SUPREME COURT OF QUEENSLAND

CITATION:	*ASIC v Managed Investments Ltd and Ors No.3* [2012] QSC 74
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 WATTS** (eighth defendant)
FILE NO:	BS 12122 of 2009
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	28 March 2012
DELIVERED AT:	Brisbane
HEARING DATE:	21 February 2012
JUDGE:	Fryberg J
ORDERS:	**1. Order that in all documents filed hereafter the parties be described as plaintiff and (ordinal) defendant.** **2. Order that para 2(e) of the defence of the sixth defendant (Hutchings) filed on 7 December 2011 be struck out, and that the sixth defendant be at liberty to replead.** **3. Order that para 4 of the defence of the seventh defendant (Anderson) filed on 2 December 2011 be struck out, and that the seventh defendant be at liberty to replead.**

CATCHWORDS: Procedure – Supreme Court procedure – Queensland – Procedure under *Uniform Civil Procedure Rules* and predecessors – Pleading – Defence and counterclaim – *Uniform Civil Procedure Rules* 1999 (Qld), r 166, r 171 – Denials and non-admissions – Self-incrimination and penalty privilege

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 165, r 166, r 171

A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union [2005] FCA 1658; (2005) 226 ALR 247, cited
Australian Competition & Consumer Commission v FFE Building Services Ltd [2003] FCAFC 132, cited
Australian Securities and Investments Commission v Mining Projects Group Limited [2007] FCA 1620, cited
Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited [2008] QSC 302; [2009] 1 Qd R 116, cited
Hadgkiss v Construction, Forestry, Mining and Energy Union [2005] FCA 1453; (2005) 146 IR 106, cited
MacDonald v Australian Securities and Investments Commission [2007] NSWCA 304; (2007) 73 NSWLR 612, cited
Trade Practices Commission v Abbco Ice Works Pty Ltd [1994] FCA 1279; (1994) 123 ALR 503, cited

COUNSEL: DMB Derham QC and MT Brady for the plaintiff
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P J Davis SC and DS Piggott for the fourth defendant
B Cohen (solicitor) for the fifth defendant
C Withers for the sixth defendant
S Doyle SC and CK George for the seventh defendant
P A Freeburn SC for the eighth defendant

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
McCullough Robertson for the first defendant
Tucker Cowen for the fourth defendant
Brian Bartley & Associates for the fifth defendant
Kennedys for the sixth defendant
Dibbs Barker for the seventh defendant
James Conomos Lawyers for the eighth defendant

[1] **FRYBERG J:** This matter was commenced by application in late October 2009. There were eight respondents: three corporations and five individuals who were alleged to have been directors or officers of the corporations or associated entities. On 7 December 2009 an order was made that the proceeding continue as if started by claim. One consequence of that order, I would have thought, would have been that in documents filed thereafter, the parties were referred to as the plaintiff and defendants. That has not always happened. Nonetheless that is how documents filed in future should describe them.

[2] By the same order a direction was given for ASIC to serve its statement of claim by 10 December 2009 "or as soon thereafter as it is able". The resolution of disputes about the statement of claim has taken from then until the fourth (and what I trust will be the final) version was filed on 21 February this year.[1] As has long been clear, ASIC alleges contraventions of the *Corporations Act 2001* and seeks orders which, it is common ground, amount to civil penalties.

[3] Although it is not apparent on the face of the order of 7 December 2009, it was (so the parties have informed me) a consent order. That might explain the rather unusual terms of para 10:

> "So far as is necessary to allow the fourth, fifth, sixth, seventh and eighth respondents to make a claim of privilege against self incrimination or exposure to penalties, it is directed that the defences filed by the respondents herein need not comply with the pleading rules of the UCPR, in respect of those parts of the defences where such a claim is made."

[4] The defendants have not yet pleaded to the latest version of the statement of claim, but they have pleaded to its predecessor.[2] ASIC has applied for a variety of orders striking out paragraphs of those pleadings and directing compliance with specified parts of the *Uniform Civil Procedure Rules.* Although the defendants will have to amend the existing defences in light of the latest statement of claim, it is common ground that the issues arising on ASIC's application in respect of the individual defendants will arise under those amended defences unless some order is made. There is therefore utility in deciding the issues to the extent possible before the defences are amended.

