HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ

MILAN VISNIC PLAINTIFF

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION DEFENDANT

Visnic v Australian Securities and Investments Commission [2007] HCA 24
24 May 2007
S389/2006

ORDER

The action is dismissed.

Representation

A W Street SC with G D Wendler and J S Emmett for the plaintiff (instructed by Van Houten Law)

Submitting appearance for the defendant

Intervener

H C Burmester QC with G M Aitken intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Visnic v Australian Securities and Investments Commission

Constitutional law (Cth) – Separation of powers – Judicial power – The Australian Securities and Investments Commission ("ASIC") disqualified the plaintiff from managing corporations pursuant to s 206F of the *Corporations Act* 2001 (Cth) – Whether the power of disqualification contained in s 206F of the *Corporations Act* 2001 (Cth) invalidly confers the judicial power of the Commonwealth upon ASIC.

Constitutional law (Cth) – Separation of powers – Whether a power of disqualification can validly be conferred concurrently upon a Chapter III court and an administrative body – Relevance of the existence of curial powers of disqualification alongside those conferred upon ASIC – Relevance of chameleon principle – Whether conferral of power upon an administrative body is an impermissible circumvention of Ch III of the Constitution.

Constitutional law (Cth) – Judicial power – Meaning of judicial power –Whether the maintenance of professional standards involves the exercise of judicial power – Whether the determination of the "public interest" involves the exercise of judicial power.

Words and phrases – "chameleon principle", "disqualification", "functional analysis", "judicial power of the Commonwealth", "public interest".

Constitution, Ch III.
Corporations Act 2001 (Cth), Pt 2D.6; ss 206F, 1317E.

1 GLEESON CJ, GUMMOW, HAYNE, CALLINAN, HEYDON AND CRENNAN JJ. Section 206F of the *Corporations Act* 2001 (Cth) ("the Corporations Act") is found in Pt 2D.6 (ss 206A-206HA) of that statute. Part 2D.6 is headed "Disqualification from managing corporations". This may be brought about in three ways.

2 First, s 206B provides for what is identified as "[a]utomatic disqualification". This occurs by force of that section if a person is convicted of an offence of a certain description. Secondly, ss 206C, 206D and 206E confer powers of disqualification upon "the Court", which is defined[1] so as to include the Federal Court and the Supreme Court of a State or a Territory. The powers of the Court under these provisions for disqualification are exercised upon application by the Australian Securities and Investments Commission ("ASIC"). Section 206C is engaged by curial declaration under s 1317E of contravention of a civil penalty provision, s 206D by responsibility for mismanagement of failed corporations, and s 206E by repeated contraventions of the Corporations Act.

3 Thirdly, s 206F confers the power of disqualification not upon one of the designated courts but upon ASIC itself. Section 206F provides that ASIC may disqualify a person from managing corporations for up to five years if the conditions spelled out in s 206F(1) are satisfied. In determining whether disqualification is justified, ASIC is directed to the matters set out in s 206F(2). The text of these provisions is set out later in these reasons. A decision by ASIC under s 206F may be reviewed by the Administrative Appeals Tribunal (s 1317B).

4 A person who becomes disqualified from managing corporations by the operation of any of these provisions of Pt 2D.6 ceases to be a director, alternate director or a secretary of a company (s 206A(2)). It is an offence for a disqualified person to manage a corporation (s 206A(1)).

5 The litigation in this Court arises in the following manner. On 24 January 2006, a delegate of ASIC served upon the plaintiff a notice stating that he had been disqualified from the time of service of the notice for a period of five years from managing corporations without the leave of ASIC. On the same day, ASIC published a statement of facts, findings and reasons for decision.

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1 s 58AA.

6 The plaintiff had been a director of 14 companies which had been wound up with the appointment of liquidators. ASIC was satisfied, within the meaning of par (a) of s 206F(1), that the plaintiff had been an officer of two or more corporations within the immediately preceding seven years and that, whilst he was such an officer or within 12 months of his ceasing to be so, each corporation had been wound up and a liquidator had lodged a report under s 533(1) of the Corporations Act concerning the inability of the corporation to pay its debts. The statement by ASIC published on 24 January 2006 concluded that the plaintiff was:

> "not fit to manage corporations and should be prohibited from further managing corporations as he has demonstrated a lack of responsibility towards his duties and responsibilities to creditors, to the detriment of those creditors, and it is therefore in the public protection interest that [the plaintiff] should be prohibited from managing a corporation for a period of 5 years fom the date of service of the Notice of Prohibition dated 24 January 2006".

