HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

PETER JAMES SHAFRON APPELLANT

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION RESPONDENT

Shafron v Australian Securities and Investments Commission
[2012] HCA 18
3 May 2012
S173/2011

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with R P L Lancaster SC and N J Owens for the appellant (instructed by Middletons Lawyers)

S J Gageler SC, Solicitor-General of the Commonwealth with A J L Bannon SC, R T Beech-Jones SC and S E Pritchard for the respondent (instructed by Clayton Utz Lawyers)

CATCHWORDS

Shafron v Australian Securities and Investments Commission

Corporations – Duties and liabilities of directors and officers – Section 180(1) of the *Corporations Act* 2001 (Cth) ("the Act") required directors and officers of a corporation to discharge duties with degree of care and diligence that reasonable person in their position and with their responsibilities would exercise – "Officer" defined in s 9 of the Act – Paragraph (a) of definition provided that secretary of a corporation is an "officer" – Paragraph (b)(i) of definition provided that person who "participates in making" decisions that substantially affect business of corporation is an "officer" – Appellant was company secretary and general counsel of corporation – Whether appellant participated in making decisions substantially affecting business of corporation – Whether s 180(1) applied to all tasks that officer of corporation performed within that corporation – Whether responsibilities of company secretary and general counsel divisible – How scope of "responsibilities within the corporation" of an officer to be determined.

Words and phrases – "in the capacity of", "occupied the office held by", "officer", "participate in making", "real contribution", "responsibilities within the corporation".

Corporations Act 2001 (Cth), s 9 (definition of "officer"), s 180(1).

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. This appeal arises out of the same circumstances as, and was heard immediately after, the appeals brought by the Australian Securities and Investments Commission ("ASIC") against Meredith Hellicar and others including the appellant in this matter, Peter James Shafron. The reasons in this matter should be read with the reasons in those other matters[1] for it is there that the facts and circumstances giving rise to this appeal are fully described. It is convenient, however, to set out shortly some of the more important facts relevant to this appeal.

2 In August 1998, Mr Shafron was employed as "general counsel and company secretary" of James Hardie Industries Ltd ("JHIL"). He was appointed company secretary on 13 November 1998. Just over a year later, on 17 November 1999, Mr Donald Cameron was appointed joint company secretary of JHIL with Mr Shafron.

3 The Court of Appeal found[2] that Mr Shafron had contravened s 180(1) of the Corporations Law, and thus incurred a liability under the equivalent provision of the *Corporations Act* 2001 (Cth) ("the Corporations Act")[3], in two respects that are put in issue in this appeal. Both contraventions were contraventions by omission: failing to give certain advice, in the one case, to the chief executive officer (Mr Macdonald) or the board of JHIL and, in the other, to the board of JHIL. To paraphrase the provisions of s 180(1), the Court of Appeal found that Mr Shafron, an officer of JHIL, did not exercise his powers and discharge his

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1 *Australian Securities and Investments Commission v Hellicar* [2012] HCA 17.

2 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 397 [994], 411 [1074].

3 The Corporations Law of New South Wales as set out in s 82 of the *Corporations Act* 1989 (Cth) applied at the time of the events relevant to this appeal: *Corporations (New South Wales) Act* 1990 (NSW), s 7. The *Corporations Act* 1989 (Cth) was repealed by s 3 and item 2 of Sched 1 of the *Corporations (Repeals, Consequentials and Transitionals) Act* 2001 (Cth) when the *Corporations Act* 2001 (Cth) ("the Corporations Act") commenced. Pursuant to s 1400(1) and (2) of the Corporations Act, a person who had incurred a liability for a breach of s 180(1) of the Corporations Law incurred an equivalent liability for breach of s 180(1) of the Corporations Act.

duties with the degree of care and diligence that a reasonable person would exercise if that person were an officer of a corporation in JHIL's circumstances and occupied the office held by, and had the same responsibilities within the corporation as, Mr Shafron.

