IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B52 of 2016

BETWEEN: **CLIVE FREDERICK PALMER**

Plaintiff

and

MARCUS WILLIAM AYRES, STEPHEN JAMES PARBERY AND MICHAEL ANDREW OWEN in their capacities as liquidators of Queensland Nickel Pty Ltd (in liq) ACN 009 842 068

First Defendants

and

JOHN PARK, STEFAN DOPKING, KELLY-ANNE TRENFIELD AND QUENTIN OLDE in their capacities as the general purpose liquidators of Queensland Nickel Pty Ltd (in liq) ACN 009 842 068

Second Defendants

SECOND DEFENDANTS' SUBMISSIONS

PART I: PUBLICATION ON INTERNET

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

PART II: CONCISE STATEMENT OF THE ISSUES THE SECOND RESPONDENTS CONTENDS THAT THE RESERVED QUESTION PRESENTS

2. The second defendants consider the question reserved presents the following issues:

   (a) is the power under section 596A of the Corporations Act one which involves the exercise of judicial power, by the power being judicial by reason of it being conferred on a court, or as incidental or ancillary to the exercise of judicial power;

   (b) is the power under section 596A of the Corporations Act sufficiently analogous to a power historically exercised by courts at the time of Federation; and

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(c) whether *R v Davison*[1] should no longer be followed, in that this court should now hold that a power is not "judicial power" by reason of the power being sufficiently analogous to a power historically exercised by courts at the time of Federation; and

(d) whether the power conferred by section 596A is incompatible with the judicial power of the Commonwealth.

PART III: NOTICES PURSUANT TO SECTION 78B OF THE *JUDICIARY ACT 1903*

3. The Plaintiff's written submissions record that notice pursuant to section 76B of the *Judiciary Act 1903* (Cth) was given on 15 September 2016. This being the case the Second Defendants do not consider further notice is necessary.

PART IV: STATEMENT OF WHETHER ANY MATERIAL FACTS ARE CONTESTED

4. The second defendants do not dispute any of the facts set out in Part IV of the Plaintiff's written submissions, save that the relevant summons for examination was not issued on 2 August 2016 (as recorded in the first defendants' written submissions). The fact is however irrelevant to the reserved question and unnecessary to determine.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

5. The second defendants do not rely on any additional constitutional provisions, statutes or regulations in addition to those referred to in Annexure A of the plaintiff's and first defendants' written submissions.

PART VI: SECOND DEFENDANT'S ARGUMENT

6. The second defendants adopt the written submissions of the first defendant save for additional submissions as set out below, in particular with respect to the issues canvassed in paragraphs 49 to 74 of the plaintiff's submissions.

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[1] (1954) 90 CLR 535.

***R v Davison* should continue to be followed**

7. Paragraph 53 of the plaintiff's written submissions expresses an argument that a test of judicial power by reference to historical functions would be unsafe if the test was referable to English historical antecedents. The historical functions of the type referred to in *R v Davison* are not merely English historical antecedents but Australian historical antecedents, being aspects of the general law received in Australia, and in relation to companies, statute law adopted in Australia which formed part of the powers exercised by courts in Australia at the time of Federation. There is nothing inapposite in construing the judicial power of the Commonwealth by reference to powers exercised by the courts in Australia at the time of Federation.

8. The argument proceeds that *R v Davison* was decided at a time when, by reason that reference to the Constitutional Convention Debates was treated as impermissible, "insufficient regard" was had to the model of separation of powers intended by the framers of the constitution. There is an evident risk of this argument assuming its conclusion

9. If it is a submission that the court should exclusively have regard to an abstract model of separation of powers without any regard to the pragmatic reality of judicial powers being exercised at the time of Federation, this is close to an appeal to the type of "fundamentalism" in relation to separation of powers under the constitution, which was criticized by French CJ & Kiefel J in *Wainohu v New South Wales* (2011) 243 CLR 181 at 201-202 [30]:

> *"... the imprecise scope of the judicial power, which historically was not limited to the determination of existing rights and liabilities in the resolution of controversies between subject and subject, or between subject and the Crown. It is also consistent with the shifting characterisation of the so-called "chameleon" functions as administrative or judicial according to whether they are conferred upon an authority acting administratively or upon a court. Assessments of constitutional compatibility between administrative and judicial functions are not to be answered by the application of a Montesquieuan fundamentalism. As Cardozo CJ said in this context:*
>
> > *"The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is of the essence of the judicial function may be destroyed".* (footnotes omitted)

10. In any event, the plaintiff's argument proceeds on the basis that the decision of Kitto J in *R v Davison*, so far as it established an "historical test" of powers that were

judicial powers, should no longer be followed because it fails to give sufficient regard to the constitutional purposes in relation to the separation of powers.

