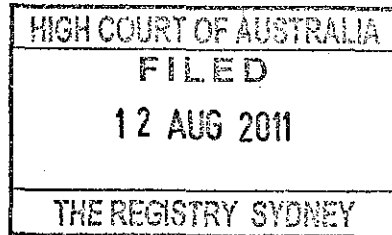


BETWEEN



AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION
Appellant

and

GEOFFREY FREDERICK O'BRIEN
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

1. These submissions are in a form suitable for publication on the Internet.

Minutes (OBS[9]-[32])

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2. Mr O'Brien's submissions (OBS) at [13]-[27] address the evolution of the minutes from prior to the board meeting and at [28]-[32] address what are said to be the "*inaccuracies*" in the minutes. Those submissions are addressed below but in summary, on examination, the asserted "*plethora of inaccuracies*" asserted at OBS[31] fall away and remain as the minor mistakes found by the trial judge at LJ[1207]-[1220] ABRed2/723Q-725X and not added to by the Court of Appeal. None of those inaccuracies come close to being similar to the case contended for by the respondents, namely the inclusion of a wholly fictitious event including a resolution that did not occur. On the contrary they remain the type of mistake that would not be picked up on a review of the minutes weeks later, when the minutes were redrafted and then approved by the board.¹ What is not addressed by Mr O'Brien nor any of the respondents is the sheer improbability that those involved in the drafting, amendment and approval of the minutes, namely the chairman, Messrs Macdonald, Shafron, Morley and Robb and the non-executive directors, could have failed to notice the inclusion of a resolution on such an important matter that the respondents contend did not occur.²

The evolution of the minutes (OBS[13]-[27])

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3. OBS[14]-[18] address the first five versions of the draft minutes, the fifth being that sent by Mr Robb to Mr Shafron by email on 15 February 2001 at 8.05 am.³ OBS[27] notes that these drafts all included the Draft ASX Announcement Resolution but they "*recorded nothing other than the beliefs of solicitors at Allens as to what might occur at the then upcoming February 2001 board meeting*". However the "*beliefs of solicitors at Allens*" as to what would occur at the meeting is significant because one of those solicitors was Mr Robb.⁴ Prior to the meeting he had not received any draft ASX announcement, yet he sent, on the morning of the meeting, a draft of the minutes of the meeting which referred to

¹ See ASIC's submissions in reply to Mr Willcox's submissions at [13].

² See LJ[1203] ABRed2/723C.

³ ABBlu5/2102-2111.

⁴ ABBlu4/1824-1829; ABBlu5/1928-1935.

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such an announcement being tabled and approved.⁵ Mr Shafron was also a recipient of these pre-meeting drafts of the minutes⁶ and gave instructions in relation to their drafting.⁷ He participated in the preparation of draft minutes which anticipated the passing of a resolution in relation to a draft ASX announcement, notwithstanding he had not received a copy of such an announcement.

4. OBS[19]-[23] address the sixth version of the minutes, being the version sent by Mr Shafron to Mr Macdonald and copied to Mr Morley on 21 March 2001 at 9.36am.⁸ OBS[23] wrongly contends that ASIC submitted the alteration of the word "*Chairman*" to become "*Chair*" in this version of the minutes of itself suggests that the drafter of the sixth draft had turned his or her mind to the events that occurred at the February 2001 board meeting. Instead, ASIC's contention is that a consideration of the entirety of the changes made to the sixth draft of the minutes suggests that they were amended having regard to events that in fact occurred at the meeting.⁹ In the submissions of Ms Hellicar and Messrs Brown, Gillfillan and Koffel (**Hellicar respondents**) at [52] it is conceded that "... *some changes were made to the pre-meeting draft minutes to capture certain aspects of the reality of the Board meeting.*" How it was that on the respondents' case they retained substantial aspects of fiction is not satisfactorily explained.
5. The significance of the changes is best illustrated by the changes that were made between the fifth and sixth versions of the minutes concerning the cashflow model. Section 3 of the fifth draft of the minutes, prepared immediately prior to the meeting occurring, was headed "*Background to creation of Foundation*" and contains references to action having been taken by the "*Chair*" concerning the MRCF, including the tabling of a board paper explaining the proposed transaction and discussion by the board of that paper "*along with the Board Paper for January's meeting*".¹⁰ It does not contain any reference to a cashflow model. Versions of the cashflow model were being prepared in the period up to the time of the meeting. The final iteration of the cashflow model, known as the twelfth cashflow model, was not completed until the evening prior to the board meeting.¹¹ Copies of the twelfth cashflow model were emailed to the US based directors at 12.33am on 15 February 2001 (LJ[278], [280], [284] ABRed2/484W, 485N, 486J), copies were distributed to the directors who were physically present at the board meeting on 15 February 2001 and Mr Morley addressed its contents at the meeting (CA[141] ABWhi/32.40; LJ[277], [285]-[301] ABRed2/484V, 486L-491E).
6. The sixth version of the minutes¹² changed section 3 of the fifth draft so that it was now headed "*Creation of Foundation*".¹³ After the section referring to the chairman tabling a board paper, a reference to the chairman tabling legal advice from Mr JLB Allsop SC (as his Honour then was) dated 14 February 2001 was added, as was the following:

