HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S20/2021

ON APPEAL FROM THE NSW COURT OF APPEAL

BETWEEN:

MICHAEL THOMAS WALTON
First Applicant

ANTHONY BOGAN
Second Applicant

and

ACN 004 410 833 LIMITED (FORMERLY ARRIUM LIMITED) (IN LIQUIDATION)
ACN 004 410 833
First Respondent

KPMG
Second Respondent

COLIN GALBRAITH
Third Respondent

SECOND RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The Second Respondent (**KPMG**)[1] submits that this appeal raises the following issues with respect to seeking and setting aside an examination summons pursuant to s 596A of the *Corporations Act 2001* (Cth) (**Corporations Act**):

   (a) Is the Appellants' predominant purpose in seeking the examinations here – namely, gathering evidence and information in support of their own private interests, along with those of a limited number of other one-time shareholders, where that is not in the interests of the corporation in question, the creditors or the contributories as a

[1] By way of context, the Appellants sought ancillary production orders pursuant to s 597(9) of the *Corporations Act* and s 68 of the *Civil Procedure Act 2005* (NSW) against KPMG, the company's auditor: (CAB 86). KPMG was granted leave to appear at first instance as an interested party: *Re ACN 004 410 833 Ltd* [2019] NSWSC 1606 (**J**) at [2] (CAB 9). Black J ordered the orders for production be set aside entirely: J [63] (CAB 38), Order 1 (CAB 41). Thus, even if the Appellants succeed in reinstating Black J's orders as sought in [6(ii)] of the relief (CAB 147), no extant production orders to KPMG exist to be re-enlivened. However, if those orders are restored, it is quite possible that more targeted ancillary production orders will be sought.

whole – outside the purposes for which the power to examine is conferred, such as to render the proceedings an abuse of process?

(b) Pursuant to KPMG's notice of contention,[2] does it remain an abuse of process where an applicant's predominant purpose is to investigate a potential claim by that applicant, even if the success of that claim would incidentally result in a benefit to the company under external administration, its creditors or contributories?

3. KPMG submits that the answer to each question is yes.

PART III: SECTION 78B NOTICES

4. The Second Respondent considers that s 78B notices are not necessary.

PART IV: STATEMENT OF MATERIAL FACTS

5. The facts stated in the Appellants' submissions (**AS**) at [5]-[15] are not disputed. KPMG notes the following further matters:

(a) The Appellants do not contest the primary judge's finding that their evidence indicated "their predominant purpose in seeking the issue of the examination summons was to investigate, and pursue, a personal claim in their capacity as shareholders against directors of Arrium or against its auditors".[3]

(b) The Appellants accepted at trial that they have no claim as creditors of the First Respondent (**Arrium**) and have no right to any distribution under the deeds of company arrangement to which Arrium is subject.[4] Thus a successful class action as proposed would not diminish Arrium's indebtedness or benefit other creditors.

(c) The Appellants abandoned any suggestion that their purpose in pursuing the examination summons was to investigate the prospect of a derivative action on behalf of Arrium.[5] Accordingly, the action the Appellants seek to bring would not increase Arrium's assets and thus benefit other creditors.

(d) The Appellants do not contest the Court of Appeal's analysis that the prospective

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2 Found at CAB 151.

3 J [49] (CAB 31-32); *ACN 004 410 833 Ltd (in liq) v Walton* [2020] NSWCA 157 (**CA**) [129] (CAB 128).

4 J [13] (CAB 14-15).

5 J [12] (CAB 14), J [49] (CAB 31-32).

class action would not bring any commercial benefit to Arrium.[6]

(e) The Appellants do not contest the Court of Appeal's finding that the proposed class, limited to shareholders who purchased shares on or after 19 August 2014, would not include all contributories of Arrium and, conversely, would include persons who were not contributories at the time Arrium went into administration.[7]

6. Three other factual matters are noteworthy about what the Appellants did and did not tell ASIC, as these cast light on ASIC's general role in authorising applicants:

(a) When the Appellants applied to ASIC, they did not specify all of the persons whom they wanted to examine. In particular, they had not specified Mr Galbraith (the Third Respondent) as one such person, and they have not sought (yet) to examine the persons they did identify.[8]

(b) The Appellants indicated to ASIC that the purpose of the examinations was "to investigate the potential for claims to be made on behalf of creditors or shareholders in Arrium", and implied that a derivative action on behalf of Arrium was possible. But, as noted above, by the time of the hearing before the primary judge the Appellants accepted that they were not creditors of Arrium, and did not seek to rely on any possibility of a derivative action.[9]

(c) The Appellants told ASIC that the persons they sought to examine were not persons that Arrium's deed administrators (who had undertaken numerous examinations[10]) had sought to examine. In fact Arrium's liquidators (as they had become) had conducted an informal, voluntary interview of Mr Galbraith in lieu of an examination.[11]

PART V: ARGUMENT

The issue

7. The Court of Appeal set aside the Registrar's orders for examination of Mr Galbraith as

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6 CA [123]–[127] (CAB 126-128).

