

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B29 of 2019

BETWEEN: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**  
Appellant

and

**MICHAEL CHRISTODOULOU KING**

First Respondent

and

**ACN 101 634 146 PTY LTD (IN LIQUIDATION)**

Second Respondent



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### FIRST RESPONDENT'S SUBMISSIONS

#### Part I: CERTIFICATION

1. These submissions ("RS") are in a form suitable for publication on the internet.

#### Part II: ISSUES

2. This matter ("ASIC appeal") is related to another matter in the Court, *King v. Australian Securities and Investment Commission* B46 of 2019 ("Mr King's application").
3. In the ASIC appeal the central question raised by ASIC is whether the Court of Appeal erred in holding ([2018] QCA 352) ("CA1") that ASIC had not established that the first respondent ("Mr King") was an "officer" of the second respondent ("MFSIM").
4. ASIC also seeks, in the ASIC appeal, if it is successful on the issue referred to in RS[3], to have the orders made against Mr King by the Court of Appeal in [2019] QCA 121 ("CA2") set aside and to have restored the orders made against him by the primary Judge.
5. The matters referred to in RS[3] and [4] are contested by Mr King. He also contends – see RS[46] to [53] below – that the Court of Appeal had reviewed the evidence and decided correctly that in any event ASIC had not satisfied the criteria on which ASIC relied to show that Mr King was an "officer" of MFSIM. In these circumstances ASIC's appeal should be dismissed. Alternatively its grant of special leave should be withdrawn.
6. The issue referred to in RS[5] does not appear to require a notice of cross-appeal or notice of contention pursuant to HCR 42.08.1 or 42.08.5.

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7. Further, there are the issues sought to be raised by Mr King's cross-appeal as to liability.
8. There are also the penalty issues sought to be raised by Mr King's application.

**Part III: JUDICIARY ACT 1903, s. 78B**

9. The first respondent does not consider that notice is required to be given pursuant to s. 78B of the *Judiciary Act 1903*.

**Part IV: MATERIAL FACTS**

10. The first respondent accepts the facts as stated in paragraphs 8, 9, 10 and 11 of the Appellant's Submissions ("AS[8], [9], [10] and [11]").
11. Whilst Mr King accepts the statements in AS[12], it may be noted that the matter is not resolved by generalities - such as that at AS[12] (and elsewhere in the AS) - that Mr King "was Chief Executive Officer (CEO) of the entire MFS Group". Rather a narrower issue is involved in the ASIC appeal, namely whether Mr King was an "officer" of a particular company, MFSIM. That is the issue dealt with very fully in CA1[230]-[295]; **CAB 545 - 565**
12. Mr King accepts the facts stated in AS[13] and [14], but notes that he was not a director of MFS Administration at the relevant time. Mr King also accepts the facts stated in AS[15], save that the question of him being knowingly concerned in MFSIM's contraventions is sought to be put in issue in Mr King's cross-appeal.
13. Each matter summarised in AS[16](a) to (d) was dealt with and its relevance and weight considered in the discussion of those issues at CA1[230]-[295]; **CAB 545 - 565**
14. Mr King accepts that the matters set out in paragraphs AS[17] to [18], and [20] are findings of the Court of Appeal, although they are not all matters relied upon in ASIC's pleaded case against Mr King at trial.

**Part V: ARGUMENT IN ANSWER TO THE ASIC APPEAL**

15. This argument concerns the issue at RS[3], the construction of the definition of "officer" in paragraph 9(b)(ii) of the *Corporations Act 2001* ("the Act").
16. Unlike other subparagraphs of the definition of "officer", subparagraph (b) does not refer to persons of a particular designation. But it is submitted – as the Court of Appeal found at CA1[241],[246]-[249]; **CAB 549-550, 552-553** – that the terms and context of the provision demonstrate that the persons referred to in subparagraph (b)(ii) are persons

who have the relevant characteristics because they act in an office “of the corporation” whether they are formally appointed to that office or not.

