ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S176 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MEREDITH HELLICAR** Respondent	**No. S177 of 2011** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MICHAEL ROBERT BROWN** Respondent
No. S178 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MICHAEL JOHN GILLFILLAN** Respondent	**No. S179 of 2011** **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MARTIN KOFFEL** Respondent

APPELLANT'S SUBMISSIONS IN REPLY

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

2. The respondents' case reduces to ASIC being obliged to call JHIL's solicitor, Mr Robb, to disprove their contention that their own minutes were incorrect in recording the approval of the Draft ASX Announcement. ASIC's reliance on the directors' own corporate record accords with the legislation and fair process. Its evidentiary case is not diminished by Mr Robb not giving evidence to the same effect as that record. In addition, the more the respondents contend that Mr Robb could not properly, and hence by inference did not, acquiesce in the approval of such a misleading statement, the more they underscore that his interests aligned with theirs.

10 ***Blatch v Archer* - Abandonment of duty of fairness**

3. The respondents, Ms Hellicar and Messrs Brown, Gillfillan and Koffel (**Hellicar respondents**), do not advance any submissions in support of the Court of Appeal's conclusion that ASIC owed an obligation of fairness which it breached in failing to call Mr Robb. Rather, they, and other respondents, submit that the Court of Appeal correctly applied *Blatch v Archer*[1] independently of any obligation of fairness in concluding that Mr Robb ought to have been called with negative evidentiary consequences for ASIC's case.[2] More explicitly, they and other respondents submit that, even if the Court of Appeal did not take that approach, its conclusion that ASIC's case suffered evidentiary consequences by reason of the failure to call Mr Robb can be supported by an application of the principle
20 in *Blatch v Archer* independently of any obligation of fairness.[3] Finally, they eschew any reliance on the principle in *Jones v Dunkel* (1959) 101 CLR 298 and make no attempt to overturn the trial judge's undisturbed finding that that principle did not assist the respondents.

4. First, it is clear that the Court of Appeal did not invoke the principle in *Blatch v Archer* independently of its view as to the existence of a duty of fairness. *Blatch v Archer* is first referred to by the Court immediately after the sentence in CA[729] ABWhi/136.23: "*We go to the second of the questions, the consequences of breach of the obligation*" [of fairness: see CA[728] ABWhi/136.17]. The discussion which follows culminates in the statements at CA[753] ABWhi/140.29 and CA[756] ABWhi/141.18 concerning the
30 obligation of fairness. This is further addressed at [2]-[6] of ASIC's reply to Mr Terry's submissions.

5. Second, although the Court of Appeal found that ASIC would be expected to call Mr Robb, that finding was based on the Court's view that ASIC owed an obligation of fairness (CA[765]-[766] ABWhi/142.39-45). That is clear from the Court's treatment of ASIC's submission in support of the trial judge's conclusion that *Jones v Dunkel* did not apply because Mr Robb was not in ASIC's camp and had his own interests or those of Allens. The Court of Appeal acknowledged that Mr Robb may have had such interests (CA[765] ABWhi/142.39) but held the present case was distinguished from ordinary adversary proceedings by reason of ASIC's obligation of fairness. For that reason, the Court of
40 Appeal found that ASIC would be expected to call Mr Robb (see CA[764]-[766], [775]-[776] ABWhi/142.27-45, 144.04-27).

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[1] [1774] EngR 2; (1774) 1 Cowp 63; (1774) 98 ER 969.
[2] Submissions of Ms Hellicar and Messrs Brown, Gillfillan and Koffel (**HS**) at [2(b)], [19], [22(b)], [136], [152].
[3] HS[34], [35], [153].

6. Specifically, the Court of Appeal did not overturn the trial judge's refusal to draw a *Jones v Dunkel* inference (CA[244], [678], [765] ABWhi/54.44, 126.21, 142.39).[4] The trial judge's findings in that regard included a decision not to draw such an inference even if otherwise available (LJ[1143] ABRed2/711I), it being recognised that a Court has a discretion as to whether it should draw such an inference, and a finding that in any event none of Messrs Robb, Sweetman or Wilson was in ASIC's camp and would not have been expected to be called by ASIC (LJ[1141], [1143] ABRed2/710U, 711I). Thus, the Court of Appeal did not determine that the trial judge's exercise of discretion not to draw a *Jones v Dunkel* inference miscarried and did not determine that any of those witnesses was relevantly in ASIC's camp.

