SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Managed Investments Pty Ltd & Ors (No 7)* [2014] QSC 72
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (Plaintiff) v **ACN 101 634 146 (in liquidation)** (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/S:	BS 12122 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	13 December 2013
JUDGE:	Douglas J
ORDER:	**Direct that, pursuant to the *Uniform Civil Procedure Rules* 1999 (Qld) r 439(5)(b), the affidavit of Mr Jason Maywald be used without Mr Maywald being cross-examined in relation to it.**
CATCHWORDS:	EVIDENCE – AFFIDAVITS AND STATUTORY DECLARATIONS – AFFIDAVITS – USE OF AFFIDAVITS – WHEN MAY BE USED IN GENERAL – where the witness was ordered to answer a question whether he had signed an affidavit – where the witness acknowledged his signature on the affidavit – where the witness claimed privilege against self-incrimination – where the witness was

not asked any further questions – whether the affidavit should be admitted into evidence – whether there is a common law discretion to exclude admissible evidence in civil cases – how any discretion to admit or exclude evidence, including evidence admissible pursuant to s 92 of the *Evidence Act* 1977 (Qld), should be exercised

Evidence Act 1938 (Eng), s 5
Evidence Act 1977 (Qld), s 92, s 98, s 129A
Evidence and Discovery Act 1867 (Qld), s 42A, s 42B and s 42C
Judicature Act 1876 (Qld), s 20, O XXXVI r 1
Rules of the Supreme Court 1900 (Qld), O 40 r 1
Supreme Court of Judicature Act 1875 (Eng), s 20
Supreme Court of Queensland Act 1991 (Qld), s 85, Schedule 1 Part 2
Uniform Civil Procedure Rules 1999 (Qld), r 367(3)(d), r 390, r 439

Accident Insurance Mutual Holdings Ltd v McFadden (1993) 31 NSWLR 412, cited
Australian Crime Commission v Stoddart (2011) 244 CLR 554, cited
Australian Securities and Investments Commission v Managed Investments Pty Ltd and Ors (No 6) [2013] QSC 355, related
Berger v Raymond Sun Ltd [1984] 1 WLR 625, cited
CDJ v VAJ (No 1) (1998) 197 CLR 172, cited
David Syme & Co Ltd v Mather [1977] VR 516 (Full Ct), cited
Duke Group Ltd (in liq) v Pilmer (1994) 63 SASR 364, cited
Manenti v Melbourne and Metropolitan Tramways Board [1954] VLR 115, cited
Mood Music Publishing Co Ltd v De Wolfe Ltd [1976] Ch 199, cited
NV Sumatra Tobacco Trading Co v British American Tobacco Services Ltd (2011) 198 FCR 435, cited
Ordukaya v Hicks [2000] NSWCA 180, cited
Pallante v Stadiums Pty Ltd (No 2) [1976] VR 363, cited
Pearce v Button (1985) 8 FCR 388, cited
Polycarpou v Australian Wire Industries Pty Ltd (1995) 36 NSWLR 49 (CA), cited
State Bank v Lo [2000] NSWSC 1191, cited
Supetina Pty Ltd v Lombok Pty Ltd (1984) 5 FCR 439, cited
Taylor v Harvey [1986] 2 Qd R 137, cited
Thompson v Bella-Lewis [1997] 1 Qd R 429, considered
Wong v Citibank Ltd (2005) ASAL 55-136, cited

COUNSEL: PJ Riordan SC with MT Brady and JP Moore for the plaintiff
PJ Davis QC with DS Piggott for the fourth defendant
N Andreatidis for the fifth defendant
DL Williams SC with C Withers for the sixth defendant
B O'Donnell QC with CK George for the seventh defendant

PA Freeburn QC for the eighth defendant

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
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] After delivering reasons in *Australian Securities and Investments Commission v Managed Investments Pty Ltd and Ors (No 6)*[1] I directed a witness, Mr Jason Maywald, to answer a question whether he had signed an affidavit. He agreed that his signature was on the final page adjacent to his name and was asked no further questions about its contents by any party because of his claim for privilege against self-incrimination discussed in that decision and which the parties recognised. Mr Riordan SC for ASIC then read the affidavit in his case. Objection was taken to its reception. The parties have now debated before me how the affidavit should be used in the trial, given the defendants' inability to cross-examine Mr Maywald.

