HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

ANTHONY BOGAN
First Applicant

MICHAEL THOMAS WALTON
Second Applicant

and

THE ESTATE OF PETER JOHN SMEDLEY (DECEASED)
First Respondent

ANDREW GERARD ROBERTS
Second Respondent

PETER GRAEME NANKERVIS
Third Respondent

JEREMY CHARLES ROY MAYCOCK
Fourth Respondent

KPMG (A FIRM) ABN 51 194 660 183
Fifth Respondent

FIFTH RESPONDENT'S REPLY

PART I: These submissions are in a form suitable for publication on the internet.

PART II: REPLY

1. There is no statutory restriction on this Court's jurisdiction to determine the cause removed (contra **AS [8]**). This Court must consider the questions for itself (see **DS [6]-[7]; CS fn 3**).

2. ***Facts.*** It is agreed that without a GCO there is a "probability" that the funder will withdraw, and that an alternate funder is not a "realistic prospect" (**CRB 82; ASOF [121]-[122]**). The plain inference is that this matter is unattractive to funders because it lacks sufficient prospects. This observation is not "gratuitous" (contra **AS [6]**); doubts as to merit weigh against any presumption that there is inherent virtue in progressing the proceedings at all costs (including by their maintenance in a less appropriate forum).

3. The applicants have never previously contested the plain inference from **ASOF [97]-[98]** (**CRB 79**) that they only commenced in the Supreme Court of Victoria in order to obtain a GCO (cf **AS [7]**). Neither Court below rejected KPMG's submission to this effect, and the Court of Appeal accepted the GCO regime operated as a "magnet to Victoria" (**CA [6]; CRB 24**). The applicants provide no contrary explanation for instituting in Victoria.

4. As to **AS [11]**, while ***jurisdiction*** to determine matters under the corporations legislation is national in nature, the State and Commonwealth Parliaments agreed that proceedings should still be heard in the more appropriate ***venue*** (and see the EM cited at [13] below).

5. Section 33ZDA was considered "an important access to justice reform" ***by the Victorian Parliament***. By contrast, the remaining Australian jurisdictions (and Victoria in non-representative proceedings) balance the same considerations in a different way, prohibiting contingency fees. Arguing the merits of the GCO regime at **AS [14]-[16]** and **[21]** erroneously invites this Court to adjudicate upon which State policy is "better".

6. Contrary to **AS [17]**, KPMG is bona fide seeking transfer because New South Wales is the more appropriate forum and most of the parties, solicitors, counsel, and likely witnesses, are located there (see **KS [24], [25], [26], [29]**). The Court of Appeal's finding that there was "little to distinguish" the two States in this regard was wrong (**KS [64]**). KPMG would prefer the proceedings to be heard in New South Wales ***whether or not*** there is a GCO (per its Question 2 submissions), and objects to the GCO anchoring it to a less appropriate forum.

7. ***Question 1: GCO is irrelevant.*** KPMG advances an orthodox textual analysis of s 1337H(2). There is no "*a priori* assimilation" of s 1337H(2) and s 5 of the *Cross-vesting Acts* (contra **AS [18]**). *Schultz* is relevant because s 1337H(2) was plainly modelled on s 5. These two statutes deal with the same subject matter (transfer), in the same way, and so it is presumed that the words "the interests of justice" have the same meaning in both statutes.[1] The applicants point to no cogent reason to construe s 1337H(2) differently. By contrast, it is the applicants who "assimilate" the assessment of "ensur[ing] that justice is done in a proceeding" ***in Victoria*** in s 33ZDA with the assessment of the "interests of justice" in s 1337H(2) (**AS [21]**). They fail to recognise the inherently different regimes in which each is construed, and repeat the vice of advocating Victorian policy over New South Wales.

8. "[S]ome lessening of procedural and substantive rights" is not a recognised consideration militating against transfer (contra **AS [22]**). That takes a sentence from *Wileypark* out of context. The point was not in issue in that case; and the Full Court did not refer to *Schultz*.

9. The cases cited at **AS fn 30** are irrelevant. *Jowene* consolidated four class actions, by consent, and was not decided on the basis of funding (see [3], [10], [14]-[15]).