7. In support of the argument that *Blatch v Archer* applied independently of an obligation of fairness insofar as ASIC would be expected to call Mr Robb, the Hellicar respondents cite in support of the Court of Appeal's finding that ASIC would be expected to call Mr Robb, but does not advert to the fact that that finding was premised on the existence of an obligation of fairness (HS[136]).

8. Third, the respondents construct an argument which has as its end point *Jones v Dunkel* inferences, but described as *Blatch v Archer* inferences, and with no challenge to the trial judge's undisturbed finding as to the application of *Jones v Dunkel*. That approach involves error. The principle in *Jones v Dunkel* draws upon *Blatch v Archer* and addresses the circumstances in which the failure to call a particular witness entitles a Court to draw certain inferences.

9. Fourth, there is nothing in *Blatch v Archer* or in cases which have referred to it which warrants a conclusion that its principle applies to the present case. The respondents' argument reduces to this proposition. Notwithstanding ASIC tendered, as it was entitled to do, the respondents' own minutes (Mr Willcox's ownership thereof being evidenced by his scrutiny of the draft and failure to raise any objection thereto) which involved the respondents themselves acknowledging they had approved the Draft ASX Announcement, it is to be expected that ASIC would have called the other attendees, or some subset thereof, to prove that what the respondents' own minutes said was correct. To the extent that statements in the cases refer to the drawing of inferences as to the failure to call evidence as being informed by "common sense", it may fairly be said that the respondents' argument, when reduced as it must be to the foregoing proposition, offends common sense.

10. *Blatch v Archer* itself was a case in debt brought by Mr Archer against the sheriff, Mr Blatch, for an escape of Moody, arrested on behalf of the sheriff at the suit of Mr Blatch. The context of Lord Mansfield's statement of principle related to the issue of whether the plaintiff had proven that the arrest was legal, a precondition to the suit for escape. The maxim did not apply to require the plaintiff to call as a witness the person who physically undertook the arrest, the son of the sheriff's officer, to prove that he was under the supervision of his father. It was a case of a defendant attempting to rely on his own alleged irregularity to defend the proceedings. In the present case, the respondents similarly rely on their own alleged irregularity, allegedly incorrect minutes, to warrant a conclusion that ASIC would be expected to call Mr Robb.

11. Cases which refer to the *Blatch v Archer* principle identify circumstances additional to mere capacity to lead evidence. Thus, in the judgment of Mason CJ and Deane and Dawson JJ in *Weissensteiner v R* (1993) 178 CLR 217 it was said at the conclusion of a

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[4] As ASIC previously submitted in its submissions filed on 23 June 2011 (AS) at [28].

passage of reasoning which commenced by reference to *Blatch v Archer* (at 228): "*Not every case calls for explanation or contradiction in the form of evidence from the accused. There may be no facts peculiarly within the accused's knowledge*" (emphasis added). Similarly, the context in which Gleeson CJ considered *Blatch v Archer* in *Russo v Aiello* (2003) 215 CLR 643 at [10] is informed by the observation: "*But when regard is had to the nature of the question about which satisfaction is required, which is a question concerning the reasons for the conduct of the claimant, and is a matter about which the claimant will ordinarily be the person best able, and will often be the only person able, to give information, then a court would be likely to infer that such information as is made available to it by a claimant (which may involve information in addition to that provided to the insurer) is all that a claimant can say by way of explanation of his or her conduct*" (emphasis added). Those statements reflect a correct understanding of *Blatch v Archer* as referring not to a mere capacity to lead evidence but a relative capacity, resulting in an expectation that the party with the peculiar capacity would call the evidence.

12. *Jones v Dunkel* reflects that understanding of *Blatch v Archer* in relation to the issue of a failure to call witnesses. If the *Jones v Dunkel* principles are not satisfied, and this Court is not invited to revisit that question, there is no scope for the application of *Blatch v Archer* independently of *Jones v Dunkel*. It is implicit in the approach of the Court of Appeal that it took the same view. Its invocation of *Blatch v Archer* was only sought to be justified by what it considered to be the additional circumstance of the alleged obligation of fairness. In the end, the Hellicar respondents are forced back to the same position to explain why ASIC was expected to call Mr Robb (cf HS[137](c) and [142]).

