

IN THE HIGH COURT OF AUSTRALIA  
BRISBANE REGISTRY

No. B29 of 2019

BETWEEN: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Appellant

and

MICHAEL CHRISTODOULOU KING

First Respondent

and

ACN 101 634 146 PTY LTD (IN LIQUIDATION)

Second Respondent



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### FIRST RESPONDENT'S REPLY ON THE CROSS-APPEAL

#### Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.
2. These submissions are in reply to paragraphs 10 to 16 of the ASIC Reply filed 23 August 2019 ("ASIC [10]-[16]").

#### Part II: REPLY

3. ASIC [13] and [15] contain submissions to the effect that even if the finding by the Court of Appeal that Mr King "approved and authorised" the use of RBS funds was erroneous, it would have made no difference to the outcome of Mr King's appeal. This is not correct.
4. In this regard the Court of Appeal accepted two bases, as justifying the finding that Mr King participated in a relevant way to make him knowingly concerned in MFSIM's contraventions (in support of its dismissal of Ground 11):

(a) that there was no error in the primary judge's reasoning that Mr King approved and authorised the use of the RBS funds: CA1 [163]; CAB 531; and

(b) alternatively and in any event, it was not necessary for ASIC to prove that Mr King had some conduct that was causative of the contravention: CA1[168], CAB 533. On that basis, the Court of Appeal held that the evidence showed Mr King's "encouragement of (to say nothing of any direction to) Mr White": CA1[169]; CAB 533.

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5. The same consequences do not flow from both findings. The latter finding by the Court of Appeal was plainly an alternative finding that Mr King was involved in the contravention, even if it could not be proved that “the contravention would not have occurred but for his conduct”: CA1[168], **CAB 533**.
6. Mr King’s submission is that, absent the finding referred to in subparagraph 4(a) above, it would have been required to set aside the compensation order because his contravention would not have been established as causally related to the loss alleged to have been suffered. The compensation order was thus dependent upon the primary finding that Mr King “approved and authorised” the use of funds (being the only other finding of participation to justify the contravention, and the only finding of participation that could support the compensation order) (at CA1[163], **CAB 531 - 532**).
7. Contrary to the suggestion in ASIC [15], the fact that the Court did not consider whether the damage suffered had “resulted from” Mr King’s “encouragement” of Mr White – which was not causative of the contravention (and so, by extension, the loss) – does not assist ASIC. This is because it was unnecessary to do so in circumstances where it had already made the “approved and authorised” finding.
8. With respect, the level of generality adopted at ASIC [16] is unhelpful, and has a tendency – as it did with the courts below – to lead to error. There ASIC refers to Mr King’s apparent ability to influence major decisions over the entire group, and his “preparedness” to issue a directive rather than advice. These examples were analysed by the Court of Appeal as part of its detailed discussion of Mr King’s influence, and ultimately findings were made that are inconsistent with the conclusion for which ASIC now contends (see RS[59]).
9. Nor do the matters identified in ASIC [16] support a finding of *participation* by Mr King, absent the further step taken by the Court of Appeal (and which Mr King attacks by his cross-appeal) that but for Mr King’s imprimatur, Mr White would not have made the \$103m payment. The matters referred to in ASIC [16] could arguably support a finding of a knowledge, but Mr King’s “preparedness” to intervene or “apparent ability” to influence matters – without evidence that he did so on this particular occasion, or the impugned finding that it would not have happened without his having intervened – does not assist ASIC’s submission.

Dated: 28 August 2019



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