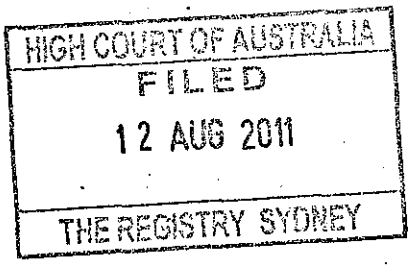
ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S174 of 2011

BETWEEN



AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

PETER JAMES SHAFRON
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

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

2. Mr Shafron's submissions (**SRS**) distill and restate various points made by the other respondents. However, they do not address any part of ASIC's submissions which point to his intimate involvement in the drafting, revising, distribution and approval of the minutes of the JHIL board meeting on 15 February 2001 as proof of conduct on his part and others in relation to the passing of a resolution approving the Draft ASX Announcement.

"*Part IV: Facts*" (SRS[4]-[13])

3. Under the heading, "*Part IV: Facts*", SRS make various submissions which extend beyond the findings of the Court of Appeal and the trial judge. In reply ASIC makes eight points.

4. First, SRS[8(a)] addresses aspects of Mr Baxter's evidence. His evidence that he had "*no actual recollection of taking a draft news release*" to the 15 February 2001 board meeting needs to be considered with his evidence that it was his usual practice to distribute hard copies to each member of the board and others present, as recorded at CA[360] ABWhi/73.49,[1] together with his 7.24am email recording his intention to take the Draft ASX Announcement to the meeting.[2] Further, it is not correct that Mr Baxter did not have any recollection of "*anything at all*" about the meeting.[3]

5. Second, SRS[9(a)] omits to note that the Court of Appeal did not overturn the trial judge's distribution finding and specifically upheld the finding that the Draft ASX Announcement was distributed to Messrs Robb and Cameron at the meeting (CA[383] ABWhi/78.20). A complete description of the Court of Appeal's reasoning on this topic is set out and addressed in ASIC's submissions filed on 23 June 2011 (**AS**) at [127]-[136].

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[1] At [112] of his affidavit (ABBlu10/4615M) Mr Baxter stated that he had no reason to believe that he departed from his usual practice of distributing copies at the meeting.
[2] ABBlu5/2085-2087.
[3] See LJ[140] ABRed2/446; LJ[195] ABRed2/460U; Baxter affidavit at [100]-[104] ABBlu10/4613K-4614F.

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6. Third, SRS[9(b)(i)] asserts, inter alia, that the Court of Appeal found that the minutes, being (initially) drafted before the meeting "*did not record the reality of what had occurred*" citing CA[494] ABWhi/98.05. However, CA[494] ABWhi/98.05 only records a submission to that effect, and not a finding. The minutes are otherwise addressed at AS[80]-[91] and at [2]-[17] of ASIC's reply to Mr O'Brien's submissions.

7. Fourth, contrary to SRS[10(b)], the Court of Appeal did not rely on the comment in Mr Baxter's 7.24am email that "*no doubt we can refine later*"[4] as negating approval (cf SRS[10(b)]).

8. Fifth, SRS[10(d)] addresses the position of Mr Shafron in the period following the meeting. Contrary to what SRS[10(d)(ii) and (iii)] appear to imply, the Court of Appeal did not find at CA[337] ABWhi/70.01 that Mr Shafron's request late on 15 February 2001 for a "*soft*" copy of the Draft ASX Announcement[5] meant that he had not received a copy at the meeting. Further, to the extent that the Court of Appeal did find that Mr Shafron's conduct post the meeting suggested that he "*appear[ed] to have thought that the news release was a work in progress*" then that is addressed in AS[98]. Mr Shafron has not addressed that contention.

9. SRS [10(d)(v)] refers to evidence of a conversation that Mr Morley said he had had with Mr Shafron on 16 February 2001. This evidence was subject to attack in cross-examination[6] and submissions.[7] The trial judge did not make any finding accepting it. In the absence of any ground of appeal seeking its acceptance the Court of Appeal could not have, and did not, make any finding accepting it. In any event, it takes the matter nowhere. This aspect of the conversation as recounted by Mr Morley was not directed to Mr Shafron's state of mind concerning the Draft ASX Announcement, but to the Final ASX Announcement. It was consistent with board approval of the Draft ASX Announcement and Mr Macdonald's approval of the Final ASX Announcement incorporating changes to the Draft ASX Announcement (without changing its meaning). Moreover, this submission ignores Mr Shafron's subsequent (and prior) conduct in relation to the drafting, amendment and approval of the minutes.