17. Mr King’s argument proceeds on the basis that the definition of “officer” contained in paragraph (b)(ii) requires *some* limitation on its literal interpretation. Read literally, “*a person... who has the capacity to affect significantly the corporation’s financial standing*” extends to someone external to, and unrelated to the management of, a corporation: for instance, a banker or mortgagee, an external advisor, or perhaps a regulator. ASIC has also previously accepted the need for some restraint on so broad an interpretation of the provision.<sup>1</sup>

10 18. The construction adopted by the Court of Appeal involved constraining (b)(ii) to a person whose capacity arises because they act “*in some office of the corporation, not in the sense of an office named in the Act, but in the sense of a ‘recognised position with rights and duties attached to it’*”: CA1[246]; **CAB** 552. This construction does not require some type of formal designation within the company; rather, it is concerned to identify a functional role or position within the management of the company as the central limiting concept. In order to have a relevant capacity for the purposes of para (b)(ii), a person must have or occupy some position within the company such that they are involved in the management of the company. Some might involve themselves in the management with the acquiescence of the company. What is needed is to identify what  
20 the person does, and the capacity in which they do it.

19. This is made clear in the Court of Appeal’s decision, which further explained that para 9(b)(ii) applies to those who act in an office – as distinct from “*hold*” – in the sense of a “*recognised position with rights and duties attached to it*”: CA1[246]; **CAB** 552. This distinction – consistent with the observations of Mason J in *Drysdale* referred to at CA1[239]; **CAB** 549 – is one with which, with respect, the AS do not grapple adequately.

20. In the following paragraphs, Mr King responds to the matters raised in the AS. In doing so, the headings A to D used at AS[29] and following are adopted.

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<sup>1</sup> See for example Special Leave Application in this Appeal [26].

**“A. Consideration of statutory text and context”: AS[25], [29]-[37]**

21. It is accepted that s. 601FD(1) concerns the duties of an “officer of the responsible entity” and that the responsible entity must be a corporation (s. 601FA). It is also accepted that in determining whether Mr King was an officer of the responsible entity one must apply the relevant part of the definition of “officer” in s. 9.

22. *Text of the definition:* The contention at AS[30] overstates the effect of the definition of “officer”. The para 9 definition of “officer” consists in para (a) of those who hold “*named positions*” and in para (b) of those who do not.<sup>2</sup> Of the persons who do not hold named positions, the definitions in paras 9(b)(i) and (ii) might conveniently be described as “*de facto officer*” provisions, and para 9(b)(iii) as a “*shadow officer*” provision. By the latter the legislature has turned its mind to the circumstances in which an “*outsider*” of the company is to be considered an officer, while the former provisions are concerned with persons who have some relevant functional capacity in the way in which they act in a role or position – whether formally appointed or otherwise – in the internal management of the company.

23. It does not follow – as the last sentence of AS[30] contends – that the contrast between this class of person and those falling within the second class of persons indicates that Parliament did not intend to restrict the persons referred to in paragraph (b)(ii) by reference to an implicit criterion that the person act in, occupy or hold a particular office or position.

24. The contents of definition provisions are not necessarily to be read separately from the terms that they define or from the provisions to which they give content.<sup>3</sup> A significant part of the statutory context of the “officer” definition is found in the references in s. 179(2) to people who manage a corporation or its property, in s. 180(1) to the exercise of powers and discharge of duties as if the person “*occupied the office held by, and have the same responsibilities within the corporation as, the director or officer*”, in s. 182(1) to the improper use of “*their position*”. This context supports the first respondent’s contended construction, by referring to or assuming the existence of an office or position within the corporation, against which the duties imposed by the Act are assessed.

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<sup>2</sup> *Shafron v. Australian Securities and Investment Corporation* (2012) 247 CLR 465; [1966] HCA 74 [25].

<sup>3</sup> See for example *Gibb v FCT* (1966) 118 CLR 628 at 635 per Barwick CJ, McTiernan and Taylor JJ; *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [29]; [2012] HCA 56.

25. *Text of s. 601FD(1)*: Mr King accepts that nothing in the text of s. 601FD(1) displays any intention to displace the definition of “officer” in s. 9. However, its terms provide context for the interpretation of definition. Section 601FD(1) prohibits a person from *inter alia* making “*improper use of their position as an officer*”. Contrary to AS[31], this – together with the statutory context referred to above – supports the construction adopted by the Court of Appeal.

