

HIGH COURT OF AUSTRALIA

GUMMOW, HAYNE AND BELL JJ

LUKE SARACENI

APPLICANT

AND

MARTIN BRUCE JONES AS RECEIVER
AND MANAGER OF NEWPORT SECURITIES
PTY LTD AND AS AGENT OF THE MORTGAGEE
IN POSSESSION OF 3517 CAVES ROAD,
WILYABRUP & ORS

RESPONDENTS

Saraceni v Jones
[2012] HCA 38
7 September 2012
P8/2012

ORDER

Special leave to appeal refused with costs.

Application for special leave to appeal from the Supreme Court of Western Australia

Representation

B W Walker QC with J C Vaughan for the applicant (instructed by Jackson McDonald Lawyers)

D F Jackson QC with T O Prince for the respondents (instructed by Ashurst Australia)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Saraceni v Jones

Constitutional law (Cth) – Judicial power of Commonwealth – Constitution, Ch III — Sections 596A and 596B of *Corporations Act* 2001 (Cth) confer power upon court exercising federal jurisdiction to order, on application of receiver, examination of person about examinable affairs of corporation – Whether conferral of non-judicial power.

Corporations Act 2001 (Cth), ss 596A, 596B.

1 GUMMOW, HAYNE AND BELL JJ. For the reasons which follow, this application for special leave to appeal from the decision of the Court of Appeal of the Supreme Court of Western Australia¹ should be refused.

2 This Court often has observed that it is not possible to frame a definition of "judicial power" which is at once exclusive and exhaustive. However, to adopt and adapt what Kitto J said in *R v Davison*², the question which it is sought to agitate in this Court is whether the Constitution requires that the power to take the step necessary to bring about the application of a general law to the particular case is one which cannot be committed to the judiciary. More particularly, on the application of the receiver of a corporation can the Parliament confer upon a court exercising federal jurisdiction the power to make an order under s 596A or s 596B of the *Corporations Act* 2001 (Cth) ("the Corporations Act") for the mandatory examination of a person about the examinable affairs of the corporation? As Kitto J said in *Davison*³:

"Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

The *Companies Act* 1862 (UK) ("the 1862 Act"), which was the model for the companies legislation of the Australian colonies, provided in s 138 that where a company was being wound up voluntarily the liquidator or any contributory might apply to the court having jurisdiction to wind up the company to exercise all or any of the powers which the court might exercise if the company were being wound up by the court.

3 One of those powers, conferred by s 115 of the 1862 Act, was to order the compulsory examination of an officer or other person whom the court deemed capable of giving information about the affairs of the company. The provisions of the Corporations Act which it is sought to impugn are not to any relevantly different effect. The identification in ss 596A and 596B of the circumstances in which an order may be made differs from the more generally expressed reference in s 138 of the 1862 Act to it being "just and beneficial" to make the order, but

1 *Saraceni v Jones* (2012) 287 ALR 551.

2 (1954) 90 CLR 353 at 382; [1954] HCA 46.

3 (1954) 90 CLR 353 at 382.

Gummow J
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Bell J

2.

those differences are not presently significant. The making on application of a receiver of a mandatory examination order is an action of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system.

4 The actual orders of the Court of Appeal are not attended by doubt. McLure P set out the text of ss 115 and 138 of the 1862 Act and the passage in the reasons of Kitto J in *Davison* to which we have referred. Her Honour concluded that the analogy between an examination in respect of companies in receivership and those in voluntary liquidation was "very close" and that the power of a court in this latter respect was of longstanding and predated Federation. We need express no further view about the correctness of the reasons given by the Court of Appeal.

5 Special leave is refused with costs.