"The Chairman tabled a financial model (incorporating legally privileged materials) which set out forecast Coy and Jsekarb assets and cashflows and which indicated there was likely to be a surplus of funds in the Foundation group when available

⁵ ABBlu5/2102-2111.

⁶ ABBlu4 1824-1829 (7 February); ABBlu5/1928-1935 (14 February); ABBlu5/ 2102-2111 (15 February).

⁷ ABBlu4/1838; OBS[16].

⁸ ABBlu6/2671-2679.

⁹ ASIC's submissions in chief at [87].

¹⁰ ABBlu5/2105D.

¹¹ CA[139] ABWhi/32.17; Harman affidavit at [153] ABBlu11/4916P.

¹² ABBlu6/2671-2679.

¹³ ABBlu6/2673Q.

assets, likely earning rates and likely future claims and costs were considered (Financial Model)."¹⁴

7. There is no doubt that these amendments (and that concerning the Allsop advice¹⁵) clearly reflect events that actually occurred at the meeting. The likelihood that this version was prepared by the addition of these events, which clearly did occur, yet with a wholesale retention of an entirely fictitious resolution (on the respondents' case) needs only to be stated to be rejected as inherently improbable. Moreover, Ms Hellicar conceded that a reference in JHIL minutes to a document being "tabled" by the chairman did not necessarily involve the chairman distributing copies, but embraced him referring to a senior officer who might distribute it.¹⁶
8. The point just made derives even greater force when one considers the "inaccuracies" in the sixth version of the minutes described at OBS[19]-[22]. OBS[19] divides the changes made between the fifth and sixth versions into three categories: formatting changes, entries addressing matters not pertaining to the creation of the MRCF and amendments to entries relating to the creation of the MRCF. OBS[21] notes 15 matters not relating to the creation of the MRCF which were inserted into the sixth version of the minutes and asserts that seven of those entries "do not accurately record events" at the February 2001 board meeting.¹⁷ Six of the seven inaccuracies referred to are: the errors concerning the failure to record a board consensus to adopt a strategy to commence a process for the sale of JHIL's gypsum business, rather than the continued exploration of strategic options for the business;¹⁸ the incorrect recording of the date on a shareholder's notice that was noted by the board;¹⁹ and four rescheduling errors as found by the trial judge at LJ[1213] and [1216] (ABRed2/724P, 725I) and set out in ASIC's annotated minutes accompanying its submissions filed on 23 June 2011 (AS) and addressed at AS[88].²⁰ These errors are, in the context of this case, qualitatively different to the asserted error in the minutes in relation to the Draft ASX Announcement Resolution. The former involve a mistake of detail concerning an event that in fact happened (eg various people entered the room at some point or a notice was tabled) or a topic that was addressed (gypsum). On the respondent's case, the minutes record a resolution of the board on a matter of great significance to the company that simply did not happen and the respondent and his fellow board members all failed to notice it before approving the minutes as a correct record.
9. The seventh inaccuracy is said to relate to a resolution that a media release and a management and discussion analysis concerning JHIL's third quarter results would be approved subject to changes discussed by the board with the secretary to arrange for its release.²¹ OBS[30(k)] contends that this is "most likely incorrect at least so far as it relates to 'the media release'". No finding to this effect was made either by trial judge or the Court of Appeal. No ground of Mr O'Brien's appeal to the Court of Appeal asserted any error in

¹⁴ ABBlu6/2674M-P.

