ANNOTATED

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S181 of 2011

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

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

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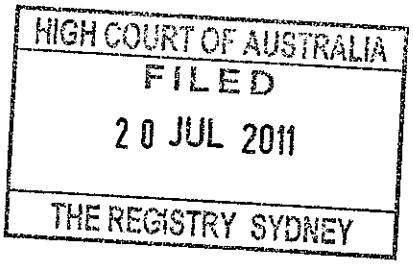
PETER JOHN WILLCOX
Respondent

RESPONDENT'S SUBMISSIONS



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Part I: Publication of Submissions.

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

Part II: Issues arising in the Appeal.

2. The respondent adopts the position articulated in the written submissions of the respondents in matters 176, 177, 178 and 179 of 2011 ("Hellicar respondents") and the respondent in matter 180 of 2011 ("Mr O'Brien").

Part III: Notices under s 78B of the Judiciary Act 1903 (Cth)

3. The respondent agrees no s 78B notices are necessary.

Part IV: Material Facts

4. The respondent generally adopts the submissions in the written submissions of the Hellicar respondents and the respondent in matter 175 of 2011 ("Mr Terry"). ASIC's statement of facts, under the heading "Importance of funding message" (AS [12] – [16]) in addition omits to note two matters. First, that slides presented at the February board meeting informed the board that the "message" that was to be communicated was not one of certainty or "full funding". Rather, it was one of funding to the best actuarial estimate of future claims, or that "the Foundation expects to have enough funds to pay all claims"[1]. The significance of this matter, as the Court of Appeal concluded (CA [235] ABWhi 53.22), is that it makes it unlikely, in the absence of some clear and plausible explanation, that the board would have been asked to approve an ASX Announcement that contained a different "message".

5. Secondly, the slides presented at the February meeting reveal that an announcement to the ASX was only one aspect of the strategy presented to the board at that meeting for communicating the "funding message". Different strategies were put forward for different segments of the community: shareholders and investors, business media, general media, government, unions, plaintiff law firms and judges, and James Hardie employees. The focus of all strategies was meetings and individual briefings of key persons, the provision of briefing notes and Mr Macdonald making presentations and giving interviews[2].

6. The significance of the above matters is as follows. The board, as ASIC notes and as the Court of Appeal found (CA [99] ABWhi 25.35) regarded as important the reactions of "stakeholders" to any decision by JHIL to separate out its asbestos liabilities. But, according to the slides presented to the board at the February meeting, those stakeholders would be reacting to that decision as communicated to them through a strategy of which the ASX Announcement was but a part. Even on ASIC's case the board was not asked to pass a resolution approving the overall communications strategy (CA [307]

[1] CA [178], [234], [235] ABWhi 39.30; 53.10-.20; ABBlu 5/2226.
[2] ABBlu 5/2228 – 22235, part of which is set out at CA [175]; ABWhi 39.1-.20.

ABWhi/66.22). That makes it unremarkable that it would not have been asked to approve an ASX Announcement that was but a part of that strategy.

Part V: Applicable Legislation

7. The respondent accepts that the applicable legislation is as set out by ASIC and annexed to its written submissions.

Parts VI and VII: Argument

Introduction

8. The respondent adopts the written submissions of Mr Terry regarding the Court of Appeal's conclusions on the duty of fairness. The respondent contends that the Court of Appeal's orders were supported independently of those conclusions and generally adopts the written submissions of the Hellicar respondents, Mr Terry and Mr O'Brien in this regard. The respondent, on its notice of contention, generally adopts the submissions of the Hellicar Respondents, Mr Terry and Mr O'Brien and contends that in any event the Court of Appeal's orders are supported by a conventional application of the principles in *Briginshaw v Briginshaw*[3] and *Blatch v Archer*[4].

9. For the purposes of minimizing repetition, these written submissions seek to deal only with the significance of Mr Robb's absence from the witness box. These submissions are made both in response to ASIC's argument on its notice of appeal and in support of the respondent's notice of contention.