4 The advice which the Court of Appeal found[4] should have been given either to Mr Macdonald or to the board of JHIL was advice to the effect that certain information about the Deed of Covenant and Indemnity which was to be given by James Hardie & Coy Pty Ltd ("Coy") and Jsekarb Pty Ltd ("Jsekarb") to JHIL should be disclosed to the Australian Stock Exchange ("the ASX"). It will be convenient to call this information the "DOCI information". The other contravention found[5] was his failing to advise the board of JHIL that material (referred to as the "February 2001 Trowbridge Report" and the "Trowbridge 50 Year Estimate") provided by actuarial consultants retained by Mr Shafron on behalf of JHIL – Trowbridge Deloitte Ltd – mentioned to the board and used as the basis for a cash flow model considered by the board at its February 2001 meeting in relation to the proposal for separation of Coy and Jsekarb from JHIL did not take into account "superimposed inflation" and that a prudent estimate would have done so. (As the Court of Appeal observed[6], "superimposed inflation" is "an actuarial concept referring to the potential for the cost of claims to increase at a level above the general rate of inflation"; it was a concept with which the Court of Appeal said[7] Mr Shafron was "acquainted".)

The issues

5 Mr Shafron presented his appeal as raising three questions:

(a) In what respect or respects did the statutory definition of "officer" apply to him?

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4 (2010) 274 ALR 205 at 395 [979], 404 [1035].

5 (2010) 274 ALR 205 at 408 [1055], 410 [1072].

6 (2010) 274 ALR 205 at 409 [1060].

7 (2010) 274 ALR 205 at 409 [1068].

(b) Having regard to the answer given to the first question:

(i) Did he fail to exercise the relevant standard of care by failing to advise either the chief executive officer or the board that the DOCI information should be disclosed to the ASX?

(ii) Did he fail to exercise the relevant standard of care by failing to advise the board that the Trowbridge material did not take account of superimposed inflation but should have?

These reasons will demonstrate, however, that regardless of whether any other element of the definition of "officer" applied to Mr Shafron, s 180(1) of the Corporations Law (and thus the Corporations Act) applied to him because he was a company secretary of JHIL. Because this is so, the relevant statutory inquiry was what were the responsibilities he had within JHIL, not an inquiry which sought to divide the capacities in which those responsibilities were undertaken: whether between a role of company secretary and some other role, or otherwise.

Officer

6 The term "officer" of a corporation was defined by s 9 of the Corporations Law (and is defined by s 9 of the Corporations Act) as:

"(a) a director or *secretary* of the corporation; or

(b) a person:

(i) *who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation*; or

(ii) who has the capacity to affect significantly the corporation's financial standing; or

(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or

(c) a receiver, or receiver and manager, of the property of the corporation; or

(d) an administrator of the corporation; or

(e) an administrator of a deed of company arrangement executed by the corporation; or

(f) a liquidator of the corporation; or

(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else." (emphasis added)

7 At no stage of the litigation has it been disputed that, as company secretary of JHIL, Mr Shafron was an officer of JHIL within par (a) of the definition. The Court of Appeal also concluded[8] that Mr Shafron was a person who, at the relevant times, participated in making decisions that affected the whole, or a substantial part, of the business of JHIL and thus was an officer within par (b)(i) of the definition.

8 Mr Shafron submitted, in effect, that his obligation of care and diligence was limited to performance of those responsibilities that attached to the office held or the circumstances that made him an "officer". That is, if he was an officer only because he was company secretary, his obligations under s 180(1) were limited to the exercise of powers and discharge of duties as secretary, without regard to any powers or duties as general counsel. Thus, Mr Shafron further submitted, only if he fell within par (b)(i) of the definition of "officer" might it be said that a reasonable person, being an officer of a corporation in JHIL's circumstances and occupying the office held by and having the same responsibilities within the corporation as Mr Shafron, would have tendered the advice which the Court of Appeal found that he should have tendered but did not. He submitted that his responsibilities as company secretary did not extend to tendering that advice. Rather, he argued, "his conduct at issue in these proceedings was not done in his capacity as company secretary, but rather was done in his capacity as general counsel".

