FEDERAL COURT OF AUSTRALIA

Maxi EFX Global AU Pty Ltd v Australian Securities and Investments Commission [2021] FCAFC 59

Appeal from:	*Australian Securities and Investments Commission v Maxi EFX Global AU Pty Ltd* [2020] FCA 1263
File number:	NSD 1092 of 2020
Judgment of:	**MARKOVIC, BANKS-SMITH AND ABRAHAM JJ**
Date of judgment:	23 April 2021
Catchwords:	**CORPORATIONS** – appeal from the order of the primary judge under s 70(3) of the *Australian Securities and Investments Commission Act 2002* (Cth) that the appellant be required to comply with a notice to produce documents – where the primary judge found the appellant was in possession of documents for the purpose of production pursuant to the notice – where the documents were held by third party service providers – where the primary judge found the appellant lacked a reasonable excuse for failing to comply with the notice – whether the primary judge gave adequate consideration to the lack of cooperation by the third party service providers – whether the primary judge was compelled to accept certain documentary evidence in circumstances where it was not contradicted – whether the primary judge erred in finding it was necessary to lead evidence from the director of the appellant – whether the primary judge took irrelevant matters into account – appeal dismissed
Legislation:	*Australian Securities and Investments Commission Act 2002* (Cth) ss 33, 70 *Corporations Act 2001* (Cth) s 1323
Cases cited:	*Australian Securities and Investments Commission v Maxi EFX Global AU Pty Ltd* [2020] FCA 1263 *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 *Comptroller-General of Customs v Zappia* [2018] HCA 54; (2018) 265 CLR 416 *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118

	House v The King (1936) 55 CLR 499 *Integrated Financial Group Pty Ltd v Australian Securities and Investments Commission* [2004] WASC 75; (2004) 183 FLR 8 *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129 *Reyes v United States of America* [2020] FCAFC 149 *Warren v Coombes* [1979] HCA 9; (1979)142 CLR 531
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	74
Date of hearing:	1 February 2021
Counsel for the Appellant:	Ms M Painter SC with Mr F Tao
Solicitor for the Appellant:	Piper Alderman
Counsel for the Respondent:	Mr D Thomas SC with Ms A Zheng
Solicitor for the Respondent:	Clayton Utz

ORDERS

NSD 1092 of 2020

BETWEEN:	**MAXI EFX GLOBAL AU PTY LTD ACN 625 283 785** Appellant
AND:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Respondent

ORDER MADE BY:	**MARKOVIC, BANKS-SMITH AND ABRAHAM JJ**
DATE OF ORDER:	**23 APRIL 2021**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant is to pay the respondent's costs to be agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 The appellant, Maxi EFX Global AU Pty Ltd trading as EuropeFX (EuropeFX), challenges the order made by the primary judge under s 70(3) of the *Australian Securities and Investments Commission Act 2002* (Cth) (ASIC Act) that it be required to comply with a notice issued to it by the respondent (ASIC) seeking production of documents. After considering the statutory context and the totality of the evidence before the Court, the primary judge was satisfied that an order requiring compliance should be made: *Australian Securities and Investments Commission v Maxi EFX Global AU Pty Ltd* [2020] FCA 1263.

2 EuropeFX's challenge is directed to two of the issues raised before the primary judge: *first*, whether EuropeFX had possession, custody or control of books which were said to be in the physical possession of third party service providers overseas; and *second,* whether EuropeFX nevertheless had a reasonable excuse for not producing some or all of the books that it was required to produce, but had not produced, in answer to the notice.

3 For the reasons given below, the appeal must be dismissed.

Background

4 EuropeFX, provided an online platform for investors to trade foreign exchange currencies and contracts for difference, among other derivatives. It did so in its capacity as a corporate authorised representative of an Australian financial services licensee, Union Standard International Group Pty Ltd. EuropeFX conducted its business with the assistance of various service providers: Antelope Systems Ltd (Antelope), E.M. Coperato Ltd (Coperato), XYX Media Technologies Ltd, Affilimedia Global Ltd (Affilimedia), BAFF Affiliate Networks Ltd, Bolacom Ltd and Global Win Solutions Ltd (the Providers): at [53]. The only Providers of which evidence was led before the primary judge in relation to the issues on this appeal, are Antelope, Affilimedia and Coperato. EuropeFX also utilised services provided by its parent, MaxiFlex Ltd (MaxiFlex).

5 On 30 July 2019, ASIC commenced an investigation under s 13 of the ASIC Act into the affairs and conduct of, inter alia, EuropeFX: at [5]. On 9 December 2019, ASIC expanded the investigation into the conduct of the directors, officers, employees and agents of, inter alia, EuropeFX: at [5].

6 On 12 December 2019, in separate proceedings the Court, on ASIC's application, made various orders pursuant to s 1323 of the *Corporations Act 2001* (Cth) against, amongst others, EuropeFX and its director, Mr Pedro Sasso. Those orders included asset preservation orders the effect of which was, relevantly, to prevent EuropeFX and Mr Sasso from dissipating their assets. EuropeFX was also required, in that context, to file an affidavit which, in summary, disclosed its financial position and certain information concerning its financial services business. The asset preservation orders have been varied on a number of occasions. Under the terms of the restraining orders, EuropeFX was not permitted to make any payment of more than $50,000 unless it first obtained ASIC's consent. The asset preservation regime remains on foot.

7 As part of its investigation, on 20 December 2019, ASIC issued a notice to EuropeFX (the Notice) pursuant to s 33(1) of the ASIC Act, by which it sought production of 19 categories of books and records, which are in a schedule to the Notice set out in [13] of the primary judge's reasons.

8 From 9 January 2020 onwards, EuropeFX asserted to ASIC that the Notice was invalid on multiple bases. From 14 February 2020 to 19 May 2020, EuropeFX produced a large quantity of documents to ASIC pursuant to the Notice: at [29], including some under categories 4, 5, 6, 8 and 12: at [40]. EuropeFX unilaterally limited its production in respect of those categories by only producing in respect of a subset of its clients known to have made formal complaints (the Known Complainants): at [40]. The Known Complainants were only 110 of EuropeFX's approximately 14,060 clients: at [33].

9 ASIC contended that EuropeFX had not fully complied with categories 4, 5, 6, 8, 12 and 19 of the Notice. On 22 April 2020, ASIC commenced proceedings under s 70 of the ASIC Act seeking to further compel EuropeFX's compliance with the Notice.

