ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

On appeal from a decision of the New South Wales Court of Appeal

No. s176 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MEREDITH HELLICAR** Respondent	No. s177 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MICHAEL ROBERT BROWN** Respondent
No. s178 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MICHAEL JOHN GILLFILLAN** Respondent	No. s179 of 2011 **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** Appellant **MARTIN KOFFEL** Respondent

RESPONDENTS' SUBMISSIONS

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Part I: Publication of Submissions

1. These submissions are filed on behalf Ms Hellicar and Messrs Brown, Gillfillan and Koffel (the **"Respondents"**) in a form suitable for publication on the internet.

Part II: Issues Arising in the Appeal

2. The Respondents agree with the issues identified by the Appellant in its written submissions dated 23 June 2011 ("**AS**") save for the following. *First*, issue (b) should be framed more generally and in the following terms:

   (b) whether the New South Wales Court of Appeal erred in concluding that the failure by ASIC to call certain witnesses attracted the principle in *Blatch v Archer*.

   Secondly, there should be an issue (e) in the following terms:

   (e) whether ASIC had established its case against Messrs Gillfillan and Koffel in light of their particular position in respect to the meeting of the Board of JHIL on 15 February 2001.

Part III: Notices under Section 78B of the *Judiciary Act 1903*

3. The Respondents agree with the Appellant that this matter does not require the issue of a notice under s78B of the *Judiciary Act 1903* (Cth).

Part IV: Material Facts

4. The Australian Securities and Investments Commission ("**ASIC**") summary of facts fails to set out fully the context in which this matter has come to the High Court.

5. *First*, a critical matter which ASIC alleged and had to prove was that an announcement to the Australian Stock Exchange ("**ASX**"), in the form of the 7.24am 15 February 2001 draft without the text boxes ("**Draft ASX Announcement**") was both tabled at the Board meeting on that day ("**Board meeting**") and then the subject of the unanimous resolution by the directors that it be approved by the company, authorised by the company for execution and released to the market ("**Draft ASX Announcement Resolution**"). Even with all allowance for informality, this allegation involved the proposition that expressly, or by necessary implication, such a resolution was proposed at the Board meeting, brought to a vote and unanimously passed.

6. *Secondly*, ASIC did not plead that the resolution had any qualification attached to it permitting management, on legal advice or otherwise, subsequent to the Board meeting to make any variation to the terms of the Draft ASX Announcement. The Draft ASX Announcement Resolution as pleaded was final – it did not permit qualification or alteration.

7. *Thirdly*, contrary to ASIC's suggestion at AS[59] that the various respondents utilised the privilege against a penalty to withhold their defences, ASIC was aware from an early date by reason of unverified defences that all defendants either did not admit or denied the essential allegation. ASIC knew clearly what it had to prove.

8. *Fourthly*, it was common ground at trial and on appeal that ASIC bore the onus of proof on a civil standard but that the degree of satisfaction needed to satisfy the standard required under *Briginshaw* or more precisely, s140 of the *Evidence Act 1995* (NSW).

9. *Fifthly*, while ASIC tendered the minutes of the Board meeting as part of its proof, those minutes on their own could never have proved the allegation or constituted what ASIC now calls "*an exact proof*": see AS[68]. Amongst other matters:

(a) ASIC's argument that the minutes carried the benefit of a statutory presumption pursuant to s251A(6) of the *Corporations Law* (Cth) failed at first instance (LJ[72] ABRed2/418) and has not been further pursued: CA[468] ABWhi/93;

(b) if the minutes are relied upon as a business record, being a document signed by the Chairman at least 7 weeks after the event, they are on their face incomplete. The Draft ASX Announcement Resolution does not identify the form of announcement that was supposedly tabled and supposedly the subject of the resolution. On any view, there needed to be additional evidence from ASIC to plug this gap. Further, the reference to an ASX Announcement being executed by the company was inapposite on its face, as was the statement that McGregor tabled any announcement (see Baxter XX [T:762] at 2-35 ABBla1/370K-R). Further again, as seen below, there were numerous inaccuracies in the minutes and good reason to believe that, when they were set against the balance of documentary evidence and the objective circumstances, they did not in fact record the manner in which the Board meeting as a whole, or in relevant particulars, had been conducted;

(c) the only version of the 7:24am draft announcement produced by the company was one created by Mr Baxter which contained a series of text boxes recording changes from a previous version. ASIC did not contend that it was this document which was actually taken by Mr Baxter to the Board meeting or distributed to anyone at that meeting. The most ASIC could rely upon were three copies of the Draft ASX Announcement produced from, in the one case, Allens, and in the other case, BIL Australia Pty Ltd ("**BIL**"), several years later. This inevitably opened up an area of evidentiary enquiry into when, and in what circumstances, those copies of the document were received by Allens or BIL; and

(d) insofar as ASIC sought to rely upon the minutes as part of a proof by way of admission because the minutes were adopted by the Board at the April 2001 Board meeting ("**April Board meeting**"), that required a further evidentiary examination as to the circumstances in which draft minutes came to be presented to and accepted at that meeting.

10. *Sixthly*, and accordingly, this was a case where it was necessary for ASIC to seek to lead direct evidence of what actually occurred at the Board meeting in order to discharge its burden of proof. Had it only tendered the minutes of the Board meeting its case would most likely have failed, particularly given the standard required by s140(2) of the *Evidence Act*. Recognising correctly this burden, ASIC had identified well prior to trial, in accordance with directions of the Court, that it would be calling evidence from every person who was present at the Board meeting when the relevant events might have occurred and been discussed who remained alive – save for those who were defendants in the proceedings. Those persons whom ASIC said it would be calling were Messrs Baxter, Harman, Robb, Sweetman and Wilson.[1]

[1] There were 18 persons at the Board meeting. 2 had died before trial (Mr Peter Cameron and Mr McGregor). Si Llewellyn Edwards left the Board meeting early. 10 persons at the Board meeting were defendants. That left the 5 proposed ASIC witnesses. For completeness, while ASIC tendered the evidence given by the now

11. *Seventhly*, following the evidence in chief and cross-examination of the first two witnesses, Mr Harman and Mr Baxter, it was apparent that neither was able to say that the Draft ASX Announcement was tabled at the Board meeting or what discussion, if any, occurred in relation to it, or critically, that any resolution was passed that it be approved, executed by the company and released to the ASX. Mr Harman was also cross-examined with success on the correctness and reliability of the minutes of the Board meeting.

12. *Eighthly*, it was at that point that ASIC announced that it would not call any of the 3 remaining witnesses (Messrs Robb, Sweetman and Wilson) that it had announced earlier that it would call: CA[657]-[661] ABWhi/123-124. Clearly enough, ASIC, with the benefit of legal advice, made a conscious decision that it would prefer to run the risk of having its case rejected on the basis of the gaps in its proof and such adverse inferences as might properly be drawn by not calling the balance of its announced witnesses, rather than see those 3 remaining witnesses give like and unhelpful evidence to ASIC as had occurred with Mr Harman and Mr Baxter.

13. *Ninthly*, after the close of ASIC's case various defendants proceeded to go into evidence, which included some of them giving oral evidence as to the events of the Board meeting itself. All 4 of the Respondents gave evidence. The issues in the case, of course, included matters beyond simply the approval of the Draft ASX Announcement and the Respondents gave evidence to meet all allegations against them. They successfully defended the other claim made against them, and that claim was not pursued by ASIC on appeal.

14. *Tenthly*, the trial judge made two critical findings. First, that Mr Baxter took multiple copies of the Draft ASX Announcement to the Board meeting and distributed them to all persons present ("**Tabled Finding**"): LJ[220] ABRed2/467. The chain of reasoning was, although none of the 8 witnesses who attended the Board meeting (or the deceased Messrs Cameron and McGregor in their evidence to the Special Commission of Inquiry) said that the Draft ASX Announcement was before the Board meeting (LJ[187] ABRed2/459), that Mr Baxter's evidence should be accepted at least as far as he said that he did take a document to the Board meeting: LJ[193] ABRed2/460. On the basis of the trial judge's reasoning, the document he took must have been the Draft ASX Announcement (with or without the text boxes), or the 9:35am draft announcement: LJ[194] ABRed2/460. From there, the reasoning continued that one could infer from the fact that Allens produced two copies of the Draft ASX Announcement and BIL produced one that it was most likely that they received those copies, and did so, at the Board meeting (rather than afterwards): LJ[219] ABRed2/466. Finally, according to the trial judge, one could accept evidence of Mr Baxter's so-called practice that he had handed out copies not just to Allens and BIL but to all persons at the Board meeting: LJ[220]-[221] ABRed2/467.

15. Notably, it was also part of the trial judge's reasoning that no inferences could be drawn against ASIC through the failure to call Messrs Robb, Sweetman or Wilson. This was because they were in the "*camp*" of the defendants or at least of JHIL, which was a client of UBS and of Allens, and there was, according to the judge, *"no*

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deceased Mr McGregor and Mr Peter Cameron at the Special Commission of Inquiry, none of that evidence related directly to the present question.

suggestion" that they would not have co-operated with the defendants to the same extent they had been prepared to do with ASIC: LJ[207] ABRed2/464. Another reason not to call them, in the trial judge's view, was that they were "*independent experts*" and there was no property in an expert: LJ[1141] ABRed2/710-711.

16. The second critical finding by the trial judge was that the directors proceeded to consider and pass the Draft ASX Announcement Resolution (**"Approval Finding"**). The reasoning was that a so-called correlation between what Mr Macdonald or Mr Baxter identified to the Board meeting as key messages which would be put to the market and the terms of the Draft ASX Announcement meant that the contents of that draft was discussed at the Board meeting: LJ[223] ABRed2/467 and [194] ABRed2/460. If it was discussed, the only purpose the trial judge could identify was for the Board to approve the release of the announcement: LJ[225] ABRed2/468. His Honour dismissed the significance of matters such as that the standard practice of obtaining approval of a draft announcement beforehand by members of line management and senior executives had not been followed, that it offended the disclosure policy of the Board (LJ[224] ABRed2/468) and that a variety of changes were made to the draft following the Board meeting and before it was released to the market: LJ[230] ABRed2/469.

17. His Honour found that a copy of the Draft ASX Announcement was not faxed or emailed to the two directors in the US, Messrs Gillfillan and Koffel (**"US Respondents"**); that its contents were not read out for their benefit (LJ[231] ABRed2/469); and that from their silence they did not participate in its approval (LJ[232] ABRed2/470). Yet he found a breach (of s180(1) of the *Corporations Act 2001* (Cth)) arising through failure: failure to ensure that they were given a copy of the draft or given details of its terms, or, on the other hand, a failure expressly to abstain from voting: LJ[337] ABRed2/500.

18. The execution of the minutes in April 2001 was not a part of the central reasoning of the trial judge: LJ[1150] ABRed2/712.

19. *Eleventhly*, the primary argument of the Respondents before the Court of Appeal was that there were a series of appellable errors in the manner in which the trial judge came to his conclusions on the Tabled Finding and the Approval Finding. One important error, but only one of many, was the failure to draw appropriate inferences against ASIC by reason of the failure to call Messrs Robb, Sweetman and Wilson and the principle in *Blatch v Archer*. The Court of Appeal, in carrying out its rehearing function under s75A of the *Supreme Court Act 1970* (NSW), examined the whole of the record below over a two week period and found appellable error.

20. The essence of the Court of Appeal's reasoning can be reduced to the following seven propositions:

    (a) although ASIC probably established that Mr Baxter brought the Draft ASX Announcement with him to the Board meeting, the Court was not persuaded to the appropriate degree of satisfaction that it followed from this fact that copies were handed out generally to all persons at the Board meeting by way of tabling: CA[384] ABWhi/78 and CA[789] ABWhi/146[2];

[2] ASIC's submission at AS[11(c)] that the Court of Appeal did not reverse this aspect of Tabled Finding is wrong.

(b) alternatively, even if copies were handed out generally at the Board meeting and there was some discussion of the Draft ASX Announcement, the Court of Appeal was not satisfied that the purpose of that discussion was for the consideration and passing of a resolution to approve the announcement: CA[384] ABWhi/78;

(c) the conduct of the various company executives and advisers in the period immediately following the Board meeting in which various changes to the draft were made prior to its announcement to the market on the following morning was strongly inconsistent with the Board having approved the Draft ASX Announcement for release: CA[336]-[337] ABWhi/69-70 and [358] ABWhi/73;

(d) there was a sound basis for concluding that in circumstances where the draft announcement was still being worked upon in the hours before the Board meeting and was expressly subject to *"refinement"* and had not been considered by advisers and was still subject to the consents of persons who were referred to in it, any distribution and any discussion of the Draft ASX Announcement (if such occurred) 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: CA[432] ABWhi/88 and [792] ABWhi/147;

(e) the correlation from which the trial judge concluded that one, or both of, Mr Macdonald or Mr Baxter spoke to the Draft ASX Announcement and reasoned to its approval by the Board could not be sustained: CA[420] ABWhi/85-86, [424] ABWhi/86, [428] ABWhi/87, [789] ABWhi/146;

(f) the failure of ASIC to call Mr Robb more comfortably allowed the Court to reach these conclusions; and

(g) a review of the conduct of the various parties post the release of the announcement to the ASX on 16 February ("**Final ASX Announcement**") through to and including the approval by the Board at the April Board meeting of the Board meeting minutes did not detract from these conclusions, particularly once the minutes were seen to be a document of doubtful reliability.

Part V: Applicable legislation

21. The Respondents accept that the applicable legislation is as set out by the Appellant and annexed to its written submissions.

