# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Australian Securities and Investments Commission v Managed Investments Limited & Ors No.4* [2013] QSC 15 |
| PARTIES: | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**<br>(plaintiff)<br>**v**<br>**ACN 101 634 146 *(in liq)***<br>(first defendant)<br>**MICHAEL CHRISTODOULOU KING**<br>(fourth defendant)<br>**CRAIG ROBERT WHITE**<br>(fifth defendant)<br>**GUY HUTCHINGS**<br>(sixth defendant)<br>**DAVID MARK ANDERSON**<br>(seventh defendant)<br>**MARILYN WATTS**<br>(eighth defendant) |
| FILE NO: | BS 12122 of 2009 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| DELIVERED ON: | 29 January 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 29 January 2013 |
| JUDGE: | Fryberg J |
| ORDERS: | **1. Order that the plaintiff's application for summary judgment against the first defendant be dismissed; and**<br>**2. Order that the fifth defendant's application be dismissed.** |
| CATCHWORDS: | Procedure – Supreme Court procedure – Queensland – Procedure under *Uniform Civil Procedure Rules* and predecessors – Summary judgment – Discretion to enter summary judgment – *Corporations Act 2001* (Cth), s 1317E, s 1317F – Declarations of contravention |

*Corporations Act 2001* (Cth), s 79, s 601FC, s 1317E, s 1317F
*Uniform Civil Procedure Rules 1999* (Qld), r 190, r 292

*Anderson & Ors v Australian Securities and Investments Commission* [2012] QCA 301, cited
*Australian Securities and Investments Commission v Rich & Ors* [2004] NSWSC 836, considered
*MacDonald v Australian Securities and Investments Commission* [2007] NSWCA 304; (2007) 73 NSWLR 612, cited
*Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich & Ors* [2003] NSWSC 186, considered

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B O'Donnell QC with C George for the seventh defendant
P Freeburn SC for the eighth defendant

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[1] **FRYBERG J:** There are before me two related interlocutory applications. One is brought by the fifth defendant to seek to restrain the plaintiff from obtaining summary judgment against the first defendant. That is perhaps expressed a little loosely but it will do for present purposes. The second is an application by the plaintiff for summary judgment against the first defendant.

[2] The principal proceedings are brought by the Australian Securities and Investment Commission (ASIC) against a company which was the responsible entity for a managed investment scheme - I will call it simply "the company"

- and against a number of directors or other officers of the company.

[3] They are proceedings for civil penalties. The relief sought against the various defendants includes declarations of contravention of provisions of the *Corporations Act 2001* (Cth) ("Act") and various civil penalties.

[4] The proceedings are brought under Part 9.4B of the Act and invoke various earlier provisions all of which are referred to somewhere or other in section 1317E of the Act.

[5] The proceedings despite their age have only reached the stage where defences have been delivered. They have been bedevilled by complex interlocutory applications principally relating to the effect of the personal defendants' right to claim privilege against exposure to a penalty. That issue has on the pleadings gone to the Court of Appeal (*Anderson & Ors v Australian Securities and Investments Commission* [2012] QCA 301) and the matter is now back in this division.

[6] During the pendency of the action the first defendant, the company, has gone into liquidation. The plaintiff has negotiated with the liquidator and has according to the evidence compromised its claim against the first defendant. The terms of the compromise are not before the Court. However, it is plain enough that one of the terms must have been the execution of a statement of agreed facts and the filing of a defence both of which together contain admissions that the first defendant has contravened the Act in the way set out in those two documents.

[7] I accept the submission made on behalf of one of the defendants that the statement of agreed facts is really of no more weight than as a set of admissions made by the first defendant.

[8] The two documents between them disclose that the contraventions which the first defendant admits are all contraventions made by the first defendant by medium of one or other of the individual defendants acting either alone or in concert.

[9] The individual defendants are intent upon the matter going to trial without any earlier resolution of any issue. They claim the right to have the case against them brought by ASIC closed before they disclose their hands. They have some support for this approach in the decision of the Court of Appeal to which I have referred and also in a decision of the Court of Appeal of New South Wales, *MacDonald v Australian Securities and Investments Commission* [2007] NSWCA 304; (2007) 73 NSWLR 612.

[10] They would not care about the position of the first defendant were it not for two matters which they say cause any judgment for a declaration of contravention against the first defendant to affect their rights.

[11] The first way in which they submit their rights are affected is by reason of the combined operation of sections 1317E(2) and 1317F of the Act. The second is by the operation of the doctrines of issue estoppel and res judicata. It may be that not all of the defendants raise that second argument but for reasons which will appear, it is unnecessary to go into it.

[12] Whether summary judgment should be entered under rule 292 of the *Uniform Civil Procedure Rules 1999* (Qld)

("Rules") or judgment on admissions under rule 190 of the Rules in each case involves the exercise of a discretion. Neither rule mandates the entry of judgment.

[13] It is, I think, common ground, that if the rights of the defendants would be affected in either of the ways in which they submit their rights might be affected, then that would be a relevant consideration in the exercise of the discretion.