26. The reliance in AS[32] and [33] on *Shafron v. Australian Securities and Investment Corporation* (2012) 247 CLR 465 at 476, [19] is misplaced. Instead, the construction for which Mr King contends is consistent with *Shafron*. *Shafron* at 476, [19] is correct in not limiting the parts of the definition of “officer” in s. 9 incorporated into s. 180, but [19] of the reasons has to be read with 476, [18] which in its concluding sentence refers to whatever:

“responsibilities the officer had *within the corporation*, regardless of how or why those responsibilities came to be imposed on that officer.” (Emphasis added)

27. In *Shafron* at [23], the majority also observed that the inquiry required by para (b)(i) of the definition “*must be directed to what role the person in question plays in the corporation*”: see also *Shafron* at [5], [13].

28. *Broad statutory context*: The contention in the last sentence of AS[35] draws too much from the second occasion on which “officer” is defined in s. 9. A more likely view is that when, in an enactment dealing principally with bodies corporate, it was necessary to deal with other bodies (namely partnerships and unincorporated associations) it was thought desirable to state specifically that partners, or office holders as the case might be, would be “officers” of the relevant entity for the purposes of the enactment.

29. The analogy in AS[36] should not be drawn. The definition of “director” in s. 9 commences with the assumption (in paragraph (a)) that the person in question is a director or an alternate director acting as such. It is not concerned with any other office. Paragraph (b) is based on the assumption that the person is *not* validly appointed as a director. It then requires the person to have acted as *a director*, or in circumstances where the actual directors are accustomed to act in accordance with the person’s instructions or wishes.

30. The reliance placed on s. 206A by AS[37] is also misplaced. The hypothesis on which s. 206A(1) operates is that the person is *already* disqualified from managing corporations. That means that the person has ceased to be a director, alternate director or secretary of

the company: s. 206A(2). It is thus necessary to look at the actual conduct said to amount to a contravention of the provision.

**“B. Need for restraint on literal interpretation”: AS[26], [38]-[41]**

31. It is difficult to identify much difference between the *result* arrived at by the Court of Appeal (CA1[247]; CAB 552) and that contended for by the appellant at AS[40] and [41] in most cases. In particular the reliance at AS[39] and [40] on the words “of a corporation” or “of a responsible entity of a registered scheme” suggests that, as the first sentence of AS[40] indicates, there should be a:

10 “relationship of belonging or affiliation between the person falling within the definition of the term “officer”, and the relevant corporation.”

32. That it does so is perfectly sensible. An “officer” does not exist in a vacuum: a person who is an “officer” will always be an officer “of a corporation” or “of a responsible entity of a registered scheme” or “of” some other relevant entity. It is that entity to whom the officer owes duties (or, relevantly, in respect of which it has capacity to affect significantly the financial standing). But that does not answer the concern identified at CA1[247]; CAB 552 that para (b)(ii) applied literally extends to those unrelated to the management of the corporation. This concern is reflected in the authorities.<sup>4</sup>

20 33. At AS[40], the appellant accepts that it “*will often be of central importance whether the person is involved in the management of that corporation*”. Implicitly, it accepts that there will be circumstances in which a person may not be so involved, but will still fall within the definition. And it is those penumbral cases with which this Court ought to be concerned, as was the Court of Appeal.

34. The concern is an important one. The effect of falling within the definition of “officer” is to impose significant duties (including in the nature of fiduciary duties) upon the person, with – in some instances – criminal sanctions (see s. 184). Para (b)(ii) should be not read as extending the application of those duties and sanctions to those whose capacity to affect significantly the financial standing of a corporation is unrelated to a recognised role that that person plays within the corporation, to which those duties might sensibly attach:

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<sup>4</sup> *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35; [2007] FCA 963 [483]-[496]; *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296; [2012] FCAFC 6 [72]-[73].

- (a) For example, a lender with strict lending conditions might have the capacity to affect significantly a company's financial standing, and to cause the company to not do certain things without its permission. But there is no reason to impose the positive duties in the Act upon that lender, in respect of its dealings with the company.
- (b) A further example is a parent company, which may well have control over a subsidiary because the parent can ultimately determine who the directors of the subsidiary are, and in that broad sense, has the capacity to affect significantly the financial standing of the subsidiary.