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8 (2010) 274 ALR 205 at 378-379 [894]-[898].

9 Mr Shafron's arguments can be seen to have proceeded by three steps: first, there should be a division of his duties and responsibilities between those undertaken "in the capacity of" general counsel and those undertaken "in the capacity of" company secretary; second, he denied that his duties and responsibilities *as company secretary* extended to tendering advice of the relevant kind; and third, he denied that he was an "officer" of the company on another and wider basis that would have carried duties and responsibilities that did extend to tendering such advice.

10 The first of these steps assumed that it was possible to divide the duties and responsibilities of a person engaged by a company as "general counsel and company secretary" between the two elements of the single, composite description given to the job. The first step in Mr Shafron's argument further assumed that the making of such a division was relevant to the application of s 180(1). Neither assumption can be made. The first step in Mr Shafron's argument was not made good.

11 The proposition that some distinction could be drawn between the "capacities" in which certain tasks were undertaken by Mr Shafron assumed, wrongly, that the work he did "as company secretary" could not, and did not, overlap with the work that he did "as general counsel". It is greatly to be doubted that the tasks that Mr Shafron undertook could be divided in this way. That may be reason enough to reject this aspect of Mr Shafron's argument (although there are other, more fundamental, reasons to do so).

12 Mr Shafron submitted that "the scope of the office" of a company secretary in any particular corporation is a question of fact and that "[i]n this case, the best evidence of the scope of Mr Shafron's role as company secretary is the scope of the role of JHIL's other company secretary, Mr Donald Cameron". It was submitted that Mr Cameron's responsibilities "never rose above purely administrative functions (such as transmitting material to the ASX, maintaining the records of the board, and such like)". So, Mr Shafron submitted, any work that he did in advising the board or others about such matters as duties of disclosure was work that was done as, or "in the capacity of", general counsel, not as, or "in the capacity of", company secretary. Similarly, he submitted, any work that he did in connection with actuarial advice "related principally to actuarial and financial matters" and was work done as, or "in the capacity of", general counsel.

13 As Mr Shafron submitted, and the Court of Appeal noted[9], what responsibilities the company secretary has in a particular company is a question of fact. More generally, what responsibilities any officer of a company has in the company concerned will be a question of fact. It by no means follows, therefore, that the tasks Mr Cameron performed at JHIL are properly to be understood as a complete identification of the work that could be or was undertaken by Mr Shafron because he too held the office of company secretary. That is, it cannot be assumed that Mr Cameron's responsibilities were identical (in whole or in part) to Mr Shafron's responsibilities. It follows that, contrary to Mr Shafron's submissions, the "scope" of his role as company secretary could not be identified as limited to the responsibilities Mr Cameron had.

14 A fundamental difficulty with Mr Shafron's submission is that there was no evidence demonstrating or suggesting that Mr Shafron performed certain tasks in one "capacity" and other tasks in another. Mr Shafron did not give evidence at trial. What evidence there was about the role of a "company secretary and general counsel" of a listed public company[10] did not support the distinction Mr Shafron's submissions sought to draw. Yet, as has been stated, what responsibilities Mr Shafron had was a question of fact.

15 As the title "general counsel and company secretary" given to Mr Shafron indicates, he was qualified as a lawyer – he was admitted to practise law both in Australia and in California. An important element in Mr Shafron's responsibilities was his giving advice about and, where appropriate, taking steps necessary to ensure compliance with all relevant legal requirements, including those that applied to JHIL as a listed public company. The primary judge[11] and the Court of Appeal[12] described this aspect of Mr Shafron's responsibilities as a duty to protect the company "from legal risk". No doubt that included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records of the board. But

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9 (2010) 274 ALR 205 at 379 [899].