10. In contending that it has discharged its onus, ASIC submits that the following inferences, which were not drawn in either of the Courts below, should be drawn in this Court:

    (a) that Mr Robb had a role in the preparation of the minutes and expected, prior to the meeting, that the pleaded resolution (ABRed 194L-Q) ("the Resolution") would be put to the board (ASIC's written submissions ("AS") [20], [85(a)], [95]).

    (b) that Mr Robb expected, prior to the meeting, that the board would approve an announcement and that there would be no difficulty in taking this course notwithstanding that no copy of any draft announcement had been provided to him ([AS [95]).

    (c) that Mr Robb's conduct in suggesting changes to the Draft ASX Announcement after the meeting can be explained on a basis consistent with the passing of the Resolution (AS [104] - [107]).

    (d) that Mr Robb accepted Mr Macdonald's assurance of full funding given immediately prior to the meeting (AS [107]).

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[3] *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[4] *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 65; 970.

(e) that Mr Robb did not believe that the message in the Draft ASX Announcement required "watering down" (implicit in AS [104] , [107], [108]).

(f) that Mr Robb did not give any advice cautioning against the issue of an emphatically worded announcement to the ASX (AS [108]).

(g) that Mr Robb had a responsibility for the proper preparation of the minutes after the board meeting (AS [84], [85(a)]).

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(h) that Mr Robb after the 15 February meeting reviewed the draft minutes of that meeting, noticed the reference to the Resolution, and was satisfied that the minutes were accurate in this respect (AS [20], [68], [85(a)], [89], [97], [104]).

11. The following submissions contend that in the absence of Mr Robb, the above inferences cannot be drawn conformably with s 140 of the Evidence Act 1995 (NSW) and that if they are not drawn then ASIC has not discharged its onus to the requisite standard. To make that contention it is necessary to consider: (1) the requisite standard of proof; (2) ASIC's reliance on the minutes; and (3) evidence detracting from the proposition that the
20 Resolution was passed.

The requisite standard of proof

12. The ultimate question for the trial judge was whether his Honour was, within the meaning of s 140 of the Evidence Act 1995 (NSW), "satisfied ... on the balance of probabilities" that the board voted in favour of the Resolution. The question for the Court of Appeal, on a rehearing under s 75A of the Supreme Court Act 1970 (NSW) and applying, as it did[5], established principles of appellate review, was the same.

30 13. That ultimate question required the application of two principles. First, the principle that the nature of the cause of action, the nature of the subject matter of the proceedings and the gravity of the matters alleged affect the answer to the question of whether a matter has been proved to the civil standard. This is often referred to as the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and is reflected in s 140(1), which requires a court to take these matters into account in assessing whether it is "satisf[ied] on the balance of probabilities" that the matters in question have been established. In the present case, the allegations were grave because of their consequences (CA [742], ABWhi 138.35) and also because of their nature and inherent unlikelihood: ASIC's case was that the directors authorized the execution and release to the ASX of an obviously misleading document in
40 circumstances where that document was designed to quell opposition to the separation of James Hardie's asbestos liabilities and where the board papers and slides indicated that there could be no certainty about the level of funding. The result of the application of this principle was that ASIC's onus would not be discharged by "inexact proofs, indefinite testimony, or indirect inferences"[6].

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[5] See CA [251] – [271] ABWhi 56.13 – 59.36)

[6] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

14. The second principle that was engaged was the principle that a failure by a party to call a witness who is available and who could shed light on some matter in issue is a matter relevant to an assessment of the cogency of the evidence actually adduced[7]. This principle is sometimes, and in the judgment of the Court of Appeal (CA [730], [732], [734], [754], [755] ABWhi 136.27 – 137.14, 140.41-141.2) referred to as the principle in *Blatch v Archer*[8]. It is an aspect of the requirement under s 140 that the court arrive at a state of "satisfaction" and of the more general principle that "[t]he facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied"[9]. That principle was engaged because ASIC did not call evidence that was available to it from Mr Robb on the question of whether the Resolution was passed.

15. The above two principles applied in a context where what was required was an assessment of the "united force" of the evidence (CA [286], [793] ABWhi 62.44, 147.13) for the purposes of deciding whether ASIC had established to the requisite standard that the Resolution was passed.

