

KPMG denies liability for Westpoint losses

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KPMG's legal challenge to the corporate regulator's section 50 powers is likely to be heard by the High Court this year. The auditing firm and the Australian Securities and Investments Commission have agreed the case should be heard at the earliest available date.

At a preliminary hearing in Melbourne yesterday, Justice Ken Hayne heard that KPMG and ASIC believed the matter should be heard by the full court of the High Court and KPMG will argue that section 50 of the Australian Securities and Investments Commission Act breaches section 51 of the constitution.

Section 50 of the ASIC act allows the regulator to sue for damages or to recover property on behalf of a person or company as a result of fraud, negligence, default, breach of duty or some other misconduct.

The High Court challenge arises from ASIC's decision in 2008 to launch a damages case against KPMG in a bid to recover about \$200 million of an estimated \$390 million of losses by investors in the failed Westpoint group of companies.

KPMG audited seven of these companies between 2002 and 2004. The case was transferred from the Victorian Supreme Court to the Federal Court in April.

Documents filed in the Federal Court show KPMG's defence, which runs to hundreds of pages, sheets blame back on Westpoint directors, the companies and ASIC itself.

KPMG argues that from at least September 2004 or April 2005, ASIC had several files and documents in its possession from which it was, or should have been, aware that Westpoint was operating managed investment schemes to raise funds for property development.

KPMG argues that ASIC breached the duty of care that it owed to the companies because it did not exercise its powers at the time to head off the losses by the Westpoint companies.

KPMG denies liability for losses by Westpoint investors. It argues that Westpoint's directors, including founder Norman Carey, failed to take reasonable steps to ensure the accuracy and adequacy of information that the company issued to investors when raising funds for property developments.

It argues the directors could have taken steps to halt the fund-raising, and they breached their duty to use care, skill and diligence.

KPMG also argues that if the Westpoint companies sustained any loss or damage arising from KPMG's audits, then the companies contributed to the losses because they failed to take reasonable care.

In brief submissions filed with the High Court, KPMG contends that "the power to control, or the right to use, the cause of action of a company or associated rights constitutes an acquisition of property" and, contrary to section 51 of the constitution, "such an acquisition is otherwise than on just terms".

KPMG and ASIC return to the High Court for further directions on July 20.

Source: [The Age](#)

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