Part VI: Respondents' Argument

Summary of respondents' main propositions

22. In summary, the Respondents' broad answers to the key submissions by ASIC are as follows:

(a) ASIC submits that it was only required to prove the case on the civil standard having regard to the degree of satisfaction required by s140 of the *Evidence Act* (AS[69]) – the Respondents agree;

(b) ASIC submits that it did not have a free standing duty of fairness which required it to call particular witnesses, breach of which duty attracted an adverse inference against ASIC (AS[34]) – the Respondents contend that the primary (but not only) framework within which to review the availability of inferences was the principle in *Blatch v Archer*. That principle was engaged

because there were missing witnesses, particularly Mr Robb (but to a lesser extent Messrs Sweetman and Wilson) who would be expected to be called by ASIC rather than the defendants, whose evidence would elucidate important matters in the trial, and whose absence was unexplained. The role of ASIC and the public interest nature of the proceedings are relevant as part of the satisfaction of the conditions for the drawing of such inferences;

(c) ASIC submits that the signed minutes of the Board meeting constitute "*an exact proof*" which as a business record, or as part of a proof by admission, are almost conclusive in proving its case (AS[68]) – the response is that the Court of Appeal correctly concluded the minutes were of doubtful reliability and not of significant weight, having regard to other evidence in the proceedings;

(d) ASIC submits (AS[11(c)]) there remains intact after the Court of Appeal a finding that after Mr Baxter brought the Draft ASX Announcement to the meeting, he distributed it to all Board members – the response is that the Court of Appeal, for detailed and correct reasons, held that ASIC had not established this fact;

(e) ASIC submits that any discussion of the Draft ASX Announcement at the Board meeting could only have been, as the trial judge held, for the purpose of approving it (AS[123]) – the Respondents submit that the Court of Appeal was correct in concluding that ASIC had not proved that any discussion (which itself is not established) could only have been for this purpose. It is far more consistent with the objective circumstances and the conduct of management and lawyers immediately before and after the Board meeting that if there was any discussion it was solely in the context of a work in progress but, furthermore, in the broader context of the Board being informed of the likely manner in which the separation, if approved, would be communicated to a variety of interested parties; none of this was for the purpose of the Board resolving upon terms of any particular communication to any particular party;

(f) ASIC separately urges that the trial judge's analysis of the evidence of Mr Brown as confirming a strong correlation between a discussion at the Board meeting of key messages and what could only have been the Draft ASX Announcement should be reinstated (AS[110]-[125]) – there is no reason either based upon advantages of the trial judge or otherwise for this Court to interfere with the careful rejection which the Court of Appeal gave to this analysis; and

(g) finally, more by implication, ASIC contends that this Court can and should reinstate the conclusions of the trial judge without need to give further consideration to the broader evidentiary landscape in the proceedings – the Respondents submit that a fair review of the whole record, as carried out by the Court of Appeal, leads to the comfortable conclusion that ASIC failed to discharge its onus. The appropriate drawing of inferences against ASIC only strengthens this conclusion but is not strictly necessary to it.

Onus of proof, standard of proof, evidentiary presumptions

23. ASIC, as the plaintiff in these proceedings, bore the legal and evidential onus to establish the allegation against the Respondents. As a civil penalty proceeding, this case was conducted under the rules of evidence and procedure for civil matters as provided by s1317L of the *Corporations Act*.

24. Section 140 of the *Evidence Act* requires the court in civil proceedings to find the case of a party proved if it is satisfied that the case has been proved on the balance of

probabilities. In deciding in a civil case whether it is satisfied that the case has been proved on the balance of probabilities, the court is to take into account: (a) the nature of the cause of action or defence; and (b) the nature of the subject matter of the proceedings and (c) the gravity of the matters alleged. Although the standard of proof remains the balance of probabilities under s140, the degree of satisfaction varies according to the seriousness of allegations and the gravity of the consequences (if the allegations are found correct) that are made under s140(1).

25. It is accepted that s140 reflects the common law as stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [128] (Branson J), (French and Jacobson JJ agreeing generally at [110]); *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v ACCC* (2007) 162 FCR 466 at [31] (Weinberg, Bennett and Rares JJ). It is has also been accepted that the *Briginshaw* principles apply to civil penalty proceedings: *Adler v ASIC* (2003) 46 ACSR 504 at [142]-[148] (Giles JA); *Whitlam v ASIC* (2003) 57 NSWLR 559 at [117]-[119] (Hodgson, Ipp and Tobias JJA). Although this case concerns an allegation of negligence, that allegation is a foundation for the nature of the relief sought: declarations of contraventions and the imposition of penalties and orders for disqualification. It was therefore appropriate for the Court of Appeal to proceed on the basis that the *Briginshaw* principles were applicable and ASIC did not assert otherwise: CA[747] ABWhi/139.

26. Significantly, in *Briginshaw* Dixon J opined at 361 that *"when the law requires the proof of any fact, the tribunal must feel actual persuasion of its occurrence or existence before it can be found"*. As the Court of Appeal observed the reference to *"actual persuasion"* in the authorities should be understood as equivalent to the state of *"satisfaction"* as it is used in s140: CA[750] ABWhi/140.[3] The Court of Appeal was therefore required to reach a state of satisfaction or an actual persuasion that ASIC proved its allegation, while taking into account the seriousness of the allegation and the gravity of the consequences that would follow if the allegation were to be accepted.

27. The conduct of ASIC during the trial, in failing to call material witnesses also raises the application of evidentiary presumptions. The applicable principles concerning these evidentiary presumptions are set out here and the consequence of ASIC's failure to call material witnesses, in the context of this case, are outlined further below.

28. The starting point for an examination of the evidentiary relevance of a failure to call a material witness is the basic principle set out in *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969. In that case, Lord Mansfield opined at 970 that *"[i]t is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other side to have contradicted"*. The underlying rationale for this principle can be simply put: a party with the burden of proof is expected to meet the requisite proof. If a party provides limited evidence when further evidence was available, a tribunal of fact is entitled to consider that failure when assessing whether the party has produced evidence to satisfy the standard of proof. This rationale was recognised in *Ho v Powell* (2001) 51 NSWLR 572 at [15], where Hodgson JA observed that in considering whether limited material is an

[3] See also: *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v ACCC* (2007) 162 FCR 466 at [31] (Weinberg, Bennett and Rares JJ).

appropriate basis on which to reach a decision *"it is important to have regard to the ability of parties, particularly parties bearing the onus of proof, to lead evidence on a particular matter, and the extent to which they have in fact done so"*.

29. The *Blatch v Archer* principle was picked up by the first edition of *Wigmore on Evidence*: JH Wigmore, *Wigmore on Evidence* (1st edn 1904), vol I § 285 at 369, see also: JH Wigmore, *Wigmore on Evidence* (3rd edn 1940), vol II § 285 at 163. The principle has also been adopted as a statement of general principle by this Court for civil law trials[4] and Gleeson CJ has observed that the principle in *Blatch v Archer "is a fundamental precept of the adversarial system of justice, and is treated as axiomatic in the day to day operations of courts"*: *Russo v Aiello* (2003) 215 CLR 643 at [11] (Gleeson CJ).

30. In *Payne v Parker* [1976] 1 NSWLR 191, Glass JA provided a detailed analysis of the principle, and this analysis has informed the development of its application by Australian intermediate courts, especially in the context of *Jones v Dunkel* (1959) 101 CLR 98. Glass JA recognised that the failure to adduce evidence was a reason to either increase the weight of the proofs of the opposite party or reduce the weight of the proofs of the party in default: *Payne* at 200. The consequence for a party bearing the legal onus of proving an issue would be that *"the direct evidence of the party carrying the onus may be more readily rejected, and the inferences for which he contends may be treated with greater reserve"*: *Payne* at 201. Glass JA then set out the conditions for the operation of the principle at 201:

(a) the missing witness would be expected to be called by one party rather than the other;
(b) his evidence would elucidate a particular matter; and
(c) his absence is unexplained.

31. The principle in *Blatch v Archer* has been applied by courts in two contexts that are relevant in this case. The first application concerns the impact of the failure of a party bearing the onus of proof to call a material witness. In those circumstances, courts have considered that such a failure by a party bearing the onus can result in an assessment of the weight of the evidence unfavourable to that party. In *ASIC v Rich* (2009) 75 ACSR 1 at [440], Austin J stated that *Blatch v Archer* can lead *"to some other assessment of the weight of the evidence, unfavourable to the party against whom the principle is applied"*. In *Shalhoub v Buchanan* [2004] NSWSC 99 at [71], Campbell J concluded that such a failure *"can be taken into account in deciding whether the onus is discharged, in circumstances where such evidence as has been called does not itself clearly discharge the onus"*. In *Cook's Construction Pty Ltd v Brown* (2004) 49 ACSR 62 at [42], Hodgson J observed that a court would be *"very*

[4] *Moreau v The Federal Commissioner of Taxation* (1926) 39 CLR 65 at 71 (Isaacs J); *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107 at 122 (Isaacs J); *Hampton Court Limited v Crooks* (1957) 97 CLR 367 at 371-372 (Dixon J); *Allied Interstate (Qld) Pty Limited v Barnes* (1968) 118 CLR 581 at 591 (McTiernan J); *Weissensteiner v The Queen* (1993) 178 CLR 217 at 225-227 (Mason CJ, Deane and Dawson JJ); *G v H* (1994) 181 CLR 387 at 391-392 (Brennan and McHugh JJ); *DP v Commonwealth Central Authority* (2001) 206 CLR 401 at [187] (Callinan J); *Azzopardi v R* (2001) 205 CLR 50 at [18] (Gleeson CJ); *Minister for Immigration v JIA* (2001) 205 CLR 507 at [317] (Callinan J); *Vetter v Lake Macquarie City Council* (2001) 202 CLR 439 at [36] (Gleeson CJ, Gummow and Callinan JJ); *Russo v Aiello* (2003) 215 CLR 643 at [11] (Gleeson CJ); *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 196 ALR 257 at [75] (Callinan J); *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at [17] (Gleeson CJ); *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [228] (Callinan J).

hesitant in drawing an inference in that party's favour from indirect and second-hand evidence". See also: *Whitlam v ASIC* (2003) 57 NSWLR 599 at [119] (Hodgson, Ipp and Tobias JJA).

32. The rule in *Jones v Dunkel* is also an application of *Blatch v Archer*: *Ho v Powell* (2001) 51 NSWLR 572 at [14]-[16] (Hodgson JA); JD Heydon *Cross on Evidence* (Loose leaf service, LexisNexus) [1215] at 1094. Applying the rule has the consequence *"that the unexplained failure by a party to call a witness may in appropriate circumstances support an inference that the uncalled evidence would not have assisted the party's case": Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11 at [63] (Heydon, Crennan and Bell JJ). Further, the rule in *Jones v Dunkel* can operate against a party bearing the evidentiary burden and a party which bears the legal onus of proving an issue: *Ho v Powell* (2001) 51 NSWLR 572 at [16] (Hodgson J); *Payne* at 201 (Glass JA); JD Heydon *Cross on Evidence* (Loose leaf service, LexisNexus) [1215] at 1091.

33. In the context of *Jones v Dunkel*, the failure to call a witness can have two consequences, namely that a court might: (i) infer that the absent witness would not have assisted the party who failed to call the witness; and (ii) draw with greater confidence any inference unfavourable to the party who failed to call the witness if that witness was in a position to give evidence about whether the inference should be drawn: *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11 at [63] (Heydon, Crennan and Bell JJ).

34. In summary, the following evidentiary presumptions (assuming the conditions set out above are satisfied) are therefore available on the application of a *Blatch v Archer* analysis where a party with the onus of proof fails to call a material witness:
    (a) the uncalled evidence would not have assisted that party;
    (b) the direct evidence of that party may be more readily rejected and the inferences for which that party contends may be treated with greater reserve;
    (c) any inferences available against that party's case may be more strongly drawn; and
    (d) an assessment of the overall weight of the evidence unfavourable to that party.

35. To the extent that ASIC's role in the proceedings and their public interest character are to be taken into account in assessing the evidentiary impact of a failure by ASIC to call material witnesses, the primary way to do it is through the framework of determining whether the conditions for a *Blatch v Archer* analysis have been satisfied.[5]

Chronology of key events

36. It is useful to review in chronological order the unfolding of the key events particularly by reference to the documentary records. A number of the matters referred to below will then be further developed in subsequent submissions.

37. *First*, the starting point was that the Board at its meeting in January 2001 had considered an earlier proposal from management which would have seen JHIL gift the

[5] Just as considerations of fairness can inform whether privilege has been waived without subsuming the entire inquiry: see, *Mann v Carnell* (1999) 201 CLR 1 at [29], [34] (Gleeson CJ, Gaudron, Gummow and Callinan JJ), [101], [102], [107] (McHugh J); *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 at [45] (Gleeson CJ, Gummow, Heydon and Keifel JJ).

asbestos subsidiaries and a cash gift of $2 million with no additional funding to cover asbestos claims (described as the "*Net Assets Model*"): CA[74] ABWhi/19. The agenda for that meeting (ABBlu3/1332) indicated that the business was to consider certain presentations based upon a detailed Board paper: ABBlu3/1277-1324. The very lengthy Board paper included a draft news release (ABBlu3/1307) as part of the package of information before the directors. The draft news release did not convey a message of full funding: cf CA[86]-[90] ABWhi/22-23. The directors were not told that they would be asked or required to approve the contents of any such release. As it happened, the Board rejected the proposal in that form and required management to do further work on funding: ABBlu3/1333 CA[99] ABWhi/25.

38. *Secondly*, sometime after 7 February 2001 Board papers were distributed for the Board meeting which was to reconsider, as Item 11 of the agenda, Project Green (ABBlu4/1441) based upon a very detailed paper in section 8: ABBlu4/1595-1669. The separation proposal had been changed including that a substantial sum (NPV $70 million) would be paid over time by JHIL to one of the subsidiaries to augment the available funds for meeting asbestos claims. Critical aspects of the Board paper were:

(a) it did not include any proposed minutes for the Board meeting and, to the extent that resolutions were foreshadowed, they were in brief and non-legal terms and focused on the separation question: ABBlu4/1599S-V;

(b) it did not include any draft announcement to the ASX of the separation proposal, nor indicate that any such draft would be made available to the directors closer to or at the Board meeting or that they would be asked to approve it at the Board meeting;

(c) it included a legal advice from Allens (ABBlu4/1667-1669) which did not identify for directors that it would be part of their function to approve, or that any legal issues could arise for them, concerning, the form of announcement which might be made to the ASX;

(d) the communication strategy proposed by management was outlined in some detail: ABBlu4/1618-1632; cf CA[108]-[120] ABWhi/26-28. Reference to an announcement being made to the ASX, if separation were approved, was made without detail as to what would be in the announcement: ABBlu4/1619H and L. Any such announcement was presented as only one aspect of a much broader communication strategy directed to a variety of parties. The Board papers did not identify that the Board was being asked to approve specifically the communication strategy as a whole or any particular component of it; and

(e) finally, the communication strategy informed directors that "*we will not be able to provide key external stakeholders with any certainty that the funds set aside to compensate victims of asbestos diseases will be sufficient to meet all future claims*": ABBlu4/1607O; CA[110] ABWhi/27. Thus directors were not asked to consider, let alone approve, either generally or in the context of any particular announcement to the ASX, the making of a claim that the Medical Research and Compensation Foundation ("**Foundation**") would be "*fully funded*" or that there would be "*certainty*" of meeting all asbestos claims into the future.

