

***THE BELL GROUP LTD (IN LIQ) -v- WESTPAC BANKING CORPORATION [No 9] [2008] WASC 239***

**CIV 1464 of 2000**

**A GUIDE TO THE REASONS FOR DECISION**

**1. PART ONE - INTRODUCTION**

The reasons for decision in this case are long and complex, as is the result. The total number of pages in the published version is 2,643. The juridical analysis (excluding formalities, schedules and annexures) takes up 2,511 pages. Other relevant statistics about the case are included in the final part of this guide.

Because of their size, these reasons for decision will be published only in electronic format. They will be available to the parties and others (on request) on CD and to members of the public on the website of the Supreme Court of Western Australia:

<http://decisions.justice.wa.gov.au/supreme/BellVWestpac.html>

The textual analysis has been divided into numbered sections. Within the formal parts, towards the front of the reasons, the reader will find a table of contents identifying the various section headings and numbers.

Anyone wishing to read the whole or part of the reasons should look at **Sect 1** of the reasons (entitled 'About these reasons') which gives a more detailed explanation of what the reasons contain and how they have been structured. Additional statistical material can be found in **Sect 8.1**.

The annexures to the reasons are some (a small percentage) of the main documents that were tendered in evidence during the hearing. Some (by no means all) of the documents referred to in the reasons but not included as annexures are identified in the endnotes. In the electronic version it will be possible to view the documents imaged as annexures

through links provided in the reasons. But there are no links to the other documents.

This guide is not part of the reasons and has no formal status. It is difficult to summarise 2,511 pages of reasoning into a neat, readily understandable package. The guide has been issued to assist interested persons in appreciating the major import of what is in the full version.

The second part of this guide contains three extracts from the reasons for decision:

(a) **Sect 2** - 'The background events and the issues in the litigation: a synopsis'. This is a relatively brief summary of what the litigation is about.

(b) **Sect 7.1** - 'The case: a brachylogy'. This section explains in more detail the major issues in the case.

(c) **Sect 37.2** - 'The issues and the result - a reflection'. In this section his Honour returns to **Sect 7.1** and describes how the parties fared in relation to the issues identified in the earlier part.

The third part of this guide contains some additional information about the trial and some further statistics.

Once the parties have examined the reasons for decision they will return to the court, on a date to be fixed, for final orders. It is at that hearing that the precise form of the relief and orders concerning costs will be determined.

Despite the most arduous efforts the reasons may still contain formatting and similar errors. His Honour reserves the right to issue a corrected version of the reasons at some time in the future if necessary. If that occurs, the parties will be advised of all changes that have been made.

## **2. PART TWO - EXTRACTS FROM THE REASONS**

### **2.1. The background events and the issues in the litigation: a synopsis [Reasons Section 2]**

The Bell Group Ltd (In Liquidation) (TBGL) was a listed public company controlled by interests associated with the late Robert Holmes à Court (RHAC). It was the holding company of a large group that I will call 'the Bell group'. TBGL had a subsidiary, Bell Group Finance Pty Ltd (In Liquidation) (Receiver and Manager Appointed) (BGF), which was created to act as the treasury entity for the group. TBGL had another subsidiary, Bell Group NV (In Liquidation) (BGNV), which was incorporated in the Netherlands Antilles. BGNV was the issuer of the bonds in several fundraising exercises in the Eurobond market.

A further subsidiary of TBGL was Bell Group (UK) Holdings Ltd (In Liquidation) (In Administrative Receivership) (BGUK), a company registered in the United Kingdom. It was originally known as TVW (UK) Ltd. BGUK was, in turn, the holding company for a group of United Kingdom-based entities. These included The Bell Group International Ltd (TBGIL) (which had originally been called Associated Communications Corporation plc (ACC)) and Bell International Investments Ltd (BIIL). From time to time I will call this 'the BGUK group'.

In addition to wholly owned subsidiaries, TBGL owned about 39 per cent of the shares in Bell Resources Ltd (BRL), which was a listed company in its own right. BRL had a number of subsidiaries including Bell Resources Finance Pty Ltd (BRF). TBGL also held a significant parcel of shares in JN Taylor Holdings Ltd (JNTH), another listed company. In January 1990 Bell group companies held about 28 per cent of the ordinary shares in JNTH. Both JNTH and (until mid-December 1989) BRL were managed by, and under the effective control of, TBGL.

In the mid-1980s, TBGL or BGF had banking facilities of one sort or another with (among others) six banks operating in Australia. The facilities were unsecured but supported by negative pledge arrangements. The Australian banks were not a syndicate as that term is understood in banking parlance. Each of the loans was advanced independently, although there was a large degree of commonality in the loan documentation.