The minutes

16. At the centre of ASIC's case in the courts below was (as it is in this Court) the proposition that the passing of the Resolution was proved to the requisite standard by the minutes of the board meeting of 15 February 2001. The minutes contained an assertion that there occurred at this meeting a resolution in terms "very close" (CA [230], ABWhi 52.2) to the terms of the Resolution[10]. That assertion was admissible as an exception to the hearsay rule by virtue of the minutes being business records of JHIL. The weight to be accorded that assertion was at the centre of the dispute between the parties. The trial judge came to his conclusion that the Resolution was passed without regard to the minutes: his Honour reasoned from that conclusion to the proposition that reference in the minutes to the Draft ASX Announcement was correct and not vice versa (LJ [1150], [1205]; ABRed 2/712R, 723K). The Court of Appeal found that the reliability and weight of the minutes was very much open to question (CA [497], ABWhi 98.41), that there were significant considerations telling against the weight to be given them as a correct record (CA [791], ABWhi 146.44), and that there were substantial grounds for treating the reliability of the minutes with some care (CA [496], ABWhi 98.26).

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[7] See, for example, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; *G v H* (1994) 181 CLR 387 at 391-392; *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 65; 970; *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559 at [119]; *Ho v Powell* (2001) 51 NSWLR 572 at [16]; *Shalhoub v Buchanan* [2004] NSWC 99 at [71]; *Australian Securities and Investments Commission v Rich* (20090 236 FLR 1 at [404] – [412].

[8] *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 65; 970.

[9] *Jones v Dunkel* (1959) 101 CLR 298 at 305, per Dixon CJ, quoted with approval by the plurality judgment in *West v Government Insurance Office of NSW* (1981) 148 CLR 62 at 66.

[10] The difference between the pleaded resolution and the resolution in the minutes is that part (b) of the pleaded resolution is that JHIL "authorise the execution" of the Draft ASX Announcement (ABRed 1/194P), whereas part (b) of the resolution that appears in the minutes is that the Draft ASX Announcement be "executed by" JHIL (ABBlu 5/2124S).

17. ASIC thus contends that the minutes should be accorded a weight that neither of the courts below gave them. That contention is put on the basis that the minutes were adopted by those directors present at the April 2001 meeting and accepted as correct by Mr Robb. To appreciate the context in which Mr Robb's conduct becomes significant, it is necessary to say something about ASIC's reliance on the directors' adoption of the minutes. The latter matter is dealt with in detail in the submissions of the Hellicar respondents, but three matters are worthy of emphasis in evaluating the weight to be accorded this conduct (cf. *Lustre Hoisery Ltd v York* (1935) 54 CLR 134 at 143-4).

10 18. First, in neither of the courts below was there a finding that any particular director who attended the April meeting was aware that the draft minutes contained the Resolution when they were adopted (or that Mr Willcox had this awareness when he failed to object to the draft minutes prior to that meeting). This Court would not revisit that position. As the Court of Appeal noted at [783], [784] (ABWhi 145.18 - .35) the trial judge's statement at LJ [1203] (ABRed 2/723C-G) does not amount to such a finding. It is not directed to any particular director and pertains to a matter on which his Honour stated he did not rely in coming to his ultimate conclusion (LJ [1150], ABRed 2/712R). The absence of such a finding deprives the adoption of the minutes of any significant weight.

20 19. Secondly, the minutes contained numerous errors (LJ [1204] – [1220], ABRed 2/723H – 725X); which the Court of Appeal regarded as significant (CA [489] – [495]; ABWhi 97.11 – 98.24). As a result of these errors, the adoption of the minutes at the April meeting, in and of itself, did not establish to the requisite standard that the Resolution was passed. It was necessary for ASIC to either explain away the errors or to adduce other evidence of the passing of the Resolution. ASIC's explanation is to contest the Court of Appeal's findings that the errors were significant. Those findings were correct for the reasons given by that Court (CA [492] – [495]; ABWhi 97.33 - 98.24). In addition, the failure accurately to record in the minutes two of the three main decisions made at the meeting was highly significant. The slide presentation given at the meeting sought three
30 "actions" from the directors: the establishment of the foundation, the commencement of the sale of the Gypsum business and the continuation of the restructure[11]. The board came to a consensus on, and resolved to take all of these "actions". The process by which it did so in relation to the Gypsum and restructure decisions was the subject of unchallenged evidence from Mr Willcox (ABBlu 12/5554E-Q). The board's decision to continue the restructure was not recorded at all in the minutes (LJ [1219], ABRed 2/725R). The board's decision to commence the sale of the Gypsum business was inaccurately recorded (LJ [1218], ABRed 2/725O).