39. *Thirdly*, between 7 February and 8.05am on 15 February 2001 draft minutes were prepared referable to the upcoming Board meeting. They went through five drafts prior to the Board meeting. This involved Mr Robb and Mr Blanchard of Allens and Mr Shafron (see attached **Board Minutes Aide Memoir**). Critically:

(a) there was no evidence that the 8.05am draft minutes (ABBlu5/2103-2111) was provided by Allens or Mr Shafron to any of the directors at, or for the purpose of, the Board meeting, let alone that it was provided to Mr McGregor as Chairman so that he could use it as a template against which to conduct the Board meeting;

(b) the structure and content of the draft minutes reflected an assumption that the manner in which the Board meeting might be conducted would be with the utmost formality by which the directors would proceed through a detailed process of resolution making whereby each legal step in the separation process would be separately and specifically considered and resolved upon by them. Such an assumption of course came to be falsified because on no view did the Board meeting proceed on this basis, nor was it possible to proceed on this basis because no-one provided the minutes to the chair or to the directors as a template upon which they could so behave; and

(c) each of the five draft versions of the minutes contemplated in Item 8 that the chair would table an announcement to the ASX which the Board would then approve and resolve that it be executed by JHIL and sent to the ASX. None of the drafts of the minutes had such an announcement attached to them and, as seen below, the announcement did not come into existence in its first draft until 7.28pm on 14 February 2001. To underline, the Draft ASX Announcement Resolution was included in the draft minutes as no more than an exercise of contemplation by Allens, and potentially Mr Shafron, of something which might occur at a future board meeting. Necessarily it was included in the draft independently of, and in advance of, what might occur at the Board meeting.

40. *Fourthly*, the draft announcement to the ASX first came into existence as one of five proposed communication documents at 7.28pm on 14 February 2001: ABBlu5/2006 at 2017. It was a work involving external communications advisers for the company (Gavin Anderson) and within the company, Messrs Baxter and Ashe. Then at 7.24am on 15 February 2001 Mr Baxter emailed to Gavin Anderson a version of the draft announcement with certain changes marked-up: ABBlu5/2085-2087. Critically:

(a) Mr Baxter's covering email confirms an intention that the document would be refined later in the day, presumably after the Board meeting, ("*no doubt we can refine further later today*") but that this was a version he would take to the Board meeting;

(b) at this stage the draft announcement had not gone through the usual procedures required by the company which required members of line management, senior management and internal and external lawyers to approve its contents: CA[309]-[310] ABWhi/66;

(c) further, to the extent that the draft made reference to opinions expressed by external advisers such as Trowbridge, Access Economics and PwC, their approval to their names being cited in the context given had not yet been sought: CA[309] ABWhi/66; and

(d) a discrepancy had opened up between what the Board paper told the directors was to be the key message, namely, certainty could not be guaranteed, and the Draft ASX Announcement, which contained more unambiguous claims as to the certainty of funding.

41. *Fifthly*, no version of the Draft ASX Announcement was sent electronically or otherwise to the US Respondents prior to, or for that matter during, the Board meeting: CA[233] ABWhi/53 and LJ[231] ABRed2/469-470. It was anticipated that those directors would participate in the Board meeting by telephone. To that end, Mr Harman was directed by management to send to the US Respondents, by email, copies of the slide show presentation and the cashflow model, being materials which were to be presented to the directors at the Board meeting, in the early hours of 15 February: Harman at [151] ABBlu11/4916; ABBlu5/2070; CA[168] ABWhi/37. No version of the draft announcement was attached to this email and no attempt was subsequently made to send to the US Respondents a copy of it.

42. *Sixthly*, prior to the commencement of the Board meeting a crucial telephone conference occurred between Messrs Peter Cameron and Robb of Allens and Messrs Macdonald and Shafron. Allens expressed concern at just learning that the Trowbridge actuarial report did not take into account the most recent claims data and that this might impact upon Allens' advice to the Board. Mr Macdonald gave assurances to Mr Peter Cameron and Mr Robb that the Foundation could still be viewed as fully funded: CA[339]-[342] ABWhi/70-71. The Court of Appeal correctly concluded that, based on this conversation, Mr Peter Cameron and Mr Robb must have gone to the Board meeting with an uncertainty as to whether a surplus of funds was the most likely outcome: CA[343] ABWhi/71. The suggestion of ASIC at AS[107] that Allens simply relied upon Mr Macdonald's "*say so*" and put any issue out of their mind about the correctness of a claim of fully funding is belied by their subsequent conduct in seeking changes to water down the message in the draft announcement.

43. *Seventhly*, it seems that the Board meeting probably commenced around 9.00am. Messrs Baxter, Robb and others joined the Board meeting after it had commenced. At 9.35am, Gavin Anderson had sent to Mr Baxter and his secretary, Ms Wheeler, a further draft announcement containing their suggested changes: ABBlu5/2126-2127; CA[211]-[213] ABWhi/47-48. On the current findings, it is more likely that what Mr Baxter brought with him to the Board meeting was the Draft ASX Announcement rather than the 9.35am version of the draft announcement.

44. *Eighthly*, as to how the Board meeting actually proceeded so far as Project Green was discussed, there was a presentation of the proposal by reference to a series of slides: ABBlu5/2197-2253. The slides dealt separately with the three different elements of Project Green: separation, sale of the gypsum business and financial restructuring: ABBlu5/2198. Various slides were addressed by the relevant persons from management, Messrs Baxter, Macdonald, Morley or Shafron: CA[412] ABWhi/84. Critically in relation to separation:

    (a) the slides referred to the Trowbridge analysis and various modelling: see Slides 14 and 15 (ABBlu5/2211-2212), which provided the context in which the distribution and discussion of the cashflow model occurred: Morley at [474]-[480] ABBlu12/5654-5655;

    (b) the slides did not include a proposal that the Board approve a message that the Foundation be "*fully funded*" or that there was "*certainty*" in meeting of asbestos claims, although they did indicate that surplus was the most likely outcome: Slide 15 ABBlu5/2212;

    (c) the slides referred to independent advice being obtained from Mr Allsop of counsel which was supportive: Slide 17 ABBlu5/2214. The advice came into

existence just before the Board meeting and was not available to the US Respondents: ABBlu4/1677-1684. Like the Allens advice, it sought to cover the range of legal issues facing the directors but made no mention of any ASX announcement;

(d) Slide 17 recorded the resolutions recommended to the directors. The only evidence of resolutions, in terms the directors could consider, was the brief non-legal summary in the Board papers (ABBlu4/1599) together with the summary on Slides 18 and 41: ABBlu5/2215 and 2238;

(e) Slide 23 spoke of key messages without identifying the content of any announcement to be made to the ASX or that the directors were required to approve it: ABBlu5/2220. Slide 29 confirmed that the key messages would include an expectation of "*enough funds to pay all claims*" and a substantial improvement in the position of claimants and much greater certainty that compensation would be available to meet all future claims – this did not amount to a proposed key message of a certainty of sufficiency of funds: ABBlu5/2226. Slide 31 referred to the fact that an announcement would be made without again identifying its content or that the Board was to approve it: ABBlu5/2228; and

(f) the ultimate recommendation on Slide 41 (ABBlu5/2238) was that the Board approve the establishment of the Foundation based on the matters outlined in the Board paper and the slide presentation.

45. *Ninthly*, and accordingly, what is most likely, having regard to all of the above matters, is that the unanimity which was reached at the Board meeting was essentially in the terms recorded at Slide 41 (ABBlu5/2238), namely a resolution that the Board approve the establishment of the Foundation based on the matters outlined in the Board papers provided prior to the Board meeting and the slide presentation. Put differently, ASIC did not establish on the civil standard, having regard to s140(2) of the *Evidence Act*, that it was more likely that the Board proceeded in a different fashion namely, to consider in a detailed fashion and then separately resolve upon each and every separate step in the separation, including for this purpose considering and resolving upon the content of the Draft ASX Announcement nowhere referred to in the Board papers or the slide presentation.

46. *Tenthly*, it is common ground that the Draft ASX Announcement was not sent to, nor read out at the Board meeting for the benefit of the US Respondents or otherwise. The trial judge so found (LJ[231] ABRed2/469) and that finding was not challenged on appeal: CA[233] ABWhi/53.

47. *Eleventhly*, for reasons not explored in the evidence no-one kept any real notes of what actually occurred at the Board meeting. The closest it came was that Mr Robb commenced a note (which is found at ABBlu5/2191) which is consistent with the first half of Slide 6: ABBlu6/2203. The reason may be that the participants were following and focusing upon the various oral presentations which were following the order of the slide presentation together with any embellishment or discussion, and that what the Board ultimately focused on was the simple shorthand resolution at Slide 41: ABBlu5/2238. While it is possible to explore in more detail the evidence of those persons who had some specific recollection of different matters discussed at the Board meeting, which can be correlated to various aspects of the slide presentation, none of

this level of detail assists ASIC's case.[6] No witness claimed to identify any particular point in the slide presentation at which a person presenting moved beyond the slides and introduced into the content of the discussion the particular terms of what was still at this stage a draft of an ASX announcement, let alone the Chairman tabling such announcement as part of the Board meeting, let alone the matters which the Board was being asked to resolve upon being expanded beyond what had been indicated in either the Board papers or in the slide show presentation. To the extent ASIC assert that Mr Brown's evidence was to the contrary, see below.

48. *Twelfthly*, the conduct of management and the lawyers after the Board meeting leading up to the release of the Final ASX Announcement the following morning is consistent with those present at the Board meeting (specifically Messrs Robb, Shafron, Macdonald, Harman, Baxter and Morley), understanding that the Board had not approved a release to the ASX in the form of the Draft ASX Announcement (see attached **ASX Announcement Aide Memoir**). Critically:

(a) the two copies of the Draft ASX Announcement produced by Allens contain handwriting (likely of either or both of Mr Robb or Mr Peter Cameron) indicating that they were suggesting changes designed to express in different terms, and, it is submitted, less unequivocal terms, the claims concerning adequacy of funding: CA[345]-[357] ABWhi/71-73; ABBlu5/2185-2188. It is unlikely that Allens would have participated in a process of substantial reworking of the statements in the announcement immediately after the Board meeting had Mr Robb or Mr Peter Cameron just observed the directors pass a resolution in unqualified terms that a release to the market be made in terms of the Draft ASX Announcement;

(b) a series of communications occurred between the company and the external advisers who were to be cited in the announcement. Changes were made to the announcement at the suggestion of those advisers to meet their requirements. Some of those changes proved significant in terms of altering the nature of the description offered as to the role of the Board itself, and the company, in the process of the determination of the level of funding: CA[330] ABWhi/69; and

(c) the most substantial changes emerged in the 7.42pm draft of the announcement: ABBlu5/2167-2168. The end result of this process was that substantially different or additional assertions were being made to the market to those in the 7.24am draft (see **ASX Announcement Comparison Aide Memoir**): CA[336] ABWhi/69.

49. ASIC seeks to explain away this conduct on the basis that it was merely an example of some allegedly well-established practice whereby, after the Board had approved the release of an announcement in a particular form, it was open to management to alter it after discussion with lawyers and at the election of the Chairman whether to refer it back to the full Board: AS[94]. As seen below, no such practice or procedure was established and nothing at the Board meeting sanctioned such an approach.

50. *Thirteenthly*, it is common ground that Mr Macdonald approved the release of the Final ASX Announcement: CA[334] ABWhi/69 and LJ[614] ABRed2/570. The trial judge also found that Mr Macdonald had approved or failed to prevent the publication

[6] See, for example: Morley [465]-[508] ABBlu12/5653H-5660K; Morley XX [T:1720] at 21-[T:1722] at 5 ABBla3/1030K-1032D; Willcox [79]-[97] ABBlu12/5534U-5543O; Hellicar XX [T:3063] at 18-25 ABBla5/2291J-N; Baxter [103] ABBlu10/4613R-4614E.

of the 23 February 2001 announcement and the 21 March 2001 announcement: LJ[695] ABRed2/591 and LJ[722] ABRed2/598. Mr Macdonald approved the Final ASX Announcement and he was the arbiter of whether or not announcements went to the Board: Baxter XX [T:707] at 15-19 ABBla1/318I-O. Mr Macdonald was authorised under the company's disclosure policy to publicly disclose information: ABBlu1/109N-P.

51. Finally in this list, the Court of Appeal was entitled to conclude that the further conduct between the release of the Final ASX Announcement and the adoption of the minutes at the April Board meeting did not significantly detract from the above conclusions.

52. Critically, as will be seen, the final minutes adopted in April were no more than an exercise carried out by Mr Shafron or someone else at JHIL five weeks after the Board meeting seeking to capture what had earlier occurred. The critical failing in what was done here was that the drafter of the minutes took as a starting point the draft which had been circulating prior to the Board meeting but which had never found its way to the Board meeting as a template against which the Board meeting was conducted. The drafter thus assumed, erroneously, that it was appropriate to prepare minutes which broadly assumed the actual Board meeting had followed the detailed logic and structure of the pre-meeting draft minutes, whereas in fact it had never proceeded in this way. While some changes were made to the pre-meeting draft minutes to capture certain aspects of the reality of the Board meeting, the end result was not a substantially accurate reflection of the way the Board meeting had been conducted or of the resolutions which had been adopted. In this process, the anticipation that there might have been a resolution by the Board specifically approving an announcement which was tabled at the Board meeting was retained quite erroneously.

53. The Court of Appeal appropriately gave weight to the fact that Mr McGregor signed the final minutes and that the Board did not object to them at the April Board meeting. However this did not prove ASIC's case. The real position is that in April, at least six weeks after the Board meeting, none of the relevant management, Allens or the Board members themselves, sufficiently attended to the minutes to observe their inaccuracies either specifically or in the entire manner in which they presented what had occurred at the Board meeting. This was conceded by the Respondents in cross-examination and it is a point equally to be made against Mr Robb. However, it does not alter what is the ultimate conclusion — that those signed minutes need to be regarded as a document of doubtful reliability upon which no significant weight can be placed in determining the ultimate issue.

54. These submissions will now deal with discretely some of the critical aspects of the evidentiary framework.

Ultimately no credible direct evidence of the critical actual events at the Board meeting

55. A critical starting point is to identify what evidence ASIC led of a direct nature of persons who observed events at the Board meeting. It is a stark fact that ASIC finally called only two witnesses who attended the Board meeting: Mr Baxter and Mr

Harman. Neither of them, by the end, had an actual recollection of what occurred at the Board meeting: CA[232] ABWhi/52.[7]

56. Specifically, Mr Baxter was the person primarily responsible for the drafting of a press release to announce the establishment of the Foundation. His evidence in chief that, based on a supposed practice that he would have distributed copies to all directors at the Board meeting, did not survive cross-examination: CA[310] ABWhi/66; LJ[135] ABRed2/445. Further cross-examination revealed that Mr Baxter could not recall what version (if any) he took to the Board meeting and could not say whether any announcement was distributed, discussed or approved at the Board meeting: CA[362] ABWhi/74-75. Further, Mr Baxter had also agreed in cross-examination that he had absolutely no recall whatsoever of what had occurred at the Board meeting in connection with any draft announcement: Baxter XX [T:764] at 12-20 ABBla1/372G-K; CA[362] ABWhi/74-75.

