

suffice; but wherever the decisions be found, the test is participation in their making. Participation is more than administrative arrangement, and there must be a real contribution from the postulated participation to the making of the decisions, but beyond that it is a question of fact.

[894] Even by the touchstone suggested by Mr Shafron, we think he participated in decisions of the requisite character. He was part of the Project Green team, and of its promotion of the separation proposal to the board. Participation in decisions may involve some frequency or repetition, which there was. The evidence particularly addressed the separation proposal, and Mr Shafron's participation as seen in the lead-up to the February meeting and as noted by the judge at LJ [379]-[385] set out above extended over a long period and was significant in the consideration of that highly important matter. He had more general participation, an incident of which can be seen in Mr Baxter's evidence that significant announcements required his approval, which would not have been a matter of form. Apart from his role in connection with actuarial information provided to the board, perusal of the minutes of board meetings from mid-1998 shows frequent reporting on asbestos litigation and risk management, and occasions such as authority to finalise the terms of an agreement with JHNV and (together with others) authority to negotiate and execute and underwriting agreement in connection with Project Chelsea.

[895] In our opinion, what Mr Shafron did went well beyond administrative arrangement, and well beyond providing advice or information as required, and is correctly described as participation in decisions affecting the whole or a substantial part of JHIL's business.

[896] We do not accept the suggestion, in Mr Shafron's submissions, that such a conclusion would unduly open the floodgates to management or advisers being officers within the definition. And it should not be forgotten that satisfaction of the definition only gives statutory status. It may be that a person participates in making decisions even if counselling against them; but if so, the participation will only satisfy the status of an officer as defined, and the person's dissent is likely to mean that he or she is not in breach of s 180(1).

[897] It is a reality of corporate life that board and other important decisions involve many persons other than the ultimate decision-makers. Just as s 9(b)(ii) of the Law recognised the reality that a person may have "the capacity to affect significantly the corporation's financial standing", that being sufficient for the status of an officer as defined, so s 9(b)(i) recognised the reality of participation in decision-making. But it required participation in making decisions affecting the whole or a substantial part of company's business.

[898] In our opinion, on this basis Mr Shafron was an officer of JHIL in relation to his conduct at the February meeting.

7.3.2 Company secretary

[899] The scope of the office of company secretary in any particular corporation is a question of fact: *Tim Barr Pty Ltd v Nauri Gold Coast Pty Ltd* [2008] NSWSC 657 at [10]-[12]; *Dr Andrew Roberts-Szudzinski Pty Ltd v .au Domain Administration Ltd* [2006] NSWSC 950 at [29]). The days when a company secretary was "a mere servant [whose] position is that he is to do what he is told" (*Barnett, Hoares & Co v South London Tramways Co* (1887) 18 QBD 815 at 817 per Lord Esher MR) are long gone, and in *Minlabs Pty Ltd v Assaycorp Pty Ltd* [2001] WASC 88 ; (2001) 37 ACSR 509 at [55] a company secretary was described, on the facts of that case, as "a senior executive officer". Company secretaries have frequently been held to occupy positions of management seniority carrying fiduciary duties to the company.

[900] ASIC relied on *Australian Securities and Investments Commission v Rich* [2003] NSWSC 85 ; (2003) 44 ACSR 341 at [49]-[50]. Austin J said, referring to use of the words "had the same responsibilities within the corporation" in s 180(1)(b)--

49 This suggests that the word "responsibilities" was intended to direct attention to the factual arrangements operating within the company and affecting the director in question -- as opposed to the legal duty of care, implying specific legal duties in particular circumstances. The content of those

specific duties would be affected by the factual matters specified by the section, relating to the corporation's circumstances, the nature of the director's office, and the director's responsibilities. The director's responsibilities would include arrangements flowing from the experience and skills that the director brought to his or her office, and also any arrangements within the board or between the director and executive management affecting the work that the director would be expected to carry out. The precise duty of care flowing from these arrangements would be subject, of course, to a minimum standard of care and diligence set by the statute in reflection of the common law position.