10. It is apparently agreed that the s 79 "pick up" of State provisions does not thereby permit a transferor Court to prefer its own State's policy and procedure over that of the transferee court (**AS [22]**). Yet taking the GCO and its potential loss into account in refusing a transfer does precisely this, and thereby confers venue privilege on the originating party (cf **AS [22]**).

11. Contrary to **AS [24]**, KPMG's construction of s 1337H(2) does not create an "instrument of chaos". The transferor court is not "blinded" to procedural differences; it is shielded from invidious policy choices where those differences favour one party over the other.

12. Contrary to **AS [26]**, there is no redundancy in KPMG's construction. Section 1337L(c) compels the transferor court to consider ***all*** courts that have requisite jurisdiction, not merely the court advanced by the applicant for transfer. Moreover, if the applicants' operation had been intended, it would have been achieved with plainer language and without giving "jurisdiction" different meanings in different parts of Pt 9.6A.

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[1] See, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [24]. The presumption applies to a later statute where, subsequent to the enactment of both statutes, the expression in the earlier statute is construed: *Roads & Traffic Authority (NSW) v McGregor* (2005) 44 MVR 261 at [167]; *Harrison v Melhem* (2008) 72 NSWLR 380 at [131]; *Gale v Federal Commissioner of Taxation* (1960) 102 CLR 1 at 12.

13. The applicants' attempt to distinguish the *Cross-vesting Acts* from the *Corporations Act* fails on a number of bases. First, a standalone corporations regime governing ***cross-vesting*** and transfer was enacted because of the "unique character of the jurisdictional apparatus under the applied law regime" in force at that time (cf **AS [28]**).[2] Second, **AS [29]** erroneously compares *the* ***cross-vesting*** provisions of the *Cross-vesting Acts* with the ***transfer*** provisions of the *Corporations Act*. Third, reliance on the text of the recitals to the *Cross-vesting Acts* at **AS [29]** is fatally undermined by the presence of ***almost identical language*** in the explanatory memorandum to the corporations transfer provisions: "matters which, apart from the cross-vesting provisions, *would be entirely or substantially within the jurisdiction* of a particular Court should be *instituted and determined in that Court* as far as practicable".[3] Fourth, contrary to **AS [25]** and **[30]**, there is no meaningful distinction arising from the use of "shall" in the *Cross-vesting Acts* and "may" in s 1337H(2) (KS [49] and CS [63]).

14. Contrary to **AS [16]** and **[32]**, the GCO ***has*** changed the respondents' rights by anchoring it to a less appropriate forum. Group members are not comparable to the terminally ill plaintiff in *Schultz*. The threat by a funder to withdraw support from a suit judged not to warrant speculation unless maintained in the jurisdiction which secures it the most advantageous remuneration is not akin to the imminent death of a party. In any event, expedition due to terminal illness is neutral as between the parties: the defendant is not forced to litigate a proceeding it otherwise would not, because the claim survives the plaintiff's death;[4] the ability to examine and cross-examine the living plaintiff benefits both parties.

15. Contrary to **AS [33]**, the gravamen of Lord Goff's reasoning at 483F-H is that in "extreme" cases where a plaintiff commences in a jurisdiction ***in order to take advantage*** of a rule that was ***never*** available in the appropriate forum (there, a longer limitation period, and here a GCO) the court should not hesitate to stay the proceedings even where the effect is that the claim will be defeated in the appropriate jurisdiction. The "practical justice" scenario called for in *Spiliada* did not involve patent forum shopping for procedural advantage.

16. Whether the Supreme Court of Victoria's interlocutory decision as to the order of the GCO and Transfer applications forms part of the cause removed, or could have been subject to a successful appeal (which is highly doubtful), is ultimately irrelevant (contra **AS [35]**).

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[2] Explanatory Memorandum to the Corporations Legislation Amendment Bill 1991 (Cth) at [138].

[3] Explanatory Memorandum to the Corporations Legislation Amendment Bill 1990 (Cth) at [173].

[4] See, eg, *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), s 2.

KPMG relies on the proper sequence as a reason why the GCO is irrelevant to the transfer application (**KS [48]**), which is a question that arises in the cause removed.

17. ***Question 2 – Alternatively, the GCO is neutral.***[5] Contrary to **AS [37]** and **[39]**, there is no substantive difference between the submissions advanced in this Court and those advanced below. KPMG maintains that the GCO "would remain in force and be able to be enforced".

