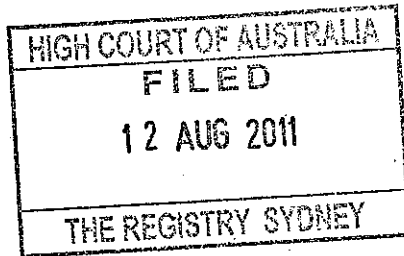


ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S181 of 2011

BETWEEN



AUSTRALIAN SECURITIES AND
INVESTMENTS COMMISSION
Appellant

and

PETER JOHN WILLCOX
Respondent

APPELLANT'S SUBMISSIONS IN REPLY

1. These submissions are in a form suitable for publication on the Internet.
2. Mr Willcox's submissions (WS) reveal that it is the respondents who sought the drawing of inferences concerning Mr Robb's conduct, and not ASIC. ASIC only points to Mr Robb's conduct, especially in relation to the minutes, as a rejoinder to the conjecture or speculation by the respondents that his conduct was inconsistent with board approval.

Submissions of other parties

3. Mr Willcox's submissions adopt (and in some respects repeat) the submissions of:
 - (a) Mr Terry in relation to the duty of fairness (WS[8]). These are addressed in ASIC's submissions filed on 23 June 2011 (AS) at [34]-[76] and at [26]-[45] of ASIC's reply to Mr Terry's submissions; and
 - (b) the submissions of Ms Hellicar and Messrs Brown, Gillfillan and Koffel (**Hellicar respondents**), Mr O'Brien's submissions and Mr Terry's submissions in relation to *Blatch v Archer* (WS[8]).¹ These are addressed at [3]-[13] of ASIC's reply to the Hellicar respondents' submissions.
4. WS[14] asserts that the principle in *Blatch v Archer* is engaged by the mere availability of a witness to "*shed light on some matter in issue*". This is an incorrect statement of the principle. It is addressed at [11] of ASIC's submissions in reply to the Hellicar respondents.
5. Further, WS[31] appears to submit that the Court of Appeal's reasoning did not depend on its finding concerning the "*obligation of fairness*" and rests upon a "*conventional restatement*" of the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and *Blatch v Archer*. WS[39] appears to suggest that the latter was at least an independent basis for the Court of Appeal's reasoning. This is incorrect for the reasons set out at [2]-[6] of ASIC's reply to Mr Terry's submissions.

¹ [1774] EngR 2; (1774) 1 Cowp 63; (1774) 98 ER 969.

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The significance of the absence of Mr Robb (WS[10], [14], [22]-[25], [37]-[39])

6. Mr Willcox contends (at WS[10]) that, in submitting that it has discharged its onus, ASIC submits that the "*following inferences*" should be drawn, and refers to various parts of AS. He refers to some of these extracts again at WS[22]. Repeatedly, he asserts throughout his submissions that these "*inferences*" were a necessary part of ASIC's case (eg WS[37]) and that it cannot prove them in the absence of calling Mr Robb.
7. This contention inverts the true position in that, with one exception, it is the respondents who need to speculate and, if necessary, draw inferences about Mr Robb's conduct, and not ASIC. Other than the precise identity of which draft was before the meeting, ASIC's case on tabling and approval was proved by the minutes. To prove which draft was before the meeting, ASIC relied on Mr Baxter's evidence. Support for that evidence derived from BIL's production of the Baxter 7.24am draft. Cumulative support derived from the production of the same draft by Allens (see AS[129]-[133]). On the basis of that evidence, the trial judge and the Court of Appeal concluded that that draft was taken to the meeting (LJ[201] ABRed2/462U; CA[383] ABWhi/78.20) and that conclusion is not now challenged by any respondent. Beyond this it is Mr Willcox who speculates and proffers inferences about Mr Robb's conduct. Mr Willcox engages in conjecture as to how he could have allowed such an announcement to be approved when it had not been vetted by advisors, including Mr Robb, prior to the meeting and was so unequivocal about funding (WS[28(2)], [30]). Mr Willcox also speculates as to how or why Mr Robb made handwritten annotations on the announcement if it was approved (WS[28(4)], [30], [31]).
8. It is only in answer to the respondents' conjecture about Mr Robb's conduct that ASIC points to the matters identified in the extracts from its submissions set out at WS[10] (and in part repeated at WS[22]). The passages from ASIC's submissions cited in WS[10(a)] and [10(b)] address the respondents' submissions and the Court of Appeal's reasoning about the absence of pre-vetting of the Draft ASX Announcement. The passages from ASIC's submissions cited in WS[10(c)] and [10(d)] concern the respondents' submissions and the Court of Appeal's reasoning concerning the conversation between Messrs Robb, Shafron, Macdonald and Peter Cameron as constituting some reason why Mr Robb would not have spoken up about the announcement. The passages from ASIC's submissions cited in WS[10(e)] and [10(f)] address the respondents' submissions and the Court of Appeal's reasoning about the effect of Mr Robb's annotations on the Draft ASX Announcement as detracting from board approval. The passages from ASIC's submissions cited at WS[10(g)] and [10(h)] concern Mr Robb's role in relation to the minutes (and thus negate the conjecture of the respondents that other aspects of his conduct detract from the accuracy of the approval recorded in the minutes).
9. This is exemplified by the conclusion at WS[37], where Mr Willcox contends in relation to the inferences ASIC is said to seek that "*[t]he inferences were a necessary part of ASIC's case for two reasons. First, the inferences regarding Mr Robb's conduct before and after and after the meeting in relation to the draft minutes were necessary to support ASIC's contention that its case was proved by the minutes.*" It was not, and is not, a necessary part of ASIC's case to draw any inference in relation to Mr Robb and the draft minutes. The accuracy and reliability of the minutes does not depend upon drawing any inference concerning Mr Robb's conduct. ASIC does, however, invoke Mr Robb's conduct in relation to the draft minutes by way of rejoinder to the respondents' (and the Court of Appeal's) conjecture that other aspects of his conduct tended against there being an approval as recorded in the minutes. Properly analysed, it is the respondents who seek the drawing of inferences concerning Mr Robb's conduct negating approval.

