



Supreme Court New South Wales

Medium Neutral Citation:

Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC [2020] NSWSC 61

Hearing dates:

9 December 2019

Decision date:

12 February 2020

Jurisdiction:

Equity - Commercial List

Before:

Hammerschlag J

Decision:

Declarations as to contraventions. Verdict for the plaintiff, damages to be assessed.

Catchwords:

CORPORATIONS LAW – CONSUMER LAW – Corporations Act 2001 (NSW) ss 1041D-1041F and 1041H, Australian Securities and Investments Commission Act 2001 (Cth) s 12DA – United States “activist short sellers” circulate and disseminate statements and information about registered management investment schemes in Australia units in which are listed on the

Australian Stock Exchange likely to induce persons to dispose of units – where the statements and information are false in material particulars, materially misleading, and deceptive or likely to mislead or deceive – whether requirements of s 1041D are met – whether requirements of ss 1041E, 1041F and 1041H and s 12DA of the ASIC Act are met – requirement under s 1041D for dissemination to the effect that the price will fall because of a transaction or other thing done in relation to financial products in contravention of other provisions and disseminator to have done the transaction or other thing – HELD – such requirement not met here – the dissemination itself cannot be the transaction or thing done – requirements of other sections met – HELD – defendants contravened ss 1041E, 1041F and 1041H and s 12DA of the ASIC Act.

Legislation Cited:

Australian Securities and Investments Commission Act 2001 (Cth)

Corporations Act 2001 (Cth)

Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited:

ABN Amro Bank NV v Bathurst Regional Council (2014) 224 FCR 355

Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538

Category:

Principal judgment

Parties:

Rural Funds Management Limited - Plaintiff

Bonitas Research LLC - First Defendant

Matthew Wiechert - Second Defendant

Representation:

Counsel:

C. Withers with R. Pietriche - Plaintiff

Solicitors:

Clayton Utz - Plaintiff

File Number(s):

2019/286421

JUDGMENT

INTRODUCTION

- 1 HIS HONOUR: Rural Funds Management Limited (ACN 077 492 838) (**RFM**), the plaintiff, is an Australian unlisted public company.
- 2 RFM is, under the *Corporations Act 2001* (Cth) (the **Act**), the responsible entity of, the trustee for, and the manager of, two stapled registered management investment schemes known respectively as the Rural Funds Trust and RF Active (together **RFF**).

RFM holds an Australian Financial Services Licence, authorising it to operate RFF.

- 3 The assets of the schemes, about \$945 million, are mostly agricultural. Revenue is derived principally from the leasing of agricultural properties and equipment. The properties include almond and macadamia orchards, poultry property with infrastructure, vineyards, cattle properties and a cotton property. Revenue is also derived from leasing agricultural plants and equipment, cattle and water rights. Assets are in New South Wales, Queensland, South Australia and Victoria.
- 4 Units in RFF (**units**) are listed on the Australian Stock Exchange (**ASX**).
- 5 The financial statements of RFF are audited. RFM presents the Group's Consolidated Financial Report for each financial year. Audited annual financial statements for the years ended 30 June 2015, 30 June 2016, 30 June 2017 and 30 June 2018 are in evidence.
- 6 Unless otherwise stated or the context otherwise indicates, references below to:
 - sections are to sections of the Act;
 - time are to Australian Eastern Standard Time; and
 - dollars are to Australian dollars.
- 7 Bonitas Research LLC (**Bonitas**), the first defendant, is an entity incorporated in Texas, United States of America.
- 8 Matthew Wiechert (**Wiechert**), the second defendant, is the principal of Bonitas and its Chief Executive Officer.
- 9 Wiechert founded Bonitas in 2018. Bonitas and Wiechert claim that Wiechert's "Street learning experience" was highlighted in a 2018 film called "The China Hustle".
- 10 Bonitas describes itself as an "activist short seller". A short seller sells securities which, at the time it sells, it does not own or have a right to obtain. If the price of the securities it sells drops before the time it must deliver to the buyer, it can buy in what it has to deliver for less than what it sold it, and thereby make a profit. Consequently, a short seller has an interest in causing a drop in the price of securities which it has sold but does not have, and has not yet delivered.
- 11 Commencing at 9:23am on 6 August 2019, Bonitas and Wiechert engaged upon a concerted course of making statements and disseminating information scathingly critical of RFM and RFF. They accused RFM and RFF of dishonesty and of being a fraud. Their plain intention was to drive down the price of units for commercial gain. In one of their releases, they said:

We have a short interest in RFF's stock and stand to realize significant gains in the event that the price of such instrument declines.
- 12 Statements which they made and information which they disseminated were false in material particulars and materially misleading. I am satisfied that they knew or ought reasonably to have known that the statements and information were false in material particulars or were materially misleading. They did not care that they were false.

Their conduct caused a significant drop in the traded price of units traded on the ASX and no doubt caused significant loss to investors who were not short.

