ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M66 of 2010

B E T W E E N

KPMG (a firm) Plaintiff

and

COMMONWEALTH OF AUSTRALIA
Firstnamed Defendant

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Secondnamed Defendant

PLAINTIFF'S SUBMISSIONS IN REPLY

1. These are the submissions of KPMG, in reply to the written submissions of the Defendants dated 17 January 2011 (**Defendants' Submissions**).

Response to paragraphs 13 – 22: "*divergence*"

2. The Defendants concede that there is the potential for divergence between the public interest (upon which ASIC acts in deciding to commence and carry on a proceeding) and the private interests of the company, but say that the potential for any such divergence is "*limited*".[1]

3. To the contrary, the potential for divergence is real and significant, and flows directly from the text of s 50 which refers specifically to the public interest and *not* to the private interests of the company.

4. The Defendants' proposition that the potential for divergence is limited is not supported by the provenance of the provision. The historical materials demonstrate that the scope of the provision has been progressively widened.[2] As recognised by the Full Court of the Federal Court in *Australian Securities Commission v Deloitte Touche Tohmatsu,*[3] regulatory or policy objectives (for

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1 Defendants' Submissions, para 20.

2 See the Plaintiff's Submissions dated 5 January 2011 (**Plaintiff's Submissions**), paras 15-22.

3 (1986) 70 FCR 93 at 125-127.

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Filed on behalf of: the Plaintiff
Solicitor code: 21455
Prepared by: Allens Arthur Robinson
DX 30999 Melbourne Stock Exchange
Lawyers
Tel 9614 1011
Level 27, Stock Exchange Building
Fax 9614 4661
530 Collins Street
Ref: MTS (Michael Schoenberg)
Melbourne VIC 3000

example, clarification of accounting standards) can legitimately be considered capable of advancing the public interest. That being so, it would be within power for a proceeding to be pursued to judgment solely or principally to achieve such regulatory purposes. It may also be easily countenanced that without any suggestion of fraud or misfeasance, and instead for legitimate commercial reasons, a company may determine not to pursue a proceeding which ASIC elects to begin and carry on for regulatory or public policy purposes.

5. Further, a strand in the reasoning of the Defendants on 'non divergence' of interest is to identify the "*mischief*" sought to be addressed by the current section by reference to an extract from the 1969 Eggleston Company Law Advisory Committee Report.[4] However, it is relevant to note that at that time, s 169(7) of the uniform State and Territory companies legislation spoke of proceedings for the recovery of damages "*in connection with the promotion or formation of that company or in the management of its affairs or for the recovery of any property of the company which has been misapplied or wrongfully retained.*" Thus the comments on which the Defendants rely were made in the context of a much more confined provision.

Response to paragraphs 23 – 25: "*property*"

6. The Defendants contend that the Plaintiff's Submissions "*do not clearly articulate the nature of the 'property' of the Westpoint companies that is said to have been acquired under s 50 of the ASIC Act*".[5] That is not correct. The Plaintiff identifies the relevant property as the chose in action, or right of action for damages.[6]

Response to paragraphs 26 – 30: "*company's capacity*"

7. The Defendants contend that the capacity of each of the Westpoint companies to begin and carry on a proceeding was qualified from the time of its incorporation, by s 50 or its predecessor, and therefore the exercise of power by ASIC under s 50 does not effect an acquisition of property.

8. However s 50 of the ASIC Act is not a provision concerned with the capacity of a company, but rather is a provision directed to enabling ASIC to begin and carry on a proceeding for the recovery of damages by a company in certain circumstances. Put another way, the subject matter of s 50 (both for companies and individuals) is the right of action for damages. It is a law with respect to that property, and it is not open to recharacterise it as a law concerned with capacity to avoid the reality of that situation.

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4 Defendants' Submissions, para 17.

5 Defendants' Submissions, para 24.

6 See Plaintiff's Submissions, paras 14, 35, 37-45, 49, 52, 54, 65.

9. Further, even if it were the case that s 50 qualified the capacity of a company to begin and carry on a proceeding, the substance of the matter would still be that the provision effected an acquisition of property; the provision would then be no more than a circuitous device to achieve indirectly an end which is prohibited directly.[7]

10. If the contention of the Defendants were to be well founded, a company would be subjected to **all** Commonwealth legislation at the time of its incorporation which authorised acquisitions of property otherwise than on just terms. That cannot be correct.

11. The Defendants seek to draw an analogy with the reasoning of this Court in *Telstra v Commonwealth*. The impairment in the *Telstra* case arose because the bundle of rights (the property for which Telstra contended) had always been subject to the access rights of third party competitors as part of the telecommunications regulatory regime.[8] That is quite different to the Defendants' argument here which is, in substance, that the capacity of each Westpoint company was qualified from the time of its incorporation. For the reasons set out above, that contention should be rejected.