7 CA [128] (CAB 128), [141] (CAB 132).

8 J [15] (CAB 15); CA [9] and [122] (CAB 85 and 126).

9 J [16] (CAB 16).

10 J [7] (CAB 11).

11 J [17] (CAB 16).

an abuse of process of the Supreme Court. The type of abuse of process in question is broadly of a kind where the purpose of bringing the proceedings is "to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers".[12] That type of abuse involves two issues: it is necessary to identify what is the predominant, subjective purpose of the person seeking to exercise the court's processes,[13] and consider whether that purpose is a proper purpose for invocation of the power in question.

8. The notion of acting beyond the proper purpose of a power arises not only with respect to abuse of process but, for example, in administrative and trust law. Here, the power sought to be exercised is statutory. Identification of what purposes are and are not authorised involves an issue of statutory construction.[14] Much the same issue arises when considering an argument that an administrative decision-maker has acted for an unauthorised purpose – save that in this context, it is the court which actually exercises the power by granting and permitting the ongoing exercise of the examination power in s 596A, at the instigation of the applicant for examination. Obviously enough, it is the purpose of the applicant, not the court, which is relevant.

9. The predominant purpose of the Appellants here has been established and is not now challenged: it was "to investigate, and pursue, a personal claim in their capacity as shareholders against directors of Arrium or against its auditors".[15] It was not a purpose to benefit Arrium, its creditors, or contributories as a whole. The issue on appeal turns on whether or not, as a matter of construction, this purpose was one for which the s 596A power could not properly be sought to be exercised.

10. The propositions for which the Appellants ultimately contend are somewhat elusive. At times, they appear to come close to saying there is no limit as to permissible purposes: eg AS [27]. But ultimately their arguments seem to distil to two propositions:

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[12] *Williams v Spautz* (1992) 174 CLR 509, 526-527 (Mason CJ, Dawson, Toohey and McHugh JJ), citation omitted; quoted approvingly *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11, [23].

[13] As to "predominant" see, eg, *Williams v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ); *Burns Philp & Co Ltd v Murphy* (1993) 29 NSWLR 723, 732; *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69, 89D (***Re Excel***); *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at [101]; as to "subjective" see, eg, *Williams v Spautz* (1992) 174 CLR 509, 532 (Brennan J); *Re Excel*, 89D; *Carter v Gartner* (2003) 130 FCR 99 at [27]; *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 (***Evans v Wainter***) at [247]; *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at [30].

[14] Note *New Zealand Steel (Australia) Pty Ltd v Burton* (1994) 13 ACSR 610, 616 (Hayne J).

[15] J [49] (CAB 31-32); CA [129] (CAB 128).

(a) a negative proposition: that the Court of Appeal erred in holding that a predominant purpose which is not to benefit the corporation, its creditors or contributories is not a permissible purpose; and

(b) a positive proposition (eg at AS [2(c)] and [60]-[62], drawing on Lander J's fourth identified purpose in *Evans v Wainter*, but taken out of its context): that it is legitimate to have the predominant purpose of enabling evidence and information to be obtained to support the bringing of proceedings (seemingly by *anyone*) against examinable officers and other persons in connection with the company's examinable affairs.

11. Both propositions should be rejected. These submissions address the following issues:

(a) the Appellants' positive proposition is not sustainable;

(b) the historical and textual context of s 596A;

(c) regulatory purposes;

(d) that s 596A is mandatory is not relevant;

(e) that ASIC's authorisation does not address the issue in question; and

(f) the nature of the Appellants' claims.