Primary judgment

10 The evidence before the primary judge relating to the Providers is summarised at [52]-[75]. The accuracy of the summary is not challenged. It is not necessary to refer to all the detail, the following paragraphs will suffice for present purposes:

> [52] On 26 August 2019, EuropeFX and a company called **MaxiFlex** Limited executed a document entitled "Services Agreement". MaxiFlex was a company apparently incorporated in Cyprus. While there was no evidence about the relationship between EuropeFX and MaxiFlex, it appeared to be common ground that MaxiFlex was EuropeFX's parent company. In those circumstances, it might be seen as

somewhat unusual that the Services Agreement provided that MaxiFlex would provide services to EuropeFX. In any event, those services were extensive and appeared to involve EuropeFX effectively outsourcing the conduct of its entire operation to MaxiFlex. The relevant services to be provided by MaxiFlex included: "Back office services", which included all "administrative related services" including "settlements, clearances, record maintenance and clients relations issues resolution"; "Dealing services", which included "control and manage the trading risk of [EuropeFX]"; "Support services", which included "Technical support to the Company's clients"; "Marketing services"; "Technology / IT services"; "Billing services"; and "Sales services". There was no express term in the Services Agreement which dealt with the ownership, possession, custody or control of documents created or received pursuant to, or in pursuance of, the Services Agreement.

…

[55] It would seem that EuropeFX's request for MaxiFlex to contact the Providers in relation to the provision of documents relating to Known Complainants was not met with any resistance. Ms Moore's evidence was that "EuropeFX received tranches of the requested documents from MaxiFlex between February and March 2020 and again in May 2020". It would thus appear that, at least as at May 2020, there were no apparent difficulties in EuropeFX being able to obtain, apparently through MaxiFlex, copies of documents responsive to the Notice which were in the physical possession of the Providers. There was no suggestion that the Providers had refused to provide the documents if they were not paid to do so.

[56] While it was Ms Moore's understanding that MaxiFlex somehow managed the services that were provided by the Providers, there was also documentary evidence which suggested that EuropeFX had entered into contracts with the Providers directly. There was, however, no evidence from Mr Sasso, or any other officer or employee of EuropeFX, about the circumstances in which those contracts had been entered into or how the services supposedly provided pursuant to them were actually provided. In any event, following is a short summary of those agreements.

[57] On 1 July 2018, EuropeFX entered into what was called an "Affiliate Agreement" with Affilimedia, a company apparently incorporated in Belize. The general effect of that agreement was that Affilimedia would use its "best efforts and devote reasonable amounts of [its] time, personnel and resources for the purpose of referring potential Customers to" a website operated by EuropeFX or "any of its related entities".

[58] On 4 May 2018, EuropeFX and Antelope, a company said to be incorporated in Cyprus, executed a document titled "Service Agreement Terms and Conditions". The general effect of that agreement was that Antelope granted EuropeFX the "right and licence" to access certain software. The software was said to relate to "the business of operating an online financial trading brokerage". It is worth noting that the agreement provided that, upon termination, Antelope would return to EuropeFX "all or any part of the Personally Identifiable Information in its possession". On 26 January 2020, EuropeFX and Antelope executed an "Addendum to Service Agreement (Addendum)" the effect of which appeared to be to extend the term of the original agreement for 12 months from 26 January 2020.

…

[65] In any event, Ms Moore's evidence was that on 6 May 2020, Mr Sasso sent letters by email to each of the Providers and MaxiFlex. Those letters requested the Providers to provide information about what documents they had in their possession on behalf of EuropeFX. The letters were annexed to Ms Moore's affidavit. So too

were the responses to those letters which were apparently received by Mr Sasso, though, as noted earlier, Mr Sasso was not called to give evidence. Following is a brief summary of those responses as recorded in the documentary evidence.

…

[71] Antelope responded to Mr Sasso's letter by letter dated 12 May 2020. It stated that it held the following types of documents on behalf of EuropeFX: the financial questionnaire which was completed by EuropeFX's clients upon registration; the "KYC" [Know Your Client] documents provided by EuropeFX's clients; and the "personal information" of EuropeFX's clients. Antelope also asserted that it would take "around 400 hours … to manually extract, analyse, prepare, run quality control tests on the Documents, and then sort and copy the Documents in to a new server". Exactly why Antelope considered that it needed to do all those things, why it was necessary for it to do them manually and why it would supposedly take 400 hours was not explained. Also not explained was the basis of Antelope's assertion that it was somehow entitled to charge EuropeFX €120 per hour to give it back its documents. It did not, for example, point to any provision of its agreement with EuropeFX which entitled it to charge anything for doing so.

[72] Mr Sasso sent a further letter to Antelope concerning the nature of the relevant data held by it. He did not, however, question the basis upon which Antelope asserted that it was able to charge €120 per hour to retrieve its documents, or why it had to do that task manually or why it would supposedly take 400 hours. Instead, he queried whether Antelope would require EuropeFX to pay an outstanding invoice prior to "processing" its request. That "Dorothy Dixer" provoked a fairly predictable response from Antelope. Not only did Antelope say that it required its previous invoice to be paid, it asserted that EuropeFX was in breach of the agreement and threatened legal action.

11 The primary judge explained the statutory context in which the issues before him were to be decided as follows at [76]-[77]:

[76] Section 70 of the ASIC Act provides as follows:

> (1) This section applies where ASIC is satisfied that a person has, without reasonable excuse, failed to comply with a requirement made under this Part (other than Division 8).
>
> (2) ASIC may by writing certify the failure to the Court.
>
> (3) If ASIC does so, the Court may inquire into the case and may order the person to comply with the requirement as specified in the order.

[77] On 20 April 2020, ASIC forwarded a document to the Court the body of which was in the following terms:

> **Notice issued to Maxi EFX Global AU Pty Ltd under s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act)**
>
> On 20 December 2019, I issued on behalf of the Australian Securities and Investments Commission (ASIC) a notice to Maxi EFX Global AU Pty Ltd (trading as EuropeFX) under s 33 of the ASIC Act.
>
> ASIC hereby certifies that EuropeFX has failed to comply with

> paragraphs 4 to 6, 8, 12 and 19 of the notice. ASIC is satisfied that EuropeFX has failed to do so without reasonable excuse.

