SUPREME COURT OF QUEENSLAND

CITATION:	*King v Australian Securities and Investments Commission* [2019] QCA 121
PARTIES:	**MICHAEL CHRISTODOULOU KING** (appellant/cross-respondent) **v** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (respondent/cross-appellant)
FILE NO/S:	Appeal No 6320 of 2017 SC No 12122 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals – Further Orders
ORIGINATING COURTS:	Supreme Court at Brisbane – [2016] QSC 109; [2017] QSC 96 (Douglas J)
DELIVERED ON:	18 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Morrison and McMurdo JJA and Applegarth J
ORDERS:	**1. The order made in paragraph 30 of the orders made on 26 May 2017 be varied, by substituting a pecuniary penalty of $270,000 for the sum of $300,000.** **2. The order made in paragraph 32 of those orders be varied, by ordering that the appellant pay 50 per cent of the respondent's costs of and incidental to the proceeding in the trial division on the standard basis.** **3. The appellant pay 75 per cent of the respondent's costs of the appeal and there be no order for costs on the respondent's cross-appeal.**
CATCHWORDS:	CORPORATIONS – MANAGEMENT AND ADMINISTRATION – DUTIES AND LIABILITIES OF OFFICERS OF CORPORATION – DISQUALIFICATION FROM MANAGEMENT OF CORPORATION – BY COURT ORDER – where the Australian Securities and Investments Commission commenced a civil penalty case against a company and various directors and officers of that company and a broader group of companies for breaches of the *Corporations Act* 2001 (Cth) – where the primary judge found that the company had contravened s 601FC(1) of the *Corporations Act* by misusing funds that belonged to an investment fund, of which the company was a custodian, for

the purpose of paying debts of other companies in the group, where the fund was not actually or contingently liable for those debts – where the appellant was the CEO of the group of companies but was not a director of the company at any relevant time – where the primary judge found that the appellant contravened the *Corporations Act* by being knowingly concerned in the company's contraventions of the *Corporations Act*, and by being an officer of the company as a person who had the capacity to significantly affect the financial standing of the company – where the primary judge consequently disqualified the appellant from managing any corporation for 20 years and ordered him to pay a pecuniary penalty of $300,000 – where the Court of Appeal did not disturb the finding as to being knowingly concerned, but found that the appellant was not an officer of the company – where the appellant submits that a lesser penalty ought to be imposed when regard is had to authorities in non-officer cases, the parity principle in respect of the penalty imposed by the primary judge on another non-director, and the totality principle in respect of a compensation order – whether the primary judge's assessment of the period of disqualification and the pecuniary penalty was appropriate

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – OTHER MATTERS – COSTS – where the Australian Securities and Investments Commission (ASIC) succeeded at trial in a civil penalty case against the appellant – where the primary judge found that the appellant contravened the *Corporations Act* 2001 (Cth) by being knowingly concerned in a company's contraventions of the *Corporations Act*, and by being an officer of that company as a person who had the capacity to significantly affect the financial standing of that company – where the primary judge ordered the appellant to pay 60 per cent of ASIC's costs of the trial – where the appellant successfully argued on appeal that he was not an officer of the company, but failed to have the finding as to being knowingly concerned disturbed – where ASIC cross-appealed on a ground that was conditional upon the appellant succeeding completely on appeal and on a second ground that was abandoned – where ASIC still enjoyed a substantial measure of success because the orders as to the appellant's disqualification period and a compensation order were undisturbed on appeal – whether and to what extent the costs order at trial should take account of the appellant's success on appeal concerning the officer issue – whether and to what extent a costs order of the appeal should be made to reflect each party's partial success on the appeal – whether a costs order of the cross-appeal should be made

Australian Competition and Consumer Commission v Safety

Compliance Pty Ltd (in liq) (No 2) (2015) 110 ACSR 306; [2015] FCA 1469, distinguished
Australian Securities and Investments Commission v Somerville (No 2) [2009] NSWSC 998, distinguished
King & Ors v Australian Securities and Investments Commission [2018] QCA 352, referred to

COUNSEL: D G Clothier QC, with B J Kabel, for the appellant/cross-respondent
J P Moore QC and M T Brady QC, with K E Slack, for the respondent/cross-appellant

SOLICITORS: Tucker & Cowen Solicitors for the appellant/cross-respondent
Corrs Chambers Westgarth for the respondent/cross-appellant

