SUPREME COURT OF QUEENSLAND

CITATION:	*Connelly and Harris & Anor v McGrath & Anor* [2019] QSC 304
PARTIES:	**ANTHONY CONNELLY AND WILLIAM HARRIS AS LIQUIDATORS OF EUREKA CO-OPERATIVE HOUSING SOCIETY NO. 2 LIMITED (IN LIQUIDATION)** (first plaintiffs) and **EUREKA CO-OPERATIVE HOUSING SOCIETY NO. 2 LIMITED (IN LIQUIDATION)** (second plaintiff) **v** **DAVID PETER MCGRATH** (first defendant) and **MCGRATH FINANCIAL SERVICES AUSTRALIA PTY LTD ACN 084 000 840** (second defendant)
FILE NO:	BS 4896 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	10 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2019
JUDGE:	Ryan J
ORDER:	1. In the defendants' application – a. I order dispensation from the pleading rules in relation to paragraphs 14, 15, 18, 21, 22 and 24 of the Amended Statement of Claim for the First Defendant. b. I order dispensation from the pleading rules in relation to paragraph 24 of the Amended Statement of Claim for the Second Defendant. c. I order, in the case of the First Defendant, *in limine* relief from the disclosure obligation to the

same extent as dispensation from the pleading rules has been ordered by me or not challenged by the plaintiffs.

d. Otherwise the defendants' application is dismissed.

e. Liberty to apply.

2. I grant the plaintiffs' application for interlocutory orders.

3. I will hear the parties as to the form of the orders, and as to costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – OTHER MATTERS – where the defendants submit that compliance with the rules of pleading and disclosure would interfere with the first defendant's privilege against self-incrimination – where the defendants applied for dispensation from the pleading requirements of the *Uniform Civil Procedure Rules* 1999 and relief *in limine* from their disclosure obligations – where the first defendant was the sole director of the second defendant – whether not granting the second defendant the same dispensation and relief would undermine the first defendant's privilege.

EQUITY – EQUITABLE REMEDIES – INJUNCTIONS – INTERLOCUTORY INJUNCTIONS – INJUNCTIONS TO PRESERVE STATUS QUO AND PROPERTY PENDING DETERMINATION OF RIGHTS – where the plaintiffs applied for freezing orders, under Rules 260A and 260D of the *UCPR*, pending resolution of the proceedings.

Financial Intermediaries Act 1996 (Qld)

Uniform Civil Procedure Rules 1999

Anderson v Australian Securities and Investments Commission [2013] 2 Qd R 401

Barnes v Addy (1874) LR 9 Ch App 244

CC Containers Pty Ltd & ors v Lee & ors (No 2) [2012] VSC 149

Chardon v B [2017] QCA 314

Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd and others (2015) 256 CLR 375

Davey v Silverstein & Ors [2019] VSC 302

E L Bell Packaging Pty Ltd v Allied Seafoods Ltd (1990) 4 ASCR 85

Gemmell and Another v Le Roi Homestyle Cookies Pty Ltd (in liq) and Others (2014) 46 VR 583

HRF Nominees Pty Ltd (In Liquidation) ATF HFR Constructions Unit Trust and another v Man Civil Constructions Pty Ltd and others [2014] VSC 93

John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2) [2014] FCA 1032

Le Roi [2014] VSCA 182

Lee v Abedian [2017] 1 Qd R 549

LM Investment Mgmt Ltd v Drake & Ors [2017] QSC 34

Microsoft Corporation and others v CX Computer Pty Ltd and others (2002) 116 FCR 372

One.Tel (in liq) v Rich (2005) 53 ACSR 623

Pascoe v Divisional Security Group Pty Ltd (2007) 209 FLR 197

Pyneboard Pty Ltd v Trade Practices Commission (1983) 152 CLR 328

QC Resource Investments Pty Ltd (In Liq) v Mulligan [2016] FCA 813

R v Ronen and Ors (2005) 62 NSWLR 707

Re Australian Property Custodian Holdings Ltd (in liq) (recs and mgrs. apptd) (No 2) (2012) 93 ACSR 130

Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation and others (1979) 42 FLR 204

Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547

Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 7) [2019] QSC 241

Sorby v The Commonwealth (1983) 152 CLR 281

TTAC Pty Ltd v Craig Edward Williams [2018] VSC 79

COUNSEL: D S Piggott for the first and second plaintiffs
M J May for the first and second defendants

SOLICITORS: HWL Ebsworth for the first and second plaintiffs
Burns Law for the first and second defendants

Table of contents

Overview

[1] Eureka is a co-operative housing society incorporated under the *Financial Intermediaries Act* 1996 (Qld). David McGrath, the first defendant, was its director. Eureka acquired funding from a source funder, the National Australia Bank (NAB), and lent those funds to its members at a rate higher than the rate at which it borrowed the funds.

[2] As at 6 March 2018, Eureka had 14 outstanding member loans totalling almost $1 million, secured by registered mortgages. Eureka owed only about $187,000 to its source funder. It had therefore a loan surplus of approximately $812,000. And it had a net asset position of about $827,000. Under relevant rules and standards, the distribution of any surplus to members was to be by way of set-off against a member's outstanding loan, except on a winding up when distributions could be made by way of set-off or cash.

[3] As well as being a director of Eureka, Mr McGrath was the sole director, secretary and shareholder of McGrath Financial Services Australia (MFSA), the second defendant.

[4] On 6 March 2018, Eureka transferred all of its member loans and mortgages to MFSA. The price paid by MFSA for the almost $1 million in member loans was $187,000, which was the amount required to pay out the NAB. Thus the entire benefit of the loan surplus was passed to MFSA.

[5] That transaction was approved by Eureka's members at a special general meeting.

[6] In April 2015, the Registrar of Co-Operative Housing Societies wrote to Mr McGrath, suggesting that the transfer of loans from Eureka required –

> The preparation of an Information Statement which must be approved by the Registrar before it is sent to members. The Information Statement should contain all information material to a member's decision including sufficient disclosure around reserves and the implications of the proposed transfer on the reserves.

[7] Mr McGrath was reminded of those requirements by the Queensland Treasury Corporation on 27 July 2015.

[8] Mr McGrath received advice about the transaction from Lachlan Graff, an accountant from RWN Chartered Accountants (Eureka's auditors). Mr Graff was aware of the Registrar's requirements.

[9] Before the meeting, on 24 May 2017, Mr Graff sent an email to Mr McGrath about the draft Information Statement which stated –

> Our main issue here is that, where a co-op has equity or value, that value is owned by the members. By transferring the members into a commercial entity, they are losing that value, i.e. potentially being disadvantaged.

[10] The plaintiffs allege that, among other omissions, the Information Statement sent to members did not inform them about the existence and size of the loan surplus; their rights to any distribution of the surplus in the ordinary course or on winding up; or that the consequence of the transaction would be to pass to MFSA the entire benefit of the loan surplus.

[11] The essence of the plaintiffs' case is that Mr McGrath ought to have informed the members about those matters.

[12] The plaintiffs claim against Mr McGrath is in respect of his alleged breaches of –

(a) his statutory duties as director, contained in s 117 of the *Financial Intermediaries Act* 1996 (to exercise a reasonable degree of care and diligence and not to make improper use of their position as director to gain an advantage); and

(b) his fiduciary duties as director (not to obtain an unauthorised benefit, nor be in a position of conflict of interest).

[13] The plaintiffs claim against MFSA under the rule in *Barnes v Addy* (1874) LR 9 Ch App 244.

[14] In response to the plaintiffs' pleading, Mr McGrath claims the privilege against self-incrimination.

[15] The privilege against self-incrimination is a rule of substantive law and a "fundamental … bulwark of liberty":[1] a person cannot be compelled to answer any question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal".[2] The privilege against exposure to penalties[3] is distinct from the privilege against self-incrimination, but they both reflect the principle that a person accused of a crime, or of conduct warranting penalty, should not be compelled to provide proof of those accusations. Because the privileges are rights, and not merely rules of evidence, they may be invoked pre-trial. Thus, they extend to pleadings and other interlocutory processes, including disclosure.

[16] The defendants submit that there is a risk that their compliance with the rules of pleading and their disclosure obligations will reveal incriminating material. To give effect to Mr McGrath's self-incrimination privilege,[4] the defendants seek orders for –

(a) limited dispensation from the pleading requirements of the *Uniform Civil Procedure Rules* 1999 (UCPR), as was ordered in *Anderson v ASIC*;[5] and

(b) *in limine* relief from the requirements of Chapter 7 of the UCPR requiring disclosure, as was ordered in *E L Bell Packaging Pty Ltd v Allied Seafoods Ltd*.[6]

---

1 *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 340.

2 *Sorby v The Commonwealth* (1983) 152 CLR 281 at 288, per Gibbs CJ, quoting *Lamb v Moss* (1882) 10 QBD 110 at 111.

3 And forfeiture.

4 Corporations are not entitled to the privileges.

5 [2013] 2 Qd R 401.

6 (1990) 4 ASCR 85.

[17] By the time of the hearing, the scope of the dispute between the parties about dispensation from the pleading requirements of the UCPR was significantly narrowed, involving only paragraphs 12 – 18, 20 – 21, 24 – 25, 29, 34, 38 and 39 of the Amended Statement of Claim. At the hearing itself, the defendants acknowledged that their position was not strong in relation to some of those paragraphs. They pursued the matter only in respect of paragraphs 14, 15, 18, 20, 21, 22, and 24.

[18] In addition to opposing the relief sought by the defendants, the plaintiff's applied for freezing orders, under Rules 260A and 260D of the UCPR, to protect the mortgages, the loans and the proceeds of the loans, pending resolution of the proceedings.

[19] I will deal first with the defendants' application for dispensation from the pleading rules and relief from the general disclosure obligations and then with the plaintiffs' application.

[20] The parties' arguments about dispensation and disclosure fall to be considered in the context of the many authorities to which I was referred. I will therefore commence with an analysis of the authorities. The emphasis in the paragraphs quoted below is mine.

Authorities

Refrigerated Express (1979)

[21] The starting point is the decision of Deane J in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corporation and others*.[7]

[22] Refrigerated Express sought injunctive relief against six corporate and six personal respondents. It alleged contravention, or involvement in contravention, of the provisions of Part IV of the *Trade Practices Act* 1974 (Cth) (the TPA).

[23] By section 78 of the TPA, criminal proceedings did not lie against a person by reason only of their contravention (or involvement in a contravention) of the TPA. However, by section 76 of the TPA, if the court was satisfied that a person contravened, attempted to contravene or was involved in certain ways with a contravention of Part IV of the TPA, the court might order them to pay a pecuniary penalty.

[24] The respondents sought an order excusing them *in limine* from giving discovery of documents or answering interrogatories. They submitted that a party to litigation ought not to be compelled to provide evidence against himself which may be used to expose him to a penalty.

[25] The *Refrigerated Express* proceedings did not involve an allegation of criminal conduct, nor were they proceedings for the recovery of a pecuniary penalty. Rather, they were "proceedings to prevent and redress alleged civil injury". But their basis lay in the contravention, or involvement in the contravention, of the provisions of Part IV and the applicants could only succeed if they established (against at least one of the respondents) contravention or involvement. In that sense, Deane J said, "the proceedings are … aimed at establishing against the respondents conduct which would make them liable to the imposition

---

[7] (1979) 42 FLR 204.

of a penalty pursuant to s 76 of the Act in proceedings brought at the suit of the Minister or the Trade Practices Commission".

[26] His Honour said (referring to relevant authority which I have omitted from the following quote) –[8]

> It is a well-established principle that a defendant in proceedings which are solely for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents which may assist in establishing his liability to the penalty … **Even where, as in the present case, the proceedings are not for recovery of a penalty but to prevent and redress civil injury, a party to litigation ought not to be compelled to provide information or produce documents for inspection by the other party if the result thereof will be to provide evidence against him which may be used to establish his liability to a penalty in other proceedings** …
>
> In the former case, that is to say in a mere action for a penalty, a court should, in the absence of statutory provision to the contrary, refuse to make any order at all against the defendant for discovery or production of documents or provision of information for the reason that the whole and avowed object of the proceedings being the imposition and the recovery of a penalty, an order for the production of documents or provision of information against the defendant can, so far as the prosecutor of the action is concerned, properly have no other intended consequence … This is a broad and unqualified rule whose origins are apparently to be found in a reluctance on the part of the Court of Chancery to lend the aid of its discovery proceedings to the common informer …
>
> In the latter case … **where the proceedings are not for the recovery of a penalty, there is no general rule precluding the making of an order for discovery or interrogatories and there will ordinarily be no proper ground for objecting to an order for production of documents or provision of information being made.** The party against whom such an order is made is left to object to producing particular documents or providing particular information on the ground that such production or provision may tend to expose him to a penalty.

[27] However, his Honour said, that approach was not, as a matter of law, necessarily appropriate to all circumstances –[9]

> If circumstances arose where the **only means** of protecting the right against self-incrimination and self-penalization were to excuse a party in limine from discovery or interrogatories, such circumstances should, in my view, be seen as **exceptional and as justifying a departure from the general rule**. **In particular, if it appeared to the court that the making of an affidavit of discovery as distinct from producing the documents referred to in such an affidavit would tend to**

---

8 (1979) 42 FLR 204 at 207 – 208.

9 (1979) 42 FLR 204 at 211.

> **expose a party to a penalty, any order for discovery should be adjusted to the extent necessary to preclude that tendency** …

[28] The respondents argued that *in limine* orders were necessary because the whole basis of the action was alleged contravention, and involvement in contravention, of the provisions of Part IV of the TPA. It was said that the only purpose of discovery or interrogatories was to provide evidence which would tend to establish the contraventions or involvement. And, if the contraventions or involvement were established, it would "inevitably tend" to render the respondents liable to penalty at the suit of the Minister or the Trade Practices Commission.

