SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Managed Investments Limited & Ors (No 5)* [2013] QSC 313
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (plaintiff) **v** **ACN 101 634 146 *(in liq)*** (first defendant) **MICHAEL CHRISTODOULOU KING** (fourth defendant) **CRAIG ROBERT WHITE** (fifth defendant) **GUY HUTCHINGS** (sixth defendant) **DAVID MARK ANDERSON** (seventh defendant) **MARILYN ANNE WATTS** (eighth defendant)
FILE NO:	BS 12122 of 2009
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	11 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2013; 6 November 2013
JUDGE:	Fryberg J
ORDERS:	**1. Applications dismissed.** **2. The applicants pay costs of the Australian Securities and Investments Commission, Mr Hutchings and Ms Watts to be assessed.** **3. As between the applicants and Mr King, costs reserved.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – STAY OF CIVIL PROCEEDINGS PENDING CRIMINAL PROCEEDINGS – Felony-tort rule – Foreign criminal proceedings – Privilege against self-incrimination EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEGE – SELF-INCRIMINATION –

IN GENERAL – Limits of operation of principle – Risk of incrimination in foreign jurisdiction

Corporations Act 2001 (Cth), s 1331, s 1317M, s 1317N, s 1317P, s 1317Q, s 1317S
Securities Act 1978 (NZ), s 55, s 58
Uniform Civil Procedure Rules 1999 (Qld), r 5

Anderson v Australian Securities and Investments Commission [2012] QCA 301, considered
Australian Securities and Investments Commission v Managed Investments Ltd No 4 [2013] QSC 15, cited
Australian Securities Commission v Bank Leumi Le-Israel & Ors [1995] FCA 1774, considered
Dolan v Australian and Overseas Telecommunications Corporation [1993] FCA 202; (1993) 42 FCR 206, cited
Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520, cited
MacDonald v Australian Securities and Investments Commission [2007] NSWCA 304; (2007) 73 NSWLR 612, considered
McMahon v Gould (1982) 7 ACLR 202, applied
R v McDonnell [1988] 2 Qd R 189, considered
R v Roberts [2004] VSCA 1; (2004) 9 VR 295, cited
X v Australian Crime Commission [2004] FCA 1475; (2004) 139 FCR 413, considered

COUNSEL: P Riordan SC, with M Brady and J Moore, for the plaintiff
No appearance for the first defendant
P Davis QC, with D Piggott, for the fourth defendant
R Jackson, with N Andreatidis, for the fifth defendant
D Williams SC, with C Withers, for the sixth defendant
B O'Donnell QC, with C George, for the seventh defendant
P Freeburn QC for the eighth defendant

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

[1] **FRYBERG J:** In 2009 the Australian Securities and Investment Commission ("ASIC") commenced proceedings against a company now in liquidation ("MFSIM") and five individuals associated with it.

The principal proceedings

[2] ASIC alleges that MFSIM was the responsible entity for a registered scheme under the *Corporations Act 2001* (Cth) and that as such it breached a number of duties imposed on it under s 601FC of that Act. In broad terms, breaches are alleged in connection with three matters: the first is in respect of a payment of $103 million in late November 2007, the second is in respect of a payment of $17.5 million in late December 2007; and the third is in respect of the creation, keeping and use of false documents in January and February 2008. ASIC further alleges that the five individual defendants were directors or senior officers of MFSIM and that they variously either brought about its contraventions or have derivative liability for them. It variously claims civil penalties and disqualification orders against them and it claims various declarations of contravention against all defendants.

[3] Controlled by liquidators, MFSIM has admitted contraventions. It does not contest the claim against it.[1] The individual defendants have defended the claims against them vigorously. There have been numerous complex and no doubt expensive interlocutory proceedings, including an appeal to the Court of Appeal[2], and it has taken over four years to get the matter ready for trial. Much of the disputation has revolved around the defendants' claims for privilege against exposure to a penalty. The parties' costs must already be measured in millions of dollars; collectively, in excess of ten million dollars.

[4] The claim is undoubtedly a complex one. The statement of claim incorporating full particulars exceeds 200 pages. As a consequence of the order of the Court of Appeal[3], the defences are opaque, but there is no reason to think that the parties' estimate that the trial will take six weeks is exaggerated. It was set down for trial to commence on 4 November before Douglas J. More than 40 witnesses are to be called by ASIC and cross-examined by at least one defendant. Arrangements have been made for the case to proceed as an e-trial, with Realtime transcript. Significant court resources have been devoted to it. The parties must have been preparing for weeks. All are ready for trial.

[5] On Thursday 31 October, the New Zealand Financial Markets Authority filed two criminal charges in the Auckland District Court against two of the defendants, Mr White and Mr Anderson. They received notice of those charges on that day. Each is charged under s 58 of the *Securities Act 1978* (NZ) first, that between 14 September 2007 and 31 January 2008 he signed a registered prospectus for a company called MFS Pacific Finance Ltd which was distributed and which contained untrue statements; and second, that between the same dates he was a director of that company, it was an issuer of debt securities and it distributed an advertisement which included untrue statements. The maximum penalty for each offence is imprisonment for five years or a fine of $300,000.

The applications

[6] Following receipt of notice of those charges both Mr White and Mr Anderson advised Douglas J of their intention to apply for a stay of the trial in the present

---

1 *Australian Securities and Investments Commission v Managed Investments Ltd No 4* [2013] QSC 15.
2 *Anderson v Australian Securities and Investments Commission* [2012] QCA 301.
3 *Ibid.*

case. To avoid any risk that by hearing those applications his Honour would be disqualified from hearing the trial, the applications were listed before me. I should say at the outset that I can see no reason why the parties should not have taken advantage of his Honour's greater familiarity with the case and brought the applications before him. For reasons which will become apparent, that may be relevant in the future.