[1] **THE COURT:** Mr King was knowingly concerned in contraventions of the *Corporations Act* 2001 (Cth) (the "Act") by MFS Investment Management Pty Ltd ("MFSIM"), the responsible entity of the Premium Income Fund ("PIF"). These included the dishonest use of money held on trust for investors. The money was used to pay the Fortress Credit Corporation (Australia) II Pty Ltd ("Fortress") debt. Mr King, the CEO of MFS Ltd, of which MFSIM was a subsidiary, encouraged this to happen.[1] He encouraged Mr White and others to obtain the Royal Bank of Scotland ("RBS") funds for the purpose of the Fortress payment. The loss caused to investors by this conduct was huge. Mr King was ordered to pay compensation to PIF in the amount of $177,017,084.[2] There is no suggestion by Mr King that the investors will actually be compensated.

[2] This Court found that Mr King was not an "officer" of MFSIM. It reached a different conclusion to the primary judge on the legal question of the meaning of "officer" in s 9 of the Act.[3] As a result, we concluded that Mr King should not have been held to have contravened the duties prescribed by s 601FD.[4] However, no findings about his conduct and being knowingly concerned in MFSIM's contraventions were disturbed.

[3] The issue is whether our conclusion that Mr King was not an "officer" of MFSIM should alter orders made by the primary judge that Mr King:

(a) be disqualified from managing any corporation for 20 years;

(b) pay the Commonwealth a pecuniary penalty of $300,000; and

(c) pay 60 per cent of ASIC's costs of and incidental to the proceeding on the standard basis.

The primary judge's assessment of an appropriate period of disqualification and a pecuniary penalty

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1 *King & Ors v Australian Securities & Investments Commission* [2018] QCA 352 at [169] ("Appeal Reasons").

2 *Australian Securities & Investments Commission v Managed Investments Ltd & Ors (No 10)* [2017] QSC 96 at paragraph 31 of the orders made on 26 May 2017 ("Penalty Reasons").

3 Appeal Reasons at [230]-[289].

4 Appeal Reasons at [289].

[4] Although the primary judge referred to the fact that Mr King had no proper regard to his duties in respect of MFSIM,[5] it is not apparent what impact the finding that Mr King was an officer of MFSIM had in deciding the penalty. Although Mr King's conduct in being knowingly concerned in MFSIM's failure to act honestly in making the Fortress payment was said to be "legally separate" from his failure as an officer of MFSIM to take steps to ensure that PIF's constitution was complied with, his conduct was described by the primary judge as "factually overlapping in significant respects".[6] ASIC submitted to the primary judge that the conduct was so inextricably interrelated that it should be regarded as one multifaceted "course of conduct", and that each of the contraventions arose out of that course of conduct in relation to the making of the $103 million payment.[7] Rather than impose a separate penalty for being knowingly concerned in MFSIM's contraventions, and a separate penalty for a contravention of Mr King's duties as an officer of MFSIM, the primary judge applied well-recognised principles where overlapping contraventions arise from "one transaction" or "one course of conduct".[8]

[5] Before the primary judge, ASIC relied on the facts that:

(a) Mr King was the "overall boss of the MFSIM group" who participated in the making of decisions that affected the whole or a substantial part of MFSIM's business;

(b) he approved and authorised the use of the money drawn down under the RBS loan agreement;

(c) he knew that the $130 million payment was made from funds managed by MFSIM as the responsible entity for PIF and that the payment was made for the purpose of the MFS group repaying $130 million to Fortress, and not for PIF's purposes;

(d) he knew that no transaction was on foot which made the payment a proper payment from PIF's funds;

(e) his failure to make inquiries about what was proposed and to ensure that something was put in place for PIF's investors before the money was taken from MFSIM was dishonest.[9]

[6] It also relied upon the nature of the contraventions which were very serious and deliberate, and involved dishonesty and misuse of investors' money held on trust with a view to benefiting other parts of the MFS Group. ASIC relied upon the senior position of Mr King within the MFS Group and the fact that he was the "overall boss of the MFS Group" as well as being an officer of MFSIM.[10] It relied upon the very substantial sum of money which was lost, and that Mr King had a substantial interest in the MFS Group and as its CEO had an obvious interest in ensuring that the MFS Group did not default on its Fortress obligations. A default

