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

APPELLANT'S REPLY

Filed on behalf of the Appellant by:

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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: ARGUMENT

A. Reply to Mr King's argument in answer to the ASIC appeal (RS [15]-[45])

2. The express premise for Mr King's submissions is that the text of para (b)(ii) of the definition of "officer" in s 9 of the *Corporations Act 2001* (Cth) (**CA**) does not mean what it says (First Respondent's Submissions (**RS**) **[17]**). Yet there is no reason to depart from the plain meaning of the text. Mr King's submission to the contrary overlooks the effect of the textual requirement that a person be an officer "of" the relevant corporation (Appellant's Submissions (**AS**) **[38]-[41]**).

3. Mr King submits that the Court of Appeal's (**QCA**) conception of a "recognised position" within a corporation does not require a formal position, designation or allocation of responsibilities in respect of a person, and that it is concerned to identify a "functional role or position within the management of the company" as the "central limiting concept" (**RS [18]**, **[43]**). In so submitting, Mr King in substance abandons (or at least makes no attempt to defend) the central finding of the QCA, which expressly did require an officer to hold "a recognised position with rights and duties attached to it" (**CAB 552** at [246]).

4. The critical difference between Mr King's analysis, and that of ASIC, is that Mr King attempts to confine para (b)(ii) of the definition of "officer" to persons whose functional role or position is within a company's management, and therefore to exclude persons who are external to the company's management, irrespective of their capacity to affect significantly the corporation's financial standing. That analysis introduces an impermissible gloss on the statutory text. It should not be accepted, for the reasons set out in **AS [29]-[64]**, and for the following additional reasons.

5. *First*, Mr King does not explain how to determine whether a "functional" role or position is within or outside a company's management. *Second*, Mr King submits (**RS [22]**) that, while Parliament was concerned, in para (b)(iii) of the definition, with "outsiders" of a company, it was concerned in paras (b)(i) and (ii) with persons in a role or position "in the internal management of the company". That is simply an assertion; yet the purpose of the legislation must be derived from what the legislation says, not from any assumption about

the desired or desirable reach or operation of the relevant provision,[1] and there is nothing in the legislation that suggests a bright line distinction between paras (b)(ii) and (b)(iii). *Third*, Mr King submits (**RS [24]** and **[25]**) that ss 180(1), 182(1) and 601FD(1) CA, in referring to an "office held" or "position", support his contention that an officer must act in some "office" within a company's management. However, there is no reason a person cannot use their "position" in the prescribed way simply because that position is not "within" the company (particularly where, as in this case, that position is a position in a parent company): **CAB 536-537** at [182]-[186]. *Fourth*, the passages in *Shafron v ASIC* (2012) 247 CLR 465 to which Mr King refers do not assist him (**RS [26]-[27]**). The appellant in that case was a secretary of the company, and the plurality's observations were made in that context (*Shafron* at [5], [10]). The important point from *Shafron* is that this Court, at [19] and [25], recognised the clear and important distinction been para (b) and the other paragraphs of the definition of "officer", specifically recognising the "evident difficulty" in defining the content of the "office held" where para (b)(i), (ii) or (iii) applied.

6. Mr King seeks, incorrectly, to elide the differences between the construction of para (b)(ii) of the definition of "officer" for which ASIC contends, and that which the QCA adopted (**RS [31]**, **[41]**, **[45]**, **[53(a)]**). There is at least one clear category of case where the two constructions differ substantially: persons who can be shown—as a factual matter—to have the requisite capacity to affect significantly a corporation's financial standing, not by reason of holding a position within that corporation, but by reason of a position in a related corporation (including, most obviously, a parent corporation).

