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Ordered by: Sonia Quigley

For: Bupa HI

Email: sonia.quigley@bupa.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-944899

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

FLICK J

No. NSD 2285 of 2017

DAVID MOFFET

and

DENTAL CORPORATION PTY LTD

SYDNEY

10.01 AM, WEDNESDAY, 26 SEPTEMBER 2018

MR M. GIBIAN appears for the applicant

MR J. DARAMS appears with MS B. BYRNES for the respondent

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HIS HONOUR: Yes. Appearances, please.

MR M. GIBIAN: May it please the court, I appear for the applicant.

5 HIS HONOUR: Thank you, Mr Gibian.

MR J. DARAMS: May it please your Honour, Darams, D-a-r-a-m-s, initial J. I appear with my learned friend MR BYRNES for the respondent.

10 HIS HONOUR: Thank you, Mr Darams. Yes, Mr Gibian.

MR GIBIAN: Just excuse me for one moment.

HIS HONOUR: You're on, Mr Gibian.

15

MR GIBIAN: Yes. Your Honour, I will let my friend - - -

HIS HONOUR: As I understand your case, Mr Gibian, you say you're an employee.

20

MR GIBIAN: Yes. Mr Darams says, "No, you're not. You're an independent contractor". If you are correct, you then say 357 of the Fair Work Act kicks in. There's a misrepresentation, namely, whether you are or are not an employee. Mr Darams says, "Well, even if that's so, 357(2) is an answer". You dispute that. If you are successful in establishing you're an employee, there's a claim under 44 and 323 for unpaid leave.

25

MR GIBIAN: Annual leave.

30 HIS HONOUR: Annual leave. Thank you. Is there any dispute between you and Mr Darams that in the event you're an employee the quantum of that annual leave is readily ascertainable? So I'm not going to hear evidence as to what the amount is. It will be agreed that you're entitled to it and they will pay it.

35 MR GIBIAN: There was a comment in the respondent's written submissions, albeit not elaborated upon, to the effect that there was some issue with the reference to base rate of pay. It seems to us to be a mechanical calculation. If we've made some error in the calculation - - -

40 HIS HONOUR: It will become a mechanical application, Mr Darams.

MR GIBIAN: That would certainly be my understanding, yes.

45 HIS HONOUR: And, similarly, in respect to the claim under the Long Service Leave Act, the State Act, is that simply a mathematical calculation?

MR GIBIAN: It is, subject to one matter that I was going to raise. Does your Honour have our submissions?

HIS HONOUR: Yes, I do. But what's the matter?

5

MR GIBIAN: The submissions are framed on the basis of the period from 2007 to 2014. The calculated – the calculation we included - - -

HIS HONOUR: Right. Yes.

10

MR GIBIAN: - - - erroneously included the earlier period. The correct – and we can correct that amount. But leaving that to one side - - -

HIS HONOUR: That can be calculated.

15

MR GIBIAN: Yes, that's a calculation, a calculatable amount.

HIS HONOUR: And, similarly, the superannuation guarantee, that's a mathematical calculation?

20

MR GIBIAN: It is. In a formal sense in that respect, we seek a declaration in relation to that Act - - -

HIS HONOUR: Yes.

25

MR GIBIAN: - - - because of the way in which those payments are structured, as your Honour is aware, or those obligations are structured.

HIS HONOUR: All right. So the sole matter of substance is employee versus independent contractor.

30

MR GIBIAN: That's the case. As your Honour is aware, in relation to the superannuation there is, in the alternative, a broader extension of the - - -

35

HIS HONOUR: Yes, that work of or something, isn't it?

MR GIBIAN: - - - wholly or principally for the labour, a contract wholly or principally for the labour, yes. So there's an extension in that area, but, otherwise, what your Honour says is correct.

40

HIS HONOUR: There also seems to be screaming agreement between the two of you as to the principles to be applied and, in summary, that's Hollis and the totality of the relationship.

45

MR GIBIAN: There appears to be broad agreement in relation to the principles. There are, obviously, as will be apparent from submissions some points of emphasis, particularly in relation to the way in which the professional status of the employee

and the degree to which that impacts upon detailed control is relevant or taken into account in the overall assessment that the court takes.

5 HIS HONOUR: Now, as I understand it, Mr Darams says – and he will correct me if I’m wrong – well, it is the totality. He may disagree with – and does disagree with you on emphasis and the like to be placed upon the particular aspects of the relationship. But he says two things which are uppermost in his mind are the absence of a right to exercise any real degree of control and, also, the extent to which Dr Moffet participated in the GST scheme.

10 MR GIBIAN: Yes. And there is – whether it’s different, whether one would phrase it as a difference of principle or emphasis, certainly we would say in the first matter that when one looks at the authorities one has regard to the fact that a person is a professional or a skilled employee is not an impediment - - -

15 HIS HONOUR: Yes.

MR GIBIAN: - - - if you like, and his – the approach that the respondent adopts in that respect is – does not sit well with those authorities and there is, I think, as
20 acknowledged in both submissions varying statements in relation to the consideration or weight to be given to taxation arrangements and the like.

HIS HONOUR: Well, it’s just one of the factors.

25 MR GIBIAN: Indeed. But the weight to be attached to it is, perhaps, dealt with differently in some of the authorities.

HIS HONOUR: Now, if you win – and leave aside declaratory relief and penalties – or, sorry, do you seek penalties?

30 MR GIBIAN: Yes.

HIS HONOUR: Leave?

35 MR GIBIAN: Only – with – yes, we do, yes.

HIS HONOUR: Yes. Leave aside penalties and declaratory relief, if you win, how much money is at stake?

40 MR GIBIAN: About \$350,000.

HIS HONOUR: That’s a lot of annual leave and a lot of superannuation.

45 MR GIBIAN: Yes. It’s - - -

HIS HONOUR: So there’s rough agreement between the two of you as to that sum?

MR GIBIAN: I'm not sure, but - - -

HIS HONOUR: No. That's okay. Right. Well, at least I know where you're going. Now, Mr Darams, for Mr Gibian's part it's about money. One matter which was
5 occupying my mischievous mind when I was looking at this case yesterday was does the decision – or would the decision in this case have wider implications for your client, namely, my suspicion – and you may say that has got nothing to do with it. But my suspicion is that this is probably a pretty standard form contract or standard form of relationship between the Dental Corporation and, in the event that you lose,
10 it may well have a ripple effect upon all of the other people.

MR DARAMS: Your observations, your Honour, are broadly correct. There are – there has been over time some changes to the agreements between my client and other persons and entities in a broadly similar position that Mr – sorry, Dr Moffet
15 was in. But as to whether those changes in the agreements would fundamentally mean that a different result would arise on a subsequent challenge, I'm not in a position to tell your Honour about that. My sense is it probably wouldn't, so the answer is that there is likely to be some potential flow-on effects, yes.

HIS HONOUR: The only reason I was being mischievous was that when you get cases like this you're always conscious of whether it only affects the parties to the proceeding, or whether it can affect the interests of other people as well. But the formal answer, I suppose, is it all depends on each individual relationship. And this case only resolves one. But it worries me about the ripple effect, but that, you say –
20 well, that's your concern, not mine.
25

MR DARAMS: Yes. Well, obviously, there is a position within the respondent as to the nature of these arrangements and arrangements that have been put in place broadly similar to Dr Moffet's and how they've operated over a number of years and
30 how people have – parties, including my client, in particular, have arranged their businesses as a consequence and likely other people, but in the circumstance of this case, Dr Moffet as well. Your Honour, can I just say one thing?

One thing, your Honour, in relation to the issues in the case, I just wanted to raise
35 one factor about the long-service leave claim. It's not – there is another issue in that and that's whether or not – so it's another issue as to whether or not Mr – Dr Moffet was the employee. That's certainly an issue. But there's also an issue as to whether he was an employee or worker for the purpose of the Act, whether he could bring himself within the particular section because he was the person who, on his case,
40 resigned the arrangement and he says that he resigned for a particular reason.

HIS HONOUR: That's right. Yes.

MR DARAMS: There's a reason issue. So it's not necessarily if we – if the court
45 finds that he was an employee, therefore, a worker that he necessarily gets it. So it's not just a computation issue. It's about the reasons for resignation.

HIS HONOUR: Right.

MR DARAMS: But I, otherwise, broadly agree with the – your Honour’s - - -

5 HIS HONOUR: No, that’s okay. I just wanted to get a feel for where we’re going.
Mr Gibian’s case is about money.

MR DARAMS: Yes.

10 HIS HONOUR: For your client it’s - - -

MR DARAMS: About the relationship.

15 HIS HONOUR: - - - high stakes litigation in that if you go down here it has the
potential to affect a lot of other – I was going to say employment relationships – the
relationship with dentists.

MR DARAMS: Yes. Yes, we broadly agree with that, your Honour.

20 HIS HONOUR: Yes. So it’s a bit of high risk, as far as you’re concerned. Right.
Well, look, does it inconvenience the two of you if I just go back to the other matter,
9.15?

MR DARAMS: Not at all.

25

HIS HONOUR: Thank you.

30 **ADJOURNED** **[10.13 am]**

RESUMED **[10.19 am]**

35 HIS HONOUR: Mr Gibian.

MR GIBIAN: Thanks, your Honour.

40 HIS HONOUR: Following my opening of your case, I suppose you want to call
some evidence.

MR GIBIAN: Indeed.

45 HIS HONOUR: Good. I’ve read your submissions and I’ve - - -

MR GIBIAN: Indeed.

HIS HONOUR: - - - read the submissions of Mr Darams.

MR GIBIAN: And I think your Honour has appreciated what the case is about.
And as your Honour will have appreciated, the gist of it is that the respondent
5 purchased the practice in 2007, and thereafter Mr – Dr Moffet, I’m sorry, worked in
that practice, we say, as an employee.

HIS HONOUR: Is it mister or doctor?

10 MR GIBIAN: Doctor.

HIS HONOUR: So that’s like a medical doctor; it’s some sort of honorary title, is
it?

15 MR GIBIAN: It’s how he and other - - -

HIS HONOUR: It’s just mere - - -

MR GIBIAN: It’s how he - - -
20

HIS HONOUR: Mere curiosity, that’s all.

MR GIBIAN: I did google it. It is how he and other dentists have been referred to
in the materials and in - - -
25

HIS HONOUR: All right.

MR GIBIAN: - - - communications. So - - -

30 HIS HONOUR: Okay.

MR GIBIAN: If we go along with that convention.

HIS HONOUR: I don’t want to cause him any disrespect, that’s all. So your case in
35 a nutshell is that he had a pretty good practice running. He sold it, and pretty much
after he sold it, carried on pretty much his own show afterwards as before.

MR GIBIAN: After he sold the practice to them? No, quite the reverse. What
happened – well, the deal upon the acquisition of the - - -
40

HIS HONOUR: Sorry, the reverse from your - - -

MR GIBIAN: Yes.

45 HIS HONOUR: - - - perspective.

MR GIBIAN: Indeed. The deal from the acquisition of the practice was that the respondent would purchase the practice and he would be required as part of that arrangement to enter into an agreement to perform work for at least a period of five years in the practice. Thereafter – and the respondent took over the lease, acquired
5 the plant and equipment, goodwill, business name and intellectual property and the like. Thereafter, it employed all the employees. It engaged the other dentists who were working in the practice over time. It paid the costs and expenses and the like of operating the business, and Dr Moffet undertook work in the practice, both
10 undertaking dentistry work but also in a way which we say is relevant.

He was, as part of the respondent's business, involved in management and supervision and the like of employees – the respondent's employees – working within the practice. And he was paid substantially by reference to what he earned, leaving aside the questions of bonuses by reference to what he earned what fees were
15 derived from the work that he personally did as a dentist. And as I say, that was the arrangement that he was required to enter into as part of the acquisition agreement for a period of five years.

HIS HONOUR: Yes, going against that is he pretty much worked whatever hours he wanted to. Like, he worked initially four days a week. If my associate says he's
20 going to work four days a week, he might get a rude shock when he's told to work longer hours. Your chap, however, chose the hours or days of the week that he worked; reduced them pretty much unilaterally, although there was negotiation.

25 MR GIBIAN: Well, the - - -

HIS HONOUR: I'm not so worried about control. Like, what control are we talking? The Dental Corporation can't tell him how to conduct a root canal therapy but – so if that's the control they're talking about, it's nonsense.
30

MR GIBIAN: Yes. And that's as we say is made out by the authorities. That is - - -

HIS HONOUR: Yes.

35 MR GIBIAN: One doesn't say that a person can't be an employee because they were exercising professional skill – undertaking professional or skilled work which, whether by law or by practice, as a matter of practicality, can't be subject of detailed direction as to the minute tasks to be undertaken. That's not a disabling factor or
40 even a matter of any significant weight in ascertaining.

Here, we did have a circumstance in which, in accordance with what was called the services agreement, it's not as if Dental Corporation didn't have any potential to have some say over the way in which work was performed in the sense that that agreement imposed obligations upon Dr Moffet to perform work with due skill and
45 the like.

HIS HONOUR: Yes, but that doesn't - - -

MR GIBIAN: And - - -

5 HIS HONOUR: That doesn't carry much weight, does it? Like, it does – all of the propositions I'm putting to you, both of you will say at the end of the day it's a question of weight; they just can't be dismissed. I understand that. But of course he's to be expected to perform things competently. So an obligation, contractual obligation to do so doesn't carry it much further, does it?

10 MR GIBIAN: That's right in one sense, in that obviously he had professional obligations as well as part of his registration and the like to conduct certainly the dental work with – to an appropriate standard and consistent with his obligations to patients. I mention the contractual obligation because what the respondent reserved to itself, as one would expect, is the capacity to terminate the whole arrangement if he was not, in the respondent's view, undertaking his work to the standard that he
15 was – that it expected of him.

HIS HONOUR: But you could do that with a - - -

20 MR GIBIAN: So separate to the - - -

HIS HONOUR: You could do that with an independent contractor too, couldn't you? Like, if he is an independent contractor, I would be amazed if there wasn't a right to terminate the services of an independent contractor if he was shoddy.

25 MR GIBIAN: In a sense, your Honour is right, but I've pointed those matters out in contradistinction to the submissions that the respondent had nothing to say in relation to the work that was done.

30 HIS HONOUR: There's objectively no right answer to this case, is there?

MR GIBIAN: The approach the courts have adopted and a number of the authorities accept that there's a lack of precision in that respect involve weighing a range of considerations that commonly arise as appropriate in the particular case and assessing the totality of the - - -
35

HIS HONOUR: Yes.

MR GIBIAN: - - - the relationship.

40 HIS HONOUR: So the answer to my question is no, there is no objectively right answer.

MR GIBIAN: I think, well, there may be – it's a spectrum, obviously, your Honour.

45 HIS HONOUR: Yes.

MR GIBIAN: And it may be some cases where there is a very clear outcome.

HIS HONOUR: That's not this case, though.

MR GIBIAN: We probably wouldn't be standing here if there was a very clear outcome in this case, but obviously for the reasons that I've advanced in the written submissions we say that the – the better view and we would say clearly the better
5 view is that given that the respondent had acquired the practice and was operating it and employed the other employees and engaged the other dentist and he was a dentist working in their practice that you would properly as an employee in that context.

10 HIS HONOUR: Am I correct in assuming that – I think it's in the submissions but I haven't looked in the evidence, that the work that was given to Dr Moffet was allocated to him by the receptionist, and she allocated it randomly or whatever between all of the dentists there?

15 MR GIBIAN: Yes. That's what Dr Moffet says and – well, to provide the best service to - - -

HIS HONOUR: Yes.

20 MR GIBIAN: - - - patients, no doubt, yes. So there was some degrees of, you know, considerations of speciality and experience and patient relationship no doubt involved but - - -

HIS HONOUR: Well, that - - -

25

MR GIBIAN: But yes.

HIS HONOUR: That helps your case a bit.

30 MR GIBIAN: Indeed.

HIS HONOUR: Right.

MR GIBIAN: It's said against us, I think, in that respect that Dr Moffet could have
35 told the receptionist what to do. Well, his evidence is that – as to how it worked, that - - -

HIS HONOUR: Yes. Right. Is there going to be any cross-examination or anything of that nature?

40

MR GIBIAN: I understand there is.

HIS HONOUR: Right. Well, we had better get on with the evidence then.

45 MR GIBIAN: So there are two affidavits of Dr Moffet and a number of documents that are marked as an exhibit to the first - - -

HIS HONOUR: Well, let's get - - -

MR GIBIAN: - - - affidavit.

5 HIS HONOUR: Let's get things out of the way.

MR GIBIAN: There's just – it's probably convenient if I just deal with one issue in that respect. The exhibited documents, there's a relatively – well, it runs over three folders.

10

HIS HONOUR: Yes.

MR GIBIAN: There were a number of pieces of email correspondence that were annexed. The versions that were annexed at various points included a number of –
15 were emails that were forward by the applicant to his lawyers and included a number of comments by him to his lawyers in the versions that were filed, and that was erroneously so, and we wish to substitute versions which removed those - - -

20

HIS HONOUR: If it's any - - -

MR GIBIAN: - - - comments.

HIS HONOUR: - - - comfort to you, I haven't read them.

25 MR GIBIAN: Indeed.

HIS HONOUR: The only documents in the exhibits which I've looked at were at pages 1 to 174, being the acquisition agreement, and pages 174 through to 199, I think it is, which is the services agreement.

30

MR GIBIAN: Yes.

HIS HONOUR: And it's after that that the emails start.

35 MR GIBIAN: Yes.

HIS HONOUR: Well, I've tagged it but I resisted the temptation to read it.

40

MR GIBIAN: Indeed. What we've done - - -

HIS HONOUR: So you wanted to substitute, do you?

MR GIBIAN: - - - and I'm not sure – I'm sorry, your Honour.

45 HIS HONOUR: Do you want the substitute the ones I've got?

MR GIBIAN: Yes. There are – yes. I’m not sure what the most convenient way of endeavouring to deal with it is. What I do have is a bundle of particular pages which we would wish to be substituted.

5 HIS HONOUR: Well, we’re going to be getting to submissions within the next half hour so if – why don’t I give to you – I’ll extract pages 1 to 199 of the DRM1, I think it is, because I’ve scribbled on the contractual documents - - -

10 MR GIBIAN: Indeed. And there are some in the third volume as well from page - - -

HIS HONOUR: And I’ll return volume 1 and 3 to you.

15 MR DARAMS: Sorry, your Honour, to interrupt. There an agreement that this should occur.

HIS HONOUR: There is agreement or - - -

20 MR DARAMS: There isn’t an agreement.

HIS HONOUR: Right. You say that privilege that is being waived and it’s in?

