

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, NETTLE AND GORDON JJ

AUSTRALIAN SECURITIES AND INVESTMENTS
COMMISSION

APPELLANT

AND

MICHAEL CHRISTODOULOU KING & ANOR

RESPONDENTS

Australian Securities and Investments Commission v King
[2020] HCA 4
Date of Hearing: 9 October 2019
Date of Judgment: 11 March 2020
B29/2019

ORDER

1. *Appeal allowed.*
2. *Set aside paragraphs 1, 2 and 7 of the order made by the Court of Appeal of the Supreme Court of Queensland on 18 December 2018 in Appeal No 6320 of 2017 and, in their place, order that the appeal to the Court of Appeal be dismissed.*
3. *Set aside the order made by the Court of Appeal dated 18 June 2019 in Appeal No 6320 of 2017 and, in its place, order that Mr King pay the Australian Securities and Investments Commission's costs of the appeal to the Court of Appeal.*
4. *Mr King pay the Australian Securities and Investments Commission's costs of the appeal to this Court.*

On appeal from the Supreme Court of Queensland

Representation

S P Donaghue QC, Solicitor-General of the Commonwealth, with M T Brady QC and O M Ciolek for the appellant (instructed by Corrs Chambers Westgarth)

D F Jackson QC with B J Kabel for the first respondent (instructed by Tucker & Cowen Solicitors)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Australian Securities and Investments Commission v King

Corporations – Officers – Meaning of "officer" of corporation – Where para (b)(ii) of definition in s 9 of *Corporations Act 2001* (Cth) defined "officer" of corporation as person who had capacity to affect significantly corporation's financial standing – Where MFS Investment Management Pty Ltd ("MFSIM") responsible entity of registered managed investment scheme, Premium Income Fund ("PIF") – Where MFSIM entered into loan facility to be used solely for purposes of PIF – Where MFSIM drew down on loan facility to pay debts of other related companies in MFS Group – Where MFSIM secured no promise of repayment of funds to PIF – Where first respondent was Chief Executive Officer of parent company of MFS Group – Where first respondent acted as "overall boss" of MFS Group and assumed "overall responsibility" for MFSIM – Where first respondent approved and authorised disbursement of funds from loan facility knowing no benefit or consideration would pass to PIF – Where first respondent not director of MFSIM at relevant time – Where Australian Securities and Investments Commission alleged first respondent breached duties as officer of MFSIM in contravention of *Corporations Act* – Whether para (b)(ii) of definition of "officer" in *Corporations Act* requires person to have acted in recognised position within corporation with rights and duties attached to it – Whether first respondent "officer" of MFSIM.

Words and phrases – "capacity to affect significantly the corporation's financial standing", "chief executive officer", "corporate group", "de facto director", "financial standing", "managed investment scheme", "management of corporation", "misuse of funds", "named office", "office", "officer", "officer of a corporation", "recognised position".

Corporations Act 2001 (Cth), ss 9, 179, 180, 601FD.

- 1 KIEFEL CJ, GAGELER AND KEANE JJ. The principal issue in this appeal concerns the construction of the word "officer", as defined in s 9 of the *Corporations Act 2001* (Cth) ("the Act"). The Court of Appeal of the Supreme Court of Queensland concluded that for the appellant ("ASIC") to establish that the first respondent ("Mr King") was an "officer" of the second respondent ("MFSIM") within para (b)(ii) of the definition of that term as it applies to a corporation, it was necessary for ASIC to prove that Mr King had acted in an "office" of MFSIM, in the sense of "a recognised position with rights and duties attached to it"¹. For the reasons that follow, the Court of Appeal erred in so concluding; and so ASIC's appeal must be allowed.

Background

- 2 Mr King was the Chief Executive Officer ("CEO") and an executive director of MFS Ltd, a formerly listed public company that was the parent company of the MFS Group of companies ("the MFS Group")². The MFS Group commenced business before the turn of the century as the mortgage lending arm of a firm of Gold Coast solicitors. By 2007, its business had grown and it fell into two broad categories: tourism and travel-related services ("the Stella Group"); and funds management and financial services, including managed investment schemes³. Of the latter, the Premium Income Fund ("PIF") was the largest registered managed investment scheme in the MFS Group.
- 3 PIF was the "flagship fund" of the MFS Group. As at 31 October 2007, it had total funds under management from retail investors of approximately \$787 million⁴. MFSIM was the responsible entity of PIF. In that capacity, on 29 June 2007, MFSIM entered into a \$200 million facility with the Royal Bank of

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- 1 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 160-161 [246], 161 [249].
- 2 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108 [2], 110 [19].
- 3 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108 [2].
- 4 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108 [3].

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Scotland Plc ("the RBS loan agreement")⁵. The facility was to be used by MFSIM for the purposes of PIF; it was not available for the use of other companies in the MFS Group⁶.

4 On 27 November 2007, MFSIM and senior personnel in the MFS Group arranged to draw down \$150 million under the RBS loan agreement. The money was not used for the purposes of PIF; rather, it was used to pay the debts of other MFS Group companies for which PIF was not actually or contingently liable⁷. In broad terms, \$147.5 million was disbursed by MFSIM to pay the debts of other companies in the MFS Group: one disbursement of \$130 million was made on 30 November 2007 and another of \$17.5 million was made on 27 December 2007⁸.

5 This appeal is concerned only with the \$130 million disbursement that was paid by MFSIM to MFS Administration Pty Ltd, which acted as the treasury company for the MFS Group. On the same day that it received the \$130 million, MFS Administration Pty Ltd paid \$103 million to Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress")⁹.

6 Fortress had previously provided a short-term loan facility of \$250 million to MFS Castle Pty Ltd, a wholly owned subsidiary of MFS Ltd. That loan was guaranteed by MFS Ltd and another wholly owned subsidiary, MFS Financial Services Pty Ltd. It was to be repaid on 31 August 2007. In order to enable the loan to be repaid by the due date, MFS Ltd had hoped to sell the Stella Group or obtain a \$450 million corporate banking facility. Neither of these hopes

5 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108 [4].

6 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108 [4]-[5].

7 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 109 [9].

8 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 109 [10].

9 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 109 [11].

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materialised and the short-term facility with Fortress was extended by agreement to 30 November 2007¹⁰.

7 In late November 2007, when it became apparent that it was unlikely that the \$250 million Fortress debt could be repaid on 30 November, Mr King, as CEO of MFS Ltd, negotiated a further deferral of the repayment of the loan with Fortress. An agreement was reached for the payment by 30 November of \$100 million, together with an extension fee of \$3 million, with the balance of \$150 million to be repaid by 1 March 2008¹¹. This agreement meant that MFS Ltd had to find \$103 million in order to pay Fortress by 30 November 2007¹². When the payment to Fortress on 30 November was made from the funds drawn down from the RBS loan agreement, no agreement had been reached by which MFSIM received any consideration for its payment of \$130 million to MFS Administration Pty Ltd and thence Fortress. PIF (and indirectly the retail investors of that fund) was thereby exposed to the risk that PIF's money would not be restored to it – there was no evident promise of repayment, let alone one that was properly secured¹³.

8 At trial, ASIC put its case against Mr King in two ways. First, ASIC claimed that Mr King contravened the Act because he was knowingly concerned in MFSIM's contraventions of the Act. The primary judge (Douglas J) held¹⁴ that MFSIM contravened s 601FC(5) of the Act because it breached its duties under s 601FC(1) of the Act as the responsible entity of PIF; and that MFSIM had also provided a financial benefit to a related party (MFS Administration Pty Ltd) in contravention of s 208(1) of the Act. Mr King was found, at trial and on appeal, to

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- 10 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108 [6].
- 11 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 108-109 [7]-[8].
- 12 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 109 [8].
- 13 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 109 [13], 112 [29], 124 [89].
- 14 *Australian Securities and Investments Commission v Managed Investments Ltd [No 9]* (2016) 308 FLR 216 at 366 [759]. A full report of the Supreme Court of Queensland's judgment is reported as *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (ACN 101 634 146) (In liq)* (2016) 112 ACSR 138.

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have been knowingly concerned in MFSIM's contraventions of the Act and, in consequence of s 79(c) of the Act, he was held to have contravened ss 601FC(5) and 209(2) of the Act¹⁵.

9 This appeal relates to the second way in which ASIC conducted its case at trial. ASIC contended that Mr King was liable under s 601FD of the Act as an "officer" of MFSIM. In that regard, the primary judge held that Mr King breached his duties as an officer of MFSIM "by not acting honestly, or alternatively failing to exercise the required degree of care and diligence and not acting in the best interests of the members of PIF"¹⁶ contrary to s 601FD(1)(a) and (c) of the Act. The primary judge also held that Mr King, contrary to s 601FD(1)(e) and (f)(iii) of the Act, "made improper use of his position as an officer of MFSIM by failing to take steps that a reasonable person would take in his position to ensure MFSIM as responsible entity for PIF complied with its constitution"¹⁷.

10 Mr King had ceased to be a director of MFSIM on 27 February 2007¹⁸. ASIC's case against him was that he nonetheless remained an "officer" of MFSIM until 21 January 2008 because he fell within para (b)(ii) of the definition of "officer of a corporation" in s 9 of the Act, being "a person ... who has the capacity to affect significantly the corporation's financial standing". ASIC argued¹⁹ that Mr King was a person who had that capacity because he was the CEO and an executive director of MFS Ltd with overall responsibility for MFSIM as a member of the MFS Group; and because Mr White, the deputy CEO of MFS Ltd and an executive director of MFSIM, had reported directly and frequently to Mr King in the

15 *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (ACN 101 634 146) (In liq)* (2016) 112 ACSR 138 at 300 [845]-[847], 300-301 [850]-[851], 301 [854]-[856]; *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 143 [169], 155 [228]-[229].

16 *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (ACN 101 634 146) (In liq)* (2016) 112 ACSR 138 at 301 [854]. See also at 301 [853].

17 *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (ACN 101 634 146) (In liq)* (2016) 112 ACSR 138 at 301 [854].

18 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 110 [19].

19 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 155-156 [230], 156-157 [232].

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performance of Mr White's role in MFSIM, and customarily acted in accordance with Mr King's instructions and wishes in that role.

Relevant statutory provisions

- 11 The term "officer of a corporation" is defined by s 9 of the Act as follows:
- "***officer*** of a corporation means:
- (a) a director or secretary of the corporation; or
 - (b) a person:
 - (i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
 - (ii) who has the capacity to affect significantly the corporation's financial standing; or
 - (iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or
 - (c) a receiver, or receiver and manager, of the property of the corporation; or
 - (d) an administrator of the corporation; or
 - (e) an administrator of a deed of company arrangement executed by the corporation; or
 - (f) a liquidator of the corporation; or
 - (g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else."
- 12 Section 601FD(1) of the Act provides relevantly as follows:
- "An officer of the responsible entity of a registered scheme must:
- (a) act honestly; and

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- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
- ...
- (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
- (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
- ...
- (iii) the scheme's constitution".

The principal issue in the courts below

13 The primary judge was satisfied that ASIC had shown that Mr King was an "officer" of MFSIM because he had the capacity to affect significantly MFSIM's financial standing²⁰.

14 The Court of Appeal (Morrison and McMurdo JJA and Applegarth J) did not disturb the primary judge's findings of fact as to the nature and extent of Mr King's involvement in relation to the operations of MFSIM. Conformably with the findings of the primary judge, the Court of Appeal concluded that Mr King, as the CEO and an executive director of MFS Ltd, acted as the "overall boss of the MFS Group"²¹ and assumed "overall responsibility for MFSIM"²² and that

20 *Australian Securities and Investments Commission v Managed Investments Ltd [No 9]* (2016) 308 FLR 216 at 345 [679].

21 *King v Australian Securities and Investments Commission* [2019] QCA 121 at [17].

22 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 111 [19]. See also at 146 [182]-[183] and *King v Australian Securities and Investments Commission* [2019] QCA 121 at [17].

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Mr King spoke daily with Mr White, who took instructions from him with respect to "proprietary matters" of MFSIM's business²³.

15 In relation to Mr King's involvement in the \$103 million payment to Fortress, the Court of Appeal found that Mr King negotiated the variation to the facility agreement with Fortress under which that payment was made and that Mr King was in frequent contact with others within the MFS Group, including Mr White, about the progress of Mr White's efforts to procure the finance by which that payment could be made²⁴. Mr King not only encouraged Mr White and others to use the funds available to PIF under the RBS loan agreement for the purpose of making the Fortress repayment²⁵ – he "approved and authorised" that use of the funds²⁶. In particular, it was found as a fact that "Mr White would not have caused PIF's money to be used in this way without the imprimatur of Mr King"²⁷. Mr King knew that there was no transaction in prospect by which any benefit or consideration would pass to PIF by the time the \$130 million payment was disbursed by MFSIM to MFS Administration Pty Ltd²⁸.

16 Notwithstanding these findings of fact, the Court of Appeal upheld Mr King's submission that he did not have the capacity to affect MFSIM's financial standing within the meaning of para (b)(ii) of the definition of "officer of a corporation" because any capacity he had to affect MFSIM's financial standing did not derive from his occupation of an "office" within MFSIM, in the sense of "a

23 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 111 [19], 145 [184].

24 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 143 [169].

25 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 143 [169].

26 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 141 [163].

27 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 142 [163].