50 Therefore, it is in my opinion incorrect to say, as counsel for Mr Greaves did, that the word "responsibilities" refers only to specific tasks delegated to the relevant director, through the articles or by resolution or otherwise. It is a wider concept, referring to the acquisition of responsibilities not only through specific delegation but also through the way in which work is distributed within the corporation in fact, and the expectations placed by those arrangements on the shoulders of the individual director. In my opinion the Commission's pleading is consistent with and reflects this concept. Mr Greaves' qualifications, experience and expertise, and his occupation of the position of "foundation" director, chairman and chairman of the Finance and Audit Committee, are all matters that may make up or contribute to the responsibilities within the corporation that Mr Greaves had (regardless of whether the chairmanship and committee chairmanship were "offices" for the purposes of the first part of s 180(1)(b)).

[901] Austin J was there dealing with a submission to the effect that the word "responsibilities" in s 180(1)(b) referred to specific tasks delegated to the relevant director. His Honour subsequently applied the same reasoning in a general review of the statutory elements of the s 180(1) duty (see *Australian Securities Investments Commission v Rich* at [7201]-[7202]).

[902] The part of the reasoning upon which ASIC relied was his Honour's characterisation of the relevant "responsibilities" within s 180(1)(b) as extending to responsibilities acquired: "through the way in which work is distributed within the corporation in fact and the expectations placed by those arrangements on the shoulders of the individual director".

[903] Writing after his retirement from the bench, the Honourable Robert Austin and his co-author Mr Ashley Black said --

As to s 180(1)(b), the wording of s 180(1) does not set the statutory standard of care and diligence by reference to a reasonable person occupying an office that is merely of the same kind as was occupied by the defendant (for example, a person occupying the position of chief financial officer if the defendant was the company's chief financial officer). Instead, the section refers to a reasonable person occupying the very office held by the defendant. The responsibilities of the defendant's office therefore include any particular arrangements that might alter the usual responsibilities attaching to an office of that kind ... For example, the evidence might show that the defendant, though appointed chief financial officer, did not have some of the usual responsibilities of a CFO and had some additional responsibilities not usually possessed by the holder of that office -- say, for responsibility for corporate tax planning -- but no responsibility for the company's treasury operations because of the appointment of a corporate treasury accountable to the CEO.

The personal, subjective characteristics of the defendant, relating to such things as qualifications, expertise and experience, are not relevant, per se, to a statutory standard of care and diligence. But it appears, from the language and history of the provision, that those personal characteristics may come to be relevant to the determination of that defendant's responsibilities, and hence the statutory standard, if the evidence shows that they have been taken into account by the company in allocating responsibilities to the defendant. For example, a person appointed to an expert position as a non-director executive officer (say, an actuary or mining engineer appointed to an executive position) may, pursuant to his or her contract of service, have special responsibilities related to the professional expertise that led to that appointment." (Austin & Black's Annotations to the Corporations Act LexisNexis, Butterworths, Australia, 2010, vol 1, [2D.180] at p 25,103.)

[904] Save in one respect, we agree with this analysis. It requires qualification because a person appointed to an executive position may or may not satisfy the statutory concept of an "officer" as defined in s 9 of the Act. However, that qualification is not pertinent to the present case because a "secretary" is separately identified as an officer in that definition.

[905] Two issues arise. First, whether the statutory duty extends, as a matter of statutory interpretation, to

any matter which falls within the scope of the responsibilities given to a company secretary, as a matter of fact, in the particular corporation. Secondly, even if the answer to the first question is "No", whether the act or omissions which could be said to flow from Mr Shafron's additional title as "general counsel" are not such as to fall within the scope of responsibilities of the person holding an office of secretary.

[906] From the time Mr Shafron moved to the United States, and a co-secretary was appointed, it appears that a number of the administrative duties of the company secretary were, as a matter of fact in the circumstances of this corporation, removed from his responsibilities. However, he retained responsibilities additional to those which may traditionally have been undertaken by a company secretary and which could, in a different corporate context, be undertaken by a person who was denoted as "general counsel" without being appointed a secretary.

[907] The words in s 180(1)(b) which fall for interpretation are part of the terminology inserted into the Act for purposes of clarifying the fact that what is involved is an objective test: see the discussion of the history of the legislation by Austin J in *Australian Securities and Investments Commission v Rich* esp at [34], [40]-[48], which immediately precede pars [49]-[50] that we have quoted at [900] above.