[29] His Honour saw "great force" in that argument but was unable to accept it. His Honour said –[10]

> … the only circumstances which would warrant a departure in the present case from the ordinary approach … would be that it appeared that the actual discovery, as distinct from production for inspection, of documents or the actual order for interrogatories would tend to expose the party ordered to make discovery or answer interrogatories to liability to a penalty …

[30] That circumstance was not present and the ordinary approach therefore applied. His Honour added that if describing a document by reference to its nature or contents would tend to render a respondent liable to a penalty, then that would justify less precision in the description of the document than would otherwise be appropriate. Where lack of precision of description would not avoid the tendency to expose to a penalty, an application could be made to the court to modify the order for discovery.

Bell Packaging (1990)

[31] In *E L Bell Packaging Pty Ltd v Allied Seafoods Ltd & Ors,*[11] Bell Packaging alleged (among other allegations) that the defendant's directors were liable for payment of their company's debt under section 556 of the Victorian Company's Code. The relevant parts of that section state (my emphasis) –

> 556(1) If –
>
> (a) a company incurs a debt, whether within or outside the State;
>
> (b) immediately before the time when the debt is incurred –
>
> (i) there are reasonable grounds to expect that the company will not be able to pay all its debts as and when they become due; or
>
> (ii) there are reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; or

---

[10] (1979) 42 FLR 204 at 212.

[11] (1990) 4 ACSR 85.

(iii) there are reasonable grounds to expect that, if the company incurs the debt, it will not be able to pay all its debts as and when they become due; and

(c) the company is, at the time when the debt is incurred, or becomes at a later time, a company to which this section applies;

any person who was a director of the company, or took part in the management of the company, at the time when the debt was incurred is guilty of an offence and the company and that person or, if there are 2 or more such persons, those persons are jointly and severally liable for the payment of the debt.

Penalty: $5000 or imprisonment for 1 year or both.

(2) In any proceedings against a person under subsection (1), it is a defence is the defendant proves –

(a) that the debt was incurred without his express or implied authority or consent; or

(b) that at the time when the debt was incurred, he did not have reasonable cause to expect –

(i) that the company would not be able to pay all its debts as an when they became due; or

(ii) that, if the company incurred that debt, it would not be able to pay all its debts as and when they became due.

(3) Proceedings may be brought under sub-section (1) for the recovery of a debt whether or not the person against whom the proceedings are brought, or any other person, has been convicted of an offence under sub-section (1) in respect of the incurring of that debt.

…

[32] The defendant directors responded to a notice for discovery by stating that they did not intend to file and serve an affidavit of documents. One of the defendants deposed that were he obliged to answer on affidavit the notice for discovery, he would object to the production of each and every document on the ground that "any such documents which may tend to substantiate or support the plaintiffs action is also a document that may tend to incriminate us". The notice for discovery was dismissed at first instance and the plaintiff unsuccessfully appealed against that decision.

[33] On appeal, the plaintiff conceded that, if the action was one for a penalty against the defendant directors, then there should be an order *in limine*, relieving them from their discovery obligations. However, it submitted that the action was not such an action.

[34] Murphy J considered the propositions stated by Deane J in *Refrigerated Express* to apply with equal force in *Bell Packaging*, noting that –[12]

> … unlike the section being considered by Deane J s 556 does make it a criminal offence to do what the plaintiff alleged that the defendants did. It is necessary for the plaintiff to establish on the balance of probabilities the elements of the crime, before it can succeed in its civil action for statutory damages …
>
> … an offence against s 556 may be proven by proving an act or acts of omission equally as by proving acts of commission. Also, a director may be guilty of an offence if he ought reasonably to have known of the existence of a relevant state of affairs – but negligently did not do so …

[35] His Honour went on to say –

> it would seem in my view to follow that means of the defendant's knowledge may be, and would seem to be, equally as important for a prosecutor or a plaintiff to establish, as actual knowledge of the company's insolvency at the time of incurring the relevant debt.
>
> If this is so, it was submitted that the mere revelation on oath of a director's possession of documents or even of his non-possession of documents would be relevant to assist the proof of the criminal offence created by the section. In my opinion this is probably so.
>
> The present case is, I believe, the very type of case contemplated to be exceptional by Deane J …
>
> Having to discover documents on affidavit, and then to object to production is calculated to have several consequences. It could establish that the deponent had the means of actual knowledge of the state of the company's affairs at the relevant time. It could also assist to establish a negligent absence of actual knowledge, by the omission from the documents schedule of material with which a competent or diligent director ought to have made himself familiar or should at some time have had in his possession. All details of actual knowledge or absence of knowledge would go to assist in the proof of a criminal offence, for the only relevant documents would be those going to prove or disprove such an offence on the balance of probabilities.

[36] It will be seen below that the defendants rely on the factual similarity between this case and the present case. However, Eureka and its liquidators emphasised this next paragraph of his Honour's reasons –

> The defendants have **deposed on affidavit** that the discovery of any or no documents would tend to incriminate them.

[37] His Honour was of the view that proof of the presence of "reasonable grounds" in section 566(1)(b)(i) and of "reasonable cause" in section 556(2)(b) would be assisted by the mere

---

[12] 4 ACSR 85 at 92 – 93.

making by the defendants of an affidavit of documents, and thus the affidavit would of itself tend to incriminate.

[38] His Honour found "good reasons" to deny the plaintiff discovery against the defendant directors, *in limine*. Whilst the action was not one to enforce a penalty, it involved proof of elements identical to those constituting the offence created by the section. Thus production of any document relative to establishing the civil case alleged, or a failure to discover documents, may tend to incriminate.

[39] Young CJ, agreeing with Murphy J, explained –[13]

> In civil litigation it is axiomatic that a litigant is not obliged to answer a question if the answer would tend to incriminate him. By another rule, a party giving discovery in a proceeding may object to produce for inspection any document which may tend to incriminate him. But as Deane J pointed out in *Refrigerated Express …* the requirement that objection be taken to the production of a particular document is not necessarily appropriate to all circumstances.
>
> Under s 566 of the Companies (Vic) Code precisely the same facts if established will expose a defendant to both civil and criminal liability. Moreover whether in civil or criminal proceedings the usual onus of proof is reversed and a defendant must prove the exculpatory facts specified in subs (2) of the section. **The necessity to reveal in advance of the hearing of a criminal charge based on the section that a defendant had or had had certain documents in his possession or power… would be directly relevant to proof of the criminal offence created by the section. I am therefore clearly of the opinion that this is a case in which the defendants should not be required to make an affidavit of discovery.**
>
> It was said in argument that if production of any particular document might tend to incriminate a defendant objection might be taken in the affidavit of documents to the production of it. But **although the defendants in their affidavit in response to the summons for discovery did not say that the mere making of an affidavit of discovery might tend to incriminate them I do not think that they should be put to the necessity of pursuing that course for I am satisfied that they would not thereby achieve the protection to which they are entitled**.

[40] Vincent J agreed with Murphy J that the case fell squarely within the class to which Deane J referred, where the taking of objection *in limine* to a notice of discovery could be properly regarded as justified.

Microsoft v CX (2002)

[41] In *Microsoft Corporation and others v CX Computer Pty Ltd and others*,[14] the causes of action against the respondents (which included Natcomp, a corporation and Grassia, an individual) alleged an infringement of copyright; infringement of registered trademarks; and

---

[13] 4 ACSR 85 at 86.

[14] (2002) 116 FCR 372.

contravention of certain provisions of the TPA. The infringements alleged were also offences under section 132 of the *Copyright Act* and section 148 of the *Trade Mark Act*.

[42] Grassia was the sole director and secretary of Natcomp. He and two others, Gaetano Grassia and Ible, were its shareholders.

[43] In January 2001, members of the Australian Federal Police (AFP) executed search warrants at premises connected to the respondents and seized documents which were reasonably suspected to afford evidence of the commission of certain offences under trade mark or copyright legislation.

[44] In October 2001, by way of a notice to produce, the applicants required the respondents to file and serve a list of documents including documents which had been seized by the AFP.

[45] The respondents applied for an order setting aside the notice to produce, relying on the privilege against self-incrimination. The applicants submitted that the seizure of the documents by the AFP meant that the respondent's giving of discovery and producing the documents referred to in the notice would not make them more likely to be prosecuted for those offences than was already the case.

[46] The *Federal Court Rules* 1979 stated that an affidavit verifying a list of documents of a corporate party may be made by "a member or officer of the corporation". Grassia was *not* the only member of Natcomp: Gaetano Grassia and Ible were as well. And Gaetano Grassia was, additionally, an officer.

[47] Lindgren J was not satisfied that it was impossible or impractical for Natcomp's list of documents to be verified by an individual other than Grassia, or for someone other than Grassia to respond to the notice to produce. Natcomp was not relieved from giving discovery or complying with the notice to produce. His Honour was not satisfied that Natcomp's doing so would require Grassia to engage in self-incriminatory conduct of any kind.

[48] As to Grassia himself, Lindgren J observed that the scope of the privilege was not to be identified, *unqualified*, as a privilege against being compelled to do something which may tend to show that the person has committed an offence. After considering relevant authority, including *Sorby v The Commonwealth*,[15] his Honour explained –[16]

> … the privilege has been held to be not available where it is clear that the taking of the step in question will not add to the individual's jeopardy …

[49] His Honour could not conceive of any way in which the production by Grassia or Natcomp of any record of documents and things seized by the AFP could expose Grassia to any additional peril of being prosecuted. Grassia and Natcomp were required to comply with the notice to produce and to give discovery of the documents and things seized by the AFP which were in their possession custody or power.

---

[15] (1983) 152 CLR 281.

[16] (2002) 116 FCR 372 at 381.

[50] Lindgren J then considered the position with respect to *additional* documents and things in Grassia's possession, custody or control.

[51] Grassia submitted that, in that regard, the case was one of the rare cases spoken of by Deane J in *Refrigerated Express*: the only purpose of discovery was to aid the applicants to prove conduct which also constituted offences. Grassia relied on *Bell Packaging* as an illustration of such a rare case.

[52] Lindgren J considered *Refrigerated Express* in detail, noting that it was a "strong case" but that Deane J was not persuaded by the submission that the very facts relied upon to establish the basis of civil liability were also made by the statute the ground for the imposition of a civil penalty.

[53] His Honour then considered the course of authority since *Refrigerated Express* noting that it had not been consistent. His Honour found in the cases he examined –[17]

> …a strong disposition in a proceeding not itself concerned with the imposition of a penalty for an offence or a civil penalty, in favour of ordering discovery, reserving the issue of self-incrimination to the stage of production for inspection, and also reserving liberty to apply in relation to the degree of specificity with which a document is to be described in the individual's list of documents.

[54] Lindgren J was not persuaded that the present case fell within the rare exception which *Refrigerated Express* allowed. Of the exceptional case, his Honour said –[18]

> It should not be thought that the rare exception referred to by Deane J … could never have work to do. It would be applicable, for example: … where *any* description of an otherwise discoverable document might tend to incriminate the discovering party or render that party liable to imposition of a civil penalty in respect of other conduct or circumstances.

Re APCH (2012)

[55] *Re Australian Property Custodian Holdings Ltd (in liq) (recs and mgrs. apptd) (No 2*)[19] involved an application for case management orders brought in pursuance of the privilege against self-incrimination and self-exposure to a penalty, in proceedings concerning the recovery of funds.

[56] The liquidators of Australian Property Custodian Holdings Ltd (APCH) made claims in the Supreme Court against seven of its former directors and other parties seeking the recovery of $30 million. Also, ASIC commenced civil penalty proceedings against APCH and five of the seven directors ("the common defendants") alleging that they had breached their duties under the *Corporations Act* 2001 (Cth). The liquidator's Supreme Court proceedings and ASIC's civil

---

[17] (2002) 116 FCR 372 at 388.

[18] (2002) 116 FCR 372 at 389.

[19] (2012) 93 ACSR 130.

penalty proceedings complained about the same transactions and conduct. Lewski, a director of APCH, was one of the common defendants.

[57] The common defendants sought a stay of the Supreme Court proceedings until the ASIC proceedings were determined. Alternatively, they sought to be excused *in limine* from filing a defence to the extent that compliance with the rules may have a tendency to expose them to a civil penalty or criminal proceedings.

[58] In terms of the evidence relied upon, it was submitted that Lewski was concerned that ASIC would bring criminal proceedings against him for breach of the statutory duties which he owed APCH as a director. He had not sworn an affidavit in support of this concern although his solicitor (Bond) had. Bond affirmed that Lewski had informed him that he had elected not to depose to matters because he wished to take all possible steps to maintain his privilege against self-incrimination and penalty privilege. Bond also said that Lewski informed him that he did not want to expose himself to potential cross-examination on any affidavit he might swear which may lead to an allegation that he had waived his right to the privileges. On the basis of Bond's affidavit and other evidence, Robson J found that Lewski had not established the reasonable possibility of *criminal* proceedings being laid against him.

[59] Robson J was not satisfied that the interests of justice required a stay of proceedings. His Honour went on to consider, and then list, the legal principles relating to *penalty* privilege and the filing of a defence in the course of an extensive review of the authorities.[20]

[60] In the course of the review, his Honour noted that Deane J's distinction between penalty and non-penalty proceedings had been confirmed by the High Court in *Pyneboard Pty Ltd v Trade Practices Commissioner*.[21]

[61] Also, his Honour compared *One.Tel (in liq) v Rich*[22] and *Pascoe v Divisional Security Group Pty Ltd.*[23] In both cases, the claim in the non-penalty proceedings required proof of a breach of a civil penalty provision. In *One.Tel*, the defendants were not required to file evidence before trial. In *Pascoe,* they were. His Honour reconciled those cases on the basis that *One.Tel* was an exceptional case because there was already a civil penalty proceeding on foot. In *Pascoe*, there were no ASIC proceedings on foot or foreshadowed. Nor had the defendants in *Pascoe* deposed on affidavit that the verification of the defence could tend to prove liability to civil penalty, or the reasonable grounds for such a belief.