12 The primary judge then explained the nature of the inquiry including at [79]-[81]:

> [79] Certification by ASIC pursuant to s 70(2) of the ASIC Act enables, rather than obliges, the Court to inquire into the case: *Insurance and Superannuation Commissioner v* ***Glaser*** (1997) 79 FCR 505 at 509F-G. Certification will ordinarily provide a sufficient reason for the Court to conduct the contemplated inquiry into whether the notice had been complied with, at least in the absence of any attack on the bona fides of the certifying officer: *Glaser* at 510. There was no such attack in this matter.
>
> [80] Having embarked on such an inquiry, the Court has a discretion whether or not to make an order under s 70(3) of the ASIC Act that the person comply with the requirement: *Australian Securities Commission v* ***Kutzner*** [1997] FCA 1453; 25 ACSR 723 at 729. Amongst other things, the Court can consider whether the person has a "'reasonable excuse' for not complying with the requirement": *Kutzner* at 729. The Court may also decline to make such an order if to do so would be a futile exercise of power, or if the order would not promote the objects of the statute: *Kutzner* at 730-732.
>
> [81] The person who has been found to have failed to comply with a requirement bears the evidential burden of demonstrating a reasonable excuse for non-compliance: *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2017] VSC 573 at [82] (appeal dismissed and reasonable excuse not addressed: *Aurora Construction Materials Pty Ltd v Victorian WorkCover Authority* [2018] VSCA 165 at [4]-[5]).

13 The primary judge then referred at [82]-[83] to the principles in relation to what might constitute a reasonable excuse.

14 The primary judge at [111]-[133] then addressed the issues raised which are now the subject of this appeal. Immediately preceding this discussion the primary judge had addressed the principles relevant to the issue of possession, which are not now challenged.

15 The primary judge rejected EuropeFX's contention that it does not have "possession" of any further documents simply because any such documents are in the physical possession of the Providers: at [110]. That is the context in which the primary judge turned to address whether any documents which may be in the physical possession of the Providers could be said to be in the possession, custody or control of EuropeFX in the circumstances.

16 The primary judge referred to the relevant legal principles at [111]-[114]. Having referred, inter alia, to *Comptroller-General of Customs v Zappia* [2018] HCA 54; (2018) 265 CLR 416, *Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499 (*FCT v ANZ*) and *Integrated Financial Group Pty Ltd v Australian Securities and Investments Commission* [2004] WASC 75; (2004) 183 FLR 8 (*Integrated Financial Group*) the primary judge concluded that the question effectively is whether EuropeFX has de

facto power over the documents held by the Providers, or is otherwise able to produce those documents: at [114].

17 Applying those principles, the primary judge observed that it was at least not in dispute that MaxiFlex and at least Antelope held documents relating to clients other than the Known Complainants that fell within categories 4, 5, 6, 8 and 12 of the Notice: at [115].

18 The evidence established that EuropeFX relevantly had possession, custody or control of any documents that were generated in the course of its business but may be physically held by MaxiFlex or one or more of the Providers. His Honour concluded that the evidence was insufficient to demonstrate that any such documents were not in its possession, custody or control: at [116].

19 Thereafter the primary judge explained his reasons for so concluding.

20 Given the nature of the grounds it is convenient to repeat his Honour's conclusion at [117]-[128] in full:

> [117] First, as for documents which fall within the scope of the Notice to which MaxiFlex has access, there could be little, if any, doubt that MaxiFlex holds those documents on behalf of, or on account of, EuropeFX. They are plainly documents relating to EuropeFX's business. According to MaxiFlex's letter to Mr Sasso dated 12 May 2020, the documents held on servers which MaxiFlex is able to access include emails relating to EuropeFX's clients which were sent or received by EuropeFX's representatives and the trading histories of EuropeFX's clients. It may be inferred that MaxiFlex has access to servers which store those documents either pursuant to the Services Agreement between EuropeFX and MaxiFlex or some other agreement or arrangement between the two companies. As noted earlier, it was common ground, or not in dispute, that EuropeFX was a subsidiary of MaxiFlex.
>
> [118] In those circumstances, the apparent suggestion that EuropeFX is in no position to request or require MaxiFlex to return or provide those documents to it has no merit. It is also unsupported by any cogent or reliable evidence. The evidence, at its highest, is that MaxiFlex's letter dated 12 May 2020 asserts that MaxiFlex will charge EuropeFX for the time it takes its staff to extract manually the relevant documents and that it requires pre-payment of its estimated costs. The legal and factual basis upon which MaxiFlex is said to be entitled to charge its subsidiary for returning its documents is entirely unexplained. It was apparently not questioned by Mr Sasso on behalf of EuropeFX. For the reasons given later, that documentary evidence should be given little, if any, weight.
>
> [119] Second, effectively the same can be said concerning any documents which fall within the scope of the Notice which are held by the Providers. There could be little, if any, doubt that, to the extent that any of the Providers hold documents that fall within the scope of the Notice, they hold those documents on behalf of, or on account of, EuropeFX. They are plainly documents relating to EuropeFX's business which the Providers apparently hold simply because they provided services to EuropeFX in respect of the conduct of EuropeFX's business. It is difficult to see why, in those

circumstances, EuropeFX would not have a right to request or require the Providers to return to it the documents held by them on its account.

[120] The documentary evidence, such as it was, tends to support the contention that EuropeFX has the right to request or require the Providers to return its documents to it. That is clearly the case in respect of Antelope, which is one of the Providers who is said to hold, or have access to, documents responsive to the Notice. As discussed earlier, the Service Agreement Terms and Conditions between EuropeFX and Antelope contains an express term (clause 7.4) which provides that upon termination, Antelope was required, at EuropeFX's request, to either "return" to EuropeFX, or "archive, erase or destroy", information which was referred to as "Personally Identifiable Information". The definition of "Personally Identifiable Information" in the agreement indicates that it would include information relating to EuropeFX's clients. There would appear to be nothing in the agreement which would permit Antelope to charge EuropeFX for the return of that information.

[121] As was the case with the documents held by MaxiFlex, EuropeFX relied on letters, said to have been sent by Antelope and received by Mr Sasso, to suggest that it did not have possession, custody or control of the relevant documents. The first of those letters, which is dated 12 May 2020, indicates that Antelope holds "on behalf of" EuropeFX documents which were completed or supplied by EuropeFX's clients. That would appear to be a concession that the documents are EuropeFX's documents which Antelope holds on its behalf, presumably because it provided services to EuropeFX pursuant to the Services Agreement Terms and Conditions. Antelope also asserts, in that letter, that it is entitled to charge EuropeFX, pursuant to the terms of the Services Agreement Terms and Conditions, an hourly rate to "manually extract, analyse, prepare, run quality control tests … and then sort and copy the Documents". It does not refer to the clause of the agreement pursuant to which it asserts that it is entitled to levy those charges in order to comply with its contractual obligation under clause 7.4. Mr Sasso, in his response to this letter, does not ask Antelope to clarify the basis upon which it is entitled to levy the charge.

