

ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

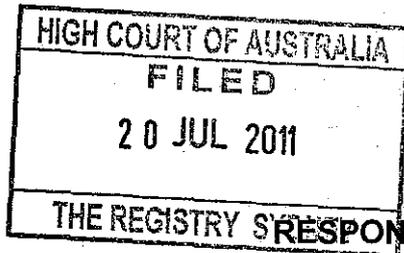
No. S180 of 2011

BETWEEN:

AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION
Appellant

and

GEOFFREY FREDERICK O'BRIEN
Respondent



RESPONDENT'S SUBMISSIONS

Part I:

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

Part II:

- 20 2 Subject to three qualifications, the respondent ("**Mr O'Brien**") agrees that the issues that the appeal presents are those stated at par 2 of the Appellant's Submissions filed 23 June 2011 ("**ASIC's Submissions**"). The first qualification concerns issue (b) at ASIC's Submissions, par 2. Mr O'Brien contends that that issue should be framed in the terms stated at par 2 of the Respondents' Submissions in appeal proceedings S176, S177, S178 and S179 ("**Hellicar's Submissions**").

- 30 3 The second and third qualifications arise by reason of Mr O'Brien's Notice of Contention¹. The second qualification is that Mr O'Brien contends that an issue in the appeal is whether, assuming that the appellant ("**ASIC**") was not obliged to call Mr Robb as a witness, ASIC proved that the Draft ASX Announcement Resolution² was passed³. The third qualification is that Mr O'Brien contends that an issue in the appeal is whether ASIC proved that the

¹ ABGre p 86.

² For convenience, these submissions employ the same defined terms as those in ASIC's Submissions.

³ ABGre p 86, ground 1.

ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 24 Chifley Tower
2 Chifley Square
Sydney 2000

DX 489 Sydney
Tel: 9226 7100
Fax: 9226 7120
Ref: JOM
Jonathan Milner

Draft ASX Announcement was tabled or distributed at the February 2001 board meeting⁴.

Part III:

4 Mr O'Brien has considered whether any notice should be given in compliance with s 78B of the *Judiciary Act* 1903 and none is required.

Part IV:

5 Mr O'Brien says that ASIC's summary of material facts at ASIC's Submissions, Part V is incomplete and refers to and adopts Hellicar's Submissions, Part IV.

Part V:

10 6 Mr O'Brien accepts that the applicable legislative provisions are stated in the Appellant's Legislative Provisions filed 17 June 2011.

Part VI:

7 Given the commonality of issues in this appeal, the other appeal proceedings referred to at par 2 above and appeal proceedings S175 of 2011 ("**the Terry Appeal**") as well as the statement of Hayne J at the directions hearing on 13 May 2001 that parties are not to put on submissions that cover the same ground, Mr O'Brien adopts Hellicar's Submissions, pars 22 to 153 and the Respondent's Submissions in the Terry Appeal, pars 4 to 12 and 14 to 136; which include, at pars 46 to 57, submissions concerning the production of a
20 draft ASX announcement by BIL. The submissions below supplement those paragraphs of Hellicar's submissions and the Respondent's Submissions in the Terry Appeal.

8 These submissions address three issues raised in ASIC's Submissions, Part VI:

- (a) the minutes of the February 2001 board meeting (ground 10 of ASIC's Notice of Appeal);

⁴ ABGre p 86, ground 2.

- (b) changes made to the Draft ASX Announcement following the February 2001 board meeting (ground 7 of ASIC's Notice of Appeal); and
- (c) ground 12 of ASIC's Notice of Appeal (which concerns costs).

It should be noted that (a) and (b) overlap directly or indirectly with grounds 1 and 2 of Mr O'Brien's Notice of Contention.

(a) Minutes (Ground 10 of ASIC's Notice of Appeal)

9 Hellicar's Submissions pars 60 to 72 address the minutes. Mr O'Brien adopts those submissions. In addition, he relies upon the submissions at pars 10 to 32 below.

10 10 ASIC admits that:

"The terms of the minutes as approved by the board were the foundation of [its] pleaded case."⁵

Given:

(a) this concession,

(b) that no witness gave evidence that the Draft ASX Announcement Resolution was passed, and

(c) that, apart from the February 2001 board minutes, there was no documentary evidence admitted against Mr O'Brien that proved that the Draft ASX Announcement Resolution was passed⁶,

20 if, as Mr O'Brien contends, the minutes are unreliable, ASIC's case must fail.

11 The Court of Appeal held that the reliability and weight to be ascribed to the minutes is very much open to question⁷. Their Honours viewed the accuracy of the minutes with considerable reserve⁸ and, mindful of s 140 of the

⁵ ASIC's Submissions, par 10.

⁶ Note that the declarations given by Ms Hellicar and Messrs Brown and Gillfillan to JHINV in September 2004 were not admitted against Mr O'Brien: see ASIC's Submissions, par 79.

⁷ ABWhi p 175, lines 29 to 33 (CA [497]).

⁸ ABWhi p 259, lines 23 to 28 (CA [791]).

Evidence Act 1995 (NSW) and *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362⁹, concluded that ASIC failed to discharge its burden of proof¹⁰.

- 12 Broadly speaking, the correctness of the Court of Appeal's conclusion as to the reliability of the minutes may be assessed by reference to two matters:
- (a) the evolution of the minutes; and
 - (b) the inaccuracies in the minutes.

The evolution of the minutes

- 10 13 The Court of Appeal referred to the evolution of the minutes¹¹ and set out an abbreviated summary of the evolution of the minutes at CA [471] to [483]¹². A more detailed evolution of the minutes is set out at pars 14 to 27 below.
- 14 The first draft of the minutes was created well prior to the February 2001 board meeting, during the first week of February 2001, by JHIL's then solicitors, Allen, Allen & Hemsley ("**Allens**")¹³. It was sent by Mr Blanchard, of Allens, to Mr Shafron (and copied to Mr Robb and Ms Mowat, both of Allens) by email on 7 February 2001 at 12:51pm¹⁴. Subject to an immaterial exception¹⁵, the first draft of the minutes contained verbatim the entry under the heading "**ASX Announcement**" which appears in the signed minutes. In other words the Draft ASX Announcement Resolution was drafted in advance, and necessarily independently, of what occurred at the February 2001 board meeting.
- 20 15 The second draft of the minutes bears the date 9 February 2001¹⁶. That draft inserts two clauses in the first draft of the minutes: a clause concerning the consolidation of shares in Jsekarb (clause 4)¹⁷ and a clause providing for the

⁹ ABWhi pp 260 to 261 (CA [794] to [796]).

¹⁰ ABWhi pp 260 to 261 (CA [796]).

¹¹ ABWhi p 167, line 28 (CA [470]).

¹² ABWhi pp 167 to 169.

¹³ ABBlu, Vol. 4, pp 1824 to 1829.

¹⁴ ABBlu, Vol. 4, p 1824; the email may have been sent on 6 February 2001 at 5:51pm (ABBlu, Vol. 4, p 1839) but nothing turns on this possibility.

¹⁵ The immaterial exception is that the first draft of the minutes refer to the "*Chair*" tabling the relevant announcement (ABBlu, Vol. 4, p 1828) whereas, in the signed minutes, the word "*Chair*" is replaced with "*Chairman*" (ABBlu, Vol. 5, p 2124).

¹⁶ ABBlu, Vol. 5, pp 1876 to 1881.

¹⁷ ABBlu, Vol. 5, pp 1876 to 1877.

ratification by JHIL of actions taken by Coy and Jsekarb (clause 6)¹⁸. The Draft ASX Announcement Resolution is unaltered¹⁹.

16 The third draft of the minutes is dated 13 February 2001²⁰. It incorporates a number of changes to the second draft. Notably, the third draft is the first version of the minutes that names persons to be appointed attorneys of JHIL for the purpose of, inter alia, executing documents in connection with the establishment of the foundation²¹. The persons named are Messrs Macdonald, Shafron and Marchione²². This appears to follow an instruction that was given by Mr Shafron to Mr Blanchard by email on 8 February 2001 at 12:36pm²³. The Draft ASX Announcement Resolution remains unaltered in the third draft of the minutes²⁴.

