



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S20/2021
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
 SYDNEY REGISTRY

No: S20/2021

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL)

BETWEEN:

Michael Thomas Walton
 First Appellant

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Anthony Bogan
 Second Appellant

and

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

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KPMG
 Second Respondent

Colin Galbraith
 Third Respondent

APPELLANTS' OUTLINE OF ORAL SUBMISSIONS

Part I:

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

Part II:

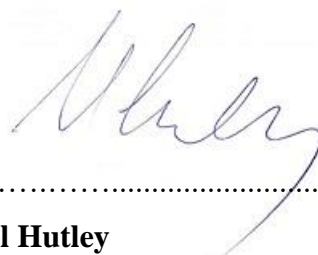
- 30 2. **AS [2]:** The issue is whether the appellants' purpose, in applying for a summons under s 596A of the *Corporations Act 2001* (Cth), was proper in that it served the legitimate purpose of enabling evidence and information to be obtained to support the bringing of proceedings against examinable officers and others in connection with the examinable affairs of Arrium: Ground 2, Notice of Appeal, **CAB 146-147**.
3. The Court of Appeal held that it was not because the prospective litigation would not confer a benefit on the company, or its creditors and possibly all of its members: **J[140]-[141] CAB 131-132**; Ground 1, Notice of Appeal, **CAB 146**.
4. **AS [16]:** The Court of Appeal was in error. Section 596A creates a system of discovery: *Hamilton v Oades* (1989) 166 CLR 486 at 497 (Mason CJ), **JBA 3/**

488; *Palmer v Ayers* (2017) 259 CLR 478 at 495, **JBA 3/526** which serves, at least, two purposes.

5. *First*, it aids the process of external administration which is not limited to assisting liquidators to protect the interests of creditors.
6. *Secondly*, it assists in the bringing of proceedings against the examinable officers of a company and others in connection with its examinable affairs.
7. The appellants' application was for this second purpose in circumstances which are recorded at J[2] – [18], **CAB 83 to 87**; **AS [5]-[14]** and the finding in respect of the appellants' purpose at J[129], **CAB 128**; **AS [15]**. There is no dispute that the potential claims relate to Arrium's alleged failures to inform the market of its true financial position in relation to a capital raising: J[8], **CAB 84**.
8. The appellants' purpose was aligned with and not foreign to the purposes of the statute, when properly construed, notwithstanding the company and its creditors would not benefit and were not intended to benefit from the prospective litigation.
9. **Express terms (AS [18]-[27])**: The express terms of s 596A do not require a benefit to accrue to the company or its creditors. "Examinable affairs", although broadly defined, does not extend beyond the affairs of the corporation and its "connected entities": *Palmer v Ayres* at 514 [97] (Gagelar J), **JBA 3/545**.
10. Standing to apply is conferred on "Eligible applicants". They include ASIC and those authorised by ASIC: **AS [28]-[41]**. An intention to benefit the company or its creditors is not required on the part of ASIC or those it authorises: *Ryan v ASIC* (2007) 158 FCR 301, 316-317 [51] (Gyles J) at **JBA 4/ 912-913**.
11. **Context**: Legislative context, including ss 596B to 596F and 597, does not suggest a benefit to the company or its creditors must arise from the prospective litigation.
12. **Chapter 5 (AS [42]-[45])**: Section 596A applies to companies in "external administration" addressed in Chapter 5: *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501, 527-528 [88]-[89] (French J), **JBA 4/799**; *Palmer v Ayres* at 513 [94] (Gagelar J), **JBA 3/544**. The different forms of external administration, and Chapter 5's purposes generally, do not support a requirement to benefit the company and its creditors. Those purposes include the protection of shareholders, creditors and interested members of the public: *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 at 521F (Gleeson CJ); **JBA 4/817**.

13. **Authorities (AS [51]-[59]):** Decisions of this Court reflect purposes including those articulated at points 5 and 6 above: *Rees v Katzman* (1965) 114 CLR 63, 80 (Windeyer J), **JBA 3/ 566**; *Hamilton v Oades* (1989) 166 CLR 486, 496-497 (Mason CJ), **JBA 3/487-488**; *Palmer v Ayers* (2017) 259 CLR 509, 491-492 [30] (Kiefel, Keane, Nettle and Gordon JJ) and 515 [98] (Gagelar J), **JBA 3/522-523 and 3/546**. They say nothing about benefits to the company or its creditors.
14. Intermediate appellate decisions which say otherwise ought not be followed: **AS [63]-[75]**. Cases on provisions which predate the role of a regulatory body, such as ASIC, authorising applicants have no bearing on the proper construction of the current provisions. Those provisions have their genesis in s 541 of the *Companies (NSW) Code* which expanded the relevant power: **JBA 2/438-440**; **AS [46]-[50]**.
15. **Abuse of process (AS [60]-[62]):** The appellants' immediate purpose aligns with the purpose stated at point [6] above. If the appellants' immediate purpose is within the scope of the relief sought, their ultimate motive is not determinative: *Williams v Spautz* (1992) 174 CLR 509, 526, **JBA 3/685**; *Victoria International Container Terminal Ltd* (2021) 95 ALJR 363, 369-370 [23]-[24], **JBA 4/1025-6**.
16. **Notice of Contention (Reply [18]):** The contention is that purpose, and not result, is determinative of abuse. Accordingly, an applicant's subjective purpose will be improper if it is not *predominantly* to benefit the company, or its creditors and (all its contributories, despite having that effect. On this basis, creditors' applications would likely be set aside, notwithstanding cases to the contrary including *Evans v Wainter* (2005) 145 FCR 176, 218 [262] (Lander J), **JBA 4/771**. If the asserted purpose cannot accommodate the likely motives of the eligible applicants who are or may be conferred standing under the terms of the legislation, then the legislation likely does not have that purpose.

Dated: 6 October 2021



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