[2] Several issues are relevant. The first is what is the source of the power to admit the affidavit as evidence in the trial, long term practice now embodied in r 367(3)(d) of the *Uniform Civil Procedure Rules* 1999 (Qld), or s 92 of the *Evidence Act* 1977 (Qld), or both. The second issue is whether there is a common law discretion to exclude admissible evidence in civil cases. The next is, if there is such a discretion, either at common law or, if relevant, pursuant to s 98 of the *Evidence Act* or as a result of the orders that have been made already in this proceeding, how it should be exercised.

Background

[3] My order of 3 April 2013 provided that, subject to further order, the plaintiff's evidence in the trial would be by affidavit. That order was not opposed but was not expressed to be one made by consent. Each defendant was required to notify the plaintiff whether the deponent of any affidavit filed by the plaintiff was required to attend for cross-examination. Mr Maywald was the subject of such a notice requiring him to attend. Paragraph 21 of the order also provided:

> "Subject to further order, by 2 September 2013, any defendant receiving an affidavit who wishes to object to the evidence in that affidavit notify the plaintiff of its objections and the grounds for each objection. If no such notice is given the plaintiff may take it that no part of the affidavit is objected to and that it will stand as the witness's evidence-in-chief if adopted by the witness."

[4] No defendant required Mr Maywald to give his evidence-in-chief by *viva voce* evidence. Paragraph 19 had provided for notice to be given if that were the case. In

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1 [2013] QSC 355.

those circumstances, ASIC argued that, subject to rulings about admissibility of particular parts of the affidavit, the balance, not the subject of objection, stood as Mr Maywald's evidence-in-chief based on agreement and the effect of paragraph 21 of the order. Objections were taken to at least some of the evidence of Mr Maywald by the fourth, fifth and eighth defendants. Those objections have been resolved between the parties and by rulings by me. I gave the parties leave to reargue the admissibility of paragraphs 20, 26, 28 and 42 to 45 of his affidavit in the event that hd did not give further evidence.

[5] The affidavit deals with Mr Maywald's positions in the MFS Group, particularly its New Zealand operations. He speaks of his role, the New Zealand operations of the Group, the nature of his dealings with Mr Michael King and others in the Group including Mr Craig White and Mr David Anderson. That evidence was of a type that he could have given orally and which dealt at least inferentially with questions of control of the New Zealand operations of the group by MFS Limited. Such control is a significant part of the case ASIC pleads.

[6] Mr Maywald also identifies a number of emails, a put option deed and an announcement to the New Zealand Stock Exchange which appears to have been a public document he said was approved by Mr King. The proof of at least some of those documents, the emails and the put option deed in particular, was facilitated by s 92 of the *Evidence Act.*

[7] He then identified documents related to the payment of $17.5 million to MFS Pacific Finance Limited ("PacFin"), two loan participation agreements relating to the sale of rights to loans in sums of $55 million and $62.5 million and what he describes as the 31 December 2007 New Loan Agreement and says he was not aware of those documents when they appear to have been created. His ignorance of those documents is likely to be relied on by ASIC to advance its arguments that those transactions were false.

[8] Paragraphs 20, 26, 28 and 42 to 45 were criticised as vague and unparticularised allegations about the nature of his activities with PacFin and of his interaction with Mr King and other defendants that required cross-examination to make sense of them.

[9] As I said in *Australian Securities and Investments Commission v Managed Investments Pty Ltd and Ors (No 6)*[2] there is no obvious inference in this case that the affidavit is false although parts of it may be controversial. That distinguishes the case factually from *Thompson v Bella-Lewis.*[3]

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2 [2013] QSC 355 at [13].

3 [1997] 1 Qd R 429, 438.