13. It cannot be said that whatever evidence any of Messrs Robb, Sweetman or Wilson could provide in relation to the events of the 15 February 2001 JHIL board meeting, was evidence peculiarly available to ASIC. ASIC did not have a peculiar capacity to provide evidence as to the events of that board meeting by comparison to the capacity of the respondents. On the contrary, the respondents were present at the board meeting (physically or by telephone). Further, in relation to Mr Robb, ASIC did not have a signed statement. The draft which it had was provided to the respondents. In relation to Mr Sweetman and Mr Wilson, their sworn affidavits had been provided to the respondents. Any of those persons could have been called as a witness by the respondents. *Blatch v Archer* has no application to the failure to call Messrs Robb, Sweetman or Wilson.

Misstatement of Court of Appeal reasoning

14. The respondents' submissions, especially at HS[20], misstate the Court of Appeal's reasoning.[5] Contrary to HS[20] the Court of Appeal did not reverse the trial judge's finding that copies of the Draft ASX Announcement were distributed at the meeting at either CA[384] ABWhi/78.29 or CA[789] ABWhi/146.26 (see AS[128]). Further, the Court of Appeal considered that the post-meeting conduct and changes to the draft announcement and conduct of management "*detract[ed]*" from the inference of board approval rather than being "*strongly inconsistent*" therewith (CA[320] ABWhi/68.22; cf HS[20(c)]). The correlation between Mr Brown's evidence and the content of the Draft ASX Announcement was weak rather than "*could not be sustained*" (CA[420] ABWhi/85.49; cf [HS20(e)]). The Court of Appeal did not conclude that the minutes "*did not detract*" from the (misstated) conclusions in HS[20]. Instead, the Court concluded that, while they were a

[5] HS[4]-[19] contain a series of argumentative propositions concerning the manner in which the case was presented at trial, the subject of findings by the trial judge and then presented on appeal. This was addressed at AS[6]-[19] and the relevant parts of the trial judge's reasoning are addressed below.

significant matter in ASIC's case, their reliability and weight were "*very much open to question*" (CA[497] ABWhi/98.38; AS[83]; cf HS[20(g)]. Each of these matters is addressed in AS.[6]

15. Contrary to HS[20(f)], the Court did not draw comfort for its "*conclusions*" on these topics from the failure of ASIC to call Mr Robb and the Court's findings on these topics did not lead it to overturn the trial judge's approval finding. The critical factor that led to that result was the failure to call Mr Robb in circumstances where ASIC was found to be under an "*obligation of fairness*" to call him (see CA[760], [775]-[777] ABWhi/141.37, 144.01-31).

Chronology of key events (HS[36]-[54])

16. Under this heading the respondents purport to address a number of key events "*by reference to the documentary records*" (HS[36]). What is set out are some findings but mostly argument and speculation that go well beyond any finding or reasoning of the trial judge or the Court of Appeal or anything embraced by the notices of contention or the evidence (eg HS[39(b)], [39(c)], [40(d)], [43], [45], [47] and [52]). For example, HS[43] appears to seek a finding that the document Mr Baxter took with him to the board meeting was the 9.35am draft announcement, a contention that was rejected by the trial judge (LJ[220] ABRed2/467D) and the Court of Appeal (CA[383] ABWhi/78.20) and not part of any notice of contention. HS[45] asserts that the board simply approved the establishment of the MRCF, and did not make resolutions on various steps, a scenario not the subject of any finding. HS[47] positively asserts that no notes were taken of the board meeting, but the company secretary (Mr Shafron) attended and later sent by email amended draft minutes. As he did not enter the witness box, it is not known whether there were such notes. HS[44(d)] asserts that slide 17 "*recorded the resolutions recommended to the directors*". It does not (ABBlu5/2214). Instead, it states that the "*Resolutions are recommended to directors*", without specifying what they were. The critical findings and background are set out at AS[6]-[19] and otherwise in ASIC's amended chronology.

Rejection of the evidence of the non-executive directors

17. The respondents seek to support the Court of Appeal's findings by invoking the evidence of those non-executive directors who entered the witness box and assert that the Court of Appeal acted on their evidence (HS[66], [76]-[81], [98]-[99][7]).