17 The fourth draft of the minutes was sent by Mr Robb to Mr Shafron by email (copied to Mr Blanchard) on 14 February 2001 at 6:16am²⁵. This draft makes several amendments to its predecessor; including, the time of the meeting is inserted as "3:00pm"²⁶, the proposed attendees are identified²⁷ and the appointment of the three named proposed attorneys pursuant to a power of attorney is made the subject of a separate clause (clause 9)²⁸. The terms of the Draft ASX Announcement Resolution remain unaltered but that resolution has been moved to clause 10²⁹ (it was clause 9 in the third draft of the minutes³⁰).

18 The fifth draft of the minutes was sent by Mr Robb to Mr Shafron by email on 15 February 2001 at 8:05am³¹. According to the evidence, this is the form of the minutes at the time of the February 2001 board meeting. The fifth draft makes several changes to the fourth draft. Those changes include the time of

¹⁸ ABBlu, Vol. 5, p 1878.

¹⁹ ABBlu, Vol. 5, p 1881.

²⁰ ABBlu, Vol. 5, pp 1912 to 1918.

²¹ ABBlu, Vol. 5, p 1914, cl 5.

²² ABBlu, Vol. 5, p 1914, cl 5.

²³ ABBlu, Vol. 4, p 1838.

²⁴ ABBlu, Vol. 5, pp 1917 to 1918.

²⁵ ABBlu, Vol. 5, pp 1928 to 1935.

²⁶ ABBlu, Vol. 5, p 1929.

²⁷ ABBlu, Vol. 5, p 1929.

²⁸ ABBlu, Vol. 5, p 1935.

²⁹ ABBlu, Vol. 5, p 1935.

³⁰ ABBlu, Vol. 5, p 1917.

³¹ ABBlu, Vol. 5, pp 2102 to 2111.

the meeting changing to 10:45am³², the proposed attendees changing³³ and the insertion of the following entry:

*"The meeting discussed the legal and financial issues concerning the amount being paid under the Indemnity, based on actuarial assessments carried out and legal advice received."*³⁴

The terms of the Draft ASX Announcement Resolution remain unaltered but that resolution has been moved to clause 8³⁵.

- 10 19 The sixth draft of the minutes was sent by Mr Shafron to Mr Macdonald (copied to Mr Morley) in an email that described the attached document as "Draft Feb 00 minutes" approximately five weeks after the February 2001 board meeting, on 21 March 2001 at 9:36am³⁶. The changes to the fifth draft of the minutes made by the sixth draft of the minutes fall into three categories: formatting changes, the insertion of entries addressing matters not pertaining to the creation of the foundation and amendments to entries relating to the creation of the foundation.
- 20 20 There are two formatting changes. The first is the removal of marked-up annotations in the sixth draft. The second is that the sixth draft appears on JHIL's, as opposed to an Allens', template.
- 20 21 So far as the insertion of entries addressing matters not pertaining to the creation of the foundation are concerned, they include the entries in the sixth draft styled "*Minutes*"³⁷, "*Notices*"³⁸, "*Material Documents*"³⁹, "*CEO's Report*"⁴⁰, "*Australia/Asia Restructure*"⁴¹, "*Finance*"⁴², "*Third Quarter Report*"⁴³, "*Revaluation*"⁴⁴, "*Compliance Certificates*"⁴⁵, "*Portfolio*"⁴⁶, "*Deed of Cross*

³² ABBlu, Vol. 5, p 2103.

³³ ABBlu, Vol. 5, p 2103.

³⁴ ABBlu, Vol. 5, p 2105.

³⁵ ABBlu, Vol. 5, p 2110.

³⁶ ABBlu, Vol. 6, pp 2671 to 2679.

³⁷ ABBlu, Vol. 6, p 2672.

³⁸ ABBlu, Vol. 6, p 2672.

³⁹ ABBlu, Vol. 6, p 2672.

⁴⁰ ABBlu, Vol. 6, p 2672.

⁴¹ ABBlu, Vol. 6, p 2672.

⁴² ABBlu, Vol. 6, p 2673.

⁴³ ABBlu, Vol. 6, p 2673.

⁴⁴ ABBlu, Vol. 6, p 2673.

⁴⁵ ABBlu, Vol. 6, p 2673.

*Guarantee*⁴⁷, *Asbestos Litigation*⁴⁸, *Market, Broker and Shareholder Reports*⁴⁹, *Environment Health & Safety*⁵⁰ and *Next Meeting*⁵¹. Seven of these entries do not accurately record events at the February 2001 board meeting. The respects in which the entries are incorrect are addressed below⁵².

22 The third category of changes to the fifth draft of the minutes made by the sixth draft of the minutes is amendments to entries relating to the creation of the foundation. There are six material amendments: the insertion into the draft minutes for the first time of statements to the effect that JHIL will pay Coy and Jsekarb a net present value of AUS\$65 million pursuant to the terms of a Deed of Indemnity⁵³; the insertion of a statement that the Chairman tabled legal advice from Mr J L B Allsop SC dated 14 February 2001⁵⁴; the insertion of a statement that the Chairman tabled a financial model which indicated that there was likely to be a surplus of funds in the foundation group when available assets, likely earnings rates, likely future claims and costs were considered⁵⁵; the deletion of an entry recording, and a resolution ratifying, the consolidation of Jsekarb's issued ordinary shares into one share⁵⁶; the deletion of a resolution that JHIL execute a contract for litigation services between JHIL, Coy and Litigation Management Systems Pty Ltd⁵⁷; 10 amendments to the clause headed "**Power of Attorney**" to the effect that a fourth person, Mr Guy Jarvi, was appointed an attorney of JHIL and that the Chairman noted that Messrs Marchione and Jarvi would be specifically instructed not to execute any documents on behalf of JHIL without the express consent of Mr Macdonald or Mr Shafron⁵⁸. Two of the six material amendments are inaccurate. These inaccuracies are addressed below⁵⁹. 20

⁴⁶ ABBlu, Vol. 6, p 2679.

⁴⁷ ABBlu, Vol. 6, p 2679.

⁴⁸ ABBlu, Vol. 6, p 2679.

⁴⁹ ABBlu, Vol. 6, p 2679.

⁵⁰ ABBlu, Vol. 6, p 2679.

⁵¹ ABBlu, Vol. 6, p 2679.

⁵² See subpars 30(e), 30(f), 30(g), 30(h), 30(i), 30(j) and 30(k) below.

⁵³ ABBlu, Vol. 6, pp 2674 and 2676.

⁵⁴ ABBlu, Vol. 6, p 2674.

⁵⁵ ABBlu, Vol. 6, p 2674.

⁵⁶ cf ABBlu, Vol. 5, p 2105.

⁵⁷ cf ABBlu, Vol. 5, p 2109.

⁵⁸ ABBlu, Vol. 6, p 2679.

⁵⁹ See subpars 30(a), 30(b), 30(c) and 30(d) below.

- 23 The sixth draft of the minutes amends the entry styled "**ASX Announcement**" in one respect: "*Chairman*" replaces "*Chair*"⁶⁰. This is the only amendment to the text of that entry that was ever made. Contrary to ASIC's Submissions par 87, the fact that the amendment was made does not suggest that the person who made it turned his or her mind to, or made inquiries about, the events at the February 2001 board meeting in relation to an ASX announcement concerning the establishment of the foundation prior to preparing, or when he or she prepared, the sixth draft of the minutes. This is because the same amendment as that made under the heading "**ASX Announcement**" is made throughout the sixth draft of the minutes. The word "*Chair*" appears thirty-one times in the fifth draft of the minutes. In the sixth draft of the minutes "*Chair*" has been replaced with "*Chairman*" twenty-four times, five references to "*Chair*" have been deleted and two references to "*Chair*" remain⁶¹; the retention of the latter two references was presumably an oversight. Thus, the only change made to the entry headed "**ASX Announcement**" subsequent to its drafting on or before 7 February 2001⁶² was a stylistic change. In other words, the probabilities are that, like the first to fifth drafts of the minutes (all of which predate the February 2001 board meeting), the entry in the sixth draft of the minutes styled "**ASX Announcement**" was prepared without regard to what occurred at the February 2001 board meeting.
- 10
- 20
- 24 Subject to three amendments, the draft of the minutes in the April board papers⁶³ is in the same form as the sixth draft of the minutes. The only material amendment is the insertion, in the former draft, of Mr Terry as a director attendee at the February 2001 board meeting⁶⁴. The other two amendments are not substantive⁶⁵.
- 25 The April board papers were sent to Mr O'Brien by email on 27 March 2001⁶⁶. They are one hundred and thirty-eight pages long⁶⁷. The draft minutes of the

⁶⁰ ABBlu, Vol. 6, p 2679.

