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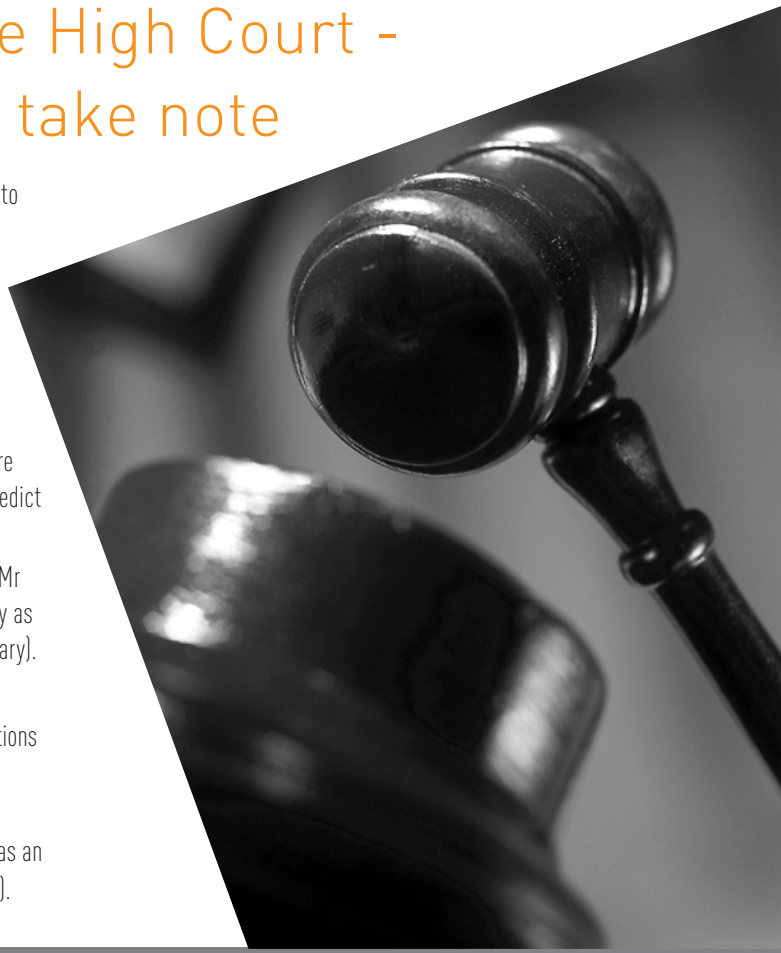
James Hardie Case: Further rulings by the High Court - general counsel and company secretaries take note



Last Thursday, 3 May 2012, the High Court found that individuals who act in the combined role of general counsel and company secretary have a high degree of responsibility. The impact of the decision is that general counsels who have a dual role of company secretary may have a greater degree of responsibility than previously thought.

On 3 May 2012 the High Court held that Peter Shafron, the former general counsel and company secretary of James Hardie Industries Ltd (**James Hardie**), had breached s180(1) of the *Corporations Act 2001* (Cth) (**Act**) by failing to discharge his duties as an officer of the company with the degree of care and diligence that a reasonable person in his position would have exercised.

The judgment was one of a number of decisions handed down by the High Court against 8 former office holders of James Hardie on 3 May.

Mr Shafron had appealed a finding made at trial (which was affirmed by the New South Wales Court of Appeal) that he had breached s180(1) of the Act.

Section 180(1) of the Act imposes a duty of reasonable care and diligence on directors and officers in the discharge of their duties.

Specifically Mr Shafron challenged the ruling that he had failed to advise:

1. either the CEO or the board of James Hardie (**the Board**) that it should disclose to the Australian Stock Exchange (**ASX**) certain information about a deed of covenant and indemnity governing the company's separation from two of its subsidiaries; and
2. the Board on the limitations of a 'best estimate' of exposure contained in an actuarial study he had commissioned to predict asbestos related liabilities.

The issue before the High Court was whether s180(1) applied to Mr Shafron for conduct he submitted was undertaken in his capacity as general counsel (as opposed to his other role of company secretary).

Mr Shafron argued that:

1. the application of s180(1) should be restricted to those functions he performed in his capacity as company secretary; and
2. the contraventions alleged against him concerned his responsibilities as general counsel, not his responsibilities as an officer of the company, and should not be subject to s180(1).

The High Court rejected this argument.

Their Honours found that Mr Shafron's responsibilities with James Hardie as general counsel and company secretary were indivisible and must be viewed as a composite whole. The scope of responsibilities of a particular officer is to be determined by an examination of all the tasks in fact performed for that company by that officer. The role of a particular company secretary cannot be deduced from an examination of the kinds of tasks that other company secretaries, whether to that company or in general, might perform. The Court of Appeal was correct to affirm the finding at trial that Mr Shafron had breached s180(1) by failing to provide the advice in question. Mr Shafron's appeal was dismissed.

The majority judgment held:

> *'The proposition that some distinction could be drawn between the "capacities" in which certain tasks were undertaken by Mr Shafron assumed, wrongly, that the work he did "as company secretary" could not, and did not, overlap with the work that he did "as general counsel"...*
>
> *A fundamental difficulty with Mr Shafron's submission is that there was no evidence demonstrating or suggesting that Mr Shafron performed certain tasks in one "capacity" and other tasks in another. Mr Shafron did not give evidence at trial. What evidence there was about the role of a "company secretary and general counsel" of a listed public company did not support the distinction Mr Shafron's submissions sought to draw. Yet, as has been stated, what responsibilities Mr Shafron had was a question of fact.*
>
> *As the title "general counsel and company secretary" given to Mr Shafron indicates, he was qualified as a lawyer – he was admitted to practise law both in Australia and in California. An important element in Mr Shafron's responsibilities was his giving advice about and, where appropriate, taking steps necessary to ensure compliance with all relevant legal requirements, including those that applied to JHIL as a listed public company. The primary judge and the Court of Appeal described this aspect of Mr Shafron's responsibilities as a duty to protect the company "from legal risk". No doubt that included ensuring that purely administrative functions were performed like transmitting necessary material to the ASX and maintaining appropriate records of the board. But Mr Shafron's responsibilities did not end at that point. His responsibilities were wider than administrative, and extended to the provision of necessary advice.*
>
> *All of the tasks Mr Shafron performed were undertaken in fulfilment of his responsibilities as general counsel and company secretary. More particularly, because of his qualifications and the position in which he was employed, his responsibilities as general counsel and company secretary extended to proffering advice about how duties of disclosure should be met. And when he procured advice of others and put that advice before the board for its use, his responsibilities could, and in this case did, extend to identifying the limits of the advice that the third party gave.'*

Mr Shafron had previously been disqualified from managing corporations for 7 years and ordered to pay a pecuniary penalty of $50,000.

Mr Shafron's matter will be remitted to the Court of Appeal in relation to the issue of penalty.

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For further information please contact:

Leneen Forde, Partner
Phone (direct) **+61 3 9608 2243**
Mobile **+61 417 165 315**
Email **l.forde@cornwalls.com.au**