[62] In the case before his Honour, the common defendants would be pleading to accusations which effectively mirrored those made in the concurrent civil penalty proceedings. His Honour found the circumstances exceptional: the existence of the civil penalty proceedings established that the taking of the privilege would be bona fide and reasonable. It was appropriate

---

[20] The list is at [115] of (2012) 93 ACSR 130. Those principles have been referred to with approval and adopted in many subsequent decisions.

[21] (1983) 152 CLR 328 at 336.

[22] (2005) 53 ACSR 623.

[23] (2007) 209 FLR 197.

therefore to rule in advance that the common defendants were entitled to exercise the privilege when pleading their defence.

[63] His Honour was also required to consider the position of the corporate defendants (who were not common defendants). Three of them were known as the Lewski companies. Lewski was either the sole director of those companies, or the person in effective control of them. The solicitor for the Lewski companies deposed that he took instructions from Lewski on behalf of the defendant companies.

[64] The Lewski companies did not assert privilege in their own right. Rather, they submitted that requiring them to comply with the rules of pleading would undermine Lewski's claims for privilege. Referring to *Microsoft,* the Lewski companies submitted that it was implicit in the judgment of Lindgren J that, had Grassia been the only shareholder available to produce the relevant documents and swear the affidavit of documents, his Honour *may* have found that Natcomp was not obliged to comply with the discovery and production requirements.

[65] In considering that argument, Robson J said –

> [2] [Lindgren J] did, however, note that Natcomp may well be obliged to take other steps to make discovery, for instance, through the appointment of another individual with the capacity to swear the relevant affidavit.
>
> [3] Consistently with his consideration of *Refrigerated Express* and the obligation on Grassia to give discovery, it seems that his Honour may have ruled that Grassia could object to production or inspection if he was the only person under the Rules who could have performed these obligations for the company but could not object to giving discovery in limine.

[66] The Lewski companies also referred to *R v Ronen and Ors*[24] in which subpoenas were addressed to the "proper officer" of a corporation. In that case, Spigelman CJ observed that there was "much to be said for the proposition that if the subpoenas do in fact require the accused [director and secretary] to perform some act, then the subpoenas should be set aside as oppressive and/or an abuse of process" and that "[w]hether the position is different in a one-person company need not be decided. In such a case it may be necessary for the court to appoint a receiver for this specific purpose".

[67] Robson J distinguished those cases from the case before him because they involved the production of documents, rather than the filing of pleadings. Also, there was at least one other member, employee or officer who was not asserting privilege and who had the ability to appropriately achieve compliance on the part of the corporation. His Honour said –

> [163] What is required of a company in filing a defence is markedly different from that which is required of the company in producing and verifying documents in its possession. Further, the steps required of a sole director of a company in filing a defence cannot be fairly or reasonably assigned to

---

[24] (2005) 62 NSWLR 707.

> another individual who does not have the requisite knowledge to provide full and proper instructions.
>
> …
>
> [165] [Because] the knowledge alleged against the companies was the knowledge of Mr Lewski, he was the only person who could provide meaningful instructions. Accordingly, the companies were relieved from their obligation to file defences in compliance with the Rules.

Anderson v ASIC (2013)

[68] *Anderson v Australian Securities and Investments Commission*[25] is a decision of the Queensland Court of Appeal, in which Holmes JA (as the Chief Justice then was) and White JA agreed with Philip McMurdo J (as his Honour then was).

[69] ASIC brought proceedings against three corporations and five individuals, including Anderson, seeking relief, including by way of pecuniary penalties, for contraventions of the *Corporations Act* 2001. As his Honour observed, the very nature of the proceedings attracted a claim for the privilege against exposure to a penalty. Also, ASIC conceded that the privilege against self-incrimination might be relevant.

[70] The relief granted by the primary judge allowed the appellants to claim the benefit of the privilege in relation to facts stated in the statement of claim which the appellants believed were true, rather than admit those facts. The primary judge also allowed the appellants to claim the privilege rather than give a direct explanation for facts which were denied or not admitted. The question for the Court of Appeal was whether the relief granted by the primary judge went far enough. It was held that it did not.

[71] His Honour considered the content of each privilege and the relevant principles for their operation and continued (footnotes omitted) –[26]

> The privilege against self-incrimination can be claimed where the claimant establishes a bona-fide apprehension of the consequence on reasonable grounds. The entitlement to the privilege against exposure to a penalty perhaps more clearly exists here, where the very purpose of the proceedings in the imposition of the penalty. In *R v Associated Northern Collieries*, dealing with the availability of this privilege as a basis for refusing an order for discovery of documents against the defendant, Isaacs J said:
>
> > **"[T]he whole and avowed object of the proceedings is the infliction of the penalty, and the discovery sought of documents relevant to the claim can therefore have no other intended consequence. It does not require in such a case the oath of the defendant to establish the fact that the**

---

[25] [2013] 2 Qd R 401.

[26] [2013] 2 Qd R 401 [22].

> **production of the documents would tend to penalize him. The Court can see the effect of discovery from the nature of the proceeding."**
>
> On the assumption that ASIC will limit its pleading to material facts, the penalty privilege is thereby available for each and every allegation within that pleading. Before the primary judge, ASIC is said to have submitted that the privilege applied only to "allegations which are central to the circumstances giving rise to the contraventions", rather than those which were "peripheral or background". His Honour correctly rejected that submission and it is not repeated here.

[72] His Honour considered the tension between the privileges and modern civil procedure rules which, among other things, prevent a defendant from contesting an allegation which he or she believes to be true.

[73] The defences would reveal a defendant's belief as to the truth or falsity of each allegation in ASIC's case, or (in the case of non-admissions) a defendant's uncertainty as to its truth. The appellants argued that the operation of the privileges would be prejudiced by the disclosure of their states of mind. They also submitted that ASIC would gain the unfair advantage of knowing what parts of the case would not be seriously challenged. Also, by making a non-admission, the defendants' lack of knowledge might be used by ASIC to advance its case.

[74] His Honour saw the potential for the operation of the privilege to be affected by the primary judge's orders –

> [27] First there is the use which might be made of a defendant's response to an allegation by claiming the privilege. At least where the alleged fact is something of which the defendant would have direct knowledge, a claim of privilege in response to the allegation could found an inference that the allegation was true. This is because the privilege could only be claimed where the defendant would otherwise have to admit the allegation, that is to say where he or she believed it to be true. If it is a fact of which the defendant would have direct knowledge, the defendant's belief that the allegation was true could found an inference, as against the defendant, that it was true. Understandably, none of the submissions for the appellants went so far as to concede that ASIC could tender such a plea as an admission of truth of the allegation …
>
> …
>
> [31] For present purposes, it may be assumed that a claim for privilege within a defence, as permitted by the primary judge, could not be tendered as an admission. But that is not to say that it could provide no assistance in the ultimate proof of ASIC's case. For example, it could be useful to ASIC in the event that a defendant gives evidence which is inconsistent with the allegation for which the claim was made. Could the defendant not be challenged in cross-examination with his claim for privilege, upon the basis that the claim could not have been made absent a belief by the witness that the allegation was true? … Ultimately, counsel for ASIC were unable to exclude the possibility that the defendant's claim for privilege within his defence, according to this regime, could be used to discredit him in cross-

> examination. At least in that way a defendant might be compelled to provide a pleading which ultimately assists ASIC to prove its case.

[75] The primary judge's orders did not go far enough. Ultimately, his Honour made the following orders, which are the orders sought by the defendants in the present matter –

> A defence filed and served by an appellant must at a minimum:
>
> (a) state with respect to each allegation of fact in the statement of claim whether that allegation is admitted, not admitted or denied;
>
> (b) give notice of any intention by the defendant to rely upon any relevant statutory defence or ground of dispensation
>
> but is not otherwise required to comply with rr 149(1)(b), (c), 150, 157, 165 and 166 of the *Uniform Civil Procedure Rules*.

Gemmell v Le Roi (2014)

[76] *Gemmell and Another v Le Roi Homestyle Cookies Pty Ltd (in liq) and Others*[27] was a successful appeal by two defendants against the refusal for orders akin to those sought by the defendants in the present case.

[77] Gemmell and Conlon were Le Roi's directors. Le Roi's liquidators brought proceedings against them for insolvent trading. The liquidators sought declarations that each appellant breached section 588G of the *Corporations Act*, and compensation (under section 588M). They did not seek a civil penalty order, although a breach of section 588G exposed a director to such an order.

[78] The appellants had been compulsorily examined under the Act. Before answering questions, neither claimed that an answer might tend to incriminate them or make them liable to a penalty. Thus the whole of the transcript of their examinations was available as evidence in the proceedings.

[79] The primary judge described the central issue before her, and the way in which it was to be resolved, in this way –

> … whether, having failed to claim either penalty privilege or privilege against self-incrimination during the course of their public examinations, the Defendants may now invoke those privileges, and avoid filing fully responsive defences or making discovery. In my opinion, for the reasons set out below, the Defendants have waived their rights to claim privilege and must plead a defence and provide discovery in accordance with the Rules.

[80] The appeal from her Honour's decision concentrated on the construction and effect of section 597(12) of the *Corporations Act* which expressly abrogated the common law privileges against self-incrimination and exposure to a civil penalty; and section 597(12A) which allowed for a claim for direct use immunity.

---

[27] (2014) 46 VR 583.

[81] The court held that section 597(12) abrogated the privileges only with respect to the questions asked and answers given at the examination. The court held that while section 597(12A) enabled an examinee to claim direct use immunity with respect to particular answers given during an examination, a failure to make such a claim did not constitute a waiver of the privilege in a subsequent civil proceeding.

[82] As to whether the concept of "no increased jeopardy" meant that the appellant's failed in their claims of privilege, Ashley JA (with whom the other Justices of Appeal agreed) said –

> [85] ... the privilege against self-incrimination can only be successfully invoked where a person shows that there is a real and appreciable risk of criminal prosecution if he gives an answer or answers; and the privilege against exposure to a penalty can only be successfully claimed where a person shows that to give an answer or answers would tend to subject him to a penalty in a separate proceeding.
>
> [86] It is clear that: [28]
>
> > … a witness cannot refuse to answer a question which tends to show that he has committed a crime for which he cannot be convicted and punished – for example, because he has received a pardon …, or a certificate under [a] statute … which protects him against all criminal prosecutions, or because he has already been convicted or acquitted of the crime …, or because the time for prosecution of the crime has expired …
>
> [87] Those are all situations of impossibility of successful prosecution. But there is a line of cases which holds that there is *absence* of real and appreciable risk *despite* successful prosecution being possible. It is the situation where a witness's prior statements have already exposed him to risk of prosecution and where giving answers would not lead to any increase in the jeopardy to which the witness is already exposed.

[83] His Honour found that the "no increased jeopardy" principle was part of Australian law. His Honour held that the privileges may be successful invoked in the case of an examinee who claimed use immunity, but not in the case of one who had not – because the one who had not would not be any "worse off".

[84] His Honour continued (footnotes omitted) –

> [112] It does not follow, however, that the appellants may not successfully raise **some** claims to privilege. **To the extent that the appellants would be obliged to go outside their answers on examination in order to plead their defences, or in giving discovery, it cannot be baldly concluded that the appellants would not be at increased risk of jeopardy were the privileges not successfully invoked**. It has been consistently said that, once it appears that a witness is at risk, then **great latitude** should be allowed to him in

---

[28] *Sorby v Commonwealth* (1983) 152 CLR 281 at 290 per Gibb CJ (citations omitted).

> judging for himself the effect of any particular question. In the present matter, therefore, the appellants may successfully invoke the privilege against potential self-incrimination if there is a real and appreciable risk that a pleading or the giving of discovery might expose them to **increased jeopardy** of criminal prosecution, and may successfully invoke the privilege against exposure to a penalty if a pleading or the giving of a pleading would tend to subject them to increased jeopardy of exposure to a penalty. To be clear, the concept of increased jeopardy has a role to play in this context.

[85] Ashley JA allowed the appeal and made orders dispensing with the relevant pleading rules, confined to matters and documents not contained in the answers given by the appellants during their examination or where a pleading or the giving of discovery would expose them to increased jeopardy.

HRF Nominees (2014)

[86] In *HRF Nominees Pty Ltd (In Liquidation) ATF HFR Constructions Unit Trust and another v Man Civil Constructions Pty Ltd and others*,[29] the liquidators of HRF Nominees brought an action against one of the several defendants (Nicholls), alleging that he had breached his fiduciary duty as a director of HRF Nominees.

[87] Nicholls did not seek to rely on the privileges in his defence or in his affidavit of documents.

[88] The plaintiffs then sought discovery by way of disclosure of specified documents. Nicholls sought to resist the disclosure of some of the documents on the basis of the privileges. Those documents had in fact been provided to the liquidators by the general manager of HRF Nominees.

[89] The court (Derham AsJ) said –

> [40] As Ferguson J pointed out in *Le Roi*, in civil actions, where no claim for penalty is made, for the defendant to show that providing the information requested would tend to subject them to a penalty in separate proceedings, **the defendant must show, or it must be clear, that there is a real and appreciable risk of criminal prosecution or tendency to subject the person to a penalty**. The precise measure or degree of the risk to a defendant is something which the Court is not called upon to assess so long as there is a **degree of risk which cannot be dismissed as tenuous or illusory or so improbably as to be virtually without substance**. The question is, whether there is a recognisable risk: *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [[1978] AC 547, 581 per Shaw LJ].

[90] His Honour then noted two relevant fundamental propositions concerning the privilege against self-incrimination –

---

[29] [2014] VSC 93.

> [41] … First, one person cannot assert the self-incrimination privilege on the ground that the giving of discovery, or compliance with a subpoena or notice to produce, tends to incriminate *another person* …
>
> [42] Secondly, and vitally to this matter, an individual cannot complain about the giving of discovery or responding to a subpoena or notice to produce by a company, or another person, on the ground that he (the individual) may tend to be incriminated as a result, because this is not *self-incrimination* …

[91] This Honour held that where the plaintiffs had obtained an incriminating document from another source, the document was not protected by Nicholls' privileges. The privilege was not available where it was clear that revealing the document would not add to an individual's jeopardy.

