

OUTCOME DETAILS

Supreme Court - Civil
at Supreme Court Sydney
on 21 November 2022

2018/00076580-009, 2018/00076580-004, 2018/00076580-008, 2018/00076580-026, 2018/00076580-023, 2018/00076580-010, 2018/00076580-027, 2018/00076580-022 / Cross Summons 003: Wayne Leonard Chapman v Andrew Gray (KPMG Partner), Cross Summons 001: Andrew Gray (KPMG Partner) v Gunns Plantations Limited (in Liquidation), Cross Summons 002: Gunns Plantations Limited (in Liquidation) v Andrew Gray (KPMG Partner), Cross Summons 007: Catlin Australia Pty Ltd v Andrew Gray (KPMG Partner), Cross Summons 006: Robin Gray v Wayne Leonard Chapman, Cross Summons 004: Robert Watson and Erica Gay as the legal personal representatives for the estate of the late John Eugene Gay v Gunns Plantations Limited (in Liquidation), Cross Summons 008: Chubb Insurance Australia Limited v Andrew Gray (KPMG Partner), Cross Summons 005: Robin Gray v Catlin Australia Pty Ltd

2018/00076580-001 / Summons: Giabal Pty Ltd v Gunns Plantations Limited (in Liquidation)

HH makes orders in terms of short minutes of order initialled and dated today's date.

Short Minutes of Order

The Court orders that:

1. The initial trial be the claims of the Plaintiffs together with the common questions set out in Annexure A.

Annexure A

Common Questions of Fact and Law

The following questions of fact and law are common to the claims of the Group Members arising from the Plaintiffs' Second Further Amended Commercial List Statement (SFACLS) filed on 28 March 2022, and the Commercial List Responses to the SFACLS filed by the respective Defendants. Abbreviations from those documents are maintained and are set out for reference below under the heading 'Defined Terms'.

Standing

1. Do the Plaintiffs have standing to sue for the relief sought (both on their own behalf and as representative of the Group Members), or alternatively, is their loss and damage merely a reflection of the loss or damage suffered by the Gunns Woodlot Schemes such that GPL (by its liquidators) is the proper plaintiff?

2. Do the Plaintiffs have standing to sue for a breach of the Directors Duties?

Operation of the Gunns Woodlot Schemes

3. Did the Gunns Woodlot Schemes operate as pleaded in section C2 of the SFACLS, in that:

3.1 the remuneration to which GPL was entitled for acting as the RE of the Gunns Woodlot Schemes was limited to the components pleaded in paragraph 38 of the SFACLS;

3.2 GPL held the Plaintiffs' Application Moneys on trust in the Application Portions of the relevant Gunns Woodlot Schemes;

3.3 GPL was entitled to release (or instruct Gunns Ltd to release) only so much of the Application Moneys held in the Application Portion as was necessary to pay the Woodlot Establishment Expenses;

3.4 where Application Moneys in the Application Portion exceeded the amount necessary to pay the Woodlot Establishment Expenses for a Gunns Woodlot Scheme, the balance remained on trust in the Application Portion;

or, alternatively, did the Gunns Woodlot Schemes operate as pleaded in the Defendants' commercial list responses, in that:

3.5 the Application Moneys (or Application Fees) were only held on trust by GPL for Applicants pending acceptance of their application for an interest in a Gunns Woodlot Scheme;

3.6 once GPL was satisfied of the matters set out in cl 7 of the relevant Constitution and had received a duly completed and executed Forestry Right Lease Deed and Management Agreement, GPL was entitled to release (or instruct Gunns Ltd to release) the whole of the Application Fee to itself in payment of the Woodlot Establishment Expenses (referred to as the Establishment Fee in the Management Agreement);

3.7 once the Applicants were accepted as Growers in a Gunns Woodlot Scheme and their Application Moneys were so released, no part of those moneys was required to be held on trust for the Growers (including the Plaintiffs and Group Members)?

4. Alternatively to 3 above, to the extent that GPL released or instructed Gunns Ltd to release the Application Moneys to pay the Woodlot Establishment Expenses, but the amount necessary for that purpose was less than the amount released and the residue amount was retained by GPL, was that an unauthorised retention of Growers' Trust Funds?

Allegations against GPL

5. Did GPL owe any of the GPL Management Duties under the Scheme Documents, the Compliance Plans, or ss. 601FC and 601LC of the Corporations Act 2001 (Cth) ("the Act")?

6. Did GPL owe any of the GPL Trust Fund Duties under the Scheme Documents, the Compliance Plans, or ss. 601FC and 601LC of the Act?