The power to direct that evidence be given by affidavit compared with admissibility under s 92 of the *Evidence Act* 1977 (Qld)

[10] Rule 367(3)(d) of the UCPR permits the making of an order requiring evidence at a trial or hearing of a proceeding to be given by affidavit as an exception to the general rule in r 390(a) that evidence at the trial of a hearing started by claim may only be given orally. Rule 439 then provides:

> "**439 Examination of person making affidavit**
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> (1) If an affidavit is to be relied on at a hearing, the court may order the person making it to be examined and cross-examined before the court and may order the person to attend the court for the purpose.
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> (2) If an affidavit to be relied on at a hearing is served on a party more than 1 business day before the hearing and the party wishes the person who made the affidavit to attend the court for cross-examination, the party must serve a notice to that effect on the party on whose behalf the affidavit is filed at least 1 business day before the date the person is required for examination.
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> …
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> (4) If the person who made the affidavit does not attend the court in compliance with the notice … the court may refuse to receive the affidavit into evidence.
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> (5) However, the court may—
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> (a) dispense with the attendance for cross-examination of a person making an affidavit; and
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> (b) direct that an affidavit be used without the person making the affidavit being cross-examined in relation to the affidavit.
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> …"

[11] Affidavits have been used in practice in English courts for eight centuries, since the earliest reported cases.[4] Historically, with proceedings commenced by summons, as in the Court's equitable or probate jurisdictions, evidence was required by affidavit[5] while in proceedings commenced by writ of summons and a statement of claim evidence was given orally.[6] The power to order that evidence be given by affidavit at a trial is old, however. The Rules of Court contained in the schedule to the

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4 John Levingston, *The Law of Affidavits* (Federation Press, 2013) pp 4-5.

5 See now UCPR r 390(b) dealing with proceedings started by application.

6 Levingston,, op cit, p 3; UCPR r 390(a). This proceeding commenced by originating application but on 7 December 2009 an order was made that it continue as if started by claim.

Judicature Act 1876 (Qld) in O XXXVI r 1 allowed the Court or a judge for sufficient reason to order that any particular fact or facts may be proved by affidavit. That was to the same effect as O XXXVII r 1 of the English rules introduced on the adoption of the *Supreme Court of Judicature Act* 1875 (Eng). Order XXXVI r 1 in Queensland became O 40 r 1 of the *Rules of the Supreme Court* 1900. The provisions clearly antedate s 92 of the *Evidence Act*.

[12] The English *Evidence Act* 1938 was the progenitor of s 92 of the Queensland *Evidence Act.* The English statute included in s 5 a provision declaring that the rule making power of the English Supreme Court of Judicature authorised orders directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination. Section 20 of the *Supreme Court of Judicature Act* 1875 (Eng) had also provided that nothing in that Act or the rules of court made under it should affect the mode of giving evidence orally or the rules of evidence "save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read." Section 20 of the *Judicature Act* 1876 (Qld) included an equivalent provision when it was first enacted. So the power to direct that affidavits may be read as evidence at a trial is very well entrenched. It is a separate power to permit the tender of written evidence than that in s 92.

[13] This conclusion is reinforced by the terms of the rule making power in s 85 of the *Supreme Court of Queensland Act* 1991 and Schedule 1 Part 2 of that Act governing civil proceedings. They make it clear that the UCPR may provide for the taking of evidence generally, including the way evidence may be given, dispensing with the rules of evidence, taking evidence out of court and affidavits.

[14] The power to dispense with the rules of evidence is now to be found in s 129A of the *Evidence Act*.[7] Counsel for Mr King submitted that this section determined what I should do in relation to the wish by ASIC to rely on Mr Maywald's affidavit. In my view that is not the case. The affidavit, if available for use, proves its contents subject to objections as to the admissibility of particular parts of it. It has been identified in evidence in this proceeding by its author who affirmed its truth when he made it. That is sufficient to comply with the rules of evidence. His claim for privilege does not detract from the conclusion that the affidavit's contents have been proved.

[15] As I have mentioned s 92 of the Queensland *Evidence Act* was inspired by the *Evidence Act* 1938 (Eng) and permits the proof of statements in civil proceedings where direct oral evidence of a fact would be admissible if the maker of the statement had personal knowledge of the matters dealt with by the statement and is called as a witness in the proceeding. Section 92(1)(b) also permits the proof of business records. Its essential content was first enacted in Queensland as ss 42A to 42C in the 1962 amendments to the *Evidence and Discovery Act* 1867 (Qld). It is likely that it was aimed at facilitating the proof of contemporaneous statements relating to events observed by a witness as well as of business records. It creates exceptions at least to the rule against hearsay, to the rule against self-corroboration and to the rule that the previous inconsistent statement of a witness

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7 See formerly UCPR r 394.

who is not a party does not constitute evidence of the facts stated.[8] It does not supersede the provisions of the UCPR permitting the giving of evidence by affidavit but the two overlap.

