SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Managed Investments Ltd and Ors (No 10)* [2017] QSC 96
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (plaintiff) **v** **ACN 101 634 146 PTY LTD (IN LIQUIDATION)** ACN 101 634 146 (first defendant) **MICHAEL CHRISTODOULOU KING** (fourth defendant) **CRAIG ROBERT WHITE** (fifth defendant) **GUY HUTCHINGS** (sixth defendant) **DAVID MARK ANDERSON** (seventh defendant) **MARILYN ANNE WATTS** (eighth defendant)
FILE NO/S:	BS No 12122 of 2009
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	14 and 17 October 2016
JUDGE:	Douglas J
ORDER:	**Orders made in the form attached.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – REASONS FOR JUDGMENT – ADEQUACY OF REASONS – where plaintiff sought supplementary rulings on questions of fact after the delivery of judgment – whether appropriate to make findings of fact

after delivery of substantive judgment but prior to making of final orders

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – DISQUALIFICATION FROM MANAGEMENT OF CORPORATION – BY COURT ORDER – where defendants engaged in dishonest conduct – where need for protection of community and both specific and general deterrence – where defendants posed ongoing risk of reoffending – what period of disqualification should apply

CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – FIDUCIARY AND RELATED STATUTORY DUTIES – REMEDIES AND PENALTIES FOR BREACH OF DUTY – where penalty orders and compensation orders both sought against defendants – where defendants engaged in serious, dishonest and deliberate conduct over substantial period of time – whether appropriate to make both penalty orders and compensation orders against defendants – what amount penalty and compensation orders should be

Bankruptcy Act 1966 (Cth)
Civil Proceedings Act 2011 (Qld)
Corporations Act 2001 (Cth)
Property Law Act 1974 (Qld)
Securities Act 1978 (NZ)

Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2) [2002] FCA 559; (2002) 190 ALR 169, cited
Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1997) 145 ALR 36
ACCC v Cement Australia [2016] FCA 453, cited
Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (No 2) [2016] FCA 698, cited
Australian Competition and Consumer Commission v Safety Compliance Pty Ltd (in liq) (No 2) (2015) 110 ACSR 306; [2015] FCA 1469, cited
Australian Competition and Consumer Commission v Telstra Corporation Ltd (2010) 188 FCR 238; [2010] FCA 790, cited
Australian Ophthalmic Supplies Pty Ltd v McLary-Smith (2008) 165 FCR 560; [2008] FCAFC 8, cited
Australian Securities and Investments Commission v

ActiveSuper Pty Ltd (in liq) (No 2) (2015) 106 ACSR 302; [2015] FCA 527, distinguished
Australian Securities and Investments Commission v Astra Resources Ltd (No 2) (2016) 113 ACSR 162; [2016] FCA 560, cited
Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq) (controllers apptd) (2014) 322 ALR 45; [2014] FCA 1308, cited
Australian Securities and Investments Commission v Beekink (2007) 238 ALR 585; [2007] FCAFC 7, cited
Australian Securities and Investments Commission v Citrofresh International Ltd (No 3) (2010) 268 ALR 303; [2010] FCA 292, cited
Australian Securities and Investments Commission v Donovan (1998) 28 ACSR 583, applied
Australian Securities and Investments Commission v Healey (No.2) (2011) 196 FCR 430, cited
Australian Securities and Investments Commission v Loiterton (2004) 50 ACSR 693; [2004] NSWSC 897, cited
Australian Securities and Investments Commission v Macdonald (No 12) (2009) 259 ALR 116; [2009] NSWSC 714, cited
Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (2016) 112 ACSR 138; [2016] QSC 109
Australian Securities and Investments Commission v Plymin (No 2) (2003) 21 ACLC 1237; [2003] VSC 230, cited
Australian Securities and Investments Commission v Superannuation Warehouse Australia Pty Ltd (2015) 109 ACSR 199; [2015] FCA 1167, cited
Australian Securities and Investments Commission v Vines (2006) 58 ACSR 298; [2006] NSWSC 760, cited
Australian Securities and Investments Commission v Vizard (2005) 145 FCR 57; [2005] FCA 1037, cited
Australian Securities and Investments Commission v White (2006) 58 ACSR 261; [2006] VSC 239, cited
Barbaro v The Queen (2014) 253 CLR 58; [2014] HCA 2, cited
Burroughs v Australian Prudential Regulatory Authority [2016] FCA 775, cited
Commissioner for Corporate Affairs v Ekamper (1987) 12 ACLR 519, cited
Commonwealth v Director of Fair Work Building Industry Inspectorate (2015) 326 ALR 476; [2015] HCA 46, applied
Consolidated Lawyers Ltd v Abu-Mahmoud [2016] NSWCA 4, cited

Construction, Forestry, Mining and Energy Union v Cahill (2010) 269 ALR 1; [2010] FCAFC 39, cited
Construction, Forestry, Mining and Energy Union v Williams (2009) 262 ALR 417; [2009] FCAFC 171, cited
Corporate Affairs Commission (Vic) v Bracht [1989] VR 821, cited
Gillfillan v Australian Securities and Investments Commission (2012) 92 ACSR 460; [2012] NSWCA 370, cited
In re A (Children) (Judgment: Adequacy of Reasoning) (Practice Note) [2012] 1 WLR 595, cited
In re L (Children) [2013] 1 WLR 634, cited
Lewski v Australian Securities and Investments Commission [2016] FCAFC 96, cited
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
Mill v The Queen (1988) 166 CLR 59, cited
Mornington Inn Pty Ltd v Jordan (2008) 168 FCR 383; [2008] FCAFC 70, cited
R v Daswani (2005) 53 ACSR 675; [2005] QCA 167, cited
Re HIH Insurance Ltd (in provisional liquidation); Australian Securities and Investments v Adler (2002) 42 ACSR 80; [2002] NSWSC 483, applied
Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs (2013) 93 ACSR 421; [2013] NSWSC 106, cited
Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2) (2014) 97 ACSR 412; [2014] FCA 27, approved
Registrar of Aboriginal and Torres Strait Islander Corporations v Murray [2015] FCA 346, cited
Rich v Australian Securities and Investments Commission [2004] 220 CLR 129; [2004] HCA 42, cited
Royer v Western Australia (2009) 197 A Crim R 319; [2009] WASCA 139, cited
Vines v Australian Securities and Investments Commission (2007) 63 ACSR 505; [2007] NSWCA 126, cited

COUNSEL: J P Moore QC and M T Brady QC for the plaintiff
No appearance for the first defendant
D S Piggott for the fourth defendant
R P S Jackson QC for the fifth defendant
P Taylor (sol.) via telephone link for the sixth defendant
D P O'Brien QC and C K George for the seventh defendant
P Freeburn QC for the eighth defendant

SOLICITORS:	Corrs Chambers Westgarth for the plaintiff No appearance for the first defendant Tucker and Cowen for the fourth defendant Bartley Cohen Litigation Lawyers for the fifth defendant Kennedys for the sixth defendant DibbsBarker for the seventh defendant James Conomos Lawyers for the eighth defendant

Penalty and final orders

[1] The factual background to this penalty decision is established by my reasons of 23 May 2016 where I found that each of the five defendants had breached relevant provisions of the *Corporations Act* 2001 (Cth) or were knowingly involved in MFSIM's contraventions.[1]

Supplementary factual findings

[2] ASIC submitted that I could make some supplementary factual findings to clarify the reasons why I found that a number of declarations of contraventions should be made. The defendants resisted my making such supplementary factual findings on the basis that I had concluded that part of the case where I had made my factual findings about the defendants' conduct and indicated that certain contraventions had occurred. ASIC relied, however, on several decisions that seemed to me to justify their approach.

[3] Their counsel were concerned that some of my decisions in relation to the declarations that should be made were not sufficiently buttressed by unambiguous or explicit factual findings. In arguing that I should make further findings to clarify those issues, they pointed out that I had not yet made final orders and argued that it was incumbent on them as counsel, whether or not invited to do so by the judge:[2] "to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process."

[4] A similar approach was taken recently by the New South Wales Court of Appeal in *Consolidated Lawyers Ltd v Abu-Mahmoud*[3] where Macfarlan JA for the court said:

> "… the appellants should, in my view, have applied to the primary judge pursuant to r 36.16 of the *Uniform Civil Procedure Rules* 2005 (NSW)

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1 See [2016] QSC 109; (2016) 112 ACSR 138. The abbreviations I use in these reasons are intended to be the same as those used in my earlier reasons.

2 See *In re A (Children) (Judgment: Adequacy of Reasoning) (Practice Note)* [2012] 1 WLR 595 at [16]; followed by the United Kingdom Supreme Court in *In re L (Children)* [2013] 1 WLR 634, 638 at [7].

3 [2016] NSWCA 4 at [39]-[40].

> ('UCPR') to set aside or vary his Honour's judgment on the ground that he had not dealt with a significant submission that they had made. That course was particularly appropriate in the present case because there had been a lengthy hearing before the primary judge involving detailed evidence and submissions and the allegedly overlooked point required findings of fact possibly involving questions of credit to be made. The submission (still assuming it was in fact made) was not one that could conveniently be dealt with on appeal in the absence of findings by the primary judge.
>
> I do not suggest that parties must always approach a primary judge if it appears that the judge has overlooked a significant point in formulating the Court's judgment. It is however a course that should be adopted in the absence of particular, valid, reasons for not doing so. The primary judge is almost always in a better position than an appellate court to decide an overlooked point and appellate courts are entitled to have the benefit of a primary judge's views about matters in issue on appeal. The requirement in s 56 of the *Civil Procedure Act* 2005 (NSW) to have regard to the 'just, quick and cheap resolution of the real issues in the proceedings' strongly supports the adoption of this course in the absence of particular reasons for the point being taken directly on appeal."

[5] In a case like this one where there were very many points argued, numerous orders sought and there are indications that several defendants propose to appeal my decision, it seems appropriate, to my mind, to deal with ASIC's concerns which they expressed in a summary way in a documentary submission.[4] In several of the matters raised I may not have made explicit the fact that I agreed with particular passages from ASIC's submissions but the general tenor of my discussion of the relevant issues establishes that I had agreed with the points they made.

Mr King

[6] At [845] of my reasons I said of Mr King that I was:

> "… satisfied that it has been established that, in late November 2007, Mr King approved and authorised the use of the money drawn down under the RBS Loan Agreement to make the $130 million payment and the $103 million payment. I am also satisfied that at the time of the approval and authorization of the draw down and $103 million payment, Mr King knew that the $130 million payment was made from funds managed by MFSIM as responsible entity of PIF and that the $130 million payment was made for the purpose of the MFS Group repaying $103 million to Fortress, not for PIF's purposes."

[7] ASIC's submission was that it was not entirely clear what I found about Mr King's involvement in that contravention. On reviewing my discussion of Mr King's

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4 See COURT.0035.0006.0001.

involvement, set out at [761]-[858] of my reasons, I have accepted the evidence and factual submissions by ASIC in general, including the evidence and submissions summarised at [769]-[782], and have expressed my acceptance of the evidence and submissions at [850]-[853] in particular.

[8] It is on that basis that I concluded that a declaration should be made that Mr King permitted MFSIM to make the RBS drawdown for the purpose of giving a benefit to related parties of MFSIM and not for the benefit of the members of PIF, thus contravening s 601FC(5) of the *Corporations Act* by being knowingly concerned in MFSIM's contraventions.

Mr White

[9] In respect of Mr White, it was submitted that I could clarify how he caused or permitted the PacFin payment and how he was involved in that contravention. It seems clear to me that I accepted the evidence summarised at [875] of my reasons and ASIC's submissions about that issue. In respect of the direction by Mr White to Mr Stride to draw documents I have accepted the evidence summarised at [258].[5] In respect of the allegation that Mr White was involved in sending RBS a PIF asset report, I have accepted ASIC's submissions at [895] and [900] and the evidence supporting those submissions.

[10] I have also accepted ASIC's submissions and the evidence supporting those submissions referred to at [896] and [897] in respect of Mr White's involvement in permitting the Compliance officers and the legal firm, Mallesons, to be given false information. As to his failure to inform the Board of MFSIM that the information as to a proposal to ratify the issue of units was false and his failure to report MFSIM's contraventions to ASIC, I have accepted ASIC's submissions summarised at [899]-[900] and the evidence supporting those arguments.

Mr Hutchings

[11] Mr Hutchings was knowingly concerned in MFSIM's contraventions in failing to report to ASIC its contraventions in relation to the RBS drawdown, the MFS payment, the Fortress payment and the PacFin payment as a logical consequence of my agreement with ASIC's submissions concerning his role, including the oral submissions by Mr Brady summarised by me at [1178] to [1209] and the conclusions I expressed at [1210] to [1218] in particular, coupled with the evidence of his role as CEO of MFSIM and the absence of any evidence that he reported these contraventions to ASIC.

Mr Anderson

[12] My conclusion that Mr Anderson permitted the making of the $103 million payment follows from my acceptance of ASIC's submissions at [1229]-[1232] of my reasons. It also follows from my further discussion of the topic at [1339]-[1346] and [1456]-[1481].

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[5] See, eg, the evidence of Mr Anderson at T47-60/24-36.

The conclusions at [1479], in particular, make it clear that I believe that he did know what the source of the funds was initially and permitted them to be used for no purpose of PIF and then participated in a fraudulent scheme to disguise the reason for the payment, thus becoming knowingly involved in MFSIM's contraventions.

[13] My conclusion that Mr Anderson was involved in sending RBS a PIF asset report follows from my acceptance of ASIC's submissions at [1291]-[1294] which is supported also by my conclusions at [1456]-[1481], particularly the discussion at [1457]-[1463].

[14] Similarly, my conclusion that Mr Anderson prepared a document for Compliance containing false information about the MFS payment and the PacFin payment follows from my acceptance of ASIC's submissions at [1295]-[1296]. The memorandum referred to there of 17 February 2008 was also discussed by me at [544] and my conclusions in respect of his conduct at [1456]-[1481], particularly my conclusion at [1479] that he participated in a fraudulent scheme to disguise the reason for the payment made for the alleged investment in MYF class A units, which had not been issued "a few months ago", contrary to the information provided by him in the memorandum of 17 February 2008.

[15] Finally, my conclusion that Mr Anderson failed to report MFSIM's contraventions to ASIC follows from my acceptance of ASIC's submissions at [1305] and the evidence buttressing those submissions. This is consistent with the approach I adopted in respect of my conclusions from the submissions for Mr Anderson at [1456]-[1485].

Form of declarations of contraventions

[16] In accordance with its most recently amended originating application, ASIC seeks against each of the individual defendants the following:

(a) declarations of contravention under s 1317E;

(b) disqualification orders under s 206C;

(c) pecuniary penalty orders under s 1317G;

(d) compensation orders under s 1317H (except in respect of Ms Watts, the eighth defendant); and

(e) costs orders.

[17] ASIC's submissions also deal with the declarations that should be made against MFSIM. Their form was not in issue.

[18] The originating application identified two declarations where ASIC now seeks, for example, 12 declarations against Mr King. He argues that is unfair. Mr White makes a similar submission. ASIC's submission is that those defendants are on notice through the statement of claim and the schedule of alleged contraventions of the nature of the relief sought against them. That seems to me to be correct.

[19] The form of the declarations sought is also contentious because the declarations sought numbered 6, 7, 8, 9 and 10 refer to multiple defendants and were said not to identify adequately the substantive conduct said to constitute the individual's contravention. In effect ASIC sought to combine the declarations thematically in respect of the RBS drawdown, the MFS payment, the Fortress payment and the PacFin payment. That had the advantage of economy in the use of language. ASIC has revised the form of the declarations it seeks to address some of the criticisms of its initial proposed orders in a manner which seemed appropriate to me.

[20] At the hearing ASIC's counsel also conceded that those declarations numbered 6, 7, 8, 9 and 10 could be amended by using the word "permitting" instead of the words "causing or permitting" in the introductory part of each declaration. The declarations were framed to identify in as compact a way as convenient the nature of the contravening conduct so as to attempt to strike the balance between conciseness and the more precise information about what each individual did. The details were fleshed out to a significant extent by the defined terms in the schedule to the order and by cross-referencing to the declarations made in respect of MFSIM's conduct. Alternative forms of declaration that identified each particular item of contravening conduct were proposed. They would certainly have been significantly lengthier but the declarations as proposed seem to me to define adequately the gist of the conduct found against each defendant.

[21] By contrast the declarations in respect of the false documents were proposed as individual declarations against each relevant defendant. They were not controversial.

[22] ASIC's submissions about the law applicable to the imposition of disqualification orders and pecuniary penalties were not the subject of significant disagreement by the defendants except in respect of the effect that disqualifications and compensation orders should have on the level of pecuniary penalty imposed. I shall summarise the main principles which seem to me to be relevant.

Disqualification orders

[23] The principles by which the period of disqualification should be set were considered by Santow J in *Re HIH Insurance Ltd (in provisional liquidation); ASIC v Adler*[6] in a seminal decision. They were summarised by his Honour as follows (citations omitted):[7]

> "The cases on disqualification gave orders ranging from life disqualification to 3 years. The propositions that may be derived from these cases include:

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[6] [2002] NSWSC 483; (2002) 42 ACSR 80 at [56]. I shall refer to the decision, generally, as *ASIC v Adler*.

[7] As to the status of the decision see the comments by McHugh J in *Rich v Australian Securities and Investments Commission* [2004] 220 CLR 129, 152 at [48]; [2004] HCA 42. See also the cases in footnote 25 of ASIC's written submissions and *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)* [2016] FCA 560; (2016) 113 ACSR 162, 191 at [148] and *Registrar of Aboriginal and Torres Strait Islander Corporations v Murray* [2015] FCA 346 at [220].

(i) Disqualification orders are designed to protect the public from the harmful use of the corporate structure or from use that is contrary to proper commercial standards;

(ii) The banning order is designed to protect the public by seeking to safeguard the public interest in the transparency and accountability of companies and in the suitability of directors to hold office;

(iii) Protection of the public also envisages protection of individuals that deal with companies, including consumers, creditors, shareholders and investors;

(iv) The banning order is protective against present and future misuse of the corporate structure;

(v) The order has a motive of personal deterrence, though it is not punitive;

(vi) The objects of general deterrence are also sought to be achieved;

(vii) In assessing the fitness of an individual to manage a company, it is necessary that they have an understanding of the proper role of the company director and the duty of due diligence that is owed to the company;

(viii) Longer periods of disqualification are reserved for cases where contraventions have been of a serious nature such as those involving dishonesty;

(ix) In assessing an appropriate length of prohibition, consideration has been given to the degree of seriousness of the contraventions, the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public;

(x) It is necessary to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct;

(xi) A mitigating factor in considering a period of disqualification is the likelihood of the defendant reforming;

(xii) The eight criteria to govern the exercise of the court's powers of disqualification set out in *Commissioner for Corporate Affairs v Ekamper*[8] have been influential. It was held that in making such an order it is necessary to assess:

— character of the offenders;

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[8] (1987) 12 ACLR 519.

— nature of the breaches;

— structure of the companies and the nature of their business;

— interests of shareholders, creditors and employees;

— risks to others from the continuation of offenders as company directors;

— honesty and competence of offenders;

— hardship to offenders and their personal and commercial interests; and

— offenders' appreciation that future breaches could result in future proceedings;

(xiii) Factors which lead to the imposition of the longest periods of disqualification (that is disqualifications of 25 years or more) were:

— large financial losses;

— high propensity that defendants may engage in similar activities or conduct;

— activities undertaken in fields in which there was potential to do great financial damage such as in management and financial consultancy;

— lack of contrition or remorse;

— disregard for law and compliance with corporate regulations;

— dishonesty and intent to defraud;

— previous convictions and contraventions for similar activities;

(xiv) In cases in which the period of disqualification ranged from 7–12 years, the factors evident and which lead to the conclusion that these cases were serious though not "worst cases", included:

— serious incompetence and irresponsibility;

— substantial loss;

— defendants had engaged in deliberate courses of conduct to enrich themselves at others' expense, but with lesser degrees of dishonesty;

— continued, knowing and wilful contraventions of the law and disregard for legal obligations;

— lack of contrition or acceptance of responsibility, but as against that, the prospect that the individual may reform;

…

(xv) The factors leading to the shortest disqualifications, that is disqualifications for up to 3 years were:

— although the defendants had personally gained from the conduct, they had endeavoured to repay or partially repay the amounts misappropriated;

— the defendants had no immediate or discernible future intention to hold a position as manager of a company;

— in Donovan's case,[9] the respondent had expressed remorse and contrition, acted on advice of professionals and had not contested the proceedings."

[24] Those principles are not, however, a rigid catalogue of matters to be considered in every case.[10] Disqualification orders are not only protective but also are punitive.[11] General deterrence is also a significant factor to take into account.[12]

[25] Santow J's reasons were considered by McHugh J in particular in *Rich v ASIC*.[13] The court's majority decision focused on the conclusion that an application for a disqualification order was a proceeding for the imposition of a penalty. McHugh J, however, also considered the principles to be applied by the court when considering whether to make such a disqualification order and, if so, the period of the disqualification. Austin J later said this of McHugh J's reasons:[14]

> 'The High Court's decision [in *Rich*], that proceedings in which an application is made for a disqualification order are proceedings for the imposition of a penalty, for the purposes of the privilege against exposure to a penalty, has very little effect on the propositions. It directly affects only proposition (v) [from *ASIC v Adler*], to the extent that a disqualification order should now be regarded as involving the imposition of a penalty.
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> The majority judges in the High Court did not directly consider the principles to be applied by the court when considering whether to make a disqualification order, and if so, the period of disqualification. However,

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9 *Australian Securities and Investments Commission v Donovan* (1998) 28 ACSR 583.

10 *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 434 at [172]-[173].

11 See, eg, *Australian Securities and Investments Commission v Vizard* [2005] FCA 1037; (2005) 145 FCR 57 at 65 [34].

12 *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; (2012) 92 ACSR 460, 505 at [183] and *Australian Securities and Investments Commission v Beekink* [2007] FCAFC 7; (2007) 238 ALR 585, 604 at [83].

13 [2004] HCA 42; (2004) 220 CLR 129, 155 at [52].