[92] Derham AsJ held that Nicholls was precluded from complaining about the production of documents by others which might incriminate him. The production of the documents by others was not *self-incrimination.* Also, disclosure by Nicholls himself of those same documents did not increase the peril which already existed.

John Holland v CMFEU (2014)

[93] In *John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union (No 2)*[30] the originating application and statement of claim sought orders imposing pecuniary penalties under the *Fair Work Act* 2009 (Cth) against 12 respondents, including the CFMEU. It was alleged that conduct at the Perth Children's Hospital site, for which the CFMEU was vicariously liable, breached provisions of the *Fair Work Act* and amounted to torts.

[94] In an introductory note to its defence, the CFMEU stated –

> As the officers and employees of the CFMEU named in the ASOC each claim penalty privilege in relation to the matters against them, this further amended defence has been prepared based on instructions given by a senior employee of the Western Australian branch of the CFMEU who is authorised to provide those instructions.

[95] Most of the defence contained non-admissions, using the formula that the CFMEU "does not know and therefore cannot admit" certain things.

[96] John Holland accepted that individual respondents were entitled to the penalty privilege in pleading their defence. But it objected to the CFMEU's approach and applied to strike out the defence. It submitted that the CFMEU appeared to be relying on the penalty privilege of the relevant individuals but it could not do so.

[97] Dismissing the application for strike out, Barker J broadly agreed with the submissions made by the CFMEU that –

---

[30] [2014] FCA 1032.

- a consistent theme running through a number of authorities was that **where a corporate entity was required to take a step which can be achieved without impinging upon the penalty privilege, then it is obliged to take that step**; but where it is required to take a step which would impinge upon that privilege, then it was not obliged to do so;
- an individual ought not to be required to provide information where the provision of that information might impact or impinge upon a privilege enjoyed by that individual: the suggestion by John Holland that the individual respondents who claim the privilege must provide instructions for the purpose of preparing the Union's defence impinges upon the privilege which is enjoyed by each of them;
- if there is an allegation in terms of whether a particular person did something on a particular day, or with a particular intention, and where that information can only come from that particular individual who claims the penalty privilege, the Union cannot be required to do more.

CFMEU v Boral (2015)

[98] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd and others*,[31] was not relevant to the issues in the present case, beyond its confirming that the privileges are not available to corporations.

QC Resource Investments v Mulligan (2016)

[99] In *QC Resource Investments Pty Ltd (In Liq) v Mulligan*,[32] QC Resource Investments and its liquidators sought declarations that Mulligan had contravened certain civil penalty provisions of the *Corporations Act* but did not seek any civil penalties.

[100] Mulligan filed a defence which – on 92 occasions – did not admit allegations contained in particular paragraphs of the statement of claim, asserting a claim to the privileges.

[101] The issue was whether Mulligan could decline to plead to 92 paragraphs of the statement of claim "by making a sweeping claim alleging that if he were required to plead to those paragraphs then he might be exposed to a penalty in other, unspecified litigation which has not been threatened or commenced".[33]

[102] Mulligan did not identify any particular basis for any reasonable grounds upon which the privilege was claimed. He submitted that the ordinary pleading rules should give way to his claim of privilege without his having to descend into the detail of the reasonable basis for such a claim. He did not attempt to associate any of the pleadings of fact with any of the penalty provisions. Nor did he attempt to explain how any of those facts, if admitted, might lead to a train of enquiry which would expose him to a penalty. Nor did he explain how any matter of fact pleaded in defence might lead to a relevant train of enquiry.

---

[31] (2015) 256 CLR 375.

[32] [2016] FCA 813.

[33] [2016] FCA 813 [1].

[103] Edelman J did not find Mulligan's privilege claim in blanket terms sufficient to relieve him from compliance with all of the court rules.

[104] His Honour considered *Refrigerated Express* and noted that it involved no claim for a penalty and was not exceptional, even though the whole basis of the action was an allegation of contravention of a penalty provision.

[105] His Honour observed *Pyneboard's* approval of the distinction made by Deane J in *Refrigerated Express* between (i) refusing discovery in an action for a penalty, and (ii) requiring objection to particular documents in an action which was not for a penalty (the result of which might be used to establish a party's liability to a penalty in other proceedings).

[106] His Honour continued –

> [22] The rationale for the distinction between these two circumstances is obvious and capable of application to other circumstances such as dispensation from rules of pleading. In the first case, where the proceedings are *themselves* for a penalty then any fact which is admitted, or any positive fact which is pleaded in response, might easily be seem immediately to expose the respondent to a penalty. There will be exceptions. For instance, if the respondent's position were that there was some basic legal basis upon which the applicants' claim for a penalty was defective, independently of any facts, then that should be pleaded.
>
> [23] In contrast, **in a civil case which does not seek any penalty something more will be required before dispensation from pleading rules can be given**. The reason why something more is required is because any effects of pleading upon privilege will usually be less direct. For instance, a pleaded admission that is not admissible in separate penalty proceedings might expose the respondent to a penalty if it could start a train of enquiry that would lead to a penalty … [I]n cases where separate penalty proceedings have already been commenced, some courts have effectively inferred that *any* admission or *any* pleading of fact may lead to a train of enquiry which could expose the respondent to a penalty. For such an inference to be made, and dispensation to be given entirely from pleading a defence, the circumstances must be exceptional. But far less exceptional circumstances are required where what is sought is dispensation merely from admitting or not admitting a fact, or from pleading to a fact, particularly where (i) the fact is central to the proceedings, and (ii) **the circumstances and seriousness of the allegations have the effect that a penalty proceeding may be likely**.
>
> [24] For these reasons, in the second case, where the proceeding does not seek a penalty, the "something more" which is required before dispensation with the rules is granted will depend on all the circumstances of the case and upon the rules of pleading from which dispensation is sought. In a case such as this **where the allegations are very serious, the circumstances will colour the extent to which a respondent must descend into detail to show a reasonable basis for dispensation**. But it is not enough to simply allege

> that there is a possibility of ASIC commencing penalty proceedings. It is necessary to descend to the detail of each claim for privilege …

[107] Mulligan relied upon the following from *Le Roi*[34] on the question of the evidence he was required to produce –

> ... it will not be difficult to show that the provision of information or the production of documents in a civil case leads to a real and appreciable risk of a criminal prosecution when the proceeding is aimed at proving that the directors engaged in conduct which would establish, or go a long way toward establishing, that they also had committed criminal acts.

[108] Edelman J said that that proposition was well established, but it did not mean that the respondent was absolved from descending into the detail of each matter upon which privilege was claimed in order to show reasonable grounds for his belief that he would be exposed to a penalty by responding.

[109] Mulligan also referred to another passage in *Le Roi* in which it had been acknowledged that, while as a matter of practical reality the likelihood of penalty proceedings being brought was low, it could not be discounted sufficiently to render it so improbable as to be virtually without substance.

[110] Edelman J observed that nothing in that passage suggested that a respondent was entitled simply to assert privilege to resist the production of a defence. His Honour said –

> [39] ... on appeal … Ashley JA (with whom Neave JA and Almond AJA agreed) described the findings of Ferguson J, without disapproval, as including:
>
> (i) … **in exceptional circumstances**, a defendant may be entitled to orders *in limine* that he may deliver a defence that departs from the Rules of Court only insofar as to protect his privilege against exposure to penalty.
>
> (j) Exceptional circumstances may exist where the defendant to the civil proceeding **is also the subject of separate civil penalty proceedings alleging the same or similar conduct**.
>
> (k) Where a defendant seeks to take the privilege against exposure to a penalty in a defence, the proper course is to plead accordingly and – if challenged – the defendant will be required to justify that the privilege is taken in good faith and on reasonable grounds for the privilege to stand.

[111] Edelman J did not find that exceptional grounds existed which would permit departure from the rules without descending into any particular details of the particular dispensations sought on each occasion.

---

[34] [2014] VSCA 182 at [12].

[112] Mulligan was required to provide reasonable grounds, "**by affidavit or submission**", **for each of the occasions upon which he claimed privilege where that privilege was challenged.** His Honour acknowledged that some required little justification and would not require substantial evidence – though others might.

LM Investment Mgmt v Drake (2017)

[113] Jackson J applied *QC Resource Investments v Mulligan* in *LM Investment Mgmt Ltd v Drake & Ors*.[35]

[114] In general terms, the question for Jackson J was what degree of risk of a pecuniary penalty order was required to allow a defendant the benefit of orders relieving him or her from the pleading requirements of the UCPR and the duty of disclosure, in proceedings in which a corporation sought compensation for breach of the *Corporations Act*.

[115] The defendant submitted that an important factor was whether the circumstances and seriousness of the allegations had the effect that a proceeding for a pecuniary penalty may be likely. His Honour noted that there were other authorities which suggested a lower threshold of risk was material. His Honour agreed with Edelman J's statement that the position in the authorities was not "wholly pellucid".

[116] His Honour then considered the risk in the case before him. His Honour said (footnotes omitted) –

> [46] The possibility of a pecuniary penalty order in the present case would appear, in part, to turn on the requirement that the contravention "materially prejudices" the interests of the corporation or the scheme or its members or is "serious": s 1317G(1)(b)(i) and (iii) [of the *Corporations Act*]. A "serious" contravention is one that is "grave or significant" according to some cases. Without forming any concluded view, the facts presently alleged in this proceeding do not suggest that must be a foregone conclusion in the present case. There is no allegation of dishonesty or deliberate wrongdoing.

[117] His Honour also found that there was no reason revealed by the evidence from which one might expect, on the basis of (for example) the defence or the direct explanations for non-admissions, that it would lead to a train of inquiry that might cause ASIC to start a proceeding before the limitation period had expired. His Honour made good his finding by considering how responses to certain of the allegations in the statement of claim might start a relevant train of inquiry and concluding that it was difficult to foresee how they might do so.

[118] His Honour held that the defendant had not shown the "something more" amounting to exceptional circumstances justifying an order relieving her of the pleading requirements because of penalty privilege. Among the orders made by his Honour was an order that the defendant was to file an affidavit setting out the ground, basis and relevant circumstances in support of any challenged claim of privilege.

---

[35] [2017] QSC 34.

Chardon v B (2017)

[119] After a trial on an eight count indictment, Chardon was convicted of six offences committed upon B when she was 14 or 15. The Crown entered a *nolle prosequi* in respect of the other two counts.

[120] B commenced civil proceedings against Chardon claiming damages for intentional and unlawful assault and trespass to the person. In her statement of claim, she pleaded that Chardon had been convicted of the six offences and had intentionally and unlawfully committed those offences.

[121] In his defence, Chardon admitted that he had been convicted of the six offences but denied that the acts were intentional or unlawful, or that they happened at all.

[122] He applied to file and serve an Amended Defence, complying with the UCPR but subject to any just claim of privilege. He sought to be relieved from the pleading rules insofar as the paragraphs which alleged the sexual offences were concerned.

[123] Before the primary judge, Chardon argued that he could not raise a positive case. To do so, he would need to make positive allegations about his relationship with B as an underage girl which raised the real prospect of incrimination, and not just with respect to the two counts which had been discontinued.

[124] His application was dismissed at first instance. He successfully appealed against that decision: *Chardon v B* [2017] QCA 314

[125] On appeal, the court applied the test for self-incrimination privilege from *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* –[36]

> [B]efore a claim for privilege is upheld the court must be satisfied that there is a **real and genuine basis** for the assertion by the witness that he will tend to be exposed to proceedings or penalties. **The precise measure or degree of the risk to the witness is something which the court is not called upon to assess as long as there is a degree of risk which cannot be dismissed as tenuous or illusory or so improbable as to be virtually without substance**. The question is, whether there is a recognisable risk? The principle which protects a witness from obligatory self-incrimination is not to be qualified by or weighed against any opposing principle or expedient consideration, so long as the risk of self-incrimination is real in the sense that what is a potential danger may reasonably be regarded as one which may become actual, if the witness is required to answer the questions or produce the documents for which privilege is claimed.

[126] And also –[37]

---

[36] [1978] AC 547 at 581.

[37] [1978] AC 547 at 647.

> The test is **not a rigorous one**. All that is necessary is that it should be reasonable to believe that production would "tend to expose" (not "would expose") the possessor of the documents to proceedings.

[127] On appeal, B submitted that there was no *evidence* of a risk of further proceedings. Nor had Chardon shown any real or genuine basis for the assertion that he would be exposed to proceedings or penalties by pleading a positive case. Only six offences were pleaded as the foundation of the action – there was no reason why Chardon could not mount a positive case in relation to those six offences.

[128] In allowing the appeal, the court acknowledged that Chardon wished to plead a positive case beyond the contention that the acts never occurred.

[129] The court examined what was known about the positive case which Chardon might plead and concluded that the facts stated by him in his defence might lead to a chain of inquiry as to whether he in fact had a sexual interest in B when she was under 16. The risk of that occurring was not tenuous or remote. Morrison JA (with whom Fraser and McMurdo JJA agreed) said, "It is no answer to say that it is difficult to understand how a positive case could be mounted which would expose him to the risk of incriminating himself. The possibilities are unknowable, though some might be guessed at".[38]

[130] His Honour went on to envisage the possible positive cases which Chardon might run. His Honour stated that it was well established that the pleading rules must give way to privilege (quoting from *Anderson*); and that the privilege protected against the direct and *indirect* use of a person's statement or document, in the sense that it might set in train a process which may lead to incrimination or the discovery of real evidence of an incriminating character. His Honour noted the similar view taken by Edelman J in *QC Resource Investments.*

TTAC v Williams (2018)

[131] In *TTAC Pty Ltd v Craig Edward Williams*,[39] TTAC purchased a financial advice service business from Equinox. Equinox agreed to assist TTAC to obtain the benefit of the goodwill of its business and to introduce TTAC to its clients. Williams was a director of TTAC.