⁶¹ See ABBlu, Vol. 6, p 2677 under the heading "*Shareholding in Coy*".

⁶² See par 14 above.

⁶³ ABBlu, Vol. 6, pp 2580 to 2587.

⁶⁴ ABBlu, Vol. 6, p 2580; cf ABBlu, Vol. 6, p 2672.

⁶⁵ There is a formatting change in the entry styled "*Establishment of the Foundation and Coy and Jsekarb Separation*" (ABBlu, Vol. 6, p 2583; cf ABBlu, Vol. 6, p 2675) and the insertion of "*a*" in the first line of the entry styled "*Amendments to the Constitutions of Coy and Jsekarb*" (ABBlu, Vol. 6, p 2583; cf ABBlu, Vol. 6, p 2675).

⁶⁶ ABBlu, Vol. 6, pp 2686 to 2824.

⁶⁷ ABBlu, Vol. 6, pp 2687 to 2824.

February 2001 board meeting comprise eight of those pages. According to the minutes of the meeting of directors of JHIL held on 3 and 4 April 2001, at that meeting the board of JHIL confirmed that the minutes of the meeting of directors held on 15 February 2001 were a correct record⁶⁸. Assuming the accuracy of the minutes of the April board meeting, the minutes of the 15 February 2001 meeting that the directors confirmed on 3 or 4 April 2001 were presumably the draft minutes of the February 2001 board meeting included in the April board papers⁶⁹. Significantly, such confirmation occurred six and a half weeks after the February 2001 board meeting.

10 26 It is unclear when Mr McGregor signed the minutes. However, he did not sign the minutes prior to 7 April 2001⁷⁰; that is, in excess of seven weeks after the February 2001 board meeting.

27 The evolution of the minutes recounted above prompts several observations. First, the first to fifth drafts of the minutes recorded nothing other than the beliefs of solicitors at Allens as to what might occur at the then upcoming February 2001 board meeting. Secondly, each of those drafts included the Draft ASX Announcement Resolution. Thirdly, together with much of that portion of the minutes concerning the establishment of the foundation, the Draft ASX Announcement Resolution as recorded in the minutes was not
20 materially amended after the February 2001 board meeting. Fourthly, there is no evidence that Mr Shafron, the person responsible for the preparation of the minutes subsequent to the February 2001 board meeting, made any note of substance as to what occurred at the meeting⁷¹. Fifthly, notwithstanding that the fifth draft of the minutes was emailed by Mr Robb to Mr Shafron on the morning of, but prior to, the February 2001 board meeting, there is no evidence of anyone attending to the amendment or further preparation of the draft minutes during an ensuing period of almost five weeks. Sixthly, the draft of the minutes provided to the directors of JHIL for their consideration and

⁶⁸ ABBlu, Vol. 7, p 2839.

⁶⁹ There is no evidence of any other draft minutes of the February 2001 board meeting being provided to the directors of JHIL prior to or at the April board meeting.

⁷⁰ See ABBlu, Vol. 7, p 2865.

⁷¹ The only evidence of notes made by Mr Shafron presumably at, or at about the time of, the February 2001 board meeting concerning what occurred at the meeting is the handwritten notations on two documents to the effect that they were tabled at the meeting: a copy of the Twelfth Cashflow Model (see ABBlu, Vol. 5, p 2311) and a copy of the advice of Mr Allsop SC dated 14 February 2001 (see ABBlu, Vol. 5, p 2177).

approval was not provided to them for consideration as a stand-alone eight page document; it was interspersed with a mass of other documentation. Seventhly, a material period of time (not less than six and an half weeks) elapsed between the February 2001 board meeting and both the directors' approval of the draft minutes of that meeting and Mr McGregor signing the minutes.

The Inaccuracies in the minutes

10 28 The Court of Appeal referred⁷² to a selection of the eleven inaccuracies in the minutes found by the trial judge⁷³, found errors in the trial judge's reasons concerning the inaccuracies⁷⁴ and held that some of the inaccuracies were significant⁷⁵. Their Honours also referred to evidence and submissions concerning inaccuracies in the minutes that were not referred to by the trial judge⁷⁶.

29 ASIC submits that "*the 'errors' that were established in relation to the minutes were trivial*"⁷⁷. This is an ambitious submission. Its force (if any) should be assessed in the context of all of the inaccuracies in the minutes (only some of which are identified in ASIC's document styled "*Appellant's Annotated minutes of JHIL Board Meeting of 15 February 2001*" ("*ASIC's Annotated Minutes*") and the circumstances pertaining to those inaccurate entries.

20 30 The inaccurate entries in the minutes were as follows:

(a) the statement that JHIL "*proposes to...pay to Coy and Jsekarb A\$65 million net present value pursuant to a Deed of Indemnity*"⁷⁸ is incorrect. The trial judge held that this statement was inaccurate because "*A\$65million*" should have read "*A\$72million*"⁷⁹. The Court of Appeal held that it was a significant inaccuracy⁸⁰.

⁷² ABWhi pp 172 to 174 (CA [489] to [495]).

⁷³ ABRed, Vol. 2, pp 723 to 725 (LJ [1207] to [1219]).

⁷⁴ ABWhi p 171, lines 30 to 41 (CA [485]); p 173, lines 30 to 41 (CA [491] and [492]); see also p 174, lines 24 to 34 (CA [494]).

⁷⁵ ABWhi p 173, lines 39 to 41 (CA [492]); see also CA [494].

⁷⁶ ABWhi p 174, lines 34 to 49 (CA [495]).

⁷⁷ ASIC's Submissions, par 88.

⁷⁸ ABBlu, Vol. 5, p 2120D.

⁷⁹ ABRed, Vol. 2, pp 723R and 724K (LJ [1207] and [1211]).

⁸⁰ ABWhi p 173, line 39 (CA [492]).

The Court of Appeal was correct: each of the cashflow model provided to the JHIL directors, the presentation slides, the oral presentation of Mr Morley by reference to both the cashflow model and the presentation slides and the oral presentation given by Mr Shafron relating to payments to be made by JHIL under the DOCI placed a net present value of AUS\$72 million, not AUS\$65 million, on those payments⁸¹. In other words, there was no foundation in the documents or oral information provided to the directors at the February 2001 board meeting for the "A\$65 million" reference in the minutes; Mr Harman, ASIC's witness, so testified⁸². For this reason, as well as the fact that \$7 million is no trivial sum, the inaccuracy in the minutes was significant;

- 10
- (b) similarly, the statement that "[t]he Directors considered the Indemnity to be in the best interests of the Company as the Directors regard the amount of A\$65 million (net present value) to be fair value for the legal and commercial certainty that results from receiving the benefit of the Indemnity and to better facilitate the Coy and Jsekarb Separation"⁸³ is incorrect⁸⁴. There was no discussion at the February 2001 board meeting about indemnity payments with a \$65 million net present value⁸⁵;
- 20
- (c) the statement, under the heading "Power of Attorney", that "[t]he Chairman tabled a power of attorney which appointed Messrs Peter Macdonald, Peter Shafron, Ms Joanne Marchione and Mr Guy Jarvi severally as attorneys for the Company"⁸⁶ is incorrect. The trial judge so found⁸⁷. The Court of Appeal referred to the inaccuracies in the

⁸¹ See ABBlA, Vol. 1, pp 70 to 74 (Mr Harman's oral evidence at T 239/30-243/23); ABBlA, Vol. 3, pp 1009 to 1011 (Mr Morley's oral evidence at T 1699/16-1701/4); ABBlu, Vol. 5, pp 2114 to 2115 and 2311 to 2314 (the Twelfth Cashflow Model); ABBlu, Vol. 5, pp 2262, 2263 and 2267 (the February 2001 board meeting slide presentation); ABBlu, Vol. 12, p 5654V to 5660Q (Statement of Evidence of Phillip Morley, pars 476 to 509).

⁸² See ABBlA, Vol. 1, pp 70 to 74 (Mr Harman's oral evidence at T 239/30-243/23).

⁸³ ABBlu, Vol. 5, p 2122G to I.

⁸⁴ See the references at footnotes 80 to 83 above.

⁸⁵ See ABBlA, Vol. 1, p 73 (T 242/2-6).

⁸⁶ ABBlu, Vol. 5, p 2124L to M.