The corporate defendant

[5] ASIC's application was heard on 20 and 21 February this year. At the outset counsel for ASIC informed the court that on 10 February the members of the first defendant, Managed Investments Ltd (now called ACN 101634146), resolved to wind up the company in insolvency. That meant that if ASIC wished to proceed against it, leave was necessary. ASIC sought time to consider whether it wished to proceed and the liquidators sought time to consider whether they wished to oppose leave. As the issues under the application in relation to the corporate defendant did not relate to a claim of privilege and were different from those arising in relation to the individual defendants, I ordered that as against the first defendant, the application be adjourned to a date to be fixed and that ASIC file any application for leave to proceed on or before 2 March 2012. It is unnecessary to refer further to that aspect of the application here.[3]

The order of 7 December 2009

[6] In the course of the argument I came to the firm conclusion that para 10 of the order of 7 December 2009 was causing confusion and argument because of its width and indiscriminate application to all of the defendants when their various positions were

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1 The matter was assigned to me for supervision toward the end of last year.

2 Except for the second and third defendants, against which the proceedings have been discontinued.

3 See *ASIC v Managed Investments Ltd and Ors No.2* [2012] QSC 72.

different. Moreover the direction was argumentative: it left unresolved what if anything was necessary to allow a claim of privilege. A pleading regime which was more nuanced, which delivered greater precision in identifying the rules (if any) to be disapplied and which differentiated among the defendants was required. I therefore held:

> "Having heard counsel for all parties in relation to the matter, I am of opinion that the proper management of this trial will be impeded by the generality of order 10 made by Justice Lyons on 7 December 2009. It seems to me that the order is unnecessary and potentially dangerous to the good management of the case. The claim for privilege which the defendants have is to the extent it is a proper claim, quite able to be made as indeed I'm told most of the defendants have already made it in their pleading and an order of the sort set out in paragraph 10 of the orders made on that date is, in my view, unnecessary. I, therefore, revoke order 10 made on 7 December 2009."

ASIC's general submission

[7] One submission made by ASIC arose in relation to all of the individual defences, although not every defendant made submissions about it. ASIC submitted that the relevant privilege (whether against self-incrimination or exposure to a penalty) did not give rise to a blanket dispensation from the operation of the rules of pleading. It submitted that to give those rules effective operation while maintaining the privilege, a distinction should be drawn between admissions of allegations which are central to the circumstances giving rise to the contraventions and admissions of those which are peripheral or background to the contraventions. It submitted that the privilege would be allowed to apply in relation to an allegation which was central to the cause of action, but not to one relating to a peripheral matter.

[8] No direct authority was cited for this submission and I know of none. In my judgment such a distinction would run counter to the principle upon which penalty privilege is based. In *Trade Practices Commission v Abbco Ice Works Pty Ltd*[4], Burchett J[5] wrote:

> "My conclusion from the survey made in these reasons of texts and authorities since the 18th century is that the privilege against self-incrimination, and that against self-exposure to a penalty, are both reflections of the one fundamental principle. It has been stated in various ways, and with differing emphases. But, with respect, it cannot be better expressed than by the words which Deane, Dawson and Gaudron JJ used in *Caltex* (at 532) with reference to self-incrimination:
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> > 'In the end, (the privilege) 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.'

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4 [1994] FCA 1279 at [40]; (1994) 52 FCR 96.

5 Black CJ and Davies J concurring.

> Substituting 'the incurring of a penalty' for 'the commission of a crime' and 'the defendant' for 'the accused', I think this statement applies to the privilege against self-exposure to a penalty."

[9] The submission should be rejected.

Waiver of privilege

[10] ASIC challenged various aspects of the claims to penalty privilege made by Mr King, Mr Anderson and Ms Watts on the ground of waiver. By agreement, that part of the challenge was not argued on this application. I was originally minded to adjourn so much of the application as related to the question of waiver to a date to be fixed. However upon reflection I think it would be better to require ASIC to raise the issue in a fresh application made in relation to the further amended defences yet to be filed. If claims to privilege are made in the amended defences, ASIC will be able to focus any challenge on specific claims. No order is necessary.

Mr Hutchings' defence

[11] Paragraph 2(c) of the defence reads, "Paragraph 2(g) [of the statement of claim] is not admitted." Many other paragraphs follow that template. The plea was not accompanied by a claim for privilege, nor by a direct explanation for Mr Hutchings' belief that the allegation in para 2(g) could not be admitted.[6] Consequently, as things stand, Mr Hutchings is taken to have admitted the allegation.[7] Mr Withers on Mr Hutchings' behalf frankly acknowledged this. However he told me that when the next amended defence is delivered, it was likely that some of these non-admissions would be explained. ASIC raised no objection to the withdrawal of implied admissions. There is no need for me to make a ruling in relation to this form of plea.