[132] Equinox introduced Williams to two entities. TTAC alleged that Williams provided financial advice in his personal capacity to the employees of one of those entities and to the clients referred to him by the other, instead of doing so on behalf of TTAC.

[133] TTAC claimed equitable compensation for Williams' breach of his fiduciary and statutory duties as TTAC's director. The statutory duties were found in certain civil penalty provisions of the *Corporations Act* but TTAC made no claim for a penalty.

---

[38] [2017] QCA 314 [29].

[39] [2018] VSC 79.

[134] TTAC sought orders for discovery from Williams of certain documents. Williams opposed the orders sought on the basis that discovering and producing the documents would tend to expose him to a penalty.

[135] Sifris J referred to the legal principles relating to penalty privilege and discovery. In particular, his Honour considered *Pasoce* (in which no ASIC proceedings were on foot or foreshadowed and White J found no exceptional circumstances) and *CC Containers Pty Ltd & ors v Lee & ors (No 2)*.[40]

[136] In *CC Containers,* the plaintiffs made serious allegations of fraud against the defendants. They sought compensation, exemplary damages and other relief. Bare denial defences were filed, which the plaintiffs applied to strike out.

[137] In resisting the strike out, the defendants, Messrs Chong and Neale, did not put on evidence to establish that there was a real and appreciable risk of prosecution. They could not point to extant criminal investigations or civil penalty proceedings. All they could do was point to possible future events. The plaintiffs submitted that did not constitute a real or appreciable risk.

[138] The question for the court was whether it was sufficient to assert the privilege on the basis of the nature of the claim.

[139] Ferguson J refused to strike out the defence having regard to the serious nature of the allegations –

> Where, as in this case, **the allegations are of a very serious nature and magnitude, the pleading alone is sufficient to establish that there is a real and appreciable risk of criminal prosecution should the matters alleged be proven**. Similarly, in this case, the proof of those allegations would tend to subject Messrs Chong and Neale to a penalty in a separate proceeding. There are **not trifling matters** nor matters which are tangential to the claim. **At the heart of the claim are allegations of regular and systemic fraud with the amount claimed being in the many millions of dollars**. If the allegations are established, then in my opinion it is very likely that a prosecuting agency would examine the case very closely with an eye to criminal prosecution or imposition of a penalty. In those circumstances, the privilege may be claimed.

[140] Sifris J was not persuaded that Williams' case was exceptional –[41]

> The critical issue is that there is no **claim for a civil penalty** in this proceeding, none is contemplated and in the circumstances of this case it is **unlikely and extremely remote** that production of the documents or the making of discovery would lead to a real and appreciable risk of criminal prosecution or separate and subsequent civil penalty proceeding. In the event of success by the Plaintiff, it is **most unlikely that ASIC would pursue a civil penalty in addition to**

---

[40] [2012] VSC 149.

[41] [2018] VSC 79 [24] – [26].

> **compensation**… Allegations of breach of ss 180-182 of the *Corporations Act* are regularly made in corporations and commercial cases. If the civil penalty is not sought in the proceeding itself, it is only in those more serious cases that there is a real and appreciable risk that the matter may go further. The **run of the mill case** does not, even though it potentially may. To exempt the defendants from discovery (and pleadings and evidence) in a civil case not involving a penalty and with no real or appreciable risk of further civil penalty proceedings would be a serious and unwarranted intrusion into the proper orderly and cost-effective conduct of civil litigation of this kind. If there was no claim for breach of statutory duty, the gateway to the civil penalty provisions, there would be no issue and dispensation from discovery would be unthinkable. There is no reason why addition of the statutory claims in a case of this kind should make any difference.
>
> Ultimately it is a question of the circumstances of the particular case. **The more serious the claim**, for example fraud (as in *CC Containers*), **the more likely the (real) possibility of criminal or civil proceeding**. By contrast, in breach of statutory duty cases of the kind under consideration, compensation is usually an appropriate remedy.
>
> It follows that I do not regard the circumstances of this case as exceptional so as to justify an order excusing the Defendant from making discovery *in limine.* There is no civil penalty proceeding on foot (or foreshadowed) as in *One.Tel.* There is no serious fraud allegation, where the nature and extent of the pleading itself raises serious risks and prospects of the matter going further, as in *CC Containers*. No real and appreciable risk of criminal or civil penalty proceedings has been established. I propose to follow the authorities referred to and order general discovery and not the specific discovery sought by the Plaintiff.

Davey v Silverstein (2019)

[141] In *Davey v Silverstein & Ors*,[42] Davey sought orders that the Court punish the defendants for contempt. The third defendant, a corporation, refused to answer Davey's interrogatories. The second defendant was the sole director and shareholder of the corporation. He had exercised his privilege against self-incrimination. It was submitted that he was the only person who could answer the interrogatories on behalf of the third defendant and the practical effect of an order compelling the third defendant to answer the interrogatories would be to deprive him of his privilege.

[142] Her Honour declined to order the third defendant to answer the interrogatories. Her Honour said –[43]

> … The only person who can answer the interrogatories is [the director]. The interrogatories go to the issues in this proceeding, and indeed, also seem to traverse the issue in dispute in the Magistrates' Court proceeding and the VCAT

---

[42] [2019] VSC 302.

[43] [2019] VSC 302 [31].

> proceeding [the court/tribunal the defendants were said to have misled]. One would query the relevance of the latter category of interrogatories. Once the interrogatories have been answered, they may be tendered into evidence. **In my view, the discretionary considerations weighing against making an order that the third defendant provide answers for interrogatories are more powerful than the discretionary considerations which might apply to say, an order for discovery** … Further, I note the recent observations of the Court of Appeal in *Sidebottom v R*,[44] where the Court stated that as contempt is punishable by imprisonment, safeguards similar to those appropriate in criminal proceedings apply. Avoiding a situation where an individual is compelled to in effect give evidence against himself is one such safeguard.

Analysis of the authorities having regard to the issues in the present matter

[143] The critical issues before me are whether the defendants are at real and appreciable risk of criminal prosecution; the basis upon which reasonable grounds for apprehension of such a risk might be shown; whether responding to certain paragraphs of the statement of claim has a tendency to expose the defendants to that risk; whether relief from the disclosure requirements *in limine* is required to preserve the privilege; and the position of a defendant corporation whose sole director is entitled to the privilege.

[144] Relevant to those issues, the authorities discussed above establish the following.

When may the privileges be claimed?

[145] The privileges against self-incrimination and self-exposure to penalty may be claimed where the defendant establishes, on reasonable grounds, a bona-fide apprehension of incrimination or exposure to penalty (*Anderson*).

[146] To invoke the privilege against self-incrimination, the defendant must establish that the provision of information or the production of documents in the civil case leads to a real and appreciable risk of a criminal prosecution (*APCH*, citing *Mining Projects*).

[147] The precise degree of the risk is not something which the court is called upon to assess. A risk that cannot be dismissed as tenuous or illusory or so improbable as to be virtually without substance is sufficient (*Le Roi*, *HRF Nominees, Chardon*).

[148] The test as to whether there is a real and genuine basis for asserting that a defendant is at risk of criminal proceedings or penalties is not a rigorous one (*Rio Tinto*, *Chardon*).

[149] The privileges are not available when the taking of the step in question will not add to a defendant's jeopardy or expose them to an additional peril of prosecution (*Sorby*, *Microsoft*, *Le Roi*).

How may reasonable grounds be shown?

---

[44] [2018] VSCA 280.

[150] Reasonable grounds may be shown by affidavit or submission (*QC Resource Investments*).

[151] The defendant must show, or it must be clear, that there is a real and appreciable risk of criminal prosecution or a tendency to expose a person to penalty (*Le Roi, HRF Nominees*).

[152] The nature of the proceeding itself might clearly establish an entitlement to the privilege, in which case a defendant need not establish on oath that the production of documents would tend to penalise him or her (*R v Associated Northern Collieries, Anderson*).

[153] The more serious the claim in the non-penalty proceeding, the more likely the real possibility of criminal or civil penalty proceedings (*TTAC*).

[154] Once it appears that a defendant is at risk, great latitude should be allowed to them in judging for themselves the effect of any particular question (*Le Roi*).

[155] Where the allegations are very serious, the circumstances will colour the extent to which a defendant must descend into detail to show a reasonable basis for dispensation (*QC Resource Investments*).

[156] Further, in terms of the way in which a defendant might show reasonable grounds in non-penalty proceedings, I note the following –

- In *Bell Packaging,* in which *in limine* relief from disclosure was granted, the defendants deposed on affidavit that the discovery of any or no documents would tend to incriminate them. The defendants did not depose that the mere making of an affidavit of discovery would tend to incriminate them, but they were not required to do so because the court was *otherwise satisfied* that taking objection to the production of certain documents in the affidavit of documents would not achieve for the defendants the protection to which they were entitled.
- In *Pascoe*, in which no relief was granted, there were no ASIC proceedings on foot or foreshadowed and the defendants had not deposed on affidavit that the verification of the defence could tend to prove liability to civil penalty or the grounds for such a belief.
- In *CC Containers* the pleading of serious allegations (regular and systemic fraud) was alone sufficient to establish the real and appreciable risk of criminal prosecution.

When may the privilege be claimed in non-penalty proceedings?

[157] The legal principles relating to penalty privilege and the filing of a defence or discovery distinguish between penalty and non-penalty proceedings (*Refrigerated Express*, *Pyneboard).*

[158] In penalty proceedings, orders for the production of documents, or for the filing of a defence in accordance with the rules, have no other intended consequence than proof of the defendant's liability to penalty and should not be made (*Refrigerated Express*, *QC Resource Investments*).

[159] In non-penalty proceedings, there is no general rule precluding the making of an order for discovery or interrogatories and ordinarily there will be no proper ground for objecting to such an order unless the circumstances are exceptional (*Refrigerated Express*).

[160] In non-penalty proceedings there is a strong disposition in favour of ordering discovery, reserving the issue of self-incrimination to the stage of production for inspection (*Microsoft*).

[161] In non-penalty proceedings, something more will be required before a court will order dispensation from the pleading rules (*QC Resource Investments*).

[162] Dispensation will be justified where the only means of protecting the privileges is to excuse a party *in limine* from discovery or interrogatories (*Refrigerated Express*).

[163] Circumstances may be considered exceptional if a civil penalty proceeding is already on foot or foreshadowed (*One.Tel*, *Pascoe*, *APCH*, *Le Roi, QC Resource Investments*).

[164] Circumstances may be considered exceptional if the allegations are of a very serious nature, such as those alleging dishonesty or deliberate wrongdoing: the more serious the allegations, the more likely the real possibility of criminal or civil penalty proceeding (*QC Resource Investments; LM Investment Mgmt, CC Containers, TTAC*).

[165] If there is no allegation of dishonesty or deliberate wrongdoing in the non-penalty proceeding, then the possibility of a penalty proceeding is not a foregone conclusion (*LM Investment Mgmt*).

[166] The privilege may be claimed in an action which is not one to enforce a penalty if it involves proof of elements identical to those constituting the offence created by the section. Thus production of any document relative to establishing the civil case alleged, or a failure to discover documents, may tend to incriminate (*Bell Packaging*).

[167] It will not be difficult to show that the provision of information or the production of documents in a civil case leads to a real and appreciable risk of a criminal prosecution when the proceeding is aimed at proving that persons engaged in particular conduct, proof of which would establish, or go a long way towards establishing, that they had committed criminal acts (*Le Roi*).

How does the privilege claim apply in the case of discovery/disclosure?

[168] If the making of an affidavit of discovery, as distinct from producing the documents referred to in it, would tend to expose a defendant to a penalty, then any order for discovery ought to be adjusted to preclude that tendency (*Refrigerated Express*, *Microsoft*).

[169] If conduct alleged in a non-penalty proceeding also amounts to a criminal offence, and the revelation on oath of a director's possession (or not) of documents would be relevant in proof of the criminal case, then the defendant's affidavit itself would tend to incriminate and the defendant should be relieved from discovery *in limine* (*Bell Packaging*).

How does the privilege claim apply in the case of a director of a corporate defendant?

[170] Where the steps required of a sole director of a company in filing a defence cannot be fairly or reasonably assigned to another individual (that is, one who has the requisite knowledge to provide full and proper instructions) the company will be relieved from their obligation to file a defence in accordance with the rules of court (*APCH*).

[171] Where a corporate entity is required to take a step which can be achieved without impinging upon the penalty privilege then it is obliged to take that step (*John Holland v CFMEU*).

[172] Where the director of a corporation is at risk of self-incrimination or self-exposure to penalty by complying with a notice to produce (including by verifying a list of documents) but it is not impossible or impractical for another person not at risk to comply with the notice or to verify the list, the corporation is not relieved from giving discovery or complying with the notice to produce (*Microsoft*).

[173] If there is another member, employee or officer of a company, who has not asserted privilege and who is able to appropriately achieve compliance with discovery, subpoenas or notices to produce, then the corporation must take steps to comply with their obligations (*APCH*).

How does the privilege claim affect the way in which documents are to be described for the purposes of disclosure?

[174] If describing a document by reference to its nature or contents would tend to render a defendant liable to a penalty, then that would justify less precision in the description of the document than would otherwise be appropriate (*Refrigerated Express*).

[175] Where lack of precision of description would not avoid the tendency to expose to a penalty, an order for discovery may be modified (*Refrigerated Express*).

[176] Where orders for discovery are made in non-penalty proceedings, those orders should reserve liberty to apply in relation to the degree of specificity with which a document is to be described in an individual's list of documents (*Microsoft*).