¹⁵ The trial judge found that the Allsop advice was considered at the meeting (LJ[496] ABRed2/539W) and no error was found in this respect at LJ[1207]-[1220] ABRed2/723Q-725X. At trial none of the non-executive directors submitted that the advice was not at the February meeting (see Written Submissions of the Fourth to Seventh Defendants, chapter 2, section 2 at [207] ABB1a7/3192O; Written Submissions of the Eighth Defendant at [76(o)]; Submissions of the Ninth Defendant at [66(c)] ABB1a8/3333T).

¹⁶ T2984/20-2985/16 AB1a5/2217K-2218I; see also Mr Brown's evidence at T1811/22-40 ABB1a3/1095L-T and Mr Gillfillan's evidence at T2394/15-2395/2 ABB1a4/1660I-1661C.

¹⁷ The seven inaccuracies are then addressed at OBS [30(e) to (k)].

¹⁸ OBS[30(e)] as noted at LJ[1218] ABRed2/725N.

¹⁹ OBS[30(f)] as noted at LJ[1212], ABRed2/724M.

²⁰ OBS [30(g) to (j)].

²¹ OBS [30(k)].

the trial judge in failing to make this finding²² and his submissions to the Court of Appeal did not seek any such finding.²³ No notice of contention in this Court asserts that either. As ASIC submitted at trial, no director gave evidence in support of this alleged error and counsel for Mr O'Brien did not seek to ask any questions of any such director to adduce further evidence on the point.²⁴

10. OBS[22] identifies six amendments between the fifth and sixth drafts which relate to the creation of the MRCF and notes that two of the six are "inaccurate". The observation made above at [8] applies with equal force to these "inaccuracies". It was not found that either the DOCI or a power of attorney was not tabled as the minutes suggest.

10 *The inaccuracies in the minutes (OBS[28]-[32])*

11. OBS[30(a)-(c) and (e)-(j)] record the inaccuracies found by the trial judge and referred to by the Court of Appeal. These errors and their lack of significance are addressed in AS[88]-[89] (and above). Their significance is best gauged by addressing the annotated minutes accompanying those submissions. OBS[30(e)] attempts to elevate the significance of the inaccuracy concerning whether the board decided to adopt a strategy to commence a process for the sale of JHIL's gypsum business rather than the continued exploration of strategic options for the business. It wrongly assumes that there is some significant difference between the two. The adoption of a strategy for sale is not inconsistent with exploring strategic options. Neither version constitutes any form of resolution or commits JHIL to any course of action.
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12. OBS[30(d)] asserts that there is some further error in the minutes concerning the power of attorney and the chairman noting that specific instruction would be given to "*Ms Marchione and Mr Jarvi*". This aspect of the minutes was not the subject of any finding by the trial judge or the Court of Appeal. In any event it takes the matter no further than the inaccuracy identified in relation to the description of the power of attorney that was tabled.
13. Each of OBS[30(k), (m) and (n)] assert further inaccuracies in the minutes and that despite "*submissions*" to the trial judge and the Court of Appeal findings were not made concerning the alleged inaccuracies. No ground of Mr O'Brien's appeal to the Court of Appeal asserted any error in the trial judge failing to make any of these findings.²⁵ Mr O'Brien's submissions in the Court of Appeal merely referred to his submissions at trial without requesting any additional finding to that made by the trial judge.²⁶ No notice of contention in this Court asserts that either.
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14. OBS[30(m)] also alleges that the minutes are inaccurate in that they refer to the chairman presenting the proposal to establish the MRCF whereas in fact others did. ASIC addressed this in its submissions at trial.²⁷ In any event there is no inaccuracy. A reference in the

²² ABRed3/938-939.

²³ OBS [30(k)] states that "*Notwithstanding submissions to this effect to the trial judge and the Court of Appeal, neither the trial judge nor the Court of Appeal made a finding as to the accuracy or inaccuracy of this entry ...*". The reference to the submission to the Court of Appeal is to ABOra1/354 at [60]. This merely refers to Mr O'Brien's submissions at trial without requesting any additional finding to that made by the trial judge.

²⁴ ASIC Supplementary Submissions and in Response to the Defendants' Submissions, chapter 1 at [101] ABBla8/3495N.

²⁵ ABRed3/938-939.

²⁶ OBS [30(m)] states that "*Submissions to this effect to the trial judge and the Court of Appeal ...*". The reference to the submission to the Court of Appeal is to ABOra1/354 at [60]. This merely refers to Mr O'Brien's submissions at trial without requesting any additional finding to that made by the trial judge.

