



## HIGH COURT OF AUSTRALIA

3 May 2012

### AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v MEREDITH HELLICAR & ORS

[2012] HCA 17

The High Court today held that seven non-executive directors of James Hardie Industries Ltd ("JHIL") each breached his or her duties as a director of the company by approving the company's release of a misleading announcement to the Australian Stock Exchange ("ASX").

The proceedings arose out of the 2001 restructure of the James Hardie group of companies. Two subsidiaries with significant asbestos-related liabilities were "separated" from the group and the Medical Research and Compensation Foundation ("MRCF") was established to fund compensation claims made against the separated companies by people injured by their asbestos products.

On 15 February 2001, the board of JHIL approved the separation proposal. The next day, JHIL sent the ASX an announcement outlining the proposal. The announcement contained misleading statements about the sufficiency of the funds available to the MRCF to meet present and future claims.

In February 2007, the Australian Securities and Investments Commission ("ASIC") brought civil penalty proceedings in the Supreme Court of New South Wales against the respondents (and others) for contravening s 180(1) of the *Corporations Act* 2001 (Cth). ASIC alleged that the board of JHIL, at its meeting on 15 February 2001, had approved a draft ASX announcement not materially different from the announcement that was made. ASIC alleged that the respondents, other than Mr Shafron, had breached their duties as directors by approving the draft announcement, and that Mr Shafron, a company secretary and general counsel to JHIL, had breached his duty as an officer in several ways, including by not advising the board that the draft announcement was misleading.

At trial, ASIC tendered the minutes of the February board meeting which recorded the tabling and approval of a draft ASX announcement. Those minutes had been adopted and signed as a correct record at the next board meeting in April 2001. Two witnesses called by ASIC to give evidence about the board meeting were unable reliably to recall events. The respondents claimed that the minute recording tabling and approval of the draft announcement was false and that the minutes were demonstrably wrong in other respects. Those of the respondents who gave evidence at the trial did not accept that they had approved a draft ASX announcement.

ASIC did not call JHIL's solicitor (Mr David Robb) who had supervised the preparation of the draft board minutes and had attended the February board meeting.

The trial judge (Gzell J) found that the board had approved the draft announcement, made declarations of contravention by the respondents (and others), imposed penalties and made disqualification orders. The respondents appealed to the New South Wales Court of Appeal.

The Court of Appeal allowed the appeal, holding that ASIC owed a "duty of fairness" analogous to that owed by a Crown Prosecutor which it had breached by not calling Mr Robb. The Court of Appeal found that, as a consequence of the breach, the cogency of ASIC's case was so diminished as not to have been proved. ASIC appealed, by special leave, to the High Court.

Allowing ASIC's appeal, the High Court held that inaccuracies in the February board minutes did not counter their probative value as a contemporaneous and formally adopted record of what was done at the February meeting. The Court found that there was no basis for inferring that Mr Robb may have given evidence favourable to the respondents. ASIC not calling him caused no unfairness. If it had, it would be wrong to respond by discounting the cogency of other evidence led at the trial; the question would be whether there had been a miscarriage of justice requiring a new trial.

ASIC's appeal was allowed and the matters remitted to the Court of Appeal for further consideration of remaining issues in the appeals to that Court about claims to be excused from liability, penalty and disqualification.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*