The capacity to use examination summonses under s 596A to investigate potential shareholder claims

Eugene Chan reports on *Walton v ACN 004 410 833 (formerly Arrium Ltd) (in liq)* [2022] HCA 3

By narrow majority, the High Court has adopted a broad interpretation of the purposes for which a summons for examination of a company officer can be issued under s 596A of the *Corporations Act 2001* (Cth) (Act). In so doing, the court discarded the historical limitation that examinations under s 596A can only be for the benefit of the company, its creditors or its contributories. The court held that it was not an abuse of process for shareholders to apply for such a summons even if their purpose was to investigate and pursue potential claims, such as class actions against former company officers.

Background

The first respondent (Arrium) was an ASX-listed producer of iron ore and steel. After publishing its results for the 2014 financial year, Arrium undertook a capital raising for which shareholders were provided with an Information Memorandum. Arrium ultimately raised $745 million in capital.

In January 2015, Arrium announced the suspension or closure of its mining operation. In its half-yearly results, published in February 2015, Arrium acknowledged a $1,335 million reduction in the value of its mining operations. Arrium was subsequently placed into administration.

The appellants were shareholders of Arrium who believed they had potential claims against Arrium's former directors and its auditors (KPMG, the second respondent) in connection with the accuracy of the Information Memorandum and the financial results. In 2018, after obtaining authorisation from ASIC as 'eligible applicants' (as defined in s 9(e) of the Act), the appellants sought orders that a former Arrium director appear for examination and produce documents concerning Arrium's examinable affairs, pursuant to s 596A. Those orders were granted by a registrar in Equity in the NSW Supreme Court.

Findings below

Arrium sought to set aside the examination orders on the ground that they were an abuse of process. It was not in dispute that the appellants' predominant purpose, in examining the former director, was to investigate and pursue a potential class action (in their capacity as shareholders) against former directors and KPMG ([20], [95]).

At first instance, Black J was not satisfied that the examination constituted an abuse of process because, *inter alia*, the liquidators had not previously examined the former director and the potential information to be produced would likely advance the interests of Arrium and its creditors (*Re ACN 004 410 833 (formerly Arrium Ltd) (subject to a deed of company arrangement)* [2019] NSWSC 1606, [50]).

Contrary to Black J's decision, the Court of Appeal (Bathurst CJ, Bell P and Leeming JA) found that the appellants' application for examination was an abuse of process. The Court of Appeal reasoned that the use of the examination was predominantly for the purpose of pursuing private litigation against a third party that did not confer a 'demonstrable' or 'commercial' benefit on 'the company or its creditors (and possibly on all of its contributories)'

(*Re Excel Finance Corporation (Receiver and Manager Appointed); Worthley v England* (1994) 52 FCR 69). Any benefit was for a limited group of persons who bought Arrium shares at a particular point in time, irrespective of whether they held shares at the time of the administrators' appointment (*ACN 004 410 833 Ltd (formerly Arrium Ltd) (In liq) v Walton* (2020) 383 ALR 298, [120], [123], [140]–[141]).

Key issue before the High Court

The central question on appeal was: what is the statutory purpose or purposes of an examination under s 596A? There was no dispute that if the predominant purpose of the examination was collateral or foreign to the statutory purpose of the examination, then the application for such an examination would be an abuse of process.

Relying on *Hamilton v Oades* (1989) 166 CLR 486, the appellants contended that there were two permissible purposes for a s 596A summons, namely: to aid the process of external administration; and aid bringing proceedings against company officers and others in connection with the company's examinable affairs ([161]). Arrium and KPMG agreed, save that they contended that the first purpose must be for the benefit of the company, its creditors or its contributories, and the second purpose must be confined to proceedings of a regulatory nature ([98], [162]).

Edelman and Steward JJ

Edelman and Steward JJ rejected the parties' submissions in respect of the two purposes of a summons, instead finding that s 596A was concerned with the administration or enforcement of the law concerning the public dealings of the company in external administration and its officers. Its purpose 'cannot be confined by reference to benefit to the company, its creditors, or its contributories' ([160], [164], [169]).