7. Did GPL owe any of the GPL RE Duties under the Scheme Documents or s 601FC(1)(h) of the Act?

8. If GPL owed any of the GPL Management Duties, did it breach any of those duties?

9. If GPL owed any of the GPL Trust Fund Duties, did it breach any of those duties?

10. If GPL owed any of the GPL RE Duties, did it breach any of those duties?

11. If GPL breached any of the GPL Management Duties, did any of those breaches cause the Group Members' loss to their:

11.1 Proportional Interests in the Wood Proceeds Portion and Carbon Rights Portion for each of the Gunns Woodlot Schemes (less the Liquidation Distributions); and/or

11.2 Proportional Interests in the Growers' Trust Funds?

12. If GPL breached any of the GPL Trust Fund Duties, did any of those breaches cause the Group Members' loss to their:

12.1 Proportional Interests in the Wood Proceeds Portion and Carbon Rights Portion for each of the Gunns Woodlot Schemes (less the Liquidation Distributions); and/or

12.2 Proportional Interests in the Growers' Trust Funds?

13. If GPL breached any of the GPL RE Duties, did any of those breaches cause the Group Members' loss to their:

13.1 Proportional Interests in the Wood Proceeds Portion and Carbon Rights Portion for each of the Gunns Woodlot Schemes (less the Liquidation Distributions); and/or

13.2 Proportional Interests in the Growers' Trust Funds?

Claims against the GPL Directors

14. Did the GPL Directors owe any of the Directors' Duties?

15. If the GPL Directors owed any of the Directors' Duties, did each respective GPL Director breach any of those duties in the Relevant Period they were a director or officer of GPL?

16. If the answer to question 16 is yes, does the 'business judgment rule' apply to any breaches of the duties in s 601FD of the Corporations Act (Act)? If so, can some or all of the GPL Directors avoid liability and be taken to have complied with some or all of the Directors' Duties on the basis they have exercised a business judgment that meets the requirements of s 180(2) of the Act?

17. If any of the GPL Directors breached any of the Directors' Duties, did any of those breaches cause the Group Members' loss to their:

17.1 Proportional Interests in the Wood Proceeds Portion and Carbon Rights Portion for each of the Gunns Woodlot Schemes (less the Liquidation Distributions); and/or

17.2 Proportional Interests in the Growers' Trust Funds?

18. Are the GPL Directors liable to discharge the whole or part of the liability of GPL pursuant to s. 197 of the Act?

Claims against KPMG

19. Did KPMG owe any of the KPMG Duties to the Plaintiffs and the Group Members?

20. If KPMG owed any of the KPMG Duties, did KPMG breach any of those duties?

21. If KPMG breached any of the KPMG Duties, did any of those breaches cause the Group Members' loss to their:

21.1 Proportional Interests in the Wood Proceeds Portion and Carbon Rights Portion for each of the Gunns Woodlot Schemes (less the Liquidation Distributions); and/or

21.2 Proportional Interests in the Growers' Trust Funds?

Claims against the Insurers

22. Is GPL entitled to indemnity from Catlin under the First Excess IMI Policy in relation to the claims made against it in the SFACLS (subject to the limit of indemnity under that policy)?

23. Are the GPL Directors entitled to indemnity from Catlin under the First Excess IMI Policy in relation to the claims made against them in the SFACLS (subject to the limit of indemnity under that policy)?

24. Is GPL entitled to indemnity from Chubb under the Chubb Policy in relation to the claims made against it in the SFACLS (subject to the limit of indemnity under that policy)?

25. Are the GPL Directors entitled to indemnity from Chubb under the Chubb Policy in relation to the claims made against them in the SFACLS (subject to the limit of indemnity under that policy)?

Limitation defences

26. Are all or parts of the proceeding statute barred pursuant to ss. 601MA(2), 1317K and 1325(4) of the Act, s. 48 of the Limitation Act 1969 (NSW), s. 24(2) of the Limitation Act 1974 (TAS), s. 21 of the Limitation Act 1958 (VIC), ss. 31 and 32 of the Limitation Act 1936 (SA), s. 27 of the Limitation Act 2005 (WA), s. 27 of the Limitation Act 2005 (QLD), s. 11 of the Limitation Act 1985 (ACT), and/or s. 33 of the Limitation Act 1981 (NT) or the doctrine of laches?

Apportionment and contribution

27. Should any of the Defendants' liability (if any) be reduced, having regard to the extent of the liability of any Defendant for the damage or loss compared to the responsibility of other concurrent wrongdoers (including other Defendants)?

28. Are any of the Defendants entitled to contribution from certain of the other Defendants pursuant to s. 3 of the Wrongs Act 1954 (TAS), s. 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW), any similar or equivalent provision of any other applicable legislation, or in equity?

Cross Claims

29. What are the respective rights and liabilities as between the Defendants/Cross Defendants in the event that one or more of the Defendants is liable to the Plaintiffs, one or more Group Members, or one or more Defendants?

30. Should KPMG's liability (if any) be reduced pursuant the Court's discretion under s. 1325(2) of the Act?

31. If they are otherwise liable, should any of KPMG, the Eighth Defendant, or the Fourth Defendant be relieved from liability under s. 1318 of the Act?

32. If they are otherwise liable, should any of the GPL Directors be relieved from liability under s. 1317S of the Act?

Relief

33. What are the correct principles for measuring the Plaintiffs' and Group Members' compensable loss and damage?

34. Should any damages award to the Plaintiffs or Group Members account for any taxation benefits received by the Plaintiffs or Group Members by reason of their investment(s) in the Gunns Woodlot Schemes?