[908] In our opinion, in the context of identifying the relevant incidents of an objective standard of care and diligence, the reference to "in the corporation's circumstances" in para (a) and the reference to "the same responsibilities" in para (b) are directed to the scope and range of responsibilities actually carried out by the director or officer whose conduct is in issue. That may involve fewer, as well as additional, responsibilities to those that may traditionally have been exercised by a person holding the relevant office.

[909] Our conclusion that the focus is on the responsibilities in fact conferred on a particular officer is reinforced by the very words imposing the duty which are, to repeat with emphasis--

A director or other officer of a corporation must exercise their powers and discharge their duties ...

[910] The use of the word "their" on two occasions directs attention to the particular officer's role in the corporation.

[911] Parliament did not, in our opinion, intend to apply the statutory duty to the powers and duties of the office in any abstract way. Parliament did not, in our opinion, intend the scope of the statutory provision to be determined in accordance with what will often be an artificial process of separating tasks performed in the capacity of an office as such, from tasks performed in fact by a person who holds a particular office.

[912] Pursuant to s 185 of the Act, the statutory duty under s 180(1) operates in parallel with any common law duty. Although the common law and statutory duties may not be precisely equivalent, nevertheless the fact that a person may be liable for contravention of the common law duty of care and diligence suggests that a narrow reading of the concept of "responsibilities within the corporation" is not appropriate. Indeed, the very overlap, even if not precise, confirms the proposition that the statutory provision is similarly directed to the actual responsibilities carried out by the relevant person.

[913] Common law duties are not subject to any process of attributing a particular function to a particular office. The identification of what functions are within the scope of a specific office, whether a director or secretary, is inherently difficult. It is unlikely that the legislature intended such a task to be required where the very same Act affirmed the existence of parallel duties at common law.

[914] Section 180(1) applies to a person who is appointed a director and should apply in the same way as it does to a person appointed as a secretary. The scope and range of responsibilities undertaken by a director are more wide-ranging than those usually associated with the office of company secretary.

[915] The management of the company is conferred upon the directors acting collectively (see s 198A of the

Act). However, it will often be the case that an individual director gets involved in particular matters outside the context of a board meeting and outside any formal delegation. The same is true of a company secretary.

[916] Any of the powers of the directors collectively can be conferred on a managing director (s 198C). Furthermore, subject to the formulation, *ex ante*, of the beliefs as to the manner in which a delegate would exercise any such powers (see s 190), the directors can delegate any of their powers to a committee of directors, to a single director or even to an employee or any other person, pursuant to s 198B. These provisions confirm, in our opinion, the conclusion that a person occupying the office of a "director" can have both fewer and greater responsibilities than may usually be the case. We can see no reason why a person occupying the office of a "secretary" should be in a different position for purposes of s 180(1).

[917] Even if the above analysis is wrong, those aspects of the duties said to be those of a general counsel, which are in issue in the present proceedings, are well within the kind of duties that are encompassed within the duties of a company secretary. We refer to the draft ASX announcement, the cash flow analysis and the DOCI Information.

[918] The position is clearest with respect to the draft ASX announcement and the DOCI Information. Notices to be filed on behalf of a company are within the traditional range of responsibilities of a company secretary. The fact that the relevant notices arise pursuant to the Listing Rules, enforced by the Act, rather than by direct obligations imposed directly by the Act, is not a material difference.

[919] The kinds of notices which a secretary is required to ensure are made included, at the relevant time--

Notice of the address of the company's registered office (s 142)

Notice of the opening hours at the company's registered office (s 145)

Lodgement of annual reports (s 345)

Notice of a director or secretary's personal details and notice when a person ceases being a director (s 205B).

[920] A contravention by the company of these sections was deemed to be a contravention by the secretary by s 188 of the Act. However, beyond express statutory requirements, the filing of notices by the company would properly fall within a secretary's role, including:

Notifying ASIC of the retirement or resignation of a director or secretary (s 205A)

Lodgement of material that is to be put for approval by the members (s 218)

Notice of variations in the rights of members (s 246F)

Notice of issue of shares (s 254X)

Lodgement of financial reports (s 319(1)).

[921] The filing of a notice pursuant to the continuous disclosure obligations under Listing Rule 3.1, as enforced by s 1001A of the Act, together with enforcement of the accuracy of the contents of any such document by s 999 of the Act, is well within the scope of a secretary's responsibilities. The position of the information concerning the cash flow model is different.

