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IS THE SKY FALLING IN ON COMPANY DIRECTORS?

The media had a field day reporting on the fallout of high profile company directors as a result of the recent James Hardie decision. There has been a domino effect so that not only are directors of James Hardie packing their bags and leaving the public stage, but other well known directors are also finding their reputations tarnished.

Meredith Hellicar, the former chairman of James Hardie and also a director of AMP, has borne the brunt of the publicity. Not only did the court hold that she was guilty of a breach of duty of care and diligence as a company director but, as well as that, she was the subject of criticism for her less than frank evidence.

Whilst most of the publicity applies to directors of major public companies, the Corporations Act rules apply, for the most part, to all directors and not only public company directors.

At the heart of the James Hardie calamity lies a simple but crucial requirement of the Corporations Act. Directors must exercise care and diligence in carrying out their duties. It was this simple proposition that the court found to have been breached by no less than seven directors of James Hardie. The critical failure related to a stock exchange announcement made in February 2001 about James Hardie's ability to meet asbestos claims. These directors over emphasised the company's ability to pay and understated the deficiencies in the company's funding.

These directors were acting, not in their own personal interests, but in what they, ill advisedly imagined to be the interests of James Hardie. They wanted James Hardie to look good in the eyes of the public and they presumably imagined that they were doing the company a service when the very opposite was the case. Because they chose to gild the lily, and to make misleadingly optimistic statements about the company's financial position, they were in fact in breach of their duty of care and diligence.

It seems that the temptation for directors to put forward the most optimistic (but sometimes misleading and deceptive) version is so irresistible that even the most experienced so called "independent directors" continue to make this mistake.

Alongside this Corporations Act requirement sits the ASX Corporate Governance Guidelines demanding the independence of non-executive directors. James Hardie and other "establishment" companies seem to be loaded with high profile names. And yet, when the chips are down, even they, one after another, seem to struggle with the requirement that they should exercise independent judgment when contributing to corporate debate and decisions. Perhaps the desire to be a good "team player" and to remain a member of the inner circle, is much more compelling than the obligation to exercise independent judgment.

What seems to be a simple solution – to simply tell it the way it is – remains a challenge for directors, even at a time when they are constantly reminded that sunlight is, and always has been, the best disinfectant.

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