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5 Penalty Reasons at [98].
6 Penalty Reasons at [79].
7 Ibid.
8 Penalty Reasons at [32]-[33] and [79].
9 Penalty Reasons at [71].
10 Penalty Reasons at [71], [74].

would have had very serious, and likely fatal, consequences for the Group. It also relied upon the fact that Mr King had not displayed any contrition or remorse.[11]

[7] Mr King submitted to the primary judge that more than 10 years had passed since the contravening conduct, that Mr King had "lost everything he had financially", that the finding of dishonesty meant he was unlikely to be able to practise as a solicitor again, that he had obtained no personal benefit from the contravening conduct, was an "officer" of MFSIM only by reason of the shadow director provisions of the Act, was not the "mastermind" of the scheme, and was not involved in the $17.5 million payment or the false documents contraventions.[12]

[8] In deciding an appropriate period of disqualification and the pecuniary penalty order, the primary judge focused on the findings of dishonesty made against Mr King and that the large amount of money in question was trust money. Mr King's training as a solicitor "should have alerted him to the impropriety of what he was authorising".[13] The primary judge stated:[14]

> "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."

A 20 year disqualification was a shorter period than that for Mr White, who was permanently disqualified from managing any corporation. Although Mr King was higher in the corporate hierarchy than Mr White, he was found to have been less involved in the offending conduct.[15] Mr King's failure to accept responsibility for his conduct encouraged the primary judge to conclude that "he remains a risk to the public if he were not disqualified from managing a corporation for a very significant period.".[16]

[9] The primary judge considered that the pecuniary penalty orders sought by ASIC against Mr King of $300,000, taking into account the nature of the conduct, seemed to be "quite moderate".[17] He continued:

> "… 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

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11 Penalty Reasons at [74].
12 Penalty Reasons at [82]-[88].
13 Penalty Reasons at [97].
14 Penalty Reasons at [98].
15 Penalty Reasons at [99].
16 Penalty Reasons at [99].
17 Penalty Reasons at [102].

> 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."[18]

Mr King's submissions about the impact of not being an officer of MFSIM

[10] Mr King submits that while it is not apparent what precise effect the contraventions of s 601FD had in deciding the penalty, the primary judge approached the exercise on the basis that it was a penalty to be applied to an officer of MFSIM who owed, and had breached, duties to it. Mr King submits that a lesser penalty ought to be imposed when regard is had to:

(a) authorities in "non-officer" cases;

(b) the parity principle in respect of Ms Watts; and

(c) the totality principle, including the making of the $177 million compensation order.

[11] While the primary judge regarded the $300,000 figure as "quite moderate" in circumstances in which s 1317G provides a maximum pecuniary penalty of up to $200,000 for each contravention, Mr King notes that the penalty was affected by the need for "general deterrence".[19] As "non-officers" do not owe the same positive duties as directors and other officers, Mr King submits that considerations of punishment and deterrence play a different role and that general deterrence is of less relevance in light of the absence of positive duties as an officer upon Mr King.

ASIC's submissions on penalty and disqualification

[12] ASIC notes that the appeal was upheld only in relation to the question of whether Mr King was an "officer" and that if he had been an officer, this Court would have concluded that his conduct breached his duties under s 601FD.[20] The findings about Mr King's conduct, his overall role as "the boss" of the MFS Group and his knowledge of, and involvement in, the relevant contravening conduct were not disturbed. As this Court found, the primary judge's conclusion that Mr King approved and authorised the use of funds did not follow from Mr King being an officer.[21] It was inferred from the hierarchy of the MFS Group that Mr White would not have caused PIF's money to be used without the imprimatur of Mr King. ASIC submits that the orders made in relation to Mr King's disqualification and the pecuniary penalty ought not be varied.

Relevant principles governing disqualification and pecuniary penalties

[13] There is no contest about the relevant principles, which were stated by the primary judge.[22]

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18 Penalty Reasons at [102].
19 Penalty Reasons at [80], [102].
20 Appeal Reasons at [289].
21 Appeal Reasons at [163].
22 Penalty Reasons at [23]-[38].

