



In the matter of BioProspect Limited 02

[2008] ATP 6

Catchwords:

Custodian – beneficial interest – legal title – stockbroking – bare trust – jurisdiction

Australia and New Zealand Banking Group Limited – ANZ Nominees Limited – Bejjal Pty Limited – BioProspect Limited – Exchange Minerals Pty Limited – Gun Capital Management Pty Limited – Opes Prime Stockbroking Limited – Opes Prime Group Limited

Corporations Act 2001 (Cth) sections 602, 606, 657A, 657C and 657E

INTRODUCTION

1. The Panel, Catherine Brenner, Kevin McCann AM (sitting President) and Anthony Sweetman declined to commence proceedings.
2. In these reasons the following definitions apply:

Term	Meaning
ANZ	Australia and New Zealand Banking Group Limited
ANZ Nominees	ANZ Nominees Limited
Application	application received on 11 April 2008 concerning the affairs of BioProspect
Applicants	Gun Capital, Exchange Minerals and Bejjal
Bejjal	Bejjal Pty Limited
BioProspect	BioProspect Limited
Disputed shares	71,254,847 BioProspect shares subscribed for by the Applicants
Exchange Minerals	Exchange Minerals Pty Limited
Green Frog	Green Frog Nominees Limited, a wholly owed subsidiary of Opes Stockbroking
Gun Capital	Gun Capital Management Pty Limited
Opes Stockbroking	Opes Prime Stockbroking Limited
Opes Prime	Opes Prime Group Limited and its subsidiaries
Max Capital	Max Capital Pty Limited

DISCUSSION

Facts

3. On 18 June 2007, BioProspect announced that it had reached an agreement with Max Capital to underwrite the exercise of 97,708,994 BioProspect listed options. The options had an exercise price of 5c and were due to expire on 30 June 2007.
4. Gun Capital entered into a sub-underwriting agreement with Max Capital. On 4 July 2007, Max Capital advised Gun Capital that it was required to subscribe for the shortfall of 83,454,847 BioProspect shares (being 97.37% of the underwritten amount).
5. On 12 July 2007, Mr Leo Khouri of Gun Capital emailed Mr Tony King of Max Capital advising him that 71,254,847 BioProspect shares (representing 14.63% of the diluted issued capital of BioProspect) would be taken up by :
 - (a) Gun Capital 31,254,847 shares
 - (b) Bejjal 20,000,000 shares and
 - (c) Exchange Minerals 20,000,000 shares
6. On 12 July 2007, Mr Khouri instructed Mr Lirim Kamberi, a settlement supervisor with Opes Stockbroking, to take up the Disputed Shares on behalf of the Applicants and to arrange payment from accounts the Applicants each held with Opes Stockbroking.
7. The Applicants submit that it “appears that Mr Kamberi registered the 71,254,847 shares in the name of Green Frog pursuant to a CHESSE sponsorship agreement with ANZ Nominees” and that the “HIN to which the BioProspect shares were issued was ANZ Nominees’ HIN”.
8. On 18 July 2007, the Disputed Shares were transferred to ANZ Nominees. (The Panel notes that this seems at odds with the submission referred to in paragraph 7.)
9. On 27 March 2008, Opes Prime went into voluntary administration and Deloitte Touche Tomatsu were appointed by ANZ as receivers and managers.
10. On 7 April 2008, ANZ released an announcement to the Australian Securities Exchange detailing that ANZ had an interest in 124,484,003 BioPropsect shares, representing 25.559% of the issued capital of BioProspect.
11. Prior to 7 April 2008, ANZ had not lodged any substantial holder notice in relation to its interest in BioProspect.

Application

12. The Applicants submitted that at all times Opes Stockbroking acted as stockbroker for them. Green Frog therefore held the Disputed Shares (which form part of the 25.559% interest disclosed by ANZ) as a bare trustee for the Applicants and ANZ had no basis for asserting beneficial entitlement to the Disputed Shares, and that at no time prior to 7 April 2008 were they aware that ANZ were asserting a beneficial entitlement to them.

13. The Applicants sought a declaration of unacceptable circumstances (in summary):
- (a) having regard to their effect on the:
 - (i) control, or potential control, of BioProspect
 - (ii) acquisition of a substantial interest in BioProspect
 - (b) because of the conduct of ANZ in breaching the substantial holder notice provisions constituted, or gave rise to a contravention.

Interim Orders

14. The Applicants sought interim orders:
- (a) to restrain ANZ Nominees from disposing of, transferring or charging any of the Disputed Shares or any interest in the Disputed Shares until the application has been considered and
 - (b) declaring that any agreement between ANZ Nominees and any third party for the disposal of, transfer of or charge over any of the Disputed Shares or any interest in the Disputed Shares be declared void and unenforceable at law.
15. The Panel did not make the interim orders.

Final Orders

16. The Applicants sought final orders that ANZ Nominees transfer the Disputed Shares to the Applicants.

Undertaking

17. In *BioProspect 01*, each of ANZ and ANZ Nominees gave undertakings to the Panel (among other things) not to:
- (a) sell any BioProspect securities until disclosure to the market, in the form of a substantial holder notice, was provided in relation to its interest in BioProspect
 - (b) trade BioProspect securities other than in the ordinary course of trading on the ASX and
 - (c) sell BioProspect securities comprising an amount greater than 5% of the issued capital of BioProspect over any three consecutive trading days.
18. On 7 April 2008, ANZ lodged a substantial holder notice in relation to its interest in BioProspect. ANZ has agreed not to sell any BioProspect securities until issues raised in the *BioProspect 01* proceedings regarding the compliance of the notice with the undertakings have been resolved.

DECISION

19. The primary relief sought by the Applicants was a determination that the Applicants have a beneficial interest in the Disputed Shares and orders transferring the Disputed Shares to the Applicants. The Panel did not consider

that the Application, on its face, came within section 657A. It did not regard the situation as analogous, or even similar, to *Pinnacle 10* and *Pinnacle 11*.¹

20. Moreover, even if the application could be brought under section 657A by reference to unacceptable circumstances having regard to control or acquisition of a substantial interest, or by reference to unacceptable circumstances because of a contravention, the Panel did not consider that the strength of the evidence supporting the Applicants' claim was such as would be likely to lead the Panel to make a declaration of unacceptable circumstances if it conducted proceedings.
21. The Panel also considered that it was unlikely that any remedies it might order (if it conducted proceedings) would be suitable remedies for the Applicants, given the relief sought. The Panel also noted the undertaking that ANZ has supplied in *Biopropect 01*. This application involves some of the same shares as in that proceeding.
22. The Panel noted that there were other possible remedies available to the Applicants, such as making an application to a court.
23. For the above reasons, the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances if it conducted proceedings. Accordingly, the Panel declined to conduct proceedings.

Kevin McCann AM
President of the Sitting Panel
Decision dated 17 April 2008
Reasons published 18 April 2008

¹ 2001 ATP 21 & 23