25 MR DARAMS: Well, ultimately, yes, but the first point we say is that we don’t accept there’s any privilege attaching to what might have been these comments forwarding emails on and no evidence, (1) that doesn’t objectively appear to us to be anything that is privileged and, secondly, no evidence that goes to establish the circumstances of that. And then even if there was then – because annexed to an affidavit served months ago in accordance with the court’s orders and nothing was raised with the parties. We proceeded - - -

30 HIS HONOUR: Yes. The reality is the barristers say – put all of this stuff in and it’s only the week before that they actually pull the brief off the shelf and start looking at it.

35 MR DARAMS: That might be the case and I - - -

HIS HONOUR: And then say, “How come this got in.”

40 MR DARAMS: I don’t wish to speak for Mr Gibian in that respect but - - -

HIS HONOUR: But does anything turn - - -

45 MR DARAMS: There’s one particular document which there are some comments and observations which does turn upon and I – I’ve seen them. I can’t – I can’t put them out of my mind. There are matters that I want to cross-examine Mr – Dr Moffatt on.

HIS HONOUR: Well, so your course is to leave the documents – the exhibits as filed?

MR DARAMS: As they are.

5

HIS HONOUR: Leave them as they are? Mr Gibian should be able to tell me in due course which are the documents – if he can provide to my associate the identification of the documents which he claims privilege over, they can be tagged by my associate in some way so I'm alerted to it when we get to it. And when you get to your bit in the cross-examination upon which something turns we can rule upon it then.

10

MR DARAMS: May it please your Honour.

15 HIS HONOUR: Are you content with that course, Mr Gibian?

MR GIBIAN: I do have an – my instructor did prepare an affidavit in relation to this issue and it says what your Honour would expect it to say. That – I suppose there's perhaps two stages to it. One is as to what we wish to tender as part of the exhibit and we can tender what we wish to tender as part of the exhibit - - -

20

HIS HONOUR: That's true.

MR GIBIAN: - - - and we wish to tender the redacted versions.

25

HIS HONOUR: Yes. Well - - -

MR GIBIAN: If my learned friend wishes to - - -

30 HIS HONOUR: To tender separate documents then he can do it that way.

MR GIBIAN: - - - use the - - -

HIS HONOUR: That's a good way to proceed.

35

MR GIBIAN: Yes. If he – yes – if he wishes to – so we wish to tender the version with the replacement pages and my instructor can assist practically in that respect.

HIS HONOUR: Yes. Well, look - - -

40

MR GIBIAN: If my learned friend wishes to use the unredacted version in - - -

HIS HONOUR: He can - - -

45 MR GIBIAN: - - - any form he wishes then - - -

HIS HONOUR: Well, no, he has got the - - -

MR GIBIAN: - - - we'll have to deal with it at that point.

HIS HONOUR: Yes. So if your instructing solicitor can give me a replacement
5 volume 1, pulling out pages 1 to 199 or whatever it is, I can then – whilst that is
being done then that's all exhibit DRM1; is that correct? All three volumes?

MR GIBIAN: Yes.

HIS HONOUR: Yes. So you wish to tender DRM1 not as previously filed but as
10 you are now seeking to file it in court?

MR GIBIAN:

HIS HONOUR: Right, then.
15

MR GIBIAN: And, as I say, the only change is to delete a number of comments that
were - - -

HIS HONOUR: Well, you're not
20

MR GIBIAN: - - - recent, not

HIS HONOUR: Mr Darams, you're not prejudiced if that exhibit is marked as an
25 exhibit and if you wish to tender some further documents in respect to which to say
have been – privilege has been waived, even if they're privileged, you can do so.

MR DARAMS: Yes. May it please your Honour.

HIS HONOUR: Right. Well, without objection - - -
30

MR DARAMS: Well, sorry. There is two objections to documents in the exhibit.

HIS HONOUR: Right. Which ones?

35 MR DARAMS: If your Honour goes to page – perhaps – could I just – because
there are some objections to the affidavit. Perhaps if I could hand your Honour up a
document. Your Honour, what we – the parties have done is that my – we provided
what we indicated were our objections. The applicant considered them and then
40 included a position and then we've included a final position in effect in the last
category.

HIS HONOUR: Objection is taken to the concluding four lines of paragraph 10.
Paragraph 10 is rejected. Liberty is reserved to call such further evidence as the
45 applicant may be advised.

MR DARAMS: I'm sorry, your Honour,

HIS HONOUR: Paragraph 13 is rejected as question form but again liberty is reserved to call further oral evidence.

5 MR DARAMS: Your Honour, just in relation to the objections to paragraph 28 and following, that should be 28 to 32. It's a typographical error.

MR GIBIAN: Sorry, you didn't press your objection to paragraph 13. Sorry, you agreed

10 MS BYRNE: We agreed to seek leave.

MR GIBIAN:

15 HIS HONOUR: Objection is taken to paragraphs 28 to 32 and paragraphs 28 to 32 can be read. The objection is overruled. Paragraph – a separate objection is taken to paragraph 30 and that objection is rejected; paragraph 30 can be read. Objection is taken to paragraph 43. Agreement is reached not to read paragraph 43?

20 MR GIBIAN: It was just the words "apart from me," I mean

I think we saying it was going to determine the issue but I think that there was objection both taken on the basis that that inferred that he was an employee.

HIS HONOUR: So there's no objection taken to the - - -

25 MR GIBIAN: I don't think there's any objection taken to the remainder of the paragraph.

HIS HONOUR: Is that correct?

30 MR DARAMS: That's correct.

HIS HONOUR: Right. Paragraph 43, the first three words are rejected. Paragraph 45 - - -

35 MR: It's not read.

HIS HONOUR: - - - is not read.

40 MR: I think I said I didn't read that.

HIS HONOUR: So paragraph 45 is rejected. Paragraph 46 – paragraph 46 can be read. Paragraph 47 – paragraph 47 is – can be read and leave is granted to call such further evidence as the applicant may be advised. Paragraph 53 – paragraph 53 can be read. Paragraph 57 is objected to. Paragraph 57 can be read other than the phrase
45 "have time to" in respect to which there's agreement not to read it.

MR GIBIAN: I – I think I pressed that, your Honour.

HIS HONOUR: As agree to removing “have time to” and read the rest of the sentence.

MR DARAMS: So that’s our position, your Honour.

5

HIS HONOUR: That’s your position; yes.

MR DARAMS: So if your Honour - - -

10 HIS HONOUR: No, no, no, no. Yes, paragraph 57 with the deletion of those three words can be read; not that it makes any difference.

MR DARAMS: Sorry, your Honour, was that with the deletion - - -

15 HIS HONOUR: “Have time to” is rejected.

MR DARAMS: Yes. Thank you, your Honour.

20 HIS HONOUR: Paragraph 58 is rejected. Paragraphs 85 – paragraph 85 can be read. 87 - - -

MR DARAMS: Sorry, that’s – that wasn’t being read, your Honour.

HIS HONOUR: Wasn’t it?

25

MR DARAMS: Yes. So you - - -

HIS HONOUR: Right.

30 MR DARAMS: - - - don’t read – we agree with that position – it’s not read.

HIS HONOUR: Right. Well, paragraph 85 is not read. 87 – paragraph 87 can be read. 91 - - -

35 MR DARAMS: That can be read, your Honour.

HIS HONOUR: Yes. Paragraph 91 can be read. Mr Darams, I get really testy with taking time resolving unnecessary things.

40 MR DARAMS: Sorry, your Honour, those last ones, we had agreed not to - - -

HIS HONOUR: Yes. I appreciate that. I’m just going through them seriatim.

MR DARAMS: And 104 is not read.

45

HIS HONOUR: 100 is not read so - - -

MR DARAMS: Not read.

HIS HONOUR: So paragraph 100 is not read. 104 - - -

5 MR DARAMS: 104, again there's an agreement on.

HIS HONOUR: Paragraph 104 can be read. Good grief. What's the non-hearsay purpose which allows you to read paragraph 132, Mr Gibian?

10 MR GIBIAN: Well, it's just as directions as to what was being done at the practice.

HIS HONOUR: Paragraph 32 is rejected – 132 is rejected. Paragraph 136 is rejected other than the last line.

15 MR DARAMS: I'm sorry, your Honour, paragraph 136?

HIS HONOUR: 36. You can refer to the email chain which are already in so that doesn't do any harm b

20 MR DARAMS: May it please - - -

HIS HONOUR: - - - but the rest of the paragraph is rejected. 138 – 138 is rejected. 142 - - -

25 MR GIBIAN: Can I just say in that respect this – this goes to this issue of the – the reasoning for the resignation which the respondent has raised in relation to the long service leave issue. The subjective view of the - - -

HIS HONOUR: 142 can be read.

30

MR DARAMS: Your Honour, could – could - - -

HIS HONOUR: 144(c) can be read.

35 MR DARAMS: Just on 42 – sorry, your Honour. Could that be limited – the applicant isn't calling any medical evidence.

HIS HONOUR: In which case it's not going to carry it very far, is it. You've foreshadowed the submission. 142 would just be read by me as, well, that's what
40 you think but if you want to prove it beyond that you had better do so by means other than this.

MR DARAMS: I was going to ask that that be the appropriate limitation. It's just
45 - - -

HIS HONOUR: Yes. So that's how it's going to be treated. 144(c) can be read. And although I don't have pages 994 or 122 to 124 before me in exhibit DRM1, the limitation seems to be sensible, Mr Gibian.

5 MR GIBIAN: Well, the documents are documents; they say what they say.

HIS HONOUR: Right. Now, that gets rid of – otherwise Dr Moffatt's affidavit sworn on 14 May – subject to those objections – can be taken as read. Next, the affidavit of Dr Moffatt sworn 5 June. Objection is taken to paragraph 7. Paragraph 7
10 is read as a submission. Paragraph 16 - - -

MR DARAMS: That's not read now. I think I said I wouldn't read that paragraph.

HIS HONOUR: Paragraph 16 is not read. 17D can be read as a submission.
15 Paragraph 18 - - -

MR GIBIAN: I think that objection is not pressed.

MR DARAMS: That's not pressed, in effect.
20

HIS HONOUR: 18, no objection is taken. 20, the second sentence is rejected. Paragraph 24 can be read. Paragraph 25, the third sentence – objection is taken to the third sentence at paragraph 25. That can be read as a submission. 27 – what do
25 paragraphs 57 and 58 say?

MR GIBIAN: In those paragraphs, Mr Evans asserts what he says he expected, or the respondent expected, Dr Moffet would do if there was defective dental work.

HIS HONOUR: Paragraph 27 can be read. In paragraph 29, it's agreed that - - -
30

MR DARAMS: It's not read.

MR GIBIAN: Yes, sorry, I didn't read that paragraph - - -

35 HIS HONOUR: It's the – paragraph 29 - - -

MR GIBIAN: I don't read that paragraph.

HIS HONOUR: - - - is not read in its entirety. Paragraphs 30 and 32 - - -
40

MR DARAMS: They're okay, your Honour.

HIS HONOUR: Right.

45 MR GIBIAN: Not pressed. Is that objection - - -

MR DARAMS: Yes.

MR GIBIAN: - - - not pressed?

MR DARAMS: Yes.

5 HIS HONOUR: So paragraphs 30 and 32 can be read. 36 - - -

MR GIBIAN: Again, that's not pressed, your Honour.

10 HIS HONOUR: Yes. No, very wise decision. Paragraph 51 – paragraph 51 can be read. 52 – paragraph - - -

MR GIBIAN: That's not pressed, is it?

15 MR DARAMS: Yes. That objection is not pressed, your Honour. We've agreed that - - -

HIS HONOUR: Well, I was going to say, again, a wise decision.

MR DARAMS: Yes.

20

HIS HONOUR: It would have been allowed to be read.

MR DARAMS: And 55 is not read, your Honour.

25 HIS HONOUR: And 55 - - -

MR DARAMS: Is not read.

30 HIS HONOUR: - - - is not read. So going back to that, 52 can be read and 55 is not read and is accordingly rejected. Right. That's Dr Moffet out the way. Now, is it convenient to deal with the objections to Mr Evans' affidavit, if there are any?

MR DARAMS: I'm in your Honour's hands in that respect.

35 HIS HONOUR: Are there in objections, Mr Gibian?

MR GIBIAN: There are.

40 HIS HONOUR: My experience is more time is spent ruling on objections than is warranted. Objection – objected bits to affidavits seldom form the basis of any real substantive submission. But that's the way it has always been done so I suppose we should do it that way. I assume, Mr Darams, you wish to read Mr Evans' affidavit in due course?

45 MR DARAMS: That's correct, your Honour.

HIS HONOUR: There's only one affidavit?

MR DARAMS: That's correct, your Honour.

HIS HONOUR: All right.

5 MR DARAMS: There's a list here as well.

MR GIBIAN: There's two affidavits, your Honour. I think they're dealt with Ms Kelton's first - - -

10 HIS HONOUR: Well, let's deal with Mr Evans first. His is the affidavit I've found. Paragraph 14 – well, if we reject the first sentence of paragraph 14, the phrase “and then the respondents” down to the end, that accommodates that concern. So paragraph 14, the second sentence, the phrase “and then the respondent engaged”
15 down to the end of that sentence is rejected. Paragraph 28 – well, paragraph 28 can be read. It's limited to intention. 29 is not read. The first sentence – well, that's the entirety of 29. Paragraph 29 is not read.

MR DARAMS: Sorry - - -

20 HIS HONOUR: Is that right?

MR DARAMS: It's just the first sentence.

HIS HONOUR: Sorry. Yes.

25

MR GIBIAN: I thought I objected to the whole of that paragraph, I have to say.

HIS HONOUR: The objection is only to the first sentence; is that correct? Is that correct?

30

MR GIBIAN: Yes – no, I – yes. Sorry.

HIS HONOUR: All right. The first sentence of paragraph 29 is rejected. 30.

35 MR GIBIAN: 30 is not read.

HIS HONOUR: 30 is not read. So that goes. 31 – paragraph 31 is rejected. Paragraph – but liberty is reserved if you want to call further evidence to do so. 42 – paragraph 42 is rejected. 44 – paragraph 44 can be read.

40

MR GIBIAN: I don't think it is read.

HIS HONOUR: It's not read?

45 MR GIBIAN: Neither is paragraph 48 or 54.

HIS HONOUR: No, I understand. Right. Surprising, but paragraph 44 is not read, paragraph 48 - - -

MR DARAMS: I will cross-examine - - -

5

HIS HONOUR: - - - is not read.

MR DARAMS: I will be cross-examining Dr Moffet on this.

10 HIS HONOUR: Sorry?

MR DARAMS: I will be cross-examining Dr Moffet.

HIS HONOUR: You will do so briefly. Paragraph 54 is not read; is that correct?

15

MR GIBIAN: Correct.

HIS HONOUR: 55 – paragraph 55 is rejected. 77 - - -

20 MR DARAMS: I'm not reading the objected parts, your Honour.

HIS HONOUR: Right. Paragraph 77 is not read as from “and Dr Moffet communicated” down to the end. 82 - - -

25 MR GIBIAN: Is not read.

HIS HONOUR: Yes. Paragraph 82 is not read. Right. And then 83 – paragraph 83 can be read. Next, then, subject to those rulings, Mr Evans' affidavit, affirmed on 21 May 2018, can be read. And then the last affidavit, is it?

30

MR DARAMS: Yes. Ms Kelton's.

HIS HONOUR: Ms Kelton.

35 MR DARAMS: Yes. 23 May 2018.

HIS HONOUR: Right. Paragraph 20.

MR DARAMS: Second sentence.

40

HIS HONOUR: Second sentence. Where's the second sentence?

MR GIBIAN: The words “I got the impression from my dealings with his” - - -

45 HIS HONOUR: I see. Right.

MR GIBIAN: It seems speculative.

HIS HONOUR: Yes. In paragraph 20, subparagraph (a), the second sentence “I got the impression” down to the end is rejected. 22 - - -

MR DARAMS: First and second – they’re not read, the first and second sentence.

5

HIS HONOUR: Is not read.

MR DARAMS: First and second sentence.

10 HIS HONOUR: So you do read “Dr Moffet did not tell”?

MR DARAMS: Yes.

15 HIS HONOUR: Paragraph 22, the first two sentences are not read. Paragraph 23 – so the proposal is - - -

MR GIBIAN: Not to read the second sentence.

20 HIS HONOUR: Yes. Paragraph 23, the second sentence is not read, otherwise, paragraph 23 can be read. 24, objection is taken to the first three sentences and the last sentence. Paragraph 24 can be read in its entirety. Is the next line correct? It goes paragraph 22, 23, 24, 23?

25 MR DARAMS: That’s my understanding.

HIS HONOUR: Seventh sentence, is that paragraph – is that just a duplication, is it, Mr Gibian?

30 MR GIBIAN: Yes, it is a duplication.

HIS HONOUR: All right.

MR GIBIAN: Yes. Apologies.

35 HIS HONOUR: So then we get to paragraph 30, then. Paragraph 30 is rejected.

MR DARAMS: It’s just the words, your Honour, “at his request”, that’s the only objected part.

40 HIS HONOUR: They’re, indeed, fortunate. Paragraph 30 can be read but the phrase “at his request” is not read. And 33 - - -

MR DARAMS: Sorry, your Honour, you missed 31.

45 HIS HONOUR: It’s 31, is it?

MR DARAMS: There’s objection taken to 31.

HIS HONOUR: Paragraph 31 is rejected. 33, second sentence – that can be read.

MR DARAMS: May it please.

5 HIS HONOUR: subject to those rulings, the affidavit of Ms Joanne Louise Kelton, affirmed on 23 May, can be taken as read. All right. Now, that gets us to cross-examination – or sorry, Mr – sorry, gets us at least Dr Moffet. Do you wish to call some further supplementary evidence from Dr Moffet?

10 MR GIBIAN: There were just a few matters, some of which your Honour has already referred to for clarification. I call Dr Moffet.

HIS HONOUR: Thank you.

15

<DAVID RODERICK MOFFET, SWORN

[11.01 am]

<EXAMINATION-IN-CHIEF BY MR GIBIAN

20

HIS HONOUR: Thank you, Dr Moffet. Please take a seat if you wish. Yes, Mr Gibian.

25 MR GIBIAN: So I will just ask that he be provided with his affidavits. I thought he was going to take them up with him. Sorry, I will just provide the witness with the first volume of the court book.

THE WITNESS: Thank you.

30

MR GIBIAN: Thank you, Dr Moffet. Can you just repeat your full name for the record?---My name is David Roderick Moffet.

35 And your address is 36 Brentwood Avenue in Warrawee in New South Wales?---Correct.

And you're a dental practitioner?---I am.

40 Now, you've made two affidavits for the purpose of the proceedings. I think you have those in the – you should have those in the volume in front of you under tabs 12 or tab –and tab 13. As you will have heard, those have been admitted into evidence subject to the objections that have just been dealt with?---Yes.

