ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S173 of 2011

BETWEEN

PETER JAMES SHAFRON
Appellant

AND

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues arising on this appeal are:

   a. Whether the appellant (**Mr Shafron**) was a person who "made, or participated in making, decisions that affected the whole, or a substantial part, of the business" of James Hardie Industries Ltd (**JHIL**), and was therefore, in performing the conduct impugned in these proceedings, subject to section 180(1) of the *Corporations Law* and the *Corporations Act* 2001 (Cth).

   b. Whether, in performing the conduct impugned in these proceedings, Mr Shafron was performing or discharging his role as a company secretary of JHIL, or his role as general counsel of that company.

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c. If Mr Shafron, in performing the conduct impugned in these proceedings, was performing or discharging his role as general counsel of JHIL, whether he was subject to section 180(1) of the *Corporations Law* and the *Corporations Act* 2001 (Cth) because he was also a company secretary of JHIL.

d. If Mr Shafron, in performing the conduct impugned in these proceedings, was subject to section 180(1) of the *Corporations Law* and the *Corporations Act* 2001 (Cth), whether he failed to comply with the duty imposed by that section by:

i. failing to advise the Chief Executive Officer or the Board of JHIL that certain information about the Deed of Covenant and Indemnity (**DOCI**) should be disclosed to the Australian Stock Exchange (**ASX**) (or obtain such advice); and

ii. failing to advise the Board of JHIL that the February 2001 Trowbridge Report and the Trowbridge 50 Year Estimate (the **Trowbridge Material**) did not take into account "superimposed inflation" and that a prudent estimate would have.

Part III: Notice under section 78B of the *Judiciary Act 1903*

3. The appellant considers that notice under section 78B of the *Judiciary Act* 1903 (Cth) is not required.

Part IV: Citations

4. The primary judge's decision on liability (*Australian Securities and Investments Commission v. Macdonald & Ors (No. 11)* [2009] NSWSC 287) is reported at (2009) 230 FLR 1; 256 ALR 199; 71 ACSR 368; 27 ACLC 522. The primary judge's decision on penalty (*Australian Securities and Investments Commission v. Macdonald & Ors (No. 12)* [2009] NSWSC 714) is reported at (2009) 259 ALR 116; 73 ACSR 638; 27 ACLC 1278.

5. The Court of Appeal's decision on liability (*Morley v. Australian Securities and Investments Commission* [2010] NSWCA 331) is reported at (2010) 247 FLR 140; 274 ALR 205; 81 ACSR 285. The Court of Appeal's decision on penalty (*Morley v. Australian Securities and Investments Commission (No. 2)* [2011] NSWCA 110) has not yet been reported.

Part V: Facts

6. Mr Shafron was general counsel and company secretary of James Hardie Industries Ltd (**JHIL**) (CA [2]; ABWhi1/8). At all relevant times for the purposes of these proceedings Mr Shafron was a resident of the United States (CA [53]; ABWhi1/15). Mr Shafron held the office of company secretary jointly with Mr Donald Cameron, a resident of Australia (CA [882]; ABWhi1/171).

7. JHIL was the holding company in the James Hardie group of companies. Until 1937, JHIL had manufactured and sold asbestos products. Thereafter, and until 1987, the group's manufacture and sale of asbestos products was carried on by two of JHIL's subsidiaries, James Hardie & Coy Ltd (**Coy**) and Jsekarb Pty Ltd (**Jsekarb**) (CA [10]; ABWhi1/9).

8. Each of JHIL, Coy and Jsekarb, but principally Coy and Jsekarb, were subject to claims for compensation for loss suffered as a result of exposure to asbestos (CA [11]; ABWhi1/9).

9. From 1987, JHIL had been looking at ways to separate the group's liability to asbestos claims from the group's operating businesses (CA [12]; ABWhi1/9).

10. Mr Shafron was involved in the development of various proposals regarding separation to be put to and considered by the board. He provided legal advice in connection with those proposals to the board. He was involved in the retention of actuaries to assess the value of the group's exposure to asbestos claims, and in the consideration and dissemination within JHIL of those actuarial reports (see, e.g., CA [889]; ABWhi1/173-174; CA [894]; (ABWhi1/175)). Mr Shafron, however, had no authority to make any decision on behalf of JHIL approving any separation proposal or any of its related transactions. His role was confined to advising the board in relation to proposals put forward for its consideration and decision, and implementing them (CA [889]; ABWhi1/173-174).

11. JHIL retained the law firm then known as Allen Allen & Hemsley (**Allens**) in connection with the separation proposals. Allens advised extensively in relation to the separation proposals (CA [1022]-[1030]; ABWhi1/198-200). In particular, senior partners from Allens drafted all relevant documents and were present at board meetings (CA [1030]; ABWhi1/200).

12. On 15 February 2001, the board of JHIL approved a proposal to create a trust (the **Foundation**), which was to be vested with JHIL's shares in Coy and Jsekarb, along with $3 million (CA [13]; ABWhi1/9).

13. At that same meeting, the board also decided to enter into an agreement (the **DOCI**) with Coy and Jsekarb, pursuant to which JHIL covenanted to pay substantial annual sums to those companies, in return for covenants by Coy and Jsekarb not to sue JHIL in relation to its manufacture of asbestos, and to indemnify JHIL in relation to any such claims that were made upon it by third parties. The DOCI also contained a put option, pursuant to which a (potential future) sole shareholder of JHIL might require Coy to acquire its shares in JHIL (CA [13]; ABWhi1/9; ABBlue6/2343).