28 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 155 [228].

recognised position with rights and duties attached to it"²⁹. Their Honours held that it was necessary for ASIC to prove that Mr King had acted in an "office" of MFSIM in order for Mr King to fall within any of the limbs of para (b) of the definition³⁰. As the primary judge made no finding as to whether ASIC had proved that fact, the Court of Appeal concluded that "[t]he findings which [the primary judge] made did not, of themselves, support his conclusion that Mr King was an officer of [MFSIM]"³¹.

17 The Court of Appeal said³²:

"Para (b) of the definition cannot be applied literally, for otherwise a person who is, on any realistic view, unrelated to the management of a corporation could be subjected to the burdens of the provisions of the Act with respect to officers. The constraint (according to *Grimaldi*) upon a literal interpretation avoids consequences of that kind. And it is a constraint which is suggested by several provisions of the Act which apply to officers."

18 The Court of Appeal, in declining to give para (b)(ii) of the definition a literal application, construed the sub-paragraph by reference to the ordinary meaning of the term "officer" as the holder of an office³³. That approach is contrary to the orthodox view that one should not attempt to "construe the words of a definition by reference to the term defined"³⁴. By confining the scope of para (b)(ii)

29 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 160-161 [246], 171 [288].

30 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 160-161 [246]-[247], 161 [249].

31 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 161 [249].

32 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 161 [247].

33 Compare *In re Western Counties Steam Bakeries and Milling Co* [1897] 1 Ch 617 at 627.

34 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.

to a person who is an "officer" within the ordinary meaning of the term, the Court of Appeal's construction, in effect, serves to read para (b)(ii) out of the Act.

19 The Court of Appeal, in so construing para (b)(ii), accepted Mr King's contention³⁵ that the judgment of the Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining NL [No 2]*³⁶ supported his argument as to the effect of para (b)(ii) of the definition.

20 In addition, the Court of Appeal, after reviewing at length the evidence relied upon by ASIC in support of its case that Mr King was caught by para (b)(ii) of the definition³⁷, accepted that in some of the matters relied upon by ASIC, "Mr King saw fit to intervene in the business of MFSIM and to issue directives as to how things should be done"³⁸, and that Mr King had "substantial"³⁹ influence over Mr White and others within MFSIM. Nevertheless, their Honours concluded⁴⁰:

"On our review of the evidence, we are not persuaded that ASIC proved that Mr King had the capacity to affect significantly the financial standing of MFSIM on the basis particularised by it. Further, any capacity which he did have to affect that matter was one which derived from his position of CEO of the MFS Group and was exercised by him in that role, rather than from acting in an office or position within MFSIM."

21 In relation to this passage from the reasons of the Court of Appeal, it should not be thought that the Court of Appeal was suggesting that it found, as a matter

35 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 158 [238], 159 [242]-[243], 161 [247].

36 (2012) 200 FCR 296.

37 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 161-170 [250]-[285].

38 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 170 [286].

39 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 171 [288].

40 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 171 [288].

of fact, that Mr King did not have the capacity referred to in para (b)(ii) of the definition. The Court of Appeal's conclusion must be viewed in the light of Mr King's case before it that he did not have the requisite capacity "*because* he did not act in an office or position within [MFSIM]"⁴¹. As the Court of Appeal stated before reviewing the evidence relied upon by ASIC, "[t]he issue for this Court is whether the evidence proved that [Mr King] was an officer, *according to what we have concluded was the correct interpretation of that term*"⁴².

22 It may also be noted here, bearing in mind the Court of Appeal's reliance on *Grimaldi*, that the conclusion that Mr King did not fall within para (b)(ii) of the definition of "officer" – because his capacity to affect the financial standing of MFSIM derived from his position as CEO of MFS Ltd – is contrary to the view taken by Santow J in *Australian Securities and Investments Commission v Adler*⁴³, a decision cited with evident approval by the Full Court of the Federal Court in *Grimaldi*⁴⁴.

23 It will be necessary in due course to address in more detail the suggestion that *Grimaldi* supports the understanding of para (b)(ii) of the definition successfully urged by Mr King upon the Court of Appeal. First, however, it is necessary to consider the proper construction of para (b)(ii) by reference to considerations of text, context and purpose having regard to the mischief at which it was directed⁴⁵.

Textual considerations

24 The approach adopted by the Court of Appeal to para (b)(ii) of the definition of "officer" departs from a literal application of the text by adding a requirement that the "officer" referred to in para (b)(ii) be acting in an "office" within the

41 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 158 [238] (emphasis added).

42 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 161 [249] (emphasis added). See also at 171 [287].

43 (2002) 168 FLR 253 at 279-280 [73]-[75].

44 (2012) 200 FCR 296 at 325 [73].

45 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

company. Textual differences between paras (a) and (b) of the definition make it clear that para (b) of the definition extends the scope of the term "officer" beyond its ordinary meaning of "office holder". While para (a) of the definition captures individuals who hold a named office in a corporation for which the Act prescribes certain duties and functions, para (b) captures those who do *not* hold such an office. Paragraph (b) defines "officer" by reference to the facts of the relationship between an individual and a corporation in relation to the affairs of the corporation. The contrasting language is a powerful textual indication that Parliament did not intend to confine the class of persons described in para (b), including sub-para (ii), by an unexpressed requirement that the relationship between an individual and a corporation be identified by reference to a recognised position with rights and duties attaching to it.

25 The significance of the contrasting language of paras (a) and (b) is confirmed by what was said by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ in *Shafron v Australian Securities and Investments Commission*⁴⁶, albeit that it was said specifically in relation to para (b)(i) of the definition. It is what the putative officer does or has the ability to do, in relation to the company, that is material for the purposes of para (b) of the definition. Their Honours said⁴⁷:

"[E]ach of the three classes of persons described in para (b) of the definition of 'officer' is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition. Persons identified in the other paragraphs of the definition all hold a named office in or in relation to the company; those identified in para (b) do not. Persons identified in the other paragraphs all hold offices for which the legislation prescribes certain duties and functions; those identified in para (b) do not. Persons identified in the other paragraphs of the definition are bound by the legislation to make certain decisions and do certain acts for or on behalf of the corporation; those identified in para (b) are identified by what they do (subpara (i)), what capacity they have (subpara (ii)) or what influence on the directors they have had and continue to have (subpara (iii)). There being these differences between para (b) of the definition and the other paragraphs (especially para (a)), it is not to be supposed that persons falling within para (b)(i) must be in substantially the same position as directors: those to whom the management and direction of the business of the company is usually ... given."

46 (2012) 247 CLR 465.

47 *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at 478-479 [25].

26 Not surprisingly perhaps, in this Court, Mr King was not disposed to defend the position that para (b)(ii) of the definition of "officer" requires the identification of a formally appointed position or formal allocation of responsibilities. Rather, Mr King sought to argue that the Court of Appeal's conception of an "office", in the sense of "a recognised position with rights and duties attached to it", rightly confines para (b)(ii) to those persons who have some "functional role or position *within the management* of the company" and that this limitation thereby excludes those persons who do not hold some position "within" the company. This requirement was articulated in various ways in oral argument: it was said that para (b)(ii) applies to an individual who has "some functional capacity *in relation to*" a corporation; and it was later put, "one does have to play some part, some relevant part, *in the management* of the corporation or its property".

27 It may be said immediately that it is difficult to see how the first of these articulations would not capture someone in Mr King's position. To say that para (b)(ii) of the definition contemplates a functional capacity exercisable in relation to a corporation invites the response that Mr King's activities in relation to the affairs of MFSIM are readily seen as demonstrating a capacity on his part to affect significantly the financial standing of MFSIM by reason of his involvement in the financial affairs of MFSIM and his ability to affect its decision-making processes in regard to its affairs. The second of the above articulations undermines the earlier articulation because an individual who has some functional capacity in relation to a corporation may not necessarily hold a position "within" it, as is amply demonstrated in the present case by Mr King's capacity to affect significantly the financial standing of MFSIM. As will become apparent later in these reasons, the difficulty with the second of the above articulations is that it presupposes that only a person who holds a position that is "within" the corporation can have an ability to participate in the "management" of that corporation. In truth, a person who satisfies any or all of the descriptions in para (b) is, ipso facto, "within" the corporation for the purposes of the Act.

28 In any event, the variety of expression resorted to by Mr King highlights the difficulty of articulating a stable gloss upon the language of para (b)(ii) which has no support in, and is indeed contrary to, the statutory text. Even with Mr King's reformulation of the argument upon which he succeeded in the Court of Appeal, there remains the abiding difficulty that para (b)(ii) is plainly intended to extend the meaning of "officer of a corporation" beyond the ordinary meaning adumbrated in para (a).

Legislative context, history and purpose

29 Considerations of legislative context, history and purpose point in the same direction as considerations of text. As ASIC rightly argued, an individual who is a shadow director, within the meaning of para (b)(ii) of the definition of "director"

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in s 9 of the Act, would also fall within para (a) of the definition of "officer of a corporation" because that person is a "director"⁴⁸. As there is no requirement for an individual to act in an "office" in order to be a shadow director, and hence an "officer" within para (a) of that definition, there is no good reason to gloss para (b) of the definition by implying such a requirement.

30 In addition, s 206A(1)(b) of the Act uses the same language as para (b)(ii) of the definition of "officer of a corporation" to make it an offence for a person who is disqualified from managing corporations under Pt 2D.6 of the Act to exercise "the capacity to affect significantly the corporation's financial standing". If para (b)(ii) of the definition of "officer" requires an individual to act in a recognised office of a corporation, s 206A(1)(b) would likewise apply only to a person who holds an identifiable office within a corporation. It cannot sensibly be suggested, however, that the prohibition in s 206A(1)(b) applies only to a person who holds an identifiable office, because that would allow ready circumvention of a provision that is directed at persons who necessarily do not hold an identifiable office.

Section 180 of the Act

31 In this Court, Mr King argued that the gloss upon para (b)(ii) for which he contends is consistent with the broader context of the Act. In this regard, he referred first to s 180 of the Act.

32 Section 180(1) of the Act provides:

"A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer."

33 Mr King's argument in relation to s 180 cannot stand with the reasoning of the plurality in *Shafroon* in relation to the operation of s 180(1) of the Act. Their Honours rejected the argument that s 180(1) was limited to the powers and duties that attach to a particular office held within the corporation; rather, s 180(1) applies

⁴⁸ See, eg, *Ho v Akai Pty Ltd (In liq)* (2006) 247 FCR 205 at 218-219 [60]-[66].

to whatever function the person concerned actually performs in relation to the corporation. Their Honours explained that one reason why s 180(1) cannot be limited to individuals who occupy a recognised office in the corporation was "the evident difficulty in defining ... the content of 'the office held' where a person is an officer by virtue of para (b)(i), (ii) or (iii) of the definition of 'officer' in s 9"⁴⁹.

34 The extended definition of "officer" in para (b) indicates that s 180 of the Act is not confined in its operation to persons who hold an office formally recognised in the corporation as contemplated by para (a). Section 180 imposes duties on persons who are officers by reason of para (b) of the definition by requiring that they perform their functions and exercise their capacities within the corporation with the same degree of care and skill that a reasonable person would exercise if the reasonable person was, in fact, within any one or more of the descriptions in para (b).

35 In *Shafron*, the plurality, in discussing para (b)(i) of the definition, said that "the inquiry required by this paragraph of the definition must be directed to what role the person in question plays in the corporation"⁵⁰. This observation applies equally to para (b)(ii) of the definition. The inquiry required by para (b)(i) and (ii) is concerned with whether the facts show that a putative officer has played a role in the corporation and the nature and extent of that role, not with some a priori classification of his or her position. As the Full Court of the Federal Court said in *Grimaldi*, when it comes to the function of managing the business of a company, "a priori classification has no general utility"⁵¹.

Section 601FD of the Act

36 Mr King argued that when regard is had to s 601FD of the Act, the obligations therein imposed upon officers, including in some instances by reference to their "position", evince a legislative intention that para (b)(ii) does not 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. Referring specifically to s 601FD(1)(f), Mr King argued that it is difficult to imagine any circumstances in which a

49 *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 at 476 [19].

50 (2012) 247 CLR 465 at 478 [23].

51 (2012) 200 FCR 296 at 323 [70].

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reasonable person who has no position within a company would take positive steps to ensure compliance by the company with the relevant obligations.

37 Nothing in the text of s 601FD implies that the person must act in any designated office or position. Although s 601FD(1) refers variously to "a reasonable person ... in the officer's position"⁵², and to an officer making improper use of their "position as an officer"⁵³, the references to the word "position" in s 601FD(1), which is itself broader than the word "office" as used in s 180(1), ought not to be relied on to confine the scope of "officer" as defined by para (b) of the definition in s 9. The reference to "position" naturally refers to the role actually performed by the officer; it certainly does not imply that the person described must act in a recognised position with rights and duties attached to it.

Unintended consequences?

38 Mr King argued, and the Court of Appeal accepted, that para (b)(ii), if applied literally, would capture persons who are, on any realistic view, unrelated to the management of the company. External consultants or advisors, bankers, and the Commissioner of Taxation⁵⁴ were given as examples of this concern. The concern is misplaced.

39 It is not necessary to gloss the language of para (b)(ii) to avoid the unintended consequences imagined by Mr King's argument. The definition in s 9 is that of an "officer of a corporation". The words "of a corporation" mean that, even where para (b) of the definition of "officer" is satisfied, it remains necessary to ask whether the "officer" is relevantly "of" the corporation. In the case of a person who is said to fall within para (b), questions of fact and degree arise as to whether that person also answers the description of being "of" the corporation in the sense of being engaged, in fact, in the management of its affairs or property.

