



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S20/2021
File Title: Walton & Anor v. ACN 004 410 833 Limited (Formerly Arriui
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Respondents
Date filed: 06 Oct 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S20/2021

BETWEEN:

MICHAEL THOMAS WALTON
First Appellant

ANTHONY BOGAN
Second Appellant

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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

**FIRST RESPONDENT'S
OUTLINE OF ORAL ARGUMENT**

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PART I: PUBLICATION ON INTERNET

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

PART II: OUTLINE OF PROPOSITIONS

2. The Appellants' predominant (indeed, sole) purpose in conducting an examination is to bring a class action against the directors and auditors of Arrium: CAB128 [129]. The class action will not benefit the company or its creditors; nor can it benefit the shareholders as a whole: CAB89 [25]-[26]; CAB126-128 [123]-[128] (1R [5](b), [49]-[50], [54]-[55]).
3. The question is whether this entails a use of the examination power in s 596A for a purpose foreign to the purposes for which the power is conferred (1R [11]).
4. There are two such purposes. The first is to aid persons who are responsible for the external administration of a corporation in carrying out their duties: *Palmer v Ayers* (2017) 259 CLR 478 at [98] (1R [16]). That purpose appears from the terms of s 596A, the context of Pt 5.9 and the legislative history: *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501 at [82]-[88].
5. An examination does not serve this first purpose unless it is conducted for the benefit of the corporation, its creditors or the contributories as a whole.
6. That follows from the fact that the central concern of an external administration is to identify, recover and distribute the assets of the company for the benefit of its creditors and in some cases its contributories: *Palmer v Ayers* at [29]-[31], [87], [99]; *Re Excel Finance Corp Ltd* (1994) 52 FCR 69 at 86D; *Corporations Act* 2001 (Cth), ss 478, 501, 506 (1R [52], [53]). It involves establishing and adjusting the rights and liabilities of the company, its creditors and contributories inter se: *Palmer v Ayres*, *ibid*.¹
7. For this reason, *Re Excel* held correctly at 93E that it is an abuse of process to obtain an examination summons for the predominant purpose of advancing the applicant's cause in litigation against third parties and not for the benefit of the corporation, its creditors or contributories (1R [29]-[30]). The same principle had been applied in *Re Imperial Continental Water Corporation* (1886) 33 Ch D 314 (1R [21]-[26]).

¹ This aligns with the modern conception of insolvency proceedings as a mechanism of collective execution against the company's assets: *Ramsay Health Care Australia Pty Ltd v Compton* (2017) 261 CLR 132 at [59]; *Rubin v Eurofinance SA* [2013] 1 AC 236 at [96], [102], [106].

8. The principle was adopted by Gleeson CJ in *Hong Kong Bank of Australia Pty Ltd v Murphy* (1992) 28 NSWLR 512 at 519C-E (1R [27]-[28]).
9. This analysis is not affected by the aspects of the statute to which the Appellants refer:
 - a. ASIC's statutory status as an "eligible applicant" is not relevant. The Commission had the same status under s 597 of the Corporations Law, considered in *Re Excel*. ASIC is not constrained to act in aid of the external administration of the company where it is pursuing the second purpose identified below (1R [17], [40]).
 - b. ASIC's statutory role in authorising a person as "eligible applicant" is irrelevant. That role is distinct from the Court's role in issuing a summons, and does not ordinarily involve consideration of the applicant's purpose: *Re Excel* at 81G-83B, 86E; *Saraceni v ASIC* (2013) 211 FCR 298 at [106]-[109], [151] (1R [42]-[44]). ASIC's authorisation merely confers standing: *Re Excel* at 86F; *Saraceni v ASIC* at [126]. Contrary to AS [35], ASIC does not authorise a person to assist it to fulfil its public functions; it simply performs a function identified in the definition of "eligible applicant": *Highstoke v Hayes Knight* at [80]; *Saraceni v ASIC* at [35].
 - c. The mandatory nature of s 596A is irrelevant. The purposes underlying s 596A are the same as those underlying s 596B: *Highstoke v Hayes Knight* at [85]-[87]; *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 at [156], [190]-[193] (1R [14]). A summons issued under s 596A may be set aside as an abuse of process (1R [12]).
10. 10. The second purpose underlying the examination provisions is the bringing of civil and criminal prosecutions in connection with the company's affairs: *Hamilton v Oades* (1989) 166 CLR 486 at 496; *Sandhurst Trustees Ltd v Harvey* (2004) 88 SASR 519 at [50], [52] (1R [17]). This purpose is not confined by any requirement that the examination benefit the company, its creditors or contributories.
11. This second purpose does not capture the Appellants' proposed claim, which is a class action to recover group members' losses: CAB17 [18]. The bare possibility that the examination might disclose information to support a prosecution is not sufficient, if that is not the purpose for which it is conducted: CAB130 [136] (1R [59], [60]).
12. The second purpose cannot be expanded to include the bringing of any proceedings against any persons in connection with the company's examinable affairs, which is the effect of the formulation for which the Appellants contend at AR [11]:

- a. The formulation is not supported by the fourth purpose articulated by Lander J in *Evans v Wainter* at [252]. Lander J was there referring to examinations conducted to expose misconduct which might attract civil or criminal sanctions: *Evans v Wainter* at [217]-[220], [232], [237]. His Honour was not departing from the principle stated in *Re Excel* at 93E: *Evans v Wainter* at [246]-[247] (1R [62]-[64]).
- b. The formulation is not supported by the suggestion at AR [14] that it “justifies examinations designed to promote the honest conduct of corporations”. The reference in *Rees v Kratzmann* (1965) 114 CLR 63 at 80 to “the honest conduct of the affairs of companies” was not a statement of the purpose underlying the examination power. The purpose was identified at 79 as being to gain information relevant “for the proper conduct of the winding up”. Moreover, an examination justified on the basis that it promotes honest conduct may not be compatible with the exercise of judicial power: cf *Highstoke v Hayes Knight* at [74].
- c. The formulation is not supported by *Re BPTC Ltd* (1992) 10 ACLC 271 at 273. The case did not concern the issue of an examination summons; and the comments cited are confined to their particular context: *Re Excel* at 92C, 92G (1R [34]-[37]).
- d. The formulation is not supported by the statutory provisions referred to at AR [9]-[10]. The fact that the regulator has bespoke powers to obtain relief on behalf of individuals does not mean that an examination can be used by a shareholder to bring an action against a third party that will benefit some but not all contributories. The fact that, under s 597(14), a record of examination can be used in a legal proceeding against a person says nothing about the circumstances in which an examination can be conducted in the first place.
- e. The formulation is inconsistent with the courts’ insistence that the examination procedure not be used to obtain a forensic advantage not otherwise available to ordinary litigants (*Re Excel* at 90E, 93E); it creates a risk of company officers and others being vexed by examination by multiple eligible applicants; and it can harm the company, which might find itself joined to litigation (CAB88 [22]) or competing with the applicant for insurance recoveries (noting that here the liquidators were suing some directors for insolvent trading: CAB12 [8], [9]).

Dated: 6 October 2021


Michael Izzo SC
Counsel for the First Respondent