[16] The overlap is clear here because proof of at least some of the documents exhibited to the affidavit is facilitated by s 92 while the evidence I described earlier of Mr Maywald's role, the New Zealand operations of the Group, the nature of his dealings with Mr Michael King and others and his ignorance of the existence of some of the documents would normally have been given orally but was permitted to be given in writing by the rules relating to the use of affidavits. Put another way, if Mr Maywald's affidavit had been sworn before the introduction of the earlier equivalent to s 92, he might have had greater difficulty in proving some of the documents exhibited to his affidavit.

[17] Section 98(1) gives the Court the discretion to reject a statement otherwise admissible if it is inexpedient in the interests of justice. But, by s 98(2), the section does not affect the admissibility of any evidence otherwise than by virtue of Part 6 of the Act, the Part that contains s 92. That discretion to reject a s 92 statement is wider than exists to refuse to receive an affidavit into evidence under r 439(4). The discretion in respect of an affidavit is limited to the situation where the person who made the affidavit does not attend the court in compliance with the notice under r 439(2). Here Mr Maywald attended the Court in compliance with the notice but claimed privilege against answering questions that may tend to incriminate him, a claim that was recognised by the parties.[9]

[18] Consequently, there is no necessary inconsistency between s 92's requirement that the maker of a statement contained in a document be called as a witness in the proceeding coupled with the ability to reject evidence otherwise admissible under Part 6 of the *Evidence Act* under s 98 and the power in r 367(3) to require evidence to be given by affidavit and the power in r 439(5) in the Court to dispense with the attendance for cross-examination of a person making an affidavit or to direct that an affidavit be used without the person making the affidavit being cross-examined in relation to it.

[19] Here, where the plaintiff's evidence was directed to be given by affidavit which was read by counsel in ASIC's case after Mr Maywald identified his signature, it seems to me to be appropriate to approach the ability to tender Mr Maywald's affidavit by reference to the rules governing the admissibility of such documents at least in respect to that part of his evidence that could have been given orally. As Austin J said in *State Bank v Lo*:[10]

> "Where evidence of a representation is contained in an affidavit prepared for the purposes of a hearing and read at the hearing, the evidence is direct primary evidence of the deponent and the reading of it at the hearing does not involve giving evidence of a previous

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8 *Cross on Evidence* (Australian edition) at [35010].

9 See *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412, 426, 434.

10 [2000] NSWSC 1191 at [148].

> representation for the purposes of the hearsay rule, even where the deponent is not called to give oral evidence."

[20] Where the affidavit in effect relies on s 92 to prove documents exhibited to it the discretion under s 98(1) also becomes relevant. In the particular circumstances of this case the result, as will be seen, is not likely to differ.

Is there a common law discretion to exclude admissible evidence in civil cases?

[21] In *CDJ v VAJ (No 1),*[11] McHugh, Gummow and Callinan JJ said that "It is highly doubtful whether at common law, in proceedings other than criminal proceedings, otherwise admissible evidence could be rejected on the grounds of prejudice." ASIC relied on that statement and other decisions including some of intermediate appellate courts[12] to argue that I had no discretion to reject the affidavit evidence of Mr Maywald. In *Taylor v Harvey,*[13] however, a decision of this Court, Carter J held that he could exclude "similar fact" evidence on the basis that it was not logically probative of the allegations against the defendant and, alternatively, because its prejudicial effect far outweighed its cogency, seeing "no logical basis for a submission that the rule is to be applied differently in a civil case to that in a criminal case."[14]

[22] ASIC's submission went on to refer to Heydon J's decision in *Australian Crime Commission v Stoddart,*[15] where his Honour referred to the discretion which had developed in criminal cases to exclude evidence if its prejudicial effect would exceed its probative value and to exclude evidence if the strict rules of admissibility would operate unfairly against the accused. His Honour was in dissent on the result of the appeal, but the issue of the discretion was not considered by the other members of the Court and was not determinative of the appeal.

[23] His Honour said that the existence of a discretion to exclude evidence:[16]

> "at common law outside criminal proceedings has been termed 'highly doubtful' in this Court and was emphatically denied in 1914 by both the House of Lords and the Privy Council. There has been, however, recognition of a limited discretion in civil cases concerning the special field of similar fact evidence to exclude evidence which, though relevant, is only remotely relevant or has small probative

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11 (1998) 197 CLR 172 at [142] n 106.

