SUPREME COURT OF QUEENSLAND

CITATION:	*LM Investment Mgmt Ltd v Drake & Ors* [2017] QSC 34
PARTIES:	**LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (plaintiff) v **PETER CHARLES DRAKE** (first defendant) **LISA MAREE DARCY** (second defendant) **EGHARD VAN DER HOVEN** (third defendant) **FRANCENE MAREE MULDER** (fourth defendant) **JOHN FRANCIS O'SULLIVAN** (fifth defendant) **SIMON JEREMY TICKNER** (sixth defendant) **LM INVESTMENT MANGEMENT LIMITED (RECEVIERS & MANAGERS APPOINTED) (IN LIQUIDATION) ACN 077 208 461** (seventh defendant) **KORDA MENTHA PTY LTD ACN 100 169 391 IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND** (eighth defendant)
FILE NO/S:	BS12317 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	13 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The second defendant is directed to file and serve an amended defence that complies with the pleading requirements under the rules of court for**

a civil proceeding subject to any just claim of privilege within 28 days.

2. **The plaintiff is to notify the second defendant in writing of any challenge to any claim of privilege in the amended defence within 7 days of service.**

3. **The second defendant is to file an affidavit setting out the ground, basis and any relevant circumstances in support of any challenged claim of privilege within 14 days of notification of the challenge.**

4. **The second defendant pay the plaintiff's costs of the application.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – OTHER MATTERS – where the respondent was not required to comply with the requirements of the rules of pleading in defence under the *Uniform Civil Procedure Rules* 1999 (Qld) – where the respondent argued that compliance with the rules of pleading could lead to a proceeding by AISC for a pecuniary penalty order against the respondents – whether the risk of exposure to an order for pecuniary penalties entitled the respondent to maintain the non-complying defence on the ground of penalty privilege

Uniform Civil Procedure Rules 1999 (Qld), r 50, r 57, r 65, r 149(1)(b), r 149(1)(c) and r 166
Corporations Act 2001 (Cth), s 13171E, s 1317G, s 1317H

Anderson v Australian Securities and Investments Commission [2013] 2 Qd R 401, considered
Australian Securities and Investments Commission v Ingleby (2012) 91 ACSR 66, considered
QC Resource Investments Pty Ltd (in liq) v Mulligan [2016] FCA 813, applied

COUNSEL: S Brown QC and M Luchich for the plaintiff
J Davies for the second defendant
J Coveney for the sixth defendant
A Nicholas for the first defendant

SOLICITORS: Gadens Lawyers for the plaintiff
RBG Lawyers for the second defendant
HW Litigation Pty Ltd for the sixth defendant
Bartley Cohen for the first defendant

[1] **JACKSON J**: The plaintiff applied for an order that the second and sixth defendants be directed to file and serve a defence and make disclosure that complies with the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). The application against the sixth defendant has been compromised. It is only necessary to deal with the application against the second defendant.

The application

[2] The purpose of the application is to reverse the effect of an order made on 30 April 2015 that the relevant defendants were only required to plead in accordance with the usual rules to paragraphs 1 to 22 and 24 to 32 of the amended statement of claim ("SOC"). As to the balance, they were directed to say of each allegation of fact whether it is admitted, not admitted or denied and to give notice of any intention to rely upon any statutory defence or ground of dispensation. Beyond that, those defendants were not required to comply with rr 149(1)(b), 149(1)(c), 50, 57, 65 and 166 of the UCPR ("the pleading requirements of the rules of court for a civil proceeding"). This form of order accords with the orders made in *Anderson v Australian Securities and Investments Commission*.[1]

[3] The effect of the 30 April 2015 order was extended by an order made on 30 June 2015 that compliance with the nominated rules was also not required for pars 30A, 30B, 30C, 30D, 30E and 31A of the further amended statement of claim ("FASOC").

[4] The reason for the plaintiff's change of position is that a proceeding brought by ASIC against the second defendant claiming a pecuniary penalty order for contraventions of the *Corporations Act* 2001 (Cth) ("CA") has been terminated[2] and public examination proceedings brought by the person appointed to ensure that the FMIF is wound up in accordance with its constitution have also been terminated.

[5] In the present case, the plaintiff claims against the second defendant an order under s 1317H of the CA that she pay compensation or damages to the plaintiff in the amount of $15,546,147.85 or any amount paid to the trustee of the Managed Performance Fund ("MPF") in excess of what was necessary to reimburse it for the contribution it made to funding a particular court proceeding.