7 Sub-sections (1) and (2) of s 206F provide as follows:

> "(1) ASIC may disqualify a person from managing corporations for up to 5 years if:
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> (a) within 7 years immediately before ASIC gives a notice under paragraph (b)(i):
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> (i) the person has been an officer of 2 or more corporations; and
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> (ii) while the person was an officer, or within 12 months after the person ceased to be an officer of those corporations, each of the corporations was wound up and a liquidator lodged a report under subsection 533(1) about the corporation's inability to pay its debts; and
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> (b) ASIC has given the person:
>
> (i) a notice in the prescribed form requiring them to demonstrate why they should not be disqualified; and

(ii) an opportunity to be heard on the question; and

(c) ASIC is satisfied that the disqualification is justified.

(2) In determining whether disqualification is justified, ASIC:

(a) must have regard to whether any of the corporations mentioned in subsection (1) were related to one another; and

(b) may have regard to:

(i) the person's conduct in relation to the management, business or property of any corporation; and

(ii) *whether the disqualification would be in the public interest*; and

(iii) any other matters that ASIC considers appropriate." (emphasis added)

Sub-paragraph (ii) of s 206F(2)(b) does not appear in the criteria for curial disqualification powers in s 206C(2), s 206D(3) and s 206E(2). However, in detailing the matters to which the Court may have regard when determining whether disqualification is justified, language to the effect of sub-pars (i) and (iii) is employed.

8 A cause then pending in the Federal Court in which the plaintiff sought a declaration on the invalidity of s 206F was by order of this Court made on 30 October 2006 removed into this Court. It then was heard concurrently with the appeals in *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* and *Gould v Magarey*[2]. These reasons should be read with those in the two appeals.

9 ASIC is the defendant in the present cause but entered a submitting appearance. The Attorney-General of the Commonwealth intervened and presented opposing submissions to those of the plaintiff.

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2 [2007] HCA 23.

10 The central issue is whether s 206F purports to confer upon ASIC a function or power pertaining exclusively to the judicial power of the Commonwealth. If, upon its proper construction, the legislation did so, then it would be invalid, ASIC not being one of the courts identified in Ch III of the Constitution.

11 The Attorney-General identifies s 206F as conferring upon ASIC a power to be exercised for the purpose of maintaining professional standards in the public interest and submits that there is nothing inherently judicial in such a power. These submissions should be accepted and the action should be dismissed. We turn to explain why this conclusion should be reached and the contrary submissions by the plaintiff rejected.

12 The plaintiff put several arguments in addition to those of the appellants in *Albarran* and *Gould*. The first submission fixed upon the presence in Pt 2D.6 of the Corporations Act of the curial powers of disqualification conferred by ss 206C, 206D and 206E, alongside the power conferred upon ASIC by s 206F. Then it was said that the Parliament could not vest judicial power at the same time in both a Ch III court and an administrative body.

13 This submission should be rejected. First, a proposition of that width cannot stand with the earlier authority of this Court provided by *R v Quinn; Ex parte Consolidated Foods Corporation*[3]. There, the Court upheld the validity of s 23(1) of the *Trade Marks Act* 1955 (Cth). That one provision was concurrently addressed to this Court and to the Registrar of Trade Marks and, upon application, conferred authority to remove for non-use trade marks from the register. Secondly, in any event, the criteria stipulated for the exercise of power by ASIC and by the courts differ and do so to a significant degree. Earlier in these reasons reference has been made to the regard ASIC may have to the public interest in a disqualification (s 206F(2)(b)(ii)) and to the absence of any reference to the public interest in the other sections conferring curial power.

14 This Court held in *Precision Data Holdings Ltd v Wills*[4] that the Corporations and Securities Panel, in declaring an acquisition of shares or conduct relating thereto to have been unacceptable, was not exercising the

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3 (1977) 138 CLR 1.

