

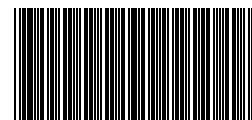
I, Toufic Bazouni, solicitor on record for the Appellants, hereby certify this and the following 21 pages are the Appellants' submissions for publication pursuant to paragraph 27 of Practice Note SC CA 1.

Signed: 

11 November 2025



Filed: 10 November 2025 11:30 AM



D00029BH36

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2024/00444848

TITLE OF PROCEEDINGS

First Appellant	Engadine Medical Imaging Services Pty Ltd ATF the Engadine Unit Trust ACN 613194219
Second Appellant	Ali Kyatt
Number of Appellants	3
First Respondent	Mena Ibrahim
Second Respondent	ENGADINE MEDICAL IMAGING PTY LTD
Number of Respondents	3

FILING DETAILS

Filed for	Engadine Medical Imaging Services Pty Ltd ATF the Engadine Unit Trust, Appellant 1 Ali Kyatt, Appellant 2 Advanced Imaging Pty Ltd ATF the Kyatt Family Trust, Appellant 3
Legal representative	Toufic Bazouni
Legal representative reference	
Telephone	02 9891 6388
Your reference	TB:GBW:240366

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Appellants Amended Submissions 10.11.2025 [with BB X Refs] (1).pdf)

[attach.]

Form 101 (version 3)

APPELLANTS' SUBMISSIONS**COURT DETAILS**

Court	Supreme Court of New South Wales
	Court of Appeal
Registry	Sydney
Case number	CA 2024/444848

TITLE OF PROCEEDINGS

First Appellant	ENGADINE MEDICAL IMAGING SERVICES PTY LTD ATF THE ENGADINE UNIT TRUST & ORS
Number of Appellants	3
Respondents	MENA IBRAHIM & ORS
Number of Respondents	3

PROCEEDINGS IN THE COURT BELOW

Title below	Engadine Medical Imaging Services Pty Ltd ATF The Engadine Unit Trust & Ors -v- Ibrahim & Ors
Court below	Supreme Court of New South Wales
Case number below	2023/134691
Dates of hearing	13, 15 and 16 May 2024
Decision of	McGrath J

FILING DETAILS

Filed for	Engadine Medical Imaging Services Pty Ltd ATF The Engadine Unit Trust & Ors, Appellants
Legal representative	Toufic Bazouni New South Lawyers
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NEW SOUTH WALES COURT OF APPEAL
SYDNEY REGISTRY

CA 2024/444848

Engadine Medical Imaging Services Pty Ltd ATF the Engadine Unit Trust & Ors
v
Mena Ibrahim & Ors

Introduction

1. On 6 November 2024, McGrath J (the **Primary Judge**) dismissed a claim brought by the First Appellant (**EMIS**) and Second Appellant (**Dr Kyatt**) against the First Respondent (**Mr Ibrahim**), Second Respondent (**EMI**) and Third Respondent (**Mr Chaudhry**) and published reasons (the **Primary Judgment** or **PJ**).
2. At its core the dispute centres around the operation of a radiology practice owned by EMIS (the **Engadine Practice**), which Dr Kyatt acquired a 51% controlling interest in on 12 February 2018, through his company the Third Appellant (**Advanced Imaging**) for \$319,218.91, placing the value of the Engadine Practice at that time at \$625,919.43: PJ [46] Red 175E-G. By that time the Engadine Practice (which had been established in 2009) had been trading from Suite 3/24-28 Station St, Engadine (the **Engadine Premises**) for close to one year: PJ [27], [30], [54] Red 169GK-V; 176U.
3. The case advanced below was that Mr Chaudhry, who was a director of EMIS until 22 February 2023: PJ [409] Red 311G-L, conspired with Mr Ibrahim to the exclusion of Dr Kyatt to deprive EMIS of its lease of the Engadine Premises and establish a competing business (**Focus Radiology Engadine**) which has traded since late March 2023: PJ [335] Red 263F-H less than 100 metres away from the Engadine Premises (the **Focus Radiology Premises**): PJ [172], [333] Red 206S-V, 262T-V.
4. The Primary Judge found that:
 - (a) on and from October 2019 when Dr Kyatt relocated to Jordan Mr Chaudhry took over the management of the Engadine Practice: PJ [72] Red 180P-R, which remained profitable: PJ [61], [62] Red 178M-U; [84], [85] Red 182S-183D; [96], [97] Red 185M-W; Black 305G-M;
 - (b) Mr Ibrahim and Mr Chaudhry were aware that the option for the lease for the Engadine Premises had to be exercised by 31 October 2021 and that the lease expired on 31 January 2022: PJ [31] Red 169W-170D;
 - (c) within a month of the lease expiring, on 25 February 2022 Mr Ibrahim, with Mr Chaudhry's knowledge, lied to the landlord of the Engadine Practice in an attempt to renew the lease for the Engadine Premises in the name of Logan Medical Imaging, an entity that Mr Ibrahim and Mr Chaudhry were each directors and equal shareholders: PJ [120] Red 190R-Y;