14 *ASIC v Vines* [2006] NSWSC 760; (2006) 58 ACSR 298, 313-314 at [35]-[38].

> McHugh J considered that topic at some length. His general thesis, expounded at [41], was that although judges frequently said that the purpose of the disqualification provisions is protective, what they did in practice was little different from what judges do in determining what orders or penalty should be made for offences against the criminal law.
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> His Honour enumerated some factors that the courts take into account, in what he referred to as a "synthesis from which the judges make a value judgment concerning whether to order disqualification and, if so, the period of disqualification that should be imposed" (at [43]):
>
> — whether the defendant now is or in future will be a fit and proper person to manage corporations;
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> — the size of any losses suffered by the corporation, its creditors and consumers;
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> — legislative objectives of personal and general deterrence;
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> — contrition on the part of the defendant;
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> — the gravity of the misconduct;
>
> — the defendant's previous good character;
>
> — prejudice to the defendant's business interests;
>
> — personal hardship; and
>
> — the willingness of the defendant to render assistance to statutory authorities and administrators.
>
> He referred to Santow J's 15 propositions with approval, and set them out: at [49]. He remarked (at [50]) that some of the propositions go to the protection of the public, while others relate to considerations that reduce the period of disqualification and therefore benefit the defendant, and still others (such as propositions (v) and (vi)) recognise that the disqualification provisions also have objectives of personal and general deterrence, strongly resembling sentencing principles under the criminal law.'

[26] In *Australian Securities and Investments Commission v White*[15] Hargrave J also referred to what McHugh J had said in *Rich* and identified four general categories of important matters to which the courts have regard when determining whether to order disqualification and, if so, for what period. They were:

(a) the nature and seriousness of the contraventions;

(b) protection of the public;

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[15] [2006] VSC 239; (2006) 58 ACSR 261 at 265 [18].

(c) retribution and deterrence; and

(d) mitigating factors.

[27] That deterrence remains an object of these penalty provisions since the *Fair Work Decision*[16] concerning the purpose of the imposition of civil penalties is evident from the plurality's reasons[17] and those of Keane J.[18] See also *Australian Competition and Consumer Commission v Safety Compliance Pty Ltd (in liq) (No 2)*.[19]

[28] Contrition or remorse is, of course, a relevant mitigating factor. Here ASIC also argued that, apart from the question of contrition, affected as it was by the defendants' intention to lodge an appeal, none of the defendants has accepted responsibility for what they did with the exception to a limited extent of Ms Watts. This, ASIC's counsel submitted, was relevant to the setting of a disqualification period to ensure the public was protected from a repetition of their behaviour.

[29] There is authority also for the proposition that the court should impose a disqualification period for each individual contravention and then take the totality principle into account to arrive at a total effective disqualification period.[20]

Pecuniary penalties

[30] The High Court in the *Fair Work Decision* made it clear that it was consistent with the purposes of civil penalty regimes and with the public interest that the regulator take an active role in attempting to achieve the penalty the regulator considers to be appropriate.[21] There is no reason why the court should not impose a pecuniary penalty as well as a period of disqualification.[22] Both specific and general deterrence are important. General deterrence may justify the imposition of what might otherwise be regarded as a harsh penalty for the individual concerned to bring about a greater benefit for society as a

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16 See *Commonwealth v Director of Fair Work Building Industry Inspectorate* [2015] HCA 46; (2015) 326 ALR 476.

17 See at [55].

18 At [102].

19 [2015] FCA 1469; (2015) 110 ACSR 306, 317 at [36]-[37] and [39].

20 *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 714; (2009) 259 ALR 116, 171 at [301]–[306], 172 at [317], 174 at [331], *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; (2012) 92 ACSR 460, 507 at [190].

21 *Fair Work Decision* [2015] HCA 46; (2015) 326 ALR 476, 493 at [64]; cf *Barbaro v The Queen* [2014] HCA 2; (2014) 253 CLR 58, 66 at [7].

22 *Australian Securities Commission v Donovan* (1998) 28 ACSR 583, 602, *Australian Securities and Investments Commission v Vines* [2006] NSWSC 760; (2006) 58 ACSR 298, 307 at [19], *Australian Securities and Investments Commission v Citrofresh International Ltd (No 3)* [2010] FCA 292; (2010) 268 ALR 303, 309 at [21].

whole.[23] The approach to setting a penalty is not mathematically precise.[24] The maximum penalty is reserved for the worst possible cases.[25]

[31] In this context, the supervision of managed investment schemes, it is highly important to keep in mind that the purpose of the legislation is to protect the interests of the members of the scheme "against the obvious conflict between their interests and those of the responsible entity or its controllers … the primary object of the civil penalties regime is protection of the public including by personal and general deterrence."[26] Nevertheless, the amount of the penalty should be no greater than is necessary to achieve the object of deterrence.[27]

[32] My attention was also drawn to the need to observe three well-recognised principles relating to the treatment of multiple contraventions, namely, the need to avoid double penalties for conduct which is truly identical but which happens to give rise to breaches of different statutory provisions; the grouping together of legally separate, but overlapping contraventions where they arise from "one transaction" or "one course of conduct" and the application of the totality principle.[28] ASIC accepted that a person should not be liable for more than one pecuniary penalty in respect of the same act or omission even where contraventions of multiple provisions arose from that same wrongful conduct. It submitted, however, that, if appropriate, penalties can be imposed for a course of conduct involving separate contraventions from separate acts such that penalties could be imposed for a course of conduct which exceeded, perhaps even greatly exceeded, the statutory maximum for a single contravention.[29]

[33] ASIC submitted that, in this case, it was appropriate to consider the use of the "course of conduct" principle to apply a penalty in relation to each course of conduct rather than to each contravention. Nonetheless, ASIC also submitted that, despite there being a single course of conduct, penalties higher than the maximum for a single contravention may be

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[23] *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559; (2002) 190 ALR 169, 173 at [16].

[24] See the useful summary of the appropriate process by Beach J in *ASIC v Superannuation Warehouse Australia Pty Ltd* [2015] FCA 1167; (2015) 109 ACSR 199, 214 at [58].

[25] *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq) (controllers apptd)* [2014] FCA 1308; (2014) 322 ALR 45, 109 at [320], citing *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357, 372 at [31] and *Australian Ophthalmic Supplies Pty Ltd v McLary-Smith* [2008] FCAFC 8; (2008) 165 FCR 560, 584 at [108].

[26] See *ASIC v Australian Property Custodian Holdings Ltd recs and mgrs apptd) (in liq) (controllers apptd)* [2014] FCA 1308; (2014) 322 ALR 45 at [23]-[25].

[27] See *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 440 at [228]-[230].

[28] See *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 436-437 at [195]-[198].

[29] See *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39; (2010) 269 ALR 1 at [39]-[42]. See also *R v Daswani* [2005] QCA 167; (2005) 53 ACSR 675, 678 at [11]-[12] and 682-683 at [30].

imposed if the penalty for a single contravention fails to reflect the seriousness of the contraventions as a whole.[30]

[34] The totality principle also requires the court, where multiple penalties are to be imposed on a particular wrongdoer, to make a final check of the penalties to be imposed, considered as a whole to ensure that they are just and appropriate.[31] ASIC's submission was that the correct application of the totality principle was for the court to determine the appropriate pecuniary penalty for each contravention or, to the extent relevant, course of conduct, and, if appropriate, to apply a discount to the aggregate amount. They referred to a number of authorities where such an approach had been adopted.[32] The parity principle, requiring that there should not be a marked disparity between sentences imposed on co-offenders giving rise to a justifiable sense of grievance, is also to be borne in mind.[33]

[35] In referring again to the need for general deterrence in cases of this nature, ASIC submitted that recent decisions drew attention to difficulties in attempting to classify the amounts of pecuniary penalties by reference to common factors in other, earlier cases. Breaches tended to take a wide variety of forms. The value of money erodes over time and in recent years the courts have been more concerned with the need to impose higher civil penalties to reflect community expectations of the standards to be imposed on company directors.[34]

[36] ASIC also submitted that pecuniary penalties are still appropriate even where a substantial compensation order is to be made on four bases in response to submissions for Mr King and Mr Hutchings in particular. Mr Piggott for Mr King drew my attention to a reference by McHugh J in *Rich v ASIC*.[35] His Honour's reasons were additional to those of the majority with whom he substantially agreed. He drew attention to an explanatory paper

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[30] See *Australian Competition and Consumer Commission v Hillside (Australia New Media) Pty Ltd (No 2)* [2016] FCA 698 at [24]-[25]. See also *Mornington Inn Pty Ltd v Jordan* [2008] FCAFC 70; (2008) 168 FCR 383, 396-397 at [41]-[42] and *Royer v Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319 at [21], [24]. See also *Construction, Forestry, Mining and Energy Union v Williams* [2009] FCAFC 171; (2009) 262 ALR 417 and *ACCC v Cement Australia* [2016] FCA 453 at [115]-[118].

[31] *Mill v The Queen* (1988) 166 CLR 59, 62-63. See also *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238, 277 at [229]-[230].

[32] See, eg, *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) 145 ALR 36 at 53, *Australian Securities and Investments Commission v Vines* [2006] NSWSC 760; (2006) 58 ACSR 298, 337–338 at [130] (approved on appeal sub nom *Vines v Australian Securities and Investments Commission* [2007] NSWCA 126; (2007) 63 ACSR 505, 509 at [15]–[19], 548 at [208]); *Australian Securities and Investments Commission v Macdonald (No 12)* [2009] NSWSC 714; (2009) 259 ALR 116, 171 at [301]–[306], 172 at [317], *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2010] FCA 790; (2010) 188 FCR 238, 277 at [228]–[230], *Gillfillan v Australian Securities and Investments Commission* [2012] NSWCA 370; (2012) 92 ACSR 460, 507 at [190].

[33] *ASIC v Macdonald (No 12)* [2009] NSWSC 714; (2009) 259 ALR 116, 173 at [139]-[322].

[34] See *ASIC v Beekink* [2007] FCAFC 7; (2007) 238 ALR 595, 607-608 at [117]-[120].

[35] (2004) 220 CLR 129, 151 at [45].

accompanying the first draft of the *Corporate Law Reform Bill* 1992 (Cth) expressing the expectation "that the Courts would consider imposing a pecuniary penalty only if it considered that a civil penalty disqualification provided an inadequate or inappropriate remedy." Mr Piggott submitted that a penalty greater than the amount needed to achieve personal and general deterrence would be oppressive.[36]

[37] ASIC's first submission was that the compensation order would be provable in bankruptcy but a pecuniary penalty would not.[37] Secondly, it was submitted there were considerations of general deterrence affecting, in particular, the misuse of trust money. As Jacobson J has said:[38] "pecuniary penalties are punitive whereas the compensation order merely orders the wrongdoer to repay the loss. I, therefore, do not see why credit should ordinarily be given for the fact that a wrongdoer is required to make good the loss resulting from his contravention." Thirdly, none of the defendants said they were able to pay part of the compensation order and, fourthly, the compensation order would require payment to PIF's responsible entity, Wellington Capital Limited, or perhaps another company called Asset Resolution Limited, not the Commonwealth of Australia to whom any penalty should be paid. ASIC would have no control over whether either of those companies would pursue the compensation order and, if that compensation was not pursued, there would be no financial penalty payable.

[38] Those reasons have persuaded me that it is appropriate to order the payment of penalties as well as compensation orders. Although the amount of compensation sought here is very large that is a function of the amount of money misappropriated. The penalties sought must reflect the seriousness of the conduct that facilitated the misapplication of the money.

ASIC's submissions common to all of the defendants

The application of the course of conduct principle

[39] ASIC submitted that there were broadly four separate courses of conduct that should be considered in this case. They identified them as:

(a) the conduct in relation to the $150 million drawdown, the $130 million payment and the $103 million payment;

(b) the conduct in relation to the $17.5 million payment;

(c) the conduct in relation to the creation (and keeping, against some of the defendants) of the false documents; and

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[36] *ASIC v Donovan* (1998) ACSR 583, 608 and *Re HIH Insurance Ltd (in prov liq); ASIC v Adler* (2002) 42 ACSR 80, 114 at [125] for example.

[37] See s 82(3AA) of the *Bankruptcy Act* 1966 (Cth).

[38] See *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 447 at [289].

(d) the conduct in relation to using the false documents to deceive others by providing false information to:

(i) RBS;

(ii) Compliance;

(iii) the MFSIM Board; and

(iv) MFSIM's auditors; and by

(v) lodging half yearly reports which contained false information.

[40] It submitted that the course of conduct in relation to the transactions in November 2007 concerning the $150 million drawdown, the $130 million payment and the $103 million payment all related to conduct that can be fairly described as so inextricably interrelated that it should be viewed as one multifaceted course of conduct or one transaction.

[41] The same could also be said for the course of conduct relating to the $17.5 million payment. It was separate from that involved in the November payments but the facts relating to that payment of $17.5 million were all part of the one transaction or course of conduct.

[42] Although the "false documents" case involved separate facts, ASIC submitted that the creation and keeping of the false documents itself comprised one multifaceted course of conduct whose purpose was to create a suite of documents that purported to record transactions and approvals to justify the money's misappropriated from PIF. Thus those contraventions in relation to the creation and keeping of the false documents should also be considered as one course of conduct.

[43] ASIC also submitted that the contraventions involved in the use of the false documents, taken together, could properly be considered to be another multifaceted course of conduct all directed to the one end of deceiving the various recipients of the documents about the true nature of the payments in 2007. Accordingly it was proper to consider the use of the false documents as contraventions involving one course of conduct.

[44] As to the individual defendants, ASIC submitted that they were involved in different courses of conduct. Mr King's contraventions related only to the course of conduct in relation to the $150 million drawdown, $130 million payment and the $103 million payment as an example of that difference from the other defendants. The other individual defendants were not always involved in all of the multifaceted factual elements of each course of conduct. As an example of that, Ms Watts was involved in the creation of six only of the 15 false documents. Mr Anderson's contraventions related only to part of the "use of false documents" course of conduct. He was not alleged to have been involved in the giving of false information to the board of MFSIM or in the execution and filing of the half-yearly report.

[45] Nonetheless, however, ASIC submitted that an approach involving the four broad separate courses of conduct identified earlier was appropriate for the purposes of setting

penalties and considering disqualification periods. That seemed to me to be a sensible way in which to consider the issues but there were contrary submissions from some of the defendants arguing that there were, effectively, only two or three courses of conduct.

[46] One submission made for Mr Anderson was that the conduct in relation to the $150 million drawdown, the $130 million payment and the $103 million payment formed one course of conduct and the conduct in relation to the $17.5 million payment formed a second where the conduct in relation to the creation, keeping and use of the false documents should be part of each of those two courses of conduct. The separation in time and personnel between the making of the payments and the creation and use of the documents argues against that approach to my mind.

[47] Another submission made for Mr White was that the creation, keeping and use of the false documents should be regarded as one course of conduct so that there were three such courses of conduct as a whole. ASIC's submission in response to that was that it was:[39]

> "one thing to create false documents to hide the true state of affairs, and perhaps under pressure because the auditors were about to come; but then to go and actively mislead people external to MFSIM and internal to MFSIM in ways that may not even have involved the false documents at all, directly, is really a separate course of conduct."

[48] It seems more useful to me to categorise the conduct as submitted by ASIC because the individual defendants were not always involved in all of the multifaceted factual elements of each course of conduct. It is easier to classify their conduct, therefore, within one of the categories in a manner which is fairer to that defendant. There is also some logic in the chronological arrangement of the different courses of conduct if one adopts that approach.

Comparative cases in relation to the question of penalties

[49] ASIC drew my attention to several cases while submitting that there were few direct comparisons to be made. Its counsel said in the written submissions (citations included):

> "152. … There have been few cases where penalties have been imposed for breaches of the additional duties imposed on responsible entities and their officers under sections 601FC and 601FD of the Corporations Act. There are also few cases where dishonesty has been established.
>
> 153 Like the defendants in the recent case of *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)*:[40]
>
> 'None of the individual defendants has been found to have contravened corporations legislation previously, and none

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[39] T3-46/18-22.

[40] [2016] FCA 560; (2016) 113 ACSR 162, 193 at [154].

> has a criminal record [except for White and Anderson, whose offences were committed during the time of the conduct the subject of this proceeding]. On the other hand … none has made any offer of reimbursement to the individual investors.'

154 The comments of Murphy J in *ASIC v APCH* are apt:[41]

> 'The requirement to impose a disqualification order which will deter other directors from similar conduct must be considered in the context that APCHL occupied a significant position in the managed investment scheme sector, and that sector is an important part of the Australian investment market. Given the legislative purpose of investor protection, and the members' vulnerability to the conflicts of interest of responsible entities and their controllers (particularly in relation to fees), it is fundamental that other directors of responsible entities understand the need to be punctilious in their commitment to the members' best interests and in the event of a conflict of interest to put the members' interests first, rather than pursuing their own interests as Mr Lewski did. A strong message must be sent to deter other directors from similar self-enriching conduct.[42]

155 Other cases share some features with the present case.

156 In *Australian Securities and Investments Commission v Astra Resources Ltd (No 2)*,[43] no dishonesty was alleged or found, and there were some attempts to comply with the relevant provisions of the *Corporations Act* (which related to offering shares without the required disclosure documents).[44] Disqualification periods of 12 years were imposed (which for one defendant was reduced to nine years for cooperation).[45] No pecuniary penalties were imposed, as none were sought by ASIC in that case.

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[41] This decision was later overturned on appeal on liability, so ASIC's appeal on penalty was rendered unnecessary to decide. Nevertheless, it is submitted that his Honour's comments are a useful exposition of the relevant principles.

[42] [2014] FCA 1308; (2014) 322 ALR 45, 108 at [309].

[43] [2016] FCA 560; (2016) 113 ACSR 162.

[44] [2016] FCA 560; (2016) 113 ACSR 162, 207 at [217].

[45] [2016] FCA 560; (2016) 113 ACSR 162, 207–208 at [222]–[231].

157 In *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs*,[46] an individual who was the mastermind behind many unregistered managed investment schemes withdrew money for his own use. He was disqualified from managing corporations permanently and a pecuniary penalty of $500,000 was imposed.[47] Another person heavily involved who was dishonest was disqualified for 20 years and a pecuniary penalty of $150,000 was imposed.[48] Others who were less involved were disqualified for between four and eight years with a pecuniary penalty for one of $20,000.[49]

158 In *ASIC v Adler*,[50] Adler engaged in 'persistent lies and deceits',[51] in part for the benefit of his own interests.[52] The relevant transactions caused loss of about $8,000,000.[53] He was disqualified for a period of 20 years,[54] and an aggregate pecuniary penalty of $450,000 was imposed on both him and his personal company.[55] Mr Williams gave false and misleading information to a board of directors and external lawyers and acted in 'gross disregard' of the interests of the company of which he was a director.[56] He was disqualified for 10 years and a pecuniary penalty of $250,000 imposed.[57]

159 In *ASIC v APCH*, contraventions of sections 601FC and 601FD were found proven at trial. No dishonesty was alleged or found.[58] An appeal on liability was allowed,[59] which rendered a challenge by ASIC to

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46 [2013] NSWSC 106; (2013) 93 ACSR 421.

47 [2013] NSWSC 106; (2013) 93 ACSR 421, 499–500 at [313]–[316], 525–526 at [432]–[437].

48 [2013] NSWSC 106; (2013) 93 ACSR 421, 505–506 at [347]–[348], 528–529 at [447]–[448].

49 [2013] NSWSC 106; (2013) 93 ACSR 421, 510–511 at [370]–[374], 517 at [403], 530–531 at [459].

50 [2002] NSWSC 483; (2002) 42 ACSR 80.

51 [2002] NSWSC 483; (2002) 42 ACSR 80, 100 at [58].

52 [2002] NSWSC 483; (2002) 42 ACSR 80, 91 at [24], 92 at [27].

53 [2002] NSWSC 483; (2002) 42 ACSR 80, 90 at [21].

54 [2002] NSWSC 483; (2002) 42 ACSR 80, 111–112 at [110]–[112].

55 [2002] NSWSC 483; (2002) 42 ACSR 80, 118–119 at [140]–[142].

56 [2002] NSWSC 483; (2002) 42 ACSR 80, 119–120 at [144]–[145].

57 [2002] NSWSC 483; (2002) 42 ACSR 80, 121–122 at [157], [159].

58 [2014] FCA 1308; (2014) 322 ALR 45.

59 *Lewski v Australian Securities and Investments Commission* [2016] FCAFC 96. As at the date of these submissions, judgment in the appeals has not been pronounced by the Full Court and the appeal proceedings remain open.

penalty unnecessary to decide.[60] Despite the appeal and notwithstanding that the Full Court has not considered it necessary to determine ASIC's cross-appeal on the adequacy of the penalties, consideration of the penalties imposed may provide some assistance in this case. They were as follows:

(a) Mr Lewski was a director of the relevant responsible entity. Murphy J found that Mr Lewski acted with 'serious incompetence', had 'material conflicts of interest and duty', 'misused his position of influence', and 'put his own interests ahead of the members at every step and his conduct represents the height of carelessness and imprudence'.[61] However, there was no finding of dishonesty.[62] Murphy J imposed a period of disqualification of 15 years,[63] and imposed an overall pecuniary penalty of $230,000.[64]

(b) Other directors, who Murphy J found 'gave scant, if any, consideration' to the relevant issues, did not deal with an obvious conflict of interest, and 'made no real effort to carry out their duties [imposed by section 601FD]',[65] were disqualified for between two and four years[66] and each ordered to pay pecuniary penalties of $20,000.[67] Another director whose conduct was 'materially different and less culpable'[68] than the other directors was not disqualified from managing corporations and was ordered to pay a pecuniary penalty of $20,000.[69]

160 In a different context, Allsop CJ recently considered an application to revoke an indefinite disqualification under the *Insurance Act 1973*

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60 See *Lewski v Australian Securities and Investments Commission* [2016] FCAFC 96 at [4], [348]. In addition to ASIC's appeal on penalty, one of the defendants contended that the primary judge did not consider matters in his favour when imposing penalties.

61 [2014] FCA 1308; (2014) 322 ALR 45, 99 at [249]–[250].

62 [2014] FCA 1308; (2014) 322 ALR 45, 107 at [299]–[300].