[12] Paragraph 2(e) of the defence[8] reads:

> "The sixth respondent does not admit or deny paragraphs 2(i), (l) and (m) on the basis of his privilege against self-incrimination and self-exposure to penalties."

Again, a substantial number of paragraphs in the defence adopt that template.

[13] Paragraph 2(i) of the statement of claim is as follows:

> "2 The first respondent (**MFSIM**):
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> …
>
> (i) at all material times had as executive directors the fifth respondent (**White**) and the sixth respondent (**Hutchings**) who were entrusted by the Board of Directors to run the business and conducted the affairs of MFSIM".

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6 Rule 166(4).

7 Rule 166(5).

8 In the course of the hearing I delivered *ex tempore* reasons for a ruling in relation to para 2(e) of Mr Hutchings' Defence. I retracted these when it became apparent that there was some commonality between the submissions for Mr Hutchings and those for other parties.

[14] I am satisfied that this allegation would, if proved, tend to expose Mr Hutchings to a penalty. It follows that any obligation to admit it imposed by the *Uniform Civil Procedure Rules* would deprive him of penalty privilege. So would any obligation to plead in such a way as to expose him "to the risk that indirect or derivative evidence, being evidence obtained by using the material disclosed … as a basis of investigation, could be tendered against the respondent." That is because the "provisional disclosure of information may set in train a process that may lead to the imposition of a penalty or may lead to the discovery of real evidence in support of the imposition of a penalty: *Reid v Howard*[9] (at 6)."[10]

[15] It is now settled that to the extent of any inconsistency, penalty privilege prevails over the rules of pleading:

> "In *Daniels Corporation*[11] Gleeson CJ, Gaudron, Gummow and Hayne JJ said that penalty privilege 'serves the purpose of ensuring that those who allege criminality or other illegal conduct should prove it.' That is, the plaintiff must prove his case without any assistance from the defendant: *Abbco Iceworks*[12]; *Rich*[13]. So it has been held that although in a civil action a defendant is required to deliver a defence he cannot be compelled to make any admissions in relation to the matters alleged against him. That is, penalty privilege operates to relieve a defendant from the need to deliver a defence that complies with the pleading rules if the rules would override the privilege. *To the extent that pleading rules purport to impose such an obligation* they must give way to the privilege.[14],[15]

[16] The words emphasised in that passage are words of limitation. They demonstrate the continued general applicability of the rules of pleading in penalty cases. Penalty privilege affords relief from the rules only if the rules would override the privilege. In any given case it is necessary to identify the relevant rules and determine what those rules require the responding pleader to do in respect of the particular allegation made against him; and to determine the extent to which that requirement is inconsistent with the privilege.

[17] The purpose of the *Uniform Civil Procedure Rules* is "to facilitate the just and expeditious resolution of the *real issues* in civil proceedings at a minimum of expense".[16] Under them a responsive pleading may take one of four forms:

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9 [1995] HCA 40; (1995) 184 CLR 1.

10 *Australian Competition & Consumer Commission v FFE Building Services Ltd* [2003] FCAFC 132 at [14]. It is not appropriate that I, sitting at first instance, consider the correctness of applying to penalty privilege what was said by only one of the judges of the High Court in a case about privilege from self-incrimination.

11 [2002] HCA 49; 213 CLR 543, 559.

12 [2007] FCA 1620; (1994) 52 FCR 96, 129.

13 [2004] HCA 42; 220 CLR 129, 142.

14 *Hadgkiss v Construction, Forestry, Mining and Energy Union* [2005] FCA 1453; (2005) 146 IR 106, 111-112; *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2005] FCA 1658; (2005) 226 ALR 247, 251.

15 *Australian Securities and Investments Commission v Mining Projects Group Limited* [2007] FCA 1620 (emphasis added) at [12].

16 Rule 5(1), emphasis added.

"**165 Answering pleadings**

(1) A party may, in response to a pleading, plead a denial, a nonadmission, an admission or another matter."

There appears to be no reason why a party should not plead in two or more of those forms in the alternative. The list is probably exclusive; I apprehend that the rules permit no other response. However that may be, they do not encourage a party not to plead at all. They make provision for the identification of the real issues. They do not permit a party to ignore r 165(1):

"**166 Denials and nonadmissions**

(1) An allegation of fact made by a party in a pleading is taken to be admitted by an opposite party required to plead to the pleading unless—
   (a) the allegation is denied or stated to be not admitted by the opposite party in a pleading; or
   (b) rule 168 applies."

Only by denying or not admitting an allegation may a party put it in issue.