20. The most obvious explanation for the errors in the minutes (including the error in the
40 recording of the Resolution) is not that they are trivial or insignificant. It is that the minutes were not drafted as a contemporaneous account of the meeting and that the attention necessary to pick up these errors was not given to the draft minutes at the time they were adopted by the directors at the April meeting. None of the directors who gave evidence claimed to be an assiduous verifier of draft minutes, and there were no findings to that effect in the courts below. The evidence of Ms Hellicar and Messrs Brown,

[11] CA [169] ABWhi 37.20-.27; ABBlu 4/1688; 1740

Gillfillan and Koffel has been dealt with in the written submission of the Hellicar directors. Mr Willcox' evidence was that when reading board papers it was not his practice to spend much time on the minutes of previous meetings (ABBlu 12/5506H) and that he had no specific recollection of reading the draft minutes of the February board meeting contained in the April board papers (ABBlu 12/5558T; ABBla 6/2937P). He said that if he had read the draft minutes, he did not recall seeing anything that was so badly misleading in them that he had cause to do anything about it (ABBla 6/2929Q-R).

21. Thirdly, there was no evidence and no finding in either of the courts below that the minutes were actually used as a guide to the conduct of the meeting (CA [478]; ABWhi 94.42). Nor was there any finding that they were in fact an accurate account of what was actually said at the meeting. Mr Willcox' unchallenged evidence was that he was certain that the Chairman did not read out the resolutions as recorded on pages 3, 4, 5, 6 and 7 of the minutes (ABBlu 12/5544J).

22. In the light of the difficulties it faces in relying on the adoption of the minutes by the directors, ASIC seeks to attribute significance to Mr Robb's conduct in the preparation and approval of the minutes. In particular, ASIC contends for the following findings (none of which was made in the courts below):

    (a) that Mr Robb had a role in the preparation of the minutes and expected, prior to the meeting, that the Resolution would be put to the board (AS [20], [85(a)], [95]);

    (b) that Mr Robb expected, prior to the meeting, that the board would approve an announcement and that there would be no difficulty in taking this course notwithstanding that no copy of any draft announcement had been provided to him ([AS [95]);

    (c) That Mr Robb had a responsibility for the proper preparation of the minutes after the board meeting (AS [84], [85(a)])

    (d) that Mr Robb after the 15 February meeting reviewed the draft minutes of that meeting, noticed the Resolution, and was satisfied that the Resolution was accurately recorded (AS [20], [68], [85(a)], [89], [97], [104]).

23. (a) and (b) detract from the ultimate inference sought by ASIC in that they draw attention to the fact that the minutes were not drafted as a contemporaneous account of what occurred at the board meeting. The trial judge's conclusion that the minutes were drafted "in the expectation" that the Resolution would be passed (LJ [1192] ABRed 2/720R), with respect, states no more than the fact that the Resolution was in the draft minutes. Who had such an expectation and why is not the subject of any finding in the Courts below (cf. CA [761], ABWhi 141.45). So far as Mr Robb is concerned, it is mere speculation to attribute any particular expectation to him in the absence of his having given evidence. As set out in paragraph 29, below, if one were, contrary to *Briginshaw*, to resort to speculation, it would be more plausible to attribute to Mr Robb either no expectation either way regarding a resolution to approve an ASX Announcement or an expectation that if a draft document were made available to and approved by all necessary

advisers and members of management prior to the meeting then, and only then, would it be put to the board for approval.