4 (1991) 173 CLR 167.

judicial power of the Commonwealth. In its reasons, the Court drew a distinction which is presently material[5]:

> "Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power[6]. However, where, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important part to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal, in this case the Panel, is entrusted with the exercise of judicial power."

15 The statement in the final sentence of that extract is sufficiently determinative of the present case. Section 206F empowers ASIC to determine that a person henceforth not manage corporations and to decide that question by reference to criteria including the public interest.

16 It is true that ASIC may look to the conduct of the person in question, in relation to the management of any corporation (s 206F(2)(b)(i)). But, as with the legislation considered in *Albarran* and *Gould*, there is no determination of guilt with respect to any offence provision. Consideration of such provisions would be but a step in concluding whether there should be a disqualification.

17 The plaintiff also fixed upon what were identified as grounds of contravention of the law which would attract both s 206C and s 206F. Were ASIC to apply under s 206C, the rules of evidence would apply (s 1317L). But, if ASIC itself moved under s 206F, as in the present case, the rules of evidence

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5 (1991) 173 CLR 167 at 191.

6 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 377 per Kitto J.

would not apply and impermissibly would be "circumvented". This argument assumes the proposition, already rejected in these reasons, that the power conferred upon ASIC is inherently or exclusively judicial in nature. If that proposition be rejected, there is no footing for an argument of "circumvention".

18 Likewise the proposition advanced by the plaintiff that s 206F was an ineffective attempt to oust the "original jurisdiction" of this Court under s 75(iii) of the Constitution in "matters ... in which the Commonwealth ... is a party". For the purposes of s 75(iii), ASIC has the identity of the Commonwealth[7]. But, in acting under s 206F, ASIC does not purport to exercise the judicial power of the Commonwealth. How then can there be a legislative attempt to oust the operation of s 75(iii)?

19 The action should be dismissed. The Attorney-General seeks no costs order.

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7 *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559.

20 KIRBY J. These proceedings, removed into this Court from the Federal Court of Australia, were heard at the same time as the *Albarran* and *Gould* appeals from that Court[8]. Like those appeals, the proceedings concern s 71 of the Constitution. That is the provision that requires "the judicial power of the Commonwealth" to be vested in a Ch III court and not exercised by a legislative or executive officer, body or tribunal.

The facts and legislation

21 *The facts*: The basic facts are set out in the reasons of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ ("the joint reasons")[9]. Before action was taken to disqualify him, Mr Milan Visnic ("the plaintiff") was an officer (director) of fourteen companies that had been wound up. Pursuant to the *Corporations Act* 2001 (Cth) ("the Corporations Act")[10], a liquidator reported that the corporations, of which the plaintiff was an officer, might have been unable to pay their unsecured creditors more than $0.50 in the dollar.

22 In the result, the Australian Securities and Investments Commission ("ASIC")[11], by service of a notice in November 2005, afforded the plaintiff an opportunity to be heard as to why he should not be disqualified from managing corporations for a period of up to five years. The notice was issued pursuant to s 206F(1)(b)(i) of the Corporations Act. The plaintiff responded by challenging the constitutional validity of s 206F.

23 These proceedings have afforded the plaintiff the opportunity to argue his challenge. Some, but not all, of the plaintiff's arguments overlapped those advanced by the appellants in *Albarran* and *Gould*.

24 *The legislation*: The joint reasons set out the terms of sub-ss (1) and (2) of s 206F[12]. It is unnecessary for me to repeat them. As the joint reasons explain[13],

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8 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [2007] HCA 23.

9 Joint reasons at [5]-[6].

10 s 533(1)(c), (d).

11 See *Australian Securities and Investments Commission Act* 2001 (Cth) ("the ASIC Act"), s 261. ASIC was formerly known as the Australian Securities Commission: see *Australian Securities Commission Act* 1989 (Cth), s 7.

12 Joint reasons at [7].

13 Joint reasons at [1]-[2].

the scheme of the Corporations Act envisages that officers of corporations may be disqualified from holding such office in three ways: (1) by automatic disqualification upon conviction of certain offences[14]; (2) by order of "the Court" (including the Federal Court or the Supreme Court of a State or Territory)[15]; or (3) by order of ASIC itself under s 206F.