14. One of the sources of the information presented to the board in connection with the proposal to create the Foundation and enter into the DOCI was an updated actuarial estimate by Trowbridge Deloitte Ltd (**Trowbridge**) of Coy and Jsekarb's future liability in relation to asbestos claims (the February 2001 Trowbridge Report and 50 Year Estimate, or **Trowbridge material**). The Trowbridge material provided three estimates of the companies' liabilities: "current", "best estimate" and "high" (CA [137]; ABWhi1/32). While the estimates made allowance for inflation, they did not make any allowance for "superimposed inflation", which is an actuarial concept referring to the potential for an increase in the value of asbestos claims (e.g., damages awards) over time at a rate greater than the ordinary rate of inflation (CA [1060]; ABWhi1/206).

15. On 16 February 2001, the trust deed and DOCI were executed, the shares and the $3 million were vested in the Foundation and an announcement of the establishment of the Foundation was sent to the ASX (CA[15]; ABWhi1/9; ABBlue6/2386).

16. ASIC alleged that Mr Shafron contravened section 180(1) of the Act in certain respects in connection with the proposal to separate the asbestos liabilities from the James Hardie group of companies. Ultimately, two contraventions were found by the Court of Appeal:

    a. First, a failure to advise, or obtain advice for, the Chief Executive Officer or the board of JHIL that certain information about the DOCI needed to be disclosed to the ASX (CA [971]-[1036]; ABWhi1/189-201); and

b. Secondly, a failure to advise the board of JHIL that the best estimate of Coy and Jsekarb's liabilities contained in the actuarial estimates prepared by Trowbridge in February 2001 did not take account of "superimposed inflation", and that a prudent estimate would have (CA [1060]-[1074]; ABWhi1/206-208).

17. For those two contraventions, the Court of Appeal disqualified Mr Shafron from managing a corporation for 7 years, and imposed a pecuniary penalty of $50,000 (ABWhi1/286; ABGre1/6).

Part VI: Argument

Was Mr Shafron Subject to Section 180(1)?

10 18. Mr Shafron's fundamental contention is that section 180(1) did not impose any duty on him in relation to his conduct at issue in these proceedings. That section imposes on "officers" of corporations a duty to exercise a certain level of care and diligence in the exercise of their powers and the discharge of their duties.

19. The reasons why section 180(1) did not apply to Mr Shafron's conduct differ, depending upon which branch of the definition of "officer" Mr Shafron is said to fall within:

a. He was not a person who "made, or participated in making, decisions that affected the whole, or a substantial part, of the business" of JHIL and thus was not an "officer" of JHIL on that basis (and so, absent some other basis, was not subject to
20 section 180(1)).

b. As an "officer" of JHIL by reason of being one of JHIL's company secretaries, he was subject to section 180(1) in the exercise of his powers, and the discharge of his duties, as company secretary. However, section 180(1) did not apply to the exercise of his powers, and the discharge of his duties, in any other capacity. Mr Shafron contends that 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.

Make or Participate in Making Decisions

20. Section 9 of the *Corporations Act* defines an "officer" to include a person "who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of a corporation".

21. ASIC does not contend that Mr Shafron falls within that definition because he made a decision of the relevant character. Rather, it is ASIC's case that Mr Shafron is an officer because he participated in making such decisions.

22. The critical reasoning of the Court of Appeal in relation to the construction of that limb of the definition is found at CA [893]; ABWhi1/175. In that paragraph, after rejecting ASIC's contention that participation in the "process" by which a decision is made constitutes participation in the making of a decision, the Court said:

"*The definition refers to participation in making decisions of a particular character. ... [W]herever the decisions be found, the test is participation in their making. Participation is more than administrative arrangement, and there must be a real contribution from the postulated participation to the making of the decisions, but beyond that it is a question of fact.*"

23. That reasoning should not be accepted to the extent that it requires only a "real contribution ... to the making of the decisions" to constitute "participation".

24. While there may be some significant overlap between the concepts of "participation" and "contribution" in relation to an event or activity, there is a fundamental difference between the two. There is a danger, therefore, in allowing the notion of "contribution" to be used as a substitute for the statutory concept of "participation".

25. A person who "contributes" to something "provides assistance to a common result or purpose" or "plays a part in the achievement of a result".[1] A person who "participates" in something, on the other hand, "takes part in or shares in an action or condition" or "takes part with others in an action or matter".[2] Put simply, a participant is someone who engages in the relevant activity (here, decision making) whereas a contributor merely assists those who so engage.

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[1] See, e.g., the definition of "contribute" in *The New Shorter Oxford English Dictionary*, 1993, at 498.
[2] See, e.g., the definitions of "participate" and "participation" in *The New Shorter Oxford English Dictionary*, 1993 at 2109.

26. In support of its construction, the Court of Appeal stated that no "limited view" should be taken of the concept of "participation in making decisions", because to do so would be "at odds with the Act's identification of participation in making decisions as a basis for officership, a basis additional to ... making decisions" (CA [892]; ABWhi1/174-175). In Mr Shafron's submission, however, to hold that a person "participates in making a decision" only where the person has actually taken part in the making of the decision does not take a "limited view" of the statutory language, but rather gives effect to the natural and ordinary meaning of the words.