57. Following this evidence of Mr Baxter, there did not remain in ASIC's case any compelling reason to think that the purpose for Mr Baxter taking the Draft ASX Announcement to the Board meeting was in order to enable the Chairman to table it and the Board to consider and approve it. Mr Baxter's total disavowal of any recollection of what he did with the Draft ASX Announcement meant that there was no occasion to explore further with him other, and more likely, explanations such as that he had it there in his back pocket if he was asked whether work was underway on it. Mr Baxter had no reason to volunteer it, because he would likely be exposed to questioning as to why it was still in such an immature state, and on its departures from what was in the Board papers and slides. Further, Mr Baxter may have intended passing on copies at or after the Board meeting, but only to others such as Allens, who would be involved in the continuing ASX announcement drafting and refinement process.

58. Mr Harman was unable to say that the Draft ASX Announcement was tabled at the Board meeting or that there was any discussion or resolution in relation to it: LJ[141] ABRed2/447, Harman, [167] ABBlu11/4921S-4922H, Harman XX [T:277] at 25-28 ABBla1/107M-O. Although Mr Harman had no recollection of the Board meeting he said in his evidence that it was *"not my understanding that the press release was set in stone at the board meeting"*: CA[337] ABWhi/70, see also Harman XX [T:262] at 27-32 ABBla1/92N-Q.

59. The failure of ASIC to call the other direct evidence available to it is considered below at paragraphs 133 to 150.

Minutes

60. In the absence of any credible direct evidence of the critical fact, ASIC places almost exclusive reliance upon a documentary proof, namely, the minutes of the Board meeting which recorded in the middle of the eighth page (as the last of the resolutions establishing the Foundation) that the Chairman tabled an announcement to the ASX and that the Board resolved to approve the ASX Announcement and authorise its

[7] While ASIC also tendered evidence of certain persons who gave evidence at the Special Commission of Inquiry (including Mr McGregor and Mr Peter Cameron), none of that evidence related to whether a draft announcement was tabled, discussed or approved at the Board meeting: CA[224] ABWhi/50 and CA[237] ABWhi/53.

execution and sending to the ASX ("**ASX Announcement minute**"): CA[465] ABWhi/93. It is important to identify the different ways in which the minutes could be used to prove the fact in issue: (a) through the operation of a statutory presumption; (b) as a business record exception to the hearsay rule; and (c) as an admission against those who were present at the Board meeting when the minutes were approved. It is also necessary to assess the weight to be afforded to the minutes both on their own and also in light of the evidence called and not called.

61. *First,* there was no statutory presumption because as the trial judge held, the minutes were not recorded in a minute book within one month (as referred to in s251A(1) of the *Corporations Law* as carried over into the *Corporations Act*) (LJ[56] ABRed2/413) and they therefore did not attract the evidentiary value in s251A(6) of the *Corporations Law*: LJ[72] ABRed2/418 and LJ[79] ABRed2/420. ASIC did not challenge these findings in the Court of Appeal and the Court accepted the conclusion of the trial judge: CA[468] ABWhi/93.

62. ASIC now asserts at AS[84] that the approach of the Court of Appeal (in then considering the weight to be afforded to the minutes) failed to appreciate the significance of the minutes in their statutory context. The failure by the company to make the appropriate record within the statutory period of one month says nothing about the evidentiary status or weight the Court should give to a minute created outside of that period. Further, in *Claremont Petroleum NL v Cummins* (1992) 9 ACSR 1, Willcox J considered s 253 of the *Companies Code* (which was the predecessor provision to s 251A of the *Corporations Law*) and observed at [20] that the condition that a minute be entered within one month was to be strictly applied because a minute prepared and signed soon after a meeting was more likely to be reliable than one prepared long afterwards. This observation is particularly apt in the circumstances of this case where the evidence established that no one performed any work on the draft minutes for a period of some 5½ weeks after the Board meeting. Indeed, it was not until 21 March 2001 that the next draft of the minutes was circulated within JHIL: ABBlu6/2671; CA[479] ABWhi/94.

63. In circumstances where the statutory presumption has no role to play, the minutes must be considered in the light of the evidence as a whole: *Galladin Pty Ltd v Aimnorth Pty Ltd* (1993) 11 ACSR 23 at 44 (Perry J). In conducting this assessment, the observation of Young CJ in *Cordina Chicken Farms Pty Ltd v Poultry Meat Industry Committee* [2004] NSWSC 197 at [28] is relevant: minutes are not the best evidence of what happened at a meeting, the best evidence is what a person who was present at the meeting swears was said or done.

64. *Secondly,* the Respondents accept that the minutes were admissible as a business record, which then gave rise to questions of weight as correctly identified by the Court of Appeal: CA[469]-[470] ABWhi/93. Although ASIC asserts otherwise (AS[82]), the trial judge came to his conclusions on the Tabled Finding and Approval Finding without resort to the minutes: LJ[1150] ABRed2/712. There were at least two matters that deprived the minutes of significant weight.

65. The first was that the minutes were not prepared in the ordinary and proper fashion by a secretary or other person delegated with the task of capturing the substance of the resolutions proposed, voted upon and passed at the Board meeting and such other

business as arose: LJ[1192] ABRed2/720. Rather, draft minutes had been prepared in advance of the Board meeting by solicitors at Allens and that draft contained the ASX Announcement minute: CA[472] ABWhi/94. On 7 February 2001, Mr Blanchard of Allens had sent to Mr Shafron an email attaching draft minutes which included the ASX Announcement minute (other than the change in the final version of the minutes of the word "*Chair*" to "*Chairman*"): ABBlu4/1828; CA[472] ABWhi/94. The Court of Appeal correctly observed that because the relevant part of the minutes was drafted before the Board meeting they did not record the reality of what occurred at the Board meeting: CA[494] ABWhi/98. Various witnesses affirmed that the Board meeting did not proceed with the formality of tabling and approving a raft of separate legal instruments as the minutes suggested (see paragraphs 76 to 81and 98 to 103 below).

66. The second factor that deprives the minutes of significant weight is the inaccuracies contained in them. The trial judge identified eleven inaccuracies: LJ[1207]-[1219] ABRed2/723-725; see also CA[489]-[496] ABWhi/97-98. The Court of Appeal also noted other inaccuracies not detailed by the trial judge: CA[495] ABWhi/98. For example, Mr Willcox and Ms Hellicar gave evidence that many of the documents recorded as *"tabled"* by the Chairman were not provided to the directors at the Board meeting: Willcox at [105] (ABBlu12/5546D); Hellicar at [181] (ABBlu13/5885N). ASIC's assertion that the errors that were established in relation to the minutes were *"trivial"* (AS[88]) cannot be accepted. Some of the errors related to matters of great importance to the company such as the failure to record *at all* the consensus of the Board for the continuation of the preparation for corporate restructuring (LJ[1219] ABRed2/725) and the inaccurate recording of the Board's decision to commence the process of the sale of the gypsum business: LJ[1218] ABRed2/725. The minutes also inaccurately recorded the net present value of the indemnity to be provided to the Foundation under the DOCI by an amount of $7 million: LJ[1207]-[1209] ABRed2/723-724.

67. These were not trivial errors and they cannot be dismissed individually but must be assessed by reference to their cumulative significance. The fact that these inaccuracies were not identified by anyone, including the Chairman, Messrs Macdonald, Shafron, Morley and Robb supported a conclusion that no one paid close attention to them when the minutes were finally drafted or approved. Indeed, it is clear that on any view the text of the Draft ASX Announcement Resolution in the minutes records an event that did not occur or would have been anomalous; namely that the Draft ASX Announcement was: *"tabled by the Chairman"* at the Board meeting or that it was to *"be executed by the Company and sent to the ASX"* (apart from the ASX Announcement minute failing to identify the form of the announcement).

68. In this regard, ASIC asserts that Mr Robb and his firm charged for *"settling"* the minutes and that the Respondents' case suggests that Mr Robb either *"knowingly or negligently allowed"* false minutes to be circulated: AS[85(a)]. That is not, and has never been, the Respondents' case. The case for the Respondents was that in circumstances where there was no clear request from the company that Mr Robb review the minutes, where there is no document recording any consideration of the draft by Mr Robb, where Mr Robb did not attend the April Board meeting and where ASIC chose not to call Mr Robb, no inference should be drawn that Mr Robb checked the minutes for their accuracy or otherwise confirmed them.

69. In seeking to support its submission, ASIC relies upon a letter sent from Allens to JHIL dated 29 March 2001, signed by Mr Robb, which set out the work performed by solicitors at Allens in relation to Project Green: ABBlu7/2826-2828; CA[481] ABWhi/95. The extract referred to at AS[81(c)], simply refers to settling *"board minutes"* as required by a number of companies, including JHIL, JHIL's subsidiaries and the Foundation: ABBlu7/2826P. That letter does not provide any indication as to what the work was, or when the work was, performed by solicitors at Allens. Moreover, it provides no indication as to whether Mr Robb personally performed any work at all in relation to drafting or reviewing the minutes after the Board meeting. Further, although Mr Shafron had sent Mr Robb by email on 30 March 2001 a copy of the draft minutes of the Board meeting, there was no request in that email from Mr Shafron that Mr Robb examine the draft minutes. Rather Mr Shafron simply asked whether the Foundation directors need to be provided with a copy of the minutes: ABBlu7/2830; CA[480] ABWhi/95.

70. The Court of Appeal correctly carried out their task of reviewing the findings of the trial judge as to weight to be afforded to the minutes and, in particular, they correctly identified the additional evidence of Mr Morley that the minutes of the Board meeting were *"full of holes and unreliable"*: CA[495] ABWhi/98; Morley XX [T:1706] at 23-25 ABBla3/1016M-N. ASIC submits at AS[91] that the Court of Appeal erred in properly considering the evidence of Mr Morley. ASIC relies on the finding by the trial judge that it had always been Mr Morley's belief that the minutes were accurate: LJ[1199] ABRed2/722. This was based on cross-examination which ASIC extracts at AS[91]. What the trial judge and ASIC's submissions overlook, is that Mr Morley also gave evidence that he had previously held that belief only because he had never considered whether the minutes matched his recollection of what occurred at the Board meeting: Morley XX [T:1685] at 33-45 ABBla3/995Q-W. Prior to being cross-examined in these proceedings, Mr Morley had not been asked by anyone to go through the minutes in their final form and match them with documents in the Board papers, or his own recollection, to determine if the minutes were accurate: Morley XX [T:1699] at 5-14 ABBla3/1009D-1009I. Mr Morley was asked to perform this exercise during cross-examination and in doing so he identified eleven errors in the minutes that the trial judge recorded: LJ[1207]-[1219] ABRed2/723-725. Following this exercise Mr Morley agreed the minutes were *"full of holes and unreliable"* (Morley XX [T:1706] at 23-25 ABBla3/1016M-N) as the Court of Appeal identified.

71. Ultimately, the Court of Appeal correctly concluded that the reliability and weight of the minutes *"is very much open to question"* (CA[497] ABWhi/98) and the accuracy of the minutes were to be viewed with *"considerable reserve"*: CA[791] ABWhi/146.

72. *Thirdly*, although ASIC submits that the minutes also constituted an admission (AS[82] and [84]), neither the trial judge nor the Court of Appeal treated the minutes or their approval at the April Board meeting as an admission. This is perfectly understandable given the numerous and substantial inaccuracies found in the minutes themselves. Their weight as an alleged admission is very limited in this light. Taken together with all the other evidence their probative value is minimal.

Copy of Draft ASX Announcement produced by BIL

73. The Court of Appeal noted that production in 2005 revealed nothing about when, and in what circumstances, the copy came into BIL's possession: CA[375] ABWhi/76.

The document had been produced in response to a notice to produce served on BIL dated 18 July 2005: CA[373] ABWhi/76. Moreover, the Court of Appeal identified difficulties with finding how or when the document came into BIL's possession. The Court of Appeal referred to evidence that the non-executive directors received Board or audit committee meeting documents in the course of the Special Commission of Inquiry: CA[375] ABWhi/76, see also: Brown, [290] ABBlu13/5779L; Hellicar, at [43]-[44] ABBlu13/5842O-5843J. The Court of Appeal also noted the fact that Mr O'Brien had separate lines of communication outside of Board meetings with management, and in particular Mr Macdonald, pursuant to which materials were sent to Mr O'Brien and not other non-executive directors in January and February 2001: cf CA[375] ABWhi/76. For example, Mr O'Brien received early drafts of the February Board papers from Mr McGregor which no other non-executive director received: ABBlu4/1806 and ABBlu4/1812.[8]

74. Accordingly, even if one took the leap that production by BIL in 2005 meant that BIL had received the document in 2001 via Mr O'Brien (or Mr Terry), who in turn had obtained it on 15 February 2001, that fact did not of itself or together with any other facts prove it had been generally distributed and indeed tabled at the Board meeting.

Evidence of 4 NEDs: Mr Brown, Ms Hellicar, Mr Gillfillan and Mr Koffel

75. Four submissions are made about the evidence of the Respondents.

Board meeting

76. *First*, their oral evidence provided additional support for the conclusion contended for above that the Board meeting did not proceed by way of a detailed consideration and approval of resolutions, including the passing of the Draft ASX Announcement Resolution.

77. Mr Brown said that he had no recollection of a draft announcement or discussing a draft announcement: LJ[145] ABRed2/448. Mr Brown gave evidence that he had no recollection of the resolutions contained in the minutes of the Board meeting being read out during the Board meeting: Brown XX [T:1832] at 34-36 ABBla3/1116Q-S. Mr Brown also stated that he had no recollection of the resolutions being identified and agreed at the Board meeting: Brown XX [T:1832] at 2-4 ABBla3/1116C-D. When Mr Brown was asked in cross-examination whether the resolutions were summarised at the Board meeting, Mr Brown stated that he had no recollection of that occurring: Brown XX [T:2077] at 3-18 ABBla3/1358C-J. The further evidence of Mr Brown that ASIC relies upon is addressed separately below.

78. Ms Hellicar gave evidence that to the best of her recollection there was no discussion at all at the Board meeting of the terms of an announcement to the market: LJ[168] ABRed2/453; CA[236] ABWhi/53. Ms Hellicar stated that she had no recollection of anybody reading out a summary of resolutions and was certain that no draft

[8] Other evidence to this effect is: (a) Mr O'Brien had raised in early January issues with management concerning the separation proposal which were recorded in an email from Mr Shafron to Mr Cameron and Mr Robb on 11 January 2001 (ABBlue3/1329); (b) Mr Macdonald emailed Mr O'Brien on 24 January 2001 in relation to a potential capital raising and various other issues in relation to Project Green (ABBlu4/1435); and (c) Mr O'Brien emailed Mr Macdonald (cc Mr Terry) on 31 January 2001 to set out the position of BIL in relation to a number of matters including the Foundation: ABBlu3/1424.

resolutions were provided to her: Hellicar XX [T:3034] at 23 – [T:3035] at 12 ABBla5/2262L-2263H.