In 1986 BGUK established a loan facility with a syndicate of 14 banks situated in Europe, Canada and the Middle East, known as the Lloyds syndicate. Like the arrangements with the Australian banks, the facility was unsecured but supported by a negative pledge.

In the period between December 1985 and July 1987, the Bell group raised about \$585 million through five separate bond issues: three by BGNV in the open market and one each by TBGL and BGF to other interests associated with RHaC. The issues were described as 'convertible subordinated bonds'. The proceeds from the three BGNV bond issues (about \$435 million) were on-lent by BGNV to TBGL or BGF. The proceeds from the other two issues (\$150 million) went direct to TBGL or BGF. The on-loans were not formally documented and there is a dispute whether they were made on a subordinated or an unsubordinated basis. In 1988, the bonds that had been issued to RHaC interests were transferred to the Insurance Commission of Western Australia, at that time called the State Government Insurance Commission (SGIC). As that body was called the State Government Insurance Commission throughout the period in which the events the subject of this litigation occurred, I will use that terminology in these reasons.

Following the stock market crash of October 1987 the Bell group was forced to revisit its business objectives and plans. It had previously operated on a relatively high level of borrowings. The group embarked on

a programme of asset sales aimed at reducing debt to more comfortable levels.

In April 1988, RHaC sold his interests in TBGL to Bond Corporation Holdings Ltd (BCHL) and SGIC. Because of the circumstances in which that transaction occurred, the National Companies and Securities Commission (NCSC) forced BCHL to make a takeover bid for the remaining shares (other than those held by SGIC). By August 1988, that process had been completed and BCHL held about 75 per cent of the ordinary shares on issue. According to the TBGL 1990 Annual Report, there were 326.1 million shares on issue and the relevant interest of BCHL was 242.8 million shares. BCHL thus controlled the Bell group. By the end of 1988 the boards of both TBGL and BRL consisted entirely of persons associated with BCHL.

During 1988 and 1989, there was public speculation about the financial health of BCHL and, through it, the Bell group. Following the BCHL takeover, the Australian banks (or some of them) sought repayment of the facilities they had granted to TBGL and BGF. In the second half of 1988 and during 1989, the Bell group continued the programme (that had been commenced after the stock market crash) of asset sales to reduce debts. Officers of TBGL or BCHL indicated to the Australian banks that the indebtedness of the Bell group to them would be cleared. But by the middle of 1989 it had become apparent that TBGL and BGF could not repay the facilities.

The Bell group had two main assets. Its most valuable asset was the publishing arm. The intermediate holding company at the apex of the sub-group that held the publishing assets was Bell Publishing Group Pty Ltd (BPG). West Australian Newspapers Ltd (WAN) (a member of the sub-group) held the masthead and other assets used in the publication of the sole daily newspaper in the Western Australian market. This was a

successful operating business but its free cash flow was insufficient to cover fully the interest commitments to the Australian banks and the Lloyds syndicate banks on the existing facilities.

The second major asset was the holding in BRL. By 1988 BRL had become a 'cash box' with liquid funds of about \$1.2 billion. Apart from some oil and gas royalties, BRL had few other significant assets or sources of income. Historically, TBGL had received significant sums by way of management fees and dividends from BRL. But by May 1989 BCHL had removed about \$996 million in cash from BRL by way of loans. BCHL encountered a problem in reporting these loans and decided to sell the BCHL brewery assets - held in a company called Bond Brewing Holdings Ltd (BBHL) to BRL and to convert the loans into a deposit. The prospect of BRL taking control of the brewing assets had been in contemplation since about September or October 1988. There were minority shareholders in BRL and approval was necessary. It was a difficult and complex transaction.

In the second half of 1989, after it had become clear that the debts owed to the Australian banks could not be repaid, negotiations began in earnest to restructure the facilities. The provision of security over assets held by the group, mainly the publishing assets and the BRL shares, was a central part of the negotiations. Because of the negative pledge arrangements it was necessary to include the Lloyds syndicate banks in the negotiations. By the end of 1989 TBGL or BGF owed the six Australian banks about \$131.5 million in respect of facilities all of which were then 'on demand'. The balance of the Lloyds syndicate banks' facility stood at its principal amount of £60 million (equivalent to about \$131 million), which was due for repayment on 19 May 1991. Accordingly, the total outstanding to all banks as at 26 January 1990 was \$262.5 million or thereabouts. In addition, there was a \$5 million

overdraft facility with Westpac. A small parcel of the bonds issued by BGNV in 1985 had been converted into shares. The face value of the outstanding bonds (which were due to mature between 1995 and 1997) was about \$546 million.