⁸⁷ ABRed, Vol. 2, p 724F to J (LJ [1210]).

minutes detailed by the trial judge⁸⁸ but did not otherwise refer to this finding.

Far from being trivial, the inaccuracy in the minutes the subject of this finding is significant not merely because of its subject matter but also because, at the time of the February 2001 board meeting, Mr Jarvi was not a proposed appointee under the relevant power of attorney⁸⁹.

10 On 8 February 2001 Mr Shafron emailed Mr Blanchard (and copied Mr Robb) asking Allens to draft a power of attorney appointing Messrs Macdonald, Shafron and Marchione as attorneys "*in connection with the transaction*"⁹⁰. Mr Blanchard delegated this task to another solicitor at Allens, Ms Mowat⁹¹. On 14 February 2001 at 8:07pm Ms Mowat sent a draft power of attorney to Mr Alan Kneeshaw, at JHIL, by email (copied to Mr Robb)⁹². The draft provided for the appointment as attorneys of Messrs Macdonald, Shafron and Marchione but not Mr Jarvi⁹³. At 9:04pm on 14 February 2001, and at Mr Kneeshaw's request, Ms Mowat sent the draft power of attorney to Mr Shafron (again, Mr Robb was copied)⁹⁴.

20 At the time of the February 2001 board meeting the power of attorney was in the form prepared by Ms Mowat and sent to Messrs Kneeshaw, Shafron and Robb on 14 February 2001. Mr Jarvi was not a proposed attorney. This changed on the evening of 15 February 2001, at Allens' offices, prior to Mr Don Cameron signing the document⁹⁵. The signed power of attorney appointed Mr Jarvi, as well as each of Messrs Macdonald, Shafron and Marchione, as an attorney⁹⁶. Owing to the fact that the directors of JHIL had not authorised the appointment of Mr Jarvi at the February 2001 board meeting, the April board papers

⁸⁸ ABWhi p 173 line 35 (CA [492]).

⁸⁹ ABBlu, Vol. 3, pp 1007 and 1010 (Mr Morley's oral evidence at T 1697/34-43 and T 1700/28-33).

⁹⁰ ABBlu, Vol. 4, p 1838P to Q.

⁹¹ ABBlu, Vol. 4, p 1838E to F.

⁹² ABBlu, Vol. 5, pp 2019 and 2024 to 2028.

⁹³ ABBlu, Vol. 5, p 2026I to M.

⁹⁴ ABBlu, Vol. 5, pp 2035 to 2040.

⁹⁵ ABBlu, Vol. 12, pp 5279 to 5283 (Outline of Evidence of Donald Ewen Cameron, pars 132-148); ABBlu, Vol. 5, pp 2192 to 2196 (Power of Attorney dated 15 February 2001).

⁹⁶ ABBlu, Vol. 5, p 2194.

contained a request of the directors "to note and ratify the execution of" the executed power of attorney⁹⁷. The execution of the document, which appointed Mr Jarvi as an attorney, was noted in the minutes of the April board meeting⁹⁸.

(d) similarly, the statement, also under the heading "Power of Attorney", that "[t]he Chairman noted that Ms Marchione and Mr Jarvi would be specifically instructed not to execute any documents on behalf of the Company without the express consent of Mr Macdonald or Mr Shafron"⁹⁹ is incorrect. ASIC's Annotated Minutes do not identify this inaccuracy in the minutes. It is significant for the reasons set out at subpar (c) above. It should also be observed that the signed power of attorney¹⁰⁰ does not contain the qualification on the powers of Messrs Marchione and Jarvi referred to in the minutes and extracted above. Hence, contrary to the minutes, it is highly improbable that the Chairman noted the qualification at the February 2001 board meeting;

(e) the entry in the minutes, styled "Portfolio"¹⁰¹, stating that "[t]he Board approved Mr Macdonald continuing to explore strategic options for the Gypsum business"¹⁰² is incorrect. As the trial judge found, the board of JHIL had decided to adopt a strategy to commence a process for the sale of JHIL's gypsum business, not the continued exploration of strategic options for the business¹⁰³. This was a significant decision for JHIL¹⁰⁴. It had the potential to impact positively upon the company's price earnings ratio and share price¹⁰⁵. To provide some perspective: as at February 2001, the company hoped to achieve a sale price for its

⁹⁷ ABBlu, Vol. 6, p 2590.

⁹⁸ ABBlu, Vol. 7, p 2839O to P; see also ABBlu, Vol. 3, p 1007L to P (T 1697/22-29).

⁹⁹ ABBlu, Vol. 5, p 2124N.

¹⁰⁰ ABBlu, Vol. 5, pp 2192 to 2196.

¹⁰¹ ABBlu, Vol. 5, p 2125C to D.

¹⁰² ABBlu, Vol. 5, p 2125C to D.

¹⁰³ ABRed, Vol. 2, p 725N to P (LJ [1218]); see also ABBlu, Vol. 3, pp 1032L to W (T 1722/22-44) and 1034M to 1035O (T 1724/23-1725/39).

¹⁰⁴ See ABBlu, Vol. 12, pp 5553L to 5554L (Statement of Peter Wilcox, pars 114 to 115); ABBlu, Vol. 3, pp 1032L to 1035O (Mr Morley's oral evidence at T 1722/22 to 1725/28).

¹⁰⁵ ABBlu, Vol. 12, pp 5553R to 5554D (Statement of Peter Wilcox, par 114).

gypsum business of about US\$550 million¹⁰⁶ and, as at 31 December 2000, its total assets were A\$1,826.6 million¹⁰⁷.

Apart from the abovementioned general reference by the Court of Appeal to the trial judge's findings of inaccuracies in the minutes, the Court of Appeal did not refer to this particular inaccuracy;

- (f) as the trial judge held¹⁰⁸, the statement that "[a] substantial shareholders notice dated 28 February 2001 for Merrill Lynch Investment Managers was noted" is incorrect¹⁰⁹. This inaccurate entry was made notwithstanding that the "notice" post dates the February 2001 board meeting, the notice contained in the February board papers is dated 29 December 2000¹¹⁰ and the notice contained in the April board papers is dated 28 February 2001¹¹¹;
- (g) the trial judge held that the record in the minutes that Sir Llewellyn Edwards retired from the February 2001 board meeting¹¹² prior to, rather than following, the business concerning "*Material Documents*"¹¹³ taking place is incorrect¹¹⁴. This was one of seven errors described by his Honour as "*rescheduling errors*"¹¹⁵. The Court of Appeal did not refer to each of the rescheduling errors but did refer to them collectively and found that they were significant¹¹⁶. Their significance lies in the fact that individually and collectively they belie the accuracy of the minutes. It is no answer to this proposition to assert, as ASIC does, that the rescheduling errors are qualitatively different to other errors¹¹⁷. Either the minutes accurately record what occurred at the February 2001 board meeting or they do not. The existence of the rescheduling

¹⁰⁶ ABBlu, Vol. 4, pp 1645R and 1646G.

¹⁰⁷ ABBlu, Vol. 4, p 1527T.

¹⁰⁸ ABRed, Vol. 2, p 724M to N (LJ [1212]).

¹⁰⁹ ABBlu, Vol. 5, p 2118J.

¹¹⁰ ABBlu, Vol. 4, pp 1448 to 1449.

¹¹¹ ABBlu, Vol. 6, pp 2588 to 2589.

¹¹² ABBlu, Vol. 5, p 2118Q.

¹¹³ ABBlu, Vol. 5, p 2118R.

¹¹⁴ ABRed, Vol. 2, p 724R to U (LJ [1213]).

¹¹⁵ ABRed, Vol. 2, p 725T (LJ [1220]).

¹¹⁶ ABWhi p 173 lines 39 to 41 (CA [492]).