79. Mr Gillfillan had no recollection of discussion of an announcement to the ASX: LJ[162] ABRed2/452. He could not recall if Mr McGregor sought the views of the Board as to whether they were happy with what was to be communicated in an ASX announcement: Gillfillan XX [T:2625] at 24 ABBla4/1883M, [T:2633] at 40 - [T:2634] at 7 ABBla4/1891S-1892E. Mr Gillfillan denied that a resolution approving a press release concerning the establishment of the Foundation was approved at the Board meeting: Gillfillan XX [T:2379] at 10-17 ABBla4/1645F-J.

80. Mr Koffel also had no recollection of a discussion at the Board meeting concerning a press release: LJ[169] ABRed2/453-454. When Mr Koffel was asked in cross-examination if Mr McGregor sought the views of the Board as to whether they were satisfied with an announcement in those terms, Mr Koffel stated that it was very unlikely that the Board would have been asked to focus on an announcement in the abstract without a formal announcement for them to approve: Koffel XX [T:3422] at 31-42 ABBla6/2627P-V. Mr Koffel swore that he did not approve the Draft ASX Announcement: Koffel XX [T:3428] at 12 ABBla6/2633G.

81. The Court of Appeal acknowledged the substance of this evidence of the non-executive directors: CA[236] ABWhi/53. The Court also noted that even though Mr Koffel accepted someone could have outlined what was to be in an announcement that did not provide evidence that they in fact did so: CA[236] ABWhi/53.

Adoption of minutes

82. *Secondly,* the conduct of the Respondents in approving the minutes at the April Board meeting is explained by the fact that they, like all others, including Mr Robb, did not pay close or sufficient attention to the document. Mr Brown stated that he recalled reviewing the first few pages of the draft minutes but he did not review the ASX Announcement minute as it was contained in a section on formal resolutions: LJ[1194] ABRed2/721; see also: Brown XX [T:1825] at 3-17 ABBla3/1109C-J and [T:1826] at 7-25 ABBla3/1110E-N. The Court of Appeal observed that, although Mr Brown had given evidence that he had noticed *"seventeen separate resolutions"*, the trial judge had made no finding that Mr Brown was aware of the ASX Announcement minute: CA[496] ABWhi/98.

83. Ms Hellicar also gave evidence that she had no recollection of reviewing the minutes of the Board meeting: Hellicar XX [T:2877] at 13-17 ABBla5/2111H-J. Ms Hellicar gave further evidence that her practice was to skim read draft minutes and that she would have only skim read the lawyers' section of the minutes: LJ[1196] ABRed2/721; see also: Hellicar XX [T:2875] at 5-29 ABBla5/2109D-P. Mr Gillfillan had a recollection of reviewing the minutes of the Board meeting: Gillfillan XX [T:2420] at 28-31 ABBla4/1683O-P. Mr Gillfillan also gave evidence that he did not believe he studied the portion of the draft minutes below the heading the "*Creation of the Foundation*": LJ[1195] ABRed2/721; see also: Gillfillan XX [T:2422] at 13-23 ABBla4/1685H-M, [T:2424] at 18-27 ABBla4/1687J-O. Mr Koffel stated that he did not review draft minutes as it was not his practice as he relied on others to ensure the minutes were correct: LJ[1197] ABRed2/721-722; see also: Koffel XX [T:3237] at 15-42 ABBla5/2445I-V, [T:3239] at 41-46 ABBla5/2447U-X.

ASIC's reliance on Mr Brown's evidence

84. *Thirdly*, ASIC's attempt to resuscitate part, but not all, of the trial judge's findings in relation to Mr Brown fails. ASIC relied on two aspects of the evidence of Mr Brown to support the allegation that the Board had approved the Draft ASX Announcement Resolution. The first concerned the finding by the trial judge that there was a *"strong correlation"* between the statements as to the *"key messages"* that Mr Brown, and to a lesser extent Mr Koffel, agreed may have been made at the Board meeting and the Draft ASX Announcement: LJ[193]-[194] ABRed2/460, see LJ[153]-[161] ABRed2/449-451 (for Mr Brown); LJ[177] ABRed2/455 (for Mr Koffel); and LJ[223] ABRed2/467 (for Mr Brown and Mr Koffel). The Court of Appeal analysed the reasoning of the trial judge by reference to the following steps: (a) the Draft ASX Announcement contained a number of statements; (b) Mr Brown recalled management (Mr Macdonald or Mr Baxter) voicing statements in the terms of those in the Draft ASX Announcement at the February meeting; (c) the only source for the statements was the Draft ASX Announcement; and (d) it should be inferred that management voiced the statements from the Draft ASX Announcement: CA[401] ABWhi/83. The Court of Appeal identified correctly that the inference in (d), depended on (b) and (c) and both of these were challenged: CA[403] ABWhi/83.

85. In considering whether the trial judge was correct to make the findings in (b) and (c) above, the Court of Appeal considered at some length the cross-examination of Mr Brown and the statement of Mr Brown: CA[387]-[400] ABWhi/78-82. The Court of Appeal acknowledged that the trial judge heard Mr Brown give his evidence (CA[408] ABWhi/83), but considered that Mr Brown's evidence had to be taken as a whole and that the Court was in a position to determine whether the evidence of Mr Brown was an *"acceptance"* that matters were put by management as key messages or only that it was *"possible"* they were put: CA[408] ABWhi/83. Part of this exercise required an analysis by the Court of questions and answers in terms of *"likelihood"*: CA[409] ABWhi/84.

86. Although ASIC asserts that the trial judge enjoyed advantages not acknowledged by the Court of Appeal (see AS[114], [118] and [120]), the actual advantage ASIC seeks to invoke is not easily identified. ASIC asserts that the answer to a question addressed in terms of *"likelihood"* (and whether it represents an actual recollection) is a *"matter of judgment"* enjoyed by a trial judge: AS[114]. It is not apparent, however, why such a judgment cannot be exercised by an appellate court following a considered review of transcript. Precision in the language used by management in relation to the key messages was necessary for the correlation, but Mr Brown, as the trial judge appears to have accepted at LJ[146] ABRed2/448 and LJ[161] ABRed2/451, did not have a clear recollection of the words used by management.

87. A proper reading of Mr Brown's cross-examination makes it clear that Mr Brown's evidence as to the communication of key messages was not a matter of recollection. Mr Brown stated on numerous occasions that he did not have an explicit recollection: Brown XX [T:2057] at 39-42 ABBla3/1338T–V; [T:2058] at 1-4 ABBla3/1339B-D; [T:2060] at 18-23 ABBla3/1341J-M; [T:2060] at 32-38 ABBla3/1341Q-T; [T:2063] at 17-22 ABBla3/1344J-L; [T:2070] at 1-23 ABBla3/1351B-M; [T:2071] at 39 - [T:2072] at 8 ABBla3/1352T-ABBla3/1353F. The questions that were put to Mr Brown were on the basis that it was *"likely"* matters were said. Mr Brown understood

"likely" in the sense of *"did I consider that it was possible, or something like that"*: Brown XX [T:2072] at 2-3 ABBla3/1353B-C. Mr Brown's evidence amounts to no more than speculation and to a series of lay opinions regarding what is *"likely"* to have occurred, without Mr Brown being asked to or indicating the basis on which he reached those conclusions as to likelihood.

88. This is not therefore a case where the demeanour or even the subtle influence of demeanour impacted on the views expressed by the trial judge: see *Fox v Percy* (2003) 214 CLR 118 at [28]-[29] (Gleeson CJ, Gummow and Kirby JJ); see also, *CSR Ltd v Maddalena* [2006] HCA 1; (2006) 224 ALR 1 at [180] (Callinan and Heydon JJ). Indeed, there is no suggestion in the reasoning of the trial judge concerning the evidence of Mr Brown on this issue that he relied upon the manner in which Mr Brown gave his evidence (or any other observation as a trial judge): LJ[153]-[161] ABRed2/449-451.

89. There was no error in the review undertaken by the Court of Appeal as that process involved a thorough examination of the totality of Mr Brown's cross-examination (see CA[387]-[400] ABWhi/78-83) and analysis of relevant documents, including the management presentation slides: see CA[412]-[419] ABWhi/84-85. This analysis provided a clear basis (as set out below) for the Court of Appeal to depart from the trial judge's finding in accordance with the principles set out in *Fox v Percy*.

90. Turning to the substantive analysis, in relation to (b) (identified at CA[401] ABWhi/83), the Court of Appeal noted at the outset that a question or answer *"in terms of likelihood has inherent difficulty"*: CA[409] ABWhi/84. The Court of Appeal found that *"[w]e do not think that recollection lay behind Mr Brown's answers involving likelihood, nor was a basis laid for reconstruction"*: CA[409] ABWhi/84. The Court also accepted that there was some inconsistency between the trial judge's reliance on Mr Brown's evidence in this respect and his finding that the Draft ASX Announcement was not in fact read out at the Board meeting: CA[410] ABWhi/84. This was Mr Baxter's evidence also: Baxter XX [T:744] at 39-41 ABBla1/352T-U. See also written submissions to Court of Appeal: [40]-[57] ABOra1/47-52 and [101]-[102] ABOra1/66.

91. In relation to (c) (identified at CA[401] ABWhi/83), the Court of Appeal then assessed whether, given Mr Brown's evidence was at best *"uncertain recollection"*, the presentation to the Board was instead based on the key messages slides and not the Draft ASX Announcement: CA[412] ABWhi/84; see also written submissions [49]-[54] ABOra1/50-51. The Court of Appeal noted that the trial judge did not undertake this analysis: CA[413] ABWhi/84. The Court of Appeal found that (with two exceptions that could be explained, see CA[419] ABWhi/85) the substance of each of the key messages Mr Brown had agreed in terms of likelihood could be sourced from the slides: CA[418] ABWhi/85. The Court considered correctly that *"[p]recision in the language ... is necessary for the correlation"*: CA[420] ABWhi/85. Accordingly, the Court of Appeal was correct to find that the correlation with the Draft ASX Announcementas drawn by the trial judge was *"weak"* (CA[420] ABWhi/85-86) and *"rather artificial"*: CA[421] ABWhi/86.

92. The second aspect of Mr Brown's evidence that ASIC relied upon at trial concerned Mr Brown's evidence that it was *"likely"* that the Board's approval of *"that message"*

was summarised by Mr McGregor with indications of agreement: CA[426] ABWhi/87. The trial judge relied on this evidence of Mr Brown, at least in part, in finding that the Draft ASX Announcement had been approved by the Board: LJ[226] ABRed2/468. The Court of Appeal set out the relevant extract of Mr Brown's cross-examination at CA[427] ABWhi/87 and concluded that the evidence did not rise above possibility in the absence of recollection or reconstruction and therefore the evidence of Mr Brown *"was in truth no evidence of what occurred"*: CA [428] ABWhi/87.

10 93. The Court of Appeal observed correctly that the *"message"* to which Mr Brown had agreed was what management had indicated it proposed to communicate: that the Foundation was fully funded in the sense he explained of sufficiently funded to the actuarial estimate: CA[429] ABWhi/87. The Court noted that whether this message was by reference to a draft announcement depended upon further cross-examination: CA[429] ABWhi/87. The Court of Appeal was correct to conclude that Mr Brown was referring to assurances given by management to the Board concerning the sufficiency of funding to be provided to the Foundation and not to public statements to be issued by the company. Mr Brown made that distinction clear in his evidence: Brown XX [T:2072] at 37-44 ABBla3/1353S-W, [T:2045] at 10-22 ABBla3/1327F-L.

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94. Significantly, ASIC does not challenge (either in its grounds of appeal or written submissions) the Court of Appeal's finding that Mr Brown's evidence (set out at CA[427] ABWhi/87) that it was *"likely"* the Board's approval of *"that message"* was summarised by Mr McGregor with indications of agreement was *"in truth no evidence of what occurred"*: CA[428] ABWhi/87. Following this finding by the Court of Appeal the finding of the trial judge at LJ[226] (ABRed2/468), which was critical to his reasoning to the Approval Finding, cannot survive. The trial judge relied on no other direct evidence of what occurred at the Board meeting to come to his conclusion at LJ[226].

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95. This conclusion is particularly important in light of the further observation by the Court of Appeal that even if there was a correlation from Mr Brown's evidence as seen by the trial judge such that it could be concluded management were speaking to a draft announcement, that evidence at best *"was of some kind of approval in principle, less than the draft ASX announcement resolution"*: CA[395] ABWhi/81. That is, even if the approach of the trial judge is accepted in relation to Mr Brown's correlation evidence, that evidence did not support a finding that the Board approved the Draft ASX Announcement Resolution.

40 *ASIC's reliance on Mr Koffel's evidence*

96. *Fourthly*, ASIC's rather faint attempt to assert appellable error in how the Court of Appeal dealt with Mr Koffel (AS[126]) should be rejected. The Court of Appeal noted that the trial judge had not specifically referred to the relevant evidence: CA[423] ABWhi/86. A review of Mr Koffel's evidence demonstrated that the evidence of Mr Koffel had been that matters based on the Draft ASX Announcement *"could have"* or *"might have"* been said: CA[423] ABWhi/86. The Court of Appeal found that Mr Koffel's evidence did not justify even the lesser extent of agreement the trial judge relied upon as Mr Koffel's evidence *"did not rise above possibility, devoid of recollection"*: CA[424] ABWhi/86. The Court also noted that for similar reasons

given in relation to Mr Brown's evidence, a correlation with the Draft ASX Announcement could not be found: CA[424] ABWhi/86.

Evidence of Mr Willcox and Mr Morley

97. The remaining direct evidence as to what occurred at the Board meeting was called from Mr Willcox and Mr Morley. It strongly supported the submissions made above. ASIC has not identified any error in how the Court of Appeal dealt with this evidence or explained how it came to be dismissed.

Mr Willcox

98. The trial judge noted that Mr Willcox gave evidence that he had no recollection of Mr McGregor (or anybody else) tabling the Draft ASX Announcement or any discussion about an announcement to the ASX at the Board meeting: LJ[180] ABRed2/456, CA[236] ABWhi/53. The evidence of Mr Willcox in chief was that he denied being asked to approve the Draft ASX Announcement and he denied that he did so: Peter Willcox at [102] ABBlu12/5544S-5545D. Mr Willcox confirmed in cross-examination that he denied seeing a draft announcement, did not recall any discussion about it at the Board meeting and denied that he was asked to approve the Draft ASX Announcement or that he did so: Willcox XX [T:3757] at 45 ABBla6/2937W, [T:3758] at 2, ABBla6/2938C and [T:3753] at 20 – [T:3754] at 8, ABBla6/2933C-2934F.

99. Mr Willcox was also asked whether someone had identified in summary form the matters about which there would need to be a resolution and Mr Willcox said that he did not recall such a discussion but that he understood management were recommending the decision to approve the Foundation and that the Board approve resolutions to give effect to the decision: Willcox XX [T:3727] at 25-29 ABBla6/2907M-P, [T:3726] at 34-40 ABBla6/2906Q-U.