63 [2014] FCA 1308; (2014) 322 ALR 45, 111–112 at [331]–[336].

64 [2014] FCA 1308; (2014) 322 ALR 45, 112 at [337]–[341].

65 [2014] FCA 1308; (2014) 322 ALR 45, 100 at [254]–[255].

66 [2014] FCA 1308; (2014) 322 ALR 45, 123 at [408]–[409], 129 at [456]–[457], 134 at [499]–[500].

67 [2014] FCA 1308; (2014) 322 ALR 45, 124 at [415]–[417], 129 at [461]–[462], 134 at [504]–[505].

68 [2014] FCA 1308; (2014) 322 ALR 45, 135 at [510].

69 [2014] FCA 1308; (2014) 322 ALR 45, 141 at [588], [564]–[565].

> *(Cth)*.[70] The applicant was disqualified because of conduct which included the preparation of separate sham documents to obscure the position from auditors and outsiders[71] and not informing auditors of the correct position.[72] His conduct was described as 'deceitful and improper'[73] and dishonest,[74] though it was under the direction of a superior.[75] On the basis of the evidence before him, including testimony about the applicant's conduct since his disqualification,[76] Allsop CJ revoked the disqualification. The total period of disqualification was about 11½ years.[77] Allsop CJ noted that the regime under the *Insurance Act* was primarily for protective purposes, not primarily for punitive purposes.[78]"

Some common factors in the defendants' cases

[50] ASIC also submitted that the following factors pointed to the need to order significant penalties in each defendant's case:

> "(a) the contraventions were extremely serious: probably the most serious contraventions to be dealt with in the 'civil penalty' level of the enforcement pyramid;[79]
>
> (b) the defendants' conduct was deliberate;
>
> (c) the defendants have been found to be dishonest (which is 'the common thread running through the cases where the longest periods of disqualification have been imposed'[80]);

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70 *Burroughs v Australian Prudential Regulatory Authority* [2016] FCA 775.

71 [2016] FCA 775 at [24].

72 [2016] FCA 775 at [27].

73 [2016] FCA 775 at [28].

74 [2016] FCA 775 at [30].

75 [2016] FCA 775 at [17], [20], [21].

76 See [2016] FCA 775 at [81]–[130].

77 [2016] FCA 775 at [131]. He was disqualified on 18 November 2004 (at [2], [30]) and Allsop CJ made orders revoking the disqualification on 24 June 2016 (at [1]).

78 [2016] FCA 775 at [50], [61], [80], [132].

79 See Michelle Welsh, "Civil Penalties and Responsive Regulation: The Gap Between Theory and Practice" (2009) 33 *Melbourne University Law Review* 908 at 911–914.

80 *ASIC v APCH* [2014] FCA 1308; (2014) 322 ALR 45 at 107 [299] per Murphy J, appeal allowed sub nom *Lewski v Australian Securities and Investments Commission* [2016] FCAFC 96.

(d) the payment contraventions (ie those relating to the $130 Million Payment and the $17.5 Million Payment) caused what can only be described as very large loss, in particular the $130 Million Payment. The loss is significantly higher than losses in other cases;

(e) the money that was misused in the payment contraventions was trust money: money held by the responsible entity on trust for the benefit of PIF's members;[81]

(f) the defendants were involved in the contravening conduct of a responsible entity and (except for Watts) were officers of a responsible entity, on whom higher duties are imposed and expected;

(g) the relevant managed investment scheme, PIF, was a large, retail scheme (with a size of over $700,000,000 at the time of the $150 Million Drawdown, and was described as MFSIM's 'flagship fund');[82]

(h) in relation to King, White, Hutchings, and Anderson, there has been no contrition or remorse or acceptance of the wrongfulness of their conduct.[83] That can be an aggravating factor for the period of disqualification, though not for pecuniary penalties.[84] While Watts expressed some remorse in her section 19 examination, the extent to which that remorse might be thought to be a genuine recognition of her wrongdoing is questionable, particularly given her contest of almost every substantive point at trial;[85]

(i) there was a disregard for the interests of PIF and its unitholders;

(j) processes, checks, and balances were circumvented (both in relation to the payment contraventions, and also the false document contraventions);

(k) there has been no compensation to PIF or its members, nor any offer to do so;

(l) not only was a significant amount of trust money misappropriated, but there was an active and deliberate cover-up (what was described in the judgment as 'a transparent attempt to hide the previous misappropriations from the auditors and RBS'[86]);

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

82 [2016] QSC 109; (2016) 112 ACSR 138, 148 at [45].

83 See submissions below in relation to the individual defendants.

84 *ASIC v Adler* [2002] NSWSC 483; 42 ACSR 80, 109 at [103]–[104].

85 See submissions below in relation to Watts.

86 [2016] QSC 109; (2016) 112 ACSR 138, 446 at [1622].

(m) it can be assumed that no meaningful compensation will actually be paid, given the likely level of penalties and losses."

[51] On the other hand they pointed out that the defendants did not gain personally and directly from the contraventions but argued that Mr King's, Mr White's and Mr Anderson's personal circumstances and, to some extent, those of Mr Hutchings and Ms Watts, were tied to MFS's circumstances so that in that sense each had a personal incentive to commit and go along with the contraventions.

[52] Similarly they submitted that the defendants did not have any history of contraventions of the *Corporations Act* although Mr White and Mr Anderson have now been convicted in New Zealand of cognate offences.

Compensation orders

[53] Sections 1317H(1), (4) and (5) of the *Corporations Act* provide that a court may make compensation orders against a person if the person has contravened a corporation/scheme civil penalty provision in relation to the corporation or scheme with resultant damage. If the responsible entity is ordered to compensate the scheme, it must transfer the amount of the compensation to scheme property and if anyone is ordered to compensate the scheme the responsible entity may recover the compensation on behalf of the scheme.

[54] The PIF scheme has been wound up. A final distribution was made to members in March 2016 and final accounts were lodged with ASIC. It has not yet been deregistered. There is a "security assignment and sale deed" between Wellington Capital Limited (WCL), now the responsible entity of PIF, Asset Resolution Limited (ARL) and Perpetual Nominees Limited as the custodian of PIF. Clause 7.6 of that deed can be given effect as an agreement by WCL to assign any compensation, if and when awarded to PIF, to ARL, with implied terms that the responsible entity of PIF would enforce the order at the request of ARL (perhaps subject to an indemnity being given by ARL) and that PIF would pay any amounts to ARL for distribution. That clause continues in effect. WCL can enforce the compensation orders as if they were judgments of this court against the relevant defendants and, although the scheme has been wound up, funds obtained pursuant to the compensation orders to be made may be distributed to the members who were unitholders in PIF as at 15 October 2008. Under s 55 of the *Property Law Act* 1974 (Qld), cl 7.6 of the deed can also be seen as a contract for the benefit of third parties able to be enforced by non-party beneficiaries. ASIC submitted, therefore, that there was no reason to refrain from making a compensation order because of the winding up of the PIF scheme.

[55] In addressing the issue whether the effect of compensation orders should be taken into account when determining the appropriate pecuniary penalty, ASIC pointed out that in some previous cases that had occurred.[87] The submission continued, however, as follows:

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[87] See, eg, *Australian Securities and Investments Commission v Beekink* [2007] FCAFC 7; (2007) 238 ALR 595, 608 at [127], *Australian Securities and Investments Commission v Vines* [2006] NSWSC 760; (2006) 58 ACSR 298, 361–362 at [240], *Australian Securities and Investments Commission v Plymin (No 2)* [2003] VSC 230;

"180 However, the correctness of this approach as a matter of principle is contested. When considering the equivalent provisions of the *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (Cth), Jacobson J said:

> 'In my opinion, no allowance should be made for the compensation order because, as I have said, pecuniary penalties are punitive whereas the compensation order merely orders the wrongdoer to repay the loss. I, therefore, do not see why credit should ordinarily be given for the fact that a wrongdoer is required to make good the loss resulting from his contravention.'[88]

181 The obvious underlying purpose of provisions requiring a preference for compensation is that affected consumers should be paid before the consolidated revenue. That is a laudable aim. But in circumstances where such evidence as there is suggests that the compensation orders are unlikely to ever be paid by the individual defendants or an insurer,[89] there is no reason to discount periods of disqualification or amounts of pecuniary penalties in this case if compensation orders are also made. The court ought not to diminish the deterrent value of the pecuniary penalties ordered because of compensation orders being made that, ultimately, will not be paid by the defendants."

[56] The order I make must specify the amount of the compensation that resulted from the contravention.

[57] My factual findings about PIF's loss and damage were that the total loss attributable to the $103 million payment was $108,217,563 including further sums for interest, fees and stamp duty. Coupled with the loss attributable to the $17.5 million payment, the total loss attributable to both payments was $125,717,563. I accepted in my earlier reasons that the relevant payments were made and that PIF received nothing in return for them at the time. There is an argument I shall address later that an amount of $425,000 was repaid.

[58] I also rejected the arguments that the transactions were subsequently ratified. The evidence supports the findings I made about the sums of money involved. My conclusions that the "alleged transactions" were ineffective and were not validly ratified also established that PIF received nothing of value for the unauthorised payments.

(2003) 21 ACLC 1237 at [106], [111], [115]. See also *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 447 at [290].

88 *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 447 at [289].

89 Anderson deposes that the directors' and officers' insurance was "fully exhausted" about two years ago: affidavit of David Anderson sworn 9 September 2016 [ANDE.0001.0001.0001], para 56(b). See also affidavit of Marilyn Watts sworn 19 September 2016 [WATTS.0001.0001.0003], para 18.

[59] ASIC also argued that interest should be calculated under s 58 of the *Civil Proceedings Act* 2011 (Qld) at ordinary commercial rates by reference to the rates set out in the Practice Directions for the inclusion of interest in a default judgment.

[60] The total pre-judgment interest ASIC sought was $65,790,565 in respect of the $103 million payment with interest accruing at $17,001 per day after the first day of the penalty hearing. The total pre-judgment interest attributable to the $17.5 million payment to the first day of the penalty hearing was $10,639,070 accruing at the rate of $2,749 per day since that first day of the penalty hearing.

[61] The compensation orders ASIC seeks against each defendant were calculated on the basis that it may seek such orders for the entire amount of loss resulting from that defendant's contravention subject to the overarching principle preventing double recovery. Thus the amounts of the compensation orders it sought for each defendant up to the first day of the penalty hearing were:

(a) King — $174,008,128;

(b) White — $202,147,198;

(c) Hutchings — $28,139,070; and

(d) Anderson — $202,147,198.

[62] ASIC submitted that each of those sums should be adjusted as necessary to reflect interest to the date of judgment. The different amounts for each defendant reflected the different contraventions in which they were involved. No compensation order was sought against Ms Watts because no loss was alleged to have flowed from her contraventions.

Costs of the proceedings

[63] ASIC submitted that, in general, I should adopt the same approach to costs as was taken in the decision in *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)*.[90] A similar approach was taken in *Australian Securities and Investments Commission v Loiterton*.[91] In that case the learned trial judge ordered the unsuccessful defendants to pay a variety of percentages of 95% of ASIC's party and party costs. That was on the basis that much of the work for which ASIC was entitled to costs was common to separate groups of defendants and, in some aspects, common to all defendants. White J summarised the reasons for adopting different percentages for different defendants by saying:[92]

> "A feature of this case is that much of the work for which ASIC is entitled to costs is common to separate groups of defendants and, in some aspects,

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[90] [2015] FCA 527; (2015) 106 ACSR 302, 314-324 at [69]-[134].

[91] [2004] NSWSC 897; (2004) 50 ACSR 693, 735–736 at [117]–[121], 737 at [129].

[92] *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq) (No 2)* [2015] FCA 527; (2015) 106 ACSR 302, 314–315 at [71]–[73].

> common to all defendants. ASIC would have incurred almost the same costs in respect of the members of these groups even if there had been fewer defendants in each group. Account must be taken of this because, in the main, this is not a case in which ASIC incurred separate and distinct costs in respect of individual defendants or to an extent in respect of the members of each group. At the same time, account must be taken of the fact that there must have been at least some costs which ASIC incurred because, and only because, a particular defendant had been joined. That is to say, there are some costs which are discrete to each individual defendant.
>
> Another circumstance bearing on the exercise of the court's discretion with respect to costs is the desirability of the orders for costs being capable of ready implementation. The Court should, it is submitted, attempt to avoid, so far as possible, creating a situation in which the quantification of costs will be complex, protracted, and by itself costly. One way by which this purpose can be achieved is by the court making orders for the defendants to pay fixed percentages of costs of a defined nature. It is desirable for a court to adopt that course if possible, even if the course does, to an extent, involve some broad axing. This should facilitate the quantification of costs on a taxation."

[64] ASIC pointed out that, in this case, where one defendant made what was considered to be a good argument, the other defendants adopted it and many of the defendants adopted parts of the other defendants' closing submissions. Similarly there was a sharing of relevant objections to evidence amongst the defendants and broadly, all defendants were in the same interest, despite there being some limited "blame shifting" by the end of the trial.

[65] Unlike the case in *ActiveSuper*, here ASIC succeeded against all defendants and all of them have been parties since the commencement of proceedings and all were separately represented. ASIC submitted that the starting point should be that it received all standard costs of and incidental to the proceedings. The interlocutory costs had already been dealt with and in many cases assessed while the costs attributable to the case against MFSIM were small. ASIC has agreed with MFSIM that there be no order as to costs between it and ASIC. It took no active part in the trial but it was always necessary for ASIC to prove the case against MFSIM in the cases against the individual defendants so that no extra costs had been occasioned by the proceedings against MFSIM as those costs had to be incurred against the other defendants in any event.

[66] ASIC argued that the division of costs between the different individual defendants was necessarily a matter of impression, that being the case in *ActiveSuper*.[93] It submitted that the relevant factors going to the division of costs against the individuals were as follows:

(a) Mr King was not alleged to have been involved in the false documents contraventions (however, ASIC needed to disprove the false documents for the case

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[93] [2015] FCA 527; (2015) 106 ACSR 302, 323 at [115] ("Exercising a broad judgment …").

against Mr King to show that the payments were improper and the subsequent documents did not reflect true contemporaneous transactions);

(b) the evidence about the use of false documents was irrelevant to the case against Mr King;

(c) Mr White admitted allegations that were in issue against other defendants, meaning certain matters did not need to be proved against him;[94]

(d) Mr White did not cross-examine witnesses or lead evidence (therefore he contributed less towards the length of the trial);

(e) the different lengths of time for which each individual defendant was in the witness box;

(f) Ms Watts was not alleged to have been involved in the payment contraventions (though the evidence in relation to that part of the case was relevant to showing the falsity of the documents she was involved in creating);

(g) evidence relating to loss was irrelevant to Ms Watts;

(h) the different numbers of contraventions pressed (and found) against each individual defendant.

[67] It also submitted that much of the evidence in the trial was required in relation to the case against all individual defendants because:

(a) all individual defendants were alleged to have been involved in contraventions by MFSIM. As MFSIM's admissions did not bind the individual defendants, ASIC needed to prove MFSIM's contraventions;

(b) while ASIC did not allege that Ms Watts was involved in the payment contraventions, the evidence about the payments was relevant to establish that the documents she was involved in creating were false;

(c) while ASIC did not allege that Mr King was involved in the "false documents" contraventions, the evidence about those documents was relevant to establish that the payments were improper.

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[94] For example, Mr White's second amended defence [COURT.0001.0001.0258] admits matters relating to the $150 million drawdown, $130 million payment, and the $103 million payment (paras 39–53), whereas at the start of the trial, Mr King, Mr Hutchings did not admit those allegations, requiring ASIC to prove these ultimately uncontroversial allegations with admissible evidence (see paras 39–53 of Mr King's defence to the fourth further amended statement of claim [COURT.0001.0001.0348], paras 39–53 of Mr Hutchings' amended defence to the fourth further amended statement of claim [COURT.0002.0002.0063]). Mr White also admitted that pleaded emails were sent or received, that he knew certain matters pleaded by ASIC, and that he signed certain false documents: see, eg, paras 91K, 92(a), 92(aa), 97, 100(a), 119(a)(i), 120(a)(i), 121(a)(i), 122(a)(i), 123(a)(i), 124(a)(i), 125(a)(i) of his second amended defence.

[68] For the reasons expressed in relation to each individual defendant to which I shall come, ASIC then submitted that the following costs orders were appropriate:

(a) Mr King is to pay 60% of ASIC's standard costs of and incidental to the proceedings;

(b) Mr White is to pay 70% of ASIC's standard costs of and incidental to the proceedings;

(c) Mr Hutchings is to pay 80% of ASIC's standard costs of and incidental to the proceedings;

(d) Mr Anderson is to pay 80% of ASIC's standard costs of and incidental to the proceedings;

(e) Ms Watts is to pay 50% of ASIC's standard costs of and incidental to the proceedings; and

(f) once ASIC has recovered its standard costs of and incidental to the proceedings, any further enforcement of these orders is stayed.

Relief sought against MFSIM

[69] Based on the findings of my earlier judgment, the contraventions of the *Corporations Act* alleged by ASIC against MFSIM have been proven with the result that declarations of contraventions under s 1317E must be made. MFSIM has been informed of the proposed declarations and does not object to them. ASIC no longer seeks monetary relief against it, it being in liquidation and without funds, so that relief is not pursued.

Relief sought against Mr King

[70] As I have previously pointed out, Mr King was only involved in contraventions relating to the $130 million payment.

ASIC's submissions

[71] In its written submissions ASIC argued that I had found or accepted that:

(a) Mr King was the "overall boss of the MFS Group" who participated in the making of decisions that affected the whole or a substantial part of MFSIM's business and had the capacity to affect its financial standing;

(b) Mr King approved and authorised the use of money drawn down under the RBS loan agreement to make the $130 million payment and the $103 million payment;

(c) At the time of approval and authorisation of the use of the money drawn down and the $103 million payment, Mr King knew that the $130 million payment was made from funds managed by MFSIM as responsible entity for PIF and that the $130 million payment was made for the purpose of the MFS Group repaying $103 million to Fortress, and not for PIF's purposes;

(d) There was no transaction on foot which made the $130 million payment (to the extent of the $103 million payment) a proper payment from PIF's funds;

(e) Mr King knew that no such transaction had been implemented at the time of the payment;

(f) Mr King either knew that no transaction by which PIF's funds could have been used to purchase MFS assets to seed MYF had been entered into, or was indifferent to whether it had been effected by the time the funds were transferred;

(g) because of his overall position in the MFS Group, Mr King was an officer of the responsible entity of PIF;

(h) Mr King did not act honestly or diligently in that position by sanctioning the payment out of investors' funds without then securing the purchase of an asset or assets intended to reimburse them for that payment;

(i) Mr King knew that the money was then being paid for no legitimate purpose of PIF but rather to alleviate MFS Limited's difficulties with its financier;

(j) if he had been acting honestly, Mr King would have made inquiries about what was proposed and have ensured that something was put in place for PIF's investors before the money was taken from MFSIM, the responsible entity of PIF;

(k) Mr King's failure to do so was dishonest;

(l) Mr King knew that the payment provided financial benefits to related parties in the MFS Group in breach of section 208(1) of the *Corporations Act* and that Mr King knew that no steps had been taken to observe the requirements of that section.

[72] I also found 13 contraventions established against Mr King, the second-lowest number of contraventions for a defendant in the proceedings. Nine contraventions were found against Ms Watts.

[73] Mr King is now 52 years old having been born on 21 June 1964. In November 2007 he was 43 years old.

[74] ASIC also submitted that, having regard to the categories set out by Santow J in *ASIC v Adler*, the following matters were relevant to the issue of disqualification in respect of Mr King:

(a) the nature of the breaches, which:

(i) were very serious and deliberate;

(ii) involved dishonesty;

(iii) involved a very substantial sum of money;

(iv) were committed with a view to benefitting other parts of the MFS Group;

(v) involved the misuse of investors' money held on trust by MFSIM;

(b) the senior position of Mr King within the MFS Group, and the fact that he was the "overall boss" as well as being an officer of MFSIM;

(c) the losses occasioned to the investors in PIF by reason of the contraventions;

(d) the risk that investors were put to by the payment of such substantial sums of trust money in circumstances where Mr King did not know what (if any) transactions might in the future be entered into for the purported benefit of PIF's investors;

(e) the fact that although Mr King gave evidence, there was nothing in his evidence to suggest that he recognised the dishonest nature of his conduct; rather, he made considerable effort to justify his conduct and blame others for the events, in particular Mr White and Mr Anderson;

(f) although Mr King knew of the payment from PIF's money, approved of it, and knew that there was no legitimate purpose of PIF for which that money was paid, he was nevertheless not the "mastermind" of the scheme to use PIF money to repay the Fortress debt;

(g) Mr King has not displayed any contrition or remorse;

(h) Mr King did not personally directly gain from the contraventions, although as a person having a substantial interest in the MFS Group and being the Group CEO, he had an obvious and urgent interest in ensuring that the MFS Group did not default on its Fortress obligations, which would inevitably have led to very serious, likely fatal, consequences for the group;

(i) Mr King has no previous record of contraventions of the Corporations Act;

(j) the court could have very little confidence that if Mr King was permitted to exercise the powers of a company director in future, he would act in a way that was honest and met the requirements of care and diligence required of a director.

[75] For those reasons ASIC submitted that Mr King's conduct fell within the most serious category described by Santow J and argued that an appropriate period of disqualification for him was 20 years consistently with the comparative cases it had referred to in its submissions and having regard to ASIC's submissions in relation to the other defendants and the principle of parity. ASIC's counsel argued also that the fact that Mr King invoked the operation of Part X of the *Bankruptcy Act* 1966 (Cth) on 23 April 2009 and entered into a personal insolvency agreement with creditors on 4 August 2009 which was fully complied with on 2 January 2013, should not be taken into account in reduction of the period of disqualification because he was precluded from acting as a company director during that period.