[922] Mr Shafron was a qualified legal practitioner with a Bachelor of Arts degree from the Australian National University and Bachelor and Master of Law degrees from the University of Sydney. He was admitted to practice in Australia and in California, and was an associate with Allens prior to joining JHIL.

[923] The first employment contract to which we were taken was dated 2 August 1998. The employment was with JHIL. Mr Shafron was "employed ... in the position of General Counsel and Company Secretary" (cl 3.1). His duties were to "include those typically associated with the position which You fill or the duties You perform including those duties set out in your delegation agreement" (cl 3.2). We were not taken to any delegation agreement, and there does not appear to be one in evidence.

[924] A second employment contract dated 28 August 1998 provided for the secondment of Mr Shafron to James Hardie (USA) Inc for approximately three years, to work in the management team where "the main focus will be on its US operations" (cl 4.1). He was "[i]nitially [to] serve as General Counsel and Company Secretary in Mission Viejo, California" (ibid). The contract provided that Mr Shafron's duties "will be as set out in an appropriate Delegation Agreement" (cl 4.3). Again, there does not appear to be such an agreement in evidence. It was not suggested that, because of the secondment, Mr Shafron ceased to be company secretary and general counsel of JHIL.

[925] The employment agreements are not particularly illuminating, although they suggest that the duties of company secretary and general counsel were close and that it may be artificial to separate out from one role another discrete role.

[926] It was submitted, although we were not referred to evidence in this regard, that Mr Shafron's responsibilities as company secretary were, like Mr Donald Cameron's, purely administrative, and did not extend to protecting JHIL from legal risk. We do not think that restriction can be accepted. A company secretary with legal background would be expected to raise issues such as potential misleading statements (in relation to the Draft ASX Announcement) and disclosure obligations (in relation to the DOCI) with the board. Ordinarily it might not be the same with respect to a matter such as the JHIL cash flow modelling, which required particular expertise. But Mr Shafron had a quite close involvement with the cash flow modelling, and raising the limitations of the cash flow model is by no means a legal matter for the attention of general counsel; the involvement, and raising the limitations, in our view fell within Mr Shafron's responsibilities as company secretary.

[927] To illustrate the lastmentioned involvement--

Mr Harman said that he was requested to undertake the cash flow modelling by "the Project Green team", of which Mr Shafron was a member; Mr Morley gave evidence that he did not ask Mr Harman to do this (of course, Mr Morley was later deeply involved) and that he proceeded on the basis that Mr Harman constructed the model on his own initiative to assist those working on Project Green;

Mr Shafron was responsible for obtaining the Trowbridge estimates used for the model (although no doubt one reason was concern for client legal privilege), and had given presentations on the estimates and initiated the updating after the Watson and Hurst study;

Mr Shafron was at the meeting with Mr Loosley and Mr Pigott of PwC on 9 February 2001;

Mr Shafron e-mailed Mr Harman in relation to review by PwC and Access Economics, saying, "Get these guys to bless your model";

Mr Shafron was a recipient of Mr Ashe's "suggested report wording";

On 14 February 2001 Mr Shafron attended a meeting with the proposed directors of the Foundation, where there was mention of the reviews by PwC and Access Economics;

Also on 14 February 2001, Mr Shafron attended a meeting of JHIL's audit committee, at which according to the minutes--

The Committee noted the papers relating to the Foundation contained in the Board papers, Messrs PG Morley and SE Harman explained the financial model underpinning the funding of the Foundation. Directors asked questions in relation to the assumptions used in the model. Mr SJ McClintock [of PwC] confirmed that PricewaterhouseCoopers was satisfied that, following establishment of the

Foundation, it was necessary to de-consolidate James Hardie & Coy Pty Limited and Jsekarb Pty Limited.

[928] Mr Shafron may not have had familiarity with and expertise in the mathematical detail, but should and must have given attention to what the modelling showed for sufficiency of funding, and to the outcomes according to the data and assumptions and their uncertainty. This was not obviously something for a person holding the position of general counsel, but was in fact within Mr Shafron's responsibilities.

[929] In our opinion, in doing what according to the contraventions found by the judge he failed to do, Mr Shafron was acting within his responsibilities as company secretary. His role as general counsel does not detract from this. In relation to the contraventions found against him, he was exercising powers and discharging duties as company secretary, and so was an officer, and the reasonable person would have Mr Shafron's responsibilities in those respects.

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