Response to paragraphs 31 – 40: *"acquisition"*

12. The Defendants rely on the analysis of the Full Court of the Federal Court in *Femcare v Bright*[9] to support the contention that the power conferred on ASIC by s 50 of the *ASIC Act* does not amount to "*use*" of the property of a company.[10] In this way, the Defendants seek to distinguish the analysis of the High Court in *Minister of State for the Army v Dalziel,*[11] and in particular the proposition that an assumption of exclusive possession or control[12] constitutes an acquisition.

13. In relation to the reliance by the Defendants on the analysis in *Femcare*, the Plaintiff says two things in response.

14. First, *Femcare* concerned the provisions for representative proceedings contained in Part IVA of the *Federal Court of Australia Act* 1976 (Cth). Under those provisions, there was an identity of interests between the plaintiff and the represented persons.[13] However in the case of s 50 of the ASIC Act, there is no necessary coincidence between the public interest, which is the basis upon which

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7 See *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 130-131 [228] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

8 (2008) 234 CLR 210 at 233-234 [52].

9 (2000) 100 FCR 331 at 356-357 [109].

10 Defendants' Submissions, para 39.

11 (1944) 68 CLR 261.

12 See especially Rich J, at 285-287 and Starke J, at 290.

13 See *Bright v Femcare Ltd* (1999) 166 ALR 743 at 755 [29] per Lehane J; and (2001) 100 FCR 331 at 357 [109] (Full Federal Court).

ASIC acts, and the private interests of the company. Indeed, as already pointed out, there is a real and significant potential for divergence.

15. Secondly, and in any event, any distinction between 'use' and enforcement of choses in action is questionable. The primary way in which a chose of action can be turned to account by its owner is for it to be enforced by action.[14] Indeed, the essence of a right of action for damages is its enforceability.

Response to paragraphs 41 – 44: "*independent proprietary character*"

16. The Plaintiff agrees that forensic decisions that will be made in the course of conducting a proceeding (e.g. which lawyers to engage, what to plead, etc) do not have an "*independent proprietary character*".[15] But it is pertinent to observe that they are decisions that can only be made by the person who has control of the property, i.e. the right of action for damages. Section 50 confers on ASIC exclusive command and control of the right of action for damages, which provides authority for it to make all such decisions. The circumstance that ASIC has such authority confirms the acquisition by ASIC of the company's right of action for damages.

Response to paragraphs 45 – 51: "*with respect to*"

17. The Defendants contend that s 50 of the *ASIC Act* is not a law "with respect to" an acquisition of property and should rather be characterised as a law with respect to trading or financial corporations formed within the Commonwealth within s 51(xx) of the *Constitution*. The Defendants rely on a passage from the judgment of Mason J in *Mutual Pools*.[16]

18. However the Defendants' reliance on that passage is misplaced. Section 50 of the ASIC Act is not a law that adjusts competing claims, obligations or property rights as an incident of the regulation of relationships between individuals. Rather, it is a provision which enables ASIC in the public interest to begin and carry on certain proceedings of a company and (with consent) of an individual. It is not an incident of regulating relationships.

19. Further, the power to control the conduct of a proceeding to facilitate public purposes without the provision of just terms is precisely the circumstance to which the constitutional guarantee is directed.[17] It would be unsound in principle if, in that circumstance, the constitutional guarantee could be

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14 *Loxton v Moir* (1914) 18 CLR 360 at 379.

15 Defendants' Submissions, para 43.

16 The passage has been the subject of criticism. See *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 at 225-233 [216 ff] per Heydon J and *Smith v ANL* (2000) 204 CLR 493 at 550-552 [178]-[181] per Callinan J.

17 See *Attorney-General of the Commonwealth v Schmidt* (1961) 105 CLR 361 at 371-372 per Dixon J.

circumvented by a proposition that the law under consideration was concerned with an adjustment of competing rights, claims or obligations.

Response to paragraphs 52 – 54: "*just terms*"

20. The Defendants say that, even if there is an acquisition of property, it is on just terms because the companies receive the fruits (if any) of the litigation. Under the legislation the subject of consideration in the *Bank Nationalisation* case,[18] the shareholders retained the right to dividends and to any surplus on winding up, but they did not receive any compensation for the loss of control of the conduct of the affairs of the company.[19] Likewise, here, the company loses control of the right of action for damages and receives no compensation for this loss of control.

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Alan C Archibald QC
Tel: (03) 9225 7478
Fax: (03) 9225 8370
Email: archibaldsec@owendixon.com

Mark Moshinsky SC
Tel: (03) 9225 7328
Fax: (03) 9225 6061
Email: m.moshinsky@vicbar.com.au

Philip Solomon SC
Tel: (03) 8600 1711
Fax: (03) 8600 1725
Email: solomon@chancery.com.au

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18 (1948) 76 CLR 1.

19 See at 348-349 per Dixon J.