25 ASIC proceeded against the plaintiff not by making application to "the Court" but under its own power expressed in s 206F. This is described in the heading to that section as "ASIC's power of disqualification". It is this asserted "power" which the plaintiff argues constitutes an invasion by ASIC – a body within the executive government of the Commonwealth – of the federal judicial power reserved by the Constitution to Ch III courts.

26 *Albarran and Gould: overlap and difference*: The overlap with the *Albarran* and *Gould* appeals is plain. Each of the proceedings concerns an aspect of the regulation of corporations under federal law. That regulation is of large and still growing importance for the economy and the nation. The protection of shareholders, creditors, employees and the community depends on the integrity of officers of corporations and, where such corporations fail, of their liquidators. One obvious mode of securing the protection of such interests is by disqualification (in the case of officers) and deregistration (in the case of liquidators) of persons who hold such positions in order to prevent them, for a time, from exercising the powers of those positions.

27 Orders that deprive those who have held such positions of the entitlement to exercise their powers are public determinations having potentially serious consequences for the property (earning) rights and the reputation of the persons concerned.

28 Nevertheless, for the reasons explained in the *Albarran* and *Gould* appeals[16], the form of discipline provided for in the Corporations Act, in the case of officers of corporations that are wound up, is permissibly administrative in character. It does not involve the exercise of powers which, of their nature, *must* be vested only in a Ch III court because they involve the exercise of "the judicial power of the Commonwealth"[17].

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14 Corporations Act, s 206B.

15 Corporations Act, ss 206C, 206D, 206E. The expression "the Court" is defined in s 58AA.

16 [2007] HCA 23 at [90]-[101].

17 Constitution, s 71; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 296.

29 It is not necessary, in these proceedings, to repeat the analysis of the issues and the explanation of the conclusions stated in *Albarran* and *Gould*. The similarity of the disciplinary features of the powers provided to the executive body (ASIC) by the Corporations Act is sufficiently plain to render repetition superfluous.

30 Nevertheless, there is one particular feature of the challenged legislation in the present proceedings upon which the plaintiff fastened. In order to understand the essence of the plaintiff's argument, different from and additional to the arguments in *Albarran* and *Gould*, it is necessary to explain the distinctive statutory provisions on which the present plaintiff relied.

The plaintiff's arguments

31 *Substantial identity of powers*: At the heart of the plaintiff's argument was the essential identity of the powers which the Parliament had conferred on "the Court" with those that it had conferred at the same time on ASIC. It was contended that there could be no clearer demonstration of the content of "the judicial power of the Commonwealth" than this.

32 In order to appreciate this argument, it is necessary to refer to the other relevant provisions of the Corporations Act and to compare their language with the terms of s 206F. I will not set out the full terms of ss 206C and 206D, although the plaintiff submitted that the powers of ASIC under s 206F were a kind of amalgam of the powers of "the Court" under ss 206C and 206D. It will be sufficient, to appreciate the point argued, to note the terms of s 206E, reading that provision alongside s 206F[18]:

> "206E Court power of disqualification – repeated contraventions of Act
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> (1) On application by ASIC, the Court may disqualify a person from managing corporations for the period that the Court considers appropriate if:
>
> (a) the person:
>
> (i) has at least twice been an officer of a body corporate that has contravened this Act while they were an officer of the body corporate and each time the person has failed to take reasonable steps to prevent the contravention; or

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18 Set out in the joint reasons at [7].

(ii) has at least twice contravened this Act while they were an officer of a body corporate; or

(iii) has been an officer of a body corporate and has done something that would have contravened subsection 180(1) or section 181 if the body corporate had been a corporation; and

(b) the Court is satisfied that the disqualification is justified.

(2) In determining whether the disqualification is justified, the Court may have regard to:

(a) the person's conduct in relation to the management, business or property of any corporation; and

(b) any other matters that the Court considers appropriate."