[122] For the reasons that follow shortly, the documentary evidence relied on by EuropeFX is deserving of little, if any, weight. That is all the more so given the absence of any evidence from Mr Sasso.

[123] Third, the apparent suggestion by EuropeFX that it is not in possession, custody or control of the documents held on its behalf by MaxiFlex and the Providers would appear to be of fairly recent origin. It did not feature at all in any of the initial correspondence between Piper Alderman, on behalf of EuropeFX, and ASIC or its lawyers. Perhaps more significantly, the evidence clearly indicates that EuropeFX had no difficulties whatsoever in initially retrieving documents from MaxiFlex and the Providers, albeit documentation which was intentionally restricted to the Known Complainants. Ms Moore's evidence was that someone, presumably Mr Sasso, requested MaxiFlex to ask the Providers to return to EuropeFX any documents responsive to the Notice in relation to Known Complainants. In due course, those documents were produced, presumably as a result of that request. There was no suggestion of any unwillingness, on the part of either MaxiFlex or the Providers, to comply with the request to provide those documents. Nor was there any suggestion that MaxiFlex or the Providers demanded that they be paid for their time in complying with the request, let alone paid in advance.

[124] There was no evidence which explained the supposed change in attitude of MaxiFlex and the Providers when Mr Sasso subsequently wrote to them concerning the provision of documents held by them which extended to clients who were not Known Complainants. The absence of any evidence from Mr Sasso generally, and in

respect of this topic specifically, was and is telling. It casts considerable doubt on the reliability and genuineness of the documentary evidence now relied on by EuropeFX. Indeed, the available inference, in all the circumstances, is that the letters from MaxiFlex and the Providers are little more than a self-serving contrivance and that the real reason why the documents have not been returned is an unwillingness or disinclination on the part of Mr Sasso to press genuinely for the return or provision of the relevant documents.

[125] It may also be observed, in this context, that the entire way that EuropeFX structured and carried on its business, at least according to the documentary evidence, appeared to be highly dubious and questionable. As has already been discussed, the documents suggested that EuropeFX outsourced virtually all of its operations to a number of businesses located in Cyprus, Belize and Israel, pursuant to a series of poorly drafted and highly questionable service agreements. Despite being the authorised representative of the holder of an Australian financial services licence, it appears to have done nothing, and retained no business records, in Australia. Its director, Mr Sasso, may have been able to give evidence and explain this business structure. He apparently chose not to do so.

[126] Fourth, the fact that EuropeFX had the capacity to procure MaxiFlex and the Providers to return or provide it with outstanding documents responsive to the Notice so it could produce those documents to ASIC was effectively conceded by EuropeFX when it made an open offer, at the commencement of the hearing, to consent to various orders. That offer was not accepted by ASIC as it was not content with the proposed orders for various reasons that it is unnecessary to consider. The proposed consent orders were, however, subsequently tendered and admitted into evidence. The proposed orders were plainly premised on the fact that EuropeFX was able to cause all outstanding documents responsive to categories 4, 5, 6, 8 and 12 which were held by Antelope, Coperato and MaxiFlex to be produced to ASIC. It is difficult to see how EuropeFX could have considered consenting to the proposed orders had it not relevantly been in possession, custody or control of the documents such that it was in a position to comply with them.

[127] It should be noted, in this context, that the production of documents held by Antelope pursuant to the proposed consent orders was conditional on EuropeFX paying what was said to be an outstanding invoice and the anticipated costs of producing the documents. Such payments had to be approved by ASIC as a result of the asset preservation orders made pursuant to s 1323 of the Corporations Act: see *Australian Securities and Investments Commission v Union Standard International Group Pty Ltd* [2020] FCA 603. While there was no evidence in this proceeding that ASIC had refused to approve the remission of monies overseas to pay the amounts claimed by Antelope, it is not difficult, in all the circumstances, to understand why ASIC might be reluctant to do so. Even if ASIC had refused to authorise any such payment, that would not demonstrate that EuropeFX does not relevantly have the possession, custody or control of the documents held by Antelope. Indeed, if anything, the inclusion, in the proposed consent orders, of a requirement that ASIC approve the payment fortifies the inference that the documentary evidence relied on by EuropeFX amounts to little more than a self-serving contrivance.

[128] In all the circumstances, EuropeFX's contention that it did not have possession, custody or control of the outstanding documents responsive to categories 4, 5, 6, 8 and 12 of the Notice which related to clients other than Known Complainants is rejected. The evidence, such as it was, supported the inference or conclusion that EuropeFX had such custody or control as was necessary to enable it to produce those documents. To the extent that the documents were in the physical possession of MaxiFlex and the Providers, at the very least EuropeFX had the right, power or

> capability of requiring those entities to return or provide those documents to it so it could produce them to ASIC. The documentary evidence which tended to suggest otherwise was deserving of little weight.

21 As to reasonable excuse, the primary judge noted that EuropeFX bore the evidential burden of establishing that it had a reasonable excuse for not having fully complied with the Notice and found that it did not discharge that burden: at [129].

22 The primary judge made observations as to the basis of the claim and that the evidence EuropeFX relied on was almost entirely documentary. Its director, Mr Sasso, did not give evidence. Nor did any other officer or employee of EuropeFX. His Honour concluded for the reasons already given, the documentary evidence relied on by EuropeFX should be given little, if any, weight: at [130]. The primary judge explained that in the absence of any evidence from Mr Sasso to explain why EuropeFX had not produced any documents relating to clients other than the so-called Known Complainants, it cannot be accepted that EuropeFX has any excuse, let alone a reasonable one, for its failure to comply fully with the Notice to date: at [131]. His Honour described the history of the matter and Mr Sasso's approach to the Notice at [131]-[132] concluding that without evidence from him "to explain fully and justify this sorry history of compliance, it cannot be accepted that EuropeFX has or ever had a reasonable excuse for its non-compliance": at [132]. The primary judge also noted at [133] that to the extent that EuropeFX relied on Ms Moore's evidence concerning the inconvenience and expense involved in fully complying with the Notice it is tolerably clear that mere inconvenience and expense would not ordinarily provide a reasonable excuse for non-compliance. The primary judge further observed that if compliance with the Notice is burdensome and expensive, that would appear to be in large part due to the way in which EuropeFX chose to conduct its business. The primary judge concluded that it could hardly be reasonable, in those circumstances, for it to now complain about the trouble and expense involved in it producing documents relating to its operations to ASIC: at [133].