During the course of the negotiations to restructure the facilities the banks received cash flows for the Bell group that had been prepared by Treasury officers of BCHL in July and September 1989. They also received the BCHL, TBGL and BRL financial statements issued in mid-November 1989. The banks received no further cash flows and little additional financial information about the Bell group in the period after November 1989 and before the main refinancing documents were executed on 26 January 1990.

In December 1989 three significant events occurred. First, TBGL raised with a bank the possibility that the bondholders might not be subordinated and might rank equally with the banks in a liquidation. By early to mid-January 1990 other banks had been made aware of that contention. Secondly, BCHL lost control of the BRL board after a minority shareholder commenced court action alleging breaches of duty by the directors. Thirdly, a banking syndicate led by National Australia Bank Ltd (NAB) applied successfully to the Supreme Court of Victoria for the appointment of a receiver to BBHL, thus affecting control of the brewing assets.

On 26 January 1990 the major refinancing and security documents were executed. Further documents in the package were executed over the ensuing days. Most of the documents were in place by 15 February 1990, although a couple were not completed until March and July 1990. The arrangements included the following:

- The Australian banks' facilities and the Lloyds syndicate banks' facility were extended so as to be repayable on 30 May 1991.

- The effect of one of the provisions was that (subject to nominated exceptions) if, during the currency of the facility, the group sold assets, the proceeds of sale were to go to the banks pro rata in reduction of the bank debt.

- All intra-group indebtedness (except for debts owed to BGNV and BIIL) was subordinated behind the claims of the banks.

- TBGL was to use reasonable endeavours to have BGNV and BIIL execute deeds subordinating the debts due to them.

In February 1990 the banks received new cash flow documents that one bank officer described as making 'fairly grim reading'. In February 1990 the banks had taken control of about \$24.3 million from sale proceeds of one of the publishing group assets. In accordance with the financing documents, this amount should have been available to reduce bank debt. But TBGL immediately asked the banks for access to those funds. Part would be used to pay stamp duty and legal costs on the refinancing documents and interest due to the banks at the end of February 1990. The balance was to be held to assist with the payment of interest due to the bondholders in May 1990. There was some initial resistance to these proposals, especially the retention of the balance for payment to the bondholders, but by May 1990 all of the banks had agreed.

On 14 May 1990 BIIL executed a deed subordinating the indebtedness of other United Kingdom sub-group companies to it. On 30 July 1990, BGNV executed a deed subordinating the debts of other Bell group companies to it.

On 28 February 1990 the court order appointing the receiver to BBHL had been reversed on appeal. In October 1990 the board of BRL completed a transaction by which it acquired some of the brewing assets in a joint venture arrangement with a third party. No management fees or dividends were paid by BRL to TBGL during 1990 or 1991.

On at least two occasions in the second half of 1990 the banks agreed, at the request of TBGL, to defer payment of the monthly interest due to them. Further extensions occurred in January, February and March 1991. In December 1990 interest payments of about \$14.9 million were due to bondholders (including SGIC). Those payments were not made. During the first quarter of 1991 SGIC gave a series of extensions to the date for payment.

During 1990 the management of TBGL was considering restructure proposals. Central to most of these proposals was the injection of additional capital by a sale or joint venture of the publishing assets. Another critical aspect was the negotiation of moratorium arrangements with the bondholders. In December 1990 and January 1991 meetings were held with bondholders. Nothing came of them. In March 1991 there were further restructure proposals, one element of which was for the banks to advance money to BRL to subscribe for shares in TBGL. The banks declined and on 16 April 1991 they issued formal notices of demand on TBGL and BGF in respect of unpaid interest.

On 18 April 1991, TBGL applied to this Court for the appointment of a provisional liquidator. Over the ensuing weeks and months insolvency administrations of one sort or another were installed in other group companies, some at the behest of the banks. The banks realised on their securities and recovered about \$283 million from the sale of the publishing assets, the sale of the BRL shares and the collection of debts.

In 1995, the liquidators commenced proceedings against the banks and the directors challenging the way in which the securities were given and taken and seeking recovery of the proceeds of realisation and consequential relief. The trustee for the bondholders later joined in the action as a plaintiff. The action against the individual directors was

discontinued at an early stage and the banks are the only remaining defendants against whom relief is sought.

At the heart of the claims by the liquidators and the trustee is the contention that at the time when the securities were given and taken, the main companies in the group were insolvent. They say:

- The directors of those companies knew that they were insolvent.

- The directors also knew that the effect of the giving of the securities was that all valuable assets of the companies were made available to the banks for repayment of the debts owed to the banks by some only of those companies in priority to the claims of all other creditors of the companies.