24. The proposition that Mr Robb had responsibility for the proper preparation of the board minutes after the board meeting ((c), above) is bare assertion. One might reasonably expect that Allens would have had an important role prior to the meeting in crafting the necessary resolutions to establish the Foundation. But there is no evidence to suggest that Mr Robb or anyone at Allens had any responsibility for ensuring that that the minutes accurately reflected what occurred at the board meeting.

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25. ASIC's contention that Mr Robb at some time after the meeting read the draft minutes, noticed the Draft ASX Announcement Resolution, and regarded it as accurate ((d), above) is also no more than speculation. The evidence now relied upon in support of that inference is a letter from Mr Robb to Mr Morley dated 29 March 2001 (ABBlu 7/2826-7). ASIC did not refer to this evidence before the trial judge. The letter lists various types of work done "by the corporate and tax departments" of Allens, including "settling various completion documents and board minutes as required by Alan Kneeshaw for JHIL" (ABBlu 7/2826N). The period of time over which the work was done is said to be "the period 5 February 2001 to 27 March 2001" (ABBlu 7/2826M). The letter does not
20 indicate which Allens personnel spent time "settling" board minutes, whether that occurred before or after the 15 February board meeting, how much time was spent on that activity or, indeed, what "settling" involved. There was evidence available (in addition to Mr Robb's testimony) that could have shed light on the reference to "settling" the minutes. Allens kept timesheets that set out who performed the work the subject of its invoices, when, and for how long. Such timesheets were in evidence for other periods of time (ABBlu 6/2521-2541), but (although ASIC claimed to have examined 348 billion documents in the course of its investigation leading up to these proceedings[12]) no such timesheet was tendered for the period after the 15 February board meeting. In the absence of such evidence, and in the absence of Mr Robb, the inferences for which ASIC contends
30 regarding his conduct and the conduct of Allens after the board meeting are matters of speculation and could not be drawn conformably with *Briginshaw* and *Blatch v Archer*.

26. In all of the above circumstances, the Court of Appeal's findings at [496], [497] (ABWhi 98.40-.43), and [791] (ABWhi 146.45) in relation to the weight to be accorded to the minutes were amply supported.

27. The minutes (whatever weight is to be attached to them as evidence of the Resolution) require assessment in the overall context of the "united force" of the evidence (and, as indicated above, the application of *Briginshaw* and *Blatch v Archer*). That is the approach
40 the Court of Appeal adopted. ASIC in its submissions at [68] contends that this approach is incorrect because minutes were an "exact proof" and that ASIC by tendering the minutes "clearly discharged" its onus. This contention assumes in ASIC's favour one of the very matters at the heart of the dispute between the parties and in relation to which ASIC has no findings in its favour in the Courts below. It ignores that the minutes were

[12] See ASIC's press release on the commencement of these proceedings: DOC.08DEF.001.0309 at .0310, second last paragraph.

not drafted as a contemporaneous account of the meeting, were not used as a guide to the conduct of that meeting and contained numerous significant errors. It also ignores that, even when drafted contemporaneously or used as a guide to the conduct of a meeting, minutes are not the best evidence of what occurred at that meeting: the best evidence is testimony of persons present at that meeting (*Cordina Chicken Farms Pty Ltd v Poultry Meat Industry Committee* [2004] NSWSC 197 at [28]).

Evidence detracting from an inference that the Resolution was passed

28. An assessment of the united force of the evidence thus required an assessment of the minutes in the context of other evidence and applying *Briginshaw* and *Blatch v Archer*. As the Court of Appeal identified, a number of aspects of the evidence detracted from the proposition that the Resolution had been passed. In particular:

    (1) The slides and the board papers as a whole were contrary to an announcement being made that it was certain that the Foundation had sufficient funds to meet potential asbestos claims or that it was fully funded (CA [235]; ABWhi 53.21).

    (2) The absence of prior vetting of the draft ASX Announcement by advisers tended against the Resolution having been passed. Even in circumstances of haste, it was not to be expected that such an important matter as the ASX Announcement would be thrust upon senior management or upon advisers, particularly Mr Robb, at the meeting (CA [315], [432] ABWhi 67.33 -.37; 88.7-.14).