40 Section 179(2) of the Act notes that s 9 defines both "director" and "officer" and states that "[o]fficer includes, as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators)". Section 179(2) confirms that the definition of "officer" in s 9 is intended to capture those managing the corporation or its property, as distinct from

52 Paragraphs (b) and (f).

53 Paragraph (e).

54 In the position of a creditor. See, eg, *Bell Group NV (In liq) v Western Australia* (2016) 260 CLR 500 at 522-523 [53]-[55], 524-525 [62]-[64].

those who are able to affect the corporation by the exercise of rights as a counterparty to a transaction involving the corporation. Thus, para (b)(ii) "does not refer to a person who has [the relevant] capacity as a third party but is not involved in the management of the corporation's affairs"⁵⁵.

41 It may happen, of course, that a person who has legal rights against a corporation as a counterparty to a particular transaction or particular transactions is able to inveigle himself or herself into the decision-making processes of the corporation by means of the mere threat of the exercise of those rights. In such a case, that person may fall within either or both of para (b)(i) or (ii) of the definition. But that depends on the facts of the case as to the nature and extent of the counterparty's control of, or capacity to control, the corporation's decision-making qua management; it does not depend on the counterparty's legal rights.

42 In addition, although advisors and consultants may give advice which, if implemented, can significantly affect the financial standing of the corporation, it does not follow that it is the advisor or consultant who, in that circumstance, has the capacity to affect significantly the financial standing of the corporation. That capacity in fact resides in the person to whom the advice is given, because it is that individual who determines whether or not the advice should be acted upon. The giving of that advice is of no consequence, unless the advisor or consultant is, in fact, involved in the management of the corporation and is thereby able to *ensure* that the advice will be implemented.

43 It is convenient to note here the parenthetical exclusion in para (b)(iii) of the definition. The exclusion makes it clear that, where the directors of the corporation are accustomed to act in accordance with advice given by the person "in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation", that person is not captured by para (b)(iii). The parenthetical exclusion in para (b)(iii) serves to ensure that where the only connection between a person and decision-making in the management of a corporation is that described in the exclusion, the person so described will not be saddled with the responsibilities of an officer of the corporation even though the directors, who are engaged in the management of the corporation, are accustomed to act in accordance with the person's instructions or wishes. That is because the professional or business relationship between the person and the directors differentiates the person from those who manage the corporation. The parenthetical exclusion is neither necessary nor appropriate in relation to para (b)(i) and (ii) because sub-paras (i)

55 *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd* (2010) 238 FLR 384 at 412 [126]; compare *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47 at 70-71 [191]-[192].

and (ii) capture only persons who are, in fact, engaged in the corporation's decision-making qua management.

Legislative history

44 The legislative history of the genesis of para (b)(i) and (ii) of the definition of "officer" confirms this understanding. The language used in para (b)(i) and (ii) of the definition is a statutory statement, the origins of which are to be found in the meaning given by the courts to the notion of being concerned in, or taking part in, the management of corporations. In particular, in *Commissioner for Corporate Affairs v Bracht*⁵⁶, Ormiston J had considered whether an individual was concerned in or took part in the management of a corporation within the meaning of s 227(1) of the *Companies (Victoria) Code*. His Honour said that for the purposes of that provision⁵⁷:

"[T]he concept of 'management' ... comprehends activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs."

45 As Jacobson J noted in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]*⁵⁸, the current definition of "officer" was introduced into the *Corporations Law* by the *Corporate Law Economic Reform Program Act 1999* (Cth), whence it was subsequently taken up in s 9 of the Act, as "codifying, at least in part, the principles stated by Ormiston J in [*Bracht*]"⁵⁹, and "[t]he language of para (b)(i) and (ii) of the definition of 'officer'

56 [1989] VR 821.

57 [1989] VR 821 at 830.

58 (2007) 160 FCR 35 at 99 [484].

59 (2007) 160 FCR 35 at 100 [488]. See also Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 16th ed (2015) at 430 [8.020]; Bednall and Ngomba, "The High Court and the c-suite: Implications of Shafron for company executives below board level" (2013) 31 *Company and Securities Law Journal* 6 at 9.

corresponds, in large measure, with Ormiston J's description of the concept of management"⁶⁰.

Purpose

46 As to the mischief at which the definition of "officer" in s 9 of the Act is directed, the construction of para (b)(ii) for which Mr King contends is not apt to achieve the purpose of the Act to protect shareholders and creditors. If the CEO of the parent company of a group of companies is allowed to act in relation to other companies in the group untrammelled by the duties that attach to officers of each of the other companies in the group, shareholders and creditors would be left exposed to an obvious risk. It would be an extraordinary state of affairs if those who actually determine the course of a company's financial affairs could avoid responsibility for their conduct by the simple expedient of deliberately eschewing any formal designation of their responsibilities. This is especially so in the present case, when regard is had to Ch 5C of the Act, and specifically s 601FD, which was enacted to provide protection to members of managed investment schemes by imposing duties and responsibilities on the officers of responsible entities.

47 It is impossible to discern from the Act the intention that an officer of a holding company should fall outside para (b)(ii) of the definition in relation to a subsidiary if, as a matter of fact, that individual has the capacity to affect significantly the financial standing of the subsidiary, particularly where that individual has demonstrated that capacity by exercising it to the detriment of the subsidiary and its creditors and shareholders. As the decision of Santow J in *Adler*⁶¹ illustrates, that the capacity arises, at least in part, by reason of a formal position in the holding company of the corporate group may well establish that the capacity exists and explain how that has come about. It is certainly not a reason to deny that the capacity exists.

Grimaldi

48 In *Grimaldi*, the Full Court of the Federal Court discussed para (b) of the definition of "officer" in s 9 of the Act in the light of the High Court's decision in *Corporate Affairs Commission v Drysdale*⁶². The High Court had concluded that

60 (2007) 160 FCR 35 at 100 [490].

61 (2002) 168 FLR 253 at 279-280 [73]-[75].

62 (1978) 141 CLR 236.

de facto directors were directors for the purposes of s 5 of the *Companies Act 1961* (NSW). In this regard, the Full Court in *Grimaldi* observed⁶³:

"In reaching this conclusion, it is apparent that the concept of an 'office' was integral to the judges' reasoning. A de facto director was a person who did not have, or no longer had, lawful authority so to do, but who nonetheless *occupied* the office of director and discharged the duties attaching to that office".

49 As the Full Court in *Grimaldi* observed⁶⁴, the High Court in *Drysdale* rejected an argument that an individual who did not hold office as a lawfully appointed director could not be prosecuted for breach of duties imposed by the *Companies Act* upon a "director". The High Court held that a person who acted as a director of a company was subject to the duties so imposed. In *Drysdale*, Mason J drew a distinction between *holding* an office and *occupying* an office; the latter refers to an individual who conducts himself or herself in the affairs of a corporation by exercising powers proper to an office even though he or she is not the lawful holder of that office⁶⁵. In *Drysdale*, the powers actually exercised were proper to a director of the corporation. Hence, the conclusion that the respondent was a "director".

50 Neither the decision in *Drysdale*, nor the Full Court's discussion of it, provides support for the approach of the Court of Appeal in this case. In *Drysdale*, Mason J cited Lindley LJ in *In re Western Counties Steam Bakeries and Milling Co*⁶⁶ as authority for the point "that a person may fill an office de jure or de facto"⁶⁷. But in speaking of the logically anterior need for an office before there can be an office holder, Lindley LJ was speaking of the ordinary meaning of the word "officer". His Lordship was not concerned with the proper construction of a statutory extension of the ordinary meaning of the term. Similarly, the observations of Mason J offer no support for a suggestion that an individual may be an officer of a company within an extended definition of "officer" only if the putative officer

63 (2012) 200 FCR 296 at 315-316 [37] (emphasis in original).

64 (2012) 200 FCR 296 at 315-316 [37].

65 (1978) 141 CLR 236 at 242.

66 [1897] 1 Ch 617 at 627.

67 *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 at 242.

is vested with the powers of an office recognised within the company with rights and duties attached to it.

51 The Court of Appeal placed particular reliance⁶⁸ on the following passage from the reasons of the Full Court in *Grimaldi*⁶⁹:

"[W]e would emphasise the following about the s 9 definition. First, though the *Corporations Act's* functional definitions do not refer explicitly to the person acting in an 'office' of the corporation, this in our view is implicit in them and is made explicit in other provisions of the Act, eg s 180(1). This said, a person who otherwise satisfies either of the requirements of subparas (b)(i) or (b)(ii) of the definition is likely as a rule to be acting in an office (or position) of the corporation for the purposes of the Act irrespective of whether he or she has been formally appointed to a position in it (ie the person can be a de facto officer) or has been engaged as a 'consultant' to perform the functions in question."

52 In the Court of Appeal, Mr King argued that the primary judge, in dealing with Mr King's argument based on this passage, regarded it as inconsistent with what was said by the High Court in *Shafron*⁷⁰. The Court of Appeal was "unable to agree with the primary judge that there is any tension between what was said in *Shafron* and the [abovementioned] passage from *Grimaldi*"⁷¹. The Court of Appeal went on to say⁷²:

"The core proposition from that passage in *Grimaldi* was that an 'officer' must act in an 'office'. In *Shafron*, the High Court distinguished between persons holding a *named* office, being an office for which the legislation prescribes certain duties and functions, and officers within the wider class as described in para (b) of the definition. But it is another thing to say, as in

68 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 159 [241], 160 [246].

69 (2012) 200 FCR 296 at 324 [72].

70 (2012) 247 CLR 465 at 478-479 [23]-[25].

71 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 160 [246].

72 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 160-161 [246] (emphasis in original) (footnote omitted).

our view the High Court did not say, that persons within para (b) need not be persons who 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'."

53 The last sentence of this statement by the Court of Appeal is distinctly inconsistent with a statement made by the Full Court in *Grimaldi* specifically in relation to para (b)(ii). The Full Court said that para (b)(ii)⁷³:

"refers to the character properly to be attributed to that person's capacity in the circumstances. It may arise from the extent of that person's participation in investment decisions or financial commitments made, from the dimensions of a decision or decisions, from the nature of that person's participation in the control and direction of the affairs of the corporation, etc: cf *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at [74] ... The question again is one of fact."

54 In this passage, the Full Court referred with evident approval to *Adler* and, as mentioned earlier, Santow J in that case held that a director of a holding company who participated in decision-making as to how the group's funds were to be invested was an officer of a subsidiary impacted by those decisions under para (b)(i) and (ii) of the definition, even though the director held no recognised position in the subsidiary. Specifically, Santow J held that the individual in question had the capacity to affect significantly the corporation's financial standing because "his involvement in matters pertaining to investment ... gave him that capacity", and "more broadly because of his participation in the control and direction of the affairs of the group, including [the subsidiary], as a director of its parent"⁷⁴.

55 It may also be noted that the Court of Appeal did not refer, in their Honours' citation of the passage from *Grimaldi* upon which they relied⁷⁵, to the two sentences that completed that passage. The Full Court had said⁷⁶:

73 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 324-325 [73].

74 *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at 279-280 [74].

75 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 159 [241].

76 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 324 [72].

"There is no reason in principle to differentiate between directors and s 9 officers in either of these regards. To do so would be contrary to the clearly manifest purpose of the legislation to extend the Act's duties and liabilities to persons whose functions and/or capacities within a corporation extend to those described in subpara (b)(i) and (ii) of the definition."

56 The Full Court was evidently concerned to acknowledge the practical likelihood of overlapping application of paras (a) and (b) of the definition, depending on the facts of the case.

57 That the Full Court said that "a person who otherwise satisfies either of the requirements of subparas (b)(i) or (b)(ii) of the definition is *likely as a rule* to be acting in an office (or position) of the corporation for the purposes of the Act irrespective of whether he or she has been formally appointed to a position in it ... or has been engaged as a 'consultant' to perform the functions in question"⁷⁷ is itself an indication that the Full Court was not saying that, as a matter of law, a person cannot be within either subparagraph unless he or she holds such a position. Indeed, the point made by the Full Court in this passage distinctly favours the view that an individual who falls within the terms of para (b)(ii) is, for that reason, an officer of the company, even though he or she is not an office holder.

58 The reasons in *Grimaldi*, when read as a whole, recognise that para (b) of the definition of "officer" expands the coverage of the duties of officers of a corporation to include individuals who would not be officers of a corporation within the ordinary meaning of the term. *Grimaldi* is distinctly not supportive of the view that, as a matter of law, a person who satisfies either of the requirements of para (b)(i) or (ii) of the definition does so only if that person is acting in a recognised office within the corporation.

59 Accordingly, while the Court of Appeal was correct to say that there is no relevant tension between *Grimaldi* and *Shafron*, the suggestion that there was some tension arose only because the argument put by Mr King misunderstood what the Full Court said in *Grimaldi*.

Disposition of the appeal

60 ASIC was granted special leave to appeal to raise the principal issue on 17 May 2019. At that time, the Court of Appeal had not determined Mr King's

⁷⁷ *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 324 [72] (emphasis added).

appeal against the orders of the primary judge in relation to pecuniary penalty and costs⁷⁸. On 18 June 2019, the Court of Appeal made orders reducing the pecuniary penalty imposed on Mr King from \$300,000 to \$270,000; reduced his liability to pay a proportion of ASIC's trial costs from 60 per cent to 50 per cent; and ordered that Mr King pay 75 per cent of ASIC's costs of the appeal to the Court of Appeal⁷⁹. The basis for these orders was Mr King's success on the principal issue⁸⁰.