18. Contrary to **AS [39]**, both s 1337P(2) and s 43(d) of the *Judiciary Act* have the constitutionally valid ***effect*** of deeming the continuation of orders made by a preceding court.

19. Contrary to **AS [40]**, there is no "radical difference" in the operation of s 1337P(2) where the transferee court could not have made the transferred order. Section 1337P(2) facilitates a "smooth transition" by effectively transferring ***all*** of the orders in the proceeding, not just the "quotidian" scenarios (whatever those are), subject to any contrary order. There is an "apparatus to administer" ***all*** orders on this basis (or the alternatives set out at **KS [59]**).

20. The applicants point to nothing in the text of s 1337P(2) that suggests, let alone "strongly suggests", that their construction is correct (**AS [42]**). The language "had been taken" does not assume that "the step" is something that the transferee could have done – the provision simply uses the (grammatically correct) subjunctive mood because it creates a fiction. The applicants do not explain how **KS [53]** ignores the "un-displaced presumption as to the consistency of meaning of a 'step' in s 1337P(2)" – "step" expressly includes "order".

21. Contrary to **AS [43]**, there is no tension with s 79 of the *Judiciary Act*: see **KS [57], CS [30]**. That a legislature conferring jurisdiction on a court generally takes that court "as it finds it" offers no interpretive assistance to a Commonwealth law which "otherwise provides".

22. Contrary to **AS [44]**, the legislative history of s 1337P**(2)** (formerly s 54(2)) is clear. Whether under the 1989 *or* the 2001 regime, a transferee court must give "reciprocal recognition to the steps that had been taken … in the transferring court".[6] This is a clear reference to subs (2), which has never depended on the exercise of "relevant jurisdiction" as defined in subs (3). The interpretation now advanced by the applicants presumes that the legislature radically altered the effect of subs 54(2) when it became subs 1337P(2) of the *Corporations Act 2001*, without amending its terms or averring to this change, and contrary to its express intention

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[5] If the Court concludes (contrary to KPMG's submissions) that the GCO will not travel, the proceedings should still be transferred because the GCO is irrelevant (for the reasons given in relation to Question 1).

[6] Explanatory Memorandum to the Corporations Legislation Amendment Bill 1990 at [179].

to "produce substantially the same outcomes".[7] Further, contra **AS [45]**, no sensible object is served if s 1337P(2) requires assessing whether the transferee court has power to make each and every order made in the transferor court. The more sensible construction is also the plain text reading: all orders are transferred, subject to any order of the transferee court.

23. Contrary to **AS [46]**, *Kable* concerns the authority of orders made ***without*** jurisdiction and is entirely immaterial to the operation of s 1337P(2). In all s 1337P(2) cases, the relevant court is exercising federal jurisdiction; its ***powers*** to "deal with" the orders are those conferred on it directly and as "picked up". It is a nonsense to refer to the transferred or deemed orders as "invalid", and given the transferee court has power to deal with the GCO in any event, the second "absurdity" at **AS [47]** also falls away.

24. In relation to **AS [48]-[49]**, KPMG adopts **CS [40]-[58]** and repeats **KS [60]-[62]**.

25. KPMG does not accept any such limitation on s 1337P(2) as suggested at **AS [51]**. It is impossible to square the applicants' narrow construction of "subject to any other order" with the text and purpose of the provision, and the principle that the conferral of powers on courts should not be read narrowly (**KS [58];** contra **AS [51]**). Section 183 continues to fill a gap; it does not confer a power to ***make*** a GCO, but only to vary or revoke extant orders deemed to exist by s 1337P (contra **AS [52]**). The inherent power operates not on an order made by another superior court, but in view of the orders deemed to exist by s 1337P(2) (contra **AS [53]**). That power extends to varying any previous interlocutory order, like a GCO, the rights created by which are in no sense "final".

26. ***Question 3 – Proceedings should be transferred.*** Contrary to **AS [56]-[57]**, the Supreme Court of New South Wales is clearly an eligible court. The applicants' construction of "jurisdiction" should be rejected as set out at **KS [65]-[66]**. None of the matters relied upon in **AS [58]** establish a "strong connection" to Victoria. In any event, those matters do not deny that New South Wales is the "more appropriate" forum.

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[7] Explanatory Memorandum to the Corporations Bill 2001 (Cth) at [5.34].