[6] The basis of the orders sought is that the second defendant contravened s 180(1), 182(1), s 601FD(1)(b), s 601FD(1)(c) or s 601FD(1)(e) of the CA. Each of those subsections or paragraphs is a corporation/scheme civil penalty provision within the meaning of s 1317DA of the CA.

[7] The plaintiff may apply for a compensation order under s 1317J(2) of the CA, either as the corporation in respect of ss 180(1) and 182(1) or as the responsible entity for the registered scheme known as the First Mortgage Investment Fund ("FMIF") in respect of s 601 FD(1)(b), s 601FD(c) or s 601FD(e).

[8] Under s 1317E(1) of the CA, if a court is satisfied that a person has contravened a civil penalty provision it must make a declaration of contravention. A declaration of contravention is conclusive evidence of the matters referred to in s 1317E(2): s 1317F. But only ASIC may apply for a declaration of contravention: s 1317J(1).

[9] Under s 1317G(1) of the CA, if a declaration of contravention is made against a person under s 1317E, the court may make an order that the person pay the Commonwealth a pecuniary penalty of up to $200,000, provided also that the contravention is of a corporation/scheme civil penalty provision and the

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1 [2013] 2 Qd R 401, 414 [44].

2 At the time of hearing the application the proceedings had been dismissed against the second defendant. The balance of the proceedings are now finalised as well: *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552.

contravention materially prejudices the interests of the corporation or scheme or its members or materially prejudices the corporation's ability to pay its creditors or is a serious contravention.

[10] The particular question of exposure to a penalty in this case is that the alleged basis of the liability of the second defendant in this proceeding is the same as would found an order for a declaration of contravention under s 1317E and the relevant subsections and paragraphs are corporation/scheme civil penalty provisions. Accordingly, if the other conditions under s 1317G(1) are met the second defendant might be exposed to an order to pay the Commonwealth a pecuniary penalty of up to $200,000 under s 1317G(1).

[11] The second defendant submits that establishment of the alleged contraventions by the plaintiff in this proceeding would tend to expose her to the risk of an order to pay a pecuniary penalty under s 1317G(1) at least until the time limit of six years after the contravention for proceedings by ASIC has expired under s 1317K.

[12] A series of cases since 2005 has established that when ASIC brings a claim for a declaration of contravention of a civil penalty provision the defendant may be entitled to be relieved generally from pleading in accordance with the ordinary rules for a civil proceeding by reason of the privilege against exposure to a penalty ("penalty privilege").[3] It is sufficient at this point to refer to *Anderson v Australian Securities Commission* which was concerned with the inter-operation of the penalty privilege and the *Uniform Civil Procedure Rules* 1999 (Qld) in the context of similar alleged breaches of the CA. *Anderson* was a claim by ASIC for a pecuniary penalty under s 1317G(1) of the CA.

[13] The present case is a claim by a corporation and responsible entity of a registered scheme for compensation under s 1317H. Another series of cases establishes that the same entitlement to relief generally from pleading in accordance with the usual rules as to pleading by reason of penalty privilege may apply where a corporation or a responsible entity for a registered scheme applies for a compensation order, in exceptional circumstances.[4]

[14] These now uncontroversial propositions lead to the focus of the present dispute, namely what degree of risk of a pecuniary penalty order entitles the second defendant to maintain the benefit of the existing orders relieving her from the pleading requirements of the rules of court for a civil proceeding and from the duty of disclosure on the ground of penalty privilege.

[15] The plaintiff's application is founded on the proposition that the termination of ASIC's Federal Court proceedings against the second defendant and the termination of the public examination proceedings mean that the risk is low enough that she should no longer be relieved from the usual rules.

The alleged contraventions

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3 In this case it is unnecessary to consider any question of privilege against self-incrimination.

4 For example, *Australian Securities and Investments Commission v Mining Project Group Ltd* (2007) 164 FCR 32, 37 [12]; *Re Australian Property Custodian Holdings Ltd (in liq) (recvrs and mgrs apptd) (No 2)* (2012) 93 ACSR 130, 146-154 [80]-[114].

[16] The plaintiff is a corporation that is and at all material times was the responsible entity of a registered managed investment scheme known as the LM First Mortgage Income Fund ("FMIF"). Permanent Trustee Australia Limited ("PTAL") was the custodian of the property of the FMIF.