10. This is made even clearer by the next statement in: WS[37] that "*[s]econdly, inferences regarding Mr Robb's conduct in suggesting changes to the Draft ASX Announcement were necessary for ASIC to explain away a fact that the respondents contended was inconsistent with Resolution [sic] being passed: that changes were made to the Draft ASX Announcement after the board meeting.*" It is a "fact" that changes were made to the Draft ASX Announcement after the board meeting. However it is not a "fact" that Mr Robb "suggested changes" to the Draft ASX Announcement: that was an inference for which the respondents contend. Moreover, as the sentence reveals, it is the respondents who contend that fact is inconsistent with board approval. This is all inference, conjecture and surmise on their part. It is not a necessary part of ASIC's case.

The minutes (WS[16]-[27])

11. Mr Willcox addresses the minutes at WS[16]-[27] in an endeavour to establish that ASIC faces difficulties in relying upon them, such that it is forced to "*attribute significance to Mr Robb's conduct in the preparation and approval of the minutes*" (WS[22]). This approach misstates the position and is addressed above. In relation to the balance of the points made concerning the minutes at WS[16]-[27], ASIC makes 6 points.
12. First, the "*numerous errors*" in the minutes referred to at WS[19] were addressed at AS[80]-[91] and at [13]-[17] of ASIC's reply to Mr O'Brien's submissions.
13. Second, WS[20] addresses the evidence of the non-executive directors concerning the minutes. The findings of the trial judge at LJ[1193]-[1203] ABRed2/720T-723F (together with LJ[1150]-[1151] ABRed2/712R-V) address the receipt and consideration of the minutes by the board and whether it can be expected that they would have noticed the Draft ASX Announcement Resolution and objected if it recorded an event that did not occur (cf HS[72]). The trial judge concluded at LJ[1203] ABRed2/723B that "*[o]n each occasion when one would have expected the non-executive directors to challenge statements if their contention [as to tabling and approval] was true, they have professed ignorance of the statements that should have caused them to complain. This was one such occasion. I do not accept that not one of the non-executive directors who gave evidence was aware of the recorded resolution in the draft minutes approving the Draft ASX Announcement.*"
14. Consistent with this, the process of review described by each of the non-executive directors (other than Mr Koffel) was one that would not necessarily identify the inaccuracies in the minutes as found by the trial judge, but would result in them noticing the Draft ASX Announcement Resolution with its bold heading, as that would be apparent even on a scan of the minutes (CA[496] ABWhi/98.25). Mr Gillfillan said he would "*review the draft board minutes briefly to ensure that the main topics discussed in a previous board meeting were covered*" (ABBlu13/5790M). Ms Hellicar said that, in relation to the "*lawyers' section*", she would "*review*" and "*skim through*" the minutes (ABBla5/2109P-W). Mr Brown said that he would "*read the minutes and generally reflect upon them as to whether that accurately recorded what was in the board meeting and agree with the minutes if that was the case*" (ABBla3/1094Q-R). As noted by the trial judge at LJ[1198] ABRed2/722D, Mr Willcox's "*normal practice was to read minutes to assure him that the essence of major decisions had been recorded. He said he did not recall seeing anything in the minutes so badly misleading that he had cause to do anything about it.*"
15. Third, WS[21] refers to the evidence of Mr Willcox which is said to be "*unchallenged*". The rejection by the trial judge of the non-executive directors' evidence, to the extent that

