is inferred from their status as children of Erwin and Emil Binetter, their participation in the transactions in which the offshore deposits were deployed as security and from the evidence that offshore funds were referred to as money belonging to the family collectively (Andrew and Ronald Binetter's statements that "we have money overseas") and that the affairs of the family were considered, as between the family, collectively (Michael Binetter's statement that "Tax assessments have been received for a couple of the family companies").

234 In the case of Andrew Binetter, it is also inferred from his dealing with the deposit fund the subject of the 2006 letter of irrevocable instructions. In the case of Michael Binetter, it also inferred from the fact that deposits were made available for transactions for the benefit of Ligon 268 (of which he was majority shareholder) and Binqld (of which he was sole shareholder).

235 Once it is found that Michael Binetter was an owner of the offshore deposit or deposits that secured advances to BCI, the contention that his dealings on behalf of BCI are properly understood as the discharge of functions as BCI's solicitor is implausible. Those dealings involved the deployment of offshore deposits in respect of which Michael Binetter had an ownership interest. I should note that Michael Binetter did not submit that he was acting as BCI's solicitor in his dealings with Mr Gicelter.

***When the existence of the offshore deposits was known***

236 Erwin and Emil Binetter knew about the offshore deposits securing the advances to BCI and EGL at all relevant times. I do not find that Margaret Binetter knew about the deposits at any relevant time.

237 Michael and Andrew Binetter knew of the deposits securing the BCI and EGL loans from the commencement of their participation in the management of each company, and about the deposits securing the advances from IDB to Ligon 268 and Binqld when those advances were made.

238 Gary Binetter had a general awareness of the existence of the deposits from at least June 2012, based on his conversation with Ms Huber and Mr Gicelter on 26 June 2012.

**Michael Binetter's "de facto" or "shadow" directorships**

239 In summary, the liquidators contended that Michael Binetter was a de facto or shadow director of each of the applicants, except to the extent that he held a valid appointment as a director.

240 By s 9(b) of the Corporations Act, a director means relevantly, a person who is not validly appointed as a director if:

> (i) they act in the position of a director [a de facto director]; or
>
> (ii) the directors of the company are accustomed to act in accordance with the person's instructions or wishes [a shadow director].

241 The court applies an objective test in determining whether a person is a de facto director: *Smithton Ltd v Naggar* [2014] EWCA Civ 939; [2015] 1 W.L.R. 189 at [39]. A person may still be a de facto director even if the company concerned has a properly constituted and functioning board: *Grimaldi v Chameleon Mining NL* [2012] FCAFC 6; (2012) 200 FCR 296 ("*Grimaldi*") at [74] and [132] to [134]. Whether a company has held out a person as a director is a relevant consideration: *Grimaldi* at [75].

242 The liquidators submitted that it is necessary to consider the functions that would be expected to be performed by a director of the relevant company in the circumstances, the functions carried out by the alleged "de facto" director and whether the person was held out as a director by the company. The role and functions performed by a director will vary with the commercial context, operations and governance structure of the relevant company. The

functions assumed need not relate to all facets of the management of the company's business: *Grimaldi* at [65] to [69].

243 A person may alternatively, or also, be a "shadow" director. Generally, being "accustomed to act" in accordance with the wishes of a person involves "habitual compliance over a period of time": *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* [2010] NSWSC 233; (2010) 77 ACSR 410 ("*Buzzle*") at [248]. Although the directors collectively must be accustomed to act on the person's instructions or wishes, it is sufficient if a governing majority is so accustomed: *Buzzle* at [250]. The instructions of the shadow director need not be given in relation to the whole of the corporation's activities for which directors are responsible: *Buzzle* at [241].

244 *Ford's Principles of Corporations Law* summarises the following factors which are considered by courts in deciding whether a person is a de facto director:

(1) the duties that would be expected to be performed by a director in the relevant company – noting that this will vary according to matters such as the size of the company and the allocation of the responsibilities within the company. This is subject to the requirement that the person performs what the court in *Deputy Commissioner of Taxation v Austin* [1998] FCA 1034; (1998) 28 ACSR 565 referred to as "top-level management functions";

(2) the duties actually performed by the person;

(3) whether others in the company considered the person a director;

(4) whether the company held out the person as a director;

(5) whether the person held themselves out as a director; and

(6) whether those outside the company considered the person to be a director.

245 The businesses of the applicants are identified earlier in these reasons. Except for Ligon 268 (which was also trustee of the Bankstown Eye Trust), the businesses comprised procuring and on-lending funds to related companies. In that context, the role of the directors was primarily concerned with procuring funds from the Israeli banks to support the business activities of associated entities in Australia, in a way that involved minimal tax liabilities. For those directors who had agreed to participate in or facilitate the scheme, their roles included:

(1) procuring the "back-to-back" arrangements by which offshore funds were used as security for advances of funds by the Israeli banks to the various applicants;

(2) documenting the arrangements so as to permit the applicants to produce documents purportedly evidencing the arrangements but which did not disclose the offshore deposits;

(3) causing or procuring the lodgement of income tax returns on behalf of the relevant applicant which would declare no or no significant taxable income referable to the transactions that occurred as a consequence of the "back-to-back" arrangements.

246 After the revised assessments were issued, the role of the directors of each of the applicants included managing the subsequent tax disputes.

***Summary of conclusions***

247 I do not find that Michael Binetter was a shadow director of any of the applicants. The evidence does not support a conclusion that, at any particular time, or during any particular period, any applicant or any director of any applicant was accustomed to act in accordance with his wishes.

248 The evidence does not support a conclusion, for any of the applicants or Erma or Ligon 158, that at any time:

(1) others in the relevant applicant company considered Michael Binetter a director;

(2) the relevant applicant held out Michael Binetter as a director;

(3) Michael Binetter held himself out as a director; or

(4) those outside the relevant applicant considered Michael Binetter to be a director.

249 Based on the evidence of his participation in the tax disputes between the applicants and the ATO, identified below, I infer that Michael Binetter was a de facto director of each of the applicant companies after the commencement of the ATO tax audit. In that role, he caused or procured the lodgement of several income tax returns by the applicants pursuant to the scheme. I reject the contention that I should find Michael Binetter was acting as company solicitor for the various applicant companies after the commencement of the audit, particularly in the absence of any evidence from Michael Binetter himself to support that finding. Particularly in the light of the misconduct revealed by Ms Huber's evidence, in my view, if Michael Binetter was to have the benefit of a finding to the effect contended for, it was necessary for him to step into the witness box to explain the facts by which he should be understood to have acted as a solicitor for the applicant companies following the commencement of the ATO tax audit rather than as a de facto director.

250 On the evidence set out below, I find that Michael Binetter was a de facto director of BCI when he took steps to procure the arrangements between BCI and Bank Hapoalim, and to procure the documentation of the arrangements so as to permit BCI to retain documents purportedly evidencing the arrangements but which did not disclose the offshore deposits.

251 Otherwise, I do not find that Michael Binetter was a de facto director of the applicant companies or of Erma or Ligon 158.

**Alleged directors' duties**

***Fiduciary duties***

252 The applicants' claim against the first to sixth respondents is primarily for breach of fiduciary duty. The fiduciary duties are pleaded in similar terms for each applicant. For BCI, the alleged fiduciary duties are:

> 27.1 a duty not to permit the interests of any member of the Binetter Entities to conflict with the interests of BCI Finances;
>
> 27.2 a duty not to allow the duties which each of them owed as directors to BCI Finances to conflict, directly or indirectly, with the interests of each of them personally and with the interests of each and all of the Binetter Entities;
>
> 27.3 a duty not to derive a benefit, directly or indirectly, for any one or more of the Binetter Entities from information acquired or acts done by each of them as a director of BCI Finances; and
>
> 27.4 a duty not to allow or cause the interests of BCI Finances to be affected adversely, or to permit, directly or indirectly, any detriment to BCI Finances for the benefit, directly or indirectly, of any of them in their capacity as directors or for the benefit of any of the Binetter Entities.

253 The respondents did not dispute that the various directors owed the relevant applicants fiduciary duties, but challenged the applicants' articulation of the scope of the duties.

254 In submissions in reply, the applicants submitted that the fiduciary duties pleaded in the statement of claim "convey adequately the nature of the relevant fiduciary duties owed by each of the directors … to each of the relevant companies" and referred to the language of para 27.1 not to "conflict with the interests of BCI" and 27.4 not to "cause the interests of BCI to be affected adversely".

255 In *Mills v Mills* [1938] HCA 4; (1938) 60 CLR 150, Dixon J said (at 185-186):

> Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power. It is only one application of the general doctrine expressed by

> Lord *Northington* in *Aleyn v. Belchier*: "No point is better established than that, a person having a power, must execute it bona fide for the end designed, otherwise it is corrupt and void."
>
> … The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment. It must, as it seems to me, take the substantial object the accomplishment of which formed the real ground of the board's action. If this is within the scope of the power, then the power has been validly exercised. But if, except for some ulterior and illegitimate object, the power would not have been exercised, that which has been attempted as an ostensible exercise of the power will be void, notwithstanding that the directors may incidentally bring about a result which is within the purpose of the power and which they consider desirable.

256 In *Pilmer v The Duke Group Ltd* [2001] HCA 31; (2001) CLR 165 at [74], McHugh, Gummow, Hayne and Callinan JJ approved the following passage from *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71 at 113*:*

> In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.

257 At [78], their Honours concluded, relevantly:

> [T]he fiduciary is under an obligation, without informed consent, not to promote the personal interests of the fiduciary by making or pursuing a gain in circumstances in which there is "a conflict or a real or substantial possibility of a conflict" between personal interests of the fiduciary and those to whom the duty is owed.

258 In *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited* [2010] HCA 19; (2010) 241 CLR 1 at [87], the High Court said:

> Mason J began his treatment of the issue whether HPI was a fiduciary by identifying the critical feature of what may be called the accepted traditional categories of fiduciary relationship – trustee-beneficiary, agent-principal, solicitor-client, employee-employer, director-company, and partners *inter se*. That critical feature was "that the fiduciary undertakes or agrees to act *for or on behalf of* or *in the interests of* another person in the exercise of a *power* or *discretion* which will affect the interests of that other person in a legal or practical sense. From this power or discretion comes the duty to exercise it in the interests of the person to whom it is owed.

259 In *Allco Funds Management Limited (Receivers and Managers Appointed) (In Liquidation) v Trust Company (RE Services) Limited (in its capacity as responsible entity and trustee of the Australian Wholesale Property Fund)* [2014] NSWSC 1251 at [114], Hammershlag J summarised the relevant principles succinctly as follows:

> For over 100 years, it has been the law that directors owe duties of a fiduciary nature to act as best to promote the interests of the corporation whose affairs they are conducting. It has been a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which they have, or can have, a personal interest conflicting or which may conflict with the interests of those whom they are bound by fiduciary duty to protect.

260 In my view, the relevant fiduciary duties owed by the respondent directors are narrower than the pleaded duties and are:

(1) a duty not to permit the interests of the relevant director to conflict with the interests of the relevant applicant company, without the company's informed consent ("conflict duty");

(2) a duty not to exercise a power conferred upon the relevant director in order to obtain some private advantage or for any purpose foreign to the power ("proper purpose duty");

(3) a duty not to exercise a power conferred upon the relevant director in a manner which is detrimental to the interests of the relevant company ("company interests duty").

261 Once the relevant duties are expressed in this way, it is necessary to consider what was in the interests of the applicant companies and what was the scope of the powers conferred upon the directors of the applicant companies. Broadly speaking, the interests of each applicant company was to carry on the business for which it existed which was, relevantly, to procure funds from Israeli banks for on-lending to related companies.

262 The interests of the applicants did not include activities or ends that would require the relevant applicant to do any act prohibited by law: cf Corporations Act, s 124(3).

263 Writing extra-judicially, Hayne J (as he then was) suggested that, at least at times of financial distress, the interests of the company may be explained by and tested against the notion of the company surviving as a solvent entity: Hayne, KM. "Directors Duties and a Company's Creditors" at 808. Even so, for the purposes of assessing a relevant decision "the focus would remain, as it must, upon whether the relevant organ of the company acted within its powers 'bona fide for the end designed'".

264 At least as a general proposition, the interests of the applicant companies included carrying on business in a manner which did not expose them to liabilities to pay penalties and interest charges under income tax legislation, or to incur tax debts which would render them insolvent. It is not in the interests of a company to lodge a false income tax return. It is not in

the interests of a company to lodge an income tax return which includes deductions for expenses that cannot or will not be substantiated by the records that record and explain the transactions or acts that justify the deductions.

***Statutory duties***

265 The applicants pleaded the following duties owed by the various respondents in respect of the applicant companies of which he or she was a director:

(1) a duty under s 180(1) of the Corporations Act to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director of a corporation in the corporation's circumstances.

(2) a duty under s 181(1) to exercise their powers and discharge their duties in good faith in the best interests of the corporation, and for a proper purpose.

(3) a duty under s 182(1) not to use their position to gain an advantage for themselves or someone else, or to cause detriment to the corporation.

266 Although the case based on breaches of statutory duty was not withdrawn, it was not addressed in closing submissions and Mr Marshall SC said that the liquidators primarily put their case on the general law duties. Accordingly, I have not given separate consideration to whether any of the respondents contravened any of pleaded statutory duties.

***Common law and equitable duties***

267 The applicants relied upon the directors' common law and equitable duties of care: *Permanent Building Society (in Liq) v Wheeler* (1994) 11 WAR 187; (1994) 12 ACLC 674; (1994) 12 ACSR 109 and *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229; (2009) 75 ACSR 1 ("*Rich*").

268 The respondents did not dispute that there is a core irreducible requirement of skill and diligence, measured objectively, that every director must exercise regardless of their actual skills or experience: *Rich* at [7205]–[7206]; *Deputy Commissioner of Taxation v Clark* [2003] NSWCA 91; (2003) 57 NSWLR 113 ("*Clark*") at [108]–[109]. This brings with it a requirement of involvement in the management of the company, and requires a director to take reasonable steps to place himself or herself in a position to guide and monitor the management of the company: *Clark* at [108]–[109]; *Daniels* at 501. A director is under a continuing obligation to become and remain informed about the activities of the company of which he or she is a director: *Daniels* at 503.

269 A failure to take reasonable care and diligence can take many forms and may, for example, overlap with a failure to act in the best interests of the company and for a proper purpose: cf *Ford's Principles of Corporations Law* at [8.305].

***To whom are directors' duties owed?***

270 The respondents accepted the general proposition that directors' duties are owed to the company as a whole.

271 They argued that, for the applicants, the company as a whole was constituted by the shareholders. Applying these principles, the Andrew Binetter parties contended that:

(1) the directors of BCI owed their duties to the shareholders of BCI as a whole, that is, to Erwin and Emil Binetter;

(2) the directors of EGL owed their duties to Milgerd and Erma;

(3) the directors of Ligon 268 owed their duties to Erwin and Michael Binetter; and

(4) Andrew Binetter as director of Binqld owed his duties in that capacity to Michael Binetter.

272 In *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch. 286; [1950] 2 All E.R. 1120 ("*Greenhalgh*") at 91, Evershed MR explained that the phrase "the company as a whole" did not (at least in the case under decision) mean the company as a commercial entity, distinct from the corporators: it means the corporators as a general body. In *Peters' American Delicacy Co Ltd v Heath* [1939] HCA 2; (1939) 61 CLR 457 at 512, Dixon J said:

> "[B]benefit as a whole" is but a very general expression negativing purposes foreign to the company's operations, affairs and organisations… The "company as a whole" is a corporate entity consisting of all the shareholders.

Each of these cases concerned an internal dispute between shareholders, which is a different situation from this one.

273 In *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722 ("*Kinsela*") at 730, Street CJ (Hope JA and McHugh JA agreeing) expressed the view that the general principles expressed in cases like *Greenhalgh* do not apply in a situation in which the interests of the company as a whole involve the rights of creditors as distinct from the rights of shareholders. Street CJ said:

> In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors

> arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration.

274 However, it is clear that directors do not owe an independent duty to, and enforceable by, the creditors by reason of their position as directors: *Spies v The Queen* [2000] HCA 43; (2000) 201 CLR 603 at [95] (Gaudron, McHugh, Gummow and Hayne JJ).

275 In *Bilta (UK) Ltd (in liq) v Nazir* [2015] UKSC 23; [2016] AC 1; [2015] 2 WLR 1168 ("*Bilta*"), Lord Toulson and Lord Hodge said (at [125] and [126]):

> A director of an insolvent company is not directly a fiduciary agent of the creditors and cannot be sued by an individual creditor for breach of the fiduciary duty owed by the director to the company: *Yukong Line Ltd v Rendsburg Investments Corpn (No 2)* [1998] 1 WLR 294.
>
> Instead, the protection which the law gives to the creditors of an insolvent company while it remains under the directors' management is through the medium of the directors' fiduciary duty to the company, whose interests are not to be treated as synonymous with those of the shareholders but rather as embracing those of the creditors.

276 At [130], their Lordships said:

> … In everyday language, the purpose of the inclusion of the creditors' interests within the scope of the fiduciary duty of the directors of an insolvent company towards the company is so that the directors should not be off the hook if they act in disregard of the creditors' interests.

277 Having regard to these authorities, I reject the submission that the duties of the applicants' directors to the various applicant companies are to be understood as duties owed to the applicants' shareholders. The extent to which directors are required to take into account the interests of creditors in their management of the company is contentious. As a general proposition, the best interests of the company will depend on various factors including solvency: *Angas Law Services Pty Ltd (in liq) v Carabelas* [2005] HCA 23; (2005) 226 CLR 507 at [67] (Gummow and Hayne JJ).

***Informed consent***

278 The general principle that any act that falls within the corporate capacity of a company will bind it if it is done with the unanimous consent of all shareholders does not enable the shareholders to bind the company itself to a transaction which constitutes a fraud on its

creditors: *In re Halt Garage (1964 Ltd)* [1982] 3 All ER 1016 at 1037; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246*; Kinsela* at 730.

279 In *Kinsela,* at 732, Street CJ concluded that, where the directors are involved in a breach of their duty to the company affecting the interests of creditors, the shareholders cannot authorise the breach.

280 In *Macleod v The Queen* [2003] HCA 24; (2003) 214 CLR 230 at [30], Gleeson CJ, Gummow and Hayne JJ stated:

> The self-interested "consent" of the shareholder, given in furtherance of a crime committed against the company, cannot be said to represent the consent of the company.

281 Similarly, at [74], McHugh J said:

> The consent of a sole shareholder cannot cure what would otherwise be a fraudulent taking or application of the company's property.

282 At [131], Callinan J stated that any "consent" by the relevant company for a use of monies contrary to its lawful objects could not be a real and effective consent, and nor could consent to an illegality be a lawful consent.

283 In *Bilta,* the UK Supreme Court considered whether a company could pursue its directors and sole shareholder for breaches of duty towards the company which deprived it of its assets. At [38], Lord Mance said:

> A company has its own separate legal personality and interests. Duties are owed to it by those officers who constitute its directing mind and will, similarly to the way in which they are owed by other more ordinary employees or agents. All the shareholders of a solvent company acting unanimously may in certain circumstances (which need not here be considered, since it is not suggested that they may apply) be able to authorise what might otherwise be misconduct towards the company. But even the shareholders of a company which is insolvent or facing insolvency cannot do this to the prejudice of its creditors, and the company's officers owe a particular duty to safeguard the interest of such creditors. There is no basis for regarding the various statutory remedies available to a liquidator against defaulting officers as making this duty or its enforcement redundant.

284 The Andrew Binetter parties' submission, that the requirement of lack of consent is part of the proper formulation of the directors' fiduciary duty, seemed to imply that fully informed consent is not a defence to a breach of fiduciary duty: cf. *Thomson v Golden Destiny Investments Pty Limited* [2015] NSWSC 1176 ("*Thomson*") at [84]; *Chan v Zacharia* [1984] HCA 36; (1984) 154 CLR 178 at 204. If that was the submission, I do not accept it. Where

such a defence is relied upon, the onus of proof lies on the fiduciary: see *Thomson* at [85], citing *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* [1929] HCA 24; (1929) 42 CLR 384 at 398 (Isaacs J) and the cases cited therein.

**Alleged breaches of duty**

285 The alleged breaches of duty, as identified in the liquidators' 4 September 2015 statement of claim notes, are set out in the following paragraphs of the statement of claim:

(1) for BCI, paras 198 to 202;

(2) for EGL, paras 227 to 231;

(3) for Ligon 268, paras 256 to 259;

(4) for Binqld, paras 275 to 278.

286 For BCI, the primary allegation is contained in para 198 which states:

> In taking each of the steps and in giving effect to each of the constituent parts of the purported Bank Hapoalim Transactions, each of Erwin Binetter (until his death on 25 August 2009), Emil Binetter, Margaret Binetter, Andrew Binetter, Gary Binetter and Michael Binetter acted in breach of the fiduciary duties which they owed to BCI Finances, in breach of the common law and equitable duties of care that they owed to BCI Finances and in breach of the statutory duties which they owed to BCI Finances as directors of BCI Finances.

287 Thus, the liquidators contended that conduct comprising "taking each of the steps and … giving effect to each of the constituent parts of the purported Bank Hapoalim Transactions" constituted breaches of each of the pleaded duties.

288 Paragraphs 199 to 202 allege that:

(1) "taking each of the steps to conceal the true purpose and effect of the purported Bank Hapoalim Transactions";

(2) "making the decision to dismiss the Tax Appeal Proceedings and … taking steps to implement that decision";

(3) "making the decision to appoint administrators and … taking steps to implement that decision"; and

(4) "taking the further and ongoing steps to conceal the true purpose and effect of the purported Bank Hapoalim Transactions";

also constituted breaches of the same duties.

289 The allegations of breach in the statement of claim are prefaced by a lengthy allegation about knowledge of the relevant respondents as follows:

> 197. By causing the incorporation of BCI Finances and, or, by acquiring BCI Finances and in causing BCI Finances to enter into the purported Bank Hapoalim Transactions as part of the scheme involving Israeli banks, each of Erwin Binetter (until his death on 25 August 2009), Emil Binetter, Margaret Binetter, Andrew Binetter, Gary Binetter and Michael Binetter knew:
>
> 197.1 that the purported Bank Hapoalim Transactions was a device to assist the Binetter Entities in having access to and, or, the benefit of the offshore funds to assist in the business activities of the Binetter Entities in Australia;
>
> 197.2 that the documentation prepared and exchanged with Bank Hapoalim was intended to create an appearance, which was false, to the effect that the purported Bank Hapoalim Transactions was a genuine commercial loan transaction between Bank Hapoalim and BCI Finances;
>
> 197.3 that, in fact, the purported Bank Hapoalim Transactions involved a back-to-back arrangement whereby offshore funds under the control of the Binetter Entities could be, by means of the back-to-back arrangement, used by the Binetter Entities without disclosing the existence or nature of the offshore funds;
>
> 197.4 that each and all of BCI Finances, EGL, Erma Nominees, Milgerd Nominees, Ligon 159 and Ligon 158 would declare income in relation to purported loans derived from the purported loan from Bank Hapoalim and claim as a deductible expense against that income interest at a rate which matched the purported rate of interest payable by BCI Finances to Bank Hapoalim, thereby avoiding assessable income tax and the amount of tax payable and to be paid by those Binetter Entities;
>
> 197.5 that the purported Bank Hapoalim Transactions would also allow profit made by the Binetter Entities to be paid to Bank Hapoalim and, or, Bank Hapoalim Switzerland to augment offshore funds, purportedly as interest payments due to Bank Hapoalim, in circumstances where those funds would be so paid to augment offshore funds without tax having been paid on those funds;
>
> 197.6 that the purported Bank Hapoalim Transactions therefore involved BCI Finances in a broader scheme which operated to the benefit of the Binetter Entities and which, if revealed, would operate to the detriment of BCI Finances, which detriment included a liability to pay income tax for which it would not otherwise have any liability, a liability to pay a penalty on any assessments or amended assessments issued by the Commissioner and a liability to pay general interest charges on any assessments or amended assessments issued by the Commissioner;
>
> 197.7 that the steps taken by the Binetter Entities to conceal the true nature of the purported Bank Hapoalim Transactions had the effect that BCI Finances would be unable to discharge its onus of establishing that any assessments issued by the Commissioner of Taxation which

> disallowed the interest expenses claimed as deductible expenses were excessive;
>
> 197.8 that the steps taken by the Binetter Entities to conceal the true nature of the purported Bank Hapoalim Transaction would incur significant legal costs and would expose BCI Finances to significant legal costs of the Commissioner of Taxation in the Tax Appeal Proceedings, which legal costs would not otherwise have been incurred and for which BCI Finances would not otherwise have been exposed; and
>
> 197.9 that the appointment of administrators to BCI Finances would further burden BCI Finances with the costs of the administration and the costs of liquidation, including the costs and expenses incurred by the liquidators and lawyers engaged by them in properly investigating the facts and circumstances relating to the purported Bank Hapoalim Transactions and the steps taken by the Binetter Entities to conceal the purported Bank Hapoalim Transactions from the Commissioner of Taxation and from the liquidators.

290 The conduct said to fall within the scope of para 198 of the statement of claim was identified in the liquidators' "breach note". For each applicant, the conduct was described in a table under the heading "breach" as:

(1) involving the relevant applicant (in the scheme);

(2) continuing to involve the relevant applicant (in the scheme);

(3) drawdowns and rollovers;

(4) on-lending;

(5) receiving and making payments;

(6) lodging tax returns;

(7) documenting the transaction in a particular way; and

(8) concealing the deposit as security so as to conceal the offshore funds and offshore income.

291 As the liquidators put their case in the "breach note", breaches (1) and (2) are no more than conclusory descriptions of the conduct referred to in breaches (3) to (8). The case against the directors is not a case of accessorial liability, by which it is alleged that they were "involved" in a contravention by BCI: cf, for example, s 79 Corporations Act.

292 Any breach of duty will arise from particular acts or omissions on the part of the relevant director. If it were suggested, I would not accept that a director's conduct "involving" BCI in the scheme, for example, by procuring a drawdown, will necessarily implicate him in some other act or omission that occurred in pursuance of the scheme. Accordingly, I have not

considered whether particular acts or omissions, said to be breaches of duty, constituted "involving" or "continuing to involve" an applicant in the scheme.

293 Breaches (3) to (8) broadly describe conduct that, if undertaken, gave effect to, or was at least consistent with, the scheme that I have found. Taking BCI as an example, based on para 197 of the statement of claim, the alleged benefits of participation in the scheme to various of the respondents comprised:

(a) use of funds by the corporate respondents, advanced to them by BCI to assist in the business activities of the Binetter Entities in Australia;

(b) a basis (albeit not sufficiently justified) for income tax deductions claimed by the corporate respondents for interest expenses incurred pursuant to the loans of funds by BCI;

(c) the augmentation of offshore funds owned or controlled by the Binetter Entities from payments made to Bank Hapoalim, purportedly as interest payments to that bank.

294 I accept that the conduct described in breaches (3) to (5) had the benefits described in (a) and (b). As to (c), although there is evidence which strongly suggests that offshore deposits were augmented by payments described as payments of interest to the Israeli banks, the evidence does not permit findings about the quantum of that augmentation. Nor does the evidence reveal the precise beneficiaries of that augmentation.

295 Conversely, as Mr Marshall SC explained the liquidators' case, there was "no upside" in the transactions for the applicants, but there was "downside risk" namely the risk of tax liabilities. As noted earlier, Mr Marshall SC contended that any income received by the applicants should not be characterised as a benefit of the transactions because that income never generated a profit.

296 Alternatively, Mr Marshall SC contended that the conduct involved a breach of the directors' duty of care and diligence because, as the directors well knew, it would not benefit the applicants and it exposed the applicants to tax liabilities which they could not pay.

297 Conduct of the kind in breaches (3) to (5), if undertaken by a director, involved an exercise or purported exercise of the director's power, in that it involved incurring liabilities or dealing with the assets of the company.

298 Accordingly, I accept that directors of the applicant companies who engaged in the conduct falling within breaches (3) to (5) breached their fiduciary duties by doing so because they exercised their powers as directors for a purpose or purposes foreign to the purposes for which the powers were conferred, namely for the benefit of third parties.

299 I also accept that directors of the applicant companies who engaged in the conduct falling within breaches (3) to (5) breached their fiduciary duties by doing so because they acted in a manner that was detrimental to the interests of the relevant company: breach (3) "drawdowns and rollovers" exposed the applicants to a risk that the receipt of funds would be treated as assessable income by the Commissioner, in the absence of records to explain the entirety of the transactions pursuant to which the drawdowns and rollovers were made; breaches (4) and (5) "on-lending" and "making payments" exposed the applicants to the risk that, in the event of being assessed to pay tax, they would not have funds to pay the tax.

300 Breach (6). Lodgement of a tax return on behalf of the company also involves an exercise of power in that it affects the company's legal rights. In this case, lodgement of the relevant tax returns exposed the applicants to the risk that, in the event the Commissioner did not accept the tax returns as accurate, the applicants would be liable to pay penalties and interest charges. It follows that directors of the applicant companies who lodged the relevant tax returns on behalf of the company breached their fiduciary duties by doing so because they acted in a manner that was detrimental to the interests of the relevant company.

301 Breach (7). Documenting the transaction in a particular way may involve an exercise or purported exercise of power because the documentation affects the legal rights and obligations of the company. Documenting the transactions in a dishonest and implausible way, that would enable the applicants to suggest dishonestly that the entirety of the relevant transactions did not include the critical deposits was not, of itself, conduct against the interests of the applicants. It was the deployment of those documents to support the applicants' income tax returns which was contrary to the interests of the applicant companies.

302 As to breach (8), whether concealing the deposits involved a breach of fiduciary duty will depend upon whether, at a particular time, there was an obligation upon an applicant to disclose facts which included the existence of the deposits. The "breach note" identifies the date of the alleged breaches falling within breach (8) as the period between the dates of the relevant transactions and the issue of the revised assessments. I do not accept that the applicants were subject to a relevant obligation throughout those periods. There may have

been occasions, particularly during the ATO tax audit, when the applicants were subject to a relevant obligation.

303 The Andrew Binetter parties submitted that the liquidators' case presupposed a conflict in the interests of the applicants and the respondents. They argued that the liquidators ignored that the persons and companies constituting the respondents are the shareholders of the applicants, and that, on the liquidators' case, the applicants were incorporated or acquired for the very purpose which the directors fulfilled. As explained above, I do not accept the matters identified by the Andrew Binetter parties demonstrate an absence of conflict of interests. The interests of the applicants and respondents were not aligned at least insofar as transactions or conduct benefiting the respondents involved a breach of law by an applicant, or exposed an applicant to a debt that it would be unable to pay. None of the applicants was able to pay the debts which arose from the revised assessments. If any of the applicants was ever in a financial position which would have permitted it to pay a tax debt, that was not the case by the conclusion of the tax audit.

304 In oral submissions, Mr Marshall SC clarified that the steps referred to in para 199 of the statement of claim were steps taken after the commencement of BCI's tax appeal. I do not accept that any of this conduct adversely affected the applicants except to the extent that they might have incurred liabilities as a result of the costs of conducting the appeal. To put it colloquially, once the revised assessments were issued the horse had bolted. The directors could only either disprove the revised assessments, or put the relevant company into liquidation. There is no evidence that any tax appeal could have succeeded. In those circumstances, it does not advance the liquidators' case to argue that conduct following the issue of the revised assessments involved a breach of fiduciary duty and I have not considered that aspect of the liquidators case further.

305 A similar analysis applies to the cases against EGL, Ligon 268 and Binqld.

**Secondary liability**

***Knowing participation in breach of directors' duties***

306 The general principles were not in contest. The liquidators relied on the following two propositions:

(1) a person who receives property with respect to which a fiduciary duty exists with knowledge that the property is transferred as a result of another person acting in

breach of fiduciary duty holds that property on constructive trust for the person to whom the fiduciary duty was owed: *Simmons v New South Wales Trustee and Guardian* [2014] NSWCA 405 ("*Simmons*") at [88]; and

(2) a person who assists a fiduciary to breach his fiduciary duties, with knowledge of a dishonest and fraudulent design on the part of the fiduciary, is liable as though they were the fiduciary: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 ("*Farah*") at [160]; *Lewis v Nortex Pty Ltd (In Liq); Lamru Pty Limited v Kation Pty Limited* [2005] NSWSC 482 at [33]. This includes liability to disgorge the property transferred to them by another person in breach of that person's fiduciary duty, as well as *in personam* liability: *Sheahan v Thompson (No 2)* [2015] NSWSC 871 at [141]-[146].

307 In each case, the knowledge that the defendant must have in order to be liable can be established in any of four different ways (*Farah* at [174]-[178]; *Simmons* at [90]):

(1) actual knowledge of the existence of the fiduciary duty, and of the misapplication of the transfer pursuant to a breach of fiduciary duty;

(2) wilfully shutting one's eyes to those things;

(3) abstaining in a calculated way from making such inquiries, as an honest and reasonable person would make, about the fiduciary and the transfer of the property; or

(4) knowledge of facts which to an honest and reasonable person would indicate the existence of the fiduciary duties and the fact of transfer being a breach thereof.

308 The case brought against the corporate respondents was that they each assisted various directors' breaches of fiduciary by executing documents in connection with the transactions and by receiving funds "channelled" to and from the various applicants in accordance with the scheme.

309 There is also a case brought against Michael Binetter that he was knowingly concerned in breaches of fiduciary duties by the directors of each of the applicants.

310 The Andrew Binetter parties submitted that a director's knowledge of a fact "in his capacity as a director of one company does not mean that a different company of which that person is a director is taken to have knowledge of that fact", citing *Re Marseilles Extension Railway Co Ex p. Credit Foncier and Mobilier of England* (1871) LR 7 Ch App 161; *Re Hampshire Land Co* [1896] 2 Ch 743 at 748.

311 That proposition needs to be understood in the context of the impact of fixing the company with the director's knowledge.

312 The general proposition, stated in *Beach Petroleum NL v Johnson* [1993] FCA 392; (1993) 43 FCR 1 at 25 per von Doussa J, is that ordinarily, if a director knows information which is important to the affairs of the company, he is under a duty both to communicate that information to the company and to receive it. Von Doussa J cited the following passage from *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* (1980) 1 All ER 392 at 404:

> Their knowledge must, in my opinion, be imputed to the companies of which they were directors and secretary, for an officer of a company must surely be under a duty, if he is aware that a transaction into which his company or a wholly-owned subsidiary is about to enter is illegal or tainted with illegality, to inform the board of that company of the fact. Where an officer is under a duty to make such a disclosure to his company, his knowledge is imputed to the company (*Re David Payne & Co Ltd* [1904] 2 Ch 608; *Re Fenwick, Stobart & Co Ltd* [1902] 1 Ch 507).

313 I conclude that the knowledge of Erwin, Emil and Andrew Binetter concerning the transactions between the applicants and the Israeli banks is to be imputed to the corporate respondents of which they were directors, because it was important to the corporate respondents to know that their receipt of funds from the applicants and payments to the applicants or to the Israeli banks facilitated the implementation of the scheme by each of the applicants.

## Causation and loss

### *Alleged losses*

314 Paragraph 211 of the statement of claim is in the following terms:

> 211. By reason of each and all of Erwin Binetter (until his death on 25 August 2009), Emil Binetter, Margaret Binetter, Andrew Binetter, Gary Binetter and Michael Binetter causing, allowing, or permitting BCI Finances to enter into the purported Bank Hapoalim Transactions, by reason of their taking steps to conceal the facts and circumstances of the purported Bank Hapoalim Transactions from the Commissioner of Taxation, by reason of the audit conducted by the Commissioner of Taxation, by reason of the Tax appeal Proceedings, by reason of the continuing and ongoing concealment of the Bank Hapoalim Transaction and by reason of the liquidation of BCI Finances, BCI Finances has suffered and incurred loss and damages and costs and expenses.
>
> **Particulars**
>
> 211.1 Assessments for income tax, penalties and interest $12,120,295
>
> …

211.3 Costs of the winding up including liquidators' remunerations and expenses and costs and legal costs and expenses

315 A similar allegation is made at para 240 of the statement of claim concerning the transactions between EGL and IDB. The particulars of loss are the liability under the revised assessments, namely $39,687,712.87 as at 28 October 2014, and the costs of the winding up of EGL including liquidators' remuneration and expenses and costs, and legal costs and expenses.

316 For Ligon 268, the relevant allegation is at para 266 of the statement of claim. The particulars of loss are the liability under the revised assessments, as at 31 October 2014 in the sum of $29,163,164.98, and the costs of the winding up of Ligon 268 including liquidators' remuneration and expenses and costs, and legal costs and expenses.

317 For Binqld, the relevant allegation is at para 283 of the statement of claim. The particulars of loss are the liability under the revised assessments, as at 27 October 2014 in the sum of $22,922,433, and the costs of the winding up of Binqld including liquidators' remuneration and expenses and costs, and legal costs and expenses.

318 The liquidators submitted that the losses represented by the revised assessments arose as a consequence of the various applicants "being involved in and continuing to be involved in the scheme" for each of the income years in respect of which revised assessments were issued.

***The liquidators' case on equitable compensation***

319 The liquidators accepted that, for equitable compensation, the Court is required to identify "the criteria which supply an adequate or sufficient connection between the equitable compensation claimed and the breach of fiduciary duty": *Maguire v Makaronis* [1997] HCA 23; (1997) 188 CLR 449 ("*Maguire*") at 473.

320 Ultimately, the liquidators put their case on a "but for" analysis that, had the applicants never been involved in the transactions no losses would have been suffered and, had the applicants not been involved in any given tax year in respect of which revised assessments were issued, the liability arising from the revised assessments in respect of that tax year would not have been suffered. Put another way, if the applicants had not entered into the back-to-back transactions, there would have been no tax liability at all. The losses represented by the revised assessments arose as a consequence of the transactions undertaken by the various applicants in furtherance of the scheme for each income year in respect of which a revised assessment was issued following the tax audit.

321 As to the costs of the windings up, the insolvency of the applicants was said to be a direct consequence of the incurring of the tax liabilities.

322 Separately, the liquidators submitted that "the fact of the applicant companies not having the full suite of documentation and in particular no documentation as to the deposit and the security, had the result that the Commissioner did not accept the transactions as presented. That is sufficient causation."