33 The similarity between the language of the provisions empowering "the Court" to disqualify a person from managing corporations and the language of s 206F by which ASIC is empowered to so determine is clear. In the case of "the Court", the period of disqualification may be longer (up to 20 years in s 206D and not specifically limited in s 206C or s 206E). Some of the criteria for reaching the satisfaction are different[19]. However, the plaintiff submitted with some cogency that these were simply differences of degree and not of kind. They did not alter the essential identity of the functions being discharged respectively by the executive government body (ASIC) and by a Ch III court.

34 *Parallel legislation*: The plaintiff therefore argued that the effective identity of the "power" of decision-making afforded to "the Court" and to ASIC, demonstrated an attempted conferral by federal law upon each of the bodies named of a power to decide substantially the same type of issue according to the same type of considerations. That "power" is, in essence, to adjudicate a controversy between the regulatory body (ASIC) and the officer of the corporation concerned (the plaintiff). It is to do so by reference to like criteria spelt out in the Corporations Act. It is to do so in a manner apt to deciding, ultimately, whether that officer should be "disqualified". Indeed, the touchstone

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19 See joint reasons at [7].

for the decision in each case is the same. It is whether "the Court" or ASIC, as the case might be, is satisfied that "disqualification is justified"[20].

35 There are further similarities in the respective legislative provisions. In each case, whether in "the Court" or in ASIC, the decision to disqualify is expressed as a facultative power by the use of the verb "may". In this way, an evaluative decision must be made by each decision-maker by reference to the criteria nominated. So far as those criteria were concerned, in "determining whether disqualification is justified" a very close similarity exists between the factors to which "the Court" and ASIC "may have regard". Thus, in each case, attention is called to "the person's conduct in relation to the management, business or property of any corporation" and "any other matters" that the decision-maker "considers appropriate". The identified considerations are cast in very broad language. The only difference, in the case of ASIC, is the addition of reference to "whether the disqualification would be in the public interest"[21].

36 The plaintiff submitted, also with a certain cogency, that the addition of this last-mentioned consideration was ineffective, if it was designed to deprive the ultimate decision of a "judicial" character. It is true that some functions are committed to judges, by statute and the general law, that ask them to consider the public interest whilst acting judicially[22]. The use of such expressions in legislation may direct the attention of the court to a "discretionary value judgment to be made by reference to undefined factual matters" but with boundaries that can be fixed by reference to the objects that the legislature is taken to have had in view[23].

37 *The plaintiff's complaints*: Once the very high similarity of the powers afforded to "the Court" and to ASIC is appreciated, together with the near identity of many of the criteria for reaching the identical conclusion (disqualification) and the similarity of the considerations called to notice by the

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20 Corporations Act, s 206F(1)(c). Compare ss 206C(1)(b), 206D(1)(b)(ii) and 206E(1)(b).

21 Corporations Act, s 206F(2)(b)(ii); joint reasons at [7].

22 The expression and like expressions are common in defamation statutes: cf *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 205-206. But note *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 377, 400; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 126 [83]; *Cattanach v Melchior* (2003) 215 CLR 1 at 34-35 [75].

23 *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216 applying *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

Parliament in each case, the force of the plaintiff's constitutional complaint is easier to appreciate.

38 If, by the application of virtually identical criteria, directed to the same outcome, a "power" has purportedly been given by federal law both to a Ch III court and to an executive government agency, the plaintiff asked, in effect, how the exercise of such "power" could not, in each case, equally, be an exercise of "the judicial power of the Commonwealth". If the existence of such a "power" was required for the valid vesting of jurisdiction in a Ch III court, how, why and when did it cease to be a "power" of the same character merely because it was vested in an executive body? The "power" was effectively the same. To allow it to take on a different constitutional quality, simply because it was assigned by the Parliament to ASIC, and not to a court, would amount to permitting the Parliament, in effect, to dictate the constitutional character of the "power" by its own choice, that is, simply by nominating the identity of the repository to which the "power" was assigned[24].