12 *Manenti v Melbourne and Metropolitan Tramways Board* [1954] VLR 115, 118; *Pallante v Stadiums Pty Ltd (No 2)* [1976] VR 363, 368-369; *David Syme & Co Ltd v Mather* [1977] VR 516 (Full Ct) at 531; *Polycarpou v Australian Wire Industries Pty Ltd* (1995) 36 NSWLR 49 (CA) and *Duke Group Ltd (in liq) v Pilmer* (1994) 63 SASR 364.

13 [1986] 2 Qd R 137.

14 [1986] 2 Qd R 137, 141, Carter J followed the decision of Warner J in *Berger v Raymond Sun Ltd* [1984] 1 WLR 625 at 632 (another similar face evidence case).

15 (2011) 244 CLR 554.

16 (2011) 244 CLR 554, 577 at [64] referring in n 134 to "*CDJ v VAJ* (1998) 197 CLR 172 at 215 [142] n 106 per McHugh, Gummow and Callinan JJ; [1998] HCA 67" and going on to say: "There are many authorities to the same effect, and only a handful to the contrary: *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119 at 127; *Pearce v Button* (1985) 8 FCR 388 at 402; *Taylor v Harvey* [1986] 2 Qd R 137."

> value compared to the additional issues which it would raise and the additional time required for their investigation, or might tend to confuse the jury as to the real issues."

[24] ASIC's submission on this point was that there is thus a serious question as to whether *Taylor v Harvey* was correctly decided in light of the subsequent High Court authorities, but that, in any event, the evidence of Mr Maywald was not "similar fact" evidence referred to in *Taylor v Harvey*, or the illegally obtained evidence referred to in *Pearce v Button*.[17]

[25] Were it necessary I would accept that submission and not follow *Taylor v Harvey* at least in relation to the evidence in the affidavit that was not reliant on s 92 for its admissibility. It was not similar fact evidence or illegally obtained evidence. In other words I would have decided that there was no discretion to refuse to admit the evidence that could have been established orally by Mr Maywald and which was affirmed in his affidavit. As will become apparent, however, I would not exclude that evidence even if I had such a discretion.

[26] Where the documents exhibited to the affidavit were admissible because of the modifications to the rules of evidence created by s 92 my conclusion would be different as s 98 does create a discretion to reject such evidence. Whether it should be exercised to exclude any evidence here is another question.

How should any discretion be exercised?

[27] The facts relevant to the exercise of any discretion to permit Mr Maywald's affidavit to be used without cross-examination include the following:

1. If I rule the affidavit out ASIC may suffer prejudice through being unable to rely on important evidence from Mr Maywald relating to the MFS Group and PacFin's operations in New Zealand;
2. Had Mr Maywald not claimed privilege ASIC would also have had the ability to re-examine Mr Maywald after he was cross-examined and would have lost the opportunity for Mr Maywald's evidence to be given appropriate weight after cross-examination;
3. If I allow the affidavit into evidence the defendants will be unable to cross-examine Mr Maywald because of his claim of privilege;
4. The defendants may suffer prejudice because they will not have the chance to test his evidence insofar as it may be contrary to their instructions or to elaborate on it if it may support their cases;
5. Paragraphs 20, 26, 28 and 42 to 45 of his affidavit in particular are arguably so vague and unparticularised that they require cross-examination to test them in the absence of which they should be excluded;
6. The defendants may have to decide whether to give evidence in their defence where otherwise they would not face such an issue if the affidavit

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17 (1985) 8 FCR 388, 402.

were excluded and where this is a civil penalty case and they are entitled to put the plaintiff to proof;

7. Much of Mr Maywald's affidavit proved documents and no defendant required Mr Maywald to give his evidence-in-chief by *viva voce* evidence;
8. This is a civil trial without a jury where I may limit the weight attributable to his affidavit by taking into account that it was not the subject of cross-examination;
9. Counsel for the seventh defendant, Mr Anderson, conceded the documentary evidence could be received but argued that the evidence related to the control of PacFin by MFS Limited should be excluded particularly because their client would be in no position to test the evidence about the interaction between Mr King and Mr Maywald dealing with control of PacFin by MFS Limited as they could not cross-examine Mr Maywald and could not call Mr King;
10. Counsel for the fourth defendant, Mr King, took the same stance in respect of the admission of the documentary evidence as a fallback position to its principal submission that none of the affidavit should be received.
11. Counsel for the sixth defendant, Mr Hutchins, were content for paragraphs 1 to 47 of the affidavit to be received with the exclusion of paragraphs 48 to 60. Paragraphs 1 to 47 covered the evidence related to the control of PacFin and Mr Williams SC for the sixth defendant informed me that there were parts of those paragraphs that his client relied on in his case. Paragraphs 48 to 60 he criticised for their references to Mr Maywald's state of awareness of a variety of documents and issues that, absent cross-examination, were not likely to be able to be challenged.