²⁷ ASIC Supplementary Submissions and in Response to the Defendants' submissions, chapter 1 at [85]-[87]

minutes to the chairman "*presenting*" a proposal includes a process whereby the chairman introduces the topic and hands the matter over to senior management.

15. OBS[30(n)] also refers to the minutes not referring to the chairman of the Audit Committee, Mr Brown, reporting to the board meeting on the discussion at the audit committee meeting. This was addressed in ASIC's submissions at trial.²⁸ Subsection 251A(1) of the *Corporations Act 2001* (Cth) requires that minutes reflect the "*proceedings and resolutions*" of directors meetings. To the extent that "*proceedings*" are recorded there is clearly room for judgment about what must be included and what is not. Mr Brown's comments are not said to be the subject of any resolution and there is no necessity for them to have been included in any discussion of the "*proceedings*" of directors. Similarly, the inaccuracy noted at OBS[30(l)], concerning the finding of the trial judge that the minutes do not record a consensus of the board for the continuation of preparation for restructuring, is not necessarily an inaccuracy. A consensus is not a "*resolution*" and there is room for debate as to whether a record of the "*proceedings*" of directors would need to record it.
16. OBS[30(o)] asserts that the Court of Appeal appeared to have "*approved*" certain submissions which invoked evidence of Messrs Hellicar, Willcox and Koffel concerning the inaccuracies in the minutes and the tabling of documents. The rejection of their evidence is addressed in ASIC's reply to the Hellicar respondents' submissions at [17]-[21]. Neither CA[495] ABWhi/98.13 nor any other part of the Court of Appeal's judgment purports to accept any part of their evidence which was not accepted by the trial judge. The trial judge rejected the evidence of all of the non-executive directors as to whether the announcement was tabled and approved as "*mistaken*" (LJ[222], [228] ABRed2/467P, 469D) and otherwise did not accept any of their evidence concerning the accuracy of the minutes (LJ[1207]-[1220] ABRed2/723Q-725X). Further, the trial judge noted but did not determine all of the attacks upon their credibility (LJ[1255] ABRed2/734I) as that was not necessary beyond the findings that were made. In those circumstances and in the absence of any challenge invoking the principles in *Fox v Percy* (2003) 214 CLR 118 the Court of Appeal did not and could not act on their evidence (see CA[251]-[271] ABWhi/56.13-59.36).
17. OBS[30(p)] refers to the witness statement of Ms Hellicar in which she stated that there were 27 errors (including the Draft ASX Announcement Resolution) in the minutes.²⁹ The comments made in the previous paragraph apply with even greater force to Ms Hellicar whom the trial judge found to be a "*most unsatisfactory witness*" generally (LJ[1251] ABRed2/733O). If the evidence of Ms Hellicar on this topic was accepted then it would lead to the absurd conclusion that, at the meeting on 15 February 2001, the board did not pass the majority of the resolutions necessary to establish the MRCF in the first place.

Post-meeting changes (OBS[33]-[39])

18. ASIC addresses the post-meeting changes at AS[92]-[109], especially at [101]-[102] which address the significance or otherwise of the changes made after the meeting. It makes 2 further points in reply.

ABBla8/3492E-R.

²⁸ ASIC Supplementary Submissions and in Response to the Defendants' Submissions, chapter 1 at [88]-[94] ABBla8/3492R-3494J.

²⁹ ABBlu13/5885N-588E.

19. First, the submission at OBS[34]³⁰ that Mr Baxter's evidence of his post-meeting behaviour is inconsistent with the board having given the requisite approval ignores his evidence about a post-meeting procedure for making changes involving Mr Macdonald and the chairman (CA[333]-[335] ABWhi/69.25-44) which meant that post-meeting changes were not inconsistent with board approval.³¹ The evidence of Mr Baxter referred to at OBS[34] takes the matter nowhere. In his affidavit, Mr Baxter stated that he could not recall the resolution as recorded in the minutes but added in relation to the resolution "*I have no reason to believe that I was not present for this discussion [of the announcement as recorded in the minutes] on 15 February 2001*".³² No cross-examiner suggested to Mr Baxter that the changes to the announcement made after the meeting were inconsistent with the board approval recorded in the minutes.
20. Second, leaving aside the eight changes, the significance of which OBS[36] asserts is "*self-evident*" and "*obvious*" without discussing why, OBS[37] notes that two of the changes reduced the "*assurance of sufficiency of funds*". This is addressed at AS[102].