10 *Australian Securities and Investments Commission v Macdonald (No 11)* (2009) 256 ALR 199 at 290 [557]; (2010) 274 ALR 205 at 396 [983].

11 (2009) 256 ALR 199 at 270 [402], 271 [411], 291 [560].

12 (2010) 274 ALR 205 at 383 [926], 395-396 [982], 404 [1035].

Mr Shafron's responsibilities did not end at that point. His responsibilities were wider than administrative, and extended to the provision of necessary advice.

16 All of the tasks Mr Shafron performed were undertaken in fulfilment of his responsibilities as general counsel and company secretary. More particularly, because of his qualifications and the position in which he was employed, his responsibilities as general counsel and company secretary extended to proffering advice about how duties of disclosure should be met. And when he procured advice of others and put that advice before the board for its use, his responsibilities could, and in this case did, extend to identifying the limits of the advice that the third party gave.

17 But even if some division could be made between the capacities in which Mr Shafron acted, what would be its relevance?

The reach of s 180(1)

18 Section 180(1) provided that:

> "A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
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> (a) were a director or officer of a corporation in the corporation's circumstances; and
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> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer."

The degree of care and diligence that is required by s 180(1) is fixed as an objective standard identified by reference to two relevant elements – the element identified in par (a): "the corporation's circumstances", and the element identified in par (b): the office *and* the responsibilities within the corporation that the officer in question occupied and had. No doubt, those responsibilities include any responsibility that is imposed on the officer by the applicable corporations legislation. But the responsibilities referred to in s 180(1) are not confined to statutory responsibilities; they include *whatever* responsibilities the officer concerned had within the corporation, regardless of how or why those responsibilities came to be imposed on that officer.

19 Contrary to Mr Shafron's submissions, reading s 180(1) in this way does not render the opening words of par (b) – "occupied the office held by" – otiose. The effect of par (b) of s 180(1) is to require analysis of what a "reasonable person" in the same position as the officer in question would do. His or her position is not adequately described unless regard is had *both* to the office held *and* to the responsibilities that the person has. Further, Mr Shafron's submissions ignored the evident difficulty in defining, for the purposes of limiting the conduct considered, the content of "the office held" where a person is an officer by virtue of par (b)(i), (ii) or (iii) of the definition of "officer" in s 9. A construction which avoids that difficulty, and avoids a more limited operation of s 180(1) in relation to some officers than in relation to others, is to be preferred.

20 In this case, Mr Shafron's responsibilities were found by both the primary judge[13] and the Court of Appeal[14] to have included the tendering of relevant advice (including legal advice) about disclosure requirements. As the Court of Appeal rightly said[15]:

> "A company secretary with legal background *would be expected to raise* issues such as potential misleading statements (in relation to the draft ASX announcement) and disclosure obligations (in relation to the DOCI) with the board. Ordinarily it might not be the same with respect to a matter such as the JHIL cash flow modelling, which required particular expertise. But Mr Shafron had a quite close involvement with the cash flow modelling, and raising the limitations of the cash flow model [based on the material Mr Shafron had obtained from Trowbridge] is by no means a legal matter for the attention of general counsel; the involvement, and raising the limitations, in our view fell within Mr Shafron's *responsibilities* as company secretary." (emphasis added)

That is, Mr Shafron's "responsibilities within the corporation"[16] extended to the several subjects identified. Once it was found that his responsibilities extended to those subjects, the question became whether Mr Shafron undertook those responsibilities with the requisite degree of care and diligence.

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13 (2009) 256 ALR 199 at 270-271 [402]-[406], 290-291 [559]-[560].

14 (2010) 274 ALR 205 at 383 [926].

15 (2010) 274 ALR 205 at 383 [926].

16 s 180(1)(b).

21 This being so, it is not strictly necessary to consider the arguments advanced by Mr Shafron about the engagement of par (b)(i) of the definition of "officer". It is as well, however, to say something shortly about the question.