[28] It has been said persuasively that the discretion to exclude evidence under s 98 should have been used in *Thompson v Bella-Lewis*.[18] The trial judge there, purporting to apply s 92, admitted an affidavit to prove that a will was duly executed, although the witness escaped cross-examination by claiming privilege against self-incrimination. In that case the inference was clearly open that the claim for privilege was made because the affidavits tendered were false.[19] No such inference is obvious here. Mr Maywald affirmed his affidavit before he was charged in New Zealand and claimed privilege only in response to the fact that he had been charged.

[29] In *Thompson v Bella-Lewis*, where the result on the appeal depended essentially on the fact that there had been a miscarriage of the trial because of the trial judge's directions to the civil jury, including his directions about the use of the affidavits, McPherson JA said in dissent:[20]

> "Section 92(1) of the *Evidence Act* provides that in any proceeding not criminal, a statement which is contained in a document and which tends to establish a fact of which direct oral evidence would be admissible 'shall … be admissible' as evidence of that fact if either of two conditions is satisfied. They are: (a) if the maker of the statement had personal knowledge of the matters dealt with in the

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18 [1997] 1 Qd R 429. For the critical comment see Fitzgerald P at 434, Davies JA at 438 and JR Forbes, *Evidence Law in Queensland*, (9th ed, Thomson Reuters) at [98.5].

19 [1997] 1 Qd R 429, 438 per Davies JA.

20 [1997] 1 Qd R 429, 452-453.

> statement, and is called as a witness in the proceedings; and (b) if the document forms part of a record relating to an undertaking, etc. The two affidavits probably satisfied para. (b) of s. 92(1); but, as ex. 17 showed, they certainly satisfied para. (a) of that subsection. Mrs Ferguson was called as a witness, and both inferentially from ex. 2 and directly from ex. 17, she had personal knowledge of the matters dealt with in her affidavits: cf. *Evidence Act*, s. 96(1). It is a consequence of the statutory provision, which has been recognised and acted on in Queensland ever since the decision in *Hilton v. Lancashire Dynamo Nevelin Ltd* [1964] 1 W. L.R. 952, that a witness's own statement or proof of evidence may if signed be put in evidence through him by the party calling him when he gives evidence.
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> In these circumstances, his Honour was on the face of it bound to admit into evidence the two affidavits of Mrs Ferguson. Section 92(1)(a) uses the mandatory expression 'shall … be admissible'. It is true that it is expressed to be 'subject to this Part', including s. 98, which confers on the court a discretion to reject any such statement 'if for any reason it appears … inexpedient in the interests of justice that the statement should be admitted'. However, his Honour was plainly correct in interpreting s. 92(1)(a) as requiring the statement to be admitted subject to the exercise under s. 98 of the discretion conferred to reject it if its admission would be 'inexpedient in the interests of justice'. As to that, his Honour was surely correct in holding that it was no reason for rejecting Mrs Ferguson's affidavit that it would or might be difficult for defence counsel to cross-examine her effectively if (as in the event proved to be the case) she maintained her claim to privilege when questioned. It was not, and could not be, suggested to have been any act on the part of the plaintiff that induced Mrs Ferguson to claim privilege as she did. Her action in signing the affidavits exs 15 and 16 and providing them, together with the letter and photograph (ex. 17), to solicitors for the plaintiff involved a waiver of her privilege with respect to the making and signing of those documents. See *BTR Engineering (Australia) Ltd v. Patterson* (1990) 20 N.S.W.L.R. 724, 727–729. The fact that the circumstances in which she signed ex. 2 fell outside the scope of that waiver, and within the limits of her claim of privilege, so that she could not be cross-examined about that occasion is simply one of the misfortunes of litigation, or of the rules of evidence, which parties are obliged to suffer. As it is, the defendant's unsuccessful attempts to cross-examine on that matter followed the admission of the evidence now impugned. His Honour was not at that juncture requested to reverse his ruling on the admissibility of exs 15 to 17, and it is doubtful if he would have been justified in doing so."