Their Honours traced the legislative history on the power of examinations, opining that s 596A 'conferred an entirely new power of examination' ([144]–[148]), as supported by the extrinsic material ([165]-[168]). Specifically, their Honours noted that:

- the issue of a summons under s 596A was mandatory once five criteria were satisfied, unlike the former s 597 of the *Corporations Act 1989* (Cth) ([152], [158], [168]);
- both the range of 'eligible applicants' and the scope of examinations (through the definition in s 9 of 'examinable affairs' and 'affairs of a body corporate') were broadened ([150], [168]); and
- the court had more explicit control, under ss 596F and 597, over how examinations took place ([156]).

As s 596A had 'no direct analogy with any former provision', their Honours held that authorities such as *Re Excel*, *Evans v Wainter Pty Ltd* (2005) 145 FCR 176 and *Hamilton v Oades* were of limited assistance ([164], [176]).

In light of the statutory history and the context and terms of s 596A, Edelman and Steward JJ found that the purpose of s 596A was to address the administration or enforcement of the law concerning the corporation and its officers in public dealings ([170]). This included enforcing the Act, promoting its compliance, and protecting shareholders or creditors from corporate misconduct ([175]). That purpose was highlighted by the fact that the persons eligible to apply for a summons are generally those who serve a public function (ASIC and persons authorised by ASIC) and s 596A invokes the court's jurisdiction ([171], [174]).

Therefore, an examination of a company officer conducted for a purpose that included investigating the possible existence of misconduct or pursuing a claim against a company or one of its officers or advisers was a legitimate use of power conferred by s 596A. It was not an abuse of process, regardless of whatever ultimate purpose a litigant may have and even if a claim may relate to a smaller group of creditors or contributories ([175], [190]).

Gageler J

Gageler J also held that there was no requirement under Pt 5.9 (of which s 596A is part) that an examination be for the purpose of benefiting the corporation or the general body of creditors or contributories ([118]), with his Honour observing that cases such as *Hamilton v Oades* and *Re Excel* did not consider Pt 5.9 ([99]). Gageler J, however, also addressed two other matters.

First, the circumstances in which a company can be in external administration (such as receivership (Pt 5.2) or under a deed of company arrangement (Pt 5.3A)) did not necessarily benefit the company or the general body of creditors or contributories, yet in every circumstance of external administration, examination under s 596A was available ([119]).

Secondly, in every circumstance of external administration, ASIC and any person authorised by it was an 'eligible applicant' for the purpose of s 596A. In determining whether to so authorise a person, the *Australian Securities and Investments Commission Act 2001* (Cth) requires ASIC to exercise its powers that promote the 'confident and informed participation of investors and consumers' ([121]). That can take the form of ASIC authorising investors or consumers to investigate corporate misfeasance through public examinations with a view to them recovering their losses in civil proceedings such as a class action ([122]). Thus, to limit the ultimate purpose of a summons under s 596A to that contended for by the respondents would unduly constrain the outworking of the regulatory choices available to ASIC in the exercise of its authorisation function ([123]).

Gageler J refrained from mapping out the 'metes and bounds' of the legitimate purposes to which an examination might ultimately be put, instead finding that the legitimacy of any purpose turned on the 'nature and quality of the connection between the purpose and the examinable affairs of the corporation' ([125]). On the facts, the appellants' ultimate purpose of enabling evidence and information to be obtained to support the bringing of proceedings against officers in connection with Arrium's examinable affairs was not illegitimate ([126]).

Kiefel CJ and Keane J (dissent)

Kiefel CJ and Keane J held that, consistent with established authorities (e.g., *Hong Kong Bank of Australia Ltd v Murphy* (1992) 28 NSWLR 512 and *Re Excel*) and the statutory context of s 596A ([31]), the purpose of an examination was confined to aiding the company's external administration, such as locating and realising assets and investigating its affairs. It did not include facilitating the investigation or prosecution of a claim that was unconnected with the company's external administration and which was being pursued exclusively for the benefit of persons other than the company, its creditors or contributories as a whole ([87]). To do so would allow the special power of examination to be available in proceedings, wholly unconnected with the company's external administration or interests of persons in its outcome, such as industrial disputes ([86]).

The minority also opined that, though legislative amendments have expanded the 'types of external administration to which the examination power is relevant', the general powers have never been framed 'by reference to litigation by individuals for their benefit' ([77]). BN