Participation in making decisions

22 The proposition central to Mr Shafron's argument about the application of par (b)(i) of the definition of "officer" – that he was not a person who participated in making decisions that affected the whole, or a substantial part, of the business of JHIL – was that "in order to 'participate in making a decision' a person must have a role in actually *making* the decision" (emphasis in original). While Mr Shafron accepted that this "does not mean that a person must have 'ultimate control'", the idea of participating in making a decision was, it was submitted, "quite different from being concerned in or taking part in the management of a company". Mr Shafron argued that the fact that he "provided information and advice to the board to assist it in its decision making" did not mean that he "participated" in that decision making, even if it could be said that he made a "real contribution" to it. That is, Mr Shafron submitted, demonstrating a "real contribution … to the making of the decisions"[17] was not sufficient to establish participation in the making of the decisions, and it was the board (not he) who decided whether the separation proposal should be adopted and what information should be given to the ASX.

23 Several points should be made about the proper construction and application of par (b)(i) of the definition of "officer". First, the inquiry required by this paragraph of the definition must be directed to what role the person in question plays in the corporation. It is not an inquiry that is confined to the role that the person played in relation to the particular issue in respect of which it is alleged that there was a breach of duty. Thus in this case the inquiry to be made about Mr Shafron's role was not confined to what he did in connection with the separation proposal. Of course, the role he played in connection with the separation proposal may itself demonstrate that he made or participated in making decisions of the requisite character, but that need not be the only material to which attention may be directed.

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17 (2010) 274 ALR 205 at 378 [893].

24 Second, in a case like the present, where the breaches of duty alleged were omissions to provide advice, it is evident that determining how a reasonable person occupying the same office and having the same responsibilities would exercise the powers and discharge the duties of that office may be assisted by consideration of how the officer in question acted on occasions other than the one which is alleged to give rise to a breach of the duties imposed by s 180(1). It was, therefore, relevant for the Court of Appeal to notice[18] what Mr Shafron had done at JHIL in connection with matters other than the separation proposal and, contrary to Mr Shafron's submission, there was no denial of natural justice in its doing so.

25 Third, each of the three classes of persons described in par (b) of the definition of "officer" is evidently different from (and a wider class than) the persons identified in the other paragraphs of the definition. Persons identified in the other paragraphs of the definition all hold a named office in or in relation to the company; those identified in par (b) do not. Persons identified in the other paragraphs all hold offices for which the legislation prescribes certain duties and functions; those identified in par (b) do not. Persons identified in the other paragraphs of the definition are bound by the legislation to make certain decisions and do certain acts for or on behalf of the corporation; those identified in par (b) are identified by what they do (sub-par (i)), what capacity they have (sub-par (ii)) or what influence on the directors they have had and continue to have (sub-par (iii)). There being these differences between par (b) of the definition and the other paragraphs (especially par (a)), it is not to be supposed that persons falling within par (b)(i) must be in substantially the same position as directors: those to whom the management and direction of the business of the company is usually[19], and in relation to JHIL was, given.

26 Fourth, sub-par (i) of par (b) distinguishes between *making* decisions of a particular character and *participating* in making those decisions. Contrary to Mr Shafron's submissions, participating in making decisions should not be understood as intended primarily, let alone exclusively, to deal with cases where there are joint decision makers. The case of joint decision making would be more accurately described as "making decisions (either alone or with others)" than as one person "participating in making decisions". Rather, as the Court of

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18 (2010) 274 ALR 205 at 378 [894].

19 Corporations Act, s 198A.

Appeal rightly held[20], the idea of "participation" directs attention to the role that a person has in the ultimate act of making a decision, even if that final act is undertaken by some other person or persons. The notion of participation in making decisions presents a question of fact and degree in which the significance to be given to the role played by the person in question must be assessed.