[30] One might legitimately disagree with his Honour's proposed use of the discretion under s 98 when one takes into account the available inferences about the falsity of the affidavits, but his view that the limit placed on the ability to cross-examine caused by the claim of privilege was simply one of the misfortunes of litigation, or

of the rules of evidence, which parties are obliged to suffer is cogent. As the New South Wales Court of Appeal decided in *Accident Insurance Mutual Holdings Ltd v McFadden*,[21] it was not a pre-condition for the application of their equivalent of s 92 that the maker of the statement in a document sought to be admitted into evidence in proceedings, be available for cross-examination when called as a witness in those proceedings.

[31] This type of difficulty has been resolved in other cases, where, for example, deponents of affidavits have not been able to be cross-examined because of death, absence or ill-health, by admission of the affidavit but by limiting the weight attributable to it because of the inability to cross-examine.[22]

[32] The relative degrees of prejudice here seem to me to be fairly evenly balanced. As was submitted for ASIC it seems likely that, based on the conduct of the trial to date, the authenticity of the documentary exhibits is not likely to be in issue. That was the essential stance taken in the oral submissions. It is not so clear what the evidence will be otherwise concerning Mr Maywald's relations with Mr King and the other defendants, the position of PacFin in the MFS Group and his knowledge of the transactions attacked by ASIC.

[33] Particularly because his is potentially important evidence in ASIC's case and he was not required to give any of it in chief orally, because the admissibility of the documents proved by him is not vigorously opposed and the larger number of the relevant defendants want some at least of his affidavit in evidence, including paragraphs where there is no unanimity of views among the defendants, it seems to me appropriate that I should admit the affidavit but treat it with less weight than if he had been subject to cross-examination.

[34] I recognise the particular concerns facing the seventh defendant about the issue of control of the New Zealand operations because they cannot cross-examine Mr Maywald nor call Mr King in their case. Mr O'Donnell QC particularly criticised the lack of precision in relation to dates of some of the evidence in paragraphs 20, 26, 28 and 42 to 45. His submission was that ASIC may succeed on the question of control by default where they have not produced any evidence that Mr Maywald was the only witness who could prove the matters in his affidavit. Mr Riordan SC for ASIC was not confident that such further evidence could be produced when I made that inquiry of him. Nonetheless, for the reasons I have expressed I propose to admit the affidavit subject to the reservations as to its weight I have expressed.

[35] It is not now appropriate to exercise my discretion differently simply because my order of 3 April 2013 in paragraph 2 said that the order that the plaintiff's evidence be by affidavit was subject to further order. No different considerations are relevant to any discretion to vary that order, taking into account the conduct of the trial to date.

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21 (1993) 31 NSWLR 412, 426.

22 See, eg, *Supetina Pty Ltd v Lombok Pty Ltd* (1984) 5 FCR 439, 445-446; *Wong v Citibank Ltd* (2005) ASAL 55-136 at 59,966 [21]; *Ordukaya v Hicks* [2000] NSWCA 180 at [41]; *NV Sumatra Tobacco Trading Co v British American Tobacco Services Ltd* (2011) 198 FCR 435, 491-492 at [316]-[320].

Conclusion and direction

[36] It is, therefore, appropriate to direct pursuant to UCPR r 439(5)(b) that Mr Maywald's affidavit be used without Mr Maywald being cross-examined in relation to it. I indicate that in evaluating what weight I shall give it I shall bear in mind the inability of the parties to further examine him on the document. I shall not exercise the discretion under s 98 of the *Evidence Act* to exclude any of the documents exhibited to the affidavit that may have been admissible pursuant to s 92 of that Act.

[37] The decisions previously made about the admissibility of particular parts of the affidavit have excluded some parts of it. That means that the balance of the affidavit will stand as Mr Maywald's evidence in chief as was anticipated by paragraph 21 of the order made by me on 3 April 2013. I see no reason to exclude paragraphs 20, 26, 28 and 42 to 45 now based on the submissions made to me during this application. Some of the allegations in them are general but those are matters I shall take into account in assessing the weight to be given to them.