11. The argument should be rejected. It reduces to an argument that the intention of the framers of the constitution should be given significant weight in the determining how strictly or rigorously the separation of powers is to be construed, but the intention of the framers should be deprecated in relation to understanding what scope of what "judicial power" was, which was the subject matter of what was to be separated. There is no reason to attach significant weight to the presumed intention of the framers in respect of one matter (the desirability of a separation of powers), but disregard it with respect to another (the content of those powers). There is every reason to avoid such an artificial approach. The plaintiff points to nothing in the Constitutional Convention Debates disclosing any intention that significant aspects of traditionally exercised functions of courts and the statute laws in Australia were liable to be beyond power by reason of sec 71 of the *Constitution*, unless they met conditions of validity which had hitherto not existed or applied in Australia.

12. Given the incongruity that would arise if the *Constitution* was interpreted in a way that would have invalidated many powers of courts exercised since the time of Federation, paragraph 60 of the plaintiff's written submissions assert that the "various categories of curial activity" referred to in *R v Davison* did not involve purely investigative or inquisitorial functions. However, many investigative and inquisitorial functions exercised by courts at the time of Federation were identified by the majority in *Dalton v New South Wales Crime Commission* (2006) 227 CLR 490 (at [45]):

> *The proposition denying the investigative functions of courts should not be accepted. From a time well before federation, the courts of the Australian colonies, like those in England and elsewhere in the Empire, exercised a range of administrative and investigative functions. Provisions for the examination of judgment debtors, bankrupts, and officers of failed corporations are in point. In Cheney v Spooner, this Court upheld the application of the 1901 Act to an order by the Supreme Court of New South Wales under ss 123 and 124 of the Companies Act 1899 (NSW) which gave leave to the liquidator of a company in voluntary liquidation to summons a number of persons to attend for examination by the Master in Equity. The equity jurisdiction of the Supreme Courts with respect to bills of discovery (or preliminary discovery in more recent parlance) provides another instance of an investigative procedure. So also the courts of marine inquiry established in the Australian colonies. Likewise the next of kin inquiry in an administration suit, conducted in New South Wales by the Master in Equity.* (footnotes omitted)

13. Specifically, sec 596A confers a power similar in nature to an order for preliminary discovery, in the absence of any requirement for a pending court process or prior court orders. The absence of any pending proceeding, or prior order of a court, is the gist of a process for preliminary discovery, given the party seeking preliminary discovery has reason to believe they may have a right to obtain relief from a court, but does not have sufficient information to determine whether they out to do so.[2] Likewise, a public examination is a process where there is no requirement for a pending proceeding or a prior order of a court commencing a relevant winding-up. In both instances, the process informs a prospective litigant as to potential or possible litigation, to an obvious end of public benefit in relation to the administration of justice.

The relevant historical analogue is close

14. Some features of the nature of the exercise of a power under section 596A are relevant to assessing whether it is in substance divergent from relevant pre-Federation powers:

    (a) the section requires a court to be satisfied that the applicant is an "*eligible applicant*"; and

    (b) the section requires a court to be satisfied that the person to be the subject of a summons is an "*officer or provisional liquidator*" of the corporation, or was in one of the time periods specified in the section.

15. An "*eligible applicant*" includes ASIC, a liquidator or provisional liquidator, an administrator[3] or a person authorised by ASIC.[4] Registration as a liquidator requires that the person concerned satisfy ASIC that they:[5]

    (a) hold qualifications in accountancy or commercial law (or qualifications ASIC considers equivalent);[6]

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[2] See *Federal Court Rules 2011*, Division 7.3 and particularly rule 7.23.
[3] Of the company itself, or of a deed of company arrangement.
[4] See definition of "eligible applicant" in section 9 of the Corporations Act.
[5] Generally in Part 9.2 of the Corporations Act.
[6] Corporations Act, Section 1282.

(b) has experience satisfactory to ASIC "*in connection with externally-administered bodies corporate*";[7] and

(c) has satisfied ASIC that they are capable of "*performing the duties of a liquidator*" and are a "*fit and proper person to be registered as a liquidator*".[8]

16. Being registered is a liquidator under the Corporations Act is required for a person to act as a receiver of a company's property,[9] act as an administrator,[10] or act as a liquidator.[11]

17. There is no radical or substantial difference in a requirement that a court consider whether a public examination be "*just and beneficial*", at a time when there was no system of registration of liquidators,[12] compared to a court being satisfied that the applicant is within a class of persons who, by their identity (on the part of ASIC or a person authorised by ASIC) or by their qualification (by a registered liquidator) can be expected to be carrying out their duties and making the application for proper purposes.

18. These are relevant controls on the identity of the party applying for an order under section 596A. By being satisfied that an applicant falls within one of these classes of persons who are "eligible applicants", a court is thereby required to assess whether the person is by their identity (as ASIC or a person authorised by ASIC) or by their registration as a liquidator (in light of the conditions for registration) within a class of persons who are likely to be acting for proper purposes.

19. The absence of any requirement for a court to separately evaluate whether a proposed public examination is "just and beneficial" is not significant in light of these circumstances. Section 596A is not, therefore, a sufficiently different version of provisions creating powers formerly exercised pre-Federation, so as to be disqualified as relevantly analogous.