[7] The applications are not identical, but in substance they seek orders staying the trial until the determination of the New Zealand prosecution. That would be in mid-2015 at the earliest and given that there are four defendants, it is not difficult to imagine how it could be further delayed. The applicants submit that there are a number of evidentiary issues which will arise in both the prosecution and the present proceedings. They submit that in relation to those issues they are entitled to maintain their privilege against self-incrimination in relation to the prosecution; yet in order to effectively defend the present proceedings they would have to waive the privilege by giving evidence themselves and through their counsel, putting facts to witnesses which would disclose their instructions. They submit that a fair trial of the present proceedings could not be had without their doing this. Only by staying the present proceedings can their right to silence be preserved. The applicants concede that the decision on whether to grant a stay is one which involves the exercise of a discretion, but submit that the privilege against self-incrimination is so fundamental that it outweighs all other considerations.

[8] Two of the defendants, Mr Hutchings and Ms Watts, oppose the grant of a stay. Although their submissions were not identical, they can be grouped for the purposes of this summary. They contend that the factors against a stay outweigh the disadvantages which would be incurred by the applicants if the case proceeds. They submit that the prejudice which they would suffer as a result of a stay outweighs that which the applicants would suffer without one. In the alternative, they submit that any stay should be limited to the two applicants, and the case should proceed against them.

[9] The other defendant, Mr King, informed the court that he wished the case to proceed, but not if the court thought that the applicants should have a stay. He adopted no position on that question. He also made no explicit submission on whether any stay should be limited to the claims against the applicants, but pointed out that if the case proceeded against the other defendants to the point where a declaration was made against MFSIM, that declaration would be conclusive against the applicants under s 1317F of the Act.[4] That, of course, would be a reason for not granting a stay so limited.

[10] ASIC opposes a stay. It submits that the interests of justice favour refusal when all relevant considerations are considered. Any prejudice to the applicants is outweighed by the interests of the other defendants, the plaintiff and the public interest in having the proceedings continue. Under no circumstances should a limited stay be granted. That would result in effect in two lengthy trials of the same allegations, with the risk of inconsistent findings. The first proceedings could not be concluded because of the difficulty created by s 1317F, so there would be little benefit to the other defendants. The cost would be substantial.

---

4 *Australian Securities and Investments Commission v Managed Investments Ltd No 4* [2013] QSC 15.

Privilege against self-incrimination

[11] Citing the decision of the Full Court in *R v McDonnell*[5], the applicants submitted that the common law privilege under Queensland law extends to incrimination under the laws of any jurisdiction. What was written on this point in that case was technically obiter, but it was not expressed in a way which ordinarily I would be inclined to disregard when sitting at first instance. Macrossan CJ wrote:

> "Although the course of authority is not all one way, there is substantial reason for thinking that the common law privilege applicable in Queensland is one against incrimination under the laws of any jurisdiction, both Queensland and extra-territorial jurisdictions: cf *The United States of America v McRae* (1868) LR 3 Ch App 79, *Re S* [1948] VLR 11 and *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No.4)* [1985] 1 Qd R 127."[6]

McPherson J wrote:

> "No doubt the common law of Queensland recognises and gives effect to the privilege against incrimination of a person examined here even if the incrimination against which the privilege is claimed arises under the law of a foreign state, which may not its self not recognise any such privilege: see *Re S* [1948] VLR 11; and cf *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No.4)* [1985] 1 Qd R 127. Because that demonstrates that the privilege subsists as a matter of local law, it means, in my opinion, that no presumption exists that its alteration or removal locally is not to have what may be loosely described as extra-territorial consequences."[7]

Derrington J wrote:

> "The domestic nature of the rule as to privilege of this kind and its relationship to the forum where the claim of privilege is taken rather than to the jurisdiction where the incriminatory disclosures may be used, is illustrated by *Re S* [1948] VLR 11 where the rule was applied in respect of a Victorian hearing of evidence concerning an offence in another country, even though the privilege was not available to the witness in that other country. See also *United States of America v McRae* (1868) LR 3 Ch App 79, *Re S* [1948] VLR 11 and *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No.4)* [1985] 1 Qd R 127."[8]

[12] However it must be remembered that McPherson and Derrington JJ were writing before the decision of the High Court in *Lange v Australian Broadcasting Corporation*[9] made it clear that there is but one common law of Australia. Moreover, it is clear that the question is controversial and remains open. In

---

5 [1988] 2 Qd R 189.
6 [1988] 2 Qd R 189 at p 191.
7 [1988] 2 Qd R 189 at p 196.
8 [1988] 2 Qd R 189 at p 201.
9 [1997] HCA 25; (1997) 189 CLR 520.

