



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

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ANTHONY BOGAN
Second Applicant

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

SECOND RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

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Ashurst
Level 11, 5 Martin Place
Sydney NSW 2000

Telephone: 02 9258 6000
Fax: 02 9258 6999
Email: john.pavlakis@ashurst.com
Ref: JPAV / EPE / 1000 040 771

PART I: PUBLICATION ON THE INTERNET

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

PART II: PROPOSITIONS TO BE ADVANCED

The Effect of the Appellants’ Positive Proposition in Appeal Ground 3: 2RS [12]-[22]

2. The effect of the Appellants’ argument is that there is no apparent purposive limitation on the s 596A power. That construction should be rejected. The text of s 596A is the beginning but not the end of the statutory construction task.
3. Compulsory examinations are a significant intrusion on the freedom of examinees:
 - a. see s 597;
 - 10 b. cf *Jones v Treasury Wine Estates Ltd* (2016) 214 FCR 111 at [27];
 - c. note CA [63] CAB p104;
 - d. *Potter v Minahan* (1908) 7 CLR 277, 304.
4. Courts have thus consistently rejected the notion that pursuit of private litigious interests – eg re a defamation claim – is a proper purpose:
 - a. *Re Excel* (1994) 52 FCR 69, 91;
 - b. *Evans v Wainter* (2005) 145 FCR 176, [249];
 - c. Note CA [80] CAB p112, and CA [82] CAB p113;
 - d. *Re Imperial Continental Water Corporation* (1886) 33 Ch D 314.
5. It is no answer to the statutory construction argument to say that those purposes are
 - 20 “not typically ... served” by examinations: cf Reply [14].

The Court of Appeal’s acceptance of *Re Excel* was correct: 2RS [23]-[50]

6. The Court of Appeal was right to accept the statement of purpose of examination powers articulated in *Re Excel* at 93 that it relevantly does not extend to examinations “not for the benefit of the corporation, its contributories or creditors”.
7. The fact of external administration is important to the context and purpose of s 596A:
 - a. *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501, [87];
 - b. *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512, 521;
 - c. *Palmer v Ayres* (2017) 259 CLR 478 at [98].

8. The power is available to aid information gathering for those recently appointed to companies who are new to its affairs: note CA [63] CAB p104. It is relevant, too, that such corporations are generally (though not invariably) distressed: *Saraceni v Jones* (2012) 42 WAR 518, [54]. Compulsory examination is an extraordinary tool, relevantly to aid those acting on behalf of, and in the interest of, the corporation, creditors or contributories in the interests of those groups: note ss 596E and 597(5A). It has a public dimension, beyond pursuit of interests as an ordinary litigant: note CA [68]-[69] CAB p105.
 9. The Appellants' purpose in using s 596A is to prosecute a private claim as an ordinary litigant for misleading or deceptive conduct in the acquisition of the company's securities. That is not a claim in the capacity of shareholder: cf *Sons of Gwalia Ltd v Margaretic* (2007) 231 CLR 160. Such claims are not linked to external administration; they are commonly brought against corporations not in administration.
 10. The mandatory nature of the provision is for convenience in the issuing of the summons. It says nothing of the scope and purpose of the examination power.
 11. ASIC performs an administrative, gatekeeper function in approving eligible applicants. The question of abuse arises after issue. No imprimatur of proper purpose can be derived from ASIC performing its statutory task, nor from its broader regulatory role.
- 20 **Notice of Contention: 2RS [51]-[53]**
12. The relevant legal doctrine is abuse of process. If the examiner's predominant subjective purpose is foreign to the power, pursuit of the summons cannot be saved by pointing to any putative incidental benefits to the corporation, creditors or contributories. In any case, no such incidental benefit attains here: see Reply [18].

6 October 2021



J K Kirk