



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: S20/2021
File Title: Walton & Anor v. ACN 004 410 833 Limited (Formerly Arriui
Registry: Sydney
Document filed: Form 27E - Reply
Filing party: Appellants
Date filed: 03 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

BETWEEN:

Michael Thomas Walton
 First Appellant

Anthony Bogan
 Second Appellant

and

ACN 004 410 833 Limited (Formerly Arrium Limited) (In Liquidation)
ACN 004 410 833
 First Respondent

KPMG
 Second Respondent

Colin Galbraith
 Third Respondent

APPELLANTS' REPLY

Part I: PUBLICATION

1. These reply submissions are in a form suitable for publication on the internet.

Part II: ARGUMENT IN REPLY

2. **Material Facts (1RS [5], [55]; 2RS [5]-[6], [49]):** The present Grounds of Appeal reflect the concessions made at the special leave hearing. The Appellants do not understand the First Respondent's submissions (at 1RS [5]) to say otherwise.
3. The Appellants do not rely on creditors potentially benefitting from the disclosure of material going to insolvent trading. However, the Appellants do not concede that the examination would not disclose material going to insolvent trading or that the potential for such disclosure would not be relevant to the public interest: *cf* 1RS [5(c)]. So much is apparent from the Appellants' submissions at the special leave hearing.¹

¹ at [2021] HCATrans 018, p 2, lines 26 to 34 and p 6 lines 177 to 182.

4. ASIC's authorisation of the Appellants is not in issue: CA [122]; **CAB 126**. Further, the Court of Appeal and the trial judge both held that information provided to ASIC tended to suggest the Appellant's predominant purpose as ultimately found and which is not contested: CA [36] and [129] at **CAB 92 and 128**, *cf* 2RS [6], [46]; 1RS [43].

10 5. The Court of Appeal found, and it is not contested, that the Appellants' predominant purpose was to investigate and pursue a potential claim *in their capacity as shareholders* against the directors or auditors of Arrium: CA [36] and [129] at **CAB 92 and 128**. The Respondents' assertions that the Appellants are pursuing their claims in some other capacity ought to be rejected: *cf* 1RS [55]; 2RS [49]. No claim can now be made by the Appellants against Arrium. Any speculation that such a claim, if made, would be postponed under a, now superseded, form of s 563A has no practical bearing on the capacity in which the Appellants applied for the summons under s 596A.

20 6. **Purpose of examinations power (1RS [13]-[17], [58]-[66]; 2RS at [12]-[22])**: The Respondents say any summons, except perhaps a summons sought by ASIC, must be sought for the purpose of conferring a benefit on Arrium or its creditors or, on the First Respondent's case, must have that effect.² Both are wrong, and the intermediate appellate decisions which support that contention ought not now be followed.

7. The First Respondent (at 1RS [13]) refers to the two purposes identified by Mason CJ in *Hamilton v Oades*,³ the second of which is:

“... to enable evidence and information to be obtained to support the bringing of criminal proceedings in connection with the company's affairs.”

30 8. The First Respondent properly acknowledges that this second purpose is not now restricted to criminal proceedings but also encompasses civil penalty proceedings: 1RS [17]. However, the types of proceedings served by the second purpose are not restricted to criminal and civil penalty proceedings for the following reasons.

² The Second Respondent says all summons are an abuse where the applicant does not have the predominant purpose of conferring a benefit on the company: 2RS [51]-[53] and Notice of Contention **CAB 149-152**.

³ (1989) 166 CLR 486 at 496.

9. First, the First Respondent fails to address the full range of ASIC's powers which are not restricted to seeking "civil penalty orders". By way of example, ASIC may apply for compensation orders,⁴ obtain injunctive relief,⁵ pursue civil action to recover damages or property on behalf of individuals,⁶ and intervene in civil proceedings.⁷ Further, while ASIC may seek declaratory relief under s 1317E, which is a "civil penalty order", the declaration is conclusive evidence of the matters stated⁸ and so may be relied upon by litigants in civil proceedings.

10. Secondly, s 597(14) provides that the record of examination may be used in "any legal proceeding against the person". That is, the legislation facilitates and does not restrict the use of the transcript to particular classes or types of proceedings.

11. Thirdly, the submission appears to be contrary to subsequent authority. As noted at AS [75], in *Re New Cap Reinsurance*⁹ Santow J referred to civil prosecutions by eligible applicants fulfilling the wider statutory purpose, including creditors. That reasoning was cited by Lander J¹⁰ before echoing, without reference to "criminal proceedings", the purpose identified by Mason CJ in the following terms:

20 " . . . enabling evidence and information to be obtained to support the bringing of proceedings against the examinable officers and other persons in connection with the examinable affairs of the corporation." (emphasis added)¹¹

12. The question is, assuming this purpose to be satisfied, whether the summons must also benefit the company, its creditors and (possibly all its) contributories. No such qualification finds its way into *Hamilton v Oades* with respect to the second purpose.

⁴ For example, s 1325(2) of the *Corporations Act 2001* (Cth) (**CA Act**); s 12GM(2) of the *Australian Investments and Security Commission Act 2001* (Cth) (**ASIC Act**) (which is available in respect of a contravention of non-civil penalty provisions such as s 12DA of the ASIC Act).

