SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Managed Investments Pty Ltd & Ors (No 8)* [2014] QSC 204
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:	BS 12122 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	7 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 August 2014
JUDGE:	Douglas J
ORDER:	**Rule against permitting the witness to be cross-examined by being shown his answer to a question in an examination of him pursuant to s 597 of the *Corporations Act* 2001 (Cth) where he had claimed privilege against self-incrimination in that examination.**
CATCHWORDS:	EVIDENCE – WITNESSES – CROSS-EXAMINATION – AS TO CREDIT – ON FORMER STATEMENTS – UPON WHAT STATEMENTS – where a witness had previously been examined pursuant to s 597 of the *Corporations Act* – where counsel for the fourth defendant sought to put to the

witness what was said to be a prior inconsistent statement made by him in the examination – where s 597(12) acts as an exception to the rule against self incrimination – where the exception is countered by s 597(12A) – whether allowing a procedure such as in *R v Orton* would amount to an indirect form of proof of the contents of the document – whether such a procedure is inconsistent with the preservation of privilege found in s 597(12A)

Evidence Act 1977 (Qld), s 18, s 19, s 21, s 101
Corporations Act 2001 (Cth), s 597, s 597(12), s 597(12A)

ASIC v Rich [2006] NSWSC 643; 201 FLR 207 followed
The Queen's Case (1820) Brod & B 284; 129 ER 976; [1820] EngR 563 referred
R v Orton [1922] VLR 469; 28 ALR 193 referred

COUNSEL:	PJ Riordan SC with MT Brady and JP Moore for the plaintiff PJ Davis QC with DS Piggott for the fourth defendant R Jackson for the fifth defendant 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] Mr Davis QC is shortly to commence cross examining Mr Hutchings and has indicated very fairly that he wished, during the cross examination, to put to Mr Hutchings what is said to be a previous inconsistent statement made by him in an examination conducted apparently pursuant to s 597 of the *Corporations Act* 2001 (Cth).

[2] The issue that it is said to be relevant to is a conversation deposed to by Mr Hutchings at paragraph 232 of his affidavit where he says that, on 20 December 2007, a date which is said to be significant having regard to the allegations against Mr King, he met with Mr White and Mr King on the Gold Coast for about five to 10 minutes. During the course of that meeting he said Mr King said to him words to the effect that, "MFSL will provide a guarantee (as it had for the Living and Leisure investment) to PIF in relation to investments the subject of the RBS facility and the MYF restructure."

[3] What he wishes to put to the witness, apparently, is that in the examination conducted under the Act he said something different. The problem that then

arises is that s 597(12) of the Act provides that a person is not excused from answering a question put to the person at an examination on the ground that the answer might tend to incriminate the person or make the person liable to a penalty.

[4] That exception from the rule against self-incrimination is then countered by s 597(12A) which provides that where the person claims that the answer might tend to incriminate the person or make the person liable to a penalty, which I was told had happened in this case, and the answer might, in fact, tend to incriminate the person or make the person so liable, and no issue was raised as to whether that might be the case in respect to this particular answer, the answer is not admissible in evidence against the person in a criminal proceeding or a proceeding for the imposition of a penalty other than a proceeding under s 597 or any other proceeding in respect to the falsity of the answer. These are proceedings for the imposition of a penalty. Subject to s 597(12A), any written record of an examination so signed by a person or any transcript of it may be used in evidence in any legal proceedings against the person.

[5] The procedure that Mr Davis proposes to adopt is to seek to avoid proof of the transcript of the previous examination of Mr Hutchings by, in effect, showing it to him and giving him time to examine its contents and then asking him whether, having examined the contents of the document, he stands by the evidence that he has given. On the assumption that there might be some pulling back by the witness from the evidence he has given, he hopes not to be put in the position of seeking to prove the document.

[6] The procedure is described, for example, by Austin J in *ASIC v Rich* [2006] NSWSC 643 at paragraph [2] and his Honour points out that it is well known as the *R v Orton* ([1922] VLR 469; 28 ALR 193) procedure and, from my recollection, developed following the decision in *Queen Caroline's case* ((1820) Brod & Bing 284; 129 ER 976), discussed in an illuminating article by Mr M H McHugh QC, as his Honour then was, in the Australian Bar Review in 1985; (see *Cross-examination on Documents* (1985) 1 Aust Bar Rev 51, 52).

[7] Austin J in that case considered whether that procedure should be adopted, however, and formed the view at paragraph [37] that allowing that procedure was tantamount to a loose and indirect form of proof of the contents of the document, inconsistent with the preservation of the privilege set out in s 597(12A) of the *Corporations Act*.

[8] In seeking to distinguish that decision Mr Davis pointed out that this was not a case where his client was seeking to establish evidence against Mr Hutchings in these proceedings for the imposition of a penalty, but to establish, in effect, that his evidence was unreliable in respect of an allegation that he has made against his client.

[9] That distinction does not strike me as being particularly significant here. If I were to allow the procedure, it seems to me that the answer that Mr Hutchings may give would similarly be one inconsistent with the preservation of the privilege against exposure to a penalty required by s 597(12A). I toyed with the idea whether the answer was admissible in evidence in the case pleaded against him by ASIC if it was elicited in this fashion, and it seems to me that it would be in any event. Certainly ASIC has indicated that it would seek to rely upon the evidence, if it were admitted, in its case against Mr Hutchings.

[10] If I were to conclude that the evidence was admissible in spite of s 597(12A) it would then be a question whether I should allow the question in any event pursuant to the procedure set out in ss 18, 19, 21 and 101 of the *Evidence Act* 1977 (Qld). The Queensland Act is significant in that, where a previous inconsistent statement is sought to be proved and if not distinctly admitted is proved by the means provided by s 101, the evidence is then admissible as evidence of any fact stated therein of which direct oral evidence by the person would be admissible; see s 101(1). So it would not be admissible simply as to the credit of the witness as would have been the case at common law but as to the truth of its contents.

[11] The effect of that is mollified to some extent by the discretion to disallow improper questions under s 21 which extends to oppressive questions by the definition in s 21(4), where s 21(3) makes it clear that the matters the court must take into account pursuant to s 21(2) are not exclusive and the discretion to disallow questions extends beyond those considerations in s 21(2) to improper questions. Such a question as is proposed in this case may arguably be oppressive because of its potential effect in undermining the protection afforded by s 597(12A).

[12] It seems to me that, following the decision of Austin J in *ASIC v Rich*, I should conclude that this particular procedure would amount to a loose and indirect form of proof of the contents of the document sought to be used to contradict Mr Hutchings which makes it not admissible in evidence against him. In other words s 597(12A) applies to prohibit the question.

[13] Were I to possess a discretion under s 21, despite having reached that conclusion, it was urged on me that the possible exercise of the discretion was evenly balanced because it was sought to be used, in effect, not against Mr Hutchings but to buttress Mr King's own evidence. His evidence is not particularly inconsistent with the allegation made in paragraph 232 except in respect of the date of the conversation which Mr King could not recall, although he did recall, in effect, evidence to the effect that funds from PIF had been used in some form to assist with the payment of the moneys made through MFSA. My main concern is, however, not so much that such a discretion should come into play in this situation. Nor am I convinced that the discretion that might arise under s 21 is particularly heavily weighted one way or the other.

[14] I am more concerned that, to allow the questioning to be conducted in that fashion, would be, as Austin J said, an indirect way of avoiding the effect of s 597(12A), and of avoiding the significant consequences attaching to requiring persons to answer questions in such inquiries where otherwise the privilege against self incrimination would apply. Accordingly I propose to rule against the procedure suggested by Mr Davis.