323 In *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 272, Spigelman CJ (Priestley JA and Meagher JA agreeing) noted that the "object of equitable compensation is to restore persons who have suffered loss to the position in which they would have been if there had been no breach of the equitable obligation". Spigelman CJ cited, with approval, the following passages from the judgment of Lord Browne-Wilkinson in *Target Holdings Ltd v Redferns* [1996] AC 421 at 432:

> At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation' *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25 at 39, per Lord Blackburn. Although, as will appear, in many ways equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault-based: the defendant is only liable for the consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same.

324 Spigelman CJ noted that, in *Maguire*, the High Court had also quoted from the judgment of Lord Browne-Wilkinson. The relevant passage in *Maguire* is as follows (at [51]-[53]):

> The obligation of a defaulting trustee is essentially one of effecting restitution to the trust estate. In *Target Holdings Ltd v Redferns*, Lord Browne-Wilkinson said:
>
> > The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate.

> His Lordship continued, with reference to decisions of Lord Eldon (when Master of the Rolls) in *Caffrey v Darby*, Lord Cottenham LC in *Clough v Bond*, Street J in *Re Dawson (deceased)* and Brightman LJ in *Bartlett v Barclays Trust Co (Nos 1 and 2)*:
>
> > If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed ... Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred.
>
> Thus, there is no translation into this field of discourse of the doctrine of *novus actus interveniens*.

325 Michael Binetter submitted that the critical step which led to the imposition of the taxation liabilities was the filing of the tax returns claiming the deductions which were eventually disallowed. I accept that this was a critical step, particularly in relation to the imposition of liabilities for penalties and interest charges, but not that it was the only step which led to the imposition of the tax liabilities. In particular, where the revised assessments included receipts from the Israeli banks as assessable income, it was the procuring of the receipts which led to the imposition of income tax liabilities on those receipts. Where the deductions were claimed on the basis of payments made to the Israeli banks, and subsequently disallowed, with the possible exception of Ligon 268 (which earned income from the Bankstown Eye Trust), it was the receipt of funds from Israel on-lent to other entities which led to the applicant companies earning assessable income upon which tax was payable once the interest expenses were disallowed.

***Claim not pressed***

326 The liquidators did not press the claim in respect of costs orders incurred by BCI in BCI's tax appeal.

***Respondents' argument that no loss suffered as a result of the revised tax assessments***

327 The Andrew Binetter parties submitted that the fact that one of the applicants engaged in conduct which gave rise to a tax liability could not be said to have caused that company a loss. If, for example, the Bank Hapoalim transactions were not genuine loans, then BCI was always required to pay the tax to which it was assessed (putting aside questions of when it might have been assessed to pay that tax, and questions of interest charges and penalties) and the liquidators have no cause to complain that the revised assessments were eventually issued.

328 However, I have found that an element of the scheme was the lodgement of income tax returns which would declare no, or no significant income. (For Ligon 268, the scheme involved the lodgement of income tax returns which would declare no, or no significant, income from its activities as a lender of funds obtained from IDB.) It follows that the applicants would not have procured funds from the Israeli banks if they contemplated paying income tax on income earned from their lending activities.

329 The Andrew Binetter parties argued that there is a conceptual problem with a claim for substantial losses against a company such as BCI, which they described as "a $2 company". They submitted that BCI was insolvent at the time that the revised assessments were raised because it had no assets to meet the assessments and no prospect of ever being able to do so, arguing:

> 507. But if the assessments were correctly issued, then the Commissioner never had a prospect of recovering any monies from BCI as it never had any assets, and never stood to acquire any assets, its sole purpose being, on the Commissioner's view, to participate in a sham.
>
> 508. In other words, on the sham hypothesis, the Commissioner was never going to have a claim against BCI, no matter what the directors did.

330 In *Bilta* at [178], Lord Toulson and Lord Hodge concluded that when the directors of Bilta caused it to incur VAT liabilities and simultaneously caused it to misapply money which should have been paid to HMRC, leaving the company with large liabilities and no means of paying them, the directors caused it to suffer a recognisable form of loss.

331 In *Stone & Rolls Ltd (In Liquidation) v Moore Stephens (A Firm)* [2009] UKHL 39; [2009] 1 A.C. 1391 at 1517 [231], Lord Mance observed that it would be wrong to assume that a deficit rendering a company insolvent is not a loss.

332 Based on these authorities, I accept that the applicants suffered loss when they were issued the revised assessments, in the amount of the liabilities incurred by reason of the revised assessments. In this regard, I do not accept that the applicant companies never had any assets: their assets were the loans which they made to the corporate respondents.

## LIMITATION PERIODS

### Breach of fiduciary duty

333 Section 1317K of the Corporations Act provides that proceedings for a declaration of contravention, a pecuniary penalty order, or a compensation order, may be started no later than six years after the contravention.

334 Equity applies the Corporations Act limitation periods by analogy unless it would be unconscionable to permit the respondents to rely upon the statute: cf. *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181; (2014) 87 NSWLR 435.

335 I accept the liquidators' submission that it would be unconscionable to permit the respondents to rely upon the s 1317K in this case, not least of which because the liquidators were only appointed to the companies in 2014 and 2015. Before the liquidators were appointed, the applicants were under the management of various of the respondents and therefore unable to prosecute the relevant claims. The fact that the respondent directors did not conceal any breach of fiduciary duty from the applicant companies does not assist the respondents.

### Breach of common law claims

336 To the extent that the liquidators' claims are based on common law duties, they are not statute barred because no relevant loss was suffered until the revised assessments were issued: cf *Wardley Australia Limited v The State of Western Australia* [1992] HCA 55; (1992) 175 CLR 514 at 527,532.

## EVIDENCE

### Parties' agreement of evidentiary issues

337 The parties tendered a minute which purported to set out their agreement on 12 propositions. Proposition 7 states:

> On the basis of the above, the Respondents withdraw their objections to the tender of previous affidavits deposed to by any of the Respondents, which are tendered by the Applicants as evidence only of the fact of the prior statements made in those affidavits and not for the truth of what was said.

338 However, it is plain from the liquidators' narrative that the liquidators sought to rely upon various statements made by Andrew Binetter in an affidavit affirmed by him on 31 October 2012 and 27 July 2012 for the truth of what was said. For example, para 600 of the liquidators' narrative reads:

> Andrew became involved in a fruit juice business in 1990, Tamarama Fresh Juices, which operated from Marrickville. By 1993 the business had tripled in size and relocated to Corish Circle, Pagewood. Another juice business in which Erwin's entities had an interest, Nudie, also operated from the Pagewood site: EL0214 (TB 6/2856), [21]–[33], [54]–[56] (Affidavit A Binetter 31.10.2012).

339 In the light of passages such as these in the liquidators' narrative, it must have been obvious to the respondents' legal representatives that the liquidators did not rely on passages of the affidavits referred to in the narrative as evidence only of the fact of the prior statements made in those affidavits. Nor was the evidentiary value of a tender on that basis explained. As a result, I have taken the passages of Andrew Binetter's affidavits that are identified in the liquidators' narrative as evidence of the truth of what Andrew Binetter said.

**Rulings**

***11 February 1998 file note***

340 I admitted into evidence, as provisionally relevant, a file note dated 11 February 1998 headed "Michael Binetter". The file note commences "PJE met with Michael Binetter (MB) in Sydney on Monday, 9th February 1998". On Michael Binetter's behalf, Mr Archibald QC contended that the document was not shown to be a business record. He acknowledged that the document, "on its face, has a business flavour" but submitted that this was insufficient to satisfy s 69(1)(a) of the *Evidence Act 1995* (Cth). Mr Archibald QC submitted that the "documentary repository of that business matter must be proven to form part of the records kept for the purposes of a business" and that the file note appears only in a vacuum.

341 Section 69(1)(a) provides:

> (1) This section applies to a document that:
>
> (a) either:
>
> (i) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business, or
>
> (ii) at any time was or formed part of such a record, and
>
> (b) contains a previous representation made or recorded in the document in the course of, or for the purposes of, the business.

342 The document is marked with a document identifier which shows that it was obtained from the lawyers who represent the Andrew Binetter parties in this proceeding. It is also marked with a watermark which states "Released under the FOI Act 1982 ATO - Sydney Office". Another document apparently obtained from the files of Andrew Binetter's lawyers and

marked with a similar watermark is a "Fraud or Evasion opinion" dated 27 November 2009 signed by Michael Cranston, Deputy Commissioner of Taxation. That document records:

> Generally this matter came to the attention of the Australian Taxation Office from information downloaded from Phillip Egglishaw's computer disk which provided a meeting note dated 11 February 1998 from Philip Egglishaw to Michael Binetter discussing two back to back loan arrangements.

343 The fraud or evasion opinion contains other details of the note from which it may be inferred that this passage is referring to the file note to which objection is taken.

344 The parties' written agreement on evidentiary issues contains the following proposition:

> 6. For the sake of clarity, any document recording the reasons of the Commissioner of Taxation for making a decision, determination, assessment or the like, is relied upon by the Applicants, and is limited pursuant to s 136, as evidence only of the fact of:
>
> a. the decision, determination, assessment or the like;
>
> b. the expressed reasons for the decision, determination, assessment or the like;
>
> c. the interactions between the Commissioner and other persons, including but not limited to the person in respect of whom the decision, determination, assessment or the like is made and that person's representatives, agents or officers; and
>
> d. the documents and information provided to or obtained by the Commissioner.

345 In my view, based on proposition 6(d), the parties' agreement does not prevent me from inferring that the file note was downloaded from Philip Egglishaw's computer disk and, from the fact that it was retained on that individual's computer and from the contents of the file note, that it was kept by him in the course of, or for the purposes of, a business, being a business of procuring or facilitating financial transactions. Accordingly, I am satisfied that the file note is a document that falls within the meaning of s 69(1)(a).

***4 April 2007 file note***

346 The liquidators contended that this four page handwritten note was a business record of Mark Douglass.

347 Mr Williams SC did not dispute that the document was a file note prepared by Mr Douglass. He argued that it was not established that the document formed part of the records belonging to a business, and alternatively that it fell within the s 69(3) exception for communications in contemplation of litigation. That exception operates if a business record:

> (a) was prepared or obtained for the purpose of conducting, or for or in contemplation of or in connection with, an Australian or overseas proceeding; or
>
> (b) was made in connection with an investigation relating or leading to a criminal proceeding.

348 The evidence included a document on the letterhead of Binettervale Lawyers entitled "Agenda for discussion with Michael Binetter and Andrew Binetter + MCD on 4 April 2007". I find, from the face of the document compared with the 4 April 2007 agenda document, that the file note is a record of the 4 April 2007 discussion between Michael and Andrew Binetter and Mark Douglass. Also in evidence is a letter dated 14 December 2007 from MDA Lawyers to the ATO concerning BCI which includes the notation "Our Ref: t-06-054". The file note is marked "t-06-054". I infer that the file note is or was part of a file kept by MDA Lawyers numbered "t-06-054" in the course of, or for the purposes of, its business of providing legal services, and that the file note was marked with that number for the purpose of its inclusion in the file. Accordingly, I am satisfied that the document falls within the scope of s 69(1).

349 Mr Williams SC submitted that it was apparent from the 4 April 2007 agenda document that the subject matter of the meeting, of which the file note is a record, included s 264 notices. Mr Williams SC submitted that the 4 April 2007 meeting took place in the context of a tax audit in which the ATO was making "serious noises" about the possibility of criminal or other proceedings instituted against people with the types of transactions described in the ATO documents. The particular evidence relied upon by Mr Williams SC is identified in the findings about the ATO tax audit set out below.

350 The submission was not that any of the Andrew Binetter parties were contemplating commencement of an "Australian or overseas proceeding" but, rather, that the ATO was contemplating such a proceeding.

351 As to s 69(3)(a), I am not satisfied that any "Australian or overseas proceeding" was in contemplation by Mr Douglass as at 4 April 2007 or that any representation contained in the file note was made "in connection with" such a proceeding. In any event, I am not satisfied that s 69(3)(a) would apply to a representation in the file note simply because the ATO contemplated commencing an Australian or overseas proceeding. The relevant contemplation is the contemplation of the person who made the representation: cf *Australian Competition and Consumer Commission v Advanced Medical Institute Pty Ltd (No 2)* [2005] FCA 1357;

(2005) 147 FCR 235 at [43]. The file note does not reveal that any representation in the file note was made for the purpose of conducting of defending an Australian or overseas proceeding, or for or in contemplation by Andrew Binetter, Michael Binetter or Mark Douglass of such a proceeding, or in connection with any such proceeding.

352 As to s 69(3)(b), I do not accept that any representation contained in the file note was made "in connection with an investigation relating or leading to a criminal proceeding". No relevant criminal offence or criminal proceeding was identified, and nor was there evidence of a criminal proceeding that was reasonably probable or likely: cf *Lewincampv ACP Magazines Ltd* [2008] ACTSC 69 at [24].

353 Accordingly, I am satisfied that the file note is a document that falls within the meaning of s 69(1)(a) and there is no representation contained in the document that falls within s 69(3).

***Transcript of examination of Mr Etzion***

354 The liquidators tendered, as evidence of what was said but not as evidence of its truth, a transcript of an examination of Mr Etzion on 4 March 2015 before an Israeli Judge, Judge Ido Druyan. The transcript records Mr Etzion's confirmation that Bank Hapoalim lent money to BCI "where half of the loan belongs to Emil and half to Erwin". Mr Etzion gave evidence of his recollection and opinions concerning the transactions between BCI and Bank Hapoalim, including the evidence set out earlier under the heading "'Back-to-back' loans".

355 The respondents objected to the transcript on the ground of relevance. Mr Marshall SC sought to have the transcript admitted only as evidence of assertions made, and not the truth of what was said. In my view, the statements made in the transcript are relevant to the possible terms of the arrangements with Bank Hapoalim but not the actual terms. The statements are relevant to the question whether mere knowledge of the existence of the deposits is sufficient to reach a reliable conclusion about the full terms of the arrangements.

**AUSTRAC records**

356 AUSTRAC records were tendered by the liquidators as evidence of the dates and amounts of payments made to and from Australia. However, without evidence explaining the meaning of some of the information in the records, particularly the meaning of "beneficiary customer", and without explanations of some of the anomalies which appear on the face of the records, I am not satisfied that they prove the recipient of funds sent from Australia to Israel. In particular, in several cases, the stated "receiving institution" is the First International Bank of

Israel and the nominated account with that bank is Bank Hapoalim. The evidence does not explain who received the funds referred to in those AUSTRAC records. I have mentioned other anomalies in the AUSTRAC records in the chronological factual findings below.

357 The AUSTRAC records do not substantiate the interest expenses which were alleged to have been incurred according to BCI's tax returns. However, AUSTRAC records do show funds transferred by BCI to Israel. The table below, taken from the ATO's reasons for amending BCI's tax returns (but substantiated by the evidence in this Court), compares the amounts claimed by BCI in its income tax returns for the period 1 July 1996 to 30 June 2008 with amounts remitted to Israel identified by AUSTRAC:

| **Financial Year** | **AUSTRAC Funds transferred to Israel** | **ITR Overseas interest deductions** | **WITHHOLDING Investment and PAYG** |
|---|---|---|---|
| 1997 | 653,686 | 674,814 | 74,979 |
| 1998 | 323,340 | 1,032,294 | 97,351 |
| 1999 | 338,000 | 677,233 | 56,190 |
| 2000 | 338,835 | 679,836 | 94,606 |
| 2001 | 338,835 | 677,041 | 75,227 |
| 2002 | 678,835 | 754,261 | 75,426 |
| 2003 | 170,000 | 754,261 | 75,426 |
| 2004 | 0 | 386,504 | 38,651 |
| 2005 | 183,500 | 487,222 | 48,722 |
| 2006 | 426,159 | 473,510 | 47,351 |
| 2007 | 356,594 | 713,188 | 39,622 |
| 2008 | 308,297 | 688,923 | 0 |

358 There were no AUSTRAC records in evidence for the 1992 to 1998 income years

359 The AUSTRAC records also do not substantiate the interest expenses which were alleged to have been incurred according to EGL's tax returns. However, AUSTRAC records do show funds transferred by BCI to Israel. The table below, taken from the ATO's reasons for amending BCI's tax returns (but substantiated by the evidence in this Court), shows that there is no correlation between the amounts claimed by EGL as overseas interest deductions, the funds remitted to Israel and the interest PAYG withholding:

| **Income Year** | **ITR Overseas interest deductions** | **Funds remitted to Israel as per AUSTRAC**[12] | **Withholding tax Interest / PAYG** |
|---|---|---|---|
| 1992 | 1,750,410 | | 0 |
| 1993 | 1,308,480 | | 37,786 |
| 1994 | 290,725 | | 49,191 |
| 1995 | 1,289,490 | | 115,575 |

| | | | |
|---|---|---|---|
| 1996 | 1,786,416 | | 184,117 |
| 1997 | 1,217,808 | | 113,616 |
| 1998 | 955,391 | | 95,567 |
| 1999 | 273,367 | | 22,975 |
| 2000 | 468,128 | 872,497 | 59,413 |
| 2001 | 832,107 | 170,493 | 0 |
| 2002 | 965,133 | 0 | 0 |
| 2003 | 1,037,193 | 0 | 0 |
| 2004 | 1,140,039 | 0 | 0 |
| 2005 | 1,215,173 | 0 | 179,724 |
| 2006 | 1,083,018 | 3,053,165 | 432,200 |
| 2007 | 357,316 | 5,182,000 | 51,074 |

**APPLICANTS' TAX AFFAIRS**

360 Paragraph 54 of the statement of claim alleges:

> Each of the income tax returns for the years ended 30 June 1993 to 30 June 2008 (inclusive) of BCI Finances was lodged by the BCI Finances directors in which they caused BCI Finances to claim, as deductible expenses, an amount equivalent to the purported interest which was purportedly paid or payable by BCI Finances to Bank Hapoalim under the purported Bank Hapoalim Transactions, thereby reducing income tax which would otherwise have been payable under the provisions of the *Income Tax Assessment Act* by BCI Finances.

361 Having regard to the relatively small number of transactions conducted by each of the applicants in each relevant year, the lodgement of their respective income tax returns was one of the few corporate acts of the relevant applicant in any given year.

362 Even so, I do not accept that each director should be found to have lodged each of the income tax returns of the company simply because he or she was a director at the time of lodgement. It is a matter for evidence who was responsible for the lodgement (by BCI) of each individual income tax return.

363 Similar allegations are pleaded in relation to EGL at para 97 and Ligon 267 at para 130 of the statement of claim. These paragraphs also raise the question of what income tax was, as a matter of fact, payable by the applicants. However, I did not understand the liquidators to seek to prove the applicants' actual income tax liability. I have not made findings about the applicants' tax liability in any given year, except those findings based on the revised assessments.

**Income tax returns as filed**

***BCI***

364 BCI's first income tax return was for the 1993 income year and was dated 11 May 1994. The return was signed by Erwin Binetter and lodged together with a handwritten note, details of which are set out below in the section headed "Chronological factual findings". A tax loss of $648 was disclosed.

365 The income tax returns for tax years 1994 to 2001 were lodged more or less on time as follows:

(1) 1994: on or about 02 May 1995. Taxable income of $454 was disclosed;

(2) 1995: on or about 15 April 1996. Taxable income of $132 was disclosed;

(3) 1996: on or about 01 May 1996. Taxable income of $85 was disclosed;

(4) 1997: on or about 05 June 1998. A tax loss of $68 was disclosed;

(5) 1998: on or about 15 July 1999. A tax loss of $2,252 was disclosed;

(6) 1999: on or about 30 May 2000. A tax loss of $403 was disclosed.

(7) 2000: on or about 27 April 2001. A tax loss of $745 was disclosed.

(8) 2001: on or about 18 April 2002. A tax loss of $200 was disclosed.

366 Sheets inserted into the returns identified above typically record that interest income was received from Erma and from Milgerd by way of direct payment to Bank Hapoalim.

367 BCI's income tax returns disclosed gross interest income in the following amounts for the following years:

(1) 1994: $1,455,678;

(2) 1995: $771,091;

(3) 1996: $830,416;

(4) 1997: $752,285;

(5) 1998: $1,106,169;

(6) 1999: $773,117;

(7) 2000: $775,220;

(8) 2001: $752,268.

368 BCI did not file returns for the next five years and only did so after the tax audit commenced in 2006. The returns for tax years 2002 to 2008 were all signed by Andrew Binetter and were lodged as follows:

(1) 2002: on or about 05 March 2007. A tax loss of $2,392 was disclosed.

(2) 2003: on or about 06 March 2007. A tax loss of $1,620 was disclosed.

(3) 2004: on or about 22 March 2007. A tax loss of $913 was disclosed.

(4) 2005: on or about 21 March 2007. A tax loss of $518 was disclosed.

(5) 2006: on or about 21 August 2009. A tax loss of $3,627 was disclosed.

(6) 2007: on or about 21 August 2009. A tax loss of $3,628 was disclosed.

(7) 2008: on or about 21 August 2009. A tax loss of $3,451 was disclosed.

369 In the later income tax returns, BCI disclosed gross interest income in the following amounts:

(1) 2002: $755,261;

(2) 2003: $755,261;

(3) 2004: $387,504;

(4) 2005: $488,222;

(5) 2006: $473,510;

(6) 2007: $441,094;

(7) 2008: $696,060.

370 As set out above, para 54 of the statement of claim alleges that the directors of BCI caused BCI to claim, in each of the income tax returns for the tax years ended 1993 to 2008 (inclusive), as deductible expenses, "an amount equivalent to the purported interest which was purportedly paid or payable by BCI to Bank Hapoalim under the transactions with Bank Hapoalim". The deductions claimed run to the many millions of dollars, as follows:

| | |
|---|---|
| Year ended 30 June 1997 | $674,814 |
| Year ended 30 June 1998 | $1,032,294 |
| Year ended 30 June 1999 | $677,344 |
| Year ended 30 June 2000 | $679,836 |
| Year ended 30 June 2001 | $677,041 |
| Year ended 30 June 2002 | $754,261 |
| Year ended 30 June 2003 | $754,261 |

| | |
|---|---|
| Year ended 30 June 2004 | $386,504 |
| Year ended 30 June 2005 | $487,222 |
| Year ended 30 June 2006 | $473,510 |
| Year ended 30 June 2007 | $713,188 |
| Year ended 30 June 2008 | $688,923 |

371 The evidence does not explain the involvement of the various directors in the preparation or approval of the income tax returns, beyond the inferences that may be drawn from the face of the income tax returns themselves and the evidence from which inferences may be drawn about the manner in which BCI was conducted. In particular, there are no minutes of meetings of directors which record the passing of resolutions to approve the income tax returns. The earlier income tax returns are certified by Emeric Szanto, as having been prepared in accordance with the information supplied by the taxpayer. Mr Szanto was an accountant and was the brother-in-law of Erwin and Emil Binetter.

372 The evidence set out below demonstrates that the affairs of BCI were managed by Erwin and Emil Binetter, consistently with their ownership of the company, at least during the period in which the 1994 to 2001 income tax returns were lodged. In my view, it is probable that each of Erwin and Emil procured the preparation and lodgement of BCI's 1994 to 2001 income tax returns, and approved the contents of the returns. I make a finding to that effect.

373 In my view, on the evidence set out below, Michael Binetter also acted as a de facto director of BCI from time to time during the 1994 to 2001 income years, although I am not satisfied that it is more probable than not that he procured the lodgement of BCI's income tax returns or that he approved the contents of the returns.

374 Michael Binetter's role in instructing Mr Douglass in connection with the ATO tax audit supports a conclusion that he also acted as a de facto director of each of the applicants from the commencement of the ATO tax audit and, in that role (with Andrew Binetter), procured the lodgement of the applicants' outstanding income tax returns. Evidence of this role as de facto director includes:

(1) notes of a meeting between Michael and Andrew Binetter on 21 March 2007, including discussion of a program for lodgement of outstanding tax returns including the 2001 to 2005 EGL tax returns;

(2) an agenda on Binettervale Lawyers letterhead for a meeting between Michael and Andrew Binetter and Mr Douglass on 4 April 2007 which refers to BCI;

(3) Mr Douglass's 14 November 2007 request for a meeting with Michael Binetter and Andrew Binetter following the receipt of offshore information notices, including notices issued to BCI, EGL, Ligon 268 and Binqld; and

(4) Michael Binetter's dealing with Mr Gicelter after the Commissioner's March 2012 application for a letter of request to obtain documents relevant to BCI's tax appeal.

375 I do not find that Erwin and Emil Binetter procured or approved the lodgement of income tax returns by BCI after the commencement of the ATO tax audit. Nor do I find that Margaret or Gary Binetter played any role in procuring or approving the lodgement of any of BCI's tax returns.

376 Based on these conclusions and on the various signatures on the tax returns and the identification of Erwin Binetter as the public officer in several returns, below the declaration as to truthfulness and correctness of the returns, I find that the following respondents caused BCI to claim the deductible expenses claimed in the following income tax returns:

(1) Erwin Binetter, for the 1994 to 2001 income tax returns;

(2) Emil Binetter, for the 1994 to 2001 income tax returns;

(3) Andrew Binetter, for the 2002 to 2008 income tax returns;

(4) Michael Binetter, for the 2002 to 2008 income tax returns.

377 On the same basis, I find that Andrew and Michael Binetter caused BCI to lodge its 2006 income tax return without including, as assessable income, the amount of $3,848,536.54 received by BCI on 26 April 2006.

***EGL***

378 EGL lodged its income tax returns for the income years ending 30 June 1992 to 30 June 2007 on the date set out in the table below, claiming the interest expenses set out:

| **Income Year** | **Lodgement Date** | **Claimed interest expense ($)** | **Signatory or nominated public officer** |
|---|---|---|---|
| 1992 | 3 June 1993 | 1,750,410 | Erwin Binetter |
| 1993 | 24 May 1994 | 1,308,480 | Erwin Binetter |
| 1994 | 12 May 1995 | 290,725 | Erwin Binetter |
| 1995 | 20 May 1996 | 1,289,490 | Erwin Binetter |
| 1996 | 12 June 1997 | 1,786,416 | Erwin Binetter |
| 1997 | 5 June 1998 | 1,217,808 | Erwin Binetter |

| | | | |
|---|---|---|---|
| 1998 | 15 July 1997 | 955,391 | Erwin Binetter |
| 1999 | 30 May 2000 | 273,367 | None identifiable |
| 2000 | 27 April 2001 | 468,128 | None identifiable |
| 2001 | 13 April 2007 | 832,107 | Andrew Binetter |
| 2002 | 11 May 2007 | 965,133 | Andrew Binetter |
| 2003 | 10 May 2007 | 1,037,193 | None identifiable |
| 2004 | 10 May 2007 | 1,140,039 | Andrew Binetter |
| 2005 | 10 May 2007 | 1,205,173 | Andrew Binetter |
| 2006 | 23 May 2007 | 1,083,018 | Andrew Binetter |
| 2007 | 4 July 2008 | 357,316 | None identifiable |

379 EGL's income tax returns disclosed gross interest income in the following amounts for the following years:

(1) 1992: $1,751,410;

(2) 1993: $1,308,480;

(3) 1994: $291,725;

(4) 1995: $1,290,481;

(5) 1996: $1,787,983;

(6) 1997: $1,218,291;

(7) 1998: $955,724;

(8) 1999: $280,282;

(9) 2000: $544,061;

(10) 2001: $834,544;

(11) 2002: $965,248;

(12) 2003: $1,037,210;

(13) 2004: $1,140,057;

(14) 2005: $1,215,191;

(15) 2006: $1,085,666;

(16) 2007: $478,621

380 EGL never disclosed any significant taxable income in any of these tax returns.

381 At para 97 of the statement of claim, the liquidators allege that each of the income tax returns was lodged by the directors of EGL and that, in each income tax return, the directors caused EGL to claim, as deductible expenses, an amount equivalent to the purported interest which

was purportedly paid or payable by EGL to IDB under a purported loan transaction with that bank, thereby reducing income tax which would otherwise have been payable under the provisions of the ITAA 1997 by EGL.

382 The evidence set out below demonstrates that the affairs of EGL were managed by Erwin and Emil Binetter, consistently with their indirect ownership of the company, at least until about April 2001. In my view, on that basis it is probable that each of Erwin and Emil procured the preparation and lodgement of EGL's 1992 to 2000 income tax returns, and approved the contents of each return.

383 Michael Binetter was a director of EGL when the company lodged its 1996 to 2000 income tax returns. As a lawyer practising in commercial law, it is reasonable to infer that he held the role of director for the purpose of playing an active role in the management of EGL. That inference is supported by my earlier conclusion that Michael Binetter held the role of authorised person rather than director in connection with BCI. Accordingly, I consider it more likely than not that the 1996 to 2000 income tax returns were lodged with Michael Binetter's approval of their contents.

384 I find that Michael Binetter commenced to act as a de facto director of EGL after the commencement of the ATO tax audit and, in that role (with Andrew Binetter), caused the lodgement of EGL's 2001 to 2008 income tax returns.

385 I do not find that Gary Binetter played any role in the lodgement or approval of any of EGL's income tax returns.

386 Based on these conclusions and the various signatures on the tax returns and the identification of Erwin Binetter as the public officer in several returns, below the declaration as to truthfulness and correctness of the returns, I find that the following respondents caused EGL to claim the deductible expenses claimed in the following income tax returns:

(1) Erwin Binetter, for the 1992 to 2000 income tax returns;

(2) Emil Binetter, for the 1992 to 2000 income tax returns;

(3) Andrew Binetter, for the 2001 to 2008 income tax returns;

(4) Michael Binetter, for the 1996 to 2008 income tax returns.

387 On the same basis, I find that Erwin, Emil and Michael Binetter caused EGL to lodge its 2000 income tax return without including, as assessable income, funds received from Israel

and that Andrew and Michael Binetter caused EGL to lodge its 2001 income tax return without including, as assessable income, funds received from Israel.

***Ligon 268***

388 Ligon 268 lodged its income tax returns for the income years ending 30 June 1998 to 30 June 2007 as set out in the table below:

| **Income Year** | **Approximate date of lodgement** | **Claimed interest expense ($)** | **Signatory or nominated public officer** |
|---|---|---|---|
| 1998 | Not known | 19,342 | Not known |
| 1999 | Not known | 195,753 | Not known |
| 2000 | Not known | 289,503 | Not known |
| 2001 | 24 April 2003 | 401,820 | Erwin Binetter |
| 2002 | 26 May 2003 | 557,740 | Not known |
| 2003 | 24 November 2003 | 436,557 | Not known |
| 2004 | 21 January 2006 | 985,196 | Not known |
| 2005 | 10 August 2008 | 938,839 | Erwin Binetter |
| 2006 | 10 August 2008 | 951,555 | Erwin Binetter |
| 2007 | Not known | 886,653 | Not known |

389 There is evidence that the affairs of Ligon 268 were managed by Erwin Binetter and Andrew Binetter at different times prior to the commencement of the ATO tax audit. I find that the affairs of Ligon 268 were principally managed by Andrew and Michael Binetter after the commencement of the ATO tax audit although it appears that Erwin Binetter signed the 2005 and 2006 income tax returns.

390 On this basis, I find that the following respondents caused Ligon 268 to lodge the following income tax returns:

(1) Erwin Binetter, the 1998 to 2006 income tax returns;

(2) Andrew Binetter, the 2005 to 2007 income tax returns;

(3) Michael Binetter, the 2005 to 2007 income tax returns.

391 It follows that Erwin Binetter caused Ligon 268 to lodge its 1999 to 2004 income tax returns without including, as assessable income, funds received from Israel; and that Andrew and Michael Binetter caused Ligon 268 to lodge its 2005 and 2006 income tax returns without including, as assessable income, funds received from Israel.

***Binqld***

392 On 8 October 2007, Andrew Binetter on behalf of Binqld, lodged that company's income tax return for the years ended 30 June 2006. In the tax return, Binqld disclosed total income of $16,258 comprising interest income.

393 Binqld's income tax returns for the subsequent years disclosed gross interest income in the following amounts as follows:

2007: $838,649;

2008: 1,563,922.

394 On 2 February 2009, Andrew Binetter on behalf of Binqld, lodged the income tax return of Binqld for the years ended 30 June 2007 and 30 June 2008. In the 2007 income tax return, Binqld claimed a deduction of $848,495 for expenses and a taxable loss of $9,847. In the 2008 income tax return, Binqld claimed a deduction of $1,564,182 for expenses and a taxable loss of $10,107.

395 As for the other applicant companies, I find that Michael Binetter commenced to act as a de facto director of Binqld after the commencement of the ATO tax audit and, in that role (with Andrew Binetter), caused the lodgement of Binqld's income tax returns.

396 On that basis, I find that Andrew and Michael Binetter caused the lodgement of Binqld's 2006, 2007 and 2008 income tax returns.

**ATO tax audit**

397 In July 2006, the ATO commenced an audit into the affairs of BCI, Ligon 158 and another company that the ATO had identified as associated with Erwin Binetter, namely Rawson Finances. By a letter dated 31 July 2006 addressed to Erwin Binetter care of Mr Douglass, then of MDA Lawyers, and entitled "Confirmation of income tax audit", the ATO sought information that included details of all funds received by BCI from overseas and funds sent overseas by BCI, as well as details of any loans held by BCI.

398 The letter stated, relevantly:

> The Commissioner is particularly concerned with the prevalence of offshore schemes and has expressed this in his Media Release NAT 2005/35 dated 10 June 2005. In that Media Release, a copy of which is attached, the Commissioner states that any persons who may have been caught up in these schemes should come forward and clear up their tax position.

399 It must have been obvious to those of the first to sixth respondents who took an interest in the tax affairs of the applicants (who included, in particular, Andrew and Michael Binetter) that the tax audit would involve investigations by the ATO into the transactions between the applicants and the Israeli banks, because terms on which those transactions were made were critical to the proper tax treatment of advances from the banks to the applicants and to whether the applicants could substantiate their deductions for interest expenses. It follows that those individuals readily appreciated, from shortly after the commencement of the tax audit, that:

(1) the tax audit might uncover information about the relevant arrangements between the applicants and the Israeli banks, that would cast doubt on the proper tax treatment of the advances and on whether the deductions could be substantiated;

(2) BCI, EGL and Ligon 268 might be assessed to pay additional taxation, penalties and interest for unpaid tax if they could not substantiate their tax returns and, in particular, their deductions for interest expenses;

(3) Binqld might be assessed in a similar fashion if it pursued transactions with IDB that relevantly similar to the transactions between BCI, EGL and Ligon 268 and the Israeli banks.

400 Erwin and Emil Binetter were respondents who were in a position to appreciate what the tax audit was likely to involve for those companies of which they were directors, because they were the original architects of the scheme that I have found below to have been established and implemented. Andrew and Michael Binetter were in a position to appreciate more generally that the tax audit would involve consequences of the kind I have described in relation to each of the applicants, because they took charge of the applicants' responses to the audit and therefore were required to familiarise themselves with the financial affairs of the applicants, to the extent that they were not already fully aware.

401 In support of a submission (concerning an objection to evidence, considered above) that the ATO was contemplating litigation or criminal proceedings against one or more of the respondents by April 2007, Mr Williams SC noted that the media release attached to the 31 July 2006 letter stated:

> Over the last two days the Tax Office has acted on information suggesting that individuals have entered into offshore schemes directed at creating fictitious deductions or concealing income from tax. The schemes rely on the use of offshore structures put in place by scheme promoters.

> "The information indicates that in some cases deductions are claimed for payments for expenses and services that are fictitious," Tax Commissioner Michael Carmody said.
>
> "In other cases, assessable income derived offshore is not brought to account in Australia. This income is secretly returned to Australia disguised as a loan, an inheritance, a gift, or through credit and debit cards.

402 Mr Williams SC also noted that the media release referred to breaches of the tax law, potential criminal behaviour being referred to the Australian Crime Commission and that warrants had been issued. It also referred to the possibility of penalty discounts that might be available to people who came forward to "clear up their tax position".

403 It was the liquidators' case that, when this letter was received, each of the applicants were, indeed, "caught up" in an offshore scheme.

404 It was the liquidators' case that the 31 July 2006 letter would have prompted disclosure of mis-statements in BCI's income tax returns but for its directors' breach of fiduciary duty.

405 On 31 August 2006, the ATO met with MDA Lawyers and complained that no information had been received from BCI pursuant to the 31 July 2006 letter. There followed correspondence and meetings between the ATO and MDA Lawyers to progress the audit.

406 By letter dated 8 September 2006, the audit was extended to include EGL and Ligon 268.

407 The evidence included an ATO document headed "Submission for authorisation to issue notice under section 264" dated 12 March 2007, in connection with a proposed notice directed to the public officer of EGL, BCI, Rawson Finances and Ligon 158. Mr Williams SC drew attention to the description of the subject matter of enquiries, which referred to Operation Wickenby as a "whole of government initiative investigating participation by Australians in internationally promoted tax arrangements that allegedly involve secrecy and dishonesty". Under the heading "Reasons for proposing issue of notice requiring information and production of documents", the ATO submission document states, relevantly:

> 5. One of the identified structures, 'back to back loans', can be summarised as an Australian taxpayer, with funds offshore, accesses this money by 'borrowing' it through an international promoter. The funds may be used for working capital and the interest claimed as a deduction which continues to "top-up" the offshore funds.
>
> 6. Austrac records indicate the likelihood of these back to back loan arrangements having been implemented by EGL Development Pty, but it is not known whether these arrangements made use of Strachans structures/vehicles, or other offshore service providers.

408 On 19 June 2007, Andrew Binetter was interviewed by the ATO pursuant to s 264 of the ITAA 1936. He also provided two statutory declarations to the Commissioner in relation to BCI and Binqld, and a written response to questions listed in a schedule to a notice dated 24 May 2007 and issued to him pursuant to s 264. On the liquidators' case, as explained below, the information that Andrew Binetter supplied to the ATO on 19 June 2007 concerning BCI and Binqld was false or misleading.

409 By letter dated 27 July 2007, the ATO sought access to the Pagewood premises to inspect documents concerning entities including BCI, EGL, Ligon 158, and Binqld.

410 By letter dated 10 August 2007, the ATO requested further material from MDA Lawyers concerning several companies, including Binqld. In particular, the ATO requested at point (4) "the details of security or collateral used to obtain the loans from Israel Discount Bank".