¹¹⁷ See ASIC's Submissions, par 89.

errors, and the number of them, strongly suggests that the minutes do not accurately record what occurred at the meeting;

- (h) the trial judge found that the record in the minutes of the business styled "*CEO's Report*"¹¹⁸ taking place prior to Messrs Baxter, Harman, Wilson, Sweetman, Cameron and Robb joining the meeting¹¹⁹ is incorrect¹²⁰. This was a rescheduling error;
- 10 (i) the trial judge found that the record in the minutes that the business styled "*Australia/Asia Restructure*"¹²¹ took place prior to, rather than following, the business concerning Project Green¹²² is incorrect¹²³. This was a rescheduling error;
- (j) the trial judge found that the record in the minutes that the business styled "*Finance*"¹²⁴ took place prior to, rather than following, the business concerning Project Green¹²⁵ is incorrect¹²⁶. This was a rescheduling error;
- 20 (k) the record in the minutes that the directors of JHIL resolved "*that the media release and MD&A [both relating to JHIL's third quarter results] be approved subject to changes discussed by the Board, and that the Secretary be and is hereby authorised to arrange for their release*" is most likely incorrect at least so far as it relates to "*the media release*"¹²⁷. Notwithstanding submissions to this effect to the trial judge and the Court of Appeal¹²⁸, neither the trial judge nor the Court of Appeal made a finding as to the accuracy or inaccuracy of this entry in the minutes; presumably this explains why it is not identified as an error in ASIC's Annotated Minutes.

¹¹⁸ ABBlu, Vol. 5, p 2118S.

¹¹⁹ ABBlu, Vol. 5, p 2119D.

¹²⁰ ABRed, Vol. 2, pp 724V to 725C (LJ [1214]).

¹²¹ ABBlu, Vol. 5, p 2118V.

¹²² ABBlu, Vol. 5, pp 2119Q to 2124U.

¹²³ ABRed, Vol. 2, pp 724P to R (LJ [1213]).

¹²⁴ ABBlu, Vol. 5, p 2119B to D.

¹²⁵ ABBlu, Vol. 5, pp 2119Q to 2124U.

¹²⁶ ABRed, Vol. 2, pp 724P to R (LJ [1213]).

¹²⁷ ABBlu, Vol. 5, p 2119L.

¹²⁸ ABOra, Vol. 1, p 354G to H.

A six page media release styled "*Lower Gypsum Prices Impact 3rd Quarter Profit*" was issued by JHIL on 16 February 2001¹²⁹. However, it was not included in the February board papers¹³⁰. Mr Baxter had no recollection of either taking it to the February 2001 board meeting or it being the subject of a resolution at the meeting¹³¹. It was not a document that Mr Baxter was drafting on either 14 or 15 February 2001 and there is no draft of the document in evidence. There is no evidence that it was distributed to the directors of JHIL prior to or at the February 2001 board meeting. Nor is there evidence from any witness who attended the meeting that it was the subject of discussion at the meeting. In all of these circumstances, whilst the likelihood that a resolution was passed approving the third quarter results media release is low, the probability that such a release was approved "*subject to changes discussed by the Board*"¹³² is negligible;

- (l) the fact that the minutes do not record that the JHIL directors approved the continuation by JHIL management of preparations for the restructuring of the JHIL Group of companies for board approval in May 2001 reflects an inaccuracy in the minutes by omission¹³³. The trial judge so held¹³⁴. The Court of Appeal did not separately address this finding;
- (m) contrary to the minutes, the chairman did not present the proposal to establish the foundation. The proposal was presented in detail, by reference to slides, by Messrs Shafron, Morley and Baxter¹³⁵. Submissions to this effect were made to the trial judge and the Court of Appeal¹³⁶. Neither the trial judge nor the Court of Appeal made a finding with respect to this error. It is omitted from ASIC's Annotated Minutes;

¹²⁹ ABBlu, Vol. 6, pp 2390 to 2395.

¹³⁰ ABBlu, Vol. 4, pp 1439 to 1684.

¹³¹ ABBla Vol. 1, pp 399E to 400K (T 791/7-792/20).

¹³² ABBlu, Vol. 5, p 2119L.

¹³³ ABBla, Vol. 3, pp 1035U to 1036M (T 1725/41-1726/47).

¹³⁴ ABRed, Vol. 2, p 725R (LJ [1219]).

¹³⁵ ABBlu, Vol. 12, p 5546H to J (Statement of Peter Willcox, subpar 105(a)).

¹³⁶ ABOra, Vol. 1, p 354G to H.

(n) the minutes omit the fact that Mr Brown, chairman of the Audit Committee, reported to the board on the discussions at the Audit Committee meeting held on 14 February 2001 and, in particular, on the discussions at that meeting concerning the cash flow model and the funding of the trust¹³⁷. Again, notwithstanding this submission having been made to the trial judge and the Court of Appeal¹³⁸, no finding was made concerning this inaccuracy. It is omitted from ASIC's Annotated Minutes;

10 (o) the minutes refer to the chairman tabling many documents at the February 2001 board meeting. With the exception of the cash flow model and the advice of Mr Allsop SC, these references in the minutes are most probably incorrect¹³⁹. Three non-executive directors who attended the February 2001 board meeting gave evidence to this effect¹⁴⁰: Ms Hellicar and Messrs Willcox and Koffel. In reliance on this evidence, it was submitted to the trial judge that, so far as the minutes recorded the tabling of many documents, they were most probably inaccurate¹⁴¹. The trial judge made no finding with respect to the inaccuracy of the minutes in this regard. The Court of Appeal referred to the said submissions with apparent approval¹⁴² and, having found that the DOCI was a very important document¹⁴³ held that, with regard to its tabling, "*there was informality belying strict accuracy of the minutes*"¹⁴⁴. ASIC's Annotated Minutes do not reflect this finding.

20

According to the minutes, seventeen documents were tabled at the February 2001 board meeting. Section 140 of the *Evidence Act 1995* (NSW) and *Briginshaw* aside, on any fair reading of the evidence, apart from the abovementioned two documents¹⁴⁵ (neither of which is the

¹³⁷ ABBlu, Vol. 12, p 5546K to O (Statement of Peter Willcox, subpar 105(b)).

¹³⁸ ABOrA, Vol. 1, p 354G to H.

¹³⁹ See ABBlu, Vol. 13, p 5922K to N (Statement of Martin Koffel, par 42); ABBlu, Vol. 12, p 5546P to X (Statement of Peter Willcox, subpar 105(c)); ABBlu, Vol. 13, pp 5885N to 5887X (Statement of Meredith Hellicar, par 181).

¹⁴⁰ See ABBlu, Vol. 13, p 5922K to N (Statement of Martin Koffel, par 42); ABBlu, Vol. 12, p 5546P to X (Statement of Peter Willcox, subpar 105(c)); ABBlu, Vol. 13, pp 5885N to 5887X (Statement of Meredith Hellicar, par 181).

¹⁴¹ ABOrA, Vol. 1, p 354G to H.

¹⁴² ABWhi p 174, lines 38 to 46 (CA [495]).

¹⁴³ ABWhi p 174, lines 44 to 45 (CA [495]).

¹⁴⁴ ABWhi p 174, lines 44 to 46 (CA [495]).

¹⁴⁵ The Twelfth Cashflow Model and the advice of Mr Allsop SC dated 14 February 2001: see footnote 71 above.

Draft ASX Announcement) it is most improbable that fifteen of these documents were tabled at the meeting. The minutes are significantly inaccurate in this respect;

- (p) twenty-seven errors in the minutes were identified by Ms Hellicar at par 181 of her statement¹⁴⁶. Not all of those errors are referred to above. Subject to one exception¹⁴⁷, Ms Hellicar was not cross examined on this evidence. Ms Hellicar's evidence and the absence of cross examination on it were drawn to the attention of the trial judge and the Court of Appeal in submissions¹⁴⁸. Neither of the courts below made findings with respect to many of the errors identified by Ms Hellicar. Most of them are not referred to in ASIC's Annotated Minutes; and
- (q) most importantly for present purposes, the entry styled "**ASX Announcement**"¹⁴⁹ is incorrect. For the reasons stated at Hellicar's Submissions, pars 22 to 153 as well as pars 10 to 30(p) above and 31 to 56 below, this entry is incorrect.

31 The plethora of inaccuracies in the minutes amply supports the Court of Appeal's reservations as to their reliability. At a general level, they are inaccurate because they record numerous resolutions being passed in circumstances where, consistently with the consensual manner in which JHIL board meetings were ordinarily conducted¹⁵⁰, that did not happen¹⁵¹. More particularly, the minutes are incorrect in each of the respects identified at subpars 30(a) to 30(q) above. The fact that the minutes were approved by the directors of JHIL at the April 2001 board meeting does not alter the position.

¹⁴⁶ ABBlu, Vol. 13, pp 5885N to 5887X.

¹⁴⁷ Ms Hellicar's evidence to the effect that the entry styled "**ASX Announcement**" in the minutes is inaccurate: see ABBlu, Vol. 13, pp 5888D to E.