- (d) Mr Chaudhry knew that Mr Ibrahim was taking active steps to obtain a new lease of the Engadine Premises in the name of the Second Respondent (**EMI**): PJ [144] Red 197G-O, which EMI obtained on 7 July 2022 (the **New Lease**): PJ [138] Red 195H-J. EMI obtained the New Lease without Dr Kyatt's knowledge and promptly thereafter on 12 July 2022 issued a notice to vacate the Engadine Premises within 30 days: PJ [139] Red 195K-196M;
 - (e) on and from July 2022 Mr Ibrahim took active steps to set up the competing business with the knowledge of Mr Chaudhry: PJ [278] Red 245A-G; and
 - (f) on and from August 2022 Mr Ibrahim and Mr Chaudhry rebrand various practices (including the Engadine Practice) to Focus Radiology without the knowledge or consent of Dr Kyatt: PJ [155]-[164] Red 202A-204R, [280] Red 245O-Q, PJ [284] Red 246I-M.
5. While all of the above steps were in train (and taking place) without Dr Kyatt's knowledge, the Primary Judge makes further findings that:
- (a) on and from July 2022, Mr Ibrahim and Dr Kyatt (through each party's respective lawyers) were negotiating terms for EMIS to obtain (as assignee) the New Lease obtained by EMI in order to continue to operate the Engadine Practice from the Engadine Premises: PJ [148], [149] Red 199W-200O;
 - (b) during the negotiations:
 - (i) EMIS continued to occupy the Engadine Premises, conduct the Engadine Practice in the same way and pay rent month to month such that it was "business as usual": PJ [325] Red 261L-S; and
 - (ii) Mr Ibrahim sought releases that are wider than Dr Kyatt was prepared to provide: PJ [200] Red 212R-213L, PJ [222] Red 219O-220O, PJ [234], [235] Red 225W-227X, PJ [264], [265] Red 235W-236E;
 - (c) towards the end of those negotiations Mr Ibrahim's solicitors, Bridges Lawyers:
 - (i) stated in an email sent on 3 November 2022 that the value of EMIS and the Engadine Practice would remain substantial: PJ [200] Red 212R-213L; and
 - (ii) stated in an email sent on 15 February 2023 that there would be "no loss to [Dr Kyatt]" to include a wider release in favour of Mr Ibrahim that extended to the unknown and undisclosed conduct Mr Ibrahim is engaging in (with Mr Chaudhry's knowledge) in establishing the competing business: PJ [285] Red 246P-U;
 - (d) Dr Kyatt agreed to the wider release sought and entered into a Deed of Settlement and Deed of Assignment (the **Deed of Settlement**) on 23 February 2023: PJ [309] Red 252R-255H, being the agreement under which EMIS obtained (as assignee) the New Lease;

- (e) on 26 March 2023 five employees of EMIS at the Engadine Practice resigned via email: PJ [329] Red 262I-K, with four of those employees commencing work at Focus Radiology Engadine around the same time: PJ [331] Red 262M-O;
 - (f) on 29 March 2023 the Engadine Practice was closed but Focus Engadine Radiology was open and operating: PJ [335] Red 263E-H; and
 - (g) on 30 March 2023 flyers were being handed outside the Engadine Practice (which was closed) informing consumers that the practice had relocated to the Focus Engadine Premises: PJ [337] Red 263R-T.
6. Neither Mr Ibrahim nor Mr Chaudhry read any Affidavits, gave evidence or called any witnesses in the proceedings below: PJ [10] Red 162E-I.
 7. However, Dr Kyatt gave evidence in support of the claims brought by EMIS and in his capacity as a director of EMIS. His affidavits sworn on 24 April 2023 and 31 January 2024 were read (subject to the Primary Judge's rulings as to the objections made by Mr Ibrahim, EMI and Mr Chaudry). He was subject to extensive cross-examination from senior counsel on behalf of Mr Ibrahim and EMI, as well as senior counsel on behalf of Mr Chaudry: Black 58M -138V.
 8. Dr Kyatt was qualified to practice medicine in Australia and specialised in radiography. Before 2019, he had worked as a radiologist in hospitals, and private imaging clinics, in Australia for over 12 years. In 2019, he had to return to Jordan; being his country of origin. He was fluent in English and able to give evidence without the assistance of an interpreter. However, his evidence still had to be given in a second language.
 9. The Appellants do not suggest Dr Kyatt performed well under extensive cross-examination from experienced senior counsel in a commercial case. At times, he evaded answering direct questions and refused to concede obvious propositions arising from contemporaneous documents: PJ [15] Red 165D-H, [312] Red 257V-258C. He gave answers which were internally inconsistent and objectively improbable: PJ [15] Red 165D-H, and at times were non-responsive: Black 74R-75D, 82M-U. He tended to interpolate, and repeat, matters which might not have been relevant to the question asked, but which material he considered supported his case: PJ [250]-[251] Red 231J-232J. He asked for questions to be repeated on twenty-two occasions: Black 59X-Z, 64K-M, 77A-D, 84A-D, 84W-Z, 88N-P, 89A-D, 89T-V, 94S-U, 97K-M, 99S-U, 99X-100C, 107L-N, 112M-O, 114K-M, 117A-D, 118K-M, 119D-F, 121J-L, 122N-Q, 129P-R, 138L-N.
 10. Dr Kyatt should have conceded matters that were in his interest under cross-examination but did not: PJ [204] Red 214D-K. He might have appeared, at times and to varying degrees, as defensive and unwilling to give direct answers to questions were perceived to be harmful to his interests, although, in

fact, they were not. Even the answers he provided to questions from the Primary Judge provide an example: PJ [316] Red 258O-259U.

11. The Primary Judge appeared to acknowledge as much observing: “[h]e gave answers which were internally inconsistent and objectively improbable”: PJ [15], Red 165D-H. However, the Primary Judge effectively made a global adverse credit finding in relation to Dr Kyatt due to the unsatisfactory nature of his performance as a witness. Moreover, on that basis, his Honor found that “on critical matters relevant to the claims” Dr Kyatt “propounded” his evidence “was not accepted”: PJ [15]-[17], Red 165D-N.
12. In adopting this approach, the Primary Judge did not take account “the well-known limitations on making credit assessments based on a person’s demeanour are amplified where cultural issues may impact the manner in which a person responds to questions, and where evidence is given in a second language”.¹
13. Relevantly, the Primary Judge observed at PJ [13(6)] Red 164J-R that “it is important to bear in mind that the ordinary human experience of a witness makes their memory of conversations fallible”, as eloquently stated in the following oft-cited passage in *Watson v Foxman* (1995) 49 NSWLW 315 ...” (*Watson*).
14. However, as McLelland CJ in Eq observed in *Watson*, there is a risk that a person’s recollection of conversations is affected by not only the passage of time, but also the intervention of litigation. “This risk is compounded where a witness, with some degree of fluency in English, has been involved in the task of translating the recollected substance of a conversation into English. The act of translation necessarily involves choices regarding vocabulary, syntax and tone, and those choices may, consciously or unconsciously, take into account the witness’s interests in the litigation”.²
15. Indeed, As Basten JA said in *Sangha v Baxter*, there “are risks in making global findings about credibility of any particular witness”.³
16. It follows, in this instance, that the contemporaneous documents which generally furnish the most reliable source of evidence as to what occurred⁴ should have taken precedence in relation to critical matters relevant to claims propounded by Dr Kyatt and EMIS; not observations as to his demeanour and performance as a witness. This was particularly so, as it was a “commercial case”.