61 On 9 October 2019, this Court granted ASIC's application for special leave to appeal against the Court of Appeal's orders in relation to pecuniary penalty and costs on the basis that they were said by ASIC to be affected by the same error that gave rise to the principal issue. Special leave was also granted in the interests of justice to enable this Court to determine the orders that should be made in consequence of the success of ASIC's appeal on the principal issue.

62 ASIC submitted that if the appeal on the principal issue is allowed, the Court of Appeal's orders in relation to pecuniary penalty and costs ought to be set aside. This is because the foundation for all of those orders was the Court of Appeal's finding in favour of Mr King on the "officer" question and those orders would have been included in the original application for special leave to appeal had they been known at the time.

63 ASIC's submission in this regard should be accepted.

64 It was argued on behalf of Mr King that the Court of Appeal resolved the "officer" issue in his favour solely upon the view it took of the proper scope of para (b)(ii) of the definition of "officer" and it did not, therefore, deal with his challenges to the adverse factual findings that underpinned the primary judge's conclusion on this issue. For this reason, so it was said, the matter should be remitted to the Court of Appeal to enable it to complete its task of determining Mr King's appeal from the decision of the primary judge. This argument is without substance.

65 It cannot be said that the Court of Appeal did not grapple with the factual errors that were alleged in grounds 3 to 9 in Mr King's Notice of Appeal filed on

78 *Australian Securities and Investments Commission v Managed Investments Ltd [No 10]* [2017] QSC 96.

79 *King v Australian Securities and Investments Commission* [2019] QCA 121 at [60].

80 *King v Australian Securities and Investments Commission* [2019] QCA 121 at [41], [45]-[46], [54]-[55].

23 June 2017 in the Court of Appeal. The Court of Appeal dealt in detail with the factual findings made by the primary judge⁸¹. To the extent that there might have been any ambiguity in the Court of Appeal's reasons for allowing Mr King's appeal on the principal issue, their Honours' reasons in relation to Mr King's appeal as to penalty and costs put the position beyond doubt. As their Honours said⁸²:

"This Court ... reached a different conclusion to the primary judge on the legal question of the meaning of 'officer' in s 9 of the Act ... However, no findings about his conduct and being knowingly concerned in MFSIM's contraventions were disturbed."

66 It is apparent that the Court of Appeal did not consider Mr King's factual challenge to be a sufficient basis upon which to allow the appeal against the primary judge's conclusion on the "officer" issue. What succeeded was Mr King's legal challenge concerning the scope of para (b)(ii) of the definition of "officer". Accordingly, there is no good reason to remit the matter to the Court of Appeal rather than to restore the orders of the primary judge.

Orders

67 The appeal should be allowed.

68 Paragraphs 1, 2 and 7 of the order made by the Court of Appeal on 18 December 2018 in Appeal No 6320 of 2017 should be set aside and in their place it should be ordered that the appeal to the Court of Appeal be dismissed.

69 The order made by the Court of Appeal dated 18 June 2019 in Appeal No 6320 of 2017 should be set aside and in its place it should be ordered that the first respondent pay the appellant's costs of the appeal to the Court of Appeal.

70 The first respondent must pay the appellant's costs of the appeal to this Court.

81 *King v Australian Securities and Investments Commission* (2018) 134 ACSR 105 at 161-170 [250]-[286].

82 *King v Australian Securities and Investments Commission* [2019] QCA 121 at [2]. See also at [16]-[17], [33]-[34], [38], [43].

71 NETTLE AND GORDON JJ. We agree with the orders proposed by Kiefel CJ, Gageler and Keane JJ, but we wish to make three points. First, the text of the definition of "officer" in s 9 of the *Corporations Act 2001* (Cth) must be read in light of its legislative context and history, with an understanding that the text is the latest form of legislative response to what has been continuing evolutionary change in corporate structure and governance.

72 Second, there are some particular aspects of the conduct of Mr King, relied upon by the Australian Securities and Investments Commission ("ASIC"), which the Court of Appeal of the Supreme Court of Queensland wrongly saw through the prism of whether he held an "office". It is necessary to reassess that conduct according to the correct legal test, as set out below⁸³.

73 Third, no issue about whether a person is an officer of a corporation arises in a vacuum. The issue will always relate to some act or omission (or a number of acts or omissions) concerning one or more companies. In a case where the relevant acts or omissions relate to one or more companies in a group, placing too much emphasis on the phrase "of a corporation" tends to suggest, wrongly, that attention is to be paid only to what the person did or did not do in respect of the relevant company or companies, ignoring the overall position of influence the person may have had in the group's affairs. As these reasons will show, the Court of Appeal took too narrow a view of the significance of the evidence ASIC led of Mr King's capacity to affect significantly the financial standing of MFS Investment Management Pty Ltd ("MFSIM").

Legislative context

74 Managed investment schemes are regulated by Ch 5C of the *Corporations Act 2001* (Cth)⁸⁴. Sections 601EA, 601EB and 601ED provide for managed investment schemes, such as the Premium Income Fund ("PIF"), to be registered with ASIC.

75 All registered managed investment schemes must have a "responsible entity"⁸⁵. Part 5C.2 sets out, among other things, the responsibilities, powers and duties of a responsible entity. The responsible entity is to operate the scheme and perform the functions conferred on it by the scheme's constitution and

83 See [85]-[96], [185]-[186] below.

84 As it stood in November 2007, when the acts occurred which constituted Mr King's breaches of the *Corporations Act 2001* (Cth) as an officer of MFSIM.

85 *Corporations Act 2001* (Cth), s 601EA(2)(a).

the *Corporations Act 2001* (Cth)⁸⁶. The responsible entity holds scheme property on trust for scheme members⁸⁷. In exercising its powers and carrying out its duties, the responsible entity must, among other things, act honestly and ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and the *Corporations Act 2001* (Cth)⁸⁸.

76 The *Corporations Act 2001* (Cth) also places duties on the *officers* of a responsible entity in s 601FD. That section relevantly provides that:

- "(1) An officer of the responsible entity of a registered scheme must:
- (a) act honestly; and
 - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
 - (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
- ...
- (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
 - (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
 - (i) this Act; and

⁸⁶ *Corporations Act 2001* (Cth), s 601FB(1).

⁸⁷ *Corporations Act 2001* (Cth), s 601FC(2).

⁸⁸ *Corporations Act 2001* (Cth), s 601FC(1)(a), (k).

27.

- (ii) any conditions imposed on the responsible entity's Australian financial services licence; and
- (iii) the scheme's constitution; and
- (iv) the scheme's compliance plan."

Those duties override any conflicting duty which an officer of the responsible entity has under Pt 2D.1 of the *Corporations Act 2001* (Cth)⁸⁹ (which deals with the duties of directors, officers and other employees).

77 Part 5C.3 deals with the constitution of the registered scheme. It requires the constitution to make adequate provision for, among other things, "the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property"⁹⁰. Part 5C.4 deals with the compliance plan of the registered scheme, which the directors must sign⁹¹. Section 601HA(1) relevantly provides that the compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with the *Corporations Act 2001* (Cth) and the scheme's constitution, including arrangements for ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme⁹². Part 5C.7 deals with related party transactions. Section 601LA provides that Ch 2E of the *Corporations Act 2001* (Cth), which prohibits related party transactions except in certain limited circumstances, applies to registered schemes. These provisions are important in this matter because Mr King directed and authorised the use of scheme property, the PIF funds, in a prohibited related party transaction.

78 The *Corporations Act 2001* (Cth) also regulates the conduct of officers of a corporation more generally (that is, not only in the context of managed investment schemes). This is principally done by Pt 2D.1. Section 179(1), the first section in that Part, states that the Part "sets out some of the most significant duties of directors, secretaries, other officers and employees of corporations". Section 179(2) states that s 9 of the *Corporations Act 2001* (Cth) defines "officer"

89 *Corporations Act 2001* (Cth), s 601FD(2).

90 *Corporations Act 2001* (Cth), s 601GA(1)(b).

91 *Corporations Act 2001* (Cth), s 601HC.

92 *Corporations Act 2001* (Cth), s 601HA(1)(a). See also *Corporations Act 2001* (Cth), s 601FC(1)(i).

and that term includes, "as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators)".

79 Two further definitions in s 9 are relevant. "[D]irector" of a company is defined as meaning:

"(a) a person who:

- (i) is appointed to the position of a director; or
- (ii) is appointed to the position of an alternate director and is acting in that capacity;

regardless of the name that is given to their position; and

(b) unless the contrary intention appears, a person who is not validly appointed as a director if:

- (i) they act in the position of a director; or
- (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.

Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body."

80 "[S]enior manager" is defined as follows:

"(a) in relation to a corporation – means a person (other than a director or secretary of the corporation) who:

- (i) makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
- (ii) has the capacity to affect significantly the corporation's financial standing ..."

81 Sections 180 and 181 set out duties which apply to directors and "other officer[s] of a corporation". A director or officer must exercise the director's or officer's powers and discharge the director's or officer's duties with the degree of care and diligence that a reasonable person would exercise if that person were a director or officer in the corporation's circumstances, and "occupied the office held by, and had the same responsibilities within the corporation as, the director or

officer"⁹³. A director or other officer must also exercise the director's or officer's powers and discharge their duties in good faith in the best interests of the corporation, and for a proper purpose⁹⁴.

82 Section 182 applies to directors, secretaries, other officers and employees of a corporation. Section 183 applies to directors, other officers and employees of a corporation. The scope of persons affected by these provisions is therefore wider than those affected by ss 180 and 181. Section 182(1) provides that directors, secretaries, other officers and employees of a corporation must not improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to the company. Section 183(1) prohibits the use of information gained from one's position being put to the same ends. Sections 180, 181, 182 and 183 are civil penalty provisions⁹⁵.

83 Section 184(1), by contrast, provides that a director or other officer (but no other person) commits an offence if they are reckless or intentionally dishonest and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation, or for a proper purpose. Section 184(2) provides that it is an offence if a director, other officer *or employee* uses their position dishonestly with the intention of gaining an advantage for themselves or another person, or of causing detriment to the corporation, or recklessly as to whether such an advantage or detriment may occur. It is also an offence if a person who is (or was) a director, other officer or employee uses information dishonestly with the intention of gaining an advantage or causing detriment of that kind, or is reckless as to whether such an advantage or detriment may occur⁹⁶.

84 In sum, the *Corporations Act 2001* (Cth) imposes duties and liabilities on a person involved in a corporation or managed investment scheme according to the person's particular role within the corporation or scheme. Some duties and liabilities are expressed to apply only to directors and other officers, while some duties and liabilities extend explicitly to secretaries and employees. The nature of a person's role or position determines the extent of that person's duty and liability. The liabilities of an officer are different, for example, from those of an employee.

93 *Corporations Act 2001* (Cth), s 180(1).

94 *Corporations Act 2001* (Cth), s 181(1).

95 *Corporations Act 2001* (Cth), ss 180(1), 181(1), 182(1) and 183(1) read with s 1317E(1)(a).

96 *Corporations Act 2001* (Cth), s 184(3).

Officer of a corporation

85 Who is an officer of a corporation? The starting point is the words of the definition of "officer" in s 9 of the *Corporations Act 2001* (Cth). The definition applies "[u]nless the contrary intention appears" in the legislation⁹⁷. The opening words of the definition identify the circumstances in which the defined term is to be used and understood: the definition is concerned with an "'officer' of a corporation".

86 As six members of this Court said in *Shafron v Australian Securities and Investments Commission*, the definition identifies two classes of person⁹⁸. Paragraphs (a) and (c)-(g) deal with persons who occupy or hold a named office in, or in relation to, the corporation. Those are offices in respect of which the *Corporations Act 2001* (Cth) prescribes certain duties and functions.

87 By contrast, persons in para (b) do not hold or occupy a named office. Rather, para (b) concerns persons who: (i) engage in certain conduct; (ii) have a certain kind of capacity; or (iii) have, or have had, a certain kind of influence on the directors of the corporation⁹⁹. They are not identified by holding an office in respect of which the legislation prescribes functions or duties. Persons falling within para (b)(i) of the definition need not be in "substantially the same position as [the] directors" of the corporation¹⁰⁰. The same may be said of those captured by para (b)(ii). Those falling within para (b)(iii) can be described as "shadow officers"¹⁰¹.

88 Paragraph (b) is thus "essentially functional in character, its concern being with the stipulated quality of a person's actions or capacity and their effects"¹⁰². Sub-paragraphs (i) and (ii) are "concerned with identifying persons who are

97 *Corporations Act 2001* (Cth), s 9.

98 (2012) 247 CLR 465 at 478 [25].

99 cf *Shafron* (2012) 247 CLR 465 at 478 [25].

100 *Shafron* (2012) 247 CLR 465 at 479 [25].

101 *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]* (2007) 160 FCR 35 at 99 [481].

102 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 at 318 [45].

31.

involved in management of the corporation"¹⁰³ – that is, people "involved in policy making and decisions that affect the whole or a substantial part of the business of the corporation"¹⁰⁴. And, of course, a person may, by their conduct, satisfy more than one of the categories of officer in para (b)(i)-(iii).