411 By letter dated 26 October 2007, Mr Douglass told the ATO, concerning alleged loans by Binqld from the IDB that no security or collateral had "as yet" been provided to the bank apart from "a personal guarantee(s)". On the liquidators' case, this statement was false. The statement was almost certainly false having regard to what is now acknowledged about the arrangements between the applicants and the Israeli banks, although it was not suggested (and I do not find) that Mr Douglass or MDA Lawyers was aware of the falsity of the statement.

412 On 29 October 2007, MDA Lawyers met with ATO officers in relation to the tax audit of Binqld.

413 On 7 November 2007, the ATO issued several offshore information notices issued pursuant to s 264A of the ITAA 1936 and relating to companies including BCI, EGL, Ligon 268 and Binqld.

414 On 30 November 2007, MDA Lawyers requested that the ATO withdraw the s 264A notices or grant an extension of time to respond to the notices.

415 By letter dated 18 December 2007 addressed to Andrew Binetter care of MDA Lawyers, the ATO responded to a request for reasons why the s 264A notices were issued. Among other things, the letter stated:

> The Tax Office has issued the notices requiring information and production of documents for the following reasons:

1. Israel is a jurisdiction where banking and secrecy laws operate in favour of their clients. There is no double tax agreement with Israel. The Tax Office has no powers over banking institutions in Israel.

2. The nature of the structures is believed to be designed to avoid natural persons, in particular Australian taxpayers, from being connected to the various trust or company structures established for or by them.

3. One of the identified structures, 'back to back loans'", can be summarised as an Australian taxpayer, with funds offshore, accesses this money by 'borrowing'" it through an international promoter or directly. The funds may be used for working capital and the interest claimed as a deduction which continues to "top-up" the offshore funds.

4. It is believed that by issuing an offshore information notice to produce documents to the listed entities the Tax Office will:

   a) Uncover further factual material and information that may assist us to determine if Australian residents have derived income which ought to be subject to taxation in Australia and / or claimed deduction which cannot be substantiated.

   b) If the taxpayer refuses or fails to comply with this request, subsection 264A(10) of ITAA 1936 provides that those documents requested are not admissible in proceedings disputing the taxpayer's assessment.

416 The letter concluded by granting a 90 day extension of time for compliance with the offshore information notices.

417 By letter dated 30 April 2008, MDA Lawyers provided a substantial volume of documents to the ATO on behalf of BCI. The liquidators contended that key documents relevant to the audit were not supplied to the ATO during the audit. The applicants contended, in effect, that those members of the Binetter family who were instructing MDA Lawyers were seeking to conceal the true position from the ATO by providing an incomplete set of documents and incomplete information.

418 By letter dated 21 May 2008, the ATO drew to Mr Douglass's attention the following matters concerning the financial record keeping obligations of various companies including the four applicants:

> Under the system of self assessment income tax return forms require tax payers to provide only limited information. However taxpayers are require[d] to retain records in relation to transactions relevant to the calculation of their taxable income. The substantiation rules also require taxpayers to retain records to verify claims for deductions.
>
> Subsection 262A(1) of the *Income Tax Assessment Act 1936* (**the Act**) imposes the primary obligation on persons carrying on a business to keep records that record and explain all transactions engaged in by them that are relevant for any purpose of the Act. We consider that a record will 'explain' transactions engaged in by person if it

> contains information which will enable Tax Office staff with accounting skills to understand the essential features of the transactions. Subsection 262A(2) makes it clear that records to be kept under subsection (1) include documents that are relevant for the purpose of ascertaining a person's income and expenditure. The content of the information needed in a record will depend on the circumstances of each case.
>
> The records that a person must 'keep' under subsection 262A(1) must record every transaction that relates to the person's income and expenditure. We consider that the word, 'keep', in subsection 262A(1), means both 'make' and 'retain'. So where a record is created in the normal course of engaging in transactions, the person carrying on the business must retain that record.

419 Following the audit, the ATO issued a position paper dated 7 August 2009, explaining the ATO's position for BCI. In November 2009, the ATO informed BCI, in the ATO BCI reasons for decision, that the Commissioner intended to issue amended assessments to BCI for the income years 1997 to 2008.

420 Similarly, the ATO issued a position paper dated 9 February 2010, explaining the ATO's position for EGL, a position paper dated 2 October 2009 explaining the ATO's position for Ligon 268 and a position paper dated 11 August 2009 explaining the ATO's position for Binqld.

**The revised assessments**

***BCI***

421 In December 2009, the Commissioner issued to BCI:

(1) notices of assessment for the 1997 to 2004 income years;

(2) notices of amended assessment for the 2005 to 2008 income years, including assessments of "shortfall interest charge";

(3) notices of assessment and liability to pay penalty for the 2001 to 2008 income years.

422 On 14 December and 15 December 2009, the Commissioner issued notices of assessment against BCI for the years ended:

(1) 30 June 1997 in the amount of $14,455.04;

(2) 30 June 1998 in the amount of $489,649.15;

(3) 30 June 1999 in the amount of $463,027.64;

(4) 30 June 2000 in the amount of $464,871.02;

(5) 30 June 2001 in the amount of $230,125.94;

(6) 30 June 2002 in the amount of $226,420.50;

(7) 30 June 2003 in the amount of $226,509.90;

(8) 30 June 2004 in the amount of $116,163.30.

423 On 14 December 2009, the Commissioner issued notices of amended assessment against BCI for the years ended:

(1) 30 June 2005 in the amount of $146,285.10;

(2) 30 June 2006 in the amount of $1,295,685.90;

(3) 30 June 2007 in the amount of $118,924.50;

(4) 30 June 2008 in the amount of $206,710.50.

424 On 18 December 2009, the Commissioner issued notices of assessment and liability to pay penalty against BCI for the years ended:

(1) 30 June 2001 in the amount of $207,113.35;

(2) 30 June 2002 in the amount of $203,778.45;

(3) 30 June 2003 in the amount of $203,858.90;

(4) 30 June 2004 in the amount of $104,546.95;

(5) 30 June 2005 in the amount of $131,656.60;

(6) 30 June 2006 in the amount of $1,166,117.30;

(7) 30 June 2007 in the amount of $107,032.05;

(8) 30 June 2008 in the amount of $186,039.45.

425 The adjustments to BCI's taxable income included the disallowance of the difference between the amounts remitted to Israel and the amounts claimed as an overseas deduction in the 1997 and 1998 income tax returns. All overseas interest deductions claimed by BCI in the income years 1999 to 2008, totalling $6,292,090, were disallowed. The adjustments also included the inclusion as income of funds received from Israel for the 2006 income year.

426 The interest payments claimed in the period to 30 June 1997 were denied under subs 51(1) of the ITAA 1936, and the interest deductions claimed in the 1998 to 2008 income years were denied under s 8-1 of the ITAA 1997.

***EGL***

427 In accordance with the reasons for decision dated 4 May 2010, between July and August 2010, the Commissioner issued to EGL:

(1) notices of assessment for the 1992 to 2004 income years;

(2) notices of amended assessment for the 2005 to 2008 income years, including assessments of "shortfall interest charge";

(3) notices of assessment and liability to pay penalty for the 2001 to 2008 income years.

428 Between 8 July 2010 and 26 July 2010, the Commissioner issued notices of amended assessment against EGL, for the years ended:

(1) 30 June 1992 in the amount of $682,659.51;

(2) 30 June 1993 in the amount of $510,212.43;

(3) 30 June 1994 in the amount of $95,918.13;

(4) 30 June 1995 in the amount of $425,531.70;

(5) 30 June 1996 in the amount of $643,089.76;

(6) 30 June 1997 in the amount of $438,294.16;

(7) 30 June 1998 in the amount of $342,993.80;

(8) 30 June 1999 in the amount of $98,287.56;

(9) 30 June 2000 in the amount of $1,518,409.44;

(10) 30 June 2001 in the amount of $784,253.52;

(11) 30 June 2002 in the amount of $319,501.50;

(12) 30 June 2003 in the amount of $377,155.80;

(13) 30 June 2004 in the amount of $456,009.90;

(14) 30 June 2005 in the amount of $364,533.30;

(15) 30 June 2006 in the amount of $324,905.40;

(16) 30 June 2007 in the amount of $107,194.80.

429 On 30 July 2010, the Commissioner issued further notices of amended assessment which imposed liabilities for penalties on understatement and on interest against EGL, for the years ended:

(1) 30 June 1992 in the amount of $1,412,213.90;

(2) 30 June 1993 in the amount of $1,721,122.85;

(3) 30 June 1994 in the amount of $313,949.65;

(4) 30 June 1995 in the amount of $1,342,032.60;

(5) 30 June 1996 in the amount of $1,944,575.80;

(6) 30 June 1997 in the amount of $1,291,134.55;

(7) 30 June 1998 in the amount of $975,050.75;

(8) 30 June 1999 in the amount of $267,798.05;

(9) 30 June 2000 in the amount of $3,628,645.30.

430 Between 9 July and 6 August 2010, the Commissioner issued notices of assessment of shortfall penalty against EGL for the years ended:

(1) 30 June 2001 in the amount of $705,828.15;

(2) 30 June 2002 in the amount of $287,551.30;

(3) 30 June 2003 in the amount of $339,440.20;

(4) 30 June 2004 in the amount of $410,408.90;

(5) 30 June 2005 in the amount of $328,079.95;

(6) 30 June 2006 in the amount of $292,414.85;

(7) 30 June 2007 in the amount of $96,475.30.

431 The adjustments to EGL's taxable income included disallowances of overseas interest deductions totalling $15,972.649.00 for the 1992 to 2007 income years, and adjustments to gross income to include as income received from Israel by EGL directly during the 2000 and 2001 income years and by Blanford Finances Pty Ltd ("Blanford"), a company which Andrew Binetter described as an agent for EGL, during the 2001 to 2004 income years.

432 The interest deductions for the 1992 to 1996 income years were disallowed under s 51(1) of ITAA 1936, and the interest deductions for the remaining years were disallowed under s 8-1 of the ITAA 1997.

***Ligon 268***

433 On 7 July 2010, the Commissioner issued notices of amended assessments to Ligon 268 for the years ended:

(1) 30 June 2004 in the amount of $1,040,660.84;

(2) 30 June 2005 in the amount of $936,647.02;

(3) 30 June 2006 in the amount of $956,053.32;

(4) 30 June 2007 in the amount of $403,366.50.

434 On 18 August 2010, the Commissioner issued notices of amended assessments to Ligon 268 for the years ended:

(1) 30 June 1998 in the amount of $17,823.90;

(2) 30 June 1999 in the amount of $733,286.00;

(3) 30 June 2000 in the amount of $1,438,543.20;

(4) 30 June 2001 in the amount of $922,381.70;

(5) 30 June 2002 in the amount of $874,328.51;

(6) 30 June 2003 in the amount of $1,155,055.98.

435 The statement of claim referred to an amended assessment dated 23 August 2010 for the year ended 30 June 2000 in an amount of $705,828.15, but that assessment did not appear to be in the evidence.

436 On 6 July and 7 July 2010, the Commissioner issued notices of assessment of shortfall penalty against Ligon 268 for the years ended:

(1) 30 June 2001 in the amount of $830,143.50;

(2) 30 June 2002 in the amount of $786,896.00;

(3) 30 June 2003 in the amount of $1,039,550.35;

(4) 30 June 2004 in the amount of $966,486.05;

(5) 30 June 2005 in the amount of $866, 392.70;

(6) 30 June 2006 in the amount of $884,154.75;

(7) 30 June 2007 in the amount of $371,064.25.

437 The adjustments to Ligon 268's taxable income included disallowances of amounts of "interest expenses overseas" for the 1998 to 2007 income years, adjustments to gross income to include overseas income for the 1999 to 2006 income years and an amount of $600,000 on account of a trust distribution for the 2005 income year.

438 Shortfall interest assessments were issued to Ligon 268 for the 2005, 2006 and 2007 income years.

***Binqld***

439 On 4 December 2009, the Commissioner issued notices of amended assessments to Binqld for the years ended:

(1) 30 June 2006;

(2) 30 June 2007;

(3) 30 June 2008,

in respect of which shortfall interest charges and general interest charges were also payable by Binqld.

440 On 9 December 2009, the Commissioner issued notices of assessment and liability to pay penalty against Binqld for the years ended 30 June:

(1) 2006 in the amount of $1,080,000.00;

(2) 2007 in the amount of $3,678,278.30;

(3) 2008 in the amount of $1,685,956.40,

in respect of which shortfall interest charges and general interest charges were also payable by Binqld.

441 The adjustments to Binqld's taxable income included disallowances of overseas interest deductions totalling $2,377,643.00 from the income years 2007 and 2008, and the inclusion in assessable income funds received from Israel in the 2006 to 2008 income years.

***The revised assessments generally***

442 In summary, the assessments were issued because the ATO was not satisfied by the applicants that the income tax returns for the relevant years were true and correct.

443 For example, the ATO was not satisfied that BCI had interest expenses arising from a loan between it and Bank Hapoalim during the 1999 to 2008 income years. The Commissioner considered "that such a loan arrangement did not exist and the amounts purported to have been paid or capitalised as an interest expense post 1998 under such an arrangement [were] not an interest expense". In relation to an amount of $3,848,552 received by BCI from Bank Hapoalim during the 2006 income year, the ATO concluded that:

> 5.18 [I]n the absence of any substantiated information to the contrary, it is reasonable for the Commissioner to conclude on the available evidence that the funds BCI remitted to and received from Bank Hapoalim are the accumulated returns on investments held in the account or accounts in Bank Hapoalim.
>
> 5.19 As returns on investments held by BCI in Bank Hapoalim account or accounts, the funds received by BCI from Bank Hapoalim are considered to be ordinary income derived by BCI. The $3,848,552 received by BCI will be

> included in their assessable income for year ended 30 June 2006 in accordance with section 6-5 of ITAA 1997.

444 The Andrew Binetter parties emphasised the fact that, by reason of the relevant provisions of the tax legislation, the various applicants did not have a liability to the Commissioner to pay the amounts the subject of the various revised assessments until those assessments were issued.

**Challenges to the revised assessments**

445 The various applicants lodged notices of objections to each of the revised assessments.

446 In due course, the objections were disallowed in full.

447 Thereafter, each of the applicants commenced taxa appeal proceedings under Part IVC of the TAA, appealing from the Commissioner's disallowance of the various objections.

448 In the case of BCI, on 29 January 2014, the Commissioner's lawyers served a notice to produce addressed to BCI. The notice to produce required production of all documents provided by Bank Hapoalim following a directions hearing on 31 December 2013. On 5 March 2014, directors of BCI resolved that BCI was to discontinue BCI's tax appeal. The directors further resolved that BCI was insolvent, or likely to become insolvent in the future, and that the company appoint administrators pursuant to s 436A of the Corporations Act. On 10 March 2014, an order was made, by consent, that BCI's tax appeal be dismissed.

449 The Part IVC proceedings brought by the other applicants were withdrawn or discontinued in 2014 and 2015.

**SUMMARY OF FLOW OF FUNDS FROM ISRAELI BANKS TO THE APPLICANTS**

450 Based on the findings below:

(1) in May 1993, BCI received advances totalling 12 million Swiss francs ("SFr."). The advances were subsequently converted to an advance totalling over $12 million;

(2) on 26 April 2006, BCI received $3,848,536.54 from Bank Hapoalim;

(3) between December 1988 and October 2000, EGL received total funds of $27,703,280.38 from IDB;

(4) between March 1999 and April 2006, Ligon 268 received 44 payments totalling $9,379,000 from IDB; and

(5) between May 2006 and January 2008, Binqld received 10 payments totalling $22,900,000 from IDB.

451 BCI's tax appeal statement alleges that in May 1993 it borrowed SFr. 12 million from Bank Hapoalim and, in April 2006 it obtained a loan of $3,850,000 from that bank.

452 EGL's SOFIC alleges that, from 30 December 1988 to 21 July 1989, EGL received loans from IDB totalling $13,027,898 and other loans thereafter.

453 In Ligon 268's SOFIC, each of the amounts comprising the $9,379,000 (except the transfer of $399,000 in February 2006) is identified as a loan from IDB.

454 Similarly, in Binqld's SOFIC, loans of $22,900,000 are identified. AUSTRAC records which show that, for each of the 10 transfers, Binqld was both the "ordering customer" and the "beneficiary customer". For the first eight transfers, the account number for Binqld as ordering customer is 962124; for the last two transfers the account number ends with the last six digits 962122. That is, the account number for the ordering customer for the last two transfers does not match the records provided by the bank in November 2011. For the ninth transfer, the Bank print out shows a loan of $700,000 provided on 26 May 2008, but the AUSTRAC record shows a transfer of $700,000 provided on 23 May 2008. For the last transfer there is also a $50,000 discrepancy between the amount in the AUSTRAC record and the amount in the bank print out. I do not accept that the AUSTRAC records provide a sufficient foundation for a conclusion that the transfers were made from funds belonging to Binqld. However, as appears below, the documentation purporting to record the transfers as loan from IDB is plainly inadequate and I have made no finding about either the source of the transfers or the terms on which the transfers were made.

455 There is no doubt that the applicants received substantial amounts from the Israeli banks, some of which has been included in the revised assessments as assessable income.

**SUMMARY OF USE OF FUNDS**

456 In their various tax appeals, the applicants made contentions about the use of the funds they received from the Israeli banks. To the extent that those contentions correspond with the liquidators' case, they are admissions as to the manner in which the funds were used and the purpose for which the funds were lent to various persons and entities.

**Funds advanced to BCI**

457 According to BCI's tax appeal statement, the funds it received from Bank Hapoalim in 1993 were on-lent to EGL to enable EGL to refinance a portion of loans it had received from IDB. EGL had used the funds it had initially borrowed from IDB to make loans to Erma and Milgerd. In turn, Erma and Milgerd had used the funds initially borrowed from IDB for the following business purposes:

(1) to invest in the Auburn Investment Trust, which investment comprised land and a warehouse at 265 Parramatta Road, Auburn;

(2) to invest in the Port Macquarie Partnership, which investment comprised the Settlement City Shopping Centre.

458 Each of the Auburn Investment Trust and the Port Macquarie Partnership were investments in which Ligon 158 had an interest.

459 According to BCI's tax appeal statement, the advance of $3,850,000 that it received in April 2006 was used for purposes set out in Andrew Binetter's 31 October 2011 affidavit, namely:

(1) $2,816,633.64 was lent to EGL so it could repay its loans that it had with IDB, which loans had initially been used by EGL for various investments;

(2) $650,000.00 was lent to Winmar Investment Trust which was then invested with a managed fund with Investec;

(3) $244,158.59 was paid to Bank Hapoalim as interest;

(4) $110,000.00 was partially used to invest in Nudie, that being $44,008.00 and the balance of approximately $50,000.00 was used as a partial interest payment to BCI;

(5) $26,780.93 was used to pay legal fees incurred by BCI;

(6) $1,463.46 was deducted on account of bank fees.

**Funds advanced to EGL**

460 According to EGL's SOFIC, the funds advanced to that company up to July 1989 were lent to Milgerd and Erma, and used for the following business purposes:

(1) in December 1988 the sum of $4,777,299 was on-lent to Ligon 159 and Ligon 158 to buy units in the Auburn Investment Trust, which trust purchased the property at 265 Parramatta Road, Auburn;

(2) in 1989 the sum of $2.2 million was on-lent to Ligon 159 to contribute a further sum of $2.2 million in the Auburn Investment Fund;

(3) in 1989 the sum of $2.2 million was on-lent to Ligon 158 to contribute a further sum of $2.2 million in the Auburn Investment Fund;

(4) the remaining money borrowed from IDB in 1989 for Milgerd was used by Milgerd for the following business purposes:

  (a) it was on-lent to Ligon 159 which purchased an office block at 12 Cordelia Street, Brisbane on 15 December 1989 for $1,175,000;

  (b) it was on-lent to Ligon 159 which used the money to purchase a shopping strip at 548 Ipswich Road, on 22 February 1990 for $1,850,000;

(5) to fund Milgerd's interest in an investment in Broadbeach, Queensland;

(6) the remaining money borrowed IDB in 1989 for Erma was used by Erma to fund the interest of Erma in the investment in Broadbeach, Queensland.

461 According to EGL's SOFIC:

(1) advances in June 1991 were transferred to Erma, who lent the money to Ligon 158, and Milgerd, who lent the money to Ligon 159;

(2) an advance in June 1993 was on-lent to Erma who in turn lent it to Ligon 158;

(3) an advance in August 1993 was on-lent to Milgerd, who on-lent the funds to Ligon 159, who used the funds to buy a shopping centre in North Richmond.

462 The evidence does not reveal how funds advanced to EGL in 2000 were used. However, around that time, correspondence between EGL and IDB referred to Erma in connection with the advances. I infer that the funds advanced to EGL in 2000 were on-lent to Erma.

**Funds advanced to Ligon 268**

463 According to Ligon 268's SOFIC, funds advanced to Ligon 268 by IDB were used for its own and associated business purposes as well as on-lending for purposes set out in a schedule to that SOFIC. The schedule identifies advances to entities including Ligon 158 and Tamarama Fresh Juices Australia Pty Ltd as trustee for the TFJA Trust ("TFJA").

**Funds transferred to Binqld**

464 According to Binqld's SOFIC, funds transferred to Binqld by IDB were on-lent to the companies identified in a schedule to that SOFIC, for the purposes set out in that schedule.

## CHRONOLOGICAL FACTUAL FINDINGS: DEALINGS WITH ISRAELI BANKS

465 In the absence of oral evidence from the respondents, the evidence about the applicants' dealings with the Israeli banks is mainly documentary.

### 1989 income year and earlier

466 In 1973 or 1974, Ronald Binetter visited a bank, probably the IDB, in Tel Aviv with Erwin and Michael Binetter. Erwin Binetter instructed Ronald Binetter to sign a name, that was not Ronald's name, for the purpose of opening an account.

#### *Commencement of the scheme*

467 According to EGL's SOFIC, in about December 1998 EGL obtained a loan facility from IDB in an amount of up to SFr. 19.5 million.

468 On 21 December 1988, Erwin and Margaret Binetter held a meeting of the directors of Erma. The minutes record, relevantly, that the IDB had agreed to provide EGL "certain facilities in an amount not exceeding SF 17,000,000 on the terms contained in a Facility Letter", a draft of which was tabled at the meeting.

469 There is a handwritten ledger for EGL with entries dated from 30 June 1982. Entries dated from 30 December 1988 refer to the IDB. The 30 December 1988 entry refers to a loan of SFr 7,157,033.37 received from IDB and on-lent to Milgerd and Erma. An entry dated 30 June 1989 refers to overseas travelling expenses for a trip by Emil Binetter to Israel to arrange working capital loans from IDB. An unsigned letter dated December 1988 from EGL to IDB requests the grant of a loan facility in the amount of SFr 17 million, although the handwritten ledger entry for 30 December 1988 refers to an amount of SFr 9,085,000. The unsigned letter was provided by EGL to the ATO to justify deductions of interest expenses.

470 EGL's loan request letter requests that the loan facility be provided on the following terms as to interest:

> 4. The loan shall bear interest on its outstanding balance at a rate which shall be 9.35% p.a. less withholding tax in Australia resulting in 8.5% payable to you but should we pay such interest no later than twenty one (21) days after the date upon which interest is due then interest on the outstanding balance shall be at the rate of 7.997% p.a. less [withholding] tax in Australia resulting in 7.27% payable to you. Such rate of interest shall be fixed for the first two years of the loan facility and thereafter shall be at such rate to be agreed between us from time to time however, should we not agree upon a new rate from time to time, the rate shall be the last rate agreed and if no such rate exists the rate shall be the aforesaid rate.

> Interest shall be paid at the end of each six month period as from the date the loan is drawn, as aforesaid or other period or periods as agreed.
>
> Increased Costs. If due to either (i) the introduction of or any change in the interpretation of any law or regulation or (ii) the compliance by you with any request from any central bank or other governmental authority, there shall be any increase in the cost (including reserve requirements) to you of agreeing to make or making funding or maintaining the loan, then we shall from time to time upon demand by you, pay to you additional amounts sufficient to indemnify you against such increased costs. A certificate as to the amount of such increased costs, submitted to us by you, shall be conclusive.
>
> 5. Each and every payment of principal or interest shall be effected on its due date of payment to Israel Discount Bank Ltd., Tel Aviv in your favour.

471 EGL's loan request letter states that the obligation to make the proposed loan is conditional upon the provision of guarantees by Milgerd, Erma, Emil Binetter and Erwin Binetter, board resolutions approving the loan and the guarantees and an opinion of Mr Szanto "reflecting favourably to our power to enter into the transactions contemplated by this letter". There are guarantees signed by Erwin Binetter, Milgerd and Erma dated 23 December 1988 in favour of the IDB under an agreement made or intended to be made on 23 December 1988. There is also an unsigned but stamped and initialled guarantee in the name of Emil Binetter.

472 There is a letter dated 22 December 1988 from Mr Szanto to the IDB in which Mr Szanto refers to himself as the auditor of the "Binetter Group" and sets out a list of assets and liabilities of Erwin Binetter. The assets total A$15,931,000 while liabilities are nil. The assets included equity in Erma which, it appears, had interests in various items of real property in the Sydney area and in Queensland, shareholdings and term deposits. One asset was described as "Private residence, situated at 883 New South Head Road, Rose Bay, Current Value for sale $3,230,000 owned jointly by Mr and Mrs Binetter".

473 EGL's SOFIC alleges that "[t]he security" for the December 1988 loan facility "was by way of written guarantees" from Erma, Milgerd, Erwin Binetter and Emil Binetter "dated 23 December 1988". Based on the concessions set out above concerning deposits, I find that this allegation falsely implied that the only security for the loan facility was the guarantees identified in the SOFIC.

474 EGL's SOFIC alleges, and I find, that on 30 December 1988 EGL received a transfer of A$4,777,299.99 from the IDB. I also find, based on EGL's SOFIC, that this amount was lent to Milgerd or Erma and, in turn lent by Milgerd to Ligon 158 and by Erma to Ligon 159.

475 EGL's SOFIC alleges, and I find, that on the following dates, EGL received the following amounts from the IDB, which were lent to Milgerd or Erma:

| | | |
|---|---|---|
| (1) | 23 February 1989 | $3,037,559.1030 |
| (2) | March 1989 | $1,575,390.9517 |
| (3) | May 1989 | $1,768,433.23 |

476 These amounts were lent by Milgerd and Erma to Ligon 158 and Ligon 159 and otherwise used in the manner set out in EGL's SOFIC.

477 There are no primary records of any payment of interest expenses by or on behalf of EGL to IDB during the 1989 income year. The handwritten ledgers of EGL are not conclusive evidence, and I do not accept that they are accurate in the absence of supporting contemporaneous records: cf. s 1305 Corporations Act*; Whitton v Regis Towers Real Estate Pty Ltd* [2007] FCAFC 125; (2007) 161 FCR 20 at [59]; *Rich* at [397].

**1990 income year**

478 EGL's SOFIC alleges, and I find, that on the following dates, EGL received the following amounts from the IDB, which were lent to Milgerd or Erma:

| | | |
|---|---|---|
| (1) | 21 July 1989 | $809,061.5022 |
| (2) | September 1989 | $1,060,154.21 |

479 These amounts were also lent by Milgerd and Erma to Ligon 158 and Ligon 159 and otherwise used in the manner set out in EGL's SOFIC.

480 On 15 June 1990, Erwin Binetter on behalf of EGL and Erma sent a facsimile to IDB which stated:

> According to our agreement of Dec. 1988 we will repay you before the end of June 1990 the sum of Sw.Fr. 1,000,000.00 on the loan granted to Erma Nominees P/L. through E.G.L. Development (Canberra) P/L."

481 There was no evidence of an agreement to repay IDB SFr. 1 million before the end of June 1990.

482 There are no primary records evidencing payment of interest expenses by or on behalf of EGL to IDB during the 1990 income year.

**1991 income year**

483 A fax from Erwin Binetter on behalf of Erma dated 19 July 1990 to IDB referred to a remittal of SFr. 1 million that day. The letter states:

> The position after this transfer is:

| | Loan to E.G.L. Dev. | Share of Erma Nominee. | Share of Milgerd Nominee. |
|---|---|---|---|
| Original loan | 19,500,000.00 | 9,000,000.00 | 10,500,000.00 |
| Less: Previous repayment | 2,000,000.00 | 1,000,000.00 | 1,000,000.00 |
| Less: Repaid NOW | 1,0000,000.00 | 1,000,000.00 | 0.00 |
| Balance Now | 16,500,000.00 | 7,000,000.00 | 9,500,000.00 |

484 There is no apparent reason why Erwin Binetter wrote to IDB with this information. It is not apparent why IDB might have had an interest in the question of the "share" of each of Erma and Milgerd: on their face, the guarantees provided by Erma and Milgerd were each referable to the whole of EGL's borrowings.

485 By letter dated 27 May 1991 from Erwin Binetter on behalf of EGL to IDB, EGL requested a remittal of SFr. 4,800,000.00. The letter states, relevantly:

> This loan amount will be utilised against the guarantee of:-
>
> Erma Nominees Pty Ltd SFr. 2,400,000.00
>
> Milgerd Nominees Pty Ltd SFr. 2,400,000.00

486 EGL's SOFIC alleges, and I find, that on 11 June 1991, EGL received the following amounts from the IDB:

(1) $2,338,006;

(2) $1,673,640.

487 The $2,338,006 was transferred to Erma, who lent the money to Ligon 158.

488 The $1,673,640 was transferred to Milgerd, who lent the money to Ligon 159.

489 As for previous years, there are no primary records evidencing payment of interest expenses by or on behalf of EGL to IDB during the 1991 income year.

490 By letter dated 26 July 1991 from Mr Szanto on behalf of EGL to IDB entitled "Interest payments on loan account of E.G.L. Development (Canberra) P/L", Mr Szanto wrote:

> Referring to the recent additional borrowing of
>
> Sw. Fr. 4,800,000.--
>
> we advise you of the following interest payments:
>
> a, On 23 July 1991 by MILGERD NOMINEES PTY. LTD.
>
> on Sw. Fr. 2,000,000.--
>
> for 20 days from 11 June, 1991
>
> to 30 June, 1991
>
> in Australian Dollar currency: $A 7,932.44
>
> b, On 26 July, 1991 by ERMA NOMINEES PTY. LTD.
>
> on Sw. Fr. 2,800,000.--
>
> for 20 days from 11 June, 1991
>
> to 30 June, 1991
>
> in Swiss Franc currency: Sw. Fr. 13,000.--
>
> The above two interest payments payments [sic] satisfies all of our interest obligations to 30 June, 1991.

491 There was no explanation given for why Mr Szanto wrote to the bank to inform it of the payments. A possible explanation is that the bank was not the recipient of the payments, and the letter was written to create the false impression that the payments were interest payments to IDB.

**1992 income year**

492 This is the first income year in respect of which revised assessments were issued.

493 By facsimile dated 28 February 1992 from Mr Szanto on behalf of Erma to Lloyds International Ltd entitled "Confirmation of request to transfer by TELEGRAPHIC TRANSFER Sw. Fr. 356,250.00 from our Swiss Franc account". The request was for a transfer to IDB "whose bank account is with the Union Bank of Switzerland. Bahnhofstrasse 45. Zurich. Switzerland. THEIR ACCOUNT NO. IS: 791-598". The facsimile requested the following message:

> Being interest payment for six months, from 1st. Jan. 92 to 30th. June, 92 on loan granted to EGL Development (Canberra) P/L.
>
> Loan no.: 971014/13692.
>
> Borrowing of Erma Nominees Pty. Ltd.

> For the attention of Mr. Loew-Beer.

494 The evidence does not explain why an interest payment to IDB would be made to an account in Switzerland, rather than to an IDB account with a number corresponding to the loan number. The evidence does not demonstrate that this Swiss account was an account owned by IDB or that an interest payment to IDB could be made to that account. A likely explanation is that this facsimile records a payment which was falsely described as a payment of interest on a loan from IDB to EGL but which was, in truth, a payment to a Swiss bank account owned by Erwin and Emil Binetter. It is not necessary to make a finding about this matter, or about other similar correspondence which records payments to the Union Bank of Switzerland. Such findings would entail findings of dishonesty on the part of the person who instructed Mr Szanto on behalf of Erma. That person was probably Erwin Binetter.

495 EGL's 1992 income tax return discloses gross interest income of $1,751,410. As noted above, in its 1992 income tax return, EGL claimed deductions for overseas interest expenses of $1,750,410. The evidence does not justify a conclusion that this amount, or any amount, was paid by way of interest to IDB during the 1992 income year by or on behalf of EGL.

**1993 income year**

***Erwin and Emil Binetter's 1992 trip to Israel to arrange transaction with Bank Hapoalim***

496 In 1992, Erwin and Emil Binetter established a banking relationship between with Bank Hapoalim and BCI. According to Mr Etzion, he was introduced to Erwin and Emil Binetter by Mr Yacov Loewbeer of IDB. Mr Etzion met Erwin and Emil Binetter personally in Israel in around 1992.

497 A letter dated 6 January 1993 from Bank Hapoalim Switzerland to Mr Ben Zeev, a banker at Bank Hapoalim in Israel, and copied to Mr B Etzion and entitled "Australian deal". The letter was produced by Bank Hapoalim from its records relating to BCI. The letter states:

> As I wrote to Mr. M. Reshef we lost contact with the client and we shall review the documentation sent to us when the matter becomes relevant again.
>
> I would like to draw your attention to Mrs. R. Zmiri's memo in Hebrew to Mr. Reshef, dated October 5, 1992, in which she states in paragraph 3 that both deed of pledge and our confirmation to Central Branch are kept with us and not sent to Tel Aviv as written in your message.

498 This letter confirms the existence of a "deed of pledge" and a "confirmation" from Bank Hapoalim Switzerland to Bank Hapoalim prior to May 1993 advances, set out below. Based

on the terms of the March 2006 deed of pledge, described below, and in the absence of evidence to the contrary, it is likely that the deed of pledge and confirmation referred to in the January 1993 letter recorded terms on which advances from Bank Hapoalim to BCI would be secured by an offshore deposit.

499 The letter also shows that an apparently significant aspect of the arrangements concerned the location where the "deed of pledge" and the "confirmation" were to be stored. This is consistent with an arrangement between BCI and Bank Hapoalim by which the offshore deposit to be provided as security for advances would be concealed.

500 There is a letter dated 6 November 1992 from Mr Szanto to Mr B Etzion of Bank Hapoalim Israel in which Mr Szanto identifies himself as the auditor of Milgerd, Erma, Ligon 159, Ligon 159, Emil Binetter and Erwin Binetter. The letter certifies that those six entities have a net value in excess of US$25 million and lists 17 assets said to be their major assets. Thus, the letter is similar to the letter written by Mr Szanto to IDB in December 1988.

501 A facsimile copy of minutes of a meeting of the directors of BCI dated 10 November 1992 was obtained from the files of Bank Hapoalim. The minute records that Erwin and Emil Binetter resolved that:

> [F]or the proper handling of the corporation's funds, it was convenient to open an account with Bank Hapoalim, Central Branch, Tel-Aviv, Israel in addition to the company's other accounts

And

> Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter each acting individually, be and is hereby authorised, for and on behalf of this corporation, to sign and draw cheques against such account and to manage and transact any other business of whatever nature with such bank with the broadest powers …

502 I find that Michael Binetter consented to be authorised to act on behalf of BCI around this time.

503 I infer that, by about late 1992, Emil, Erwin and Michael Binetter had agreed to enter into discussions with Bank Hapoalim through, among others, Mr Etzion, to enter into transactions whereby a substantial amount would be advanced by Bank Hapoalim to BCI on terms that included dealings with Bank Hapoalim Switzerland, and the provision of a deposit of offshore funds as security for the advance.

504 There is a document dated 10 November 1992 entitled "Deed of continuing guarantee unlimited in amount" signed by Erwin and Emil Binetter in favour of Bank Hapoalim in respect of "credit in the form of loans in foreign currency" that BCI had received and or may receive from time to time. There is a similar document executed on behalf of Milgerd, Erma, Ligon 159 and Ligon 158. The latter document was signed by Erwin and Margaret Binetter on behalf of Erma and Ligon 158 and by Emil and Gerda Binetter on behalf of Milgerd and Ligon 159. Each document refers to Mr Szanto's 6 November 1992 letter, and verifies its accuracy.

505 By letter dated 6 January 1993, Michael Binetter wrote to Mr Etzion concerning some amendments apparently proposed by Mr Etzion in relation to a "letter of undertaking". The letter addressed "Dear Baruch" and is signed "Michael". I infer that Michael Binetter had been introduced to Mr Etzion by this date. In this letter, Michael Binetter was acting on behalf of BCI in negotiating the terms of the arrangements with Bank Hapoalim.

506 I have previously referred to the 6 January 1993 letter from Bank Hapoalim Switzerland, copied to Mr Etzion and entitled "Australian deal". The letter shows that, in around January 1993, Mr Etzion was probably aware of the existence of the deed of pledge and the confirmation, and that they were relevant to the advances ultimately made in May 1993.

507 There is a facsimile dated 6 January 1993 from Erwin Binetter on behalf of Erma to Lloyds Bank entitled "Confirmation of request to transfer by TELEGRAPHIC TRANSFER Sw. Fr. 206,230.00 from our Swiss Franc account". The request was for a transfer purportedly to IDB, and it stated the same account details at the Union Bank of Switzerland mentioned in the February 1992 facsimile. The facsimile requested the following message:

> This is a partial interest payment. Being the balance of interest due for the period from 1st. July, 92 to 31. Dec. 92. SW. Fr. 150,000.00 was remitted to you on 29th. Dec. 1992.
>
> Reference loan granted to EGL DEVELOPMENT (CANBERRA) P/L. Loan No. 971014/13692. Borrowing of Erma Nominees P/L. Attention: Mrs. Miriam Cohen.

508 The payment does not appear to be recorded in the EGL handwritten ledgers. I am not satisfied that this was a payment of interest to IDB, in the absence of other evidence that the Union Bank of Switzerland bank account was owned by IDB.