[76] Such an approach was rejected by Ward JA in *Re Idylic Solutions Pty Ltd; Australian Securities and Investments Commission v Hobbs*.[95] Her Honour regarded the fact that the defendant there had been unable to manage corporations as, in a sense, fortuitous and not

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[95] [2013] NSWSC 106; (2013) 93 ACSR 421, 506 at [349].

reflecting any judgment on the nature and extent of his departures from the standards expected of him as a company director and officer. Nor was she satisfied that, over that period, the defendant had come to appreciate the extent of the wrongdoing engaged in by him that led her to make disqualification orders.

[77] The lack of apparent contrition or awareness of the nature of Mr King's conduct in this trial is such as to lead me to a similar conclusion. As ASIC pointed out, also, Mr King has continued to act as a company director after the completion of his personal insolvency agreement in "some small mining exploration companies".[96]

[78] In making submissions about the appropriate pecuniary penalty to be applied to Mr King, ASIC submitted that his conduct reflected in the various offences found against him could be summarised as follows:

(a) approving and authorising the use of the money drawn down under the RBS Loan Agreement to make the $130 million payment (to the extent of the $103 million payment) and the $103 million payment knowing that such payments were for the purpose of the MFS Group repaying the $103 million to Fortress (and for the benefit of the wider Group) and not for PIF's purposes;

(b) failing to take steps to ensure that PIF complied with its constitutional requirements in making those payments; and

(c) giving a financial benefit to related entities out of PIF's scheme property.

[79] In spite of submitting that this was not a case where, for example, precisely the same conduct gave rise to the contravention relating to being knowingly concerned in MFSIM's failure to act honestly in making the various payments and the separate contraventions concerning the failure to ensure that the relevant payments were made in accordance with PIF's constitution, ASIC argued this could be regarded separately from the second contravention arising from his knowledge that the relevant payments were made from PIF's funds and that he as an officer of MFSIM failed to take steps to ensure that PIF's constitution was complied with in making those payments. Nonetheless, ASIC, although submitting that the actual conduct giving rise to the contraventions was not identical, accepted that Mr King's conduct might be legally separate but factually overlapping in significant respects and submitted that the conduct was so inextricably interrelated that it should be regarded as one multifaceted "course of conduct" or "one transaction". Therefore, it accepted that each of the 13 contraventions found against him arose from one course of conduct, his course of conduct in relation to the making of the $103 million payment.

[80] On the basis that I have discussed earlier that, if the resulting penalty fails to reflect the seriousness of the contraventions, however, ASIC submitted that the application of one maximum penalty of $200,000 to Mr King's course of conduct did not reflect the seriousness of his contraventions because of the sheer magnitude of the dishonest misappropriations such that, as a matter of general deterrence, a penalty of something less

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[96] See T 33-15/5 of the trial transcript.

than $200,000 was inadequate. Accordingly, its counsel submitted that, where, as here, there had been a course of conduct leading to multiple contraventions, and having regard to the requirements for general deterrence as well as issues of parity and totality, the appropriate pecuniary penalty was $300,000 which should be coupled with a compensation order made in relation to the $130 million payment or $108,217,563 plus interest of $65,790,565 to the first day of the penalty hearing and 60% of ASIC's standard costs of and incidental to the proceedings.

[81] That latter percentage was designed to reflect the fact that he was only alleged to have been involved in one course of conduct. It was necessary, however, to prove that the later transactions were not genuine so that a considerable part of the false documents case was also relevant to the case against him.

Submissions for Mr King

[82] Apart from the submissions concerning the form of the proposed declarations with which I have already dealt, counsel for Mr King also pointed to the long period of more than 10 years that has passed since the contravening conduct during which Mr King, like the other defendants, has had to live with the burdens inherent in ASIC's investigation and with this proceeding. He lost everything he had financially and has spent three years performing his obligations under a personal insolvency agreement during which he was prohibited from acting as a director of any company. His age, together with the disqualification order sought by ASIC, would mean that he was unlikely to manage corporations again and the finding of dishonesty made means he is unlikely to be able to practise as a solicitor again.

[83] Little weight, it was submitted, should be given to the lack of evidence by him of contrition or remorse given his intention to appeal against the judgment of the court.[97] The amount of compensation sought by ASIC against Mr King was also submitted to be a distinguishing feature of the case with the evidence suggesting that none of the defendants would be able to pay the compensation orders. Accordingly, it was submitted that it would be oppressive to order him to pay any additional pecuniary penalty order and would serve no end. The object of general deterrence was said to be adequately achieved by the disqualification order and the very substantial compensation order that almost no person could ever hope to pay.

[84] The period of 20 years disqualification sought by ASIC was criticised as being too long, especially having regard to the period of more than 10 years since the contravening conduct.

[85] It was also submitted that the compensation order sought should be reduced, both as to capital and interest because the evidence was that $425,000 was returned to MFSIM on behalf of PIF from MYF in the 2009-2010 financial year. ASIC argued that it was not demonstrated to my satisfaction, however, that this sum came from the funds

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[97] *ASIC v APCH* (2014) 322 ALR 45 at [312]-[315].

misappropriated from PIF rather than from the $2.1 million MYF had invested in PacFin in late December 2007.[98] Mr Piggott's oral submissions made a plausible case for the conclusion, however, that it was an intended part repayment of the misapplied money.[99] I was not persuaded to the contrary by ASIC's argument on this point.[100] I shall reduce the compensation amount sought for that reason.

[86] It was also submitted that the order should be further reduced as to interest because of the delay of almost a decade between the contravening conduct and the making of the orders.

[87] The 60% portion of ASIC's standard costs sought from Mr King was criticised as being too high having regard to the number of defendants and the scope of the issues in the case not relevant to the case against him.

[88] Other features of the conduct of Mr King relied on by his counsel were that he was an officer of MFSIM only by reason of the shadow director provisions of the *Corporations Act* 2001 (Cth), that he obtained no personal benefit from the contravening conduct, was not the "mastermind" of the scheme and was not involved in the $17.5 million payment or the false documents contravention. Mr Piggott also submitted that the evidence of the alternative possibilities of refinancing the Fortress debt about which evidence was given in the principal proceedings negated any conclusion that Mr King behaved as he did to protect his financial interests in MFS. I am not persuaded, however, that it was irrelevant to his conduct.

[89] ASIC's response to the argument that Mr King obtained no personal benefit from the contravening conduct was that, he, as with Mr White and Mr Anderson, had shareholdings in MFS and marginal loans in relation to their shareholdings. The defendants argued that their financial interests were irrelevant on the case pleaded against them but ASIC submitted that, while it was irrelevant to whether they had committed contraventions of the *Corporations Act*, it was relevant at the penalty phase as part of ASIC's case to rebut the submission that the defendants did not benefit from this conduct. That seems to me to be correct. It was in the defendants' interest to keep the group operating as a going concern.

[90] Mr Brady also submitted that arguments that the defendants had previously been of good character were less relevant to a case like this where it was their good character which enabled them to occupy a position of trust which they have breached.[101]

[91] The argument that the compensation order interest component should be reduced because of the delay between the contravening conduct and the making of the orders is not

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[98] See at [713] of my principal reasons; *ASIC v Managed Investments Ltd and Ors (No 9)* [2016] QSC 109; (2016) 112 ACSR 138, 273.

[99] See T4-35 to T4-37.

[100] See T4-73 to T4-74.

[101] *ASIC v Vizard* (2005) 145 FCR 57, 65-66 at [36]-[37].

persuasive, particularly having regard to the objects of ordering the payment of compensation. I recognise that it is highly unlikely that Mr King would ever be able to pay the full amount but the principle that interest should be payable on compensation is one which seems to me to be important in trying to set the true measure of the loss occasioned by the contraventions where Mr King was a party. Investigations and proceedings of this nature are often lengthy and involve significant delays partly, in a case like this because of the complexity of the transactions involved, including the attempts to conceal their true nature. The imposition of orders for the payment of interest on the amounts of compensation ordered is appropriate to make the orders effective. There was no fault on the part of PIF's beneficiaries disentitling them to proper compensation for the money taken from their use. I see no discretionary reason to reduce the amount of interest payable.

[92] The decisions in *Re Idylic Solutions* and *ASIC v APCH* were advanced as instructive comparisons, having been made in 2013 and 2014 in respect of the periods of disqualification and pecuniary penalty orders. In *Re Idylic Solutions*, Mr Collard, like Mr King, was not said to be the mastermind of the contravening scheme, to have been actively involved in implementing it, however, where here, it was submitted, Mr King's involvement was limited to approving and authorising contravening transactions. Mr Collard received direct personal benefits where Mr King received no direct personal benefits. Mr Collard's conduct related to multiple companies and took place over almost five years and was likely to have continued. In Mr King's case, there was only a single course of conduct concerning one company. He played no part in any subsequent contraventions or attempted cover-up. Mr King was significantly younger than Mr Collard who was an undischarged bankrupt and Mr King has successfully performed his obligations under a personal insolvency agreement.

[93] Mr Piggott for Mr King pointed out that Mr Collard's contraventions involved significantly lower sums than the amount of $103 million involved in Mr King's contravention but pointed out that no compensation order was made against Mr Collard where, here, a very substantial compensation order is sought. The disqualification ordered against Mr Collard was for a period of 20 years with a pecuniary penalty of $150,000 and a permanent disqualification from the provision of financial services.

[94] In *ASIC v APCH*, Mr Lewski was criticised for his involvement in facilitating payment of a $33 million listing fee even though he was the primary beneficiary of that fee which was payable from trust property, where he was found to have subordinated the members' interest to his own at every step. No finding of dishonesty was made but that was said to present as only a limited basis for distinction from the position of Mr King. Again Mr Lewski obtained direct personal benefit in the amount of $33 million which he retained, unlike Mr King. He instigated and orchestrated the contraventions where, it was submitted, Mr King was not the mastermind of the scheme and his involvement was limited to approving and authorising it. Mr Lewski was said to have engaged in two courses of wrongful conduct where Mr King's could be characterised properly as a single course of conduct. Mr Lewski had personally received the funds, had not repaid them and no compensation order was made against him. He was disqualified for a period of 15 years with a pecuniary penalty of $230,000.

[95] ASIC's submission that there was a high propensity that Mr King would engage in similar activities or conduct if given the chance to do so was said not to be soundly based with no evidence of any other prior or subsequent contraventions by him or of any disciplinary issues during his time as a practising solicitor. ASIC was criticised as seeking to infer a high propensity from an isolated piece of conduct.

[96] Accordingly, Mr Piggott submitted that a 20 year disqualification was too long, coupled with his own insolvency, the ASIC investigation and then this proceeding, it would see Mr King affected for about 30 years from the age of 43 to the age of 72 which he submitted would not be a proportionate outcome.

Conclusions concerning Mr King

[97] The amount of money involved here was significantly higher than that involved in Mr Lewski's case, was trust money as well and occurred in circumstances where Mr King's training as a solicitor should have alerted him to the impropriety of what he was authorising. There were no actual findings of dishonesty made against Mr Lewski although his conduct was seriously incompetent and he also had material conflicts of interest and duty.

[98] Mr King's disregard of PIF's beneficiaries' entitlements and the amount of money involved combine to support the view that he had no proper regard to his duties in respect of this company which was a trustee of an investment fund held for others. I have also found that he acted dishonestly but accept that he did not take the money personally but, conversely, conclude that it is relevant to bear in mind that he had an interest in keeping the MFS group afloat in response to the submission that he did not benefit personally from his conduct. Both from the point of view of personal and general deterrence, it seems to me that a 20 year disqualification is appropriate.

[99] Parity considerations also suggest that his disqualification should be for a shorter period than that of Mr White. Even though he was higher in the corporate hierarchy than Mr White, he was less involved in the offending conduct. His failure to accept responsibility for his conduct encourages me to believe, however, that he remains a risk to the public if he were not disqualified from managing a corporation for a very significant period.

[100] Mr Piggott also sought to distinguish Mr King's conduct from that of Mr Adler in *Re HIH Insurance Ltd (in prov liq); ASIC v Adler*[102] by describing his conduct as significantly worse than that of Mr King. He had personally enriched himself and instigated the transactions. He knew they were bad investments involving the deceit of many people. He was disqualified for 20 years with a compensation order below $8 million. Apart from his 20 year disqualification, a pecuniary penalty order was made against him of $450,000.

[101] He submitted that the better analogy was to be made with the treatment of Mr Williams in the same case. He was disqualified for a period of 10 years where a pecuniary penalty

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[102] (2002) 42 ACSR 80.

of $250,000 was imposed as well as a compensation order. Having regard to the amount of money in the PIF fund that was misappropriated here, however, I cannot agree that Mr Williams' behaviour should be regarded as comparable to that of Mr King.

[102] Similarly, the pecuniary penalty order sought of $300,000, taking into account the nature of the conduct, seems to me to be quite moderate. The compensation order, of course, provides a very significant counter-balance to that impression of moderation, but it is an incident of the size of the fund misappropriated and is payable to the private interests who suffered loss rather than as a vindication of the public interest in discouraging this form of conduct. Again, from the point of view of general deterrence, it seems to me to be appropriate that a pecuniary penalty of $300,000 for a contravention of this seriousness is perfectly justifiable as well as the compensation order because of the notions of general deterrence I accepted earlier in these reasons.

[103] In respect of the costs order, the submission was that the portion of 60% proposed for Mr King was too high having regard to the number of defendants and the fact that he was only directly concerned in one of the four courses of conduct the subject of ASIC's case. Nonetheless, his conduct was a significant feature of the case and proof of it also required evidence to be led concerning the false documents case. The defence of the action by his representatives formed a substantial part of the litigation. The percentage of 60% seems to me, therefore, to be appropriate.

Relief sought against Mr White

[104] Mr White was found to have engaged in conduct contravening each of the four courses of conduct identified by ASIC relating to the $130 million payment for which there were 13 contraventions, the $17.5 million payment for which there were eight contraventions, the creation of the false documents for which there were 32 contraventions and the use of the false documents for where there were 11 contraventions.

ASIC's submissions

[105] My findings were summarised in ASIC's written submissions as follows:

(a) Mr White knew that the transactions proposed to be recorded had not actually occurred at the time the payments were made;

(b) Mr White did not have a settled view of what, if anything, was intended to be transferred to PIF in return for the money taken from it at the time of the payments, let alone any expectation that assets were in a position to be transferred in return for the payments;

(c) Mr White was the "mastermind" behind the scheme;

(d) the $130 million paid to MFS Administration from the $150 million drawdown was "illegitimately borrowed" or taken in the short term, rather than as part of some planned scheme to make investments with the funds;

(e) Mr White's behaviour was dishonest;

(f) the transactions were not genuine but were, effectively, created to justify, at a later stage, the drawdown of the moneys that had previously occurred;

(g) the backdating of the documents was intended to create the impression that the transactions had occurred earlier than the payments;

(h) Mr White was heavily involved in both payment contraventions;

(i) Mr White and Mr Anderson were the architects of the scheme set out in the false documents, which had their genesis in the listing of loans documents. He also signed some of the false documents. He was involved in misleading the non-executive directors of MFSIM and his conduct in relation to the false documents was undertaken at a time when he was the CEO of the MFS Group. He had previously been in the position of Deputy Group CEO.

[106] Mr White was born on 16 July 1973, was 34 in November 2007 and is now 43.

[107] ASIC submitted that the following matters were relevant to the issue of disqualification stemming from the categorisation of the issues by Santow J in *ASIC v Adler*:

(a) the nature of the breaches, which:

(i) were very serious and deliberate;

(ii) involved repeated acts of dishonesty;

(iii) involved very substantial sums of money;

(iv) were taken with a view to benefitting other parts of the MFS Group;

(v) involved the misuse of investors' money held on trust by MFSIM;

(b) the senior position of Mr White within the MFS Group, as Deputy Group CEO at the time of the payment contraventions and as Group CEO by the time of the false document contraventions;

(c) the losses occasioned to the investors in PIF by reason of the breaches;

(d) the risk that investors were put to by the payment of such substantial sums of trust money in circumstances where Mr White did not know what (if any) transactions might in the future be entered into for the purported benefit of PIF's investors;

(e) Mr White was the "mastermind" behind the use of PIF's money in the way it was used and the subsequent efforts made to cover up those illegitimate uses;

(f) Mr White has not displayed any contrition or remorse;

(g) Mr White did not personally directly gain from the contraventions, although as a person having a substantial interest in the MFS Group and being the Group Deputy CEO and later CEO, he had an obvious and urgent interest in ensuring that the MFS Group did not default on its Fortress obligations, which would inevitably have led to very serious, likely fatal, consequences for the MFS Group.

[108] Mr White had no previous record of contraventions of the *Corporations Act* but has been convicted on his own plea of guilty in New Zealand on 23 September 2015 of two charges under s 58 of the *Securities Act* 1978 (NZ) for distributing an advertisement, namely an investment statement dated 14 September 2007 for PacFin that included untrue statements and signing a registered prospectus for PacFin dated 14 September 2007 that was distributed and included untrue statements.

[109] Other submissions made by ASIC were that:

(a) Mr White was a senior officer within the MFS Group of companies. He was the person who dishonestly conceived of, and arranged for, the use of PIF's funds to pay the Fortress loan. He was the person who (together with Mr Anderson) later worked out a scheme of purported transactions that were designed to hide the fact of the misuse of PIF's funds. He then made false reports to the MFSIM Board about events and knew that certain of the false documents were being used to mislead external parties.

(b) Mr White's penalty affidavit does not reveal any remorse or contrition on his part. He deposes to feeling "enormous shame and embarrassment about the effect of the collapse of MFS on shareholders and investors", but nowhere in the affidavit is there any expression of remorse about his own role in that collapse. His "shame and embarrassment" does not seem to extend to his own conduct as found in these proceedings.

(c) His conduct resulted in very large losses to investors in a retail fund; the conduct was in respect of investors' funds; there were repeated acts of dishonesty as well as a deliberate attempt to cover up the true nature of events in 2007; he has demonstrated no contrition or evidence to suggest that he recognises the gravity and seriousness of his conduct. Although the court heard no evidence from Mr White at trial (alone among the defendants), the court is safely able to infer from his long course of conduct that he has a continuing propensity to act dishonestly, a lack of insight into his conduct, and that he ought not to be in a position of management in respect of corporations ever again.

[110] ASIC's submission was that the periods of disqualification for the courses of conduct in which he was involved should be 20 years for the $130 million payment, a period the same as Mr King's disqualification. ASIC also submitted that the same period of disqualification should apply to the $17.5 million payment and that periods of 15 years disqualification should apply the creation of the false documents course of conduct and also to the use of those false documents. The rationale for the lesser period submitted in respect of the false documents was that although it was extremely serious and grossly dishonest conduct, it did not of itself result in loss to PIF. His participation in the use of those documents also reflected his involvement in the "creation" contraventions given that they were created for the purpose of misleading people both internal to MFSIM such as the board and the compliance section, and external to that company such as RBS and the auditors.

[111] Then applying the totality principle, having regard to the extent, nature and seriousness of the contraventions found against Mr White, ASIC submitted that he should be disqualified from managing corporations permanently.

[112] Pointing to Mr White's involvement in the significant number of contraventions to which I have referred, ASIC submitted that four separate penalties should be imposed on Mr White for his four separate courses of conduct. The submission was that the penalty for the $130 million payment should be the same as Mr King's $300,000, because, although Mr White was junior to Mr King in the group hierarchy, Mr White was the "mastermind" of the payment and the driving force behind it so that they should have equivalent financial penalties in respect of that course of conduct.

[113] The same penalty of $300,000 was urged in relation to the $17.5 million payment. Although the amount of money involved was significantly less, ASIC submitted it still remained very substantial and was also held on trust for investors. ASIC's counsel invoked the need for general deterrence such that the misuse of such a large sum should be reflected in an appropriately significant pecuniary penalty. The appropriate penalty they submitted for the creation of the false documents was $160,000 reflecting that the conduct of directing the creation of documents, to hide the true nature of the earlier payments, was very serious and that such conduct in relation to the use of millions of dollars of trust money was one of the worst examples of dishonest conduct in corporate affairs imaginable. The only matter of mitigation to which ASIC referred in respect of Mr White was that he had not been found to have breached the *Corporations Act* previously. It submitted that the amount of $160,000 was sufficiently close to the maximum available penalty to be ordered while recognising that this particular contravention, although very serious, was not an example of the worst possible contravention of this nature.

[114] ASIC also submitted that the appropriate penalty for the use of the false documents was $70,000, somewhat less than ASIC submitted in relation to Mr Hutchings, as Mr Hutchings had a more extensive involvement in using the false documents to effect the "cover-up".

[115] Those figures total $830,000 as a pecuniary penalty which ASIC submitted, taking into account the totality and parity principles, should be reduced to $650,000. That was on the basis that a total penalty of $830,000 may be considered to reflect a degree of blame for Mr White which was disproportionate to the other defendants, although it submitted that the penalties imposed should reflect that Mr White's contraventions were the most serious in total and deserved the highest penalty of any of the defendants.

[116] Mr White's involvement in the contraventions relating to the $130 million payment as well as the $17.5 million payment meant that he should be ordered to compensate PIF in the sum of $125,717,563 together with interest of $76,429,635 to the first day of the penalty hearing.

[117] ASIC also submitted that, although Mr White did not himself give evidence or call evidence or cross-examine any of ASIC's witnesses, he was involved in all four courses of conduct and was at the centre of the case. He made more admissions than other

individual defendants which ASIC submitted should be reflected in a reduction so that he was ordered to pay 70% of ASIC's standard costs of and incidental to the proceeding.

Submissions for Mr White

[118] Similar submissions were made for Mr White as to those for Mr King in respect of the form of the declarations and I have already addressed them.

[119] It was also submitted that ASIC wrongly suggested there were four relevant courses of conduct when, in substance, there were three, the creation of the false documents and their use being effectively being part of the same course of conduct as, it was clear from ASIC's submissions, the false documents were created for the purpose of misleading persons both internal and external to the company. In that context, Mr Jackson QC's submissions included that the orders sought by ASIC:

(a) wrongly suggest there were four relevant courses of conduct when in substance there were three;

(b) would have the effect of imposing an overall suite of penalties and other orders which are oppressive and unnecessary to achieve the appropriate objects of the imposition of penalties for the conduct found to have occurred;

(c) fail to have proper regard to the absence of any finding that Mr White was motivated by personal gain and the important distinction between conduct engaged in with that goal and other albeit very serious conduct not motivated by personal gain;

(d) do not consider the prospect of rehabilitation in circumstances where:

(i) Mr White was relatively young at the time the conduct was engaged in and had a previously unblemished career; and

(ii) in the more than eight years since the events in question, Mr White has not engaged in any other contravention of the *Corporations Act*;

(e) do not address at all the relevance of the other consequences that Mr White has suffered (which are relevant to both personal deterrence and thus the likelihood of reoffending) including:

(i) being a respondent to numerous legal proceedings;

(ii) having his prospects of employment in the industry in which he was employed destroyed;

(iii) being financially ruined;

(iv) extensive and sustained media scrutiny;

(v) being shunned by former friends and business associates;

(vi) his sense of shame and embarrassment about the effect of the collapse on investors.