Australian Securities Commission v Bank Leumi Le-Israel, Ebc Zurich Ag, Sackville J wrote:

> "Mr Conti contended that the better view is that the privilege extends to self-incrimination under foreign law: see McNicol, *Law of Privilege* (1992), 215-223; *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Company Ltd (No.4)*. In the latter case, … it was held that a Swiss corporation was entitled to claim privilege from producing a class of documents, the contents of which disclosed shareholdings in another Swiss corporation. The privilege from non-disclosure arose because the disclosure would or might expose the party making the disclosure to a penalty under the Swiss Penal Code.
>
> 132. Mr Conti's argument raises several difficult questions. First, it is not settled in Australia whether the privilege against self-incrimination protects a person from self-incrimination under foreign law. In *Adsteam v Queensland CLC*, McPherson J held that it did, at least in the context of discovery in civil proceedings between subject and subject (at 145). There have been decisions to the contrary (see, for example, *In re Atherton* per Phillimore J) and other Australian authorities are inconclusive: *Commissioner of Australian Federal Police v Cox*, Morling J at 167; *FF Seeley Nominees Pty Ltd v El Ar Initiations (UK) Ltd*, Zelling AJ), at 471-474."[10]

[13] To those authorities I would add *X v Australian Crime Commission*, where Finn J wrote:

> "43. What is claimed here is the common law privilege as such and it is 'rigid and absolute': *Brannigan*, at 249. Whether it extends to the risk of incrimination under foreign law has been the subject of conflicting judicial opinion and decision for many years now: see the general discussion of this in *Brannigan v Davison* at 247 ff; see also *Adsteam Building Industries Pty Ltd v The Queensland Cement and Lime Co Ltd (No 4)*; *FF Seeley Nominees Pty Ltd v El AR Initiations (UK) Ltd.*
>
> 44. While I refrain from expressing a concluded view on this controversy, I would not wish my failure to do so to be interpreted as providing implicit support for this claimed application of the privilege. Rather, in my respectful view, there is much force in the opinion expressed by Lord Nicholls of Birkenhead in *Brannigan* (at 249-250) that:
>
> > 'It is the unqualified nature of the right, so valuable as a protection for the witness, which gives rise to the problem when a foreign law element is present. If the privilege were applicable when the risk of prosecution is under the law of another country, the privilege would have the effect of according primacy to foreign law in all cases. Another country's decision on what conduct does or does not attract criminal or penal sanctions would rebound on the domestic court. The foreign law would override the domestic court's

---

10 [1995] FCA 1774 (citations omitted).

> ability to conduct its proceedings in accordance with its own procedures and law. If an answer would tend to expose the witness to a real risk of prosecution under a foreign law then, whatever the nature of the activity proscribed by the foreign law, the witness would have an absolute right to refuse to answer the question, however important that answer might be for the purposes of the domestic court's proceedings.
>
> This surely cannot be right. Different countries have their own interests to pursue. At times national interests conflict. In its simple, absolute, unqualified form the privilege, established in a domestic law setting, cannot be extended to include foreign law without encroaching unacceptably upon the domestic country's legitimate interest in the conduct of its own judicial proceedings. Their Lordships respectfully agree with the views to this effect expressed in the Court of Appeal by Cooke P., Henry and Thomas JJ. Their Lordships' conclusion is that the common law privilege does not run where the criminal or penal sanctions arise under a foreign law.' "[11]

[14] In the present applications all parties assumed that the view expressed in *R v McDonnell* was correct. I shall not depart from that common assumption.

The area of overlap

[15] Relevantly, the New Zealand Act provides:

> "**58 Criminal liability for misstatement in advertisement or registered prospectus**
>
> (1) Subject to subsection (2) of this section, where an advertisement that includes any untrue statement is distributed,—
>
> (a) the issuer of the securities referred to in the advertisement, if an individual; or
>
> (b) if the issuer of the securities is a body, every director thereof at the time the advertisement is distributed—
>
> commits an offence.
>
> (2) No person shall be convicted of an offence under subsection (1) of this section if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of the distribution of the advertisement, believe that the statement was true.
>
> (3) Subject to subsection (4) of this section, where a registered prospectus that includes an untrue statement is distributed, every person who signed the prospectus, or on whose behalf the registered prospectus was signed for the purposes of section 41(b) of this Act, commits an offence.

---

11 [2004] FCA 1475; (2004) 139 FCR 413.

(4) No person shall be convicted of an offence under subsection (3) of this section if the person proves either that the statement was immaterial or that he or she had reasonable grounds to believe, and did, up to the time of the distribution of the prospectus, believe that the statement was true"

and

"**55 Interpretation of provisions relating to advertisements, prospectuses, and registered prospectuses**

For the purposes of this Act,—

(a) a statement included in an advertisement or registered prospectus is deemed to be untrue if—

(i) it is misleading in the form and context in which it is included; or

(ii) it is misleading by reason of the omission of a particular which is material to the statement in the form and context in which it is included."

[16] The applicants limited their submissions to four elements of s 58. They were whether relevant statements were untrue, whether they were material, whether the applicants had reasonable grounds to believe that the statements were true and whether they in fact so believed. The applications before me were conducted on the assumption that no issue arose as to the distribution of an advertisement or their positions as directors of the relevant New Zealand company.

[17] The documents instituting the New Zealand charges were accompanied by a 26 page draft summary of the facts on which the prosecution relies. That summary refers to the company involved in the charges, MFS Pacific Finance Ltd, as "PAC". It contains lengthy and elaborate particulars of the complex arrangements alleged to have resulted in the presence of untruths in the documents referred to in the charges. It identifies the involvement of the applicants. It is unnecessary to record the whole of the statement. It alleges that, among many other things, the statements of the security of loans in the New Zealand documents were untrue, and summarises transactions said to bring about that result. The parts alleged to overlap the present proceedings state:

"117 The background to these transactions is the MFSL subsidiary, MFS Castle Pty Ltd (MFS Castle), had an AU$250m loan facility with a lending organisation referred to as Fortress. The Fortress facility was due to be repaid in August 2007. MFS Castle was at that date not in a position to repay. The repayment date was extended to 30 November 2007.