18. To the extent that the evidence of any of the non-executive directors who gave evidence differed from his Honour's findings in relation to the Draft ASX Announcement, his Honour rejected that evidence as not being reliable ("*mistaken*": LJ[222], [228] ABRed2/467P, 469D), but did not consider it necessary to go further and make more severe findings at that point ("*For present purposes*": LJ[222]; "*at this stage*": LJ[228]). However, later in that part of the judgment dealing with the Scheme of Arrangement issue (LJ[791], [811], [854] ABRed2/617K, 622K, 633S),[8] the trial judge made it clear that he

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[6] The relevant findings of the Court of Appeal are set out at AS[11], the structure of Part 4 of the Court's judgment is described in AS[78]-[79] and the Court's reasoning on each of the matters tending for and against the overturning of the approval finding is set out at AS[13]-[16] (communication strategy), AS[89] (absence of pre-meeting vetting and the making of post-meeting changes), AS[112]-[113] (correlation), AS[89] (minutes) and AS[28]-[32]).

[7] And at HS[100]-[102] in relation to Mr Morley, which is addressed at [25]-[28] of ASIC's reply to Mr O'Brien's submissions.

[8] [791] "*While I approach with caution the evidence of the non-executive directors who gave evidence for reasons discussed in relation to subsequent events and credit issues ...*"; [811] "*While I maintain my scepticism with respect to the evidence of the non-executive directors who gave evidence ...*"; [854] "*I have not lost my scepticism with*

did not consider them to be reliable witnesses for the reasons discussed at LJ[1148]-[1255] ABRed2/712J-734K.

19. In those paragraphs, his Honour catalogued various issues which were raised with each of these witnesses[9] and which he regarded as warranting comment if the tabled and approved findings were wrong. Yet no comment was forthcoming, namely the distribution to them of the Final ASX Announcement, the follow up telephone conference, the 23 February 2001 ASX Announcement, the minutes and the declarations provided to JHINV. His Honour also made a number of adverse findings concerning Ms Hellicar (LJ[1238]-[1251] ABRed2/730C-733R), including that she "*feigned*" shock in part of her cross-examination (LJ[1244] ABRed2/731S). The trial judge concluded that she was a "*most unsatisfactory witness*" (LJ[1251] ABRed2/733O). His Honour noted a particular misgiving with the evidence of Mr Koffel (LJ[1252]-[1254] ABRed2/733T-734G) and concluded (at LJ[1255] ABRed2/734I) that "*[t]here were not nearly so many attacks on the credit of the other non-executive directors*" which his Honour did not catalogue (nor resolve).

20. This adverse assessment of the reliability of the evidence of the non-executive directors was based upon the advantages his Honour enjoyed as trial judge in assessing their reliability. His Honour had the opportunity to observe each of the non-executive directors give evidence over a significant period[10], and to hear and consider the explanations they gave both as to what occurred during the meeting and as to the documents they received in the period after the meeting. In that process the "*subtle influence of demeanour*" still played a significant role (*Abalos v Australian Postal Corporation* (1990) 171 CLR 167 at 179). Insofar as Ms Hellicar was concerned, the trial judge expressly addressed her demeanour (LJ[1238]-[1251] ABRed2/730C-733S).

21. It follows that the trial judge's rejection of the evidence of the non-executive directors on tabling and approval could only be overturned based on the principles discussed in *Fox v Percy* (2003) 214 CLR 118 and, even if successful, could only have led to a new trial as a number of ASIC's submissions attacking their credit remained unresolved (LJ[1255] ABRed2/734I). None of the respondents' grounds of appeal or submissions before the Court of Appeal sought to invoke those principles.[11] In these circumstances, the Court of Appeal could not have, and did not, purport to accept their evidence. The Court of Appeal noted the constraints on its appellate review and, although it noted their evidence in part, made no express findings based on it (see CA[251]-[271] ABWhi/56.13-59.35).

Aspects of Mr Baxter's evidence (HS[56]-[57])

22. The second sentence of HS[56] asserts that the evidence of Mr Baxter that he usually took sufficient copies of an ASX announcement for every attendee did not survive cross-examination, citing CA[310] ABWhi/66.48 and LJ[135] ABRed2/445I. Neither of those findings supports that proposition. LJ[220] ABRed2/467D is directly to the contrary, and CA[383] ABWhi/78.20 is consistent with his practice in that the Court of Appeal found that he provided copies to Messrs Robb and Cameron. HS[57] compounds this by attempting to create scenarios by which Mr Baxter took an announcement to the meeting but did not distribute it, including that he "*would likely be exposed to questioning as to why*

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respect to the evidence of the non-executive directors who gave evidence ..." (emphasis added).