¹⁴⁸ ABOra, Vol. 1, p 354G to H.

¹⁴⁹ ABBlu, Vol. 5, p 2124P to S.

¹⁵⁰ ABBlu, Vol. 9, pp 4202U to 4203G (Statement of Alan Gordon McGregor dated 9 May 2004, par 20); ABBlu, Vol. 10, p 4451N to Q (Affidavit of Llewellyn Roy Edwards sworn 15 February 2008, par 29); ABBla, Vol. 3, pp 996R to 997T (Mr Morley's oral evidence at T 1686/34-1687/39); ABBla, Vol. 3, pp 1114R to X and 1318D to 1319N (Mr Brown's oral evidence at T 1830/34-46 and 2036/4-2037/25); ABBla, Vol. 4, p 1658E to N (Mr Gillfillan's oral evidence at T 2392/11-27); ABBlu, Vol. 13, p 5840M to U (Statement of Meredith Hellicar, pars 32-33); ABBlu, Vol. 13, pp 5939P to 5940J (Statement of Martin Koffel, pars 100 and 101).

¹⁵¹ ABBla, Vol. 3, pp 1028E to 1029C (Mr Morley's oral evidence at T 1718/7-1719/2); ABBlu, Vol. 13, p 5759L to R (Statement of Michael Robert Brown, par 224); ABBlu, Vol. 13, p 5939P to W (Statement of Martin Koffel, par 100).

That approval should never have been given. The fact that it was wrongly given, for whatever reasons¹⁵², does not render the minutes accurate.

32 The foregoing demonstrates that the Court of Appeal did not err in finding that the reliability of the minutes and their weight is very much open to question¹⁵³, that there are significant considerations telling against the weight to be given to the minutes as a correct record¹⁵⁴ and that the accuracy of the minutes should be viewed with considerable reserve¹⁵⁵. This disposes of ASIC's appeal against Mr O'Brien. In view of the way in which ASIC framed its case against him¹⁵⁶, that case must fail if the minutes are unreliable. There was no other evidence in ASIC's case against Mr O'Brien which proved (either directly or inferentially) that the Draft ASX Announcement Resolution was approved at the February 2001 board meeting.

(b) **Changes to the Draft ASX Announcement following the February 2001 board meeting (Ground 7 of ASIC's Notice of Appeal)**

33 ASIC submits that none of the changes made to the text of the Draft ASX Announcement between the conclusion of the February 2001 board meeting and the release to the ASX of the Final ASX Announcement was significant¹⁵⁷. This submission is flawed for the reasons articulated at Hellicar's Submissions, pars 113 to 121. Mr O'Brien adopts those submissions. In addition, Mr O'Brien makes the submissions at pars 34 to **Error! Reference source not found.** below. It should be noted that this issue is also relevant to the matters raised by Mr O'Brien's Notice of Contention (which is addressed in Part VII below).

¹⁵² See, for example, ABBlu, Vol. 13, p 5759D to V (Statement of Michael Robert Brown, pars 223 to 225); ABBlu, Vol. 3, pp 1108W to 1109J, 1110I to N and 1114M to P (Mr Brown's oral evidence at T 1824/46-1825/17, 1826/16-25 and 1830/25-46); ABBlu, Vol. 13, p 5819N to U (Statement of Michael John Gillfillan, par 118); ABBlu, Vol. 4, pp 1685H to 1688H and 1949F to I (Mr Gillfillan's oral evidence at T 2422/13-2425/12 and 2708/8-14); ABBlu, Vol. 13, pp 5839O to 5840L and 5885I to N (Statement of Meredith Hellicar, pars 29-31 and 180); ABBlu, Vol. 5, pp 2108O to 2111M (Ms Hellicar's oral evidence at T 2874/28-2877/24); ABBlu, Vol. 13, p 5939I to P (Statement of Martin Koffel, pars 98 and 99); ABBlu, Vol. 5, pp 2445D to 2448E and 2632D to 2633O (Mr Koffel's oral evidence at T 3237/4-3240/6 and 3427/5-3428/27); ABBlu, Vol. 12, p 5558M to U (Statement of Peter Willcox, pars 127-128); ABBlu, Vol. 6, pp 2928R to 2929R (Mr Willcox' oral evidence at T 3748/34-3749/35).

¹⁵³ ABWhi p 175, lines 32 to 33 (CA [497]).

¹⁵⁴ ABWhi p 259, lines 23 to 25 (CA [791]).

¹⁵⁵ ABWhi p 259, lines 24 to 26 (CA [791]).

¹⁵⁶ See ABWhi pp 92 to 94 (CA [227] to [231]).

¹⁵⁷ ASIC's Submissions, pars 101 and 102.

- 34 The post meeting changes to the Draft ASX Announcement were extensive: see the Annexure to these submissions¹⁵⁸. They were made primarily by Mr Baxter. He believed that, in making the changes, he was discharging his duties as a senior officer of JHIL¹⁵⁹. He did not believe that, in making the changes, he was acting inconsistently with or in defiance of anything resolved by the directors of JHIL at the February 2001 board meeting¹⁶⁰. Both Mr Baxter's conduct in making the changes and his state of mind when making the changes were inconsistent with the unconditional approval of the Draft ASX Announcement at the February 2001 board meeting¹⁶¹.
- 10 35 Mr O'Brien also draws particular attention to the findings of the Court of Appeal at CA [321] to [336]¹⁶². The Court of Appeal commences by observing that, while some of the changes to the Draft ASX Announcement following the February 2001 board meeting were unexceptional, others were more significant¹⁶³. Then their Honours set out eight changes and make a finding that the changes were significant¹⁶⁴.
- 36 For the most part, contrary to ASIC's submission, the significance of the eight changes is self-evident. For example, one of the amendments changed the function of Towers Perrin from managing the foundation's investments to advising the foundation on its investments¹⁶⁵. Another change inserted a statement that the establishment of the foundation provided certainty for claimants and shareholders¹⁶⁶. A further change increased the starting assets of the foundation by \$9 million¹⁶⁷. A further change replaced "*the company*" with "*two former James Hardie subsidiaries*" as the entities bearing the relevant asbestos related liabilities¹⁶⁸. The significance of each of these changes is obvious.
- 20

¹⁵⁸ The blue text in the Annexure is text that was deleted between the conclusion of the February 2001 board meeting and the making public of the Final ASX Announcement. The red text was inserted during the period.

¹⁵⁹ ABBla, Vol. 1, p 409V (T 801/42-45).

¹⁶⁰ ABBla, Vol. 1, pp 409F to 410E (T 801/9 to 802/7).

¹⁶¹ Noting that, for the reasons given at pars 113 to 118 of Hellicar's Submissions, there was no procedure for post Board meeting changes to media releases (as alleged by ASIC) that applied to the present circumstances.

¹⁶² ABWhi pp 123 to 125.

¹⁶³ ABWhi p 123, lines 23 to 24 (CA [321]).

¹⁶⁴ ABWhi p 125, line 44 (CA [336]).

¹⁶⁵ ABWhi p 124, lines 28 to 30 (CA [328]).

¹⁶⁶ ABWhi p 124, lines 10 to 18 (CA [326]).

¹⁶⁷ ABWhi p 123, lines 32 to 38 (CA [323]).

¹⁶⁸ ABWhi p 123, lines 28 to 31 (CA [322]).

- 37 Of the eight changes the subject of focus by the Court of Appeal, two comprise amendments to the Draft ASX Announcement that reduced the assurance of sufficiency of funds in the document¹⁶⁹. These changes were significant. It should not pass unnoticed that the Court of Appeal held that one of the two changes appears to have come at the suggestion of Mr Robb¹⁷⁰ and the other may have come from him¹⁷¹. As their Honours noted, that, itself, tells quite strongly against approval of the Draft ASX Announcement¹⁷².
- 38 Finally, it should be recalled that Mr Baxter swore that six changes to the Draft ASX Announcement were significant and two were not insignificant¹⁷³.
- 10 39 For the reasons stated at pars 33 to 38 above, the Court of Appeal did not err in concluding that the post meeting changes to the Draft ASX Announcement were significant¹⁷⁴.

