CHAMBERS No. 3189 of 1979

BEFORE MR. JUSTICE CONNOLLY

BRISBANE, 23 NOVEMBER 1979

BETWEEN:

THIESS HOLDINGS LTD.	First Plaintiff
- and-	
THIESS BROS. PTY. LIMITED	Second Plaintiff
- and –	
JAMES ROBERT BOURNE	Third Plaintiff
- and –	
C.S.R. LIMITED	First Defendant
- and-	
THE SHELL COMPANY OF AUSTRALIA LIMITED	Second Defendant

ORDER

HIS HONOUR: On 8 November 1979 the first defendant, which I shall call C.S.R., was entitled to 19.1 per cent of the issued capital of Thiess Holdings Limited, the first plaintiff, which I shall call Thiess Holdings. On 9 November 1979 the first defendant delivered to Thiess Holdings a Part A statement in compliance with section 180C of the Companies Act. This statement related to a take-over scheme which involved offers to be made by C.S.R. to purchase all the stock units of Thiess Holdings to which it and its subsidiaries were not already entitled. It would appear that the offer has not yet been made, and indeed that it cannot be made until tomorrow by virtue of the fact that the Part A statement was only delivered on 9 November.

Thiess Bros. Pty. Limited (Thiess Bros.) is a wholly owned subsidiary of Thiess Holdings. Between them the plaintiffs have interests in Coal ventures at Theodore and Callide in Queensland, and in the Hunter Valley in New South Wales (Drayton). The defendant, the Shell Company of Australia Limited (Shell) would seem in the past to have had an interest in the Drayton venture. When it acquired its stock in Thiess Holdings that interest would

seem to have been reduced. On 19 November 1979, C.S.R. notified Thiess Holdings by telex of the purchase by it of Shell's 15.8 per cent stock holding in Thiess Holdings. The transfer of the shares is in evidence, and it is of interest that the transfer is to be taken by C.S.R. Investments Pty. Ltd., which I assume to be a subsidiary of C.S.R. It would also appear from the transfer that 19 November was, in fact, the date of the purchase. The Part A statement and the telex, and indeed all the facts of the case, indicated that the negotiations for the acquisition of this stock were to be undertaken by the first defendant, and while I make no findings of fact, it seems to me that if the evidence remains in its present state it is likely to be found that the transfer is to be taken by C.S.R. Investments Pty. Ltd., as the nominee of the parent company. The telex, which announces the purchase of Shell's stock holding, also stated:

> "It has been agreed that when C.S.R.'s offer is successful Shell will, subject to necessary Government and other approvals, participate as a minority venturer in Theodore, Drayton and Callide steaming coal ventures. The consideration for the acquisition of these interests will be full commercial value: The increase in Shell's participation in Drayton will restore its equity in this project to the level prior to its acquisition of the stock holding in Thiess."

It is contended by the plaintiffs that the arrangements, the subject of this statement by the General Manager of C.S.R., involved a breach of section 3R of the Listing Rules of the Australian Associated Stock Exchanges. Clause 13(e) of section 3R reads as follows:

> "(e) The offerer shall not enter into arrangements to deal or make purchases or sales of shares of the offeree company either during an offer, or when one is reasonably in contemplation, if such arrangements to deal, purchase or sell have attached thereto special favourable conditions which are not extended to all share-holders."

It is contended that what has happened here is that C.S.R. has entered into an arrangement to make a purchase of shares of Thiess Holdings when an offer was reasonably in contemplation, that arrangement to purchase shares being the contract for the purchase of Shell's stock holding. It seems clear to the point of demonstration that an offer within the meaning of this Rule was in contemplation on 19 November last. Then it is said by the plaintiffs that that arrangement to purchase the Shell stock holding had attached to it special favourable conditions which were not extended to all shareholders in that Shell was given the right to participate in the steam coal ventures which are referred to in the telex. The defendants object that the right to participate in the joint venture is not shown to be favourable, contending that there must be some evidence that it is likely to be of financial benefit to Shell. It seems to me however that this right is a special favour to Shell over and above other shareholders, and that it is therefore properly to be described as a specially favourable condition. The notion that the right to participate in such joint