27 As Mr Shafron rightly submitted, very little assistance is to be had from considering decisions about the application of other statutory expressions such as those directed to whether a person is concerned in or takes part in the management of a company[21]. Whether a person participates in making decisions of a particular character requires examination of what contribution that person makes to the making of a decision. As Mr Shafron submitted, again correctly, demonstrating that a person's contribution to a decision can properly be described as a "real contribution" would not be *sufficient* to show that the person concerned had participated in making the decision. But, contrary to Mr Shafron's submission, the Court of Appeal did not decide that making a real contribution to a decision was sufficient to constitute participation in making the decision. Rather, the Court's focus was upon what was necessary to constitute participation. The references to "real contribution" were no more than a summary description of the result of a more detailed consideration of the relevant question. In addition, it should not be forgotten, as the Court of Appeal also pointed out[22], that the statute requires that the decisions concerned be "decisions that affect the whole, or a substantial part, of the business of the corporation". Participation in *any* decision of a corporation does not make a person an "officer" – the decisions in which the person participates must have the significance for the business of the corporation that the statute prescribes. And the Court of Appeal found[23] that Mr Shafron participated in decisions of that kind.

28 In this case, Mr Shafron was a senior executive of JHIL (either the second or third most senior executive in the company). He was one of a group of three executives (Messrs Macdonald, Morley and Shafron) responsible for formulating

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20 (2010) 274 ALR 205 at 377-378 [892]-[893].

21 See, for example, *Commissioner for Corporate Affairs v Bracht* [1989] VR 821 at 827, referring to s 227(1) of the *Companies (Victoria) Code*.

22 (2010) 274 ALR 205 at 378 [897].

23 (2010) 274 ALR 205 at 378 [894].

proposals for the separation of Coy and Jsekarb from the James Hardie group and presenting those proposals to the board.

29 Between December 1999 and February 2001, Messrs Macdonald, Morley and Shafron, at times with the assistance of others, formulated several "variants" of the separation proposal[24]. At the January 2001 board meeting, Messrs Macdonald, Morley and Shafron (and others) presented the net assets model, which the board rejected[25]. Messrs Macdonald, Morley and Shafron (again with the assistance of others) then formulated the revised proposal that was put to and approved by the board in February[26].

30 The fact that Mr Shafron was an employee of the company, and not an external adviser, is important. What he did was not confined to proffering advice and information in response to particular requirements made by the company. And what he did went well beyond his proffering advice and information to the board of the company. He played a large and active part in formulating the proposal that he and others chose to put to the board as one that should be approved. It was the board that ultimately had to decide whether to adopt the proposal but what Mr Shafron did, as a senior executive employee of the company, was properly described as his participating in the decision to adopt the separation proposal that he had helped to devise.

31 The conclusion that Mr Shafron participated in making that decision is not a conclusion based only on what Mr Shafron did. That what he did can be described as proferring advice or providing information for the board's consideration is not an end to the relevant inquiry. The conclusion that he participated in making the decision depends not only upon what he did but also upon identifying the relationship between his actions and the decision to adopt the proposal as "participation" in making the decision. In this case, Mr Shafron was one of three executives who shaped and developed the proposal through its successive variants; he was one of the executives who presented successive

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24 (2010) 274 ALR 205 at 218 [56], 221-226 [68], [71]-[90], 387 [941]; (2009) 256 ALR 199 at 268 [385].

25 (2009) 256 ALR 199 at 221 [89]; (2010) 274 ALR 205 at 226 [91].

26 (2010) 274 ALR 205 at 228 [100], 234-240 [133]-[166].

proposals to the board; he was, as the Court of Appeal found[27], part of the "promotion of the separation proposal to the board", a board that did not itself decide what elements would go to make up any of the several proposals it considered and was, as ASIC submitted, "reactive" rather than "proactive" in the formulation of the proposals. And he did all this as a senior executive employee of the company who, with Messrs Macdonald and Morley, decided what would be put to the board.

Breaches of duty?