23 Accordingly, the primary judge found that ASIC has made good its case that EuropeFX had failed to comply fully with the Notice. The primary judge was satisfied that EuropeFX had not produced all documents within its possession, custody or control, which fall within categories 4, 5, 6, 8 and 12 of the Schedule to the Notice: at [134].

Appeal grounds

Grounds 1-6: the primary judge erred in finding that EuropeFX was in possession, custody or control of the documents (ground 1) and made errors in so finding (grounds 2-6)

Submissions

24 In respect to ground 1, EuropeFX submitted that the primary judge erred in finding that it was in possession, custody or control of documents responsive to categories 4, 5, 6, 8 and 12 of the Notice, in circumstances where the unchallenged documentary evidence was that the Providers had possession of the said documents and had refused or failed to provide the documents to EuropeFX despite its requests that they do so. It submitted that the primary judge's reasoning in [115]-[128] of the judgment reveals reliance on what was said to be EuropeFX's "right to request or require the Providers to return its documents to it", which was said to be an error, citing *Integrated Financial Group* at [70].

25 It was submitted that it cannot be controversial that EuropeFX did not have physical control of the documents, which were held electronically offshore. EuropeFX sought the documents from the Providers and the refusal of the Providers to unconditionally deliver up any documents was not a factor which could reasonably be sheeted home to EuropeFX. ASIC's downstream refusal to approve payment needed to effect provision of the documents both exacerbated the Providers' refusal and constituted a fresh cause of the refusal. EuropeFX submitted that the primary judge failed to give any or adequate consideration to the lack of cooperation of the Providers, or the existence of intervening circumstances which abrogated any private rights which EuropeFX may have had to access the documents held by the Providers. Thereafter grounds 2-5 rely on what EuropeFX contended were specific errors by the primary judge reflective of that approach. During the appeal those grounds were, at least to some extent, addressed together with this ground. Ground 6 is a catch all and does not relevantly add to the other grounds.

26 In respect to grounds 2 and 3 it was alleged that the primary judge failed to give any or adequate regard to: each Provider's failure and/or refusal to provide the requested documents to EuropeFX, where such failure and/or refusal had the effect of abrogating materially any power or control which EuropeFX may have otherwise had to the documents in the possession of the Providers; and EuropeFX's written request to ASIC for approval of a payment to at least one Provider, namely Antelope, and ASIC's refusal to provide such consent. Submissions were directed to the evidence. Simply put, it was contended that the evidence demonstrated that

EuropeFX made requests of each Provider: Antelope's response set conditions for its accession to the request; Coperato did not respond before the hearing; and Affilimedia has never responded. The evidence also demonstrated that EuropeFX made a written request to ASIC for permission to pay the sum demanded by Antelope by letter dated 7 May 2020, which was rejected. It was submitted that ASIC's refusal to permit EuropeFX to make the payments to Antelope was a material intervening event which had the effect of severing EuropeFX's ability to procure the documents, even assuming that it had such ability to direct the actions of any Provider.

27 In respect to ground 4 EuropeFX alleged that the primary judge erred in finding that it was necessary for it to lead evidence from its sole director, Mr Sasso, in circumstances where it adduced sufficient documentary evidence addressing such matters, with submissions being directed to demonstrating inter alia that the primary judge's criticisms in this regard were misplaced.

28 In respect to ground 5 it was alleged that the primary judge erred by taking into account a number of extraneous and irrelevant matters which "betray a chauvinistic approach which is unfounded", in the sense that one's own country is the only true and trustworthy country. EuropeFX criticised the reference to the Providers having been said to be located in "far-flung places" which were "exotic". It was submitted that given the Providers were in Cyprus, Israel and Belize, it is not apparent that they should be described in that way. It was submitted that "[i]t is a matter of public record that Cyprus is a member of the European Union, a jurisdiction which has significant financial regulation"; that "Israel is a world leader in information technology services and a modern success story"; and that "Belize is a member of the Commonwealth (it was formerly named British Honduras) and the UN and a founding member of the World Trade Organisation". The physical location of the Providers was submitted to be irrelevant, in circumstances where the services were internet-based technological services such as client relationship management online platforms or VOIP telephony capabilities. It was submitted that the primary judge's comments about the quality of the drafting of the service agreements was irrelevant to the issues. EuropeFX also submitted that the primary judge appeared to be critical of EuropeFX for not retaining any business records in Australia although there was, and is, no requirement that it do so. This was said to reflect a misunderstanding of the internet-based nature of document retention. Further, it was submitted that in the context of the primary judge's criticism of the Providers being headquartered abroad, there was criticism of EuropeFX's purported failure to give evidence through Mr Sasso of its business structure.

29 ASIC took issue with EuropeFX's interpretation of the relevant legal principles which were said to stem from *Integrated Financial Group*, and emphasised that the consideration of this ground is to take place in the context of the relevant statutory provisions. ASIC submitted that the primary judge's conclusions were well-founded on the evidence. It submitted that EuropeFX oversimplifies the primary judge's reasoning because the analysis was not confined to the identification of EuropeFX's legal right to its documents, held on its behalf by the Providers. Rather, the primary judge also considered whether there was evidence that, in practical terms, this right was frustrated by the Providers' failure or refusal to produce documents to EuropeFX.

Consideration

30 Although grounds 1-6 are interrelated, it is appropriate to address the propositions underlying the grounds, which are demonstrated by the first ground.

31 That ground is premised on two propositions: *first*, that s 33 of the ASIC Act is unconcerned with the legal relationships between the person who has possession of the book, or the person with the proprietary or other legal interest in it, but rather the question focuses on the practicality of whether the recipient of the notice is able to produce it (eschewing technical and legal rights); and *second*, as there was uncontradicted documentary evidence that the Providers had possession of the documents and had not provided them to EuropeFX despite its requests for them to do so, the Court was bound to accept that evidence as a complete answer to EuropeFX's inability to comply with the Notice. Neither proposition can be accepted.

32 We address each separately.

33 As to the *first* proposition, although EuropeFX submitted that it did not cavil with the primary judge's summation of the statements of principle concerning the expression "possession, custody or control" and no ground of appeal alleges any error of legal principle, grounds 1-6 are premised on an interpretation of the legal principles inconsistent with those described by the primary judge.