45 There are just a few matters that arising from those I wish to clarify. Can you just – if you just have your first affidavit of 14 May, which is under tab 12. Have you got that?---I have.

Can you just go to paragraph 10 on page 2?---Yes.

You see there that you say from January 1987 until November 2007, you were employed by Immediate Dental Care. Do you see that?---I do.

5

Can you just explain what your relationship with Immediate Dental Care was ---?---I was ---

--- in that period?---I was employed by Immediate Dental Care to administer the expenses and – of the dental practice that I own, which was Dr David Moffet sole trader on behalf of the trust. I administered the expenses. I – I administered the – the administration of the – of the practice in terms of hiring and firing, negotiating leases, buying equipment.

15 And what ---

MR DARAMS: I'm sorry. Your Honour, the objection we took to the paragraph was the reference to employ. The witness has given the same answer.

20 HIS HONOUR: To which you didn't take any objection.

MR DARAMS: Which I'm now objecting to the word "employ" and I ask that to be struck.

25 HIS HONOUR: You can't strike it in this court.

MR DARAMS: Well, I object to the – I object to ---

30 HIS HONOUR: Yes. Can you go back and tidy up that issue, Mr Gibian.

MR GIBIAN: Yes.

HIS HONOUR: You can approach it differently. That's all.

35 MR GIBIAN: Indeed.

What – were you – who were the directors and shareholders of Immediate Dental Care?---The directors were myself, David Roderick Moffet, and in – at the start of 1987, my sister, Elizabeth Jane Moffet. She was replaced as a director by my fiancé, Jane Louise Bandy who became my wife.

45 And in that period, what payments did you receive from Immediate Dental Care?---Immediate Dental Care paid me regularly superannuation payments and paid me when there was profit in the practice. It – Immediate Dental Care paid me drawings.

Now, next, you will see at the bottom of that page in paragraph 13, you indicate there – or indicated there that you were approached by a representative of the respondent regarding the aggregation of dental practices into one corporation and then you say in the second sentence that you do not recall the name of the representative, do you see that?---Yes. Yes.

Have you had an opportunity to reflect upon that?---I do know the name of that representative.

10 And what is it?---His name is – his name was Nick Thleveris.

I think – do you recall the spelling of that?---Can I refer to – my phone is off. But I – I received in a SMS. T-h-l-e-v-r-i-s.

15 Thank you. And was he the person that you were referring to was a representative of the respondent in the first sentence of paragraph 13?---He was the person that I met with on a number of occasions discussing aggregation of dental practices.

20 And on what basis did you infer that he had some association with the respondent?---I saw him present at a – a function, a Dental Corporation function in 2008 and so I assumed that his presence, as he was not a dentist, was that he – he had some relationship with Dental Corporation.

25 Right. Can you then go forward to page 6 in the same affidavit and paragraph 46. You will see there that you say that in order for you to provide the dentistry services in accordance with the engagement, you were expected to ensure the practice was generating expected profits, do you see that?---I do.

30 Was that a reference to what's called the minimum annual cash flow in the services agreement?---Do you have the services page - - -

Yes?--- - - - in the services agreement?

35 All right. The service agreement should be under tab 15 in what you have in front of you commencing at page 175?---Sorry. Yes.

And can I just direct your attention to, probably most easily, schedule 2 which is at page 196?---196. Yes. Schedule 2.

40 You will see that there's a reference to the minimum annual cash flow in point 1 at the top of that page?---Yes.

45 And it's there indicated in the text of the service agreement – sorry, services agreement that the parties agree that the minimum annual cash flow for the purposes of calculating the cash flow shortfall for each anniversary year is a figure of – sorry, \$570,000?---It does say that there, yes.

Yes. And – sorry, if you can just then go back to the text of your affidavit, you will see there that – still at page 6 in the following paragraph, paragraph 47, you refer to or you indicate that during the first agreement, the expected profit was – profits were 620,000 annually, do you see that?---Yes.

5

What's your recollection as to what the figure was for the period of the first agreement?---During the first agreement, I received monthly progress report and the figure of \$620,000 was always the one that was referred to in that agreement.

10 And do you have any recollection as to how the figure of 570,000 which appears in the service agreement became 620,000?---I felt that the figure was always 620,000. My understanding was that there had been some discussion about there being a buffer in that if 620,000 was not reached there would be a penalty, but the penalty would only come into place if the annual cash flow was less than 570,000. But the
15 buffer was also above the 620,000 as well for the payment of profit sharing.

And when you refer to profit sharing, you're referring to the performance bonus?---Yes, yes.

20 And what was the effect on your understanding of the buffer above that figure?---That if the expected profits were between 620,000 and the higher limit of the buffer, there would be no profit sharing of that amount.

And did you receive performance bonuses in the period you were working
25 - - -?---Never.

- - - for Dental Corp?---Never.

30 Lastly, I think, still on the same page, in the second part of paragraph 46 you refer to – you indicate that you were individually – you had individually generated expected collections; do you see that?---Sorry?

Sorry, paragraph 46 on page 6?---Yes. In order - - -

35 You will see in the second part of what you say in paragraph 46 - - -?---Yes, yes. Expected collections, yes.

40 Yes. What was that a reference to?---That was a reference to the arrangement that I had with Dental Corporation after the expiration of the five-year service agreement, and the – it – that arrangement was based on expected collections by me as a dentist and not expected profits of the practice, as of the previous five years.

45 Thank you. Yes. Those were the matters of clarification. Mr Darams will ask you some questions.

HIS HONOUR: Mr Darams, how long will you be?

MR DARAMS: Sorry, your Honour?

HIS HONOUR: How long will you be approximately?

5 MR DARAMS: I suspect I will be a couple of hours. There's a number of documents which – your Honour, in accordance with your associate's email, we've

10 HIS HONOUR: Well, if we can keep it relevant, that would be appreciated.

MR DARAMS: Yes, your Honour.

HIS HONOUR: Yes.

15

<CROSS-EXAMINATION BY MR DARAMS

[11.12 am]

20 MR DARAMS: Now, could I ask you a few questions, Dr Moffet. In relation to the acquisition, the dental acquisition purchase agreement and the negotiations for that agreement with the respondent, were you legally represented during that time?---Can you define for me what you consider the negotiation period?

25 Well, did you have negotiations with Dental Corporation, the respondent, in respect of the acquisition agreement that you signed?---Sorry, I'm a little confused.

Okay. You signed a dental - - -?---Agreement.

30 The acquisition agreement?---I did.

And an annexure to that was the services agreement?---Yes.

Did you have a lawyer representing you at the - - -?---I did. I did.

35 You did. I don't want you to tell me any advice you got. I just want to know did you obtain advice about the terms of the acquisition agreement from that lawyer?---I must have.

40 But no other reason to engage a lawyer in relation to that issue – would that be right – other than to get advice?---It was a fairly substantial document.

45 Are you saying you engaged a lawyer, but you didn't get advice from the lawyer about the terms of the agreement?---The agreement was prepared by Minter Ellison on behalf of Dental Corporation and my lawyer advised me of the terms of the agreement.

Yes. Did he also – he or she – and, again, don't tell me what the advice is, but did they give you advice about the terms of the services agreement you signed?---I guess they must have.

5 Yes. Now, during your engagement with Dental Corporation, there were two principal components making up the remuneration money that you were paid, or were entitled to be paid. Do you accept that?---What were those two?

10 Well, there was the monthly dental draw; do you accept that?---Yes. There was a monthly dental draw that I was paid, yes.

That dental draw, you agree, was based upon the fees that were collected from patients who you treated?---Correct.

15 There was also a potential for an annual bonus or shortfall payment?---Yes.

20 That amount, the bonus or the shortfall payment, was determined by reference to the fees collected from all of the dentists who were engaged to see patients in the practice; that's correct?---From all money collected by the practice?

Yes. Is that what you're saying? It's from all money collected by the practice?---Yes, because there were – there were hygienists.

25 I see?---And there was sale of product.

Yes. So in relation to that second component, either the annual bonus or the shortfall payment, components of that were the fees that were collected from patients you saw?---Yes.

30 Fees from patients that other dentists who worked in the practice saw?---Yes.

I think you said hygienists?---Yes.

35 Was there any other – what's – well, was there any other source of payment in respect of that?---Some patients bought dental product.

And was there on that dental product a premium or a fee over and above the cost of the product?---Potentially.

40 Yes. Just very broadly, as you understood it, if the annual cash flow generated from the practice exceeded a certain sum, you would be entitled to a percentage of that sum; correct?---As I understood the agreement, yes.

45 Yes. And Dental Corporation would be entitled to the rest?---Sorry, can you repeat that?

Yes. If the annual cash flow generated from the practice exceeded a certain sum, you were entitled to a proportion of that; correct?---The annual cash flow, yes, if it exceeded a certain sum, yes.

5 And if the annual cash flow exceeded a certain sum, the balance, what you weren't paid, was retained by Dental Corporation?---Yes. It was retained by them. Yes.

Yes?---They collected the money.

10 Likewise, if the annual cash flow generated from the practice was below a certain amount in any particular year, you would have to pay the difference to Dental Corporation?---Yes.

15 That happened on a number of occasions during your engagement, didn't it?---Is one a number?

Do you say it happened on one occasion?---It happened on – in the fifth year.

20 Yes?---There were circumstances.

Could I just – in relation to those two amounts – sorry, that annual cash flow amount, this broadly represents the position. And you can agree with me or not agree with me. All of the fees that were generated from the fee earners in the practice for a particular year was calculated; you accept that part?---What do you mean? Can you
25 define “calculated”?

Added up?---Yes.

30 And then from those – that total amount all of the expenses incurred in operating the practice were deducted from that amount; do you accept that?---That was my understanding.

35 Yes. Now, the – those expenses that were deducted from all of the fees that were added up or collected, that included the dental draw that was paid to you during the year?---Sorry, can you repeat that? Those - - -

The expenses that were deducted from all the fees that were collected to determine the cash – the annual cash flow amount - - -?---Yes.

40 - - - that – the amounts that were deducted included the amounts that were paid to you for your dental draw; correct?---Yes.

45 It also included the amounts deducted in respect of the dental draw paid to the other dentists?---Correct.

The hygienists?---No.

No. Were those expenses paid to the hygienists, or the amounts paid to the hygienists for their work – was that another general expense deducted from the fees that were collected?---The hygienists were paid salaries.

5 Yes. But those salaries in determining the annual cash flow amount – what you call the expected profits, those salaries were deducted from the amounts collected by the practice; correct?---Yes.

10 Yes. Also what was deducted from the fees generated by the practice were those expenses you say you incurred and were reimbursable. Correct?---I did incur some expenses.

15 Yes. So if I could ask you to – perhaps I will do it this way: if you go to paragraph 93 of your first affidavit?---Yes.

You say there:

I was reimbursed by the respondent for expenses incurred by me in connection with the dentistry services.

20 Now, did you understand that when you incurred those expenses that you're referring to there and you were reimbursed, those expenses were then included or taken off the fees collected by the practice in order to give the annual cashflow amount. Do you agree with that?---Yes.

25 Yes. So they were all brought into account in determining – I think you've said before or referred to profit sharing but to determine whether the practice made a profit?---Yes.

30 Yes. You then in that second sentence you say:

A copy of the respondent's records of expenses from 4 November 2000 –

35 I think that should be 2008 to 7 October 2014 appear as your annexure. Now, those amounts – do you accept that to the extent that you submitted those expenses to be paid they were reimbursed paid by Dental Corporation during your engagement?---They were.

40 Yes. Now, could I ask you to go to page 279 of your exhibit. Now, this is a practice report for the month of October 2012. Correct?---Yes.

45 Was this the document – I think you gave some evidence before to my learned friend, Mr Gibian, that you were provided with reports every month. Is this the document – the type of document you were referring to?---This is the type of document they provided every month.

Yes. Now, could I ask you to go to page 283. That document – you’re familiar with that type of document?---I’ve seen it. I – I haven’t looked at one of these documents for some time so - - -

5 This type of document, do you agree with me, that you were provided with this roughly on a monthly basis?---On a monthly basis.

Did you take the time to look at them when they were provided to you?---I did.

10 You did. So you would be familiar with the information that’s set out in the document?---Yes.

Just in relation to the first, I guess, number of lines under Revenue, we have – you’re the first Dr David Moffet and then the other names. Are they names – all the
15 doctors, are they all dentists or associate dentists?---No.

Who isn’t?---Sonny Foster is not. Stacy Billingham is not. Sales – other dental revenues is not.

20 So all – sorry, I should have limited that. So all of the names that are a doctor, were they dentists or associate dentists?---They were all dentists or associate dentists.

Yes. This document seems to indicate that in that particular month, other than yourself, Dr Katinyo and is it Dr Boler?---Yes.

25 And Ms Billingham, none of the other dentists generated any revenue that month. Is that correct?---Correct.

Were they still engaged to work in the practice at that stage?---No. Sorry, maybe Dr
30 Briggs was.

Right?---But Dr Katinyo not, Dr Ahmed not, Dr Corr not, Dr Gazanto not, Dr Simon not, Dr Santos Basse not, Dr Kumar not.

35 But they had in previous years been engaged in working in the practice. Is that correct?---Yes.

Yes. Could I just show you another document. Could I ask you to – for the first document or first page of that document, do you accept that this is the report –
40 similar type of report that we’ve just been talking about. Do you accept that?---It looks like it.

This would appear to be for the period ending 31 December 2007 so just after you had entered the first engagement. Do you agree with that?---Yes.

45 Could I ask you to go to page 4?---Yes.

I would draw your attention again to that revenue box. It's similar to the one that we've just been talking about?---Yes.

5 In relation to the names that appear under there – under your name, were they persons who worked in the practice before the engagement – or the relationship between you and Dental Corporation started?---Yes.

10 Could I ask you then to go to the document – or the report that starts at page 6. Do you accept that this is the report of the type that's annexed to your – or exhibited to your affidavit but for the month of October 2008 so four years before?---Yes.

Yes. Could I ask you to go page 10. Again, this is a similar type of document or information as that we've just been talking about. Do you agree with that?---Yes.

15 Again, just drawing your attention to the revenue column and the names under your name. It appears for – well, that month in particular that a number of the dentists or associate dentists don't seem to have generated any revenue. Is that correct? Is that actually the position?---It looks that way.

20 Can you tell now or identify now whether any of those were still engaged in the practice at that stage, that is, October 2008? Can you recollect?---That's 10 years ago. Based on this document that you've given me it would appear that some of those people were engaged in the practice in October 2008.

25 Do you mean that those ones who were earning or generating revenue. Is that correct?---Yes.

30 What about the ones that there doesn't seem to be a figure in respect of the – under the actual column there?---So we have Dr Ben Lee, Dr Jocine Felito, Dr Max Gazanto, Dr Simon Briggs, well, he was engaged at that time and as the document to page 283 – sorry, our reference to it, he – Simon Briggs was still engaged right up to my departure in 2014. Dr Wendy Shiu, it appears not. And Michelle Price – I think Michelle Price was there for two days as a hygienist.

35 Yes. Can I ask you this: in relation – just focusing on the expected profits, the figure for the expected profits or the annual cash flow figure, do you accept that that could have been achieved in large part by work done by dentists other than yourself?---No.

40 You don't; why is that?---Different dentists work at different rates and do – and diagnose differently and, so, historically through the time at the practice I was definitely one of the dentists that was a – a high producer.

45 Sorry, when you say higher producer, do you mean a high income earner?---A high – high producer – sorry, production meaning the amount of money that - - -

Yes?--- - - - was collected from my patients.

Yes. But if you could encourage or persuade or train or develop those other dentists to achieve what you were doing or the service that you were providing that would have an effect on the revenue generated by those dentists; do you accept that?---I don't believe all dentists have the potential to work as well as I did.

5

Yes. Is it part of your current job or function or role, that type of consulting, getting the best out of dentists?---No.

10

It's not. Isn't that a part of the ultimate patient experience?---No.

No. We will come back to that in a moment. If I could ask you, now, to go to page 314 of your exhibit. Sorry, your Honour, could I – your Honour, could I tender that bundle of documents.

15

HIS HONOUR: Yes. Just bear with me for a sec. Now, what's your view, Mr Gibian? Mr Gibian?

20

MR GIBIAN: I'm sorry, your Honour. Look, I think that the witness identified them, so I don't think I object to the tender. I was just asking whether we had been provided in discovery with all of these reports or not. And I'm not sure that we had seen these ones before. So whether we would want to compare them to – given they're produced now to compare them to others or to have an opportunity to review the others - - -

25

HIS HONOUR: Do you object to the - - -

MR GIBIAN: - - - if some point has been taken about these particular - - -

30

HIS HONOUR: Do you object to the tender?

MR GIBIAN: No, your Honour.

HIS HONOUR: Thank you.

35

MR GIBIAN: I was just foreshadowing that we may wish to take some short time just to consider that issue I raise.

40

HIS HONOUR: The consolidated practice financial results shown to Dr Moffet being pages 1 through to 17 will be marked as exhibit R1.

EXHIBIT #R1 THE CONSOLIDATED PRACTICE FINANCIAL RESULTS SHOWN TO DR MOFFET BEING PAGES 1 THROUGH TO 17

45

HIS HONOUR: Yes. Now, you wanted to go to page 314?

MR DARAMS: Yes.

5 Now, Dr Moffet, this is an example of the tax invoice that was provided to you during your engagement with Dental Corporation?---This is a tax invoice that was provided to me.

Yes. I think you've annexed a number of similar types of invoices in your exhibit, that's correct?---Yes.

10 Just – I'm not going to take you to all of them. I just want to ask you about one of them and ask you some questions after that. Just could you help me with the amounts included in the tax invoice. So the total collection for April '08, that first line, 169,152.70 - - -?---Yes.

15 - - - do you know what that is in respect of?---Yes.

What is it?---That would be the amount of money paid by patients seen by me.

20 Yes?---To Dental Corporation.

The "less lab fees for March 2008", what are lab fees? What are the lab fees? Do you understand what they are?---I know what they are.

25 Can you tell us what they are?---Laboratory for – lab fees is a short – a term short for laboratory fees. These are fees charged by external businesses that provide dental appliances. I use the word appliances like dentures, retainers, orthodontic aligners, crowns, bridges. And so, they are – that is an expense incurred by the practice - - -

30 Yes?--- - - - in the treating of certain patients for certain conditions.

Would it be fair to assume that those costs or those expenses were in respect of patients that you provided services to?---The lab fees for March 2008 would – would reflect on fees charged by laboratories for patients seeing in March 2008.

35 Patients seen by you or - - -?---By me.

40 Yes. And then, the Dental Service Commission, 68,000, that's the amount that you received of the net collection amount; is that correct?---If that amount is 43 per cent of the 160 then that would be what I received.