- There were shareholders and external creditors of the companies - in particular, the bondholders and the Deputy Commissioner of Taxation (DCT) - who were prejudiced by the giving of the securities.

- By giving the securities the directors breached duties that they owed to the companies.

- The banks knew that the companies were insolvent, that the effect of the giving and taking of the securities was as set out in the second bullet point above and that the directors had breached their duties to the companies.

In those circumstances, the liquidators and the trustee say, the banks are liable to disgorge the proceeds from the realisation of the securities or otherwise compensate them for losses suffered because:

- The banks knowingly participated in the breach by the directors of their duties to the companies and received the proceeds from the realisation of the securities knowing of the breach of duty.

- The conduct of the banks amounted to an equitable fraud on the companies and on the trustee.

- The securities were void or voidable because the circumstances in which they were given contravened various provisions of the *Bankruptcy Act 1966* (Cth) and other statutes.

The plaintiffs want this Court to declare that the various transactions have been or should be set aside. They also seek monetary compensation. Their monetary claim is said to be in the region of \$1.5 billion.

Not surprisingly, the banks take a different view of events. They deny liability and say that the companies were not insolvent at the relevant time or, if they were, the banks had no knowledge of that state of affairs. They also contend that:

- The directors believed that unless the securities were given the facilities would be called up and the companies would be placed in liquidation.

- That being so, the directors were reasonably entitled to believe that the giving of the securities was in the best interests of the companies concerned. The directors believed that the giving of securities was of real and substantial benefit to the companies because it gave them time to restructure so the group could continue in business as a going concern and avoid liquidation.

- The banks believed that the directors had those beliefs.

- The directors did not breach their duties or, if they did, the banks had no knowledge of the breaches.

- No creditors or shareholders of the companies were prejudiced by the giving of the securities.

- In particular, the bondholders (as creditors) were not prejudiced because they were already subordinated behind the claims of the banks or, if they were not, the liquidators and the trustees are not now

in a position to assert a claim based on the proposition that the bondholders ranked equally with the banks.

- The banks had not knowingly participated in any breach of duty, there was no equitable fraud and the securities were not given and taken in circumstances that contravened the statutory provisions relied on.

## **2.2. The case: a brachylogy [Reasons Section 7.1]**

The plaintiffs' case centres on a number of propositions that can be broadly stated. First, at the time when the securities were given and taken, the main companies in the group were (to the knowledge of the directors) insolvent. A significant plank in that argument is that known recurrent liabilities (including bondholder interest payments) falling due in the foreseeable future could not be met from known income sources. The only way they could be met was by recourse to asset sales and one effect of the Transactions was to relinquish control over the proceeds from asset sales to the banks.

Secondly, the effect of the securities was to give to the banks priority over the claims of all other creditors of the companies. As a consequence, shareholders, intra-group creditors external creditors of the companies (in particular, the bondholders and DCT) were prejudiced by the giving of the securities. A significant factor in that argument is whether the on-loans made by BGNV to TBGL and BGF of the proceeds from the three BGNV bond issues were subordinated or unsubordinated. If the loans were unsubordinated from inception and if the Transactions had not been entered into, BGNV (and thus, effectively, the bondholders) would have ranked equally with the banks in a winding up. Under that scenario, the taking of securities was to the advantage of the banks and to the prejudice of the bondholders. If, on the other hand, the loans were

subordinated from inception, the prejudicial effect on bondholders of the taking of security by the banks is much less clear.

Thirdly, the giving of the securities involved a breach by the directors of duties that they owed to the companies to act in the best interests of the companies as a whole, to act only for proper purposes and to refrain from acting in a position of conflict of interest. Because of the financial predicament of the companies, the directors were obliged (when considering the best interests of the companies) to take into account the interests of creditors. The essence of the breaches lies in the fact that the directors:

- (a) looked simply at the group globally and failed to take into account the interests of the individual group companies that entered into a Transaction and the interests of the creditors and shareholders of those individual companies;
- (b) acted for an improper purpose, namely, to keep the banks at bay so as to ward off liquidation, in the interests of the banks and of BCHL rather than in the interests of the Bell group companies and their creditors; and
- (c) because of their involvement with BCHL, were in a position of conflict or potential conflict between (on the one hand) their interests in furthering the position of BCHL and their own pecuniary interests in BCHL, and (on the other hand) the interests of the Bell group companies.