509 On 25 April 1993, Erwin and Emil Binetter held a meeting of the directors of BCI. The minutes record under the heading "Proposed loan from Bank Hapoalim BM":

> PRODUCED to the meeting was a form of letter of undertaking intended to be entered into by this company with Bank Hapoalim B.M. Central Branch, Tel Aviv, Israel.
>
> RESOLVED:
>
> (1) to agree to the terms of the letter of undertaking produced to the meeting, being a letter of undertaking between this Company and Bank Hapoalim B.M. Central Branch, Tel Aviv, Israel;
>
> (2) to date the letter of undertaking this 25th day of April 1993; and
>
> (3) to execute the said letter of undertaking under the common seal of this Company and to authorise Mr Emil Binetter and Erwin Binetter to attest the affixing of the common seal of this Company to the said letter of undertaking and to cause delivery of the said letter of undertaking to Bank Hapoalim B.M. Central Branch, Tel Aviv, Israel.
>
> PRODUCED at the meeting was a form of request for provision of credit.
>
> RESOLVED that this company agree to the terms of the request for provision of credit and authorise each of Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter on their own to negotiate the terms of any provision of credit, to fill in any request for credit, to execute any request for credit to make any request for credit and to deliver any request for credit, in each case on behalf of this Company to Bank Hapoalim B.M. Central Branch, Tel Aviv, Israel.

510 Again, I find that Michael Binetter consented to be authorised to act on behalf of BCI around this time.

511 The minutes also record that the directors agreed to execute a deed of charge in favour of Bank Hapoalim. The deed of charge, dated 25 April 1993, was in evidence. It refers to "Collateral Securities" as the two 10 November 1992 guarantees.

512 There is a document entitled "Letter of undertaking" dated 25 April 1993 and signed by Erwin and Emil Binetter on behalf of BCI ("1993 letter of undertaking"). The document refers to past and or future requests to Bank Hapoalim "to provide me, from time to time, with credit by means of loans in freely convertible foreign currencies". Clause 7(k) records that the financial certificate issued by Mr Szanto dated 6 November 1992 is true and correct. Clause 9 provides:

> As security for the due and punctual performance of all of any of my undertakings hereunder or pursuant hereto, all securities given or which may be given (if any) by me and/or on my behalf to the Bank and also all bills and other negotiable instruments which I have delivered and/or may deliver (if any) to the Bank from time to time, shall serve as collateral as well as all the additional securities which may be given by me to the Bank after the signing of this Letter of Undertaking.

513 Neither the 1993 letter of undertaking, nor the deed of charge, refers to any security for loans in the form of a deposit. Nor is there any reference to the deed of pledge and confirmation

from Bank Hapoalim Switzerland to Bank Hapoalim, mentioned in the 6 January 1993 facsimile.

514 I accept the liquidators' submission that the 1993 letter of undertaking and the charge must have been deliberately drafted without reference to the offshore deposit that had been or would be provided as security for the advances to be made pursuant to these documents. The documents were drafted in this way to permit BCI to provide them to the ATO, if necessary, in support of deductions that BCI intended to claim in its tax returns for overseas interest expenses. Based in particular on Michael Binetter's 6 January 1993 letter, I find that Michael Binetter participated in the creation of the documents in this form and for this purpose.

515 By letter dated 27 April 1993, Michael Binetter wrote to Bank Hapoalim, purportedly as Australian solicitor to BCI, in connection with the 25 April 1993 letter of undertaking. The letter sets out certain opinions concerning BCI and the letter of undertaking under Australian law. Paragraph 9 of the letter states:

> Mr Emil Binetter and Mr Erwin Binetter who attested the affixing of the seal of the Borrower to the Letter of Undertaking had the right power and authority to do so and any one of Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter has the right to sign on any Request for Provision of Credit and/or to give any certificate, notice and other instrument pursuant to the Letter of Undertaking.

516 By a second letter dated 27 April 1993, Michael Binetter wrote to Bank Hapoalim, purportedly as Australian solicitor to Milgerd, Erma, Ligon 159, Ligon 158, Emil Binetter and Erwin Binetter, concerning guarantees given in connection with banking facilities granted or to be granted by Bank Hapoalim to BCI.

517 By another letter dated 27 April 1993, from Emil Binetter on behalf of BCI, BCI enclosed 10 documents in relation to a "proposed loan from Bank Hapoalim" to BCI.

518 Finally, there is a letter dated 27 April 1993 from Bank Hapoalim to Bank Hapoalim (Switzerland), copied to Mr Etzion, entitled "Australian transaction" seeking agreement to the wording of a draft "letter of irrevocable instructions to be issued to you by the pledgor in connection with the a/m transaction". The letter continued:

> Please note that in order to proceed we require your agreement to the wording of the said draft. …
>
> Please note that our customer has agreed to the said wording.

519 This letter was produced by Bank Hapoalim from its records relating to BCI. It provides confirmation of the existence of the deed of pledge referred to in the 6 January 1993 facsimile, and of Mr Etzion's probable knowledge of its existence.

520 The Gary Binetter parties submitted that the original loan funds provided by Bank Hapoalim to BCI were SFr. 12 million and were advanced on 17 May 1993. They also submitted that Michael Binetter was the BCI company solicitor and was involved in the establishment of the banking relationship with Bank Hapoalim.

521 I do not accept that Michael Binetter's role in establishing the banking relationship with Bank Hapoalim was as a company solicitor, although he did purport to have that role in two letters written to Bank Hapoalim. The authority conferred upon Michael Binetter to act on behalf of BCI, the 6 January 1993 letter and Michael Binetter's subsequent concern to avoid knowledge of who participated in negotiations for the transactions between BCI and Bank Hapoalim together support a conclusion that Michael Binetter's participation in those negotiations on behalf of BCI involved him acting as a de facto director of BCI.

522 There is a letter dated 11 May 1993 from EGL to IDB which foreshadows a transfer of 6 million Swiss francs to loan account "Code No (&971057 A/C. 13692" to reduce "the principal of our loan account. This reduction of the account is to be applied in connection with the borrowing of Erma Nominees Pty Ltd." The loan account details correspond with the loan number on the 28 February 1992 and 6 January 1993 facsimiles identified above.

523 By 12 letters dated 13 May 1993, from BCI to Bank Hapoalim, BCI purported to request the provision of credit in accordance with the 25 April 1993 letter of undertaking. Each letter requests the provision of credit in Swiss francs in the amount of SFr. 500,000. Each letter provides that interest shall be at the rate of 6.20% per annum, less Australian Interest Withholding Tax. Each letter is signed by Erwin Binetter.

524 On 14 May 1993, there was a meeting of Erwin and Emil Binetter as directors of BCI which resolved:

> 1. To become a party to Bank Hapoalim BM's arrangement for executing transactions by means of instructions given by telephone and/or fax.
>
> 2. To empower each and every one of Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter to give instructions as aforesaid.

525 The minutes were certified by Michael Binetter as BCI's solicitor.

526 By letter dated 17 May 1993 from Bank Hapoalim to Michael Binetter, the Bank requested that a deed of charge be duly registered in favour of the bank and that confirmation evidencing the registration be provided.

527 By an undated letter from Erwin and Emil Binetter on behalf of BCI to International Services Manager Australia and New Zealand Banking Group Ltd, signed around 17 May 1993, BCI requested that the ANZ Bank open a Swiss franc currency account for BCI. The individuals authorised to arrange transfer of funds from the account were Michael, Erwin, Emil, Gary and Andrew Binetter.

528 The handwritten ledgers of BCI record the amount of CHF12,000,000.00 as having been received on 17 May 1993 from Bank Hapoalim and lent first to EGL, and through it then by each of Erma and Milgerd Nominees as follows:

| 1993 | | | | |
|---|---|---|---|---|
| May 17 | E.G.L. DEVELOPMENT (CANBERRA) P/L<br>BANK HAPOALIM B.M. | 14<br>4 | $5,829,770.60 | $5,829,770.60 |
| May 28 | E.G.L. DEVELOPMENT (CANBERRA) P/L<br>BANK HAPOALIM B.M.<br>Recording loans received in Swiss currency from Bank Hapoalim B.L. of 50 Rothschild Bld. Trust Account Trust. Two lots of Sw. Fr. 6,000,000.00 total Sw. Fr. 12,000,000.00 | 14<br>4 | $6,030,150.70 | $6,030,150.70 |

| 1993 | | | | |
|---|---|---|---|---|
| May 17 | ERMA NOMINEES PTY LTD | 6 | $5,892,770.60 | |
| May 25 | MILGERD NOMINEES PTY LTD | 7 | $6,030,150.70 | |
| May 17 | E.G.L. DEVELOPMENT (CANBERRA) P/L | 14 | | $5,829,770.60 |
| May 25 | E.G.L. DEVELOPMENT (CANBERRA) P/L<br>By agreement the loans from Bank Hapoalim B.M. were on lent to Erma Nominees P/L and Milgerd Nominees P/L via E.G.L. Development (Canberra) P/L | 14 | $6,030,150.70 | |

529 Thus, BCI recorded advances totalling $11,859,921.30 to EGL, and advances of $5,829,770.60 from EGL to Erma and $6,030,150.70 from EGL to Milgerd.

530 The EGL handwritten ledgers contain the following relevant entries:

| 1993 | | | | |
|---|---|---|---|---|
| May 29 | New loan to Milgerd Nominees Pty Ltd BCI Finances P/L | 27 | $6,030,150.70 | |
| | Recording receipt of a Sw. Fr. 6,000,000 loan from BCI Finances Pty Ltd which was on lent to Milgerd Nominees P/L | 28 | | $6,030,150.70 |

| 1993 | | | | |
|---|---|---|---|---|
| May 28 | BCI Finances P/L | 20 | $6,030,150.70 | |
| | New loan to Milgerd Nominees. | 27 | | $6,030,150.70 |
| | Being ??? only Sw. ??? No 22. Loan transferred originally from BCI to Milgerd Nominees | | | |

531 There is a document entitled "Indemnity – Payment and other instructions by facsimile" addressed to the ANZ Bank dated 20 May 1993 and signed by Erwin and Emil Binetter on behalf of BCI.

532 By a further batch of 12 letters, dated 27 May 1993, from BCI to Bank Hapoalim, BCI purported to request the provision of credit in accordance with the 25 April 1993 letter of undertaking. Again, each letter requests the provision of credit in Swiss francs in the amount of SFr. 500,000. Again, each letter provides that interest shall be at the rate of 6.20% per annum, less Australian Interest Withholding Tax. Each letter is signed by Emil Binetter.

533 Erma advanced the funds received from EGL to Ligon 158. Milgerd advanced the funds received from EGL to Ligon 159.

534 According to EGL's SOFIC, in May 1993, EGL repaid to IDB the following amounts:

(1) $5,829,770.60 (described as "repayment by Erwin Binetter"); and

(2) $6,030,150.17 (described as "repayment by Emil Binetter").

535 The amounts correspond with the figures set out in the BCI handwritten accounts, as amounts loaned to Erma and Milgerd via EGL. The $6,030,150.17 loan is recorded in the EGL ledgers, as "new loan to Milgerd". The ledger records payments made by Milgerd on behalf of EGL to IDB totalling approximately $6,030,150.17. There is no obvious reference to the $5,829,770.60 loan to Erma in the EGL ledger.

536 A balance sheet attached to EGL's 1993 income tax return records that overseas loans reduced from $17,039,544 to $7,318,767.80 during the 1993 income year. This difference between these two figures is $9,720,776.

537 By letter dated 4 June 1993, from Erwin Binetter on behalf of EGL to IDB, Erwin Binetter wrote:

> RE: OUR LOAN ACCOUNT:
>
> CODE NO. 971057
>
> A/c. No. 13692
>
> Around the time you receive this letter, you will have received
>
> Sw.Fr. 100,000.00
>
> (One Hundred Thousand Sw. Fr.)
>
> into the above account to reduce the principal of our loan account.
>
> This reduction of the principal account is to be applied in connection with the borrowing of ERMA NOMINEES PTY. LTD.
>
> The loan is now reduced from Sw.Fr. 3,100,000.00 to the round figure of Sw.Fr. 3,000,000.00.

538 A letter dated 7 June 1993 from Erwin Binetter on behalf of EGL to IDB referred to a rate of 5.4% on "the new SF 2,000,000 facility" and a rate of 7.27% net of withholding tax "on the outstanding SF3,000,000 existing facility". An unsigned letter from Erwin Binetter on behalf of Erma on behalf of EGL (sic) to IDB, also dated 7 June 1993 requested remittal of SFr. 2 million and stated "When remitting this SF 2,000,000 please state that this loan is based on our new loan agreement."

539 The EGL SOFIC states that, on 10 June 1993, EGL received a transfer of $2,010,050 from IDB. This amount was lent by EGL to Erma who in turn lent it to Ligon 158.

540 By facsimile dated 10 June 1993, Mr Szanto wrote on behalf of EGL to Mrs Therese Poulton, International Services Manager, as follows:

> RE: Sw.Fr. 2,000,000.00
>
> We were advised that the above amount was credited to our Sw.Fr. account no. 527028-001
>
> We are asking you to remit out of these funds ONLY ON THE 11th. JUNE, 1993
>
> BY TELEGRAPHIC TRANSFER

Sw.Fr. 330,785.00

TO:

ISRAEL DISCOUNT BANK LTD.

16 Mapu Street.

Tel Aviv. Israel.

whose bank account is with the Union Bank of Switzerland. 45 Bahnhofstrasse. Zurich. Switzerland, with the following message:

> "Being interest payment on Loan No. 971057/13692 of E.G.L. Development (Canberra) Pty. Ltd. for the period from 1 Jan. 93 to 30 June, 93.
>
> Borrowing of Erma Nominees Pty. Ltd.
>
> Attention; Mrs M. Cohen.

541 The effect of this instruction, when read with the 7 June 1993 letter and the EGL SOFIC, appears to be that a portion of an amount advanced by IDB would immediately be returned to IDB, albeit into a bank account in Switzerland. This letter reinforces the suspicion that IDB was not the owner of a Swiss bank account with the Union Bank of Switzerland and that the payments into that account were not, in truth, payments of interest expenses on a loan from IDB. Rather, they may have been payments which augmented offshore funds originally owned by Erwin and Emil Binetter and, from some unknown time, also owned by Andrew, Michael and Gary Binetter.

542 In its 1993 income tax return, EGL disclosed gross interest income of $1,308,480 and claimed deductions for interest expenses within Australia of $1,308,480. However, the profit and loss statement attached to the tax return refers to an expense of $1,308,480 as "Interest paid to Israel Discount Bank Ltd". There are no primary records to support the payment of interest expenses to IDB on behalf of EGL during the 1993 income year.

543 I infer that the manner in which the advance of 12 Swiss francs was documented was agreed between Emil, Erwin and Michael Binetter with knowledge of the totality of the arrangements by which the advance was procured. That agreement included creating and executing documents which gave the appearance that there was a transaction comprising loans totalling 12 million Swiss francs secured only by the guarantees set out above and a charge over the assets of BCI. However, as each of Emil, Erwin and Michael Binetter knew, the advance was secured by an offshore deposit of 12 million Swiss francs.

544 Based on later evidence of two deposits, called “fiduciary” deposits, upon which interest was earned, I infer that each of Emil, Erwin and Michael Binetter knew that the deposited funds would earn interest. Based on the fact that Emil, Erwin and Michael Binetter were able to procure the deposits, I infer that they each owned the deposits and, therefore, earned any interest income that was earned on the deposits.

545 I also conclude that Emil and Erwin Binetter as the directors of BCI decided that BCI would:

(1) record advances totalling $11,859,921.30 to EGL in the records of BCI in the manner set out above;

(2) advance those funds to Erma and Milgerd in the amounts recorded in the records of BCI.

546 I am not satisfied that Michael Binetter was a party to those decisions.

547 The liquidators contended that Erma advanced the funds received from EGL to Ligon 158, while Milgerd advanced the funds received from EGL to Ligon 159. Based on the agreement of the Margaret Binetter parties that these advances occurred, and the fact that the Andrew Binetter parties did not dispute them, I conclude that Emil and Erwin Binetter as the directors of BCI (but not Michael Binetter) agreed for these advances to occur.

**1994 income year**

548 The EGL SOFIC refers to EGL’s receipt, in August 1993, of a transfer of $4,153,685.40 from IDB.

549 By letter dated 13 August 1993 from Erwin Binetter on behalf of BCI to Bank Hapoalim, Erwin Binetter requested “a schedule of dates when interest is payable and the amounts of interest payable so that there can be no misunderstanding as to the amounts payable and the dates on which interest is to be paid”. The letter also requested confirmation “that payments are to be received at Central Branch, Tel Aviv”.

550 A second letter dated 13 August 1993, from Erwin Binetter on behalf of BCI to Bank Hapoalim enclosed a deed of charge dated 25 April 1993 and a certificate of entry of a charge.

551 A letter dated 16 August 1993 from Emil Binetter on behalf of EGL to IDB referred to a rate of 7.27% until end December 1993 on a “further drawdown of the loan to [EGL] to the extent to which it will be on lent to [Milgerd] namely SFR4,000,000”, reducing to 6% (inclusive of

Australian withholding tax) from 1 January 1994. The letter refers to a total loan of SFr 7,500,000.

552 A letter dated 30 August 1993 from Erwin Binetter on behalf of EGL to IDB stated, relevantly:

> We confirm your agreement as follows:-
>
> a, From 1 January, 1994 the loan facility of SF 2,000,000 referred to in our letter of 7 June, 1993 and the above referred to amount of SF 3,000,000 will be governed upon the same basis as the proposes SF 4,000,000 loan, referred to in our letter of 16 August, 1993. Accordingly, from 1 January 1994 interest shall be at the rate of 8 per cent (8%) per annum reduced to 6% per annum if paid on time being 30 June and 31 December, though if interest is paid more than two monthsslate [sic] from those dates then additional 1% interest above the 8% interest is payable for each and every additional month of delay. In relation to the payment of interest we will pay Australian interest withholding tax therefore for [example] if interest is paid on time then the rate is 6% with 5.4% to be sent to you and 0.6% payable as withholding tax.

553 The substance of the 30 August 1993 letter was confirmed by a letter from IDB to EGL dated 1 December 1993, including referring to a "loan facility of SwFr.2,000,000".

554 By facsimile dated 5 November 1993, Erwin Binetter on behalf of Erma requested Lloyds Bank Ltd to make a telegraphic transfer of 171,120 Swiss francs to Bank Hapoalim (account no. 342415-00001) with the following message:

> For the attention of Mr Baruch Etzion representing interest payment by BCI Finances Pty Ltd, borrowing of Ligon 158 Pty Ltd of Sw Fr 6,000,000 interest due on 14.11.93. Please forward receipt.

555 By facsimile dated 6 December 1993, Erwin Binetter on behalf of Erma requested a telegraphic transfer of SFR. 950 to Bank Hapoalim (account no. 342415-00001) with substantially the same message as that in the 5 November 1993 facsimile.

556 By facsimile dated 10 February 1994, Erwin Binetter on behalf of Erma wrote to Lloyds Bank Ltd in Sydney. The facsimile states: "Confirmation of request: Please transfer by TELEGRAPHIC TRANSFER Sw.Fr. 281,750.00". The request was for a transfer to IDB "whose bank account is with the Union Bank of Switzerland, 45 Bahnhofstrasse, Zurich". No account number is stated. The facsimile requested the following message to accompany the transfer:

> Being interest payment on borrowings of Sw.Fr. 5,000,000 from 1st. July, 93 to 31 December, 1993.
>
> Account of E.G.L. DEVELOPMENT (CANBERRA) P/L.

Loan no.: 971057/13692

Borrowing of Erma Nominees P/L.

Attention: Mrs. Miriam Cohen.

557 By letter dated 17 February 1994, Erwin Binetter on behalf of EGL wrote to IDB requesting, relevantly:

> The term of all loan facilities between the Bank and this company be for a period of 5 years except that after 1 June 1994 the whole or any part or parts may be repaid on one or more times upon one month's' notice stating the amount to be repaid.

558 By letter dated 22 February 1994, Erwin Binetter on behalf of Erma wrote to IDB concerning "the finalisation and extension of our existing loan agreement".

559 A letter dated 15 March 1994 from IDB to EGL refers to "AUD$4,153,685.40 loan; (arising from the agreed conversion of Swiss Franc facility of SwFr 4,000,000.00)".

560 A letter dated 20 March 1994 from IDB to EGL entitled "Loan arrangements", refers to letters dated 17 and 22 February 1994 and "the finalisation and extension of our existing loan agreement".

561 By letter dated 29 March 1994, the Erwin Binetter Family Trust wrote to the Deputy Commissioner of Taxation, as follows:

> Dear Sir,
>
> Re: Currency Exchange Loss/Gain
>
> Section 82Z Notification
>
> Our File No. : 51 324 546
>
> This is to advise you that on 25 April, 1993 an associate company, B.C.I. FINANCES PTY. LTD. (Tax file no. 40 548 737) entered into a loan agreement with BANK HAPOALIM B M of 50 Rothschild Blvd., Tel Aviv, Israel, to borrow Swiss Francs 12,000,000.00
>
> The purpose of this borrowing was to onlend this amount to two Trusts, viz.,:-
>
> a, The Erwin Binetter Family Trust. Sw.Fr. 6,000,000-00
>
> (File no. 51 324 546)
>
> b, The Emil Binetter Family Trust. Sw.Fr. 6,000,000-00
>
> (File no. 51 324 551)
>
> "B.C.I. Finances" and the above mentioned two Trusts agreed in a separate contract, that:-

a, The Trusts will pay the interest on behalf of "B.C.I. Finances" to "Bank Hapoalim" in proportion what they borrowed respectively from "B.C.I. Finances".

b, The rate of interest what the two Trusts pay to "Bank Hapoalim" will be 6.2%, less the Interest Withholding Tax. This rate is the same as that agreed on between "Bank Hapoalim" and "B.C.I. Finances".

c, The term of the loan will be for 5 years.

d, The Trusts will pay the Interest Withholding Tax on any amount of interest paid to "Bank Hapoalim".

As this letter is written solely on behalf of The Erwin Binetter Family Trust, we are advising you furthermore:-

1. The purpose of the borrowing by the Erwin Binetter Family Trust was to refinance their onerous borrowings, which carried an interest rate of 8.0777%

2. On the 26 May 1993, Bank Hapoalim B M transferred Sw.Fr. 6,000,000.00 to B.C.I. Finances, via ANZ Bank, Martin Pl. and Pitt St. Branch. Sydney, and the Erwin Binetter Family Trust received a converted Austral Dollar amount of $A 5,829,770-60.

Yours faithfully,

For THE ERWIN BINETTER FAMILY TRUST

562 There are no primary records substantiating an interest rate of 8.0777% on any borrowings.

563 The Emil Binetter Family Trust also wrote to the Deputy Commissioner on 29 March 1994, saying:

Dear Sir,

CURRENCY EXCHANGE GAIN/LOSS

SECTION 82Z NOTIFICATION

TAX FILE NO.: 51 324 551

This is to advise you that the trustee as trustee of this trust agreed on or about 13 May 1993 with B.C.I. Finances Pty Ltd (A.C.N. 055 988 531) to borrow an interest swiss francs from that company upon terms that:

(a) this trust would pay to the lender to B.C.I. Finances Pty Limited, Bank Hapoalim B.M., such interest as is payable by B.C.I. Finances Pty Limited to Bank Hapoalim BM in respect of the amount of swiss francs borrowed by this trust from B.C.I. Finances Pty Limited subject to deduction and remission to the Australian Taxation Office of any applicable interest withholding tax.

(b) this trust would indemnify B.C.I. Finances Pty Limited for all costs expenses and liabilities which B.C.I. Finances Pty Limited is responsible to the Bank in respect of the swiss francs borrowed by this trust from B.C.I. Finances Pty Ltd and which B.C.I. Finances Pty Limited drew down from the Bank.

(c) this trust would be entitled to any exchange gains referrable to and would be responsible for any exchange losses referrable to the swiss francs borrowing by this trust from B.C.I. Finances Pty Limited which B.C.I. Finances Pty Limited drew down from the Bank.

(d) the terms of the loan is such that any amounts draw down by B.C.I. Finances Pty Limited from the Bank and on-lent to the trust which are to be repaid by B.C.I. Finances Pty Limited to the Bank shall require this trust to repay the equivalent amount to B.C.I. Finances Pty Limited.

The purpose of the borrowing by this trust was to increase this trust's working capital for use in this trust's businesses and refinance various borrowings of this trust.

Yours faithfully,

for THE EMIL BINETTER FAMILY TRUST

E. BINETTER

Public Officer of the Trustee

564 By facsimile dated 30 March 1994, from Erwin Binetter on behalf of EGL to IDB, Mr Binetter confirmed the Bank's conversion of "our last borrowing, on 9th. June, 1993" of SFr. 2 million to Australian dollars, being A$2,010,252.

565 By facsimile dated 6 April 1994 from Erwin Binetter on behalf of Erma to Lloyds Bank Ltd, Erwin Binetter requested a transfer of SFr. 200,000 by telegraphic transfer to IDB "whose bank account is with the Union Bank of Switzerland, 45 Bahnhofstrasse. Zurich. THEIR BANK A/C. NO. IS: 791-598". The facsimile requested the following message:

> Being final repayment on the principal of the account of the original loan of Sw. Fr. 1,000,000 borrowed on 20 July, 1989 on account of E.G.L. DEVELOPMENT (CANBERRA) P/L.
>
> Borrowing of Erma Nominees Pty. Ltd.
>
> Attention: Mrs. Miriam Cohen.

566 By letter dated 4 May 1994, IDB wrote to EGL as follows:

> This letter serves to confirm the agreement between the Israel Discount Bank Ltd. and your Company, that the interest rate agreed to between us in relation to A$2,010,252.00 loan, arising from the agreed conversation of part of the Swiss Franc loan facility (Sw.Fr. 2,000,000.00 transferred on 10 June, 1993) and converted on 29 March, 1994 to A$2,010,252.00 loan, is –
>
> <u>at the rate of 7.1/2% (Seven and half per cent) per annum,</u>
>
> before deduction of Australian Interest Withholding Tax.
>
> We note that this part of the above loan facility, as converted, relates to the onloaned loan by your Company to Erma Nominees Pty. Ltd.

567 A note attached to BCI's 1993 income tax return, which return was dated 11 May 1994, asserted that BCI had borrowed SFr. 12 million which was on-lent to Milgerd and Erma as trustees. The note also asserted that prior to this transaction, Milgerd and Erma had borrowed from EGL. The note stated, in part:

> Note to the Commissioner of Taxation
>
> During the current taxation year BCI Finances Pty Limited, (File No. 40 548 737) entered into a loan agreement with Bank Hapoalim BM of 50 Rothschild Boulevard, Tel Aviv, Israel to borrow Swiss Fr 12,000,000-00.
>
> The purpose of this borrowing was to on lend this amount to two trusts:
>
> a) The Emil Binetter Family Trust SWFR 6,000,000
>
> b) The Erwin Binetter Family Trust SWFR 6,000,000.
>
> The main conditions of the borrowing between "BCI Finances" and the "Bank Hapoalim" were:
>
> 1. The term of the loan was for 5 years;
>
> 2. The rate of interest is ~~5.4% 5.5%~~ 6.2% ~~net in the hands of the lender [?], that is~~ The borrower to [indecipherable] the Australian Interest Withholding Tax;
>
> 3. Penalties apply for late payment of interest;
>
> 4. The security for the loan was provided by the above mentioned two family trusts ...
>
> The 2 trusts entered into the abovementioned agreement because they wanted to refinance their previously contracted borrowings which carried an onerous interest rate of ~~7/27%~~ 8.077% ~~net in the hands~~ of the lender. The borrower paying the interest withholding tax.
>
> Notes to the Commissioner of Taxation
>
> Prior to the borrowing from "BCI Finances", the 2 trusts borrowed funds from "EGL Development (Canberra) Pty Limited", File No. 81 573 751 who in turn borrowed the funds from "Israel Discount Bank Limited" of 16 Mapu Street, Tel-Aviv, Israel.
>
> The terms of the borrowing were similar to that of from "BCI" via the "Bank Hapoalim" but the Israel Discount Bank charged 7.27% net interest ...
>
> It is advised to you furthermore as stated in the first paragraph of these notes:
>
> a) Bank Hapoalim transferred via ANZ Bank, Martin Pl, 8 Pitt St, Sydney, SwFr 6,000,000 on 28 May 1993 to BCI Finances P/L re the borrowing of the Emil Binetter Family Trust. This was converted to $A 6,030,150.70
>
> b) Bank Hapoalim transferred via ANZ Bank, Martin Pl, 8 Pitt St, Sydney, SwFr 6,000,000 on 28 May 1993 to BCI Finances P/L re the borrowing of the Erwin Binetter Family Trust. This was converted to $A 5,829,770.00

568 A facsimile dated 27 June 1994, from Erwin Binetter on behalf of EGL and Erma to IDB, referred to a drawdown of A$1.5 million requested on 9 June 1994, and requested that the drawdown be increased to A$2.5 million.

569 In its 1994 income tax return, EGL disclosed gross interest income of $291,725 and claimed deductions for overseas interest expenses of $290,725. The profit and loss statement attached to the tax return refers to interest income received from Erma of $34,876 and from Milgerd of $256,848.99.

570 There are no primary records recording payment of the overseas interest expenses.

**1995 income year**

571 There is an unsigned letter dated 11 July 1994 from IDB to Lloyds Bank, referring to "two transfers on behalf of [Erma and Milgerd]". The unsigned letter states:

> The transfers should be effected through FM 100 and our correspondent bank is Australia And New Zealand Banking Group Ltd, Melbourne.

572 In its 1995 income tax return, EGL disclosed gross interest income of $1,290,481 and claimed deductions for overseas interest expenses of $1,289,490. Again, there are no primary records recording payment of the overseas interest expenses.

**1996 income year**

573 IDB issued a credit note to EGL dated 1 February 1996 referring to two amounts of A$236,600 and A$236,250 respectively with the following particulars: "Transfer received from ANZ Bank, representing payment of interest until 2.1.96". The payments were identified as made to accounts nos. 016799 and 016802.

574 By letter dated 11 June 1996, IDB wrote to EGL concerning the interest rate on a loan no. 803189-016799. The loan amount is stated to be A$5,510,000.00.

575 In its 1996 income tax return, EGL disclosed gross interest income of $1,787,983 and claimed deductions for overseas interest expenses of $1,786,416. The 1 February 1996 credit note is some evidence of payment of overseas interest expenses of $472,850. There are no primary records recording payment of the remaining $1,313,566.

**1997 income year**

576 On 10 September 1996, Erwin and Margaret Binetter held a meeting of the directors of EGL. The minutes record, relevantly, the following resolution:

> [T]hat the existing loan of the Company from the Israel Discount Bank Ltd. at Tel Aviv, Israel (Aud. 5,500,000.-) be enlarged by the addition of a new drawdown of Aud. 350,000.- on the same conditions as the original Loan Agreement.

577 There is a handwritten letter of request from Erwin Binetter on behalf of Erma to IDB in accordance with the resolution.

578 By letter dated 18 September 1996, from IDB to Erma, IDB wrote:

> Re: Loan account of E.G.L. Development (Canberra) Pty. Ltd.
> Loan number: 803189-016799 AUD5,500,000.-
>
> This is in reply to your fax of 11th September 1996.
>
> Please be informed that in principle we agree to enlarge the above loan, adding AUD350,000. -
>
> For this purpose, we need to receive the following documents:
>
> a. A copy of the Minutes of the meeting of the Board of Directors, in which it was decided the present request, indicating the names of the persons who signed on behalf [of] the Company.
>
> b. A personal guarantee from the Directors of the Company.
>
> Other conditions remain unchanged.

579 AUSTRAC records show funds transferred by BCI to Bank Hapoalim in the income year ended 30 June 1997 of $653,686. The overseas interest expenses disclosed in BCI's 1997 income tax return were $674,814. There is no evidence to explain the $21,128 difference. The ATO adjusted BCI's overseas interest expense deduction by the amount of $21,128. That is, the Commissioner appears to have accepted that the payments totalling $653,686 were deductible expenses.

580 In its 1997 income tax return, EGL disclosed gross interest income of $1,218,291 and claimed deductions for overseas interest expenses of $1,217,808. There are no primary records of payment of these interest expenses. The AUSTRAC records in evidence do not include any payments that might comprise part or all of these interest expenses.

**1998 income year**

581 According to an affidavit affirmed by Gary Binetter on 20 December 2012, in about 1997 Emil Binetter told him that Emil and Erwin Binetter had decided to separate their business dealings "now that the children are getting older".

582 In November 1997, Erwin Binetter and Andrew Binetter went to Israel where Erwin introduced Andrew to Mr Etzion. Mr Etzion was the person who was responsible for dealing

with the requests set out below on behalf of Bank Hapoalim. The applicants noted that the requests operated to extend BCI's facility with Bank Hapoalim from May to November 1998. The extension appears to have occurred "as if by default". In his 2011 affidavit, Mr Etzion sought to explain this apparent anomaly by saying:

> I cannot now recall the discussions that I had with Erwin and Emil Binetter as to the six month extension of the Loans, however, I believe that it may have been due to a number of factors including a change in the Libor rates for Swiss Francs loans and Australian dollar loans since the loan was granted, as well as my own unwillingness to have to revisit the loan arrangements in such a short period of time. By this time the relationship between the Bank and BCI had developed and I was unconcerned to extend the loans.

583 On 20 November 1997, there was a meeting of Erwin and Emil Binetter as directors of BCI concerning a request to Bank Hapoalim for provision of credit to convert the existing loan from Swiss francs into Australian dollars. The minutes record the following resolution:

> RESOLVED that this company agree to the terms of the request for provision of credit and authorise each of Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter on their own to negotiate the terms of any provision of credit, to make any request for credit and to deliver by facsimile any request for credit, in each case on behalf of this company to Bank Hapoalim B.M. Central Branch Tel Aviv Israel.

584 According to BCI's tax appeal statement, on about 20 November 1997, the "loans" which had been procured from BCI were converted to Australian dollars by agreement between BCI and Bank Hapoalim.

585 By letter dated 20 November 1997, Michael Binetter wrote to Bank Hapoalim, stating that he had acted as Australian solicitor to BCI in connection with an amendment to the letter of undertaking to the Bank dated 20 November 1997. The letter concludes by saying that "any one of Mr. Emil Binetter, Mr. Erwin Binetter and Mr Michael Binetter has the right to sign on any Request for Provision of Credit and/or give any certificate, notice and other instrument pursuant to the Letter of Undertaking".

586 Bank Hapoalim produced a letter dated 20 November 1997 from Erwin Binetter on behalf of BCI entitled "Request for Provision of Credit – Loans 1-12/Our Letter of Undertaking for Credit Dated April 25th, 1993, as amended November 20, 1997". The letter requested the provision in foreign currency account no. 343415 of credit in Australia dollars in 12 approximately equal amounts totalling $6,177,288.20. It stipulated the repayment date as 20 November 1998. There is also a document entitled "Amendment" between BCI and Bank Hapoalim dated 20 November 1997, signed by Erwin and Emil Binetter on behalf of BCI.

587 Michael Binetter and the Margaret Binetter parties admitted that BCI's Bank Hapoalim account was designated no. 343415. The Andrew Binetter parties did not deny this fact.

588 On 25 November 1997, there was a meeting of Erwin and Emil Binetter as directors of BCI concerning a request to Bank Hapoalim for provision of credit to convert "the existing loans 13-24 inclusive into Australian dollars". The minutes record a further resolution authorising:

> [E]ach of Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter on their own to negotiate the terms of any provision of credit, to make any request for credit and to deliver by facsimile any request for credit, in each case on behalf of this company to Bank Hapoalim B.M. Central Branch Tel Aviv Israel.

589 Bank Hapoalim produced a letter dated 25 November 1997 from Emil Binetter on behalf of BCI entitled "Request for Provision of Credit – Loans 13-24/Our Letter of Undertaking for Credit Dated April 25th, 1993, as amended November 20, 1997". This letter requested the provision, again in foreign currency account no. 343415, of credit in Australian dollars in 12 approximately equal amounts totalling $6,188,757.10. The letter stipulated the repayment date as 30 November 1998.

590 Around this time, Bank Hapoalim converted the amounts advanced through account no. 343415 from Swiss francs to Australian dollars, on the basis that the terms of the advance were otherwise unchanged except as to the stipulated dates for repayment. I infer that Erwin and Emil Binetter, as directors of BCI, agreed to this change to the arrangements between BCI and the bank.

591 On 11 February 1998, Michael Binetter met with Philip Egglishaw, and requested quotes for two "back-to-backs". Michael Binetter's proposal was that funds would be deposited with an off-shore branch of a UK bank, apparently as security for a loan of funds "to a purpose formed Australian company" which would lend to another Australia company which would invest in real estate. The liquidators submitted that Mr Egglishaw's file note of his meeting with Michael Binetter "provides incontrovertible evidence of Michael's role in actively procuring back to back arrangements". They did not submit that the file note could be connected to any of the transactions the subject of this proceeding.

***Commencement of Ligon 268's dealings with IDB***

592 There is a form on the letterhead of IDB entitled "General Conditions for management of foreign currency debitory accounts" dated 9 April 1998. It is signed by Erwin and Andrew Binetter on behalf of Ligon 268 and includes three stamps in Hebrew script which apparently

refer to Erwin, Andrew and Michael Binetter. In addition, the following documents are dated 9 April 1998:

(1) A form, apparently on the letterhead of IDB, entitled "Application to effect banking operations as per phone instructions", signed by Erwin and Andrew Binetter on behalf of Ligon 268;

(2) A form on the letterhead of IDB entitled "Application to act upon facsimile orders", on the rear of which are three stamps in Hebrew, referring to Erwin, Andrew and Michael Binetter.

593 There is also a form on the letterhead of IDB completed on behalf of Ligon 268 requesting the opening of a foreign currency account, and identifying Andrew, Erwin and Michael Binetter, by their signatures, as the "attorneys" of Ligon 268. The form states the account no. as 982-01-627887.

594 Finally, there is an undated document, signed by Erwin and Andrew Binetter on behalf of Ligon 268 entitled "Loan application in foreign currency for a foreign resident".

595 According to Ligon 268's SOFIC, on 3 May 1998 Ligon 268 received an advance from IDB of $850,000 and on 6 May 1998, it received a further advance of $800,000. Ligon 268's SOFIC alleged that the advances were loans, and that "[t]he security for the loans was by way of guarantees". The AUSTRAC records do not evidence these advances.