[9] Noting that a specific matter was not raised with Mr Willcox: LJ[1189] ABRed2/720G.

[10] Mr Morley: 4 days; Mr Brown: 5 days, Mr Gillfillan: 4 days; Ms Hellicar: 6 days, Mr Koffel: 3 days; Mr Willcox: 3 days.

[11] Mr O'Brien's grounds of appeal complained that the trial judge did not give proper reasons for rejecting their evidence (ABRed3/938O). This ground of appeal supported his claim for a new trial (ABRed3/940X).

it was still in such an immature state". This was not put to him, it is contradicted by the terms of his 7.24am email (ABBlu5/2085) which refers to him taking the version attached to the meeting, by his uncontested evidence as to the importance of the announcement[12] and by the fact it was to be and was released the following day.

Minutes (HS[39], [52], [53], [60]-[72], [82]-[83])

23. ASIC addressed the minutes at AS[80]-[91] and at [2]-[17] of its reply to Mr O'Brien's submissions. In addition it notes the following. First, HS[60]-[61] misstate the submission at AS[84]. Although the preconditions to the statutory presumption in s 251A(1) of the *Corporations Act 2001* (Cth) were not established, the requirements in s 251A(1) that minutes be kept of the "*proceedings and resolutions*" of directors of JHIL with penal consequences for non-compliance is a significant matter in assessing their importance as a company record. It can be expected this would have been understood by at least Messrs Shafron and Robb who both had legal training.[13]

24. Second, contrary to HS[65] (and HS[39]), the fact that drafts of the minutes were prepared in advance of the meeting and then amended after the meeting reinforces the accuracy of the Draft ASX Announcement Resolution. This is addressed at [3]-[10] of ASIC's reply to Mr O'Brien's submissions.

25. Third, the submission at HS[66]-[67] concerning the errors in the minutes (including the asserted error in relation to the "*tabling*" of the announcement) is addressed at AS[88]-[89] and at [2]-[17] (esp at [7]) of ASIC's reply to Mr O'Brien's submissions.

26. Fourth, HS[68] seeks to disavow any suggestion that the respondents' "*case*" involved Mr Robb "*knowingly or negligently allow[ing]*" false minutes to be circulated. However, given his involvement in their preparation as outlined at AS[81(a)], [81(c)], [85(a)] and CA[481] ABWhi/95.07[14] that is the necessary consequence of an acceptance of their "*case*". The submission in HS[69] is addressed at [17] of ASIC's reply to Mr Willcox's submissions.

27. Fifth, the evidence of Mr Morley in relation to the minutes is addressed at AS[91] and at [25] of ASIC's reply to Mr O'Brien's submissions (cf HS[70]). Nothing in HS[70] contradicts the submission made at AS[91] concerning the error of the Court of Appeal at CA[485] ABWhi/96.16 in criticising LJ[1199] ABRed2/722I.

28. Sixth, HS[82]-[83] address the evidence of the respondents in adopting the minutes. That evidence is addressed at [13]-[15] of ASIC's reply to the submissions of Mr Willcox.

BIL production (HS[73]-[74])

29. This is addressed at AS[127]-[136] and at [18]-[20] of ASIC's reply to Mr Terry's submissions.

Evidence of Messrs Brown and Koffel (HS[84]-[96])

30. ASIC addresses the evidence of Messrs Brown and Koffel at AS[110]-[126]. The respondents do not engage with the points raised at AS[115]-[117] and [118]-[123]. They

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[12] Baxter affidavit at [112] ABBlu10/4615M.

[13] Further, the comments of Young CJ in Eq in *Cordina Chicken Farms Pty Ltd v Poultry Meat Industry Committee* [2004] NSWSC 197 at [28] addressed at HS[63] are addressed at [18] of ASIC's reply to Mr Willcox's submissions.

[14] ie that on 30 March 2001 Mr Shafron sent Robb an email attaching a revised draft of the minutes (ABBlu7/2830-2838).

do not identify any submission to the trial judge that the slide presentation was the source of the statements accepted by Mr Brown as likely to have been made. Otherwise ASIC notes the following.

31. First, the distinct advantages enjoyed by the trial judge in considering this evidence are addressed at AS[114] and [125] (cf HS[86]).