34 Relevantly, that summation of the principles is at [111]-[114] where the primary judge, under the heading "possession custody and control" observed:

> [111] In *Zappia*, which was a case concerned with whether a person relevantly had the "possession, custody or control" of dutiable goods for the purposes of s 35A(1) of the *Customs Act 1901* (Cth), it was emphasised that those words had to be read in context, that none of them had a fixed legal meaning and that the "statutory

collocation" connotes a degree of power or authority in relation to the relevant thing. The plurality said (at [30]):

> The critical reference within the description to "the possession, custody or control" must be read in that context, recognising that none of the terms "possession", "custody" or "control" has a fixed legal meaning and that the power or authority of a person in relation to a thing connoted by any one or more of those terms in statutory collocation is a question of degree. The individual terms, used disjunctively, serve to indicate both that the requisite degree of power or authority is not closely confined and that the requisite degree of power or authority can arise from such a range of sources that, depending on the circumstances, one term might be more appropriate to use than another.
>
> (Footnote omitted.)

[112] Nettle J also emphasised the importance of context and referred (at [45]) to the "end points of the range of contexts" being, at one end, statutory provisions having the object of obtaining production of something in a person's custody or control, and, at the other end, statutory provisions having the object of attributing an intent to sell to a person in possession, custody or control of specified goods. His Honour gave the case of *FCT v ANZ* as an example of the former case. This case and s 33(1) of the ASIC Act is also such a case. His Honour stated that in such a case, the statutory context implied that custody or control extended to "persons having de facto power of disposition over the thing which is sought to be produced".

[113] In *FCT v ANZ*, it was held that a bank had control over documents which it held in a safe deposit box, within the meaning of a statutory provision which empowered the Commissioner of Taxation to require a person to produce documents "in his custody or under his control". Gibbs ACJ reasoned (at 520), in that context, that the aim of the relevant provision was a "practical one of having documents produced" and that it was not concerned with the "legal relationship of the person to whom the notice is given to the documents which he is required to produce", but rather with "the ability of the person to whom the notice is addressed to produce the documents when required to do so". The question, therefore, was "has the person to whom the notice is given such custody or control as renders him able to produce the documents?".

[114] The same can be said about s 33(1) of the ASIC Act. It is "concerned with the ability of the person to whom the notice is addressed to produce the books when required to do so": see *Integrated Financial Group* at [70]. The question, then, is effectively whether EuropeFX has de facto power over the documents held by the Providers, or is otherwise able to produce those documents.

35 EuropeFX's submission as to the legal test is based on *Integrated Financial Group*, principally at [69]-[70]. There Roberts-Smith J stated:

> [69] The first is that s 33 of the ASIC Act is not concerned with property rights in, nor legal entitlement to, possession of books. It does not matter that a person who has possession of a document may not have a legal right to possession (***Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)*** (1981) 34 ALR 105, 125-6).
>
> [70] The second principle, allied to the first, is that s 33 is not concerned with the legal relationships between the person who has possession of the book, the person with the proprietary or other legal interest in it and ASIC. The section is concerned with the ability of the person to whom the notice is addressed to produce the books when

> required to do so (***Federal Commissioner Taxation v ANZ Bank***, *supra* per Gibbs ACJ at 520).

36 However, properly read, the reasons of Roberts-Smith J in [69]-[70] do not equate to the proposition that whether a person has a proprietary or other legal interest in the documents is irrelevant to a notice pursuant to s 33 of the ASIC Act. Rather, his Honour says no more than it does not matter that a person who has possession may not have a legal right to possession.

37 As can be seen, Roberts-Smith J cites in support of the second proposition Gibbs ACJ in *FCT v ANZ* at 520. There the High Court considered a relevantly identical version of the legislation where the Court below had held that the legislation was indifferent to the questions of ownership or entitlement and that the relevant compulsion was over a document which the recipient was able to produce. In that context, Gibbs ACJ stated:

> … The aim is the practical one of having documents produced so that an officer of the Taxation Department can obtain from them information concerning the income or assessment of some person. The section is not concerned with the legal relationship of the person to whom the notice is given to the documents which he is required to produce: it is concerned with the ability of the person to whom the notice is addressed to produce the documents when required to do so. Therefore, in my opinion, a notice can be given under the section to any person who has physical control of the documents in question, whether he has or has not the legal possession. For example, if an employer gives his books of account to a servant to keep on his behalf, a notice under s. 264 can be given to the servant, who has physical control, although the master has the legal possession. However, "control" in s. 264 (1) is not limited to physical control, and in the example given the notice could be given to the master, who has legal control of the documents, as well as to the servant. Indeed I can see no reason why a notice cannot be given to a person who wrongfully has physical control of the documents, or to a person who has parted with possession but retains a right to legal possession: the question is, has the person to whom the notice is given such custody or control as renders him able to produce the documents?

38 That further makes plain that the passage in *Integrated Financial Group* does not bear the meaning contended for by EuropeFX.

39 As to the *second* proposition, EuropeFX's submission is also based on the documentary evidence being "uncontradicted" (the term used in the appeal ground) or "unchallenged", the terms being used interchangeably during its submissions. Referring to the evidence as uncontradicted or unchallenged in this context is apt to mislead. Evidence is admitted subject to its inherent strengths and weaknesses. True it is that ASIC did not lead evidence contradicting the documentary evidence relied on by EuropeFX. However, it challenged the adequacy of the evidence. The evidence and submissions before the primary judge reflect that position. After all, ASIC challenged that EuropeFX has a reasonable excuse to fail to comply with the Notice. Moreover, it does not follow from the absence of contradictory evidence that

the primary judge was required to accept the evidence at face value, with the weight and significance which EuropeFX contended flowed from it. The primary judge was required to assess the evidence in the context of the whole of the evidence before the Court and the issues required for determination: whether EuropeFX had established that the documents were not within its possession custody and control. Even if the underlying evidence is accepted, it does not necessarily follow that it has the consequence contended for.

40 Against that background we turn to the findings said to reflect error. EuropeFX's factual submission is necessarily affected by its misconstruction of the legal test.

41 These grounds challenge the primary judge's factual findings. EuropeFX submitted this Court could make the assessment on the evidence, it being documentary. It can be accepted that in a case such as this where the evidence is documentary and no issues of witness credit arise, this Court is in as good a position as the primary judge: *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129 (*Lee v Lee*) at [55]-[56] citing *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 551 and *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [25]. However, the identification of error remains indispensable, whether that be in relation to a step in the reasoning process, or even just by reason of the result arrived at: *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [45], [49]; see also [4]-[7]; *Lee v Lee* at [56]; *Reyes v United States of America* [2020] FCAFC 149 at [44]-[45].