596 By letter dated 26 June 1998, Emil Binetter wrote on behalf of BCI to Mr Etzion, Bank Hapoalim as follows:

> According to our agreement, I have sent one (1) years interest in advance, till 28 May, 1999, for account Number 71940801001 000.096. Representing payment by B.C.I. Finances Pty Ltd borrowing of Milgerd Nominees Pty Ltd. Please acknowledge receipt.

597 This account number is different from BCI's Bank Hapoalim account number, identified above as 343415.

598 AUSTRAC records show funds transferred by BCI to Bank Hapoalim in the income year ended 30 June 1998 of $314,340. The overseas interest expenses disclosed in BCI's 1997 income tax return were $1,032,294. There is no evidence to explain the $717,954 difference. The ATO adjusted BCI's overseas interest expense deduction by this amount. Thus, it again

appears that the Commissioner accepted that the payments of $314,340 comprised deductible expenses.

599 In its 1998 income tax return, EGL disclosed income of $955,724 and claimed deductions for overseas interest expenses of $955,391. There are no primary records of payment of these interest expenses. The AUSTRAC records in evidence do not include any payments that might comprise part or all of these interest expenses.

600 In its 1998 income tax return, Ligon 268 claimed a deduction of $19,341.66 for interest expenses paid to IDB. There are no primary records of payment of these interest expenses. The AUSTRAC records in evidence do not include any payments that might comprise part or all of these interest expenses.

**1999 income year**

601 According to Ligon 268's SOFIC, on 24 July 1998, IDB advanced to it by way of loan a further $250,000.

602 By letter dated 4 August 1998, from Bank Hapoalim to BCI, the Bank acknowledged receipt of A$356,249.00 and stated "This sum would cover the interest due on your loan no. 343415/10004 till 28.5.1999".

603 From several documents, it appears that in November 1998, the Australian dollar transactions between BCI and Bank Hapoalim were extended to November 2002. There is a letter from BCI to Bank Hapoalim dated 20 November 1998 from Erwin Binetter on behalf of BCI headed "request for provision of credit" referring to an amount of AUD$6,177,288.20 and a similar letter dated 23 November 1998 from Emil Binetter, referring to an amount of AUD$6,188,757.10.

604 Other documents created around this time are:

(1) Minutes of a meeting of a meeting of Erwin and Emil Binetter as directors of BCI, at which the following resolution was passed:

> IT WAS RESOLVED that this company borrow and extend its borrowing from BM upon the basis of a Request for Provision of Credit acceptable to any one of Erwin Binetter and Emil Binetter and any one of Erwin Binetter, Emil Binetter and Michael Binetter be and are hereby authorised and empowered for and on behalf of and in the name of this company and as its corporate act and deed and upon terms and conditions as may be agreed to in writing by any of the aforesaid to execute a Request for Provision of Credit to BM. This resolution shall continue in full force and effect until BH shall

> receive written notice from this company or by one of the aforesaid persons of the revocation of this resolution.

(2) A document entitled "Reaffirmation of guarantee" dated 20 November 1998 signed by Erwin Binetter on behalf of Erma and Ligon 158;

(3) Minutes of a meeting of a meeting of Erwin and Margaret Binetter as directors of Ligon 158, at which it was resolved that Ligon 158 "guarantee and reaffirm its guarantee in favour of [Bank Hapoalim]";

(4) A document entitled "Reaffirmation of guarantee" dated 23 November 1998 signed by Emil Binetter, marked with a facsimile stamp "22 Nov 1998 16:47 Andersen Legal". Andersen Legal is a law firm at which Michael Binetter worked.;

(5) A document entitled "Reaffirmation of guarantee" dated 23 November 1998 signed by Emil and Gerda Binetter on behalf of Milgerd and Ligon 159;

(6) Minutes of a meeting of Emil and Gerda Binetter as directors of Ligon 159 on 23 November 1998, at which it was resolved that Ligon 159 "guarantee and reaffirm its guarantee in favour of [Bank Hapoalim]";

(7) Minutes of a meeting of Emil and Gerda Binetter as directors of Milgerd on 23 November 1998, at which it was resolved that Milgerd "guarantee and reaffirm its guarantee in favour of [Bank Hapoalim]";

(8) A letter from Michael Binetter to Bank Hapoalim dated 24 November 1998, in which Michael Binetter states that he has acted as Australian solicitor to BCI "in connection with the Request For Provision Of Credit dated 20 November 1998 and Request For Provision Of Credit dated 23 November 1998 (collectively the "1998 Loan Requests") which related to the previous loans numbered 1 – 24 (inclusive) signed by the Borrower". The letterhead refers to the Pagewood property as Michael Binetter's address.

The letter also stated:

> Mr Emil Binetter and Mr Erwin Binetter who have signed the 1998 Loan Requests had the right, power and authority to sign the 1998 Loan Requests on behalf of the Borrower and any one of Mr Emil Binetter, Mr Erwin Binetter and Mr Michael Binetter has the right to sign on any certificate, notice and any other instrument pursuant to the 1998 Loan Requests.

605 According to Ligon 268's SOFIC, on 25 November 1998, IDB advanced to it by way of loan a further $650,000.

606 By letter dated 29 January 1999, IDB wrote to EGL concerning "Loan No. 803189-016799 in the amount of AUD 4,750,000" confirming that the "above loan was granted to you on July 2nd, 1998 for a period of 5 years, until July 2nd, 2003. At present the loan's balance is AUD2,700,000".

607 On 29 March 1999, Ligon 268 received $300,000 from IDB.

608 By letter dated 5 May 1999, Erwin Binetter on behalf of EGL wrote to IDB as follows:

> This letter serves to authorise the bearer of this letter to discuss with you during the month of May 1999 any matter touching upon the account with you including but not limited to interest paid and items debited and credited to the account at any time.

609 On 31 May 1999, Ligon 268 received a further $300,000 from IDB.

610 In his 20 December 2012 affidavit, Gary Binetter affirmed that, sometime in 1999, his father told him that he had told Erwin "that it is time to completely separate our businesses … I have decided to set up a new company and refinance my part of the EGL loan through the new company".

611 According to the Gary Binetter parties, in June 1999, Emil arranged to repay his "share" of the loan from IDB to EGL.

612 By letter dated 8 June 1999, Erwin Binetter on behalf of EGL wrote to IDB as follows:

> As you are aware loans by your bank to this company have been on lent to one of two companies, namely, Erma Nominees Pty Limited and Milgerd Nominees Pty. Limited. As you are also aware Milgerd Nominees Pty. Limited does not wish to have loans through this company any longer. To this end a Deed of Novation was presented to you for approval.
>
> Despite representations to you, your bank has declined to accept the Deed of Novation as an appropriate method for the separation of the various loans.
>
> Accordingly it is proposed that this company repay loans to you, to the extent to which loans from you, have been lent to Milgerd Nominees Pty. Limited.
>
> Consequently once those loans are repaid, which will occur prior to 30 June 1999, Milgerd Nominees Pty. Limited will cease to guarantee any monies outstanding by this company.

613 On 24 June 1999, Erwin and Margaret Binetter held a meeting of the directors of Erma at which Erwin Binetter advised that IDB had agreed to provide certain facilities to EGL on the terms contained in a draft facility letter. The meeting resolved that Erma enter into an instrument of guarantee in favour of the Bank.

614 The same day, Erwin Binetter wrote to IDB on behalf of EGL requesting a loan facility to an amount of $10 million.

615 AUSTRAC records show an outgoing, on 29 June 1999, of $144,544 from an unidentified ordering customer to IDB, for which the receiving customer is identified as EGL. The EGL handwritten ledgers identify an amount of $144,544 as a payment by Erma on behalf of EGL for interest for six months to 30 June 1999.

616 In its 1999 income tax return, BCI claimed deductions for overseas interest expenses of $677,344. There are no primary records of payment of these interest expenses. The AUSTRAC records in evidence do not include any payments that might comprise part or all of these interest expenses.

617 In its 1999 income tax return, EGL disclosed gross interest income of $280,282 and claimed deductions for overseas interest expenses of $273,367. The only primary record which might demonstrate that there was a part payment of these amounts is a 29 June 1999 AUSTRAC record for transfer of $144,544.

618 In its 1999 income tax return, Ligon 268 claimed a deduction of $195,753.59 for interest expenses paid to IDB (including interest withholding tax of $19,381.93). The ATO's reasons for decision records the remittal of the withholding tax. The AUSTRAC records in evidence do not include any payments that might comprise part or all of the remainder of $176,371.66. However, the ATO's reasons for decision refer to an AUSTRAC record of a transfer of $103,188 from Ligon 268 on 4 May 1999.

**2000 income year**

619 AUSTRAC records show that, during the 2000 income year, EGL received the following amounts from IDB on the following dates:

| | |
|---|---|
| 10 January 2000 | $1,000,000 |
| 13 January 2000 | $500,000 |
| 25 February 2000 | $300,000 |
| 12 April 2000 | $1,000,000 |
| 31 May 2000 | $500,000 |
| 15 June 2000 | $450,000 |

620 During the 2000 income year, Ligon 268 received the following amounts from IDB on the following dates:

| | |
|---|---|
| 19 November 1999 | $490,000 |
| 20 December 1999 | $200,000 |
| 9 February 2000 | $150,000 |
| 25 February 2000 | $200,000 |
| 23 March 2000 | $100,000 |
| 11 April 2000 | $100,000 |
| 27 April 2000 | $100,000 |

621 AUSTRAC records show an outgoing, on 25 November 1999, of $172,346 from EGL to IDB, for which the receiving customer is identified as Ligon 158.

622 AUSTRAC records show an outgoing, on 30 December 1999, of $184,349 from EGL to IDB, for which the receiving customer is identified as Erma.

623 There is a document dated 28 March 2000, apparently signed by Erwin Binetter entitled "General Conditions for Management of Foreign Currency Debitory Accounts", with the customer account no. 803-16799. This account number matches references to an account held by EGL.

624 By letter dated 29 March 2000, IDB wrote to EGL as follows:

> We enclose herewith documents which kindly return to us initialled and signed on the marked places.

625 On 11 April 2000, a facsimile was sent from an unknown sender to EGL, comprising a one page form marked with a letterhead of IDB and signed by Erwin Binetter on behalf of EGL. The form is headed "Framework instrument for the creation of an approved deposit for the grant of loans in foreign currency". ("April 2000 IDB framework instrument"). The form is not fully completed. Relevantly it provides:

> We the undersigned hereby request to deposit with you, to the credit of a deposit account that shall be opened in our names, the amount particularised below in connection with the grant of loans by you:

626 The document does not particularise an amount to be deposited. The form contains the following section concerning interest:

> **INTEREST**

> **On the deposit**:
>
> … % per annum (annual adjusted interest … %) (The interest rates mentioned in this instrument shall be changed from time to time in accordance with the Bank's determination and in coordination with the customer)
>
> **On the loan**:
>
> … % per annum (annual adjusted interest … %) (or as shall be specifically prescribed for every borrower separately in a notice to be sent separately).

627 In handwriting the amount of 7.2% is inserted as the figure for annual adjusted interest. No other figures are inserted.

628 There is a document dated 12 April 2000 entitled "Loan application in foreign currency for a foreign resident", signed by Erwin Binetter on behalf of EGL requesting a loan of $10 million in AUD currency on 2 July 1998, repayable on 2 July 2008. Clause 8 of the document refers to a lien that the bank would have "on all monies and/or securities that we have deposited and will deposit with you".

629 There is another document entitled "Loan application in foreign currency for a foreign resident", signed by Erwin Binetter on behalf of EGL apparently requesting a loan of $10 million in AUD currency on 2 July 1998. The form identifies the loan no. as 16799. Concerning interest, the form states:

> The loan shall bear compound interest at the rate of ~~LIBOR plus~~ 7.2% per annum. The interest shall be determined for every period of 6 months, commencing with the granting of the loan, two business days before the commencement of each such period.

630 The documents above tend to bear out the contention, made by the Gary Binetter parties, that Emil Binetter ceased to be involved in the dealings between EGL and IDB from around 1999 or 2000. Emil Binetter ceased to be a director of EGL on 28 September 2001.

631 On 12 May 2000, EGL received $1,000,000 from IDB.

632 AUSTRAC records show an outgoing, on 19 May 2000, of $168,640 from EGL to IDB, where the receiving customer is identified as Ligon 158.

633 AUSTRAC records show an outgoing, on 28 June 2000, of $282,852 from EGL to IDB, for which the receiving customer is identified as EGL.

634 AUSTRAC records show an outgoing, on 28 June 2000, of $64,310 from EGL to "MDB", for which the receiving customer is identified as Rawson Finances.

635 AUSTRAC records show an outgoing, on 29 June 2000, of $64,310 from Ligon 268 to IDB, for which the receiving customer is identified as Ligon 268.

636 In its 2000 income tax return, BCI claimed deductions for overseas interest expenses of $679,836. There are no primary records of payment of these interest expenses. The AUSTRAC records in evidence do not include any payments that might comprise part or all of these interest expenses. The notes to the balance sheet attached to the tax return record that the interest was paid directly to Bank Hapoalim: by Erma as to $340,986 and by Milgerd as to $338,850.

637 In its 2000 income tax return, EGL disclosed gross interest income of $544,061 and claimed deductions for interest expenses within Australia of $75,933 and overseas interest expenses of $468,128. The EGL handwritten ledgers record a payment made on 30 December 1999 of interest net of withholding tax to IDB of $184,389 and a payment on 28 June 2000 of interest net of withholding tax in the sum of $283,739.18.

638 In its 2000 income tax return, Ligon 268 claimed a deduction of $289,503.20 for interest expenses paid to IDB (including interest withholding tax). The ATO's reasons for decision records the remittal of withholding tax.

**2001 income year**

639 AUSTRAC records show that, during the 2001 income year, EGL received the following amounts from IDB on the following dates:

| | |
|---|---|
| 6 July 2000 | $250,000 |
| 9 October 2000 | $500,000 |

640 There is an unsigned letter dated 6 July 2000 from Erwin Binetter on behalf of EGL to IDB requesting a drawdown of $250,000 "from the loan account of EGL Development (Canberra) Pty Ltd Code No. 803189 Account No. 016799 (Erma Nominees P/L)".

641 There is a similar unsigned letter dated 6 October 2000 from Erwin Binetter on behalf of EGL to IDB requesting a drawdown of $500,000 "from the loan account of EGL Development (Canberra) Pty Ltd Code No. 803189 Account No. 016799 (Erma Nominees P/L)".

642 By facsimile dated 10 October 2000 entitled "Loan No. 16799" from IDB to EGL, the bank wrote:

> Following our phone conversation of October 5th regarding your request to increase loan facilities from AUD 10 Million to AUD 15 Million; we are pleased to inform you that the above has been approved.
>
> All conditions of the loan in question remain unchanged.
>
> Please confirm the above by signing this letter and returning same by fax.

643 The letter is signed by Erwin Binetter immediately above the words "We confirm the contents of this letter".

644 There is an unsigned letter dated 10 November 2000, from Erwin Binetter to IDB which states:

> RE: INTEREST ON LOAN ACCOUNT
>
> As discussed with you on 1 November 2000 the interest payable to The Israel Discount Bank Ltd from January 1 2001 will be 8.5% Net to the Bank on all outstanding loans.

645 Under the name of Erwin Binetter is a file name including the words "family affairs" and "IDB drawdown by 268 191 399". The unsigned letter is probably a copy of a letter that was sent on the letterhead of Ligon 268. The drafter of the letter probably considered advances from IDB to Ligon 268 to be appropriately classified as "family affairs" and not the sole concern of one person or entity. As noted earlier, Ligon 268 received an advance of $490,000 from IDB on 19 November 1999.

646 An AUSTRAC report records a payment of $170,493 from EGL to Bank Hapoalim (that is, not to IDB) on 17 November 2000, with the message:

> Attention Baruch Etzion
>
> Interest payment BCI
>
> Finances Due November

647 The account number for the payment is 3421500001: a different account number from the account number designated by Bank Hapoalim for BCI (which was 343415). There are no documents to explain why EGL purportedly made a payment of interest on behalf of BCI. There is no evidence from Bank Hapoalim which would identify the owner of account number 3421500001.

648 During the 2001 income year, Ligon 268 received the following amounts from IDB on the following dates:

| | |
|---|---|
| 6 November 2000 | $600,000 |

| | |
|---|---|
| 30 January 2001 | $150,000 |
| 19 March 2001 | $500,000 |
| 1 May 2001 | $150,000 |
| 22 June 2001 | $100,000 |

649 By letter dated 9 February 2001 from Erwin Binetter to IDB, Mr Binetter requested a "draw down from the loan account Code No. 803189 Account No. 016799" in the sum of $650,000. An AUSTRAC report records the transfer of this amount to Blanford. As noted earlier, Blanford was described by Andrew Binetter as an agent of EGL.

650 By letter dated 29 March 2001 from Erwin Binetter on behalf of Blanford to IDB, Mr Binetter requested a "draw down from the loan account Code No. 803189 Account No. 016799" in the sum of $200,000. An AUSTRAC report records the transfer of this amount to Blanford.

651 By letter dated 17 May 2011 from Erwin Binetter to IDB, Mr Binetter requested a "draw down from the loan account Code No. 803189 Account No. 016799" in the sum of $180,000. There is no AUSTRAC report in evidence which records a transfer of this sum.

652 In its 2001 income tax return, BCI claimed deductions for overseas interest expenses of $677,041. The notes to the balance sheet attached to the tax return record that the interest was paid directly to Bank Hapoalim: by Erma as to $338,206.52 and by Milgerd as to $338,835. There is an AUSTRAC report which records the latter payment on 25 June 2001, but the beneficiary customer is Ariana Birk and the account number is 209220 (which does not match the 343415 account number previously identified as BCI's account number with Bank Hapoalim).

653 In its 2001 income tax return, EGL disclosed gross interest income of $834,544 and claimed deductions for overseas interest expenses of $832,107.

654 In its 2001 income tax return, Ligon 268 claimed a deduction of $401,820 for interest on overseas loans. The ATO's reasons for decision records the remittal of withholding tax. There are AUSTRAC reports recording transfers by Ligon 268 to IDB on 15 August 2000 ($174,375) and 8 February 2001 ($227,375).

**2002 income year**

655 During the 2002 income year, Ligon 268 received the following amounts from IDB on the following dates:

| | |
|---|---|
| 8 August 2001 | $200,000 |
| 15 October 2001 | $100,000 |
| 8 November 2001 | $120,000 |
| 26 November 2001 | $50,000 |
| 30 January 2002 | $150,000 |
| 27 February 2002 | $275,000 |
| 15 May 2002 | $100,000 |
| 25 June 2002 | $250,000 |

656 There is an AUSTRAC report of a transfer, on 21 August 2001, of $281,490 from Ligon 268 to Ligon 268. The receiving institution is identified as Bank Hapoalim. The name of the account with the receiving institution is "Israel Discount Bank" and the payment details are "Interest payment - att: Mrs Miriam Cohen/Ligon 268 interest due".

657 There is an unsigned letter dated 14 August 2001 from Erwin Binetter on behalf of Ligon 268 to the Commonwealth Bank concerning the transfer, which contains the following message:

> For Account No:- 627887
>
> With the following message;-
>
> "For the attention of Mrs. Miriam Cohen. Representing interest payment by Ligon 268 Pty. Ltd. As per the following schedule. Interest due on December 31 2001. Please forward receipt."

| Date | Amount | No. Days | Interest Owed |
|---|---|---|---|
| 01/07/01–31/12/01 | $6,300,000 | 6 months | $281,490-00 |

658 By letter dated 17 October 2001, Erwin Binetter wrote to IDB requesting a drawdown of $50,000 from "loan account "Code No. 803189 Account No. 016799" to be remitted to Blanford. An AUSTRAC report of the transfer identifies the ordering customer as "Ourselves".

659 By letter dated 29 October 2001, Erwin Binetter wrote to IDB requesting a second drawdown of $50,000 from "loan account "Code No. 803189 Account No. 016799", again to be remitted to Blanford. An AUSTRAC report of the transfer again identifies the ordering customer as "Ourselves".

660 There is a facsimile transaction dated 29 November 2001 from IDB to EGL which refers to "Loan No. 803189-016799 in the amount of AUD11,380,000". The letter requests remittal of AUD421,116 "which represents interest at the rate of 7.2% p.a." as per the following details:

| **AMOUNT** | **PERIOD** | **INTEREST** |
|---|---|---|
| AUD11,280.000.- | 05.07.01 – 07.01.02 | AUD419,616.- |
| AUD 50,000.- | 18.10.01 – 07.01.02 | AUD810.- |
| AUD50,000.- | 30.10.01 – 07.01.02 | AUD690.- |
| | Total: | AUD421,116.- |

(e. & o. e.)

> The amount of AUD421,116.- should be in our possession not later than January 7th, 2002.

661 There is no AUSTRAC record of a payment in this amount.

662 There is an unsigned letter from Erwin Binetter to IDB dated 14 January 2002, which states:

> RE: REPAYMENT OF LOAN
>
> ACCOUNT: 627887
>
> This is to confirm with you that A$200,000 (Two Hundred Thousand Australian Dollars) was remitted to you for repayment of loan of Ligon 268 Pty Ltd. This fax has been confirmed with you by telephone.

663 There is no AUSTRAC record of this payment.

664 There is an unsigned minute of a meeting of Erwin, Margaret and Andrew Binetter as directors of EGL on 18 January 2002. The liquidators contended that this is not a genuine document. They note that the document came to light in 2012, and that Margaret Binetter was never a director of EGL. The minute records the following:

> CAPITALISATION OF INTEREST ON LOANS FROM ISRAEL DISCOUNT BANK:
>
> IT WAS NOTED THAT the Company had agreed with Israel Discount Bank that with effect from 1 January 2002 interest due and payable from time to time to that Bank will be capitalised and this will continue on all outstanding loans from the Bank until the earlier of 31 December 2006 or such earlier date this company determines that such capitalisation cease in whole or in part.
> RESOLVED that the aforesaid capitalisation of interest and the basis of it be and is hereby approved.

665 In the absence of corroborative evidence from IDB, and in the absence of verification of the minute by Andrew Binetter, I do not find that there was an agreement of the kind described in the unsigned minute.

666 In its 2002 income tax return, BCI claimed deductions for overseas interest expenses of $754,261. The profit and loss statement attached to the tax return record that the interest of $678,835 was paid to Bank Hapoalim. There are AUSTRAC reports of three payments from BCI to Bank Hapoalim which equal $678,335, on 23 November 2001, 6 June and 27 June 2002. For the first, the beneficiary customer is Ligon 158/Att Mr B Etzion, and the account number is 3421500001; for the second, the beneficiary customer is Bank of Hapoalim and the account number is 3421500001; for the third, the beneficiary is BCI Finance Pty Ltd Ligon 159 PL and the account number is 209220.

667 In its 2002 income tax return, EGL disclosed gross interest income of $965,248 and claimed deductions for overseas interest expenses of $965,133.

668 In its 2002 income tax return, Ligon 268 claimed a deduction of $557,740 for interest on overseas loans. There is an AUSTRAC report of a payment of $277,250 on 3 May 2002 from Ligon 268 to "Israel Discount Bank – Ligon 268 PL".

**2003 income year**

669 Ligon 268's SOFIC refers to the following receipts from IDB (as loans):

| | |
|---|---|
| 24 December 2002 | $220,000 |
| 26 February 2003 | $700,000 |
| 5 May 2003 | $100,000 |
| 13 May 2003 | $250,000 |
| 23 June 2003 | $100,000 |

670 In addition, there are AUSTRAC reports of the following receipts by Ligon 268 from IDB:

| | |
|---|---|
| 14 August 2002 | $150,000 |
| 9 September 2002 | $50,000 |
| 26 September 2002 | $275,000 |
| 31 March 2003 | $100,000 |
| 2 May 2003 | $100,000 |
| 24 June 2003 | $220,000 |

671 There is a document entitled "Amendment", dated 20 November 2002, which purports to extend repayment dates of the November 1998 loans from Bank Hapoalim to BCI to 31 May 2004. The document is signed by Erwin and Emil Binetter on behalf of BCI and includes a

handwritten certification by Michael Binetter. By the document, BCI reaffirmed the representations and warranties made in the 25 April 1993 letter of undertaking and the deed executed by BCI in favour of Bank Hapoalim. There are also two documents entitled "Reaffirmation of Guarantee", one signed by Emil and Erwin Binetter, and the other by those men on behalf of variously Milgerd, Erma, Ligon 159 and Ligon 158. Both these documents are endorsed with handwritten certifications by Michael Binetter.

672 In April 2003, Erwin Binetter was examined by a consultant neurologist, Dr O'Neill, at the request of Ronald Binetter. In a report of the examination, Dr O'Neill recorded that he explained to Erwin Binetter that there was objective evidence of worsening cognitive function since Dr O'Neill had first seen him.

673 By letter dated 24 June 2003 to IDB, apparently signed by Erwin Binetter on behalf of EGL, Mr Binetter requested a draw down from "loan account Code No. 803189 Account No. 016799" of $220,000.

674 In its 2003 income tax return, BCI claimed deductions for overseas interest expenses of $754,261 (that is, the same amount as for 2002). The profit and loss statement attached to the tax return records that the interest of $678,835 was paid to Bank Hapoalim. There is a single AUSTRAC report of a payment of $170,000 from BCI to Bank Hapoalim on 20 May 2003. That report shows the beneficiary customer as Mr Etzion. The account number is 3421500001.

675 There is also an AUSTRAC report of an outgoing of $170,000 from Ligon 158 to Baruch Etzion on 27 November 2002. The text details of the payment as "Mr Baruch Etzion interest by Ligon Pty due 22/11/02". The account number is 3421500001.

676 By this time, Mr Etzion had left Bank Hapoalim, having retired from there on 31 December 2001. He claimed to continue to act as a liaison between the bank and the Binetters after his retirement, but this does not explain his apparent receipt of payments that were claimed as interest expenses paid to Bank Hapoalim.

677 In its 2003 income tax return, EGL disclosed gross interest income of $1,037,210 and claimed deductions for overseas interest expenses of $1,037,193.

678 In its 2003 income tax return, Ligon 268 claimed a deduction of $436,557 for interest on overseas loans. There is an AUSTRAC report of a payment of $144,500 on 19 November 2002, described on the report as "interest payment by Ligon Pty 31/12/02".

**2004 income year**

679 In the 2004 income year, Ligon 268 received 10 payments from IDB, totalling $1.5 million.

***Erwin, Michael, Andrew and Ronald Binetter's trip to Israel***

680 In 2003, Erwin, Michael, Andrew and Ronald Binetter travelled to Israel to meet with Bank Hapoalim. Before the visit, either Michael or Andrew told Ronald that they needed to discuss loans with the Israeli banks. Ronald was asked to come along so he could look after Erwin Binetter, who was not well. The fact that Ronald was asked and agreed to make this trip supports a conclusion that the dealings with the Israeli banks were for the ultimate benefit of Michael, Andrew and Ronald Binetter as well as their father.

681 While in Israel, the four men went to Bank Hapoalim for a meeting with bankers and their legal advisers. The meeting lasted between 20 minutes and one hour, and no documents were exchanged.

682 Ronald Binetter's evidence was that Erwin Binetter was physically unwell at the time of this trip, and also showed early signed of vascular dementia and memory loss.

683 There is an unsigned letter from Erwin Binetter to IDB dated 25 October 2003 which states:

> RE: INTEREST ON LOAN ACCOUNT
>
> As discussed with you on 1 September 2003 the interest payable to The Israel Discount Bank Ltd from October 1 2003 will be 7.30% Net to the Bank on all outstanding loans to Ligon 268 Pty Ltd

684 By letter dated 20 November 2003, Bank Hapoalim Switzerland sent a facsimile to Bank Hapoalim in the following terms:

> **Back-to-back transaction**
> **Australian Dollar Loan Facility granted by yourselves to one of your clients**
> **Our fiduciary deposit for AUD 6,177,2888.17 [sic] placed with yourselves as security**
>
> Dear Mrs. Emilie
>
> Our above stated fiduciary deposit matured for value today, November 20, 2003. On November 18, 2003 we telephoned Mr. Goldberg (Credit Department Tel. 5673502) who informed us that your Bank will extend the loan until May 2004 and that we are to rollover our fiduciary deposit until May 31, 2004.
>
> We have today established that you have in fact repaid to us the total amount of our fiduciary deposit plus the interest. Only the interest payment should have been effect [sic].

> Consequently, we shall remit back to you the amount of AUD 6,177,288.17 however, we shall most probably not be in a position to effect repayment for value today, November 20. Any loss of interest is to be born [sic] by your Bank.

685 The following day, 21 November 2003, Bank Hapoalim Switzerland sent a further facsimile to Bank Hapoalim concerning the same transaction. The letter stated:

> **Back-to-back transaction**
> **Australian Dollar Loan Facility granted by yourselves to one of your clients**
> **Our fiduciary deposit for AUD 6,177,288.17 placed with yourselves as security**
>
> Ladies and Gentlemen
>
> As already stated in our faxletter of November 20, 2003 Bank Hapoalim Tel Aviv has granted an Australian Dollars loan. As collateral for your Bank, we have placed a fiduciary deposit with you, which matured value November 20, 2003.
>
> On November 18, 2003 Mr Goldberg (Credit Department Tel. 5673502) has given us instructions to roll over the deposit until May 31, 2004 since your Bank is also extending the loan facility until May 2004. This was also confirmed by Mr. David Kirschenbaum of the Legal Department.
>
> On November 20, 2003 late afternoon we have noticed that you have repaid to us the full amount of our deposit, e.g. AUD 6,177,288.17 plus the interest. In fact you should have paid us only the interest, in the same manner as you have done for all previous roll-overs in the past.
>
> We discussed the matter on the phone and you have requested us to repay the funds to yourselves. We have effected such payment today value, November 21, 2003 and any loss of interest is to be borne by your Bank. A copy of our swift payment has been sent today to Mr. Alon Keden.
>
> Since your Bank has granted the loan and we are only providing the collateral, we are of the opinion, that it is indeed your responsibility to take the lead in this transaction.

686 The amount of the fiduciary deposit matches the amount in the 20 November 1998 BCI request for credit signed by Erwin Binetter on behalf of BCI.

687 The documents show that there was an arrangement between Bank Hapoalim and BCI (which Bank Hapoalim called a "back-to-back" transaction) comprising:

(1) an advance of monies from Bank Hapoalim to BCI on terms that included an obligation of repayment, that is, a loan;

(2) a deposit of an equivalent amount by Bank Hapoalim Switzerland from funds procured by or on BCI's behalf, probably on terms that, if BCI defaulted on its repayment obligation, Bank Hapoalim would have recourse to the deposit.

688 There is no evidence that the arrangement was materially different at any time, except as to the amounts advanced.

689 There is a record printed on 24 November 2003, which appears to be an internal bank record of Bank Hapoalim. It refers to a "Fixed Loan/Deposit Confirmation" and identifies the sender as Bank Hapoalim Switzerland and the receiver as Bank Hapoalim. The principal amount is stated as AUD$6,177,288.17. The interest rate is stated as 5.1. The sender to receiver information is:

> /A/ZH/TRUST FUNDS
> //ROLLOVER/SPECIAL AGREEMENT BANK T
> //BACK FINANCING

690 A facsimile dated 24 November 2003 marked with the details of Kevin Munro & Associates, a former employer of Michael Binetter, shows that Michael Binetter was involved in the November 2003 dealings with Bank Hapoalim. In particular, Michael Binetter witnessed two documents dated 10 November 2003 entitled "Reaffirmation of guarantee" addressed to Bank Hapoalim from Erwin and Emil Binetter, and from Milgerd, Erma, Ligon 158 and Ligon 159. In the case of the former document, the signatures of Erwin and Emil Binetter were certified as genuine by Michael Binetter. For the latter document, Michael Binetter certified that Erwin and Emil Binetter were authorised to bind each guarantor.

691 There is an AUSTRAC report, recording a transfer of $169,000 from Ligon 158. The beneficiary customer is Mr Etzion and the account number is 3421500001. The details of payment are:

> ATTENTION OF MR BARUCH ETZION
> REPRESENTING PAYMENT LIGON 158 P/L

692 On 18 December 2003, EGL ordered a transfer of $180,000 for Blanford. There is an unsigned letter from Andrew Binetter to IDB requesting a drawdown from loan account "Code No. 803189 Account No. 016799" in this sum.

693 Dr O'Neill examined Erwin Binetter again on 20 January 2004. His report records that Ronald Binetter felt there had been further deterioration in his father's recent memory but that he was still driving the car safely.

694 There is an unsigned letter from Erwin Binetter dated 1 January 2004 on behalf of Ligon 268 to the Commonwealth Bank requesting a transfer of $175,000 to IDB with the following message:

> "For the attention of Mrs. Fernanda Barisaac Representing balance of interest payments for Q1 and Q2 2003/4 and partial interest payment by Ligon 268 Pty. Ltd for Q3 2003/4. As per the following schedule.
>
> Interest due on December 31 2003."

| Date | Amount | No. Days | Interest Owed |
|---|---|---|---|
| 01/07/03–31/12/03 | $9,000,000 | 6 months | $328,500-00 |
| 01/01/04 – 31/03/04 | $9,000,000 | 3 months | $164,250-00 |

695 In an affidavit made in October 2011, Gary Binetter gave an account of a meeting that he attended with Emil Binetter at IDB on 16 March 2004. On that account, Gary Binetter had some prior beliefs about Emil Binetter's dealings with IDB (Gary Binetter said to his father "You have been a good customer. You even paid interest in advance"). According to Gary Binetter, at the meeting, Emil said to Mrs Barisaac of IDB:

> Fernanda, I need your help. I have a loan from another bank which I would like to repay. I would like to borrow money from your bank in order to do this. I intend paying the money back in about one year.

696 Gary Binetter recounts a similar conversation the same day with an officer of Mercantile Discount Bank. Then, he recounts a meeting with Mr Etzion in which Emil Binetter told Mr Etzion that he would be repaying "the loan to Bank Hapoalim".

697 There is a document dated 19 March 2004, signed by Emil and Gary Binetter and titled "Framework Instrument for the creation of an approved deposit for the grant of loans in foreign currency" ("March 2004 framework instrument"). The first page is similar to the April 2000 IDB framework instrument signed by Erwin Binetter in 2000. The March 2004 framework instrument document refers to a deposit of $3,690,000. The depositor is identified as "C/A 791628", notwithstanding that the form provides for the identification of the depositor by name, passport number and address. The document includes "Provisions, terms and conditions that shall apply to the deposit against the grant of the loans". Clause 1 provides relevantly:

> 1.1 The Israel Discount Bank Ltd … shall, in its discretion and subject to the matters set forth in the terms and conditions of this instrument, grant loans in the deposit currency against the deposit monies to borrowers …
>
> …
>
> 1.4 Without prejudice to all the aforegoing, the amount of the balance of the loans shall not exceed the balance of the deposit monies less an appropriate safety margin in the Bank's sole discretion, unless the Bank decided to act otherwise in a specific case or in general.

698 Clause 2 provides relevantly:

> 2.1 The interest that shall be credited to us on the amounts in the deposit shall be freely available to us, and the Bank shall transfer it to the credit of the account from time to time in accordance with the Bank's usual procedures herein.
>
> 2.2 You shall, in accordance with all statutory provisions, be entitled to deduct at source or otherwise the tax and any other levy and charge that shall apply to the deposit and the interest thereon, such that every payment on your part in respect of the deposit shall only be made available to our credit after the deduction as aforesaid.

699 I infer that the April 2000 IDB framework instrument is part of a larger document which included terms to the effect of the terms set out in the 19 March 2004 document.

700 A draft letter dated 19 March 2004 was obtained from IDB, which included the following handwritten annotation:

> Dear Hagai,
>
> Kindly have this re-typed on IDB letterhead (as it is, including the date) and post it to us at the address below. Thank you!

701 Plainly enough, this was a request for IDB to create a document that would be back-dated.

702 The draft letter was in the following terms:

> CIVIC FINANCES PTY LTD
>
> 2/63 BAY STREET
>
> DOUBLE BAY NSW 2028
>
> AUSTRALIA
>
> 19 March 2004
>
> Attention: Mr Emil Binetter
>
> Dear Mr Binetter,
>
> This letter is to confirm agreement between the Israeli Discount Bank Ltd and your company.
>
> Civic Finances Pty Ltd agreed that from 27 May 2004 interest of 6.00% p.a. (including Australian Withholding Tax) will be paid on the existing loan of AUD1,000,000 (one million Australian Dollars) and an additional loan amount of AUD3,690,000 (three million, six hundred and ninety thousand Australian dollars), provided that the interest on these amounts is paid on or before the due date (that is to say, 30 June and 31 December each year).
>
> Civic Finances Pty Ltd will pay Israel Discount Bank 5.40% p.a.
>
> Civic Finances will pay the Withholding Tax of 0.60% due in Australia.

> We note that the above facility relates to the loan by your Company to Ligon 159 Pty Ltd.
>
> This confirms the content of loan documents signed by you.
>
> However in any event, the loan documents will always prevail.

703 According to an affidavit affirmed by Andrew Binetter on 27 July 2012, he visited IDB with Erwin Binetter in March 2004. On that occasion, he met Fernanda Barisaac and Hagai Peled of IDB.

704 In April 2004, Margaret Binetter visited Dr O'Neill without her husband. She reported that Erwin Binetter remained in bed for most of the day. Dr O'Neill told Mrs Binetter that Erwin Binetter had dementia for which there was no additional useful treatment which could be recommended.

705 By letter dated 21 May 2004, Mr Szanto wrote to Bank Hapoalim as auditor of Erma, Ligon 158 and Erwin Binetter to certify the value of the assets of those three entities.

***May 2004 transactions (including repayment of part advance from Bank Hapoalim to BCI)***

706 On 24 May 2004, AUD$3,690,000 was transferred from an account in Zurich with UBS AG to an account with IDB. This amount was probably the deposit of $3,690,000 referred to in the March 2004 framework instrument.

707 The SWIFT transfer form named the ordering customer as Batorove Kesy Foundation. The Andrew Binetter parties did not dispute that the father of Erwin and Emil Binetter was born in the village of Batorove Kosihy (also known as Batorove Kesy) in Slovakia. The transfer form identified the beneficiary customer only as "/ATTENTION HAGAI PELED 791628".