[14] Disqualification orders are not only protective but are also punitive.[23] General deterrence is also a significant factor to take into account.[24]

[15] As for a pecuniary penalty, as the primary judge noted, 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 whole.[25]

The relevant conduct

[16] The critical finding concerning Mr King's conduct, unaffected by whether or not he was an "officer" of MFSIM, was his knowing involvement in serious and deliberate contraventions by MFSIM, which involved dishonesty and misuse of a large amount of money held on trust for investors. We found the characterisation of Mr King's involvement as granting *permission* for the payment was too limited a description of his conduct, and amended the declarations against him accordingly.[26] Mr King was in frequent contact with others within MFS, particularly Mr White, about using the RBS funds for the purpose of the Fortress payment. He encouraged the funds to be improperly used for the purpose of the MFS Group repaying $103 million to Fortress, not for PIF's purposes. He disregarded the entitlements of PIF beneficiaries. His conduct was dishonest.

[17] Mr King's conduct in encouraging Mr White and others to use the RBS facility for the purpose of the Fortress payment occurred in circumstances in which he was the "overall boss of the MFS Group"[27] and assumed "overall responsibility for MFSIM".[28] He used his position in the MFS Group to encourage MFSIM to misuse a very substantial amount of money held on trust. His conduct resulted in huge losses to investors.

[18] General deterrence requires a substantial pecuniary penalty to be imposed upon Mr King to deter others in a position of power and influence from engaging in similar conduct. The fact that he did not owe duties as an "officer" of MFSIM does not alter the need for a large pecuniary penalty to punish Mr King for the course of contravening conduct in which he was involved, and to deter others from engaging in similar conduct.

Do other "non-officer" cases provide useful comparisons?

[19] Mr King submits that in the few cases involving contraventions by "non-officers", the range of disqualification orders and pecuniary penalty orders has been substantially less than those ordered against Mr King by the primary judge. He cites *Australian*

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23 Penalty Reasons at [24]; see *Australian Securities & Investments Commission v Vizard* (2005) 145 FCR 57 at 65 [35]; [2005] FCA 1037 at [35].

24 Penalty Reasons at [24] citing *Gillfillan v Australian Securities & Investments Commission* (2012) 92 ACSR 460, at 505 [183]; [2012] NSWCA 370 at [183] and *Australian Securities & Investments Commission v Beekink* (2007) 238 ALR 595 at 604 [83]; [2007] FCAFC 7 at [83].

25 Penalty Reasons at [30] citing *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* (2002) 190 ALR 169 at 173 [16]; [2002] FCA 559 at [16].

26 Appeal Reasons at [291].

27 Appeal Reasons at [162]; *Australian Securities & Investments Commission v Managed Investments Ltd & Ors (No 9)* [2016] QSC 109 at [679].

28 Appeal Reasons at [19], [182]-[183].

Competition and Consumer Commission v Safety Compliance Pty Ltd (in liq) (No 2)[29] and *Australian Securities and Investments Commission v Somerville (No 2)*.[30]

[20] The facts of those cases are very different. In *ACCC v Safety Compliance*, orders were made against a Mr Dean King. He was involved in breaches of the *Trade Practices Act* 1974 (Cth) and the *Australian Consumer Law* arising from misrepresentations made by a company to prospective customers. His was a single course of conduct involving repeated misleading representations, and the loss to individual consumers was small. Mr Dean King's involvement in a "systematic and deliberate scam"[31] is very different to the conduct engaged in by Mr King in this case.

[21] In *ASIC v Somerville (No 2)*, an external solicitor, who was not involved in the management of the relevant companies, provided advice to directors which permitted them to continue to trade in an insolvent or near-insolvent state under a new company structure. There was a course of repeated conduct in giving advice and the losses were not substantial.

[22] Mr King's conduct in being knowingly concerned in contraventions by MFSIM was of a very different character to the conduct involved in the "non-officer" cases cited by him. Mr King encouraged the improper use of trust funds and the contraventions caused extremely large losses to investors.

[23] Neither of the cited cases provide useful guidance in relation to the very different conduct of Mr King. Rather than calibrate Mr King's conduct by reference to two other "non-officer cases" which differ significantly from the facts of this case, it is necessary to assess an appropriate penalty for what Mr King did in being knowingly concerned in MFSIM's contraventions. Account must be taken of the fact that he did not make use of his position as an "officer" of MFSIM and thereby breach duties which he owed as an officer of it. Regard should be had to the fact that he used his influence as CEO of the MFS Group and encouraged officers of MFSIM to obtain and use the RBS funds for the purpose of keeping the MFS Group afloat, rather than use the funds for PIF's purposes.