[120] I have previously concluded that it is appropriate to treat the facts as giving rise to four courses of conduct.

[121] It was accepted that, given the findings made against Mr White, there must be a substantial period of disqualification. The circumstances relevant to the period that should be imposed were submitted to be that:

(a) the contraventions found are conceded to have been of a very serious nature involving dishonesty and large losses;

(b) the contraventions were not motivated by and did not result in any personal gain. There is no finding that Mr White gained personally from the contraventions or that they were motivated by the pursuit of personal gain. ASIC's submission in paragraph 162(a) to the effect that Mr White's personal circumstances were tied to MFS's circumstances so that in that sense he had a personal incentive to commit and go along with the contraventions ought to be rejected. That was not a matter which was pleaded in the case against him as giving rise to any motive to engage in the relevant contravention. It is a matter that would necessarily have to be pleaded. No suggestion of that kind was made in the way in which the case was conducted whether pleaded or not. Nor is there any relevant finding as to a motive of personal gain or personal gain in fact;

(c) Mr White has no previous record of contraventions of the *Corporations Act* and none in the more than eight years since the events in question were found to have taken place;

(d) while he now has a conviction in New Zealand, as a result of his guilty plea, it was not suggested in that case that he had acted dishonestly. That distinction concerning the nature of the wrong doing is relevant to whether such conduct can be considered as of the same kind as that found to have occurred in this matter. It was submitted that it cannot be;

(e) the conviction in New Zealand related specifically to publication of an investment statement and a prospectus which included untrue statements. However, it arose in circumstances where there were substantial areas of factual overlap with the present proceeding. In those circumstances, he has suffered already the consequences of the conviction in New Zealand;

(f) there has been a great deal of adverse publicity in relation to the proceedings which Mr White refers to in paragraphs 10 and 11 of his affidavit. As a result Mr White has been shunned by former friends and business associates and is referred to as a "convicted criminal". He deposes to his difficulties obtaining employment as a result;

(g) the strain placed upon Mr White and his family by reason of the multitude of proceedings, the publicity and his financial ruin is clear;

(h) it is conceded that very substantial sums of money were involved;

(i) it is conceded that Mr White was in a senior position;

(j) while it is accepted that Mr White has not shown contrition in respect of the contraventions, that should not be seen as something that allows the Court to infer safely that he has a continuing propensity to act dishonestly but is rather explicable by an intention to appeal. Little weight is to be given to the absence of evidence of contrition or remorse in circumstances where the defendant proposes to appeal;

(k) while it is accepted that the activities in question were undertaken in a field in which there was potential to do great financial damage, it cannot reasonably be thought that Mr White would be likely to be employed in that field again after a lengthy period of disqualification, having regard to the publicity which the collapse of the MFS Group attracted;

(l) at the time of the contraventions Mr White was 34 years of age which, it was submitted, was a very young age to be in such a senior position. He is now aged 43 and it might be expected that he will continue to mature over time, particularly in circumstances where he deposes to feeling enormous shame and embarrassment about the plight of investors in MFS;

(m) pursuant to s 206B(l)(c) of the *Corporations Act*, Mr White became disqualified from managing a corporation for five years from 23 September 2015. It is submitted that period of disqualification is relevant given that contrary to the position in *Re Idylic Solutions Pty Ltd*, *ASIC v Hobbs*, it does reflect a judgment as to departures from the standards required of him. His disqualification is a direct result of that conviction in New Zealand. That conviction, in turn, resulted from his conduct as a director. It is a punishment which follows as a consequence of his failings as a director in relation to overlapping facts.

[122] Accordingly, his counsel submitted that the public protective purpose, the deterrent purposes as well as the punitive aspect arising from a banning order were appropriately achieved by ordering that Mr White be disqualified from managing corporations for a period of 15 years. By that time he would be 58 years of age, well through his working life and subject to the effects of the wrongdoing he has been found to have engaged in for nearly 25 years. Nor could it reasonably be expected that he would pose any continuing threat to the public. That was submitted to be an appropriate period having regard to the totality of the orders to which he is to be subjected.[103]

[123] It was also conceded that it was appropriate that a pecuniary penalty order be made that was substantial. Mr Jackson compared the circumstances of Mr Williams with those of Mr Adler in *ASIC v Adler*, pointing out that, while Mr Adler acted dishonestly and repeatedly made decisions for the purpose of personal gain, he was disqualified for 20 years while Mr Williams, who also acted dishonestly but not for personal gain, was subject to a disqualification period of 10 years. He also submitted that Mr Adler's conduct was more serious than that of Mr White and he received in total a banning order

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[103] *ASIC v Plymin (No 2)* (2003) 21 ACLC 1237 at [106], [111] and [115]; *ASIC v Vines* (2006) 58 ACSR 298 at [240] and *ASIC v Healey (No.2)* (2011) 196 FCR 430 at [227]-[228].

of 20 years, a pecuniary penalty of $450,000 and a compensation order of about $8 million.

[124] There were similar differences between Mr Collard's treatment in *Re Idylic Solutions Pty Ltd* where he was disqualified for 20 years with a pecuniary penalty order of $150,000 imposed. Again, Mr Lewski was treated quite differently from the other directors in *ASIC v APCH*.[104] He was disqualified for 15 years and ordered to pay a pecuniary penalty of $230,000.

[125] Mr Jackson submitted that the size of the compensation order should also be taken into account in setting the appropriate pecuniary penalty and argued that the sum of $300,000 was appropriate in the circumstances, particularly when regard was had to the length of the disqualification order it was submitted should be made, the extent of the compensation order and the likely costs order. The effect on Mr White over the previous 10 years of these proceedings, his previously unblemished career and his prospects generally were also said to be relevant to the objective of personal deterrence in setting the pecuniary penalty at that amount.

[126] Mr White did not oppose the making of the proposed compensation order and submitted that he should pay less than 70% of ASIC's standard costs because of the limited part he took in the proceedings. The submission was that Mr White's involvement in the trial involved less expense for ASIC than that of any other defendant. By the same token proof of Mr White's activities was a very significant central element of the evidence in the case.

Conclusions concerning Mr White

[127] Mr White's central involvement in all four of the courses of conduct, namely the misappropriation of the $103 million in November 2007, $17.5 million in December 2007 and then in the creation and use of the false documents where the sums misappropriated were trust moneys call for very significant punishment. ASIC submitted, in my view correctly, that he has demonstrated a reckless disregard for his responsibilities as a company director in the group. His conduct is within the most serious category and I agree that, having regard to the comparative decisions and the issue of parity with the other defendants, a permanent disqualification order is appropriate. I say this in spite of his relative youth at the time when he was 34.

[128] His involvement in each of the four courses of conduct makes the proposed pecuniary penalty of $650,000 appropriate. It was submitted for him that $300,000 was sufficient but, having regard to the seriousness of the conduct over a significant period, it is my view that the figure proposed by ASIC is appropriate.

[129] The fact that he has been disqualified in New Zealand related to earlier but associated conduct does not persuade me that this conduct should not attract a disqualification and penalty of the nature sought. The New Zealand disqualification from managing a

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[104] (2014) 322 ALR 45.

corporation was for five years from his conviction there but related to separate conduct about the prospectus issued in New Zealand in September 2007.

[130] While Mr White did not derive anything from his conduct personally, apart perhaps from a hope that the transactions would help keep MFS afloat, the latter was not an issue that was litigated at the main hearing, in Mr Jackson's submission, and should not affect my decision. It does seem to me, however, to be a legitimate response by ASIC to the submission that the defendants did not benefit personally here.

[131] His behaviour is, in any event, very serious and involves much larger sums of other people's money than Mr Adler's conduct, even accepting that it occurred around the year 2000. I cannot accept that the comparison with Mr Adler's conduct is such as to warrant less than a complete disqualification and a penalty of the nature proposed by ASIC. No two cases are likely to be completely comparable but the outstanding feature of this one is the large amount of trust money that was misappropriated. That warrants very serious punishment and careful attention to the protective aspect of a disqualification order and the punitive nature of the penalty ordered.

[132] Although his counsel took a very limited part in this proceeding in respect of the reception of evidence because of his involvement in the New Zealand proceedings, nevertheless, the vast majority of the evidence led was relevant to the case against him so that the 70% of costs sought, less than the 80% sought against Mr Anderson and Mr Hutchings, seems to me to be appropriate. As ASIC submitted, but for his limited involvement in the trial generally, he would have been likely to be responsible for close to 100% of the costs because of his involvement in so much of the conduct. Accordingly, I shall disqualify Mr White permanently from managing any corporation and order that he pay the Commonwealth of Australia a pecuniary penalty of $650,000 and pay compensation and costs as sought by ASIC.

Relief sought against Mr Hutchings

[133] Mr Hutchings was found to have engaged in conduct contravening three of the four courses of conduct identified by ASIC, namely, the $17.5 million payment where seven contraventions occurred, the creation and keeping of the false documents, where he was involved in 60 contraventions, and the use of the false documents, where he was involved in 21 contraventions.

ASIC's submissions

[134] ASIC's summary of my findings was as follows:

(a) it should have been apparent to Mr Hutchings by the time of his conversation with Mr White on 20 December 2007 that there had been no determination of what it was that PIF was said to have acquired for the $130 million payment;

(b) nevertheless, Mr Hutchings agreed to pay out a further $17.5 million from PIF to an MFS Group company;

(c) Mr Hutchings also agreed to and participated in the preparation and execution of documents in late January and early February 2008 which he knew were at odds with what had actually occurred in late November 2007;

(d) by 17 January 2008 Mr Hutchings considered that MYF's only investment at that stage was $2.1 million in PacFin notes;

(e) during the period between provision of the listing of loans spreadsheet and the preparation of the documents purporting to record the relevant transactions, Mr Hutchings was involved in the provision of misleading information to RBS about the use of the funds drawn from its facility;

(f) Mr Hutchings knew that there was no meeting of the IAC on 30 November 2007 as recorded in the false documents. He knew that there was no offer of class A units in MYF dated 1 November 2007. He knew there was no submission to the IAC for MYF or PIF proposing the issue of 100 million class A units in MYF;

(g) Mr Hutchings signed loan participation agreements which on their face appear to have been entered into before 31 December 2007, when no agreement had been reached in fact before February 2008, if at all, as to what loans would be participated in and in what amounts. These loan participation agreements conveyed a false impression of the dates the particular agreements had been reached and documented. The documents were drawn as if agreements had been made which were presented to the MFSIM Board in that form.

[135] ASIC also referred to my unwillingness to accept that Mr Hutchings could not distinguish between the ratification agreements previously made and misrepresentation of documents as previously made agreements. I decided that it should have been clear to Mr Hutchings that there had been no such transactions before 31 December 2007 so that, in approving them, he knew that they were false.

[136] The conclusion that he intended that they would form an apparently genuine part of MFSIM's financial books and records was also obvious as was the conclusion that he knew they would become available to the auditors. He also knew that the board was being informed that the IAC had considered and approved the transactions in November 2007 when in fact that had not occurred.

[137] He knew that the $130 million payment to the extent of the $103 million payment and the $17.5 million payment had not been invested in accordance with PIF's constitution. Therefore, it followed that he was involved in the keeping of the false documents contrary to the duty imposed by s 286 to keep correct financial records and the same applied to the information provided by him to RBS, the MFSIM board and the compliance branch of MFS Limited.

[138] He was the defendant most heavily involved in the creation, keeping and use of the false documents and the associated contraventions. Of all the defendants he was implicated in the largest number of contraventions. He was a senior manager as Chief Executive

Officer of MFSIM and a director of that company but acted under the general direction of Mr White.

[139] He was born on 1 June 1963. In November 2007 he was 44 and he is now 53.

[140] ASIC submitted that the matters relevant to his disqualification, having regard to the categorisation of Santow J in *ASIC v Adler*, were:

(a) the nature of the breaches, which:

(i) were very serious and deliberate;

(ii) involved repeated acts of dishonesty;

(iii) involved very substantial sums of money;

(iv) were taken with a view to benefitting other parts of the MFS Group; and

(v) involved the misuse of investors' money held on trust by MFSIM;

(b) the senior position of Mr Hutchings within MFSIM as CEO and director of the company;

(c) the losses occasioned to the investors in PIF by reason of the contraventions;

(d) in any event, the risk that investors were put to by the payment of such substantial sums of trust money in circumstances where Mr Hutchings did not know what (if any) transactions might in the future be entered into for the purported benefit of PIF's investors; and

(e) Mr Hutchings has not displayed any contrition or remorse.

[141] ASIC also submitted that, although Mr Hutchings did not personally directly gain from the contraventions, as MFSIM CEO and director he had an obvious and urgent interest in ensuring that the wider group remained afloat and that any payments from PIF's trust moneys did not reflect poorly on him as CEO.

[142] He has no previous record of contraventions of the *Corporations Act*. ASIC also submitted that there was nothing in his affidavit sworn for the purposes of the penalty proceedings to suggest that he was remorseful or had gained any sort of insight into the unacceptable nature of his conduct. This submission was also that, as he had apparently not managed to gain such insight despite proceedings of this nature, that strongly suggested that a lengthy period of disqualification was appropriate. He said in his affidavit that the concept of being accused of not acting in the interests of investors and of dishonesty was completely at odds with his professional ethics, which ASIC argued reflected a continuing refusal to accept that it was not the accusations which have led to the impacts on his life but his own conduct. ASIC submitted that he continued with the same steadfast refusal to accept that he did anything wrong as he displayed at the trial.

[143] It submitted that the period of disqualification relating to the $17.5 million payment should reflect those imposed on Mr White and Mr Anderson, namely a period of 20 years.

In respect of the creation of the false documents, ASIC submitted that an appropriate period of disqualification was 10 years, pointing out that the creation of the false documents did not of itself result in loss to PIF. ASIC also submitted that Mr Hutchings, though the CEO of MFSIM, was in large part acting under the direction of Mr White and Mr Anderson in relation to the creation of the documents.

[144] The submission in respect of the course of conduct relating to the use of the false documents was that an appropriate period of disqualification was 15 years because of his intimate involvement in many aspects of the course of conduct relating to their use, the fact that he was the senior officer of MFSIM and knew that he was misleading both internal and external parties.

[145] Applying the totality principle and having regard to the extent of the nature and seriousness of the contraventions found against him, ASIC submitted that Mr Hutchings should be disqualified from managing corporations for 25 years. That was put on the basis that the period should be less than that for Mr White overall but should, nevertheless, be considerable.

[146] It was submitted that he did not express any contrition in the penalty proceedings and displayed no recognition of the wrongfulness of his conduct or remorse for the impact which it had on the investors in PIF. ASIC argued that his conduct fell within the category reserved by Santow J for the longest period of disqualification and that there was a continuing substantial risk to others if he were permitted to continue as a company director, he having proven himself to be neither honest nor competent. His lack of insight also suggested that he could engage in similar activities in the future if he was put in a position of corporate management with the potential for him to again cause great financial damage to others.

[147] The numerous contraventions in respect of those three courses of conduct led, ASIC submitted, to the need to assess three separate penalties. The submission in respect of the penalty for the $17.5 million payment was that it should be $200,000 recognising that his conduct encompassed not only approving the payment but also failing to act to ensure that PIF's constitution was followed when it was made.

[148] The submissions also were that the penalty of $200,000 reflected:

(a) the dishonest nature of the course of conduct;

(b) the senior position of Mr Hutchings within MFSIM;

(c) the very significant sum involved;

(d) the fact that the money paid was held on trust for investors in PIF;

(e) the fact that the $17.5 million payment was approved by Mr Hutchings at a time when Mr Hutchings professed concern about not knowing why the $130 million payment was made in November 2007;

(f) the obvious lies told by Mr Hutchings during the course of his evidence about this course of conduct;

(g) the lack of remorse or contrition;

(h) the need for an appropriate penalty to serve the purpose of general deterrence. Mr Hutchings' conduct occurred over a period of some weeks. It involved the deliberate creation of documents known to be false in order to justify multi-million dollar payments that had been made from trust funds some months before. That calls for a significant penalty to meet the objects of general deterrence;

(i) that notwithstanding the dishonest nature of his conduct, Mr Hutchings' penalty in respect of this course of conduct ought to be somewhat less than that of Mr White: although Mr Hutchings approved this payment, he did not instigate it.

[149] In respect of the creation and keeping of the false documents, ASIC submitted that an appropriate penalty was $110,000, somewhat less than the penalty proposed for Mr White because of Mr White's instigation of the false documents with Mr Anderson. It was also pointed out that Mr Hutchings supervised Ms Watts and Ms Platts, signed seven of the documents and was the person who finally approved the suite of false documents so that he should have a higher penalty in respect of this course of conduct than Ms Watts and a lesser penalty than each of Mr White and Mr Anderson.

[150] In relation to the use of the false documents, ASIC submitted that a penalty of $90,000 was appropriate. That was the highest of all of the defendants in relation to this course of conduct because Mr Hutchings was the most involved in their specific use in relation to:

(a) making them available to the auditors;

(b) sending false information to RBS;

(c) sending false information to Compliance;

(d) providing false information to the MFSIM Board; and

(e) the signing and lodgement of half yearly reports that did not reflect the true state of PIF's financial affairs.

[151] The total of those suggested pecuniary penalties was $400,000 and ASIC submitted that the application of the totality and parity principles should not reduce it because, having regard to the relevant positions of the defendants, this suggested total penalties of less than those against Mr White and Mr Anderson but higher than the penalty against Mr King because Mr King was only involved in one course of conduct.

[152] The compensation order sought against Mr Hutchings only related to the $17.5 million payment. It also should follow that he be ordered to pay interest of $10,639,070 to the first day of the penalty hearing.

[153] In respect of costs, ASIC pointed out that Mr Hutchings was not found to have contravened the *Corporations Act* in relation to the $130 million payment but, nevertheless, in order to prove the falsity of the later transactions, it was necessary for ASIC to prove the circumstances of the $130 million payment and $103 million payment

in the case against him. Unlike Mr White's counsel, Mr Hutchings' counsel did engage in extensive cross-examination of ASIC's witnesses and he was the defendant most intimately involved in the false documents part of the case both as to their creation and use. In those circumstances, ASIC submitted that the appropriate order was for Mr Hutchings to pay 80% of ASIC's standard costs being slightly more than the proportion proposed against Mr White to reflect Mr White's lesser involvement in the conduct of the trial and the admissions made by him and the same order as ASIC submitted should be made against Mr Anderson.

Submissions for Mr Hutchings

[154] The written submissions for Mr Hutchings focussed on the absence of similar misconduct by him in the past and the submission that there was no real prospect of a repetition of his contravening conduct. Mr Hutchings accepted, given the serious nature of the contravention, that a disqualification order was appropriate but submitted that the period of 25 years sought by ASIC was oppressive, not taking into account any of the mitigating factors set out in his affidavit dated 15 September 2016.

[155] In summarising that affidavit his counsel said:

> "6. Hutchings has and continues to be significantly affected by these proceedings and their outcome. As described in his affidavit, the proceedings have impacted on Mr Hutchings standing amongst his professional colleagues and in the wider community. The reputational damage to Mr Hutchings and the effect that it has had on him and will continue to have on him, is extremely significant. Mr Hutchings lost employment that he held following the collapse of MFSIM and has been unable to secure alternative employment. He has not held any kind of employment position since December 2012 and has not earned any income since that time. … The proceedings have had a very substantial impact on Mr Hutchings' family (his wife and three children). His wife became ill during the course of the proceedings and they were forced to sell the family home. …
>
> 7. Mr Hutchings did not derive personal benefit from his conduct. ASIC did not allege nor prove that he had a financial interest which motivated his conduct. .".[105]

[156] In response to the submission by ASIC that there was nothing in Mr Hutchings' affidavit to suggest that he was remorseful or had gained any sort of insight into the unacceptable nature of his conduct, the submission was made that his expressions of regret and devastation about what happened at para 22 of his affidavit were not the words of someone who was not remorseful or who had not been affected by the proceedings. Similarly to others of the defendants the criticism that he has not acknowledged wrongdoing was said to be offset by his consideration of an appeal against the decision

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[105] Para 6 and para 7 of Sixth Defendant's submissions on Penalty and Final Order.

so that the fact that he had not acknowledged wrongdoing should have limited relevance to the penalty imposed.

[157] His lack of a previous record of contravention of the *Corporations Act* and the fact that he was in large part acting under the direction of Mr White and Mr Anderson in relation to the creation of the documents should lead, it was submitted, to the conclusion that he did not pose a continuing, substantial risk of engaging in similar activities in the future if put in a position of corporation management. It was submitted that his conduct occurred in a crisis situation where the future of MFSIM and PIF was very much in doubt and Mr Hutchings was working extreme hours in circumstances of extreme stress to try to remedy the situation, one that he had never encountered before. As against that, ASIC submitted that the $17.5 million payment occurred in December 2007, several weeks before the episode known as "Black Friday" in early 2008.

[158] I was urged to conclude that Mr Hutchings was motivated by the desire to save PIF and protect its unitholders rather than for any personal gain. It was submitted that it would have been far easier for him to resign in January 2008 when he could not obtain a satisfactory answer about how PIF's funds had been used. I was asked to have regard to the crisis that was engulfing MFSIM and PIF at that time and the heightened risks of errors of judgment being made by otherwise responsible, hardworking and ethical people like Mr Hutchings with no prior history of professional misconduct. Reference was made to the principle that the penalty imposed should not be greater than is necessary to achieve the object of deterrence, otherwise it would be oppressive.[106]

[159] Mr Hutchings was said not to have any assets and no means to pay any substantial pecuniary penalty. The conclusion sought was, therefore, that there was no utility in imposing a pecuniary penalty and one should not be imposed. That does not, to my mind, square with the objects of general deterrence as I have explained earlier. The submission was also made that the imposition of a disqualification order, taken together with the declaration of contravention itself, was, in the circumstances of this case, sufficient to achieve the objective of general deterrence in the case of Mr Hutchings given the evidence of the effects of the events on him, the difficulties faced by his family, including the health of his wife, and his substantial personal financial losses. These were said to militate against the imposition of any further punitive orders.