The Appellants' positive proposition is not sustainable

12. Limits on the purposes for which a power may be exercised arise as a matter of statutory construction in light of the text, context and purpose of the provision, taking account of the subject matter, scope and purpose of the Act.[16]

13. Addressing the text first, the power to summon a person for examination in s 596A is limited to examination of certain persons (an officer or provisional liquidator) who held their position in a certain period. Exercise of the power can be sought by "an eligible applicant", which is defined in s 9 to include ASIC, liquidators/administrators/ restructuring practitioners, and a person authorised by ASIC to make such applications either generally or specifically with respect to a particular corporation. There is no

[16] As to subject matter, scope and purpose, see eg *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 23 (Mason J); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 186 (Gibbs CJ).

express limit on who can be authorised by ASIC.

14. The subject matter of the examination – the corporation's "examinable affairs" – is further defined in ss 9 and 53. The term includes the corporation's "business, trading, transactions and dealings …, property …, liabilities …, profits and other income, receipts, losses, outgoings and expenditure" (s 53(a)). In practical terms, the concept encompasses anything whatsoever to do with a corporation – from its circumstances of formation, to the circumstances of its need for external administration, to any day to day activity conducted by the corporation. That would include, for example, its employment practices, or whether it was negligent in some particular respect so as to cause an individual some injury, or whether it had published defamatory material.

15. The conduct of an examination, following the issuing of a summons under either ss 596A or 596B, is governed by ss 596F and 597. An examination is to be held in public, absent special circumstances: s 597(4). The examinee may be asked "such questions about the corporation or any of its examinable affairs as the Court thinks appropriate": s 597(5B). The privilege against self-incrimination is overridden, although if the examinee claims privilege, then in general an answer cannot be admitted in evidence against them in criminal or penalty proceedings: s 597(12) and (12A).

16. Given the breadth and significance of such examination powers, it is unsurprising that courts have long recognised that there are limits on the purpose for which they may be sought to be exercised, as illustrated by the Court of Appeal's review of the case law.[17]

17. An examination offers significant forensic benefits to a prospective or current litigant against the corporation, its officers or connected persons. It enables the ascertainment and gathering of evidence. It involves a form of pre-trial deposition process of a kind not otherwise generally available in Australian curial procedures.

18. The distinctiveness of the process suggests that it is not intended to be available to all actual or prospective litigants. Why should the mere fact that the corporation is under external administration of itself mean that any such litigant – perhaps a plaintiff in a slip and fall claim, or a consumer in a faulty product claim – should be able to access this powerful tool, which overrides the rights and interests of examinees? As stated by

[17] CA [40]-[92] (CAB 94-119).

Gummow, Hill and Cooper JJ in *Re Excel*:[18]

> But it may be quite a different question where proceedings contemplated or instituted are not proceedings to be brought by the company, but proceedings brought by some other party for the advantage of that party rather than the company. For example, it would be an abuse of process for a creditor approved by the Commission for the purposes of s 597(1) to obtain an examination summons to conduct an examination for the purpose of obtaining evidence in proceedings which the creditor proposed to bring against the examinee for defamation. That would be a purpose completely foreign to the power of examination which is ultimately in aid of the company itself and not the personal advantage of the person seeking to conduct the examination. [at 91] …
>
> … we are of the view that the use of the power to obtain an examination summons for the principal purpose of furthering the cause of the applicant for the summons or, as in this case, appointor of the applicant in litigation against third parties, not for the benefit of the corporation, its contributories or creditors (other than in the most indirect way) is a use of the power for a purpose foreign to that power and thus an abuse of the power. Such a purpose would provide to the examiner the opportunity for pre-trial depositions which would not be available in the litigation. [at 93]

19. Lander J's conclusions in *Evans v Wainter*, with the apparent agreement of Crennan and Ryan JJ, were to similar effect:[19]

> [246] Those persons who have the responsibility of external administration owe duties to the creditors and the contributories, and to the corporation which they are then managing.
>
> [247] In my opinion, they are entitled only to seek an order for an examination summons where the purpose of the examination is, as was stated in *Re Excel*, for the benefit of the corporation, its creditors or its contributories.
>
> [248] So also ASIC is only entitled to authorise a person as an eligible applicant if that person's purpose in seeking an examination summons is for the benefit of the corporation, its contributories or its creditors.
>
> [249] 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. For example, a person claiming damages for a tort against a corporation could be authorised by ASIC as an eligible applicant and apply for an examination summons for the purpose of examining the corporation's examinable officers under s 596A or its officers under s 596B to provide evidence in support of the action in tort.

20. Thus the Appellants' positive proposition – that it is legitimate to have the predominant purpose of enabling evidence and information to be obtained to support the bringing of

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[18] *Re Excel Finance Corp Ltd; Worthley v England* (1994) 52 FCR 69.