⁵ For example, s 1324(2) of the CA; s 12GD of the ASIC Act (which is available in respect of a contravention of non-civil penalty provisions such as s 12DA of the ASIC Act) and s 177 of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP Act**) (which is available in respect of any contravention of the Act).

⁶ For example, s 50 of the ASIC Act and s 275 of the NCCP Act.

⁷ For example, s 1330(1) of the CA; s 12GO of the ASIC Act and s 209 of the NCCP Act.

⁸ s 1317F of the CA.

⁹ In *Re New Cap Reinsurance Corp Holdings Ltd* [2001] NSWSC 835 at [14]-[16].

¹⁰ *Evans v Wainter*, at 213, [232].

¹¹ *Evans v Wainter* at 217, [252] at proposition 3.4.

13. Both Respondents rely on the statement of Lander J at [249] to the effect that eligible applicants ought only be authorised where the summons is for the benefit of the corporation, its contributories or its creditors otherwise “every corporation would be at risk of having its examinable officers or its officers or other witnesses examined to the possible detriment of the corporation”: 1RS [62]; 2RS [19]. This concern is warranted where the company is still trading and its directors may be summonsed as Lander J held, erroneously, at 191-192, [84]. The same concerns no longer apply given only corporations in external administration may now be the subject of such orders: AS [42].
- 10 14. Finally, the legislative purpose cited at paragraph 11 above has history, context and content. It justifies examinations designed to promote the honest conduct of corporations for the protection of shareholders, creditors and interested members of the public: AS [52]-[54]. Notwithstanding the broad definition of “examinable affairs”, this is not a purpose which typically is served by examinations concerning defamation proceedings or slip and fall claims against the company contrary to the *reductio ad absurdum* argument of the Second Respondent: *cf* 2RS [14], [18], [20]-[21]. In any case, none of those examples provided by the Second Respondent are analogous to the present case where the Appellants do not seek to claim against Arrium.
- 20 15. **ASIC’s purposes (1RS [39]-[45], 2RS [40]-[43]):** The First Respondent submits (at 1RS [39]), that ASIC’s purposes, which include giving effect to the laws it administers, must also be to benefit a company its creditors or contributories if that is held to be the purpose of s 596A. This argument is circular and ought to be rejected. Neither Respondent addresses the point which is that the statutory context of ASIC’s ‘eligible applicant’ status informs the objects of s 596A and negates the ‘benefit’ requirement.
- 30 16. ***Re Imperial* (1RS [21]-[28]):**¹² The capacity of an 1886 Chancery Division decision to inform the purposes of the presently drafted examinations power is doubtful in light of ASIC’s emerging role and must, in any case, be rejected. The case is not analogous: *cf* 1RS [21]. In *Re Imperial* the plaintiff sought to enforce his security (a mortgage on calls) and to obtain specific performance. It was no part of the proposed examinations to interrogate or expose any potential breaches of duty or misconduct on the part of the

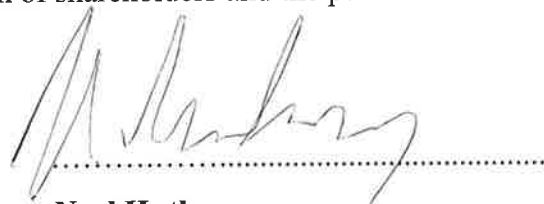
¹² *Re Imperial Continental Water Corporation* (1886) 33 Ch D 314.

directors in their management of the company. Its treatment in *Hong Kong Bank v Murphy*¹³ has no bearing on the present case: cf 1RS [27].

17. Of greater relevance is *In Re North Brazilian Sugar Factories*.¹⁴ In that case, representative shareholder applicants alleged that the company had issued a misleading prospectus and illusory balance sheets: at 84. Citing their decision in *Re Imperial* the year before, their Lordships rejected the application on the basis that its purpose was to obtain evidence in support of actions by individual shareholders for their own benefit against the directors. As noted at AS [70]-[71], this statement of principle was expressly rejected by McLelland J in *Re BPTC*¹⁵ when the case was cited in argument. The ratio of McLelland J was distinguished in *Re Excel*¹⁶ but not stated to be wrong.

18. **Notice of Contention (2RS [51]-[53]):** The Second Respondent's contention is not dispositive of the appeal in circumstances where the Appellants concede that neither their subjective purpose nor any incidental outcome will benefit the company or its creditors. Further, it is wrong in principle. A creditor seeking to have its debt claim satisfied by a third party is not acting outside the purposes of the winding up which includes creditor protection. Similarly, members investigating claims of fraudulent fundraising are not acting outside of the purposes of bringing misfeasance proceedings against examinable officers for the protection of shareholders and the public.

Dated: 3 June 2021



Noel Hutley

Telephone: (02) 8257 2599

Email: nhutley@stjames.net.au

Joanne Shepard

Telephone: (02) 9232 7222

Email: jshepard@12thfloor.com.au

¹³ (1992) 28 NSWLR 512 at 519D-F.

¹⁴ (1887) 37 Ch D 83.

¹⁵ (1992) 10 ACLC 271 at 273.

¹⁶ *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69 at 91F-91C.