32. Second, the passages from Mr Brown's cross-examination cited at HS[87] do not rebut ASIC's proposition (AS[117]) that Mr Brown had an actual recollection of the effect of what he was told, even if he could not recall the specific words stated. The first two references merely involve him stating that he did not have an "*explicit recollection*" of who spoke (and not what was spoken).[15] The next two references concern his not recalling the exact form of any document from which the message was sourced.[16] The fifth reference involves him not specifically recalling being advised in a board paper (not the board meeting) that work was being done on an announcement.[17] The sixth reference involves Mr Brown accepting that the words to the effect put to him by the questioner were spoken, but that he could not "*specifically recall*" the precise words spoken.[18] This is exemplified by the seventh and eighth references which are part of the same passage and partially extracted in HS[87]. A consideration of that answer and the next one[19] reveals that Mr Brown's attention was drawn to the fact that he was being asked about likelihoods, not possibilities. Consistent with his other answers, he recalled the effect of what was said but not the specific or exact words.

33. Third, once the Court of Appeal's analysis of Mr Brown's evidence is accepted as erroneous, that part of its reasoning noted at HS[94] (ie CA[427] ABWhi/87.15) falls away for the same reasons. In any event, the correlation that the trial judge found between these statements and the terms of the Draft ASX Announcement provide further support for a finding of approval based on the minutes and rebut the contention that the various other matters negate or detract from such a finding.

34. Fourth, HS[96] repeats the overstatement by the Court of Appeal of the extent of the trial judge's reliance on Mr Koffel's evidence (see AS[126]).

Evidence of Mr Willcox and Mr Morley (HS[97]-[103])

35. Like the other non-executive directors, Mr Willcox's evidence was rejected by the trial judge, and not resurrected by the Court of Appeal (see [17]-[21] above and [29]-[31] of ASIC's reply to Mr O'Brien's submissions). Mr Morley's evidence is addressed at [25]-[28] of ASIC's reply to Mr O'Brien's submissions.

Draft release a "*work in progress*" (HS[105]-[132])

36. These matters are addressed at AS[92]-[109]. ASIC makes the following further points. First, at 8.05am on 15 February 2001 Mr Robb's email to Mr Shafron stating "*Revised*

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[15] T2057/39-42 ABBla3/1338T-V; T2058/1-4 ABBla3/1339B-D.
[16] T2060/18-23 ABBla3/1341J-M; T2060/32-38 ABBla3/1341Q-T.
[17] T2063/17-22 ABBla3/1344J-L.
[18] T2070/17-23 ABBla3/1351K-M: "... *that to the effect that words along those lines were spoken - I don't specifically recall - but it would be in the context that the board understood ...*".
[19] T2072/5-2072/8 ABBla3/1353D-1353F: "*Q. "Likely" is the word. A. Likely. And I think there would have been a discussion of certainty and - but I cant' be explicit as to the exact way in which it was used*" (emphasis added).

minutes for your review"[20] was preceded by an earlier email on the morning of 14 February 2001[21] with a copy of the first draft.[22] Mr Robb was aware of the content of the minutes (cf HS[111]).

37. Second, nothing in HS[113]-[118] negates the submission made at AS[94] in relation to the procedure for post-meeting changes. Mr Baxter's evidence is summarised at CA[333] ABWhi/69.25 (and not CA[334] ABWhi/69.33 as stated at HS[114]). HS[114(a) and (b)] refer to pre-meeting procedures. HS[114(c)] misstates Mr Baxter's evidence[23] and the evidence referred to at HS[114(c) and (d)] does not contradict the procedure.

38. Third, contrary to HS[116], Mr Harman's evidence did not rebut the existence of this procedure. Mr Harman was JHIL's financial controller.[24] Mr Baxter was the executive responsible for announcements. As to Mr Willcox's evidence, that has been addressed above. His evidence of board processes was not inconsistent with the procedure. Whether that procedure was in fact complied with in the urgent circumstances on 15 February 2001, beyond obtaining Mr Macdonald's approval, is not known and does not matter.

39. Fourth, Mr Baxter's evidence was that significant non-financial announcements were dealt with at board level[25] and that he regarded this announcement as "*a very important matter within my area of responsibility*"[26] (cf HS[117]).

40. Fifth, the subsequent conduct of Messrs Harman, Shafron and the evidence of Mr Morley does not assist the respondents (cf HS[122]-[125]). The position of Mr Harman is addressed at AS[99] and at [22] of ASIC's reply to Mr O'Brien's submissions. The position of Mr Shafron is addressed at AS[98]. No attempt is made to reconcile this characterisation of Mr Shafron's conduct with his role in the drafting, amendment and approval of the minutes. The evidence of Mr Morley referred to at HS[125] is addressed at [9] of ASIC's reply to Mr Shafron's submissions.