Mr King's argument about parity with Ms Watts

[24] Mr King submits that the penalty ordered against Ms Watts is of particular relevance and relies upon the parity principle that there should not be a marked disparity between penalties imposed in like cases, particularly between co-offenders.[32]

[25] Ms Watts was found to have been knowingly concerned in nine of MFSIM's contraventions relating to the creation and use of false documents. She was not an officer of MFSIM. She was a fund manager. The primary judge ordered that she be disqualified for five years and pay a pecuniary penalty of $90,000. No compensation order was sought against her.

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29 (2015) 110 ACSR 306; [2015] FCA 1469.

30 [2009] NSWSC 998.

31 (2015) 110 ACSR 306 at 324 [75]; [2015] FCA 1469 at [75].

32 *Australian Securities and Investments Commission v MacDonald (No 12)* (2009) 259 ALR 116 at 173 [319]–[322]; [2009] NSWSC 714 at [319]–[322].

[26] Mr King's submissions acknowledge that there are distinctions to be drawn between Ms Watts and him. Most importantly, she was not alleged to have been knowingly involved in relation to the misuse of funds. As noted, she was involved in the creation and use of false documents which purported to record transactions. Another point of distinction is that she showed contrition. Mr King submits that little weight should be given to the absence of any evidence of contrition on his part because of his then stated intention to appeal.[33] However, the absence of contrition remains a distinguishing feature between his circumstances and those of Ms Watts.

[27] Ms Watts was involved in more contraventions than Mr King. However, that is largely a function of the number of documents which had to be created. Mr King's and Ms Watts' conduct was very different, as were their positions. Mr King was the CEO of the group and encouraged the misuse of funds drawn from the RBS facility. Ms Watts was not involved in the payment away of PIF's money. She did not encourage its misuse. Instead, she was involved in attempts to cover up what had happened. Her conduct did not directly cause the loss of funds to PIF. Instead, the creation of false documents concealed the fact that Mr King encouraged Mr White and others to use PIF's funds in circumstances in which, to Mr King's knowledge, PIF received nothing in return when its funds were paid away.

[28] Mr King and Ms Watts were not involved in the same contraventions. Their respective conduct was different in its character and consequences. Mr King's conduct was far more serious and is deserving of a much greater penalty.

The totality principle and the $177 million compensation order

[29] Mr King submits that while the amount of money involved in the contraventions is substantial, a significant compensation order remains against him. The compensation order is submitted to be both compensatory and punitive, and to serve as a significant deterrent. The totality principle is said to require the compensation order to be considered as part of the overall penalty imposed. According to Mr King, any further penalty would be "needlessly oppressive".

[30] The primary judge had regard to authorities about whether the effect of compensation orders should be taken into account when determining the appropriate pecuniary penalty.[34] In reaching a conclusion about the appropriate pecuniary penalty, he had regard to the compensation order, and noted that "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."[35]

[31] Mr King's submissions about totality and the compensation order, which reflect submissions made to the primary judge, are unpersuasive. It is unnecessary to review authorities in which the effect of compensation orders has been taken into account when determining the appropriate penalty or authorities to the effect that credit should not ordinarily be given for the fact that a wrongdoer is required to make good the loss resulting from his contravention.[36] In this matter the evidence suggests that the compensation orders are unlikely to ever be paid by the individual

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33 *Australian Securities and Investments Commission v Australian Property Custodian Holdings Ltd (recs and mgrs apptd) (in liq)* (2014) 322 ALR 45 at 109 [312]–[315]; [2014] FCA 1308 at [312]–[315].

34 Penalty Reasons at [55].

35 Penalty Reasons at [102].

36 The relevant authorities are noted in the Penalty Reasons at [55].

defendants or an insurer.[37] There is no reason to discount periods of disqualification or amounts of pecuniary penalties on the basis that affected investors have been or will be paid. The compensation order and the pecuniary penalty order are designed to serve different purposes.

[32] In circumstances in which the compensation order requiring Mr King to make good the loss has not been satisfied and is unlikely to be ever satisfied, there is no sound reason to discount the penalty to take account of the burden of the compensation order. To do so would be to lessen the deterrent value of the pecuniary penalty order which (unlike the compensation order) is not provable in bankruptcy. The compensation order required payment of compensation to PIF. ASIC does not control recovery steps pursuant to the compensation order. In circumstances in which it is unlikely that there will be any recovery from Mr King pursuant to the compensation order, its deterrent value is questionable. The interest in general deterrence requires a substantial pecuniary penalty.