[14] The case took on a new dimension today when the plaintiff conceded that the question of the impact of a decision on the application vis-à-vis the defendants was such an important issue that it was in fact, as far as the plaintiff was concerned, determinative.

[15] The plaintiff's position was that the making of declarations against the first defendant as sought in the application would have no impact on the other defendants. Consequently, it was not a factor which gave rise to any interest on their part in the matter, it was not a factor relevant to the exercise of discretion, and in indeed, it really meant that with the considered benefit of hindsight, the defendants had no reason to appear on the application.

[16] I turn first to that factor, because the plaintiff conceded that were its argument not correct, then such was the importance of that factor that the application for judgment should be dismissed, or adjourned to the trial.

[17] It is convenient to deal with the position of the fifth defendant, who made the application for the injunction, because it is, I think, by common concession,

representative of the positions of all of the defendants.

[18] The plaintiff alleges against Mr White, among other things, that he conducted himself dishonestly. It alleges that by reason of his conduct, the first defendant has acted dishonestly; that this amounts to a breach of one of the duties imposed by section 601FC(5) of the Act, and that consequently, the company is exposed to the making of the declaration.

[19] A number of declarations are sought against the company, but the one which is relevant in relation to Mr White are declarations 2, 3 and 4 in the draft order annexed to the application.

[20] To take order 3 as an example, it is in these terms:

> "MFSIM as responsible entity of PIF contravened section 601FC(5) of the Corporations Act in January and February 2008 by creating false financial documents to disguise its having paid $147,500,000 of PIF members' funds to related parties and not for the benefit of the members of PIF, and in so doing not acting honestly"

[21] It will be noted that nothing in that declaration refers to Mr White. No part of it expressly states anything that affects his position. However, the argument that his position is affected arises because the claim against him is that he was involved in the contraventions of the company.

[22] In order to prove the case against Mr White, therefore, it is necessary that the plaintiff prove that the company contravened the Act. That arises from the wording of section 601FC in combination with section 79

of the Act. Section 601FC of the Act imposes the duties, as I have said; for example, the duty in subsection 1(a) to act honestly, and subsection (5) provides that "any person who is involved in a responsible entity's contravention of that subsection, contravenes this subsection".

[23] Putting it another way, therefore, it lies upon the plaintiff to prove that Mr White was involved in the company's contravention. "Involved" is defined in section 79 of the Act to include (among other things) being "in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention". In short, the cause of action against Mr White mandates proof of a contravention by the company.

[24] If that were where the matter stood it would be insufficient to show that an interest of the defendant was affected. A declaration against the company that it had contravened the Act by reason of conduct which was, in fact, the conduct of Mr White, while it might reflect adversely on Mr White, would not impact upon his legal position because he would not be a party to the judgment. No doubt one would need to be a little careful about the phraseology in the reasons for judgment, to ensure that his reputation did not unduly suffer any damage, but that could be done.

[25] What changes the position here is the terms of section 1317F of the Act: "A declaration of contravention is conclusive evidence of the matters referred to in subsection 1317E(2)." That section sets out the matters which must be included in the declaration and, relevantly, they include the conduct that constituted the contravention. The fact that a declaration of

contravention is made, therefore, arguably, is conclusive evidence in any subsequent proceeding of that contravention. The contravention by the company is an element of the cause of action against Mr White, therefore his interests are prejudicially affected.

[26] No party suggested that section 1317F of the Act should be read literally. I was referred to the decision of Justice Bryson in *Re One.Tel Ltd (in liq); Australian Securities and Investments Commission v Rich* [2003] NSWSC 186 where, in a passage included in para 18, his Honour said the declarations will be conclusive evidence even in proceedings in which the person against whom the declaration was made has never been or is no longer a party, or at a hearing in which he does not take part, that he contravened the relevant section of the corporations law. No-one submitted that the provision should be read literally without any limit upon its scope. I think that approach was correctly adopted. Notwithstanding a certain natural affinity for reading the words of legislation as they are written it seems to me that both the history of the Act and the extraordinary ambit which the section would have were it given a literal meaning point away from such a reading.

[27] The defendants did not completely eschew such a reading. They maintained the position that some judge in the future might give the Act such a reading, and therefore they should not be put at risk, but I am satisfied that there is no such risk. In other words, I am satisfied that an unlimited reading of the Act would be plainly wrong and would not be adopted in any future case. There is no risk of that. I am sure that Justice Bryson, read in context, was not saying otherwise. His statement has to be read in context and he was dealing with the particular facts that he had before him and not

with the sort of wide scenarios that were postulated hypothetically during the argument before me.

[28] I was also referred to the decision of Justice White in the Supreme Court of New South Wales in another decision in the same litigation, that which is reported in *Australian Securities and Investments Commission v Rich & Ors* [2004] NSWSC 836. His Honour there had before him an application by ASIC for various declarations of contravention against one of the personal defendants in that case. He did not have any of the other defendants before him, nor any other party. After the conclusion of the argument his Honour became concerned that declarations of the type sought might, if a literal reading of Justice Bryson's dictum were adopted, affect other parties. He therefore had the matter relisted for further hearing. Both ASIC and the respondent against whom the application was brought submitted that section 1317F should be limited as if it provided that it applied only for the purposes of Part 9.4B of the Act. In other words, declarations were conclusive only in proceedings under that part.