During the negotiations, it had been recognised that unless there was a corporate benefit to a company granting a security, there was a risk that the securities might be set aside. This was particularly so where the company was financially unstable. In such a case, a company could not enter into a transaction, even if the transaction was in the best interests of the group as a whole, unless the transaction was also in its own interests

and in the interests of its creditors. The corporate benefit argument loomed large in the correspondence and discussions between the solicitors for the banks and for the companies and between the banks' solicitors and the banks. The plaintiffs argue that although the recitals to the Transaction documents and the minutes or resolutions refer to corporate benefit there was, in reality, a signal failure of the directors to apply their minds to the corporate benefit accruing to individual group companies. This is at the heart of the case concerning breach of directors' duties.

It is also alleged that the banks knew of all (or at least most) of these things. In particular, the banks knew that the companies were insolvent and they knew of the lack of corporate benefit. The plaintiffs are especially critical of the banks over a number of things they say the banks did or failed to do. First, the banks pressed ahead with the Transactions knowing of the parlous financial state of the companies, without seeking adequate information about the cash flow situation and without satisfying themselves that there was a real and substantial benefit to the entities concerned. Secondly, they did so after becoming aware of the argument that the BGNV on-loans might be unsubordinated. Thirdly, they did so having formed a view they would be no worse off if the securities were eventually set aside. Fourthly, they knew of that the directors were breaching the duties they owed to the companies. Finally, they took steps (including waiving compliance with some obligations under the Transaction documents) to avoid defaults that might have precipitated a liquidation of the companies within the six-month preference period. They did so as a means of enhancing the ability of the banks to resist a challenge to the validity of the securities.

The plaintiffs say that in engaging in this conduct, the banks knowingly assisted the directors to breach their fiduciary duties. They received property from the companies knowing that it arose from a breach

of a fiduciary duty. They perpetrated an equitable fraud on the companies and on the companies' creditors. They received the property in circumstances that contravened certain provisions in the *Bankruptcy Act* and other legislation. When they stepped in to sell property over which they had taken security they made gains for themselves and caused loss to the Bell group companies. The amount recovered by the banks from the realisations was approximately \$283 million. The plaintiffs say the banks must now account to the plaintiffs for the gains so made. In addition, they must compensate the companies for their losses.

The banks' response to the plaintiffs' case can be distilled into four broad propositions. First, the companies were not insolvent and the directors could rely on the banks to release asset sale proceeds if required to meet recurrent outgoings. If the companies were insolvent the banks did not know about it. Secondly, no creditors were relevantly prejudiced by the Transactions. The bondholders were not prejudiced because the on-loans were, from inception, subordinated and thus they always ranked behind the banks. The DCT was not (at that stage) a 'creditor' and no other creditors suffered a detriment.

Thirdly, there was no breach by the directors of their duties to the company. It was reasonable for the directors to believe that the group had valuable assets and that it could continue as a going concern. But there needed to be a restructure of the financial position of each company in the group. Such a restructure could not take place unless the borrower companies first regularised their banking relationships. This was an essential first step that provided time for the financial restructure to be put in place. Without that first step it was likely that liquidation would ensue and the opportunity for the group to continue as a going concern would be lost. And therein lay the corporate benefit. The banks also say that if

(unknown to them) the directors did contravene their obligations, the duties they breached were not of a fiduciary nature.

Finally, even if there were breaches of duty by the directors, the circumstances are such that the banks have no obligation to account for the proceeds of the realisations or to compensate the companies. Further, due to the conduct of the plaintiffs and for myriad other reasons the plaintiffs cannot now claim any relief.

I now intend to pose a series of questions that will have to be answered in order to reach a final decision. The reader should keep this list in mind as the reasons develop. Towards the end of the reasons I will return to the list and attempt to provide succinct answers.

1. Were the Bell group companies insolvent as at 26 January 1990?
2. Did the directors know the companies were insolvent?
3. In causing the companies to enter into the Transactions (including giving securities over all worthwhile assets), did the Australian directors breach the duties they owed to the Australian Bell group companies?
4. In causing the companies to enter into the Transactions, did the UK directors breach the duties they owed to the UK Bell group companies?
5. In causing BGNV to enter into its Transaction, did its directors breach the duties it owed to BGNV?
6. Were the duties that were breached fiduciary in nature?
7. Are the banks liable under the first limb of *Barnes v Addy*, that is, that they received trust property knowing that it arose from a breach of the directors' fiduciary duties?
8. Are the banks liable under the second limb of *Barnes v Addy*, that is, that they knowingly assisted in the breach of the directors' fiduciary duties?