89 *Shafron* was concerned with para (b)(i) of the definition of "officer" and is instructive. Six members of the Court stated that determining whether a person falls under para (b)(i) of the definition requires consideration of the *role* the person played in the corporation¹⁰⁵. The inquiry is not limited to any particular issue or act which the person was involved in, and which is said to constitute a breach of duty¹⁰⁶. The text of para (b)(i) draws a distinction between those who make decisions and those who participate in making decisions¹⁰⁷. The notion of participation "directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons"¹⁰⁸. Consistent with that view, their Honours held that s 180(1) applies to whatever responsibilities a person has, as opposed to responsibilities which attach to a particular office¹⁰⁹.

90 The question of how significant a role a person played is one of fact and degree¹¹⁰. The person's contribution to the making of a decision must be assessed, and that decision must be (in accordance with the words of para (b)(i)) one which affects the whole, or a substantial part, of the business of the corporation¹¹¹. Not just "any" decision will suffice¹¹². Nor is it a question only of what the person

103 *Citigroup* (2007) 160 FCR 35 at 99 [483].

104 *Citigroup* (2007) 160 FCR 35 at 100 [490].

105 *Shafron* (2012) 247 CLR 465 at 478 [23].

106 *Shafron* (2012) 247 CLR 465 at 478 [23].

107 *Shafron* (2012) 247 CLR 465 at 479 [26].

108 *Shafron* (2012) 247 CLR 465 at 479 [26].

109 *Shafron* (2012) 247 CLR 465 at 476 [18]-[19].

110 *Shafron* (2012) 247 CLR 465 at 479 [26].

111 *Shafron* (2012) 247 CLR 465 at 479-480 [27].

112 *Shafron* (2012) 247 CLR 465 at 480 [27].

did¹¹³. It depends on "identifying the relationship between [the person's] actions and the decision to adopt [a] proposal"¹¹⁴.

91 Similarly, determination of whether a person falls under para (b)(ii) of the definition of "officer" of a corporation" requires consideration of the role the person played in the management of the corporation. The inquiry is not limited to any particular issue or act which the person was involved in, and which is said to constitute a breach of duty¹¹⁵. The text of para (b)(ii) is directed to those who have the capacity to affect significantly a corporation's financial standing: not just *any* capacity will suffice¹¹⁶. Determining whether a person has such a capacity depends on identifying their role in relation to the corporation, what they did or did not do (whether on a particular occasion or over time) and the relationship between their actions or inaction and the financial standing of the corporation.

92 The quality of a person's capacity or actions, and the effects of that capacity or those actions on the management of a corporation, are not necessarily uniform across corporations or corporate groups, or even uniform within a single corporation or group. The size of a corporation, the corporate structure, the management structure, and the identity and nature of the persons involved are likely to affect who is an officer of a corporation at any point in time. Circumstances may change over time, sometimes dramatically.

93 In smaller companies, it is possible for all members to participate in the management of the company such that it practically operates much like an incorporated partnership¹¹⁷. This is not true of larger companies¹¹⁸:

"The traditional focus of corporate law in relation to responsibility for corporate actions has been on the role of directors. In smaller companies especially, this may still reflect the way they are in fact run.

113 *Shafron* (2012) 247 CLR 465 at 480 [31].

114 *Shafron* (2012) 247 CLR 465 at 480 [31].

115 *Shafron* (2012) 247 CLR 465 at 478 [23].

116 *cf Shafron* (2012) 247 CLR 465 at 480 [27].

117 Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 241 [7.050].

118 Corporations and Markets Advisory Committee, *Corporate Duties Below Board Level: Report* (2006) at 1 [1.2].

However, the reality in most medium to large enterprises is that operational decision-making devolves to managers and other individuals below board level who conduct the ongoing business of the company subject to higher level supervision by the board of directors."

94 In large public companies, the board of directors sits at the apex of the managerial pyramid. Ordinarily, the board is involved in setting strategy, approving business plans, making key management decisions (such as major expenditure decisions) and monitoring the performance of management and the returns of the business¹¹⁹. Below the board "there will be 'management' consisting of executive employees of the company (senior, middle and junior, perhaps in various divisions of business units), and then the general personnel employed by the company"¹²⁰.

95 The extension of statutory duties to those below board level takes "account of the fact that many companies are managed under the broad direction of the board of directors rather than by the board itself"¹²¹. It recognises that there is substantial room for people outside the boardroom to have a significant effect on a corporation and that modern structured corporate groups are often "run day-to-day by key group executives or executive committees of the holding company whose decisions, made on a group rather than an entity basis, are implemented across the various companies within the group"¹²².

96 Moreover, we do not accept that bankers and other third parties could never fall within the reach of one or more of para (b)(i)-(iii) of the definition of "officer" in s 9 of the *Corporations Act 2001* (Cth). Those questions did not arise directly in this litigation but, to give just one example, lenders managing the way in which a

119 Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 242-243 [7.060]; ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations*, 4th ed (2019) at 6.

120 Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 241 [7.040].

121 Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 466 [8.060.30].

122 Corporations and Markets Advisory Committee, *Corporate Duties Below Board Level: Report* (2006) at 1 [1.2]. See also *AWA Ltd v Daniels trading as Deloitte Haskins & Sells* (1992) 7 ACSR 759 at 832-833; *Australian Securities and Investments Commission v Adler* (2002) 168 FLR 253 at 279-280 [73]-[75]; *Grimaldi* (2012) 200 FCR 296 at 324-325 [73].

company attempts to work its way out of financial distress may present real issues about the application of these provisions¹²³.

Legislative history

97 The legislative history reinforces the conclusion that para (b)(ii) of the definition of "officer" is not concerned with whether a person holds an identified office but with identifying persons involved in the management of a corporation who, by their actions (including inaction), have the capacity to affect significantly a corporation's financial standing.

Companies Act 1958 (Vic)

98 Section 3(1) of the *Companies Act 1958 (Vic)* stated that "officer" "includes a director and any other officer whatsoever of a company". The Act imposed obligations on officers. Section 107(2) provided that "[a]ny officer of a company shall not make use of any information acquired by virtue of his position as an officer to gain an improper advantage for himself or to cause detriment to the company".

Companies Act 1961 (Vic)

99 The *Companies Act 1961 (Vic)* was part of the uniform companies legislation enacted in the States in the early 1960s ("the Uniform Companies Acts")¹²⁴. Section 124(2) of the Uniform Companies Acts imposed a substantively identical duty on officers to that previously found in s 107(2) of the *Companies Act 1958 (Vic)*, adding only that an improper advantage may not be gained by an officer "directly or indirectly".

100 Section 5(1) of the Uniform Companies Acts defined "[o]fficer" as including "any director, secretary or employee of the corporation"¹²⁵.

123 See, eg, *Hill v David Hill Electrical Discounts Pty Ltd (In liq)* (2001) 37 ACSR 617 at 620 [12]; *Emanuel Management Pty Ltd (In liq) v Foster's Brewing Group Ltd* (2003) 178 FLR 1 at 72-73 [263]-[264]; *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd* (2011) 81 NSWLR 47 at 51 [9]-[10], 76-77 [227]-[232]; *Re Akron Roads Pty Ltd (ACN 004 769 895) (In liq) [No 3]* (2016) 348 ALR 704 at 746-747 [271].

124 See Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 49 [2.170.3].

125 See, eg, *Companies Act 1961 (Vic)*, s 5(1) para (a) of the definition of "Officer".

It also defined the term "[d]irector" as including "any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the directors of a corporation are accustomed to act"¹²⁶. The second part of this definition of "[d]irector" captured "shadow directors"¹²⁷.

101 This definition of "[d]irector" interacted with s 124(1) of the Uniform Companies Acts, which required a director to "act honestly and use reasonable diligence in the discharge of the duties of his office". These provisions¹²⁸ were considered in *Corporate Affairs Commission v Drysdale*¹²⁹. Mason J found that s 124(1) extended to de facto directors¹³⁰. His Honour held that s 124(1) assumed that a person "occupies an office ('his office') and that there are functions ('duties') attaching to that office which he is discharging"¹³¹. His Honour said¹³²:

"To say that a person occupies a position or office is to say something more than that he holds the position or office. The first statement denotes one who acts in the position, with or without lawful authority; the second denotes one who is the lawful holder of the office."

102 *Drysdale* was not directly concerned with the definition of "[d]irector" in s 5(1), but with the use of that word in s 124(1). Nevertheless, as was later explained in *Grimaldi v Chameleon Mining NL [No 2]*¹³³, the extension of liability to de facto directors "altered significantly [the] contemporary understanding of who could be said to be a director for the purposes of director's duties provisions".

126 See, eg, *Companies Act 1961* (Vic), s 5(1) definition of "Director".

127 *Grimaldi* (2012) 200 FCR 296 at 315 [35].

128 As enacted in the *Companies Act 1961* (NSW).

129 (1978) 141 CLR 236.

130 *Drysdale* (1978) 141 CLR 236 at 242-243.

131 *Drysdale* (1978) 141 CLR 236 at 242.

132 *Drysdale* (1978) 141 CLR 236 at 242.

133 (2012) 200 FCR 296 at 315 [36].

Companies Act 1981 (Cth)

103 Over the course of 1981 and 1982, each of the States passed an Act which was "broadly uniform" with the new *Companies Act 1981 (Cth)*¹³⁴. As well as dealing with receivers, managers, liquidators and trustees, s 5(1) of the *Companies Act 1981* defined "'officer', in relation to a corporation" as including (in para (a) of the definition) "a director, secretary, *executive officer* or employee of the corporation" (emphasis added).

104 The term "executive officer" was new. It was defined in s 5(1) as meaning "any person, by whatever name called and whether or not he is a director of the corporation, who is concerned, or takes part, in the management of the corporation". This "addition heralded a new concern with senior officers in companies beyond directors"¹³⁵.

105 Section 5(1) of the *Companies Act 1981* defined "director", in a way which elaborated on the language and concepts used by Mason J in *Drysdale*¹³⁶, as follows:

"'director', in relation to a corporation, includes:

- (a) any person occupying or acting in the position of director of the corporation, by whatever name called and whether or not validly appointed to occupy or duly authorized to act in the position; and
- (b) any person in accordance with whose directions or instructions the directors of the corporation are accustomed to act".

106 The provisions of the *Companies Act 1981* which imposed statutory duties and liabilities on officers of a corporation adopted a different structure from previous statutory regimes. Section 229 set out liabilities of officers *and* employees. Section 229(5) contained its own exhaustive definition of "officer" for the purposes of that section. Paragraph (a) of that definition said that an "officer" was "a director, secretary or executive officer of the corporation".

134 Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 50 [2.170.6].

135 *Grimaldi* (2012) 200 FCR 296 at 317 [42].

136 See *Grimaldi* (2012) 200 FCR 296 at 316 [41].

107 Section 229(1) and (2) only applied to an officer. Section 229(1)¹³⁷ required an officer to act honestly in the exercise of their powers and the discharge of the duties of their office. Section 229(2)¹³⁸ required an officer to exercise a reasonable degree of care and diligence in the exercise of their powers and the discharge of their duties. By contrast, the obligations in s 229(3) and (4) applied to officers and to employees of a corporation¹³⁹. These provisions obliged officers and employees not to make improper use of information or their position to gain, directly or indirectly, an advantage for themselves or for any other person, or to cause detriment to the corporation.

108 As will be apparent, the scheme of the *Companies Act 1981* sought to identify people based on their function, or the nature of their involvement in the management of the company, rather than on the basis of holding a recognised office or title. A distinction in terms of function, duty and liability was drawn between those who participated in management and those who were "employees".

109 The provisions of the *Companies Act 1981*¹⁴⁰ were considered by Ormiston J in *Commissioner for Corporate Affairs v Bracht*¹⁴¹. Bracht was alleged to have contravened s 227, which provided that a person who was an insolvent under administration could not be "a director or promoter of, or be in any way (whether directly or indirectly) concerned in or take part in the management of, a corporation without the leave of the Court". This language was substantially similar to the definition of "executive officer" in s 5(1) of the *Companies Act 1981*¹⁴².

110 Ormiston J held that the definition of "director" in s 5(1) covered de facto directors, and persons in accordance with whose directions or instructions the

137 cf *Corporations Act 2001* (Cth), s 181(1).

138 cf *Corporations Act 2001* (Cth), s 180(1).

139 cf *Corporations Act 2001* (Cth), ss 182-184. In the case of s 229(3), this included former officers and employees.

140 As enacted by the *Companies (Victoria) Code*, which was given force by the *Companies (Application of Laws) Act 1981* (Vic).

141 [1989] VR 821.

142 See [104] above.

directors are accustomed to act¹⁴³. The concern of the legislature was "with the exercise of managerial control, not confined to the level of the board of directors but extending to all who perform management functions"¹⁴⁴. In the case of small companies, those "engaged in routine activities of a kind not normally associated with management" who had delegated "powers and functions" could be involved in "management" of the company if those powers and functions were "likely in their performance to have a significant effect on the business and financial standing of [the] company"¹⁴⁵. That accorded with the legislature's purpose of protecting creditors and shareholders: those whose conduct could have a significant effect on the business and financial standing of a company were able to "put the solvency or the probity of the corporation's administration at risk"¹⁴⁶. By contrast, the statutory definitions would necessarily exclude those who were not given any "significant discretion or advisory role in decision-making"¹⁴⁷.

111 Ormiston J further held that to "take part in" the management of a corporation connoted "the active participation of a ... person in the management of a corporation"¹⁴⁸. Such participation had to be "real and direct", but did not have to amount to "ultimate control"¹⁴⁹. The concept of "management" comprehends¹⁵⁰:

"activities which involve policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs."

143 *Bracht* [1989] VR 821 at 828.

144 *Bracht* [1989] VR 821 at 828.