Other matters relied upon by Mr King

[33] As noted, Mr King relies upon the fact that, not being an "officer" of MFSIM at the relevant time, he owed no positive duties to it and instead owed duties to MFS Ltd. He notes that he was not the "mastermind or architect of the scheme" and that his conduct involved encouragement of Mr White. These matters are relevant. However, they do not alter the fact that Mr King's encouragement was in connection with the dishonest misuse by MFSIM of funds held on trust, which resulted in a huge loss to investors. His conduct involved a course of wrongful conduct and more than one contravention. He was not involved in the $17.5 million payment or in the subsequent cover up through the creation and use of false documents. This is why the appropriate pecuniary penalty and disqualification period in his case should be less than those imposed upon Mr White and Mr Anderson, who were. Mr King's involvement in the $103 million payment out of the $130 million payment made by MFSIM warrants a substantial penalty because of the nature of the contraventions, their dishonesty and the very large loss which they occasioned.

[34] Mr King submits that he did not benefit personally from the conduct. However, as the primary judge noted, his interest was in keeping the MFS Group, of which he was CEO, afloat. He had an interest in preserving his position and encouraged the dishonest contravention of MFSIM's duties to investors in order to pay Fortress and preserve his position.

[35] Mr King told the primary judge that he became insolvent after "Black Friday" (18 January 2008). He negotiated an agreement with several major creditors who were margin lenders. That required him to work for their benefit between late 2009 and early 2013. At the time of the trial in 2014 he was working as a project manager for a Hong Kong investor who was pursuing tourism-related projects in Queensland, and was a director of some small mining companies.[38] The collapse of the MFS Group and its financial consequences for Mr King was something for which he and his fellow directors had to assume responsibility, along with the benefits which they enjoyed before its collapse. Prior to Black Friday, Mr King was "very well off."[39] The fact that Mr King is said to have "lost everything" following

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37 Penalty Reasons at [55] footnote 89.
38 Trial transcript 33-15.
39 Ibid.

the collapse of the MFS Group does not alter the fact that investors in PIF lost money which was held on trust and which would have remained an asset of PIF had it not been paid away. Mr King's losses do not lessen the losses and financial hardship suffered by investors.

[36] While Mr King is currently 54 years of age and has had to live with the burdens inherent in ASIC's investigation in this proceeding since 2009, this burden is, in part, a consequence of the complex corporate malfeasance in which he was involved.

[37] Mr King submits that if the pecuniary penalty order of $300,000 and his disqualification period was to remain, he would have the most significant liability of any non-officer in the history of the Act.

What is an appropriate disqualification period?

[38] Although Mr King was not an "officer" of MFSIM, he used his position as CEO of the MFS Group to encourage the misuse of a large amount of money held on trust. His conduct involved more than one contravention. He demonstrated no contrition. He gave evidence which was rejected and minimised his responsibility for encouraging Mr White and others to use the RBS funds for the purpose of the group of which he was CEO, and not for PIF's purposes. The primary judge observed that Mr King's failure to accept responsibility for his conduct encouraged his Honour to believe that he would remain a risk to the public if he was not disqualified from managing a corporation for a very significant period. We share that view.

[39] Mr King's conduct and its consequences justified a very lengthy period of disqualification, by way of deterrence as well as protection. Parity considerations suggest it should be less than the period of disqualification imposed upon Mr White and Mr Anderson. The need for the protection of the public is no less for the fact that Mr King's misconduct, on our findings, was not as an officer of MFSIM. Ultimately we are unpersuaded that the period of disqualification in Mr King's case should be varied.

An appropriate pecuniary penalty

[40] Having regard to the dishonesty involved in the contraventions in which Mr King was knowingly concerned, the use of his position as the CEO of the MFS Group to encourage the misuse of funds held on trust and the size of the loss suffered by beneficiaries who were entitled to have the funds used for the purposes of PIF, the primary judge was correct to characterise the pecuniary penalty sought by ASIC as "moderate".

[41] The penalty should reflect the seriousness and number of Mr King's contraventions as well as the large loss sustained by investors. Although Mr King did not breach duties owed by him as an officer of MFSIM, general deterrence remains a significant factor in arriving at an appropriate penalty. Personal deterrence is also a relevant factor in circumstances in which Mr King has expressed no contrition for his conduct or acceptance of responsibility for his conduct. The law provides a maximum penalty of $200,000 for each contravention. There was more than one contravention and the penalty should have regard to his course of conduct. An appropriate penalty in the circumstances is $270,000.