118 Prior to 30 November 2007, agreement was reached with Fortress whereby AU$100m would be repaid on 30 November and the AU$150m balance on 29 February 2008. An AU$3m fee was payable on 30 November in relation to the AU$150m extension.

119 The AU$103m payment to Fortress was funded from the proceeds of PIF drawing down AU$140m from an AU$200m Royal Bank of Scotland ("RBS") facility available to it. The AU$150m drawdown occurred on 28 November. Further drawdowns occurred during December 2077 such that, by 31

December 2007 the full AU$200m facility had been drawn down.

120 The purpose of PIF drawing the AU$140m was to enable it to fund new investments. Whilst it is clear that the AU$103m repayment to Fortress was funded from the AU$150m draw down against the RBS facility that is not the way that the transactions were structured and accounted for.

121 To achieve this necessary outcome for the benefit of MFS group a scheme was devised involving the use of PAC and its assets to enable and permit the Fortress repayment. Most of what occurred was not documented at the time, and not until January/February 2008. Via a complicated set of transactions, PIF "acquired" AU$62.5m of loan interests from PAC in November 2007. However none of the AU$62.5m was ever paid to PAC. As at the date of the AU$150m draw down it had not been decided which loans PIF would acquire an interest in (there is no documentation to show that PIF was locked into purchasing any PAC loan interests). The loan interests were only actually transferred from PAC to PIP in February 2008. It seems that the document which records the sale of the loan interests was only prepared in February 2008. That signed document is undated.

122 Similarly, PIF was shown to have expended AU$85m subscribing for units in MYF, and MFY was shown to have expended AU$55m acquiring loan participation interests from PAC. Again, it seems that it was not until February 2008 that it was decided which loan interests would pass to MYF. Again, the document recording the sale of the loan interests is not dated. It seems likely also that PIF did not subscribe for any MYF units until February 2008.

123 As to receiving payment for the AU$55m of loan advances transferred to MYF, PAC received an AU$17.5m payment on 27 December 2007. This payment was ultimately treated as being in relation to the sale of the loan participation interests, although the receipt was initially treated by PAC as being for another purpose.

124 Crucially, from PAC's perspective, the results of the transactions was PAC 'sold' AU$117.5m of loan interests for which it received AU$17.5m is cash with the balance of AU$100m being accounted on the basis that it was owed to PAC by another entity, PIP. The 'advance' to PIP (a related party) was entirely unsecured and did not go through any loan approved protocol or processing at PAC, and certainly did not go to the PAC Investment Approval Committee for approval. The defendants Anderson and White were involved in the scheme of events, and the various transactions including the back-dating of various transactional documents.

125 Put in simple terms, PIF will have represented to RBS that it needed AU$150m to fund investments that it was making.

AU$117.5m of that sum was accounted as being applied to fund the purchase of the loan interests from PAC, however, only AU$17.5m was actually applied for that purpose, with the balance of AU$100m applied to enable MFS to repay the Fortress facility.

126 From PAC's perspective, it sold AU$117.5m of loan interest in return for AU$17.5m of cash, with the balance of the amount payable to it applied by MFS to repay the Fortress facility and accounted in a manner that left PAC owed AU$100m (unsecured) by PIP, an amount that, following PIP's collapse, was never repaid.

127 If PAC did not formalise the transaction (by the necessary transactional documents) binding it to sell the loan participation interests until after 31 December 2007 which seems likely, then the position is simply that persons with authority transferred ownership of those loan interests without formalising means of settling the amount owed to PAC. In accounting terms, PAC had relinquished ownership of those loan interests, and this was accounted by replacing the loan interests with an amount owed to PAC by PIP.

128 This series of events and transactions breached a number of terms in the Trust Deed and made untrue many key statements in the Offer documents. These untrue statements are set out in the following section. Additionally the outcome of these transactions was entirely contrary to PAC's investors' interests. PAC had 'sold' AU$119.3m of its book (much of which was eligible to be put to MFS under the Put Option) and only received AU$17.5m payment and an unsecured AU$100m debt with a related party which proved valueless.

…

Sale of the participating share in loans

143 The sale of loans totalling AU$117.5m to PIF and MYF on 30/11/07 which equated to 40% of PAC's total assets. The transaction was constructed by Craig White and David Anderson but without the prior actual knowledge or consent of two of PAC's four directors, Jason Maywald and Mark Lacy. Messrs Maywald and Lacy were or ought to have been aware of the transaction after December 2007. The transaction breached the terms of the Trust Deed as disclosed in the prospectus as it was with a non-charging related party and even if it was not between related parties it was outside the ordinary course of business, disposed of a substantial part of the business and it was without the consent or knowledge of the Trustee. The Extension Certificate (and Investment statement) made no mention of the adverse change in PAC's financial position or the implication of the transaction. The untrue statements in respect of the transaction were flagrant and prejudicial to PAC's investors.

Cash advance AU$100m made to PIP

144 The advance allegedly occurred on 30/11/07 and was recorded in PAC's business records in February, 2008 by way of journal entries that were back-dated to December, 2007. The transaction was constructed by Craig White and David Anderson, but without the prior knowledge or consent of Jason Maywald or Mark Lacy. Messrs Maywald and Lacy were or ought to have been aware of the transaction after December 2007. The transaction, which breached the Trust Deed for the same or similar reasons as set out above and additionally because it did not comply with PAC's own prudential lending practices. Again it occurred without the prior consent or knowledge of the Trustee. The Extension Certificate made no mention of the adverse changed in PAC's financial position or the implications of the transaction insofar that the advance had also been made without adequate security, on terms that had not been documented, and in a manner that flagrantly increased PAC's loan concentration exposure to PIP. The untrue statements in respect of the cash advance transaction were grossly prejudicial to PAC's investors."

