

HIGH COURT RULES THAT GROUP CEO WAS AN 'OFFICER' OF SUBSIDIARY

On 11 March 2020, the High Court changed the perception that had previously been accepted that an officer of a corporation was a person who held an office in a corporation in the ordinary sense of that word, and who participated in the management of that company by implying that rationale to the definition of officer in the Corporations Act 2001 (Cth) (Act).

The Court held that paragraph (b)(ii) of the definition of 'officer of a corporation' contained in section 9 of the Act is not limited to those persons who hold or occupy a named office in a corporation or a recognised position with the rights and duties attached to such offices, and can extend to persons that do not hold or occupy those positions.

The Facts

Mr King was the CFO and executive director of MFS Ltd (MFS) a publicly listed company that was the parent company of the MFS group of companies (Group).

The Group mainly traded as fund managers and offered financial services alongside travel and related services that were managed through a range of different related entities.

Within the Group, MFS Investment Management (MFSIM), being a wholly owned subsidiary of MFS, was the responsible entity for a managed investment scheme (PIF). King was a director of MFSIM until his resignation on 27 February 2007.

On 29 June 2017, MFSIM entered into a \$200 million loan facility with the Bank of Scotland which facility stipulated that the loan funds were to be used solely for PIF's purposes (BOS Facility).

Shortly after the loan funds were extended to MFSIM, a loan facility provided by Fortress Credit Corporation (Australia) II Pty Ltd (Fortress) that had been made available to another entity within the Group at an earlier time, became repayable in circumstances where the other entities in the Group including the facility recipient were cashflow tight.

Mr King entered into discussions directly with Fortress to extend the repayment date of that facility and ultimately negotiated a deal to pay Fortress part of the debt forthwith and extend the balance of that repayment to a later time.

Mr King then proceeded to instruct Mr White, the deputy CEO of MFS and an executive director of MFSIM who reported to Mr King and who customarily acted in accordance with Mr King's instructions and wishes in his role as an executive director of MFSIM, to arrange for a draw down from the BOS Facility, which funds were in turn used to pay the immediate payment due under the Fortress deal.

Mr King resigned as CEO of MFS on 21 January 2008.

Court Ruling

In the circumstances where:

1. Mr King acted as the Group CEO, notwithstanding that he did not hold or assume an office in any of the subsidiaries in the Group; and
2. each company's management within the Group customarily acted in accordance with his directions; and
3. Mr King was a person who had the capacity to affect significantly a corporations' financial standing within the meaning of the Act,

he was an officer of each of those companies, including MFSIM, pursuant to section 9 of Corporations Act.

As an officer of MFSIM his conduct in directing the drawdown of the funds from the BOS Facility in a manner that was not consistent with BOS facility terms, breached Section 601FD of the Act related to the obligations of an officer with respect to managed investment schemes, notwithstanding that he was not a director or acting in any internal management capacity within MFSIM.

Mr King effectively ceased being an officer of the companies within the Group, including MFSIM on his resignation as CEO of MFS on 21 January 2008.

How will this impact you

If you occupy the position of a director or secretary or act in those capacities, or are in any way involved in a significant way in the management of a company even if you hold no office in that company, you may be considered nevertheless to be an officer of that company and subject in all respect to the duties of an officer that are governed by the Act.

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