The allegations made against the Defendants

[177] In very simple terms (and without attempting to be comprehensive) the amended statement of claim includes the following allegations about breaches of the *Financial Intermediaries Act* 1996:

That –

- *Before* the special general meeting to approve the transfer of the loans and mortgages to MFSA, Eureka's members were not informed about the extent of the loan surplus or their rights to it;
- Mr McGrath knew that;
- He chaired the meeting;
- He purported to give a summary of Eureka's present situation and to explain the transaction;
- *At the meeting*, Eureka's members were not informed about the extent of the loan surplus or their rights to it,

- The members voted to refinance the source funder debt to MFSA, and understood that their loans would then be repaid to MFSA;
- Mr McGrath caused MFSA and Eureka to complete the transaction;
- Mr McGrath owned duties, under the *Financial Intermediaries Act* 1996, to exercise a reasonable degree of care and diligence in performing the functions and exercising the powers of a director, and in protecting Eureka's members;
- He did not do certain things which a person exercising a reasonable degree of care and diligence in performing the functions and exercising the power of a director, and in protecting the interests of Eureka's members, would have done;
- Mr McGrath contravened section 117(2) of the Act;
- Under the Act, Mr McGrath had a duty not to make improper use of his position as a director to gain an advantage for himself or any other person, or to cause a detriment to Eureka;
- MFSA gained an advantage from the transaction – for the price of $187,099.61, it became entitled to receive payments of $999,308.72 in Member Loans secured by mortgages;
- Mr McGrath gained that same advantage through his ownership and control of MFSA;
- Mr McGrath made improper use of his position as director to gain an advantage for MFSA and himself;
- Mr McGrath contravened section 117(4) of the Act.

[178] The plaintiffs claimed against Mr McGrath, as a debt owing under section 118 of the Act, $812,209.11 (the loss to Eureka); and the profit made as a result of the transaction or an account of profits.

Relevant provisions of the *Financial Intermediaries Act* 1996

[179] The defendants' application relies upon the potential for criminal proceedings under the *Financial Intermediaries Act* 1996.

[180] Among other purposes, the *Financial Intermediaries Act* 1996 provides for the regulation of co-operative housing societies. Under the Act, the registrar has certain prudential and advisory functions. The registrar also has "other functions" set out in section 18.

[181] Those functions include (my emphasis) –

(a) register, supervise and regulate societies; and

(b) **supervise and enforce compliance by societies with this Act and with standards**; and

(c) ensure that an effective and efficient system of prudential supervision is applied to societies; and

(d) **protect the interests of members of societies**; and

(e) administer the Cooperatives Supervision Fund; and

(f) facilitate or direct the transfer of engagements of, or the merger of, societies; and

(g) **otherwise undertake the administration and enforcement of this Act**; and

(h) give information and statistics to the Treasurer about societies; and

(i) advise, and make recommendations to, the Treasurer; and

(j) carry out the other functions conferred on it by this Act.

[182] Section 117 of the Act sets out the duties of an officer of a society. The defendants relied upon this section, read with section 41 of the *Acts Interpretation Act* 1954, to make the point that it creates offences punishable upon conviction.

[183] Section 117 of the *Financial Intermediaries Act* 1996 states:

(1) An officer of a society must at all times act honestly in performing the functions and exercising the powers of the office.

Maximum penalty –

(a) 1600 penalty units or 7 years imprisonment –

(i) if because of the contravention –

(A) the society is, or its members are, deceived or defrauded; or

(B) a creditor of the society, or a creditor of any other person, is deceived or defrauded; or

(ii) if paragraph (a) does not apply but the contravention was committed –

(A) with the intention of deceiving or defrauding the society or its members, a creditor of the society or a creditor of any other person; or

(B) for any other fraudulent purpose; or

(b) 800 penalty units or 4 years imprisonment, in any other case.

(2) An officer of a society must at all times exercise a reasonable degree of care and diligence in performing the functions and exercising the powers of the office and in protecting the interests of the society's members.

Maximum penalty – 400 penalty units.

(3) An officer or employee of a society, or a former officer or employee of a society, must not make improper use of information acquired because of his or her position as an officer or employee to gain, directly or indirectly,

an advantage for himself or herself or for any other person, or to cause detriment to the society.

Maximum penalty – 800 penalty units or 4 years imprisonment.

(4) An officer or employee of a society must not make improper use of his or her position as an officer or employee, to gain, directly or indirectly, an advantage for himself or herself or for any other person, or to cause detriment to the society.

Maximum penalty – 800 penalty units or 4 years imprisonment.

(5) Section 5[45] applies to subsection (2) as if, in subsection (1)(a) of the section, the words ", executive officer or employee" were omitted and the words "or executive officer" were substituted.

[184] Section 41 of the *Acts Interpretation Act* 1954 states:

[45] Section 5 (Meaning of "officer").

41 Penalty at end of provision

In an Act, a penalty specified at the end of –

(a) a section (whether or not the section is divided into subsections); or

(b) a subsection (but not at the end of a section); or

(c) a section or subsection and expressed in such a way as to indicate that it applies only to part of the section or subsection;

indicates that an offence mentioned in the section, subsection or part is punishable on conviction (whether or not a conviction is recorded) or, if no offence is mentioned, a contravention of the section, subsection or part constitutes an offence against the provision that is punishable on conviction (whether or not a conviction is recorded) –

(d) if a minimum as well as a maximum penalty is specified – by a penalty not less than the minimum and not more than the maximum; or

(e) in any other case – by a penalty not more than the specified penalty."

[185] Section 118 of the *Financial Intermediaries Act* 1996 sets out the effect of a contravention of section 117:

(1) If –

(a) a person is convicted of an offence against section 117; and

(b) the court by which the person is convicted is satisfied that the society has suffered loss or damage because of the act or omission that constituted the offence;

the court may, in addition to imposing a penalty, order the convicted person to pay compensation to the society of an amount stated by the court.

(2) The order may be enforced as if it were a judgment of the court.

(3) If a person contravenes section 117, the society may, whether or not the person has been convicted of an offence against the section for the contravention, recover from the person as a debt due to the society by action in a court having jurisdiction for the recovery of debts up to the amount involved –

(a) if that person or any other person has made a profit because of the contravention – an amount equal to that profit; and

(b) if the society has suffered loss or damage because of the contravention – an amount equal to that loss or damage.

(4) This section and section 117 are in addition to and do not derogate from any other rule of law about the duties of officers and employees of a society.

[186] The plaintiffs claim is based on section 118(3).

[187] By section 232, a section 117(2) offence is a summary offence and a section 117(4) offence is an indictable offence.

[188] By section 233(1), a proceeding for an indictable offence may be taken by way of summary proceedings, or on indictment, at the election of the prosecution.

[189] By section 235, a summary proceeding for an offence must start within two years after the offence was allegedly committed.

[190] There is no limitation period attaching to offences proceeding on indictment.

Defendants' application

Defendants' submissions

[191] The defendants made the following submissions:

- In the proceedings, the plaintiffs allege contraventions by Mr McGrath of sections 117(2) and 117(4) of the *Financial Intermediaries Act* 1996.
- The alleged contraventions could not be dismissed as trivial in nature.
- They are also offences.
- A summary prosecution for offences under the Act must commence within two years from the date of the commission of the offence. But no limitation period applied to an "improper use" offence if it were prosecuted on indictment.
- There is an enforcement aspect to the Regulator's/registrar's functions under section 18(g) of the Act.
- The Regulator is contributing to the funding of the substantive proceedings (see "Plaintiffs' evidence" below);
- The enforcement aspect of the registrar's function, in combination with the fact that the Regulator is contributing to the funding of the substantive proceedings, demonstrates the Regulator's regulatory interest in the proceedings;
- From the Regulator's interest in the proceedings, the court ought to conclude that there is a real prospect of criminal proceedings against Mr McGrath;
- Rules 165 and 166 and the disclosure requirements of the UCPR oblige the defendants to create documents which may be incriminating; and
- (relying on *Anderson* and *Bell*) because the pleaded allegations constitute offences, compelling the creation of potentially incriminating documents created "the relevant peril that justifies procedural modifications" in terms of the relief sought.

Defendants' evidence

[192] In support of their application, the defendants relied upon two affidavits of their solicitor, Robert Burns.

[193] Relevantly, Mr Burns said in his affidavit sworn 15 October 2019[46] –

> …
>
> 2. The first defendant, David Peter McGrath was at all times material to this proceeding, and continues to be, the sole director and shareholder of the second defendant, McGrath Financial Services Australia Pty Ltd (**MFSA**).
>
> …
>
> 27. After considering the position of the defendants, reviewing the correspondence that had passed between the solicitors for the Plaintiffs and my office on behalf of the Defendants on this issue, and taking instructions from Mr McGrath, I formed the opinion that the Plaintiffs had been properly informed as to the basis of the Defendants' claim for privilege against self-incrimination and that to send further correspondence would be repeating myself and unnecessarily generating costs. Consequently, I did not send further correspondence on this issue to the Plaintiff's solicitors.
>
> …
>
> **Mr McGrath's belief**
>
> 30 I am informed by Mr McGrath and believe that:
>
> a he is concerned that information contained in or conveyed by his defence or a defence by MFSA (which would necessarily be on instructions from him) in this proceeding may be used, directly or indirectly, in proceedings against him to impose a civil penalty or in criminal proceedings; and
>
> b he wishes to claim privilege against self-incrimination.

[194] In the correspondence referred to by Mr Burns in paragraph 27, he indicated that the facts relied upon were "evident from the pleadings and information" which the plaintiffs already possessed. He also indicated his view that the "something more" which was required could be adequately dealt with by way of submissions.

[195] With respect to MFSA, Mr Burns said (in a letter dated 19 August 2019) –

> … the position of the Defendants is that where Mr McGrath is the sole director (and shareholder) of the second Defendant:
>
> (a) there is little distinction in practical terms between him as an individual and the corporation itself; and

---

[46] Court document 8.

(b) the corporation in pleading (in full) and making disclosure (in full) could, in practical terms, require the individual to engage in self-incriminating conduct.

This is not a case where there are other office holders or employees of the corporation who could provide instructions or give evidence on behalf of the company. Mr McGrath, as director, should not be expected to unfairly or unreasonably assign to another individual the responsibility of providing full and proper instructions, in circumstances where such other person may not have the requisite knowledge.

It is clearly the case that the knowledge alleged against the second Defendant is the knowledge of Mr McGrath. The Plaintiff alleges this in the Statement of Claim. As such, instructions from the company can only be obtained from Mr McGrath himself.

[196] Of course, the opinions or assertions of the defendants' solicitor, stated in correspondence, do not assist the defendants in satisfying their evidential burden.

Plaintiffs' submissions

[197] The plaintiffs submitted that I ought to infer from the Regulator's interest in the present proceedings that the Regulator was interested in the *liquidators* pursuing relief. In other words, I ought to infer that the Regulator was interested in *non-penal*, rather than penal, proceedings. The plaintiffs submitted that I could draw such an inference even though I was unaware of (and there was no evidence before me about) the Regulator's usual practice (*cf TTAC*).

[198] In response to the defendants' reliance upon *Anderson*, the plaintiffs emphasised that it was a penalty proceeding and the present case was not.

[199] The plaintiffs submitted that the defendants had failed to show the "something more" which was necessary before a court would allow dispensation from the pleading rules in non-penalty proceedings although they acknowledged that the extent of the evidence required to show the something more might vary between allegations (as explained in *QC Resource Investments*).

[200] The defendants' evidence was limited to paragraph 30(a) of the affidavit of Robert Burns. That was not enough. The defendants had established nothing more than a possibility of a civil penalty or criminal proceedings.

[201] Notwithstanding those submissions, the plaintiff's opposition to dispensation (for both defendants) was limited to a defence in respect of 15 paragraphs of the Amended Statement of Claim.[47]

---

[47] Paragraphs 12 – 18, 20 – 21, 24 – 25, 29, 34, 38 and 39.

[202] The plaintiffs opposed *in limine* relief from the disclosure requirements for Mr McGrath and MFSA.

[203] Insofar as Mr McGrath was concerned, the plaintiff submitted that the defendants failed to prove that their case fell within the rare exception contemplated by Deane J in *Refrigerated Express*.

[204] In response to the defendants' reliance upon *Bell*, the plaintiffs submitted that in *Bell* there was an evidential basis for establishing that the discovery would tend to incriminate which did not exist in this case.

[205] Insofar as MFSA was concerned, the plaintiffs submitted that the defendants failed to prove that their case fell within the *Refrigerated Express* rare exception *and* within the exception contemplated by Robson J in *APCH* (that there was no other member, employee or officer who was not asserting privilege available to give instructions).

[206] The plaintiffs referred to the strong disposition in the authorities not to grant *in limine* relief (*Microsoft*); reserving the issue of self-incrimination to production and also reserving liberty to apply in relation to the degree of specificity with which a document was to be described. They submitted that there was no reason not to follow the ordinary course. None of the exceptional circumstances referred to by Lindgren J were present here.

[207] The plaintiffs' position was that the defendants should provide a list of documents in accordance with rule 214 and that any privilege claims could be identified in the list as required by rule 214.

Plaintiffs' evidence

[208] The plaintiffs' evidence included –

- evidence from which one might infer that Melissa McGrath was aware of, and involved in, all aspects of the transaction between Eureka and MFSA;
- hearsay evidence that RWM Chartered Accountants (Eureka's auditors) were retained in relation to the potential funding change and deregistration of Eureka;
- correspondence between Lachlan Graff, of RWM Chartered Accountants, to David and Melissa McGrath (from One Call Finance) about the loan information for each member of Eureka, the special general meeting, the notice to members, the mechanics of the special resolution, the votes of members, and the transfer "of Eureka CHS to MFSA" (among other matters), from which one might infer that
  Mr Graff was aware of the requirement of the Registrar insofar as the Information Statement was concerned;
- an email from Mr Graff to "Dave and Melissa" containing the following, from which one might infer his understanding of the notice requirements for members:

> "Our main issue here is that, where a co-op has equity or value, that value is owned by the members. By transferring the members into a commercial entity, they are losing that value, ie potentially being disadvantaged.
>
> Can you see if you can find out what has happened to the equity in co-ops that have been placed in administration Dave. If their equity has been eroded by the process then we have a stronger basis to argue that we are protecting the interests of members by transferring them to another entity outside the scope of the registrar."