- 14 In some of their published material, Bonitas and Wiechert say that they try to identify and expose fraudulent activity that exists in the public capital markets, which they believe ultimately makes the world a better place. I leave it to others to assess whether their conduct achieved that goal or the opposite.
- 15 In Australia, it is, by s 1041D, unlawful for a person to circulate or disseminate (whether in this jurisdiction or elsewhere), or be involved in the circulation or dissemination of, any statement or information to the effect that the price for trading in securities on the ASX will, or is likely to, fall because of an act or thing done in relation to those securities, if the thing done constitutes or would constitute a contravention of s 1041E and the person, or an associate of the person, has done such an act or thing or has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.
- 16 It is, by s 1041E, unlawful for a person to make a statement or disseminate information (whether in this jurisdiction or elsewhere) which is false in a material particular or materially misleading if the statement or information is likely to induce persons to dispose of securities or has the effect of reducing the price on the ASX for trading in securities if the person does not care whether the statement or information is true or false, or knows or ought reasonably to have known that it is false in a material particular or is materially misleading.
- 17 It is, by s 1041F, unlawful for a person in this jurisdiction to induce another person to deal in financial products by making or publishing a statement if the person knows, or is reckless as to whether, the statement is misleading, false, or deceptive.
- 18 It is, by s 1041H, unlawful for a person to make a statement or disseminate information about securities that is misleading or deceptive or likely to mislead or deceive.
- 19 It is, by s 12DA of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**), unlawful, in trade or commerce, to engage in conduct in relation to securities that is misleading or deceptive or likely to mislead or deceive.
- 20 Under the Act and the ASIC Act, the Court has power to order a person (the liable person) to compensate another person for damage suffered by conduct of the liable person in contravention of those Acts.
- 21 RFM alleges that Bonitas and Wiechert contravened each of the aforementioned sections, as a consequence of which RFM suffered loss and damage. It seeks declarations as to the contraventions and it claims damages and compensation, including profits made by Bonitas and Wiechert resulting from the contravention.
- 22 On 12 December 2019, I ordered, pursuant to *Uniform Civil Procedure Rules 2005* (NSW) r 28.2, that all questions in the proceedings except for quantum of damage or compensation be decided separately from, and before, questions of quantum of

damage or compensation. Hence, this judgment does not deal with quantum.

- 23 The initiating process, being a Summons and accompanying Commercial List Statement, were served upon Bonitas and Wiechert in Texas pursuant to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, signed at The Hague on 15 November 1965.
- 24 Bonitas and Wiechert have chosen not to defend the proceedings in this Court. They have not appeared to challenge the Court's jurisdiction.
- 25 Their attitude is revealed in an email which they sent RFM's lawyers on 1 October 2019. It is appropriate to set out the pertinent text:

We are not going to spend much time familiarizing you with the laws of the United States as we assume you reviewed those laws before deciding to commence an action in Australia against an entity and person who do not do business there, and never been physically present there. You likely understand that the United States safeguards commercial as well as political speech under the First Amendment of the Constitution. You also are probably familiar with the liberal discovery policies of United States courts. To abrogate and avoid the First Amendment protections we hold, as well as to put up roadblocks toward a full airing of the financial unsoundness of your client through a vibrant discovery process, you have commenced litigation in Australia and invited us to participate. We respectfully decline the invitation. Australian courts have no jurisdiction over us, and we will contest the enforcement of any orders or judgments you obtain that certainly will be contrary to the discoverable facts, as well as United States and Texas law and policy.

However, United States Courts do have jurisdiction over RFF as a large percentage of its publicly traded shares were historically held by United States investors. In fact, prior to our initial report on August 6, 2019, United States investors had significant ownership of RFF shares and occasionally held more RFF shares than any other country worldwide, including Australia.

In light of the recent affirmation of our opinions regarding RFF's financial precariousness by a reputable and totally independent research firm, Bucephalus Research, we are considering a defamation action in the United States against your client. We appreciate we will have to meet a malice standard, but we are more confident than ever that we can do so. Please confirm that you or your client's Texas counsel will voluntarily accept service of a complaint which, unlike yours, clearly would have no jurisdictional infirmities.

By this letter we are not intending to participate in any way in litigation in Australia.

Very truly yours,

Matthew Wiechert, Bonitas Research LLC

- 26 I am not qualified to express any view on the operation of the Constitution of the United States of America, or on Texas law and policy, and I do not do so. They play no role in the adjudication of these proceedings, which are governed by the laws of Australia.

FACTS

- 27 RFM holds 11,843,659 units in RFF.
- 28 RFF is a trust and has no legal personality of its own. It does not have a board of directors or employ a management or executive team.
- 29

RFF's business is managed by RFM's directors and members of its management team. The management team comprises specialist fund managers, finance, human resources and compliance professionals, horticulturalists, and agricultural and livestock managers employed by RFM.

30 Under the constitutions of RFF, RFM is entitled to a 1% management fee and a 1% asset management fee calculated as a percentage of the Gross Asset Value of the Assets under management. According to David Anthony Bryant (**Bryant**), the managing director of RFM, in practice, RFM generally charges up to a 0.6% management fee and 0.45% asset management fee to RFF.

31 At the close of trading on the ASX on 5 August 2019, the unit price was \$2.35.

32 At 9:23 am on 6 August 2019, Bonitas released the following statement on Twitter under the (so-called) "handle" @BonitasResearch (the **first tweet**):

Latest Bonitas report out shortly. ASX listed fraud. Many unsuspecting international mutual fund index holders. We are short and we believe the company is worthless.

33 At 10:37 am, Bonitas published the following statement on Twitter from @BonitasResearch (the **second tweet**):

We are short Rural Funds Group (#ASX:\$RFF) and believe it is a Fraud. Expect \$RFF #RFF to ultimately be worthless. New Fraud Report just released on our website bonitasresearch.com @ActivistsShorts @FT @business @markets @WSJbusiness @ASX

34 A hyperlink to Bonitas' website was given.

35 Contemporaneously, Bonitas and Wiechert published a report (the **first report**) on Bonitas' website, together with a summary report (the **first summary report**).