[160] The compensation order seeking payment of $17.5 million plus interest of $10,639,070 was said to serve no real utility given that he could not possibly pay that sum. He was also said to be not responsible for the period of delay in the conclusion of the matter so that no order as to interest should be imposed.

[161] The order for costs sought by ASIC was said to be inconsistent with the general approach to costs to the proceedings set out in its submissions where Mr Hutchings' contraventions did not relate to the biggest loss suffered by PIF and MSFIM, the $130 million payment. The greater role in the conduct of the proceedings was said to have stemmed in part from

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[106] See *ASIC v Donovan* (1998) 28 ACSR 583, 608 and *Re HIH Insurance Ltd (In prov liq); ASIC v Adler* (2002) 42 AcSR 80, 114 at [125].

Mr White's inability to participate actively in the proceedings because of the pending New Zealand criminal action against him. The submission for him was that, since ASIC has succeeded against all defendants and all had been parties since the commencement of the proceedings and were separately represented that ASIC's costs should be paid by equal contributions by each of them, namely 20 per cent each.

Conclusions concerning Mr Hutchings

[162] Mr Hutchings' lack of insight into the nature of his behaviour and its seriousness was criticised by ASIC, it seems to me rightly. The $17.5 million payment was sufficiently serious to justify a compensation order of $200,000.

[163] ASIC submitted that the penalty proposed of $110,000 for his involvement in the creation and keeping of the false documents and $90,000 in respect of their use recognised his lower position in the hierarchy than Mr White and Mr Anderson but his closer involvement in the use of the false documents. Dr Moore QC submitted orally for ASIC that to deliberately create documents knowing that they are false, when those documents relate to the use of more than $100 million of trust money, is one of the most serious examples of deliberate dishonest conduct one could imagine. He characterised this as one of the most deliberate dishonest conduct cases that the courts have ever seen, one which could not be characterised as a mistake.

[164] Despite that I am persuaded that the $400,000 figure should be reduced having regard to issues of totality and parity. Although it puts him below Mr White and Mr Anderson as ASIC submitted and above Mr King, it does not seem to me to reflect adequately the fact that he was not involved in the first course of conduct related to the $103 million payment and his lower position in the corporate hierarchy, even having regard to the fact that he was the CEO of MFSIM and a director of that company with significant responsibilities for its management. It seems to me that an appropriate penalty order for Mr Hutchings is $350,000.

[165] The disqualification period advocated by ASIC of 25 years does, however, seem to me to be appropriate having regard to the number and variety of the contraventions with which he was involved, his failure to take responsibility for his conduct and the risk that, in my view, would be posed to the public should he be allowed to manage a corporation.

[166] His involvement in the payment of $17.5 million from PIF's funds to PacFin occurred well before the events of Black Friday in January 2008, contrary to the submission that the pressure of those events affected the nature of his conduct.

[167] The submission that he should not pay interest I have rejected earlier in these reasons. He also submitted that he should pay only 20% of the costs on the basis that the costs should be paid by equal contributions by each of the defendants. I reject that as an approach although, of course, the order proposed recognises that ASIC cannot recover more than its costs of and incidental to the proceedings on the standard basis against the defendants' overall.

[168] It is more appropriate to consider the costs on the basis of how much of ASIC's case against him required proof of all the evidence led. Having regard to the fact that he was not involved in the $130 million or $103 million payments involved in the first course of conduct but to the fact that it was necessary to lead some evidence about those issues in the case against him in respect of the false documents cases against him, it seems to me more appropriate to order that he be liable for 70% of the costs rather than the 80% sought by ASIC.

Relief sought against Mr Anderson

[169] Mr Anderson, like Mr White, was found to have engaged in conduct contravening each of the four courses of conduct identified by ASIC. There were 11 contraventions related to the $130 million payment, eight in respect of the $17.5 million payment, 16 in relation to the creation of the false documents and eight in respect of the use of the false documents.

ASIC's submissions

[170] ASIC summarised my findings as follows:

(a) the need for the listing of loans document was precipitated by the need to prepare some explanation for the auditors and RBS of what happened with the money drawn down from PIF's RBS facility;

(b) Mr Anderson was aware that funds had gone from PIF improperly, with nothing in place to justify their payment out;

(c) Mr Anderson knew that the $147.5 million had been paid out wrongly from PIF, and that the formalities associated with the $130 million payment had not been met;

(d) Mr Anderson knew that PIF was the source of the funds for the $130 million payment in November 2007, but expected that Mr White would put some explanation in place for the payment. In his role as CFO for MFS Group, it was incumbent on him to ensure that there was a transaction in place for the payment out from PIF s funds to protect the interests of investors;

(e) Mr Anderson was not acting on only one side of the transaction: he owed significant duties to the investors in PIF as CFO of MFSIM and he should have made sure their investment was protected;

(f) Mr Anderson knew that there was no purpose of PIF that existed at the time of the payments to justify them;

(g) even if Mr Anderson did not know initially of the source of the funds for the $130 million payment (which the court did not accept), he clearly became aware of it later and then did nothing except to participate in a fraudulent scheme to disguise the reason for the payment, thus becoming knowingly involved in MFSIM's contraventions;

(h) in relation to the $17.5 million payment, Mr Anderson knew its provenance from PIF and that it was wanted urgently to assist in PacFin's cash flow issues;

(i) Mr Anderson was on notice even more to ensure that the $17.5 million was paid for PIF s purposes, not those of PacFin, and in failing to do so Mr Anderson breached his duty to act honestly; and

(j) as one of the creators of the listing of loans documents and the giver of instructions to Mr Stride, Mr Anderson was knowingly involved in those contraventions relating to the creation of the false documents.

[171] ASIC also described Mr Anderson, together with Mr White, as the architect of the scheme set out in the false documents which had their genesis in the listing of loans document. He was described as acting dishonestly and being involved in the provision of the false documents to RBS and to the auditors. It was submitted further that he did not act honestly in knowing that compliance had been given false information and failing to correct it.

[172] He was born on 27 September 1959 so that in November 2007 he was 48 and is now 57.

[173] The following matters were said by ASIC to be relevant to the issue of disqualification so far as they concerned Mr Anderson:

(a) the nature of the breaches, which:

(i) were very serious and deliberate;

(ii) involved repeated acts of dishonesty;

(iii) involved very substantial sums of money;

(iv) were taken with a view to benefitting other parts of the MFS Group; and

(v) involved the misuse of investors' money held on trust by MFSIM;

(b) the senior position of Mr Anderson within the MFS Group, as Group CFO with considerable control over the financial dealings of the Group;

(c) Mr Anderson's long experience as an accountant, registered liquidator and certified fraud examiner. Notwithstanding those qualifications and that experience, he nevertheless engaged in the conduct the subject of the proceedings;

(d) the losses occasioned to the investors in PIF by reason of the breaches;

(e) in any event, the risk that investors were put to by the payment of such substantial sums of trust money in circumstances where Mr Anderson did not know what (if any) transactions might in the future be entered into for the purported benefit of PIF's investors;

(f) Mr Anderson has not displayed any contrition or remorse;

(g) Mr Anderson did not personally directly gain from the contraventions, although as a person having a substantial interest in the MFS Group (which he has described himself as totalling about $10 million in MFS shares and options and further investments in MFS related products of about $4 million) and being the Group CFO, he had an interest in ensuring that the MFS Group did not default on its Fortress obligations;

(h) Mr Anderson has no previous record of contraventions of the *Corporations Act* although he was convicted in New Zealand in September 2015 of breaches of the *Securities Act* 1978 (NZ).

[174] His affidavit filed in these penalty proceedings was said to demonstrate a singular lack of remorse for his actions with nothing suggesting that he recognised the manner in which his behaviour fell far below that expected of an officer in his position. There was said to be no expression of acceptance of his role in the whole affair or that his conduct might involve an element of blameworthiness. Nor was there said to be any contrition or indication that he had an appreciation of the nature of his conduct which could allow me to conclude that there was a likelihood of his reformation. His lack of insight was described as startling. He emphasised his own losses as well as those of the investors but said nothing to indicate that he took any personal responsibility for his part in the collapse. It was pointed out that the Companies Auditors and Liquidators Disciplinary Board had cancelled his registration because of his failure to comply with a "serious statutory obligation" and did not accept his "misconceived" approach to maintaining his registration without complying with the usual statutory obligations.

[175] This failure, in ASIC's submission, by Mr Anderson to accept his own part in the losses caused to PIF led to the significant prospect that he could engage in similar activities or conduct in the future. Given his extensive experience in the field of financial management, ASIC submitted that was a factor which would indicate a very lengthy period of disqualification was warranted. His conduct resulted in very large losses to investors in respect of those investors' funds and involved repeated acts of dishonesty as well as a deliberate attempt to cover up the true nature of events in 2007.

[176] ASIC submitted that his period of disqualification in relation to the $130 million payment ought to be the same of Mr King's, 20 years, and that the same period should apply to his involvement in the $17.5 million payment. In respect of the creation and keeping of the false documents, ASIC submitted that an appropriate period of disqualification was 10 years because of the fact that the creation of those documents did not of itself result in losses to PIF and because he was less involved in their creation than Mr Hutchings so that a lesser period of disqualification was sought than in relation to him. The period of disqualification sought in respect of the use of the false documents was 15 years given that they were created for the purpose of misleading people both internal to MFSIM such as its Board and Compliance section and external, such as RBS and the auditors. Taking into account the extent, nature and seriousness of the contraventions found against him, as well as the totality principle, ASIC submitted that Mr Anderson should be disqualified from managing corporations for 25 years.

[177] After detailing the number of contraventions Mr Anderson had been party to, ASIC repeated its submission that this was not a case where the court was obliged to apply the course of conduct principle if the resulting penalty failed to reflect the seriousness of the contraventions and argued for penalties of $200,000 in respect of the $130 million payment course of conduct; the same amount in respect of the $17.5 payment course of conduct; and sums of $150,000 and $60,000 in respect of the creation and keeping of the false documents and in respect of their use.

[178] Because of the magnitude of the dishonest appropriations from trust funds that Mr Anderson as an officer of the responsible entity was involved in and because he owed higher duties than an ordinary director, he was said to be deserving of condign punishment. His acting dishonestly for the benefit of the other companies in the corporate group at the expense of the investors in PIF resulted in very significant loss for them. The penalty proposed for the $130 million payment was said to be less than that proposed for Mr White and Mr King because Mr Anderson was less involved in the details of the transaction. The same penalty was submitted as appropriate in respect of the $17.5 million payment course of conduct because both courses of conduct involved dishonesty resulting in a very significant loss to PIF.

[179] His involvement in the creation and keeping of the false documents was submitted to be roughly similar to that of Mr White as the "creative brain" that Mr White sought. He was the initial creator of the listing of loans document and was present at the meeting with Mr Stride at which instructions were given for the creation of the false documents. He was less involved in the use of the false documents than Mr White hence a lesser penalty was proposed in respect of that course of conduct.

[180] The total derived from those figures submitted by ASIC would be $610,000 which ASIC submitted should be reduced having regard to the totality of his behaviour and questions of parity to $500,000 on the basis that his conduct was, relatively speaking, less serious overall than that of Mr White, but more serious than that of Mr Hutchings, particularly because of the absence of contraventions against Mr Hutchings in relation to the $130 million payment.

[181] As he was involved in the courses of conduct relating both to the $130 million payment as well as the $17.5 million payment it was said to be appropriate that he be ordered to compensate PIF in the sum of $125,717,563 together with interest of $76,429,635 to the first day of the penalty hearing.

[182] The proportion of the costs sought against Mr Anderson, since he was involved in all four courses of conduct and maintained a much more active participation in the proceedings by cross-examination of ASIC's witnesses and was another central player in the case, led ASIC to submit that it was appropriate that he be ordered to pay 80% of ASIC's standard costs of and incidental to the case, slightly more than Mr White and the same as Mr Hutchings.

Submissions for Mr Anderson

[183] The submissions for Mr Anderson focussed on the period of disqualification and the aggregate pecuniary penalty. No submissions were made for him in respect of the amount of the compensation order sought by ASIC or the proportion of the costs.

[184] The submissions by his counsel in respect of the period of disqualification were that it should be for a period of 10 years. ASIC's submissions were said to have failed to take adequate account of the fact that he had had a lengthy and successful professional and business career without blemish, apart from the contraventions, where there was no suggestion that he gained in any way personally from the contraventions.

[185] It was also said that, because of the significant impact on his professional and personal life from the collapse of MFSIM and the ongoing fallout of these proceedings it could not be said that there was any real prospect that he would reoffend. His age and serious health issues led to the submission also that disqualification for 10 years was more than adequate to protect the public and serve as an appropriate deterrent, both general and specific.

[186] The relevant considerations for any order to be made against him for disqualification were said to be:

(a) the purpose of a disqualification order is to protect the public from present or future harmful use of the corporate structure or use contrary to proper commercial standards;

(b) a disqualification order also has the purpose of achieving personal and general deterrence;

(c) the interest of the public is paramount, but not the sole consideration;

(d) the degree of seriousness of the contraventions and the loss suffered as a result of the contraventions;

(e) whether the contraventions were engaged in with dishonesty, intent to defraud or to enrich the defendant;

(f) the propensity that the defendant may engage in similar conduct in the future and the likely harm that may be caused to the public;

(g) contrition and the prospect that the defendant may reform; and

(h) the necessity to balance the personal hardship to the defendant against the public interest and the need for protection of the public from any repeat of the conduct.

[187] The seriousness of his contraventions and the dishonesty associated with them were recognised but the other relevant considerations, including his otherwise unblemished career, the lack of personal gain and the substantial professional, financial and personal fallout from the MFS collapse and these proceedings, coupled with his poor health and age and his acknowledgement of the consequences suffered by MFS investors and his distress at that, with a lack of a real prospect of him reoffending should lead to the 10 year disqualification order submitted.

[188] My attention was drawn to the decision in *ASIC v Lindberg*[107] where Robson J took into account the effect of delay and the deterioration in the defendant's health during the period of that delay before the imposition of penalties. The manner in which his Honour took those considerations into account is not immediately apparent. It was submitted, however, that it was appropriate for me to take such matters into account for Mr Anderson.

[189] His counsel accepted that he had made no formal statement of contrition but also referred to his intention to appeal the findings made against him. They also made the point that the absence of contrition does not lead to an increased penalty; it is only a mitigating factor. Mr O'Brien also drew attention to the assistance he had provided to the administrators and liquidators after the collapse of the MFS Group.

[190] It was submitted that, although Mr Anderson did not gain personally and directly from the contraventions, I should reject ASIC's submission that he had a personal incentive to commit and go along with the contraventions because of his financial interest in MFS Group's circumstances. That was said not to be a part of ASIC's pleaded case or its case as prosecuted that Mr Anderson acted with such base and improper motives. As I have said in respect of the other defendants, however, it seems to me to be a legitimate response by ASIC at this stage of the proceedings to the submission that he did not gain personally from the contraventions to point out that he had an interest in keeping the Group going.

[191] In respect of a pecuniary penalty an amount of $200,000 was said to be appropriate for Mr Anderson. ASIC's proposal of $500,000 was said to fail to reflect the proper application of the course of conduct principle on the basis that, properly analysed, there were two courses of conduct, relating to the $130 million payment and the $17.5 million payment with the false documents and their use being "part and parcel of those two transactions". I have previously rejected that approach.

[192] It was also submitted that the proper application of the totality principle required the pecuniary penalty imposed to be considered against any disqualification or compensation order at the same time so that the imposition of a fine of $500,000, a compensation order of $202,147,198 together with costs and a lengthy disqualification order, whether 10 years or 25 years, was, on any view, excessive. In that context reference was made to *ASIC v Vines*[108] where the Court treated the amount of a compensation order as relevant to the making of pecuniary penalty orders and counsel contrasted that with the decision in *Matcham.*[109] I have previously expressed my preference for the approach adopted by Jacobson J in *Matcham*.

[193] Dr Moore for ASIC also submitted that, in the circumstances of this case, the effect of compensation, even if taken into account when determining pecuniary penalties and the

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[107] [2012] VSC 332; (2012) 91 ACSR 640 at [111]-[116].

[108] [2006] NSWSC 760; (2006) 58 ACSR 298 at [240].

[109] See *Registrar of Aboriginal and Torres Strait Islander Corporations v Matcham (No 2)* [2014] FCA 27; (2014) 97 ACSR 412, 447 at [289].

length of disqualification, should have very little impact at all given the inherent likelihood that none of the defendants would pay compensation but rather would become bankrupt.

[194] In summarising their submission on this topic, Mr Anderson's counsel accepted that a pecuniary penalty order may go some way to achieve the purpose of general deterrence but submitted that, balanced against this were these considerations:

(a) for the reasons submitted above, there is no need to deter Mr Anderson personally from contravening the Act in the future or to protect the public from Mr Anderson (and certainly no need beyond a 10 year disqualification);

(b) for the reasons submitted above, the length of the disqualification order and the size of the compensation and costs orders serve as a very public and powerful general deterrent;

(c) Mr Anderson has access to savings of less than $20,000 and expects to be reliant on his family for financial support based on current circumstances;

(d) Mr Anderson has not worked for some time and will find it difficult to do so given his very poor health, damage to his reputation and absence from the workforce;

(e) the effect of a disqualification order will be to restrict Mr Anderson's ability to pay any pecuniary penalty order. Put simply, the combined effect of both orders will be to create a debt on the one hand, but restrict the ability to pay it on the other hand;

(f) the compensation order will invariably result in Mr Anderson's bankruptcy given his current financial resources;

(g) Mr Anderson has been ordered to pay a fine of A$100,000 as a result of his prosecution by New Zealand authorities; and

(h) accordingly, there is very little prospect of Mr Anderson being able to pay any pecuniary penalty.

Conclusions concerning Mr Anderson

[195] Mr Anderson was involved in all four courses of conduct and was in a responsible position where his experience and training qualified him for the role but where he was involved in very serious misconduct.

[196] The submission that he should be disqualified for only 10 years is misconceived. Nor do his health issues affect the protective nature of the order that must be made. That period is not consistent with the comparable decisions referred to earlier, nor can it appropriately be said that he was involved in only two courses of conduct, something I have also discussed earlier.

[197] Again I am not confident that he accepts responsibility for his conduct or that he presents no real prospect of reoffending. General deterrence also requires a significant penalty order to be made for the reasons expressed earlier.

[198] The order sought that he pay 80% of ASIC's costs was not resisted nor was the compensation order. In the circumstances, the disqualification of 25 years and the pecuniary penalty proposed of $500,000 seem to me to be appropriate.

Relief sought against Ms Watts

[199] Ms Watts was found to be knowingly concerned in nine of MFSIM's contraventions of s 601FC(5) relating to the creation and use of the false documents. She was found to have created or to have helped create six of the 15 false documents, principally the submissions and minutes of meetings that she knew did not occur and which she knew would be provided to the auditors. She was not involved in the misappropriation of PIF's funds and so is in a different position to each of the other defendants. Nor was she alleged to have been an officer of MFSIM or any other relevant company and no loss was alleged to have flowed to PIF by reason of her contraventions. She held a senior position as a fund manager of PIF but had conceded that she was uncomfortable with backdating the documents and said that she should not have participated in drafting them.

ASIC's submissions

[200] The findings relied on by ASIC for its submissions were:

(a) Ms Watts knew that the $150 million drawdown occurred on the day it occurred and that PIF paid $130 million straight from its own bank account to MFS Administration's account;

(b) there was no transaction then in place to justify that payment out to MFS Administration;

(c) the documents that Ms Watts assisted in preparing record that the decision to make the investments on behalf of PIF was made by Mr White and Mr Hutchings. However, she knew that Mr Hutchings had not made any decisions in November 2007, contrary to the false suggestions in the documents she helped draft;

(d) Ms Watts knew that the date on each of the three submissions from her to the IAC dated in November 2007 was false and she knew that there were no such submissions to the IAC and no meetings of the IAC as recorded in the minutes dated 21 and 23 November 2007;

(e) Ms Watts was involved in providing false documents to the auditors and sending false information to RBS; and

(f) although Ms Watts played a lesser role in the MFS Group than the other defendants, she had a senior role as a fund manager (for which she was paid an annual salary of $200,000) that required her to act in the investors' interests. On any analysis, she did not do so. When it became obvious to her that the investors' funds had not been

used for investments, she participated in a scheme to hide that fact by falsifying documents.

[201] She was born on 23 October 1960 so that in November 2007 she was 47 years of age and is 56 now.

[202] The matters relied upon by ASIC in respect of its submission that she should be disqualified from managing a corporation were:

(a) the nature of the contraventions, which:

(i) were serious and deliberate;

(ii) involved dishonesty;

(iii) involved the falsification of documents to hide the fact that a substantial amount of the scheme money had not, in fact, been used for PIF investments;

(b) albeit that Ms Watts, as fund manager, was not a director or other officer of the responsible entity, her position involved a direct responsibility to act in the interests of scheme members, and she knew that the responsible entity had a duty to act in the best interests of scheme members;

(c) the fact that Ms Watts recognised in her evidence that she should not have participated in drafting the documents and that she recognised that she was "uncomfortable" in doing it;

(d) although Ms Watts did not personally directly gain in a monetary sense from the contraventions, as with the other defendants her conduct can be characterised as seeking to ensure the continued operation of the MFS Group and thus her own continuing employment; and

(e) Ms Watts has no previous record of contraventions of the *Corporations Act*.

[203] ASIC submitted that her circumstances fell towards the lower end of the middle class of cases described by Santow J in the categories he described in *ASIC v Adler*. They submitted that there was a significant element of dishonesty in her conduct taking place over the course of a number of weeks. She deliberately sought to mislead RBS by providing false information and knew that the auditors likewise would be misled by the documents that she helped to create.