(c) Ground 12 of ASIC's Notice of Appeal

- 40 By this ground of appeal ASIC seeks an order for costs against Mr O'Brien on the hypothesis that this Court overturns the judgment of the Court of Appeal and finds that Mr O'Brien contravened s 180(1) of the *Corporations Act* 2001. ASIC makes no substantive submissions in support of this ground of appeal and submits that, in the event that this issue arises, it should be remitted to the Court of Appeal. Mr O'Brien agrees.

20 **Part VII:**

- 41 Mr O'Brien contends that the Court of Appeal's decision should be affirmed on either or both of two grounds stated in his Notice of Contention:
- (a) that the Court of Appeal ought to have found that, whether or not ASIC was obliged to call Mr Robb as a witness, ASIC failed to prove that the Draft ASX Announcement Resolution was passed¹⁷⁵; and

¹⁶⁹ ABWhi pp 123, lines 39 to 50 (CA [324] and [325]) and 125, lines 10 to 19 (CA [331]).

¹⁷⁰ ABWhi p 123, line 46 (CA [325]).

¹⁷¹ ABWhi p 125, lines 17 and 18 (CA [332]).

¹⁷² ABWhi p 122, lines 21 to 29 (CA [317]).

¹⁷³ ABBla, Vol. 1, pp 403B to 408T (T 795/1 to 800/38).

¹⁷⁴ ABWhi p 125, line 43 (CA [336]).

¹⁷⁵ Ground 1 of the Notice of Contention: ABGre p 86.

- (b) that the Court of Appeal ought to have found that the Draft ASX Announcement was neither tabled nor distributed at the February 2001 board meeting¹⁷⁶.

42 Hellicar's Submissions, pars 22 to 153 address both of these grounds. As stated above, Mr O'Brien adopts those submissions. In addition, he makes the submissions below which address two matters:

- (a) the conduct of persons who attended the February 2001 board meeting following the meeting. This matter is primarily relevant to ground 1 of the Notice of Contention but also has indirect relevance to ground 2; and
- (b) evidence of Messrs Morley and Willcox. This evidence is primarily directed to ground 2 of the Notice of Contention but also has indirect relevance to ground 1.

(a) Conduct following the February 2001 board meeting

43 There is a body of evidence that proves conduct engaged in after the February 2001 board meeting by persons who attended the meeting which is inconsistent with the approval of the Draft ASX Announcement Resolution. The conduct was engaged in by Messrs Baxter, Robb, Morley, Shafron and Harman. It took place within 24 hours of the meeting.

20 44 The conduct of each of the relevant persons is referred to in the following pars of Hellicar's Submissions (which Mr O'Brien adopts):

- (a) Mr Baxter: Hellicar's Submissions, pars 119 to 120 and 128 (see also par 34 above);
- (b) Mr Robb: Hellicar's Submissions, subpar 126(c) and pars 127, 128 and 131;
- (c) Mr Morley: Hellicar's Submissions, par 125;
- (d) Mr Shafron: Hellicar's Submissions, par 124; and

¹⁷⁶ Ground 2 of the Notice of Contention: ABGre p 86.

(e) Mr Harman: Hellicar's Submissions, par 123.

45 In addition to the conduct referred to in the submissions cited at a) to e) above, Mr O'Brien relies upon further conduct of Messrs Shafron, Harman, Robb and Morley. With respect to Mr Shafron, at 8:12pm on 15 February 2001 he sent an email to Mr Minty, of Trowbridge, stating "[t]he wording we **propose** in the press release simply says that James Hardie got advice from Trowbridge (and Access Economics, and PwC)" (emphasis added) and "[a]s of the moment the document is not available for me to attach"¹⁷⁷. It is most unlikely that Mr Shafron would have sent an email in these terms if the board had approved the Draft ASX Announcement for release to the ASX earlier that day because the terms of the announcement would have been settled, not proposed, and available to him.

46 The further conduct of Mr Harman upon which Mr O'Brien relies was his involvement in the proposal of changes to the Draft ASX Announcement at the request of PwC. As the Court of Appeal observed, after the February 2001 board meeting, Mr Harman sought the consent of PwC to the reference to it in the then proposed media release¹⁷⁸. In addition, following the meeting Mr Harman spoke with Mr Brett, of PwC, who suggested that changes be made to the text of the proposed announcement¹⁷⁹. Mr Harman conveyed these changes to Mr Baxter with the expectation that Mr Baxter would make them¹⁸⁰. Mr Harman perceived no difficulty with this because "[i]t was not [his] understanding that the press release was set in stone at the board meeting"¹⁸¹. Like Mr Baxter¹⁸², both Mr Harman's conduct and state of mind shortly after the board meeting were inconsistent with the passing of the Draft ASX Announcement Resolution.

47 The further conduct of Messrs Robb and Morley upon which Mr O'Brien relies occurred at Allens' offices after the February 2001 board meeting. Mr Morley was working with Messrs Robb and Frangeskides (of Allens) and observed Mr

¹⁷⁷ ABBlu, Vol. 5, p 1956F to H.

¹⁷⁸ ABWhi p 126, lines 20 to 27 (CA [337], first dot point).

¹⁷⁹ ABBlu, Vol. 11, p 4922N to P (Outline of Evidence of Stephen Edward Harman, par 170); ABBla, Vol. 1, p 91L to S (Mr Harman's oral evidence at T 261/22 to 37).

¹⁸⁰ ABBla, Vol. 1, pp 91Q to 92I (Mr Harman's oral evidence at T 261/34 to 262/15).

¹⁸¹ ABBla, Vol. 1, p 92N to Q (Mr Harman's oral evidence at T 262/31 to 32).

¹⁸² See par 34 above.

Robb write "*Anticipated*" on a draft of the media release¹⁸³. This notation was made by Mr Robb on a different draft of the media release to the drafts produced by Allens (at least one of which also bears Mr Robb's handwriting)¹⁸⁴. The making of the notation by Mr Robb is inconsistent with the unqualified approval of the Draft ASX Announcement by the directors of JHIL at the February 2001 board meeting. So too was Mr Morley's response: he neither said nor did anything in response to what he observed. This was because he did not think that, in making the handwritten annotation, Mr Robb was doing anything that countermanded any discussion or resolution at the February 2001 board meeting¹⁸⁵.

10

(b) Evidence of Messrs Morley and Willcox

48 At pars 98 to 103 of Hellicar's Submissions, evidence of Messrs Morley and Willcox is addressed. Those submissions are adopted by Mr O'Brien and expanded upon below.

49 The trial judge held that Mr Baxter took the Draft ASX Announcement to the February meeting and, in accordance with his practice, provided copies of the document to those present¹⁸⁶. On this basis, the trial judge held that ASIC discharged its onus of proving the pleaded allegation that the Draft ASX Announcement was tabled at the meeting. In reaching this conclusion the trial judge found that the individual defendants who swore that the Draft ASX Announcement was not before the February 2001 board meeting were collectively "*mistaken*"¹⁸⁷.

20

50 The Court of Appeal reached a different conclusion to the trial judge. It upheld the trial judge's finding that Mr Baxter took the Draft ASX Announcement to the February board meeting¹⁸⁸ but left open whether the document was distributed and, consequently, tabled at the meeting. Their Honours held that it did not follow from the fact that the Draft ASX Announcement was taken to

¹⁸³ ABRed, Vol. 2, p 466N to Q (LJ [218]); see also ABBlu, Vol. 12, pp 5667J to 5668D (Statement of Evidence of Phillip Morley, pars 534 to 537) and ABBlu, Vol. 2, pp 919S to 920U (Mr Morley's oral evidence at T 1599/38 to 1600/41).

¹⁸⁴ See ABBlu, Vol. 5, pp 2185 to 2188 (the annotated draft media releases produced by Allens); see also ABBlu, Vol. 2, pp 920C to U (Mr Morley's oral evidence at T 1600/3 to 35).

¹⁸⁵ ABBlu, Vol. 3, p 1008D to O (Mr Morley's oral evidence at T 1698/5 to 27).

¹⁸⁶ ABRed, Vol. 2, p 467D to R (LJ [220] to [222]).

¹⁸⁷ ABRed, Vol. 2, p 467P to R (LJ [222]).

¹⁸⁸ ABWhi p 140, lines 43 to 49 (CA [383]).

the February board meeting that the document “*was generally distributed at the meeting, by way of tabling*”¹⁸⁹. Their Honours criticized the trial judge’s abovementioned finding that defendant witnesses were collectively mistaken¹⁹⁰.