27. The work intended to be done by the word "participate" in the definition is clear. Many decisions cannot be said to have been "made" by a particular person. The concept of "participation" in the making of decisions operates to catch all persons taking part in the making of a decision. In the context of the Act (dealing with the immensely varied circumstances of Australian corporations) such an expansion makes perfect sense. It captures, for example:

    a. a person who makes a decision jointly with other persons;

    b. a person who is a member of a body (such as a committee) that makes decisions, whether or not that person is for or against the decision that is ultimately made; and

    c. a person who makes a decision that is, or may be, subject to ratification or reversal by superiors.

28. In Mr Shafron's submission, therefore, in order to "participate in making a decision" a person must have a role in actually *making* the decision. That does not mean that a person must have "ultimate control".[3] But it is quite different from being concerned in or taking part in the management of a company.[4] A person may still make a decision even if he or she is subject to direction or control by some other person, or if the decision is subject to ratification or reversal. It is always a question on the facts of the particular case: has the putative officer made, either alone or with others, a decision?

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[3] See CA at [888]; ABWhi1/173. See also *Re HIH Insurance Ltd (in prov. liq); Australian Securities and Investments Commission v. Adler*(2002) 41 ACSR 72 at [73].

[4] The Court of Appeal correctly identified (CA [886]-[667]; ABWhi1/173) the difficulties in the trial judge's apparent equation of "participate in making a decision" with notions derived from different statutory formulations considered in cases such as *Commissioner for Corporate Affairs v. Bracht* [1989] VR 821.

29. In this case, the trial judge held that Mr Shafron did participate in making a decision of the relevant significance on the following grounds (LJ [393]; ABRed2/515):

"The Separation Proposal considered by the board of directors of JHIL at the 15 February 2001 Meeting was [a decision that affected the whole or substantial part of the business of JHIL]. And Mr Shafron played a vital role in the board's deliberations thereby participating in the making of that decision."

30. The trial judge erred by holding that participating in the making of a decision is equivalent to "taking part in the relevant process" (LJ [388]; ABRed2/514). The Court of Appeal correctly rejected the injection of the language of "process" into the statutory language (CA [893]; ABWhi1/175). But the Court of Appeal in substance committed the same error by its determination that the statutory language required that there need be only "a real contribution from the postulated participation to the making of the decisions" (CA [893]; ABWhi1/175). The statute describes only those who make, or participate in making, the decisions.

31. The principal basis upon which the Court of Appeal held Mr Shafron to have participated in decisions of the requisite character was expressed broadly. In particular, the Court of Appeal did not confine its consideration of Mr Shafron's conduct to his role in relation to the meeting on 15 February 2001. The Court of Appeal relied generally upon the fact that Mr Shafron "was part of the Project Green team, and of its promotion of the separation proposal to the board" (CA [894]; ABWhi1/175). In particular, the Court of Appeal relied upon the matters set out at LJ [379]-[385] (ABRed2/511-513) as evidence of that participation (CA [894]; ABWhi1/175).

32. None of those matters, however, reveals the participation by Mr Shafron in the activity of decision making, as opposed to the provision of advice or assistance to decision makers. The matters relied upon involved merely the preparation and/or presentation of discussion papers, reports, legal advice and the like to the board.

33. Decisions made by Mr Shafron, either alone or with other members of the Project Green team, as to the nature of the advice to be provided, or the particular information to be presented, can hardly be described as decisions having the requisite significance. There was, and could be, no suggestion that the board treated information provided to it by Mr

Shafron as anything other than helpful material assisting it to consider, independently, the options available to it.

34. The matters upon which the Court of Appeal relied may well, therefore, demonstrate that Mr Shafron provided great assistance to those within JHIL who made decisions concerning the separation of asbestos liabilities; but they cannot be characterised as participation in any relevant decision making.

35. In addition to Mr Shafron's interactions with the board in relation to the separation proposal, however, the Court of Appeal also appeared to rely on matters never raised by ASIC as indicating participation by Mr Shafron in decisions of the requisite character. In particular, the Court of Appeal referred to (CA [894]; ABWhi1/175):

    a. the requirement that Mr Shafron's approval be obtained for significant announcements before release;

    b. Mr Shafron's reports to the board on asbestos litigation and risk management; and

    c. the conferral upon Mr Shafron of authority to finalise the terms of an agreement with JHINV and (with others) authority to negotiate and execute an underwriting agreement with Project Chelsea.

36. First, all of these responsibilities fall squarely within Mr Shafron's advisory and assistance role as general counsel, not as a decision maker or participant in decision making.