[18] It was I think common ground that the New Zealand charges proceed on the basis that the transactions referred to did indeed bear the character ascribed to them in the documents created in January and February 2008. ASIC's case is quite the opposite; ASIC claims the documents are false..

[19] The transactions referred to in the quoted passage are of importance in the present litigation. MFS Pacific Finance Ltd is referred to many times in the statement of claim, albeit by the abbreviation "PacFin". The applicants' knowledge of and involvement in those transactions is an important aspect of ASIC's case against them. Because they have been relieved from the need to comply with the pleading rules it is not possible to say whether they admit or deny such knowledge or whether they seek to explain their conduct as innocent. It is not known whether they will contend that the documents created in January and February 2008 truly reflect the nature of the transactions (which potentially could tend to incriminate them in New Zealand), nor whether they deny involvement in the creation of or knowledge of those documents. They have however pleaded reliance on s 1317S, which raises questions of honesty. Mr Anderson has testified that should he give evidence in the present proceedings it would cover the extent of his knowledge of and his personal involvement in the following matters:

"(a) the $130 million payment;

(b) the $103 million payment;

(c) the $17.5 million payment;

(d) the transactions being recorded in loan participation agreements with MFS Pacific Finance Ltd (PacFin);

(e) the Premium Income Fund (PIF) acquiring 85 million units in the Maximum Yield Fund (MYF);

(f) the participation by PIF and MYF in loans held by PacFin;

(g) the financial position of MFS Limited and MFS Castle and any ability for MFS Limited to provide financial support to other entities;

(h) the MFS Group's dealings with Fortress Credit Corporation;

(i) the relationship between MFS Limited and PacFin;

(j) business arrangements between MFS Administration and PacFin;

(k) any financial support that MFS Administration Pty Ltd may have provided to PacFin and Pacific Investment Pty Ltd;

(l) the structuring and accounting of the transactions referred to in (a) - (f) above upon PacFin and any effect this may have had upon PacFin's financial position;

(m) the timing of the various transactions involving PacFin, PIF and MYF and payments to Fortress;

(n) the documenting of the various transactions involving PacFin, PIF and MYF."

He deposed that if the trial were to proceed he expected that his counsel would cross-examine ASIC's witnesses about these matters. Mr White does not provide any similar evidence, although it is not difficult to infer that his position is not very different from that of Mr Anderson.

[20] It can in my judgment be inferred that there are indeed substantial areas of factual overlap between the present proceedings and the New Zealand proceedings. It may also be inferred that the applicants could give evidence and cross-examine about a number of the events in the areas of overlap. It is not possible to determine the likely content or extent of that evidence or those questions.

Discretionary guidelines

[21] Counsel for Mr Anderson submitted:

"10. The jurisdiction to grant a stay involves the balancing of competing interests. The question is whether the prejudice to Mr Anderson (and Mr White) if the civil proceeding is not stayed, outweighs the other parties' interest in having the trial of the civil proceeding now.

11. The Court's jurisdiction to stay proceedings in the interests of justice has been described as extensive. Whether or not a stay is granted involves an exercise of the Court's discretion based on the merits of each case.

12. In *McMahon v Gould* (1982) 7 ACLR 202 at 206-207, the Court referred to a number of guidelines for the determination of applications to stay proceedings. Among those considerations is the impact of the civil proceeding on a defendant's rights to silence and privilege against self-incrimination."

[22] Subject to one matter, I accept that submission. My reservation is that I would add the words "and any public interest" to the balancing process referred to in the second sentence of para 10. ASIC so submitted in the present case and I think it is fair to say that the applicants did not challenge that submission in oral argument.

[23] It was common ground that I should apply the guidelines from *McMahon v Gould*,[12] although the applicants reserved the right to challenge those guidelines on appeal. What Wootten J said in that case was:

> "I approach the decision of this matter with the following guidelines:
>
> (a) Prima facie a plaintiff is entitled to have his action tried in the ordinary course of the procedure and business of the court (*Rochfort v John Fairfax & Sons Ltd* at 19);
>
> (b) It is a grave matter to interfere with this entitlement by a stay of proceedings, which requires justification on proper grounds (*ibid*);
>
> (c) The burden is on the defendant in a civil action to show that it is just and convenient that the plaintiff's ordinary rights should be interfered with (*Jefferson v Bhetcha* at 905);
>
> (d) Neither an accused (ibid) nor the Crown (*Rochfort v John Fairfax & Sons Ltd* at 21) are entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;
>
> (e) The court's task is one of 'the balancing of justice between the parties' (*Jefferson Ltd v Bhetcha* at 904), taking account of all relevant factors (ibidat 905);
>
> (f) Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors (ibidat 905);
>
> (g) One factor to take into account where there are pending or possible criminal proceedings is what is sometimes referred to as the accused's 'right of silence', and the reasons why that right, under the law as it stands, is a right of a defendant in a criminal proceeding (*ibid* at 904). I return to this subject below;
>
> (h) However, the so-called 'right of silence' does not extend to give such a defendant as a matter of right the same protection in contemporaneous civil proceedings. The plaintiff in a civil action is not debarred from pursuing action in accordance with the normal rules merely because to do so would, or might, result in the defendant, if he wished to defend the action, having to disclose, in resisting an application for summary judgment, in the pleading of his defence, or by way of discovery or otherwise, what his defence is likely to be in the criminal proceeding (*ibid* at 904–5);
>
> (i) The court should consider whether there is a real and not merely notional danger of injustice in the criminal proceedings (*ibid* at 905);

---

12 (1982) 7 ACLR 202.