Defined Terms

35. The defined terms above are as follows:

35.1 'Application Fees' means the fee per Woodlot payable by an applicant seeking participation in the relevant Gunns Woodlot Scheme in accordance with the terms of the relevant Product Disclosure Statement, and 'Application Moneys' means the amount payable on application in accordance with clause 4.1 of the relevant Constitution;

35.2 'Application Portion' means the portion of the Fund for a given Gunns Woodlot Scheme created pursuant to clause 3.4(b) of the relevant Constitution;

35.3 'Carbon Rights Proceeds Portion' means the portion of the Fund for a given Gunns Woodlot Scheme created pursuant to clause 3.4(d) of the relevant Constitution;

35.4 'Catlin' means the Twelfth Defendant;

35.5 'Chubb' means the Thirteenth Defendant;

35.6 'Chubb Policy' has the meaning defined in paragraph 13B of the SFACLS;

35.7 'Constitution' means the constitution governing a given Gunns Woodlot Scheme;

35.8 'Compliance Plan' means the compliance plan for a given Gunns Woodlot Scheme;

35.9 'Defendants' means the Third to Thirteenth Defendants in the proceeding;

35.10 'Directors' Duties' means the duties described in paragraph 69 of the SFACLS;

35.11 'First Excess IMI Policy' has the meaning defined in paragraph 110 of the SFACLS;

35.12 'GPL' means Gunns Plantations Limited (ACN 091 232 209) (in Liquidation) (Receivers and Managers Appointed);

- 35.13 'GPL Directors' means the Third and Fifth to Ninth Defendants and the late Mr John Eugene Gay;
- 35.14 'GPL Management Duties' means the duties described in paragraphs 65 and 66 of the SFACLS;
- 35.15 'GPL RE Duties' means the duties described in paragraph 67A of the SFACLS;
- 35.16 'GPL Trust Fund Duties' means the duties described in paragraph 67 of the SFACLS;
- 35.17 'GPL's Unauthorised Retention of Growers' Trust Funds' means the allegation at paragraph 52C of the SFACLS that, to the extent that GPL released or instructed Gunns Ltd to release the Application Money to pay the Woodlot Establishment Expenses, but the amount necessary for that purpose was less than the amount released, any residue amount retained by GPL was an unauthorised retention of the Growers' Trust Funds;
- 35.18 'Group Members' has the meaning defined in paragraph 1 of the SFACLS under Section A, Nature of Dispute;
- 35.19 'Growers' means the Plaintiffs' and Group Members' role under the Scheme Documents whereby, upon entering into the relevant Management Agreement and Forestry Right Lease Deed with GPL for the relevant Gunns Woodlot Scheme and paying the Application Moneys, they would become a "Grower" under the relevant Constitution;
- 35.20 'Growers' Trust Funds' has the meaning defined in paragraph 52B of the SFACLS;
- 35.21 'Gunns Duties' has the meaning defined in paragraph 68 of the SFACLS;
- 35.22 'Gunns Ltd' means Gunns Limited (CAN 009 478 148) (in Liquidation) (Receivers and Managers Appointed);
- 35.23 'Gunns Woodlot Schemes' means the managed investment schemes known as the "Woodlot Projects" operated by GPL in the periods 2002-2003, 2005-2006 and 2008-2009;
- 35.24 'KPMG' means the Tenth and Eleventh Defendants;
- 35.25 'KPMG Duties' has the meaning defined in paragraphs 70 and 72 of the SFACLS;
- 35.26 'Liquidation Distributions' means the liquidation distributions received by the Growers in late 2016 and 2017 as set out in paragraph 64 of the SFACLS;
- 35.27 'Plaintiffs' means Giabal Pty Ltd (CAN 009 863 807) and Geoffry Edward Underwood.
- 35.28 'RE' means responsible entity;
- 35.29 'Relevant Period', for each of the GPL Directors, means:
- (a) For the Third Defendant, 21 February 2000 to 11 August 2010;
 - (b) For Mr John Eugene Gay, 21 February 2000 to 3 June 2010;
 - (c) For the Fifth Defendant, 21 February 2000 to 27 November 2012;

(d) For the Sixth Defendant, 21 February 2000 to 13 August 2010;

(e) For the Seventh Defendant, 16 April 2008 to 27 November 2012;

(f) For the Eighth Defendant, 24 February 2009 to 3 February 2011; and

(g) For the Ninth Defendant, 3 June 2010 to 27 November 2012;

35.30 'Scheme Documents' has the meaning defined in paragraph 17 of the SFACLS;

35.31 'Wood Proceeds Portion' means the portion of the Fund for a given Gunns Woodlot Scheme created pursuant to clause 3.4(c) of the relevant Constitution;

35.32 'Woodlot Establishment Expenses' means the costs and expenses of performing the duties and obligations of the Responsible Entity for a given Gunns Woodlot Scheme under clause 4 of the relevant Management Agreement.

Justice M Ball

Signed

Date