42 ASIC contended, and EuropeFX accepted in reply, that this is an appeal from a discretionary decision, and that this Court is dealing with a *House* error: *House v The King* (1936) 55 CLR 499 at 504-505. In that respect, EuropeFX submitted that the primary judge took into account irrelevant matters which was said to enliven the prospect of factual review by this Court.

43 Grounds 2 and 3 can conveniently be addressed together.

44 As will be apparent from the recitation of the submissions above, these grounds appear to be premised on the basis that the Providers' refusal or failure to provide the documents abrogates any power or control over them that EuropeFX may have had. Interlinked with this was said to be ASIC's refusal to provide consent to pay Antelope.

45 It is plain that the primary judge had significant misgivings about the quality of the documentary evidence and its contended significance. In our view he was right to do so.

46 As a starting point, as the primary judge properly concluded, there could be little if any doubt that MaxiFlex holds the documents on behalf of, or on account of, EuropeFX: at [117]-[118],

or that the Providers hold the documents on behalf of, or on account of EuropeFX: at [119], [121]. This appears consistent with the language of the service agreements, and the correspondence between Mr Sasso and the Providers: at [120]-[121]. Although EuropeFX submitted that the description in the correspondence about the nature of the relationship, in particular that the Providers hold the documents on behalf of EuropeFX, should not be relied on because the correspondence was written by non-lawyers, that cannot be accepted. The primary judge also properly concluded that the evidence supports the contention that EuropeFX has the right to request or require the Providers to return the documents to it: at [119]-[120]. Indeed, given that the Providers are holding the documents on behalf of EuropeFX, as the primary judge observed, it is difficult to see why that would not be so: at [119].

47 Moreover, as the primary judge observed, the fact that EuropeFX had the capacity to procure MaxiFlex and the Providers to return or provide it with outstanding documents responsive to the Notice so it could produce those documents to ASIC was effectively conceded by EuropeFX when it made an open offer, at the commencement of the hearing before the primary judge, to consent to various orders: at [126]. Although the proposed orders in respect to Antelope are drafted on condition, for example the payment of the fee requested being approved by ASIC, the orders in respect to the other Providers were not so conditioned. Regardless, the orders are plainly premised on the basis that EuropeFX was able to cause all outstanding documents responsive to the Notice which were held by Antelope, Coperato and MaxiFlex to be produced to ASIC: at [126]. It "effectively conceded" that EuropeFX had the capacity to cause those Providers to give production. That the orders are prefaced by "without admission" does not alter that.

48 Indeed, the Providers had previously produced documents under the Notice, with no suggestion of any unwillingness to comply with the request to provide those documents, or any demand for payment: at [123]. There was also no suggestion of any requirement of payment for them doing so: at [123].

49 In respect to Antelope, although initially only documents relating to the Known Complainants were requested by EuropeFX (as a result of a unilateral decision by it to limit the request) and that number was vastly smaller than the Notice required, there was no evidence before the primary judge that there was any difference in terms of difficulty in doing so. EuropeFX submitted that the inference could be drawn from the letter from Antelope stating how long the procedure would take, and what would be needed to undertake the process. As EuropeFX

acknowledged during the course of the hearing, "that is as far as the evidence takes us". Therein lies the issue that confronted the primary judge. The evidence was limited. As the primary judge concluded at [124], there was no evidence which explained the supposed change in attitude of MaxiFlex and the Providers when Mr Sasso subsequently wrote to them concerning the provision of documents held by them which extended to clients who were not Known Complainants.

50 There are obvious issues on the face of the correspondence. For example, there is no explanation in the correspondence, or in any other evidence, as to the calculation of the fee Antelope purports to charge EuropeFX before providing the documents to it, nor the basis on which it is entitled to claim it. The clause of the service agreement between Antelope and EuropeFX relied on by EuropeFX during its submission as the basis of the charge, relates to a "custom development fee". There is no apparent basis for such a fee to be charged in this instance, as there was no customer development in retrieving documents. Such a description appears, at the very least, to be inapt.

51 ASIC's refusal to provide consent to enable EuropeFX to pay Antelope did not have the effect of severing EuropeFX's ability to produce the documents. Although it may be accepted that, contrary to the primary judge's conclusion at [127], there was evidence from which it could be found that ASIC had refused consent, as asserted by ground 3, the error is to no effect. The primary judge concluded that "[e]ven if ASIC had refused to authorise any such payment, that would not demonstrate that EuropeFX does not relevantly have the possession, custody or control of the documents held by Antelope. Indeed, if anything, the inclusion in the proposed consent orders of a requirement that ASIC approve the payment fortifies the inference that the documentary evidence relied on by EuropeFX amounts to little more than a self-serving contrivance": at [127].

52 In any event, ASIC's refusal is not the end of the matter. An obvious and reasonable step, if payment was genuinely necessary for EuropeFX to comply with the Notice, was for it to approach the Court for an order varying the freezing order to release funds for that purpose. That was not done. In the absence of that step, regardless of what might be said about the genuineness of the correspondence, it could not be contended, based on that correspondence alone, that the Notice could not reasonably be complied with.

56 We note also that, as ASIC submitted, clause 3.1 of the service agreement with Antelope, provided a right of access by EuropeFX to utilise its proprietary software. In that context it was

submitted that there was no evidence that EuropeFX had attempted to exercise this right to access the services to obtain data. EuropeFX was not in a position to accept that was so, but rather submitted the clause was unclear. Even if that be so, this reflects the more fundamental problem, that unanswered issues are raised on the face of the documents relied on by EuropeFX.

57 In respect to Affilimedia, that there is a letter from EuropeFX requesting production and no reply received, does not, without more, provide a proper basis to contend that EuropeFX cannot provide the documents. It was in this context that the primary judge made a number of observations about the absence of evidence from Mr Sasso, to which we return below.

58 In respect to Coperato, although as at the date of the hearing it had not responded to the correspondence, EuropeFX informed the primary judge during the hearing that Coperato had been in contact, and since the hearing had produced material which had been provided to ASIC. There was no evidence of this before the primary judge, and no attempt to provide further evidence after the hearing. Rather, the primary judge was left to decide the issue before him in respect to Coperato on only the limited evidence presented. Despite that position, the appeal was advanced on the basis that "at least in respect of the Affilimedia, Coperato and Antelope, EuropeFX was not relevantly in possession of the documents".

