

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

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Facts

- Mr King was the CEO and executive director of MFS Ltd. MFS Ltd was the parent company of the MFS Group. The MFS Group was a financial services and investment group of companies.
- Premium Income Fund ("**Premium**") was part of the MFS Group and MFS Investment Management Pty Ltd ("**Management**"), the second respondent, was its responsible entity.
- On 29 June 2007, Management obtained a \$200 million loan from the Royal Bank of Scotland, which was to be used solely for Premium and nothing else.
- On 27 November 2007, Mr King arranged for \$150 million to be drawn down from the loan. \$130 million of these funds was paid to MFS Administration Pty Ltd ("**Administration**"). Administration used these monies to pay an outstanding debt for Management. There was no agreement for payment or consideration for these monies.
- ASIC alleged that Mr King had breached his duties as an "*officer*" of management under s 601AD of the *Corporations Act 2001* (Cth), even though Mr King had ceased being a director of Management on 27 February 2007. This was because Mr King had the capacity to "*to affect significantly the corporation's financial standing.*"
- The Queensland Court of Appeal held that Mr King did not fall within the definition of "*officer*" because any capacity he had to affect the financial standing of Management did not derive from his occupation of an "*office*" within Management, at least in the sense of a "*recognised position with rights and duties attached to it*".
- ASIC appealed to the High Court.

Issues

- Was Mr King an officer of Management, within the definition of s 9 of the *Corporations Act 2001* (Cth)?

Held

- The High Court unanimously allowed ASIC's appeal.
- Section 9 of the *Corporations Act 2001* (Cth) is not limited to those who hold or occupy a named office in a corporation or a recognised position with rights and duties attached to it.
- Mr King acted as the leader of Management and had overall responsibility over that entity. This was sufficient to establish that Mr King could affect significantly the financial standing of Management.
- The Court identified certain factors as being relevant to determining whether someone was an

"officer" within the meaning of section 9, including:

- The identification of the role of a person in relation to the corporation;
- What they did or not do to fulfil that role; and
- The relationship between their actions or inaction and the financial standing of the corporation.

Quotes

"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."

(Keifel CJ, Gageler J and Keane J)

Full Text

The full text is available here: <http://eresources.hcourt.gov.au/showCase/2020/HCA/4>

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