Article Information

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High Court confirms use of public examination powers to investigate potential class actions

The High Court has ruled in favour of shareholders in Walton & Anor v ACN 004 410 833 Ltd (formerly Arrium Limited) (in liq) & Ors. In a 3:2 decision, the majority permitted former shareholders of Arrium Ltd to examine the insolvent company's officers under s 596A of the Corporations Act 2001 ('CA') for the purpose of potentially bringing a class action against the company's managers.

The Road Ahead

The High Court (3:2) decision is positive news for shareholder class actions as it confirms that "eligible applicants" can publicly examine corporate officers about a corporation's affairs, to test the merits of a potential class action against the company. This is even if a liquidator does not intend to investigate or pursue claims against the officers of the company.

The approach adopted by the majority is a welcome step forward for corporate accountability in the midst of many attempts by the legislature to constrict the Australian class action landscape.

Procedural history

The applicants were shareholders in a former mining company, Arrium Ltd ('Arrium'). The applicants bought shares in Arrium during a capital raising in 2014. Shortly thereafter, Arrium announced an impairment to the value of its business of over $1billion. Arrium was then placed into administration, and then finally liquidation.

Under s 596A CA, the Court is to summon a person for examination about a corporation's 'examinable affairs' if an eligible applicant seeks the order, and the court is satisfied that the person subject to the order was an officer or liquidator of the corporation during the prescribed period.

With authorisation from ASIC, the applicants sought an order from the Supreme Court of New South Wales summoning a former director of Arrium for public examination. The applicants sought the order, as they believed that they may have claims against the former directors and auditors of Arrium arising out of the capital raising and the company's published financial results for the same period. The goal of the examination was to investigate whether pursuing these claims as a class action with other shareholders was viable.

The Supreme Court of New South Wales initially granted the order. However, the Court of Appeal overturned the decision to allow the examination on the basis that it was an abuse of process, as the examination did not benefit Arrium, its creditors, or its contributories.

The issue to be determined by the High Court was whether the applicant's purpose for seeking the order was an abuse of process. This involved considering whether the purpose of the application was consistent with the purpose of s 596A CA.

Was the Proposed Examination an abuse of process?

The majority (Justices Edelman, Steward and Gageler) allowed the appeal, finding that the application was not an abuse of process. The purpose for the application was held to be within the scope of s 596A CA.

In coming to this conclusion, the court considered section 596A CA to ascertain its purpose, which involved lengthy consideration of the preceding iterations of the statutory scheme for public examinations.

The High Court acknowledged that earlier laws insisted on public examinations being for the benefit of the company or its creditors, or for bringing criminal or regulatory proceedings in connection with the company. However, the High Court concluded that these requirements did not apply to bringing an application under s 596A CA because s 596A CA has no direct analogy with any former provision in the earlier companies' legislation. Instead, the court held that s 596A has much broader requirements than the former laws on this issue.

This is because:

1. section 596A CA is drafted differently, and applications under it require less supporting evidence than earlier companies' legislation and other sections within the same part of the *Corporations Act 2001;*

2. section 596A CA was intentionally drafted to have a broad application;

3. section 596A was enacted in the public interest to facilitate the administration or enforcement of the law concerning a corporation and its officers in public dealings. Therefore, an application under this section will not be an abuse of process if it promotes compliance with the law.

On this basis, the High Court concluded that using a compulsory examination to test the merits of a potential class action for corporate misconduct coincides with the purpose of s 596A CA. The fact that the proposed class action would not benefit all of Arrium's shareholders did not jeopardise the validity of the application, because s 596A CA is directed to enforcing the law, rather than benefitting the company in administration.

The judgment is available here: Walton v ACN 004 410 833 (formerly Arrium Ltd) (in liq) [2022] HCA 3, 16 February 2022.

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