37. Secondly, none of those matters were relied upon by ASIC either at trial or in the Court of Appeal as decisions having the relevant significance.[5] Mr Shafron did not, therefore, have the opportunity to lead evidence relevant to an assessment of the significance to JHIL of those decisions, or to make submissions in relation to them. To the extent that he is in a position to make submissions now, Mr Shafron says:

    a. the evidence did not demonstrate that Mr Shafron had the requisite authority to approve, in the sense of authorise the publication of, any company announcement. While JHIL's compliance procedures required company announcements to be

[5] See ASIC's Supplementary Submissions and In Response to the Defendants' Submissions, Chapter 2, at [95]-[96] for ASIC's position at trial, and Respondent's Submissions in Reply to Mr Shafron's Submissions at [268] for ASIC's position on appeal; ABOra2/787-789.

reviewed by Mr Shafron[6], this review was a legal review of the same character as the review undertaken by Allens as JHIL's external legal advisers[7]. Further, JHIL's Disclosure Policy made it clear that in relation to individual authority to disclose information publicly, a company secretary could only do so "*on behalf of the Board*"[8], that is, in a ministerial capacity.

b. In any event, approving a significant company announcement cannot be said, without more, to be a decision affecting the whole, or a substantial part, of the business of the company. Some approvals may have that effect, many others are unlikely to do so. That is so, particularly when the "approval" likely to be given by a company's general counsel would relate to questions of compliance with the relevant legal requirements alone, rather than wider business considerations. ASIC made no attempt to demonstrate that Mr Shafron's approval of any particular announcement involved anything other than a legal review or had the requisite significance.

c. Providing updates and reports to the board in relation to asbestos litigation, and the management of that risk, can hardly be said to constitute the making of a decision (or the participation in the making of a decision), let alone a decision of the requisite character.

d. Before the conferral upon Mr Shafron of authority to negotiate and make agreements on behalf of JHIL could be said to reveal the making, or participation in making, decisions of the relevant character, a great deal more information would need to be known (including, most obviously, the nature of the agreements in question, the scope of Mr Shafron's authority and the limits of his discretion, and, if nothing else, whether or not the authority had in fact been exercised).

38. Overall, therefore, it is submitted that there was no basis upon which the Court of Appeal could find that Mr Shafron participated in making decisions of the requisite significance. The fact that Mr Shafron provided information and advice to the board to assist it in its decision making does not mean that he "participated" in that decision making, even if it can be said that he made a "real contribution" to it.

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[6] ABBlue10/4596H-L; ABBla1/247M-U
[7] ABBla1/281; ABBla1/247R; ABBla1/247S-T; ABBla1/247U; ABBlue3/1261J
[8] ABBlue1/109

39. The statutory language clearly requires a person to take part in *making* a decision (whether making it, or participating in making it). By construing the definition so that it catches people who make a "real contribution" to a decision, the Court of Appeal has impermissibly, and significantly, widened the definition.

40. The extent to which the Court of Appeal's construction has expanded the scope of the definition should not be underestimated. In this case, equivalently important decisions in relation to the development of proposals for the consideration of the board, and the provision of information and advice to the board, were made by law firms, investment banks, actuaries, accountants and other advisors. There is no reason why many of those external advisors would not be "officers" of JHIL according to the Court of Appeal's construction (nor, indeed, many low-level employees of corporations who are involved in developing and presenting important proposals for decision by a corporation).

Company Secretary

41. Section 9 of the *Corporations Act* provides that a "secretary of the corporation" is an "officer". Mr Shafron, being a joint company secretary of JHIL (CA [882]; ABWhi1/171), was thus plainly an officer of JHIL. Two questions arise in this case (c.f. CA [905]; ABWhi1/177):

    a. *First*, whether section 180(1) imposes a duty of care and diligence on a company secretary in respect of the exercise of his or her powers, and the discharge of his or her duties, as company secretary; or whether the duty of care and diligence applies to the exercise of *all* of that person's powers, and the discharge of *all* of that person's duties; and

    b. *Secondly*, whether the impugned conduct of Mr Shafron in this case involved the exercise of his powers, or the discharge of his duties, as company secretary.

Does s. 180(1) Apply to Conduct Other than as Company Secretary?

42. The Court of Appeal held, in relation to this question, that section 180(1) is concerned with "the scope and range of responsibilities *actually* carried out by the director or officer whose conduct is in issue" (CA [908]; ABWhi1/178), and that Parliament did not intend "the scope of the statutory provision to be determined in accordance with what will often be an artificial process of separating tasks performed in the capacity of

an office as such, from tasks performed in fact by a person who holds a particular office" (CA [911]; ABWhi1/178).

43. It is not in dispute that the scope of the responsibilities of directors or officers may vary between companies. That is to say, for example, the office of company secretary at one company may involve greater, fewer, or merely different responsibilities than the office of company secretary at another. It follows that the words "in the corporation's circumstances" in section 180(1)(a), and the reference to "the same responsibilities" in section 180(1)(b), serve the important purpose of ensuring that the *actual* responsibilities of the office in question (as opposed to the responsibilities of some notional or hypothetical "standard" director or company secretary) are performed to the requisite standard of care.[9]

44. The language of section 180(1) does not, however, suggest that the statutory standard of care and diligence is to apply to the responsibilities of the office held by the person *and* any other roles and responsibilities that the person has or undertakes in the company. If that were the intended effect of the section, there would have been no cause to include the words "occupied the office held by" at the beginning of subsection 180(1)(b). The "responsibilities" referred to in section 180(1)(b) are the responsibilities of that office exercised by the occupant in the circumstances of the company, not every responsibility of the person who occupies the office.

45. It would be to take section 180(1) beyond the confines imposed by the ordinary words of the section if it were treated as imposing (at the risk of civil penalty proceedings for contravention) the statutory standard of care and diligence on every facet of a person's responsibilities in the company. The purpose of the section is the assurance of requisite care and diligence in the carrying out of an office. It is not to regulate (and perhaps to punish) conduct in areas outside or separate from the office, which happen to be carried out by the same person in the company.

