SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Managed Investments Ltd and Ors No.2* [2012] QSC 72
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (plaintiff) **v** **ACN 101 634 146 *(in liq)*** (first defendant) **MICHAEL CHRISTODOULOU KING** (fourth defendant) **GUY HUTCHINGS** (fifth defendant) **CRAIG ROBERT WHITE** (sixth defendant) **DAVID MARK ANDERSON** (seventh defendant) **MARILYN WATTS** (eighth defendant)
FILE NO:	BS 12122 of 2009
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	16 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	16 March 2012
JUDGE:	Fryberg J
ORDERS:	**The plaintiff have leave to proceed against the first respondent.**
CATCHWORDS:	Corporations – Winding up – Conduct and incidents of winding up – Proceedings by or against the company – Leave to proceed – When leave granted *Corporations Act 2001*, s 471B *Haviland v Joslow (No 4) Pty Ltd* [1979] 2 NSWLR 318
COUNSEL:	DMB Derham QC and MT Brady for the plaintiff T F Ritchie (solicitor) for the first defendant
SOLICITORS:	Corrs Chambers Westgarth for the plaintiff McCullough Robertson for the first defendant

HIS HONOUR: ASIC has commenced proceedings against a company and a number of its directors alleging breaches of the provisions of the *Corporations Act* relating to managed investment funds. In particular it seeks against the company a declaration that the company has in various ways contravened the Act, an order for payment of a pecuniary penalty by the company and an order for the payment of compensation for damage suffered by a particular fund to which I will describe as PIF.

The action was commenced over two years ago and has proceeded slowly. The statement of claim has reached its fourth incarnation and hopefully its last. Delivery of defences to that statement of claim has been deferred while a decision is made by the Court in relation to claims for privilege by the directors who are also defendants in the proceedings. Notwithstanding that, disclosure of documents by ASIC has substantially been completed. No disclosure is expected from the individual defendants, but the company will be obliged to give disclosure, it not being entitled to claim privilege.

Earlier this year the company went into liquidation. ASIC now seeks leave to proceed against it in the action. The only question which has concerned me is the utility of granting leave. In *Haviland v. Joslow (No 4) Pty Ltd* Justice Needham said:

"It has commonly been accepted as a principle in the application of [the then] section 263(2) and its equivalent in a winding up by the Court that the Court ought not grant leave

to proceed or leave to commence proceedings against a company after winding up if it appears that there is no possibility that the company, should a verdict be given against it, would be able to meet any part of the verdict. The basis of this principle is that the Court should not give its imprimatur to fruitless proceedings which can only involve a waste of public time and money."

It seems to me that insofar as the present application is concerned that dictum has application to the second and third classes of claim made by ASIC against the company. The evidence shows that the company has, according to the directors, a little over $70,000-odd of assets and some $46,000 of liabilities. However, the directors have not taken into account the multimillion dollar claim by PIF. At this stage, the company only having recently been wound up, proofs of evidence have not been submitted, so one must assume that PIF will in due course make a claim for the $147.5 million alleged to have been extracted from it. If that claim succeeds there will be no return of any significance to any creditor. On the other hand, if it fails the unsecured creditors will be paid in full.

Against this ASIC submits there is utility because pecuniary penalty orders and compensation orders are not the only relief sought. The declaration is of a different order. It is submitted that the making of a declaration is in the public interest.

I am extremely doubtful about that proposition, particularly

when such a declaration will be made if the case succeeds against the individual directors. Mr Brady for the applicant ASIC submits that a public vindication of the position as against the company is important and is easier to prove than the cases against the directors of being knowingly concerned. There is some force in that submission.

He also points out that the privilege which the directors can claim against proceedings for a penalty is not attracted by the company and that therefore the company will be obliged to disclose its documents when the stage for that is reached. Whether the company has any documents is not in evidence. One wonders whether, if the conduct of the directors has been as ASIC alleges, any documents of significance will be obtained. However, I need not examine that. There have been proceedings by way of examination of the directors and no doubt ASIC is familiar with what documents are around.

Mr Brady submitted that the making of a declaration and the ordering of a pecuniary penalty against the company would serve as a general deterrent. With the utmost respect to Mr Brady I think the prospects of that occurring are negligible. I cannot see that directors of other companies in the future would be in the slightest bit deterred by the fact that a declaration and a pecuniary penalty order were made against an insolvent company which had no prospects of paying and which lost nothing from having the declaration made. There is no gain from the declaration except perhaps to ASIC's standing in the perception of the public as an active efficient and energetic pursuer of evil corporate doers. That

is no doubt something to be encouraged, but it may not outweigh the interests of the unsecured creditors. More important, I think, is the point about disclosure of documents and the fact that the company does not have the capacity to claim privilege.

When looked at in the light of the fact that proof against the company is easier than proof against the directors, I am persuaded by a narrow margin that the leave should be granted. The balance, I might say, is close. There is not much benefit to anyone in this, but since the litigation is going to go ahead and in particular since the liquidators do not oppose the order, I am content on the evidence to make it.

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