9. Are the banks liable under any of the heads on which the equitable fraud claims are based?
10. Are the banks liable under any of the three species of statutory claims; namely, transactions done with intent to defraud creditors, voidable settlements or unregistered charges?
11. Were (and are) the holders of convertible subordinated bonds (after taking into account the effect of the on-lending within the group of the bond issue proceeds) effectively subordinated behind the claims of unsubordinated creditors including the banks?
12. Is there anything in the myriad defences raised in the litigation disentitling the plaintiffs to relief?
13. To what (if any) relief are the parties (or either of them) entitled?

### **2.3. The issues and result - a reflection [part of Reasons Sect 37.2]**

In **Sect 7.1** I proffered a brachylogy of the case. I return now to the issues highlighted in that section to identify how the parties fared in relation to each of them. I caution against placing too much emphasis on a four or five page summary of 2500 pages of reasoning.

In an objective sense, the Bell group companies were insolvent as at 26 January 1990. The companies' ability to pay their debts as and when they fell due was dependent on the publishing assets in terms of their ability to contribute to cash flow from ongoing business operations. They faced a recurring annual deficiency of about \$60 million. They could only meet their commitments from proceeds of asset sales. Control of those proceeds had been ceded to the banks. A more detailed summary appears in **Sect 9.20**. The directors might not have known that the companies were insolvent but they knew they were in an insolvency context.

By reason of the Transactions all of the worthwhile assets of the Bell group companies were made available to the banks for repayment of

the debts owed to the banks by BGF and BGUK in priority to the claims of all other creditors and future creditors of the companies. The companies incurred an obligation to the banks that had previously been limited to BGF (to the Australian banks) and BGUK (to the Lloyds syndicate banks) and TBGL (as guarantor). It exposed them to a probable prospect of loss with no probable prospect of gain. Direct and indirect creditors of individual Bell group companies were consequentially exposed. Therein lies the prejudice. To understand the import and reach of the prejudice regard needs to be had to what is said in **Sect 19**.

The position of the bondholders is different. The on-loans made by BGNV to TBGL and BGF from the proceeds of the bond issues were not, as the plaintiffs contend, unsubordinated. The bondholders were, therefore, effectively subordinated to the claims of the other unsubordinated creditors (including the banks). The prejudice to them does not lie in the way contended for by the plaintiffs but there may have been some prejudice in relation to interest and in a broader non-economic sense. My finding that the on-loans were, from inception (and remain), subordinated creates a huge hole in the hull of the plaintiffs' case. Fortunately for them, the hole was slightly above the water line and they were able to limp into port. **Section 18** and **Sect 19.6** contain summaries of these findings. This conclusion complicates the overall result of the litigation. It may entitle the banks to some relief under their counterclaim.

Against that background, I believe that in causing the companies to give the securities and enter into the Transactions the directors breached fiduciary duties they owed to the companies. They contravened the duty to act in the best interests of the companies and the duty to exercise powers only for proper purposes. There was no breach of the duty to avoid conflicts of interest.

It is not possible to condense the content of **Sect 23** to **Sect 29** into a neat summary. My conclusions are based on, but not limited to, the following considerations. A fundamental problem is that the directors concentrated on the group and failed to look to the interests of individual companies. They caused the companies to undertake obligations when they did not previously have such obligations. They did so knowing that those borrowers were in an insolvency context. They thereby exposed the companies (and their creditors and shareholders) to a probable prospect of loss and no probable prospect of gain. The finding that the BIIL directors and the London-based directors of BGUK breached their duties was one that I reached only after longer than usual hesitation. It was arrived at by the narrowest of margins.

In addition some, but not all, of the directors exercised their powers for an improper purpose, namely, to protect BCHL by removing a threat to its continuing survival. The effect was to avoid the inevitable consequence that the winding up or liquidation of assets of Bell Participants would have on BCHL and other BCHL companies. There is no finding against Aspinall, the BIIL directors and the London-based directors of BGUK in this respect.

I have made no finding that the conduct of Equity Trust, the director BGNV, in causing the company to enter into the BGNV Subordination Deed was a breach of duty. In **Sect 28.5** there is a summary of the material relating to this conclusion. One of the reasons is that I could not find sufficient evidence that the director of Equity Trust knew that the on-loans were subordinated and that the instrument would, therefore, prejudice the bondholders.

The banks knew a lot of things. I am not even going to try to summarise the material in **Sect 30**. All I am intend to say is that the banks knew that the companies were in an insolvency context; that there had to

be a corporate benefit to the companies in entering into the Transactions; and that the Transactions were vulnerable to being set aside if the companies went into liquidation within six months, or for an indefinite period if there was no corporate benefit. The banks believed they would be no worse off even if the Transactions were set aside. It emerges from a consideration of all relevant evidentiary material that the banks knew of the breaches of duty. The banks entered into the refinancing with that store of knowledge.

