

Directors & Officers Alert December 2010

James Hardie directors win appeal

Seven former James Hardie directors today won appeals to overturn bans and fines applied in April 2009.

In *Morley & Ors v Australian Securities and Investments Commission* [2010] NSWCA 331, Spigelman CJ, Beazley and Giles JA this morning found that ASIC failed to make its case against the directors for approving a “false and misleading” market announcement about a compensation fund for asbestos victims in 2001. The press release claimed that a foundation for asbestos victims was “fully-funded”. Two years later, James Hardie revealed an \$800 million shortfall in the fund.

The Appeal reverses the decision of Gzell J in April 2009 that the entire Board of Directors breached their duties of care and diligence under section 180(1) of the *Corporations Act 2001* (Cth). Gzell J banned each of the seven directors from serving on a board in Australia for 5 years and fined each director \$30,000. More importantly, the decision restores the directors’ reputations and marks the end of a long-running whirlwind of litigation.

Former CFO Peter Shafron, who was banned for 7 years and fined \$75,000, partially succeeded in his appeal, although two breaches of director’s duties have been upheld against him for failing to properly advise the Board. General Counsel/Secretary Phillip Morley’s appeal is still being decided. Former CEO Peter Macdonald did not appeal his 15 year ban and \$350,000 fine.

Their Honours rejected Gzell J’s reasoning that if the Draft ASX Announcement was discussed at the relevant board meeting, it could only have been for the purpose of the board approving the release of the announcement. Instead, they found that even if it was before the meeting and was considered, it was not necessarily tabled, distributed and approved by a resolution of the board.

The board papers did not include a draft news release, which was substantially changed after the meeting, and was at that point in time yet to be approved by external advisers. Accordingly,

“there was a sound basis for concluding that, in the unusual circumstances of “a last minute affair”, any distribution and discussion of a draft news release was to inform the board of the work in progress, as part of explaining the communication strategy, but with the ASX announcement to be finalised by management following consideration by the advisers.”

Spigelman CJ, Beazley and Giles JA held:

“The contraventions rested upon voting in favour of the Draft ASX Resolution. We have found that ASIC failed to prove its case in that respect. For that reason, the declarations of contravention cannot stand, and must be set aside.”

ASIC has been ordered to pay the successful directors’ costs of the appeal. ASIC will have 28 days to seek special leave to appeal to the High Court.

The decision is a reminder of the necessity of keeping accurate and reliable records of all board meetings, discussions about key decisions (especially market and other public announcements) and individual records by directors of their decision-making to answer any questions about their involvement in a decision and, as in this case, whether a decision has even been made.

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