Mr Morley

100. Mr Morley gave evidence about the Board meeting and events at that meeting. The trial judge noted that Mr Morley did recall a discussion about a communications strategy: LJ[142] ABRed2/447, Morley XX [T:1483] at 11-47 ABBla2/806 G-X. Mr Morley's evidence was that he could not recall seeing a press release at the Board meeting, a press release being distributed at the Board meeting or a press release being discussed at the Board meeting: Morley at [533] ABBlu12/5666V-5667D. Mr Morley's best recollection was that no draft press release was tabled: Morley XX [T:1687] at 15-27 ABBla3/997I-O.

101. The trial judge also noted that Mr Morley's evidence was that the Draft ASX Announcement was not approved at the Board meeting and he would not have supported any proposal that JHIL make unqualified public statements about the sufficiency of funding and he would have opposed it: LJ[142] ABRed2/447.

102. Instead of merely dismissing the evidence of Messrs Willcox and Morley as *"mistaken"* (LJ[222] ABRed2/467 and LJ[228] ABRed2/469), the trial judge ought to have brought it to account as direct evidence contrary to ASIC's case and evidence which was entitled to significant weight.

103. Before moving to the objective circumstances it is should be noted that this review of the evidentiary record demonstrates that not one of the eight witnesses who attended the Board meeting and who gave evidence at the trial, or the late Mr Peter Cameron and the late Mr McGregor, said that the Draft ASX Announcement was before the Board meeting: CA[628] ABWhi/118; LJ[187] ABRed2/459. Not one of them could recall any discussion about a document, which had it been there for approval, would inevitably have provoked significant debate.

Objective circumstances

104. There are a set of objective circumstances that detract from any inference that the Board approved the Draft ASX Announcement Resolution and the Court of Appeal's analysis in Part 4.5.4 titled *"In accordance with JHIL's practice"* (ABWhi/65) provides an appropriate starting point for their consideration. The objective circumstances include: (i) the Draft ASX Announcement was a *"work in progress"*; (ii) failure to follow the usual JHIL practice in respect of a draft news release; (iii) Mr Baxter's evidence concerning amendments to announcements following a Board meeting; (iv) significant changes made to the Draft ASX Announcement following the Board meeting; (v) conduct of management and others following the Board meeting; and (vi) the conduct of Allens over the whole of 15 February 2001. Each of these is addressed below, along with the errors ASIC alleges were made by the Court of Appeal.

Draft press release a "work in progress"

105. The Court of Appeal found that the draft announcement Mr Baxter took to the Board meeting (being the Draft ASX Announcement) was a *"work in progress"*: CA[316] ABWhi/67, CA[432] ABWhi/88, CA[792] ABWhi/147. Contrary to AS[92], the Court made an express finding to this effect: *"whatever occurred was no more than a consideration of a draft news release as a work in progress"*: CA[316] ABWhi/67. This conclusion was derived from a number of objective circumstances (which are addressed in turn below), but importantly included the failure to follow JHIL's usual practice and the subsequent significant changes made to the Draft ASX Announcement.

106. ASIC contends at AS[100] that the Court of Appeal speculated about any discussion occurring at the Board meeting as being a discussion of the Draft ASX Announcement as a *"work in progress"*. There is significant evidentiary support, however, for the finding that the document Mr Baxter took to the Board was a *"work in progress"*. *First*, work was still being performed on the draft announcement in the hours leading up to the Board meeting: CA[313] ABWhi/67. *Secondly*, the Draft ASX Announcement had not been considered by JHIL's advisers, Allens or UBS, before the Board meeting and Trowbridge, PwC and Access Economics had not yet considered, or consented to, the Draft ASX Announcement: CA[309] ABWhi/66. *Thirdly*, Mr Baxter had specifically commented in his 7:24am email to Ms Rotsey that *"no doubt we can refine later today"*: CA[308] ABWhi/66. *Fourthly*, Mr Baxter in fact volunteered in cross-examination that the process was a *"work in progress"*: Baxter XX [T:743] at 32-41 ABBla1/351Q-U. *Fifthly*, the changes that were made to the Draft ASX Announcement occurred after the Board meeting (which are set out below) demonstrated that the Draft ASX Announcement was *"in fact"* treated as a *"work in progress"*: CA[336] ABWhi/69 and [792] ABWhi/147. ASIC's contention at AS[100] that there was a lack of evidence from the respondents who gave evidence

is hardly surprising when none of them had any recollection that a draft announcement had been taken to the Board meeting.

107. ASIC complains that the Court of Appeal made no attempt to reconcile the inconsistency between a possible discussion by the Board of the Draft ASX Announcement as a *"work in progress"* and the minutes: AS[97]. The Court of Appeal found, instead, that the Draft ASX Announcement was taken to the Board meeting as a *"work in progress"*: CA [432] ABWhi/88 and [792] ABWhi/147. The Court did reconcile the inconsistency. It recounted the relevant chronology of events concerning the minutes before and after the Board meeting in Part 4.5.9 of its judgment. The Court found that having regard to all the evidence that the ASX Announcement minute did not reflect what occurred at the Board meeting.

Usual JHIL practice not followed

108. Mr Baxter gave evidence about the usual practice within JHIL for the drafting and approval of ASX announcements. After a draft announcement was prepared, Mr Baxter said it would be sent to the line management concerned, being Mr Attrill in relation to asbestos liabilities, Mr Morley in relation to financial matters and Mr Shafron and Allens in relation to legal matters: LJ[134] ABRed2/445. A draft would also be sent to UBS and Mr Macdonald and possibly Mr Harman for them to be satisfied before the draft was presented to the Board for approval: LJ[134] ABRed2/445; see also CA[303] ABWhi/65.

109. The Court of Appeal considered that the usual JHIL practice had not been followed in relation to the Draft ASX Announcement: CA[310] ABWhi/66. No members of management or any advisers approved the announcement prior to the Board meeting and Mr Baxter agreed that what occurred in relation to the Draft ASX Announcement was *"entirely irregular"*: LJ[135] ABRed2/445. As the Court of Appeal noted, what *"should have been done, according to Mr Baxter's practice, was not done"*: CA[310] ABWhi/66.

110. The Court of Appeal observed that the circumstances were *"unusual"* as *"[t]here was great haste"* with a deadline for a media announcement to be made on 16 February 2001: CA[313] ABWhi/67. However, even in circumstances of great haste, the Court of Appeal considered that it was not to be expected that such an important matter as an ASX announcement *"would be thrust upon senior management, or upon advisers, particularly Mr Robb, at the meeting"*: CA [315] ABWhi 67.

111. ASIC submits that the Court of Appeal's consideration of the absence of pre-meeting vetting overlooked the fact that Allens (including Mr Robb) had reviewed the draft minutes less than two hours before the Board meeting: AS[95]. There is no evidence that Mr Robb did engage in such a process of review just before the Board meeting or that he had at that time the Draft ASX Announcement for review. Instead, what he did learn from Mr Shafron was that he may need to review the whole Allens' advice (see [42] above and [129]-[131] below).

112. The Court of Appeal was correct in finding that the trial judge had erred in overlooking the significance of the failure to follow standard practice by simply asserting that this was a *"last minute affair"*: LJ[224] ABRed2/468. The absence of

proper vetting, advice and consents instead, as the Court of Appeal concluded, *"tends against the definitive approval alleged by ASIC"*: CA[315] ABWhi/67.

Alleged established procedure for subsequent approval

113. ASIC instead contends at AS[94] that there was an *"established procedure"* by which changes could be settled by Mr Macdonald and Mr McGregor following a Board meeting and that the changes would not need to come back to the Board unless Mr McGregor thought appropriate. ASIC had submitted at trial and on appeal that there was a *"procedure"* for the approval of changes to press releases following the approval of a press release by the Board. There are fundamental difficulties with ASIC's submission.

114. *First*, neither the trial judge nor the Court of Appeal found that there was any such procedure. ASIC has mischaracterised both the description of Mr Baxter's evidence by the Court of Appeal at [334] ABWhi/69 and his underlying evidence: Baxter XX [T:769] at 32-36 ABBla1/377Q-S; Baxter XX [T:801] at 23-[T:802] at 7 ABBla1/409M-410E; Baxter XX [T:803] 27-38 ABBla1/411N-T. All Mr Baxter in fact said was this:

(a) Allens needed to sign off on announcements to the ASX prior to a Board meeting and if any changes came out of that meeting they would need to sign off again: Baxter XX [T:803] 27-38 ABBla1/411N-T;

(b) Mr Baxter accepted that he had not sent the 7.24am draft announcement to Mr Robb or Mr Peter Cameron prior to the Board meeting (Baxter XX [T:759] at 28-36 ABBla1/367O-S and [T:761] at 19-21 ABBla1/369/K-L). It followed (as the trial judge found at LJ [224] ABRed2/468 and the Court of Appeal found at CA[309] ABWhi/66) that Allens had not signed off on the Draft ASX Announcement prior to the Board meeting and accordingly the procedure Mr Baxter referred to in (a) was not applicable;

(c) the reason that Mr Baxter felt he was entitled to participate in the 15 changes from the Draft ASX Announcement to the Final ASX Announcement was that the Board had not "*set in stone*" the terms of the release: Baxter XX [T:801] at 23-[T:802] at 7 ABBla1/409M-410E; and

(d) Mr Baxter believed or recalled that Mr Macdonald had discussed the changes with Mr McGregor but, as to the role of the Board as a collective entity in respect of the changes, his answer was "*I don't know about the rest of the directors*": Baxter XX [T:769] at 32-36 ABBla1/377Q-S.

115. *Secondly*, apart from this evidence of Mr Baxter which does not support ASIC's case, ASIC did not tender evidence of any occasions upon which the alleged procedure had been followed, let alone establish that such a well-established practice of the Board, in effect, qualified what was otherwise a final approval of a document in a specific form.

116. *Thirdly*, there was positive evidence denying the existence or application of any such alleged procedure. Mr Harman, who was called by ASIC gave no evidence in chief about such a procedure and was not re-examined after he had stated in cross-examination that his understanding was that the press release was not set in stone: CA[337] ABWhi/70. There is no evidence that he was aware of the procedure alleged by ASIC. Mr Willcox's unchallenged evidence in chief was that if the Board had approved the wording of a draft announcement, based on his understanding and observation of the procedure during his time as a non-executive director of JHIL, he

would not have expected changes other than minor to spelling and punctuation post approval by the Board: Willcox at [107] ABBlu12/5547M.

117. *Fourthly*, a further reason against there being such a procedure is that non-financial ASX announcements were not usually approved by the Board. According to JHIL's applicable disclosure policies it was within the authority of JHIL's CEO to approve such an announcement: ABBlu1/109N; Baxter XX [T:707] at 15-29 ABBla1/318I-O.

118. Finally, ASIC's assertion at AS[94] that the alleged procedure would be consistent with the approval recorded in the minutes is simply incorrect. The terms of the ASX Announcement minute record that an announcement was to be executed and released to the ASX; there is no ambiguity in the acts to be performed and they do not accommodate any procedure to be followed in the event that subsequent changes are made to the draft news release. ASIC provides no explanation for the consistency it asserts.

Significant subsequent changes

119. Mr Baxter also gave evidence about further work he performed on the Draft ASX Announcement after the Board meeting. Mr Baxter had commented in his 7.24am email to Ms Rotsey that *"no doubt we can refine later today"*: CA[308] ABWhi/66. The Draft ASX Announcement was the subject of least twenty-five changes between the conclusion of the Board meeting and the release of the Final ASX Announcement: see written submissions [119] ABOra1/71-73. The Court of Appeal concluded that seven of the changes made after the Board meeting were significant: CA[321]-[332] ABWhi/68-69. This conclusion was consistent with the evidence of Mr Baxter, who had agreed in cross-examination that those seven changes were significant: Baxter XX [T:795] at 1 – [T:800] at 38 ABBla1/403B-408T.

120. Nonetheless, ASIC submits that none of the changes were significant, especially in light of the alleged established procedure for post-meeting changes: AS[101]. The alleged procedure has already been addressed. More importantly, the changes made to the Draft ASX Announcement were significant, not just for the content of those changes, but also for the fact that any changes at all were made following the Board meeting. Whatever occurred at the Board meeting must have been something other than the Draft ASX Announcement Resolution because those involved in the changes must have considered that it was open to them to make such changes.

121. In any event, the changes were significant. An increase in payment to the Foundation from $284 million to $293 million could not be dismissed as immaterial: CA[323] ABWhi/68. Similarly, there were changes in the description of the role of the directors in determining the level of funding required by the Foundation, which on any view, was significant: CA[330] ABWhi/69.

Subsequent conduct of management

122. The conduct of several members of management following the Board meeting before the release of the Final ASX Announcement and the contemporaneous documents concerning subsequent changes to the Draft ASX Announcement is also inconsistent with approval by the Board of the Draft ASX Announcement Resolution. In addition to Mr Baxter and Mr Robb, the Court of Appeal identified Mr Harman, Mr Shafron

and Mr Morley as persons who attended the Board meeting who acted as though the ASX announcement had been left to management: CA[337] ABWhi/70.

123. Mr Harman was responsible for obtaining PwC's approval of the reference to PwC in the draft announcement to the ASX (Harman XX [T:260] at 11-14 ABBla1/90G-90H) and although he was aware before the Board meeting of the need to obtain PwC's approval he did not approach PwC until after the Board meeting: Harman XX [T:260] at 16-21 ABBla1/90I-90L. It is no answer, as ASIC suggests at AS[99], that Mr Harman's evidence was consistent with the Draft ASX Announcement Resolution in light of Mr Baxter's evidence about post-meeting procedure. There was no basis for that procedure as outlined above, let alone a finding that Mr Harman was aware of it.

124. Mr Shafron was responsible for obtaining the consent of Trowbridge in relation to the reference to it in the announcement to the ASX. Mr Shafron had asked for a *"soft copy"* of the announcement late on the afternoon of 15 February 2001 and Ms Wheeler sent an email to Mr Shafron at 4.58pm which included that statement: *"Greg [Baxter] is currently working on it so once final will send it through"*: ABBlu5/2162. Mr Shafron responded in an email at 5.07pm which stated: *"whatever you have now please – I what* [sic] *to get Trowbridge approval to cite them"*: ABBlu5/2162. The Court of Appeal considered that this email exchange demonstrated that Mr Shafron *"appears to have thought that the news release was a work in progress"*: CA[337] ABWhi/70. Mr Shafron did not ask for a copy of the Draft ASX Announcement, which it was alleged that the Board had approved: CA[337] ABWhi/70.

125. Mr Morley also gave evidence that on 16 February 2001, after the results presentation that day, Mr Shafron asked Mr Morley the question: *"who approved the press release?"*: Morley at [537] ABBlu12/5667T-V. Mr Morley's response was that he assumed that Mr Macdonald approved it (ABBlu12/5667T-V) and he maintained this evidence under cross-examination: Morley XX [T:1599] at 20 – [T:1600] at 45 ABBla2/919K-920W. The trial judge did not consider this evidence and the Court of Appeal considered the evidence was consistent with Mr Shafron thinking that the Board had not signed off on the Draft ASX Announcement: CA[337] ABWhi/70. ASIC does not address this evidence from Mr Morley.