39 The plaintiff argued that, consistently with the rule of law, this could not be so. He pointed to a number of considerations which, he suggested, rendered such a conclusion offensive to basic constitutional principle:

- Effectively, it left the decision on whether the jurisdiction of Ch III courts was engaged at all to a regulatory body which was scarcely neutral as to the outcome of its own determinations;

- It allowed the regulatory body, at its own option, to bypass the courts completely, thereby depriving the officer of the corporation or corporations concerned of the facilities afforded by the courts, including the determination of controversies by an independent and impartial decision-maker; the elucidation of contested facts by application of the law of evidence; and the provision of effective appeal rights in respect of decisions of considerable economic and reputational importance for the officer and corporations concerned;

- It offended constitutional principle by allowing the executive government regulator to become the effective decision-maker of its own accusation without permitting the officer of the corporation or corporations affected the privilege of having such a significant public "punishment" determined by a decision-maker distinct and removed from the regulator. Whereas arguments might be mounted for permitting certain regulatory

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24 Ratnapala, *Australian Constitutional Law: Foundations and Theory*, 2nd ed (2007) at 136-137.

"punishment" (civil penalties and "on-the-spot fines")[25] at the option of the person accused, with a concurrent privilege to elect for judicial determination if unwilling to submit to administrative decision, no such privilege was provided by s 206F to an officer such as the plaintiff. ASIC, by its own decision, transmogrified itself from the accusing regulator into the effective decision-maker, with consequential orders of large potential importance for those affected. The plaintiff charged that the legislation allowed ASIC to perform at once the functions of investigator, prosecutor, judge and jury and that this represented an impermissible blurring of constitutional roles forbidden to bodies established by federal legislation; and

- In the result, the "disqualification" which ASIC was permitted to determine was in the nature of an injunction forbidding the person disqualified from continuing to earn his or her living as an officer of corporations. Determinations of that character were, so the plaintiff submitted, judicial in their essential character. They could not be vested in an executive government body such as ASIC[26].

The legislation is valid

40 *Reliance on the chameleon principle*: I have endeavoured to explain the plaintiff's submissions because I regard them as presenting a serious question for decision. It is not one to be dismissed by an appeal to "formularies"[27].

41 Once again, the Attorney-General of the Commonwealth, who assumed the defence of the legislative scheme, founded his argument on the "double aspect" or "chameleon" principle. I have myself, to some degree, accepted that principle in the past[28]. In the right context[29], it can serve a useful function. However, it requires considerable care in its application lest it becomes a self-fulfilling means by which the executive and the legislature, by ingenious

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25 cf *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 at 175-177.

26 *R v Davison* (1954) 90 CLR 353 at 366; *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277 at 305.

27 Lane, *Some Principles and Sources of Australian Constitutional Law*, (1964) at 114-115.

28 *Pasini v United Mexican States* (2002) 209 CLR 246 at 264-267 [48]-[60], 268-269 [62].

29 See *Spicer* (1957) 100 CLR 277 at 305. See also *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628.

legislation, may sideline the independent courts. If that were to happen, serious decision-making of large importance might be transferred from independent and impartial decision-makers (such as judges) protected from external influences, to committed agencies within the other branches of government, lacking the same features of institutional neutrality and impartiality.

42 There has been a clear tendency on the part of the Commonwealth of late to meet virtually every appeal to the separation of powers doctrine in the Constitution by an invocation of the "chameleon" principle. The Commonwealth then says that it can solve virtually all supposed infractions of the doctrine by the decision that it makes to assign the functions in question to courts or to executive bodies at its own pleasure. We need to be careful lest this "doctrine", taken too far, destroys the important objectives which the constitutional separation of powers serves. It is of the nature of executive government (and sometimes parliaments) to be impatient with the requirements of such separation. However, the separation can sometimes protect the interests of the people and serve important constitutional ends that this Court should be vigilant to safeguard.

43 *The investigator as adjudicator*: The danger of which the plaintiff complained is illustrated by contrasting the exercise of the power illustrated in the *Albarran* and *Gould* appeals and that deployed in the plaintiff's proceedings. At least in *Albarran* and *Gould*, the decision resulting in the public sanction, exacted in those matters, was committed to an independent panel, namely the Companies Auditors and Liquidators Disciplinary Board ("the Board"). The Chairperson of the Board is required to have legal qualifications similar to those required for judicial appointment[30]. A feature of public administration in Australia in recent years, including in federal administration, has been the growth of important tribunals with members who enjoy substantial tenure and exhibit independence and impartiality similar to the courts[31]. However, as the corporate "watchdog", with an expected and proper commitment to policing corporations and to corporate law enforcement, ASIC cannot exhibit the appearance of similar institutional independence and impartiality. It is this element in the present case that causes me a degree of unease about the legislative design. The question is whether this unease betokens constitutional invalidity. Obviously, the joint reasons conclude that it does not.