[17] On or about 10 March 2003, PTAL advanced $16M of the FMIF's funds to an entity known as Bellpac on the security of a first mortgage over land ("the land") and a company charge given by Bellpac.

[18] The plaintiff was also the trustee of a fund known as the Managed Performance Fund ("MPF").

[19] On 23 June 2006, the plaintiff as trustee of the MPF advanced $6M of the MPF's funds to Bellpac on the security of a third mortgage over the land and a company charge given by Bellpac.

[20] On 23 June 2006, the parties entered into a deed of priority providing that the plaintiff as responsible entity for the FMIF had priority to the extent of $33.8M over the plaintiff as trustee of the MPF.

[21] Following default, PTAL as custodian of the FMIF and the plaintiff as trustee of the MPF started proceedings against Bellpac and other parties in relation to a sale by Bellpac of the land, among other things.

[22] In July 2009, the plaintiff as trustee of the MPF funded the proceedings in circumstances where the plaintiff or PTAL did not have the means to do so on behalf of the FMIF. The amount funded was $1,380,431.

[23] From November 2010, it was proposed to sell the land to a purchaser from Bellpac under a settlement of the proceedings.

[24] On 7 March 2011, LMIM obtained advice as to the appropriate amount to be paid to the plaintiff as trustee of the MPF from the litigation settlement proceeds. On 28 March 2011, LMIM received further advice from lawyers as to whether it was legally acceptable to split the balance of the proceeds between the funds by allocating 65 percent to the FMIF and 35 percent to the MPF.

[25] On 21 June 2011, the plaintiff in its capacity as responsible entity of the FMIF entered into a settlement of the proceedings. Under the terms of the settlement, $45.5M was paid to PTAL and/or the plaintiff, inter alia, for the release of the securities and claims by PTAL and the plaintiff on behalf of the FMIF. Of that sum, PTAL was to pay $1.3M to a third party to secure their release and removal of caveats. The settlement agreements were contained in a contract for the sale of the land by PTAL to the purchaser ("Gujarat contract") under which part of the overall amount was to be paid and a contract for the payment of the balance made with the plaintiff ("Deed of Release").

[26] Also on 21 June 2011, a deed poll was executed by the plaintiff as responsible entity of the FMIF and as trustee of the MPF that provided for the litigation settlement proceeds to be split 65 percent to the FMIF and 35 percent to the MPF ("deed poll").

[27] Under the deed poll the plaintiff as trustee of the MPF received the sum of $15,546,147 ("MPF settlement payment").

[28] The plaintiff as responsible entity of the FMIF alleges that the second defendant contravened s 180(1) and s 182(1) of the CA, or contravened s 601FD(1)(b), s 601FD(1)(c) or s 601FD(1)(e) by causing permitting or directing the MPF settlement payment to be made (together with the other directors of the plaintiff). It alleges that the MPF settlement payment was scheme property of the FMIF that ought to have been held by the plaintiff as responsible entity for the FMIF.

[29] The basis of the claim for compensation for those alleged contraventions against the second defendant is contained in paras 32 to 34 of the further amended statement of claim ("FASOC"). Summarising, it is that the directors of the plaintiff including the second defendant decided that the plaintiff as responsible entity of the FMIF needed to reach an agreement with the plaintiff as trustee of the MPF about sharing the litigation settlement proceeds because the overall settlement could not occur without the agreement of the trustee of the MPF, when:

(a) PTAL had the power to sell and did sell the land as mortgagee exercising power of sale on behalf of the FMIF; and
(b) the agreement of the plaintiff as trustee of the MPF was not required for PTAL and the plaintiff as responsible entity of the FMIF to perform their obligations under the Gujarat contract and the Deed of Release.

[30] To put it simply and neutrally, the alleged contraventions are that the directors, including the second defendant, caused the plaintiff to agree to split the litigation settlement proceeds in the ratio of 65:35 and to make what became the MPF settlement payment when there was no need as a matter of law or fact to make that agreement and it was not in the interests of the FMIF or to make that payment.