36 The first summary report includes the following:

August 5, 2019 – Short Rural Funds (ASX: RFF)

Listed in 2014, Rural Funds Group (ASX: RFF) ("RFF", the "Company") presents itself as a successful real estate investment trust ("REIT") with an enviable portfolio of Australian agricultural assets that offers investors an attractive dividend yield without exposure to traditional farming business risks. Not all is what it seems.

Evidence suggests that RFF's reported profitability had included A\$ 28+ million of fabricated rental income paid to RFF by its two largest third-party lessees. We believe that RFF had artificially inflated its reported financial performance to raise cash from the capital markets for two reasons: (1) to finance its attractive ~76% payout ratio to shareholders; and (2) to conduct multiple nefarious transactions between RFF and RFF Management's privately-held business, Rural Funds Management ("RFM") in order to siphon assets into RFM for RFF Management's own personal gains.

RFF's shareholder dividends have accounted for only a small portion of the A\$ 475 million RFF raised from equity issuances and borrowings since FY'14. In addition, evidence suggests that a portion of RFF's cash proceeds were siphoned out of RFF into RFM. RFF Management has given little explanation why RFF would lend RFM or RFM Related Funds any money at all, let alone A\$ 30+ million! RFF Management continues to tell investors that RFM's sole form of compensation for managing RFF's assets under management is ~1% fee per annum. This is far from the truth.

As we researched RFF, we became convinced that RFM was specifically designed to operate as a separate private entity to allow RFF Management to siphon cash into RFM. RFF Management operates both RFF and RFM, yet RFF Management owns

100% of RFM and owns less than 5% of RFF's equity. To us, this immediately appeared as a clear conflict of interest between the incentive structures of RFM Management versus RFF minority shareholders.

RFF's largest nefarious transaction appeared as an undisclosed dividend recapitalization of RFM's newly acquired cattle asset, J&F, which included a A\$ 30 million special cash dividend paid to RFM financed by borrowings backstopped by RFF's A\$ 75 million financial guarantee to J&F. In addition, RFF's 1H'19 results disclosed that it was owed A\$ 14.5 million from an RFM related party macadamia lessee which inexplicably did not appear on the lessee's balance sheet. In total, we calculate that through these two transactions plus various ongoing cash expenses and fees since FY'14, RFF Management had siphoned A\$86+ million into RFM at the ultimate expense of RFF minority shareholders.

We encourage all market participants to carefully review the publicly-available evidence we relied upon when formulating our opinion. We think it to be in the best interest of RFF minority shareholders to immediately commence an independent investigation into RFF's reported rental income from its two largest third-party lessees and into its two recent transactions that appear solely to benefit RFF Management's private holdings.

[...]

We calculate that RFF Management overstated RFF's net assets by 100% and that RFF's true net assets figure was only A\$ 268 million as of December 31, 2018, which would put RFF in breach of its recently increased minimum A\$ 400 million net asset loan covenant. And as we have laid out in this report, we believe nearly 100% of RFF's reported profits since FY'17 are attributable to either fabricated rental income or non-cash gains from dubious fair value changes applied to RFF's assets.

We believe the outcome of corrected financial statements will reveal that RFF minority shareholders were always designed to be last in line when RFF's capital raising days were over and the music stopped. Because of this, we are short RFF and believe RFF's equity is ultimately worthless.

- 37 The first report includes what was said in the first summary report, but goes a good deal further. It includes the following:

We encourage those with authoritative power to contact David Bryant's former Company Secretary Andrea Lemmon, who abruptly resigned in August 2018 after 21 years of working with David Bryant since RFM was founded in 1997. Andrea Lemmon was a former director of RFF and RFM and involved as the spokeswoman featured in numerous RFF capital raising promotional videos.

- 38 Within minutes of the first report being published, RFM received numerous inquiries from RFM investors, market analysts, and the media about what had been said.

- 39 That day, RFM requested and obtained a trading halt of the units. Immediately before the trading halt, the price of the units had dropped 42% (to \$1.36) from the price at the close of trading on the ASX on the previous day.

- 40 On 7 August 2019, RFM released a statement to the ASX in which it said:

RFM rejects entirely the unfounded allegations of financial impropriety and irregularity contained in the Document and is obtaining legal advice in respect of those matters. Notwithstanding, given the seriousness of the matters raised and the resultant adverse effect on the price of RFF securities, RFM has engaged Ernst & Young to independently investigate the matters raised and assess RFM's rejection of each of the claims made in the Document as set out below.

- 41 The release responded specifically to various statements made in the first report.

On 7 August 2019, RFM, by its solicitors, engaged accounting firm Ernst & Young (**EY**) to investigate specific allegations made by Bonitas in the first report to determine whether they were substantiated. The engagement extended to EY determining whether RFM's responses to the first report in the 7 August 2019 ASX release were corroborated.