145 *Bracht* [1989] VR 821 at 830.

146 *Bracht* [1989] VR 821 at 830.

147 *Bracht* [1989] VR 821 at 830.

148 *Bracht* [1989] VR 821 at 831.

149 *Bracht* [1989] VR 821 at 831.

150 *Bracht* [1989] VR 821 at 830, quoted in *Citigroup* (2007) 160 FCR 35 at 100 [489].

As will be seen, *Bracht* considerably influenced the subsequent amendments to companies legislation in Australia.

Corporations Law

- 112 The *Corporations Law*¹⁵¹, introduced in 1990, contained definitions of "executive officer"¹⁵², "officer" in relation to a body corporate¹⁵³ and "director"¹⁵⁴ which were in substantially the same form as the *Companies Act 1981*. There was also a second definition of "officer" in s 232(1). Section 232 set out the duties and liabilities of officers and employees in similar terms to s 229 of the *Companies Act 1981*. As in the *Companies Act 1981*, s 232(1) of the *Corporations Law* contained a specific and exhaustive definition of "officer" for the purposes of that section, in substantially the same terms as the previous s 229(5) definition in the *Companies Act 1981*.

Managed Investments Act 1998 (Cth)

- 113 The *Managed Investments Act 1998* (Cth) introduced a new Ch 5C into the *Corporations Law*, containing the regime for the regulation of managed investment schemes to which reference has already been made¹⁵⁵. Relevantly, the definition of "officer" was amended to provide that officer

151 *Corporations Act 1989* (Cth), s 82 as amended by the *Corporations Legislation Amendment Act 1990* (Cth). Each State enacted an Act to adopt the *Corporations Law* as the law of that State: see Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 50 [2.170.12].

152 *Corporations Law*, s 9. The wording of the definition was later amended slightly, though with no change in substance: see *Company Law Review Act 1998* (Cth), Sch 2, item 265.

153 *Corporations Law*, s 9. The s 9 definition of "officer" was later replicated in s 82A of the *Corporations Law*, and s 9 was amended to define "officer" as having the meaning given by s 82A: *Corporations Legislation Amendment Act 1991* (Cth), Sch 3.

154 *Corporations Law*, ss 9 and 60.

155 See [74]-[77] above.

"in relation to the responsible entity of a registered scheme – means a person who is a director, secretary or executive officer of the responsible entity"¹⁵⁶.

CLERP Act

114 The *Corporate Law Economic Reform Program Act 1999* (Cth) ("the CLERP Act") repealed s 232 of the *Corporations Law* and introduced a new Pt 2D.1¹⁵⁷. Within Pt 2D.1, the new s 179(2) stated that "[s]ection 9 defines both **director** and **officer**. **Officer** includes, as well as directors and secretaries, some other people who manage the corporation or its property (such as receivers and liquidators)".

115 New definitions of "director" and "officer" of a corporation were introduced to s 9¹⁵⁸, with no separate definition of "officer" in relation to a managed investment scheme, as was previously found in the *Corporations Law*. The term "executive officer", previously part of the definition of "officer"¹⁵⁹, was deleted from that definition. The Explanatory Memorandum which accompanied the Bill which became the CLERP Act noted that¹⁶⁰:

"The draft provisions define officer to include a director or secretary *as well as certain other persons who may manage the company*, but not employees (proposed subsection 179(2)). Where an obligation imposed by the Law applies to employees, as well as officers, the Law will state this." (emphasis added)

116 Any suggestion that the deletion of the term "executive officer" narrowed the definition of "officer" because it did not refer (in such expansive terms) to people who "take part in" or "are concerned in" management¹⁶¹ is rejected.

156 *Managed Investments Act 1998* (Cth), Sch 2, item 21.

157 Sections 180-184, within the new Pt 2D.1, are set out at [81]-[83] above.

158 CLERP Act, Sch 3, items 109, 112.

159 See [103] above.

160 Australia, House of Representatives, *Corporate Law Economic Reform Program Bill 1998*, Explanatory Memorandum at 26 [6.22].

161 See also Austin and Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law*, 17th ed (2018) at 467 [8.060.33]; Corporations and Markets Advisory Committee, *Corporate Duties Below Board Level: Report* (2006) at 35-36.

The deletion of the term did not narrow the class of person to whom statutory duties applied. As will be recalled, an "executive officer" was defined¹⁶² as a person who was concerned in, or took part in, the "management" of a corporation. In *Bracht*, Ormiston J had explained the notion of "management" by reference to activities which involved policy and decision-making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of it, to the extent that those activities may have some significant bearing on the financial standing of the corporation or the conduct of its affairs¹⁶³. The effect of the CLERP Act was to synthesise and codify these notions within the definition of "officer"¹⁶⁴.

117 The idea¹⁶⁵ that Ormiston J's judgment depended on the words "concerned in" is misplaced. His Honour said, in effect, that "management" involved certain types of conduct and it was those types of conduct which were picked up in the definition of "officer" as amended by the CLERP Act. As Jacobson J rightly concluded in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd [No 4]*¹⁶⁶:

"The language of para (b)(i) and (ii) of the definition of 'officer' [in s 9 of the *Corporations Act 2001* (Cth)] corresponds, in large measure, with Ormiston J's description of the concept of management. What emerges from this is that an officer is involved in policy making and decisions that affect the whole or a substantial part of the business of the corporation."

Corporations Act 2001 (Cth)

118 The *Corporations Act 2001* (Cth), which replaced the *Corporations Law*, contained three relevant definitions. First, s 9 retained the definition of "officer" as amended by the CLERP Act. Second, the term "executive officer" of

162 See [104] above.

163 See [109]-[111] above.

164 *Citigroup* (2007) 160 FCR 35 at 100 [490].

165 Corporations and Markets Advisory Committee, *Corporate Duties Below Board Level: Report* (2006) at 35-36.

166 (2007) 160 FCR 35 at 100 [490]. See also Commonwealth of Australia, *CLERP (Audit Reform & Corporate Disclosure) Bill: Commentary on the Draft Provisions* (2003) at 141 [569]; Ford, Austin and Ramsay, *An Introduction to the CLERP Act 1999: Australia's New Company Law* (2000) at 7 [2.5].

a corporation remained defined in s 9, also in unchanged form from the *Corporations Law*. Third, "officer" was also defined inclusively in s 82A (applying to a "body corporate" or "entity"), carried over from s 82A of the *Corporations Law*.

119 The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) ("the CLERP 9 Act") made a number of amendments "designed to clarify the classes of personnel who have duties and obligations under the [*Corporations Act 2001* (Cth)]"¹⁶⁷. One reason for the amendments was stated to be to correct "current anomalies in relation to the definition of 'officer'"¹⁶⁸. That anomaly was the co-existence of the two definitions of "officer" in ss 9 and 82A, as well as definitions used for specific purposes in other provisions¹⁶⁹. The solution chosen was to repeal s 82A, leaving only the s 9 definition¹⁷⁰.

120 The definition of "officer" in s 82A had included employees. The separate definition of "executive officer" distinguished between regular employees and those officers who took part in management of the company. With the repeal of s 82A, the definition of "executive officer" was no longer necessary for this

167 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 201 [5.571].

168 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 201 [5.571].

169 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 201 [5.572].

170 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 201 [5.572].

purpose¹⁷¹. Where the *Corporations Act 2001* (Cth) was to extend to employees, this would be expressly stated¹⁷².

121 Having removed the definition of "executive officer", it was nevertheless thought undesirable to rely solely on the definition of "officer", because some provisions were not intended to put liability on, or bestow powers on, receivers, managers, administrators and others falling within paras (c) to (e) of the definition of "officer"¹⁷³. Some other term was needed, and so references to "executive officer" were to be replaced, where appropriate, with the term "senior manager"¹⁷⁴.

122 As explained earlier, the term "executive officer" was concerned with "management" of the corporation, and the fact that the explanation of "management" given by Ormiston J in *Bracht* had been effectively codified in the definition of "officer" in s 9 was confirmed in the Commonwealth's commentary on the draft CLERP 9 Act¹⁷⁵:

"The term 'executive officer' ... is already sufficiently encapsulated by [the] subsection 9(b) definition of 'officer', and section 82A is to be removed so there is no need for such a distinction [between executive officers and employees]. Further the concept of being 'concerned in management...' as described by the definition of 'executive officer' is not easily definable, and subsequent reliance on judicial interpretation is unwelcome."

171 Commonwealth of Australia, *CLERP (Audit Reform & Corporate Disclosure) Bill: Commentary on the Draft Provisions* (2003) at 141 [568].

172 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 201 [5.574].

173 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 203 [5.581].

174 Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 203 [5.582].

175 Commonwealth of Australia, *CLERP (Audit Reform & Corporate Disclosure) Bill: Commentary on the Draft Provisions* (2003) at 141 [570].

123 The Explanatory Memorandum to the CLERP 9 Act stated that the definition of "officer" in s 9 "generally covers persons who have a degree of influence or potential influence over the general conduct of the entity, through the office they hold or *otherwise*" (emphasis added)¹⁷⁶.

Facts

124 Although the Court of Appeal differed from the trial judge as to the meaning of "officer", the Court stated that none of the trial judge's findings about Mr King's conduct were disturbed. Nonetheless, because of the Court of Appeal's misconception that to be an officer required holding a recognised position with rights and duties attaching to it, the Court of Appeal wrongly concluded that Mr King was not an officer when he did, in fact, have the capacity to significantly affect the financial standing of MFSIM.

125 Understanding the question in the correct way demands close attention not only to the facts and circumstances relating to the misuse of PIF's funds in November 2007, but also to all of the matters relied on by ASIC as showing the nature and extent of Mr King's capacity to significantly affect the financial standing of MFSIM. As will be explained, taken together, the facts and circumstances relating to the misuse of funds in November 2007 and the other matters relied on by ASIC compelled the conclusion that Mr King was an officer of MFSIM within the meaning of para (b)(ii) of the definition. After Mr King ceased to be a director of MFSIM, his involvement in and impact on MFSIM and its business remained extensive and significant. Without holding an office, Mr King had a degree of influence over the general conduct of MFSIM which had the capacity to affect significantly MFSIM's financial standing.

MFS Group

126 MFSIM sat within a large group of companies, known as the MFS Group. The parent company of the MFS Group was a publicly listed company, MFS Ltd. The companies within the MFS Group dealt with two types of business. The first was tourism and travel. Those businesses constituted a division of the MFS Group known as "the Stella Group". The second was funds management and financial services.

127 MFS Financial Services Ltd ("MFS Financial Services") was a wholly owned subsidiary of MFS Ltd. Its principal activity was the holding of investments in its immediate subsidiaries. MFS Castle Pty Ltd ("MFS Castle") was another

¹⁷⁶ Australia, House of Representatives, *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill 2003*, Explanatory Memorandum at 202 [5.578].

wholly owned subsidiary of MFS Ltd, which did not carry on any business itself. MFS Administration Pty Ltd ("MFS Administration") was the treasury company for the MFS Group, employed all staff in the MFS Group and maintained intercompany loans within the Group. It was a wholly owned subsidiary of MFS Ltd, and MFS Ltd controlled its affairs.

MFSIM

128 During the second half of 2007 – when PIF's funds were misused – MFSIM had five board members. There were three non-executive directors. Craig White was an executive director of MFSIM, as well as deputy Chief Executive Officer ("CEO") of MFS Ltd. Guy Hutchings was also an executive director of MFSIM, as well as the CEO and chief investment officer of MFSIM from early 2007.

129 The board had various committees. The Conflicts and Related Party Committee ("CRPC"), consisting of all non-executive directors, was charged with the review and approval of transactions involving the various MFSIM funds which may have involved a party that was related to MFS. MFSIM also had Investment Approval Committees ("IACs"), consisting of executives of MFSIM (including some executive directors). The role of the IACs was to review submissions regarding investments and transactions for the MFSIM funds and to decide whether the relevant fund ought to proceed with the transaction or not and whether additional information was required before transactions could be progressed. In November and December 2007, the IAC for PIF consisted of, among others, Mr White, Mr Hutchings and David Kennedy.

130 PIF had a constitution, a product disclosure statement ("PDS") and a compliance plan. Clause 15 of PIF's constitution required MFSIM, as the responsible entity, to seek and invest in "authorised investments", defined to include registered mortgages, bank deposits, bills of exchange and negotiable certificates of deposit issued by any bank, registered investment schemes and any investment authorised under s 21 of the *Trusts Act 1973* (Qld)¹⁷⁷. PIF's PDS stated that MFSIM would not lend to, or invest in, entities which were majority owned by MFS Ltd, but there was no such restriction in PIF's constitution.

131 PIF's compliance plan described the processes designed to ensure compliance with MFSIM's Australian financial services licence, PIF's constitution, the *Corporations Act 2001* (Cth) and other legislation. Clause 35 required the

¹⁷⁷ Section 21 of the *Trusts Act 1973* (Qld) allows a trustee to invest trust funds in "any form of investment", to vary or realise an investment of trust funds at any time, and to re-invest any amounts resulting from the realisation, unless the instrument creating the trust expressly forbids any of these actions.

management of PIF to assess investment opportunities on their merits, and to only make investments authorised by the constitution and PDS. Clause 19 of the compliance plan required any related party transactions to comply with the restrictions on such transactions found in the *Corporations Act 2001* (Cth). Those transactions had to be in the best interests of PIF members, be made on commercial terms and be properly documented.