46. In support of its construction, the Court of Appeal stated that the common law duties to which company directors and officers are subject are not limited to the responsibilities of the particular office by reason of which the director or officer became subject to the duty (CA [913]; ABWhi1/178). No authority was cited in support of that proposition,

[9] See generally *Australian Securities and Investments Commission v. Rich* (2003) 44 ACSR 341 at [49]-[50]; [7201]-[7202].

and implicit in the reported cases is an assumption that the director or officer concerned was acting in his or her capacity as such. There is, with respect, no reason to think that the common law is concerned to impose duties on directors and officers acting other than in the discharge of their offices.

47. The Court of Appeal also appeared to rely on the perceived difficulty in undertaking the required process of "attribution" of responsibilities to a particular office (CA [913]; ABWhi1/178). That difficulty is apt to be overstated. There is a historical concept of the role of director and company secretary, and there is no reason to think that Courts would be unduly challenged by a requirement that they determine, on the facts of a particular case, the scope of the particular office occupied by an individual director or secretary.

48. The construction for which Mr Shafron contends is consistent with what should be the cautious approach by the courts to the construction of a statutory standard which, if contravened, gives rise to civil penalty proceedings and the prospect of serious punishment by declaration, monetary penalty and banning order.

49. The effect of the Court of Appeal's decision is to expand significantly the field of operation of section 180(1). To take an extreme example, the day to day responsibilities of an employee elected as the employee representative director would be caught. More generally, a director or officer with responsibilities in the workplace unconnected with his or her office (for example, a director who elects to join the staff committee responsible for planning the annual company Christmas party) is now subject to the statutory duty of care. That cannot have been what was intended by Parliament.

50. In Mr Shafron's submission, the duty in section 180(1) applies only to conduct of an officer of a company *qua* officer.

Was Mr Shafron Acting as Company Secretary?

51. The Court of Appeal held that "those aspects of the duties said to be those of a general counsel, which are in issue in the present proceedings, are well within the kinds of duties that are encompassed within the duties of a company secretary" (CA [917]; ABWhi1/179).

52. Of course, it is not to the point if the conduct of Mr Shafron in this case could fall within the duties of a company secretary: the question is whether that conduct fell within the role of company secretary actually held by Mr Shafron.

53. The scope of the office of a company secretary in any particular corporation is a question of fact.[10] As Barrett J said in *Tim Barr Pty Ltd v Nauri Gold Coast Pty Ltd* [2008] NSWSC 657:

> "*The corporations legislation envisages certain functions for company secretaries. One would readily infer that any company secretary had authority commensurate with those functions. Beyond that, however, one cannot make any assumptions about the authority of a particular company secretary in a particular context.*
>
> *There are statements in the case law that equate a company secretary with a mere clerk: George Whitechurch Ltd v Cavanagh [1902] AC 117. There are also statements that a company secretary is the chief administrative officer (Panorama Developments Ltd v Fidelis Fabrics Ltd [1971] 3 WLR 440) or a senior executive officer: Minilabs Pty Ltd v Assaycorp Pty Ltd [2001] WASC 88; (2001) 37 ACSR 509.*
>
> *But everything depends on the context and factual surrounding.*"

54. In 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. Mr Cameron's responsibilities as company secretary never rose above purely administrative functions (such as transmitting material to the ASX, maintaining the records of the board, and such like) (ABBlue12/5231K-S; ABBlue12/5235F-K). There is certainly no basis upon which it might be suggested that Mr Shafron possessed responsibilities as company secretary additional to those held by Mr Cameron. If anything, Mr Shafron's relocation to the United States for about three years from August 1998 suggests the opposite, at least in respect of his responsibilities for the Australian operations.[11] The clear inference is that the balance of his responsibilities were owed due to his appointment as general counsel.

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[10] See *Dr Andrew Roberts-Szudzinski Pty Ltd v. Au Domain Administration Ltd* [2006] NSWSC 950 at [29]; *Holpitt Pty Ltd v. Swaab* (1992) 33 FCR 474 at 476-8.

[11] The Court of Appeal refers to the relocation of "senior management" to the United States at CA [54]; ABWhi1/30. Mr Shafron's employment contract provided for his secondment to the United States to work in the group management team in Mission Viejo, California: JHAB.073.003.0081, (ABBlue1/303 and ABBlue1/317)].

55. The particular allegations made against Mr Shafron in these proceedings relevantly included:

a. failing to advise the board that a draft announcement to the ASX was expressed in too emphatic terms concerning the adequacy of the Foundation's funding to meet all legitimate present and future asbestos claims;

b. failing to advise the Chief Executive Officer or the board that JHIL should disclose certain information about the DOCI, or that they obtain such advice;

c. failing to advise the board of limitations in PwC's and Access Economics' review of the cashflow model; and

d. failing to advise the board that certain actuarial estimates had not taken into account superimposed inflation, and that a prudent estimate would have.

56. In relation to the first two of those matters, involving questions of disclosure to the ASX, the Court of Appeal held that they fell within the role of company secretary because "notices to be filed on behalf of a company are within the traditional range of responsibilities of a company secretary" (CA [918]; ABWhi1/179).

