



Supreme Court of Victoria
Commercial Court

The James Hardie case

Justice Anne Ferguson
26 October 2011



Supreme Court of Victoria
Commercial Court

Duties of Directors

Duties imposed for many years

Themes:

- Proper governance
- Proper exercise of powers

Getting the balance right



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First instance:

- *ASIC v Macdonald (no 11)* (2009) 256 ALR 199; [2009] NSWSC 287 – liability
- *ASIC v Macdonald (no 12)* (2009) 259 ALR 116; [2009] NSWSC 714 – penalty

Court of Appeal (NSW):

- *Morley v ASIC* (2010) 274 ALR 205; [2010] NSWCA 331



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The James Hardie case (cont.)

- Manufacture and sale of asbestos products
- Concern about liability
- Establishment of Foundation to deal with claims



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The James Hardie case (cont.)

- ASX announcement:
“The Foundation has sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of [James Hardie].
[James Hardie] CEO, ... said that the establishment of a fully-funded Foundation provided certainty for both claimants and shareholders.”



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The James Hardie case (cont.)

- Misleading statement
- Was the ASX release approved by the board?
- Two directors participating by telephone



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The James Hardie case (cont.)

- Approval of draft release as breach of duty

s 180 (1): A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.



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The James Hardie case (cont.)

Gzell J:

- Announcement was tabled and approved
- Release was misleading
- Breach of duty by those present by approving
- Overseas directors:
 - Failure to request copy
 - Failure to be familiar with terms
 - Did not abstain from voting



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The James Hardie case (cont.)

Court of Appeal (NSW)

- Not satisfied that directors approved release
- If they had, would have contravened s180(1)
- Objective test
 - What would an ordinary person with knowledge and experience of the director have done?



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The James Hardie case (cont.)

Court of Appeal (NSW) (cont.)

- Not every ASX release will/should go to board
- Had to apply their own minds to the release
- Intelligence, experience, qualifications of directors
- Couldn't just accept say-so of management