



HIGH COURT OF AUSTRALIA

Public Information Officer

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JOHN DAVID RICH AND MARK ALAN SILBERMANN v AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Proceedings seeking an order disqualifying a person from managing corporations were proceedings for a penalty, so defendants could claim privilege against exposure to penalties to enable them to resist discovery of documents in pre-trial procedures, the High Court of Australia held today.

In civil proceedings in the New South Wales Supreme Court, ASIC, pursuant to the Corporations Act, sought declarations that Mr Rich and Mr Silbermann had contravened their duties as directors of One.Tel, orders that they pay One.Tel \$93 million in compensation, and orders disqualifying them from managing a corporation. ASIC also sought an interlocutory order that the pair make discovery of documents, but they contended that the material to be disclosed was covered by the privilege against exposure to penalties. Supreme Court Justice Robert Austin ordered Mr Rich and Mr Silbermann to hand over the documents and the NSW Court of Appeal by majority dismissed an appeal. Both Justice Austin and the Court of Appeal held that ASIC's proceedings were not penal and that disqualification orders were protective rather than punitive.

An appeal from Mr Rich and Mr Silbermann to the High Court was heard on 22 April. The Court, by a 6-1 majority, allowed the appeal with costs and ordered ASIC's application for discovery be dismissed. The Court's written reasons for judgment were handed down today.

ASIC had submitted that because no pecuniary penalty order was sought – only declarations of contravention, compensation orders and disqualification orders – Mr Rich and Mr Silbermann were not exposed to penalties. Mr Rich and Mr Silbermann argued the declarations of contravention and disqualification orders amounted to penalties or forfeiture within the meaning of the privilege to resist discovery of documents. The High Court accepted their argument.

The majority held that for ASIC to seek an order disqualifying persons from managing a corporation on the ground that they have contravened the law is to seek a penalty or forfeiture. The order is sought by a regulatory authority, it is founded on demonstration of a contravention of the law, it requires the vacating of office in a corporation, and it imposes a continuing disability for the duration of the order. The majority held that a distinction between “punitive” and “protective” purposes was unhelpful as disqualification may serve both. The question was not what purpose a disqualification order served but what was the nature of the order sought. Whether proceedings had a purpose of protecting the public was not determinative. Seeking to classify proceedings as either protective or penal invited error as the categories were not mutually exclusive and proceedings may bear several characters. Once it was determined that the proceedings exposed a person to penalty or forfeiture, the proper course was to refuse any order for discovery.

The civil proceedings brought by ASIC against the One.Tel directors remain on foot in the NSW Supreme Court.

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