B. Reply to Mr King's "further submission" (RS [46]-[53])

7. The central question raised by ASIC's appeal is whether the QCA erred in holding that ASIC had not established that Mr King was an "officer" of MFSIM. If the QCA erred in that regard, its error cannot be separated from its evaluation of whether Mr King was a person who had the capacity to affect significantly MFSIM's financial standing. That is so for three reasons. *First*, Mr King's case on appeal to the QCA was that he did not have a capacity to affect MFSIM's financial standing within the meaning of s 9 CA "because he did not act in an office or position within that company" (**CAB 549** at [238] (emphasis added)). *Second*, consistently with Mr King having put his case in that way, the QCA introduced its evaluation of the evidence as being directed to "whether the evidence proved

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1 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 390 [26] (French CJ and Hayne J), citing, *inter alia*, *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 262 [28].

that [Mr King] was an officer, according to what we have concluded was the correct interpretation of that term" (**CAB 553** at [249]). *Third*, consistently with that framing of the issue, the QCA in fact evaluated the evidence relevant to Mr King's capacity by reference to its construction of the definition of "officer" and, in doing so, treated the question whether Mr King acted in an office or position of MFSIM (as distinct from his role as CEO of the MFS Group) as a touchstone (see **CAB 556, 558** at [261], [266], [267]; **CAB 561-562** at [279], [285], [286]; see also **Supp CAB 17** at [52]). Given those three points, it is not open to construe the reasoning at [287]-[288] (**CAB 562-563**) as rejecting ASIC's case on two separate bases, one of which has not been challenged: cf **RS [49]-[52]**.

10 To the contrary, the QCA's error in construing the definition of "officer" underpinned, and cannot be disentangled from, its observation that ASIC had not proved that Mr King had the requisite capacity to satisfy para (b)(ii) of the definition of "officer".

8. Mr King's submission that special leave should be revoked is without foundation: **RS [52]**, **[53(c)]**. As it happens, Mr King advanced the argument addressed above in attempting to resist special leave, yet special leave was granted (after the Court repeatedly raised with his counsel the difficulty in disentangling the reasoning in **CAB 562-563** [287]-[288] in the manner suggested): [2019] HCATrans 104, ln 213-268.

9. If the QCA erred in its interpretation of the definition of "officer", ASIC's appeal should be allowed (cf **RS [52]**), as should ASIC's proposed appeal from the QCA's 18 June 2019

20 orders on penalty. Given that the primary judge found that Mr King was an "officer" on the basis that he had the capacity to affect significantly MFSIM's financial standing (**CAB 152** at [679]), if this Court agrees with that conclusion then it is appropriate that the orders of the primary judge should be restored (cf **RS [71]-[72]**).

PART III: MR KING'S SUMMONS DATED 18 JULY 2019

10. ***Mr King's summons ought to be dismissed:*** By his summons dated 18 July 2019, Mr King seeks special leave to cross-appeal, and a dispensation from the requirements of the *High Court Rules 2004* (Cth) (the **Rules**) by reason of his failure to file a notice of cross-appeal in the time permitted by r 42.08.1 of the Rules.

11. After service of ASIC's notice of appeal on 29 May 2019, Mr King had 7 days to file any

30 notice of cross-appeal from the QCA's 18 December 2018 orders (r 42.08.1). Mr King submits that his failure to file a notice of cross-appeal within that time should be excused because, at that time, the QCA had not yet decided the issues that were before it on penalty (**RS [66]**). That explanation ought to be rejected, for the issue that Mr King seeks to raise

by cross-appeal is the argument that the QCA erred in finding that Mr King "approved and authorised" the misuse of PIF's funds by Mr White, being an issue that is not affected by the penalty judgment on 18 June 2019. Moreover, Mr King's summons was filed one month after the QCA pronounced its orders in respect of penalty on 18 June 2019, and no explanation has been proffered for that additional delay (which itself substantially exceeds the 7 days permitted by the Rules).

12. In any event, no question of public importance arises on Mr King's proposed cross-appeal such as to warrant the grant of special leave. His complaint asserts inconsistent findings of fact (being findings where the QCA unanimously upheld the primary judge). Nor do the interests of the administration of justice in this case require consideration of Mr King's proposed cross-appeal. To the contrary, as explained below, even if Mr King made out his proposed ground of cross-appeal, it would not lead to any different result. In those circumstances, Mr King's summons should be dismissed.