[204] Her evidence that her conduct was not lengthy or sustained was challenged by ASIC on the basis that the evidence demonstrated that she was involved in the creation of the false documents from at least 3 January 2008 and that her involvement in their creation and use continued throughout January and February 2008. Accordingly, it was described as a sustained course of conduct over a number of weeks with the intention of creating documents to mislead the auditors and RBS.

[205] Accordingly, ASIC's counsel submitted that this was an example of a serious and deliberate course of dishonest conduct. Against that, they conceded, she appeared to have

shown some insight into the fact that she should not have participated in the drafting of the documents and said that in hindsight she should have responded by saying that she did not want her name on these papers at all and was sorry that she had put her name on them. That, ASIC conceded, gave at least some hope that she might be able to reform.

[206] ASIC submitted also, however, that the submissions made on her behalf at the end of the trial undermined any expression of remorse or contrition by putting her statement of "discomfort" in the context of a more general concern that documents were being prepared later than they should have been, rather than it being a concern about documents being backdated and reflecting events that simply never occurred. Although her conduct did not lead to actual loss, it did cover up a misuse of more than $100 million.

[207] Her conduct was described as qualitatively worse than the kinds of cases where the shortest disqualification is given of up to three years but, because she was not an officer, there were few relevant comparators in previous cases. On the basis that she was found to have an involvement in two of the courses of conduct, namely the creation and keeping of the false documents and their use, ASIC submitted that an appropriate period of disqualification was six years for her involvement in each course of conduct but that, having regard to the totality principle, the appropriate period of disqualification was eight years.

[208] In respect of the pecuniary penalty, ASIC submitted that, having regard to the various factors identified earlier, as well as the issue of parity with the other defendants, a fine of $60,000 was appropriate in relation to the creation of the false documents and of $30,000 in relation to their use. The proposed penalty was less than that for Mr White, Mr Hutchings and Mr Anderson because she was not an architect of the scheme but she did draft and approve a number of the false documents. She was at a lower level in the corporate hierarchy and was not an officer of MFSIM.

[209] Alone among the defendants she provided a schedule of assets and liabilities with assets exceeding $1.2 million, including funds in a savings account exceeding $470,000. Her only substantial liabilities were a possible need to repay her insurer part of the costs incurred in defending these proceedings and about $110,000 to $120,000 for repairs and maintenance on her brother's house. She lives with her brother for the time being.

[210] ASIC submitted that her financial situation is such that the penalty imposed by it can be met by her and that the requirements of general deterrence are such that a penalty of that order be imposed on her to reflect the serious, sustained and dishonest nature of her conduct.

[211] Because the declarations sought against her relate only to the false documents part of the case, her involvement was less. So was her involvement in terms of cross-examination and participation in the trial generally somewhat less than those of the other defendants.

[212] It was necessary to prove the courses of conduct in the case against Ms Watts, although she was not alleged to have been involved in the transactions. It was said not to be possible to prove the false documents contraventions without establishing the payments

made and the purposes for which they were made, something which seems to make sense to me. In the circumstances, ASIC proposed that it was appropriate that Ms Watts be ordered to pay 50% of its standard costs of and incidental to the proceedings. This was the lowest proportion of costs sought by ASIC to reflect her relative involvement in the costs incurred in running the case while still reflecting that much of the evidence, even in the transactional contraventions, was relevant to the case against her.

Submissions for Ms Watts

[213] Counsel for Ms Watts accepted that it was within the court's power to impose a disqualification order on Ms Watts if I considered it to be justified. Mr Freeburn QC, however, pointed out that there was no evidence or finding that Ms Watts actually managed MFSIM or any of the companies in the MFS Group, nor any evidence that she, either before or after her 14 months of employment with MFS, managed another corporation. Her present occupation is as an employed "business development manager". She is not a director of her employer. The submission was that my discretion to impose a disqualification order was enlivened if a declaration were made that a person has contravened s 1317E (a civil penalty provision) and I am satisfied that the disqualification is justified.

[214] It was accepted that such a declaration will be made because the order proposed involves a declaration of contravention of s 601FC(5) which includes any person involved in the contravention. My satisfaction that a disqualification is justified required me to have regard to the person's conduct in relation to the management, business or property of the corporation and any other matters the court considers appropriate; see s 206C(2).

[215] The submission was that the nature of the court's power of disqualification is inextricably tied to the management of corporations given the language used in s 206A:

> "**206A Disqualified person not to manage corporations**
>
> (1) A person who is disqualified from managing corporations under this Part commits an offence if:
>
> (a) they make, or participate in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
>
> (b) they exercise the capacity to affect significantly the corporation's financial standing; or
>
> (c) they communicate instructions or wishes (other than 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) to the directors of the corporation:
>
> (i) knowing that the directors are accustomed to act in accordance with the person's instructions or wishes; or

> (ii) intending that the directors will act in accordance with those instructions or wishes."

[216] The factors to be considered by the court also involved "the person's conduct in relation to the management, business or property of any corporation", with the emphasis, Mr Freeburn submitted, on the word "management"; see s 206C(2).

[217] He also referred to the propositions set out by Santow J in *ASIC v Adler* arguing that, here, they included consideration of:

(a) protection of the public from harmful use or misuse of the corporate structure;

(b) suitability of directors to hold office;

(c) fitness of an individual to manage a company;

(d) propensity that the defendant may engage in similar conduct in the future.

[218] He discussed the following statements by Ormiston J dealing with the concept of management of a corporation in *Corporate Affairs Commission (Vic) v Bracht*:[110]

> "There must be an element of decision-making, which affects the corporate enterprise as a whole, but those responsible need not form part of the board, nor even need they be executives directly communicating with the board. … As it is a protective section, protective at least of the creditors and shareholders, then it must have been designed to prevent the participation in management of those who might put the solvency or the probity of the corporation's administration at risk. Persons not given any significant discretion or advisory role in decision-making could not therefore be intended as an object of the prohibition.
>
> …
>
> … in my opinion the concept of 'management' for present purposes 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."

[219] In describing that background to the issue, Mr Freeburn also argued that there was no relevant statutory definition of "managing a corporation". Accordingly, he submitted that it was difficult to see how the court could determine a disqualification from managing a corporation was justified when Ms Watts was not involved in management at the time of the impugned conduct and is still not involved in management in her current occupation.

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[110] [1989] VR 821, 830.

Her role in assisting Ms Platts in the preparation of six of the 15 documents where Mr White had instructed Ms Platts to prepare them, it was submitted, was not the role of a person managing a corporation.

[220] She was a fund manager, however, and, as events have shown, had the capacity to participate in seriously deceptive conduct affecting the ability of the auditors to fulfil their functions and of RBS, PIF's financier, to discover what was happening with the financial resources made available by it for PIF.

[221] Even if I accepted that she was not involved in the management of the company, which I do not, as the decisions she made did have significant bearing on the financial standing of the corporation or the conduct of its affairs, it seems to me perfectly appropriate to take into account the dishonesty of her behaviour as another matter I can consider appropriate in determining whether she should be disqualified in the future.

[222] Mr Freeburn submitted that, if I were to disqualify Ms Watts from managing a corporation, the period should be short, perhaps two years. He also submitted there was no prospect of her reoffending, that she was quite low in the corporate hierarchy and took her instructions from and assisted Ms Platts who herself took her instructions from Mr White. He pointed out that ASIC's submissions described Ms Watts' role as essentially in implementing what others had decided.

[223] In respect of ASIC's submission that, although Ms Watts did not personally gain in a monetary sense from the contraventions, her conduct could be characterised as seeking to ensure the continued operation of the MFS Group and her own continuing employment, he pointed to the absence of a finding or evidence that she was motivated by such a desire. He submitted that was not even put to Ms Watts and pointed out that it was unlikely that an employee with no role in management, seven months into her job as a fund manager for PIF, would have such a motivation.

[224] He also submitted that the period during which Ms Watts knew of the falsity of the documents was based on the conflicting lists of loans documents she received in 23 January 2008 and that it should not be said that she was involved in their creation from at least 3 January 2008. He argued that Ms Platts commenced preparing the documents on 26 January 2008 and that they were finalised by 6 February 2008, thus limiting the period of the course of conduct in which Ms Watts was involved.

[225] In submitting that there should be no pecuniary penalty or one limited to $20,000, he said it was appropriate to have regard to the following factors:

(a) Ms Watts was an employee – not a director or officer – and did not manage any of the companies in the group;

(b) Ms Watts' role, as ASIC conceded, was limited to implementing what others had decided; she was not the architect of the scheme and there was no evidence she participated in its design;

(c) the significant impact of the litigation on her, as explained in her affidavit, over some 8 years;

(d) Ms Watts has had an unblemished and impeccable working record and an unblemished personal record;

(e) the burden of any costs order will bankrupt Ms Watts.

[226] He also submitted that the costs ordered against her ought not to exceed 20% because:

(a) she was not involved in the payment contraventions;

(b) evidence relating to loss was irrelevant to her;

(c) a trial against Ms Watts would have been considerably shorter – of the 48 ASIC witnesses, only 12 were cross-examined by Ms Watts' counsel and of those only one (Ms Platts) exceeded 20 minutes;

(d) some parts of the case against Ms Watts were abandoned (for example, the documents referred to in paragraphs 109 and 118 of the statement of claim) and that abandonment came very late in the proceeding;

(e) a significant dishonesty allegation (paragraph 104 of the statement of claim) was not supported by any evidence and yet the allegation was persisted with and only in final addresses did ASIC acknowledge the lack of evidence to support the allegation.

Conclusions concerning Ms Watts

[227] Although Ms Watts was not a director, she was a fund manager for PIF. The contraventions found against her were serious and deliberate involving dishonesty and the falsification of documents to hide the fact that a substantial amount of scheme money had not been used for PIF's purposes. She did, however, recognise that she should not have participated in drafting the documents and said that she was uncomfortable in doing so. She did not gain personally and had no previous contraventions.

[228] It seems appropriate to me that she should be disqualified because of the dishonest nature of her conduct and the risk posed to the public by leaving someone with such a record in the position potentially of managing a corporation. The position of fund manager was a responsible one and the contraventions suggest that she should not be in a management role at least for some time. ASIC's submission that her involvement in the two separate courses of conduct each warranted a six year disqualification which should be moderated to eight years in application of the totality principle needs to be contrasted with her counsel's submission that it should be perhaps two years.

[229] I agree with ASIC's characterisation that her offending falls somewhere near the middle of the accepted categorisation of cases. It seems to me, however, that, having regard to her low position in the corporate hierarchy overall, even bearing in mind that she was the fund manager of a fund worth about $900 million under management, requires a

disqualification period of more than two years. Having regard to her lesser involvement, however, and the expression of contrition that she has shown, it seems to me that a five year disqualification period would be appropriate. The penalties sought totalling $90,000 in respect of the two courses of conduct relating to the false documents seem to me to be appropriate. They recognise the seriousness of creating and using such documents, particularly in a situation like this one where she was responsible for managing large amounts of money on behalf of other people.

[230] ASIC sought 50% of its costs against her on the basis that although she was not involved in the courses of conduct relating to the payments of the $130 million and $17.5 million, it was always necessary to prove those payments in the case against her.

[231] Having regard to her limited involvement overall, however, it seems to me to be more appropriate that she be ordered to pay 40% of ASIC's costs.

General conclusions

[232] In concluding its written submissions, ASIC said:

(a) The conduct of the defendants in these proceedings was in each case seriously dishonest. The conduct related to very large sums of money which were held on trust for others under the strict provisions of Part 5C of the *Corporations Act*. The requirements of the *Corporations Act* were flagrantly ignored; the interests of investors were sub-ordinated to the need for the wider corporate group to have access to funds in order to meet their own obligations. The ready source of those funds was a trust fund holding retail investors' money.

(b) The conduct of the defendants in then preparing documents which sought to record events that simply never occurred, and to use those documents dishonestly in various ways to mislead others, both internal and external, was a most serious example of contravention of the duties imposed by Part 5C. The importance of officers and senior personnel accurately documenting transactions and events that occur in the corporate world, particularly when those transactions and events relate to the use of trust money, cannot be overstated.

(c) The periods of disqualification and the pecuniary penalties involved should reflect the complete disregard which these defendants had to their duties under the *Corporations Act*; (except for Ms Watts) the loss of many millions of dollars to PIF; and (except for Mr King) the defendants' various roles in the cover up. The defendants' own evidence on penalty is largely devoid of any basis to conclude that any of the defendants have learned from this long and sorry saga; or that they recognise the extent to which their own conduct fell so far below the standards required of persons in control of other people's money.

(d) For those reasons, the imposition of substantial periods of disqualification and pecuniary penalties will ultimately have the effect which the statutory scheme seeks: recognition on the part of those controlling responsible entities that they must

act with honesty and competence and remember at all times that they are dealing with other people's money.

[233] Those submissions were justified. The insouciant attitude of the defendants to this misuse of money intended to be used for PIF's investors beggars belief. I shall make orders in the form attached.

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE

NUMBER: S12122/09

IN THE MATTER OF A.C.N. 101 634 146 PTY LTD (IN LIQUIDATION)

Plaintiff:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
	AND
First defendant:	**A.C.N. 101 634 146 PTY. LTD. (IN LIQUIDATION)**
	ACN 101 634 146
Fourth defendant:	**MICHAEL CHRISTODOULOU KING**
Fifth defendant:	**CRAIG ROBERT WHITE**
Sixth defendant:	**GUY HUTCHINGS**
Seventh defendant:	**DAVID MARK ANDERSON**
Eighth defendant:	**MARILYN ANNE WATTS**

ORDER

Before:	Douglas J
Date:	26 May 2017
Initiating document:	Second further amended originating application filed 6 December 2012

Note: The schedule to these orders contains a list of defined terms used in these orders.

The Supreme Court of Queensland declares under section 1317E(1) of the Corporations Act that:

As against MFSIM:

1 MFSIM, the responsible entity of PIF, contravened section 601FC(1)(a) and therefore section 601FC(5) of the Corporations Act by not acting honestly in:

(a) making the RBS Drawdown for the purpose of making the Fortress Payment, which was for the benefit of related parties of MFSIM and not for the benefit of the members of PIF;

ORDER

Filed on behalf of the plaintiff

Form 59, Version 1

Uniform Civil Procedure Rules 1999

Rule 661

Corrs Chambers Westgarth

Lawyers

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111 Eagle Street

BRISBANE QLD 4000

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Ref FMW/DS ASIC5067–9071541

(b) making the MFS Payment from PIF's scheme property to a related party of MFSIM for the purpose of making the Fortress Payment, which was for the benefit of related parties of MFSIM and not for the benefit of the members of PIF;

(c) permitting the Fortress Payment, which was from PIF's scheme property and for the benefit of related parties of MFSIM and not for the benefit of the members of PIF; and

(d) making the PacFin Payment to a related party of MFSIM for the benefit of PacFin and not for the benefit of the members of PIF.

2 MFSIM, the responsible entity of PIF, contravened section 601FC(1)(c) and therefore section 601FC(5) of the Corporations Act by not acting in the best interests of the members of PIF in:

(a) making the RBS Drawdown for the purpose of making the Fortress Payment, which was for the benefit of related parties of MFSIM and not for the benefit of the members of PIF;

(b) making the MFS Payment from PIF's scheme property to a related party of MFSIM for the purpose of making the Fortress Payment, which was for the benefit of related parties of MFSIM and not for the benefit of the members of PIF;

(c) permitting the Fortress Payment, which was from PIF's scheme property and for the benefit of related parties of MFSIM and not for the benefit of the members of PIF; and

(d) making the PacFin Payment to a related party of MFSIM for the benefit of PacFin and not for the benefit of the members of PIF.

3 MFSIM, the responsible entity of PIF, contravened section 601FC(1)(k) and therefore section 601FC(5) of the Corporations Act by not ensuring that all payments out of PIF's scheme property were made in accordance with PIF's constitution in:

(a) making the MFS Payment from PIF's scheme property to a related party of MFSIM for the purpose of making the Fortress Payment, which was not an authorised investment under PIF's constitution; and

(b) making the PacFin Payment from PIF's scheme property to a related party of MFSIM, which was not an authorised investment under PIF's constitution.

4 **MFSIM, the responsible entity of PIF and MYF, contravened section 601FC(1)(a) and therefore**

section 601FC(5) of the Corporations Act in January and February 2008 by

not acting honestly in creating and keeping the MFSIM False Documents, which were knowingly false in material respects, to hide the MFS Payment and the PacFin Payment, which were unauthorised payments from PIF's scheme property.

5 MFSIM, the responsible entity of PIF and MYF, contravened section 601FC(5) of the Corporations Act between January 2008 and April 2008 by reason of:

(a) contravening section 601FC(1)(a) by not acting honestly in providing its auditors with access to false financial information;

(b) contravening section 601FC(1)(a) by not acting honestly in providing false financial information to one of its bankers, RBS;

(c) contravening section 601FC(1)(a) by not acting honestly in providing false financial information to its compliance officers and external lawyers;

(d) contravening section 601FC(1)(a) by not acting honestly in recording false information as to its assets in its half yearly report dated 18 March 2008 lodged with ASIC; and

(e) contravening section 601FC(1)(l) by failing to report breaches of the Corporations Act relating to PIF to ASIC in circumstances where those breaches had or were likely to have a materially adverse effect on the interests of the members of PIF.

As against the individual defendants in relation to the RBS Drawdown, MFS Payment, and Fortress Payment:

6 By permitting MFSIM to make the RBS Drawdown for the purpose of giving a benefit to related parties of MFSIM and not for the benefit of the members of PIF, each of King and White contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contraventions of MFSIM, the responsible entity of PIF, at paragraphs 1(a) and 2(a) above.

7 By permitting MFSIM to make the MFS Payment from PIF's scheme property for the purpose of giving a benefit to MFS Castle, MFS Limited, and MFS Financial Services, each a related party of MFSIM, and not the members of PIF and without being satisfied the MFS Payment was for the purpose of an authorised investment under PIF's constitution, each of King, White, and Anderson:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contraventions of MFSIM, the responsible entity of PIF, at paragraph 1(b) and 2(b) above;

(b) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM the responsible entity of PIF at paragraph 3(a) above; and

(c) contravened section 209(2) of the Corporations Act by being

knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, of section 208(1) of the Corporations Act as modified by section 601LC of the Corporations Act, by making the MFS Payment, which was:

(i) a financial benefit to MFS Administration, a related party of MFSIM;

(ii) out of PIF's scheme property; and

(iii) made without obtaining the approval of PIF's members;

(d) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly;

(e) contravened section 601FD(1)(c) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting in the best interests of the members of PIF;

(f) contravened section 601FD(1)(e) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by making improper use of their position as an officer of MFSIM;

(g) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by failing to take all steps that a reasonable person would take if they were in their positions to ensure that MFSIM complied with PIF's constitution.

8 By permitting MFS Administration to make the Fortress Payment, each of King, White, and Anderson:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contraventions of MFSIM, the responsible entity of PIF, at paragraph 1(c) and 2(c) above; and

(b) contravened section 209(2) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, of section 208(1) of the Corporations Act as modified by section 601LC of the Corporations Act, by permitting MFS Administration to make the Fortress Payment, which was:

(i) a financial benefit to MFS Castle, MFS Limited, and MFS Financial Services, each a related party of MFSIM;

(ii) out of PIF's scheme property; and

(iii) made without obtaining the approval of PIF's members.

As against the individual defendants in relation to the PacFin Payment:

9 By permitting the PacFin Payment to be made from PIF's scheme property for the purpose of giving a benefit to a related party of MFSIM and not for the benefit of the members of PIF and without being satisfied it was for the purpose of an authorised investment under PIF's constitution, each of White, Hutchings, and Anderson:

(a) contravened

section 601FC(5) of the Corporations Act by being knowingly concerned in the contraventions by MFSIM, the responsible entity of PIF, of section 601FC(5) of the Corporations Act at paragraphs 1(d) and 2(d) above;

(b) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the

contravention of MFSIM, the responsible entity of PIF, of

section 601FC(5) of the Corporations Act at paragraph 3(b) above;

(c) contravened

section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF by not acting honestly;

(d) contravened

section 601FD(1)(c) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting in the best interests of the members of PIF;

(e) contravened

section 601FD(1)(e) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by making improper use of their positions as an officer of MFSIM; and

(f) contravened

section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by failing to take all steps that a reasonable person would take if they were in their positions to ensure that all payments out of PIF's scheme property were made in accordance with PIF's constitution.

10 By permitting the PacFin Payment to be made, each of White and Anderson contravened section 209(2) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, of section 208(1) of the Corporations Act as modified by section 601LC of the Corporations Act by making the PacFin Payment, which was:

(a) a financial benefit to PacFin, a related party of MFSIM;

(b) out of PIF's scheme property; and

(c) paid without obtaining the approval of PIF's members.

As against the individual defendants in relation to the creation and keeping of the False Documents:

11 By:

(a) directing Stride to draw documents which showed that the MFS Payment and the PacFin Payment had been invested by MFSIM on

behalf of PIF and which led to the creation of the White False Documents; and

(b) signing the White Signed False Documents,

when White knew that the transactions proposed to be recorded had not actually occurred at the time of the MFS Payment and the PacFin Payment and intended to create the impression the transactions occurred earlier than the payments, White:

(c) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contraventions of section 601FC(1)(a) and therefore section 601FC(5) of the Corporations Act by MFSIM, the responsible entity of PIF and MYF, by MFSIM creating the White False Documents, which MFSIM knew to be false in material respects, to hide the MFS Payment and the PacFin

Payment, which were unauthorised payments from PIF's scheme property;

(d) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by not acting honestly;

(e) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by failing to take all steps that a reasonable person would take if they were in his position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in White's position would have:

(i) not given directions to Stride to draw documents which showed the MFS Payment and PacFin Payment had been invested by MFSIM on behalf of PIF; and

(ii) not signed the White Signed False Documents; and

(f) contravened section 344(1) of the Corporations Act as a director of MFSIM, the responsible entity of PIF and MYF, by failing to take all reasonable steps to comply with, or to secure compliance with, MFSIM's obligation under section 286 of the Corporations Act to keep written and financial records which correctly recorded and explained the transactions of MFSIM, when reasonable steps were:

(i) not giving directions to Stride which led to the creation of the White False Documents; and

(ii) not signing the White Signed False Documents.