(j) In this regard factors which may be relevant include:
  (i) the possibility of publicity that might reach and influence jurors in the civil proceedings (*ibid* at 905);
  (ii) the proximity of the criminal hearing (*ibid* at 905);
  (iii) the possibility of miscarriage of justice eg by disclosure of a defence enabling the fabrication of evidence by prosecution witnesses, or interference with defence witnesses (*ibid* at 905);
  (iv) the burden on the defendant of preparing for both sets of proceedings concurrently (*Beecee Group v Barton*);
  (v) whether the defendant has already disclosed his defence to the allegations (*Caesar v Somner* at 932; *Re Saltergate Insurance Co Ltd* at 736);
  (vi) the conduct of the defendant, including his own prior invocation of civil process when it suited him (cf *Re Saltergate Insurance Co Ltd* at 735–6); 7 ACLR 202 at 207

(k) The effect on the plaintiff must also be considered and weighed against the effect on the defendant. In this connection I suggest below that it may be relevant to consider the nature of the defendant's obligation to the plaintiff;

(l) In an appropriate case the proceedings may be allowed to proceed to a certain stage, eg, setting down for trial, and then stayed *Beecee Group v Barton*).

In considering the reasons why 'the right of silence' exists (para (g) above), one enters a realm of controversy (see, for example, the discussion of the Eleventh Report of the English Criminal Law Revision Committee (1972) Cmnd 4991 in *The Right of Silence*, being papers presented at a seminar of the Sydney University Law School Institute of Criminology in June 1973). The phrase is a convenient rubric for several rules and practices which have various origins and serve various purposes. In the process of investigation of crime and the interrogation of suspects it comprehends the fact that it is not normally an offence to refuse to answer questions or to fail to provide an explanation or account of events. Not only is refusal or failure not an offence, but it cannot be used to draw an adverse inference against the person concerned at his trial. This aspect of the right of silence was greatly strengthened by the Judges' Rules which provided for the cautioning of suspects. Serving some of the same purposes but of different origin is the law relating to confessions in criminal cases, which cannot be used unless they are fully voluntary.

In terms of procedure at a criminal trial, the 'right of silence' covers the situation that the accused is not obliged to give evidence — indeed he may make an unsworn statement about which he cannot be questioned — and for the most part no comment can be made to the jury on his failure to go in the box.

Finally, in legal proceedings generally, civil and criminal, a witness has a privilege to refuse to answer a question which might tend to incriminate him. Naturally this does not apply to a defendant who chooses to give evidence in a criminal case.

…

In this context there are some consequences of the 'right of silence' which no one, so far as I am aware, puts forward as legitimate reasons for its existence. These include the opportunity it may give the accused to remain silent till the end of the evidence against him at the trial, and then produce a fabricated story perfectly tailored to meet that evidence. They include the possibility of depriving the prosecution of any opportunity to check the accused's story and obtain evidence to refute it before the trial is over. In one particular matter — the last minute production of alibis — the injustice was so frequent and obvious that the legislature made an inroad into the 'right of silence' by requiring notice of such an intended defence.

These are advantages which 'the right of silence' gives to an accused, but they cannot reasonably be regarded as part of the reason why the right exists. In exercising its discretion to stay civil proceedings the court need not be concerned to preserve these advantages. It should be concerned to avoid the causing of unjust prejudice by the continuance of the civil proceedings, not to preserve the tactical status quo in the criminal proceedings whether it be just or unjust."

All parties agreed that these were merely guidelines to be approached as such and not as if they were a statutory formula.

[24] Five provisions of the Act provide part of the background against which the guidelines need to be applied:

"**1331 Civil proceedings not to be stayed**

No civil proceedings under this Act are to be stayed merely because the proceeding discloses, or arises out of, the commission of an offence."

"**1317P Criminal proceedings after civil proceedings**

(1) Subject to subsection (2), criminal proceedings may be started against a person for conduct that is substantially the same as conduct constituting a contravention of a civil penalty provision regardless of whether:
   (a) a declaration of contravention has been made against the person; or
   (b) a pecuniary penalty order has been made against the person; …"

"**1317M Civil proceedings after criminal proceedings**

A court must not make a declaration of contravention or a pecuniary penalty order against a person for a contravention if the person has been convicted of an offence constituted by conduct that is substantially the same as the conduct constituting the contravention."

"**1317N Criminal proceedings during civil proceedings**

(1) Proceedings for a declaration of contravention or pecuniary penalty order against a person are stayed if:
   (a) criminal proceedings are started or have already been started against the person for an offence; and

(b) the offence is constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention.

(2) The proceedings for the declaration or order may be resumed if the person is not convicted of the offence. Otherwise, the proceedings for the declaration or order are dismissed."

"**1317Q Evidence given in proceedings for penalty not admissible in criminal proceedings**

Evidence of information given or evidence of production of documents by an individual is not admissible in criminal proceedings against the individual if:

(a) the individual previously gave the evidence or produced the documents in proceedings for a pecuniary penalty order against the individual for a contravention of a civil penalty provision (whether or not the order was made); and

(b) the conduct alleged to constitute the offence is substantially the same as the conduct that was claimed to constitute the contravention.