Individuals

132 Mr King was an executive director of MFS Ltd. Mr King was the CEO of MFS Ltd until his resignation on 21 January 2008. Until that date, he was, in effect, also CEO of the MFS Group. Mr King was a director of MFSIM until 27 February 2007. He resigned from that position, he said, pursuant to a strategy "to separate ... the funds management away from [the] proprietary activities of MFS Limited". Mr King described his involvement in MFSIM after his resignation as a director on 27 February 2007 as follows:

"In what it did and how it operated nothing; in worrying about the general activities of the MFS Group, yes, I was always peripherally involved. I mean, I couldn't be the CEO of the group and not be concerned about what was going on in any company ... [F]rom when I resigned the idea was that that was Craig's [Mr White's] baby and that, you know, that was one of his areas of responsibility, but of course I had the responsibility."

This was an accurate description of the role that Mr King played in the overall management of the MFS Group until he left the Group on 21 January 2008. And, unsurprisingly, as part of that overall management of the MFS Group, Mr King had an "overall responsibility" for MFSIM.

133 Mr White was deputy CEO of MFS Ltd and had primary day-to-day conduct of the funds management side of the MFS Group. He was a member of the IAC for PIF, and was an executive director of MFSIM. He was also a director of MFS Castle and MFS Administration. Although Mr King said that Mr White was in charge of PIF, Mr King spoke to him daily and Mr White took instructions from him with respect to the proprietary matters of the business. Mr King conceded that he was unable to recall any instance where Mr White refused to take a direction from him with respect to the funds management side of the business.

134 David Anderson was chief financial officer of MFS Ltd and acted as chief financial officer for the whole MFS Group. He was company secretary of MFSIM, MFS Administration and MFS Ltd. He was a director of MFS Castle.

Events

135 During 2007, the board of MFS Ltd considered ways in which at least some of the Stella Group could be sold to free up capital for the MFS Group and to repay

debt. Mr King played "the lead role" in the effort to sell the Stella Group. The board of MFS Ltd was advised by consultants to seek out a private equity joint venture partner to invest in the Stella Group. A private equity investor was found and in May 2007 it made a non-binding proposal to acquire half of the Stella Group business.

136 On 1 June 2007, \$250 million was borrowed by MFS Castle from Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress"). The full \$250 million was drawn down and paid to MFS Administration. The debt was guaranteed by MFS Ltd and MFS Financial Services. It was anticipated that the proceeds from the sale of part of the Stella Group would be used to repay the loan. The original repayment date was 31 August 2007, later extended to 30 November 2007 following delay in the sale of the Stella Group.

137 The Stella Group was funded as part of MFS Ltd until, in June 2007, a facility of \$800 million was obtained from UBS which enabled the Stella Group to operate as a standalone business. The UBS loan facility precluded the use of property of the Stella Group for other parts of the MFS Group.

138 On 29 June 2007, the Royal Bank of Scotland ("RBS") provided MFSIM with a loan facility of \$200 million. The purpose of the facility, as described in PIF's PDS, was to help manage the liquidity of the fund – that is, managing the payment of distributions and redemptions – and to provide short-term funding for investments that may arise on an opportunistic basis when PIF did not have surplus cash. No money was drawn down from the RBS loan facility until 27 November 2007. As will be seen, this drawdown constituted a blatant misuse of PIF's scheme property.

139 On 7 November 2007, Mr King reported to the board of MFS Ltd that the partial sell-down of the Stella Group should have resolved by the end of November. He also reported on what had emerged as an alternative proposal: demerging the Stella Group and financial services businesses of the MFS Group into separate entities, after each had been recapitalised.

140 An investment management meeting of MFSIM was held on 12 November 2007. The minutes of that meeting do not record any proposed acquisitions. At a meeting of the Finance and Investment Committee for MFS Ltd on the same day, Mr King reported on the Stella Group sale and "potential hybrid notes/bank debt". No reference was made to the sale of any assets to PIF.

141 The cash flow of MFS Ltd by this time (November 2007) was "extremely tight". The trial judge found that "[b]y late November 2007, it was apparent that none of MFS Castle, MFS Limited and MFS Financial Services had sufficient funds on hand to enable the repayment in full of the \$250 million debt to Fortress by the end of November 2007". The MFS Group was facing

"serious cash flow difficulties" and the "inability to repay the loan to Fortress on time could have had potentially devastating effects for the MFS Group, especially given that the loan was secured by [MFS Ltd]".

Week commencing Monday, 19 November 2007

142 Marilyn Watts (the fund manager for PIF) sent an email to Janina Howard (the Head of Business Analysis and Governance Funds Management of MFSIM) on 19 November 2007, stating that she wanted to "discuss the possibility of drawing down on the PIF loan facility from RBS to fund some planned investments later this week". The parties disputed whether this referred to the repayment of the Fortress loan, or whether it instead referred to a plan to "seed" another investment fund (known as "MYF") for which MFSIM was the responsible entity. The trial judge, by reference to other documentary evidence, accepted that the evidence was inconsistent with any plan for MYF to be "seeded in some way with a \$130 million payment made in November [2007]".

143 David Kelleher, of Fortress, was by now becoming nervous about repayment of the Fortress loan. Mr White arranged a teleconference with himself, Mr King and Mr Kelleher for 20 November 2007.

144 On Wednesday, 21 November 2007, Ms Howard responded by email to Ms Watts and Mr Hutchings regarding the "RBS Facility" providing "Key Details" of the steps required to draw funds from the RBS facility. She said, "I am ready to go when you are". She advised that having regard to the relevant gearing ratio of "20% of FUM" (funds under management), "we have approx \$155m max to draw on", and that the funds would be paid by RBS into PIF's account within two business days of the required forms being lodged with the bank.

145 On Friday, 23 November 2007, Ms Watts replied by email to Ms Howard (copied to Mr Hutchings) asking her to "start the process for a drawdown by PIF next week from the RBS facility", because PIF would have to "fund some anticipated investments late next week and the current (and anticipated) cash balance will be insufficient". Ms Watts added that "[t]he amount of the draw-down and the period for which it will be required has not yet finalised, but I will have a better idea on Monday".

Saturday, 24 November 2007

146 At some time in the early morning of Saturday, 24 November 2007, or possibly the previous night, Mr King had conversations with Mr White or Mr Anderson in which Mr King was told that \$25 million would be available to pay Fortress. That day, Mr King emailed the directors of MFS Ltd saying, "[w]e have decided overnight to withdraw from the Stella Private Equity sale process". He explained that decision by saying that the company should pursue an

alternative strategy, under which the Stella Group would first acquire certain businesses in the United Kingdom which would add to the Stella Group's profitability and value. Mr King said in his email:

"The only present issue this all presents is we have a [\$]250 million facility due to Fortress on 1 December and I have today asked them to roll that until 1 March to allow a replacement debt facility to be put in place. Worst case is we have to raise 250 mill of debt or hybrid or equity capital this week if they are themselves under pressure from their investors due to whatever is happening in the USA and resolve not to allow any extensions[.]"

147 On the same day, Mr King emailed Mr Kelleher of Fortress (copied to Mr White and Mr Anderson) informing him that MFS Ltd was withdrawing from negotiations to sell the Stella Group to private equity investors. Mr King recorded what he described as the "background to the MFS/Fortress position". He wrote that Fortress had approached MFS originally in "May/June 07", in the expectation that an agreement would be reached for the sale of the Stella Group by 30 June that year, and that subsequently the private equity investors had asked for the transaction to be delayed until mid-October, so that MFS was seeking to extend the time for repayment of the Fortress facility to 1 December 2007, "believing that the Stella process would terminate one way or another in sufficient time for your debt to be repaid or refinanced". Mr King wrote that the negotiations with the private equity investors had continued until the middle of that week, when they had stalled over the price. Consequently, Mr King said that MFS was withdrawing from the negotiations and "pushing the 'go' button on the bank refinance application". He told Mr Kelleher that if Fortress insisted upon full repayment by 1 December 2007, MFS would be able to comply "off the back of an equity and hybrid raising", but MFS Ltd did not wish to do this "on such short notice and before we have had a chance for the market to understand the Stella numbers". He wrote:

"But if you insist then that is what we will do all be it [sic] costly, inconvenient and undesirable. You will achieve repayment in full but at great cost to us. We are saying plainly that is your right and if that is ... your position we will act upon it and complete."

148 Mr King then made an alternative proposal under which \$25 million would be paid on the due date, with the balance to be repaid on 1 March 2008. This would permit MFS Ltd to raise capital in February 2008 and allow for the Commonwealth Bank of Australia ("CBA") "debt process to be pursued with all vigour". The trial judge found that this was evidence that it was possible for MFS Ltd to raise the money needed to repay Fortress by going to the market but that Mr King considered this a possibility to be avoided. The email was also evidence that funds could not have been expected from CBA by the end of November 2007.

149 After the email, in a telephone conversation between Mr Kelleher and Mr King, Mr Kelleher made a counter-offer under which MFS Ltd would pay \$100 million by 30 November (along with a \$3 million extension fee) and the balance would be payable on 1 March 2008. Mr Kelleher said that Mr King then "quickly agreed in principle ... without any hesitation". The trial judge accepted that Mr King's quick agreement to Mr Kelleher's counter-offer was based on Mr King being informed (by Mr White) that PIF could draw down up to \$155 million from the RBS facility.

Sunday, 25 November 2007

150 On Sunday, 25 November 2007, Mr Kelleher emailed Mr King (copying Mr White and Mr Anderson) saying that he had the "go ahead as per our conversation of today". Mr King later emailed Rolf Krecklenberg (an executive director of MFS Ltd and CEO of the Stella Group) saying, "I am getting somewhere on Fortress which is workable", without making any reference to equity raising or any other means of raising the required \$103 million. The Court of Appeal found that there was "no evidence to suggest that Mr King, Mr White or Mr Anderson then considered any alternative source of funds for the \$103 million to be paid to Fortress, other than a drawdown on the RBS facility".

Monday, 26 November 2007

151 Ms Watts reported to the MFSIM management team meeting, on the morning of Monday, 26 November 2007, that she was "facilitating several large settlements which will drain the liquidity position in PIF. To draw down on RBS facility to fund and will be running a fairly tight ship in the coming weeks."

152 Later on 26 November, Mr Hutchings received an email from Scott Parker, a fund analyst of MFS Ltd, attaching what Mr Parker described as the "[m]ost up to date cash flow" for PIF. This projection showed no need for funds to be drawn down by PIF by Thursday or Friday of that week. Mr White then emailed Mr Hutchings under the subject, "per conversations this morning", saying:

"have had a think, am across the cash flow. all good and thanks for turn around ... can you please put in motion drawdown of \$150m. see if we can aim for thursday, with Friday fall back. i will be back to you with work up fo [sic] all details. at this stage i don't think any one will breach the \$50m. any issues let me know."

Mr White's email was immediately forwarded by Mr Hutchings to Ms Watts and Ms Howard, adding, "[l]et's implement [Mr White]'s request". Mr King said that it was likely that by this time, Mr White had told him that the \$100 million payment could be covered, and that Mr White may have told him that he was going to draw the money down from PIF's loan facility with RBS.

153 Emails between Mr King, Mr White and Mr Anderson later that day showed that consideration had been given to obtaining funds to pay Fortress from CBA, but that funding was, at best, weeks away, and that Mr King realised that funds would have to be found from some other source.

Tuesday, 27 November 2007

154 On Tuesday, 27 November 2007, Ms Watts emailed Ms Howard instructing her to draw down \$150 million from the RBS facility for PIF "for repayment on 31st December 2007". Ms Howard advised Ms Watts that there would not be any IAC minutes or other backup for the funding notice for the drawdown. Mr White told Mr Anderson that "we are getting c\$130m on Friday". Mr White then emailed Mr Kelleher, asking for account details for payment to Fortress. Mr White received a reply from Fortress, which he then forwarded to Mr King the same afternoon.

Wednesday, 28 November 2007

155 On Wednesday, 28 November 2007, RBS advised that it had sent \$150 million. Ms Watts passed this information on to Mr Hutchings and Mr White, and Mr White copied this to Mr King. Ms Howard sent an email that morning to Mr White, Mr Hutchings and Ms Watts, saying that the \$150 million should reach the PIF operating account that day or the following morning and that "we can then organise RTGS to fund investment". "RTGS" stood for Real Time Gross Settlement, which was the manner in which Fortress was paid \$103 million. Later that day, Mr White emailed Mr King saying, "I have the \$150m in our account ready to transfer to MFS A tomorrow if need be". "MFS A" referred to MFS Administration. Mr King immediately responded by email to Mr White, saying: "You the man. Definitely the man. Thank you very very much. Let's talk tomorrow."

Thursday, 29 November 2007

156 There was a meeting of the Finance and Investment Committee by teleconference. Mr King and Mr Anderson, among others, attended that meeting. According to minutes of the meeting, the committee discussed the Fortress loan, repayment of \$100 million of that loan, and the "key terms – interest rate & fees" for the extension of the loan to March 2008. The minutes of the meeting do not record anything about the source of funding for the repayment.

Friday, 30 November 2007

157 On Friday, 30 November 2007, \$130 million was transferred from a PIF account to MFS Administration. There was no approval for the \$130 million payment from either the IAC for PIF or the CRPC for MFSIM. Later the same day, \$103 million was paid from the MFS Administration account to Fortress.

Mr Anderson emailed Mr King (copying Mr White) at 4.50 pm, saying "All done all signed all sent all received". Mr King replied, "Great work guys".