**“C. The legislative history of the definition of “officer” of a corporation in section 9”:**

10 AS[27], [42]-[61]

- 35. Very little can be taken from a differently expressed predecessor definition of “executive officer”. Further what might arguably be taken from it does not support ASIC’s contention.
- 36. The crux of ASIC’s submission at AS[61] is that the earlier companies legislation – for the purpose of imposing statutory duties of the kind for which ss 180-183 of the *Corporations Act* now provide – sought to identify persons by reference to a different definition which was concerned with the nature of their involvement in the management of a corporation. It then contends that this definition has been incorporated into a more exhaustive definition of “officer” in the current Act – through a number of convoluted changes – and that the absence of an express indication of an intention to alter the breadth of the classes of person covered indicates that this Court should not adopt the construction contended for by the first respondent.
- 37. ASIC’s reliance upon *Commissioner for Corporate Affairs (Vic) v Bracht* (see AS[50],[52]) directly contradicts this Court in *Shafron* at [27], which observed – by reference to that decision and in considering paragraph (b)(i) of the officer definition – that “*very little assistance is to be had from considering decisions about the application of other statutory expressions such as those directed to whether a person is concerned in or takes part in the management of a company*”.
- 38. In any event, the discussion in *Bracht* was not the law regarding the scope of the definition of “executive officer”. The scope of the definition of “executive officer” was given content in the subsequent decisions of *Holpitt Pty Ltd v Swaab* (1992) 33 FCR 474, *Sycotex Pty Ltd v Baseler* (1994) 51 FCR 425 and *Standard Chartered Bank v*

*Antico* (1995) 38 NSWLR 290. Those subsequent decisions had the effect that to be an “executive officer” (that is, to take “part in the management of” a company) a person:

(a) had to have “*the management of the whole affairs of the company*”, be “*person who is entrusted with power to transact the whole of the affairs of the company*”, and be “*the person who in fact really managed the affairs of the company*” – *Holpitt* at 477-478 per Burchett J;

(b) be a person with “*some decision making role in the company*” – *Sycotex* at 441-2 per Gummow J; or

(c) be a person “*whose management role in the company may be likened to that of a director*” – *Antico* at 323 per Hodgson J.

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39. Subparagraph (b)(i) of the definition of “officer” covers much of the same ground as the definition of “executive officer” as understood from *Holpitt*, *Sycotex* and *Antico*.

40. Subparagraph (b)(ii) covers different ground. It is directed to a capacity to affect significantly the corporation’s financial standing.

41. The legislative history outlined at AS[42]-[61] does not, with respect, support an absence of any constraint upon the paragraph (b)(ii) definition, as ASIC contends. Instead, it supports some constraint which requires that – at least – the relevant person’s capacity must derive from their involvement in the management of the corporation. If so, it is difficult to identify any real difference to the result in any particular case between that construction, and that advanced by Mr King.

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**“D.Promotion of protective purpose”: AS[28], [62]-[64]**

42. It is submitted that AS[63] and [64] rather overstate the position. It is clear that the Court of Appeal treated the question whether a person fell within paragraph 9(b)(ii) of the definition of “officer” as a question of fact: see the reference to the last sentence of *Grimaldi* quoted at CA1[241]; **CAB** 549-550. But that is the position for which ASIC contends at AS[40], third and fourth sentences.

43. Further, the “recognised position with rights and duties attached to it” does not require a formally appointed position, or even formal allocation of responsibilities, let alone a contractual relationship or constitutional recognition. The analysis of the Court of Appeal of the position of Mr King makes this clear: see CA1[249]-[288]; **CAB** 553 - 563. Even if it did, the relevant person may still be captured by paragraph (b)(i) or (b)(iii) in an appropriate case, and not avoid paragraph (b) entirely, as AS[63] suggests.

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44. Importantly, in the courts below, ASIC expressly disavowed a case based upon paragraph (b)(i): see, for example CA1[235],[287]; **CAB** 548, 562-563. In that instance, little can be taken from any result that Mr King is not an officer under paragraph (b)(ii): CA1[288]; **CAB** 563.