One of the difficulties with the banks' central thesis that the Transactions were an essential first step in a plan to restructure the finances of the Bell group companies and that it gave the directors time to devise and implement such a restructure is that there was no 'plan'. At some stage, the general body of creditors would have to be engaged. There was no plan (even a tentative one) as to how and when that was to occur. A critical feature of the Transactions was to transfer to the banks a deep level of control over all worthwhile assets of the companies (including over the proceeds from the sale of those assets). This meant the destiny of the companies and the shape and timing of any such 'plan' was under the control of the banks.

In all of these circumstances the banks knew of the existence of the directors' fiduciary duties; they knew that the duties covered the assets over which they were to take security; and they knew that in taking the securities they were receiving property that arose from a breach of fiduciary duty. This opens up liability under the first limb of *Barnes v Addy* (knowing receipt).

The banks are not liable under the second limb of *Barnes v Addy* (knowing assistance or knowing participation in a breach of fiduciary duty). One reason is it is an essential element of such a cause of action

that the directors engaged in a dishonest and fraudulent design. That was never properly formulated as part of the plaintiffs' case.

The plaintiffs have not satisfied me in relation to any of their claims under the equitable fraud head. Again the reader will have to look at **Sect 31** and **Sect 32** to appreciate why I have reached these conclusions. The thrust of the argument is that the banks' conduct amounted to an imposition and deceit on the companies and their creditors. I do not think that case was made out. A significant (but not the only) factor underpinning the conclusion is this. As at 26 January 1990 the banks knew that there was a real risk that the on-loans might not be subordinated and that, to this extent, the bondholders might rank equally with them in a winding up. This was part of the motivation for the banks pursuing the refinancing.

It was also a strong motivation in the banks' conduct in the ensuing months. The banks had no obligation or duty to inform the bondholders of anything. That duty (as and when the obligation arose) lay with the companies, not the banks. The banks knew that if there were a default by the companies under the terms of the bond issue trust deeds the bondholders would, most likely, move against the issuer and the guarantor and seek to have them wound up. This would place the banks' securities in jeopardy. The banks were determined that this should not happen and they agreed (reluctantly) to assist the companies with their interest payments to the bondholders. But it is one thing to help the companies to avoid a default. It is another thing to say the banks directed or persuaded the companies to stay right away from the bondholders' trustee, not to tell the trustee anything and to keep it (the trustee) in the dark.

I was not satisfied on the evidence that the latter was the case. Had I been so satisfied I would have been more inclined to say that the circumstances justified intervention under the broader head of equitable

fraud rather than the narrower confines of specific equitable causes of action. There was not quite enough evidence to lead me to that result.

The other head of the equitable fraud claims, namely an inequitable and unconscientious bargain, failed because I was not satisfied that the Bell group companies were under a special disability of which the banks took advantage. The directors were experienced business people who had been in various sectors of commerce for a long time. They had access to independent legal advice. In some aspects of the negotiations they gave as good as they got. While I am not saying the doctrine can never apply to large commercial enterprises, on the facts of this case the essential element of special disability was missing.

The statutory claims under *Bankruptcy Act* s 121 and *Property Law Act* s 89 failed because for such a cause of action the claimant must establish that the disponent has a real or actual intention to defraud creditors. A real or actual intention means a dishonest intention. This was neither properly pleaded nor established. The plaintiffs have satisfied me that a small number of the Transactions were voidable settlements under *Bankruptcy Act* s 120. The reader will need to go to **Sect 33** to understand this gloss.

I will now attempt to provide short answers to the questions I posed at the end of **Sect 7.1**. The formulation of the questions will be slightly different as the reader will have the benefit of the preceding analysis.

1. Were the Bell group companies insolvent as at 26 January 1990?

Answer: Yes.

2. Did the directors know the companies were insolvent?

Answer: No, but they knew the companies were nearly insolvent or of doubtful solvency.

3. In causing the companies to enter into the Transactions (including giving securities over all worthwhile assets), did the Australian directors breach the duties they owed to the Australian Bell group companies?

Answer: Yes.

4. In causing the companies to enter into the Transactions, did the UK directors breach the duties they owed to the UK Bell group companies?

Answer: Yes.

5. In causing BGNV to enter into its Transaction, did its director breach the duties it owed to BGNV?

Answer: No

6. Were the duties that were breached fiduciary in nature?

Answer: Yes

7. Are the banks liable under the first limb of *Barnes v Addy*, that is, that they received trust property knowing that it arose from a breach of the directors' fiduciary duties?

Answer: Yes.