[19] (2005) 145 FCR 176; note Ryan J at [1]-[2], Crennan J at [265]-[271].

proceedings against examinable officers and other persons in connection with the examinable affairs of the company in question – should be rejected. It would extend a powerful and intrusive litigation tool to a wide range of potential litigants, for reasons unconnected to the fact that the corporation was in external administration, for no obvious or sensible purpose.

21. The Appellants may argue that ASIC would not be likely to authorise a person claiming about their slip and fall, or their faulty consumer product, or having been defamed, to apply for an examination. But if the Appellants' positive proposition represents a legitimate purpose of exercise of the power, then it must be open and reasonable for ASIC to do so.

22. The question then is whether the Appellants' negative proposition – rejecting the limit stated in *Re Excel* and *Evans v Wainter* (as just quoted) and applied by the Court of Appeal here – should be accepted. It should not be, once the historical and textual context of s 596A are taken into account.

The historical and textual context of s 596A

23. Several cases have considered in some detail the text, context and evident purpose of s 596A of the Corporations Act,[20] including its historical antecedents.[21] That task will not be repeated here.

24. Section 596A sits within Chapter 5 of the Corporations Act, which concerns companies under external administration. French J traced the development of s 596A in *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*.[22] His Honour noted that by the passage of the *Corporate Law Reform Act 1992* (Cth) (**the 1992 Act**) the present text of ss 597, 596A and 596B was enacted.[23] His Honour held at [90] that it was not a provision capable of being used against corporations not under external administration.[24] The Appellants do not dispute that proposition – see AS [42]. In that regard, French J noted the following

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[20] See, eg, *Saraceni v Jones* (2012) 42 WAR 518 (WA CA) (***Saraceni v Jones***) at [24]-[57] (Martin CJ), [88]-[113] (McLure P); special leave to appeal in that case was refused: *Saraceni v Jones* (2012) 246 CLR 251.

[21] See, eg, *Re Excel*, 79-81; *Evans v Wainter* per Lander J at [44]-[97]; *Saraceni v Jones* at [114]-[141] (McLure P, Martin CJ and Newnes JA agreeing); CA [40]-[64] (CAB 94-104).

[22] (2007) 156 FCR 501, [46]-[78] (*Highstoke*).

[23] See *Highstoke*, [62]. The effect was that the changes made in the 1992 Act were picked up and applied in the Corporations Act, but without change or any further explanatory statement.

[24] This holding was referred to with apparent approval in *Palmer v Ayres* (2017) 259 CLR 478 at [10] (Kiefel, Keane, Nettle and Gordon JJ) and [94] (Gageler J); see also *Saraceni v Jones*, [50].

(at [87]-[88], emphasis added):

> The context in which Pt 5.9 of the *Corporations Act* appears, as a set of miscellaneous provisions in Ch 5, *strongly suggests that the examination power is intended to be ancillary to the functions of the Court and/or the functions of external receivers, controllers or liquidators of corporations for which Ch 5 makes provision*. …
>
> … That history indicates, it is true, a widening of the power of examination beyond the examinable affairs of corporations subject to winding-up orders. But the historical roots of the power lie deep in corporate insolvency law nourished by the development of the examination powers in respect of bankrupt individuals. The proposition that s 541 of the Companies Codes introduced, by a sidewind, unrecognised in the Explanatory Memorandum, a general power in the courts to examine persons about the affairs of corporations is, with respect, improbable. It is remarkable that the Harmer Report would have failed to recognise the statutory divergence from that closer alignment with bankruptcy law which it proposed. The Explanatory Memorandum for the 1992 amendments which introduced ss 596A and 596B into the *Corporations Law* was focused on insolvency and forms of external administration.

25. Gleeson CJ said in *Hong Kong Bank of Australia Ltd v Murphy*, of the earlier provision in s 597:[25]

> The statutory context of "*external administration*", in which s 597 has its place, throws light on the purposes for which the power to order examinations (or to authorise persons to apply for examination orders) is conferred. Those purposes include the protection of shareholders and creditors and of interested members of the public. They are not, however, confined to the need for such protection in the case of winding up. Winding up is only one form of external administration. The scope of s 597 is wider.