45 What's the third component adjustment for April '08, 8333. What's that amount?---I would have to refresh my memory on that.

Well, what do you need to refresh your memory?---I'm not sure what it applied to.

You got that figure, it seems to be, from these tax invoices every month, if I'm accurate?---It applied for a certain period of time, and then it ceased.

Well, can you remember when it ceased?---I'm not sure. I can't remember.

Well, just – I mean, it seems to be, well, a regular payment of – or do you accept it's a payment to you of an amount of money?---It – it – I'm assuming it is. Yes.

5

Do you have no recollection now as to what that amount is?---Well, it's \$8333.

No. But what's it's in respect of?---I – I don't have any recollection as to what it is.

10 Was it - - -?---For.

Was it part of the transaction payment paid to you in respect of the purchase of your practice?---Is it mentioned in the agreement?

15 Well, I'm just asking you?---I'm not sure.

Okay. Now, I want to ask you about some other documents, so you can close that folder.

20 HIS HONOUR: Thank you.

MR DARAMS: Yes. For the witness, please.

25 Now, Dr Moffet, just put that down. I just want to ask you a few questions before we go to some of the documents in there. Each year during your engagement with Dental Corporation you prepared and submitted to the ATO your personal tax return, correct?---Yes.

30 Those tax returns, did you prepare them yourself or did you have an accountant - - -?---I had an accountant prepare them.

You provided the information to the accountant to prepare the reports?---I did.

35 You understood, didn't you, that the information that you were providing to your accountant to prepare those tax returns had to be correct?---Correct.

40 Do you recall that when you had to sign off on your tax returns each year, there were statements to the effect that you agreed or understood that the offences is if you provided false or misleading information?---Correct.

Could I ask you to go to page 59 of the bundle of documents? The pages are numbered in the bottom right-hand corner. Now, just – at the top of the page, it says "taxation estimate for the year ended 30 June 2018". Do you see that?---I do.

45 So that would have included the last month and a bit of 2007 and the first six months of 2008 in which you were engaged by Dental Corporation?---Yes.

Can you just tell me – it says the date prepared there – 26 April 2018 – was that the date you actually did your tax for that particular year, or is that the date that this document was printed off for you or provided to you or - - -?---This – this – sorry, since this document was filed – and I – to the Australian Tax Office – and I’m
5 assuming that was done sometime closer to 2008 than today, this is the first time I’ve seen this document with that date on it.

I guess what I’m asking- if you can help me whether or not your tax return for the year ended 30 June 2008 was prepared earlier this year or whether that date of 26
10 April 2018 represents something else?---I don’t know what that date represents.

Do you recall now whether you prepared your income tax return for the year – ended 30 June 2008 closer in time, that is, around that period of time – June 2008/2009?---I just said that.

15 You don’t know?---I – I - - -

Sorry, you did?---I said that to you.

20 Yes. Okay. Could I ask you to go to page 65?

HIS HONOUR: Sorry, which page?

MR DARAMS: 65.
25

HIS HONOUR: 65. Thank you.

MR DARAMS: Can I draw your attention to the component there that says
30 “business and professional items schedule 2008”; do you see that? P1 – personal service and income?---I see that line, yes.

And the box, then, is marked N; do you accept that’s a no?---If that were – it’s marked “N”; I don’t know what “N” means.

35 So then I draw your attention to P2 where the description of your main – main business or professional activity is dental surgeon; do you see that?---Yes.

In P3, it says “number of business activities” – you see it’s four. Are the business activities for that year that you engaged in olive growing, timber hewing and forest
40 planting?---I know that at that time I was engaged in some timber investments.

Well, can I ask you to go to page 266 – sorry, 66?---Yes.

45 Are they the activities you say you were engaged in in that year? They just don’t all seem to be timber growing?---Sorry, what – there’s olive growing - - -

Yes?---Timber – forest harvest, forest planting – there’s three.

Yes?---And the fourth one would be dentistry, I'm assuming.

HIS HONOUR: Sorry, page 266?

5 MR DARAMS: Sorry, 66, your Honour. I did say 266 and then I corrected myself. I do apologise, your Honour.

HIS HONOUR: It's okay. That's okay.

10 MR DARAMS: Could I then ask – just so I'm clear, are they just – page 68 – I just want to go through these. That's a rental property schedule for a particular property in Elizabeth Bay; you see that?---Yes.

The next page, 69, that's for a property at Penrith?---Yes.

15

Page 70 – another property in Penrith?---Yes.

Page 71 – another property in Penrith?---Yes.

20 72 – a property in Penrith?---Yes.

73 – another property in Penrith?---Yes.

Another property in Penrith at page 74?---Yes.

25

They're just – I just want to get this clear on none of those properties are properties that you used to generate or operate what you've identified as your business activities; that's correct?---No.

30 No?---Sorry, no, they weren't. They were rental properties providing accommodation - - -

Yes?--- - - - to residents of Penrith.

35 Yes?---Is that wrong?

Could I then ask you to go to page 82 – draw your attention to where it – the trade says – “profession, trade or business income and deductions including primary production”, and you've identified there business activity “dental surgeon”; you see that?---Yes.

40

And then under the line “income”, see there “gross income from business sources”?---Yes.

45 Your professional fees from Marsden and Victoria practice?---Yes.

And then dental draw from Dental Corp?---Yes.

Now – and then there’s a gross business income or loss, but you seem to have made a significant amount of income that you – do you accept that?---There’s – it’s an amount.

5 Yes. In relation to the professional fees from Marsden and Victoria practice, was that the name or – or, sorry, Marsden and Victoria, they’re the streets at which Active Dental was operating - - -?---Correct.

- - - prior to the engagement of - - -?---Yes.

10

And they are the locations where, after your engagement – or during the engagement of you by Dental Corporation the practice operated from?---Sorry, those are the locations that I sold the dental practices to Dental Corporation.

15 And during the engagement, you – to the extent you provided services, you provided them from those practices at those locations?---I primarily provided my services from Marsden Street. Other dentists worked at the Victoria Road practice.

20 Yes. Now, then we see less deductions, and you’ve identified a number of categories of deductions and then you’ve identified in your tax return amounts in respect of those deductions; you see that?---Yes.

25 Are you able today – well, I put this proposition: what you’re saying to the ATO here is that in earning that income from those two sources identified under income, you incurred these expenses. That’s what you’re saying; is that correct?---What I’m saying is that during that year – 2007 to 2008 – these expenses were incurred.

30 Incurred in respect of earning that income; is that what you’re saying?---They may have all – there is no date applied to this, as you can see, so they’re in – only a date range of a year. These expenses may have primarily applied before I sold my business to Dental Corporation.

35 That’s what I was going to ask you. Are you able to identify now how many or what part of those expenses were incurred in earning the professional fees from Marsden and Victoria practice?---Now, this instant? No, I’m not able to.

40 Could I ask you now, do you accept that – are you able to say – no, I withdraw that. Just thinking back now, and looking at this – the information presented on this page of your tax return, do you recall in the years preceding your engagement with Dental Corporation whether you completed tax returns – so, for example, the period – so for the year ending 30 June 2007 – where you carried out a similar – included similar information in your tax returns?---I assume I would have, yes.

45 Just if I can go over the page, 83, you there have identified some of the – if you accept this, you’ve identified there some of the expenses incurred in your olive growing business. You accept that?---Correct.

Page 84, you've identified the expenses incurred in your timber hewing and also your – I think the forest business?---Correct.

5 Likewise over at page 85. Now, I want you then to go to page 97, please, of the tender bundle. You see that this is your – well, start of your tax return for the year ended 30 June 2009. Do you see that?---I do.

10 And I've got some similar questions, but I won't – because I expect you will give the same answer – but in relation to date prepared 26 April 2018, you can't assist us whether this tax return was prepared earlier this year?---I'm – this tax return was not prepared earlier this year.

Yes?---My assumption would be that this was the date that it was prepared for you.

15 Yes. Do you mean produced in respect of the discovery orders in this case?---Probably.

Yes?---If that's the terminology.

20 Yes. Could I then ask you then to go to page 103, and we see there, again, in P1 and P2, and the like, similar description of your main business activity. Or, in particular, P2, being dental surgeon?---Yes.

25 You were still doing four business activities by reason of what's set out in P3 that year?---Yes.

30 Could I then ask you to go to page 120. On this page of your tax return for that year, we again see under the income other gross income from business sources. This is in respect of your business activity as a dental surgeon, you accept that?---Yes.

Professional fees from Marsden, Victoria practice of \$5017?---Yes.

Then the amount from Dental Corporation; you see that?---I do.

35 I want to ask you again, there's obviously a much lower amount this year from – sorry, recorded in this year in respect of the Marsden, Victoria practice?---Yes.

40 You see that. Were you still in this particular year operating the Marsden, Victoria practice?---No.

Do you have any independent knowledge now as to how or why you've recorded income in that particular year from that practice?---I have no knowledge, but I – I – I could probably hazard a guess.

45 And what would that guess be?---Somebody paid for treatment that they incurred before I sold the practice to Dental Corporation at a date that fell into this financial year.

I see. Yes. That seems to be logical explanation?---That would be my thought but
- - -

You don't have any other explanation for it, though?---Off the top of my head, no.

5

Well, can I then ask you about the deductions. Now, you have again identified – well, you accept this. In that year, end of 30 June 2009, you weren't actually operating the Victoria Marsden practice?---No.

10 No. So in respect of those deductions you've identified in that – or that list under the income there, they were all expenses incurred in earning the income associated with the Dental Corporation; correct?---Some of those expenses could have been for rental properties, or are they explained on another page? I'm not - - -

15 Well, just – don't guess about whether these expenses were for something. What I'm suggesting to you is from the taxation returns that you've provided to the – submitted to the ATO, you've identified a number of expenses that you've incurred, and what I'm suggesting to you is that those expenses have been incurred in earning the income from Dental Corporation. What do you say about that?---Is there another
20 page - - -

No, just focus on my – on my question.

25 MR GIBIAN: Well, he probably just wants to look at the document?

MR DARAMS: Well, no, he has asked me a question.

HIS HONOUR: Sorry, is there an objection or not?

30 MR GIBIAN: I was only – just if the witness wishes to look through the document, he should be provided with that opportunity.

MR DARAMS: If he wants to look through the document to answer my question, then feel free, Mr – Dr Moffet, sorry?---Can we go back to your question?
35

Yes?---What was your question?

40 The proposition I'm putting to you, Dr Moffet, is that the expenses you've identified there were expenses you told the ATO or the Commissioner of Taxation in respect of the year end of 30 June 2009 were expenses you incurred in earning the Dental Corporation business income?---These were expenses that I would have incurred in maintaining my standard and knowledge as a dentist.

45 Well, is that the answer you want to give to the question I put to you?---I don't have the exact details of these, and – and this is 2009, as to what these receipts are. These are cumulative expenses. Do you have them?

Well, just in this, Dr Moffet, I get to ask questions. Let me put a number of propositions to you. I asked you some questions before about your evidence about being reimbursed for expenses being incurred by the practice. Recall those questions?---Mmm.

5

Yes. You've given some evidence and I will come to them in a little bit more detail in a moment?---Sure.

10 So you will get the opportunity. But you submitted expenses for costs you say you incurred; correct? To Dental Corporation?---I did.

You were reimbursed for those costs - - -?---I did.

15

- - - or expenses?---I was, yes.

You're not saying that those costs are reflected in here, are you?---No.

20

No, because that would be double counting or something along those lines, wouldn't it?---It is.

Yes?---It would be. It would be.

25

And so that these expenses here, you agree with me, were other or additional expenses that you – we accept this is being truthful – you incurred in generating that income for that year. Do you accept that?---Yes.

Yes. That's certainly the position you've indicated to the Australian Taxation Office?---Yes.

30

You don't resile from that position giving your evidence today?---My thoughts are that these things here, some of these seminars that I attended were related to business development outside of the practice of dentistry for Dental Corporation.

35

Are you saying that that wasn't incurred in earning that income; is that what you're now saying?---I'm sorry?

40

Are you now trying to say that that expense – if that was an expense, that that wasn't incurred in earning that income?---What I'm saying is that if I attended a seminar on my own time that made me more knowledgeable on financial investment, then that would be a tax deductible expense but not one due to Dental Corporation.

45

It would be one deductible to – if you were continuing operating a business as a dental surgeon in that particular year, that would be deductible; you accept that?---If I was – if I was - - -

Well, you were - - -?---Sorry, you lost me on that.

Yes. Are you saying that, using that as an example, going to a seminar, are you saying that that's deductible because you're outside Dental Corporation, all the work at Dental Corporation, that's an expense you incurred in operating a dental business? Do you - - -?---No.

5

No. So which one of these are the – in this particular year, which one are those are the seminar you were talking about?---Well, there's – there are – down there you can see \$3491 - - -

10 Yes?--- - - - worth of seminars.

Yes?---They may not have been dental related seminars but they were related to income production.

15 See, what I want to suggest to you is that they were related to the income you've identified above; do you accept that as a proposition?---No.

No. Now, can I ask you now to go to page 130. This is your income tax return for the year ended – or the start of your income tax return for the year ended 30 June 2010; do you see that?---Yes.

20

And could I ask you to go to page 131. Now, I just want you to just draw your attention to the line that says "business income", 514,156; do you see that?---Yes.

25 I just want you to note that figure for a moment. And then I ask you to go to page 138. Again we see the familiar identification of your main business activity or professional activity that year; do you see that? Dental surgeon?---Page 138.

Yes?---Where is – oh, P2?

30

Yes?---Sorry, yes.

And then if we then go to page 155?---Yes.

35 We see the – here, again, the similar information from the preceding – or the similar page from the preceding – as the preceding years, but this year you only identify the business source's income as the Dental Corporation amount; you see that?---Yes.

40 And then I just want to come back in a moment and just, again, there are a number of, again, deductions. I want to suggest to you that what you've told the ATO in that particular year for that financial year, that they were the expenses incurred in generating that income from – or that business income identified in the panel above; do you accept that?---Yes.

45 The income, the gross business income, they are the amounts paid, obviously, by the respondent to you; correct?---Yes.

And a similar question in relation to deductions: none of those expenses there were expenses that you were reimbursed for; correct?---Correct.

5 Do you accept that that – and I just want to draw your attention to the net business income, 514,156?---Yes.

If I could just ask you to go back to page 130.

10 HIS HONOUR: 131 I think it was.

MR DARAMS: 131, I apologise. You accept that the figure 514,156 on page 131 is the same figure – or is a representation or refers to the same figure on page 155; correct?---It appears that way, yes.

15 Well, there's no other explanation that you are aware of for that figure; is that correct?---No.

20 Now, I want you to skip ahead a few pages to 228, please. Now, this is your – are you there?---I'm here.

This is your tax return or the start of your tax return for the year ended 30 June 2013?---Yes.

25 So this is the first year after the end of your – well, includes part of the expiration of the five-year first engagement; correct?---Yes.

And I ask you to go to page 229?---Yes.

30 I just draw your attention to the line, business income negative 35,475; do you see that?---Yes.

Now, I want you to go to page 255, would you, please. Or, sorry, if you could go to page 236, please, first?---So which page do you want me to - - -

35 Page 236?---236.

And, again, just – you've identified for that particular year that your main business or professional activity was dental surgeon; do you see that? P2 again?---Yes.

40 Likewise, you're still doing three other activities that year?---Yes.

45 Is that correct? Could I ask you to go over page 237? Just – the first activity one is dental surgeon and it says there in reference to partnership or sole trader there's an "s". Do you see that?---Yes.

I want to suggest to you that means that you've identified that you were operating as a sole trader; do you accept that?---Well, I wasn't operating as a partner.

You've got a similar identification in relation to your forest planting and your timber joinery. Had the olive growing stopped at that stage?---It must have.

5 Yes. Does that mean that it would just go back to – and this is just for my clarification – that the reference in P3 to four activities that year might be incorrect?---In that it says four instead of three?

Yes. Yes?---I don't know.

10 Can I then ask you to go to page 255?---So there's a reference to olive growing on 256.

15 Is there? I see. Yes, I see that. Maybe the inaccuracy might have been in those preceding pages not identifying the olive growing. But if we can just focus back on 255, please?---Yes. 255, yes.

So you identify in that year gross income from business sources, again, Dental Corporation. This is the dental draw; is that correct?---I assume so, yes.

20 Was there any profit share that year, do you recall?---2013?

Yes?---No.

25 No. And so, again, you've identified what you're telling the ATO were the expenses incurred in that year in respect of earning that income; you accept that?---Yes.

I just want – can you help me out about with this line Dental Corp income adjustment. What's that?

30 HIS HONOUR: Sorry, where is that?---That's - - -

MR DARAMS: Other – under other expenses, the second one down. It's 291,125.

35 HIS HONOUR: Yes. Thank you.

MR DARAMS: Can you tell me what expense you've claimed that year?---This would be the – as put forward by Dental Corporation to me, this was – this would – this was claimed as part of the – the loss adjustment.

40 So just – let me put this again. You say - - -?---Sorry, I'm not an accountant.

45 Well, you've signed off on these as being accurate and correct?---Based on the information that Dental Corporation gave me and that I gave my accountant from Dental Corporation.

Yes. Yes. Aren't you saying this? You're saying, "Mr Taxation Commissioner, in respect of that business income of 407-odd thousand dollars this year, you need to

take off this expense of 291,125 that I've incurred in earning that because it's an expense that I'm being charged". Isn't that what you're saying?---We're talking about something that happened five years ago and I'm still having memory difficulties in recalling the exact wording of the correspondence from Dental Corporation about it.

Well, I'm not asking you about any correspondence from Dental Corporation. I'm asking you about the figures you've put in your taxation returns?---Yes.

Well, what I'm suggesting to you is that you told the ATO, or a representative of the ATO, "Well, in respect of that business income for that particular year, here's an expense that I want you to deduct because it's an expense I incurred in generating that business income". Do you accept that?---It is an expense that I incurred in generating that business income.

Yes. And all of those other expenses that are identified in the deductions, they were all expenses you incurred in that particular year in generating that business income; correct?---No.

Are you saying that you've claimed an expense for a particular financial year that you didn't incur in earning that income? Is that what you're saying?---I – as I said previously, I claimed expenses here for businesses that weren't generating income.

So what were the other businesses that weren't generating income that year that you were operating?---I was starting a consulting business.

As I – can I – I understand – so I can understand the evidence you've just given, are you saying that – saying to the ATO, "Look, there are – some of these expenses weren't actually incurred by me in generating this income, but I still want to a claim a deduction for them". Is that what you're saying?---I would have to find out exactly what those expenses were.

Well, do you want to stick to that evidence you've just given?---Sorry?