708 The Batorove Kesy Foundation was probably an entity owned by Erwin and Emil Binetter.

709 The funds from UBS appear to have been received into an IDB account no. 130-0803-18-997560.

710 A letter dated 21 May 2004 signed by Emil Binetter on behalf of Civic Finances to IDB requested that $3,690,000 be sent to Ligon 159's bank account.

711 On 25 May 2004, Bank Hapoalim Switzerland wrote to Bank Hapoalim. The letter stated:

> **Two back-to-back transactions, concerning**
> **Two Australian Dollar Loan Facilities granted by yourselves to two of your clients**

**As security for the above loans, we have placed with yourselves:**
**Our fiduciary deposit for AUD 6,188,757.00 maturing May 31, 2004**
**Our fiduciary deposit for AUD 6,177,288.17 maturing May 31, 2004**

Ladies and Gentlemen

Please be informed that we have two back-to-back Australian Dollar transactions whereby we have placed the following fiduciary deposit with your Bank as collateral for two loans you have granted to two Australian clients:

AUD 6,188,757.00
From: November 28, 2003
Maturity date: May 31, 2004
Interest rate: 5.1%
Interest amount: AUD 162,197.01
Interest days: 185

AUD 6,177,288.17
From: November 20, 2003
Maturity date: May 31, 2004
Interest rate: 5.1%
Interest amount: AUD 168,897.35
Interest days: 193

We understand that your Loans will not be repaid and that the transactions will be rolled over for a further 6 months (from May 31, 2004 until November 30, 2004) with the same conditions.

Consequently, our above stated Fiduciary Deposits placed with yourselves must NOT be repaid to us on May 31, 2004.

The two interest amounts, e.g. : AUD 162,197.01 and AUD 168,897.35 are however to be transferred as follows:

Value May 31, 2004
To our AUD account maintained with
ANZ, Melbourne (anzbau3mxxx)
Australia and New Zealand Banking Group Ltd., Melbourne

712 Gary Binetter signed a document dated 27 May 2004 entitled “Loan application in foreign currency for a foreign resident” in connection with the advance from IDB to Civic Finances.

713 An IDB document entitled “Withdrawal of Foreign Currency Loan/Credit” records “your instructions dated 27/05/04 to withdraw loan for the amt of 3,690,000.00 AUD from acc. No. 803-18-997560 at branch 130 and credit acc. no. 980-18-955159 at branch 130”.

714 In this document, IDB apparently referred to the transfer of $3.69 million from the account into which it had been deposited by Batorove Kesy Foundation, to another account, as a “loan”.

715 A bank statement for an account in Sydney in the name of Ligon 159 records a receipt of $3,689,995 on 27 May 2004. The printed narration for the transaction on the bank statement is "Ourselves". That narration accurately summarises the true position, which is that the ultimate source of the funds was the $3.69 million sent from UBS in Switzerland by the Batorove Kesy Foundation to IDB. Next to the printed narration are the handwritten words "Loan from Israel Discount Bank". These words reflect the fact that the funds came from UBS in Switzerland via IDB (and, in that sense, "from" IDB). Without more evidence, it is not clear whether the funds were transferred from IDB to Ligon 159 pursuant to a loan arrangement involving an obligation of repayment to IDB.

716 The bank statement also records a credit of AUD$2,499,981 on 27 May 2004, apparently from a related entity, Advance Finances Pty Ltd.

717 On 28 May 2004, Ligon 159 transferred $6,188,757 to an account in Israel. The relevant AUSTRAC report identified the beneficiary customer as BCI and the account number as 209220. This is the third reference to account 209220 in the documents, and the second time that it is associated with the name "Birk". The details of payment are:

> SWIFT CODE POALILIT ATT A BIRK FOR
>
> LOAN PAYMENT BEHALF LIGON 159 LTD

718 According to the liquidators, this transfer had the effect of discharging Emil Binetter's "share of BCI's 'loan'". The Andrew Binetter parties do not dispute that proposition.

719 It is more probable than not that Emil Binetter, as a director of both Ligon 159 and BCI, arranged Ligon 159's 28 May 2004 transfer of $6,188,757 to IDB.

720 By facsimile dated 31 May 2004, Bank Hapoalim sent a facsimile to Bank Hapoalim - Zurich titled "Back-to-back transactions" which said:

> Following your fax transmission of 25 May 2004 this is to inform you that we renew the loan for AUD 6,177,288.17 for an additional period of six months, from 31 May 2004 until 30 November 2004. Please advise us of the rate of interest applied to the relevant deposit (bearing in mind that the margin stands at 0.3%).
>
> The deposit for AUD 6,188,757.00 is released and the credit facility against this deposit is cancelled.
>
> Please relay to us your customer's further relevant instructions.
>
> We have no objections regarding the transfer of the interest, and we would like to point out that until now our consent (i.e. of the Central Branch) to this extent was not

> required. Therefore please contact Mr. Y. Wodnik (Back Office – Tel Aviv) with any questions pertaining thereto.

721 Based on this facsimile I find that, around the time of Ligon 159's 28 May 2004 transfer of $6,188,757 to IDB, the amount of $6,188,757.00, which had been deposited as a "fiduciary deposit" by Bank Hapoalim Switzerland with Bank Hapoalim was returned by Bank Hapoalim to Bank Hapoalim Switzerland.

722 The facsimile confirms that the arrangements between BCI and Bank Hapoalim thereafter included that an amount of $6,177,288.17 previously advanced to BCI remained secured by an equivalent amount deposited as a "fiduciary deposit" by Bank Hapoalim Switzerland with Bank Hapoalim.

723 The facsimile also confirms, as would be expected, that the deposit which supported the A$6,177,288.17 advance was accruing interest. I also infer, from Bank Hapoalim's request to be advised of the rate of interest applied to the deposit, that Bank Hapoalim did not set the interest rate apart from the margin of 0.3%. In this regard, I note that the Andrew Binetter parties' did not dispute the liquidators' proposition that the indifference to the interest rates revealed in the 31 May 2004 facsimile discloses that the arrangement under discussion in the facsimile was a back-to-back transaction. Nor did they dispute the proposition that the 0.3% represented Bank Hapoalim Israel's fee for facilitating the transaction.

724 There is an AUSTRAC report of a transfer of $178,826 from Ligon 158. The beneficiary customer is Mr Etzion. The account number of the beneficiary customer is 3421500001. The details of payment are:

> ATT MR BARUCH ETZION INTEREST
>
> PAYMENT BY LIGON 158 INT DUE 28/05/04

725 On 2 June 2004, Gary Binetter sent a facsimile to IDB on behalf of Civic Finances in the following terms:

> Re: loan of AUD3,690,000
>
> I am going away on holidays on 11 June and therefore need to organise the interest payment due on 30 June 2004 prior to that date.
>
> Kindly fax (to the above number) or email (garybinetter@hotmail.com) the amount of interest due on the loan at 30 June 2004 based on the interest rate of 65.% p.a.

726 On 11 June 2004, Erwin and Andrew Binetter held a meeting of directors of BCI. The minutes of the meeting refer to a letter of undertaking by BCI to Bank Hapoalim and a

request for the provision of credit by BCI to Bank Hapoalim. The directors approved, among other things, "the execution, dating and delivery, from time to time, of forms of Request for the provision of credit by [BCI] to Bank Hapoalim B.M, by any one of Erwin Binetter, Andrew Binetter and Michael Binetter, and/or for any one of [them] to give any certificate, notice and other instrument pursuant to the Letter of Undertaking".

727 The same day, Erwin and Andrew Binetter signed a document entitled "Letter of Undertaking" on behalf of BCI. The document contains terms concerning security for the performance of undertakings given, but no reference to any security in the form of a deposit. I infer from this document that each of Erwin and Andrew Binetter was each participating in the management of BCI insofar as it involved transactions with Bank Hapoalim, and each was aware of the terms of the arrangements between BCI and Bank Hapoalim around this time.

728 On about 21 June 2004, EGL ordered a transfer of $200,000 for Blanford. There is an unsigned letter from Andrew Binetter to IDB requesting a drawdown from loan account "Code No. 803189 Account No. 016799" in this sum.

729 According to the Gary Binetter parties, Emil and Gary Binetter had no involvement in the activities of BCI following the repayment of "Emil's share" of the Bank Hapoalim loan in May 2004.

730 By facsimile dated 1 June 2004, Bank Hapoalim Switzerland confirmed that AUD$6,188,757 would be paid "to our AUD account maintained with ANZ, Melbourne". This is the same account mentioned in the 25 May 2004 facsimile from Bank Hapoalim Switzerland to Bank Hapoalim.

731 There is also a letter from BCI to Bank Hapoalim, dated 11 June 2014 entitled "Application for provision of credit – my letter of undertaking (Mem Shin 20(E) for credit in foreign currency dated 11 June 2004" requesting credit in the sum of AUD$6,177,288.20, repayable on 31 May 2014. This document is also signed by Erwin and Andrew Binetter on behalf of BCI. It bears endorsements stamped at the Embassy of Israel in Canberra on either 9 November 2004 or 11 September 2004.

732 In its 2004 income tax return, BCI claimed deductions for overseas interest expenses of $386,504. There are no primary records to substantiate payment of any part of this amount.

733 In its 2004 income tax return, EGL claimed deductions for overseas interest expenses of $1,140,040. There are no primary records to substantiate payment of any part of this amount.

734 In its 2004 income tax return, Ligon 268 claimed a deduction of $985,196 for interest on overseas loans. AUSTRAC reports record the following transfers by Ligon 268 during the 2004 income year:

| | |
|---|---|
| 5 August 2003 | $100,000 |
| 5 November 2003 | $170,000 |
| 5 November 2003 | $100,000 |
| 5 January 2004 | $175,000 |
| 4 February 2004 | $90,000 |
| 9 February 2004 | $50,000 |
| 28 April 2004 | $150,000 |
| 27 May 2004 | $200,000 |
| 22 June 2004 | $100,000 |

735 These amounts total $1,135,000.

**2005 income year**

736 By message dated 6 July 2004, Bank Hapoalim wrote to Bank Hapoalim Switzerland as follows:

> RE
> YOUR FIDUCIARY DEPOSIT FOR AUD 6,177,288.17 PLACED WITH
> OURSELVES FROM 20.11.03 UNTIL 31.05.04
> BACK-TO-BACK TRANSACTION – ROLL-OVER DOLLAR LOAN FACILITY
>
> FURTHER TO YOUR LETTER DATED 18.06.04, WE HEREBY INFORM YOU THAT SINCE THE DEPOSIT TOPIC IS NOT UNDER OUR RESPONSIBILITY AND SINCE WE ARE DEALING WITH THE LOAN FACILITY TOPICS ONLY, WE ARE NOT IN THE CAPACITY TO CREDIT YOU WITH THE AMOUNT CLAIMED IN YOUR LETTER.

737 The letter dated 18 June 2004, mentioned in this message, was not in evidence.

738 There is a document entitled “Deed of Continuing guarantee unlimited in amount” addressed to Bank Hapoalim signed by Erwin Binetter and dated 18 July 2004. The recitals refer to BCI as the “Borrower”.

739 There is a similar document dated 18 July 2004 signed by Erwin and Andrew Binetter on behalf of Erma and Ligon 158.

740 According to an affidavit affirmed by him on 12 August 2004, Andrew Binetter was informed that Erwin Binetter had Alzheimer's disease by a psycho-geriatric specialist named Dr Brodaty.

741 By facsimile transmission dated 26 November 2004, Bank Hapoalim Switzerland wrote to Bank Hapoalim as follows:

> **Back-to-back transaction**
> **Australian Dollar Loan Facility granted by yourselves to one of your clients**
> **Our fiduciary deposit for AUD 6,177,288.17 placed with yourselves as security**
>
> Ladies and Gentlemen
>
> We have been trying to roll over to roll-over [sic] our fiduciary deposit with your Bank as follows:
>
> AUD 6,177,288.17
> Value date: November 30, 2004
> Maturity date: February 28, 2005
> Interest rate: 5.10%
>
> **No payment of the Capital is to be effected to us value November 30, 2004.** (Only the interest due is to be remitted).

742 There is another letter, dated 30 November 2004, from BCI to Bank Hapoalim entitled "Application for Provision of credit – Our Letter of Undertaking (Mem Shin 20(E) for Credit in Foreign currency dated 11 June 2004" and requesting credit in the sum of AUD$6,177,288.20 on 30 November 2004, repayable on 28 February 2005. The application is signed by Andrew Binetter on behalf of BCI. This letter might suggest that the terms of the facility were not extended to 31 May 2014, as had been requested in June 2004, but had been extended only to 30 November 2004.

### *Apparent capitalisation of interest on EGL loans*

743 On about 5 January 2005, Andrew Binetter wrote to Premium Business Services on behalf of Erma, requesting a transfer of $748,896.66 from Ligon 158 to IDB, with the following message:

> "Attention Mr. Hagai Peled
>
> Interest for 12 months to 30 June 2001 as follows on behalf of E.G.L. Development (Canberra) Pty. Limited on Erma Nominees Pty. Ltd's account. Loan No. 803189 – 0167992.

| Date | Amount | Interest Owed |
|---|---|---|
| 01/07/00–30/06/01 | $9 500 000 | $82 126.03 |
| 06/07/00–30/06/01 | $250 000 | $17 704.11 |

| | | |
|---|---|---|
| 06/10/00–30/06/01 | $500 000 | $26 334.25 |
| 12/02/01–30/06/01 | $650 000 | $17 694.25 |
| 02/04/01–30/06/01 | $200 000 | $3 511.23 |
| 18/05/00–30/06/01 | $180 000 | $1 526.79 |
| | **TOTAL =** | **$748 896.66** |

744 The AUSTRAC report of the transfer records the beneficiary customer as EGL. The details of payment are:

> INT 12MTHS TO 300601 BEHALF EGL
>
> DEVELOPMENT CANBERRA PL ON ERMA NO

745 On 18 February 2005, Ligon 268 received $175,000 from IDB.

746 There is letter, dated 1 March 2005, from BCI to Bank Hapoalim entitled "Application for Provision of credit – Our Letter of Undertaking (Mem Shin 20(E) for Credit in Foreign currency dated 11 June 2004" and requesting credit in the sum of AUD$6,177,288.20 on 1 March 2005, repayable on 30 August 2005. The letter is signed by Andrew Binetter on behalf of BCI. The application bears the facsimile stamp of "Kevin Munro & Assoc", where Michael Binetter worked. I infer that Michael Binetter assisted BCI to arrange an extension of its arrangements with Bank Hapoalim around this time.

747 There is a document dated 23 March 2005 entitled "Re: loan confirmation and repayment schedule for loan no. 10008 Branch 600 Acc 343415. The loan amount is $6,177,288.00. At the bottom of the document are "remarks" including "Int. rate: deposit + 0.30000%". Based on this document, I conclude that BCI's purported payments of interest to Bank Hapoalim comprised a fee calculated as a margin (probably of about 0.3%, consistent with the 31 May 2004 facsimile identified above) which was received by the bank, and an amount equivalent to interest paid by the bank on the fiduciary deposits which secured the advances from Bank Hapoalim.

748 There is an unsigned letter dated 31 March 2005, from Andrew Binetter on behalf of EGL, to Premium Business Services, requesting a transfer from Ligon 158 to IDB with the following message:

| **Date** | **Amount** | **Interest Owed** |
|---|---|---|
| 01/07/01–30/06/02 | $12 028 897 | $863 707.74 |
| 18/10/01–30/06/02 | $50 000 | $2 515.07 |
| 30/10/01–30/06/02 | $50 000 | $2 396.71 |

| | | |
|---|---|---|
| | **TOTAL =** | **$868 619.52** |

749 There is an AUSTRAC report of a transfer of $868,620 on 4 April 2005. Ligon 268 is the ordering customer. Ligon 158 is the beneficiary customer and the account no is 8031890167992. The details of payment are:

> ATT HAGAI PELED INTEREST 12 M
>
> 30/03/2002 EGL DEVELOPMENT PL

750 There is an AUSTRAC report of a transfer of $183,500 on 24 May 2005. The ordering customer and the beneficiary customer are both BCI. The details of payment are:

> ATT – MR BARUCH ETZION INTEREST
>
> PAYMENT FOR LIGON PL 30/09/2005.

751 In its 2005 income tax return, BCI claimed deductions for 'interest expenses overseas' of $487,222.

752 In its 2005 income tax return, EGL claimed deductions for 'interest expenses overseas' of $1,215,173.

753 In its 2005 income tax return, Ligon 268 claimed a deduction for 'interest expenses overseas' of $938,839.

**2006 income year**

754 There is another letter, dated 5 September 2005, from BCI to Bank Hapoalim entitled "Application for provision of credit – my letter of undertaking (Mem Shin 20(E) for credit in foreign currency dated 11 June 2004" and requesting credit in the sum of AUD$6,177,288.20 on 8 September 2005, repayable on 8 May 2006. The application is signed by Andrew Binetter on behalf of BCI.

755 By letter dated 8 September 2005, Andrew Binetter on behalf of BCI wrote to the Commonwealth Bank to request a transfer of $182,000 to account no. 34215-00001 with the following message:

> For the attention of Mr Baruch Etzion. Representing interest payment by BCI Finances P/L to 31 March 2006. Please forward receipt.

756 There is another letter from BCI to Bank Hapoalim, dated 14 September 2005, entitled "Application for Provision of Credit- Our Letter of Undertaking (Mem Shin 20(E) for Credit

in Foreign currency dated 11 June 2004" requesting credit in the sum of AUD$6,177,288.20 repayable on 8 March 2006. The application is signed by Andrew Binetter on behalf of BCI.

757 According to an affidavit sworn by Andrew Binetter, he visited IDB in Israel in late 2005.

758 On about 18 January 2006, Andrew Binetter on behalf of EGL wrote to Premium Business Services to request a transfer from EGL of AUD$3,053,165.28 to IDB with the following message:

| **Date** | **Amount** | **Interest Owed** |
|---|---|---|
| 01/07/02–30/06/03 | $12 977 516 | $933 257.27 |
| 25/06/03–30/06/03 | $220 000 | $216.99 |
| 01/07/03–30/06/04 | $14 150 990 | $1 018 871.31 |
| 19/12/03–30/06/04 | $180 000 | $6 888.33 |
| 23/06/04–30/06/04 | $200 000 | $276.16 |
| 01/07/04–31/12/04 | $15 557 026 | $561 587.34 |
| 01/01/05—31/03/05 | $15 369 717 | $269 833.28 |
| 01/04/05–30/06/05 | $14 770 931 | $262 234.60 |
| | **TOTAL =** | **$3 053 165.28** |

759 The AUSTRAC report of this transfer contains the following details of payment:

> ATTENTION: MR HAGAI PELED, INTEREST
>
> FOR LOAN NO. 803189-0167992

760 It appears that the initial transfer was rejected because the Commonwealth Bank had wrongly stated the beneficiary to be Mr Peled. By letter dated 27 January 2006, Andrew Binetter requested that the transfer be made for the benefit of:

> Loan No. 803189 – 0167992.
>
> Being interest on behalf of E.G.L. Development (Canberra) Pty. Limited on Erma Nominees Pty. Ltd's loan account

761 On 26 January 2006, Andrew Binetter on behalf of BCI signed a document entitled "Limited power of representation", permitting Mr Etzion to deal with Bank Hapoalim on its behalf and to receive information from Bank Hapoalim "about any of our loan accounts with the Bank". It is marked with a facsimile stamp dated "30 Jan 2006 14:39".

***Increase of advance from Bank Hapoalim to BCI to $10 million***

*30 January 2006 correspondence*

762 There is a letter to Bank Hapoalim, in Michael Binetter's handwriting, signed by Andrew Binetter on behalf of BCI, which "acknowledge[s] that our application for a loan of A$10 million for 10 years awaits the approval of you". This document is marked with a facsimile stamp dated 30 Jan 2006 14:40.

763 Then, there is a letter signed by Andrew Binetter, apparently on behalf of BCI to Bank Hapoalim, dated 8 March 2006. The letter is entitled "Application for Provision of Credit - My Letter of Undertaking (Mem Shin 20(E) for Credit in Foreign currency dated 11 June 2004". The letter requests the provision of credit in Australian dollars in the amount of $10,000,000. It is marked with a facsimile stamp dated "30 Jan 2006 14:40", which indicates that the letter was post-dated. The space for insertion of an interest rate is blank.

764 In February 2006, Ronald Binetter re-married Ms Huber (they having been divorced in 1992). After Ms Huber asked some questions about financial matters, Ronald Binetter mentioned her questions to Michael Binetter who instructed Ronald not to discuss Ligon 268 with Ms Huber, saying "We don't want her to know anything about the family businesses".

765 AUSTRAC records show a transfer, on 21 February 2006 from IDB to Ligon 268 of $399,000.

*8 March 2006 correspondence*

766 There is a letter signed by Andrew Binetter, apparently on behalf of BCI, dated 8 March 2006. It was sent by facsimile dated 8 March 2006 from Bank Hapoalim Switzerland to Bank Hapoalim. The letter is addressed to Bank Hapoalim entitled "Application for Provision of Credit- Our Letter of Undertaking (Mem Shin 20(E) for Credit in Foreign currency dated 11 June 2004". The letter requests the provision of credit in Australian dollars in the amount of A$10,000,000.

767 Also forming part of the facsimile dated 8 March 2006 is a letter of the same date addressed to Bank Hapoalim Switzerland. This letter is signed by Andrew Binetter as "The Pledgor". It is entitled "Deed of Pledge and Declaration of Assignment executed by us on Account No. 7196960" ("letter of irrevocable instructions") The recitals to the letter record that "pursuant to the Deed of Pledge we have pledged a deposit held with you as specified in the Deed of Pledge … as collateral for all claims vested in [Bank Hapoalim]". The recitals also record

that "the Deposit and the credit balance thereof are to create a fund that … serve for satisfaction and payment of any and all amounts due and payable by the Debtor to [Bank Hapoalim] …".

768 The letter of irrevocable instructions records that the "Deposit" "is pledged and assigned pursuant to the Deed of Pledge". It includes the following clause:

> Your obligations to pay any amount on account of the Deposit either to us or to our order, to the extent of the amount outstanding from time to time by the Debtor to [Bank Hapoalim], pursuant to the Documents of Undertaking, ceases to be an ordinary obligation between a bank and its customer or depositor so that, to the extent of the amount outstanding from time to time by the Debtor to [Bank Hapoalim] pursuant to the Documents of Undertaking, it is and shall be contingent upon your receiving from [Bank Hapoalim] written advice to the effect that there are no amounts owing by the Debtor to [Bank Hapoalim] (hereinafter: "Notice of Release") before your becoming obligated to make any payment on account of that part of the credit balance of the Deposit which does not exceed the amount outstanding from time to time by the Debtor to [Bank Hapoalim] pursuant to the Documents of Undertaking.

769 The letter of irrevocable instructions operated to provide 'collateral'" for the 'provision of credit' made by Bank Hapoalim, and is expressed to be irrevocable except with the consent of Bank Hapoalim. It concludes with the words: "This letter is regarded as constituting an inseparable part of the Deed of Pledge".

770 There are two other letters dated 8 March 2006. Each is signed by Andrew Binetter on behalf of BCI, and is addressed to Bank Hapoalim. Two of the letters request credit in the sum of A$6,177,288.20. One letter provides for an interest rate of 6.67% per annum less Australian interest withholding tax. From the document's footer, it appears to have been created by Mr Etzion. The other provides for an interest rate of 7% per annum less Australian interest withholding tax. The latter letter was sent by facsimile from "Kevin Munro & Associates" on 13 March 2006.

771 There are three more letters from Andrew Binetter on behalf of BCI to Bank Hapoalim around this time. One is dated 8 April 2006, and requests credit of A$3,850,000 at an interest rate of 7%, repayable on 8 March 2011. From the document's footer, it appears to have been created by Mr Etzion. Another is dated 8 April 2006 and requests credit of A$3,822,717.80. The third is dated 22 April 2006 and requests credit of A$3,850,000 at an interest rate of 7.34%, repayable on 8 March 2011.

772 There is a letter from BCI to Bank Hapoalim dated 22 April 2006, entitled "Application for Provision of Credit- Our Letter of Undertaking (Mem Shin 20(E) for Credit in Foreign currency dated 11 June 2004" It is signed by Andrew Binetter on behalf of BCI and requests "that you provide me in my foreign currency account with you No. 343415" an amount of AUD$3,850,000 in accordance with the terms set out in the 11 June 2004 letter of undertaking. There is also an unsigned letter dated 22 April 2006 from Andrew Binetter on behalf of BCI requesting a drawdown from loan account no. 343415 of $3,850,000.

773 On about 26 April 2006, BCI received an amount of $3,848,552 from Bank Hapoalim.

774 Also on about 26 April 2006, Ligon 268 received $675,000 from IDB to Ligon 268.

775 The sum of $3,848,552 and $6,177,288 is $10,025,840, being approximately the amount of credit referred to in two applications for provision of credit in May 2006. Based on the respondents' acknowledgements concerning the existence of deposits, it appears that by this time, there was a deposit of about $10 million which secured the advances from Bank Hapoalim to BCI.

776 Although the evidence demonstrates that Andrew Binetter was the director of BCI primarily involved in arranging the advance of $3,848,552, the handwritten letter marked 30 January 2006, signed by Andrew Binetter but written in Michael Binetter's handwriting, supports a conclusion that Michael Binetter acted as a de facto director of BCI with Andrew Binetter to procure that advance.

777 As for earlier advances from BCI, documents were prepared in connection with the advance which gave the appearance that the transaction comprised a loan from Bank Hapoalim to BCI, secured only by guarantees and a charge over the assets of BCI when the true position was that the advance was secured by a "back-to-back" deposit. I infer from Michael Binetter's role in procuring the advance that he, together with Andrew Binetter, procured the preparation of the relevant documents. On the same basis, I further infer that Michael Binetter knew that the advance was secured by a "back-to-back" deposit which would earn interest income offshore to the ultimate benefit of the owner of the deposit.

778 On 28 April 2006, BCI transferred $2,816,633.64 to Ligon 158. The same day, Andrew Binetter on behalf of EGL wrote to "Premium Business Services" requesting a transfer from Ligon 158 of $2,816,633.64 to IDB. He requested that the transfer be accompanied by the following message:

Interest for the period 01 July 2005 to 30 April 2006 and partial loan repayment as follows on behalf of EGL Development (Canberra) Pty Ltd on Erma Nominees Pty Ltd's account. Loan No. 803189-0167992.

| **Date** | **Amount** | **Interest owed** |
|---|---|---|
| 01/07/05 –31/12/05 | $15 033 165 | $542 676.67 |
| 01/01/06 – 30/04/06 | $ 12 522 677 | $293 956.97 |
| Loan repayment | $1 980 000 | $1 980 000.00 |
| | **TOTAL =** | **$2 816 633.64** |

779 There is a deed dated 28 April 2006, signed by Erwin Binetter, by which Erwin Binetter guarantees obligations of Binqld to IDB.

780 The following documents are also dated 28 April 2006:

(1) An equitable mortgage of redeemable notes, shares and units from Ligon 158 in favour of IDB, signed by Erwin and Andrew Binetter as directors of Ligon 158;

(2) An equitable mortgage of redeemable notes, shares and units from Ligon 237 Pty Ltd in favour of IDB, signed by Peter Binetter and Andrew Binetter as directors of Ligon 237 Pty Ltd;

781 There is a form dated 1 May 2006 entitled "Application to receive a foreign currency loan" signed by Andrew Binetter on behalf of Binqld, applying for a loan in the sum of $4,000,000. The document appears to have been partly completed in the handwriting of Michael Binetter. The liquidators disputed the authenticity of this document, and nine other similar documents annexed to an affidavit of Andrew Binetter dated 27 July 2012.

782 On about 4 May 2006, Binqld received $4,000,000 from IDB, which was subsequently transferred to Ligon 158, either directly or through Erma. This transfer from Binqld was arranged by Andrew Binetter.

783 By letter dated 22 May 2006, Andrew Binetter on behalf of BCI wrote to the Commonwealth Bank requesting a transfer from BCI of USD$20,000 to:

Bank of Hapoalim B.M
50 Rothschild Blvd.
Tel Aviv Israel

For Account No:- 34215-00001
With the following message:-

"For the attention of Mr. Baruch Etzion. Representing legal fees by B.C.I Finances P/L. Please forward receipt."

784 Based on this letter, I find that account no. 34215-00001 was an account owned or controlled by Mr Etzion. It was an account from which Mr Etzion made payments at the direction of Andrew Binetter. However, I do not accept at face value any of the messages which purport to record the purpose of funds transferred to account no. 34215-00001.

785 Also on 22 May 2006, Andrew Binetter on behalf of BCI wrote to the Commonwealth Bank requesting a transfer of AUD$244,158.79 to:

> Bank of Hapoalim B.M
> 50 Rothschild Blvd.
> Tel Aviv Israel
>
> For Account No:- 34215-00001
> With the following message:-
>
> "For the attention of Mr. Baruch Etzion. Representing interest payment by B.C.I. Finances P/L to 8 September 2006 as calculated below Please forward receipt."

| **Date** | **Amount** | **Interest Owed** |
|---|---|---|
| 09/03/06–08/09/06 | $6 177 288 | $167 243.73 |
| 25/04/06–08/09/06 | $3 822 712 | $76 915.06 |
| | **TOTAL =** | **$244 158.79** |

786 On 7 June 2006, Andrew Binetter sent a facsimile to Ophira Perry of IDB, annexing a signed form entitled "Application to receive a foreign currency loan". The customer was identified as Ligon 268 and the loan amount sought was A$11,250,000. The proposed repayment date was 31 May 2016. The form contained a provision for interest but no rate was inserted into that provision. Andrew Binetter had initialled the form at various places.

787 According to an affidavit affirmed by Andrew Binetter in September 2012, in about 2006 Erwin Binetter told Andrew that there were numerous loans outstanding between Ligon 268 and IDB, which Erwin Binetter thought needed to be consolidated into one loan. According to Andrew Binetter, he contacted Ophira Perry at his father's request and asked her for the same form of loan documentation as had been agreed in relation to advances to Binqld for "the new consolidated loan for Ligon 268".

**2007 income year**

788 By letter dated 19 September 2006 from Andrew Binetter on behalf of EGL to Premium Business Services, Andrew Binetter requested a transfer from Ligon 158 of $5,278,137 to IDB with the following message:

"Attention Ms Ophira Perry

Interest for the period 01 May 2006 to 19 September 2006 and partial loan repayment as follows on behalf of E.G.L Development (Canberra) Pty. Ltd on Erma Nominees Pty Ltd's account. Loan No. 803189 – 0167992.

| **Date** | **Amount** | **Interest Owed** |
|---|---|---|
| 01/05/06 - 10/07/06 | $10 000 000 | $138 082.21 |
| 10/07/06 - 19/09/06 | $10 000 000 | $140 054.79 |
| **Loan repayment** | $ 5 000 000 | $5 000 000 |
| | **TOTAL =** | **$5 278 137.00** |

789 The source of these funds included $3.1 million from TFJA and $1,990,000 from Binqld via Erma.

790 On 12 September 2006, Ligon 158's bank account was credited with $4,770,000.

791 In the 2007 income year, Binqld received the following amounts from IDB on the following dates:

| | |
|---|---|
| 25 September 2006 | $1,500,000 |
| 1 November 2006 | $3,000,000 |
| 1 December 2006 | $1,500,000 |
| 20 December 2006 | $1,200,000 |
| 27 March 2007 | $3,300,000 |
| 11 May 2007 | $2,300,000 |

792 Each of these transfers was arranged by Andrew Binetter.

793 On 28 September 2009, $1,507,500 was transferred from Binqld to Erma, at the direction of Andrew Binetter.

794 According to Andrew Binetter, in mid-October 2006, he sought $3,000,000 for Binqld from Ms Perry of IDB, noting that "we have repaid $5 million from EGL". On 1 November 2006, Binqld transferred $3,000,000 to Ligon 158. The majority of those funds were subsequently invested in the Nudie Juice business.

795 By letter dated 14 November 2006, Andrew Binetter requested a transfer of AUD$161,063.01, which he referred to as "Interest for the period 05 May 2006 to 05 November 2006 … on behalf of Binqld Finances Pty Limited".

796 On 1 December 2006, Binqld transferred $1,500,000 to Ligon 158. The majority of those funds were subsequently invested in the Nudie Juice business.

797 Similarly, on 20 December 2006, Binqld transferred $1,200,000 to Ligon 158 and the majority of those funds were subsequently invested in the Nudie Juice business.

798 A letter dated 23 January 2007 signed by Andrew Binetter and addressed to IDB records Andrew Binetter's guarantee to the bank in connection with "loans and/or credit facilities and/or banking services … which the Bank granted and/or will grant to BINQLD FINANCES PTY LTD".

799 By letter dated 7 March 2007, Andrew Binetter on behalf of BCI wrote to the Commonwealth Bank requesting a transfer from BCI of $306,594 to:

> Bank of Hapoalim B.M
> 50 Rothschild Blvd.
> Tel Aviv Israel
>
> For Account No:- 34215-00001
> With the following message:-
>
> "For the attention of Mr. Baruch Etzion. Representing balance of interest due by B.C.I Finances P/L to 8 March 2007."

800 On 14 March 2007, EGL received $1,250,000 from an unknown source. On 15 March 2007, EGL received $3 million from an unknown source. On 19 March 2007, EGL transferred $4,250,000 to IDB.

801 I have previously noted that Andrew and Michael Binetter were principally responsible for instructing MDA Lawyers to act on behalf of the applicants in their dealings with the ATO.

802 The earliest evidence of a meeting between Mark Douglass of MDA Lawyers and Michael Binetter in connection with the ATO audit is a handwritten file note of a meeting on 21 March 2007. During that meeting, there was discussion of "debt management" and a schedule of lodgements of outstanding income tax returns include the 2001 to 2005 returns for EGL. Those returns were lodged in April and May 2007.

803 There are two documents dated 4 April 2007. One is an agenda for a meeting between Michael and Andrew Binetter and Mark Douglass. The agenda document is on "Binettervale Lawyers" letterhead. That document also includes an agenda for the discussion between Michael Binetter and Mark Douglass on 21 March 2007. I infer that Michael Binetter prepared, or caused to be prepared, the agenda document.

804 The 21 March 2007 agenda records Ligon 159 and Milgerd as matters for discussion and "All notices to be discussed … in so far as possible Andrew Binetter will be the person attending,

otherwise it will be Emil Binetter". The agenda refers to debt recovery and notes: "MB to instruct re: offset amounts to various entities".

805 There is also a box containing the words "Lodgement program" with the note: "MB to advise re: bundle of new documents for lodgement".

806 The second document is the handwritten file note of a meeting between Michael and Andrew Binetter and Mark Douglass on 4 April 2007, referred to at [340] and following above.

807 The liquidators relied on the file note of this meeting as unequivocal evidence of Binqld's involvement in the alleged scheme. The note records the establishment of new entities by Andrew Binetter, of which he was the sole director, possibly including Binqld. It records that the entities borrowed money from overseas after June 2005. As noted earlier, Binqld was incorporated in March 2006. The note records:

> Whenever $$ available + accumulated + sent offshore to discount bank + then re-borrowed to Binqld

808 In my view, it is more likely than not, having regard to the entirety of the evidence of his role in providing instructions to MDA Lawyers, that Michael Binetter was involved in instructing Mr Douglass throughout the period that he or his law firm was retained to deal with the ATO in connection with the tax affairs of the various applicants. However, there is no evidence that Michael Binetter was interviewed by the ATO in the course of the audit.

809 The next day, 5 April 2007, MDA Lawyers wrote to the ATO saying, relevantly, that MDA Lawyers acted for Andrew Binetter and his related entities.

810 On 5 April 2007, Ligon 158 received $2,747,250. That amount probably came from Erma who, in turn, probably received it from Binqld.

811 On 30 April 2007, EGL received $931,000, probably from Ligon 158. On 9 May 2007, EGL transferred $932,000 to IDB. There is a letter dated 3 May 2007 from Andrew Binetter on behalf of EGL to the Commonwealth Bank requesting the latter transfer, which refers to a portion of the amount as a loan repayment of $750,000.

812 According to Andrew Binetter's 27 July 2012 affidavit in the EGL tax appeal, EGL fully repaid its loans from IDB in three payments: on 19 September 2006 ($5,000,000), 2 April 2007 ($4,250,000, an amount obtained by Erma from Binqld) and 3 May 2007 ($750,000, an amount obtained by Ligon 158 from Binqld). Andrew Binetter arranged the payments at

Erwin Binetter's request. In making these payments, EGL deprived itself of those funds as a source of payment of any tax debt that might arise from the tax audit. There is no evidence that it had other funds to pay any tax debt.

813 On 18 June 2007, Andrew and Michael Binetter met with Mark Douglass to prepare for Andrew Binetter's meeting with the ATO the following day.

814 From no later than May 2007, EGL had no funds available from any source to meet any future liabilities to the Commissioner.

815 On 19 June 2007, Andrew Binetter made a statutory declaration attaching an unsigned copy of the 8 March 2006 Application for Provision of Credit document which he described as an application "to increase the loan facility for BCI Finances Pty Limited from approximately $6 million to approximately $10 million". The statutory declaration was provided to the ATO at a s 264 interview that day.

816 Also on 19 June 2007, Andrew Binetter made a statutory declaration attaching "my file copy of a 2006 Application to receive a Foreign Currency Loan and Terms and Conditions to [IDB] in respect of [Binqld]". By this time, in the ordinary course, Binqld would have had records of the terms on which the seven advances from IDB between 4 May 2006 and 10 May 2007 had been received. The document attached to the statutory declaration was incomplete as to the loan account number, the amount of the loan and the rate of interest payable in respect of the loan but was endorsed with a handwritten notation to the effect that the loan would be for a term of 120 months commencing in 2006 and expiring in 2016. The document was signed by Andrew Binetter.

817 As at June 2007, Binqld had minimal (and insufficient) documentation to any deductions of interest expenses that it would make based on its transactions with IDB. However, it had not yet lodged an income tax return.

***Payments by or on behalf of Ligon 268 to IDB***

818 According to Ligon 268's SOFIC, payments which it characterised as "principal advances repayments" totalling $9,500,000 were made to IDB. Although the SOFIC is not entirely clear, it appears to say that the advances were repaid in full by 30 June 2007.

