

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

OUTLINE OF ORAL SUBMISSIONS OF THE APPELLANT

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PART I INTERNET PUBLICATION

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

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Facts

2. MFSIM was part of the MFS Group, and the responsible entity of the Premium Income Fund (**PIF**). PIF obtained a \$200M loan facility from RBS. In November 2007, that facility was drawn-down and \$103M was used to pay a debt of another company in the MFS Group (**Fortress payment**). That debt was unrelated to PIF or MFSIM, and PIF received nothing in exchange. By misusing PIF's funds in that way, MFSIM breached its statutory duties as PIF's responsible entity: QCA [2]-[4], [6]-[9], [11], [13]-[14].
3. Mr King was the most senior officer within the MFS Group. While he was not a director of MFSIM at the time of the Fortress payment, he retained "overall responsibility" for MFSIM. Mr White, the executive director of MFSIM, talked daily with Mr King and took instructions from him: QCA [182]-[184]. Mr King "approved and authorised" the misuse of PIF's funds. He negotiated a variation to the terms of the Fortress payment; was in frequent contact with others in the MFS Group about progress to find the money to make that payment; and encouraged Mr White and others to obtain the RBS funds to make the payment: QCA [163], [169].

II. Meaning of "officer"

4. **Text and ordinary meaning:** At issue in the appeal is whether Mr King breached s 601FD of the *Corporations Act 2001*, which imposes duties on "officers" of responsible entities. That turns on whether para (b)(ii) of the definition of "officer" of a corporation in s 9 extends to a person who can be shown to have the requisite capacity to affect significantly a corporation's financial standing, but who does not act in a "recognised position with rights and duties attached to it" (QCA [246]) (that requirement excluding, amongst others, persons with the requisite capacity by reason of a position in a parent corporation).
5. The exhaustive definition of "officer" of a corporation in s 9 identifies two classes of persons: those who hold a named office in, or in relation to, the corporation; and those who do not: *Shafron v ASIC* (2012) 247 CLR 465, [25] (Vol C, tab 18): **AS [30]**. That provides a powerful textual indication that there is no implicit restriction on para (b) by

reference to whether persons hold a position of the kind required by the other class. The use of the term “position” in s 601FD likewise does not require para (b)(ii) to be confined to persons who hold a recognised position: *Shafron*, [18]-[19], AS [31]-[32].

6. **Statutory context:** The statutory context does not support the implication of a restrictive criterion in para (b) of the definition of “officer” of a corporation.

6.1. A person can be a shadow director of a corporation, and therefore an “officer” as defined in para (a) and/or (b)(iii), without occupying an “office”. Once it is recognised that a person can be an officer without occupying an “office”, there is no reason to imply such a requirement into para (b)(ii): AS [36].

10 6.2. Section 206A(1)(b) uses the same language as para (b)(ii) of the definition of “officer”. The equivalence confirms that Parliament used that language to identify persons involved in the management of a corporation: see, eg, *ASIC v Reid* (2005) 55 ACSR 152, [141] (Lander J) (Vol D1, tab 20). Section 206A(1) clearly is not limited to persons who act in a recognised position within a corporation with rights and duties attached: AS [37]. That points against any such implied limit in para (b).

6.3. Where Parliament intended to refer to a person holding or acting in an office, it did so explicitly: eg s 9 defn of “director” and “officer” of an entity: AS [35].

20 7. **Legislative history:** Contrary to QCA [248], the legislative history of para (b)(ii) is instructive. It reveals that the language used in para (b)(i) and (ii) was intended to codify the meaning courts had given to the definition of “executive officer”, which was a definition used to extend statutory duties to persons who are “concerned with, or take part, in the management of” corporations. That definition did not require a person to hold a “recognised position with rights and duties attached to it”. To imply such a limit into para (b)(ii) would confine the class of persons on whom statutory duties were previously imposed, contrary to the intention when para (b)(ii) was enacted: AS [42]-[61].

7.1. *Managed Investments Act 1998* (Cth), Sched 2, Item 21 (Vol B, tab 12, p216)

7.2. *Companies Act 1981*, ss 5 (“executive officer” and “officer”), 229 (Vol B, tab 6, p146)

30 7.3. *Commissioner for Corporate Affairs (Vic) v Bracht* [1989] VR 821 at 828, 830 (Vol D1, tab 22, p524)

7.4. *Corporate Law Economic Reform Program Act 1999* (Cth) Sch 3, Pt 3, item 112; Sch 1, item 1 (s 179(2)) (Vol B, tab 11, p192)

7.5. *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (CLERP 9 Act)* Sch 9, items 8 and 11 (Vol B, tab 8, p162)

7.6. Explanatory Memorandum, CLERP 9 Bill, [5.572], [5.577]-[5.578] (Vol E, tab 34, p1089)

7.7. Commentary on the Draft Bill for the CLERP 9 Act, [569]-[570] (Vol E, tab 35, p1095)

7.8. Ford et al, *An Introduction to the CLERP Act 1999*, [2.5]-[2.6] (Vol E, tab 33, p1083)

7.9. *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, [45] (Vol D1, tab 23, p539)

7.10. *ASIC v Citigroup Global Markets (No 4)* (2007) 160 FCR 35, 100 (Vol D1, tab 19, p383).

10 8. **Court of Appeal's reasoning:** The QCA held that para (b)(ii) extends only to persons who act in an "office" of a corporation, being "a recognised position with rights and duties attached to it": [240], [246]. In so holding, it adopted language derived from *In re Western Counties Steam Bakeries & Milling Co* [1897] 1 Ch 617 (Vol D2, tab 31), where the ordinary meaning of "officer" was discussed. The ordinary meaning of the word "officer" cannot permissibly constrain the exhaustive definition of that term: **AS [23]**.

9. The QCA at [239]-[241] took too much from *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 at [37], [72]-[73] (Vol D1, tab 23), which did not hold that a person must hold a "position" internal to the company of which the person is an "officer". If it did, it is inconsistent with the reasoning in *Shafron*, and should not have been followed in preference to it.

20 10. Before any duties are imposed under s 601FD, a person must answer the statutory description of being "of" the relevant corporation: **AS[38]-[40]**; cf QCA [247]. Whether that is so under para (b)(ii) will be a question of fact and degree: cf *Shafron* at [26].

11. Mr King's characterisation of the QCA's reasoning as requiring a functional role "within" a company's management introduces an impermissible gloss on the statutory text; is inconsistent with the QCA's reasons; and would require the drawing of an uncertain line between those whose functional role is within or "outside" a company's management: **Reply [4]-[6]**, cf RS [18], [22], [43].

30 12. **No alternative basis for the QCA's judgment:** Contrary to RS [46]-[53], it is not open to construe QCA [287]-[288] as rejecting ASIC's case on two separate bases, one of which is not challenged, given QCA [238], [249], [266], [279], [286]: **Reply [7]**.

Date: 9 October 2019

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