ventures could not be found at trial to be especially favourable seems to me to be a little fanciful. Then it is said that it is not shown that the agreement for the acquisition of the shares, and the agreement for the joint venture participation were contemporaneous, and with respect it does not seem to me that this is necessary. The only information, or the only evidence before me, is in the telex to which I have referred, and the statement by Mr. Jackson seems to me to treat the two aspects of the arrangements between C.S.R. and Shell as interdependent arrangements. It seems to me therefore that should the evidence remain in its present state it is probable that a breach of rule 13(e) of section 3R of the Listing Rules of the Stock Exchanges will be established. This in turn, say the plaintiffs, will bring into play section 31 of the Securities Industry Act 1975 of this State. Section 31 provides, so far as is material, that where any person who is under an obligation to observe or give effect to the Listing Rules of a Stock Exchange fails to observe or give effect to any of those rules, the Court may, on the application of the Commissioner for Corporate Affairs, or of a person aggrieved by the failure, and after giving to the person against whom the order is sought an opportunity of being heard, make an order giving directions to the last mentioned person concerning the observance or enforcement of, or the giving of effect to those Listing Rules. Now, C.S.R. is listed on the member exchange of the Australian Associated Stock Exchanges and the Listing Rules on page 1 require compliance by companies on the official list of member exchanges with the Listing Rules. Section 31 is on its face drawn in the light of, and with a recognition of the rules in question which indeed are subject to Ministerial approval.

See section 28 (2) (a) (iii).

It seems to me, therefore, that there is evidence that C.S.R. is a person under an obligation to observe and give effect to the Listing Rules of the Stock Exchange. This cannot he said of Shell which is not listed on the member exchange of any of the branches of the Australian Associated Stock Exchanges. In this situation, it is contended that the Court should grant an interlocutory injunction restraining the defendants and each of them until the trial of the action or further order from giving effect to the arrangement made, as I believe, on 19 November for the purchase by C.S.R. from Shell of shares in Thiess Holdings without extending to all shareholders in the last mentioned corporation to whom C.S.R. proposes to address offers to acquire shares, the right to acquire interests in the mining lease or the mining ventures referred to in the writ of summons on conditions, the same as those appearing in the telex. It is only right to say that at the hearing, counsel for the plaintiffs conceded that the jnjunction should not be granted against Shell, there being no basis in relation to that company for maintaining the situation in which the Court at trial may ultimately grant relief under section 31. It seems to me that the proper course to take is to restrain the carrying into execution of the part of the arrangements between C.S.R. and Shell which, there is a probability, will be found to have been in breach of rule 13(e). The breach on the evidence before me would consist in the specially favourably conditions attached to the

contract of purchase. It is to be understood that, as I have said before, I am not making findings of fact, but, that is a view which, if the evidence remains in its present state, seems to me would probably be reached. That being so, I propose to grant an injunction until trial of the action of the action further earlier order restraining the first defendant from carrying into execution any agreement for any greater participation by the second defendant in the Theodore, Drayton and Callide steaming coal ventures that it was entitled to prior to 19 November 1979.

I have framed it in this way because, on the face of the telex, it rather appears that Shell may have had some interest in those ventures quite apart from the arrangements on 19 November. I am not sure whether that is so or not, and I do not need to be told.

Mr. MACROSSAN: We choose the option of giving an undertaking in that form rather than submitting to an jnjunction.

HIS HONOUR: In those circumstances, I will not grant the injunction, but accept the undertaking.

(Mr. McPherson gave the usual undertaking as to damages)

HIS HONOUR: I order that the costs of the second defendant of and incidental to the application be taxed and paid by the plaintiff. I reserve the costs of the other parties.

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