Role of Allens

126. The role of Allens and in particular, Mr Peter Cameron and Mr Robb, before the Board meeting, during the Board meeting and after the Board meeting is significant. The evidentiary record is clear that Mr Peter Cameron and Mr Robb were warned prior to the Board meeting of a potential difficulty with the claims data relied upon by Trowbridge. They wanted to give careful consideration to this development. Mr Robb made annotations to the Draft ASX Announcement that watered down the assurance that the company was to convey to the market. Further, the minutes for the Board meeting were not reviewed (if it all) by Allens until at least 5 weeks after the Board meeting. Based on these facts, the following inferences concerning the role of Allens are available:

(a) it is most unlikely that Mr Peter Cameron and Mr Robb would have remained silent during the Board meeting if the Board had in fact been asked to approve the Draft ASX Announcement Resolution;

(b) it is highly likely that either or both Mr Peter Cameron and Mr Robb would have informed the Board about their conversation with Mr Shafron and Mr

Macdonald had there been any discussion about the Draft ASX Announcement at the Board meeting, and they would have indicated that Allens needed more time to consider potential changes to the draft;

(c) it is highly unlikely that Mr Robb would have participated in making substantial changes to the Draft ASX Announcement immediately after the Board meeting without reference back to the Board if he had just observed the Board pass the Draft ASX Announcement Resolution; and

(d) it is likely that in late March/April Mr Robb did not give the draft minutes of the Board meeting close attention; had he done so, he could not have missed the fact that they did not approve the Draft ASX Announcement Resolution.

127. To address ASIC's very different submission about the conduct of Allens (see AS[102]-[109]) it is necessary to start with the reasoning of the trial judge and the Court of Appeal. The trial judge implicitly found and the Court of Appeal found that Mr Robb suggested changes to the Draft ASX Announcement after the Board meeting (and these findings are set out below). The trial judge accepted that Mr Robb had made handwritten alterations (that there was also some unidentified handwriting, possibly of Mr Peter Cameron) on each of the two versions of the draft announcement produced by Allens: LJ[217] ABRed2/466; CA[345] ABWhi/71; see also ABBlu5/2187 and Baxter XX [T:804] at 34-40 ABBla1/412R-U and [T:805] at 39-42 ABBla1/413T-V. The trial judge stated that *"Mr Robb had the opportunity later that day to give his view of the document"*: LJ[329] ABRed2/498.

128. Similarly, the Court of Appeal found that Mr Robb made those annotations at some point after the Board meeting: CA[351]-[352] ABWhi/72. The changes suggested by Mr Robb contemplated a paring back of the level of assurance of adequate funding, by introduction of expectation and an actuarial basis: CA[351] ABWhi/72. The Court of Appeal found that the changes to the Draft ASX Announcement, or at least some of them, occurred as a result of the suggestions of Mr Robb: CA[352] ABWhi/72. In reaching this view, the Court drew on the evidence of Mr Baxter, who recalled that he had a number of conversations with Mr Robb about the draft announcement and that the Draft ASX Announcement was changed to include *"the spirit of"* amendments suggested by Mr Robb: CA[352] ABWhi/72, Baxter XX [T:772] at 43 – [T:773] at 3 ABBla1/380V-381C, Baxter at [98]-[99] ABBlu10/4612U-4613H.

129. The distinction between the trial judge and the Court of Appeal lies in the further inferences that the trial judge sought to draw in relation to Mr Peter Cameron and Mr Robb. The trial judge considered that Mr Peter Cameron held back on voicing a view at the Board meeting, notwithstanding the Draft ASX Announcement was being discussed and up for approval, and that Trowbridge was being discussed, because he needed more time to absorb and assess the impact of the absence of the most recent claims data from the Trowbridge report before Allens discussed the matter with the Board: LJ[327]-[329] ABRed2/497-498. There was no basis in the evidence for such speculation by the trial judge and the Court of Appeal rightly rejected that speculation. Instead, the Court considered that rather than not voicing a view would not a solicitor *"who had not had time to absorb something ... have advised the board not to approve the draft news release as an ASX announcement until he was in a position to provide advice?"*: CA[357] ABWhi/73.

130. ASIC now speculates as to two reasons why Mr Peter Cameron and Mr Robb accepted the language of *"fully funded"* on the *"say so"* of Mr Macdonald in the telephone conversation immediately prior to the Board meeting. *First*, ASIC claims that Allens could not be imputed with expert knowledge as to the impact of claims data upon the actuarial advice: AS[107]. *Secondly*, ASIC claims that Mr Peter Cameron and Mr Robb accepted the assurance of full funding because the annotations do not seek to water down the assurance that the Foundation would be fully funded: AS[107]. These reasons provide no satisfactory foundation for further speculation.

131. Mr Peter Cameron and Mr Robb did not require expert knowledge to appreciate the significance of the absence of claims data. As the Court of Appeal observed, Mr Peter Cameron and Mr Robb *"were alive to the importance of sufficiency of funding to the proposal to go to the board"*: CA[339] ABWhi/70. The evidence of Mr Peter Cameron as set out by the Court of Appeal at CA[341] (ABWhi/70-71) also demonstrated an acute awareness on his part of the potential significance of a change in claims data. Moreover, contrary to ASIC's submission, the handwritten annotations demonstrate, as the Court of Appeal found, that Mr Robb *"contemplated reduction in the level of assurance of adequate funding"* through the introduction of expectation and an actuarial basis: CA[351] ABWhi/72. It is no answer to point to other language in the Draft ASX Announcement that was not amended; it is clear that at several places on the Draft ASX Announcement Mr Robb suggested alterations that directly concerned the level of assurance that the company would make to the market about the adequacy of funding for the Foundation.

Conclusion

132. ASIC did not satisfy the standard of proof required under s140(1) to prove its allegation. This is so even without a consideration of the consequences of ASIC's failure to call Mr Robb.

Evidence ASIC did not lead and the consequences

133. ASIC elected not to call Messrs Robb, Sweetman and Wilson, each of whom attended the Board meeting. The Court of Appeal set out at some length the procedural history of ASIC's conduct and failure to call these witnesses: CA[648]-[666] ABWhi/122-125 (in relation to Mr Robb) and CA[674]-[677] ABWhi/126 (in relation to Messrs Sweetman and Wilson). See attached **Witnesses Not Called Aide Memoir**.

134. For these evidentiary inferences to be available on a *Blatch v Archer/Payne v Parker* analysis it is necessary to satisfy the three conditions outlined in the opening section of this submission, namely that:

(a) Mr Robb (and Messrs Sweetman and Wilson) would be expected to be called by ASIC rather than the defendants;

(b) Mr Robb's (and Messrs Sweetman and Wilson's) evidence would elucidate a particular matter; and

(c) Mr Robb's (and Messrs Sweetman and Wilson's) absence is unexplained.

135. The first condition is satisfied here because ASIC would be expected to call Messrs Robb, Sweetman and Wilson. The trial judge had found that the first requirement could not be satisfied for Mr Robb on what appeared to be three different grounds. *First*, the trial judge considered that Mr Robb remained in the camp of the defendants, or at least the eleventh defendant: LJ[207] ABRed2/464. *Secondly*, the trial judge

asserted that the witnesses were also not in ASIC's camp because they were independent experts and there is no property in an expert witness: LJ[1141] ABRed2/710-711. *Thirdly*, the trial judge observed that Mr Robb was subject to a subpoena to give oral evidence served by ASIC and it was open to the defendants to serve Mr Robb with such a subpoena: LJ[1142] ABRed2/711.

136. The Court of Appeal disagreed with this finding of the trial judge and found that *"ASIC would be expected to call Mr Robb"*: CA[766] ABWhi/142. The Court found that Mr Robb *"could not be categorised as a witness who was equally available to both sides"* and that *"[i]t was ASIC...that should have called him"*: CA[776] ABWhi/144.

137. ASIC would have been expected to call Mr Robb, in particular, for these cumulative reasons:

(a) Mr Robb was the best placed of any single person to give evidence about the crucial events before, during and after the Board meeting. Without the benefit of his direct evidence the Court would be left to rely heavily on uncertain inferences in reaching its conclusions;

(b) the logic of ASIC's case, both express and implicit, depended critically upon the Court having to draw a series of inferences about Mr Robb's state of mind and conduct both by action and omission. The Court and the defendants, against whom those inferences were sought, could fairly expect that since direct evidence was available from Mr Robb it would be proffered in preference to relying upon uncertain inferences;

(c) the role of ASIC and the public interest nature of these proceedings, as well as the grave consequences which ASIC was asking the Court to impose on the defendants, made it all the more to be expected that ASIC would enable the Court to consider such affirmative evidence as Mr Robb was able to give and that the defendants would have the usual opportunity to test it. In this sense, the fairness of which the Court of Appeal spoke was a factor in forming the expectations properly made of ASIC and, indeed, in what might be considered an inconsistency between the nature and purposes of the relief ASIC sought from the Court and the truncated manner in which ASIC was asking the Court to proceed; and

(d) Mr Robb was available in a real sense to ASIC far more than he was to the defendants.

138. Specifically, it is not correct (as the trial judge asserted) that the witnesses would have co-operated to the same extent with the defendants as they did with ASIC. There was no suggestion that ASIC needed any of its regulatory powers to require Mr Robb to give reasonable assistance. The delay in providing a statement or outline of evidence from Mr Robb was explained by the assertion by JHINV and JHIL that witnesses, including Mr Robb, owed them an ongoing duty of confidentiality which prevented them disclosing information to ASIC concerning their affairs: ABBlu12/5225. However, the companies had *"relaxed"* the duty of confidentiality such that the witnesses were permitted *"to provide statements which may be adduced by [ASIC] in its case in chief in the proceedings"*: ABBlu12/5225.[9] Following this development,

[9] ASIC was then asked on 15 September 2008 to confirm that it would give priority to those of the Allens' witnesses it had asserted were *"major witnesses"* (DOC.08DEF.001.0090) and ASIC did confirm that an

counsel for ASIC informed the court on 22 September 2008 that it *"had exemplary co-operation from the Allens witnesses"*: [T:25] ABBla1/2P. As a result, by letter dated 7 October 2008, Mr Robb's solicitor provided ASIC with Part 1 of a draft statement of Mr Robb, indicated that Part 2 would be provided later in the week and invited ASIC's solicitor and counsel to meet with Mr Robb: ABBlu12/5308. On the following morning ASIC informed the Court it was considering whether or not to call Mr Robb and others.[10] ASIC then informed the defendants on 9 October 2008 that it would not be calling Mr Robb and other witnesses from Allens: ABBlu12/5309.

139. Thus, ASIC had not only full cooperation from Mr Robb but an unrestricted opportunity, one could infer, to assess the detailed evidence he could give.

140. Once ASIC announced it no longer intended to call Mr Robb, Mr Robb's solicitors indicated that Mr Robb was not prepared to meet with the other parties to the litigation: CA[669] ABWhi/125; see ABBlu12/5411. The defendants had no ability to obtain statements or otherwise assess whether they wished to call Mr Robb, particularly given the late stage at which they were informed by ASIC (being during the course of the trial) that they would not be calling Mr Robb. In these circumstances, it cannot be claimed that the defendants could have received the same level of co-operation that ASIC obtained, certainly at least in relation to Mr Robb. The finding at CA[776] ABWhi/144 was undoubtedly correct in that, having regard to the procedural history, the Respondents had no practical ability to assess whether to call Mr Robb and he could not be expected to be called blind.

141. Similar arguments apply to Mr Sweetman, who also provided ASIC with an affidavit, which was sworn on 1 September 2008: LJ[205] ABRed2/463, ABBlu11/5078. ASIC also had the co-operation of Mr Wilson and it had served the defendants with a list of topics for his evidence: LJ[205] ABRed2/463. ASIC then informed the defendants on 6 October 2008 that it would not be reading the affidavit of Mr Sweetman and it would not be calling Mr Wilson: ABBlu12/5306. That much is not disputed by ASIC.

142. In these circumstances, Messrs Robb, Sweetman and Wilson would be *"expected to be called"* by ASIC, particularly given the level of co-operation Mr Robb gave to ASIC, including the provision of a draft statement. This follows even where the results of the co-operation have been provided to the defendants: *ASIC v Rich* (2009) 75 ACSR 1 at [472] (Austin J). The public interest dimensions of ASIC's role as a regulator in bringing civil penalty proceedings only serve to reinforce the conclusion that if there is witness available who could provide direct evidence of a fact in issue then it is more natural for ASIC to call that evidence.

143. In addressing this issue, ASIC suggests at AS[61] that the Court of Appeal found that Mr Robb had *"his own interests to protect"*. As noted, part of the procedural history included the statement by ASIC's counsel that ASIC had received *"exemplary co-operation"* from the Allens' witnesses, including Mr Robb: [T:25] ABBla1/2P. There was no basis whatsoever to suggest that Mr Robb would not continue to co-operate with ASIC or that Mr Robb would do other than tell the truth as an officer of the court.

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affidavit of Mr Robb was *"underway"* and would be provided to the defendants *"at the earliest opportunity"*: DOC.08.DEF.001.0096.

[10] See discussion recorded at CA [657]-[660] ABWhi/123-124; ABBla1/218 and [T:593] at 41 – [T:595] at 8.

Relevantly, it is only in circumstances where a witness has a reason for not telling the truth or refusing to assist and the party who may call him is aware of this that a *Jones v Dunkel* inference may not arise: *Fabre v Arenales* (1992) 27 NSWLR 437 at 450 (Mahoney JA, Priestley and Sheller JJA concurring); JD Heydon, *Cross on Evidence* (Loose leaf service, LexisNexus) [1215], 1091. That was not the case in relation to Mr Robb and cannot be employed as a reason to deny the satisfaction of the first condition. Notably, ASIC had no embarrassment in calling Mr Baxter or Mr Harman.

144. The second condition requires that the evidence of a witness would elucidate a particular matter. An inference cannot be drawn unless evidence is given of facts *"requiring an answer"*: *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at [51] (Gaudron J). That condition was certainly met here. Mr Robb played a central role as an adviser to JHIL and was *"deeply engaged in advising and otherwise acting for JHIL"*: CA[200] ABWhi/45. Moreover, Mr Robb had been a party to the telephone conversation with Messrs Macdonald and Shafron before the Board meeting (CA[341] ABWhi/70), he attended the Board meeting and there was evidence that his handwriting appeared on the Allens copies of the Draft ASX Announcement: CA[345]-[348] ABWhi/71-72. The Court of Appeal acknowledged that the issues Mr Robb was aware of *"would have been of sufficient concern ... for him to have given attention to the events at the meeting"*: CA[761] ABWhi/141-142. The Court of Appeal concluded that Mr Robb *"would 'probably have knowledge' on the issues"*: CA[766] ABWhi/142.