- 43 On the morning of 8 August 2019, Bryant presented an "on-line webinar" for RFF investors in which he rejected the allegations made by Bonitas in the first report.
- 44 At 1:20pm, Bonitas released a research report (the **second report**) entitled "Rebuttal to Rural Funds Clarification Announcement".
- 45 At about the same time, Bonitas released the following statement on Twitter from @BonitasResearch:
- Just published our Rebuttal on Rural Funds (#ASX:\$RFF). No Disclosure, No Transparency. No Explanation of Management Conflicts of Interest. Remain Short \$RFF. Full Rebuttal at bonitasresearch.com @ActivistShorts @FinancialReview @aus_business @ASX @business @markets
- 46 The second report was published on Bonitas' website and significant parts of its text distributed by email to subscribers. The second report contained no retractions.
- 47 On 8 August 2019, RFM released the following statement to the ASX:
- On 6 August 2019, Bonitas Research LLC (Bonitas) selectively released a document about the financial position of the Rural Funds Group (ASX: RFF) (Document).
- Rural Funds Management Limited (RFM) as responsible entity for the Rural Funds Group (ASX: RFF), released a response to the Document on 7 August 2019. RFM will not provide further detailed responses to any existing, or possible future, allegations made by Bonitas, a short-activist with an acknowledged financial interest in a declining RFF security price.
- RFM has engaged Ernst & Young to independently investigate the matters raised and assess RFF's rejection of each of the claims made in the Document.
- RFM relies on its audited financial statements and again confirms their accuracy. RFF's results for the financial year ended 30 June 2019 are scheduled for release on Tuesday, 27 August 2019 and remain in line with guidance.
- In light of the above, trading in RFF securities will resume today. The Board of the responsible entity has determined that RFM staff and Directors may trade in RFF securities from market open in accordance with the RFM Securities Trading Policy.
- 48 On 26 August 2019, EY produced a report (the **EY report**), concluding that the allegations in the first report were not substantiated and that RFM's response was corroborated.
- 49 On 27 August 2019, RFM released the EY report to the ASX.
- 50 On 6 September 2019, Bonitas issued a third report commenting on the EY report, to which RFM responded on the same day. It is not presently necessary to deal in detail with these instruments.
- 51 Bryant gave evidence by way of an affidavit affirmed on 4 December 2019 and an affidavit affirmed on 11 December 2019. His evidence falsifies statements made and information disseminated by Bonitas and Wiechert.

Between 6 August 2019 and 10 September 2019, numerous articles appeared in the Australian press about RFM and the material which had been disseminated by Bonitas and Wiechert.

- 53 Bonitas and Wiechert did not, before publishing the first report or at any time thereafter, inquire of RFM as to the truth of the matters they proposed to disseminate. Neither did they seek any explanation from RFM as to any matter which was the subject of their allegations of fraud and financial irregularity.
- 54 In responding to the allegations, RFM incurred significant costs and expenses.
- 55 It may safely be inferred that Bonitas and Wiechert directly or indirectly profited from the fall in the price of units which they caused.

RELEVANT STATUTORY PROVISIONS

- 56 Section 9 provides that ***financial product***, when used in a provision outside Chapter 7 of the Act, has the same meaning as it has in Chapter 7.
- 57 Section 79 provides:
- 79 Involvement in contraventions**
- A person is involved in a contravention if, and only if, the person:
- (a) has aided, abetted, counselled or procured the contravention; or
 - (b) has induced, whether by threats or promises or otherwise, the contravention; or
 - (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - (d) has conspired with others to effect the contravention.
- 58 Chapter 7 of the Act is entitled “Financial services and markets”.
- 59 Sections 1041D, 1041E, 1041F and 1041H are in Chapter 7, as is s 764A(1)(b)(i) which provides that, for the purposes of Chapter 7, an interest in a registered scheme is a financial product. The units are a financial product.
- 60 Section 1041D provides, relevantly:

1041D Dissemination of information about illegal transactions

A person must not (whether in this jurisdiction or elsewhere) circulate or disseminate, or be involved in the circulation or dissemination of, any statement or information to the effect that the price for trading in financial products on a financial market operated in this jurisdiction will, or is likely to, rise or fall, or be maintained, because of a transaction, or other act or thing done, in relation to those financial products, if:

- (a) the transaction, or thing done, constitutes or would constitute a contravention of section [...] 1041E [...] ; and
- (b) the person, or an associate of the person:
 - (i) has entered into such a transaction or done such an act or thing; or
 - (ii) has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this section, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

61 Section 1041E provides, relevantly:

1041E False or misleading statements

- (1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:
- (a) the statement or information is false in a material particular or is materially misleading; and
 - (b) the statement or information is likely:
 - [...]
 - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
 - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and
 - (c) when the person makes the statement, or disseminates the information:
 - (i) the person does not care whether the statement or information is true or false; or
 - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

[...]

62 Section 1041F(1)(a) provides:

1041F Inducing persons to deal

- (1) A person must not, in this jurisdiction, induce another person to deal in financial products:
- (a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or
 - [...]

63 Section 1041H provides, relevantly:

1041H Misleading or deceptive conduct (civil liability only)

- (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

- (2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

- (a) dealing in a financial product;
- (b) without limiting paragraph (a):
 - (i) issuing a financial product;
 - (ii) publishing a notice in relation to a financial product;
- [...]

64 Section 1041I(1) provides:

(1) A person who suffers loss or damage by conduct of another person that was engaged in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

65 Section 1317HA provides, relevantly:

1317HA Compensation orders—financial services civil penalty provisions

Compensation for damage suffered

(1) A Court may order a person (the liable person) to compensate another person (including a corporation), registered scheme [...] for damage suffered by the person, scheme or fund if:

- (a) the liable person has contravened a financial services civil penalty provision; and
- (b) the damage resulted from the contravention.