¹ *Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd* [2024] NSWSC 1293 per Nixon J at [40]; *DVO16 v Minister for Immigration and Border Protection* (2021) 273 CLR 177 per Edelman J at [54].

² *Firmtech Aluminium Pty Ltd v Xie; Zhang v Xu; Xie v Auschn Conveyancing & Associates Pty Ltd* [2024] NSWSC at [35]; see also *Huang v Wei (No 2)* [2022] NSWSC 473 per Kunc J at [18].

³ [2009] NSWCA 78 at [155], Handley AJA agreeing.

⁴ *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 at [25] per Bell P, Leeming JA agreeing at [287].

17. It was for the Court to reason to its conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events, in relation to those critical matters.⁵ Such an approach has been described by this Court as an exemplary approach to fact-finding.⁶
18. It was an instance where the following passage from the oft-cited observations of Leggatt J (as his Lordship then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* is apt:

“the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses’ recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts”.⁷
19. As the Full Court of Federal Court observed in *Liberty Mutual Insurance Company Australian Branch t/as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd*: “the usual course of resolving contested factual issues in commercial cases contemporaneous documents written in the ordinary course of business are of great importance”.⁸
20. If the Court had reasoned to its conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events in relation to matters critical to the claims propounded by Dr Kyatt and EMIS, it is submitted the claims would have succeeded, for the reasons which follow.

What this appeal is about?

21. The central aspect of this appeal seeks to challenge the factual findings made by the Primary Judge that:
 - (a) Mr Ibrahim was not an officer of EMIS: PJ [352] Red 276H-L;
 - (b) any silence by Mr Ibrahim concerning his involvement in the establishment of the Focus Radiology Engadine was not actionable by the Appellants as an instance of misleading or deceptive conduct: PJ [378], [379] Red 294D-S;
 - (c) Mr Ibrahim did not make representations that there was no competing business, would be no competing business and no steps were taken to establish a competing business: PJ [374(5)] Red 291A-H;
 - (d) Dr Kyatt did not rely on anything said to him by Mr Ibrahim or Mr Ibrahim’s lawyers as:

⁵ *Fox v Percy* (2003) 214 CLR 118 per Gleeson CJ, Gummow and Kirby JJ at [31].

⁶ *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 per Bathurst CJ at [212].

⁷ [2013] EWHC (Comm) 3560 at [22].

⁸ (2021) 154 ACSR 126 per Allsop CJ, Besanko and Middleton JJ at [239].

- (i) by 21 December 2021 Dr Kyatt did not trust anything that Mr Ibrahim or Mr Ibrahim's lawyers said to him: PJ [248] Red 231E-G;
- (ii) Dr Kyatt placed the whole of his reliance on his lawyers: PJ [376] Red 293R-U; and
- (iii) Dr Kyatt signed a solemn disclaimer of no reliance contained in clause 13.2 of the Deed of Settlement: PJ [309] Red 255F-H; PJ [377] Red 293U-294C;

(together the **Reliance Findings**).

- (e) Mr Chaudry, whilst a director of EMIS from 26 September 2019 until 22 February 2023: PJ [409] Red 311G-L:
 - (i) was not involved in the steps taken in July 2022 by Mr Ibrahim to obtain the New Lease: PJ [415] Red 313A-N; and
 - (ii) did not have any involvement in the establishment of the competing business: PJ [419] Red 314L-O,

(together the **Central Factual Findings**).

- 22. Although, the Court is asked to overturn a number of factual findings, that is in circumstances where the Appellants embrace most of his Honour's conclusions and findings about the conduct of Mr Chaudry and Mr Ibrahim. The Appellants' central complaint is, having made those conclusions and findings, the Reliance Findings and Central Factual Findings should not have been made.
- 23. When assessing the Central Factual Findings, this Court conducts "a real review of the trial" and engages in "weighing conflicting evidence and drawing [their] own inferences and conclusions", with due allowance made they did not see or hear from Dr Kyatt.⁹ The question whether particular inferences should be drawn from established facts is a matter as to which this Court is generally in as good a position as the Primary Judge to consider for itself.¹⁰
- 24. The Central Factual Findings will not withstand a real review by this Court on the basis that the Primary Judge:
 - (a) placed too much weight on the adverse credit findings made against Dr Kyatt: PJ [14] Red 164S-165C, [208] Red 215M-T, [312] Red 257V-258C;
 - (b) failed to have sufficient regard to the context revealed by objectively contemporaneous documents and logic of events, which should have taken precedence over Dr Kyatt's evidence in relation to critical matters; and

⁹ *Fox v Percy* (2003) 214 CLR 118 at [25].

¹⁰ *Bauer Media Pty Ltd v Wilson (No 2)* (2018) 56 VR 674 at per Tate, Beach & Ashley JJA at [264] to [288].

(c) failed to draw sufficient *Jones v Dunkel* inferences against Mr Ibrahim and Mr Chaudhry, being Ground 1 of the Amended Notice of Appeal: Red 343K-P.

25. Ground 2 refers to the Primary Judge's failure to consider the pleaded relief seeking a constructive trust over Focus Radiology Engadine: Red 84H, 85F-H; Black 312U-313O by reason of Mr Ibrahim's and Mr Chaudhry's breach of duties owed to EMIS.
26. Ground 3 challenges the dismissal of the Appellants' claim which occurred as a result of the Central Factual Findings which are infected by the errors identified in Grounds 1 and 2.
27. Ground 4 raises a question of law and contends that the Primary Judge ought not to have considered the terms of the Deed of Settlement when considering the factual question of reliance, being one of the Central Factual Findings challenged by the Appellants.
28. The reasoning of the Primary Judge is then considered when addressing each Central Factual Finding by reference to context and that which was revealed objectively by contemporaneous documents.¹¹
29. In what follows, key aspects of the background, context and chronology leading to and beyond EMI's entry into the New Lease and Deed of Settlement are highlighted, drawing extensively on unchallenged factual findings and the documentary evidence.