**2008 income year**

819 In the 2008 income year, Andrew Binetter arranged for Binqld to receive the following amounts from IDB on the following dates:

| | |
|---|---|
| 17 July 2007 | $4,000,000 |
| 25 May 2008 | $700,000 |

820 On 23 August 2007, Andrew Binetter made a statutory declaration which attached an annexure headed "Application to Receive a Foreign Currency Loan" which did not have a loan account number, but was endorsed by Andrew Binetter with the words "AUD$4,000,000 … four million Australian dollars" for a term expiring "on the 15th day of July 2017". That document appears to bear the signature of Andrew Binetter.

821 On 26 October 2007, Michael Binetter met with Mark Douglass for 1.25 hours. That meeting included discussion of Andrew Binetter's 2005 income tax return and EGL's income tax return. The file note records that "MB says will lodge this return". The note also records:

> Ligon 258/Erma Nominees Pty Ltd by Xmas
>
> Ligon 268 is a long way down the track

822 In relation to "Binqlds Pty Ltd" (sic), the note records "MB doesn't believe on her radar". This note probably records a statement by Michael Binetter to the effect that he does not believe that an ATO officer was concerned about lodgement of income tax returns by companies including Binqld.

823 The note concludes "List to Michael B. Reconvene tomorrow with shopping list".

824 By letter dated 26 October 2007, Mr Douglass informed the ATO, in response to point (4) of the ATO's 10 August 2007 letter, as follows:

> We are instructed that no security or collateral has as yet been provided to the Israel Discount Bank apart from a personal guarantee(s).

825 Based on the fact of the meeting between Michael Binetter and Mr Douglass that day, and the other material in the letter concerning matters within the knowledge of Michael Binetter, I find that this instruction was probably provided by Michael Binetter, in his capacity as sole shareholder of Binqld.

826 On 29 October 2007, Mr Douglass met with ATO officers in relation to their audit of Binqld. I infer from the 26 October 2007 file note, including the meeting between Mr Douglass and

Michael Binetter on that day, that Michael Binetter provided instructions to Mr Douglass for the purpose of his 29 October 2007 meeting with the ATO.

827 As previously mentioned, on 7 November 2007, the ATO issued several offshore information notices issued pursuant to s 264A of the ITAA 1936 and relating to companies including BCI, EGL and Binqld.

828 By memo dated 14 November 2007, Mr Douglass informed Michael Binetter of the entities that had received the notices and provided copies of the notices. Mr Douglass wrote:

> As discussed with you earlier today I am of the opinion that these notices have been issued as a precursor to the issue of amended assessments to each entity to deny deductions claimed for interest (amongst other things) where applicable.
>
> Given the very serious implications of these notices in the assessment/appeal process you Andrew and I should meet very soon to discuss a range of matters that need to be considered including both immediate responses and longer term strategies in connection with the documents that the ATO seeks in relation to the various loans from the Israeli banks.

829 On 19 December 2007, Michael and Andrew Binetter met with Mark Douglass. A file note of the meeting records "MCD draft letters from [sic] banks to Binetters". Remarkably, there is evidence that Mr Douglass thereafter drafted letters to be sent on the letterhead of the IDB and another bank. A handwritten note shows that one of the draft letters was discussed in a conference with Michael Binetter on 20 December 2007. The draft letters appear to have been forwarded on 20 December 2007 to Andrew Binetter care of Michael Binetter. The draft letters concerned, relevantly, EGL and Binqld.

830 An early draft, concerning EGL (and two other companies, namely, Advance Finance Pty Ltd and Civic Finances Pty Ltd) stated, relevantly:

> The Bank confirms the amounts remitted to it in the attached Table A constitute interest amounts incurred by the borrower company and paid to the bank by the company named and in the years as set out in the attached schedule.

831 Other draft letters prepared around this time included the following words concerning interest:

> (For EGL) IDB hereby confirms that the amounts remitted to it constitute interest amounts incurred by the relevant borrower companies, on the outstanding loan amounts, and paid to IDB by that company or on its behalf, in the amount and at the time as set out in the Table B below.
>
> (For Binqld) IDB hereby confirms that the amounts remitted to it constitute interest amounts incurred by the relevant borrower company, on the outstanding loan

> amounts, and paid to IDB by that company or on its behalf, in the amount and at the time as set out in the Table B below.

832 For EGL, the draft letter included a table headed "Table B – Interest Amounts Received by Bank from Borrower Companies". For Binqld, the draft letter included a table headed "Table B – Interest Amounts Received by Bank from Borrower Company".

833 In the 20 December 2007 covering letter from MDA Lawyers to Andrew Binetter, the following warning appears:

> Please note that the above draft letters should be considered to be a "first-cut" working draft of our suggested inclusions for your consideration and by no means is settled.
>
> We note that we are very concerned that if identical letters are sent to the ATO from the respective banks that this will serve to heighten rather than allay the suspicions of the ATO. It may therefore be prudent to amend the letters so that they are structurally and linguistically different to ensure that suspicions of this nature do not arise.

834 The draft letter concerning EGL was revised in late January 2008, apparently by MDA Lawyers. The paragraphs about interest were revised to read:

> IDB hereby confirms that from time to time IDB has received from the Company interest payable by the Company to IDB in relation to the loans advanced by IDB to the Company. Even though the interest received by IDB, in relation to the loans by IDB to the Company, may not have been sent by the Company, the interest has been treated by IDB as interest paid by the Company. The interest remitted to IDB has always been reminted by an entity associated with, directly or indirectly, Mr Erwin Binetter or Mr Emil Binetter.
>
> IDB hereby confirms that the amounts set out in Table B below are the aggregate amount received by IDB during the periods as set out in that Table, as interest payable by the Company in relation to the loan funds owing to IDB by the Company.
>
> From time to time IDB may have requested that either interest be paid to IDB other than on the due date that it was originally required to be paid by the Company and/or that interest amounts be capitalised as an increase to the outstanding loan balance of the Company.

835 By letter dated 15 April 2008, MDA Lawyers reiterated to the ATO that Binqld did not have any documents explaining the advances that had not already been provided to the ATO. However, in the course of the Binqld tax appeal, Binqld served an affidavit of Andrew Binetter which attached 10 documents purporting to relate to the transfers from IDB to Binqld. The documents are forms entitled "Application to receive a foreign currency loan". Each form bears Andrew Binetter's signature and each form contains handwritten endorsements of amount, term and interest rate that appear to correspond with the 10

transfers from IDB to Binqld. The handwriting includes the handwriting of Michael Binetter (for example, the description of the purpose of the loan on each document).

836 As the liquidators contended, the genuineness of the 10 documents is suspect because they were not provided to the ATO during the audit and because Andrew and Michael Binetter had asked Mr Douglass, in late 2007, to prepare a letter on behalf of IDB about the terms of the "loans" from IDB to Binqld. Some of the documents contain identical handwritten inclusions, suggesting that they were created from an earlier document which contained those inclusions. In the absence of corroborative evidence from IDB, I do not accept that the 10 documents prove the terms of the transfers from IDB to Binqld.

**2009 income year**

837 An IDB bank statement for an account in the name of Ligon 268 identifies a credit of $450,000 on 15 October 2008 and a debit of $450,000 on 20 October 2008. The narration for the debit is "Deposit into deposit account". There is no AUSTRAC record which appears to correspond with the 15 October 2008 credit. There are two other entries around this time which record a "renewal of deposit" of $450,000 on 28 November 2011 and a "withdrawal from deposit" of $450,000 on 1 December 2011. There are several entries narrated as "renewal of deposit", "crediting of deposit profits" and "deposit renewal into deposit account".

838 On 21 January 2009, Binqld received $1,450,000 from IDB. According to Andrew Binetter's affidavit in the Binqld proceedings, this transfer was procured by him and the funds were applied to multiple purposes, the largest being a loan to BCI for payment of interest to Bank Hapoalim in an amount of $306,000 on 6 March 2009. There is an AUSTRAC record of a payment from BCI to Bank Hapoalim of $306,594 on 10 March 2009.

839 Eventually, by letter dated 2 March 2009, the IDB wrote to the directors of EGL in terms similar but not identical to the January 2009 draft. The 2 March 2009 letter, which was tendered by the Andrew Binetter parties, states relevantly:

> IDB hereby confirms that from time to time IDB has received from the Company payments/transfers in relation to the loans granted by IDB to the Company. Even though the payments/transfers received by IDB, in relation to the loans granted by IDB to the Company, may not had [sic] been sent by the Company, the above payments/transfers had been treated by IDB as interest/principal paid by the Company.

> IDB hereby confirms that the amounts set out in Table B below are the aggregate amounts received by IDB during the periods set out in Table B, from the Company (or on its behalf) in relation to the loans owing to IDB by the Company.

840 In the 2 March 2009 letter, Table B is headed "Transfers received by IDB from the Company or on its behalf (including principal payments)". The table set out payments covering the period from 1 July 1999 to 30 June 2007.

841 I infer that either the IDB was not willing to refer in the extracted passages to the relevant "transfers" as payments of interest, or those instructing MDA Lawyers were ultimately not willing to ask IDB to refer to the transfers as payments of interest. In either case, I conclude that this was because IDB did not receive interest payments from or on behalf of EGL. Any amount that IDB earned from the transactions between EGL and IDB was probably not in the nature of interest.

**July to December 2009**

842 There is a letter dated 15 October 2009 from Bank Hapoalim to BCI. The letter states:

> **Balance of Account**
>
> At your request we are pleased to confirm the balances at the close of business on 30 [S]eptember 2009 in your account N. 343415 with us:
>
> Current Account: AUD 304457.80
>
> B.T.B Loans AUD 10061353.96.

843 On the reverse side of the letter is a spreadsheet in Hebrew script. This spreadsheet was said (in November 2013), by Ms Varda Lusthaus, BCI's expert on Israeli banking practices, to contain the following words under the heading "Loans":

> Back to back; constant interest rate…(the first loan)
>
> Back to back; constant interest rate…(the second loan)

844 Andrew Binetter was in Israel between 13 and 15 October 2009. He arrived in Frankfurt Germany on 15 October 2009 and departed on 17 October 2009. The 15 October 2009 letter was probably prepared at his request.

845 On 27 October 2009, Michael and Gary Binetter met with Judith Sutton of MDA Lawyers. A file note of the meeting records that Andrew and Michael Binetter had met with Baruch Etzion. It recorded that Andrew Binetter was going back (I infer, to Israel) from the end of November to early December. The note recorded that Andrew Binetter wanted to "fix the

statement. Then will organise the statement". I infer this is a reference to a statement to be signed by Mr Etzion.

846 On 10 November 2009, Bank Hapoalim wrote a further letter to BCI, entitled "Balance of Account". The letter records:

> At your request we are pleased to confirm the balance in your account 343415 with us at the Close of business on 30.09.2009 as follows:
>
> CURRENT ACC.
>
> AUD -304,457.80
>
> LOANS
>
> AUD 10,061,353.96
>
> PRINCIPAL: AUD 6,177,288.00 INTEREST: AUD 205,909.96
>
> PRINCIPAL: AUD 3,850,000.00 INTEREST: AUD: 13,475.00

847 The 10 November 2009 letter was annexed to an affidavit affirmed by Mr Etzion on 4 October 2011. In the affidavit, Mr Etzion said that he obtained the letter from the bank at the request of Andrew Binetter.

848 The liquidators submitted that the 10 November 2009 letter was fabricated by Mr Etzion, to replace the 15 October 2009 letter. I am not satisfied that the evidence supports this conclusion, particularly in the absence of evidence from Bank Hapoalim that the 10 November 2009 letter was not genuine. There is also no evidence about when the 15 October 2009 letter was received by BCI, or any of the respondents.

849 An IDB bank statement for an account in the name of Ligon 268 identifies a credit on 17 December 2009 of $460,000 with the narration "transfer from Binqld Fina". There is no AUSTRAC record which appears to correspond with this payment, although there is a record of a transfer from Binqld to IDB of $652,567.00 on 26 November 2009. In my view, the transfer of $460,000 was probably from funds held by Binqld with the IDB.

**2010**

850 Between 5 January 2010 and 28 October 2011, amounts totalling $22,950,000 were paid by or on behalf of Binqld. In Binqld's SOFIC, it alleged that these payments were made in repayment of the loans from IDB.

851 Andrew Binetter's passports show that, during 2010, he travelled to Frankfurt on three occasions (each for a few days) and also to Zurich on two occasions. In the case of his trips to

Zurich in 2010, Andrew Binetter arrived on 23 September 2010, departed on 25 September 2010, arrived on 26 September 2010 and departed again the same day.

852 In an affidavit dated 29 November 2010, Emil Binetter stated:

> I have never made any deposits overseas or had any other money in overseas banks or any assets overseas at all which were used as security for any of the loans from the Israel banks.

853 That statement was misleading because, in fact, Emil and Erwin Binetter had accumulated funds outside Australia that were used to provide the offshore deposits that were security for the advances from Bank Hapoalim to BCI and from IDB to EGL.

854 On 17 December 2010, Erma received $4,800,000 from Binem Pty Ltd. On 20 December 2010, Erma transferred two amounts, totalling $3,768,919, to Binqld's account with IDB.

**2011**

***February to April 2011: repayment of BCI loan***

855 On 23 February 2011, Erma received $1,100,000 from Ligon 158. On 24 February 2011, Erma transferred $1,532,548 to Binqld's account with IDB.

856 On 4 March 2011, Erma received two amounts, totalling $5,100,000 from Ligon 158. On 7 March 2011, Erma transferred $5,162,454 to Bank Hapoalim in part repayment of advances to BCI.

857 On 5 April 2011, Erma received $4,905,000 from Ligon 158. On the same day, Erma transferred $4,916,287.67 to IDB, apparently in connection with transfers from IDB to Binqld.

858 From no later than 8 April 2011, BCI had no funds available from any source to meet its liabilities to the Commissioner, which then exceeded $12 million.

859 On 6 and 7 April 2011 respectively, Ligon's IDB account no. 10627881 received amounts of $5,010,698.63 and $5,011,987.12. The account was simultaneously debited with two amounts of $4,875,000 described as "Capit payment" (totalling $9,750,000) and two payments described as "Int payment" of $135,698.62 and $136,767.12.

860 On 4 October 2011, Mr Etzion affirmed an affidavit which set out that the security for the advances made to BCI were guarantees given by Emil and Erwin and Milgerd, Erma, Ligon

159 and Ligon 158 and a charge over the assets of BCI. That affidavit was false because it omitted to identify the overseas deposits that formed part of the security.

861 On 21 October 2011, Gary Binetter affirmed an affidavit in which he stated:

> 53. I am not aware of any offshore assets that were used as security for the BCI loan. I am sure my father would have told me if such assets existed in case something happened to him.

862 The Andrew Binetter parties tendered two letters dated 4 November 2011 from IDB. The first letter purports to attach loan agreements for two loans, in the sums of $700,000 and $1.45 million respectively. The letter states:

> Re: Bank Loans
>
> As you requested…in connection with Loans which Israel Discount Bank Ltd. granted the Company as follows:
>
> Loans no:
>
> 803-18-998877
>
> 803-18-998907

863 The attached documents, each entitled "Application to Receive a Foreign Currency Loan" include the following clause:

> 2B Please credit the current account set out at the top of this Deed … with the proceeds of the Loan.

864 Neither loan document includes details of a current account.

865 The second letter dated 4 November 2011 from IDB purports to attach "photocopies of customer notifications, regarding payments of principale [sic] and interest of the following loans". Accompanying the letter are 10 documents dated 4 November 2011 and 70 documents dated 3 November 2011. Each document is headed Israel Discount Bank Ltd and refers to account no 130-0980-01-962124. That account number is stated to be the "proceeds account" credited with amounts corresponding to the 10 advances. Each document states:

> Re: provision of loan – in foreign curr. With fixed interest
>
> Please be advised that on the date …
>
> A loan was provided value
>
> In account no. … in the sum of
>
> Proceeds account … was credited with …

**From 2012**

866 It is unnecessary to make details findings about events from this time on. However, the following matters concern Michael Binetter's continuing role in the management of the applicants' tax disputes.

867 On 6 June 2013, Michael Binetter gave instructions to a lawyer working with Mr Douglass, Melissa Care, to make contact with Mr Douglass and to arrange for seek a stay of an order in Israel. On 11 June 2013, Andrew Binetter told BCI's lawyers that he had given Michael Binetter an update on matters relating to BCI. On 16 July 2013, Ms Care had a conversation with Andrew Binetter in which she recounted a conversation between Mr Douglass and Michael Binetter about whether Baruch Etzion was in good health. Her note of the conversation was as follows:

> MXC: Basically, Mark met with Baruch and formed the view he was of good health. Discussed same with Michael and they formed view we shouldn't push hearing. That was the only reason we were going to rely upon.
>
> AB: That wasn't our reason, it was our excuse.

868 On 18 September 2013, Michael Binetter participated in a conference attended by Andrew Binetter, Mark Douglass, Ms Care and Sheila Kaur-Bain, a barrister retained on behalf of BCI. Michael Binetter gave instructions that he was happy for Baruch Etzion to send a letter to Bank Hapoalim saying nothing about him was to be sent to BCI.

869 In July 2012, Andrew Binetter swore an affidavit in which he set out payments made to Israel Discount Bank by Erma and Ligon 158.

## CONCLUSIONS

### The establishment of the scheme involving the Israeli banks

870 The evidence above supports the following findings.

871 In about December 1988, Erwin and Emil Binetter, together with Milgerd, Erma, Ligon 158 and Ligon 159 (the latter two companies having been incorporated in February 1988), embarked on a course of conduct which can aptly be called a "scheme involving Israeli banks". At that time, the scheme involved at least the following elements:

(1) using a company (initially EGL) to enter into a transaction with IDB;

(2) documenting part of the transaction so as to give the appearance that the transaction comprised, in its entirety, a loan of funds from IDB which was secured only by

guarantees given by various persons and entities associated with Erwin and Emil Binetter (in the case of EGL, in 1988, guarantees were given by Emil Binetter and Erwin Binetter, Milgerd and Erma);

(3) depositing funds held or controlled by Erwin and Emil Binetter with banks or other entities outside of Australia equal to the amount of advances from IDB to EGL for the benefit of the Israeli bank so as to constitute security to the Israeli bank for the advance of funds (initially, probably, SFr. 9,085,000, but up to SFr. 17 million) to EGL. It was part of the scheme that interest would accrue on the deposited funds;

(4) each of Erwin and Emil Binetter would, in their own capacities, in their capacities as directors of EGL and, or, in their capacities as directors of Erma and Milgerd, sign documents and have communications with IDB by documentation to give the appearance of a loan from IDB, on terms as to interest, interest payments and repayment, which was secured by guarantees only;

(5) funds received from IDB were then lent by EGL to one or more of Milgerd and Erma, at a rate of interest and on terms which matched the purported rates of interest and terms of the transaction as partly documented between IDB and EGL;

(6) in turn, the funds so loaned to Milgerd and, or, Erma would be further advanced by Milgerd to Ligon 159, or by Erma to Ligon 158, at terms and at rates of interest which match the terms and rates of interest of the transaction as partly documented between IDB and EGL;

(7) the funds further so advanced to Ligon 159 or Ligon 158 or to both would be used by Ligon 159 and by Ligon 158 in furtherance of business activities to earn income or to make capital gains; and

(8) EGL would declare, in its income tax return, as income, interest earned from the monies which it had on-lent directly or indirectly to one or more of Milgerd, Erma, Ligon 159 and, or, Ligon 158 and would claim, as a deductible expense against that income, an amount equal to the interest which was purportedly payable to IDB.

872 In reaching these conclusions, I note in particular upon the following matters:

(1) as to (2), the documents which gave this appearance include EGL's loan request letter dated December 1988, Mr Szanto's 22 December 1998 letter and the contentions in EGL's SOFIC about the documents which recorded the transactions between EGL and IDB;

(2) as to (3), the respondents admissions that offshore deposits secured the advances which the respondents characterised as loans, together with Mr Ben Zeev's evidence about the characteristics of "back-to-back loans" and the absence of evidence from the respondents. As to the fact that the fund was controlled by Erwin and Emil Binetter, I note that it was procured by EGL at a time when the directors of EGL were Erwin and Emil Binetter. The inference that interest was earned on the offshore deposit is also supported by the subsequent April 2000 IDB framework instrument, which provides for interest to accrue on deposits for the grant of loans in a foreign currency;

(3) as to (4) to (8), these elements of the scheme are consistent with the events that are happened. There is no reason to doubt that Erwin and Emil Binetter acted intentionally and pursuant to a course of conduct that is aptly described as a "scheme" in connection with those events, bearing in mind that they were directors of EGL at the relevant time.

873 The evidence does not permit a conclusion that the funds advanced to EGL were funds that were held by IDB on behalf of an entity associated with any of the respondents. I am not satisfied that funds held by or under the control of any of the respondents were brought into Australia under cover of the transactions between IDB and EGL. However, I accept that IDB's advances to EGL were secured by a deposit of funds under the control of Erwin and Emil Binetter and that the terms of the advances were documented so as to give the false appearance that the terms that did not include the security provided by the deposit.

874 The liquidators submitted that, with Erwin and Emil Binetter, Michael Binetter was one of the architects of the scheme. I do not accept that the evidence supports this conclusion, however strongly it might be suspected having regard to the fact that Michael Binetter apparently practised as a tax lawyer, met with Mr Egglishaw in 1998 and was concerned to conceal documentation that might be found in the records of Bank Hapoalim.

***Purposes of the scheme***

875 The evident purposes of the scheme, as originally implemented, included allowing Erma, Milgerd, Ligon 158 and Ligon 159 to have the benefit in Australia of offshore funds accumulated by Erwin and Emil Binetter (by using them as a means of securing the advances provided by EGL to EGL, which were subsequently on-lent) without transferring those funds to Australia. There is no evidence that the offshore funds themselves could not have been deployed directly, had Erwin and Emil Binetter chosen to deploy them. An obvious reason

why Erwin and Emil Binetter might have chosen not simply to lend offshore funds to any of Erma, Milgerd, Ligon 158 and Ligon 159 was that tax, which should have been paid on those funds, was not paid.

876 Whether it was a purpose of the scheme to interpose EGL between IDB and Erma, Milgerd, Ligon 158 and Ligon 159, that was certainly how the scheme operated.

877 An integral part of the scheme was the matching of EGL's interest income from the downstream companies with the interest expenses purportedly incurred by EGL to IDB, pursuant to advances that were documented as loans on which interest was payable. There is no reason to doubt that the scheme was intended to achieve its result, namely that EGL could claim deductible expenses in connection with the advances that had been obtained through the use of the offshore funds.

878 Was it a purpose of the scheme, as initially devised, to evade or avoid liability to pay income tax? In my view, it must have been a purpose to evade income tax. The liquidators did not explain how it could have been a purpose merely to avoid liability to pay income tax and I am not satisfied that there was any such purpose.

879 The March 2009 letter from IDB, and the drafts of this letter, cast significant doubt over whether interest expenses purportedly paid to the bank were correctly so described. What they show is that this simple question could not be answered in a straightforward way. I have found that the payments identified in the March 2009 letter were not, in truth payments of interest to IDB. Any amount that IDB earned from the transactions between EGL and IDB was probably not in the nature of interest. These findings are fortified by the absence of evidence from the respondents themselves or from IDB proving the nature of the payments. On these findings, a purpose of the scheme was to evade EGL's liability to pay income tax.

880 It is objectively unlikely that Erwin and Emil Binetter would have been willing to commit EGL to pay substantial interest expenses to IDB as a cost of advancing funds, in circumstances where they had deposited an equivalent amount to obtain the advance, unless they would earn commensurate interest on the deposit. Otherwise, such interest expenses would not be justified by the insignificant financial risk to the lender of the advance. Thus, a purpose of the scheme was to enable Erwin and Emil Binetter to earn interest income on the offshore deposit. From the evidence of the efforts that various of the respondents made to

conceal the deposits, I infer that income tax was not paid on interest earned on the offshore deposits. Accordingly, this purpose was a purpose of evading liability to pay income tax.

881 I also find that one purpose of the scheme, as initially devised, was to enable Erwin and Emil Binetter to obtain the benefit of their funds offshore without paying income tax in Australia on those funds. The evidence supports a conclusion that the funds were accumulated offshore by Erwin and Emil Binetter and there was no sensible reason for them to establish the scheme unless those funds were, as Gary Binetter called them, "black money". Michael Binetter told Mr Gicelter that the funds were taken out of Australia by Erwin and Emil Binetter. I infer that the funds were not after tax earnings.

882 If I am wrong and the amounts claimed as interest expenses were, in truth, the cost of borrowing funds from IDB, that fact would strengthen conclusion that the scheme's purposes included evading income tax on the offshore funds, because it would show that Erwin and Emil Binetter were prepared to expend considerable sums to obtain the benefit of the offshore funds via loans from IDB instead of bringing the money onshore and deploying them directly.

***Results of the scheme***

883 One result of the scheme, as initially established, was that EGL commenced to claim deductions for interest expenses on purported borrowings from IDB in each income tax return.

884 The liquidators contended that a result of the scheme was that the applicants were exposed to a risk of audit by the Commissioner. All taxpayers are exposed to that risk. In the case of the applicants, they were audited as a result of Michael Binetter's dealings with Philip Egglishaw. I am not satisfied that any particular element of the scheme, as originally established, exposed EGL to a risk of audit.

885 The liquidators contended that another result of the scheme was that the applicants were exposed to a risk that the Commissioner would issue them with assessments of amended assessments which disallowed interest expenses claimed as deductible expenses. Whether the applicants were exposed to this risk depended upon whether, if audited, EGL would be unable to substantiate its interest expenses. This would include substantiating the borrowing pursuant to which the interest was paid: cf *Macquarie Finance Ltd v FCT* 2004 ATC 4866 at 4877.

886 The documentation prepared in December 1988, if produced to the ATO without anything more, was insufficient to substantiate the borrowing. There was no signed loan agreement and the available security documentation, particularly the letter from Mr Szanto, lacked credibility in the context of the large amount allegedly loaned. The preparation and retention of this documentation raises a strong suspicion that the intention of Erwin and Emil Binetter, back in December 1988, was to produce this documentation to the ATO in the event of an audit, and to conceal (dishonestly) the deposit which formed part of the transaction between EGL and IDB. In the absence of evidence that EGL could have produced more evidence to substantiate the borrowing, I accept that a result of the scheme from its inception was that EGL was exposed to a risk that, in the event of an audit, overseas interest expenses claimed by EGL would be disallowed. As a consequence, EGL was exposed to a risk of penalties and interest in respect of any additional taxable income assessed to the company.

***Respondents who gave effect to the scheme***

887 The evidence set out above supports that inference that funds advanced to EGL by IDB between December 1998 and August 1993 were on-lent to Milgerd and Erma and Ligon 158 and Ligon 159, at the direction of Erwin and Emil Binetter, as working capital for businesses conducted by or for the benefit of various of the respondents.

888 I infer from the dealings by Erwin and Andrew Binetter with IDB in connection with the 2000 advances that each of them arranged for those funds to be on-lent to Erma and Ligon 158 as working capital for businesses conducted by or for the benefit of various of the respondents.

**The Bank Hapoalim transactions**

889 Having regard to the evidence of the activities of BCI, which were solely related to its transactions with Bank Hapoalim, I find that the purpose of the incorporation of BCI was for it to enter into transactions with Bank Hapoalim in furtherance of the scheme embarked on by Erwin and Emil Binetter involving Israeli banks.

890 The transactions between BCI and Bank Hapoalim in 1993 involved a course of conduct that was consistent with the scheme engaged in by Erwin and Emil Binetter, together with Milgerd, Erma, Ligon 158 and Ligon 159, in December 1988, in important respects. The transactions were instigated by Erwin and Emil Binetter. They involved the following elements:

(1) using BCI to enter into a transaction or transactions with Bank Hapoalim; discussions with Mr Etzion to secure a transaction between Bank Hapoalim and BCI involving an advance of 12 million Swiss francs to BCI on the basis of the execution of various documents by BCI and other entities associated with Erwin and Emil Binetter;

(2) procuring and creating documentation to give the appearance that the transaction comprised, in its entirety, a loan of funds from Bank Hapoalim which was secured only by guarantees given by various persons and entities associated with Erwin and Emil Binetter (in the case of BCI, in November 1992, guarantees were given by Emil Binetter and Erwin Binetter, Milgerd, Erma, Ligon 158 and Ligon 159);

(3) one or more deposits of offshore funds held or controlled by Erwin and Emil Binetter equal to the amount of the advances from Bank Hapoalim to BCI for the benefit of Bank Hapoalim (either with Bank Hapoalim Switzerland or Bank Hapoalim) so as to constitute security to the bank for the advances from Bank Hapoalim to BCI. The deposits were made on terms that interest would accrue on the deposited funds to the ultimate benefit of the owner or owners of the deposit or deposits, being (at least in 1993) Erwin and Emil Binetter;

(4) each of Erwin and Emil Binetter, in their own capacities, in their capacities as directors of BCI and, or, in their various capacities as directors of Erma, Milgerd, Ligon 158 and Ligon 159, signing documents and having communications with Bank Hapoalim by documentation to give the appearance that there was a loan arrangement between Bank Hapoalim and BCI, on terms as to interest, interest payments and repayment, which was secured by guarantees only;

(5) by reason of (3) and (5), placing BCI in a position in which its documents did not reveal, and concealed, the existence of the deposits and any income earned on those deposits;

(6) advancing funds received from Bank Hapoalim by BCI to one or more of Milgerd and or Erma, and subsequently Ligon 158 and Ligon 159 at rates of interest and on terms which matched the rates of interest and terms in the documents referred to in (3) above;

(7) the use of the funds advanced to Ligon 158 and Ligon 159 in furtherance of business activities to earn income or to make capital gains; and

(8) BCI declaring, in its income tax return, as income, the interest from the monies which it had on-lent directly or indirectly to one or more of Milgerd, Erma, Ligon 159 and,

or, Ligon 158 and would claim, as a deductible expense against that income, an amount equal to the interest which was purportedly payable to BCI under the Bank Hapoalim transaction.

891 As appears from the chronological factual findings, the transactions between Bank Hapoalim and BCI were modified as follows:

(1) in November 1997, by the conversion of the currency of the advances (from Swiss francs to Australian dollars). At this time, if not before, Andrew Binetter became an active participant in the implementation of the scheme;

(2) in May 2004, by the withdrawal of the participation of Emil Binetter, Milgerd and Ligon 159 in the transactions;

(3) in April 2006, by an additional advance of $3,850,000 arranged by Andrew Binetter.

892 Thus, the advances from Bank Hapoalim to BCI formed part of a "back-to-back" arrangement whereby funds to match the amounts transferred by Bank Hapoalim to BCI had been deposited by Bank Hapoalim Switzerland in 1993 at the direction of Erwin or Emil Binetter and in 2006 at the direction of Andrew Binetter.

***Purposes of the Bank Hapoalim transactions***

893 On the evidence above, the "Binetter Entities" who were parties to the Bank Hapoalim transactions in 1993 were Erwin and Emil Binetter, Milgerd, Erma, Ligon 158 and Ligon 159.

894 As for the earlier transactions between EGL and IDB, the evident purposes of the Bank Hapoalim transactions (and, therefore, the purposes of those parties who participated in the transactions), included allowing Erma, Milgerd, Ligon 158 and Ligon 159 to have the benefit in Australia of offshore funds accumulated by Erwin and Emil Binetter (by using them as a means of securing the advances provided by EGL to EGL, which were subsequently on-lent) without either transferring those funds to Australia, or disclosing the existence of those funds in the records of BCI.

895 From November 1997, Andrew Binetter was also a person whose purpose it was to allow Erma, Milgerd, Ligon 158 and Ligon 159 to have the benefit in Australia of offshore funds accumulated by Erwin and Emil Binetter (by using them as a means of securing the advances

provided by EGL to EGL, which were subsequently on-lent) without either transferring those funds to Australia, or disclosing the existence of those funds in the records of BCI.

896 The statement of claim pleads that a purpose of the persons who entered into and gave effect to the Bank Hapoalim transactions was "to create circumstances whereby each and all of BCI Finances, Milgerd Nominees, Erma Nominees, Ligon 159 and Ligon 158 would purport to incur apparent borrowing expenses for which deductions could be claimed under the provisions of the Income Tax Assessment Act, thereby reducing the tax otherwise payable by each of them". An obvious and predictable consequence of entering into the Bank Hapoalim transactions, and then on-lending advances from Bank Hapoalim, was that BCI would purport to incur borrowing expenses in accordance with the documentation that formed part of the transaction and, in turn, interest would be charged and incurred by the downstream borrowers, and deductions would be claimed for interest incurred or purportedly incurred. There is no reason to doubt that these consequences were a purpose of the persons who entered into and gave effect to the Bank Hapoalim transactions.

897 The Bank Hapoalim transactions are not materially different from the transactions between IDB and EGL. The respondents did not seek to differentiate between them. I accept that it was a purpose of the scheme, as implemented by the Bank Hapoalim transactions, that BCI would pay no income tax as a result of its involvement in the transactions. This conclusion is supported by the submissions made on behalf of the Gary Binetter parties that, at no time during its existence could BCI have paid any assessment of the kind that were eventually issued. As they said "Its inability to do so now simply reflects its corporate life and purpose".

898 Further, once it is accepted that the advances from Bank Hapoalim to BCI were secured by deposits, there is no reason to accept at face value the documentation which suggests that BCI incurred significant interest expenses to Bank Hapoalim as the price of the advances. The unlikelihood of that proposition is increased by the evidence concerning the flow of funds, which does not correlate with the terms of available documentation. In the absence of evidence from Bank Hapoalim about what it received in return for the advances, I conclude that a purpose of the Bank Hapoalim transactions was to falsely seek to justify deductions on account of interest expenses. That is a purpose of evading liability to pay income tax.

***Results of the Bank Hapoalim transactions***

899 As for the 1998 transactions between IDB and EGL, I accept that a result of the Bank Hapoalim transactions from their inception was that BCI was exposed to a risk that, in the event of an audit, overseas interest expenses claimed by EGL would be disallowed.

900 In the absence of evidence that BCI could have produced more evidence to substantiate the borrowing, BCI was also exposed to a risk from April 2006, that the Commissioner would assess it to income tax on its receipt of $3.85 million.

901 BCI was also exposed to a risk of penalties and interest in respect of any additional taxable income assessed to the company.

***Respondents who participated in the transactions between BCI and Bank Hapoalim***

902 The findings set out above lead me to conclude that the following parties, acting as directors of BCI caused BCI to enter into the following transactions:

(1) Erwin Binetter, in relation to the 1993 advances, the 1997 conversion of the facilities from Swiss francs to Australian dollars currency, the extension of the arrangements in 1998, 2002 and 2004.

(2) Emil Binetter, in relation to the 1993 advances, the 1997 conversion of the facilities from Swiss francs to Australian dollars currency, and the extensions of the arrangements in 1998 and 2002.

(3) Andrew Binetter, in relation to the 1997 conversion of the facilities from Swiss francs to Australian dollars currency and all transactions with Bank Hapoalim thereafter.

(4) Michael Binetter, in relation to all transactions between BCI and Bank Hapoalim.

903 In relation to each of those transactions into which the director caused BCI to enter, the relevant director knew from his awareness of the terms of the transaction the following matters:

(1) the transactions were a means to assist companies including Milgerd and Erma benefit from offshore funds;

(2) by using those funds as deposits securing advances of funds for use in connection with business activities in which various of the respondents were interested;

(3) the documentation of the transactions was intended to create a false appearance that the funds obtained were on the terms contained in the documentation, and no other terms;

(4) in fact, the transactions involved a back-to-back arrangement whereby offshore funds were used as deposits securing the advances;

(5) that each of BCI, and the entities to whom BCI would on-lend the funds advanced and any subsequent borrower would claim, as a deductible expense, interest in an amount which matched interest purportedly paid by BCI to Bank Hapoalim. As a result, each of BCI and the other entities would reduce their respective assessable income and thereby avoid paying income tax;

(6) the transactions would permit payments to be made to Bank Hapoalim which were described as interest payments but in respect of which only a small portion would be received by Bank Hapoalim, with the remainders being used to augment the offshore funds, probably by way of interest on the security deposit. In that way, the offshore funds would be augmented by funds on which no income tax was paid;

(7) BCI would not have documentation that would fully explain the transactions, as required by s 262A of the ITAA 1936.

**Further transactions between IDB and EGL (1993 and 2000 calendar years)**

904 Pursuant to the scheme, EGL received the additional amounts identified earlier between 10 June 1993 and 9 October 2000.

905 These advances also formed part of a "back-to-back arrangement" in furtherance of the scheme, whereby funds to match the amounts purportedly loaned by IDB had been deposited at the direction of Erwin or Emil Binetter as security for the advances.

906 I accept that each advance, secured as it was by a matching offshore deposit, was intended by EGL to be presented to the ATO, if asked, as a loan on ordinary commercial terms which did not include the existence of the matching deposit.

907 By reason of the transactions between EGL and IDB, EGL was able to obtain the use of funds equivalent to the amount of the deposits without those deposits being themselves transferred to Australia. The evidence does not permit a finding that funds owned by any of the "Binetter Entities" were themselves brought into Australia under the cloak of the transactions. The precise terms of the transactions remain unknown.

908 However, for the reasons given earlier, by its participation in the transactions with IDB including the advances made from June 1993 to October 2000, EGL was exposed to a risk, in the event of a tax audit, that its deductions for interest expenses would be disallowed and the advances themselves would be included in its assessable income, together with the risk that penalties would be imposed and interest would be charged.

**The transactions between IDB and Ligon 268**

909 Although there are documents which appear to record arrangements between Ligon 268 and IDB in April 1988, there are no documents from IDB which refer explicitly to an agreement to advance part or all of the advances totalling $9,379,000.

910 Ligon 268's SOFIC alleges that the advances were loans. It does not specify when the alleged loans were repayable. It alleges that "[t]he security for the Loans was by way of guarantees". Based on the concessions set out above concerning offshore deposits, I find that this allegation falsely implied that the only security for the advances was the guarantees identified in the SOFIC.

911 Ligon 268's SOFIC states that the funds received from IDB were used "for its own and associated business purposes as well as on lending" for purposes set out in a schedule to the SOFIC. The SOFIC states that the funds were on-lent by Ligon 268 on terms that the on borrowers repaid the loans and paid interest as agreed by IDB with Ligon 268 plus Australian withholding tax liability.