26. In *Saraceni v Jones*, Martin CJ reviewed the text, context and purpose of Ch 5. His Honour's summary at [51]-[55] identified these features:

(a) in every case of external administration, the normal governance structures of the company are either extinguished or attenuated to some extent;

(b) financial difficulty will be a common, though not universal feature, of the circumstances giving rise to external administration;

(c) there is the potential need to balance competing interests of secured and unsecured creditors, contributories and employees, as well as a public interest in the maintenance of appropriate standards of fair dealing and propriety in the balancing of those competing interests; and

[25] (1992) 28 NSWLR 512, 521.

(d) the courts are given extensive powers of direction, supervision and control in relation to all forms of external administration covered by Ch 5, and there is little or no material distinction between the extent of the courts' powers of direction, supervision and control as between the various forms of external administration covered by Ch 5.

27. These decisions direct attention to the connection between the fact of a company's external administration and the availability of the examination process under s 596A. The fact that the corporation is in external administration must be significant for why the power is available to be exercised.

28. The generally distressed position of such companies is of some relevance. It may be accepted that there are various forms of external administrations, some of which do not involve insolvency – see AS [42]-[45]. However, those observations distract from the reality that the great majority of cases in which s 596A is used is by controllers of corporate entities seeking to aid the recovery of funds to creditors.[26] As Gageler J stated in *Palmer v Ayres* at [98] (footnote omitted), "[t]he purpose of Pt 5.9, it has repeatedly been recognised, is to aid persons who have the responsibility of the external administration of a corporation in carrying out their duties".

29. It makes sense that administrators (using that term in an encompassing sense) should have an additional, efficient tool available to them to investigate, for example, what assets are held by the company, including the existence and utility of potential claims to recover or increase the assets available to the corporation, such as those connected to the circumstances causing the corporation to go into administration. But the mere fact that such corporations are generally distressed does not suggest that all potential or current litigants should gain the additional tool. Why should one defamation claimant be so aided where another, suing a company not in administration, is not?

30. Leaving aside regulatory purposes for the moment, the context suggests that the availability of the power is intended in some way to aid the process of external administration (which is not to say it is limited to aiding the *administrators*). As explained by Lander J in the passage quoted above, external administration directs attention to the interests of the corporation itself, and its contributories and its creditors

[26] See, eg, Murray and Harris, *Keay's Insolvency Personal and Corporate Law and Practice*, (10th Ed, 2018), 581 at [15.140].

in their capacity as such. The fact that eligible applicants may include persons beyond the administrators themselves does not undermine this point. Such others – perhaps a significant creditor or contributory – may still act in pursuit of those broader interests.

31. In the context in which it appears, and taking account of the fact that there must be *some* limits on the powers for which the examination power in s 596A can be exercised, it is appropriate to conclude that actual or potential litigants seeking to exercise the power "not for the benefit of the corporation, its contributories or creditors (other than in the most indirect way)" – to quote *Re Excel* – are acting for an unauthorised purpose.

32. The Court of Appeal surveyed the relevant case law at CA [65]-[91], and while recognising at [132] that "there has not been unanimity…as to the scope of power", it also noted at [140] that none of the cases to which they referred "stated that *Re Excel* was incorrectly decided".

33. It is not insignificant, incidentally, that the Full Court's decision in *Re Excel* is long standing.[27] *Re Excel* precedes the enactment of the Corporations Act. The approach taken there was re-affirmed 16 years ago in *Evans v Wainter*, which the Appellants describe as "a leading authority on the purposes of s 596A" (AS [56]).

34. As to the two non-insolvent examples identified at AS [44]-[45], contrary to AS [44] the conduct of examinations by receivers has been held to benefit the company and its other creditors.[28] As for a voluntary winding up, it does not seem likely that this would lead to an application for examinations. If such did occur, it is entirely plausible that the purpose of the examination would be to benefit the corporation, contributories or creditors. Even in voluntary windings up property needs to be gathered in.

35. Further, the position of contributories can be explained by reference to both insolvent and solvent windings up. Contributories, in their capacity as such, generally have a right to participate in any surplus assets as an ordinary incident of the external administration of a company with surplus assets.[29]

36. If a benefit is to attain, it should do so fairly to the relevant classes – the company,

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[27] Cf *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, [31]-[43] (McHugh J).

[28] See, eg, *Boys v Quigley* (2002) 26 WAR 454 (WA CA), as explained at CA [138] (CAB 131).