Notice of contention (OBS[41]-[56])

Conduct following the February 2001 board meeting (OBS[43]-[47])

21. OBS[45] contends that an email that Mr Shafron sent to Mr Minty at Trowbridge at 8.12pm on 15 February 2001 referring to "*the wording we propose ...*" in the announcement was inconsistent with board approval. There is no inconsistency between that statement and the board having passed a resolution. A reading of the email reveals that Mr Shafron was outlining what was in the announcement for the purposes of obtaining Mr Minty's approval to refer to Trowbridge. If that approval was not forthcoming then changes would have been required which might have necessitated invoking the post-meeting procedure referred to above. The most significant aspect of Mr Shafron's pre and post-meeting conduct is his role in drafting, reviewing and circulating the minutes. Despite repeated references in ASIC's submissions to that conduct, there is no attempt by Mr O'Brien or any other respondent to address how, consistent with their case, Mr Shafron could have acted in that way.
22. OBS[46] refers to the post-meeting conduct of Mr Harman in seeking the consent of PwC to their being named and discussing changes with Mr Brett from PwC. This submission proceeds on the incorrect assumption that post-meeting changes were not permissible, which they were (see AS[102]). Similarly, Mr Harman's evidence that he did not believe the "*press release was set in stone at the board meeting*" (CA[337] ABWhi/70.02) was not inconsistent with a resolution approving the announcement and no such suggestion was squarely put to him.³³ The position of Mr Baxter as referred to in OBS[46] has been addressed above.
23. The evidence concerning Mr Morley referred to at OBS[47] takes the matter nowhere. At trial ASIC submitted that it should be rejected as unreliable.³⁴ The recitation of the evidence in OBS[47] omits the significant matter that Mr Morley claimed that he witnessed Mr Robb writing the word "*anticipated*" on the announcement on the morning of

³⁰ See also OBS[38].

³¹ See AS[94] and ASIC's reply to the Hellicar respondents' submissions at [37].

³² Baxter affidavit at [114]-[115] ABBlu10/4616D-O.

³³ See in particular T262/2-32 ABBla1/92C-Q.

³⁴ ASIC Supplementary Submissions and in Response to the Defendants' Submissions, chapter 1 at [202] and [268] ABBla8/3525R and 3542S.

16 February 2001.³⁵ That evidence is inconsistent with the incontrovertible fact that the word "*anticipated*" had been included in the announcement by 7.42pm on the evening of 15 February 2001.³⁶ The trial judge did not expressly address whether the evidence should be accepted, although his Honour rejected Mr Morley's evidence as "*mistaken*" to the extent that it was inconsistent with the finding of tabling and approval (LJ[222] and [228] ABRed2/467P and 469D; see below at [27]). No ground of appeal to the Court of Appeal nor the submissions of any respondent made any complaint about the trial judge's treatment of this part of his evidence.

- 10 24. Further OBS[47] overlooks that Mr Robb drafted and reviewed the minutes of the meeting (and charged for doing so - see AS[85(a)]). Equally Mr Morley received copies of the minutes on 21 March 2001 (CA[479] ABWhi/94.45). His position in relation to the minutes is addressed below.

Evidence of Messrs Morley and Willcox (OBS[48]-[55])

- 20 25. In relation to the evidence of Mr Morley referred to at OBS[49]-[51], the evidence extracted at OBS[51] involved Mr Morley agreeing with senior counsel for Ms Hellicar and Messrs Brown, Gillfillan and Koffel that his "*best recollection is that no draft press release was tabled*". Prior to that, he had been cross-examined by senior counsel for ASIC. During that exchange he agreed that his "*belief at the time of the Jackson Inquiry was that the 15 February minutes were correct*"³⁷ and, as noted at AS[91], that his "*honest belief has always been that those minutes were accurate and correct*" (emphasis added).³⁸ In this regard Mr Morley certainly had occasion to consider the minutes. He received a copy of the draft minutes of the 15 February 2001 meeting prior to the April meeting.³⁹ The trial judge noted Mr Morley's evidence in relation to his belief about the accuracy of the minutes at LJ[1199] ABRed2/722I.
- 30 26. The evidence referred to at OBS[51], if put forward as positive evidence that the minutes are inaccurate, is not only inconsistent with Mr Morley's prior actions as just noted, but also inconsistent with other evidence of Mr Morley. In his written statement, Mr Morley merely stated that he could not recall the Draft ASX Announcement being tabled or discussed, although he could recall a discussion about a communication strategy.⁴⁰ A number of times in cross-examination, Mr Morley agreed that he was not focussed on matters relating to the communication strategy.⁴¹ Critically, he agreed that his recollection did not enable him to assist the Court concerning matters relating to the Draft ASX Announcement.⁴²
27. The trial judge found that Mr Morley's evidence about whether an announcement was distributed was "*mistaken*" (LJ[222] ABRed2/467P). To the extent that Mr Morley received the minutes and was present when they were approved, yet sought to give evidence inconsistent with his Honour's finding, his credit was damaged by his failure to contradict or correct them (LJ[1151] ABRed2/712V). These findings were made in

³⁵ Morley statement at [534] ABBlu12/5667E.