However, this does not apply to a criminal proceeding in respect of the falsity of the evidence given by the individual in the proceedings for the pecuniary penalty order."

A plaintiff's right to trial

[25] The applicants submitted that ASIC should not be considered in the same way as an ordinary plaintiff in a civil proceedings. In a sense that is correct. ASIC does not in these proceedings seek relief for infringement of a private right and it has not itself sustained any damage. However its purpose, and the purpose of the proceeding, is to enforce the law. If successful it will obtain a declaration which will operate as public denunciation of the defendants' conduct, pecuniary penalties and disqualification orders. It might be thought that prompt resolution of such issues is at least as important as prompt vindication of private rights.

[26] Moreover it is not simply the plaintiff which has an interest in having actions tried in the ordinary course of the procedure and business of the court. There is a public interest in that course. The import of r 5 of the *Uniform Civil Procedure Rules* is well known. In a case such as the present the public interest is magnified by the unusual effort which the court has put into preparing for this trial and the resources which have been devoted to it. It is not appropriate to disregard these matters.

[27] *Gould v McMahon* was a case where there was only one defendant. There was no occasion for Wootten J to consider the position where multiple parties were involved. It is otherwise in the present case. Three defendants want the case to proceed. They have serious allegations of dishonesty hanging over their heads, and have done so now for more than four years. One can properly infer generally that for the pendency of the trial there must be serious social and economic consequences for the defendants. Mr Hutchings has given evidence of particular economic disadvantage: unemployment. Counsel for Mr Anderson criticised that evidence as vague and unconvincing hearsay. While there is some force in that criticism, it must be remembered that the affidavit was prepared over the weekend and in haste.

[28] The evidence discloses another risk which might become a reality if a stay were granted. The defence of the individual defendants is being funded under one insurance policy, which has a limit of $30 million in total. Each defendant has two counsel and a substantial city firm of solicitors representing him or her. There is to my mind a very real risk that if a stay were granted, the funds which would be left would be insufficient for the trial. The applicants urged that little weight be given to this factor because of the absence of evidence giving any detail of expenditure to date and of the personal wealth of the defendants. Again there is some force in that criticism, but again it must be considered in the light of the haste with which the applications were brought on. Moreover if Mr Hutchings or Ms Watts could have got detailed information from the insurer, so too could Mr White and Mr Anderson. In my judgment this factor is entitled to some weight.

Existence of pending criminal proceeding

[29] Wootten J based guideline (d) on case law, but the Act is now relevant. The applicants submitted that were the prosecution brought in Australia the present proceedings would automatically be stayed under s 1317N. I reject that submission. That section operates only if the offence is *constituted* by conduct that is substantially the same as the conduct alleged to constitute the contravention. That is not the case here. They also submitted that because the offence was a New Zealand offence, they were deprived of the benefit of s 1317Q. That submission fails for the same reason. The elements of the offence are quite different from the conduct constituting the contravention, notwithstanding the overlap of evidence.

[30] In any event, if it should be the position that the applicants would sustain unfairness in the prosecution by reason of evidence given in the present proceedings, there would I assume (in the absence of any evidence that the law of New Zealand differs from that of Queensland in this regard) be a judicial discretion to exclude that evidence.

Delay

[31] As the applicants submit, much of the proof of ASIC's case depends upon documents, particularly e-mails. However there is still a significant portion of the evidence which relates to events and conversations. There has already been considerable delay. Further delay will inevitably degrade memories. Moreover the applicants do not concede that the contents of the e-mails are true. One can reasonably expect cross-examination designed to establish that the author of an e-mail has no independent recollection of the events referred to in it as a foundation for seeking to extract a concession that part of the content might be erroneous. Delay creates uncertainty. Further delay would be prejudicial to a fair trial.

The right of silence and its protection in contemporaneous civil proceedings

[32] The privilege against self incrimination was the factor upon which the applicants' submissions focused. They referred the court to a number of recent cases in which the fundamental nature of this privilege was emphasised. They submitted:

> "13. The content and the principles in respect of the privilege against self-incrimination are well established:

> a. The privilege springs from a cardinal principle of our system of justice that the Crown must prove the guilt of an accused person.
>
> b. It is based upon the deep-seated belief that those who allege the commission of a crime should prove it themselves and should not be able to compel the accused to provide proof against himself.
>
> c. If a witness is compelled to answer questions which may show that he has committed a crime with which he may be charged, his answers may place him in real and appreciable danger of conviction, notwithstanding that the answers themselves may not be given in evidence.
>
> d. No person can be compelled to incriminate himself or herself and a person may refused to answer any question, or 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'.
>
> e. The protection which the privilege against self-incrimination confers extends not only to the risk of incrimination by direct evidence (ie evidence of the fact of disclosure and of the material disclosed) but also to incrimination by indirect or 'derivative' evidence (ie 'evidence by using' the disclosed material 'as a basis of investigation') or the setting 'in train a process which may lead to incrimination or may lead to the discovery of real evidence of an incriminating character'."

[33] ASIC did not dispute that submission but rather sought to distinguish it on the basis that it related only to the situation where a person might be required to act under compulsion. It submitted that in the present proceedings there was no question of compelling the applicants to go into evidence or to put their instructions to witnesses, so the existence of right to silence was irrelevant. Whether these things happen will be a matter of choice for the applicants, based on tactical considerations extant at the relevant time.