#### **E. Summary**

45. What is apparent from the above is that ASIC's contentions on its appeal do not differ significantly, at least in their application to the present case, from the approach adopted in CA1. The cases in which they do differ significantly are precisely the circumstances which the Court of Appeal was trying to address: application of the definition of officer under para (b)(ii) to persons unrelated to the management of the corporation

#### **~~Part VI~~ MR KING'S FURTHER SUBMISSION**

46. The submissions in this Part deal with the issue referred to in RS[5], namely the contention that ASIC's appeal should in any event fail or the grant of special leave should be withdrawn.

47. The Court now has the decision of the Court of Appeal on penalty. It had not been given at the time of the grant of special leave. In substance, the pecuniary penalty was reduced by \$30,000 and there were some alterations to the costs orders. The Court also now has the detail of ASIC's contentions, as set out in the AS.

48. What the material in the AS does not touch upon, however, is that the Court of Appeal did not reject the appellant's case *only* on the basis that Mr King did not hold a specified office in MFSIM (CA1[249]; **CAB** 553). Importantly the Court of Appeal also held that there were two questions, namely as stated at CA1[287]; **CAB** 562-563:

(a) whether the appellant had proved that Mr King was an officer "upon the basis which ASIC had pleaded, namely that Mr King had the capacity to affect significantly the corporation's financial standing"; and

(b) "Further, as we have concluded above, ASIC had to prove that Mr King had that capacity by acting in an "office of MFSIM".

49. It is clear that the Court of Appeal decided **both** those issues against ASIC: see its summary of its views at CA1[287] to [289]; **CAB** 562-563. In order to set aside that Court's judgment, it is necessary for ASIC to succeed in setting aside the decision on both issues. There is no ground in the Draft Amended Notice of Appeal which deals

with the issue referred to in RS[5] and [48(a)]. Nor do the AS deal with this issue in any substantive way.

50. This cannot be regarded as a matter which the Court of Appeal bypassed. After its lengthy discussion on the “knowingly concerned” issue (at CA1[111]-[239]: **CAB** 519 - 549) the Court of Appeal dealt in detail with the relevance and weight to be given to each of the matters relied on by ASIC and Mr King on the role played by the first respondent in relation to MFSIM.

51. The discussion of the detail commences at CA1[249]; **CAB** 553 and goes through to CA1[286]; **CAB** 562, before arriving at the conclusions referred to earlier at CA1[287]; **CAB** 562-563. The discussion is one in which, as a “matter of fact and degree”, the various circumstances are considered and weighed with a view to arriving at conclusions on both the issues referred to at CA1[287]; **CAB** 562-563.

52. Unless both bases of the Court of Appeal’s decision were obviously erroneous, it is difficult to see why this Court would allow the appeal which attacks only one such basis. It is submitted that in these circumstances the ASIC appeal should be dismissed.

53. Further, in addition to the matters referred to in RS[48] to [52]:

(a) Now that the AS have been received it is not apparent that there is any very clear distinction – or at least one meriting this Court’s intervention in this case – between the approach taken by the Court of Appeal and that now contended for by ASIC: see the passage from AS[40] quoted at RS[16], see also AS[61].

(b) The ASIC appeal involves no more than \$30,000 plus some costs. Cases where the issue would be of significance must be rare: see AS[41].

(c) It is submitted with respect that this is also a case where the grant of special leave might properly be revoked. If the ASIC appeal is permitted to proceed it should be on terms that ASIC pays the costs of that issue in any event.

~~Part VII~~  
Part VI

#### **MR KING’S CROSS-APPEAL ON LIABILITY**

54. Pursuant to HCR 42.08.1, Mr King seeks to cross-appeal from the decisions of the Court of Appeal on liability. In respect of liability, it is recognised that special leave is required (HCR 42.08.4) and that the seven days referred to in HCR 42.08.1 expired prior to Mr King filing his summons on 18 July 2019.