[29] A third party, an insurance company for one of the directors, sought leave to intervene to argue a similar view. That leave was rejected. No-one else appeared, so there was no contradictor to the parties' common submission. Notwithstanding the absence of a contradictor, his Honour accepted the submission.

[30] In the present application, ASIC also did not challenge the correctness of that approach. The defendants too were content to assume that it was correct because in the present case the proceedings against them mainly do fall within the ambit of Part 9.4B of the Act. ASIC, however, submitted that there was a further limitation

to be placed on the ambit of the section. It was, according to the submission, that the section does not operate in relation to persons other than the party against whom the declaration is originally made. That being so, it was submitted, the interests of the other defendants could not be affected and there was no reason to not enter judgment.

[31] It seems to me that this extra limitation is not one which can be drawn from the words of the Act. I note the reference in Justice White's judgment to the wording of the Act before the adoption of what his Honour described as "simplified drafting adopting plain English which did not change the intended scope of the section." I see no words in either the present section or the previous section which imply the limitation for which ASIC contends. Indeed, in the case of subsequent proceedings by ASIC against the same defendant the section would be unnecessary, as the case would give rise to an Anshun estoppel. ASIC submitted that the limitation was to be spelled out of his Honour's reasoning. It submitted that in para 48 of the reasons for judgment the issue was raised, that in paras 60 to 62 reasons were developed for imposing the additional limitation and that in para 67 the conclusion was stated.

[32] It is true that para 67 does refer to proceedings under Part 9.4B of the Act brought by persons other than ASIC against the defendant against whom the declaration was made. I do not read that paragraph as stating a conclusion that this is a limitation; in other words that section 1317F applies only in proceedings being brought against the defendant against whom the declaration was made.

[33] Moreover, as Mr O'Donnell QC demonstrated in his submissions on behalf of another of the defendants, Mr Anderson, there are proceedings which might be brought by other parties against persons other than the defendant who is the subject of the declaration, to which, on the face of the legislation, the presumption of conclusive evidence might well apply and in respect of which one could imagine a policy reason for it to apply. In my reading of the case, therefore, it does not support the submission.

[34] ASIC also sought support from the decision of Justice Bryson, to which I have referred. It referred to the passage in his Honour's reasons for judgment dealing with unfairness and submitted that essentially it was unfairness of the outcome which dictated his Honour's conclusion, not the fact that the case was to be distinguished on the ground that nothing in the declarations was capable of affecting the other persons involved. I do not read the judgment in that sense.

[35] I have, therefore, come to the conclusion that the interests of the defendants are affected by any declaration of contravention made against the first defendant.

[36] It is therefore unnecessary for me to deal with the alternative argument advanced that those interests could be affected by reason of the operation of the doctrines of res judicata and issue estoppel.

[37] That conclusion, it seems to me, would simply be one factor to be considered in the exercise of the discretion to give early judgment. There are numerous other factors to which I have been referred in the course of the argument set out in the various outlines of argument. One is utility. ASIC disclaims any

intention or right to use the declarations to prove an element of the cause of action against the other defendants. One wonders, then, why the application is brought. What benefit, what utility, is there in the granting of judgment at this stage? I would be most reluctant to embark upon a detailed analysis of the merits of the application if it were conceded that no benefit was to be had and that the application was simply a waste of time.

[38] Other factors mentioned included the possibility of conflicting decisions, the need for the other defendants to deal with the merits of the application and thereby waive their privilege if they were not to be adversely affected, the seriousness of the misconduct alleged, the absence of any prejudice by deferring a decision in relation to the first defendant, the fact that the proposed judgment is based solely on admissions made by a liquidator who would have had no personal knowledge of the matter, the impact which a decision might have indirectly on the defendants particularly in relation to their insurers, the probable further delay which any appeal, which would be likely, would have on the trial and the possibility of apprehended bias were I to be the trial judge.

[39] Most of those factors, I think, are of little weight. I do not propose to essay a hypothetical weighing of them in light of the concession which ASIC has made. The issue of law on the construction of section 1317F of the Act being resolved in the way I have described and applying the concession, the application cannot succeed.

[40] Whether it should be adjourned or dismissed is, perhaps, of no major importance but I have heard it, I have decided it, and I see no point in further adjourning it.

The issues which it raises will be, no doubt, raised at trial anyway by the nature of the trial and if it is dismissed and ASIC is unhappy with my ruling, it provides a vehicle for an appeal. In my view, the proper course is to dismiss ASIC's application.

[41] As far as the fifth defendant's application for an injunction is concerned, subject to any submissions which may be made to me in relation to the detail of the order, it seems to me that that application was misconceived and that it, too, should be dismissed.

[42] There remains to be dealt with a question of costs of this application and there is also a further application in relation to costs incurred in proceedings a year ago. I shall hear the parties on those questions.