41. Sixth, HS[131] misstates the point made in AS[107]. Messrs Cameron and Robb were entitled to and clearly did rely upon Mr Macdonald's statement about the lack of significance of the missing claims data at least to the claim that the MRCF was "*fully funded*". The terms of the conversation as recounted in Mr Cameron's statement to the Jackson Inquiry support this[27] and no change was made to that claim in the Final ASX Announcement. The Draft ASX Announcement was not substantially altered by Allens' annotations in contradiction of the respondents' contention that it was not approved because Messrs Cameron and Robb would have objected (cf HS[131]).

US respondents' notices of contention (HS[154]-[171])

42. There are a number of circumstances relevant to the respondents' contention that, even if the board passed the Draft ASX Announcement Resolution, Messrs Gillfillan and Koffel

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[20] ABBlu5/2102-2111; the fifth version referred to in Mr O'Brien's submissions at [18].
[21] ABBlu5/1928-1935; the fourth version referred to in Mr O'Brien's submissions at [17].
[22] ABB1u4/1824-1829.
[23] In the passage at T801/23-802/7 ABBla1/409M-410E Mr Baxter said that the changes made needed the approval of Mr Macdonald and discussion with others and that he was not sure whether the terms of the press release were "*set in stone*" (at line 40). He agreed that he "*couldn't have run that going behind the back of the directors, if they had set in stone the terms of the resolution*" (T802/3 ABBla1/410C).
[24] His evidence is addressed at AS[99] and at [22] of ASIC's reply to Mr O'Brien's submissions.
[25] Baxter affidavit at [11] ABBlu10/4596N.
[26] Baxter affidavit at [112] ABBlu10/4615M.
[27] ABB1u9/4247V-4248Q.

either did not vote in favour of the resolution or did not breach ss 180(1) of the *Corporations Act*. First, each of Messrs Gillfillan and Koffel (and the rest of the board) approved the minutes of the meeting of 15 February 2001 containing the Draft ASX Announcement Resolution without any amendment limiting or qualifying their role in approving the announcement. Second, as found by the trial judge (LJ[234] ABRed2/470M) and the Court of Appeal (CA[240] ABWhi/54.01), the practice of the board in relation to resolutions was that the chairman summarised a position and, absent voiced opposition by any director, that was taken as a unanimous resolution by the board. Both Mr Gillfillan and Mr Koffel specifically accepted that silence in response to a statement of consensus by the chairman constituted approval of a resolution.[28] Third, the board was forewarned in the board papers for the January 2001 board meeting that an announcement of the formation of the MRCF would be made after the February meeting if the proposal was accepted (LJ[225] ABRed2/468K; CA[84] ABWhi/22.09; ABB1u3/1297O). This was repeated in the board papers for the February 2001 board meeting (LJ[92] ABRed2/424R; CA[104] ABWhi/26.14); ABB1u4/1597G). Fourth, as found by the trial judge, the formation of the MRCF and the separation of Coy and Jsekarb from JHIL were "*potentially explosive steps*" (LJ[333] ABRed2/499N) and the Draft ASX Announcement was a "*key statement in relation to a highly significant restructure of the James Hardie group*" (LJ[260] ABRed2/479W). As found by the Court of Appeal, the board was aware of the importance of communication to stakeholders of sufficiency of funding of any separation proposal (CA[59]-[61] ABWhi/16.27-17.20). Fifth, in cross-examination each of Messrs Gillfillan and Koffel accepted that they understood that JHIL proposed to issue an announcement which addressed the sufficiency of funding if the meeting of the board decided to approve the separation proposal.[29] Sixth, they each accepted that they could have heard a discussion during the meeting of the fact that there would be an announcement about separation.[30]

43. In the event ASIC restores the approval finding then, together with the undisturbed findings of the trial judge, that would necessarily entail: (i) the Draft ASX Announcement being distributed to the board members physically present; (ii) there being a discussion about the document sufficient to bring it to the point of the chairman proposing a resolution in the usual manner; and (iii) the chairman then making that proposal. Mr Brown's exchange with Mr Macdonald concerned the promulgation by the company of messages of sufficiency of funding (CA[866] ABWhi/163.27).[31] Without any consideration of the "*correlation*" evidence of Mr Brown, this is sufficient for Messrs Koffel's and Gillfillan's attention to have been brought to the fact that the board was being asked to approve a highly important statement on asbestos separation and funding. In accordance with the accepted procedure for proposing resolutions, their silence, viewed objectively, amounted to their joining in the resolution. The subsequent approval of the minutes by the board confirms it considered it in that way. This would be more than sufficient to satisfy the premises underlying the Court of Appeal's conclusions at CA[855]-[856] ABWhi/161.32-47 (cf HS[157]).