The Federal Court proceedings

[31] ASIC's claim in the Federal Court proceedings was brought against the former directors of the plaintiff, including the second defendant. As previously noted, those proceedings have now been resolved by final judgment.[5]

[32] However, those proceedings were not concerned with the same subject matter as the present claim. ASIC's claim was described thus in the reasons of Edelman J:

> "The particular investment by LMIM (as trustee for the MPF) with which this case is concerned was a loan made to a related company which became called Maddison Estate. The loan, secured by two mortgages, was for a large development project on the Gold Coast (the Maddison Estate development). The interest rate was eventually set at 25%. The interest rate was designed to ensure that Maddison Estate, which was a special purpose vehicle, did not obtain any of the profit from the development. ASIC did not allege that the loan involved any breach of duty although ASIC alleged that it was, in effect, a disguised equity participation in a development.
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> The loan from LMIM to Maddison Estate (the Maddison Estate loan) was made in November 2007 with an initial limit of $40 million. In 2008 the limit of the loan was increased to $58 million. In 2009 the limit was increased to $70 million. In 2010 it was increased to $95 million. In 2011 it

5 *Australian Securities and Investments Commission v Drake (No 2)* [2016] FCA 1552.

> was increased to $115 million. Again in 2011 it was increased to $180 million. Then, in August 2012, it was increased to $280 million (the August 2012 Variation).
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> ASIC did not allege that the loan was imprudent. Nor did ASIC allege that the loan was made by the directors of LMIM without care and diligence. Nor did ASIC allege that there was any breach of duty arising from the approval of the loan variations in 2008, 2009 or 2010. After the conclusion of the evidence, ASIC also abandoned any allegation of breach arising from the loan variation in 2011, and therefore abandoned the whole of its case against the fourth and fifth respondents, Mr Tickner and Ms Darcy respectively. ASIC's case against the remaining three respondent directors of LMIM, Mr Drake**,** Ms Mulder**,** and Mr van der Hoven (the first, second and third respondents respectively), was solely based upon the variation which increased in the loan limit in 2012.
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> The abandonment of ASIC's case against Mr Tickner and Ms Darcy, and its case concerning the 2011 loan variation, was likely due to the evidence of ASIC's final witness, the expert witness Mr Woolley… It created substantial gaps in the whole of ASIC's case.
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> The decision by ASIC not to allege any breach of duty in making the loan, or any breach of duty in any of the series of variations to the loan limit before 2012, was likely to have been based on the nature and terms of the MPF. As I have explained, the fund was reasonably high risk and was only open to wholesale or sophisticated investors who invested through financial advisers.
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> ASIC's allegations against the three remaining directors were that the directors breached their duties of care and diligence under s 180(1) of the *Corporations Act* 2001 (Cth) in causing or permitting LMIM to approve the August 2012 Variation. This breach by each director was based on the allegation that each caused LMIM to breach its duties by failing to act as a prudent trustee and that each exposed LMIM to a foreseeable risk of harm, namely civil proceedings by unitholders in the MPF."

[33] Accordingly, it appears that the risk of exposure to a pecuniary penalty order in the present case is properly to be seen as the risk that ASIC may institute a claim for such an order against the second defendant in respect of the subject matter of the plaintiff's claim in this proceeding. That has nothing or little to do with the subject of the now resolved Federal Court proceedings.

The authorities as to the degree of risk

[34] Although the first defendant is not a respondent to the present application a submission was filed on his behalf because the same or similar questions will possibly arise in this case in relation to his defence.

[35] The second defendant submits that this is a case where there are "circumstances [that] should… be seen as exceptional and as justifying a departure from the general rule"[6]

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6 *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation* (1979) 42 FLR 204, 211.

of the kind that justify a general order to permit the second defendant to continue to file and serve a defence that departs from the pleading requirements of the rules of court for a civil proceeding.

[36] The second defendant submits that an important factor is whether the circumstances and seriousness of the allegations have the effect that a proceeding for a pecuniary penalty order may be likely, referring to *QC Resource Investments Pty Ltd (in liq) v Mulligan*.[7]

[37] However, some of the cases relied on by the first defendant suggest a lower threshold of risk is material. In *QC Resource Investments*, Edelman J said that the "position in the authorities… is not wholly pellucid". I agree. Nevertheless, some of the differences in expression and approach are explicable, as Edelman J's analysis in *QC Resource Investments* showed, by having regard to the context in which the particular statements were made.