³⁶ ABBlu5/2166-2168 esp. at 2167H; Written Submissions of the Fourth to Seventh Defendants, chapter 2, section 2 at [188]; ABBlu7/3187L.

³⁷ T1590/20-30 ABBlu2/910K-P.

³⁸ T1601/5-7 ABBlu2/921D-E.

³⁹ ABBlu6/2545M, 2580-2587, 2671-2679.

⁴⁰ Morley statement at [533] ABBlu12/5666V.

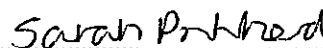
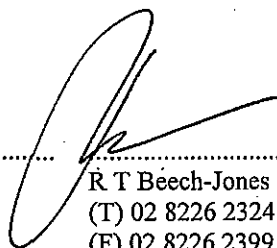
⁴¹ T1445/40-43 and T1482/41-1483/15 ABBlu2/776T-V and 805U-806I.

⁴² T1484/1-20 ABBlu2/807B-K.

circumstances where the trial judge had the opportunity to observe Mr Morley give evidence over a period of 4 days.

28. Contrary to OBS[52], the Court of Appeal did not at CA[485] ABWhi/96.19 or anywhere else purport to accept or act upon the evidence at OBS[51]. It could only have done so if an attack had been made upon his Honour's rejection of Mr Morley's evidence on this topic in accordance with the principles in *Fox v Percy*, which it was not. In particular, Mr O'Brien did not adopt that approach before the Court of Appeal. Instead he pointed to the absence of reasons for the rejection in support of that part of his appeal which sought a new trial.⁴³ He does not pursue that course in this Court. The Court of Appeal criticised the observations of the trial judge concerning Mr Morley at LJ[1199] ABRed2/722I as not reflecting his evidence. For the reasons stated at AS[91], that criticism was unfounded and none of the respondents have sought to defend that aspect of the Court of Appeal's reasons.
29. In relation to Mr Willcox, the rejection of the evidence of the non-executive directors by the trial judge is addressed in ASIC's reply to the Hellicar respondents' submissions at [17]-[21] which are repeated here.
30. The trial judge rejected Mr Willcox's evidence as to tabling on the basis that it was "mistaken" (LJ[222] ABRed2/467P). His Honour was sceptical about Mr Willcox's evidence (LJ[811], [854] ABRed2/622K, 633S) and drew comfort for the rejection of his evidence by reason of the damage that was done to his credit (LJ[1151] ABRed2/712V). The damage that was done to his credit followed from the various documents that were sent to him (and the other non-executive directors) after the meeting which warranted comment if the trial judge's findings as to distribution and approval were wrong (LJ[1161], [1202] ABRed2/714U, 722T).
31. Contrary to OBS[53], the Court of Appeal did not at CA[829] ABWhi/157.32, CA[485] ABWhi/96.19 or anywhere else purport to accept or act upon Mr Willcox's evidence. It could only have done so if an attack had been made upon his Honour's rejection of Mr Willcox's evidence on this topic in accordance with *Fox v Percy*, which it was not. This is particularly so where the trial judge did not consider it necessary to catalogue and determine all of ASIC's attacks upon his credit (LJ[1255] ABRed2/734I). As with Mr Morley's evidence, Mr O'Brien did not attack the trial judge's rejection of Mr Willcox's evidence on *Fox v Percy* principles in the Court of Appeal. Instead, he pointed to the absence of reasons for the rejection in support of that part of his appeal which sought a new trial.⁴⁴ He does not pursue that course in this Court.

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⁴³ Mr O'Brien's submissions in the Court of Appeal which address this are at ABOral/345-346. They concern his ground of appeal 4 which alleged the trial judge's reasons were inadequate (ABRed3/938O), which in turn was the basis for order 8 of his notice of appeal which sought, in the alternative, a retrial (ABRed3/940X).

⁴⁴ See footnote 40.