51 The Court of Appeal also referred to evidence of Mr Morley, who was present at the meeting, that was inconsistent with the tabling of the Draft ASX Announcement¹⁹¹. Mr Morley gave the following evidence¹⁹²:

“Q: *And your best recollection is that no draft press release was tabled?*”

A: *That’s correct.*”

10 52 Apart from the compendious references by the trial judge to the evidence of witnesses at LJ [191]¹⁹³ and [222]¹⁹⁴, this evidence was not referred to by the trial judge. It was apparently accepted and relied upon by the Court of Appeal for the purpose of assessing the accuracy of the minutes of the February board meeting¹⁹⁵. Notwithstanding, the Court of Appeal did not make a finding as to whether the Draft ASX Announcement was distributed or tabled at the meeting. It should have done so on the basis of Mr Morley’s evidence.

20 53 The Court of Appeal also referred to evidence of Mr Willcox that was inconsistent with the distribution, and tabling, of the Draft ASX Announcement at the February board meeting. In the context of considering whether, on the hypothesis that the Draft ASX Announcement Resolution was passed, Mr Willcox had knowledge of what the Draft ASX Announcement conveyed, their Honours referred to the fact that Mr Willcox denied that he received or read the draft news release¹⁹⁶. In a different context, namely, their Honours’ assessment of the accuracy of the minutes, the Court of Appeal referred to (and relied upon) Mr Willcox’ evidence that many of the documents recorded

¹⁸⁹ ABWhi p 141, lines 12 to 13 (CA at [384]; see also ABWhi pp 135, lines 12 to 13 (CA [363]) and 258 to 259 (CA [789] to [790]).

¹⁹⁰ ABWhi p 107, lines 38 to 45 (CA [270]).

¹⁹¹ ABWhi p 171, lines 36 to 38 (CA [485]).

¹⁹² ABBla, Vol. 3, p 997N (Mr Morley’s oral evidence at T 1687/25-27).

¹⁹³ ABRed, Vol. 2, p 459U to W.

¹⁹⁴ ABRed, Vol. 2, p 467P to R.

¹⁹⁵ ABWhi p 171, lines 35 to 37 (CA [485]); see also ABWhi pp 174, line 34 to 175, line 33 (CA [495] to [497]).

¹⁹⁶ ABWhi p 277, lines 29 to 30 (CA [829]).

in the minutes as "tabled" by the Chairman were not provided to directors¹⁹⁷. The Draft ASX Announcement was one such document. Their Honours' latter evidentiary reference is a reference to subpar 105(c) of Mr Willcox' statement¹⁹⁸ which read:

"The minutes refer to a substantial volume of documents that the chairman "tabled" at the meeting. I do not recall the tabling of these documents, with the exception of the cash flow model and the advice of Allsop. Certainly, with the exception of these two documents, the other documents said to have been "tabled" were not circulated to me or to the other directors of JHIL during the meeting."

10

54 In addition, Mr Willcox gave the following oral evidence¹⁹⁹:

"Q. You see, Mr Willcox, the reason you have structured your statement in the way in which you have is that you are not sure whether or not there was a draft press release at the meeting. That's the position, isn't it - that is, at the February meeting?"

A. Whether somebody had one.

Q. Whether it was distributed?"

A. I don't believe one was distributed and I would go so far as to say that I am sure it was not distributed to me."

20 55 This evidence is consistent with Mr Willcox' evidence in his statement extracted above. It is inconsistent with the Draft ASX Announcement having been distributed or tabled at the February meeting. Although the trial judge referred to some of Mr Willcox' evidence²⁰⁰, apart from the compendious references to the evidence of witnesses referred to par 52 above, his Honour did not refer to this evidence.

¹⁹⁷ ABWhi p 174, lines 39 to 41 (CA [495]).

¹⁹⁸ ABBlu, Vol. 12, p 5546P to X.

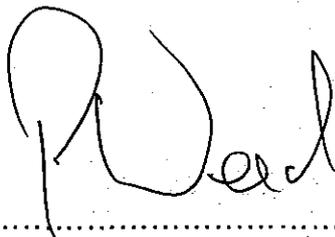
¹⁹⁹ ABBla, Vol. 6, pp 2936M to R (Mr Willcox' oral evidence at T 3756/25-34).

²⁰⁰ ABRed, Vol. 2, p 456P to V (LJ [180]).

56 Given the abovementioned evidence of Messrs Morley and Willcox, the Court of Appeal ought to have held that the Draft ASX Announcement was not tabled at the February board meeting. This Court should make that finding. It is fatal to ASIC's case.

Dated: 20 July 2011

10



.....
Peter Michael Wood
(02) 9235 1024
(02) 9235 2342
pmwood@selbornechambers.com.au

20

ANNEXURE

Comparison between "Draft ASX Announcement" and "Final ASX Release"

~~Legally privileged and confidential – for legal advice only~~

~~Draft news release~~

1614 February 2001

James Hardie resolves its Asbestos Liability Favourably for Claimants and Shareholders

James Hardie Industries Limited (JHIL) announced today that it had established a foundation to compensate sufferers of asbestos-related diseases with claims against two former James Hardie subsidiaries ~~the company~~ and fund medical research aimed at finding cures for these diseases.

The Medical Research and Compensation Foundation (~~MRCF~~ Foundation), to be chaired by Sir Llewellyn Edwards, will be completely independent of JHIL and will commence operation with assets of \$293,284 million.

The Foundation ~~has will have~~ sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL.

JHIL CEO, Mr Peter Macdonald said that the establishment of a fully-funded Foundation provided certainty for both claimants and shareholder ~~the best resolution for all stakeholders~~.

"The establishment of the Medical Research and Compensation Foundation provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products," Mr Macdonald said.

"The Foundation will concentrate on managing its substantial assets for the benefit of claimants. Its establishment has effectively resolved James Hardie's asbestos liability and this will allow management to focus entirely on growing the company solely on asbestos for the benefit of claimants allowing, James Hardie to pursue its very exciting growth prospects for the benefit of shareholders."

A separate fund of \$3 million has also been granted to the Foundation ~~set aside~~ for scientific and medical research aimed at finding treatments and cures for asbestos diseases.

The \$293,284 million assets ~~of vested~~ into the Foundation includes a portfolio of long term securities ~~commonly traded shares~~, a substantial cash reserve, properties which earn rent and insurance policies which cover various types of claims, including all workers compensation claims.

~~Fund manager,~~ Towers Perrin has been appointed to advise the Foundation on its ~~manage the~~ Foundation's investments, which will generate investment income and capital growth.

In establishing the Foundation, James Hardie sought expert advice from a number of firms, including actuaries ~~Trowbridge, Access Economics and PricewaterhouseCoopers~~, Access Economics and the actuarial firm, Trowbridge. With this advice, supplementing the company's long experience in the area of asbestos, the directors of JHIL and formed the basis of determining the level of funding required by the Foundation to meet all future claims.

~~"The directors of James Hardie~~ isare satisfied that the Foundation haswill have sufficient funds to meet anticipatedall future claims," Mr Macdonald said.

The initial \$3 million for medical research will enable the Foundation to continue work on existing programs established by James Hardie as well as launch new programs.

~~When all future claims have been concluded, the Foundation will convert any remaining assets to cash and these surplus funds will be used to support further~~ donated to a reputable medical and scientific and medical research organisation involved in work on lung diseases.

Mr Macdonald said; Sir Llewellyn Edwards, who has resigned as a director of James Hardie Industries Limited to take up his new appointment as chairman of the Foundation, has enjoyed a long and distinguished career in medicine, politics and business. His experience with James Hardie will assist the Foundation to rapidly acquire the knowledge it needs to perform effectively. Sir LlewHe is a director of a number of organisations including Westpac Banking Corporation and is also Chancellor of the University of Queensland.

The other Foundation directors areinclude Mr Michael Gill, Mr Peter Jollie and Mr Dennis Cooper.

~~-~~Ends~~-~~

For further details contactinformation:

Greg Baxter, Senior Vice President Corporate Affairs
BusTel: (61 2) 9290 5225 (BH)
Mob: 0419 461 368 (AH)

This document is available from the Investor Relations Section of the James Hardie website - www.jameshardie.com.

This document contains forward-looking statements. Forward-looking statements are subject to risks and uncertainties and, as a result, readers should not place undue reliance on such statements. The inclusion of these forward looking statements should not be regarded as a representation that the objectives or plans described will be realised.