55. A short but important issue is involved. It involves making the assumption that Mr King knew that the ultimate source of the \$103m paid to Fortress was money provided under an RBS facility for the purposes of PIF: CA1[146]-[155]; **CAB** 529-530 ].
56. In order, however, for Mr King to be liable in respect of the payment of the \$103m to Fortress, he must have participated in the contravention. The Court of Appeal upheld the finding of the primary Judge that Mr King did so in that he “approved and authorised” the payment because Mr White would not have done so without Mr King’s imprimatur because of their relative positions in the Group: CA1[163]; **CAB** 531-532.
57. When one goes to CA1[164]-[168]; **CAB** 532-533 it is apparent that the Court of Appeal thought (at CA1[168]; **CAB** 533) that it was unnecessary for ASIC to show that the payment of \$103m was approved or authorised by Mr King. It was sufficient that there was some conduct which implicated or involved Mr King in the contravention by MFSIM.
58. Yet, when one goes to the evidence in this regard, it is all based upon his supposed influence over others in the Group: see CA1[169],[181]-[183],[227]-[228]; **CAB** 533, 536, 545
59. This is, with respect, a rather curious conclusion to have arrived at in the light of the later, and detailed, discussion of that influence which appears at CA1[250]-[287]; **CAB** 553 - 563. There the particulars of ASIC’s case against Mr King are discussed one by one and the conclusions (at e.g. CA1[285], [286] and [288]; **CAB** 562 - 563) are inconsistent with the view at CA1[163]; **CAB** 531 - 532 that Mr White would not have acted without Mr King’s imprimatur.
60. Also, that conclusion:
- (a) is outside ASIC’s pleaded case, which did not plead that but for the imprimatur of Mr King, White would not have acted as he did: FASOC, **SCAB** pp 42-46[55]. This is not a case where fresh evidence outside the pleadings was admitted but not objected to, or where otherwise Mr King’s acquiescence to the case being decided other than on the pleadings might be inferred.<sup>5</sup> Instead, Mr King persistently objected that ASIC was to be held to its pleaded case.<sup>6</sup> Indeed, the Court of Appeal

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<sup>5</sup> See e.g. *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, 286-7 (Mason CJ and Gaudron J); 296-297 (Deane J).

<sup>6</sup> T3-37/29 to T3-38/46 and T3-41/10-24; Submissions of Mr King dated 13 November 2013 [2], [22].

upheld grounds on the basis of ASIC being held to its pleaded case: e.g. CA1[235], [288]; **CAB** 548 – 563;

(b) goes beyond the evidence referred to by the primary Judge, at CA1[162]; **CAB** 531. That is, the evidence referred to by the primary Judge, and at CA1[162]; **CAB** 531, did not support a finding that Mr White would not have transferred the funds without Mr King’s imprimatur;

10 (c) relied upon reasoning by the primary Judge which was delivered in supplementary findings in [2017] QSC 96 – delivered some 12 months after the delivery of his liability reasons – in which the primary Judge simply clarified that he had “*accepted the evidence and factual submissions by ASIC in general, including the evidence and submissions summarised at [762]-[782]*”: CA1[158]; **CAB** 530; and

(d) had the effect of reversing the onus of proof – in a civil penalty hearing – by apparently relying upon Mr King’s inability to recall an instance when Mr White refused to take a direction from him with respect to the funds management side of the business: CA1[162]; **CAB** 531.

61. Each such matter is a significant error by the Court of Appeal. The significance of each is also compounded by the nature of the case being a civil penalty proceeding. Cumulatively, they amount to a serious miscarriage of justice.

20 62. The consequence of the errors by the Court of Appeal is to impose a \$177 million compensation order upon Mr King, which otherwise would not be imposed. The alternative factual finding made by the Court of Appeal – and tellingly, relied upon by it in its judgment on penalty: CA2[1],[16],[17],[22],[23],[27],[33]-[34],[38],[40]; **SCAB** 7, 11 - 15 – was that Mr King “encouraged” Mr White and others obtaining the RBS funds for the purpose of the Fortress Payment: CA1[168]-[169]; **CAB** 533. That finding is not causally linked to the damage which was suffered: CA1[168]; **CAB** 533. Section 1317H of the Act requires a causal link, and so an order under s. 1317H would not follow.

63. In light of that evidence and the conclusions of the Court, the finding at CA1[163]; **CAB** 531 - 532 that Mr King “approved and authorised” the misuse of the RBS funds should not have been made.

30 64. It is submitted that the interests of the administration of justice, generally and in this case, require consideration by the Court of the judgment of the Court of Appeal.

65. The errors by the Court of Appeal are fundamental; only this court can correct the miscarriage of justice which has occurred as a result.