Costs of the trial

[42] The general approach taken by the primary judge to costs following the trial is appropriate. Because of the numerous issues involved at the trial, it is practically impossible to separate the costs incurred in relation to the issue at trial as to whether Mr King was an "officer" within the meaning of s 9 of the Act. Nevertheless, Mr King's success on the "officer" issue ought to be reflected in a reduction of the trial costs of ASIC that he was ordered to pay. Any costs order should reflect the extent to which ASIC succeeded in its case against Mr King. Also, to succeed against Mr King it was necessary for ASIC to prove its case against MFSIM concerning the $150 million drawdown, $130 million payment and the $103 million payment. Although Mr King's alleged contraventions did not include the $17.5 million payment or the creation and use of the false documents, ASIC's case against him and others required it to prove that there had not been contemporaneous transactions, including those documented after the event. Although Mr King was not personally involved in the creation of false documents, the contraventions in which he was knowingly concerned were so serious that they occasioned the cover up. While it is possible to have regard to the proportions of ASIC's pleading, its trial submissions, the trial judgment and the penalty reasons which related only to its case against Mr King, this ignores the fact that ASIC was put to proof in establishing the contraventions which it established against MFSIM, including the significant contraventions in which Mr King was knowingly concerned.

[43] If ASIC had not tried to prove that Mr King was an "officer" of MFSIM, it is likely that his role as CEO of MFS Ltd, his relationship with Mr White and other officers of MFSIM and the influence which he played in its affairs would have remained relevant to ASIC's case that he was knowingly involved in MFSIM's contraventions.

[44] The primary judge applied an appropriate approach to the costs of the proceedings and had regard to relevant factors going to the division of costs against the individual defendants as well as the fact that much of the evidence in the trial was required in relation to the case against each individual defendant.[40] The primary judge concluded that Mr King's conduct was a significant feature of the case and proof of it also required evidence to be led concerning the false documents case. He also noted that Mr King's defence of the proceeding formed a substantial part of the litigation. We agree with these observations.

[45] The primary judge concluded that an order that Mr King pay 60 per cent of ASIC's standard costs of and incidental to the proceeding was appropriate. This order should be reconsidered and varied because it reflected, in part, ASIC's success at trial on the "officer issue".

[46] The costs order should take account of Mr King's success on the officer issue. An appropriate order is that Mr King pay 50 per cent of ASIC's costs of and incidental to the proceeding on the standard basis.

Costs of the appeal and the cross-appeal

[47] The parties were directed to file and serve written submissions as to costs of the appeal and the cross-appeal.

[48] Mr King submits that:

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40 Penalty Reasons at [63]-[68], [103].

(a) ASIC should pay his costs of his appeal on the officer point, in particular, grounds 3, 8 and 9 of his notice of appeal;

(b) ASIC should pay his costs of ASIC's cross-appeals; and

(c) Otherwise he should pay ASIC's costs of his appeal.

Alternatively, he submits that an appropriate order would be for him to pay 50 per cent of ASIC's costs of his appeal, reflecting his partial success on appeal.

[49] ASIC submits that Mr King's success on the issue on which he prevailed should be reflected in a modest reduction in the amount of ASIC's costs of the appeal. It submits that Mr King should be ordered to pay 80 per cent of its costs of the appeal, and also 80 per cent of ASIC's cross-appeal.

[50] The Court may make the order as to the whole or part of the cost of the appeal as it considers appropriate.[41] The usual exercise of the discretion is that the general costs of the appeal follow the event. Also, it is appropriate to keep the assessment "as simple and as inexpensive as possible".[42]

Mr King's appeal

[51] Mr King's notice of appeal raised 15 grounds of appeal. They, and his submissions, may be grouped in relation to:

(a) the scope of ASIC's pleaded case;

(b) the conclusion that he was an "officer" of MFSIM;

(c) contravention findings, including issues in relation to Mr King's knowledge;

(d) a challenge to the finding that the Fortress payment was not an authorised investment;

(e) the adequacy of the primary judge's reasons; and

(f) the granting of relief under ss 1317S and 1318 of the Act.

One ground in relation to the "officer" findings (ground 4) was abandoned at the start of the hearing of the appeal.