[18] Moreover a party is no longer free to not admit or deny allegations at will, or even for the purpose simply of putting an opponent to proof of his case.[17] The circumstances where a party may "not admit" are explicitly defined by r 166:

"(3) A party may plead a nonadmission only if—
   (a) the party has made inquiries to find out whether the allegation is true or untrue; and
   (b) the inquiries for an allegation are reasonable having regard to the time limited for filing and serving the defence or other pleading in which the denial or nonadmission of the allegation is contained; and
   (c) the party remains uncertain as to the truth or falsity of the allegation."

Sub rule (4) makes it clear that an allegation may be denied only when the party believes it to be untrue.

[19] The net effect of these rules is that the party is required or deemed to admit an allegation unless he or she is uncertain as to its truth or falsity or believes it to be untrue.

[20] Mr Hutchings' response to para 2(i) of the statement of claim was to assert that he did not admit or deny the paragraph. That pleading, I was told, was not intended to mean that the allegations in para 2(i) were not admitted or in the alternative were denied; it was intended to mean that Mr Hutchings did not plead to the allegations.[18] That was clearly in breach of r 165(1). Was that breach justified by his claim of penalty privilege?

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17 See generally the convincing analysis of the rules by Daubney J in *Cape York Airlines Pty Ltd v QBE insurance (Australia) Limited* [2008] QSC 302; [2009] 1 Qd R 116.

18 Transcript 20 February 2012, p 1-25, line 55.

[21] It was common ground among the parties that "the need for a privilege claim to be bona fide and reasonable is well established".[19] If Mr Hutchings believes the allegations in para 2(i) of the statement of claim are true, he may neither not admit or deny them under the rules. In that case he may choose to waive his privilege and admit them or he may refuse to plead to the allegations, relying on his privilege. (It makes no difference if the latter course be regarded as pleading "another matter" under r 165(1) rather than as a refusal to plead.) Since the allegations are material to the penalty claim, penalty privilege relieves him of any obligation to admit them and in my judgment it must also override any deemed admission under r 166(1).

[22] Mr Hutchings submitted that penalty privilege went further. It is theoretically possible that Mr Hutchings may after making reasonable enquiries remain uncertain as to the truth or falsity of the allegations, or even hold the belief that they are untrue. He submitted that penalty privilege entitled him not only to refuse to plead admissions, but also to refuse to plead non-admissions or denials. That entitlement arose not because an obligation to plead any denial would assist the plaintiff's proof, but because a requirement to plead a denial of that which was to be denied at trial would confer a forensic advantage on the plaintiff. As counsel put it:

> "Now, that's the point of the privilege. It's the rationale. We don't need to do anything to assist them to prove their case. Now, if we plead to some things as denials and we don't plead to others that we ordinarily might have admitted, it's going to tell ASIC exactly what is going to be in issue and what my client is not going to be able to prove or defend at the trial."

Denials would therefore convey information to the plaintiff, information which "may have the tendency to expose [Mr Hutchings] directly or indirectly to the penalties being sought by ASIC".[20] The plaintiff would be able to infer the defence strategy.

[23] In addition Mr Hutchings submitted that there was somehow a potential for the plaintiff to embark upon a chain of enquiry if it knew what was really in issue. He did not identify any rational process by which this might occur, but pointed out that "courts err on the side of caution lest an apparently innocuous disclosure has unforeseen adverse consequences".[21]

[24] I reject both of these submissions. As to the latter, I can see no way in which a bona fide and reasonable claim for privilege could be supported. Neither a denial nor a non-admission could conceivably propel ASIC on a chain of enquiry to aid in proof of the allegations in para 2(i) of the statement of claim.

[25] No authority was cited which directly supported the former submission. Once it is accepted that pleading a denial or non-admission neither assists the proof of the claim for a penalty nor points toward a further line of enquiry, there is in my judgment no scope for the privilege to operate. The rationale for the privilege is set out in the passage from the judgment of the Federal Court quoted above.[22] It does

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19 *MacDonald v Australian Securities and Investments Commission* [2007] NSWCA 304 at [67]; (2007) 73 NSWLR 612 at p 624 per Mason P, citing Heydon J D, *Cross on Evidence*, 6th Aust ed, Butterworths, Sydney, 2000 at [25100].

20 *Ibid* at [71].

21 *Ibid* at [67].

22 Paragraph [8].

not extend to concealment of the issues. It lies in the "deep-seated belief" regarding the provision of proof by defendant against himself.