[38] First, cases like *Anderson v Australian Securities and Investments Commission*[8] where the claim by ASIC was to impose a pecuniary penalty order, are more likely to call for a general order to depart from the pleading requirements of the rules of court for a civil proceeding, because the very object and claim in the proceeding is to impose a pecuniary penalty order against which the penalty privilege is raised. An admission in such a proceeding has a different consequence than an admission in a case between different parties like the present case. Generally speaking, an admission by a party in one proceeding is not available against the party in another proceeding in favour of a different party. The position was summarised by Edelman J in *QC Resource Investments*:

> "…where the proceedings are *themselves* for a penalty then any fact which is admitted, or any positive fact which is pleaded in response, might easily be seen immediately to expose the respondent to a penalty. There will be exceptions. For instance, if the respondent's position were that there was some basic legal basis upon which the applicants' claim for a penalty was defective, independently of any facts, then that should be pleaded.
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> In contrast, in a civil case which does not seek any penalty something more will be required before dispensation from pleading rules can be given. The reason why something more is required is because any effects of pleadings upon privilege will usually be less direct. For instance, a pleaded admission that is not admissible in separate penalty proceedings might expose the respondent to a penalty if it could start a train of enquiry that would lead to a penalty. I do not accept the submission… that this could never occur. To the contrary, it is easy to imagine circumstances in which a partial admission could substantially change the complexion of the case and lead to a train of enquiry which exposes the respondent to a penalty."[9]

The risk in this case

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7 [2016] FCA 813 [24].

8 [2013] 2 Qd R 401.

9 *QC Resource Investments Pty Ltd (in liq) v Mulligan* [2016] FCA 813 [22]-[23].

[39] The second defendant describes the events the subject of the claim in the present case as extending over an eight year period, but that is a mischaracterisation. The alleged contraventions relate to a single subject potentially considered over a period between November 2010 until 21 June 2011 by which point the decision was made to split the litigation settlement proceeds between the FMIF and the MPF in the ratio of 65:35.

[40] The second defendant submits that there is a real and appreciable risk that ASIC will be able to use full pleadings in this proceeding to bring a proceeding against the second defendant because ASIC has left open the prospect of commencing a new proceeding for a pecuniary penalty order against her if circumstances change, so that if the plaintiff establishes its claim against the second defendant in this proceeding it is almost inevitable that the facts necessary to establish a civil penalty liability will also be established. Alternatively, the second defendant submits that if she were to comply with the pleading requirements of the rules of court for a civil proceeding that would provide ASIC with information for a train of inquiry that could lead to a proceeding by ASIC.

[41] In a practical sense, it is difficult to accept these submissions. First, on the assumption that any loss was suffered by the plaintiff about when the deed poll was executed on 21 June 2011,[10] the remaining window of opportunity for ASIC to commence a proceeding within time is between the present and about 22 June 2017, unless there were any grounds to extend the limitation period.

[42] Second, it may be too simplistic to say that success by the plaintiff in the present proceeding would establish all the facts necessary for liability to a pecuniary penalty order.

[43] A compensation order for a contravention of a corporation/scheme civil penalty provision under s 1317H may be made if "damage resulted from the contravention". In the present case, the claim is for the amount of the MPF settlement payment that was allocated to and paid for the benefit of the MPF or the amount that exceeded the funds advanced or used from the MPF for the Bellpac proceeding.

[44] It is not yet clear what the damage was to the plaintiff as a corporation, although the FASOC alleges that the MPF settlement payment was the loss.

[45] The funds so allocated or paid were not paid away from the plaintiff's own funds but in effect were paid by or on behalf of the plaintiff as responsible entity and trustee to the account and funds held on behalf of one trust instead of to another account and fund held on behalf of another trust. I note that the FASOC does not allege that the present trustee of the MPF (who is also a defendant) is unable to repay any overpaid amount or that the plaintiff is obliged to restore the wrongly paid trust funds of the FMIF from its own funds in priority to any liability of the trustee of the MPF to pay any such amount. However, it may be that the payment of the MPF settlement payment resulted in damage to the FMIF as a scheme, without more.

[46] The possibility of a pecuniary penalty order in the present case would appear, in part, to turn on the requirement that the contravention "materially prejudices" the interests of the corporation or the scheme or its members or is "serious": s 1317G(1)(b)(i) and (iii). A "serious" contravention is one that is "grave or significant" according to some

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[10] I note the analysis in *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 524, 530 and 532.

cases.[11] Without forming any concluded view, the facts presently alleged in this proceeding do not suggest that must be a foregone conclusion in the present case. There is no allegation of dishonesty or deliberate wrongdoing.[12]

[47] As to "materially prejudice", involvement by a company in the wrongful payment of UN held funds to the benefit of the Government of Iraq was held not to materially prejudice the interests of a company.[13] But there do not appear to be settled principles as to what is required to make out the required material prejudice. In the present case, it may be that the payment of the MPF settlement payment materially prejudiced the FMIF as a scheme, without more. But that is not common ground on the hearing of this application. The question whether it materially prejudiced the plaintiff as a corporation may be more complex.