Was Mr Ibrahim an officer of EMIS?

30. The pleaded case was that Mr Ibrahim was an officer on and from October 2019: FASOC at [16.6(h)], [17] Red 98G, 99R-100N. The Primary Judge found that Mr Ibrahim was not an officer of EMIS: PJ [353] Red 276M-S which informed consideration as to whether there was a reasonable expectation on Mr Ibrahim to disclose his plans for establishing a new radiology practice in Engadine in competition with the Engadine Practice: PJ [378] Red 294D-O.
31. Such a finding cannot stand a real review by this Court for the following reasons:
 - (a) **First**, whilst Mr Ibrahim did have the right to the financial statements and books of account of the Engadine Unit Trust: PJ [42] Red 173L-N, PJ [391] Red 299V-300C231G-I, it did not permit full and unfettered access to Xero, which is what Mr Ibrahim requested and obtained on 12 March 2020.¹² Such access provided Mr Ibrahim with the ability to make informed decisions about EMIS.
 - (b) **Second**, the finding that there was no evidence that Mr Ibrahim's written request for profit of \$300,000.00 to come out of EMIS made on 28 January 2021: PJ [91] Red 184I-L, PJ [348(8)] Red 274K-X:

¹¹ *ET-China.com International Holdings Ltd v Cheung* [2021] NSWCA 24 at [212].

¹² Exhibit B 52, 53; Blue 1:261-262 (Emails passing between Mr Ibrahim and Mr Rizwan 12.3.2020).

- (i) fails to take into account the financial statements of EMIS for the year ending 30 June 2021 showing that \$450,000.00 was withdrawn as consulting fees: PJ [96] Red 185M-O; Black 304Q-S;
 - (ii) fails to take into account the emails December 2021 which demonstrates that a further \$100,000.00 (over and above the \$300,000.00) was distributed and the Mr Ibrahim simply took his \$33,000.00 from EMIS' bank account without consulting Dr Kyatt;¹³ and
 - (iii) that the above objective evidence demonstrates that Mr Ibrahim either made the decision to take profit out, or was a person with whose instructions the directors of EMIS were accustomed to act.
- (c) **Third**, the finding that Mr Ibrahim had no involvement in negotiating or agreeing to the terms of settlement resolving a dispute with a former employee of EMIS in June 2021: PJ [348(5)] Red 272T-293D:
- (i) fails to take into account that this employee was the same employee that Mr Ibrahim had to investigate prior to terminating his employment, being a significant matter, on 2 May 2021 without consulting either Dr Kyatt or Mr Chaudhry: PJ [94] Red 185F-I , [348(4)] Red 272G-J;
 - (ii) the settlement with the employee occurred less than eight weeks after Mr Ibrahim's made the decision to terminate the employee;¹⁴
 - (iii) the only person with any knowledge of the employee's conduct and the person best placed to respond to the immediate dispute on behalf of EMIS was Mr Ibrahim;
 - (iv) Mr Ibrahim is expressly identified as the point of contact in the terms of settlement;¹⁵ and
 - (v) this is a fact that was peculiarly within the knowledge of Mr Ibrahim that has not been explained away by him. In these circumstances the evidence adduced by the Appellants is sufficient for the Court to find that Mr Ibrahim either made the decision to settle the dispute with the employee or at the very least participated in that decision, being a decision that affected the whole, or substantial part, of the business owned by EMIS.¹⁶

¹³ Exhibit A 834-835; Blue 1/177-178 (Emails passing between Dr Kyatt and Mr Inayat on 10 & 16.12.2021).

¹⁴ Exhibit A; Blue 1/202-203 (Terms of Settlement 25.6.2021).

¹⁵ Exhibit A; Blue 1/202-203 (Terms of Settlement 25.6.2021) at [3.6].

¹⁶ *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 per Menzies, Fullagar, Kitto & Taylor JJ at 375; *BCI Finances Pty Ltd (in liq) v Binetter* (in his capacity as the legal personal representative of the late Binetter) (No 4) (2016) 117 ACSR 18 per Gleeson J (as her Honour then was) at [122] to [125]; *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at per

- (d) **Fourth**, with respect to the finding that there was insufficient evidence that Mr Ibrahim was involved in renegotiating the Lease on behalf of EMIS in August 2021: PJ [348(9)] Red 275A-K:
- (i) the Primary Judge fails to appreciate the nature of objective evidence in that it was Mr Ibrahim who drafted the email setting out the proposed terms of the new lease on 11 August 2021 (being a 5x4x4x4 lease),¹⁷ which Mr Chaudhry conveyed to All Star Property later that day;¹⁸ and
 - (ii) the objective evidence referred to above demonstrates that Mr Ibrahim was a person who, in fact, made the significant decision that affected the whole, or substantial part, of the business owned by EMIS and was a person with whose instructions the directors of EMIS were accustomed to act.

32. The above matters, coupled with other factual findings made by the Primary Judge, reveal the following:

- (a) by July 2019 Mr Ibrahim was a person that was at least involved in the business owned by EMIS;
- (b) on and from 12 March 2020 Mr Ibrahim had the ability to make informed decisions about EMIS, having been provided with full and unfettered access to all of EMIS' financial information through Xero;
- (c) in June 2020 to August 2020 Mr Ibrahim was involved in the decision concerning rent deferral during the COVID-19 pandemic by EMIS for the Engadine Premises: PJ [86]-[87] Red 183F-N, being a significant decision that affected the whole, or substantial part, of the business owned by EMIS;
- (d) by 28 January 2021 Mr Ibrahim was a person making the decision to take a substantial amount of profit out of EMIS, or alternatively was a person with whose instructions the directors of EMIS were accustomed to act;
- (e) by May 2021 Mr Ibrahim was a person who was able to terminate an employee of EMIS, being a significant matter, without consulting either Dr Kyatt or Mr Chaudhry: PJ [92] Red 184N-P, [348(4)] Red 272G-K;

Handley at [121], Giles & Hodgson JJA agreeing; *Payne v Parker* [1976] 1 NSWLR 191 at 201 per Glass JA; *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; *Ferguson, Ex parte; Re Alexander* (1944) 45 SR (NSW) 64 at 67, 70.