[26] I conclude that Mr Hutchings is relieved by penalty privilege from the need to comply with r 165(1) in pleading to the allegations contained in para 2(i) of the statement of claim only if compliance would, having regard to r 166, require him to make an admission. In that case and in that case only, he may refuse to plead to the allegations and claim penalty privilege. The claim should be made in relation to specific allegations in the statement of claim. In any case where the claim is upheld or not challenged, it would presumably be necessary to exempt the plea from the operation of r 166(1).

[27] Counsel for Mr Hutchings informed me that there was much of the defence which adopted the same formulation as para 2(e) and which would be covered by my ruling of that paragraph. Given that the defence is to be amended in any event, there is no point in my identifying the relevant paragraphs – counsel can do that in the light of these reasons and make any necessary changes. I shall however order that para 2(e) be struck out, with liberty to replead, so that Mr Hutchings will have an order against which to appeal if he wishes to do so.

[28] ASIC also sought an order in relation to para 216 of the defence. In that paragraph Mr Hutchings seeks to be excused for the alleged contraventions pursuant to s 1317S and/or s 1318 of the *Corporations Act 2001*. After some discussion about the applicability of penalty privilege, counsel for Mr Hutchings submitted that this part of the application was premature, given the foreshadowed amendment of the defence. Counsel for ASIC agreed that it would be better to defer consideration of this matter until after the amended defence was filed. I accept that it would be difficult and unhelpful to argue the questions raised on a hypothetical basis. If ASIC wishes to agitate them again after the amended defence is filed, it may bring a further application.

Mr Anderson's defence

[29] Mr Anderson's defence was short; it can be set out in full:

> "1. The seventh respondent claims, and reserves his right to claim, privilege against self-incrimination and exposure to penalties in this proceeding.
> 2. This defence is pleaded in accordance with paragraph 10 of the Order of 7 December 2009 in that the seventh respondent makes a claim of privilege against self-incrimination and exposure to penalties and so this defence need not comply with the pleading rules of the UCPR in respect of those parts of the defence where such a claim of privilege is made.
> 3. The seventh respondents admits paragraphs 1, 1A, 2(a), 3(a), 4(a), 10(a), 11(a), 12(a), 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30 of the third further amended statement of claim.
> 4. The seventh respondent denies paragraphs 2(b)-(m), 3(b)-(h), 4(b)-(h), 5-9, 10(b)-(c), 11(b)-(e), 12(b)-(h), 13-17, 27, 31 – 214B of the third further amended statement of claim

> but does not provide a direct explanation for the denial because of the seventh respondent's claim of privilege against self-incrimination or exposure to penalties."

[30] Paragraph 2 incorrectly stated the effect of order 10 made on 7 December 2009. It is unnecessary to explore this in the light of the revocation of that order.

[31] ASIC challenged para 4 of the defence on the ground of failure to comply with r 166(4) of the *Uniform Civil Procedure Rules*.

[32] Paragraph 4 asserts privilege as the reason for its failure to "provide a direct explanation for the denial". That assertion discloses a misreading of the rule. The explanation which is required is for a party's belief that the allegation is untrue, not for the denial. The focus is upon the state of mind of the party at the time of the pleading. The precise form of the required explanation was not the subject of argument before me. It may be something along the lines of "I have made reasonable enquiries as to whether the allegation is true and I believe it to be untrue as a result of the information which I have obtained thereby" would be adequate.

[33] In the course of submissions on behalf Mr Anderson it became apparent that his defence had been drawn on the basis that order 10 of the orders of 7 December 2009 entitled a defendant to deny that which he knew to be true. Mr Anderson's submissions maintained that entitlement. The order in question specified that the defences need not comply with the pleading rules of the *UCPR* "so far as is necessary to allow [the defendant] to make a claim of privilege". Mr Anderson submitted that the privilege could only be asserted by permitting such a denial as a means of putting ASIC to proof. Where a defendant made such a denial, it would be impossible for him to provide an explanation for his belief that the allegation was untrue, because he would have no such belief.

[34] As noted above,[23] r 166(4) makes it clear that an allegation may be denied only when the party believes it to be untrue. I see no inconsistency between that requirement on the one hand and either penalty privilege or self-incrimination privilege on the other. The privilege can be asserted in any case where the rules would otherwise require an admission. The right to plead a false denial was not necessary to allow Mr Anderson to make his claim of privilege. For the reasons given in relation to Mr Hutchings' defence I see no reason why Mr Anderson should not be obliged to comply with the rules in this respect.

[35] Paragraph 4 of the defence should be struck out, with liberty to replead.

