
## *Australian Securities and Investments Commission v King* [2020] HCA 4

Judgment Notes
16 March 2020

***Last Wednesday, the High Court unanimously allowed ASIC's appeal against the findings of the Queensland Court of Appeal in ASIC v King. The appeal concerned the proper construction of the definition of "officer" in s 9 of the Corporations Act and, in particular, the phrase "capacity to affect significantly the corporation's financial standing" in s 9(b)(ii) of the Act.***

**Background**

The first respondent, Mr King, was the Chief Executive Officer of MFS Ltd, the parent company within the MFS Group of companies. The MFS Group was involved in funds management and financial services.

The Premium Income Fund (PIF) was a managed investment scheme in the MFS Group, and MFS Investment Management Pty Ltd (MFSIM) was its responsible entity. MFSIM held a loan facility with the Royal Bank of Scotland, for the sole purpose of PIF. In 2007, AUD 150 m was drawn down from MFSIM's loan facility with RBS, and AUD 130 m of those funds paid to MFS Administration Pty Ltd (MFS Admin). MFS Admin then paid on AUD 103 m of that sum in respect of an outstanding debt of one of the other companies in the MFS Group.

Before the Court of Appeal, the findings that Mr King was knowingly involved in the contraventions by others in respect of these events were upheld. However, the Court of Appeal had held that Mr King was not an "officer", in his position as CEO of MFS Ltd, in the sense of having the "capacity to affect significantly the corporation's financial standing" (being the only relevant matter pleaded by ASIC) because any such capacity did not derive from Mr King occupying an "office" within MFSIM in the sense of "recognised position with rights and duties attached to it".

**The Appeal**

On appeal to the High Court, ASIC contended that the Court of Appeal had misconstrued the definition of "officer" in the Act.

The majority (Kiefel CJ, Gageler and Keane JJ) preferred the literal meaning of the words of para (b)(ii) and held that the construction adopted by the Court of Appeal had the effect of "read[ing] para (b)(ii) out of the Act" ([18]). They also saw no reason to construe the plain meaning of the words so to avoid the "unintended consequences" which Mr King and the Court of Appeal foreshadowed – namely that, read literally, para (b)(ii) could apply to persons unrelated to the management of the corporation. Instead, in their view, the requisite enquiry for the purpose of para (b)(ii) is twofold: first, whether the person has the relevant capacity and second, whether the person is "of the corporation" ([39]). Their Honours were of the view that the risk of contractual counterparties or advisors falling within the definition of "officer" would be appropriately constrained by this approach ([41]-[42]). Nettle and Gordon JJ also accepted that such third parties could fall within the definition ([96]).

Their Honours particularly observed (at [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…"*

The judgment can be read here.



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