Do you want to maintain that evidence you've just given?---I was suggesting that that could possibly be what it is. But I don't - - -

Well, I don't want you to - - -?---I don't have the exact information in front of me. You've given me a summary.

Well, I'm just asking you about your tax returns, and what I'm suggesting to you and the proposition I'm putting to you is that these are all expenses that you incurred, or you've told the ATO that you've incurred in earning that business income for that particular year. You can either accept that or not. That's the proposition.

MR GIBIAN: Well, the witness has answered the question and he says he doesn't know what the expenses are.

HIS HONOUR: I will allow the question.

THE WITNESS: Sorry, can you repeat the question?

5 MR DARAMS: The question – my proposition – and you can either say “yes” or
“no”. You can agree with it or disagree with it. The proposition I’m putting to you
is that the expenses you’ve identified there are those you told the ATO in relation to
that particular year end to 30 June 2013 were expenses you incurred in generating
10 that business income of \$407,396?---The wording there says “other business
expenses”. So does the “other” apply to expenses, or does it apply to “business” –
other – is it another business or is it - - -

Dr Moffet - - -?---another expense?

15 Dr Moffet, these are your tax returns. These are your tax returns that you agreed
with my question earlier had to be not including any false or misleading information.
Do you accept that?---I agree.

20 That was your evidence?---Yes. You’re asking me to remember what adds up to that
from - - -

Well, what?--- - - - five years ago. I can’t - - -

25 What I’m asking - - -?---I can’t - - -

What I’m asking - - -?---I can’t tell you - - -

What I’m asking?--- - - - exactly.

30 Sorry. What I’m asking you, Dr Moffet, is do you have – other than speculation or
supposition, do you have any evidence that is contrary to the proposition that I put to
you that these were expenses you incurred in generating that business income in that
particular year?---You made reference to a page - - -

35 Dr Moffet?--- - - - that qualified me for primary producer. Did you – didn’t you refer
to a page where income was generated – some of these expenses may have been
related to that.

40 Well, again, I don’t want you to give evidence that is speculation or supposition on
your part. What I want you to - - -

MR GIBIAN: Well, I object to that. The witness can answer the question as best
he’s able to do.

45 HIS HONOUR: What I think I will do, Mr Darams, is I will just adjourn for a few
minutes, which will allow the witness an opportunity to go through his return/

MR DARAMS: May it please.

HIS HONOUR: And rather than speculating, if there's some other expense he can identify it.

5

MR DARAMS: Yes. That's appropriate.

HIS HONOUR: So can you just adjourn the court until, say, 12.30?

10 MR DARAMS: May it please the court.

ADJOURNED

[12.20 pm]

15

RESUMED

[12.33 pm]

HIS HONOUR: Yes.

20

MR DARAMS: Dr Moffet, having had an opportunity, could you identify – were you able to identify any document or page that assisted?---No.

25 I want to draw your attention the reference, depreciation, do you recall now what that was for? So this is on page 255?---No.

Could I ask you to go to page 265 and could I just draw your attention to – this is a page for your depreciation schedule, do you accept that?---It looks that way.

30 And just draw your attention to a group which is identified as seven – Dental Income?---Yes.

It appears that you're saying to the ATO that you're claiming depreciation of 1592 in respect of computer monitor and keyboard, do you accept that?---Yes.

35

Yes. Now, could I ask you then to go to – and just before we leave 255 – so the proposition that I did put to you before and I wasn't sure whether you answered it and I understood you wanted an opportunity to consider the documents before answering, but the proposition I put to you is that what you were telling the ATO in respect of that – that income year ended 30 June 2013, was that you incurred those expenses identified in the – under the less deductions box in respect of earning the business income of 407,396, do you recall that? That's the proposition, do you agree with that?---And that was your proposition?

45 Yes. Do you agree with that?---Do I agree with - - -

My proposition that – well, I will go back one. The expenses you've identified there, they were expenses you incurred in earning that income in that year, correct?---These are totals of expenses that I incurred in the year ending June 2013.

5 In respect of earning the income that you've identified as the business income of 407,396, do you accept that?---I'm assuming that, yes, is correct.

Having a look at the documents and given the opportunity, you haven't been able to identify any other income which those expenses are related to, have you?---I'm not –
10 Mr – Mr Darram, sometimes I walk into my pantry and I think I should be in my fridge, your Honour. Sometimes I walked around my house looking for my car keys and I can't remember where they are. I've got a father with dementia. He had a sister and a brother with dementia. And I find your line of questioning as to why –
15 adequate representation and evidence as to what those numbers mean – I find that challenging.

HIS HONOUR: Well, Dr Moffet, your job is to answer questions. If you can't answer a question, you say so. Can we resume the cross-examination.
20

MR DARAMS: We will, your Honour.

Could I ask you – I've just got a few more questions about these tax returns, Dr Moffet, and then I will move on. But could I ask you to go to page 298 and again,
25 this is the start of your tax return for the year end 30 June 2015, do you accept that?---Yes.

Could you go to page 299?---Yes.

30 You've identified there as – in the line Business Income – 136,213?---Yes.

Yes. I just have you note that, please. And then I ask you to go to page 308. I draw your attention once again to P2?---Yes.

35 You see there you're identifying again as your main business or professional activity for that year as dental surgeon?---Yes.

And then if I can then ask you to go to – well, I think, can I ask you then to go – you've identified a number of business activities that year as four?---Yes.
40

You see that. Go over the page – 309. You see forest planting. That's the same forest planting you've identified previous years?---Yes.

Then timber hewing?---Yes.
45

And then the third activity is – this is a new one for this year, isn't it, writer?---Yes.

Yes. And then could I ask you to go to 328 – page 328.

HIS HONOUR: Sorry, which page, 328?

5 MR DARAMS: Page 328, your Honour.

And – so under the income Dental Corporation, the amount there, that's again, the amounts that are paid to you in that particular year by the respondent?---Yes.

10 Referring income, you've identified this under your – on the main – or the dental surgeon business. Is that income referable to dental surgery work you did in that year?---I'm not sure.

What's referring income referred in respect of then?---I'm not sure.

15

Can you recollect now whether in that financial year, that is, ended 30 June 2015, you engaged in any other work for which you were paid a remuneration – or paid an amount of money of 9550?---I left working Dental Corporation in 2014, so there were six months of that financial year, 2015 – January through to June that I could have engaged in other income generating processes.

20

Could I suggest this to you that to the extent that you did and given you can't now recall what referring income is a reference to, it doesn't appear that in those six months that you engaged in anything or a business that was that significant or memorable, do you agree with that?---Sorry. I don't – I did engage in businesses that were significant and memorable.

25

Were those the businesses which you have identified as a dental surgery – or dental surgeon, sorry, and for which that referring income relates?---No.

30

Okay. Well, just in relation to referring income?---I would need to see the receipts.

Yes. I will come at that another way. I want to suggest to you that to the extent that you've identified expenses under the table less deductions for that particular year, I put this proposition to you, that they are expenses that were incurred in earning the business income from Dental Corporation, what do you say about that?---No.

35

No. You don't accept that?---No.

Why don't you accept that?---I can't imagine that advertising copywriting would come under a Dental - - -

40

So we're talking about - - -? - - - Corporation income.

Okay. So take that one out. So that could possibly be referable to referring income? Well, it could only be referable to referring, do you accept that?---I'm not sure what referring income means.

45

Well, if you don't know what referring income means, you can't be certain that advertising copywriting is referable to that income at all, can you?---Didn't I just answer that?

5 Well, see, what I want to suggest to you – well – is that these expenses you've identified or the deductions, they were expenses you say you incurred in generating that business income from Dental Corporation?---And the referring income.

10 Can you help me – can you assist us with what are those expenses are associated with referring income?---I can't recall.

Okay. Dental Corp income adjustment, can I draw your attention to that – that line?---Yes.

15 That's not associated with the referring income, is it?---I'm not sure.

Is that an honest answer, doing the best - - -?---I'm not sure is an honest answer. I'm
- - -

20 Is that the best you can do today?---That's the best I can do today.

Well, let me put this proposition to you. You included that expense in the preceding year, do you accept that – well, the previous year – or expense of that type?---An income adjustment to Dental Corporation?

25 Correct?---If it was there, it was there, yes.

30 Do you not recall that line of questioning we just went through a short time ago?---Yes.

In the year before – sorry, in the financial year ended 30 June 2014 you recall that you included an expense Dental Corp income adjustment?---Yes.

35 The only income that you recorded in that - - -

MR GIBIAN: I think it was actually the year ending '13 that he was asked about.

MR DARAMS: I stand corrected if that's right.

40 MR GIBIAN: Nothing went to - - -

MR DARAMS: No, no.

45 MR GIBIAN: - - - for the purpose of that question.

MR DARAMS: You are right.

MR GIBIAN: For correctness.

MR DARAMS: I accept that. For the year ended 2013 but in that year there was no referring income. Do you accept that? The year ended 30 June 2013?---Did it say
5 referring income on that page?

Well, you can take it from me it didn't. What I want to suggest to you then is that the expense Dental Corp income adjustment in the year ended 30 June 2014 is an expense you have claimed is referable to the income generated by you from Dental Corporation. Do you accept that proposition?---It's logical. Yes.
10

Yes. Because it doesn't seem logical that it would be referable to referring income, correct?---No.

15 Again, can you tell me now – can you tell the court now what that expense Dental Corp income adjustment was, or you don't recollect any more?---I don't – I don't recollect the exact terminology of what it related to.

Yes. And again, you just – could I ask you to note depreciation. Do you see the
20 \$1776?---Yes.

Can I just ask you to go to page 377 – 337, my apologies, 337?---Yes.

And then do you see in group 7 “dental business”?---Yes.
25

Do you accept it's another asset that you're depreciating that year in respect of the dental business?---Yes.

And that's the dental business from which you were – the income from Dental Corporation. Correct?---Yes.
30

Yes. Now, I want to put this proposition – or a number of propositions to you, Dr Moffet, that – do you accept these, that for each of the income tax years during your engagement with Dental Corporation and for which you received payment from
35 Dental Corporation, you have told or represented to the ATO that that income was from a business you were operating that you described as a dental surgeon. Do you accept that?---I was employed as a dental surgeon.

Is that the answer you want to give?---I don't believe I was operating a business as a
40 dental surgeon.

Isn't that – that's my proposition that I'm putting to you, that that's what you have represented and told to the ATO in those documents. Do you accept that?---I was
45 working as a dental surgeon and I paid the tax on the income base that I earned.

HIS HONOUR: Dr Moffet, the question has been put to you twice. Can you please answer the question that was put to you?---Sorry.

MR DARAMS: Do you remember the question?---Can you repeat it again.

Yes. That – the proposition I was putting to you was that for each of the years of financial taxation years during which your engagement with Dental Corporation
5 extended and for which you received payment from Dental Corporation, you have told or represented to the ATO that that income from Dental Corporation was from a business that you were operating described as a dental surgeon. Do you accept that?---If that’s what I’ve represented to the ATO then that’s what I’ve represented to the ATO.

10 See, I want to put this to you based upon the evidence you’ve given earlier is that what you told the ATO in your tax returns for those years was correct. Do you accept that?---As far as I was led to believe, yes.

15 It was correct because you understood that it would be an offence to provide false or misleading information to the ATO?---The information I provided to the ATO was to the best of my knowledge at the time.

20 And your position now under oath is that you were not in fact operating or conducting a business as a dental surgeon each of those years. Is that what you’re saying now?---Yes.

You say you were doing that as an employee of the respondent?---Yes.

25 Your Honour, I’m not quite sure what – when your Honour proposes to sit. I was going to move on to another topic now.

HIS HONOUR: Right. We will adjourn until 2.15. How much longer will you be roughly?
30

MR DARAMS: I will probably be another – I think about another hour or – proceed through – there’s a few other things I have to cover off.

HIS HONOUR: Thank you. We will adjourn until 2.15.
35

<THE WITNESS WITHDREW

40 **ADJOURNED** [12.49 pm]

RESUMED [2.19 pm]

45 HIS HONOUR: Mr Darams.

MR DARAMS: Yes.

HIS HONOUR: Dr Moffet, can you resume your seat in the witness box and if I can ask the court officer to re-administer the oath.

5

<DAVID RODERICK MOFFET, RESWORN

[2.19 pm]

10 <CROSS-EXAMINATION BY MR DARAMS

HIS HONOUR: Thank you, Dr Moffet. Please take a seat.

15 Dr Moffet, you accept, don't you, that there's no provision in the services agreement which – set out that you had to provide the dentistry services under the service agreement on any particular days or number of days of the week? And please feel free to go to the services agreement if you want to?---Now, which section was that?

20 I haven't indicated a section?---Sorry, I have it here. I've found it. There was nothing in the services agreement that I can remember saying which days that the practiced need to be open.

25 Yes. And at no stage were you given any direction by Dental Corporation that you had to keep the practice open on particular days between hours or something like that?---No.

30 No. It's also the case that you decided the days upon which you would work. Correct?---I continued working the same days that I had before I sold to Dental Corporation.

HIS HONOUR: That's not an answer to the question. Can you answer the question please.

35 MR DARAMS: You determined the days upon which you would work during the engagement with Dental Corporation?---Yes.

40 You determined, in respect of those days, that you decided you wanted to work, you determined when you would start on those particular days?---Yes.

You determined when you wanted to take any particular break on any one of those work days, whether it be for lunch or smoko or something?---I don't smoke.

45 Sorry, I was using that in the colloquial sense. Any other break during the day?---If I got a break, I was lucky.

And do you recall now for each of those particular years of your engagement how many weeks vacation you had each year?---No, I don't recall.

5 If I said to you that at least in 2011 you had 15 weeks vacation, that sounds about right, doesn't it?---No. I – I don't recall having that.

Well, let me show you a document – actually, before I do that, ultimatepatientexperience.com – that's a website, isn't it?---It could be.

10 Don't you write a blog?---I do.

Do you post – don't you post that on theultimatepatientexperience.com?---That's – you've just named a second dotcom URL address to the one that you just named previously.

15 Well, which website do you publish your blog on?---I publish my blog at theultimatepatientexperience.com.

20 Sorry, it was my error that I didn't include theultimatepatientexperience.com?---Correct.

I see. Thank you for correcting me. What about a report called Ultimate Dental Report. You're familiar with that?---Yes.

25 Would it surprise you if I – sorry, would it surprise you if someone was able to access theultimatepatientexperience.com, click on some links and able to download a page referring to the Ultimate Dental Report. Would that surprise you?---No.

30 No. That's something that you've – that is, the ability to access theultimatepatientexperience.com and click on particular links to identify this report – Ultimate Dental Report – that's something that you've arranged to occur. Is that right?---Yes.

35 You want the public to be able to access that website and access that information?---The public can, yes.

Yes. Are you in control of the website theultimatepatientexperience.com?---Yes.

40 And you are able to access it and control what information is put on there?---Through other parties, I can, yes.

I want to show you a document. At this stage just familiarise yourself with those pages, please?---Yes.

45 The information contained on those pages, does that look familiar to you?---Yes.

That's information that you've composed at some stage in the past?---Yes.

You've organised to have that accessible from that website, theultimatepatientexperience.com?---Yes.

5 Now, I want to draw your attention to page 2. Do you see the first paragraph that says:"

Inside this free report –

10 can I just stop there. What's the free report you're talking about?---It's a report that dentists can download so that they can improve their dental practices.

Is that – have you referred to – I will come back to that in a moment. I just want to draw your attention to the paragraph below that which says:

15

The secret weapon I've been using since 1996 allowed me to personally build \$1,826,445 last year working only four days a week for thirty-seven and a half weeks.

20 And then you – in brackets:

While I was vacationing all over the world the other 15 weeks.

That there - - -?---Yes

25

- - - I want to suggest to you that that's a reference to 2011; what do you say about that?---Could be. Yes.

All right. Let me show you another document, then, to assist you with your memory.

30 Now, can I just ask you to again look at this 10 page document?---Yes.

So the information contained in that document I've just handed to you, that's information you're familiar with?---Yes.

35 It's information you caused to be accessible from the website theultimatepateintexperience.com?---Yes.

It's information that you authored; is that correct?---No. I - - -

40 Well, when I say "authored" you were responsible for having that information included or accessible from the website?---I didn't write it. I didn't author it, but it was - - -

Well, who authored it?---It was written for me by a copywriter.

45

Did you tell them the information to be included in it?---I gave them the information.

Yes. Well, you gave them the information which is on page 2; did you not?---Page 2 of which report?

That document I've just handed you?---The last one?

5

Yes. The 10-page document?---Yes. Got you. Yes.

This information in particular:

10 *In 2011, my last year of working full time –*

just stop there. 2011, that's in the period of the first engagement; you accept that?---Correct.

15 Continuing:

- - - I billed my clients for a total of \$1,826,445.

Stop there?---Correct.

20

That information is what you gave to the copywriter?---Yes.

25 What I'm suggesting to you is that in relation to that first document I showed you, the four-page document, that the reference to that amount of money in this longer document is the same referenced as the amount of money in the shorter document; do you accept that?---Yes.

30 So what I'm putting to you is that in relation to the shorter document, the first document, what you're talking about there or the year you were talking about there is 2011; do you accept that?---Yes.

35 Yes. So let's just go back to the shorter document, the first document I showed you. The 15 weeks vacation you took in 2011, you decided when you wanted to take that vacation, correct?---I decided when I was absent from the practice. Yes.

Yes. And I want to suggest to you that you didn't seek the consent or authorisation of Dental Corporation before deciding to go on or taking that absences from the practice?---No. That wasn't a requirement of my engagement with them.

40 No. That's all right. Now, during your engagement in relation to the patients you saw, Dental Corporation didn't say or direct you along these lines that you could only see a particular type of patient. And by that I mean you could only do – I don't know what the proper term is now, but I call them braces – you could only do braces work, did they?---Dental Corporation did during the time that I was engaged by them
45 – sorry, apply some restrictions to the types of patients - - -

Yes. Just - - -?--- - - - I could see.

Well - - -?---And the procedures I could do for them.

Okay. Well, where do we see that in your evidence?---It's in an email from Alison Coates to – copied to Joanne Kelton sent to Jane Bandy, the practice manger, saying
5 that all new patients had to be seen by Dr Alpa Thakka and I that I was to see no more new patients.

Okay. So is there – so is that the only evidence that you're referring to in response to your last answer to my question?---There may be other evidence, but you said there
10 was no evidence. That is one piece. One is more than none, so - - -

Just in relation to the services or the work to patients, this is my question, focus on that, Dental Corporation at no stage during your engagement with them did they say you could only do this type of work, or you could only do that type of work in
15 relation to patients, did they?---That would be beyond their scope as – of ownership.

Is that a roundabout way of saying, no, they didn't do that?---They didn't tell me what to do and what not to do on patients. They weren't dentists.