[29] Corporations Act, ss 485(2), 488(2), 501; see generally *Re Yanollee Pty Ltd (in liq)* (2006) 24 ACLC 1087 (NSWSC); *Re FAI Car Owners Mutual Insurance Co Pty Ltd* (2009) 262 ALR 552 (NSWSC).

creditors or contributories. As Doyle CJ said in *Sandhurst Trustees Ltd v Harvey*:[30]

> The fact that a consequence of an examination order may be a forensic advantage to a particular class of creditors, or to a particular creditor, of the corporation, or to a particular person, does not *of itself* lead to the conclusion that the order was not made for a proper purpose. Nor does the fact that the order was made at the instance of that person or creditor. *On the other hand, the power is not conferred with a view to its exercise solely to benefit an individual with a claim of some kind against the corporation in question, or with a claim arising out of its affairs*.

That s 596A is mandatory is not relevant

37. The Appellants argue that the mandatory nature of s 596A of the Corporations Act is "a departure from the examination provisions which preceded it" (AS [23]), and that this "speaks against a construction which imposes requirements and outcomes not mandated by its terms" (AS [27]). The latter submission may suggest that *no* limits as to purpose should be taken to apply to exercise of the power. Any such argument should be rejected for the reasons given above.

38. More generally, the fact that s 596A does not grant a court the same discretion that s 596B does as to whether to issue the summons says nothing as to the purposes for which the power is intended to be exercised by the applicant for examination.[31] As Lander J explained in *Evans v Wainter*, having referred at [191] to the Explanatory Memorandum[32] to the 1992 Act:

> [192] Parliament enacted s 596A to make it easier for an "eligible applicant" to examine "examinable officers" because it wished to simplify the procedure and bring it into line with the bankruptcy procedure. In doing so, it recognised that a corporation's examinable officers should always be available to eligible applicants for examination under this section.
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> [193] I do not agree that because s 596A is mandatory in its terms the section's purposes have changed.
>
> [194] In my opinion, there is nothing in the 1992 Act which derogates in any way from the underlying assumption in the reasons of the Court in *Re Excel* that the purpose in seeking the examination summons must be in the interests of the corporation, its creditors or its contributories.

39. Simplifying the process of obtaining an examination summons is a different issue to the sorts of purposes for which that power may be put to use. This simplification did not

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[30] (2004) 88 SASR 519 (FC) at [51], emphasis added (Perry and Bleby JJ agreeing).

[31] Note also *Dowling v Colonial Mutual Life Assurance Society Ltd* (1915) 20 CLR 509, 519-520 (Isaacs J).

[32] The Explanatory Memorandum at [1152]-[1158] is extracted in CA at [61] (CAB 102-103).

broaden the reach or purposes of the examination power.

Regulatory purposes

40. The Appellants at AS [28]-[40] seek to make something of the fact that ASIC itself is an eligible applicant. The argument is not to the point.

41. It may be a proper purpose for ASIC itself to seek examinations for a regulatory purpose, that is, to investigate potential contraventions of the law, including with a view to potentially instigating civil penalty or criminal proceedings.[33] That said, in fact ASIC has its own very extensive investigation powers pursuant to Part 3 of the *ASIC Act 2001*, including compulsive examination powers in ss 19 and 58. It is not necessary to resolve the issue, because the fact that there may be a permissible purpose for examinations under ss 596A and 596B in addition to acting for the benefit of the company, contributories or creditors does not detract from the arguments that self-interested actual or prospective litigants pursuing private purposes fall outside the scope of the proper exercise of the power.

42. Whatever their purpose, an authorised eligible applicant does not take on the role and responsibilities of a regulator, nor stand in the shoes of the regulator, merely by having been authorised by ASIC to *apply* for an examination summons. ASIC is not thereby delegating its powers to allow the pursuit of private interests against third parties.[34] Conversely, an authorised eligible applicant is not constrained in the exercise of the examination power by, for example, the express and implied legal limits applying to ASIC, exercising its statutory powers and functions.

43. The relevant purpose in considering abuse of power is that of the person seeking the exercise of the court's power, not ASIC. Even if it is assumed that ASIC could also authorise someone else to undertake examinations for a regulatory purpose held by both it and the applicant, that is not the purpose of the Appellants here. And the mere possibility of generating a transcript of an examination which ASIC or others might use

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[33] Note *Hamilton v Oades* (1989) 166 CLR 486, 496-7 (Mason CJ). However, this statement was made prior to the enactment of the powers in Part 3 of the *Australian Securities and Investments Commission Act 1989* (Cth); there were not equivalent powers under the *Companies Code* regime (noting that pursuant to Part VII of the *Companies Code*, the National Companies and Securities Commission could examine an "officer" of a corporation about the affairs of that corporation by way of an application to and direction by a relevant Minister or the Ministerial Council – see, eg, ss 290, 291 and 295 of the *Companies Code*).