158 In deciding whether Mr King contravened the *Corporations Act 2001* (Cth), the trial judge found that Mr King approved and authorised the use of the money drawn down under the RBS facility to make the \$130 million payment to MFS Administration and the \$103 million payment to Fortress. Mr King also knew that the \$130 million payment was made from funds managed by MFSIM as the responsible entity for PIF.

159 Mr King admitted that he was aware that the \$150 million was money effectively held in trust by PIF for its investors. At the latest, he was probably aware of this by 9.00 am on 28 November 2007. Mr King considered alternative means of raising the money to repay Fortress – namely, by going to the market – as being inconvenient, undesirable and costly.

160 The trial judge found that Mr King either knew that there was no transaction on foot to reimburse PIF, or studiously avoided asking questions on that point because he knew that it was unlikely that something could be put in place sufficiently quickly to justify the payment. This was in circumstances where, the Court of Appeal said, Mr King "approved and authorised" the use of PIF's funds and "was the likely decision maker about what would be provided to PIF in return for its funds". There was no documentary evidence of any agreed consideration for the use of PIF's money, any understanding as to what PIF might receive in return for use of its funds, or any agreed date of repayment to PIF.

Further findings as to Mr King's capacity to affect significantly MFSIM's financial standing

161 In finding that Mr King was an officer of MFSIM, the trial judge noted that ASIC had "assembled a significant number of [specific] examples in its written submissions showing [Mr King's] capacity to affect decisions within MFSIM in particular or as part of the MFS Group", without examining them further. The Court of Appeal considered these examples. It concluded that none of the examples showed that Mr King was an officer of MFSIM, because they did not show that Mr King acted in a recognised position within MFSIM.

162 As has been explained, the Court of Appeal applied the wrong test to determine who is an officer of a corporation within para (b)(ii) of the s 9 definition. But it also took too narrow a view of the significance of the specific examples which ASIC advanced of Mr King's capacity to affect significantly MFSIM's financial standing. Each example was significant in what it demonstrated.

Early 2007 directive to cease banking with National Australia Bank ("NAB")

163 In early 2007, Mr King had issued a directive to the entire MFS Group to cease banking with NAB. It applied to PIF. The directive was issued before Mr King's resignation as a director of MFSIM. Nevertheless, Mr King sought updates about PIF's withdrawal from NAB in March and June 2007, *after* his resignation as a director of MFSIM in February 2007. The Court of Appeal said this showed "the particular influence which Mr King still had across the MFS Group". The Court of Appeal said that "Mr King was apparently able to influence such a major decision across the entire group" and that while the withdrawal decision had been made while he was a director of MFSIM, it was "unlikely" that Mr King's influence would have diminished significantly over the year. The Court of Appeal was correct in finding that this showed Mr King's influence, but evidently failed to appreciate that it also supported a finding that Mr King had the capacity to affect significantly MFSIM's financial standing, even after he had resigned as a director.

August 2007 instructions concerning PIF redemption numbers

164 In August 2007, Mr King gave instructions "about how the PIF applications and redemptions numbers should be presented at least for the purposes of an MFS Ltd presentation". The Court of Appeal concluded that Mr King's motivation in this respect was to present a more favourable picture of the liquidity of the MFS Group and that while this may or may not have been proper, the presentation was for MFS Ltd, and Mr King was not acting for MFSIM. This conclusion was not to the point. Mr King permitted altered information about redemptions in PIF to be released to investors and that had the capacity to significantly affect the financial standing of MFSIM.

October 2007 funding directive

165 On 12 October 2007, Mr King sent an email to three individuals within MFS, copied to Mr White, setting out a policy for the funding of businesses which competed with the Stella Group. Under the heading, "Decision", Mr King gave an unqualified direction that funds should not be used to fund competitors of the Stella Group except on certain conditions which Mr King set out.

166 Mr White forwarded that email to others two months later, saying that it needed to be "formalised into policy and tabled" at the IAC for PIF. That was done by way of a memorandum to the IAC for PIF attaching "amended MFSIM 2007 Lending Guidelines for consideration and confirmation by IAC". The attached guidelines provided that PIF would not fund any hotel, serviced apartment or resort operation except on the conditions which Mr King had set out in his email. No minutes record discussion of that memorandum.

167 The Court of Appeal concluded that Mr White followed the "unqualified direction" given by Mr King in his email and that:

"[T]hese events further demonstrate an influence which Mr King had over Mr White, and in that way they are relevant to ASIC's case that Mr King was an officer of MFSIM. But this example does not prove that Mr King acted in an office or position of MFSIM. Notably, the direction which he issued was across the entire MFS Group."

168 The Court of Appeal was correct to say that these events demonstrated Mr King's influence. However, the fact that the direction was across the entire MFS Group showed that he had the capacity to significantly affect MFSIM's financial standing.

November 2007 proposed expansion of PIF into New Zealand

169 On 30 November 2007, Mr King received the following email from Jason Maywald:

"For a little while I've been trying to convince PIF to sell their product through our distributions team in NZ. I'm emailing you about it now because your support for that idea might overcome PIF's reluctance to make the changes we think they need to [make] in order to make the product sell here [New Zealand].

...

My view is that from an MFS corporate perspective there are lots of reasons to have PIF here, and I think those reasons should override the concerns of PIF team in regard to the specific product issues."

170 Mr King replied, copying Mr White, asking, "So does it all come down to me convincing them to offer 9.75% in NZ?" Mr Maywald replied, "Basically yes". Mr King replied, "[W]e are on to it[.] When could we launch it[?]" After Mr King emailed Mr White and Mr Hutchings asking for their thoughts about PIF offering potential New Zealand investors certain interest rates, a series of emails followed in which Mr King pursued the launch of PIF into New Zealand.

171 The Court of Appeal rejected Mr King's submission that he was not proven to have been the relevant decision-maker on this proposal. The Court of Appeal correctly accepted that these emails "demonstrate[d] a participation by Mr King in the business of MFSIM and thereby provide[d] some support for ASIC's case that he was an officer of the company".

Late 2007 funding proposal

172 Mr King "closely directed" Mr White in negotiations from September to December 2007 concerning a proposal for a joint venture to establish a new investment fund, between a company other than MFSIM and an entity called Mariner Bridge. Mr King's evidence was that the MFS Group would contribute equity and staffing to the joint venture, and that PIF would invest in the fund, despite the fact that Mr King was no longer a director of MFSIM at this time.

173 The Court of Appeal held that this evidence concerned use of the resources of the MFS Group rather than simply being a proposal for the investment of PIF's funds, and did not advance ASIC's case that Mr King was an officer of MFSIM. That conclusion was incorrect. The evidence showed Mr King's capacity to significantly affect the financial standing of MFSIM, because Mr King effectively determined how PIF funds would be invested.

First December 2007 investment by PIF

174 On 2 December 2007, Ms McBain, of MFS Ltd, emailed Mr King because she was unhappy that the IAC for PIF had approved lending for a property development on condition that the developer's presale level be at least 30 per cent of the debt. This was based on the IAC's lending guidelines. Ms McBain thought the presale level should have been 15 per cent. Mr King agreed, and sent the following email to Ms McBain and Mr White on 2 December 2007:

"[Ms McBain] has agreement from a quorum of the committee ... and from you and from me ... that is more than enough[.]

It is approved[.]

Make it happen please[.]

[N]ot going back to any more committees if they won't answer in a timely and appropriate manner[.]

[Ms McBain] ... consider it approved at the 15% level[.]"

The proposal for a 15 per cent presale level was approved by the IAC the following day.

175 The Court of Appeal held that the fact that Ms McBain saw fit to take the matter to Mr King indicated his influence, and that Mr King "seems to have had no doubt that this was properly a matter for his decision". That analysis was correct, and showed that Mr King had the capacity to significantly affect MFSIM's financial standing.

Second December 2007 investment by PIF

176 On 2 December 2007, Ms McBain emailed Mr King concerning financing for a project called "Seachange Developments" and attached a summary of alternative proposals. Ms McBain wrote that one of those proposals would "have a better chance of approval through the committees as we could sell it to them as an interest in an asset class that would be attractive to one of the funds or someone like MFT considering the yields". The email suggested that the developer had been offered finance from a combination of PIF, MFS Pacific Finance Ltd ("PacFin") and an "MFS equity loan". Ms McBain stated that the PIF and PacFin loans were already approved and it appeared, according to the Court of Appeal, that she was seeking direction for the MFS equity loan.

177 Mr King replied by email, copied to Mr White, in the following terms:

"I have decided to utilise my right to overrule the committees with this one[.]

It is approved on either basis as proposed by [Ms McBain.]"

The Court of Appeal held this showed the influence of Mr King in a "general sense", though the committee spoken of was not an MFSIM committee.

178 The Court of Appeal was correct in holding that this evidence demonstrated Mr King's influence. The matter may be tested this way. Prior to Mr King's intervention, the proposal had two investors and MFS did not intend to be a lender to the project. At that point, the project would not go ahead or the developer would have had to find an external lender. By reason of Mr King's "overruling" of an investment committee, the three lenders (which were related parties) were now investing in a project which, but for the overruling, would not have taken that form. That changed, or at least had the potential to change, the risk profile of the project for MFSIM. On a correct interpretation of the term "officer", that influence indicated that Mr King had the capacity to significantly affect MFSIM's financial standing and supported the conclusion that he was in fact an officer of MFSIM.

Direction to change the composition of PIF's IAC

179 On 2 December 2007, Mr King emailed Ms McBain and Mr White stating that he wanted Mr White to remove Mr Kennedy from PIF's IAC, and to provide that a quorum of the IAC would exist only if Mr King or Mr White was present. Mr King's stated reason for the change was that "in this way we can get back to deal making and making money and not get tied down in ... arguments". Mr King's email also told Ms McBain that if she encountered problems with Mr Kennedy, she should email Mr King and Mr White immediately.

180 Mr White persuaded Mr King to abandon what Mr King later described as his "silly idea". The Court of Appeal held that this did not greatly assist ASIC's case, because Mr White exercised his own judgment rather than following the instructions of Mr King. This was not correct. The evidence demonstrated that Mr King saw it as his business to interfere with the business of PIF. Mr White did not tell Mr King that it was not Mr King's place to dictate the affairs of PIF. Rather, it was necessary to convince Mr King of the correct course of action. The example demonstrated Mr King's influence in MFSIM and his capacity to significantly affect MFSIM's financial standing.

PIF's investment in New Zealand in 2007 and 2008

181 On 19 December 2007, Mr King emailed Mr White, Ms Watts and Mr Hutchings. The subject of the email was "PIF, Wholesale PIF and opportunities in NZ and other places". The email referred to advertising undertaken by competitors, and said:

"I think at the MFS level I am prepared to fund from early January for 6 months a huge marketing campaign to steal back market share[.]

We should talk tomorrow sometime to develop some basic strategies in that area[.]

I would like to see PIF at 1.5 billion by 30 June next year."

182 The Court of Appeal held that this was a suggestion by Mr King as to how MFSIM should conduct its business, but that it did "not demonstrate that others, Mr White in particular, acted on Mr King's say-so". That was incorrect. It demonstrated that Mr King was involved in managing the business of PIF, including setting targets for growth and strategies of how to achieve that growth, which were all matters that had the capacity to significantly affect MFSIM's financial standing.

January 2008 MFSIM Investment Management Meeting

183 Mr King emailed Mr White, Mr Anderson, Mr Hutchings and others on 18 December 2007, stating:

"You are all aware of the Centro issue [the collapse of the Centro Group in December 2007]. This has now flowed thru [sic] to the whole listed property market and I think right across the board property values could come under real pressure as people are forced to sell property assets sooner than they would want and in a rather disorderly way.

As of now and for the remainder of the calendar year I do not want to settle any property lending/invest transactions.

As of now all of you need to put your thinking caps on as to how to defer the completion of any of these transactions until mid January when we have some idea how this is all going to pan out a little better[.]

It would be easy for me to turn a blind eye to this challenge but we need to confront it and head on for the long term good of MFS.

I am not saying we are not going to do the deals but as a risk management issue we need to see how things pan out a little better[.]"

184 Minutes of an Investment Management Meeting of MFSIM, held on 7 January 2008, recorded a directive from Mr King that no new investment transactions would be settled until at least late January. No evidence was led at trial as to settlements being deferred or cancelled but, as the Court of Appeal rightly accepted, these documents "illustrate[d] the preparedness of Mr King to intervene in the business of MFSIM (and other companies) and by something in the nature of a directive rather than an advice". And this conduct had the capacity to significantly affect MFSIM's financial standing.

Conclusion

185 Paragraph (b)(ii) of the definition of "officer" in s 9 of the *Corporations Act 2001* (Cth) is not limited to those who hold or occupy a named office, or a recognised position with rights and duties attached to it. A conclusion that a person has to hold or occupy a named office, or a recognised position with rights and duties attached to it, would be contrary to the text of the definition, which does not refer to any need to hold a named office. Such a construction would also be contrary to the extension of the definition of "officer" over time to those who are concerned in, or who take part in, the "management" of the corporation as that expression was explained by Ormiston J in *Bracht*.

186 An officer of a corporation includes a person who has engaged in certain conduct (para (b)(i)), who has a certain kind of capacity (para (b)(ii)), or who has (or had) a certain influence on the directors of the corporation (para (b)(iii)). The question was not whether Mr King held a named office in MFSIM. Taken together, the facts and circumstances described compelled the conclusion that Mr King was a person who had the capacity to significantly affect the financial standing of MFSIM.