8. Are the banks liable under the second limb of *Barnes v Addy*, that is, that they knowingly assisted in the breach of the directors' fiduciary duties?

Answer: No.

9. Are the banks liable under any of the four heads on which the equitable fraud claims are based?

Answer: No.

10. Are the banks liable under any of the following species of statutory claims:

(a) under s 121 of the *Bankruptcy Act* or comparable legislation relating to transactions done with intent to defeat, delay or defraud creditors? Answer: No.

(b) under s 120 of the *Bankruptcy Act* relating to voidable settlements?

Answer: Yes, in relation to a small number of the Transactions.

(c) as unregistered charges?

Answer: No.

11. Have the banks established that the holders of convertible subordinated bonds (including the effect of the on-lending within the group of the bond issue proceeds) were and remain effectively subordinated behind the claims of unsubordinated creditors including the banks?

Answer: Yes.

12. Is there anything in the myriad defences raised in the litigation that is a complete bar to the plaintiffs claiming relief?

Answer: No

13. To what relief are the plaintiffs entitled?

Answer: That remains to be determined but it may include declarations relating to the avoidance of the Transactions, return of the proceeds of realisation of assets and interest.

14. To what relief are the banks entitled?

Answer: That remains to be determined but it may include declarations relating to the subordinated status of the bonds and the on-loans.

15. What will be the disposition of the costs of the litigation?

Answer: That remains to be determined.

### **3. PART THREE - THE *BELL* LITIGATION: FURTHER INFORMATION AND STATISTICS**

#### **3.1. Information**

The *Bell* litigation is one of the longest civil trials ever heard in Australia. Particular features of the litigation contributed directly to the trial's length and complexity.

1. In reality, it was 20 or 21 trials because the case (especially in terms of knowledge) had to be proved against each of the 20 banks individually and one of them as agent.

2. The impugned transactions occurred between July 1989 and January 1990 but critical events took place from October 1985 and through to April 1991. In other words, the events occurred a long time ago and over an extended period.

3. The events took place in many different parts of the world.

4. Whenever a large commercial group of companies fails there will inevitably be congeries of intra-group dealings to be untangled.

The practical logistics for a court hearing a long trial such as *Bell* are enormous. It was necessary to have a courtroom big enough to accommodate teams of lawyers and a large volume of documents. It meant the installation and upgrading of technological facilities and the removal from other uses for years of the courtroom dedicated to the trial.

Significant resources were allocated (probably at the expense of other more deserving sectors of the Court) to the development and maintenance of the technology necessary to run the trial. The technological facilities were of an extremely high standard.

Despite the earlier reference to large quantities of documents, the trial was conducted largely in electronic format. Although the use of paper was by no means eliminated, it provided an opportunity to reduce

the number of sets of documents reproduced in hard copy. For those who are environmentally conscious, a rough calculation indicates that to create one complete set of the tendered documents would use 3.5 tonnes of paper. For that amount of paper, the manufacturing process would require 2.5 pine trees and 200,000 litres of water.

Many of the participants in the impugned transactions were European residents. Due to age, infirmity and other reasons, some of them were unable to travel to Australia to testify. In order to accommodate those witnesses the Court relocated to London on two occasions to take evidence: once for one week during the plaintiffs' case and once for six weeks during the defendants' case.

## **3.2. Statistics**

### **3.2.1. The hearing**

Hearing period: 22 July 2003 to 22 September 2006

Hearing days: 404

- Plaintiffs' opening - 120 days.
- Plaintiffs' witnesses - 62 days.
- Defendants' opening - 43 days.
- Defendants' witnesses - 170 days.
- Post-evidence interlocutory hearings - 4 days.
- Oral closing submissions - 5 days.

### **3.2.2. The witnesses**

Number of witnesses: 166

- Witnesses called and cross-examined - 155.
- Witnesses providing statements (not cross-examined) - 11.
- Lay witnesses - 154.
- Expert witnesses - 12.

### **3.2.3. The documents**

- Documents (pages) imaged for the trial book - 134,706 (452,212).
- Documents (pages) tendered in evidence - 86,340 (318,819).
- Transcript - 37,105 pages.
- Pages (documents) of written closing submissions - 36,932 (770).

### **3.2.4. Numbers of documents referred to during the hearing**

- In the transcript - 14,722.
- In witness statements - 21,347.
- In written closing submissions - 25,471.

### **3.2.5. The reasons for decision**

- Total number of words - 1,084,735.
- Total number of pages - 2,643.
- Pages of analysis and reasoning - 2,511.
- Pages of Schedules - 78.
- Number of paragraphs - 9,762.
- Number of cases cited - 547.