[34] Note *Re BPTC Ltd (in liq) (No 2)* (1992) 29 NSWLR 713, 717.

(an outcome[35]), does not alter the Appellants' predominant purpose: cf AS [34]. If it is said that exposing misconduct is a sufficient benefit to warrant an examination, then that could potentially be said of any examination by any actual or prospective litigant.

ASIC authorisation does not address the issue in question

44. The Appellants also seek to make something of the fact that ASIC acts as gatekeeper in designating further eligible applicants: AS [39]-[41]. But that fact does not address the purposes for which the applicant may seek to exercise the examination power.

45. ASIC may or may not investigate the purposes of the applicant. It is not required to do so.[36] Even if it does, it may do so based only on the information supplied by the applicant; there is no requirement for input by the corporation or the potential examinee/s. ASIC is not required to afford a hearing to any proposed examinee at the time of granting eligibility status.[37] As this case illustrates, ASIC may not even know who all the proposed examinees are. Nor, here, did it have reason to know that Mr Galbraith had already volunteered for an informal interview with the liquidators.

46. Further, as the Appellants acknowledge at AS [40] by reference to *Re Excel* at 81-83, there is a two stage process: authorisation and application. ASIC makes its decision when the applicant seeks authorisation from it. The issue of abuse of process arises at a later stage, when the examination summons is sought and then acted upon. The situation may have changed in the meantime. Here, as noted above at [6], the purposes of the Appellants put as justifications to the Supreme Court were somewhat different to those they had put to ASIC. And exercise of the power may be an abuse of process with respect to one examinee but not another, depending on the purpose of the examination, including for example whether it is a mere dress rehearsal for cross-examination in a proceeding.[38] The abusive purpose may only come into existence, and/or manifest, after the examination summons issues or after the examinations have commenced.

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[35] Note similarly CA [127] (CAB 127-8), indicating that it was pure speculation to suggest what might be produced by any examination.

[36] *Re Excel*, 83B; *Saraceni v Australian Securities and Investments Commission* (2013) 211 FCR 298 at [107]-[109], [132] (Jacobson J, Gilmour J agreeing at [165]).

[37] *Ryan v Australian Securities and Investments Commission* (2007) 158 FCR 301, [54], [61] and [67] (Gyles J); *Saraceni v Australian Securities and Investments Commission* (2013) 211 FCR 298.

[38] Note *Re Hugh J Roberts Pty Ltd (In Liq)* (1970) 91 WN (NSW) 537, 541 (Street J); *Re Excel*, 91.

The nature of the Appellants' claims

47. This case is an unusual one because the Appellants concede they are not creditors of the corporation in question. They seek to downplay the significance of not having submitted a proof of debt or participated in a deed of company arrangement as leading to "capricious outcomes" (AS [64]). There is nothing capricious or surprising about the fact that there are consequences for not having taken the requisite steps to assert rights at the time and in the manner provided for in the statutory scheme.

48. The Appellants sometimes seem to seek to make something of the fact that they, and the class which they seek to represent in a class action, are contributories: AS [38], [46]-[50], [59], [60]. But as the Court of Appeal noted, the proposed class does not include all contributories, and the class would include people who had sold their shares before Arrium went into administration, which the Court noted "highlight[s] … the essentially private nature of the proposed claim".[39]

49. In substance the potential claims are not asserted in the capacity of shareholders. They are claims relating to alleged misleading conduct said to have affected the price paid for the shares[40] – a step prior to becoming members.[41] They are claims which could equally have been made against the company, including by lodging a proof of debt (despite s 563A), because they are not made "in a capacity as a member". As was said of the similar type of shareholder claim by the respondent in *Sons of Gwalia*:[42]

> the claim made by the respondent is not founded upon any rights he obtained or any obligations he incurred by virtue of his membership of the first appellant. He does not seek to recover any paid-up capital, or to avoid any liability to make a contribution to the company's capital. His claim would be no different if he had ceased to be a member at the time it was made, or if his name had never been entered on the register of members.

50. The proposed claims are for the private benefit of the Appellants and similar potential class members. They, and the proposed examinations, are not in aid of the external administration. They are not for the benefit of creditors or contributories as a whole. They could equally be claims for defamation, personal injury, or for employee rights. They are not for a purpose consistent with the statutory power.