13. ***Submissions on cross-appeal:*** If special leave to cross-appeal is granted, the cross-appeal should be dismissed, for three reasons. *First*, the sole ground in the notice of cross-appeal attacks **CAB 531-532** [163], where the QCA rejected the attack on the primary judge's finding that Mr King had "approved and authorised" the use of the RBS funds to pay Fortress. But even if Mr King demonstrates error in that finding, it would have made no difference to the outcome of Mr King's appeal. That follows because the finding at **CAB 531-532** [163] was made as part of the QCA's consideration of Ground 11 (**CAB 468**), which concerned whether Mr King was involved in MFSIM's contraventions of ss 601FC and 208 CA. Yet, on that issue, having rejected the attack on the primary judge's finding, the QCA went on to make clear that the question was <u>not</u> whether Mr King "approved and authorised" the use of PIF's money, but whether he was "knowingly concerned in MFSIM's contraventions" (**CAB 532** at [164]). Answering that question, the QCA found that "clearly [Mr King] was involved or implicated" in MFSIM's contraventions (**CAB 533** at [169], **CAB 563** at [291]). The proposed notice of cross-appeal makes no attack on that finding. As the QCA did <u>not</u> find that Mr King participated in MFSIM's contraventions only by "approving and authorising" the use of money drawn down from the RBS (cf **RS [56]**), it follows that Ground 11 was dismissed on a basis that is not attacked.

14. *Second*, to the extent that Mr King's submissions now seek to go beyond the notice of cross-appeal (**RS [58]-[60]**), Mr King is wrong to assert that the Court's finding was "all

based on [evidence concerning] his supposed influence over others" (**RS [58]**). To the contrary, the QCA found that Mr King was knowingly concerned in MFSIM's contraventions based on (**CAB 533, 545** at [169], [228]): (i) Mr King's negotiations with Fortress after which the $103 million payment was made; (ii) Mr King's frequent contact with Mr White about efforts to procure funds to repay Fortress; and (iii) Mr King's encouragement of Mr White and others to obtain the RBS funds for the purpose of the Fortress payment. Furthermore, in rejecting Ground 12, the QCA gave detailed reasons for rejecting Mr King's challenge to the findings that he had the requisite state of mind to be "knowingly concerned" in MFSIM's contraventions (**CAB 533-545** at [171]-[229]).

15. In the part of its reasons that Mr King seeks to challenge by cross-appeal, the QCA was not concerned with whether the damage suffered by PIF had "resulted from" Mr King's involvement in MFSIM's contraventions, within the meaning of s 1317H(1)(b) CA (cf **RS [62]**). There is nothing in **CAB 532-533** [164]-[169], or elsewhere in the QCA's reasons, to suggest that the compensation order was dependent upon the finding that Mr King had "approved and authorised" the use of the funds. The attack on that finding in the notice of cross-appeal therefore provides no basis for the assertion that the Court would not otherwise have imposed the compensation order of $177 million: cf **RS [62]**.

16. *Third*, the QCA was correct in its conclusion (**CAB 532** at [163]) that there was no error in the primary judge's reasoning that Mr King "approved and authorised" the use of the RBS funds. The QCA accepted that: Mr King had influence over Mr White (**CAB 557, 559** at [266], [267], [270]); Mr King and Mr White spoke on a daily or almost daily basis about the affairs of MFS Ltd and its subsidiaries, including MFSIM (**CAB 555** at [255]); Mr King was "the boss" with overall responsibility for MFSIM (**CAB 536** at [183]; **CAB 555** at [255]); Mr King was apparently able to influence major decisions across the entire group (**CAB 556** at [261]) and was prepared to intervene in the business of MFSIM by something in the nature of a directive rather than advice (**CAB 561-562** at [280], [283]).

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ANNEXURE

Constitutional provisions, statutes and statutory instruments referred to in submissions

1. *Corporations Act 2001* (Cth), ss 9, 180, 182, 601FD, 1317H (compilation prepared on 2 October 2007)[2]
2. *High Court Rules 2004* (Cth), r 42.08.1 (compilation No. 23 dated 1 January 2019)

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2 Section 1317H of the *Corporations Act 2001* (Cth) was not amended between 2 October 2007, and 27 May 2017, the date on which the primary judge made the compensation order against the first respondent.