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Court appealed from: New South Wales Court of Appeal
[2010] NSWCA 331

Date of judgment: 17 December 2010

Date of grant of special leave: 13 May 2011

The Respondents in matters numbered S175/2011 to S181/2011 ("the Respondents") were non-executive directors of James Hardie Industries ("JHI"). Mr Peter Shafron was JHI's joint secretary and general counsel.

It is uncontroversial that JHI was concerned about its liability arising from its manufacture and sale of asbestos. In February 2001 its board of directors decided to create a trust, the Medical Research and Compensation Foundation ("the Foundation"), and to vest in it both \$3 million and JHI's shares in two of its subsidiaries. The Foundation was intended to manage and pay out asbestos related claims made against the James Hardie Group. It was further decided that JHI and those subsidiaries would enter into a deed and covenant of indemnity. ASIC later commenced proceedings against the respondents, Mr Shafron (and a Mr Morley, JHI's chief financial officer), alleging a number of breaches of the *Corporations Act* 2001 (Cth) ("the Act") and the *Corporations Law* (Cth). ASIC alleged that the respondents had approved a draft announcement to the Australian Stock Exchange ("ASX") that gave the misleading impression that the Foundation was funded to meet all present and future asbestos related claims. ASIC also alleged that the respondents had breached the *Corporations Law* because of their belated disclosure of the indemnity arrangement to the ASX.

Justice Gzell found that the respondents, Mr Shafron (and Mr Morley) had breached the provisions of both the *Corporations Law* and the Act. His Honour also found that the evidence established ASIC's contention that the board approved the draft ASX announcement on 15 February 2001.

The respondents therefore knew (or should have known) that if JHI made a statement as to the adequacy of the Foundation's funding, it would be potentially exposed to an action for publishing false, misleading or deceptive statements. His Honour also found that Mr Shafron, by virtue of his role as general counsel, was an officer of JHI within the meaning of section 9 of the Act. He therefore had a duty to warn the board that the draft announcement to the ASX should not have been released. His Honour further found that Mr Morley had failed to discharge his duties to JHI and that that failure constituted a breach of section 180(1).

On 17 December 2010 the Court of Appeal (Spigelman CJ, Beazley & Giles JJA) unanimously allowed the Respondents' appeals. It also partially allowed the appeal and the cross-appeal with respect to Mr Shafron, while it dismissed the appeal and the cross-appeal by Mr Morley. Their Honours found that while ASIC did not have a duty akin to a prosecutorial duty to call witnesses, it still had an obligation to act fairly with respect to the conduct of the proceedings. The Court of Appeal also held that ASIC had not established that the respondents had approved the draft announcement at the board meeting on 15 February 2001. Accordingly, the declarations of contraventions against them could not stand.

The Court of Appeal also set aside Justice Gzell's declaration of contravention in relation to Mr Shafron. Their Honours did however find that he had breached his duty under section 180(1) of the Act by, inter alia, failing to advise the board on certain matters concerning the Foundation.

The grounds of appeal in S173/2011 include:

- The Court of Appeal erred in holding that the appellant was an officer of JHI within the meaning of section 9 of the *Corporations Law* and the Act, as a person who participated in making decisions that affected the whole or a substantial part of the the business of JHI

The grounds of appeal in S174/2011 to S181/2011 include:

- The Court of Appeal erred in concluding (at [775] –[777], also at [794] – [795]) that, as a regulator with various statutory functions and duties, the appellant was obliged to call a particular witness or witnesses pursuant to an obligation of fairness.

In each of the matters numbered S175/2011 to S181/2011, the respondents have filed a notice of contention.