    (3) That there were changes made to the release after the meeting detracts from the inference that the Resolution was passed (CA [320] ABWhi 68.22-.24)) and suggested that whatever occurred at the meeting was no more than a consideration of the draft release as a work in progress (CA [316] ABWhi 67.42-.45) and that the making of such changes was thought to have been open despite whatever occurred at the meeting (CA [336]; ABWhi 69.45-.51).

    (4) That Allens suggested changes after the meeting brings considerable pause to the conclusion that the Resolution was passed (CA [358], ABWhi 73.41-.43).

29. The written submissions of the other respondents deal with the above matters in more detail. For present purposes it is convenient to deal only with Mr Robb's involvement in matters (2) – (4). As to (2) (the absence of prior vetting of the draft ASX Announcement) ASIC contends for a finding that Mr Robb expected that the board would approve an announcement at the board meeting and that there would be no difficulty in this course notwithstanding the absence of prior vetting (AS [95]). This contention is speculative in the absence of Mr Robb. Amongst other matters, it assumes, in the absence of evidence, that he would be comfortable about a departure from established practice on the basis that the "prior vetting" necessary could be done at the board meeting. That is but an assumption and an unwarranted one for at least two reasons. First, some of the persons

whose approval was necessary, representatives of Trowbridge and Access Economics[13], were not present at that meeting. Secondly, Mr Robb, having not been provided with a copy of any draft ASX Announcement, was not in position to know whether such a document would be controversial or require significant time at the board meeting to correct. Even if one were to resort to a "choice among rival conjectures"[14], it is more likely that either (a) Mr Robb did not turn his mind at all to the question of whether the board would be asked to approve an announcement because the focus of his attention prior to the board meeting was on what legal decisions were necessary to give effect to the establishment of the Foundation, should the directors decide to take that course (CA [761] ABWhi 141.47); or (b) Mr Robb expected that, if management and advisers and persons named in any draft release had the time and opportunity prior to the meeting to approve a draft announcement and did so, then and only then would the board be asked to give its approval to that document. Neither (a) nor (b) assists ASIC.

30. As to the changes made after the meeting ((3) and (4), above), Mr Morley's evidence was that he saw Mr Robb write "anticipated" on a copy of the draft announcement in the early hours of 16 February (ABBlu 12/5567E-J; ABBla 919T – 920U). The trial judge noted that since the word "anticipated" found its way into a draft circulated at 7:42pm, Mr Morley must have been mistaken as to the timing of this event (LJ [218], ABRed 2/466N-Q). His Honour found, however, that Mr Robb had an opportunity later that day to give his views about the document (LJ [329], ABRed 2/498O-Q; and see CA [792] ABWhi 147.7). The Court of Appeal found that it was likely that the changes to the 7:24am release, or some of them, came about at the suggestion of Mr Robb (CA [352], [792]; ABWhi 72.26, 147.6).

31. The fact that Mr Robb suggested changes to the Draft ASX Announcement after the meeting required ASIC, in contending that the Resolution was passed, to explain two related matters (to the "satisfaction" of the Court, on the balance of probabilities, applying *Briginshaw* and *Blatch v Archer*). The first explanation required was of the fact that the Resolution (a resolution to execute and send to the ASX a particular document) was passed in Mr Robb's presence in circumstances where he was dissatisfied with that document. In the absence of Mr Robb (and having regard to *Briginshaw* and *Blatch v Archer*) there could be no satisfactory explanation for that fact. The absence of such an explanation was a serious obstacle to the courts below arriving at a state of "satisfaction" or "actual persuasion"[15], on the balance of probabilities, that the Resolution was passed.

32. The Court of Appeal accepted as much (CA [358], ABWhi 73.41-.43). The trial judge addressed the issue at LJ [327] – [329] (ABRed 2/497P -498R). His Honour considered that "[p]resumably" Mr Cameron and Mr Robb held back on voicing a view about the document at the meeting because they needed time to absorb the fact, revealed to them shortly before the meeting, that Trowbridge had not been given recent claims data. Some of the difficulties with his Honour's reasoning are set out by the Court of Appeal at [354]

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[13] CA [311], [313], [432] ABWhi 67.7, 67.22, 88.6. See also the unchallenged evidence of Mr Willcox at ABBlu 12/5547H and the evidence of Mr Baxter in cross-examination at ABBla 1/321J – X

[14] *Jones v Dunkel* (1959) 101 CLR 298 at 304, per Dixon CJ.