[34] In my judgment the applicants are correct to emphasise the extent to which appellate courts have recognised the fundamental nature of the privilege against self-incrimination. It undoubtedly constitutes a substantive right and it demeans it to refer to it as a mere tactical advantage. Nor do I accept ASIC's submission that in the absence of compulsion it is an irrelevant consideration. In my judgment that submission overlooks the fundamental question which *Gould v McMahon* requires the court to consider: is it in the interests of justice that the proceeding be stayed. One must in my view take into account the fact (if it be the fact) that if the proceedings are not stayed the cases for the applicants may be damaged if they choose not to give evidence or put their instructions to ASIC's witnesses.

[35] Wootten J stated that a plaintiff in a civil action is not barred from pursuing the action *in accordance with the normal rules* merely because to do so would or might result in the defendant, if he wished to defend the action, having to disclose in a

pleading or by way of discovery what his defence is likely to be in the criminal proceeding. Cases such as *Anderson v Australian Securities and Investments Commission*[13] and *MacDonald v Australian Securities and Investments Commission*[14] show that the normal rules will be modified to avoid such disclosure. Moreover the former case negates his Honour's statement that the possibility of depriving the prosecution of any opportunity to check the accused's story and obtain evidence to refute it before the trial is over it is not a legitimate purpose of the privilege, at least in this State. That is an advantage which if it exists the applicants are entitled to preserve. I approached the exercise of my discretion accordingly.

Real or notional injustice in the criminal proceedings

[36] I held above that it could be inferred that there are substantial areas of factual overlap between the present proceedings and the New Zealand proceedings and that the applicants could give evidence and ask questions about a number of the events in the areas of overlap.

[37] What cannot be inferred on the evidence before me is that their evidence would tend to incriminate them under s 58 of the *Securities Act 1978* (NZ). Whether it would do so would, of course, depend upon what their evidence was. Naturally, they do not reveal that. This is quite a normal dilemma for a witness in a civil or criminal case. It does not mean that the claim must inevitably fail for want of direct proof. In some cases the tendency may be obvious from the terms of the question. Sometimes the likely content of the evidence and the existence of a tendency to incriminate may be inferred from other evidence or from admitted facts. I do not think that this can be done in the present case. In the present case neither applicant has proffered an affidavit from his solicitor to the effect that he is aware of what the applicant would say on relevant matters and that in his opinion the evidence would have an incriminatory tendency. Neither has even deposed to a belief, on legal advice or otherwise, that his evidence on the overlapping matters would tend to incriminate him. It is not obvious that their evidence would have that tendency. The point is left up in the air. In *R v Roberts*, the Victorian Court of Appeal held:

> "[81] … The cases cited show that a mere statement by the witness that his or her answer might tend to incriminate is not sufficient: the court must be able to see for itself that there is reasonable ground to fear that the answer may have the stated effect."[15]

[38] As noted above[16], the applicants' submissions focused on four elements of s 58. The prosecutor in New Zealand would bear the onus of proving that the impugned statements were untrue. Having regard to s 55 of the *Securities Act 1978*, that means an obligation to prove that the statement was misleading. In cases where that quality is derived from an omission the prosecution must also prove the materiality of the omitted particular. The applicants will carry the onus of proof in relation to immateriality of included statements, their own beliefs and the reasonableness of those beliefs. Assuming in the absence of evidence to the contrary that New Zealand criminal procedure is similar to that of Queensland, that will mean that the prosecution will be able to split its case. It will not have to give evidence in relation

---

13 [2012] QCA 301.
14 [2007] NSWCA 304; (2007) 73 NSWLR 612.
15 *R v Roberts* (2004) 9 VR 295 at p 327-8.
16 Para [16].

to the materiality of included statements, the applicants' actual beliefs and the reasonableness of those beliefs until after they have given their evidence. On those matters they will have to make their election about waiver of privilege before the prosecution goes into evidence.

[39] How much worse off will they be if they choose to give evidence and put questions to ASIC's witnesses in the present proceedings? In relation to those elements of the New Zealand offences on which they carry the onus of proof, the only difference must be that the prosecution will have more time to prepare than it would if it heard the evidence and questions for the first time during the trial. An advantage would be lost, but to my mind it is one which is properly described as a mere tactical advantage. In relation to the elements of misleading and (in the case of omissions) materiality it may be otherwise. However I find it difficult to conclude from what has been placed before me at the present hearing that there is much evidence which they could give which would bear upon those issues.

[40] Two other points should be noted. First it is by no means certain that the applicants will have to give evidence in the present case. At the end of ASIC's case they may be able to apply successfully for a ruling that they have no case to answer, or a non-suit. ASIC conceded that they could do so without having to elect whether to go into evidence. Second, there must be many topics on which the applicants can give evidence in the present proceedings without incriminating themselves and without risk of waiver of privilege. If they do not waive privilege they may still claim it if asked incriminatory questions in cross-examination, and the claim may not be used as evidence against them.[17]

Conclusion

[41] I am not satisfied that the applicants have demonstrated that there is a real risk of their being placed in the dilemma which they fear. Even if one assumes in their favour that they will indeed be placed in that dilemma, it has not been demonstrated that they will suffer significant disadvantage in the present proceedings by maintaining their claim of privilege. Whatever injustice they might suffer is in my judgment outweighed by the injustice which a stay would cause to the other defendants and the detriment to the public interest which would result.

[42] The applications are dismissed. Subject to any submissions from the applicants, they must pay the costs of the other parties to be assessed.

---

[17] *R v Roberts* [2004] VSCA 1; (2004) 9 VR 295; *Dolan v Australian and Overseas Telecommunications Corporation* [1993] FCA 202; (1993) 42 FCR 206.