

ASIC played by the rules. But the court rewrote them
by Tony D'Aloisio, ASIC Chairman

There has been criticism of the Australian Securities and Investments Commission following the Court of Appeal's decision in the James Hardie case last Friday.

Some commentators have questioned the way in which ASIC conducted the trial, which concerned the approval of the draft ASX release by non-executive directors.

Let me assure you that ASIC, as a Commonwealth agency, conducted the case as a model litigant under the Legal Services Directions. It used external lawyers and experienced Counsel. It complied with rules of fairness in accordance with the case law as it stood prior to the Court of Appeal's decision.

The Court of Appeal referred to earlier authority that in the absence of a prosecutorial duty, ASIC is not under a duty to call any particular witnesses. However, it held that there could be a "middle ground" - the possibility that failure to call a witness can breach the obligation of fairness.

The Court of Appeal's judgment extends the duty of fairness on a public body in a civil case.

Let me elaborate and explain the Court of Appeal's findings for the non-executive directors.

The draft ASX release in question related to the establishment of the Medical Research and Compensation Foundation, to be established by JHIL for the benefit of claimants suffering from asbestos-related diseases. The draft ASX release (this was a market announcement, not a mere media release) included a statement about the sufficiency of funding.

The trial judge found that the former non-executive directors had approved the draft release at a meeting of 15 February 2001, that it was misleading and that in approving it they had breached section 180(1) of the Corporations Act.

The Court of Appeal overturned the finding that the former non-executive directors approved the draft release but agreed that it was misleading. It agreed that had the former non-executive directors approved it, then they would have been in breach of section 180(1) – a significant finding for corporate governance.

The real point of difference between the trial judge and the Court of Appeal was whether ASIC had proved that the former non-executive directors approved the draft ASX release. ASIC relied on a range of evidence, including:

- the minutes of the 15 February board meeting, which contained a resolution that the board had approved an ASX release. They were signed as a correct record by JHIL's then chairman;
- that each of the seven former non-executive directors received copies of the minutes of the 15 February 2001 meeting in draft, and six of them attended the meeting of JHIL in April 2001, which adopted those minutes as a correct record of the board meeting on 15 February 2001;
- a draft of the minutes recording the fact that the board had approved a release was also sent out to the former legal adviser after the 15 February 2001 meeting;
- the then CEO's memorandum dated 13 December 2000 to the directors, which included a statement to the effect that management would seek approval at the January 2001 board meeting to create a trust and that press releases would explain this;

- the email of 15 February, 2001 at 7.24am of Mr Baxter, JHIL's then senior vice president, corporate affairs, stating that he would take the version of the draft ASX release attached to his email to the board meeting;
- Mr Baxter's evidence as to his usual practice and the fact that he had taken a particular version of the draft release with him for circulation at the board meeting;
- the content, in part, of the board papers of 17 January and 15 February 2001;
- the production by BIL Australia Pty Limited and by Allens (JHIL's then lawyers) of the same version of the draft release that Mr Baxter said in his evidence he took with him to the board meeting;
- the 2004 declarations of some of the former non-executive directors.

In the conduct of the case before the trial judge, ASIC, aware that the safest path to a fair outcome is fair procedure, acted with complete propriety and ensured that fair procedure was met in its conduct of the trial. ASIC:

- met a strict timetable to achieve efficient disposition of the proceedings;
- made available all statements (or lists of topics) of witnesses it intended to call in its case.

ASIC did not call the former legal adviser. At that time, ASIC did not understand that it had a duty to call any particular witness as now enunciated by the Court of Appeal.

At the trial ASIC did, however:

- provide the draft witness statement of the former legal adviser to all defendants after it became available to ASIC, having decided not to call him;
- subpoenaed a number of witnesses, including the former legal adviser, and invited the defendants to rely on the relevant subpoena if they wished to call him as a witness.

The trial judge reached the view that the non-executive directors had approved the draft ASX release, notwithstanding the absence of evidence from the former legal adviser. The trial judge weighed up the evidence, with the benefit of hearing evidence from some of the defendants, and reached the view that the draft ASX release had been approved by the non-executive directors.

The Court of Appeal differed from the trial judge.

It found that there was some basis for finding that there had been approval of the release. However, what persuaded it to conclude that ASIC had not discharged its burden of proof, was that ASIC should have called the former legal adviser.

What in effect the Court of Appeal is saying is that there is a possibility that failure to call a witness can breach the obligation of fairness. Up to that point, there had been no case in which the failure to call a witness constituted a breach of the obligation to act fairly. To understand the difference between the trial judge and the Court of Appeal on this, it is important to make these additional points:

- These are civil penalty proceedings and not criminal proceedings. In criminal proceedings, a prosecutorial duty exists. Both the trial judge and the Court of Appeal held that in civil penalty proceedings ASIC is not under such a duty.

- Significantly the Court of Appeal also expressly acknowledged earlier Court authority that, in the absence of a prosecutorial duty, ASIC is not “*under a duty ... to call any particular witnesses*”. The Court of Appeal, however, took the “*middle ground*” – an obligation of fairness which required, in the particular circumstances of this case, that the former legal adviser should have been called.

As can be seen from this description, this is a case where two courts have taken different views.

ASIC at all times has acted properly in the conduct of this case and in accordance with the case law as it then stood. The fact that the Court of Appeal, in contrast to the trial judge, came to a different view in relation to the calling of the former legal adviser does not affect the propriety of ASIC having commenced and continued these proceedings. ASIC relied on the material set out above, including the minutes that were approved,

And ASIC rejects any suggestion that it did not have a proper basis to commence or continue the proceedings.

As ASIC explained when launching these proceedings, they raise important issues of corporate governance and it was in the public interest to bring the action.

ASIC is considering whether it will seek special leave to appeal to the High Court of Australia.

Date: 20 December 2010