20 I know that they didn't tell you how to do a filling or how to – is it fix a crown or put in a crown or something along those lines. I know they didn't do that, but whether or not you could do that work or not do that work they didn't give you any direction one way or the other in respect of that, did they?---Dental Corporation didn't look at the diagnoses that I made on patients.

25 You determined what work would be carried out in relation to a particular patient, correct?---As they needed. Yes.

30 The patient needed?---As the patient needed.

You determined, didn't you, whether or not you wanted to do that work for a particular patient?---As a healthcare practitioner it's my responsibility to treat patients.

35 Yes. But are you saying that – and help me on this – are you saying that if a member of the public came in off the street and they had dental work that had to be done, you couldn't reject that work?---No. I'm not saying that.

40 Okay. Are you saying that as a health practitioner you believed it was your professional obligation or duty to carry out that work for a patient if they asked for the work to be done and you could do it; is that what you're saying?---No. I'm not saying that either.

45 All right. Now, in relation to the amount that you charged or decided to charge a patient, you were the person who could dictate that amount, correct, for the services you provided?---Yes.

At no stage during your engagement did Dental Corporation say, “Here’s a list of fees that you have to charge when you do this work,” correct?---No. They never did.

5 All right. I want to ask you about – can you go back to the longer document there, the 10-page document and draw your attention back to that information on page 2. I think you agreed with me that the information in 2011, “My last year of working full time I billed my clients for a total of” – the amount of money there, the one million eight - - -?---Yes.

10 That’s information you gave to the copyrighter; correct?---Correct.

This next part, “Nearly \$2 million” – again that’s information you gave to the copyrighter?---Yes.

15 This information here, “And I didn’t have to work crazy hours or rush out in the middle of the night for emergency calls or selling overpriced or unnecessary treatments,” again that’s information that you gave to the copyrighter?---Correct.

20 That information is true?---I didn’t do emergency calls. I didn’t rush out in the middle of the night for them. The definition of crazy might be – what would you define crazy as.

Well, I get to ask the questions and it’s your information?---Sorry.

25 And you’ve included in there you didn’t have to work – I withdraw that. Let me put this to you – what you’re saying to the public is that in order to earn that money in that particular year 2011, “I didn’t work crazy hours. In fact I worked four days a week for 37 weeks of the year.” It’s effectively what you’re saying, is it not?---No, it’s not. I think the 37.5 weeks of the year is – if you divide that is – if you multiply
30 that by four is the number of days I worked in the year.

Well, let’s just use that – use that maths there for 2011. You – if – correct me if I’m wrong about this but one of the complaints you make in relation to the second engagement period, ie, after the first 12 years – sorry, first five years – was that you
35 were expected to collect \$900,000; correct?---I don’t know whether that was a complaint.

40 So in relation to the – in relation to that \$900,000, collecting that, it seems on these – I withdraw that and I apologise. It seems to me on these figures here that even if the – you didn’t increase any of the fees that you were charging your patients, in order to bill your clients – I’ll come back one – in order to bill your clients at about \$900,000 you perhaps worked half the time you had to do in 2011; would you agree with that?---That’s your deduction, not mine.

45 What’s wrong with my deduction on that – those – that maths based upon 2011?---You’re talking about the agreement for year 6, 2013 - - -

Well, I'm just - - -?--- - - - where the goal was set for 900,000?

Yes?---That was working three days per week.

5 They were the days that you wanted to work in that period of time; correct?---They were the – that was the employment arrangement I organised moving forward - - -

You - - -?--- - - - after the five year term was up.

10 Isn't it the case that you had decided that you only – you only wanted – for your own reasons you only wanted to work three days a week; correct?---That was my request - - -

Yes?--- - - - in negotiations.

15

Well, let me – let's just work on these 2011 figures. Let's assume that you didn't increase the prices for the patients that you saw. Assume all other things are equal for similar type of services, even if you worked 37 and a half weeks per year you would probably only have to on those figures work about two days per week; do you accept that?---No.

20

Why don't you accept that?---We're talking about a two year time difference?

25

Mmm?---So during that two year time difference the building – do I have permission to talk?

Well, you answer the question?---Or are you going to cut me short? Sorry. The – the two – in that two - - -

30

HIS HONOUR: I bet your – Mr – Dr Moffet, that was uncalled for, with respect?---Sorry.

You'll find it much easier if you just answer the questions which are put?---Okay. Yes, sir.

35

MR DARAMS: You don't have to agree with my proposition, Dr Moffet. I just - - -?---I don't agree with it.

40

Okay. And – and – okay. Can I just ask you then to go back to the smaller document that I've handed you up – the four page document and take you to the top of page 3. You – this reference here – “How to consistently increase your prices. How's 10.5 per cent per year on average while retaining 90 per cent of your clients or more,” again that's information you gave to the copyrighter?---Correct.

45

That was correct information?---Correct.

Does that – what you say there or what information you’ve given to the copyrighter, was that based upon the period of time up to, let’s say, 2012?---No.

When was that based to?---I based it on a period of time from 2002 to 2008.

5

Could I tender both of those documents, your Honour.

HIS HONOUR: Yes. They’re evidence as to when this information was available on the web.

10

MR DARAMS: Sorry?

HIS HONOUR: When this information was available on the web or the internet or whatever you call it.

15

MR DARAMS: Yes.

HIS HONOUR: I know it relates to 2011 or so the evidence is but you could publish something in 2018 as to what happened in 2011.

20

MR DARAMS: Yes. Perhaps I’ll ask some questions about that.

HIS HONOUR: So I just don’t know.

25 MR DARAMS: I think the short answer is there isn’t at the moment. Dr Moffet, can you – can you give us any evidence as to when this information was available for access by the public on the ultimate – theultimateexperience.com website?---My thoughts are that the four page document was available in 2013 and the longer document was taken from a website that was updated at the start of, I think, 2017.
30 Those are my recollections.

Can you recollect when that – sorry, do I understand your last answer that the information in the longer document was available from – or available for access for the public from 2017?

35

HIS HONOUR: No, he said it was updated in 2017.

MR DARAMS: That’s what I’m trying to ask – if that’s what he means by updated?---The longer document is a downloaded website that was – that appeared in
40 2017.

That’s what I mean so from 2017 one – a member of the public could access the website theultimateexperience.com - - -?---Sure.

45 - - - and access this information there?---Yes.

Yes. Whereas the shorter document, that was accessible some years before that from the internet; is that correct?---Correct.

Yes.

5

HIS HONOUR: Well, Mr Gibian, is there any objection to the tender?

MR GIBIAN: No.

10

HIS HONOUR: Thank you. Well the – what has been described as the shorter document being the four page extract available on the web as from 2013 will be admitted and marked as exhibit R2. The longer document being a 10 page document available as from 2017 will be admitted and marked as exhibit R3.

15

**EXHIBIT #R2 “SHORTER DOCUMENT” – FOUR PAGE EXTRACT
AVAILABLE ON WEB FROM 2013**

20

**EXHIBIT #R3 “LONGER DOCUMENT” – 10 PAGE DOCUMENT
AVAILABLE FROM 2017**

25

MR DARAMS: Dr Moffet, do you have the bound document that I provided to you some time – or before the luncheon adjournment in the witness box?---I have it.

Now, I just want to ask you a few questions. You still have an ABN; correct?---I do.

30

The ABN that you – do you still use your ABN at the moment?---I don't know.

Do you render tax invoices at the moment?---No.

35

Have you rendered tax invoices with that ABN on it in the last 12 months?---What month are we in? September. No.

When was the last time you recall issuing a tax invoice using that ABN, your ABN?---It would have been in – the day I finished practicing dentistry, which was July 2017.

40

Yes. So just outside the last 12 months. About 14 months ago?---14 months, yes.

That ABN was the same ABN that you had tax invoices issued under – during the whole period of your engagement with the respondent?---Correct.

45

Before your engagement with the respondent, you used and issued tax invoices under that ABN too, didn't you?---Correct.

Can you recall for how many years before your engagement with the respondent you were issuing tax invoices under that – using that ABN?---For as long as ABNs were required.

5 It's true, isn't it, that you were issued your ABN in about January 2000?---I can't recall when it was.

Were you issuing tax invoices and using your ABN, the ABN you used during your engagement with the respondent, when you were operating the Victorian Marsden Street practice?---The invoices to patients bore my ABN.

10 Yes. Your personal ABN?---My personal ABN.

Yes. It would be correct also to say then that before the engagement – before the period that your engagement with the respondent started, you were familiar with preparing BAS?---Yes.

Is it the case that you, for that period before your engagement with the respondent started, you were issuing BAS or preparing BAS on a quarterly basis?---Correct.

20 Yes. I just want to – I won't take you through many of these but I just want to have you identify a few of these. If I could ask you to go to the tender bundle page 33.

HIS HONOUR: Sorry, the joint bundle or the - - -

25 MR DARAMS: Sorry, your Honour.

HIS HONOUR: - - - or the exhibit?

30 MR DARAMS: The Spirex bound that I handed up this morning.

HIS HONOUR: So page 33?

MR DARAMS: Page 33.

35 HIS HONOUR: Thank you.

MR DARAMS: Now, have you got that, Dr Moffet?---Page 333?

40 No, 33?---Oh, page 33. Sorry.

Could I ask you this: did you prepare your activity statement yourself or did you get your accountant to do it?---My accountant prepared them.

45 Yes. Based on information that you provided to him?---Correct.

Or her, sorry. I should apologise for that. Do you have any – if I could just draw your attention to that part that says “goods and services tax”; do you see that? That section there?---Yes.

5 Do you have any understanding of what these amounts are or what they represent?---Goods and services tax, I know what goods and services tax is, yes.

Could I just draw your attention to G11; see the reference there to G11, non-capital purchases?---Yes.

10 Do you understand what they relate to?---No.

You don't. Do you recall that you were – did you recall ever asking your accountant about what these items were or you just left it to your accountant?---I don't recall asking my accountant what they were.

15 But you recall the accountant asking you for information, etcetera, in order to complete these statements?---I don't – my memory, you know – as honestly as I'm trying to remember back to that period of time, I don't – I can't remember what those non-capital purchases were during that period of time.

20 I'm not asking you for what went into them but just broadly do you understand what would be included in them? Put it this way: did you understand that these were expenses you incurred in that particular quarter in respect of earning that – earning the sales that are represented in G1; did you understand that?---I don't understand that. No.

You don't. You don't understand that?---No.

30 What about in relation to your tax invoice – sorry, the tax invoices you issued most recently in, say, 14 months ago; does that assist you in your recollection?---I don't believe there were any non-capital purchases on the tax invoice I – that was issued 14 months ago. Sorry, can I make a correction? My apologies.

35 Yes?---The tax invoice that was issued for my dental services 14 months ago wasn't issued in that ABN number.

Which ABN was it issued in?---It was issued in Immediate Dental Care.

40 I see. So you – is this what you're saying: in relation to the dentistry services you provided 14 months ago, you provided them through Immediate Dental Care?---I did.

Yes. So if there was tax – sorry, if there was a tax return for that particular period of time, it would show income of Immediate Dental Care?---Correct.

45 In respect of work that you carried out and did?---Correct.

All right. Just let me ask you about that then. I want to ask you to go back to page – sorry, paragraph 93 of your affidavit – your first affidavit?---Yes.

5 Now, you say there your evidence is that you were reimbursed by the respondent for expenses incurred by you in connection with the dentistry services?---Yes.

Being the dentistry services that you were engaged to provide under the service agreement?---Yes.

10 And then you refer to a large number of pages in your exhibit. I just want to ask you some questions about all of them. So just before I do that, let me just understand this: any expense that was incurred in providing the dentistry services under the service agreement, a reimbursement – or an invoice was submitted to the respondent to reimburse for that expense; correct?---Correct.

15 Yes. All right. And each time that a tax invoice was submitted to the respondent for reimbursement, it would be fair to assume that the cost or expense had been incurred; correct?---Yes.

20 That it had been incurred by the party who was seeking that reimbursement?---By me?

You say they were all incurred by you?---The expenses – sorry.

25 Well, let me just give you an example?---Yes.

Let's go to page 406?---Yes.

30 HIS HONOUR: Which volume is that in?

MR DARAMS: Sorry, your Honour, I've got them all in one volume, but I will find that out. I apologise. I'm told - - -

35 HIS HONOUR: Volume 2, by the looks of it.

THE WITNESS: Which – sorry, mine only goes to 393.

40 MR DARAMS: Yes. I think we will have to give you another volume. In fact, can I ask you to go to page 405. Sorry, I apologise.

HIS HONOUR: 405 or 406?

MR DARAMS: Sorry, I apologise to everyone. Let me - - -

45 HIS HONOUR: If you used the old system of paper, you would have less trouble.

MR DARAMS: I'm not sure that that - - -

HIS HONOUR: This new witchcraft is just not to be endorsed.

MR DARAMS: Your Honour, I would have got it wrong if I had paper. That was my mistake and I apologise to everyone.

5

Sorry, could I ask to go to 396. My apologies, I'm now - - -?---Sorry, I need a copy of that. I haven't got it.

10 Yes, sorry, I think – I thought it was given – been given to you?---I haven't got volume 2 in front of me, I'm sorry. Thank you.

So are you at page 396?---I am now, yes.

15 This is an invoice – well, again, this is an invoice that you prepared?---Correct.

This is an invoice that you submitted to the respondent for reimbursement of expenses?---Yes.

20 Incurred in providing the dentistry service under the agreement?---Yes.

Yes. And this is an invoice that is in respect of expenses incurred by Immediate Dental Care; correct?---It says that there.

25 Well, I think you accepted before that to the extent that you submitted invoices, or invoices were submitted to the respondent, the costs were truly incurred; correct?---Sorry?

30 Sorry. I will come about this another way. It says that these were costs incurred by Immediate Dental Care. That's – do you accept that's what the document says?---Yes.

That's accurate; correct?---Yes.

35 Immediate Dental Care incurred those costs in providing the dentistry services; correct?---Not in relation to dentistry services. In providing – Immediate Dental Care – a credit card by Immediate Dental Care. These were all incurred on a credit card, and the credit card had Immediate Dental Care's name on it, so the credit card obviously had been issued in that name.

40 So what I want to suggest to you is that Immediate Dental Care was discharging obligations in respect of the provision of the dentistry services. Do you agree with that?---No, I don't think so.

45 Well, why would Immediate Dental Care be seeking reimbursement for expenses that it didn't – sorry, that didn't relate to the provision of the dentistry services?---The – can I – can I have a look the expenses - - -

Of course?--- - - - on the list there.

Yes, let's have a look at them. Well, let's have a look at 398. Can I draw your attention to the expense on 19.9.2008. Sabatini's Restaurant, staff
5 celebration?---Yes.

That there is - - -

10 HIS HONOUR: Sorry, where are you reading from?

MR DARAMS: Entry on page 398.

HIS HONOUR: Yes.

15 MR DARAMS: Entry on 19 September 2008.

HIS HONOUR: All right. Thank you.

20 MR DARAMS: Perhaps if I take you up to the entry on 1 September, RJA Computer Solutions, software package?---Yes.

That was a software package used in the practice; correct?---Yes.

25 If I could draw your attention to page 400. You see the – under the Total column, 82,456.73. Do you see that amount?---I see that amount.

And that's the amount, if you go back to page 396, of the total of that invoice?---Yes.

30 Having a – well, do you need any further time to look at the – I want to suggest to you is that the items referred to in page 397 through to 400, they are the expenses that represent that tax invoice.

HIS HONOUR: Expenses of, sorry, what?

35 MR DARAMS: The expenses that had been incurred that are referred to or represented in that tax invoice on 396. Do you agree with that?---Yes.

So these weren't expenses incurred by you, were they?---There's a simple answer.

40 Well, could you just answer my question first?---I have an American Express account that has four cards. One of those cards is in the name of Immediate Dental Care, the other three are in my own personal name. They come on the one statement. So some of these expenses were paid on that Immediate Dental Care card, but for all intents and purposes, the bill was issued to me.

45

Just want to ask you about the reference under the – back on page 396, where it says:

Purchases made on behalf of Dr David Moffet's Active Dental.

Did you include that reference "Dr David Moffet's Active Dental"?---Dr David Moffet's Active Dental was the name of the practice.

5

That was the name of the practice also before your engagement with the respondent; correct? Active Dental?---They bought the name of the practice.

10 But the name Active Dental was the name under which the practice operated before your engagement?---That was the name of the practice.

Yes. Can I ask you to go to page 405. Just want to – again, the date of this invoice is 4 November 2008, but the description says:

15 *Purchases made on behalf of Dr David Moffet's Active Dental by Immediate Dental Care up to 12 January 2009.*

Is the date of 4 November just an error?---I would say it is just an error.

20 Is this a possible explanation? You just used the invoice that we've been talking about – the one from page 396 – as a template, and then forgot to change the date when you issued that second invoice?---True.

25 Can you think of any other explanation?---I can't think of any other explanation.

And if you go back to page 404?---404, yes.

30 And I just draw your attention to the last figure in the Total column. Do you see that? 177,125.69?---Yes.

Do you agree with me that that's the same – that is a reference to the amount that's set out in page 405 on the tax invoice?---Yes.

35 Can I just ask you to go to page 403? If I can just draw your attention to those items at – on 18 December. There are three references on 18 December, the two US Airways tickets, Vanessa Scottsdale ticket, Elizabeth Scottsdale. Were Vanessa and Elizabeth people who worked in the practice?---They were.

40 Yes. And Scottsdale, were they attending some conference or something like that?---They were.

Yes. Now, during this – and you're still a director of Immediate Dental Care; correct?---Correct.

45 Were you a director of Immediate Dental Care throughout the period of the engagement?---Correct.

Is it correct to put this description? You caused Immediate Dental Care to incur expenses on behalf, or in operation of the practice; correct?

HIS HONOUR: Which practice are we talking about?

5

MR DARAMS: Sorry. Yes. The practice – I apologise. The practice being operated or in which you worked during the engagement?---Immediate Dental Care, it appears, paid expenses of the practice and was reimbursed those expenses.

10 Yes. Could I then ask you in the – to go back to the spiral bound book and if you can go to – please go to page three hundred – go to page 339, please. Now, you're familiar with this agreement?---Yes.

15 Was anyone else a director of Immediate Dental Care other than you on 8 November 2009?---Yes, my wife.

Is that Ms Bandy?---Yes.

20 Yes. What role did Ms Bandy have, other than director of Immediate Dental Care, at that time?---With Immediate Dental Care or - - -

No, other than being a director of Immediate Dental Care?---During the 8th of – at 8 November 2009?

25 Yes. Well, let me come at it this way. During your engagement by the respondent, Ms Bandy also worked in the practice?---Correct.