¹⁷ Exhibit B 81; Blue 1/290-291 (Email from Mr Ibrahim 18.8.2021).

¹⁸ Exhibit B 80; Blue 1/289 (Email from Paul Milsted to Nabeel Chaudhry 18.8.2021).

- (f) by June 2021 Mr Ibrahim was a person making the decision to settle the dispute with the employee he had terminated on behalf of EMIS, or alternatively was a person with whose instructions the directors of EMIS were accustomed to act;
- (g) prior to 11 August 2022 Mr Ibrahim was a person with whose instructions the directors of EMIS were accustomed to act with respect to the rebranding of the Engadine Practice: PJ [278] Red 245C-G; and
- (h) Mr Ibrahim was personally involved in the rebranding of the various practices to Focus Radiology which was a “lengthy and coordinated exercise” that this Court should find was a fundamental matter to the Engadine Practice: PJ [278], [279] Red 245A-M.

33. The context of the evidence and findings referred to above, is that all of Mr Ibrahim’s conduct:

- (a) occurred after Dr Kyatt moved to Jordan in October 2019: PJ [378] Red 294D-P;
- (b) were matters that were peculiarly within the knowledge of Mr Ibrahim and that have not been explained away by him, and

in those circumstances it is sufficient¹⁹ for the Court to find that Mr Ibrahim was the person that either made significant decisions that affected the whole, or substantial part, of the business owned by EMIS or was a person with whose instructions the directors of EMIS were accustomed to act during the pleaded period of October 2019 and following: FASOC at [16.6(h)], [17] Red 98G; 99R.

34. Accordingly, this Court should find that Mr Ibrahim was an officer of EMIS on and from October 2019.

Misleading or deceptive conduct - Silence

- 35. The Primary Judge concluded that Mr Ibrahim’s silence as to his involvement in the establishment of Focus Radiology Engadine was not actionable as an instance of misleading or deceptive conduct: PJ [379] Red 294Q-S. Central to that conclusion was the finding that Mr Ibrahim was not an officer of EMIS.
- 36. In the event Mr Ibrahim is found to be an officer of EMIS on and from October 2019, he would be subject to the pleaded statutory duties imposed on officers by ss 180 to 183 of the Corporations Act

¹⁹ *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 per Menzies, Fullagar, Kitto & Taylor JJ at 375; *BCI Finances Pty Ltd (in liq) v Binetter (in his capacity as the legal personal representative of the late Binetter) (No 4)* (2016) 117 ACSR 18 per Gleeson J (as her Honour then was) at [122] to [125]; *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 at per Handley at [121], Giles & Hodgson JJA agreeing; *Payne v Parker* [1976] 1 NSWLR 191 at 201 per Glass JA; *Parker v Paton* (1941) 41 SR (NSW) 237 at 243; *Ferguson, Ex parte; Re Alexander* (1944) 45 SR (NSW) 64 at 67, 70.

2001: FASOC [21.3] Red 102E-N. Such a duty would create a reasonable expectation that Mr Ibrahim would disclose his involvement to Dr Kyatt, even in circumstances where each were in a competitive position of equal bargaining power and were equally well resourced and advised by their respective lawyers: PJ [378] Red 294F-K.

Misleading or deceptive conduct – the representations

37. Of the seven representations pleaded, the last five that are directed to the competing business, the value of EMIS and there was no loss arising from agreeing to a wider release, are the subject of challenge: PJ [354(3)-(7)] Red 276U-277L.

The competing business representations: PJ [354(3)-(5): Red 277D-G

38. The Primary Judge found that there was no evidence that Mr Ibrahim made representations that he was:
- (a) not taking steps to establish a competing business;
 - (b) that there was no competing business; and
 - (c) that there would be no competing business: PJ [374(3)-(5)] Red 290W-292H.
39. At the outset it is important to delineate between taking the existing business of EMIS on the one hand and setting up a separate competing business on the other. This distinction was made clear by Dr Kyatt who stated that he was only aware that Mr Ibrahim wanted to “take the business” as opposed to establishing a competing business: Black 99H-K. The cross-examination of Dr Kyatt made it clear that Dr Kyatt did not consider the business operating under the New Lease as a competitive business: PJ [145] Red 198F-H, N-V. It was the same business (i.e. the Engadine Practice) that had been taken by Mr Ibrahim.
40. Whilst the Primary Judge found that Mr Ibrahim took active steps to:
- (a) “take the business of EMIS” on and from July 2022;
 - (b) “set up a competing business” on and from July 2022: PJ [278] Red 245C-G, [412] Red 311X-312D;
 - (c) “conceal the Focus Radiology rebranding from EMIS” on and from February 2023: PJ [276(7)] Red 244G-J,
- the only findings as to Dr Kyatt’s knowledge was that he was aware on and from 12 July 2022:
- (d) that Mr Ibrahim wanted to take the business of EMIS and install a business in place of it (i.e. not in competition with it): PJ [146] Red 199F-H; PJ [284] Red 246I-M, [292] Red 247U-248E;
 - (e) that the Engadine Practice was threatened by Mr Ibrahim who wanted to establish a business in place of it (i.e. not in competition with it): PJ [374(5)] Red 291M-O and not in competition with it; and

- (f) that he had no knowledge of the rebranding of the Engadine Practice to Focus Radiology: PJ [284] Red 246I-M.

41. Those findings are consistent with Dr Kyatt's evidence that:

- (a) Dr Kyatt was not aware of Mr Ibrahim's conduct in establishing a competing business (i.e. Focus Engadine Practice) and would not have entered into the Deed of Settlement had he known anything about a competing business;²⁰ and
- (b) that he was under the impression that Mr Ibrahim was going to give the Engadine Premises back: PJ [145] Red 199A-E.

