

SUPREME COURT OF QUEENSLAND

CITATION: *Australian Securities and Investments Commission v ACN 101 634 146 Pty Ltd (in liquidation) and Ors* [2013] QSC 280

PARTIES: **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**
(Plaintiff)

v

ACN 101 634 146 PTY LTD (IN LIQUIDATION) AND ORS
(Defendant)
MICHEAL CHRISTODOULOU KING
(Fourth Defendant)
GUY HUTCHINGS
(Fifth Defendant)
CRAIG ROBERT WHITE
(Sixth Defendant)
DAVID MARK ANDERSON
(Seventh Defendant)
MARILYN WATTS
(Eighth Defendant)

FILE NO/S: BS 12122 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 17 October 2013

DELIVERED AT: Brisbane

HEARING DATE: 10 October 2013, and written submissions filed on 14, 15 and 16 October 2013

JUDGE: Douglas J

ORDER: **Declare that the notices to the fourth to eighth defendants given by the plaintiff on 26 September 2013 in respect of the examinations of Christopher Huon Stride and Christopher Gavras-Moffat and the notice similarly given to the eighth defendant dated 26 September 2013 in respect of the examination of the eighth defendant are invalid.**

CATCHWORDS: CORPORATIONS – GENERALLY – CORPORATIONS LEGISLATION – where notices pursuant to s 79 of the *Australian Securities and Investments Commission Act 2001*

were issued to defendants – where evidence sought to be admitted were transcripts of examinations pursuant to s 19 of the Act – where notices describe various parts of the transcripts – where defendants objected on the ground that the parts identified in the notices were too broad – whether s 79 of the Act demands specificity in the notices – whether the notices were too broad – whether the notices are valid

Australian Securities and Investments Commission Act 2001 (Cth), s 19, s 79

Australian Securities and Investments Commission v Australian Investments Forum Pty Ltd (2004) 184 FLR 448; [2004] NSWSC 491, cited

COUNSEL: P J Riordan SC with M T Brady for the plaintiff
D S Piggott for the fourth defendant
R Jackson with N Andreatidis for the fifth defendant
D L Williams SC for the sixth defendant
B O'Donnell QC with C K George for the seventh defendant
P A Freeburn QC with P D Hay for the eighth defendant

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Tucker Cowen for the fourth defendant
Bartley Cohen for the fifth defendant
Kennedys for the sixth defendant
Dibbs Barker for the seventh defendant
James Conomos Lawyers for the eighth defendant

- [1] The plaintiff has issued notices to the defendants pursuant to s 79(1) of the *Australian Securities and Investments Commission Act 2001 (Cth)* whose validity has been challenged by the sixth and eighth defendants. There are two notices, one in respect of statements of a Christopher Stride and a Christopher Gavras-Moffat sought to be admitted against each of the fourth, fifth, sixth, seventh and eighth defendants. The other notice is in respect of a statement of the eighth defendant sought to be admitted against her.
- [2] The statements which the plaintiff wishes to have admitted in evidence are from the transcripts of examinations of each of those persons conducted pursuant to s 19 of the Act. Each notice described the statements sought to be admitted by reference to schedules attached to the notices which number a passage and then identify it by reference to page and line numbers of the relevant transcript.
- [3] Section 79(1) provides that a party to a proceeding may give another party notice that it will apply to have admitted in evidence in the proceeding specified statements made at an examination and, for that purpose, will apply to have evidence of those statements admitted in the proceedings. This application relates to the validity of the notice that has been given rather than to the admissibility of the statements at the hearing itself.

- [4] In that context, it is relevant to note that the party receiving the notice may itself within 14 days give ASIC a written notice objecting to specified statements being admitted in evidence and specifying in relation to each of those statements the grounds of objection: see s 79(3). Section 79(7) then goes on to provide that the other party is not entitled to object at the hearing of the proceeding to a statement specified in the notice being admitted in evidence unless it has, in accordance with s 79(3) objected to the statement being so admitted or the court gives that other party leave to object to the statement being so admitted. Section 5 of the Act also provides that “statement”, in relation to an examination, includes a question asked, and answer given, and any other comment or remark made at the examination.
- [5] In arguing that the notice is valid, ASIC relies upon a decision of Palmer J in *Australian Securities and Investments Commission v Australian Investments Forum Pty Ltd*.¹ In particular, the following passages are relied on:
- “6. In a transcript of fifty-one pages of the examination of Mr Appleby, there are twelve ‘specified statements’ identified in the Notice in this way. Some of the passages identified are a few lines on the same page, some are within the same page, some are two or three pages in length.
7. Each passage of transcript thus identified does not comprise a single statement of a single fact by the witness. **Rather, it contains a series of questions and answers concerned with a particular topic** – for example, how the witness came to work with AIF and who else was working there at the time, or what were the witness’ duties as an employee, and so on. The ‘specified statements’ in the transcripts of evidence of the other witnesses referred to in the Notice are identified in the same way.
- ...
11. The words ‘*specified statements*’ appearing in s 79(1) and (2) must be given a practical meaning according to the context in which s 79 is to operate and having regard to the purpose which it is intended to achieve. The ‘*statements*’ are, clearly, statements made by a witness in the course of oral examination. Part 3 Div 9 CA expressly contemplates in s 76(3) that transcript of an oral examination may be tendered as evidence of the statements to be relied upon. As anyone having the slightest experience of oral examination knows, answers in such an examination often cannot be understood without reference to the questions which elicited them. Sometimes answers are discursive, disjointed or partly non-responsive. Sometimes answers are misleading or even unintelligible unless they are read in the context of possibly lengthy passages of transcript. The requirements of s 79(2) must be understood in the light of these realities, as

¹ (2004) 184 FLR 448; [2004] NSWSC 491 (emphasis added).

the ASIC Act itself expressly recognises, by the definition of ‘statements’ in s 5:

“Statement’ in relation to an examination, includes a question asked, an answer given and any other comment or remark made, at this examination.”