[52] Mr King enjoyed success in relation to the meaning of "officer" in s 9 of the Act. There were two reasons for that outcome. The first was that it was necessary for ASIC to prove that Mr King acted in an office or position within MFSIM, and there was no finding to that effect by the primary judge. The second was that on this Court's review of the evidence, we were not persuaded that ASIC proved that Mr King had the capacity to significantly affect the financial standing of MFSIM, which was the basis of ASIC's case that he was an officer.[43] Any capacity which he had to affect its financial standing was one which derived from his position as CEO with the MFS Group and was exercised by him in that role, rather than acting in an office or position within MFSIM.[44]

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41 *Uniform Civil Procedure Rules* 1999 (Qld) r 766(1)(d).
42 *Sochorova v Commonwealth of Australia* [2012] QCA 152 at [21].
43 Appeal Reasons at [249].
44 Appeal Reasons at [288].

[53] The "officer" points upon which Mr King succeeded occupied a significant part of his appeal, as reflected in his grounds of appeal, the proportion of his written and oral submissions devoted to these points and in ASIC's response to them. However, as noted, there were many other issues raised by his appeal and his unsuccessful challenges occupied more time than his successful "officer" points. These included consideration of a significant body of evidence in relation to the November payment, MFSIM's contraventions, pleading points, the role which Mr King occupied and evidence bearing upon what he knew.

[54] Overall, ASIC enjoyed a substantial measure of success. Mr King's success on the "officer" finding resulted in declarations that he had contravened s 601FD being set aside and other declarations against him being recast because they contained too limited a description of his conduct. Whilst Mr King succeeded on the issue of whether he was an "officer" of MFSIM, that success has not been reflected in a reduction in the period of his disqualification. It has, however, resulted in some reduction of the pecuniary penalty and an adjustment to the costs order made against him in respect of the trial. The order for compensation remains.

[55] It would be possible to make an order that ASIC pay Mr King's costs of his appeal on the "officer" grounds upon which he succeeded and that he otherwise pay ASIC's costs of his appeal. However, this would result in two assessments and it is preferable to avoid that by making a single order as to the costs of his appeal. An appropriate order to reflect his partial success on appeal is that he pay 75 per cent of ASIC's costs of his appeal.

ASIC's cross-appeal

[56] ASIC's cross-appeal against Mr King raised two grounds. The first was conditional upon this Court allowing his appeal against certain declarations made and relief ordered in respect of the dishonesty findings made, his knowing involvement in the dishonesty contraventions of MFSIM and his conduct as an officer. It argued that, in that event, declarations and other relief should have been granted in relation to alternative contraventions about MFSIM's failure to exercise the degree of care and diligence that a reasonable person would exercise. Because this Court did not set aside the findings of dishonesty against Mr King, there was no need to consider this aspect of the cross-appeal.[45] ASIC argues that it was proper for it to contend for the "alternative" contraventions in the event that the dishonesty contraventions were overturned.

[57] It was not unreasonable for ASIC to advance that matter on a conditional, precautionary basis. It was unnecessary for the Court to decide the merits of that ground of the cross-appeal because Mr King failed to overturn the dishonesty findings which he challenged. ASIC has reasonable grounds to contend that Mr King should pay its costs in relation to the first ground of its cross-appeal.

[58] The second ground in the cross-appeal alleged that the primary judge erred in holding that the sum of $425,000 paid to PIF by MYF came from misappropriated funds and was intended as part repayment of the misapplied money. That aspect of the cross-appeal was abandoned. This justifies an order being made for ASIC to pay Mr King's costs associated with that ground of the cross-appeal.

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45 Appeal Reasons at [292].

[59] In circumstances in which ASIC has a reasonable basis to recover its costs of the first ground of its cross-appeal and Mr King enjoyed success in relation to the second ground of ASIC's cross-appeal, the simplest and most appropriate order is that there be no order as to costs in relation to ASIC's cross-appeal against Mr King.

Orders

[60] For these reasons, there will be orders as follows:

1. The order made in paragraph 30 of the orders made on 26 May 2017 be varied, by substituting a pecuniary penalty of $270,000 for the sum of $300,000.

2. The order made in paragraph 32 of those orders be varied, by ordering that the appellant pay 50 per cent of the respondent's costs of and incidental to the proceeding in the trial division on the standard basis.

3. The appellant pay 75 per cent of the respondent's costs of the appeal and there be no order for costs on the respondent's cross-appeal.