10. Sixth, SRS[11] does not accurately record the Court of Appeal's reasoning. The Court did not draw a conclusion adverse to ASIC and then consider it fortified by the failure to call Mr Robb. Instead, it concluded in an overall sense that ASIC's case "*suffer[ed] in its cogency*" by reason of the failure to call Mr Robb in circumstances where the "*obligation of fairness*" required it to do so (CA[756] ABWhi/141.13).

11. Seventh, aspects of the circumstances recounted in SRS[11] concerning the announcement of the decision not to call Mr Robb need to be clarified:

    (a) on 8 September 2008, ASIC was advised of the relaxation by JHINV and ABN60 of a duty of confidentiality said to be owed to them by the Allens witnesses[8] and which had been invoked to prevent them conferring with ASIC. ASIC could not use its powers in s 1317R(1)(a) of the *Corporations Act 2001* (Cth) to require Mr Robb to assist it with the proceedings because he was or had been a lawyer for one or more of

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[4] To the contrary, this is the email in which Mr Baxter announced his intention to take the Draft ASX Announcement to the board meeting (CA[207] ABWhi/45.46).
[5] ABBlu5/2162.
[6] T1599/20-1601/44 ABB1a2/919K-921V.
[7] ABBla8/3526E.
[8] ABBlu12/5224-5225.

the defendants (s 1317R(5)). The statement at the directions hearing on 22 September 2008 that ASIC was receiving "*exemplary cooperation*" needs to be considered in that context (cf SRS[11(e)]);[9]

(b) on 8 October 2008, ASIC's senior counsel informed the court that ASIC was "*fast running out of witnesses ... a bad thing in terms of timetabling*", that the delay in obtaining an affidavit from Mr Robb had caused ASIC to consider whether the Allens witnesses were truly part of ASIC's case in chief and that the defences were being reviewed to ascertain whether any defendant raised a positive defence of reliance on Allens' advice. The Court was informed that ASIC intended to make a final decision as to whether the witnesses were needed at all by the end of the day;[10]

(c) on 9 October 2008, when ASIC wrote to the other parties indicating that it did not propose to call Mr Robb, it offered to stand over the subpoena directed to him so that "*if any defendant wishes to call any of these witnesses, our client is happy to facilitate their attendance via the subpoena issued at its request*" (cf SRS[11(i)]);[11]

(d) on the same day, ASIC was served with a notice to produce but it was not made returnable until 13 October 2008. On that day, ASIC claimed privilege over its production and argument on the privilege was stood over;[12] and

(e) on 21 October 2008, ASIC waived any privilege that it had and consented to all defendants having access to the draft of Mr Robb's statement (CA[662] ABWhi/124.31).[13]

12. Each of ASIC and the respondents had access to Mr Robb's draft statement. Each of them had the means to secure his attendance at Court to give evidence, if necessary. There was evidence that prior to 8 September 2008 JHIL/JHINV had insisted on a duty of confidentiality from Mr Robb that prevented him from voluntarily disclosing material to ASIC. ASIC could not exercise its power under s 1317R to require Mr Robb to assist it. Although the Court of Appeal acted on the basis that from October 2008 Mr Robb was not willing to meet with the legal representatives of the respondents (CA[669] ABWhi/125.25), there was no evidence or even assertion by the respondents that they had not been able to confer with Mr Robb prior to 8 September 2008, when JHINV's and JHIL's insistence on his duty of confidentiality had prevented him from conferring with ASIC.

13. Eighth, SRS[13] seeks to overturn the trial judge's finding as to a conversation that occurred on the morning prior to the 15 February 2001 meeting involving Messrs Macdonald, Shafron, Robb and Cameron (LJ[328]-[329] ABRed2/497U-498R). None of Mr Shafron's grounds of appeal to the Court of Appeal sought to overturn that finding.[14] The Court of Appeal did not overturn it and, to the contrary, acted on the basis that it had occurred (CA[343] ABWhi/71.26). Mr Shafron has not filed any notice of contention concerning it in this Court. The conversation confirms the familiarity of all of the participants, including Messrs Shafron and Robb, with the use of the phrase "*fully funded*" in describing the position of the MRCF.