912 Ligon 268's SOFIC makes the following contention:

> 37. Ligon 268 contends that the amounts received by [sic] [IDB] were by way of loans. Therefore the principal advances under the loans were not assessable as income. Further Ligon 268 contends it was entitled to claim deductions in respect of the interest expenses incurred under the loans with [IDB].

913 The advances from IDB to Ligon 268, totalling $9,379,000 were procured by adopting a course of conduct that was similar to the course of conduct between IDB and EGL, and Bank Hapoalim and BCI in the following respects:

(1) Ligon 268 entered into a series of transactions with IDB involving advances of funds by IDB to Ligon 268;

(2) offshore funds were deposited as part of the arrangement by which IDB advanced funds to Ligon 268;

(3) Ligon 268 declared, in its income tax returns, as income, the interest from the monies which it had on-loaned directly or indirectly to Ligon 158 and other entities and claimed, as deductible interest expenses against that income, an amount equal to interest which was purportedly payable to IDB;

(4) there is no evidence that Ligon 268 ever had records which could adequately have explained the transactions, accepting that it may have lost records in the May 2004 fire at the Pagewood premises.

(5) I find that Ligon 268 never kept records that would have been sufficient to justify the interest expense deductions that Ligon 268 claimed in its tax returns.

914 As for EGL, the evidence does not permit a conclusion that the funds advanced to Ligon 268 were funds that were held by IDB on behalf of an entity associated with any of the respondents. I am not satisfied that funds held by or under the control of any of the respondents were brought into Australia under cover of the transactions between IDB and Ligon 268. However, I find that IDB's advances to Ligon 268 were secured by a deposit of funds owned by Erwin and Andrew Binetter, being the directors of Ligon 268 who procured the advances.

915 To the extent that the terms of the advances were documented, by the 9 April 1998 "General Conditions for management of foreign currency debitory accounts", this was done so as to give the false appearance that the terms that did not include the security provided by the offshore deposit.

916 Based on manner in which the funds advanced by IDB to Ligon 268 were deployed, I find that the funds were procured by Ligon 268 and on-lent by Ligon 268 in order to achieve the effects consistent with the purposes of the scheme. In particular:

(1) the transactions allowed Ligon 158, and other entities, to have the benefit in Australia of offshore funds without transferring those funds to Australia;

(2) the transactions involved the interposition of Ligon 268 between IDB and Erma and Ligon 158;

(3) Ligon 268 was placed in a situation whereby it treated advances of funds from IDB to Ligon 268 as loan funds and claimed, as deductible interest expenses, amounts said to be liabilities to IDB, despite lacking documentation sufficient to demonstrate that the

transfers were loans on terms that included an obligation to pay interest to IDB in the amounts of the interest expenses that were deducted;

(4) Ligon 268 evaded liability to pay income tax, because it claimed amounts as deductible interest expenses which it was not able to substantiate. Had it not claimed those deductions, it would have been liable to pay income tax in respect of the assessable income against which those deductions were offset.

917 However, Ligon 268 was also exposed to a risk, in the event of a tax audit, that its deductions for interest expenses would be disallowed and the transfers from IDB would be included in its assessable income, together with the risk that penalties would be imposed and interest would be charged.

918 The factual findings set out above show that Andrew and Erwin Binetter, the directors of Ligon 268 during the years in which funds were advanced by IDB to Ligon 268 were both responsible for arranging the transactions between IDB and Ligon 268, and for on-lending those funds.

919 Erwin and Andrew Binetter caused Ligon 268 to on-lent the funds principally to Ligon 158, a company of which they were directors at the relevant times. Thus, Ligon 158 knew that the true terms upon which Ligon 268 procured the advances from IDB, including that offshore funds were deposited for the benefit of IDB as part of the arrangement by which IDB advanced funds to Ligon 268.

920 Based on the fact that Andrew and Erwin Binetter arranged the advances, I find that they arranged the offshore deposit that formed the security for the advances. Consequently, I find that the offshore deposit came from funds owned by Andrew and Erwin Binetter.

**The transactions between IDB and Binqld**

921 The factual findings set out above lead me to conclude that the transfers from IDB to Binqld, totalling $22,900,000, were procured by adopting a course of conduct that was similar to the courses of conduct between IDB and EGL and Ligon 268 respectively, and Bank Hapoalim and BCI in the following respects:

(1) Binqld entered into a series of transactions with IDB involving transfers of funds by IDB to Binqld;

(2) offshore funds were deposited for the benefit of IDB as part of the arrangement by which IDB transferred funds to Binqld;

(3) Binqld declared, in its income tax returns, as income, the interest from the monies which it had on-loaned directly or indirectly to Erma and Ligon 158 and other entities and claimed, as deductible interest expenses against that income, an amount equal to interest which was purportedly payable to IDB;

(4) Binqld did not keep records which adequately explained the transactions. The records that it presented to the ATO were insufficient to justify the interest expense deductions that Binqld claimed in its tax returns.

922 Based on manner in which the funds transferred by IDB to Binqld were deployed, I find that the funds were procured by Binqld and on-lent by Binqld in order to achieve the effects consistent with the purposes of the scheme. In particular:

(1) the transactions allowed Erma and Ligon 158, and other entities, to have the benefit in Australia of offshore funds without transferring those funds to Australia;

(2) the transactions involved the interposition of Binqld between IDB and Erma and Ligon 158;

(3) Binqld was placed in a situation whereby it treated transfers of funds from IDB to Binqld as loan funds and claimed, as deductible interest expenses, amounts said to be liabilities to IDB, despite lacking documentation sufficient to demonstrate that the transfers were loans on terms that included an obligation to pay interest to IDB in the amounts of the interest expenses that were deducted;

(4) Binqld evaded liability to pay income tax, because it claimed amounts as deductible interest expenses which it was not able to substantiate. Had it not claimed those deductions, it would have been liable to pay income tax in respect of the assessable income against which those deductions were offset.

923 However, Binqld was also exposed to a risk, in the event of a tax audit, that its deductions for interest expenses would be disallowed and the transfers from IDB would be included in its assessable income, together with the risk that penalties would be imposed and interest would be charged.

924 The factual findings set out above show that Andrew Binetter, the sole director of Binqld, was primarily responsible for arranging the transactions between IDB and Binqld, and for on-lending those funds.

925 Andrew Binetter caused Binqld to on-lent the funds principally to Erma and Ligon 158, companies of which he was a director at the relevant times. The precise entities who received loans from Binqld and the purposes to which those loans were applied are set out in Schedule 4 to the statement of claim. Thus, each of Erma and Ligon 158 knew that the true terms upon which Binqld procured the transfers from IDB, including that offshore funds were deposited for the benefit of IDB as part of the arrangement by which IDB transferred funds to Binqld.

926 Based on the fact that Andrew Binetter arranged the transfers, I find that he arranged the offshore deposit that formed the security for the transfers. Consequently, I find that the offshore deposit came from funds owned by Andrew Binetter.

**BREACHES OF DUTY**

927 I refer back to my earlier findings concerning the alleged breaches of duty at [284] to [384] above.

**Drawdowns and rollovers, and on-lending**

928 The drawdowns are the various advances and transfers from the Israeli banks to the applicants. The rollovers are the various transactions by which BCI and EGL extended the terms of their arrangements with the banks.

929 I have set out above my findings about which directors of the various applicants were responsible for procuring the various advances and transfers, and rollovers.

930 In my view, the probabilities are that the same persons were responsible for procuring drawdowns of funds from Israeli banks, and then on-lending them to various of the corporate respondents. This conclusion arises from the fact that the funds were typically on-lent contemporaneously with the receipt of the funds from Israel. Binqld may be an exception in this regard but, in that case, the facts are simpler: it appears that Andrew Binetter was responsible for both procuring and deploying funds.

*BCI*

931 The conduct of Erwin, Emil, Andrew and Michael Binetter in causing BCI to enter into transactions with Bank Hapoalim, including procuring advances from BCI and extensions of

the arrangements with BCI, was in breach of their respective proper purpose and company interests duties to BCI, and their general law duties to act in the interests of BCI. In the cases of Erwin and Emil Binetter, their conduct was also in breach of the conflict duty.

*EGL*

932 The conduct of Erwin and Emil Binetter in causing EGL to enter into transactions with IDB in the period between December 1988 and June 1993, including procuring advances from IDB, was in breach of all three of the fiduciary duties identified earlier, as well as their general law duties to act in the interests of EGL.

933 When EGL received funds from IDB in 2000, its directors were Emil, Erwin, Gary and Michael Binetter. There is no evidence that Gary Binetter participating in procuring these funds. I find that each of Emil, Erwin and Michael Binetter was responsible for procuring these funds. This conduct was in breach of the proper purpose and company interests duties owed by Emil, Erwin and Michael Binetter to EGL, and their general law duties to act in the interests of EGL. In the cases of Erwin and Emil Binetter, their conduct was also in breach of the conflict duty.

*Ligon 268*

934 The conduct of Erwin and Andrew Binetter in causing Ligon 268 to enter into transactions with IDB, including procuring advances from IDB, was in breach of all three of the fiduciary duties identified earlier, and their general law duties to act in the interests of Ligon 268.

*Binqld*

935 The conduct of Andrew Binetter in causing Binqld to enter into transactions with IDB, including procuring transfers from IDB, was in breach of all three of the fiduciary duties identified earlier, and his general law duty to act in the interests of Binqld.

**Receiving and making payments**

936 There was no breach of duty involved in causing the various applicants to earn income from lending funds to the corporate respondents. However, by causing the applicants to make payments from that income to the Israeli banks, or by causing the corporate respondents to make such payments on behalf of the applicants, the relevant directors depleted the applicants of funds that could otherwise have been used to pay their tax liabilities.

*BCI*

937 The evidence shows that both Erwin Binetter and Emil Binetter participated in the management of BCI. In the absence of any evidence that one of them did not participated in the management of BCI during any particular period prior to the commencement of the ATO audit, I find that both of them were responsible for procuring payments by or on behalf of BCI to Bank Hapoalim or otherwise to Israel during the periods of their respective directorships.

938 Accordingly, I find that Erwin and Emil Binetter each breached all three of the identified fiduciary duties and his general law duty to act in the interests of BCI, by causing all payments made by or on behalf of BCI to Bank Hapoalim or otherwise to Israel during the period from 1988 to July 2006.

939 Although Andrew Binetter was a director of BCI was 1994, his active participation in the management of the company appears to have commenced in November 1997. Accordingly, I find that Andrew Binetter breached the proper purpose and company interest fiduciary duties and his general law duty to act in the interests of BCI, by causing all payments made by or on behalf of BCI to Bank Hapoalim or otherwise to Israel during the period from November 1997. I have also found that Andrew Binetter procured the offshore deposit which secured the 2006 advance from Bank Hapoalim to BCI and, consequently that he was in a position to control the funds from which that deposit was obtained. From that time, he was also in breach of the conflict duty by causing payments made by or on behalf of BCI to Bank Hapoalim or otherwise to Israel.

940 I find that, throughout the period of his de facto directorship of BCI, Michael Binetter breached the proper purpose and company interest fiduciary duties and his general law duty to act in the interests of BCI, by causing all payments made by or on behalf of BCI to Bank Hapoalim or otherwise to Israel throughout that period. The relevant period is from May 1993 to the issue of the revised assessments.

*EGL*

941 The evidence shows that both Erwin Binetter and Emil Binetter participated in the management of EGL. In the absence of any evidence that one of them did not participated in the management of EGL during any particular period prior to the commencement of the ATO

audit, I find that both of them were responsible for procuring payments by or on behalf of EGL to IDB or otherwise to Israel during the periods of their respective directorships.

942 Accordingly, I find that Emil Binetter breached all three of the identified fiduciary duties and his general law duty to act in the interests of EGL, by causing all payments made by or on behalf of EGL to IDB or otherwise to Israel during the period from 1988 to 28 September 2001.

943 I find that Erwin Binetter breached all three of the identified fiduciary duties and his general law duty to act in the interests of EGL, by causing all payments made by or on behalf of EGL to IDB or otherwise to Israel during the period from 1988 to July 2006.

944 I find that Andrew Binetter breached all three of the identified fiduciary duties and his general law duty to act in the interests of EGL, by causing all payments made by or on behalf of EGL to IDB or otherwise to Israel during the period from 28 September 2001.

945 I find that Michael Binetter breached the proper purpose and company interest fiduciary duties and his general law duty to act in the interests of EGL, by causing all payments made by or on behalf of EGL to IDB or otherwise to Israel during the period from 16 October 1996 to 28 September 2001, and from July 2006.

*Ligon 268*

946 The evidence shows that both Erwin Binetter and Andrew Binetter participated in the management of Ligon 268. In the absence of any evidence that one of them did not participated in the management of Ligon 268 during any particular period, I find that both of them were responsible for procuring payments by or on behalf of Ligon 268 to IDB or otherwise to Israel. Accordingly, I find that each of Erwin Binetter and Andrew Binetter breached all three of the identified fiduciary duties and their general law duty to act in the interests of Ligon 268, by causing all payments made by or on behalf of Ligon 268 to IDB or otherwise to Israel.

*Binqld*

947 At all relevant times, Andrew Binetter was responsible for procuring payments to Binqld and for payments made by or on behalf of Binqld to IDB or otherwise to Israel. He breached all three of the identified fiduciary duties and his general law duty to act in the interests of

Binqld, by causing all payments made by or on behalf of Binqld to IDB or otherwise to Israel.

**Lodging tax returns**

948 The conduct of Andrew and Michael Binetter in failing, in the course of the ATO audit, to disclose documents to explain the transactions or alternatively to take steps to minimise the applicants' liability for penalties and interest charges, was also in breach of their respective fiduciary duties to the applicants, and their general law duties to act in the interests of Ligon 268.

**Margaret Binetter**

949 Margaret Binetter facilitated BCI's entry into the Bank Hapoalim transactions by her execution of the guarantee on behalf of Erma and Ligon 158 in November 1992.

950 Margaret Binetter was not a director of BCI at the time of the 1993 advances from Bank Hapoalim to BCI. She did not cause BCI to enter into those transactions. However, she gave a specimen signature to operate an ANZ bank account in the name of BCI in May 1993, nominating her office as "director".

951 To the extent that BCI entered into further transactions with Bank Hapoalim in November 1997, there is no evidence that Margaret Binetter dealt with Bank Hapoalim or assisted Emil, Erwin, Andrew or Michael Binetter to deal with Bank Hapoalim.

952 In November 1998, Margaret Binetter attended meetings of the directors of Ligon 158 and Milgerd (with Erwin Binetter) at which it was resolved that the relevant company "guarantee and reaffirm its guarantee in favour of Bank Hapoalim".

953 The liquidators accepted that the evidence was "ambivalent" as between whether Margaret Binetter was an active participant in the scheme or whether she acted in gross dereliction of her duty to BCI. The possibilities that she was either deceived or kept in the dark were not contemplated.

954 I do not find that Margaret Binetter took any steps in her capacity as director of BCI to give effect to the scheme.

955 The liquidators made various allegations about inferences available concerning Margaret Binetter's knowledge of the scheme and, particularly, BCI's involvement in it. However, no case was put that Margaret Binetter had failed to take steps to stop BCI's participation in the

scheme. In any event, I do not accept that the evidence supports the proposed findings of knowledge.

956 In particular, I reject the proposed inference that, before signing the November 1992 guarantee, she would have ascertained what risks they gave rise to and would have been assured by Erwin Binetter that the guarantee was given as part of the scheme, was not a true guarantee because the underlying transaction was not a true loan, and that therefore the guarantee did not give rise to any likelihood of loss. Those matters were not ascertainable from reading the guarantee itself. Assuming that she read the guarantee before signing it, there was nothing to alert her to any offshore deposit that would secure advances to BCI.

957 It is at least as likely that any questions asked by Margaret Binetter were answered in a manner that would have kept her in the dark. I am not satisfied that Mrs Binetter's execution of the guarantees was consistent with any particular assessment by her as to the risks associated with the proposed Bank Hapoalim transactions.

958 I am not satisfied that it is more probable than not that Margaret Binetter knew of the back-to-back nature of the proposed Bank Hapoalim transactions at the time that she signed the guarantee on behalf of Erma and Ligon 158 in November 1992.

959 I also reject the proposed finding that Michael Binetter would not have permitted his mother to have signed the guarantees unless he was satisfied that she understood their true nature and the personal risks to her of signing them. Again, it is at least as likely that Michael Binetter would have chosen to keep Margaret Binetter in the dark.

960 Similarly, I reject the proposed finding that Andrew and Michael Binetter would probably not have allowed their mother to remain a director of BCI unless they were satisfied that she understood the affairs of BCI. That is also a matter of pure speculation.

961 I do not consider that the fact that Mrs Binetter became a signatory to BCI's Bank Hapoalim account significantly advances the liquidators' case against her. Nor does her attendance at the Board meeting of EGL on 10 September 1996. Nor does her awareness that Erwin obtained loans from banks in Israel or her meeting of Yacov Loewbeer, an IDB officer, at dinner at her home.

962 Finally, the liquidators contended that, if BCI's case against Margaret Binetter were incorrect, she would have given evidence to explain herself. I do not accept that Margaret Binetter's failure to give evidence requires or permits that conclusion. Although she was a

director of BCI for a significant period, the evidence does not suggest that she took an active role in the management of BCI. Further, there are several pieces of evidence that members of the Binetter family took pains to conceal their dealings with the Israeli banks from other family members, including:

(1) The evidence of Ms Huber that:

(a) in early 2012 Michael Binetter snatched a Hebrew bank document away from her after asking her to translate it, saying "none of your business" when she asked what it was;

(b) at a family meeting in 2012, Ronald Binetter and Suzanne Binetter (Andrew Binetter's wife) were asked to leave the room before Andrew and Michael Binetter asked Ms Huber to travel to Israel for another meeting with Mr Gicelter;

(c) when Ms Huber asked Andrew Binetter the source of money to pay Mr Gicelter, he said "It's on a need to know basis";

(2) The evidence of Ronald Binetter that, in about February 2006, Michael Binetter told him not to discuss Ligon 268 with Ms Huber and that "We don't want her to know anything about the family businesses".

963 Taking these matters into account, I am not satisfied that Margaret Binetter is a person who is or was "presumably able to put the true complexion on the facts relied on" by the liquidators for drawing inferences against her.

964 The liquidators sought to infer Mrs Binetter's knowledge of the back-to-back nature of the Bank Hapoalim transactions from her consent to being joined to BCI's tax appeal, and to an indemnity costs order against her in favour of the Commissioner in those proceedings. I am not persuaded that these matters support the proposed inference, particularly as to her state of mind at any particular time.

965 It follows that I find no breach of duty by Mrs Binetter and the case against her must be dismissed.

**Gary Binetter**

***BCI***

966 Gary Binetter was not a director of BCI at the time of the 1993 advances from Bank Hapoalim to BCI. He did not cause BCI to enter into those transactions.

967 To the extent that BCI entered into further transactions with Bank Hapoalim in November 1997, there is no evidence that Gary Binetter dealt with Bank Hapoalim or assisted Emil, Erwin, Andrew or Michael Binetter to deal with Bank Hapoalim.

968 There is also no evidence that Gary Binetter caused BCI to enter into any further transactions with Bank Hapoalim after November 1997. The most that can be said is that he was aware, in March 2004, of his father's intention to "repay the loan to Bank Hapoalim" which apparently led to the payment of $6,188,757 by Ligon 159 to Bank Hapoalim.

969 There is no evidence that Gary Binetter took any steps, as a director of BCI, to give effect to the scheme involving BCI. There is also no evidence that he took any particular role in the management of BCI.

970 The liquidators submitted that, from May 1993 (when he executed BCI's request to open a Swiss franc account with ANZ), Gary Binetter "had knowledge of and agreed to participate in the Scheme and have BCI participate in the Scheme". This submission was put on the basis of the following matters:

(1) the only business of BCI from its incorporation until its winding up was to be used to take steps to implement the Scheme;

(2) contrary to his sworn testimony, Gary Binetter plainly knew about the involvement of the Binetter family in back-to-back arrangements and appears to have held term deposits with IDB himself;

(3) Gary Binetter participated in the advance of funds from IDB to permit "repayment" of Emil's share of the Bank Hapoalim transaction in May 2004;

(4) on about 18 February 2013 and 19 February 2013, Gary Binetter's lawyers recorded that they became aware that Gary Binetter was aware of a deposit with IDB from 2004;

(5) Gary Binetter attended the meeting with both Andrew Binetter and Michael Binetter with Mr Gicelter in Tel Aviv in June 2012 when instructions were given to seek to

obtain or destroy the Bank Hapoalim file relating to BCI and the back-to-back arrangements;

(6) when the true nature of the transactions was exposed in BCI's tax appeal, Gary Binetter gave instructions to Mark Douglass that he should consent to orders joining him and ordering him to pay costs on an indemnity basis personally, which he would not have done had he any way of resisting the order (for example, in the basis that he had not known the true position).

971 Even assuming that the evidence supports findings in accordance with (1) to (6), I do not accept the liquidators' submission. As to (1), the evidence does not reveal that Gary Binetter knew that BCI's business was "to implement the Scheme". I accept that Gary Binetter knew from May 1993 that BCI had foreign currency dealings, in Swiss Francs. I also find that Gary Binetter was aware that Emil Binetter's dealings with IDB in 2004 involved back-to-back arrangements. The evidence also supports a conclusion that Gary Binetter was aware of back-to-back arrangements with BCI by June 2012. However, even if the 2004 dealings support a further inference that Gary Binetter knew that the dealings between BCI and Bank Hapoalim involved back-to-back arrangements, I am not satisfied that this knowledge lead to the further inference that Gary Binetter knew of the key elements of the scheme or that he agreed to participate in it or agreed that BCI should participate in it. Further, even if Gary Binetter agreed to participate in the scheme, there is no evidence that he did participate in the scheme by doing any particular thing or receiving any particular benefit.

972 As for Margaret Binetter, I do not accept that any relevant inference can be drawn from Gary Binetter's consent to being joined to BCI's tax appeal, and to an indemnity costs order against him in favour of the Commissioner in those proceedings. I am not persuaded that these matters support the proposed inference, particularly as to her state of mind at any particular time.

973 I am also not satisfied that Gary Binetter's failure to give evidence lends support to any inference sought to be drawn by the liquidators in the case brought by BCI.

974 It follows that I find no breach of duty by Gary Binetter as a director of BCI.

***EGL***

975 Gary Binetter was a director of EGL from 16 October 1996 to 28 September 2001. There is no evidence that he participated in any dealings between EGL and IDB.

976 There is also no evidence that Gary Binetter took an active role in the management of EGL or took any steps, as a director of EGL, to give effect to the scheme involving EGL.

977 The liquidators submitted that "[i]t should be inferred from Gary's being a director of EGL, from Gary's BCI-related involvement in the Scheme and from the similarities between the BCI transactions and the EGL transactions that Gary knew that the transactions that EGL was engaging in with [IDB] were transactions pursuant to the Scheme". I do not draw this inference as to Gary Binetter's knowledge. There is nothing to suggest that Gary Binetter knew of any dealings between EGL and IDB during the period of his directorship.

978 I am also not satisfied that Gary Binetter's failure to give evidence lends support to any inference sought to be drawn by the liquidators in the case brought by EGL.

979 It follows that I find no breach of duty by Gary Binetter as a director of EGL.

## KNOWING PARTICIPATION IN BREACHES OF DUTY

### Erma, Milgerd, Ligon 158 and Ligon 159

980 Erma, Milgerd, Ligon 158 and Ligon 159 undertook various acts which furthered the scheme as implemented by the various applicants, including the provision of guarantees and the making of payments to the Israeli banks. Some of those payments were treated by the applicants as deductible interest expenses. Other payments were repayments of funds advanced by the Israeli banks on behalf of the various applicants.

981 It was a matter of importance to Erma, Milgerd, Ligon 158 and Ligon 159 whether their respective acts were facilitating or furthering the scheme because the scheme was implemented for purposes including the evasion of income tax.

982 Accordingly, the knowledge of Erwin, Emil and Andrew Binetter about the scheme, to the extent that they were directors of Erma, Milgerd, Ligon 158 and Ligon 159, must be imputed to those companies.

983 I am satisfied that this conduct amounts to participation in the various directors' breaches of fiduciary duty in procuring drawdowns and in procuring payments to the Israeli banks in furtherance of the scheme because it was conduct which enabled those breaches to be committed.

984 I am not satisfied that Erma, Milgerd, Ligon 158 and Ligon 159 participated in the breaches of fiduciary duty involving the lodgement of the applicants' income tax returns or in concealing the offshore deposits from the ATO.

**Michael Binetter**

***BCI***

985 Michael Binetter participated in the breaches of duty by Erwin, Emil and Andrew Binetter by the conduct described above which assisted those directors to procure the advances from Bank Hapoalim. I have previously found that he had knowledge at all relevant times of the terms of the transactions between Bank Hapoalim and BCI and of the purposes for which BCI engaged in the transactions.

***EGL***

986 Within the period of his directorship of EGL, between October 1996 and September 2001, I infer that Michael Binetter made a deliberate decision to accept the role of director for the purpose of participating in the management of EGL including its dealings with IDB. That inference is based on the fact that Michael Binetter was a commercial lawyer who made a deliberate choice to accept the role of "authorised person" in connection with BCI.

987 There is no direct evidence that Michael Binetter otherwise participated in breaches of duty by the directors of EGL. I do not infer from his role as director of EGL that he participated in the breaches of duty by the directors of EGL that did not occur within the period of his directorship.

***Ligon 268***

988 There is no direct evidence that Michael Binetter participated in the breaches of duty by the directors of Ligon 268. I am not satisfied that there is evidence to support an inference that he participated in those breaches of duty.

***Binqld***

989 Michael Binetter assisted in the completion of the documentation which was said by Andrew Binetter to have documented its "loans" from IDB.

**Benefits arising from participation in breaches of duty**

990 Each of Erma, Milgerd, Ligon 158 and Ligon 159 benefited from their participation in the breaches of duty in that, by their participation, they obtained the use of the funds advanced to various of the applicant companies and, consequently, they claimed tax deductions for interest paid to the applicant companies thereby reducing their assessable income.

991 Michael Binetter benefited from his participation in the breaches of duty to the extent that they led to interest being earned on the offshore deposits in which he had an ownership interest.

## CONSEQUENCES OF THE BREACHES OF DUTY

### BCI losses

#### *Conduct which enabled BCI to earn assessable income*

992 The primary tax liabilities levied against BCI, by the revised assessments, arose primarily from the fact that the ATO disallowed interest expense deductions claimed by BCI, thereby increasing its assessable income.

993 Those interest expense deductions were disallowed because they were not substantiated to the satisfaction of the ATO.

994 In the case of BCI, the interest expense deductions were largely (but not entirely) claimed by reference to payments made to Bank Hapoalim. Those payments were made pursuant to transactions between BCI and Bank Hapoalim that resulted from the breaches of duty of BCI's directors in causing BCI to obtain advances from Bank Hapoalim.

995 For the 1997 income year, the primary assessment of $14,455.04 arose from disallowed interest expense deductions of about $21,000 being the difference between payments made to Israeli and the amount of the claimed deduction. BCI's assessable income arose from its receipt of interest income on its borrowing of funds procured from Bank Hapoalim to BCI in May 1993, which funds were procured by the breaches of duty of Erwin, Emil and Michael Binetter. That assessable income would not have been earned if the breaches of duty had not been committed.

996 Accordingly, the 1997 assessment is a loss that would not have suffered by BCI if there had not been those breaches of duty.

997 For the 1998 income year, BCI's assessable income arose from its receipt of interest income on its borrowing of funds procured from Bank Hapoalim to BCI in May 1993, in respect of which there was an alteration to the currency of the facility and an extension to the duration of the facility in late 1997. Those changes were procured by Erwin, Emil, Andrew and Michael Binetter. BCI's assessable income arose from its receipt of interest income on its borrowing of funds procured from Bank Hapoalim to BCI in May 1993, which funds were procured by the breaches of duty of Erwin, Emil and Michael Binetter and which continued to be available to BCI by reason of the breaches of Erwin, Emil and Michael Binetter. Accordingly, the 1998 assessment is a loss that would not have been suffered by BCI apart from those individuals' breaches of duty, including Andrew Binetter to the extent that income was earned after the late 1997 changes.

998 For the 1999 income year, BCI's assessable income arose from its receipt of interest income on its borrowing of funds procured from Bank Hapoalim to BCI in May 1993, in respect of which there was, at least on the face of the available documents, an extension to the duration of the facility. That change was procured by Erwin, Emil, Andrew and Michael Binetter in breach of their respective duties as directors of BCI. Applying the reasoning for the 1997 and 1998 income years, BCI's assessable income was earned by reason of the breaches of duty of each of Erwin, Emil, Andrew and Michael Binetter. Accordingly, the 1999 assessment is a loss that would not have been suffered by BCI apart from those individuals' breaches of duty.

999 For the 2000, 2001 and 2002 income years, there were no material changes to the arrangements between Bank Hapoalim and BCI. Accordingly, the 2000, 2001 and 2002 assessments are losses that would not have been suffered by BCI apart from the same breaches of duty of Erwin, Emil, Andrew and Michael Binetter.

1000 There were also penalty assessments for the 2001 and 2002 income year. Those assessments arose because BCI earned the assessable income which it did not disclose. It follows that these assessments are losses that would not have been suffered by BCI apart from those breaches of duty of Erwin, Emil, Andrew and Michael Binetter.

1001 During the 2003 income year, the arrangements between Bank Hapoalim and BCI were apparently extended to May 2004, in about November 2002. That change was procured by Erwin, Emil and Michael Binetter in breach of their respective duties as directors of BCI. Accordingly, the 2003 assessment is a loss that would not have been suffered by BCI apart from those breaches of duty of Erwin, Emil and Michael Binetter. As to Andrew Binetter, it

is a loss that would not have been suffered by BCI apart from his breach to duty to the extent that the 2003 assessment includes income earned prior to the November 2002 extension of the facility.

1002 There is also a penalty assessment for the 2003 income year. As for the 2001 and 2002 penalty assessments, this assessment arose because BCI earned assessable income in the 2003 income year which it did not disclose. Accordingly, this is a loss that would not have been suffered by BCI apart from the breaches of duty of Erwin, Emil and Michael Binetter. It is also a loss that would not have been suffered by BCI apart from Andrew Binetter's breach of duty to the extent that it is referrable to assessable income earned prior to the November 2002 extension of the facility.

1003 During the 2004 income year, the arrangements between Bank Hapoalim and BCI were probably extended to 30 November 2004. That change was procured by Erwin and Andrew Binetter in breach of their respective duties as directors of BCI. Accordingly, the 2004 assessment is a loss that would not have been suffered by BCI apart from the breaches of duty of Erwin, Emil and Michael Binetter, and the breaches of duty of Erwin and Andrew Binetter.

1004 There is also a penalty assessment for the 2004 income year. This is a loss that would not have been suffered by BCI apart from the same breaches of duty as caused the loss arising from the 2004 assessment.

1005 During the 2005 income year, there were further extensions of the arrangements between Bank Hapoalim and BCI, procured by Andrew and Michael Binetter. Accordingly, the 2005 amended assessment and the 2005 penalty assessment are losses that would not have been suffered by BCI apart from the breaches of Andrew and Erwin Binetter and the breaches of duty of Andrew and Michael Binetter.

1006 During the 2006 income year, the arrangements between Bank Hapoalim and BCI were managed by Andrew Binetter. This included procuring the advance of A$3,850,000 in April 2006. It follows that the assessable income earned by BCI in that year was earned by reason of Andrew Binetter's breaches of duty to BCI. Accordingly, both the 2006 amended assessment and the 2006 penalty assessment are loss that would not have been suffered by BCI apart from Andrew Binetter's breaches of duty to BCI.

1007 For the 2007 and 2008 income years, there were no material changes to the arrangements between Bank Hapoalim and BCI. Accordingly, the 2007 and 2008 amended assessments and the 2007 and 2008 penalty assessments are losses that would not have been suffered by BCI apart from the same breaches of duty of Andrew Binetter.

***Lodgement of false tax returns***

1008 I have previously found that each of the directors of BCI who lodged the relevant tax returns on behalf of the company breached their fiduciary duties by doing so because they acted in a manner that was detrimental to the interests of the relevant company.

1009 The consequence of those breaches of fiduciary duty was that BCI suffered the losses identified in the various penalty assessments, as well as liabilities for interest on the primary tax liabilities.

***Costs of winding up***

1010 The costs of the winding up would not have been incurred but for BCI incurring the tax liabilities which it was unable to pay. Therefore, the costs of the winding up are losses that were inflicted upon BCI by the various directors in causing BCI to incur those tax liabilities.

**EGL losses**

1011 The same reasoning applies to the losses incurred by EGL. In particular:

***Conduct which enabled EGL to earn assessable income***

1012 Applying the same reasoning as for BCI, the revised assessments for the 1992, 1993, 1994, 1995 and 1996 income years are losses that would not have been suffered by EGL apart from the breaches of duty of Erwin and Emil Binetter.

1013 The revised assessments for the 1997, 1998, 1999, 2000 and 2001 income years are losses that would not have been suffered by EGL apart from the breaches of duty of Erwin, Emil and Michael Binetter.

1014 Thereafter, the revised assessments for the 2002 to 2007 income years are losses that EGL would not have suffered apart from the breaches of duty of Andrew and Erwin Binetter.

***Lodgement of false tax returns***

1015 Andrew and Michael Binetter were responsible for the lodgement of the EGL 2002 to 2007 income tax returns. They breached their fiduciary duties to EGL in lodging those returns

without documents to explain the transactions relied upon to claim deductions for overseas interest expenses, thereby exposing EGL to penalty assessments.

1016 The consequence of those breaches of fiduciary duty was that EGL suffered the losses identified in the various penalty assessments, as well as liabilities for interest on the primary tax liabilities.

***Costs of winding up***

1017 The costs of the winding up would not have been incurred but for EGL incurring the tax liabilities which it was unable to pay. Therefore, the costs of the winding up are losses that were inflicted upon EGL by the various directors in causing EGL to incur those tax liabilities.

**Ligon 268 losses**

***Conduct which enabled Ligon 268 to earn assessable income***

1018 The connection between the breaches of duty and the losses is more complex in the case of Ligon 268 because it earned assessable income from sources apart from its dealings with the Israeli banks.

1019 The adjustments to Ligon 268's assessable income in the revised assessments included overseas income (except for the 2007 year). It was the conduct of Erwin and Andrew Binetter, in breach of their respective duties to Ligon 268 which enabled Ligon 268 to earn this assessable income to which Ligon 268 was eventually assessed by the various revised assessments.

1020 To the extent that Ligon 268's assessable income was increased by the disallowance of deductions for "interest expenses overseas", I do not find that the additional primary tax liability was caused by the breaches of duty. Rather, that liability probably arose from income earned from other sources.

1021 However, Erwin and Andrew Binetter's breaches of their respective duties led to Ligon 268's liabilities to pay penalties and shortfall interest charges. Thus, but for the conduct of Erwin and Andrew Binetter in breach of their respective duties to Ligon 268, Ligon 268 would not have suffered those losses in the revised assessments issued to that company.

***Lodgement of false tax returns***

1022 Andrew and Michael Binetter were responsible for the lodgement of the Ligon 268 2005 to 2007 income tax returns. They breached their fiduciary duties to Ligon 268 in lodging those

returns without documents to explain the transactions relied upon to claim deductions for overseas interest expenses, thereby exposing Ligon 268 to penalty assessments.

1023 The consequence of those breaches of fiduciary duty was that Ligon 268 suffered the losses identified in the 2005 to 2007 penalty assessments, as well as liabilities for interest on the primary tax liabilities.

***Costs of winding up***

1024 The costs of the winding up would not have been incurred but for Ligon 268 incurring the tax liabilities which it was unable to pay. Therefore, the costs of the winding up are losses that were inflicted upon Ligon 268 by Erwin and Andrew Binetter in causing Ligon 268 to incur those tax liabilities.

**Binqld losses**

***Conduct which enabled Binqld to earn assessable income***

1025 Applying the same reasoning as for BCI, the 2006, 2007 and 2007 amended assessments are losses that would not have been suffered by Binqld apart from the breaches of duty of Andrew Binetter. Similarly, the 2006, 2007 and 2008 penalty assessments are losses that would not have been suffered by Binqld apart from the breaches of duty of Andrew Binetter.

***Lodgement of false tax returns***

1026 Andrew and Michael Binetter were responsible for the lodgement of the Binqld 2006 to 2008 income tax returns. They breached their fiduciary duties to Binqld in lodging those returns without documents to explain the transactions relied upon to claim deductions for overseas interest expenses, thereby exposing Binqld to penalty assessments.

1027 The consequence of those breaches of fiduciary duty was that Binqld suffered the losses identified in the various penalty assessments, as well as liabilities for interest on the primary tax liabilities.

***Costs of winding up***

1028 The costs of the winding up would not have been incurred but for Binqld incurring the tax liabilities which it was unable to pay. Therefore, the costs of the winding up are losses that were inflicted upon EGL by Andrew Binetter in causing Binqld to incur those tax liabilities.

**ORDERS**

1029 The proceedings against the third and fifth respondents will be dismissed.

1030 I will hear the parties on the orders which should be made to give effect to these reasons, and on the question of costs.

I certify that the preceding one thousand and thirty (1030) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson.

Associate:

Dated: 18 November 2016

# SCHEDULE OF PARTIES

**SAD 5 of 2015**

**Plaintiffs**

| | |
|---|---|
| Fourth Applicant: | BINQLD FINANCES PTY LIMITED (IN LIQUIDATION) (ACN 119 243 220) |

**Respondents**

| | |
|---|---|
| Fourth Respondent: | ANDREW JOHN BINETTER |
| Fifth Respondent: | GARY ROBERT BINETTER |
| Sixth Respondent: | MICHAEL THOMAS ROBERT BINETTER |
| Seventh Respondent: | MILGERD NOMINEES PTY LIMITED |
| Eighth Respondent: | ERMA NOMINEES PTY LIMITED |
| Ninth Respondent: | LIGON 159 PTY LIMITED |
| Tenth Respondent: | LIGON 158 PTY LIMITED |