The order must specify the amount of compensation.

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

Damage includes profits

(2) In determining the damage suffered by a person, scheme or fund for the purposes of making a compensation order, include profits made by any person resulting from the contravention.

Damage includes diminution of value of scheme or fund property

(3) In determining the damage suffered by a registered scheme [...] for the purposes of making a compensation order, include any diminution in the value of the property of the scheme or fund.

[...]

Recovery of damage

(5) A compensation order may be enforced as if it were a judgment of the Court.

66 Section 1317DA read together with s 1317E identify s 1041D as a financial services civil penalty provision, for the purposes of s 1317HA. Accordingly, damage suffered by a registered scheme as a result of a contravention of s 1041D includes profits made by any person resulting from the contravention.

67 Section 12DA(1) of the ASIC Act provides:

12DA Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct in relation to financial services that is misleading or deceptive or is likely to mislead or deceive.

[...]

68 Section 12GF(1) of the ASIC Act provides, relevantly, that a person who suffers loss or damage by conduct of another person that contravenes s 12DA of the ASIC Act may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

69 Section 5(2)(b) of the ASIC Act has the effect that the expression “involved in a contravention” used in s 79 of the Corporations Act, has the same meaning for the purposes of the ASIC Act.

CONSIDERATION

70 For the reasons which follow, I have concluded that:

- (a) Bonitas and Wiechert contravened ss 1041E, 1041F and 1041H;
- (b) Bonitas and Wiechert contravened s 12DA(1) of the ASIC Act;
- (c) RFM has suffered loss or damage by the conduct of Bonitas and Wiechert in contravention of those enactments;
- (d) RFM has failed to establish that Bonitas and Wiechert contravened s 1041D;
- (e) there is no scope for the Court to make a compensation order under s 1317HA;
- (f) it is appropriate for the Court to mark its disapproval of the conduct of Bonitas and Wiechert by making declarations as to their contravention; and
- (g) RFM is entitled to a verdict against both Bonitas and Wiechert, damages to be assessed.

71 The first tweet did not name RFM or RFF. It foreshadowed that a report would shortly be out about an ASX listed fraud. The second tweet identified the Rural Funds Group, repeated the fraud allegation, and expressed a view that the group would ultimately be worthless. The gravamen of the tweets is that RFM and RFF were part of a general fraud on the public.

72 Subsequently, by the first report and the first summary report, Bonitas and Wiechert made specific and detailed allegations of dishonest and fraudulent conduct.

73 I will now deal with particular statements and information in the first report and the first summary report in turn.

Revenue and rental

74 Bonitas and Wiechert said:

Evidence suggests that RFF’s reported profitability had included A\$ 28+ million of fabricated rental income paid to RFF by its two largest third-party lessees. We believe that RFF had artificially inflated its reported financial performance to raise cash from the capital markets for two reasons: (1) to finance its attractive ~76% payout ratio to shareholders; and (2) to conduct multiple nefarious transactions between RFF and RFF Management’s privately-held business, Rural Funds Management (“RFM”) in order to siphon assets into RFM for RFF Management’s own personal gains.

RFM's two largest third party lessees are Select Harvests Pty Ltd and Olam Orchards Australia Pty Ltd. There are executed leases for each property for which rental is received. EY examined these instruments and determined that the agreed methodology for determining rent had been followed and that amounts received for financial years ending 30 June 2016, 2017, 2018 respectively and the half-year ending 31 December 2018 agreed to underlying rental agreements and cash received.

76 What Bonitas and Wiechert said was false in material particulars and was materially misleading and was deceptive and likely to deceive, because in truth:

- there was no evidence to suggest that RFF's profitability included fabricated rental income;
- RFF's profitability did not include fabricated income; and
- RFF's financial performance had not been artificially inflated, either for the stated purpose or at all.

Acquisition of J&F

77 Bonitas and Wiechert said:

RFF's largest nefarious transaction appeared as an undisclosed dividend recapitalization of RFM's newly acquired cattle asset, J&F, which included a A\$ 30 million special cash dividend paid to RFM financed by borrowings backstopped by RFF's A\$ 75 million financial guarantee to J&F.

78 The gravamen of this statement is that RFM received, in a dishonest and hidden fashion, \$30 million to which it was not entitled and which it received to the detriment of RFF minority shareholders (meaning unit holders).

79 A company called JBS Australia Pty Ltd (**JBS**) was, in 2018, Australia's largest meat processor and exporter. It operated feed lots. J&F Australia Pty Ltd (**J&F**) had an arrangement with JBS to acquire cattle for delivery to the feed lots.

80 In mid-2018, RFF agreed to acquire five feed lots from JBS and lease them back for ten years.

81 To enable it to implement the transaction, RFF raised, by way of a retail offering, equity of \$149.5 million. Details of the structure of the proposed transactions were disclosed in a retail offer booklet issued on 13 July 2018.

82 Separately, but as part of the wider transaction, RFM acquired 100% of the equity in J&F for \$30,693,936.

83 RFM's acquisition of the J&F shares was funded through a \$30 million loan facility obtained from ANZ bank.

84 Agreements were to be entered into, under which J&F would purchase and own cattle until they achieved desired weight, at which point they would be sold to JBS.

85 J&F was apparently debt-laden at the time. It obtained a significant syndicated loan facility (\$250 million) from ANZ Bank and Rabobank and, as another part of the transaction, RFF provided a \$75 million guarantee to those banks.