145. Further, although the trial judge did not consider this condition, he did appreciate the significance of explaining the absence of any warning or advice from Allens at the Board meeting: LJ[327]-[329] ABRed2/497-498. The speculation that the trial judge undertook in relation to the conduct of Messrs Peter Cameron and Robb illustrated the significance of the failure to call Mr Robb. As both Messrs Sweetman and Wilson attended the Board meeting (and the UBS engagement letter required UBS to vet ASX announcements) similar reasoning applies to them as noted by Giles JA: CA[772]-[774] ABWhi/143-144.

146. The third condition was also satisfied: ASIC failed to explain its failure to call Messrs Robb, Sweetman and Wilson. The procedural history (see CA[648]-[673] ABWhi/122-126 in relation to Mr Robb and CA[674]-[677] ABWhi/126 in relation to Messrs Sweetman and Wilson) demonstrates that ASIC provided no explanation for its failure to call these witnesses and the third condition is therefore satisfied. In this regard, the Court of Appeal found that the procedural history demonstrated that ASIC made a conscious decision not to call the witnesses, especially Mr Robb: CA[673] ABWhi/126. The Court of Appeal found that ASIC had not explained or justified its failure to call Mr Robb: CA[669]-[670] ABWhi/125. ASIC does not submit otherwise.

147. With these three conditions satisfied, the following inferences sought by ASIC should be treated with greater reserve and indeed, ultimately, should not be drawn:

(a) that the Draft ASX Announcement was handed to Mr Robb at the Board meeting and distributed generally to those in attendance at the Board meeting;

(b) that there was discussion of the Draft ASX Announcement at the Board meeting in the presence of Mr Robb and that discussion led to obtaining the Board's approval;

(c) that Mr Robb and Mr Peter Cameron accepted the *"say so"* of Mr Macdonald that the Foundation would be fully funded and this provided the reason why they remained silent and allowed the Board to approve the Draft ASX Announcement, which they were still considering suggesting changes to; and

(d) in late March/early April, Mr Robb engaged in a considered activity of reviewing and settling the draft minutes to ensure their accuracy, thereby lending extra credibility to them.

148. Instead, the inferences identified above at [126] should be more strongly drawn.

149. Further, with the three conditions above satisfied, the absence of such evidence from Mr Robb and others assists in deciding whether the total evidence called provides an appropriate basis on which to conclude ASIC has not discharged its onus of proof having regard to the standard required under s140 of the *Evidence Act*. The trial judge declined to follow the principle and observations of the Court of Appeal in *Whitlam* on the basis that ASIC had called Mr Baxter, being the witness *"who might have proved"* the allegation directly: LJ[204] ABRed2/462. Once Mr Baxter was unable to give direct evidence supporting ASIC's contention, the failure to call an even more central witness became even more significant when applying this principle. It could be said that ASIC's default *"brings a great slur"* on its case: *Ward v Apprice* (1704) 6 Mod Rep 264; 87 ER 1011.

150. ASIC's only real answer is to assert that this was not a case such as *Ho* or *Shalhoub* and to claim that the minutes provided a sufficient basis to prove ASIC's case: AS[68]. The weight that should be afforded to the minutes and their approval has already been addressed above and those considerations make it clear that the minutes could not provide a basis to establish ASIC's case, especially to requisite standard required under s140 of the *Evidence Act*. Such evidence was *"limited material"* (*Ho*) and did *"not itself clearly discharge the onus"* (*Shalhoub*) and it therefore was appropriate to consider the absence of evidence from Mr Robb and the others.

Other matters

151. To the extent that ASIC's submissions make passing reference to other matters but do not identify with precision any error in the approach of the Court of Appeal (eg. declarations at AS[79]), no further comment is necessary.

Summary

152. In summary, the Court of Appeal was entitled and bound to exercise its own judgment under the rehearing power in s75A of the *Supreme Court Act*. The Court conducted a thorough analysis of the evidence and reasoning of the trial judge and there is no error in its ultimate conclusions. Importantly, the intermediate conclusion of the Court of Appeal that ASIC could be expected to call Mr Robb was correct and the drawing of an adverse inference by the Court of Appeal was also correct.

153. Even if the Court of Appeal erred in the formulation of duty of fairness, the result is no different. ASIC did not and cannot prove its allegation to the requisite standard under s140 of the *Evidence Act*. An application of the orthodox *Blatch v Archer/Payne v Parker* evidentiary presumptions serves to further weaken ASIC's case.

Part VII: US Respondents' Argument on notice of contention

154. The Respondents' arguments on their Notices of Contention (insofar as they are common to all) have been addressed above. The arguments specific to the US Respondents now follows.

155. The starting point of the assessment of the claim of legal liability against the US Respondents is to identify precisely how the Court of Appeal analysed the pleadings and the findings of the trial judge so as to uphold the finding that the US Respondents were guilty, on the assumption that the Draft ASX Announcement Resolution had been passed, of the contravention found against them: see generally CA[838]-[857] ABWhi/158-161.

156. The two critical elements for the Court of Appeal were:
   (a) that the silence of the US Respondents constituted a vote in favour of the Draft ASX Announcement Resolution; and
   (b) this was a contravention not because they had knowledge of what the Draft ASX Announcement might convey (as was the case with the Australian directors) but because they had failed to equip themselves with the terms of the Draft ASX Announcement, and therefore were in no position to make a proper judgment to vote for or against its approval.

157. The premise upon which the Court of Appeal upheld the correctness of this reasoning is found at CA[855]-[856] ABWhi/161 and involves the US Respondents hearing on the telephone line:
   (a) that the company proposed to issue an announcement which the directors were asked to approve in the event that the separation itself was approved;
   (b) an extensive discussion on the topic occurring in Australia;
   (c) it being apparent from the above that the Australian directors had access to a document they did not have; and
   (d) a point being reached where Mr McGregor as the Chairman asked: "*Is the board happy with that?*", leading to nods by the directors situate in Australia and silence from the US Respondents.

158. Each and every element of this premise was earlier rejected by the Court of Appeal: see particularly CA[395] ABWhi/81, CA[428]-[432] ABWhi/87-88, CA[792] ABWhi/147. Accordingly, it would be only if ASIC made substantial headway in overturning the Court of Appeal's findings and in resurrecting the findings of the trial judge that any separate issue concerning the liability of the US Respondents properly arises.

159. While these submissions cannot canvass all of the ways in which ASIC might succeed in reinstating the premises which the Court of Appeal rejected, some key points can be made, all of which arise strictly in the alternative.

160. *First*, the Court of Appeal's conclusion in CA[855] ABWhi/161 that there was no reason to treat the silence of the US Respondents in the face of the proposed announcement to the ASX as any different to the (assumed) silence in the face of the proposal to separate is unfounded. The US Respondents were in a very different position in relation to these two matters. As to the separation proposal, they had exhaustive materials in their Board papers, the additional documents that had been

forwarded to them by Mr Harman the previous evening, and they were on clear notice that separation was a central purpose of business at the Board meeting. On any view, there was discussion involving a whole variety of parties on the merits of separation. By contrast, the US Respondents did not have the terms, or even a summary read out for them, of the Draft ASX Announcement; nor did they have any advance notice that they were duty bound to consider it. This is not merely seeking refuge or excuse in being participants solely by telephone; it is rather a reflection of the very different position which they faced between the subject of the Board meeting, namely separation, and what was, at best, a late addition.

161. *Secondly*, the furthest the trial judge went was that there were discussions at the Board meeting which involved the correlation between key messages to be communicated to the market and various paragraphs of the Draft ASX Announcement. The errors in the finding as to correlation identified by the Court of Appeal are discussed above: see [84] – [85], [90] – [91] and [95]. But, in any event, in circumstances where the US Respondents did not have before them the Draft ASX Announcement, it is difficult to see how they were required to intuit from anything that was being said about key messages that the business of the Board meeting had moved to the consideration and possible approval by the Board of a specific form of draft announcement, which on any view they did not have.

162. *Thirdly*, the Court of Appeal's contingent premise at CA[856] ABWhi/161 that the US Respondents heard sufficient discussion to appreciate that the Australian directors were reviewing, and considering approving, the precise terms of an actual document which they, and they alone, had is not borne out in the findings of the trial judge. Neither the critical paragraph (LJ[226] ABRed2/468), nor the underlying evidence relied upon, which is the evidence of Mr Brown (especially at Brown XX [T:2057] at 16 – 42, ABBla3/1338I-V), establishes this fact.

163. *Fourthly*, looking at the matter objectively, the US Respondents did not vote in favour of the Draft ASX Announcement Resolution, even if it is supposed that it was considered and approved by the JHIL Board. Assessing whether a vote is cast at a meeting is determined objectively by a consideration of whether the conduct of the putative voter manifests an intention to exercise a vote: *Whitlam v ASIC* (2003) 57 NSWLR 559 at [144], [145] (Hodgson, Ipp and Tobias JJA).[11] Although there was a general practice at the JHIL Board that silence could amount to a vote in favour of a resolution, such a practice would only apply in the circumstances of the ordinary or usual operation of the Board where all Board members had the necessary documents available to them and the substance of what was being proposed was clear to all. The silence of the US Respondents in the objective circumstances of the Board meeting, where they did not have a copy of the document, it was not read out for their benefit, and they did not participate in its approval (LJ[232] ABRed2/470) were such that their silence could never be taken to constitute a vote in favour of the Draft ASX Announcement Resolution. In the circumstances of informality found by the trial judge, the silence of the US Respondents was in substance an abstention from any vote on an approval of a draft announcement. There was no practical or legal reason for that abstention to be further expressed.

[11] See also, *Everett v Griffiths* [1924] 1 KB 941, where McCardie J observed at 953 that: *"A man may give his vote in divers ways, either by writing, or by hand, or by voice, or by conduct – e.g,. by nod. The form in which acquiescence is given matters not if acquiescence be actually indicated."*

164. *Fifthly*, and accordingly, it is highly unlikely that any person in the meeting in Sydney would have understood silence to mean that the US Respondents were participating in the decision whether to approve the Draft ASX Announcement, let alone that they were approving such a decision. Those present in Australia would reasonably have understood: the US Respondents did not have the content of the Draft ASX Announcement before them (in writing or having it read out); they had not been forewarned it was a subject for resolution; they had not made any comments about it down the telephone line; and overall were not in any real position to make a meaningful decision about the suitability of its contents for release to the market. The only reasonable conclusion that could have been drawn from that silence is that the US Respondents were not party to the assumed decision to approve the release of the Draft ASX Announcement. Analysed in legal terms, that could never amount to voting in favour of the resolution, and would be best viewed as abstention. There was nothing more that the US Respondents needed to say or do to make clear to those present in Australia that they were not taking responsibility for the terms of the Draft ASX Announcement: that was evident from their silence in such circumstances.

165. *Sixthly*, in those circumstances, a convenient way to crystalise the issue is to identify the irreducible minimum that needed to be conveyed orally at the Board meeting, ordinarily by Mr McGregor as Chair, before one could reasonably conclude that the US Respondents fairly understood that they were being asked to consider an approval by the Board of the Draft ASX Announcement. What would have been required is something like this:

> "*Before we proceed further I need to indicate for the benefit of Messrs Gillfillan and Koffel, who are on the telephone, that the business of this meeting is now moving beyond that which was indicated in the Board Papers or the materials which you received recently on email. We, as directors in Sydney, are now considering the contents of the Draft ASX Announcement which has been handed out to all of those present in the meeting by Mr Baxter. It is an announcement which at this stage is only in draft form as it has not yet been approved by Allens, UBS or management. What we are now considering, as part of this meeting, is whether we as the Board should authorise the release of that draft announcement to the market assuming we otherwise agree upon the substance of the separation proposal. Could you confirm that you are content for the business of the meeting to extend to this additional item and for you to be a part of this discussion and any resolution on it even though you don't have before you a copy of the draft announcement?*"

166. The above represents more than a mere rhetorical flourish. Short of the Chairman taking such steps, it could not be considered reasonable or necessary for the US Respondents to appreciate that the business of the Board meeting had been so expanded such that they needed affirmatively to indicate whether they remained part of the relevant discussion on this point or whether they could safely consider themselves to be excluded from responsibility for it.

167. This immediately leads to the central difficulty in ASIC's case. There is no evidence that any such statement was made at the Board meeting by Mr McGregor so as to indicate clearly to the US Respondents that the business at the Board meeting had been expanded.

168. No-one suggested the Board meeting occurred in that way. It is inherently unlikely it would have. The directors present in Australia could not have considered that it would be fair to their colleagues in the United States to ask them to be joining in such a resolution when they did not have the material before them. Mr Robb could never have considered, as the solicitor for the company, that this was an appropriate way in which the Board should be bound in law to the approval of a resolution. From Allens' point of view, as the persons whose legal advice (apart from Allsop SC) was being relied upon by the directors in relation to this most important decision, and bearing in mind his unresolved concerns about what message could properly be conveyed to the market, Mr Robb could not have done other than warn Mr McGregor that no such resolution in this form ought to be allowed to be considered by the Board.

169. *Seventhly*, before a finding of contravention in the term of the declaration set out at CA[839] ABWhi/158-159, and analysed at CA[840]-[851] ABWhi/159-161 is to be upheld, there needs to be a sound basis upon which a director is subject to a legal duty to take steps within the conduct of a Board meeting to equip him or herself with material otherwise not provided. Ordinarily, a director would be entitled to assume that he or she must give careful and conscientious attention to all the material in Board papers, together with, subject to the limits of practicality, material provided subsequent to the Board papers. If there is yet further material a director is supposed to absorb which is only available at the meeting itself, it would be an essential part of the Chairman's role to identify that there is such additional material and to ensure the directors know that they are duty bound to consider it before exercising a vote.

170. Accordingly, in the highly specific circumstances in which the present issues arose, and allowing for the full contingency of the premises which the Respondents otherwise reject, the burden imposed on the US Respondents of actively taking steps within the confines of the Board meeting to obtain and then review the terms of the document which neither the Chair, nor their fellow directors in Sydney, nor the lawyers present at the Board meeting, thought they should be provided with, is one which does not properly reflect the duty imposed by s180(1) of the *Corporations Act*. Further, considering the other aspect of the declaration upheld at CA[869] ABWhi/164, in all the specific and contingent circumstances, nothing further was required from a competent director consistent with his or her duty under s180 to make further express what was, in any event, conveyed through silence, namely that such director could not be taken as having participated in the consideration of the Draft ASX Announcement Resolution, nor taken to have exercised a vote one way or another in relation to it.

171. While the above arguments have focused on the specific position of the US Respondents and are independent in the sense that they confirm why those directors, ought never have been held liable, they also, as part of the overall matrix, tend to confirm the inherent unlikelihood of the ASIC case against all the Respondents.

Dated: 20 July 2011

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