Ms Bandy was your practice manager?---Not on 8 November 2009.

30 Sorry?---She wasn't the practice manager.

35 When was she practice manager?---She became the practice manager – she became the practice manager later. She worked – on 8 November 2009, she was probably doing marketing for Dental Corporation's active dental practices.

Was she doing marketing for practices other than the one in which you worked?---There were two active dental practices. I worked in one. I didn't work in the other.

40 This is the Marsden in Victoria?---Yes.

Yes?---She was doing marketing for both of those practices.

45 Yes. And when – sorry, when did you say she became practice manager at the practice in which you worked?---Well, according to Dental Corporation, she never became practice manager.

You say something differently?---Sorry?

You say something differently?---She was in charge – Dental Corp – we have
5 correspondence from Dental Corporation calling her the practice manager, but at the
time they dismissed her they said she wasn't the practice manager.

Just put aside all of those. What was Ms Bandy – what was your wife, Ms Bandy,
doing in the practice during the time that you were engaged by the
respondent?---During the time that I was engaged by the respondent, Ms Bandy was
10 working doing newsletters and for the practice. That was initially. I'm recalling the
world at large back then in 2007 onwards. And as my children became able to find –
or and her children – they are the same children – became able to find their way
home from school, she was able to come and work at the practice during the day and
she morphed then into an administrative role at the practice and then – and a
15 reception role and then practice manager.

Just in relation to when the receptionist role started, can you recall today when that
might have been?---She tells this – she tells the story that she was there to do her
administrative duties and we had a receptionist sick and so she was placed in
20 becoming the receptionist for the day. I can't put a date on that.

Would it be within the first year of the engagement, or be within the first year from
November 2007?---I don't – I'm trying to recall. My wife had some P&C duties at
school and I'm trying to recall what years they were. I can't say definitely yes or no
25 when she was receptionist, but I know in – and November 2009, I'm just trying to
recall who was employed at the practice at that time. I know that we did lose two
receptionists in August, September of that year and I – for the life of me, I can't
recall the names of the people who would have been working on 8 November 2009
as receptionist.

30 Your wife, Ms Bandy, worked in the Victoria Marsden Street practice before the
engagement; correct?---So my wife never worked at the – in the Victoria Road
practice.

35 She worked in the Marsden?---She worked in the Marsden Street rooms, yes.

Yes. And you can't recall now when she started working in the Victoria Street
practice?---She never worked in the Victoria Road practice except to help Dental
Corporation when they closed the practice down down there.

40 Sure. I apologise. Maybe I've got this wrong. You worked – during the
engagement, you only worked from Marsden Street; is that right?---99.9 per cent of
the time.

45 Yes. And your wife, Ms Bandy, worked from Marsden Street?---Yes.

When did she – can you recall when she started working from Marsden Street?
That's the point. You can't recall, can you?---I can't recall exactly when that was.

5 I see. Can you recall whether it was that she worked from the Marsden Street
practice for the majority of your engagement with Dental Corporation?---Yes.

Yes?---I would say for the majority of the engagement.

10 And she fulfilled either the receptionist role or on your – on her version or your
version or your evidence, the practice manager role?---Well, or concierge as well.

Yes. And to the extent that you say that a receptionist or practice manager allocated
patients to you, that would be your wife was allocating patients to you;
correct?---Sorry, can you - - -

15 To the extent that you would give any evidence that during your engagement the
respondent's employee, being the receptionist or the practice manager – that would
mean to the extent that person, the receptionist or practice manager, allocated clients
for you to see or patients for you to see – that would have been your wife?---Yes.
20 Sorry. The reason – the practice manager didn't allocate patients, because they
weren't dealing with appointments and phone calls. That was done by the
receptionist. And - - -

25 Well, just on that, when your wife was receptionist, she would have done that
role?---She would have done that role on the days that she was doing that. But, as I
said, she didn't – she didn't become a full-time receptionist until we had one of our
receptionists put in jail for stealing. Sorry, embezzling.

30 Just go back to this service agreement, please, at page 339?---Yes.

Now, I just want to put this. And hopefully you don't take offence. This agreement
wasn't some sort of sham or something entered into for tax minimisation or evasion
purposes, was it, this agreement?---The service – sorry. This three-page services
agreement?

35 Yes?---I don't even know what the purpose of that agreement was.

Well, it's between you. Correct?---Yes.

40 Between your company or – so your service company or the trustee of your family
trust. Correct?---Yes.

45 Well, if you don't know what it's about, who would?---Isn't there more paper to the
services agreement than this?

Well, Dr Moffet, why don't you look at pages 339 to 343 and try and use that to
assist you as to whether there are further pages to this agreement?---Sorry. In

volume 1 I have another services agreement which goes from page 175 through to page 199. And that was the services agreement that I relied upon in my employment by Dental Corporation.

5 Yes. Well, I'm not asking you, at the moment, about that services agreement. I'm just asking you about this agreement that you signed on 8 November 2009, approximately two years after your engagement started, that you signed personally and you executed on behalf of – well, I withdraw that.

10 Well, you did execute it on behalf of Immediate Dental Care. So can we just focus on that agreement. What I'm asking you: if you don't know why this agreement was entered into, who can tell us why it was entered into?---Sorry. I don't – I have seen this document. And I have a copy of this document. But I don't have a copy of it with Samuel Patrick Brown's stamp on it. It's a document that's in my bag. With
15 the court's permission, I would like to be able to access the document that I have and compare it to this one.

Well, we can come back to that in a moment?---Sorry. I – I don't believe that I have seen this document. And you're relying on this document that's presented here with
20 that stamp by Samuel Patrick Brown - - -

Well, can I just - - -?--- - - - and – and the date 8 November 2009. And the – the document that I have in my bag, I believe, will precede that 8 November 2009. And I don't – and I would like to be able to access this before I - - -

25 Well, can I - - -?---It will - - -

- - - just - - -?--- - - - take 30 seconds.

30 Could I just - - -

HIS HONOUR: Dr Moffet, your job is to answer the questions which are put to you?---Sure.

35 If there's any uncertainty in respect to the evidence, you may not be aware that Mr Gibian will have a chance to ask you questions - - -?---Sure.

- - - if he thinks - - -?---Yes, sir.

40 - - - they're relevant. But your job at this stage is not to volunteer information but simply to answer the questions which are put. So can we go back to the document, being the services agreement, being pages 339 to 343. Now, do you wish to ask some further questions in respect to that agreement?

45 MR DARAMS: I do.

HIS HONOUR: Right. Let's get on with that, then.

MR DARAMS: Yes.

Dr Moffet, if I could ask you to go to page 343. That's your signature. Both of those are your signatures. Correct?---Both of those are my signature.

5

If you go back to page 339, the date – is that your handwriting?---No.

Do you know whose handwriting it is?---No.

10 Yes. And I want to just ask you a couple of questions. Can I draw your attention on page 339 – it says Background A, paragraph (a):

The practice principal wishes to engage the service provider –

15 I just want to pause there. I can't find any definition of "service provider" in this agreement. What I want to suggest to you is that that's a reference to Immediate Dental Care. Do you accept that?---I don't know what the word wish means in that sentence either. So I can't accept that the service provider is Immediate Dental Care if it doesn't refer to it.

20

Now, can I draw your attention to paragraph 2. "Practice principal" is a reference to you. Correct?---Sorry. Yes. Engagement of service provider – are we on the next page? Is that correct?

25 Yes?---Thank you.

Paragraph 2. So I just want to draw your attention to the defined term "services". Do you accept that? Do you see that there?---Sorry. Which - - -

30 Paragraph 2(a)?---2(a):

The practice principal the service

Do I agree with that statement?

35

What I want to suggest to you is that this agreement is referring to an agreement between you and Immediate Dental Care that is referable only – to the extent that it's referring to services and engagement by you of Immediate Dental Care, it can only be sensibly understood to be a reference to the services that you had agreed to provide under the services agreement, you and Immediate Dental Care had agreed to provide under the service agreement. Do you accept that proposition?---No.

40

You're not engaging Immediate Dental Care to provide services at any other location or in respect of any other business at this time, are you?---That sentence doesn't say that I'm providing services anywhere.

45

Well, at this period of time, in November 2009, to the extent that you were providing dentistry services, you were only providing them – or – sorry. You were only providing them at the Marsden Street practice. Correct?---This sentence doesn't use the word dentistry services. It just uses the word services.

5

And the services – if I could draw your attention – are on page 342. Do you see that?---342. May include already of those.

Yes. So what I want to suggest to you, Dr Moffet, is that you entered into an agreement with Immediate Dental Care in order to – as you requested, Immediate Dental Care to provide services or discharge services for you in order to allow you to discharge or provide your services under the services agreement with the respondent. What do you say about that?---This agreement – sorry. Sorry. I was reading while you were saying. Sorry. Can you repeat the question?

15

You entered into an agreement with Immediate Dental Care that permitted you to have immediate dental care discharge or provide services to enable you or allow you to provide – you in turn to provide those services that you had agreed to provide under the services agreement with the respondent; what do you say about that?---This agreement says that as agreed between the parties from time to time.

20

Yes. Because at this stage, you weren't providing – I withdraw that. Do you recall now whether you engaged or required Immediate Dental to provide these services?---I don't think I ever invoiced Immediate Dental for services in this manner.

25

My question was – in this manner; did you do it in another manner?---No.

My question wasn't whether you invoiced them, but my question was did you recall – do you recall now, and if you don't recall you can say so, whether you engaged Immediate Dental to provide any one or more of these services?---They didn't provide premises. They didn't provide plant equipment, stationary. They didn't do maintenance and cleaning. They didn't do utilities. They didn't provide staff for the dental practice. They didn't provide accounting, marketing and payroll for the dental practice. They didn't provide reception services for the dental practice. Any other head office and administrative service, they didn't do any of those.

30

35

Do you recall them providing any other services? That is, Immediate Dental Care?---Off the top of my head, I can't think of anything else. They didn't provide any dental services. I can't think of anything else that would be remotely providable.

40

Now, I want to ask you about – now, Dr Moffet, you – during two thousand and – there were some negotiations between you and - - -?---Sorry, what year was that?

45

Yes, I'm coming to the year?---Sorry.

There were some negotiations between you and the respondent at the end of 2012 in relation to a negotiation for the period after the first contract ended; you recall that?---Yes.

5 And you didn't execute or enter into another written agreement with Dental Corporation at that time, did you?---The original agreement said that that agreement would roll over if it didn't reject and I rejected it.

10 And you rejected it and you didn't need to enter into another written agreement at any other time?---Only through email correspondence.

Yes?---That - - -

15 And could I draw – have you got your affidavit there? Your first affidavit?---Yes.

Could I ask you to go to page 222?---Page?

222?---Sorry.

20 HIS HONOUR: I think you've lost me. 222 of what?

MR DARAMS: 222 of the first affidavit?---Yes. Sorry.

25 Sorry, in the exhibit, your Honour.

HIS HONOUR: Oh, in the exhibit.

MR DARAMS: Yes.

30 HIS HONOUR: Right.

MR DARAMS: I just want to draw your attention to the email on 13 December; do you see that?---Yes.

35 This email was in the context of these discussions that were occurring with the respondent about your engagement after the initial engagement has expired; correct?---Yes.

40 And you say the first line:

Last year, year 5, I worked 150 days.

45 That's the – I want to suggest to you that 150 days at four days a week is 37 and a-half weeks; do you accept that?---Correct.

The previous year you worked 15 more days than that?---Yes.

So potentially 40 weeks of the year at four days a week?---Yes.

And then you draw your attention to the third last paragraph. You said:

5 *I worked a solid four days per week from June 25 through to October 31.*

That's a reference to December – sorry, June to October 2012; correct?---Yes.

And then you then say:

10

This was my disagreement with one of Ray's proposal. I can't accept a number higher than year 5 in a contracting economy and I don't want to work harder year 6. I've done my time.

15 And so what you're saying is that, "To the extent that I'm going to continue in the engagement with Dental Corporation, I want to work less than I've previously been working"; is that wrong?

HIS HONOUR: What's the answer to the question?

20

MR DARAMS: What's the answer to the question?---What I'm saying there is that – exactly what it says. Ray's proposal was that they set me an economic target with penalties that was higher than year 5, which was based on year 1 – which was the same as year 1, and it was a contracting economy, thanks to the GFC mentioned above, and I didn't want to work harder in year 6. That's exactly what I said.

25

Just in – where you say "I've done my time", is that a reference to you've given the five years under the services agreement?---Yes.

30 Or "I've done my time generally. I – you know, I've worked a long time in this profession; I want to wind back"?---No, it's in relation to the five-year agreement.

Yes. Just in relation to working harder, your position or your view that you expressed there on 13 December 2012, that didn't change after that period of time for the rest of your engagement, did it? That is, you didn't suddenly, say, in 2013 say, "Look, actually, I do now – I now want to work harder"; is that correct? A fair assumption?---For 2013 and 2014 I had a different target to hit which was not as onerous.

35

40 Is that the target – well, that's the target you say was 900,000 personal billings?---Correct.

And do we see that in the email from Mr Bonham on page 221? Is that what this is all about; is that right?---The email that begins at the top?

45

Yes:

Okay. Thanks DM. This is a really good – this is really good data.

Where he says “really good data”, that’s information you provided to him, didn’t you? It’s not annexed – well, it doesn’t appear to be annexed in any of these emails
5 but you’ve given him some information to say to him, “Look, I only want to work these days”?---I gave him the information that I – I wanted to reduce from working four days a week from 6.45 to 7 o’clock to three days a week doing the same – so 6.45 am to 7 pm.

10 Now, later – that email there sets out a broad – broadly the agreement after that period of time between you and Dental Corporation. What I mean by that is that you were operating under a target of \$900,000 personal billings; correct?---Yes.

Towards – in 2014 Dental Corporation was seeking to negotiate another agreement
15 with you, was it not, other than the one that you had been negotiating in 2012
-- -?---They were.

Yes. That – do you recall that one of those – one of the terms of that agreement was that Dental Corporation was seeking a three-year time period for the agreement?---I
20 don’t recall what the time period was.

Well, can I ask you to go to page 1020. You might need the third volume.

MR GIBIAN: I think I have to raised the privilege issue that was mentioned earlier.
25

HIS HONOUR: All right. Now, you say 1020 is the subject of a claim for privilege.

MR GIBIAN: There was a notation on it – sorry. Yes. There was a notation on it.
30 I think it has been redacted in the copy that’s in your Honour’s folder, if that has been substituted correctly.

HIS HONOUR: It doesn’t appear to have any redactions in it. Do you want me to – I will show you the copy I’ve got.
35

MR GIBIAN: Yes. I’m sorry. The redaction is unhelpfully were white redactions. But there was a line of text that appeared underneath the – or above where it reads, “Message being forwarded” it shouldn’t be provided.

40 HIS HONOUR: All right. So underneath “Attachments” and “Begin forwarded message”, there’s a bit missing, is there?

MR GIBIAN: Yes. Yes.

45 HIS HONOUR: All right.

MR GIBIAN: And your Honour will see that the - - -

HIS HONOUR: So this is an exchange between Moffet - - -

MR GIBIAN: The email that has been printed is a message that was forwarded from Dr Moffet to Ms Odell and Mr Penning, who were my instructing solicitors - - -

5

HIS HONOUR: All right.

MR GIBIAN: - - - on 23 April 2018. The message being forwarded was one from 2014, which your Honour will see at about point 3 on that page.

10

HIS HONOUR: Well, how do I resolve a claim for privilege where I don't have the information and no evidence?

MR GIBIAN: Well, as I indicated earlier, I do have an affidavit from my instructor as to those matters.

15

HIS HONOUR: How long is this argument going to take?

MR GIBIAN: I wouldn't imagine it would take very long.

20

HIS HONOUR: I'm just wondering whether Dr Moffet is more comfortable sitting in the back of the court rather than the witness box. That's all.

MR GIBIAN: I don't have any objection to that course.

25

HIS HONOUR: Dr Moffet, if you want to resume your seat in the well of the court you're free to do so, but you can stay there if you want to.

30

<THE WITNESS WITHDREW

[3.46 pm]

HIS HONOUR: Right. Where's the evidence in support of this claim for privilege?

35

MR GIBIAN: Sorry. I have an original which is unstapled and there's a copy, which might be more convenient.

HIS HONOUR: All right. Which is the purple passage? Page 1020 is included in the pages at 5B.

40

MR GIBIAN: If I could just have a moment.

HIS HONOUR: So all that I know is that page – part of page 1020 included a comment by Dr Moffet to your instructing solicitors for the purposes of seeking legal advice.

45

MR GIBIAN: Well, for the purposes of providing documents for discovery in connection with these proceedings.

HIS HONOUR: Yes.

5

MR GIBIAN: And to be provided with professional legal services in connection with the preparation for these proceedings. The document obviously should have been printed out and annexed to the – or included in the exhibit without the comment that Dr Moffet made to his lawyers for the purposes of him being provided with professional legal services in connection with these proceedings.

10

HIS HONOUR: Well, you've got – well, sorry. Let's take it in stages. Mr Darams, it has got the smell of privilege about it.

MR DARAMS: We don't accept that paragraph 6 goes anywhere near the type of evidence that the court - - -

15

HIS HONOUR: That's why I said it has got the smell of privilege about it.

MR DARAMS: Well, your Honour should look at the document. Your Honour, it's common for courts in - - -

20

HIS HONOUR: Yes. No. Mr Gibian wouldn't oppose me looking at the document, I assume. Mr Gibian, do you want me to look at it or not?

25

MR GIBIAN: I don't have any objection if that's what your Honour would wish to do to resolve it.

HIS HONOUR: Paragraph 6, you've got to accept, is pretty light on.

30

MR GIBIAN: Yes. As I say, it's – the affidavit is made by reference to a series of comments that were included in documents in a similar way. I think there's only a desire to use this particular one, which is obviously not a matter that – so I think otherwise there's no issue as to the redaction, except for this particular page. We obviously weren't aware of that when the affidavit was prepared.

35

HIS HONOUR: Well, if you can find the evidence to paragraph 6, I would be inclined to think that the document may well not be privileged – may not be.

MR GIBIAN: Well, it's not limited to paragraph 6. Your Honour will see that from paragraph 4 onwards there was a reference to the purposes for which the documents were being provided – that is, to comply with orders for discovery documents were being forwarded by Dr Moffet to his solicitors for the purposes of complying with those orders in the court. It's clearly for the purposes of him being provided with professional legal services in connection with litigation, which is - - -

40
45

HIS HONOUR: Well, do you want me to look at the document or not? You're the one making the claim for privilege.

5 MR GIBIAN: Well, your Honour, it's plain that the comments are for that purpose.

HIS HONOUR: I can only make a ruling based upon the evidence that you put before me.