[15] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

– [357] (ABWhi 73.9-.39). The point for present purposes is that his Honour's reasoning is unsound because, in the absence of Mr Robb from the witness box, it lacked a proper evidentiary foundation.

33. ASIC (AS [108]) does not seek to uphold the trial judge's explanation but rather proffers the following explanation (AS [104], [107], [108]). Mr Robb accepted Mr MacDonald's assurance that the proposal to be put to the directors was for a "fully funded" Foundation (AS [107]). Accordingly, ASIC contends, Mr Robb was not of the view that the message in the Draft ASX Announcement required watering down (AS 104], [107]) and did not give any advice to that effect (AS [108]): such changes as were made at his suggestion were as misleading as the original document. This explanation is no more than speculation in the absence of Mr Robb and inconsistent with the Court of Appeal's finding that Mr Robb contemplated reduction in the level of assurance of adequate funding (CA [351] ABWhi 72.21). In a more fundamental sense, however, ASIC's explanation misses the point. Whatever the quality or effectiveness of the changes Mr Robb suggested, he evidently thought they were changes worth making - and, as the Court of Appeal found, JHIL executives acted on his suggestion (CA [352], [792]; ABWhi 72.26, 147.6). In those circumstances, it was necessary for ASIC in contending for a finding that the Resolution was passed, to explain why Mr Robb did not voice his suggestions at the meeting. The evidence, in the absence of Mr Robb, was not sufficient to provide that explanation.

34. The second matter of which ASIC's contention that the Resolution had been passed required an explanation was related to the first. It was the fact that, after the board meeting, Mr Robb participated in the making of changes to the Draft ASX Announcement (CA [352], [792]; ABWhi 72.26, 147.6). Most of the changes that were made to that document were found by the Court of Appeal to be significant, were accepted as such by Mr Baxter and described in similar terms in the unchallenged evidence of Mr Willcox[16]. The Resolution required the execution and release of a particular document. Shortly after the meeting the persons that had been present at it (Mr Robb, Mr Macdonald, Mr Baxter and Mr Shafron) treated the document not as the Resolution would require but rather as a work in progress. That was a matter which ASIC needed to explain to make plausible its contention that the Resolution was passed: it made that contention, absent such an explanation, a matter of "inherent unlikelihood"[17].

35. ASIC sought and now seeks to give such an explanation by suggesting that there was a practice in place for the making of such changes without reference to the board (AS [94]). There is no finding in either of the courts below to this effect. Nor was there any finding that the practice alleged by ASIC to have been in existence was in fact followed in this particular case. The evidence upon which ASIC relied to establish the existence of the practice and that it was followed (Mr Baxter's evidence in cross-examination[18]) was

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[16] The changes are set out by the Court of Appeal at [321] – [332] ABWhi 68.26 – 69.24). Mr Baxter's evidence appears at ABBla 1/403B – 408T, Mr Willcox' evidence appears at ABBlu 12/5547M – 5549T.

[17] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362.

[18] ABBla 1/411N-412Q). The evidence was referred to by the Court of Appeal (CA [333] – [334]; ABWhi 69.25-.38), but not the trial judge.

insufficient for that purpose for the following reasons. First, ASIC does not refer to the unchallenged evidence of Mr Willcox that, on the basis of his understanding and observation of the practice during his time as a director of JHIL, if a board had approved a document, changes other than minor corrections to spelling, grammar or punctuation that did not affect the sense of that document would not be made to it (ABBlu 12/5547M-R). Mr Willcox identified 12 changes to the Draft ASX Announcement which he would not have expected to have been made in light of that practice (ABBlu 12/5547R-5549T). Secondly, Mr Baxter was describing a practice under which Allens signed off on the press release before the board meeting (ABBla 1/411P-Q): there is no doubt that did not occur in the present case. Thirdly, Mr Baxter was describing a practice under which any changes to a press release after a board meeting were approved by Allens (ABBla 1/411P-Q). ASIC never sought and does not now seek a finding that Allens did in fact approve all of the changes to the Draft ASX Announcement[19]. ASIC thus relies on speculation and uncertain inference to explain away "inherent unlikelihood". That is not sufficient in a *Briginshaw* context.