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39 CA [128] (CAB 128).

40 See CA [15] (CAB 86), CA [28] (CAB 90).

41 *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160, [205]-[206] (Hayne J).

42 Ibid, [31] (Gleeson CJ).

PART VI: NOTICE OF CONTENTION

51. KPMG's contention is that on the proper construction of s 596A, it is an abuse of process for an eligible applicant to conduct an examination for the predominant purpose of investigating a potential claim by that applicant against a third party, even if the success of that claim would benefit the company, its creditors or its contributories (for instance by relieving the company of a debt to the eligible applicable).[43] Although not entirely clear, it is possible that the Court of Appeal suggested that this might be enough at CA [140], although this would seem inconsistent with CA [130] and [137].

52. The argument is simple but fundamental. The relevant purpose when considering abuse of process is the subjective, predominant or substantial purpose of the litigant in question.[44] As stated in *Re Excel* at 91, "[w]hether there will be, in a particular case, a use of the process or an abuse of it will depend upon purpose rather than result". That focus is consistent with the approach taken in administrative law, where the focus is on the substantial, causative purpose of the decision-maker.[45]

53. In that context, an incidental or coincidental benefit cannot save the use of power from being improper. That would be so even if that benefit was known of, or intended by, the litigant. Such a benefit might even represent a motive of the litigant.[46] But if the predominant, substantial and causative purpose is not a permissible purpose, then the exercise of the statutory power sought by the litigant is beyond power; they are seeking "some advantage for which [the proceedings] are not designed or some collateral advantage beyond what the law offers".[47]

Conclusion and costs

54. For the reasons above, this appeal should be dismissed. KPMG does not seek its costs.

55. Conversely, if the appeal is upheld, KPMG should not be liable for the costs of the Appellants in this Court. The Appellants seek their costs in this Court from KPMG,

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43 Notice of Contention, ground 1 (CAB 151).

44 *Williams v Spautz* (1992) 174 CLR 509, 529 (Mason CJ, Dawson, Toohey and McHugh JJ), 532 (Brennan J); *Burns Philp & Co Ltd v Murphy* (1993) 29 NSWLR 723, 732; *Re Excel*, 89D; *Carter v Gartner* (2003) 130 FCR 99 at [27]; *Evans v Wainter* at [247]; *Kimberley Diamonds Ltd v Arnautovic* (2017) 252 FCR 244 at [30] and [101].

45 eg *Samrein Pty Ltd v Metropolitan Water, Sewerage and Drainage Board* (1982) 41 ALR 467 (HC), 468-9.

46 Cf *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11, [23]-[24].

47 *Williams v Spautz* (1992) 174 CLR 509, 526-527.

even though they are not seeking such a costs order against KPMG as regards the Court of Appeal.[48] KPMG's role has been as an interested party (in effect an intervenor), playing a secondary role. KPMG did not seek its costs from the Appellants below, consistently with its position here. It should not have to pay the Appellants' costs.

PART VII: ESTIMATE OF TIME REQUIRED

56. KPMG estimates it will require some 30 minutes for oral argument.

13 May 2021

10

J K Kirk
Eleven Wentworth
T: 02 9223 9477
kirk@elevenwentworth.com

A B Emmerson
Eight Selborne Chambers
T: 02 8066 0882
aemmerson@eightselborne.com.au

[48] Notice of Appeal, paragraphs 6 and 7 (CAB 147).

ANNEXURE A

List of constitutional provisions, statutes and statutory instruments referred to in the Second Respondent's submissions

Constitutional Provisions

1. Nil.

Legislation

2. *Australian Securities Commission Act 1989* (Cth), as enacted, Part 3.
3. *Australian Securities and Investments Commission Act 2001* (Cth), compilation no. 72, as in force from 6 April 2019 to 30 June 2019, Part 3.
4. *Civil Procedure Act 2005* (NSW), compilation no. 28, as in force from 30 June 2018 to 22 March 2020, s 68.
5. *Corporations Act 2001* (Cth), compilation no. 94, as in force from 6 April 2019 to 30 June 2019, s 9, s 53 and Ch 5.
6. *Corporate Law Reform Act 1992* (Cth), no. 210 of 1992, as made.
7. *Judiciary Act 1903* (Cth), compilation no. 47, current, s 78B.

Statutory Instruments

8. *Companies (New South Wales) Code*, as in force on 1 July 1982, Part VII and s 541.