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[7] Section 1282(2)(b).
[8] Ibid, section 1282(2)(c).
[9] Ibid, section 418(1)(d).
[10] Section 448B.
[11] Ibid, section 532(1).
[12] The historical practices were described by McHugh JA in *Brian Cassidy Electrical Indistries Pty Ltd v Attalex Pty Ltd (No 2)* [1984] 3 NSWLR 52 at 76-77.

The function conferred by section 596A is compatible with the judicial power of the Commonwealth

20. The first matter relied on by the plaintiff to submit incompatibility is the lack of "discretion" conferred on a court by reason of the mandatory nature of sec 596A.

21. The plaintiff's written submissions emphasise a number of matters that are said to establish an absence or lack of discretion on the Court said to be incompatible with the institutional integrity of a court. The thrust of the submissions is that the court is enlisted into a process that is "*no more than a fact-gathering exercise*".[13] A liquidator or similar external controller of a company obtaining facts and evidence they consider necessary or useful to carry out their duties as liquidators of a company is not at all dubious as a matter of public interest.

22. The characterisation of the court as a conscripted participant in a process controlled by others on the making of an application under sec 596A fatally disregards the supervisory powers granted to the Court and provisions concerning the conduct of an examination, after it has commenced, which include:

    (a) the power of a court to refuse to issue of summons if it considers that it is an abuse of process. The plaintiff himself availed himself twice of an opportunity to argue for the exercise of this power before a judge of the Federal Court (on application and then by way of leave to appeal);[14]

    (b) the court powers to give directions as to which matters may be inquired into, the procedure to be followed, who may be present (if it is being held in private), and who may be excluded, and directions concerning access to the records of the examination;[15]

    (c) the courts powers to determine which questions it may put or allow to be put in the way it considers appropriate;[16]

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[13] Paragraph 68.
[14] *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (In Liq)* [2016] FCA 1048; *Palmer, in the matter of Queensland Nickel Pty Ltd (In Liq) v Parbery, in his capacity as Liquidator of Queensland Nickel Pty Ltd (In Liq)* [2016] FCA 1094.
[15] Section 596F of the Corporations Act.
[16] Ibid, section 597(5B).

(d) the rights of an examinee may have a solicitor or counsel attend at the examination, with that representative permitted to put questions to the examinee to explain or qualify answers or evidence given;[17] and

(e) the power of a court, if it considers a summons was obtained "without reasonable cause", to make an order for payment of costs incurred by the applicant or a person who took part in the examination.[18]

23. Although the "practical operation" of sec 596A is that an eligible applicant is given a right to commence a public examination process, this only relates to the commencement of the process and one where (as addressed above) the class of applicants is circumscribed. The process that follows the issuing of a summons is one where the court is given broad and pervasive control and authority. The situation is not unlike an ordinary court process, where a litigant may file and commence a process as of right, but then becomes liable to the control and direction of the court as to its conduct. A court being required to deal with a process which has regularly invoked its jurisdiction does not make the court a "conscript" of the litigants. A court controlling and supervising a public examination is in a similar position.

24. As the first defendant's submissions correctly identify, as an additional matter, the court also has under the Act broad powers of supervision and review over the conduct of external controllers of a company who are likely to be eligible applicants, such as a power to inquire into the conduct of a liquidator and a power to take such action "as it thinks fit".[19] The Court is also given a power, for cause, to remove a liquidator.[20]

25. Nothing in the Act provides that a Court is required to exercise any powers of control or discretion given to the court in relation to the conduct of a public examination in favour of an "eligible applicant" or in a manner prescribed by the Act. There is no basis for the submission[21] that the court's role in the process gives rise to a risk that it will be seen as not independent or impartial in a subsequent proceeding. The bare

[17] Ibid, section 597(16);
[18] Ibid, section 597B.
[19] Section 536 of the Corporations Act.
[20] Ibid, section 503.
[21] In paragraph 69 of the plaintiff's written submissions.

fact that a court has a power to ask questions in an examination is not dissimilar to a court's power to ask questions of a litigant or witness in a proceeding.

26. The final point made in the plaintiff's submissions is that the power in question is "extraordinary" and that it "should be" undertaken "without the involvement of the court". Why the various risks and possibilities of abuse "should be" exercised without the involvement of a court is not elaborated and explained. The risks asserted seem to be that:

    (a) an examinee may be unduly compelled to give evidence which may involve inconvenience or hardship; and

    (b) an examinee may be exposed to questioning in a public forum that includes untested allegations.

27. Witnesses being compelled to attend and give evidence is a familiar aspect of a court proceeding. So is the airing of allegations, and allegations being put to witnesses, prior to the truth of those allegations being judicially determined. Controlling and supervising these processes is a familiar task of a court. Controlling and supervising these issues in the context of an examination are similar in nature.

PART VII: ORDERS SOUGHT

28. The second defendants seek the following orders:

    (a) The question reserved for consideration of the Full Court be answered: "No".

    (b) The writ of summons be dismissed.

    (c) The plaintiff pay the second defendants' costs of these proceedings.

PART VIII: ORAL ARGUMENT

70. The first defendants seek to supplement this outline with oral argument and estimate that one hour may be required.

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