RFF furnished a guarantee which advantages J&F, all of the equity which is owned by RFM. Whilst the guarantee exposes RFF to risk in respect of an asset acquired by RFM, RFF earns a commercial monthly income return on the guarantee amount. Also, RFF owns the feed lot upon which J&F's cattle is managed by JBS. RFF's risk exposure is mitigated by J&F's insurance cover on its feed lot cattle.

87 The provision of the guarantee was approved at a meeting of unit holders on 10 August 2018.

88 Following the acquisition of J&F, J&F executed a share buyback of all but five of the shares on issue from RFM, and paid an amount of \$30,693,936 to RFM for its shares. The payment was paid out of J&F's existing cash reserves and was used to pay down the bank bridging loan provided to RFM by ANZ Bank to finance the acquisition. This is, it seems clear, the \$30 million special cash dividend referred to by Bonitas and Wiechert.

89 What Bonitas and Wiechert said was false in material particulars and was materially misleading and was deceptive and it was likely to deceive because in truth:

- RFM had not received \$30 million in a dishonest and hidden fashion;
- it was legally entitled to receive the money it received;
- the transaction was disclosed; and
- the receipt was not to the detriment of RFF unit-holders.

Compensation

90 Bonitas and Wiechert said:

RFF Management has given little explanation why RFF would lend RFM or any of RFM's Related Funds money at all, let alone A\$ 30+ million! RFF Management continues to tell investors that RFM's sole form of compensation for managing RFF's assets under management is ~1% fee per annum. This is far from the truth.

91 The gravamen of this dissemination is that RFM receives compensation other than its management fee of approximately 1% per annum in accordance with the constitutions of RFF and that statements by RFM that this is its sole form of compensation are untrue, at least because of the \$30 million payment referred to earlier in respect of the acquisition of J&F.

92 The circumstances of the \$30 million payment in relation to J&F are dealt with above. Bonitas and Wiechert do not identify any other form of compensation and there is no evidence to suggest that RFM was paid management fees other than in accordance with RFF's constitutions. The positive evidence is that it was paid management fees less than the total which those constitutions permit.

93 Under cl 21.1, of the constitutions of RFF, RFM is permitted to be paid, out of the Assets, a management fee of up to 1% per annum of the Gross Value of the Assets, calculated and payable monthly in advance.

Under cl 21.2 RFM is entitled to be paid, out of the Assets, an asset management fee of up to 1% per annum of the Gross Asset Value of the Assets, calculated and payable monthly in advance.

- 95 Under cl 21.11, all expenses properly incurred by RFM in respect of RFF must be paid from the Assets and RFM must not reimburse itself for an expense not incurred in the proper performance of its duties.
- 96 The payment of both fees and expenses are subject to cl 21.12, which provides that the rights of RFM to be paid fees or recover expenses are subject to it properly performing its duties.
- 97 The constitutions thus permit the payment to RFM of management fees of not more than 2%.
- 98 For the financial years ending 30 June 2017 and 30 June 2018, the total management fees paid to RFM were approximately 0.97% of the average adjusted total asset value of RFF. This was verified by EY, and Bryant gave evidence that he is not aware of any reason to doubt the correctness of EY's assessment.
- 99 What Bonitas and Wiechert said was false in material particulars and was materially misleading and it was deceptive and likely to deceive, because in truth
- RFM did not receive money to which it was not entitled; and
 - RFM did not receive management fees in excess of that to which it was entitled.

Conflict of interest

- 100 Bonitas and Wiechert said:
- As we researched RFF, we became convinced that RFM was specifically designed to operate as a separate private entity to allow RFF Management to siphon cash into RFM. RFF Management operates both RFF and RFM, yet RFF Management owns 100% of RFM and owns less than 5% of RFF's equity. To us, this immediately appeared as a clear conflict of interest between the incentive structures of RFF Management versus RFF minority shareholders.
- 101 The gravamen of this dissemination is that:
- RFM was designed to be a vehicle to permit the unlawful diversion of cash from RFF to RFM;
 - such diversion is facilitated by the fact that RFF management operates both entities whilst RFF management owns all of RFM, but only 5% of RFF, which places RFM management in a conflict of interest position with respect to RFF minorities; and
 - such diversion has occurred.
- 102 I am satisfied that there is no foundation for the assertion that RFM was designed for the suggested purpose, or that such purpose has been effectuated. Its purpose is disclosed in its foundational instruments.
- 103 RFF is a trust which has no legal personality of its own. It is incapable of having a board of directors, a management team, or employees. RFM is a trustee. It holds the assets for the benefit of the beneficiaries. That RFM is privately owned is immaterial in

the present context.

- 104 I am satisfied that there is no foundation for the assertion that there has been any illicit diversion of cash, whether in the context of a conflict of interest or otherwise.
- 105 What Bonitas and Wiechert said was thus false in material particulars and was materially misleading and it was deceptive and likely to deceive.

Asset value

- 106 Bonitas and Wiechert said:

We calculate that RFF Management overstated RFF's net assets by 100% and that RFF's true net assets figure was only A\$ 268 million as of December 31, 2018, which would put RFF in breach of its recently increased minimum A\$ 400 million net asset loan covenant.

- 107 The gravamen of this dissemination is that, as at 31 December 2018:

- RFM had overstated its net assets by 100%; and
- RFM's net assets were \$248 million, which would put it in breach of a \$400 million net asset loan covenant.

