

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 OUTLINE OF ORAL ARGUMENT

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

ASIC's appeal

2. Its reliance upon paragraph (b)(ii) of the definition of "officer of a corporation" in s 9 of the *Corporations Act* 2001 (Cth) ("the Act") required ASIC to prove at trial that the Mr King had the capacity to affect significantly the financial standing of MFSIM, and that he had that capacity by acting in an "office" of MFSIM in the sense of a recognised position with rights and duties attached to it ("CA construction"): Respondent Submissions ("RS")[18]-[19], [43].
3. The Court of Appeal decided each of those two issues separately, against ASIC: RS[46]-[53] and see Supplementary CAB 17 at [52]. ASIC, however, challenges one only and nothing follows from its appeal.
4. Section 9 does not merely define the word "officer" in isolation from the composite expression "officer of a corporation". Officer is defined twice in s 9, so one must look to the further words providing the context and which give it meaning. The use of "means" after "officer of a corporation" signals the commencement of the content of

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the definition, and the limbs which follow bear out the requisite link between the corporation and the persons deemed to be an “officer”.

5. “Capacity” within the meaning of paragraph (b)(ii) of the Act can refer to a capacity as a matter of law or as a matter of fact. As a matter of law, “capacity” carries with it the notion that the person has a legal ability to affect significantly the financial standing of the corporation. Factually, “capacity” conveys the notion that the person’s position in relationship to the corporation is such that the person’s decisions, if made, will affect significantly the financial standing of the corporation.
6. Paragraph (b)(ii) does not contain the limiting words in paragraph (b)(iii). If read as
10 ASIC contends, paragraph (b)(ii) would extend to external persons or entities with no involvement internally in the company including, for example, bankers, the Commissioner of Taxation, or legal advisors. It is unlikely that the legislature intended that paragraph (b)(ii) be given so broad a meaning: RS[31]-[34].
7. The CA construction is consistent with the statutory context: see RS[22]-[24]. It is consistent with the other limbs of the definition, each of which involves some influence upon the management of the corporation. It is also consistent with the broader context of the Act. For instance, s 180 assumes the existence of both an “office” and of “responsibilities... within the corporation” in respect of the officer. That section has no content if the relevant officer has neither. Section 601FD(f) is similar, in that it is
20 difficult to imagine any circumstances in which a reasonable person who has no role within a company or ability to affect internally its management or operations would take positive steps to ensure compliance by the company with relevant obligations.
8. Sections 181 to 184 and 601FD also impose obligations upon officers, including in some instances in respect of their “position”. Each obligation is of a kind suggesting that the legislature did not intend the definition of officer to extend to persons whose capacity to affect the financial standing of the corporation arises entirely outside of any position – whether held, occupied or assumed – within the corporation.
9. Ultimately, ASIC’s argument that “of the corporation” requires some “belonging or affiliation” is not substantially different from the CA construction. The natural

interpretation of such a “belonging or affiliation” to a corporation requires that the relevant person has some position recognised by the company.

10. If ASIC’s argument is substantially different from the CA construction, then it does not avoid the difficulty arising from the broadest interpretation of paragraph (b)(ii), because it permits the officer definition to extend to persons with no ability to influence the management of the corporation.

Mr King’s cross-appeal

- 10 11. The Court of Appeal decided the question of Mr King’s involvement in MFSIM’s contraventions on two separate bases: first, in upholding the primary judge’s finding that Mr King “approved and authorised” the transaction, and secondly, in finding that Mr King was relevantly involved including because he “encouraged” Mr White, to say nothing of a direction to him: RS[56]-[57].

12. The second finding is not causally linked to the payment by MFSIM. Section 1317H(1) requires causation between the compensation ordered, and the contravention *by Mr King*. If Mr King’s challenge to the first finding succeeds, the \$177,017,084 compensation order should not stand: RS[62].

- 20 13. The “approved and authorised” finding made by the Court of Appeal relied upon essentially the same factual allegations as the officer case, which the Court of Appeal rejected. That allegation having been rejected, it is unclear how the Court could have come to its conclusion at CA1[163]: RS[59].

14. In making the “approved and authorised” finding, the Court of Appeal relied upon a finding that but for Mr King’s direction, Mr White would not have transferred the funds. That finding was outside ASIC’s pleaded case, and the trial below was conducted on the basis that ASIC was to be confined to its pleaded case: RS[60].

Dated: 9 October 2019

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D.F. Jackson QC