High Court clarifies meaning of 'officer'

Claire Roberts reports on *Australian Securities and Investments Commission v King* [2020] HCA 4

The High Court has confirmed that there is no requirement that a person occupy a named office or recognised position with rights and duties attached to it in order to be an 'officer of a corporation' within the meaning of that term in the Dictionary of the *Corporations Act 2001* (Cth) (Act).

The implications for corporations are significant; albeit, probably in some form expected. For example, the Australian Law Reform Commission had suggested that statutory reform might be needed if the Court had found otherwise.[1]

Background

Mr King was the chief executive officer and an executive director of MFS Limited, a formerly listed public company that was parent of a group of companies including MFS Investment Management Pty Ltd (MFSIM). Mr King was not a named director or secretary of MFSIM.

Whether Mr King was an 'officer' of MFSIM pursuant to s 9 of the Act was central to the issue of whether he was involved in various contraventions of the legislation.

Section 9 of the Act relevantly provides that: 'officer of a corporation means:

(a) a director or secretary of the corporation; or

(b) a person:

(i) who makes, or participates in making, decisions that affect the whole, or substantial part, of the business of the corporation; or

(ii) who has the capacity to affect significantly the corporation's financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation 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 corporation); or …'

Earlier findings

Justice Douglas, sitting in the Supreme Court of Queensland, was satisfied at first instance that the evidence was 'sufficient to establish at least that [Mr King] participated in the making of decisions that affected the whole or a substantial part of MFSIM's business and had the capacity to affect significantly its financial standing': (2016) 308 FLR 216 at [679].

The Queensland Court of Appeal found otherwise. In joint judgment, Morrison, McMurdo JJA and Applegarth J indicated that they felt compelled to follow a persuasive proposition from an earlier Full Federal Court judgment: *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296 (*Grimaldi*). *Grimaldi*, in Court of Appeal's reasoning, stood for the proposition that an officer must act in an office – with the consequence that 'Para(b) of the definition [in the Act] cannot be applied literally..': (2018) 134 ACSR 105 at [246]-[247].

Five justices of the High Court overturned the Court of Appeal's finding on this issue across two concurring judgments.

Interpretation of the provision

Chief Justice Kiefel, Gageler and Keane JJ found that the Court of Appeal's approach had the consequence of leaving s 9(b) without work to do (at [18]). It was clear to their Honours that: 'While para (a) of the definition captures individuals who hold a named office in a corporation for which the Act prescribes certain duties and functions, para (b) captures those who do *not* hold such an office': [24]. Concerns about an excessively broad definition were misplaced, because the word '*of*' in s 9 functions to require that the officer be 'engaged, in fact, in the management of [the corporation's] affairs or property': [39].

Their Honours also indicated that the Court of Appeal had misstated the effect of *Grimaldi*, which was in fact consistent with the High Court's interpretation ([48] – [59]).

Justices Nettle and Gordon agreed with the orders proposed and expanded upon the legislative history of the provision, as well as some of the Court of Appeal's factual findings. Their Honours emphasised that a broad assessment of a person's overall influence will be required before they are found to fall within one of the sub-categories of s 9(b) – for example, not just *any* decision (in relation to ss (i)) or *any* capacity (in relation to ss (ii)) will suffice (at [90]-[91]). Their Honours concluded that Mr King's involvement and impact on MFSIM was extensive and significant, and that without holding an office, his degree of influence over the general conduct of MFSIM had the capacity to affect significantly its standing (at [125]).

General remarks on regulatory oversight

Both judgments emphasised that people who control a corporation should be subject to regulatory oversight whether or not they hold a formal title.

Chief Justice Kiefel, Gageler and Keane JJ noted that the Act is intended to protect shareholders and creditors (at [46]):

> 'If the CEO of the parent company of a group of companies is allowed to act in relation to other companies in the group untrammelled by the duties that attach to officers in each of the other companies in the group, shareholders and creditors would be left exposed to an obvious risk. It would be an extraordinary state of affairs if those who actually determine the course of a company's financial affairs could avoid responsibility for their conduct by the simple expedient of deliberately eschewing any formal designation of their responsibilities.'

Justices Nettle and Gordon considered that while smaller companies may well be controlled by their directors, larger companies often feature a board 'at the apex of the managerial pyramid', with levels of management beneath them occupying 'substantial room for people outside the boardroom to have a significant effect on a corporation' (at [94], [95]). Their Honours alluded to how broadly the term officer might be construed – '… we do not accept that bankers and other third parties could never fall within one or more or para (b) (i)-(iii) of the definition of 'officer' in s 9 of the [Act]': [95], [96].

Conclusion

The Court's decision provides an important clarification.

As the regulator noted, it '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.'[2] BN

ENDNOTES

1 ALRC 'Corporate criminal responsibility – individual liability for corporate misconduct – an update' (March 2020).

2 ASIC media release 20-060MR (11 March 2020): 'High Court of Australia rules in favour of ASIC in finding Group CEO was an 'officer' of subsidiary', quoting Commissioner John Price.