57. With respect, it does not follow at all from the fact that it is part of the role of a company secretary to lodge notices on behalf of a company, that it is part of the company secretary's role to provide advice as to the company's obligation to file a notice, or advice as to the content of notices proposed to be filed. A company secretary does that which the Corporations Act specifically designates as a company secretarial duty[12]. In addition, a company secretary does that which the board authorises to be done, rather than warning or advising the board about that which it proposes to do. A company secretary is naturally to be seen as a ministerial delegate, rather than an advisor.

58. In practice, advice on disclosure obligations (both as to the need to disclose, and the content of any disclosure) is frequently sought from lawyers. Indeed, the trial judge held that Mr Shafron's obligation to provide advice in relation to disclosure arose from his "high degree of responsibility to protect JHIL from legal risks" (LJ [398];

[12] The Court of Appeal identifies, by reference to provisions of the Corporations Act 2001, the kinds of company notices required or likely to be filed by a company secretary: CA[918]-[921]; ABWhi1/179).

ABRed2/517). That obligation is most naturally sourced in Mr Shafron's responsibilities as general counsel (c.f. CA [982]; ABWhi1/192-193).

59. The third matter can be put to one side, as the Court of Appeal found that ASIC had not established the pleaded contravention (CA [968]; ABWhi1/189). It follows that whether Mr Shafron was in that respect acting as company secretary or not is no longer relevant.

60. In relation to the fourth matter, the Court of Appeal did not consider whether or not Mr Shafron's conduct was engaged in as company secretary or general counsel. His conduct in relation to the Trowbridge material did not involve conduct in discharge of the role of general counsel or company secretary, since it related principally to actuariarial and financial matters (c.f. CA [926]; ABWhi1/180).

61. However, to the extent this conduct might be taken to fall within one of Mr Shafron's two roles, the consideration of actuarial valuations of asbestos liabilities fell within his role as general counsel. Mr Shafron's oversight of James Hardie's asbestos litigation (which was managed by Wayne Attrill [ABBlue10/4671-4673]) and his involvement in the process of obtaining actuarial valuations provided to JHIL derived from his work in relation to managing the companies' legal risks, and his work in relation to the separation proposals.

62. It is thus submitted that the conduct at issue in relation to the fourth matter was engaged in by Mr Shafron as general counsel, and not company secretary.

Conclusion

63. For the above reasons it is submitted that either Mr Shafron was not an officer of JHIL or that he did not engage in the relevant conduct as an officer of JHIL. Section 180(1) thus did not apply to Mr Shafron's conduct at issue in this case, and the Court of Appeal thus erred in finding contraventions by him.

The DOCI Contravention

64. If Mr Shafron is found to have been subject to section 180(1), it is submitted that the Court of Appeal erred in finding that he failed to act with the requisite care and diligence in failing to advise the Chief Executive Officer, or the board, that certain

information about the DOCI should be disclosed to the ASX (or that they should obtain such advice) (CA [971]-[1036]; ABWhi1/189-201).

65. In summary, Mr Shafron says that he did not fail to exercise the relevant standard of care because, in the circumstances, he was entitled to assume that Allens would have advised him if disclosure of the DOCI Information to the ASX was required, and to assume that their silence – having advised in relation to the press release establishing the Foundation - meant that they considered no such disclosure to be required. In those circumstances, it is submitted that a reasonable person would have considered that Allens did not regard disclosure to be necessary, and would not therefore raise the issue with the board or the Chief Executive Officer.

66. A reasonable person in Mr Shafron's position would have assumed that Allens would advise him if disclosure of the DOCI Information was required for the following reasons:

a. The question of disclosure of the DOCI, whether it be continuous disclosure to the ASX or other forms of disclosure required under the *Corporations Law*, was expressly raised with Allens on several different occasions. In circumstances where disclosure of any kind in relation to the DOCI was expressly raised, a reasonable person would consider it incumbent upon Allens to advise in relation to all relevant disclosure obligations. In particular, Mr Shafron relies upon the following matters:

i. His email of 1 February 2001 to Allens in which he asked, in relation to the DOCI (CA [1002]; ABWhi1/195; ABBlue4/1437): "If it's a private document, then I wonder about disclosure – initially anyway." Whether that query concerned the obligation to disclose in light of the confidentiality exception to ASX Listing Rule 3.1, or the confidentiality provisions of the DOCI itself, the question of disclosure of the DOCI was squarely raised.

ii. His email of 4 or 5 February 2001 to Allens in which he asked (CA [1006]; ABWhi1/196; ABBlue4/1797): "query whether this can be structured as a non discloseable commitment in relation to JHIL Shares – Allens to advise". Once more, whether that query concerned continuous disclosure to the ASX, or disclosure of the existence of a substantial shareholder under

section 671B of the *Corporations Law*, the topic of disclosure in relation to the DOCI was squarely raised.

iii. Allens' notes of a conference call that occurred on 5 February 2001 (CA [1008]; ABWhi1/196-197; ABBlue4/1815). Those notes included the statements: "To do – Query disclosure + relevant interest on the Put.", "if JHIL grants an option/give right over shares – ASX disclosure?", and "Does it need disclosure?". Again, whether those references were to continuous disclosure, or disclosure under section 671B, the question of disclosure in relation to the DOCI was plainly under consideration.