[36] Mr Anderson also submitted that if he were required to plead as described above and to comply with r 166(4), there would necessarily be occasions when the explanation required by that sub rule would assist in the proof of the case against him. On his behalf Mr Doyle SC referred to para 42 of the statement of claim as an example. It reads:

> "42 On 30 November 2007, MFSIM as Responsible Entity for PIF, paid $130 Million from PIF's Operating Account to Commonwealth Bank account BSB 064-430, number 10469091 which was held in the name of MFS Administration (MFS

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23 Paragraph [18].

> Administration's Bank Account and the $130 Million Payment)."

Suppose, he submitted, Mr Anderson did not know whether the payment was made and could not find out by reasonable enquiry. If he were required to explain this, he would be contributing to proof of the allegation against him in para 60A that a reasonable person in his position would have prevented the payment. This was because if he did not know now whether the payment was made it might be inferred that he did not know in November 2007 either, and then it was his duty to know.

[37] The argument is hypothetical. Mr Anderson has made no non-admissions. Moreover the case against him pleaded in para 60 of the statement of claim is that he instructed the making of the payment, not that he was negligent. Nonetheless the example serves to point out a possible situation which might arise in a particular case. It illustrates the theoretical possibility that having to provide the explanation for a non-admission could conceivably infringe penalty privilege or privilege against self-incrimination. Perhaps in theory a similar situation could arise in relation to a denial. I do not propose to make a ruling on a hypothetical basis. If when Mr Anderson's amended defence is drafted any such situation arises, privilege can be claimed to avoid giving an explanation in respect of the specific allegation. It will then be possible to determine whether it is properly claimed. If it is, an order can be made exempting the failure to provide an explanation from the operation of r 166(5).

Ms Watts' defence

[38] Apart from matters relating to waiver of privilege, the challenges to Ms Watts' defence fell into five categories. It is convenient to deal with them in turn.

Relevance

[39] Paragraph 2(d) of the statement of claim alleged that the first defendant was at all material times the responsible entity for an identified registered scheme within the meaning of Pt 5C.2 of Div 1 of the *Corporations Act*. Ms Watts pleaded that she did not admit that allegation "as that paragraph does not comprise allegations made against" her. That form of pleading was repeated many times throughout the defence. ASIC sought an order that the plea be struck out pursuant to r 171(1)(b) on the basis that the allegation was made against her.

[40] At first sight it is not easy to see how this form of pleading would tend to prejudice or delay the fair trial of the matter. If the plea is correct questions of the admissibility of evidence as against Ms Watts might arise and this could cause delay while the question of the relevance of the allegation in the statement of claim to the case against her was resolved. However it seems unlikely that such issues will occur. If the plea is not correct, r 166(1) will have been engaged and the allegations will be deemed to have been admitted. Again there is unlikely to be any impact on the fair trial of the matter.

[41] As Mr Freeburn SC on behalf of Ms Watts submitted, it might be better to have the question of relevance resolved before trial from a case management point of view. However there has been correspondence between the lawyers acting for ASIC and those for Ms Watts, and the latter have indicated a willingness to respond to any

paragraphs which ASIC claims contain allegations made indirectly against her. This will be done in the forthcoming amended defence. I accept Mr Freeburn's submission that to deal with the issue now would be pointless.

Vague and embarrassing

[42] Paragraph 84 of the statement of claim alleges:

> "84. (a) During a period from about 30 November 2007 to about 23 January 2008 Watts orally asked Hutchings and White on numerous occasions which the applicant cannot particularise, to tell her what investments had been acquired with the $150 Million Drawdown.
>
> (b) From about 27 December to about 23 January 2008 Watts orally asked Hutchings and White on numerous occasions, which the applicant cannot particularise, to tell her what investments had been acquired with the $17.5 Million Payment.
>
> (c) In response to the enquiries pleaded at sub-paragraphs (a) and (b), until 23 January 2008 Watts received no information as to what investments had been acquired from either White or Hutchings."

In response Ms Watts pleaded, among other things, that the paragraph "is vague and embarrassing". ASIC seeks to have that response struck out under r 171(1)(b) "on the basis that the relevant allegations of the statement of claim are not vague and embarrassing".

[43] Technically ASIC's nominated ground does not conform with the rule relied upon. That rule does not authorise the determination of the accuracy of an allegation in the defence on interlocutory basis. I take it however that the application intended to raise the point that a fair trial was likely to be delayed by leaving a pleading point in issue on the pleading until the trial rather than by resolving it by means of an interlocutory application.