42. When the conduct of Mr Ibrahim in taking active steps to set up a competing business on and from July 2022 with the knowledge of Mr Chaudhry: PJ [278] Red 245C-G is assessed against the findings as to Dr Kyatt's knowledge being limited to what Mr Ibrahim had done with respect to the New Lease, the pleaded representations regarding the competing business are established.

The value of EMIS remaining substantial and no loss representations: PJ [354(6)-(7): Red 277H-J

43. The Primary Judge made an implied finding that each of these representations were, in fact made, however the Appellants did not succeed given the express finding that Dr Kyatt and EMIS did not rely on them: PJ [374(6)] Red 292R-S; PJ [374(7)] Red 293M-O. Those findings as to reliance are the subject of challenge.

The Reliance Findings

44. The factual findings upon which the Primary Judge concluded there was no reliance by Dr Kyatt and EMIS on any representations are:

- (a) by 21 December 2021 Dr Kyatt did not trust anything that Mr Ibrahim or Mr Ibrahim's lawyers said to him: PJ [248] Red 231E-G;
- (b) that Dr Kyatt placed the whole of his reliance on his lawyers: PJ [376] Red 293R-U; and
- (c) Dr Kyatt signed a solemn disclaimer of no reliance contained in clause 13.2 of the Deed of Settlement: PJ [309] Red 255F-H; PJ [377] Red 293U-294C

(the **Reliance Findings**).

45. It is convenient to deal with the first two Reliance Findings as these both arose entirely by reason of the oral evidence provided by Dr Kyatt.

46. Dr Kyatt was cross-examined about:

²⁰ Affidavit of Ali Kyatt, sworn 31 January 2024 at [24(n), (p)], Blue Book 1/104, 105.

- (a) referring to Mr Ibrahim as a “hijacker asking for ransom” in his email sent to his lawyer, Mr Gasic, on 10 November 2022: PJ 209 Red 215U-216C; and
 - (b) referring to Mr Ibrahim as “the thief” in his email sent to his lawyer, Mr Gasic, on 21 December 2022: PJ [245] Red 229V-229F: Black 93K – 94S.
47. Pausing here, the use of such emotive language by Dr Kyatt is understandable given Mr Ibrahim had used EMI to obtain a lease of the Engadine Premises and Dr Kyatt discovered on 14 July 2022 that Mr Ibrahim had in fact lied to All Star Real Estate back in February 2022 to obtain the New Lease: PJ [148] Red 199W-200M. It is understandable that Dr Kyatt retained lawyers “to assist him to recover the Lease on behalf of EMIS” at the time of this discovery: PJ [149] Red 200M-O.
48. The emotive language used by Dr Kyatt in his emails of 10 November 2022 and 21 December 2022 are nothing more than that, emotive. Dr Kyatt’s evidence that these were “reactive responses” or “frustration” are apt: PJ [247] Red 230K-L, particularly in circumstances where Dr Kyatt had discovered that Mr Ibrahim had lied to All Star Real Estate to obtain the New Lease without Dr Kyatt’s knowledge who, quiet properly held the view that it was business as usual with respect to the Engadine Practice: PJ [325] Red 261L-P.
49. The Primary Judge places significant weight on the emotive language used by Dr Kyatt to find that Dr Kyatt could not trust anything that Mr Ibrahim or his lawyers said to him as he considered Mr Ibrahim to be a thief: PJ [248] Red 231E-H. That finding:
- (a) ignores the contemporaneous objective evidence and logic of events, being the ongoing negotiations occurring between Dr Kyatt’s solicitors, New South Lawyers, and Mr Ibrahim’s solicitors, Bridges Lawyers, that occurs after 21 December 2022 until the Deed of Settlement is signed on 23 February 2023; and
 - (b) fails to appreciate that Dr Kyatt’s expressed distrust through the use of his emotive language, which he described as a “reactive response” on more than one occasion: Black 93M-O, 94M-O only extends to Mr Ibrahim and not Mr Ibrahim’s lawyers.
50. The contemporaneous documents reveal what, in fact, occurred. In short compass:
- (a) on 15 February 2023 New South Lawyers received the email from Bridges Lawyers seeking a wider release with the statement “We note that there is no loss to [Dr Kyatt] to include this release”: PJ [285] Red 246I-M. That statement as expressed reveals two things:
 - (i) **First**, it is not a statement expressed to be made on instructions and is a statement made by Bridges Lawyers; and
 - (ii) **Second**, it is a statement made with the intent that it be republished or reconveyed to Dr Kyatt and EMIS.

- (b) Mr Gasic accepts and endorses the statement made in the email from Bridges Lawyers that there would be no loss to [Dr Kyatt] to include this release when he provides advice to Dr Kyatt on 21 February 2021:
 - (i) by email sent at 3.59am when Mr Gasic states that he did not see any issues arising from the wider release sought: PJ [294]-[295] Red 248J-249C; and
 - (ii) by further email sent at 8.28am when Mr Gasic states against that he did not see any issue arising from the amendments sought: PJ [299] Red 251C-F.
- (c) Dr Kyatt accepts the advice of Mr Gasic and communicates this to Mr Gasic by email sent on 21 February 2023 at 4.47pm: PJ [301] Red 251H-J.

51. The context of the above exchanges is also important. The Primary Judge finds that the email from Bridges Lawyers is sent during the back-and-forth negotiations which were being conducted by Mr Ibrahim and Dr Kyatt through “their respective lawyers about what they each would agree in the final form of the Deed of Settlement.”: PJ [374(7)] Red 293H-K.