44 It is true that, in the past, parallel institutional arrangements have existed under federal law for the exercise of substantially similar powers by a court and

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30 ASIC Act, ss 203(2), 210A(4)(a)(i). For specified purposes, the hearing before the Board is "taken to be a judicial proceeding": see ASIC Act, s 222.

31 *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 485.

by an administrator[32]. However, the absence of a facility of a full "appeal" to a court, or of a privilege to elect to proceed in a court, presents a different picture in the plaintiff's case[33].

45 The arguments of the plaintiff are by no means meritless. They make a number of effective points. If this field of law were free from legal authority, it might be possible to examine the validity of the legislative model presented in the present case. The "chameleon" principle does not appear to have been adopted in the United States of America where, otherwise, there are similarities in the constitutional provisions requiring separation of the judicial power from the other powers of government. Thus, in the United States Supreme Court it has been held repeatedly that "the nature of a proceeding 'depends not upon the character of the body but upon the character of the proceedings'"[34]. The chameleon principle still has a place in our constitutional doctrine[35]. Yet, as Deane J explained in *Polyukhovich v The Commonwealth*[36]:

> "[T]o construe Ch III of the Constitution as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers. ... [I]n insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch III, the Constitution's intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires."

46 *The legislation is valid*: In the end I have concluded that, within the present doctrine, the legislation does not infringe the requirements of s 71 of the Constitution. However, I would express my conclusion narrowly. I would rest it on the essential disciplinary character of the powers committed to ASIC by

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32 *Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma Pty Ltd* (1959) 101 CLR 652 at 658; *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1.

33 cf *Davison* (1954) 90 CLR 353 at 365.

34 *District of Columbia Court of Appeals v Feldman* 460 US 462 at 477 (1983) citing *Prentis v Atlantic Coast Line Co* 211 US 210 at 226 (1908) and also referring to *Roudebush v Hartke* 405 US 15 at 20-22 (1972); *Lathrop v Donohue* 367 US 820 at 827 (1961); *Nashville, C & St L R Co v Wallace* 288 US 249 at 259 (1933); *Public Service Co v Corboy* 250 US 153 at 161-162 (1919).

35 *Spicer* (1957) 100 CLR 277 at 305.

36 (1991) 172 CLR 501 at 607.

s 206F; the differentiation of the larger and somewhat more open-ended powers conferred by the Corporations Act on "the Court"; the fact that ASIC's decision is not conclusive or enforceable, as such, but forms a basis, where necessary, for curially enforceable rights and liabilities; and that ASIC's powers could not fairly be characterised as determining "basic legal rights"[37] of the kind that must always be reserved to a Ch III court[38].

47 The federal regulation of corporations and their officers evident in s 206F is therefore a constitutionally valid feature of contemporary public administration. Whilst some aspects of that regulation may properly be conferred on Ch III courts (as ss 206C, 206D and 206E illustrate), it cannot be said that the functions conferred by s 206F are of such a kind that they must be vested in the courts. So long as a "functional analysis"[39] continues to be endorsed by this Court and applied in its present form, legislation such as this will not be declared invalid. And in Mr Visnic's proceedings the "functional" approach was not challenged[40], but accepted.

Conclusion and order

48 I therefore agree in the order proposed in the joint reasons. The action should be dismissed.

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37 *Quinn* (1977) 138 CLR 1 at 11-12 per Jacobs J. See *Albarran* [2007] HCA 23 at [98].

38 *Albarran* [2007] HCA 23 at [99].

39 See *Albarran* [2007] HCA 23 at [36], [42], [76]; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15].

40 Leave to reopen the correctness of *Farbenfabriken* and *Quinn* was sought but refused in *Pasini* (2002) 209 CLR 246 at 248, 254 [13] per Gleeson CJ, Gaudron, McHugh and Gummow JJ.

17.