[44] Some of the allegations which Ms Watts claims are vague and embarrassing have been amended since the current defence was filed. Mr Freeburn informed the court that when the question of an amended defence is considered, all of the pleas in this form will be reviewed, and that it is likely they will be dropped. In these circumstances I see no utility in attempting to resolve this class of criticism at the present time.

No direct explanation

[45] ASIC levelled a number of criticisms at Ms Watts' defence under this heading. Some of them were plainly justified by errors in the defence, but it is unnecessary to deal with them as they will no doubt be corrected in the amended defence. In addition, the defence makes no claim for privilege. That too will be changed in the amended defence, and privilege will be claimed in cases where Ms Watts alleges that its existence justifies her not giving an explanation in accordance with the rules. Doubtless those who draft the amended defence will take into account what I have written above on this topic.

[46] Paragraph 9 of the statement of claim reads:

> "9. (a) Watts was employed as the Fund Manager of PIF and MYF from June 2007 to 4 July 2008.
>
> (b) Watts' position as Fund Manager entailed:
>
> (i) knowing in what assets the funds of PIF and MYF were invested;
>
> (ii) continually monitoring and reviewing the investments held in PIF and MYF to ensure that they were authorised and appropriate investments for those funds;
>
> (iii) recommending to the IAC changes to the investments held in PIF and MYF.
>
> **Consolidated Particulars**
>
> (a) Watts' employment was partly in writing, in that Watts was employed by MFS Administration in the position of Fund Manager to 'carry out services for entities within the MFS Group' pursuant to a written contract of employment comprising an offer of employment, Employment & TEC Schedule and Employment Agreement dated 2 May 2007 [**OCA.0006.0003.0382]**;
>
> (b) Watts' employment as Fund Manager of PIF was express, in writing, in the written employment agreement particularised at sub-paragraph (a) above;
>
> (c) Watts' employment as Fund Manager of MYF was not written, the applicant relies on the particulars provided at paragraph 10(c)-(g) above;
>
> (d) the requirements of Watts' position as Funds Manager for PIF are set out in the employment agreement;
>
> (e) the requirements of Watts' position as Fund Manager for MYF are to be implied from the terms of the employment agreement, and were admitted by her (see Watts' 19 Examination at pp 14, 17, 24-26 and 32)."

Paragraph 9 of Ms Watts' defence is:

> "9. As to paragraph 9 of the statement of claim, the eighth respondent:
>
> (a) admits that the eighth respondent was employed as a Fund Manager with MFS Administration Pty Ltd from 4 June 2007 to 4 July 2008.
>
> (b) otherwise denies paragraph 9 because the allegations are untrue."

A number of other paragraphs adopt this template.

[47] ASIC submitted that the explanation in that form did not comply with the requirements of r 166(4), with the consequence that the allegations are taken to be admitted under r 166(5). That submission is correct. The rule provides that a denial must be accompanied by an explanation for the party's belief, not an explanation of

why the party has denied the relevant allegations. An acceptable format would be to follow the denial in para 9(b) of the defence with the words:

> "Explanation for belief
> The eighth defendant believes the allegations are untrue because *[state reason]*."

[48] Whether it would be a sufficient statement of the reason to say "they are in fact untrue" was not the subject of concerted argument before me. As presently advised I doubt that it would be appropriate ordinarily to include a summation of the evidence. No doubt when the matter is repleaded regard will be had by the pleader to what was said by Daubney J on this topic.[24]

Reasonable inquiries

[49] In a number of cases Ms Watts has not admitted allegations of the statement of claim "as despite reasonable enquiry [she] remains uncertain as to whether the allegation is true". Strictly speaking, this formula does not comply with r 166(5). The rule requires an explanation for Ms Watts' belief that the allegations cannot be admitted. The focus is on an explanation of her state of mind. An acceptable formula to express the idea which Ms Watts was trying to convey would be to follow the non-admission with the words:

> "Explanation for belief
> The eighth defendant believes the allegations can not be admitted because despite reasonable inquiries she remains uncertain about the truth of the allegation."

No doubt even more pedantic formulations could be achieved by an even closer adherence to the terms of r 166(3), though it should not be thought that continuing uncertainty after due enquiry is the only possible explanation for a belief that an allegation cannot be admitted.

[50] In fairness I should point out that ASIC did not take this technical approach. It submitted that in some instances the explanation was rolled up with an assertion that the pleading responded to was vague and embarrassing. Those propositions, it submitted, could not stand together. I reject that submission. It also referred to r 166(6), presumably to imply that by now many of the matters not admitted ought to have been ascertained. No doubt those who plead the further defence will take that into account.