52. The context as found by the Primary Judge invokes the following additional considerations:

- (a) **First**, Mr Ibrahim’s solicitors, Bridges Lawyers had a duty of honesty which prevents them from making false statements to New South Lawyers in relation to a case, including its compromise;²¹
- (b) **Second**, the same obligations apply when a lawyer is taken out of the adversary role in favour of the negotiating role. In that co-operative role it is important that practitioners may be relied upon by the other party and his advisers to act honestly and fairly in seeking a reasonable resolution of the dispute. If everything a practitioner says in negotiations must be checked and verified, many of the benefits and efficiencies of a settlement will be lost or compromised;²² and
- (c) **Third**, honesty, fairness and integrity are of importance in such negotiations because they are conducted outside the Court and are beyond the control which a judge hearing the matter might otherwise exercise over the practitioners involved. Outside the trial process, there is no impartial adjudicator to “find the truth” between the opposing assertions. Dishonest or sharp practice by the practitioner to secure an advantage for his client might go undetected for some considerable time or for all time. A level of trust between the advisers involved is therefore essential.

²¹ *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015 (Cth)*, r 22.1.

²² *Legal Practitioners Complaints Committee and Fleming* [2006] WASAT 352 at [75], [76]; *Legal Services Commissioner v Mullins* [2006] QLPT 12 at [29]; The Hon T F Bathurst AC KC [2017] (Spring) *Bar News* 22 “Off with the wing: issues for advocates when switching from the court room to the negotiating table”: writing extra-judicially, at the time.

53. The contemporaneous communications referred to above, when viewed in context, are consistent with Dr Kyatt's evidence that the whole of his reliance in entering into the Deed of Settlement was placed on his lawyers: PJ [316] Red 259S-U; Black 124R-T. The contemporaneous documents and context reveal that it was Mr Gasic who:

- (a) conveyed the email from Bridges Lawyers sent on 15 February 2023 to Dr Kyatt on 16 February 2023: PJ [290] Red 247K-R; and
- (b) propounded (and even arguably endorsed) the representation contained therein (i.e. that there would be no loss) in two separate emails sent to Dr Kyatt on 21 February 2023: PJ [294]-[295] Red 248J-249C; PJ [299] Red 251C-E,

which Dr Kyatt accepted.

54. The problem faced by the Primary Judge in placing too much weight on the oral evidence provided by Dr Kyatt that the whole of his reliance was placed on his lawyers: PJ [316] Red 259S-U; Black 124R-T is that, as with much of Dr Kyatt's oral evidence, it was preceded by "answers which were internally inconsistent and objectively improbable": PJ [15] Red 165G-I.

55. The answers given under cross examination immediately before the discussion with his Honour should be noted, particularly Dr Kyatt's evidence that the way he dealt with his lawyers: Black 124C-K:

Q. You've seen three drafts of this document, or two previous drafts, hadn't you?

A. I don't recall.

Q. You saw two iterations of it in 2022, and this third version in 2023, didn't you?

A. If it's something I signed, I - I - I've seen it.

Q. You read it carefully, didn't you?

A. No.

Q. You must have read some part of it carefully?

A. *The way I deal with my lawyers, we make the deal. They send me the papers, I sign them. Without going through them.*

Q. So you rely upon your lawyer's advice without reading the documents. Is that what you're saying to his Honour?

A. *Correct*

56. It is apparent from the answers given by Dr Kyatt that it is unclear whether they were made in relation to a “document” which was either one of two iterations of the Deed of Settlement, or a third version iteration of the Deed of Settlement in 2023.
57. The appropriate course was to proceed by reference to what was revealed by the contemporaneous documents referred to in paragraph 53 above, to the extent it was inconsistent with Dr Kyatt’s oral evidence, for the reasons which have been expressed in relation to the utility of such testimony, in a commercial case.
58. Had the Primary Judge properly considered that which was revealed by contemporary materials, objectively established facts and the apparent logic of events,²³ rather than the oral evidence provided by Dr Kyatt, who was from a different cultural and ethnic background, was giving evidence in a foreign language in a stressful and unfamiliar situation: PJ [12(4)] Red 163R-T, [14] Red 164S-V, the factual findings upon which the Primary Judge concluded there was no reliance by Dr Kyatt and EMIS on the representations were not available on the material before the Primary Judge.
59. The other aspect upon which the Primary Judge placed significant weight on was that the Primary Judge described as a “solemn disclaimer”: PJ [377] Red 294A-C of no reliance contained in clause 13.2 of the Deed of Settlement: PJ [309] Red 255F-H; PJ [377] Red 293U-294C.
60. The statutory predecessor to s18 of the *Australian Consumer Law* was s52 of the *Trade Practices Act 1974* (Cth) (TPA). It was an accepted proposition that liability under s52 of the TPA could not be excluded by contract. It was known as the “no exclusion principle”.
61. In *Campbell v Backoffice Investments Pty Ltd* the High Court found that the “no exclusion principle” applied to an entire agreement clause, such as clause 13.1 of the Deed of Settlement, and a no reliance clause, such as clause 13.2 of the Deed of Settlement.²⁴
62. Recently, in *Viterra Malt Pty Ltd v Cargill Australia Ltd*, the Court of Appeal discussed various cases as how the no-exclusion principle operated in its application to enforcement of the statutory norm under s18 of the ACL.²⁵ The Court observed at [379]:

No representation clauses and no reliance clauses and other forms of disclaimers can have an evidentiary effect that negates an integer of liability in relation to misleading or deceptive conduct. They may alter the character of a representation which was made. They may render conduct not misleading or deceptive. They may lead to a conclusion that a claimant did not rely upon the conduct or did not suffer loss because of the conduct. Such provisions, however, cannot otherwise

²³ *Fox v Percy* (2003) 214 CLR 118 at [31] per Gleeson CJ, Gummow and Kirby JJ.

²⁴ (2009) 238 CLR 304 at [138] per Gummow, Hayne, Heydon and Kiefel JJ.

²⁵ (2023) 74 VR 1

have the effect of absolving a party from liability for misleading or deceptive conduct, even where their express terms purport to do so.

