

# What's in a name? High Court stipulates broad definition of company "officer"

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In the recent case of *ASIC v King & Anor*, the High Court has held that the definition of "officer" under the Corporations Act 2001 (Cth) (**Corporations Act**) is not limited to persons who occupy a recognised "office" within a company. Whether someone is an officer must be determined by reference to the facts and circumstances of their involvement in a company's affairs. The decision has particular significance for corporate groups, as the actions of a person in an overall position of influence in relation to a particular group company can mean they are an officer of that company.

## The facts

Michael King was the CEO and executive director of MFS Ltd, a formerly listed public company that was the parent company of the MFS group of companies (**MFS Group**). MFS Investment Management Pty Ltd (**MFSIM**) was the responsible entity of Premium Income Fund (**PIF**), a managed investment scheme which was the "flagship fund" of the MFS Group.

Mr King and other senior personnel of MFSIM arranged for the company to draw down \$150 million on an existing loan facility. The monies were used to pay the debts of other MFS Group companies, with no consideration, promise of repayment or security to PIF, leaving PIF and its investors at risk.

## Issue - who is an officer?

The principal issue in the High Court appeal was whether Mr King was an "officer" of MFSIM and could therefore be held liable by ASIC for breaching duties placed on officers under the Corporations Act.

The Corporations Act defines officer as:

- a director or secretary of the company; or
- a person:
  - who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the company; or
  - who has the capacity to affect significantly the company's financial standing; or
  - in accordance with whose instructions or wishes the directors of the company are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the company).

Mr King was not a director of MFSIM at the time of the relevant conduct, having ceased to be a director in 2007.

ASIC contended that notwithstanding Mr King was not a director of MFSIM at the relevant time, he was nonetheless an "officer" of that company being *"a person...who has the capacity to affect significantly the corporation's financial standing"*.

The primary judge's finding that Mr King acted as the *"overall boss of the MFS Group"* and assumed

*“overall responsibility”* for MFSIM was not in dispute.

Mr King argued that he was not an officer of MFSIM because his ability to affect the company's financial standing did not derive from his occupation of an “office” within the company, in the sense of a recognised position with rights and duties attached to it. The Queensland Court of Appeal found in favour of Mr King in this regard and overturned the primary judge's decision. ASIC then appealed the decision to the High Court.

## **Decision - Mr King was an “officer”**

The High Court reversed the Queensland Court of Appeal decision and held that:

- the definition was not limited to a person acting in a recognised or identifiable “office” within the company;
- rather, it was concerned with the facts of the relationship between an individual and a company in relation to the company's affairs;
- the construction contended by Mr King was not consistent with the purpose of the Corporations Act to protect shareholders and creditors;
- determining whether a person has capacity to affect significantly a company's financial standing involves identifying:
  - their role in relation to the corporation;
  - what they did or did not do (whether on a particular occasion or over time); and
  - the relationship between their actions or inaction and the financial standing of the corporation; and
- the facts and circumstances *“compelled the conclusion”* that Mr King was a person who had the capacity to significantly impact the MFSIM's financial standing and therefore, he was an officer of MFSIM.

## **Takeaways**

- This decision will be welcomed by regulators who will now be able to capture more broadly individuals who influence a company's financial standing or affairs.
- ASIC Commissioner John Price has said the decision *“sends a clear signal to anyone running a company - in name or in effect - that they should be responsible and held accountable for their actions.”*
- Persons who may not necessarily have an identifiable or recognised position in the company may still be an officer and owe duties to the company – this can include key group executives or executive committees of a holding company whose decisions affect other companies within the group.
- Broadly, the duties of an officer are to act with the degree of care and diligence that a reasonable person would exercise if they were a director or officer in the corporation's circumstances, exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose and not improperly use their information or to gain advantage for themselves or another.

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