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CHAIRMAN OF A COMPANY BOARD – WHY TAKE IT ON?

Following the comments by Justices Austin and White in *ASIC v Rich* (2003) 44 ACSR 341 and (2004) 50 ACSR 500 in Greaves case ("**Greaves**") the expectations of the corporate community relating to the duties and obligations of a non-executive company chairman became uncertain. The background of the case and its potential consequences on company chairmen are set out below.

Background

Litigation was initiated by the ASIC against former One.Tel directors in relation to alleged breaches of director's duties and responsibilities, and the statutory duty of care under section 180 of the *Corporations Act 2001* (Cth). Greaves was formerly the non-executive chairman of the board of directors. He was the only non-executive director to have proceedings brought against him. Austin J discussed the "usual" practice of chairmen of listed Australian companies, and whether they had a duty to keep informed of developments within the company.

White J commented that Mr Greaves ought to have sought independent advice, in addition to that provided by the company.

Mr Greaves had a fine of \$20 million imposed for failure in undertaking his responsibilities.

Implications of Greaves

An issue resulting from Greaves is whether the responsibilities and liabilities of a non-executive company chairman have been significantly elevated in contrast to other non-executive directors. The Australian Institute of Company Directors released a policy position paper as well as a short book discussing the issue.

The policy paper suggests that the judicial remarks in Greaves should be limited to the facts of the One.Tel case, for the following reasons:

1. An executive responsibility imposed on a non-executive director would result in a fundamental change to the structure and operation of company boards. Further the trust and collegiality promoted by the collective responsibility of the board of directors would diminish.

2. Such a change to the established board model would affect the risk tolerance of boards, and result in increasingly risk-averse behaviour. This would culminate in increased reluctance for talented individuals with the skills required by companies to take up chairmanship roles. The position paper suggests that company performance would suffer in the long term, and consequently Australian economic performance.
3. Should chairmen be expected to seek separate advice other than that provided by management then their relationships with management would be changed fundamentally. Under the current framework directors, as a group, may seek external advice if they consider this necessary.
4. The position paper rejects that the higher pay awarded to chairmen is an automatic confirmation of a higher level of liability.

Impact of Greaves

Greaves highlights the potential for a suit against non executive company chairmen. Negligence/breach of duty could be attributed solely to a chairman in circumstances of his/her role as confidant and advisor to the CEO, as he or she is the channel for information and decides what information goes to the board. If a chairman became aware of a matter that should be elevated and failed to bring it to the board he or she would be in breach of their duties.

We are presently acting for the chairman of a formerly listed public company, now in liquidation. It is alleged by his co-directors, one of whom was an executive director, that as chairman he had a higher duty to inform the board of various developments; even in circumstances where he had informed the board of all developments as he knew of them. The case raises significant issues also as to whether there is any arguable separation of a chairman's duty in the context of an insolvent trading action against directors and generally.

Conclusion

The present state of the law as to the role of chairman of company boards is uncertain. The scope of any arguable heightened duty has not been demarked and indeed the factual situation in Greaves was that the higher duty was arguable. That case should be seen also in the context that the Austin J decision was on an application to dismiss the proceedings as giving rise to no cause of action known to Australian law. It was not a final hearing. Nevertheless, anyone assuming the role of a company chairman needs to be aware of the potentially heightened risks that go with that task, and consider procuring independent legal advice from time to time, as well as ensuring adequate insurance is in place and / or other forms of security/indemnification.



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