- 108 RFF's assets are reviewed and supported by independent valuations.

- 109 EY:

- assessed the appropriateness of management's allocations of external valuations in accordance with accounting policies of RFF;
- agreed management's allocation of fair value to the underlying general ledger;
- agreed the general ledger allocations to the financial statements; and
- where directors' valuations were used during the period, obtained an understanding from management as to the basis of the directors' valuation.

- 110 In the EY report, EY commented in some detail on the valuations and allocations used by management.

- 111 They drew attention to the fact that external valuers' reports used to prepare the financial statements inclusive of the periods between 30 June 2017 to 30 June 2018 for three properties contained an incorrect allocation of water allotments (and as a result an incorrect allocation of value of water) due to transfers between the properties. However, they "agreed" (to use EY's terminology) the total water allocation available to the three properties and the total fair value attributed for the three properties on a collective basis and no differences were noted.

- 112 EY's overall conclusion was that asset values reported are supportable through external valuations obtained.

- 113 What Bonitas and Wiechert said was false in material particulars and was materially misleading and it was deceptive and likely to deceive because

- there was no foundation for the assertion that RFF management, being RFM, has overstated RFF's net assets; and
- there was no foundation for the assertion that RFF is in breach of a \$400 million net asset loan covenant.

Macgrove

114 Bonitas and Wiechert said:

Why is RFF's A\$ 14.5 million loan nowhere to be found on 2007 Macgrove Project's balance sheet?

115 The gravamen of this dissemination is that RFF had made a \$14.5 million loan to a related entity, which loan was not recorded in its accounts.

116 In truth, however, no such loan had been made.

117 Note E2 to RFM's financial statements for the half year to December 2018 (which are in evidence) refers to a loan to this project of \$14.463 million. The note was in error. The correct figure was an immaterial \$8000.

118 EY reported that the error did not alter the accuracy of the financial report. The error in the note did not flow through to RFF's Statement of Comprehensive Income or Statement of Financial Position, because they were prepared from the primary financial data.

119 The evidence establishes that RFF's Consolidated Statement of Financial Position, as at 31 December 2018, did not contain such a loan.

120 One can understand, however, why Bonitas and Wiechert thought one had been made, although they did not see fit to make any inquiry of RFM.

121 Bonitas and Wiechert were questioning what ostensibly flowed from RFF's own accounts, which were wrong insofar as they contained note E2. For this reason, I am not satisfied that what they said was false or misleading or deceptive or likely to deceive.

Lemmon

122 Bonitas and Wiechert said:

We encourage those with authoritative power to contact David Bryant's former Company Secretary Andrea Lemmon, who abruptly resigned in August 2018 after 21 years of working with David Bryant since RFM was founded in 1997. Andrea Lemmon was a former director of RFF and RFM and involved as the spokeswoman featured in numerous RFF capital raising promotional videos.

123 Bryant gave evidence, which I accept, that Andrea Lemmon first advised him in 2015 of her plan to retire. Ms Emma Spear was approached about taking on the role of Company Secretary in August 2017. On 16 October 2017, Bryant circulated the following memorandum to staff:

Dear Colleagues

Andrea Lemmon has advised us of her intention to retire by 31 December 2018. Recognition of her substantial contribution to the success of RFM and our workplace will occur in due course.

Andrea's position involves numerous functions and responsibilities, not the least of which is the role of Company Secretary. Emma Spear has agreed to fill this position after an appropriate period of training, at which time we will advise the ASX. The other functions for which Andrea has been responsible will be allocated to Emma and other staff members over coming months, once we have had a chance to assess workloads that may change with the expansion of the business.

Emma has been a senior member of the Finance team for many years, employed by RFM for nine years and holds a Bachelor of Commerce, Bachelor of Laws, Graduate Diploma of Legal Practice and is a Certified Practising Accountant (CPA). It is clear from Emma's tenure and qualifications that she is eminently suited to the task ahead.

- 124 Andrea Lemmon's resignation was thus not abrupt and the dissemination to the contrary by Bonitas and Wiechert was false in a material particular and was materially misleading and was deceptive and likely to deceive.
- 125 The dissemination contains the imputation that the resignation occurred in suspicious circumstances deserving of further investigation and about which Andrea Lemmon could give information. I am not satisfied that this somewhat vague imputation, coupled with the exhortation to contact Andrea Lemmon, can be characterised as being false in material particulars, materially misleading, deceptive or likely to deceive.

Sections 1041E, 1041F and 1041H and section 12DA(1) of the ASIC Act

- 126 Manifestly, the statements and information made and disseminated by Bonitas and Wiechert were intended to, likely to, and did, induce persons in this jurisdiction to dispose of their units, or acquire units. They were also plainly intended to, likely to, and did, have the effect of reducing the trading price of the units.
- 127 The conduct complained of was in relation to a financial product and was in trade or commerce.
- 128 The disseminations which Bonitas and Wiechert made were of the most serious kind. Wiechert is no doubt a sophisticated operator. Yet, as has earlier been said, neither Bonitas nor Wiechert took the trouble to check with or enquire of RFM as to any of the matters which they broadcast. They had an obvious commercial interest in depressing the price. **I have no difficulty in concluding that they did not care whether what they were saying was false.**
- 129 RFM has established that each necessary element of these sections has been satisfied. It has established that it has suffered loss or damage by the conduct complained of, being at least what it cost it to respond.
- 130 Wiechert was a direct disseminator or a circulator of the statements and information complained of. But in any event, he was a person involved in each of the contraventions.