[209] The plaintiffs' evidence established that Ben Schneider of Burns Law acted for MFSA in the transaction.

[210] It also included evidence that the Queensland Treasure Corporation, as delegate of the Registrar of Queensland Housing Societies, provided an indemnity in favour of Eureka and its Liquidators for $345,500, which would cover an undertaking as to damages (as a result of the proposed restraint) up to $50,000.

Matters in contention

[211] At the hearing, the defendants did not press their application in relation to the following paragraphs of the Amended Statement of Claim –

- 12 and 13, which stated the result of that which was alleged in paragraphs 1 – 11, in respect of which the defendants made no claim;
- 16 and 17, which described documents in the plaintiffs' possession;
- 25, which set out the duties of a director under the *Financial Intermediaries Act* 1996;
- 34, which set out the effect of section 118 of the Act; and
- 38 and 39, which set out the duties of a fiduciary owed by a director.

[212] This left in contention the question of relief from the pleading rules for a defence in respect of paragraphs 14, 15, 18, 20, 21, 22 and 24 of the Amended Statement of Claim, and the application for *in limine* relief from disclosure.

Dispensation from the pleading rules

[213] To achieve dispensation from the pleading rules, the defendants must show a bona fide, real and appreciable apprehension of self-incrimination on reasonable grounds; and demonstrate the way in which their response to each paragraph of the Amended Statement of Claim, in respect of which they sought relief, carried the risk of incrimination directly or indirectly (*cf Anderson*, *APCH*, *Rio Tinto*, *QC Resource Investments, LM Investment Mgmt, Chardon,*).

[214] The test is not rigorous. It is enough to show that there is a degree of risk which cannot be dismissed as tenuous or illusory or so improbable as to be virtually without substance (*Le Roi, HRF Nominees*, *Rio Tinto*, *Chardon*).

[215] In my view, while the defendants' evidence is extremely limited, the circumstances reveal reasonable grounds for the defendants' real and appreciable apprehension of Mr McGrath's self-incrimination in a section 117 offence. The circumstances which give rise to the real and appreciable apprehension include –

(a) that the conduct alleged, which the plaintiffs must prove to succeed, is itself criminal conduct;

(b) the nature of the allegations made in the proceedings; and

(c) the interest of the Regulator in the proceedings.

[216] As to (a): the present defendants are in the same position as the defendants in *Bell Packaging.* The plaintiffs seek to establish the facts which would prove a *criminal offence* against the defendants, under the same section as the criminal offence is created. Also, no limitation period applies to proceedings on indictment.

[217] As to (b): The more serious the claim, the more likely the real possibility of criminal or civil penalty proceedings (*TTAC*). I acknowledge that the allegations against Mr McGrath do not include express allegations of dishonesty, deceit or fraud (*cf* section 117(1) of the Act, *LM Investment Mgmt; CC Containers*). Rather, it is alleged that he failed to exercise a reasonable degree of care and diligence and that he made improper use of his position. In my view, those allegations are serious ones, particularly those alleging conduct in breach of section 117(4). Indeed, the plaintiffs' evidence suggests that Mr McGrath *knowingly* withheld information from members which might have caused them not to vote in favour of the transfer to his company.

[218] As to (c): I consider that the Regulator's interest in the proceedings adds to, rather than detracts from, the risk of criminal proceedings. The Regulator, through the registrar, is responsible for enforcing the Act and protecting the interests of members. It is not at all improbable that the Regulator may attempt to protect the interests of members of co-operatives via successful prosecutions under the Act, which may deter others in McGrath's position from breaching their duties.

[219] Having regard to the circumstances, I consider that there is a risk of self-incrimination which cannot be considered so improbable as to be virtually without substance (*Le Roi*, *HRF Nominees, Chardon*).

[220] In terms of the risk attaching to a response to the particular paragraphs of the Amended Statement of Claim in contention, I acknowledge that the defendants' evidence is limited. However, a reasonable basis for dispensation *may* be established by way of submissions (e.g. *QC Resource Investments)*. I consider it appropriate for the defendants to rely on submissions in this case insofar as the pleading is concerned.

[221] The defendants invited me to start with paragraphs 28 and 33 of the Amended Statement of Claim.

[222] Paragraph 28 states:

> In the premises pleaded in paragraphs 25(a), 26 and 27 Mr McGrath contravened section 117(2) of the Act.

[223] Paragraph 33 states –

> In the premises pleaded in paragraphs 25(b) and 29 to 32 Mr McGrath contravened section 117(4) of the Act.

[224] The defendants argued that –

- those paragraphs alleged contraventions which were offences;
- the premises identified by those paragraphs were, collectively, the allegations in 25 – 27 and 29 – 32;
- the premises identified by those paragraphs (25 – 27 and 29 – 32) were the allegations in paragraphs 6 to 24;
- paragraphs 34 to 37 pleaded the consequences alleged to follow from the contravention, and associated matters,

thus, all of paragraphs 6 – 37 were self-evidently potentially incriminating.

[225] The defendants also submitted that the contraventions alleged involved a question of Mr McGrath's state of mind and, as was the case in *Anderson,* compliance with the pleading rules would, or had a tendency to, require him to incriminate himself.

[226] In reaching my conclusions about dispensation in respect of particular paragraphs of the Amended Statement of Claim, I have taken into account that –

- where the allegations are very serious, a defendant may not be required to descend into detail to show a reasonable basis for dispensation (*QM Resource Investments*); and
- great latitude is to be shown to an individual who is at risk (*Le Roi*).

[227] I will deal first with the position of Mr McGrath's position and then with the position of MFSA.

[228] I have already indicated that I consider it appropriate for the defendants to rely on submissions in establishing a reasonable basis for dispensation.

Mr McGrath's position

[229] **Paragraph 14** alleges essentially that, "by reason of" the transaction between Eureka and MFSA, Eureka ceased to have the Loan Surplus; members did not and would not receive any benefit from the Loan Surplus; Eureka's Net Asset Surplus was diminished; and members did not and would not receive any benefit from the Net Asset Surplus.

[230] The plaintiffs' position was that the transaction and its effect was recorded in documents provided by Mr McGrath. *In the absence of evidence*, the bona fide and reasonable basis for concluding that it would imperil Mr McGrath any further if he were required to plead in response to paragraph 14 was not apparent.

[231] The defendants submitted that there ought to be dispensation in respect of this paragraph, relying on *Le Roi* and arguing that to require the defendants to plead to this paragraph would oblige them to "go beyond" the information that the plaintiffs' already had, thereby increasing the jeopardy. Paragraph 14 pleaded the effect of the transaction, and Mr McGrath's knowledge of the effect was material to the contravention alleged.

[232] I note that the opening words of paragraph 14 are "By reason of the Transaction". Pleading a defence to paragraph 14, especially to sub-paragraphs 14(b) and (d), would require Mr McGrath to respond to allegations that, essentially, members of Eureka lost *any* benefit, *by reason of* the transaction.

[233] Also, paragraph 14 is not to be considered in isolation. In particular, it must be read together with paragraphs 19, 24 and 26.

[234] Read with those paragraphs, paragraph 14 is a critical part or element of the ultimate allegation in paragraph 26 that Mr McGrath failed to exercise a reasonable degree of care and diligence in performing the functions and exercising the powers of a director and in protecting the interests of Eureka's members including by failing to inform members of "material considerations" *of which he had knowledge*, which included the matters pleaded in paragraph 14.

[235] Mr McGrath cannot be compelled to contribute to the plaintiffs' case against him. Requiring him to plead to paragraph 14 would compel him to do so. It is appropriate grant his application insofar as paragraph 14 is concerned.

[236] **Paragraph 15** alleges that, since on or about 6 March 2018, members of Eureka made payments under the member loans to MFSA. Its particulars state: "Particulars of the payments made will be provided after completion of disclosure by MFSA and Mr McGrath".

[237] The plaintiffs' position was that paragraph 15 pleaded the effect of the transaction which was recorded in documents provided already by Mr McGrath, and requiring him to plead to it would not imperil him further.

[238] The defendants submitted that the claim against them included an allegation that they profited from the transaction. Requiring them to plead to paragraph 15 would assist the plaintiffs in that regard. Further, having regard to the particulars, on the face of the pleading, disclosure would assist the plaintiffs to prove their case against Mr McGrath.

[239] Paragraph 15 must be considered in the context of the pleading as a whole, and in particular in the context of paragraphs 19, 30 and 31. Paragraph 19 in particular alleges that Mr McGrath knew of the matters pleaded in paragraphs 6 to 18. I note that the plaintiffs do not oppose Mr McGrath's relief from the pleading rules insofar as paragraph 19 is concerned.

[240] In my view, requiring Mr McGrath to plead to paragraph 15 carried the risk of self-incrimination for what it had the potential to reveal about his knowledge of the payments made to MFSA. I consider it appropriate to grant his application insofar as paragraph 15 is concerned.

[241] **Paragraph 18** alleged that the Meeting Notice and Information Document did not inform members about –

(a) The extent of the Loan Surplus held by Eureka as at 22 June 2017 or the extent of the projected Loan Surplus that would be held by Eureka as at the date of the Transaction;

(b) The extent of the New Asset Surplus held by Eureka as at 22 June 2017 or the extent of the projected Net Asset Surplus that would be held by Eureka as at the date of the Transaction;

(c) Their rights as members regarding distributions of reserves in the ordinary course or distributions of any surplus on a winding up;

(d) That the matters pleaded in paragraph 14 would be a consequence of the transaction.

[242] The plaintiffs submitted that the allegation in paragraph 18 concerned a document which Mr McGrath had already provided and there was no reasonable basis for concluding that Mr McGrath would be further imperilled were he required to plead to it.

[243] The defendants submitted, in effect, that while on its face the paragraph alleged omissions from documents which Mr McGrath had already provided, it implied that the propositions in (a) to (d) were correct.

[244] In my view, requiring Mr McGrath to plead to the allegation in 18(d) went beyond requiring a response to a statement of the content of the Meeting Notice and Information Document to the extent that it required a response to an allegation that the members lost a benefit as a consequence of the transfer of their loans and mortgages.

[245] Whilst the defendants' argument is not as strong in relation to paragraphs (a), (b) and (c), showing the latitude required, I consider it appropriate to grant Mr McGrath's application insofar as it concerns paragraph 18.

[246] **Paragraph 20** alleges that a special general meeting of members was held on 25 July 2017.

[247] **Paragraph 21** alleges as follows (particulars omitted) –

21. At the Special General Meeting:

(a) Mr McGrath chaired the meeting;

(b) Mr McGrath purported to provide a summary of the present situation of Eureka;

(c) Mr McGrath purported to explain the Transaction;

(d) The members present voted in favour of a motion that:

"*The members of Eureka Co-operative Housing Society No 2 Limited vote to refinance the source funder debt of the Society to McGrath Financial Services Australia Pty Ltd".*

[248] The plaintiff submitted that paragraphs 20 and 21 followed the minutes of the meeting which Mr McGrath had already provided to the plaintiffs and there was no basis for concluding that he would be further imperilled by pleading to those paragraphs.

[249] The defendant acknowledged that the question was whether requiring the defendants to plead in accordance with the rules in respect of paragraphs 20 and 21 increased their jeopardy. The defendants submitted that while the plaintiffs had documents about the meeting, the document itself did not establish "everything in 20 and 21".

[250] In my view, pleading to paragraph 20 would not place Mr McGrath at increased peril of incrimination. It is what occurred at the meeting, rather than the fact of it, which is critical to the allegations made against him.

[251] Paragraph 21 is not framed as a recitation of the content of the minutes of the meeting. Rather, it alleges that certain things actually happened at the special general meeting, including, for example, that Mr McGrath "purported" to provide a summary of Eureka's present situation and the transaction.

[252] I consider that requiring Mr McGrath to plead to the allegation as framed in paragraph 21 risked further imperilling him. It is appropriate to grant the application insofar as paragraph 21 (but not paragraph 20) is concerned.

[253] **Paragraph 22** was said to be in the same category as paragraph 18. It alleged that at the special general meeting, Mr McGrath did not inform the members of the matters in (a) – (d).

[254] The plaintiffs submitted that the allegations in this paragraph followed the minutes of the meeting and requiring Mr McGrath to plead to them would not further imperil him.

[255] In my view, as in the case of paragraph 21, the allegations do not simply recite the content of the minutes of the meeting. They assert that Mr McGrath did not inform members of certain matters which lie at the heart of the allegations of breach made against him. I consider it appropriate to grant his application insofar as paragraph 22 is concerned.

[256] **Paragraph 24** alleges that, in evaluating whether the motion voted on at the Special General Meeting was in the interest of Eureka or its members, certain considerations were "material".

[257] The plaintiffs submitted that "material considerations" were a question for expert evidence, and it was not apparent how Mr McGrath would imperil himself further were he to plead to it.

[258] The defendant submitted that the allegation concerned Mr McGrath's state of mind and that he ought not to be required to plead to it.

[259] I consider that requiring Mr McGrath to plead in response to paragraph 24 would imperil him to the extent that it required him to admit (or not) his appreciation of matters which were material. It is appropriate to grant his application insofar as paragraph 24 is concerned.

[260] **In summary,** in relation to Mr McGrath, I order dispensation from the pleading requirements in relation to paragraphs 14, 15, 18, 21, 22 and 24.

MFSA's position

[261] The defendants submitted that it was appropriate to modify MFSA's pleading obligations in the same way and for the same reasons because Mr McGrath was the only person who could give instructions for any pleading. Thus requiring MFSA to plead to the paragraphs in contention would have the effect of imperilling Mr McGrath.