32 There remains for consideration so much of Mr Shafron's appeal as alleged that he had not been shown to have acted without due care and diligence in respect of either the DOCI information or the question of superimposed inflation. More particularly he alleged, first, that the Court of Appeal was wrong to have found[28], as had the primary judge[29], that he breached s 180(1) by not advising Mr Macdonald or the board that they needed to consider whether disclosure of the DOCI information to the ASX was required, by not obtaining advice for Mr Macdonald or the board or giving his own advice to the board about that matter, or by not advising Mr Macdonald or the board to decide to disclose the information. Second, he alleged that the Court of Appeal was wrong to find, as it did[30], that in making a presentation to the board about the material provided by Trowbridge which formed the basis of the cash flow model considered at the February 2001 board meeting he did not advise the board that the Trowbridge material did not allow for superimposed inflation and prudence warranted making that allowance.

33 As to the first of these matters it is enough to say that there is no reason to doubt the correctness of the factual findings made in relation to this aspect of the matter by both the primary judge and the Court of Appeal. It follows that Mr Shafron's argument in this Court, that he "was entitled to assume that Allens [JHIL's solicitors] would have advised him if disclosure of the DOCI [i]nformation to the ASX was required", founders on the rock of the finding at

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27 (2010) 274 ALR 205 at 378 [894].

28 (2010) 274 ALR 205 at 403-404 [1034]-[1036].

29 (2009) 256 ALR 199 at 290-292 [555]-[563], [566]-[567].

30 (2010) 274 ALR 205 at 410-411 [1073]-[1074].

trial[31], not disturbed on appeal[32], that Allens' retainer neither expressly nor impliedly extended to considering that question.

34 As to the second matter, there is again no reason to doubt the correctness of the conclusion reached by the Court of Appeal. As the Court of Appeal recorded[33]:

> "Mr Shafron had a primary involvement with Trowbridge's estimates, including knowledge of the significance of superimposed inflation. He made the slide presentation concerning Trowbridge's estimates at the February meeting. *In the June [2000] draft report Trowbridge had pointed out that their estimates of asbestos liabilities did not allow for superimposed inflation, and the significant difference which such an allowance could make.* It was not a matter of Mr Shafron second-guessing Trowbridge. *He knew that JHIL's experience was that the cost of claims was increasing at a much higher rate than the general inflation rate.* A reasonable person with his responsibilities would have made sure that the board knew of those matters, and in our opinion, would have drawn to the board's attention, as a matter highly significant to the reliance to be placed on the cash flow modelling, that no allowance had been made for superimposed inflation and that prudence warranted that an allowance should be made." (emphasis added)

35 Contrary to Mr Shafron's submissions in this Court, the conclusion reached by the Court of Appeal did not depend upon Mr Shafron bringing to bear any expert actuarial knowledge about what was an appropriate rate for superimposed inflation. What the Court of Appeal decided was that a reasonable person with his responsibilities (which included commissioning the Trowbridge material) would have drawn to the attention of the board a matter of which he knew (that the cost of claims was increasing at a much higher rate than the general inflation rate) and that, as Trowbridge had shown in its June 2000 draft report on JHIL's potential exposure to asbestos-related claims, an allowance for superimposed inflation could make a significant difference to the estimates that Trowbridge made and upon which the board relied.

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31 (2009) 256 ALR 199 at 287 [535].

32 (2010) 274 ALR 205 at 403 [1030].

33 (2010) 274 ALR 205 at 410-411 [1073].

36 The findings of breach should not be disturbed.

Conclusion and orders

37 For these reasons, Mr Shafron's appeal should be dismissed with costs.

38 HEYDON J. The Court of Appeal was right to dismiss Mr Shafron's appeal against the trial judge's orders. It is thought that the following are sufficient reasons to justify that conclusion.

39 The background circumstances of this appeal are set out in *Australian Securities and Investments Commission v Hellicar*[34].

Was Mr Shafron an "officer"?