Section 1041D

- 131 I turn to s 1041D.
- 132 RFM provided the court with a six-page written submission on this topic. The submission was refined in oral argument.
- 133 Relevantly, for present purposes, the elements of a contravention of the section are:
- (a) circulation or dissemination of information to the effect that the price for units will or is likely to fall;
 - (b) the fall is because of a transaction or other thing done in relation to the units; and

(c) that transaction, or thing done, constitutes, or would constitute, a contravention of ss 1041E or 1041F.

134 The thrust of RFM's argument is that

- (a) the first tweet, the second tweet, the first report and the first summary report were statements or information disseminated by Bonitas and Wiechert to the effect that the price for trading in units was likely to fall;
- (b) the drop was likely because of a transaction or other acts or things done in relation to the units, namely that fraudulent conduct by RFF and RFM had been or was to be exposed by Bonitas and Wiechert; and
- (c) that transaction or those other things done gave rise to contraventions of ss 1041E and 1041F.

135 This argument is unsound. It elides, wrongly in my opinion, the element of the initial required circulation or dissemination of information about a transaction, act or thing done which will affect the price, with that transaction, act or thing itself which was entered into or done by the disseminator in breach of ss 1041E or 1041F.

136 The section is concerned with dissemination of information about illegal transactions, acts, or things previously done by the disseminator, not with dissemination of misleading or deceptive information about legal ones done by the subject entity and, in any event, to which the disseminator was not party.[1]

137 What the disseminator says cannot itself be the contravention of ss 1041E or 1041F for the purposes of s 1041D(a).

138 The circulation or dissemination of misleading information in contravention of the Act about a series of transactions or acts or things done, cannot itself be the transaction or act or thing done required by s 1041D(a). That is something separate.

139 Consistently with this, the section contemplates that at the time the circulation or dissemination occurs, the illegal transaction, act or thing done has already taken place. That is also not the case here.

140 The section is directed to a person who disseminates information which will affect the price because of an illegal transaction in which that person has participated (or from which that person will get a consideration or benefit for the dissemination).

141 Section 1041D replaced s 1001(1) with effect from 11 March 2002. The predecessor section was slightly simpler but was directed to the same mischief. It provided, relevantly:

1001 Dissemination of information about illegal transactions

(1) A person must not circulate or disseminate any statement or information to the effect that the price of any securities of a body corporate will or is likely to rise or fall or be maintained because of any transaction entered into or other act or thing done in relation to securities of that body corporate or of a body corporate that is related to that body corporate, in contravention of section 997, 998, 999 or 1000 if:

- (a) the person, or an associate of the person, has entered into any such transaction or done any such act or thing; or

[...][2]

Sections 1041E, 1041F, and 1041H, rather than s 1041D, are directed to the type of mischief which occurred here.

- 143 As dishonest and deserving of criticism as their behaviour was, what Bonitas and Wiechert did was not within that which the section contemplates. They published false information about a series of transactions said to have been entered into by RFM, none of which transactions was, in fact, illegal.
- 144 It follows that s 1317HA has no application here. There is no scope to make a compensation order which includes profits resulting from the contraventions which I have found.

JURISDICTION

- 145 There is ample evidence establishing that the first report and the first summary report were published in a manner which made them capable of being accessed and that they were in fact accessed in Australia and that they remain accessible by persons resident in Australia.
- 146 The first report was obtained on 6 August 2019 from the Bonitas website by Scott Roxburgh, a business manager with RFM. After this, Mr Roxburgh signed up as a subscriber with Bonitas and received the second report by email from Bonitas.
- 147 In instructing its solicitors and EY with respect to the preparation of the EY report, RFM incurred expenses of \$134,815.42 in respect of solicitors and \$385,000 in respect of EY.
- 148 Section 1041H of the Act and s 12DA of the ASIC Act reach conduct in this jurisdiction that is misleading or deceptive or is likely to mislead or deceive. If there has been such conduct, the provision is engaged, whether or not there is other conduct outside of the jurisdiction: see *ABN Amro Bank NV v Bathurst Regional Council* (2014) 224 FCR 355 at [733].
- 149 If a statement is directed from one place to another, where it is known or even anticipated that it will be received, the statement is taken to have in substance been made at the place to which it was directed: see *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 567-568 and *ABN Amro Bank NV v Bathurst Regional Council* (2014) 224 FCR 355 at [733] and following.
- 150 The evidence establishes that not only was Australia an intended destination for the statements and information disseminated by Bonitas and Wiechert but that the statements and information actually reached Australia and were read here.
- 151 The Act and the ASIC Act reach the conduct complained of.

CONCLUSION

- 152 The Court will make appropriate declarations as to the contraventions of ss 1041E, 1041F and 1041H of the Act and s 12DA(1) of the ASIC Act by Bonitas and Wiechert.

There will be a verdict for the plaintiff, damages to be assessed, on the footing that damages do not include profits made as a result of the contravention.

- 154 I will stand the matter over to enable the plaintiff to bring in short minutes of order, to draw to my attention any further issues which remain to be dealt with, and to make directions with respect to the assessment of damages.

Endnotes

1. It is not argued that s 1041D(b)(ii) is in play here.

2. Sections 999 and 1000 were broadly equivalent to ss 1041E and 1041F.

Amendments

12 February 2020 - corrected formatting and paragraph numbering

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 12 February 2020