59 It follows that the submission that the primary judge erred in respect to Coperato should also be rejected when considered in the context that it did produce documents following the hearing, which reflects that the primary judge was correct to conclude that the documentary evidence established that EuropeFX could procure production from Coperato, as that in fact happened.

60 Ground 4 is directed to the failure to call Mr Sasso.

61 The ground as drafted is premised on the basis that the primary judge erred in finding it was necessary for EuropeFX to lead evidence from Mr Sasso in circumstances where EuropeFX adduced sufficient documentary evidence addressing the matters to do with the relationship between it and the Providers. The ground is rather circular because it presupposes the sufficiency of the documentary evidence. Once it is accepted, as it must be, that the primary judge was not obliged to accept that documentary evidence and that it was a complete answer to EuropeFX's failure to comply with the Notice, the significance of Mr Sasso not giving evidence is self-evident.

62 EuropeFX criticises the primary judge's comments about the significance of the absence of evidence from Mr Sasso, primarily on the basis that there was nothing he could have added in relation to the topics of concern. It was submitted, for example, that he could not give any admissible evidence about the Providers' change of position: see [124]. That submission cannot be accepted.

63 There are topics on which Mr Sasso could have given evidence which would have shed light on the issues that were before the primary judge. For example, in respect to the change of position by the Providers, Mr Sasso could have given evidence of the process that had been undertaken and the communication and interaction with the Providers which resulted in the provision of the documents relating to the Known Complainants. He could have given evidence as to what else he did, if anything, apart from send the disclosed email correspondence to facilitate the production of the remaining documents. Certainly, it would have been expected to be followed up with the results in evidence. There could have been evidence of what additional steps had been taken to enforce the legal rights to the documents. There are unanswered questions arising from the correspondence. Mr Sasso could also have given evidence of the structure of the companies. This is in a context where, in assessing the nature of the relationship between EuropeFX and the Providers, EuropeFX's submission was that the Court ought not to attach weight to the description in correspondence, where the Providers spoke of holding documents on behalf of EuropeFX. The evidence was silent on these topics. In that context, and given the content of the correspondence which was, in effect, the only evidence relied on, there is no proper basis to contend that the evidence was to be accepted on its face as a complete answer.

64 As will be recalled, ground 5 is directed to the primary judge taking into account extraneous matters that, it is contended, were not relevant to the issue to be determined. The nature of the discretion being exercised by the primary judge is reflected by the statutory scheme, described above at [11].

65 Three of those matters, grounds 5(a), (b) and (c), relate to the location of the Providers. The primary judge did observe that EuropeFX outsourced virtually all of its operations to a number of businesses located in Cyprus, Belize and Israel, and that despite being the authorised representative of the holder of an Australian financial services licence, it appears to have done nothing, and retained no business records, in Australia: at [125]. That is factually correct. Although EuropeFX contended that any location was irrelevant given the nature of the

platforms on which the documents were stored, the answer is not as simple as that. For example, as is apparent from the service agreement with Antelope which is located in Cyprus, any proceedings against them would be determined by the Cypriot judicial system. Given that EuropeFX is based in Australia, to be required to use a foreign justice system with whatever that might entail necessarily makes the situation different from using the Australian justice system. Once that is accepted, any submission as to location being irrelevant cannot be accepted.

66 The primary judge's references to these locations as "far-flung", which appears in [133], were made when his Honour was addressing the evidence of Ms Moore concerning the inconvenience and expense involved in EuropeFX fully complying with the Notice. In that context the primary judge found, a conclusion not challenged on appeal, that "[i]t is difficult to imagine that compliance with the Notice would have been particularly burdensome or expensive had EuropeFX not apparently chosen to outsource virtually all its operations and administration to entities domiciled in such far-flung places as Cyprus, Belize and Israel. It is hardly reasonable, in those circumstances, for it to now complain about the trouble and expense involved in it producing documents relating to its operations to ASIC": at [133]. The description "far-flung" was plainly not significant to the reasoning. Similarly, the reference to "exotic" locations in [2], is of no practical moment to the reasoning relevant to this appeal. The use of the descriptors, which might be considered perhaps as imprudent and apt to distract from the reasoning, was no more than a judicial flourish that ultimately did not affect the reasoning.

67 The matters identified in grounds 5(d)-(f), which concerned EuropeFX's business structure and its contractual arrangements with the Providers, appear to be based on the observations at [125]. The primary judge did not err by taking into account those matters. This is in a context where EuropeFX was seeking to establish a reasonable excuse by correspondence between it and the Providers and the documentary evidence (being service agreements) as to the nature of these business arrangements. It is plain that the primary judge formed a view about the quality of this material, for example at [67]-[73]. That the documentary evidence "appeared to be highly dubious and questionable" and the service agreements were "poorly drafted", is relevant to the weight to be attached to them: at [125], see [39] above.

68 EuropeFX has not established that the primary judge took into account irrelevant considerations.

69 EuropeFX has failed to establish grounds 1-6, noting as explained above, that ground 6 is a catch-all ground.

Ground 7: A reasonable excuse for failing to fully comply with the Notice

70 This ground, as drafted is said to relate to the Notice in so far as it required production from XYX Media Technologies Ltd, Affilimedia, Antelope, Coperato, Affiliate Networks Ltd, Bolacom Ltd and Global Win Solutions Ltd, all seven of the Providers. Indeed, the orders sought by EuropeFX, if successful on this appeal, relate to these seven entities. As ASIC properly pointed out, despite the argument being directed to only three of the Providers, with no reference to the remaining four, the orders sought are directed to all seven Providers. As ASIC rightly contended, EuropeFX "is trying to leverage off submissions in relation to only three providers… to overturn the judgment below in relation to all seven".

71 EuropeFX's submissions have been premised on the assertion that only Antelope, Coperato and Affilimedia have or may have possession of any documents responsive to the Notice, and that none of the remaining providers have any relevant documents. It is a proposition that ASIC disputes. There does not appear to be any finding by the primary judge to that effect.

72 In any event, as explained above in relation to grounds 1-6, EuropeFX has not established any error in the findings of the primary judge. It was accepted that this ground was "inevitably interconnected", but that it was also a stand-alone ground. In that context no additional or separate argument was advanced in relation to this ground.

73 Given the conclusions above, EuropeFX has not established this ground.

Conclusion

74 The appeal is dismissed, with costs.

I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Banks-Smith and Abraham.

Associate:

Dated: 23 April 2021