[48] Third, in any event, there is no reason revealed by the evidence to expect that a defence of the second defendant would give grounds or direct explanations for her non-admission of facts or direct explanations for her denial of facts or allegations of further facts that will lead on a train of inquiry that might cause ASIC to start a proceeding before the limitation period has expired.

[49] A few examples will show the point more clearly.

[50] Paragraph 30A alleges that on or about 6 December 2010, the plaintiff as responsible entity of the FMIF and as trustee of the MPF instructed WMS Chartered Accountants in writing to provide an opinion about what wold be a fair and reasonable split of the likely proceeds. Paragraph 30D alleges that on or about 7 March 2011 WMS Accountants provided a (written) report containing the opinion sought in par 30A.

[51] Similarly, par 30B alleges that on or about 14 March 2011, the plaintiff as responsible entity of the FMIF and as trustee of the MPF instructed Allens Arthur Robinson to provide advice as to whether a proposed split of proceeds from the proceeding of 65 percent for the FMIF and 35 percent for the MPF was legally acceptable given that the plaintiff was in a position of conflict. Paragraph 30E alleges that on or about 28 March 2011, Allens provided that advice sought in par 30B.

[52] Paragraph 31A and the particulars under that paragraph in paras (a), (b) and (e) allege that the second defendant knew or ought to have known most of the facts alleged in prior paragraphs of the pleading.

[53] Paragraph 35 alleges the amount of the MPF settlement payment. Paragraph 36 alleges that the MPF settlement payment was made by the plaintiff from the amounts payable to the plaintiff as responsible entity of the FMIF and to PTAL under the Gujurat contract and the Deed of Release.

[54] Paragraph 37B alleges that the plaintiff as trustee of the MPF accepted and retained the MPF settlement payment.

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11 *Re Idyllic Solution Pty Ltd; Australian Securities and Investments Commission v Hobbs* (2013) 93 ACSR 421, 449 [109]; *Tasmanian Spastics Association; Australian Securities Commission v Nandan* (1997) 23 ACSR 743, 752.

12 Compare *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640, 643 [12].

13 *Australian Securities and Investments Commission v Ingleby* (2012) 91 ACSR 66, 74 [56]. However this decision was reversed on appeal although not on this point: *Australian Securities and Investments Commission v Ingleby* (2013) 39 VR 554.

[55] It is difficult to forsee how the responses to those allegations might start a train of inquiry of the postulated kind. By definition, the court cannot be in a perfect position to make that assessment. But it is for the party claiming the dispensation from the usual rules to show the "something more" required to satisfy the court as to the extent of the risk.

[56] Paragraphs 41 to 43, 47 to 49 and 50 to 54 are not allegations made against the second defendant. It is difficult to understand, therefore, how she can either be obliged to plead to them or what her basis for a claim of penalty privilege might be in relation to them.

[57] It is unnecessary and would be inappropriate to go further. The parties did not address the extent to which the second defendant would be obliged to respond to the current pleading if the order relieving her generally from the usual rules as to pleading in a civil proceeding (except for the nominated paragraphs) were terminated.

Conclusion

[58] Taking the approach of Edelman J in *QC Resource Investment* as the guide, in my view, the second defendant has not shown or identified the "something more" amounting to the exceptional circumstances that justify an order to permit the second defendant to continue with a defence that generally relieves her from the pleading requirements of the rules of court for a civil proceeding because of penalty privilege.

[59] I have reached that view even though it was not particularly clear that the circumstances that have changed have greatly affected the risk of exposure of the second defendant to a proceeding for a pecuniary penalty order. It might be correct to say that there is a real question whether a general order relieving the second defendant should have been made in the first place.

[60] In the circumstances, the appropriate course is to direct the second defendant to file and serve an amended defence complying with the pleading requirements of the rules of court for a civil proceeding, but leaving it for the second defendant to make any just claim of penalty privilege on a fact by fact basis. In that way, if there is a true objection on the ground of penalty privilege, the objection can be made in each individual instance.

[61] If the plaintiff challenges any claim of privilege, the second defendant should be required to serve an affidavit upon the plaintiff in support of each relevant claim setting out the facts as to the basis on which she apprehends that compliance with the rules would tend to incriminate her or expose her to a penalty. If there remains a dispute about whether any claim of penalty privilege is properly made, an application may then be made by the plaintiff challenging the particular claim.