

## **ASIC v KING & ANOR (B29/2019)**

Court appealed from: Queensland Court of Appeal  
[2018] QCA 352 & [2019] QCA 121

Dates of judgments: 18 December 2018 & 18 June 2019

Special leave granted: 17 May 2019

The MFS Group started out as the mortgage lending arm of a firm of Gold Coast solicitors. By 2007 it comprised a multitude of businesses, including managed investment schemes. One such scheme was the Premium Income Fund (“PIF”) of which MFS Investment Management Pty Ltd (“MFSIM”) was the responsible entity. PIF invested in equities, debt instruments, cash and registered mortgages.

In the relevant period, Mr Michael King was CEO of the MFS Group. As such, he had overall responsibility for MFSIM, with Mr Craig White taking instructions from him with respect to proprietary matters of MFSIM’s business. Mr King continued to have influence over MFSIM’s affairs even after he ceased to be a director of it in February 2007.

On 29 June 2007 MFSIM obtained a \$200 million loan facility with the Royal Bank of Scotland Plc (“RBS”). This facility could only be used for the purposes of PIF and it was not available for the use of other companies in the MFS Group.

On 1 June 2007 the MFS Group obtained from Fortress Credit Corporation (Australia) II Pty Ltd (“Fortress”), a short-term loan facility of \$250 million for purposes unrelated to PIF. The whole amount was due to be repaid by 31 August 2007, but this deadline was subsequently extended, on new terms, to 30 November 2007. By mid to late November 2007 however, MFS Ltd was in financial difficulty. In late November 2007 Mr King, as the CEO of MFS Ltd, negotiated terms with Fortress to defer repayment of the total amount of the loan. An agreement was reached for the payment by 30 November 2007 of \$100 million, together with an extension fee of \$3 million. The balance of \$150 million was to be repaid by 1 March 2008. This meant that MFS Ltd had to find \$103 million in order to repay Fortress by 30 November 2007.

MFSIM and senior individuals in the MFS Group arranged on 27 November 2007 to draw down \$150 million under the RBS loan agreement. Rather than being used for the purposes of PIF, PIF’s money was used to pay the debts of MFS companies for which PIF was neither actually nor contingently liable.

In broad terms, two disbursements totaling \$147.5 million are in issue. At the trial, ASIC established that MFSIM had misused the \$147.5 million that belonged to PIF to pay the debts of other companies in the MFS Group. It also established that, through the misuse of PIF’s \$147.5 million, MFSIM had breached its duties as PIF’s responsible entity and thereby contravened s 601FC(1) of the *Corporations Act 2001* (Cth) (“the Act”). The primary judge found that Mr King and Mr White, as persons intimately involved in MFSIM’s

contraventions in respect of the November payments, had also contravened s 601FC. Both Mr King and Mr White were further found to have breached their duties, as “officers” of MFSIM, in contravention of s 601FD of the Act.

On 18 December 2018 the Court of Appeal (Morrison & McMurdo JJA, Appelgarth J) upheld Mr King’s appeal. Their Honours held that any capacity Mr King may have had to substantially affect MFSIM’s financial standing was derived from his position as CEO of the MFS Group and not because he acted in some office or position within MFSIM. The Court of Appeal went on to find that, *had it* concluded that Mr King was an officer of MFSIM, it *would have* concluded that he breached his duties under s 601FD.

In these appeals, the grounds of appeal include:

- The Court of Appeal erred by concluding (QCA at [249]) that it was necessary for ASIC to prove that Mr King acted in an “office” of MFSIM, that is, “a recognised position with rights and duties attached to it” (QCA at [246]) in order for Mr King to be an “officer” of MFSIM for the purposes of s 601FD and s 9(b)(ii) of the Act.

On 18 July 2019 Mr King filed a summons, seeking leave to cross-appeal from the judgment of the Court of Appeal dated 18 December 2018. The ground of that proposed cross-appeal is:

- The Court of Appeal erred in finding that Mr King approved and authorised the misuse of PIF’s funds by Mr White (QCA at [163]) by impermissibly adopting inconsistent factual findings beyond the scope of ASIC’s pleaded case.