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[9] ABBla1/2P.
[10] T526/7-527/4 ABBla1/218; in part extracted at CA[657] ABWhi/123.27.
[11] ABBlu12/5309-5310.
[12] T602/9-41 ABBla1/219F-U.
[13] T998/1-8 ABBla2/476B-F.
[14] ABRed3/963-965.

"*Part VI: Argument*" (SRS[15]-[22])

14. Mr Shafron's argument at SRS[15]-[22] involves a distillation and restatement of various points made in the submissions of the other respondents.

15. First, Mr Shafron contends that the absence of Mr Robb engaged the principles in *Blatch v Archer*[15] independent of any reasoning based upon the obligation of fairness. This is addressed in ASIC's reply to the submissions of Ms Hellicar and Messrs Brown, Gillfillan and Koffel at [2]-[13].

16. Second, Mr Shafron appears to contend that the Court of Appeal found that those principles were engaged independent of any reasoning based upon the obligation of fairness (SRS[17(f)]). This was addressed in ASIC's reply to Mr Terry's submissions at [2]-[6].

17. Third, Mr Shafron appears to contend that any inferences that flowed from the failure to call Mr Robb did not explain the Court of Appeal's overturning of the trial judge's approval finding (SRS[21]). This is completely inconsistent with the findings at CA[789]-[796] ABWhi/146.26-147.45, especially CA[789] ABWhi/146.26 and CA[796] ABWhi/147.41. The Court of Appeal did not conclude that ASIC had failed to discharge its burden and then draw comfort from the absence of Mr Robb. In the face of the minutes, it could not, and did not, purport to reason that way. Instead, it concluded that overall ASIC's case suffered in its cogency from its failure to call Mr Robb.[16]

18. Fourth, the application of the United States "*missing witness*" doctrine would not assist any of the respondents. The doctrine is only to be invoked "*if a party has it peculiarly within his [or her] power to produce [the] witnesses*" (*United States v. Mahone*, 537 F.2d 922, 926 (7th Cir.) (1976) (***Mahone***), cert. denied, 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 627 (1976) (quoting *Graves v. United States*, 150 U.S. 118, 121; 14 S.Ct. 40, 37 L.Ed. 1021 (1893); *McCormick on Evidence*, 6th ed, 2009, §264). This can be satisfied by either party proving that the missing witness is peculiarly within the other party's power to produce (*US v Rollins and Slaughter* 862 F. 2d 1282 (1988) (***Rollins***) at 1297 (7th circuit) cert. denied *Slaughter v. U.S.*, 490 U.S. 1074, 109 S.Ct. 2084, 104 L.Ed.2d 648 (1989), citing *Mahone*, 537 F.2d at 926). This was not met in this case as Mr Robb was able to be called on subpoena by either party. Alternatively, the party seeking a missing witness instruction to a jury "*can demonstrate that because of the witness' relationship with the opposing party, his or her testimony is, in pragmatic terms, only available to the other side*" (*Rollins* at 1297, emphasis added, citing *Yumich v. Cotter*, 452 F.2d 59, 64 (7th Cir.1971), cert. denied, 410 U.S. 908, 93 S.Ct. 955, 35 L.Ed.2d 269 (1973) and *Mahone* at 926-927). Thus in *Yumich* the missing witnesses were employed police officers and in *Mahone* a State police officer "*closely associated with the federal government and [who] had a strong personal interest in the success of the prosecution*" (*Rollins* at 1298). The mere fact that a witness would not confer with the lawyers for one party but would confer with the other does not of itself appear to be sufficient to invoke the doctrine (see, for example, *Bing Fa Yuen and Anor v State of Maryland*, Court of Special Appeals of Maryland, 403 Md App 109, 112; 403 A 2d. 819 Md. App., 822-823 (1979) cert. denied *Shui Ping Wu v. Maryland*, 444 U.S. 1076, 100 S.Ct. 1024, 62 L.Ed.2d 759 (1980); see also *US v Torres & Ors* (2nd circuit) 845 F.2d 1165 at 1169-1170 (1988)).

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[15] [1774] EngR 2; (1774) 1 Cowp 63; (1774) 98 ER 969.
[16] CA[678] ABWhi/126.21; CA[756] ABWhi/141.13; CA[777] ABWhi/144.28.

Dated: 12 August 2011

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