[51] One particular example proffered by ASIC has more substance. By para 85(b) of the statement of claim ASIC alleged that Watts "knew that $130 million of the money so drawn down had been paid out of PIF's Operating Account". The paragraph went on in a number of subparagraphs to give reasons why Ms Watts' knowledge is to be inferred. In her defence she has responded to a number of these subparagraphs and has then pleaded that otherwise she does not admit para 85(b) because despite reasonable enquiry she remains uncertain of the truth of the allegations. It is not immediately obvious whether that plea is intended to respond to the allegation about her knowledge of the payment. Doubtless those who draw

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[24] *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Limited* [2008] QSC 302 at [29]; [2009] 1 Qd R 116 at p 124.

her amended defence will give careful thought to this matter. I see no reason to make an order at the present time.

Defences under ss 1317S and 1318 of the Corporations Act

[52] Paragraph 45 of Ms Watts' defence raises excuse issues similar to those raised by Mr Hutchings. For the reasons given above consideration of this should be deferred until the form of the amended defence is known. It may well be that no pleading issue will ultimately arise.

Mr King's defence

[53] Except in three respects, Mr King's defence raised substantially similar issues to those raised by Mr Anderson's defence. One difference was that Mr King's defence pleaded some non-admissions as well as denials; but in both cases privilege is asserted as the basis for not complying with r 166(4). A second is that it is not altogether clear whether Mr King is asserting that by reason of the privilege he is entitled to not admit or deny allegations which he knows to be true. It seems likely that the defence has been drawn on the basis that the privilege, coupled with order 10 of 7 December 2009, gave rise to such an entitlement.

[54] Because of this uncertainty it is not appropriate at this time to strike out any representative paragraph in the defence. However the defence is to be redrawn and in redrawing it Mr King's lawyers will be bound by the rulings which I have made in relation to Mr Hutchings' and Mr Anderson's defences. In other words, he may deny or not admit allegations only when permitted so to do by rr 165 and 166, not where he believes the allegations to be true. He may claim privilege so as to avoid the situation where he must either admit such allegations or be deemed to have admitted them. Where he denies or not admits an allegation he must give the required explanation for his pleading unless privileged from giving the explanation. Such privilege would arise only where there is a bona fide and reasonable risk that to give the explanation would aid proof of the case against him or point ASIC to a line of enquiry potentially productive of such proof. Such a risk may exist when the explanation involves disclosing the state of Mr King's knowledge or lack of it in circumstances where an adverse inference may relevantly be drawn from that knowledge. The mere fact that ASIC would acquire the forensic advantages of knowing what the true issues in the trial are and being able to infer which allegations Mr King was not in a position to not admit or deny under the rules would not suffice.

[55] On Mr King's behalf Mr Davis SC adopted the arguments advanced on behalf of Mr Anderson by Mr Doyle SC. He also emphasised the importance of considering the relevant allegations not in isolation but in the context of the allegations made about Mr King's knowledge of and involvement in various entities referred to in the pleadings. I accept that submission, but in my judgment it does not alter what I have already determined.

[56] The third difference between Mr King's position and that of Mr Anderson arose in relation to Mr King's response to para 31 of the statement of claim. That paragraph alleged that at all material times the constitution of a particular registered scheme (PIF) was an identified document, and that it contained certain terms. Paragraph 31 of Mr King's defence purported to not admit those allegations on the ground that

they concern matters of law. The ground does not seem to be justified. I ruled that I would make no order on this point on the basis that it would be reconsidered by counsel in drawing the amended defence.

Mr White's defence

[57] It is common ground that the issues raised in relation to Mr White's defence are the same as those raised in relation to the defences of Mr Anderson and Mr King. Mr White's solicitors simply adopted the submissions made by Mr Doyle SC and Mr Davis SC. Reasons which I have given in relation to their defences apply equally to Mr White's. It is not possible to strike out any particular part of the defence for the same reason that that is not possible in relation to Mr King's defence.

Orders

[58] I make the following orders:

1. Order that in all documents filed hereafter the parties be described as plaintiff and (ordinal) defendant.
2. Order that para 2(e) of the defence of the sixth defendant (Hutchings) filed on 7 December 2011 be struck out, and that the sixth defendant be at liberty to replead.
3. Order that para 4 of the defence of the seventh defendant (Anderson) filed on 2 December 2011 be struck out, and that the seventh defendant be at liberty to replead.

[59] I shall hear the parties on costs and directions to further progress of this matter.