[262] The plaintiffs submitted that to the extent that Mr McGrath's claims for dispensation failed, so too should MFSA's claims because they relied upon his privilege. However, were some or all of Mr McGrath's claims for dispensation upheld, it did not follow that MFSA's claims ought to be upheld. Relying on *APCH*, the plaintiffs submitted – in effect – that there were others who were able to provide instructions to MFSA about the allegations which did not concern Mr McGrath's state of mind.

[263] The evidence relied upon by the plaintiffs to establish (directly or circumstantially) that there were others able to provide instructions to MFSA includes evidence that –

(a) "One Call Financial Services" is the business or trading name of MFSA;

(b) Melissa McGrath is employed by, or at least engaged by, One Call Financial Services;

(c) Lachlan Graff was retained in relation to the funding change (from Eureka to MFSA) and the deregistration of Eureka;

(d) Melissa McGrath was aware of, or conducted an analysis of, Eureka's financial position and the refinancing of the Eureka loans;

(e) Melissa McGrath obtained information from the NAB about the transaction which she communicated to David McGrath;

(f) Melissa McGrath, David McGrath and Lachlan Graff corresponded about and discussed Eureka's financial position and refinancing the Eureka loans;

(g) David McGrath sent to Lachlan Graff the email from the Regulator about the content of the Information Statement;

(h) David McGrath and Melissa McGrath were informed by Lachlan Graff about the potential disadvantage to members of the transfer from Eureka to MFSA:

(i) Lachlan Graff advised David McGrath and Melissa McGrath about the resolution required to allow the transaction between Eureka and MFSA;

(j) Melissa McGrath attended to the tasks required to achieve the transfer from Eureka to MFSA, including sending the Notice to Members;

(k) Melissa McGrath was involved in obtaining the votes of members on the relevant motion and communicated with David McGrath and Lachlan Graff about it;

(l) Lachlan Graff was at the special general meeting as "Society Auditor"; and

(m) Ben Schneider, of Burns Law, was involved in the settlement of the transaction between Eureka and MFSA and corresponded with David McGrath and Melissa McGrath about it.

[264] Specifically, the plaintiffs argued[48] that –

(a) meaningful instructions in response to the allegations in paragraphs 14 and 15, regarding the transaction and its consequence, could be given by Melissa McGrath, Mr Graff or Mr Schenider;

(b) meaningful instructions in response to paragraph 18, which concerned the information provided to members, could be given by Melissa McGrath or by Mr Graff;

(c) meaningful instructions in response to the allegations in paragraphs 20 to 22, regarding the special general meeting, could be given by Mr Graff; and

(d) meaningful instructions in response to the allegations in paragraph 24, regarding the information provided to members, could be given by Melissa McGrath or Mr Graff.

[265] The defendants' evidence about the availability of someone other than Mr McGrath to give instructions to allow MFSA to respond to the pleadings is limited to the statement, expressed parenthetically, in Mr Burns' affidavit that Mr McGrath believed that the company's defence would "necessarily" be on instructions from Mr McGrath.

[266] The defendants produced no other evidence about the role of the persons nominated by the plaintiffs as available to give meaningful instructions, notwithstanding that correspondence about that issue had passed between the parties since August 2019.

[267] The defendant has not persuaded me that no-one other than Mr McGrath is able to give instructions about paragraphs 15, 18, and 20 – 22 having regard to the allegations made in those paragraphs and the role of others in MSFA and the transaction as revealed in the evidence.

[268] A response to paragraph 14 requires a response to an allegation that the transfer of the loans to MFSA would leave the members without any benefit. In my view, the evidence establishes that Mr Graff would be able to respond to that allegation.

[269] A response to paragraph 24 requires a response to an allegation about "material considerations" in the interests of Eureka or its members. I do not consider that anyone other than Mr McGrath is able to provide instructions for that response.

[270] **In summary**, in relation to MFSA, I order dispensation from the pleading requirements in relation to paragraph 24 of the Amended Statement of Claim only.

[271] That brings me to the application for *in limine* relief from the general disclosure obligation.

***In limine* relief from the disclosure obligation**

[48] In relation to the terms of the paragraphs of the Amended Statement of Claim remaining in contention.

[272] The defendants' position in relation to the disclosure obligations was essentially the same as its position in relation to their pleading requirements. They submitted that the disclosure obligation obliged them to create documents which "by their nature" may be incriminating. This was because the defendants were required to identify documents in their possession relevant to the matters alleged in the pleadings which were identical to the matters which established criminal offences.

[273] The defendants relied upon *Bell Packaging*, in which it was accepted that an individual's means of knowledge could be revealed by their affidavit of documents, thereby tending to incriminate them. Because, for example, paragraph 19 alleged that Mr McGrath knew all of the matters pleaded in paragraphs 6 to 18, having to produce documents directly relevant to the allegations in paragraphs 6 to 18 would be potentially incriminating as to Mr McGrath's knowledge.

[274] The defendants asked me to infer that the schedule of documents which the defendants were required to provide would not be signed other than on instructions and that the mere act of identifying the document could be incriminating, because the defendants were required to make admissions about who was in possession of the document, who created it and its relevance. The defendants argued that, were they required to create a list, Mr McGrath's constructive knowledge of the contents of the documents may be inferred – thereby incriminating Mr McGrath.

[275] Also, the defendants argued that the identification by them of a document such as an email might cause the Regulator to embark on a train of inquiry starting with the other party to the email which might uncover incriminating information.

[276] The plaintiffs relied upon the authorities to argue that the ordinary rule should apply and that the defendants had not established that the present case was one of the rare cases in which *in limine* relief ought to be granted to Mr McGrath or MFSA. The defendants' evidence, which was limited to paragraph 30(a) of Mr Burns' affidavit did not address at all the perils arising from disclosure.

[277] As well as emphasising that the defendants had put on "zero evidence" about this, the plaintiffs submitted further that –

(a) the UCPR did not require disclosure by way of affidavit – all that was required was a list;

(b) the list of documents did not stand as a testimonial statement that Mr McGrath had adjudicated on the direct relevance of the documents contained in it;

(c) documents of direct relevance had already been provided – so even if admitting to possessing those documents might be incriminating, Mr McGrath would not be further imperilled by their inclusion on the list;

(d) the defendants' solicitor, and not Mr McGrath, ought to be considering the question of direct relevance. There was no evidential basis upon which I might conclude that the question of direct relevance could only be determined by Mr McGrath;

(e) Mr McGrath had not sought dispensation in relation to every allegation in the pleading, it was not apparent how where was a bona fide and reasonable basis for concluding that

it would imperil Mr McGrath were he to disclose documents directly relevant to allegations in respect of which no dispensation was sought;

(f) Mr McGrath had already produced documents to the plaintiff and it was not apparent how making disclosure of the same documents would further imperil Mr McGrath;

(g) the disclosure of the several categories of documents likely to be directly relevant would not involve any testimonial admission by Mr McGrath, for example, records of the member loans transferred to MFSA, bank statements, emails and letters sent by and to other persons, records of the transaction created by others.

[278] Overall, the plaintiffs submitted, the defendants had not gone beyond the hypothetical to establish that describing a document in a list might amount to a testimonial statement. If it got to that point, then the defendants could seek an appropriate order, as contemplated by Deane J in *Refrigerated Express*.

[279] The plaintiffs submitted that the claim made in respect of disclosure was as general as the claim made in *QC Resource Investments.* It was inadequate: the law had "gone well past" *Bell Packaging* and *Le Roi.*

[280] With respect to MFSA, the plaintiffs relied on the existence of other persons who were apparently in a position to identify potentially relevant documents, and the absence of evidence from the defendants that Mr McGrath was the only person able to identify relevant documents. Melissa McGrath was involved in preparing documents for the transaction. A solicitor was involved in performing the transaction and an accountant was involved in advising on the transaction. There was "literally" no evidence as to how revealing which documents were in the company's possession would or could operate as a testimonial statement against Mr McGrath.

Mr McGrath's position

[281] The authorities distinguish between pleading and disclosure obligations in this context.

[282] *In limine* relief is not granted ordinarily (*Refrigerated Express, Pyneboard, Microsoft*).

[283] There is a strong disposition in favour of ordering discovery, reserving the issue of self-incrimination to the stage of production for inspection (*Microsoft*).

[284] However, exceptional circumstances may be found where there is a real and appreciable risk of self-incrimination.

[285] I consider the significant aspect of the present case to be the fact that the contraventions relied upon by the plaintiffs are punishable criminally and that I have found that the risk of criminal proceedings is not so improbable as to be virtually without substance.

[286] I acknowledge the lack of evidence put on by the defendant but *QC Resource Investments* allows for evidence or submissions to establish the basis upon which dispensation is sought. I have also taken into account the latitude that ought to be shown once it appears that a person is at risk of self-incrimination.

[287] There are "sweeping" aspects to this part of the defendants' application, yet the defendants have not sought dispensation from the pleading rules in relation to every paragraph of the statement of claim. The defendants have not persuaded me by evidence or submission how it is that disclosure in relation to allegations to which Mr McGrath will plead in the ordinary way would imperil or further imperil him.

[288] I am not prepared to grant *in limine* relief from disclosure other than in the case of allegations in respect of which I have ordered that Mr McGrath is not required to plead or in respect of which the plaintiffs do not require Mr McGrath to plead because of the risk of self-incrimination.

[289] In respect of the paragraphs to which Mr McGrath will plead, the ordinary rule applies. Further, Mr McGrath has, in respect of those paragraphs, liberty to apply in relation to the degree of specificity by which a document is to be described.

MFSA's position

[290] The defendant submitted that the list of documents produced by the company could only be created on instructions and only Mr McGrath could provide those instructions.

[291] I asked counsel for the defendant to address me on the plaintiffs' argument about others not at risk of self-incrimination who would be able to provide instructions. Counsel said that the answer was that Mr McGrath was the sole director and shareholder of MFSA.

[292] I do not consider the fact that Mr McGrath is the sole director and shareholder of MFSA to mean that he and only he is able to give MFSA instructions for the list of documents.

[293] I consider that the evidence reveals that there are others with the requisite knowledge to provide instructions to the company to allow it to comply with its disclosure obligations.

[294] It follows that I refuse the defendants' application for *in limine* relief from disclosure insofar as MFSA is concerned.

The plaintiffs' application

[295] The plaintiffs applied for orders preserving the mortgages, loans and loan proceeds. The defendants opposed such orders on the limited basis that the plaintiff had not established a sufficiently strong prima facie case. The defendants submitted that there was a gap in the plaintiffs' case. Their statutory and fiduciary claims required them to establish causation and that had not been established. It was not enough to plead that a loss was suffered or a profit was made "because of" something. In other words, the plaintiffs had not pleaded what properly informed members would have done.

[296] The defendants referred to *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors (No 7)*[49] and in particular Bond J's statements about the correct way to plead a causation hypothesis. The defendants argued that the plaintiffs had not pleaded directly and unambiguously the material

[49] [2019] QSC 241.

facts relied upon between the impugned conduct and its link to the loss allegedly suffered. In effect, the defendants argued that they should not have to cherry pick through the pleading to work out what the plaintiffs' case was in this regard (*Lee v Abedian*).[50]

[297] I note that the plaintiffs' case is a relatively straightforward one which does not involve the complexities of *Sanrus*.

[298] The plaintiffs submitted that the causation hypothesis was apparent from paragraph 26: that had McGrath not breached his 117(2) statutory duties, he would not have permitted the motion, the vote or the transaction.

[299] Paragraph 26 alleges what a person exercising a reasonable degree of care and diligence in performing the functions and exercising the powers of a director and in protecting the interests of Eureka's members would have done.

[300] That is, such a person would have (a) ensured that members were informed of certain matters; or "further or in the alternative" (b) would not have permitted a motion of approve the transaction to have been proposed or voted upon; or "further or in the alternative" (c) would not have caused the transaction to be completed.

[301] It may be that the plaintiffs have failed to adequately plead the counterfactual in relation to allegation (a). However, I consider that the counterfactual is apparent in relation to the allegations in (b) and (c).

[302] In my view, causation has been sufficiently pleaded for the alternative allegations; that is, that a person exercising the reasonable degree of care and diligence et cetera would *not* have permitted a motion to approve the Transaction to be proposed for the Special General Meeting; nor would the person have caused or permitted the Transaction.

[303] Also, the plaintiffs submitted that the pleadings alleged a complete cause of action for the alleged breach of fiduciary duty.

[304] In that regard, it was pleaded that Mr McGrath owed a fiduciary duty to Eureka not to obtain any unauthorised benefit from his position as director; and not to be in a position of conflict. It was pleaded that he breached those duties and gained the benefit and was in a position of conflict. It was pleaded that he was liable to compensate Eureka for the losses caused by his breaches of fiduciary duty.

[305] It is not pleaded expressly that loss was caused by the breach of duty but in my view, reading the pleading as a whole, and having regard to the facts of this case which are not particularly complex, the link between the alleged breach of fiduciary duties and the loss is sufficiently established.

[306] I am otherwise satisfied that the interests of justice require the making of the order, particularly having regard to their nature (the orders sought did not impose a particularly heavy burden on MFSA) and the value of the undertaking offered.

---

[50] [2017] 1 Qd R 549 [81].

[307] It follows that I will grant the plaintiffs' application for the orders they seek.

Summary

[308] In the case of Mr McGrath, I order dispensation from the pleading rules in relation to paragraphs 14, 15, 18, 21, 22 and 24 of the Amended Statement of Claim.

[309] In the case of MFSA, I order dispensation from the pleading rules in relation to paragraph 24 of the Amended Statement of Claim only.

[310] In the case of Mr McGrath, I order *in limine* relief from the requirements of Chapter 7 of the UCPR only to the same extent as dispensation from the pleading rules has been ordered by me or not challenged by the plaintiffs.

[311] I also grant liberty to apply in relation to the specificity of the description of a document which is required.

[312] Otherwise, the defendants' application is dismissed.

[313] I grant the plaintiffs' application for interlocutory orders.

[314] I will hear the parties as to the form of the final orders and as to costs.