63. The Primary Judge erred in the manner in which clauses 13.1 and 13.2 of the Deed of Settlement were used as they are referred to as an “insurmountable obstacle”: PJ [375] Red 293O-Q. Such reasoning indicates that the Primary Judge considered clauses 13.1 and 13.2 could operate as a separate and independent bar. The no-exclusion principle expressly prevents this.
64. When a real review of the Reliance Findings is conducted by this Court by reference to the contemporary materials, objectively established facts, context and the apparent logic of events they ought be overturned.²⁶

Mr Chaudhry

65. The Primary Judge found that there was no evidence that Mr Chaudhry had any involvement in establishing the Focus Engadine Practice: PJ [419] Red 314J-O.
66. Such a finding cannot stand a real review by this Court for the following reasons:
- (a) **First**, Mr Chaudhry had knowledge that Mr Ibrahim was taking active steps to set up a competing business on and from July 2022: PJ [278] Red 245C-G, [412] Red 311X-312C.
 - (b) **Second**, on 18 February 2023 Crowd IT issued a partnership proposal to Mr Chaudhry which outlined the terms in accordance with which Crowd IT would provide IT equipment, software and support services to Focus Radiology at each the Focus Engadine Premises: PJ [276(8)] Red 244L-O. There would be no reason to issue this document in the name of Mr Chaudhry unless he was assisting Mr Ibrahim establish Focus Radiology Engadine.
 - (c) **Third**, on 26 February 2023 Mr Chaudhry signed the proposal from Crowd IT to implement, manage and support specific IT systems at the Focus Engadine Practice. PJ [276(10)] Red 244R-T. The Focus Engadine Premises is clearly identified in this proposal.²⁷ When Mr Chaudhry signed this document:
 - (i) he was not aware that he had been removed as a director of EMIS on 23 February 2023; and
 - (ii) he continued to attend to “all responsibilities relevant to his position as Manager” thereafter.

²⁶ Cf. *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 130; *Owners Corporation of Strata Plan 61, 390 v Multiplex Corporate Agency Pty Ltd* (No.2) [2022] NSWSC at [29]; *Wright v David John Neale Lemon as executor of the estate of Michael John Maynard Wright* (No. 2) [2021] WASC 159 at [792] to [800].

²⁷ Exhibit B 378-405; Blue 2/587-613 (Crowd IT Partnership Proposal).

The letter from his legal representatives issued on 17 March 2023 confirms each of the above matters.²⁸

- (d) **Fourth**, receiving the personally addressed proposal from Crowd IT and then signing it is an active step taken by Mr Chaudhry to assist Mr Ibrahim establish the competing business.
- (e) **Fifth**, the absence of any other documentary evidence is explained by the finding that efforts were being made on and from 14 December 2022 to ensure that there was no paper trail revealing the involvement of Mr Chaudhry with respect to matters relating to Focus Radiology Engadine: PJ [276(3)] Red 243O-P.
- (f) **Sixth**, within days of resigning as director on 17 March 2023: PJ [321] Red 260N-O Mr Chaudhry is copied into emails issued with respect to Focus Radiology Engadine²⁹: PJ [326] Red 261U-W.
- (g) **Seventh**, the steps taken by Mr Chaudhry to assist Mr Ibrahim are matters peculiarly within the knowledge of Mr Ibrahim that has not been explained away by him. In these circumstances the evidence adduced by the Appellants is sufficient for the Court to find that Mr Chaudhry assisted Mr Ibrahim to establish Focus Radiology Engadine whilst he was a director of EMIS.³⁰

67. In addition to the above, the Primary Judge does not draw a *Jones v Dunkel* inference, that would permit the Court with greater confidence to find that Mr Chaudhry assisted Mr Ibrahim to establish the competing business, notwithstanding that Mr Ibrahim's failure to provide evidence and being a person that was in a position to cast light on these matters.
68. For the reasons set out above the Court should find, or infer, that Mr Chaudhry assisted Mr Ibrahim to establish the competing business on and from July 2022 whilst he remained a director of EMIS and breached the duties contained in ss180, 181, 182 and 183 of the *Corporations Act* 2001 as well as fiduciary duties to EMIS: PJ [409] Red 311G-K.

Relief

69. As the Primary Judge does not make any findings about the relief that might have been granted to the Appellants had the Primary Judge upheld one or more of their claims: PJ [422] Red 315A-E, the subsequent "comments" made in relation to the monetary relief are somewhat otiose: PJ [422]-[426] Red 315A-Z.

²⁸ Exhibit A 1446-1449; Blue 1/105-197 (Letter from Madison Marcus 17.3.2023) at [11], [17].

²⁹ Exhibit B 427; Blue 2/636 (Email from Mr McCudden 20.3.2023).

³⁰ *Hampton Court Ltd v Crooks* (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; *Ferguson, Ex parte; Re Alexander* (1944) 45 SR (NSW) 64 at 67, 70.

70. The relief that was sought below and in this forum against Mr Ibrahim is to:
- (a) set aside the Deed of Settlement under s237 of the ACL;
 - (b) for Mr Ibrahim to transfer 100% of his shareholding in EMI to EMIS; and
 - (c) for Mr Ibrahim to indemnify EMIS for any liability EMIS has to the landlord of the Engadine Premises,
- being equitable relief for breach of fiduciary duty and/or compensation under s1317H(1) of the *Corporations Act 2001*: Black 312Z-313O.
71. By 17 May 2024, EMIS had incurred \$109,818.40 of costs and fees with respect to the Engadine Premises: Black 315P-316F. Those costs have increased since 17 May 2024 as EMIS and Dr Kyatt as guarantor each remain liable under the New Lease which EMIS took the benefit of as assignee.
72. The relief that was sought below and in this Court against Mr Chaudhry is:
- (a) for Mr Chaudhry to indemnify EMIS for any liability EMIS has to the landlord of the Engadine Premises; and
 - (b) equitable compensation,
- being equitable relief for breach of fiduciary duty and/or compensation under s1317H(1) of the *Corporations Act 2001*: Black 313Q-314E.

Disposal of Appeal

73. This Court has a wide discretion as to how to dispose of the appeal in the event the Appellants succeed.
74. Given the ambit and extent of the appeal, this is a case where only one conclusion is open on the evidence available at trial, being the imposition of the constructive trust and the indemnities sought by the Appellants.
75. As this Court is in as good a position to decide the matter as the Primary Judge, it should do so and grant the relief sought in the Amended Summons.

Dated: 29 August 2025



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