44. This conclusion is only strengthened if, for the reasons submitted at AS[110]-[126] and above, the trial judge's correlation findings concerning Mr Brown's evidence is restored.

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[28] Gillfillan at T2392/7-36 ABB1a4/1658E-S; Koffel at T3316/4-18 ABB1a5/2523C-J.

[29] Koffel at T3409/19-34 ABB1a6/2614/K-R; Gillfillan at T2566/29-41 ABB1a4/1824O-U and T2611/38-42 ABB1a4/1869S-U.

[30] Gillfillan at T2612/7-11 ABB1a4/1870E-G; T2624/42-2625/10 ABB1a4/1882U-1883G; Koffel at T3409/36-40 ABB1a6/2614S-U and T3410/43-46; ABB1a6/2615V-X.

[31] LJ[149] ABRed2/449B. In cross-examination, Mr Brown stated that he understood Mr Macdonald's comments to be a reference to the "*press release statements and the statements that would go to the other interested stakeholders*" (T2046/18-20 ABBla3/1328K).

That would lead to an acceptance that the Draft ASX Announcement was "*spoke[n] to*" at the meeting, and either Mr Macdonald or Mr Baxter put the key messages to be communicated to the market set out in that document (LJ[223] ABRed2/467S; PJ[127] ABRed3/778K), and that discussion would have alerted Messrs Koffel and Gillfillan to the fact that the meeting was considering whether to approve an announcement to the ASX, a copy of which they did not have (PJ[61] and [127] ABRed3/761L and 778K).

45. HS[160] overlooks the third, fourth and fifth points in [42] above, and otherwise assumes that the correlation findings are not restored. Contrary to HS[161], even absent the correlation evidence, the matters noted in the previous paragraphs above would have been more than sufficient to bring to the attention of a director participating by telephone that an announcement was to be approved at a point no later than when the chairman sought the meeting's approval. In relation to HS[162], the findings at PJ[61] ABRed3/761L and PJ[127] ABRed3/778K were more than sufficient to result in an appreciation that the board was considering an actual document. Moreover CA[856] ABWhi/161.40 embraces the scenario whereby there should have been a realisation that the rest of the board had received a document they did not have at the time of the chairman putting the resolution (although the evidence suggests that it should have been earlier).

46. HS[163] submits that the silence of Messrs Koffel and Gilfillan could only constitute a vote on the resolution "*where all Board members had the necessary documents available to them and the substance of what was being proposed was clear to all*". The necessity for them to have a copy of the document is merely asserted. There is no reason in principle nor revealed by the practice of the company for them to have necessarily had a copy of the document before joining in a resolution concerning it. The various minutes that were tendered do not suggest that,[32] and neither of them stated that was their practice. The reference to the finding at LJ[232] ABRed2/470E overlooks the clarification of that finding at as explained at CA[850] ABWhi/160.45.

47. HS[164]-[167] postulate a speech that would have to have been given by the chairman before the silence of Messrs Koffel and Gillfillan could have amounted to a vote and, not surprisingly, HS[167] concludes by submitting that there was no evidence that it occurred. The submission wrongly asserts that a consideration of an announcement moved beyond the board papers and was otherwise unexpected, which it was not (see [42] above). HS[168] revives the spectre of Mr Robb's intervention, yet once again fails to confront how he could have been so involved in the minutes especially when they do not record non-participation by Messrs Gillfillan and Koffel. HS[169] is the only submission that attacks the finding of breach in the event that it is found that they did vote for the Draft ASX Announcement Resolution. It is addressed by the Court of Appeal's reasoning at CA[858]-[868] ABWhi/162.3-164.5.

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[32] ABBlu1/410-412; ABBlu2/697-700; ABBlu3/1122-1125; ABBlu3/1333.