they disputed tabling and approval of the Draft ASX Announcement, and its non-disturbance by the Court of Appeal is addressed at [18]-[21] of ASIC's reply to the Hellicar respondents' submissions. Further, the critical parts of Mr Willcox's evidence were "*challenged*". It was suggested to him that he read the draft minutes of the 15 February 2001 board meeting and raised no objection because a draft release was before the board at that meeting² and that the reference to the announcement in the minutes accorded with his recollection at the time.³ Moreover, his assertion that the contents of various resolutions that were put to the board were not read out was vigorously challenged.⁴

- 10 16. Fourth, in relation to WS[24], Mr Robb was an attendee at the meeting. At the very minimum, he can be taken to be aware that minutes should accurately reflect the "*proceedings and resolutions*" of the meeting (s 251A(1)) and would advise against approving minutes that were inconsistent with his own knowledge of what occurred (bearing in mind the respondents' contention that his annotations on the Draft ASX Announcement reflect an understanding on his part that an announcement was not approved by the board).
- 20 17. Fifth, the bill referred to in WS[25] needs to be considered with the emails sent to and from Mr Robb in the period of the bill (5 February 2001 to 27 March 2001) concerning the minutes.⁵ On 7 February 2001, Mr Robb was copied in on email from an employed solicitor of Allens to Mr Shafron attaching a draft of the minutes (ABB1u4/1824-1829). On 14 February 2001, Mr Robb sent an email to Mr Shafron attaching a revised draft of the board minutes (ABB1u5/1928-1935). On 15 February 2001, Mr Robb sent Mr Shafron an email stating "*[r]evised minutes for your review*" and attaching revised minutes (ABB1u5/2102-2111). (Further, on 30 March 2001, Mr Shafron sent Mr Robb an email attaching a draft of the minutes, noting "*they have not been confirmed by the Board yet*" and asking Mr Robb whether they should be disclosed to the MRCF.⁶) It is unlikely that Mr Robb did not charge for the work he undertook on the minutes as revealed in the emails, nor is it likely that he falsely charged for settling "*board minutes*".⁷
- 30 18. Sixth, WS[27] refers to *Cordina Chicken Farms Pty Ltd v Poultry Meat Industry Committee* [2004] NSWSC 197 at [28] out of context. In *Cordina*, the evidence of the chairman as to the committee's discussions was called, not to contradict the minutes and prove that a resolution was or was not passed, but to supplement the minutes and rebut an allegation that they took into account irrelevant considerations and acted for an purpose ulterior to the statute (*Cordina* at [24]-[29]).

Evidence said to detract from an inference that the resolution was passed (WS[28]-[36])

- 40 19. WS[30]-[36] address and repeat the respondents' contention that the post-meeting changes and the handwritten comments of Mr Robb on the Draft ASX Announcement were inconsistent with, or weighed against, board approval. These have been addressed at AS[92]-[109], at [37]-[41] of ASIC's reply to the Hellicar respondents' submissions and at [18]-[20] of ASIC's reply to Mr O'Brien's submissions.

² T3757/17-23 ABB1a6/2937J-M.

³ T3757/33-35 ABB1a6/2937R-S.

⁴ T3726/19-3727/35 ABB1a6/2906J-2907R.

⁵ ABB1u4/1824-1829; ABB1u4/1838-1839; ABB1u5/1928-1935; ABB1u5/2102-2111.

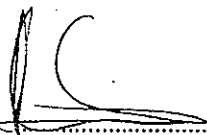
⁶ CA[480] ABWhi/95.01; ABB1u7/2830-2838.

⁷ ABB1u7/2826-2829.

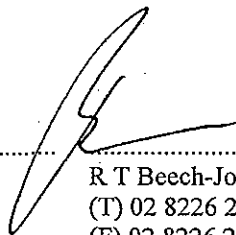
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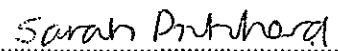
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