36. ASIC seeks to stigmatize as "speculation" the Court of Appeal's reasoning on this issue (AS [96], [97], [100] – [103], [108], [109]). But the correct analysis is that the subsequent changes to the release have the result that acceptance of ASIC's case required and requires speculation. It is a fact accepted by all parties, and not speculation, that the Draft ASX Announcement was changed in numerous ways after the meeting. The Court of Appeal found, consistently with Mr Baxter's evidence in cross-examination and Mr Willcox' unchallenged evidence in chief[20], that those changes were significant[21]. To reason, as the Court of Appeal did, from the fact of those changes, and their significance, to the proposition that it was less likely that the board passed a resolution which in terms did not contemplate any such changes was not speculation. It is a common sense inference by application of the statutory standard of "satisfaction ... on the balance of probabilities". ASIC, however, asked both of the courts below to engage in speculation by suggesting that the subsequent changes could be explained as consistent with the Resolution, either on the basis that a particular practice was followed or by attributing to Mr Robb and Mr Cameron a particular state of mind. Particularly in a context where *Briginshaw* was applicable, the evidentiary foundation for taking that course was lacking.

Conclusion

37. These submissions address the inferences sought by ASIC in relation to Mr Robb. For the reasons given in these submissions, the Court of Appeal and the trial judge (to the extent the inferences were sought before his Honour) were correct not to draw those inferences. The inferences were a necessary part of ASIC's case for two reasons. First, the inferences regarding Mr Robb's conduct before and after the meeting in relation to the draft minutes were necessary to support ASIC's contention that its case was proved by the minutes. Secondly, inferences regarding Mr Robb's conduct in suggesting changes to the Draft ASX Announcement were necessary for ASIC to explain away a fact that the respondents

[19] Cf. CA [352] ABWhi 72.26.
[20] As to Mr Baxter, see ABBla 1/403B – 408T. As to Mr Willcox, see ABBlu 12/5547M – 5549T.
[21] CA [321] – [332] ABWhi 68.25 – 69.24).

contended was inconsistent with Resolution being passed: that changes were made to the Draft ASX Announcement after the board meeting.

38. In the absence of Mr Robb, the cogency of ASIC's case thus suffered because it did not have findings in its favour on the two most important aspects of the evidence: the minutes and the subsequent changes to the Draft ASX Announcement. The cogency of ASIC's case suffered for an additional reason. No witness recalled the passing of the Resolution. Mr Robb was, on ASIC's case, present when the Resolution was passed. There was "every reason to believe" (CA [761] ABWhi 142.4) that he would have given attention to the events that occurred at the meeting and been in a position to shed light on them. *Briginshaw* and *Blatch v Archer* required that the evidence that ASIC did lead be weighed having regard to Mr Robb's absence.

39. The Court of Appeal's ultimate conclusion at [794] (ABWhi 147.22-.26), after weighing the evidence consistently with established principles of appellate review, was that, in the absence of Mr Robb, ASIC had not discharged its onus for two reasons. First, as a result of an obligation of fairness, and secondly, "consistently with what was said in *Whitlam*". "[W]hat was said in Whitlam" is a reference to the passage in *Whitlam v Australian Securities and Investments Commission* (2003) 57 NSWLR 559 at [119] and set out at [734] of the Court of Appeal's judgment (ABWhi 137.6f). That passage is a conventional restatement of the principles in *Briginshaw* and *Blatch v Archer* as they operate in the context of s 140. There is no error in the Court of Appeal's application of these principles or in its detailed consideration of the evidence and trial judge's findings – or, in any event, its orders would be upheld on that basis. The appeal should be dismissed.

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