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Restructuring & Insolvency Alert

Another blow to unwilling examinees: ASIC's obligations when authorising "eligible applicants" of examinations clarified and confirmed

Saraceni v ASIC [2013] FCAFC 42

WHAT YOU NEED TO KNOW

- The Full Court of the Federal Court of Australia has unanimously dismissed an appeal from the decision of Barker J in *Saraceni v ASIC* [2012] FCA 688, (see our *Restructuring and Insolvency Alert* dated 2 July 2012). Barker J had summarily dismissed a challenge by Mr Saraceni to a decision by the Australian Securities and Investments Commission (ASIC) to authorise the receivers and managers of a number of companies to obtain orders for his compulsory examination under section 596A of the *Corporations Act 2001* (Cth).
- Mr Saraceni argued that ASIC was obliged to afford him procedural fairness by consulting with him prior to making its decision and ASIC had failed to do so. He also argued that he should have been allowed to seek discovery of documents to show what ASIC had actually taken into account in arriving at its decision.
- The Full Court found that ASIC is never obliged to afford procedural fairness to a person who might later be examined by a court, when considering such applications for authorisation

WHAT YOU NEED TO DO

- The Full Federal Court's decision in *Saraceni v ASIC* will be welcomed by ASIC and insolvency practitioners. It confirms the difficulties potential examinees face in seeking to challenge ASIC's decision to authorise a person to apply for and conduct an examination under Part 5.9 of the *Corporations Act*.

What happened?

The Bank of Western Australia Ltd (Bankwest) held various securities over assets of three companies, of which Mr Luke Saraceni was a director. The companies were Newport Securities Pty Ltd, Mayport Nominees Pty Ltd and Seaport Pty Ltd.

In early 2011, Bankwest appointed Ferrier Hodgson as receivers and managers of certain assets of each of the companies. In addition, Bankwest entered into possession of certain real property owned by Newport as mortgagee, and appointed Ferrier Hodgson as its agents.

Subsequent to their appointment, Ferrier Hodgson applied to ASIC for authorisation to seek the issue of examination summonses against Mr Saraceni. ASIC granted that authorisation, and Ferrier Hodgson obtained orders from the Supreme Court of Western Australia for the issue of examination summonses to Mr Saraceni under section 596A of the *Corporations Act 2001* (Cth). In addition to mounting a constitutional challenge to the Supreme Court's ability to order and conduct his examination (see our *Restructuring and Insolvency Alert* dated 2 July 2012]), Mr Saraceni separately applied to the Federal Court for judicial review to set aside ASIC's authorisation decision. The receivers and managers were also joined to the proceeding.

The receivers and managers, supported by ASIC, applied to dismiss the proceedings summarily. Barker J granted summary judgment and dismissed the proceeding. Mr Saraceni appealed that decision to the Full Court of the Federal Court.

The arguments on appeal

Mr Saraceni contended that Barker J was wrong to dismiss the proceeding summarily. He relied upon two primary arguments:

1. **An obligation to afford procedural fairness to a person will arise if a decision of a government body, like ASIC, prejudices that person's rights or interests.** Mr Saraceni was one of only two directors of the companies in receivership, and so if ASIC granted authorisation to a person to conduct examinations in connection with those companies, it was practically inevitable that the court would order Mr Saraceni's examination under section 596A. That meant the decision of ASIC to authorise the receivers and managers to apply for the orders prejudiced Mr Saraceni by making it likely he would be compulsorily examined, and so he contended that ASIC should have consulted him before making that decision. Further, he argued that the obligation of procedural fairness depends on all the circumstances and so the case should not have been dismissed before discovery and evidence-gathering was completed.

2. **ASIC, in making its decision, had failed to take into account relevant considerations related to the status of the receivers and managers.** While there was no evidence of anything to impugn the decision made by ASIC, Mr Saraceni argued that he should have been allowed to seek discovery orders against ASIC to see what information it relied on in coming to its decision. He stated that his claim should not have been summarily dismissed before then.

What did the Full Federal Court decide?

The Full Federal Court confirmed that Justice Barker was correct to dismiss the proceeding summarily.

The Court found that, when considering an authorisation application, ASIC is not required to consult a person who might later be examined in a compulsory examination under Part 5.9 of the *Corporations Act*. It made no difference how likely it was, in a practical sense, that Mr Saraceni would be examined. Some of the key reasons were:

- The authorisation was only the first stage of a two stage process, potentially culminating in the issue of a summons by a court for compulsory examination. That court summons, if issued, would then start an investigative process designed to gather information about the affairs of the company in question. That was similar to powers of examination and inquiry held by public bodies like the Commissioner of Taxation. A purely investigative process like this, as a general rule, is less likely to be attended by an obligation to accord procedural fairness to affected persons.
- Importantly, ASIC's decision was even further removed from the beginning of an investigative process. A person authorised by ASIC might decide not to apply for the issue of a summons at all. Or, that person might decide to apply for summonses against only a few potential examinees.
- It also does not necessarily follow that a person who may be examined will be prejudiced in any relevant sense.
- If a potential examinee had an entitlement to be heard by ASIC, that would impede the sensible administration of the *Corporations Act*. ASIC would be required to identify, in every case, those directors or other persons who would be the subject of examination and give notice to them of the application for authorisation. That would be impractical and provide two opportunities, at least, for them to challenge ASIC's decision – both the first stage authorisation decision and in the course of resisting the second stage examination in a court.

The Court then said that Mr Saraceni's remaining contentions amounted to nothing more than an assertion that irrelevant considerations may have been taken into account by ASIC, coupled with a claim to make good those assertions by seeking to obtain information on discovery. The Court would not order discovery to assist Mr Saraceni to establish a speculative case for which he had no evidence in the first place.

What is the significance of the decision?

The Full Federal Court's decision in *Saraceni v ASIC* will be welcomed by ASIC and insolvency practitioners. It confirms the difficulties potential examinees face in seeking to challenge ASIC's decision to authorise a person to apply for and conduct an examination under Part 5.9 of the *Corporations Act*.

The Full Court has also gone a step further than Barker J on the issue of procedural fairness. The Full Court has unequivocally stated that ASIC will never be required to consult with potential examinees prior to making such a decision. Unless the High Court determines otherwise, this removes any doubt that different facts or circumstances might require ASIC to consult potential examinees in a different case. This clear statement of the law should go even further towards eliminating, or at least significantly deterring, future judicial review challenges by unwilling examinees.

The Full Court has also emphasised the limited role that compulsory discovery orders can play in these kinds of cases. Potential examinees are unlikely to have access to any specific information about what ASIC took into account in granting an authorisation for their public examination. ASIC is also not required to give any reasons for its decision. If the examinee wants to mount a challenge, the Court will not permit him or her to run a hypothetical case and try and obtain evidence for it through discovery. In light of this, the circumstances in which an examinee might be able to mount a successful challenge would seem to be very rare.

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