66. ASIC's Notice of Appeal in this Court was filed on 29 May 2019. Mr King's Notice of Cross-Appeal, filed on 18 July 2019, as to the liability issue, is thus outside the seven days provided for by HCR 42.08.1. At the time so provided for, however, the issues before the Court of Appeal on penalty had not yet been decided. This did not occur until 18 June 2019.

67. It is submitted, with respect, that in circumstances where it was not known what approach would be taken by the Court of Appeal on penalty, the failure of Mr King to challenge the decision on liability within time from ASIC's appeal should be excused.

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~~Part VIII~~ **PENALTY ISSUE RAISED BY ASIC'S APPLICATION**

68. At AS[65]-[66], ASIC advances a further application for special leave from the penalty orders of the Court of Appeal on 18 June 2019. As above at RS[2], Mr King has also filed an application for special leave to appeal from this decision.

69. As set out at RS[48] to [52] above, the Court of Appeal did not reject the appellant's case *only* on the basis that Mr King did not hold a specified office in MFSIM. It also held that Mr King did not have the capacity to affect significantly MFSIM's financial standing at all, on the basis pleaded by the appellant: CA1[287]; **CAB** 562 - 563

70. Unless both bases of the Court of Appeal's decision were obviously erroneous, it is difficult to see why this Court would allow the appeal which attacks only one such basis. It is submitted that in these circumstances the ASIC application for special leave to appeal from the penalty orders of the Court of Appeal on 18 June 2019, or any appeal pursuant to any grant of special leave, should be dismissed.

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71. In any event, Mr King's challenge to the primary Judge's decision on liability below was not limited to the proper construction of the definition of officer in paragraph (b)(ii); Mr King also challenged the primary Judge's analysis of the evidence in significant respects.<sup>7</sup>

72. Therefore, even if the orders of the Court of Appeal are set aside, it does not follow that the orders of the primary Judge should be reinstated. Instead, the matter should be

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<sup>7</sup> Mr King's Notice of Appeal filed 23 June 2017 [3], [8], [9]: **CAB** 464.

reconsidered according to the evidence, whether by further argument in this Court or by remission to the Court of Appeal.

~~PART IX~~     **ORDERS SOUGHT**

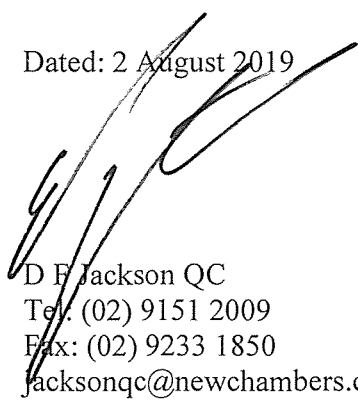
73. Mr King seeks the following orders:

- (a) ASIC's appeal be dismissed.
- (b) Alternatively, the order dated 17 May 2019 granting special leave is revoked.
- (c) ASIC pay Mr King's costs of the ASIC appeal.
- (d) ASIC pay Mr King's costs of ASIC's summons filed 28 June 2019.
- (e) Mr King be granted leave to file, and special leave in respect of, the Notice of  
10                      Cross-Appeal in the form exhibited to the Affidavit of Daniel Gregory Arthur  
                                 Davey sworn 18 July 2019.
- (f) Mr King's cross-appeal be allowed.
- (g) Orders 2 and 7 of the orders made by the Court of Appeal dated 8 December 2018  
in Appeal 6320 of 2017 be set aside and orders 1 to 3 of the orders made by the  
Court of Appeal dated 18 June 2019 be set aside, and in their place order that  
orders 6, 7, 8 insofar as they concern Mr King, and 29 to 32 of the orders made by  
the primary Judge dated 26 May 2017 be set aside.
- (h) ASIC pay Mr King's costs of the cross-appeal.
- (i) ASIC pay Mr King's costs of the appeal to the Court of Appeal of the Supreme  
20                      Court of Queensland in Appeal 6320 of 2017.
- (j) ASIC pay Mr King's costs of the primary proceeding being Supreme Court of  
Queensland proceeding no. 12122 of 2009.
- (k) Such further or other relief as to the Court may seem meet.

vii  
PART X ESTIMATE OF THE TIME FOR ORAL ARGUMENT

74. It is estimated that up to 2½ hours may be required to present Mr King's argument.

Dated: 2 August 2019



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