12 By:

(a) approving the Hutchings False Documents with the intention they would form part of MFSIM's financial books and records and that they would be made available to MFSIM's auditors as an apparently genuine part of the books and records of MFSIM; and

(b) signing the Hutchings Signed False

Documents; when Hutchings knew that:

(c) there had been no meetings of or submissions to the investment approval committee as shown in the Hutchings False Documents;

(d) the Hutchings Signed False Documents conveyed the false impression that transactions and events had occurred at times when no such transactions and events had occurred,

Hutchings:

(e) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contraventions of section 601FC(1)(a) and therefore section 601FC(5) of the Corporations Act by MFSIM, the responsible entity of PIF and MYF, in creating and keeping the Hutchings False Documents, which MFSIM knew to be false in material respects, to hide the MFS Payment and the PacFin Payment, which were unauthorised payments from PIF's scheme property;

(f) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by not acting honestly;

(g) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by failing to take all steps that a reasonable person would take if they were in his position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in Hutchings' position would have:

(i) not approved the Hutchings False Documents;

(ii) directed that the Hutchings False Documents not form an apparently genuine part of MFSIM's financial books and records; and

(iii) not signed the Hutchings Signed False Documents; and

(h) contravened section 344(1) of the Corporations Act as a director of MFSIM, the responsible entity of PIF and MYF, by failing to take all reasonable steps to comply with, or to secure compliance with, MFSIM's obligation under section 286 of the Corporations Act to keep written and financial records which correctly recorded and explained the transactions of MFSIM, when reasonable steps were:

(i) not approving the Hutchings False Documents;

(ii) directing that the Hutchings False Documents not form an apparently genuine part of MFSIM's financial books and records; and

(iii) not signing the Hutchings Signed False Documents.

13 By:

(a) creating a listing of loans document showing transactions that had not occurred with the intention it would be used to give explanations to auditors and RBS and with knowledge that money had been improperly paid from PIF's scheme property; and

(b) giving directions to Stride to draw documents which showed that the MFS Payment and the PacFin Payment had been invested by MFSIM on behalf of PIF and which led to the creation of the Anderson False Documents, when Anderson knew that the transactions proposed to be recorded had not actually occurred at the time of the relevant payments and intended to create the impression the transactions occurred earlier than the payments,

Anderson:

(c) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention of

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1 There are two contraventions numbered '62' in the amended schedule of contraventions for Hutchings. This is a reference to the first contravention numbered '62'.

2 There are two contraventions numbered '62' in the amended schedule of contraventions for Hutchings. This is a reference to the second contravention numbered '62'.

section 601FC(1)(a) and therefore section 601FC(5) of the Corporations Act by MFSIM, the responsible entity of PIF and MYF, in creating and keeping the Anderson False Documents, which MFSIM knew to be false in material respects, to hide the MFS Payment and the PacFin Payment, which were unauthorised payments from PIF's scheme property;

(d) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by not acting honestly; and

(e) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by failing to take all steps that a reasonable person would take if they were in his position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in Anderson's position would have:

(i) not created a listing of loans document showing transactions that had not occurred; and

(ii) not given directions to Stride which led to the creation of the Anderson False Documents.

14 By creating or assisting in the creation of the Watts False Documents, which she knew to be false in material respects, Watts contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention of section 601FC(1)(a) and therefore

section 601FC(5) of the Corporations Act by MFSIM, the responsible entity of PIF and MYF, in creating the Watts False Documents, which MFSIM knew to be false in material respects, to hide the MFS Payment and the PacFin Payment, which were unauthorised payments from PIF's scheme property.

As against the individual defendants in relation to the use of the False Documents and false accounting:

15 By signing the White Signed False Documents intending that the White Signed False Documents:

(a) would be an apparently genuine part of MFSIM's financial books and records; and

(b) would be made available to MFSIM's auditors as an apparently genuine part of MFSIM's financial books and records,

White:

(c) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF and MYF, at paragraph 5(a) above;

(d) contravened section 601FD(1)(a) and therefore

section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by not acting honestly;

(e) contravened section 601FD(1)(f) and therefore

section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by failing to take all steps that a reasonable person would take if they were in his position to ensure that

MFSIM complied with the Corporations Act, when a reasonable person in White's position would have:

(i) not given directions to Stride which led to the creation of the White False Documents; and

(ii) not signed the White Signed False Documents.

16 By:

(a) approving the Hutchings False Documents intending that the Hutchings False Documents:

(i) would be an apparently genuine part of MFSIM's financial books and records; and

(ii) would be made available to MFSIM's auditors as an apparently genuine part of MFSIM's financial books and records; and

(b) signing the Hutchings Signed False

Documents, Hutchings:

(c) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF and MYF, at paragraph 5(a) above;

(d) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by not acting honestly;

(e) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF and MYF, by failing to take all steps that a

reasonable person would take if they were in his position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in Hutchings' position would have:

(i) not approved the Hutchings False Documents;

(ii) not signed the Hutchings Signed False Documents;

(iii) directed that the Hutchings False Documents not form an apparently genuine part of MFSIM's financial books and

records.

17 By:

(a) creating a listing of loans document showing transactions that had not occurred with the intention it would be used to give explanations to auditors and with knowledge that money had been improperly paid from PIF's scheme property; and

(b) giving directions to Stride to draw documents which showed that the MFS Payment and the PacFin Payment had been invested by MFSIM on behalf of PIF and which led to the creation of the Anderson False Documents, when Anderson knew that the transactions proposed to be recorded had not actually occurred at the time of the relevant payments and intended to create the impression the transactions occurred earlier than the payments,

Anderson contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF and MYF, at paragraph 5(a) above.

18 By creating or assisting in the creation of the Watts False Documents, which she knew to be false in material respects and with the expectation they would be provided to auditors, Watts contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF and MYF, at paragraph 5(a) above.

19 By permitting to be sent to RBS a PIF asset report which he knew to be false, White:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(b) above;

(b) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly;

(c) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by failing to take all steps that a reasonable person would take if they were in his position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in White's position would have prevented the false PIF asset reports from being sent to RBS.

20 By sending to RBS a PIF asset report, permitting to be sent to RBS a PIF asset report, and permitting to be sent to RBS a listing of loans sourced from money borrowed from RBS, each of which he knew to be false, Hutchings:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(b) above;

(b) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly;

(c) contravened section 601FD(1)(c) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting in the best interests of the members of PIF in that the provision of false information to RBS exposed PIF's members to the possibility of litigation or that RBS would withdraw its financial support to PIF;

(d) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by failing to take all steps that a reasonable person would take if they were in his position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in White's or Hutchings' position would have given instructions that:

(i) the false PIF asset reports not be provided to RBS; or

(ii) RBS receive correct information about the MFS Payment and PacFin Payment.

21 By permitting to be sent to RBS a PIF asset reports that he knew to be false, Anderson:

(a) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly; and

(b) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly.

22 By sending to RBS a PIF asset report and a listing of loans sourced from money borrowed from RBS, each of which she knew to be false, Watts contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(b) above.

23 By permitting false information about the MFS Payment and PacFin Payment to be given to MFSIM's internal compliance unit and MFSIM's external lawyers, each of White and Hutchings:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(c) above;

(b) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly; and

(c) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by failing to take all steps that a reasonable person would take if they were in their position to ensure that MFSIM complied with the Corporations Act, when a reasonable person in their position would have informed MFSIM's internal compliance unit and MFSIM's external lawyers of the true facts about the MFS Payment and PacFin Payment.

24 By preparing a document to be provided to MFSIM's internal compliance unit with false information about the MFS Payment and PacFin Payment, Anderson:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(c) above; and

(b) contravened section 601FD(1)(a) and therefore section 601FD(3)

of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly.

25 By signing PIF's half yearly reports for 1 July 2007 to 31 December 2007 in March 2008, which contained information he knew to be false, Hutchings:

(a) contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(d) above;

(b) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly; and

(c) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by failing to take all steps that a reasonable

person would take if they were in Hutchings' position, when a reasonable person in Hutchings' position would not have signed PIF's half yearly reports for 1 July 2007 to 31 December 2007 that contained information they knew to be false.

26 By providing the board of directors of MFSIM on around 23 January 2008 with information about the use of the money drawn down from RBS that he knew to be false, Hutchings:

(a) contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of PIF, by not acting honestly; and

(b) contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the

responsible entity of PIF, by failing to take all steps a reasonable person would take if they were in Hutchings' position, when a reasonable person in Hutchings' position would have not have given knowingly false information to the board of directors of MFSIM.

27 By not informing the board of directors of MFSIM in February 2008 that the information in a proposal to ratify the issue of 100,000,000 class A units in MYF was false when they knew that the information in the proposal was false:

(a) each of White and Hutchings contravened section 601FD(1)(a) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of MYF, by not acting honestly; and

(b) Hutchings contravened section 601FD(1)(f) and therefore section 601FD(3) of the Corporations Act as an officer of MFSIM, the responsible entity of MYF, by failing to take all steps a reasonable person would take if they were in Hutchings' position, when a reasonable person in Hutchings' position would have ensured that the proposal to the board of directors of MFSIM contained accurate

information.

28 By not reporting or causing MFSIM to report MFSIM's contraventions of the Corporations Act in relation to the RBS Drawdown, MFS Payment, Fortress Payment, and PacFin Payment to ASIC, each of White, Hutchings, and Anderson contravened section 601FC(5) of the Corporations Act by being knowingly concerned in the contravention by MFSIM, the responsible entity of PIF, at paragraph 5(e) above.

And the Court orders that:

As against King:

29 Under section 206C of the Corporations Act, King be disqualified from managing any corporation for 20 years from the date of these orders.

30 Under section 1317G of the Corporations Act, King pay the Commonwealth of Australia a pecuniary penalty of $300,000.

31 Under section 1317H of the Corporations Act, King pay compensation to PIF in the amount of $177,017,084.

32 King pay 60% of ASIC's costs of and incidental to the proceeding on the standard basis.

As against White:

33 Under section 206C of the Corporations Act, White be permanently disqualified from managing any corporation.

34 Under section 1317G of the Corporations Act, White pay the Commonwealth of Australia a pecuniary penalty of $650,000.

35 Under section 1317H of the Corporations Act, White pay compensation to PIF in the amount of $205,755,601.

36 White pay 70% of ASIC's costs of and incidental to the proceeding on the standard basis.

As against Hutchings:

37 Under section 206C of the Corporations Act, Hutchings be disqualified from managing any corporation for 25 years from the date of these orders.

38 Under section 1317G of the Corporations Act, Hutchings pay the Commonwealth of Australia a pecuniary penalty of $350,000.

39 Under section 1317H of the Corporations Act, Hutchings pay compensation to PIF in the amount of $28,738,517.

40 Hutchings pay 70% of ASIC's costs of and incidental to the proceeding on the standard basis.

As against Anderson:

41 Under section 206C of the Corporations Act, Anderson be disqualified from managing any corporation for 25 years from the date of these orders.

42 Under section 1317G of the Corporations Act, Anderson pay the Commonwealth of Australia a pecuniary penalty of $500,000.

43 Under section 1317H of the Corporations Act, Anderson pay compensation to PIF in the amount of $205,755,601.

44 Anderson pay 80% of ASIC's costs of and incidental to the proceeding on the standard basis.

As against Watts:

45 Under section 206C of the Corporations Act, Watts be disqualified from managing any corporation for 5 years from the date of these orders.

46 Under section 1317G of the Corporations Act, Watts pay the Commonwealth of Australia a pecuniary penalty of $90,000.

47 Watts pay 40% of ASIC's costs of and incidental to the proceeding on the standard basis.

Costs

48 The enforcement of paragraphs 32, 36, 40, 44, and 47 above in respect of all defendants is stayed once ASIC has recovered its costs of and incidental to the proceeding on the standard basis.

Signed: _____

Registrar

SCHEDULE

Defined terms

20 November 2007 MYF IAC Submission means the submission to the IAC for MYF dated 20 November 2007 recommending that MYF issue up to 100 million Class A units at $1 per unit pleaded in paragraph 110 of the Statement of Claim.[3]

20 November 2007 PIF IAC Submission means the submission to the IAC for PIF dated 20 November 2007 recommending PIF enter into a $62.5 million loan participation agreement with PacFin pleaded in paragraph 111 of the Statement of Claim.[4]

20 November 2007 MYF IAC Minutes means the minute of meeting of the of the IAC for MYF dated 21 November 2007 approving the issue of 100 million Class A units in MYF pleaded in paragraph 112 of the Statement of Claim.[5]

23 November 2007 MYF Information Memorandum means the MYF class A units information memorandum dated 23 November 2007 pleaded in paragraph 113 of the Statement of Claim.[6]

23 November 2007 PIF IAC Minutes means the minute of meeting of the IAC for PIF dated 23 November 2007 approving PIF (1) entering into $62.5 million loan participation agreement with PacFin and (2) acquiring $85 million class A units in MYF pleaded in paragraph 114 of the Statement of Claim.[7]

27 November 2007 MYF IAC Submission means the submission to the IAC for MYF dated 27 November 2007 recommending MYF enter into a $55 million loan participation agreement with PacFin pleaded in paragraph 115 of the Statement of Claim.[8]

27 November 2007 MYF IAC Submission means the submission to the IAC for MYF dated 28 November 2007 recommending MYF lend Sunleisure $30 million pleaded in paragraph 116 of the Statement of Claim.[9]

28 November 2007 MYF IAC Minutes means the minute of meeting of the IAC for MYF dated 28 November 2007 approving MYF (1) entering into a $55 million loan participation agreement with PacFin and (2) lending Sunleisure $30 million pleaded in paragraph 117 of the Statement of Claim.[10]

30 November 2007 MYF Application Form means the application by PIF dated 30 November 2007 for 67.5 million Class A units in MYF pleaded in paragraph 121 of the Statement of Claim.[11]

3	WIM.0002.0004.0201
4	WIM.0002.0004.0139
5	WIM.0002.0004.0199
6	OCA.0002.0004.0108
7	WIM.0002.0004.0137
8	WIM.0002.0004.0077
9	OCA.0002.0004.0284
10	WIM.0002.0004.0075
11	WIM.0006.0001.0138

30 November 2007 MYF Unit Certificate means the certificate of unitholding for PIF dated 30 November 2007 of 67.5 million units in MYF pleaded in paragraph 122 of the Statement of Claim.[12]

27 December 2007 MYF Application Form means the application by PIF dated 27 December 2007 for 17.5 million Class A units in MYF pleaded in paragraph 123 of the Statement of Claim.[13]

27 December 2007 MYF Unit Certificate means the certificate of unitholding for PIF dated 27 December 2007 of 17.5 million units in MYF pleaded in paragraph 124 of the Statement of Claim.[14]

31 December 2007 New Loan Notice means the new loan notice with an effective date of 31 December 2007 pleaded in paragraph 125 of the Statement of Claim.[15]

Anderson means the seventh defendant, David Anderson.

Anderson False Documents means the following MFSIM False Documents:

(1) the 23 November 2007 MYF Information Memorandum;

(2) the MYF–PacFin Loan Participation Agreement;

(3) the PIF–PacFin Loan Participation Agreement;

(4) the 30 November 2007 MYF Application Form;

(5) the 30 November 2007 MYF Unit Certificate;

(6) the 27 December 2007 MYF Application Form;

(7) the 27 December 2007 MYF Unit Certificate;

(8) the 31 December 2007 New Loan Notice.

ASIC means the Australian Securities and Investments Commission, the plaintiff.

Corporations Act means the *Corporations Act 2001* (Cth).

Fortress means Fortress Credit Corporation (Australia) II Pty Limited (in liquidation) ACN 114 624 958.

Fortress Payment means the payment of $103,000,000 by MFS Administration to Fortress on 30 November 2007.

Hutchings means the sixth defendant, Guy Hutchings.

Hutchings False Documents means the following MFSIM False Documents:

(1) the 20 November 2007 PIF IAC Submission;

(2) the 21 November 2007 MYF IAC Minutes;

(3) the 23 November 2007 MYF Information Memorandum;

(4) the 23 November 2007 PIF IAC Minutes;

(5) the 28 November 2007 MYF IAC Minutes;

(6) the MYF–PacFin Loan Participation Agreement;

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12 WIM.0006.0001.0140

13 WIM.0006.0001.0135

14 WIM.0006.0001.0137

15 OIM.0001.0001.0324

(7) the PIF–PacFin Loan Participation Agreement;

(8) the 30 November 2007 MYF Application Form;

(9) the 30 November 2007 MYF Unit Certificate;

(10) the 27 December 2007 MYF Application Form;

(11) the 27 December 2007 MYF Unit Certificate;

(12) the 31 December 2007 New Loan Notice.

Hutchings Signed False Documents means the following Hutchings False Documents:

(1) the MYF–PacFin Loan Participation Agreement;

(2) the PIF–PacFin Loan Participation Agreement;

(3) the 30 November 2007 MYF Application Form;

(4) the 30 November 2007 MYF Unit Certificate;

(5) the 27 December 2007 MYF Application Form;

(6) the 27 December 2007 MYF Unit Certificate;

(7) the 31 December 2007 New Loan Notice.

IAC means Investment Approval Committee.

King means the fourth defendant, Michael Christodoulou King.

MFS Administration means Octaviar Administration Pty Ltd (in liquidation) ACN 101 069 390, formerly known as MFS Administration Pty Ltd.

MFS Castle means Octaviar Castle Pty Ltd (in liquidation) ACN 124 889 381, formerly known as MFS Castle Pty Ltd.

MFS Financial Services means Octaviar Financial Services Pty Ltd (in liquidation) ACN 101 579 999, formerly known as Octaviar Financial Services Limited, MFS Financial Services Limited, MFS Group Limited.

MFS Limited means Octaviar Limited (receivers and managers appointed) (in liquidation) ACN 107 863 436, formerly known as MFS Limited.

MFS Payment means $103,000,000 of the $130,000,000 paid by MFSIM, the responsible entity of PIF, to MFS Administration on 30 November 2007.

MFSIM means the first defendant, A.C.N. 101 634 146 Pty Ltd (in liquidation), formerly known as MFS Investment Management Limited, Octaviar Investment Management Limited, Wellington Investment Management Limited, Management Investments Limited, and Management Investments Pty Ltd.

MFSIM False Documents means:

(1) the 20 November 2007 MYF IAC Submission;

(2) the 20 November 2007 PIF IAC Submission;

(3) the 21 November 2007 MYF IAC Minutes;

(4) the 23 November 2007 MYF Information Memorandum;

(5) the 23 November 2007 PIF IAC Minutes;

(6) the 27 November 2007 MYF IAC Submission;

(7) the 28 November 2007 MYF IAC Submission;

(8) the 28 November 2007 MYF IAC Minutes;

(9) the MYF–PacFin Loan Participation Agreement

(10) the PIF–PacFin Loan Participation Agreement;

(11) the 30 November 2007 MYF Application Form;

(12) the 30 November 2007 MYF Unit Certificate;

(13) the 27 December 2007 MYF Application Form;

(14) the 27 December 2007 MYF Unit Certificate; and

(15) the 31 December 2007 New Loan Notice.

MYF means Maximum Yield Fund ARSN 109 106 658, now deregistered, formerly known as MFS Maximum Yield Fund (Number One) and Octaviar Maximum Yield Fund.

MYF–PacFin Loan Participation Agreement means the loan participation agreement between MYF and PacFin pleaded in paragraph 119 of the Statement of Claim.[16]

PacFin means OPI Pacific Finance Limited (in receivership) ARBN 110 685 651, formerly known as MFS Pacific Finance Limited.

PacFin Payment means the payment of $17,500,000 by MFSIM, the responsible entity of PIF, to PacFin on 27 December 2007.

PIF means Premium Income Fund ARSN 090 687 577, formerly known as MFS Premium Income Fund and Octaviar Premium Income Fund.

PIF–PacFin Loan Participation Agreement means the loan participation agreement between PIF and PacFin pleaded in paragraph 120 of the Statement of Claim.[17]

RBS means The Royal Bank of Scotland plc ARBN 101 464 528.

RBS Drawdown means $103,000,000 of the $150,000,000 borrowed by PIF from RBS on 27 November 2007.

Statement of Claim means the fifth further amended statement of claim and combined particulars filed 17 October 2013.[18]

Stride means Christopher Stride, an in-house lawyer.

Sunleisure means Sunleisure Group Pty Ltd ACN 112 000 978, now deregistered, formerly known as Sunleisure Group Limited.

Watts means the eighth defendant, Marilyn Anne Watts.

Watts False Documents means the following MFSIM False Documents:

(1) the 20 November 2007 MYF IAC Submission;

(2) the 20 November 2007 PIF IAC Submission;

(3) the 21 November 2007 MYF IAC Minutes;

(4) the 23 November 2007 PIF IAC Minutes;

(5) the 27 November 2007 MYF IAC Submission;

(6) the 28 November 2007 Memo to MYF IAC.

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16 OPI.0002.0001.0079

17 OPI.0002.0001.0126

18 COURT.0008.0001.0205

White means the fifth defendant, Craig Robert White.

White False Documents means the following MFSIM False Documents:

(1) the 23 November 2007 MYF Information Memorandum;

(2) the MYF–PacFin Loan Participation Agreement;

(3) the PIF–PacFin Loan Participation Agreement;

(4) the 30 November 2007 MYF Application Form;

(5) the 30 November 2007 MYF Unit Certificate;

(6) the 27 December 2007 MYF Application Form;

(7) the 27 December 2007 MYF Unit Certificate;

(8) the 31 December 2007 New Loan Notice.

White Signed False Documents means the following White False Documents:

(1) the MYF–PacFin Loan Participation Agreement;

(2) the PIF–PacFin Loan Participation Agreement;

(3) the 30 November 2007 MYF Application Form;

(4) the 30 November 2007 MYF Unit Certificate;

(5) the 27 December 2007 MYF Application Form;

(6) the 27 December 2007 MYF Unit Certificate;

(7) the 31 December 2007 New Loan Notice.