40 Mr Shafron was "General Counsel and Company Secretary" of James Hardie Industries Ltd. He therefore fell within par (a) of the definition of "officer" in s 9 of the *Corporations Act* 2001 (Cth) ("the Act").

41 Mr Donald Cameron was joint Company Secretary with Mr Shafron. Mr Shafron submitted that Mr Cameron's duties were of an administrative character only. Even if that is so, it does not follow that Mr Shafron's duties as Company Secretary were also of an administrative character only. It is not possible to sever Mr Shafron's responsibilities into watertight compartments, one marked "Company Secretary" and the other marked "General Counsel". The expression "company secretary" is not a term of art. The responsibilities of company secretaries can vary from company to company, within companies, and over time. They have tended gradually to wax over many decades. From Mr Shafron's behaviour in practice, it may be inferred that his responsibilities were much more than mere administrative duties. He advised the board on substantive matters, particularly in respect of James Hardie Industries Ltd's exposure to asbestos litigation. He was one of its three most senior executives. He had assisted in devising proposals for separating its subsidiaries exposed to asbestos claims from the rest of the group[35].

What is the test for the liability of an officer under s 180(1) of the Act?

42 For the purposes of this appeal, it is sufficient to say that the obligation of care and diligence that s 180(1) imposed on Mr Shafron is measured by what a reasonable person would do if that person occupied the office of company secretary and had the same responsibilities as those Mr Shafron had in that office. The responsibilities which he had are those which he ordinarily carried out.

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34 [2012] HCA 17.

35 See the Court of Appeal's summary of his activities: *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 378 [894].

43 James Hardie Industries Ltd had legal obligations to make disclosures to the Australian Stock Exchange ("the ASX"). Mr Shafron had a duty to take care and employ diligence to protect the company from legal risk in relation to those obligations. The company would be exposed to legal risk both from non-disclosure of information in the Deed of Covenant and Indemnity and from any failure of actuarial consultants to take into account "superimposed inflation". For Mr Cameron the position might well be different, because his responsibilities, on Mr Shafron's submission, were much narrower.

Was Mr Shafron in breach of duty in relation to the Deed of Covenant and Indemnity?

44 The trial judge concluded that Mr Shafron was in breach of duty for not advising, or obtaining advice for, James Hardie Industries Ltd's Chief Executive Officer or its board that certain information relating to the Deed of Covenant and Indemnity should be disclosed to the ASX. What that information was need not be investigated. That is because Mr Shafron's sole argument was that he was entitled to assume that James Hardie Industries Ltd's solicitors would have advised him if disclosure of the information to the ASX was required. The argument must be rejected. The solicitors' retainer did not extend to advising on that question.

Was Mr Shafron in breach of duty in relation to "superimposed inflation"?

45 At the board meeting of 15 February 2001, a cash flow model was tabled. It was based in part on two documents provided by actuarial consultants that Mr Shafron had retained. The courts below found that Mr Shafron breached his duty in failing to advise that the actuarial documents did not take into account "superimposed inflation" – the potential for the cost of asbestos claims to increase over time at a rate above the general rate of inflation.

46 The Court of Appeal found that Mr Shafron was "acquainted" with that concept and "aware of its importance in estimating asbestos liabilities." It also found that he knew that the cash flow projections in the actuarial material did not allow for superimposed inflation[36]. Although Mr Shafron was not a trained actuary, he was familiar enough with superimposed inflation to suggest in June 2000 that a different figure for it be used than the one which appeared in an earlier actuarial report[37]. He had had primary involvement with the actuaries'

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36 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 409 [1068].

37 *Morley v Australian Securities and Investments Commission* (2010) 274 ALR 205 at 410 [1069].

estimates in the past. He conducted the slide presentation of the estimates at the 15 February 2001 meeting. And he knew about the superimposed inflation which James Hardie Industries Ltd had experienced during his time as Company Secretary. These facts are enough to support the conclusions of the trial judge and of the Court of Appeal.

Orders

47 The appeal must be dismissed with costs.