10 b. Furthermore, the general nature of Allens' retainer meant that a reasonable person would expect the firm to advise on all relevant aspects of the proposed transactions, including disclosure. In particular, Mr Shafron relies on the following matters:

i. On 15 March 2000 Mr Shafron wrote a letter of instructions to Allens seeking advice in relation to Project Green (CA [1024]; ABWhi1/199; ABBlue2/676). That letter sought advice in relation to numerous specific matters (not including disclosure), but concluded with the following sentence:

"*You should comment on ... any other matter you think may be relevant or*
20 *appropriate. Please cover the issues raised but do not confine yourself to them.*"

That instruction to Allens is clearly consistent with a retainer pursuant to which Allens would advise generally in relation to all significant matters pertaining to the contemplated transactions. While the DOCI was not in contemplation at this time, there is no reason to suggest that when that transaction was proposed subsequently, that JHIL would require any less comprehensive advice in relation to it.

ii. On 5 April 2000, Allens provided the requested detailed advice to JHIL (CA [1025]; ABWhi1/199; ABBlue2/577). Although advice in relation to
30 continuous disclosure had not been sought in the letter of 15 March 2000, Allens made several references to continuous disclosure in their advice.

This confirms that Allens regarded continuous disclosure obligations as within the range of matters upon which they should advise JHIL, and provides a basis upon which it may be concluded that Mr Shafron would have relied on them to provide such advice in relation to the DOCI, when it was under consideration.

iii. On 7 February 2001, Mr Shafron emailed Allens in relation to the Put Option and asked "Any roadblocks in having this feature? I need to know quick." (CA [1016]; ABWhi1/198; ABBlue4/1823). Even accepting that an obligation to disclose this aspect of the DOCI Information would not constitute a "roadblock" in a strict sense, it is plainly a general request for advice as to the consequences for JHIL of including the Put Option as part of the proposed transaction. It is, therefore, at the very least, consistent with the retainer of Allens to advise JHIL in a general way, rather than purely in response to specific and carefully crafted questions.

iv. Allens were involved in drafting the DOCI, were present at all significant board meetings (including the meeting at which the board resolved that the DOCI be executed), and were involved in settling the Draft ASX Announcement (see CA [1030]; ABWhi1/200), which was the primary vehicle adopted by JHIL to announce the establishment of the Foundation. Allens were thus aware of all relevant details of the transaction, and were aware of the nature of the public announcement that the company was planning to make (which made no reference to the DOCI Information (other than the total funding, part of which was made available under the DOCI) (ABBlue6/2387S)).

v. The extent of Allens involvement in Project Green is most clearly revealed by the fact that, in the period 28 August 2000 to 25 October 2001, Allens billed JHIL over $3 million for legal services.[13]

[13] See: JHAB.063.004.0140 (ABBlue3/111) and JHAB.063.004.0141 (ABBlue3/112); JHAB.063.004.0182 (ABBlue6/2500); JHAB.063.004.0169 (ABBlue3/1147); JHAB.063.004.0174 (ABBlue4/1427) and JHAB.063.004.0176 (ABBlue4/1429); JHAB.063.004.0189 (ABBlue6/2515); JHAB.063.004.0128 (ABBlue7/2826); JHAB.063.004.0197 (ABBlue7/2867); JHAB.063.004.0204 (ABBlue7/2874); JHAB.063.004.0211 (ABBlue7/2948); JHAB.063.004.0119 (ABBlue7/2955); JHAB.063.004.0111 (ABBlue7/2958); JHAB.063.004.0105 (ABBlue7/3112); JHAB.063.004.0098 (ABBlue7/3117).

vi. The fact that JHIL also sought specific advice from Allens in relation to its continuous disclosure obligations (see CA [1026]-[1028]; ABWhi1/199-200; ABBlue3/1120) does not undermine the proposition that Allens could reasonably have been expected to advise in relation to disclosure of the DOCI Information, without being requested to do so. The fact that specific requests were made in response to queries from directors, or during the course of a meeting, does not suggest that there was a more general expectation that Allens would advise in relation to the disclosure issues arising out of transactions that it was developing, documenting and in relation to which it was advising.

67. Overall, it is submitted that a reasonable person in Mr Shafron's position would have considered that if Allens thought that ASX disclosure of the DOCI Information should have been made, they would have alerted Mr Shafron, the Chief Executive Officer, or the board. It follows that a reasonable person in Mr Shafron's position would have regarded Allens' silence as implicit advice that no ASX disclosure was required.

68. In the circumstances, it is submitted that Mr Shafron discharged his duty under section 180(1) by retaining clearly competent external legal advisors, and ensuring that they had sufficient knowledge of material facts to identify accurately any continuous disclosure issues and the steps that needed to be taken to address them.

69. It follows that the Court of Appeal erred in finding (a) that Mr Shafron did not ensure that Allens would give relevant advice and (b) that the fact that a person in Mr Shafron's position would reasonably expect Allens to provide such advice did not mean he discharged his section 180(1) duty (CA [1034]; ABWhi1/200).

The Superimposed Inflation Contravention

70. If Mr Shafron is found to have been subject to section 180(1), it is submitted that the Court of Appeal erred in finding that he failed to act with the requisite care and diligence in failing to advise the board that the best estimate contained in the Trowbridge material had not taken into account superimposed inflation, and a prudent estimate would have (CA [1074]; ABWhi1/208).