10 MR GIBIAN: I'm content for your Honour - - -

HIS HONOUR: All right. Well, you better show me the document.

15 MR GIBIAN: And it's apparent that what Dr Moffet is doing is providing some shorthand descriptor of the document that is being forwarded for the purposes of the request in relation to discovery and for the purposes of his lawyers being in a position to ascertain whether it's a document that would be produced for the purpose of discovery for the purpose of these proceedings.

20 HIS HONOUR: Thank you.

MR GIBIAN: It's clearly a privileged communication.

25 HIS HONOUR: Mr Darams, the prudent course is to uphold a claim for privilege. Any suggestion that privilege was waived was purely a mistake. Approaching it pragmatically, other than in a very confined manner, I don't see how you would be prejudiced by upholding the claim, quite frankly.

MR DARAMS: Sorry, your Honour. I

30 HIS HONOUR: Speaking pragmatically - - -

MR DARAMS: Yes.

35 HIS HONOUR: - - - and other than in a very confined respect, I could see how you want to use it. But I don't see that you're prejudiced in any material sense by upholding the claim. But that, I appreciate, is not the test. The test is whether it's subject to privilege and I think it probably is.

40 MR DARAMS: I'm content, your Honour, to – if your Honour, having the - - -

HIS HONOUR: The claim for privilege is made in respect to one line appearing on page 1020 of DM1. That claim for privilege is upheld. I return to you the unexpurgated version, Mr Gibian.

45 MR GIBIAN: May it please the court.

HIS HONOUR: Now, do you wish to ask some further questions?

MR DARAMS: Yes, I do.

HIS HONOUR: Dr Moffet, do you mind resuming your seat in the witness box.

5

<DAVID RODERICK MOFFET, RECALLED

[3.46 pm]

<CROSS-EXAMINATION BY MR DARAMS

10

HIS HONOUR: And may I remind you that you're still under oath.

MR DARAMS: Now, Dr Moffet, can I ask you to go to page 1020. Do you have
15 that there?---That's the third folder?

I think so?---I don't have the third folder.

Okay. Can we please provide that to you. I just draw your attention to the email
20 from Mr Bonham. Do you accept that this was the broad terms of the agreement that
the respondent was offering or seeking to enter into with you around this time in
August 2014?---This email looks like Mr Bonham's proposals for further
engagement of my services.

25 Yes. Is it the case that – I think you accepted this before – but around this time – that
is, August 2014 – the respondent was seeking to enter into this – a different
agreement to the one that you were operating under at that time. Do you accept
that?---Yes.

30 One of those terms was that they wanted your agreement on would be a three-year
term commencing on 1 October that year. Do you see that?---Yes.

That's not something you were interesting in, was it, at that time in August
35 2014?---That's just one clause in the – in the whole proposal.

Do you say you were happy to agree to a three-year term?---I wasn't happy to the
proposal as a – in its totality there.

40 Yes. Did you go back with a different proposal?---I had a proposal to them as to
how I would have liked to have continued.

Just where do we see that evidence?---It would have been – it would have been a
verbal proposal to Ray Khouri during meetings with him.

45 Well, can you be any more specific now about when those meetings were and what
that proposal was?---Those meetings were held during 2014 at restaurants in the
eastern suburbs. Sorry. What was the second part of your question?

Just on that, when you say “2014”, was it before this email of 27 August?---I think I had some meetings before 27 August.

5 Well, can you now recall what the terms of those discussions were or what you were – the terms of your proposal was?---One of the – I can recall one of the primary objections was that they didn’t want to reimburse me for the time I was spending administering their practice and that was something that I wanted to be remunerated for.

10 Well, just let me break this up a bit. After 27 August 2014, can you – and if you can’t recall, then I don’t want you to speculate – but can you recall going back to anyone or, in particular, David Bonham, with a different term or different terms upon which you were prepared to remain engaged by Dental Corp?---I rejected this one. I don’t recall going back with a counteroffer.

15 No. Do you accept this; there’s no evidence in your affidavit of any other correspondence after 27 August 2014 whereby there’s any discussion with you about – or terms being discussed with you about a continued engagement by Dental Corp; do you accept that?---Discussions continued after 27 August 2014.

20 Have you – tell me if I’m wrong about this, but you haven’t referred to any of those conversations or discussions in your affidavits – either one of your affidavits?---I’m assuming I haven’t.

25 Sorry?---I haven’t. I’m assuming I haven’t.

Well, given your – some of the concerns you expressed earlier today about recollection of events from years ago, are you in any better position today to recollect the content of any of those conversations, or discussions, or negotiations?---I have
30 vague recollections of some conversations.

So I want to suggest to you this, that, by, sort of, August – towards the end of August 2014, Dental Corporation was seeking to have a further agreement reached – a further agreement between you and it; do you accept that?---I think they were.

35 It had proposed various terms, correct, of that agreement?---It had proposed various agreements.

40 You weren’t content or happy in respect of at least the proposal put in the email on 27 August 2014; correct?---I didn’t proceed with that, so I obviously must not have been happy with it.

45 Yes. What I want to suggest to you is that, by this time, August 2014, or thereafter, you had decided that you wanted to do and explore – or continuing doing work outside an arrangement with Dental Corporation; correct?---No. Incorrect.

By this time, you had – around this time, you had been writing a book; is that correct?---I was writing a book at that time.

You were also doing consulting work?---In my own hours. Yes.

5

That consulting work – and I think you’ve annexed a number of agreements in respect of that consulting work – you did that during 2014; correct?---Yes.

10 What was that consulting work involving? What did it involve? What was the nature of the consulting work?---I was approached by dentists who wanted to improve their dental practices.

15 Is that a part of the Ultimate Patient Experience services?---The Ultimate Patient Experience is the trading name of that service.

Yes. Are you still engaging in that work, the consulting work?---On a very limited basis.

20 Around this time in 2014 – when I say this time, sort of August onwards – I want to suggest to you that that consulting work was where your interest lied and that’s what you were seeking to pursue at that time; do you agree with that?---I still practised dentistry up until 2017 when I became physically unable to, so - - -

25 How many days a week were you practising dentistry after August 2014 up to 2017?---I had a shoulder replacement, which limited the amount of movement that I can do, so - - -

That’s not the question. I was asking you?--- - - - I wasn’t - - -

30 - - - how many days a week were you doing dentistry work after August – well, after the end of your engagement in December 2014?---Well, after I had my shoulder operation, I did none for - - -

35 When did?--- - - - four or five months until I recovered and then I started working one day a week trying to build up, but, at that time, I developed arthritis in my hands, which prevents me from holding dental instruments, and, as much as I wanted to keep going as a dentist, I physically wasn’t able to hold the drills as much as I could.

40 What you say there in relation to the – when did those injuries occur?---Sorry?

The shoulder - - -?---The shoulder injury – the shoulder – the illness to the shoulder is osteoarthritis, so it wasn’t actually a physical action, but a deterioration over time, as is the osteoarthritis - - -

45 Yes. I see?--- - - - and it’s a different joint in that hand to that hand.

You see, what I want to suggest to you – I want to put these propositions, Dr Moffet – by about November 2014, you had decided that you weren't interested in any further engagement with Dental Corporation; correct?---That's correct.

5 That's evidenced by the fact that you didn't negotiate any further after August 2014 on the terms upon which you would stay?---You just said November in the previous sentence, so, in November 2014, I decided that I was not going to work for Dental Corporation any more.

10 Yes. I understand all that. What I was suggesting to you is that that was evident also by the fact that you didn't, after August 2014, engage in any further discussions or negotiations about the terms upon which you would remain engaged with Dental Corporation?---I did engage in discussions, we just haven't presented any written correspondence about those discussions.

15 Yes. And the reason that you ceased – or wanted to cease your engagement with Dental Corporation was that you, by that time, in November 2014, had decided that you were wanting to pursue other professional pursuits; agree with that?---No.

20 No?---I left because I was bullied by members of Dental Corporation staff.

Yes. And you say that the bullying is evidenced by those matters you set out in your affidavit; correct?---I complained to Gordon Towell; I complained to Steven Ralphs; I complained – and I mentioned it in my resignation to Bonham – I
25 complained to Ray Khouri.

Just one last thing. Do you – just one last thing, Doctor Moffet. The True Local website, do you know what that's all about?---I've got a vague recollection.

30 Well, what's your recollection of the True Local website?---It's a directory service for industries and businesses.

Yes. You were a member – or you were able to logon to that website, weren't you; the True Local website?---I can't recall.

35 Can't recall. Could I show you a document, ask you to look through those pages. This is – does this assist you with your recollection of the website?---It is assisting me with the recollection of the website. Yes.

40 Can I ask you – draw your attention to page 6. They're numbered. Bottom right hand corner. It appears to be there's a name there, David2750?---Yes.

Was that your name or your member number or your member ID on that website?---It appears to be.

45 Well, is there any reason to suggest that isn't you?---No.

HIS HONOUR: Sorry. Where are you looking at?

MR DARAMS: Page 6.

5 HIS HONOUR: Yes.

MR DARAMS: Your Honour will see the round circle, "Papaya Man."

HIS HONOUR: Yes.

10

MR DARAMS: It seems to be a complaint. And then under that, there's a David2750, which seems to be a response.

15

HIS HONOUR: Thumbs up, thumbs down, report, share, comment. Still can't pick it up.

MR DARAMS: Page 6, your Honour.

HIS HONOUR: Yes. Sorry:

20

Hello, Papaya Man. I'm so sorry your sister came to see us.

MR DARAMS: Yes. That's it there. It's just signed off "Dr David Moffet".

25 HIS HONOUR: I see. Yes. And what was your question?

MR DARAMS: I'm just asking him – I was going to ask Dr Moffet, do you recall writing that - - -

30 HIS HONOUR: I'm sorry. I see the 2750.

MR DARAMS: Yes.

HIS HONOUR: Sorry. I was a bit slow.

35

MR DARAMS: What I suggest to you, Dr Moffet, is during the period of your engagement with the respondent, you were active on this website reviewing – looking at what people were reviewing of the services you were providing. Is that correct?---Did I make any other responses apart from that one?

40

I can't see any, but I've just drawn your attention to that and asked you a question. What do you say about that?---It looks like we've had one negative – no, there's another one, here on page – no, it's the same one. You - - -

45 Yes. I've just extrapolated. I - - -?---Page 3. Yes. You've taken page 3 and turned into an extra page on page 6.

Separate page. Yes. So you can see your comment. That's what I've done?---Yes. Okay. That's what businesses do. Respond to negative comments, don't they?

5 That's what you were doing in that respect, correct?---Yes.

Yes. And can I just ask you, if you go to page 3, just draw your attention to Ms Wright?---Page 3.

10 Second entry on the page?---Yes.

Is that a person who – she seems to indicate that she has been a patient of yours for many years. Is that right?---Yes.

15 The last one I want to draw your attention to is – go to page 7. And I just want to draw your attention to the “Jane L”. Do you see that there?---Yes.

It has got the active dental logo. It seems to be – is that an active dental logo?---It is.

20 When was that logo used?---That logo – that logo was used for a long time.

Was it used during your engagement?---It was the logo I – I figure, if that's over nine years ago, which is what – that's 2009, isn't it.

25 That's what I suggested to you, that these are comments being made by yourself, but also what I want to suggest to you, Jane is your wife, Ms Bandy. Do you accept that?---Yes. Yes.

30 So both you and - - -?---She says she – she says she works at Active Dental, so I'm assuming that - - -

I was going to ask you, were there any other Janes who worked at Active Dental?---There were.

35 There were. But do you see whether this is likely to be the other Jane, or any other Jane other than your wife?---It's probably my wife. Yes.

40 Then just in relation to identifying, on the first page, David Moffet, Active Dental, do you recall whether you were the person responsible for identifying that business there as David Moffet, Active Dental?---The – I used to call the business David Moffet apostrophe S Active Dental.

So you used to call it David Moffet's Active Dental?---That's what it was called when Dental Corporation purchased it.

45 Just on that, then, could I actually – in fact, you and your wife continued to use that signoff, did you not, during the time that you were engaged? Sorry, engaged by the respondent?---That was the name of the business.

The name of the business was Dr Moffet's Active Dental, is that correct?---Dr David Moffet's Active Dental.

5 Can I ask you to go to page – of the tender, the spiral bound bundle of documents?---Yes. What page?

Page 344?---Yes. Yes.

10 Is that what you're referring to there? That email from you on 17 June 2009?---Yes.

You've got the signoff there, Dr David Moffet's Active Dental?---Yes.

And there's – who's Anna Champion?---I don't know.

15 Sure. Could I then ask you to go to page 345?---She can't spell my name on page 344, so - - -

So 345?---Yes.

20 And just draw your attention to the email at the bottom of the page of page 1 there from Jane Active Dental to you?---Sorry.

Do you see that?---Page 344.

25 5?---5.

345?---There's an email from Jane Active Dental to me.

30 So this is a – this is in January 2014, so in the sort of last – within the last year before you terminated your engagement. Do you accept that?---Sorry. I haven't got that image on page 345. I don't have an image that has – I don't have anything that has January 2014. And I can't see anything on there from Jane.

35 Just at the very last - - -?---At the top of the page - - -

No, no?--- - - - it reads Ned Overend.

40 Yes. Don't – I draw you to the bottom of the page?---Sorry. Right. The last three lines.

Yes?---Got you.

And then if you go to the next page - - -?---Yes.

45 - - - 346, there's – there will be two screenshots. Do you accept that?---I don't know what they are. Facebook screenshots. Derek Mahoney.

It's not important to focus on that, but can you focus – it says “Regards, Jane”?---Sorry. At the bottom.

Yes?---Yes, “Regards, Jane.” Yes.

5

And then there's Jane Bandy?---Yes.

And then over the next page, 347 - - -?---Yes.

10 - - - and then it has got – it says:

Manager Office, Dr David Moffet, Active Dental.

?---Yes.

15

Yes. So that – and that's an email that your wife Jane was sending to you on 22 January 2014, again, identifying that Dr David Moffet is Active Dental. Correct?---Sorry. Yes.

20 You never told your wife – well, I withdraw that. Your Honour, could I - - -

I want to suggest to you that – your Honour, could I tender now that Spirax-bound book of documents.

25 HIS HONOUR: Any objection, Mr Gibian?

MR GIBIAN: I don't think so, but can I just reserve my position briefly in relation to that? The – Dr Moffet raised an issue about at least one of the documents in there that I think I need to obtain instructions on.

30

HIS HONOUR: Right. Anything else you want to tender?

MR DARAMS: Yes. Sorry. The next is the David Moffet Active Dental True Local website.

35

HIS HONOUR: Okay. The seven-page document identified as the David Moffet Active Dental True Local website will be admitted and marked as exhibit R4.

40 **EXHIBIT #R4 SEVEN-PAGE DOCUMENT IDENTIFIED AS THE DAVID MOFFET ACTIVE DENTAL TRUE LOCAL WEBSITE**

45 MR DARAMS: I think, your Honour, that is – they're all the documents we – sorry. I didn't – was your Honour reserving in relation to the tender bundle Spirax until Mr Gibian - - -

HIS HONOUR: I'm just wondering how long Mr Gibian requires.

MR DARAMS: Yes.

5 HIS HONOUR: Is there any objection, subject to resolving the outstanding issue as to a further document? In which case, it can be admitted now and, if you want to add to it, you can add to it later.

10 MR GIBIAN: It's not so much adding to it as obtaining instructions in relation to the status of one of the documents.

HIS HONOUR: The status of - - -

15 MR GIBIAN: One of the documents which the witness - - -

HIS HONOUR: Which document?

20 MR GIBIAN: The service agreement, what's called – it's the page 339 to 343. Your Honour may recall that the witness had some doubts about that document.

HIS HONOUR: It's not a basis for objecting to the tender. It may be the subject of re-examination and the subject of further tender of another document.

25 MR GIBIAN: I just was unsure as to what the witness - - -

HIS HONOUR: He identified the document - - -

MR GIBIAN: - - - meant - - -

30 HIS HONOUR: - - - as having been signed by him - - -

MR GIBIAN: That's - - -

35 HIS HONOUR: - - - twice.

MR GIBIAN: That is – he did identify his signature. He raised some issue about the form and the date that appeared on the first page of it.

40 HIS HONOUR: Yes.

MR GIBIAN: So I did - - -

45 HIS HONOUR: No, he just said he didn't know whose handwriting it was in respect to the date. And he said he didn't know who this Samuel Patrick Brown was, but he's obviously the person that certified there's a true copy back in whenever it was, September 2010.

MR GIBIAN: It may be there's nothing to it, your Honour. I did just – if the witness - - -

5 HIS HONOUR: No, that's the only basis of the objection. The respondent's tender bundle used for the purpose of cross-examining Dr Moffet will be admitted and marked as exhibit R5.

10 **EXHIBIT #R5 RESPONDENT'S TENDER BUNDLE USED FOR THE PURPOSES OF CROSS-EXAMINING DR MOFFET**

MR DARAMS: I have no further questions.

15 HIS HONOUR: That's not pre-empting a further tender of another document, if you want to, or re-examination, obviously.

MR GIBIAN: Indeed.

20 HIS HONOUR: Yes. Does that conclude the cross-examination?

MR DARAMS: Sorry, your Honour. Yes. There's no further questions.

25 HIS HONOUR: how long will you be in re-examination, Mr Gibian?

MR GIBIAN: I think it will be a – some short period of time and I do need obtain instructions, at least in relation to that matter that's raised - - -

30 HIS HONOUR: Yes.

MR GIBIAN: - - - with your Honour. But - - -

35 HIS HONOUR: Well, if the cross-examination is finished, there's no impediment to you getting instructions.

MR GIBIAN: Indeed.

40 HIS HONOUR: Now, that leaves the two other witnesses. How long is that going to take, the cross-examination?

MR GIBIAN: I think that will be shorter than the applicant.

HIS HONOUR: Well, I can tell you it's going to be shorter, but - - -

45 MR GIBIAN: Indeed.

HIS HONOUR: - - - the question was how long you take.

MR GIBIAN: I would have thought both of the witnesses are likely to be within an hour and a half or two hours.

5 HIS HONOUR: An hour and a half to two hours. Make it shorter, Mr Gibian.

MR GIBIAN: I will see what I can do, your Honour.

10 HIS HONOUR: Now, oral submissions is – I don't want people repeating what they've put in written submissions. That's just a waste of time. That's not precluding you for making whatever submissions either of you want to, but if it's in writing, don't repeat it. Right. We will kick off tomorrow morning at 9.30.

MR GIBIAN: May it please.

15 HIS HONOUR: Right. Can you adjourn the court till 9.30, please.

<THE WITNESS WITHDREW

20

**MATTER ADJOURNED at 4.15 pm UNTIL
THURSDAY, 27 SEPTEMBER 2018**

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