- [6] Counsel for the sixth and eighth defendants argue that the notices are too general, failing to identify specific statements but rather large slabs of the record of the examination. The submissions go on to argue that because the specified statements are not properly identified the objection process becomes oppressive so that the object of the section in facilitating objections to the specified statements cannot properly be achieved. The importance of that requirement is said to be heightened in proceedings such as these which involve serious allegations of misconduct which may give rise to penal consequences.
- [7] In that context, the eighth defendant submitted, in particular, that the notices uncritically identify swathes of transcript rather than specific statements where many of the statements covered multiple pages of transcript covering multiple disparate topics. In the case of Mr Stride’s statement, they argue that the attempt at specifying the statements was made largely by reference to the entire transcript pages with no apparent attempt to identify the specified statements within them. When one examines the transcript of the interview of Mr Stride, that argument is borne out.
- [8] Items 1 to 15 of the document accompanying the notice do identify passages of transcript extending, for example, from page 10, line 21 to page 24, line 7. The identification of the statement numerically is simply by reference to the page number and the lines on the page without distinguishing the statements by reference, for example, to a particular topic. As counsel for the eighth defendant submitted, those pages consist of more than 14 continuous pages of transcript traversing a wide variety of topics including:
- “
 - o Mr Stride’s qualifications as a solicitor;
 - o Mr Stride’s work history before working at Octaviar,
 - o other legal staff who worked at Octaviar;
 - o the location of offices of other in-house legal staff relative to the office of Mr Stride;
 - o Mr Stride’s work in relation to a transaction with Domain Aged Care;
 - o how frequently Mr Stride would have dealings with other legal staff at Octaviar;
 - o the nature of matters other legal staff would consult Mr Stride about;

- o Mr Stride's progression from carrying legal work to more commercial work;
- o Mr Stride's workload before and after the GFC crash in 2008;
- o how Mr Stride received instructions and to whom he reported;
- o how Mr Stride would delegate legal work to other in-house lawyers at Octaviar;
- o Mr Stride's participation in preparing loan participation agreements involving the maximum Yield Fund and Pacific Investments;
- o an internal investigation carried out by Nigel Fitzgerald and by Mallesons;
- o a meeting with Mr Stride, Mr Gavras-Moffat and Ms Karen Platts regarding the potential re-opening of the Maximum Yield Fund;
- o preparation of a diagram depicting movement of assets from Pacific Finance and Premium Income and from the Maximum Yield Fund to Pacific Finance; and
- o meetings with Mr Stride, Mr Craig White and Mr David Anderson."

[9] Similar criticisms were made of items 16 to 28 in respect of that interview and of the transcript of Mr Gavras-Moffat's examination. The notice in respect of Mrs Watt's statement is criticised in a similar fashion as encompassing entire pages and covering different topics. Some passages were also said to identify only parts of sentences or unintelligible parts of lines or sections where a vital passage was missed.

[10] In seeking to rely on the decision of Palmer J in *Australian Securities and Investments Commission v Australian Investments Forum Pty Ltd*, the plaintiff argued that his Honour's reasons, which I have extracted above, supported the view that "specified statements" were not equivalent to a single statement of a single fact by a witness and that lengthy passages of transcript may amount to specified statements. They also submitted that those words must be given practical meaning according to the context in which s 79 operates and having regard to its purpose. Similarly, they argued that answers cannot always be understood without reference to the questions which elicited them and that sometimes answers are discursive, disjointed or partly non-responsive. Those arguments are reasonable on their face.

[11] It seems to me to be relevant, however, that, although his Honour at [7] spoke of the passages of transcript identified before him as not comprising a single statement of a single fact by the witness, he went on to say in the passage I have emphasised

above, “Rather, it contains a series of questions and answers concerned with a particular topic”. When one bears that observation in mind, this notice fails to achieve the intended object of the section in specifying the statements in a form which will facilitate the process of objection being made to their admissibility. When a statement is identified simply by reference to a page number and a number of lines which cover several particular topics, then the object of the giving of the notice is frustrated and the process of objection to the specified statements made significantly more difficult.

- [12] It is true that some of the “specified statements” do relate to discrete topics but many of them do not. In those circumstances, instead of succinctly stating an objection to the specified statement, the party receiving it will be obliged to identify the objections to particular lines and passages within the “specified statement” on potentially disparate grounds, something which does not seem to me to meet the objects of the legislation.
- [13] Accordingly, the objection to the validity of the notices is sound and I declare that the notices to the fourth to eighth defendants given by the plaintiff on 26 September 2013 in respect of the examinations of Christopher Huon Stride and Christopher Gavras-Moffat and the notice similarly given to the eighth defendant dated 26 September 2013 in respect of the examination of the eighth defendant are invalid.