71. The critical matters upon which Mr Shafron relies are as follows:

a. It is not the case that the Trowbridge material "had not taken into account" superimposed inflation. The Trowbridge material was an update of the June 2000 draft report (CA [1064]; ABWhi1/206; ABBlue2/912). The June 2000 draft report stated that Trowbridge was assuming that there was no "superimposed inflation" for asbestos claims (CA [1061]; ABWhi1/206; ABBlue2/912). It is thus apparent that Trowbridge had taken into account the concept of "superimposed inflation", and had determined that it should be reflected at a rate of zero percent. At the February 2001 board meeting, Mr Shafron made clear that the Trowbridge material utilised the same assumptions as the June 2000 draft report (CA [1067]; ABWhi1/206 and LJ [274]; ABRed2/483).

b. That approach was consistent with the approach taken by Trowbridge in earlier valuations prepared for JHIL. In the October 1996 (CA [125]; ABWhi1/29) and September 1998 (CA [128]; ABWhi1/30) valuations, Trowbridge stated that they had adopted a rate of zero percent for superimposed inflation, on the basis that the upward pressure on damages awards was offset by the increase in the average age of claimants (thereby reducing the amount of compensation for future economic loss).

c. Trowbridge did include a percentage increase for ordinary inflation.

d. It follows that ASIC's criticism of Mr Shafron cannot be that he failed to point out that a matter had not been included in the Trowbridge material that he knew should have been included. Rather, Mr Shafron must be said to have had an obligation to question before the Board Trowbridge's expert opinion that the appropriate rate of superimposed inflation was zero percent. That case is simply unsustainable:

    i. Mr Shafron was not an actuary (CA [1052]; ABWhi1/204-205), and there was no evidence to suggest that he was, or should have been in a superior position to that of an expert actuary in identifying any flaw in the methodology of Trowbridge in relation to the decision to make no allowance for superimposed inflation. Even if the Court of Appeal's finding that Mr Shafron was acquainted with the concept of superimposed inflation (CA [1068]; ABWhi1/206-207), it does not follow that he was aware, or should have been aware, that a rate of zero percent was inappropriate.

ii. There was no evidence establishing that a reasonable estimate in 2001 would have applied a rate greater than zero percent for superimposed inflation. There is thus no reason to require Mr Shafron to have pointed out that aspect of the valuation. ASIC's expert actuary, Dr Taylor, accepted that "the appropriate rate of superimposed inflation could conceivably have been zero", and agreed with Mr Wilkinson's opinion that a rate of zero percent was at "the lower bound of the range of assumptions made by Australian actuaries for this factor at this time" (CA [1071]; ABWhi1/207).

iii. There was no evidence that the standard of care required of a company secretary with no actuarial expertise would involve disagreeing with an expert actuary's explanation for adopting, or adoption of, a rate of zero percent for superimposed inflation. A reasonable person in Mr Shafron's position could not be said to have a duty to second guess the methodology of experienced actuaries retained by JHIL over many years. Mr Shafron was entitled to rely on the general competence of the actuaries when it came to matters like the inclusion or non-inclusion of superimposed inflation, or the appropriate rate at which it was to be included. He was entitled to assume that Trowbridge had assessed for itself whether or not superimposed inflation should be taken into account.

72. Overall, it is submitted that in circumstances where the expert actuary's report incorporated a rate of zero percent for superimposed inflation, which was within the realm of accepted actuarial practice, there is no possible basis for suggesting that Mr Shafron did not act with due care and diligence by failing to suggest to the board that some different rate should have been used.

Part VII: Legislation

73. The text of the relevant provisions is set out in Annexure A.

Part VIII: Orders Sought

74. Mr Shafron seeks the following orders:

a. Appeal allowed with costs.

b. Vary Order 3(a) of the orders of the Court of Appeal made on 17 December 2010 to read:

i. Appeal allowed.

c. Set aside:

i. Orders 3(c) and 3(d) of the orders of the Court of Appeal made on 17 December 2010;

ii. Order 3(e) of the orders of the Court of Appeal made on 17 December 2010 (as amended by the Court of Appeal by order made on 25 February 2011); and

iii. Orders 2(a)-(d) of the orders of the Court of Appeal made on 6 May 2011

and in lieu thereof order:

iv. Set aside declaration 3 made on 27 August 2009.

v. Set aside orders 1, 2 and 3 made on 27 August 2009.

vi. Cross-appeal dismissed.

vii. The respondent pay the appellant:

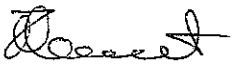
1. the $50,000 (the balance of pecuniary penalty not repaid) pecuniary penalty plus any amount paid in costs by the appellant pursuant to the order made on 27 August 2009; and

2. interest on $50,000 and/or any amount paid for costs by the appellant, calculated at the rate(s) prescribed in Schedule 5 of the *Uniform Civil Procedure Rules* 2005 from the date upon which the appellant paid the said pecuniary penalty and/or costs.

viii. The proceedings against the appellant be dismissed with costs.

ix. The respondent pay the appellant's costs of the appeal and cross-appeal and the appellant's costs of the proceedings in the Court below.

Date: 24 June 2011



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Annexure A

LEGISLATIVE PROVISIONS

The following provisions remain in force, as they appear, at the date of making these submissions.

Definition of "Officer", section 9, *Corporations Law* and *Corporations Act* 2001 (Cth)

officer of a corporation means:

(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.

Section 180(1), *Corporations Law* and *Corporations Act* 2001 (Cth)

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:

(a) were a director or officer of a corporation in the corporation's circumstances; and

(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.