

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID1449/2018
File Title: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v
HAROLD CHARLES MITCHELL & ANOR
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 16/11/2018 5:16:36 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Concise Statement

Federal Court of Australia

No. of 2018

District Registry: Victoria

Division: General

IN THE MATTER OF TENNIS AUSTRALIA LIMITED ACN: 006 281 125

Australian Securities and Investments Commission

Plaintiff

Harold Charles Mitchell

First Defendant

Stephen James Healy

Second Defendant

Facts giving rise to the claim

1. This proceeding concerns the grant in 2013 by Tennis Australia Limited (**TA**) to Seven Network (Operations) Limited (**Seven Network**) of the domestic rights to broadcast the Australian Open tennis championship on free to air television, pay television and digital media (particularly online and mobile phones).
2. TA is a company limited by guarantee. It is the governing body of tennis in Australia and its members are the State and Territory peak tennis bodies. TA is authorised by the International Tennis Federation to organise and conduct the Australian Open, one of only four Grand Slam events. TA is responsible for marketing the broadcast rights for the Australian Open and the granting of licences for those rights.
3. Seven Network held the domestic broadcast rights for the Australian Open for over 40 years. In 2007 TA and Seven Network entered into a five-year agreement for the period 2010 to 2014 for a total fee of \$100.95 million. By the agreement, Seven Network had an “exclusive negotiating

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period” from 30 April to 30 September 2013 to negotiate a new broadcast rights agreement to commence on the expiry of the agreement in January 2014.

4. During 2012 Seven Network initiated discussions with TA to renew the broadcast rights agreement. Other parties were also interested in acquiring the rights. Those parties were Network Ten Pty Ltd, Nine Entertainment Holdings Co Ltd and IMG Media Ltd (**IMG**). IMG, which held TA’s international broadcast rights, is a sports agency, not a broadcaster, and sub-licenses broadcast rights. IMG advised TA it should put the broadcast rights out to competitive tender.
5. Harold Mitchell (the first defendant) was one of nine directors of TA, and a Vice-President. From early 2012, Mitchell advised Steve Wood, TA’s CEO, and TA’s board that the Rights should remain with Seven Network.
6. Stephen Healy (the second defendant) was a director and the President and Chair of TA. He was responsible for setting the agenda for TA’s board meetings.
7. In mid-2012 TA engaged Gemba Pty Ltd, a sports and media consultancy firm, to provide advice on the value of its domestic broadcast rights (**Gemba**). Gemba’s report valued the free to air broadcast rights over five years at between \$148 to \$212 million, or about \$40 million per annum. Mitchell and Healy were aware of the report.
8. During 2012, Network Ten informed TA senior management and Healy that it was interested in acquiring the domestic broadcast rights at a substantial increase to the current deal. It suggested it might offer more than \$40 million per annum (perhaps even up to \$50 million per annum) for those rights. Mitchell was also aware of Network Ten’s interest and knew that Seven Network was concerned that it might be outbid by Network Ten. Mitchell passed on details of Network Ten’s interest to Seven Network and in May 2012 Bruce McWilliam (Seven Network’s Commercial Director) reported internally “Sadly our friends at Ten have been speaking \$40 mill a year in rights fees and whilst Mitchell has pooh poohed that, management of TA is aware.”
9. On 3 September 2012, Seven Network offered to acquire the domestic broadcast rights for five years for a total fee of \$125 million. On 10 October 2012, Mitchell emailed Lewis Martin (Managing Director of Seven Network Melbourne) and McWilliam regarding the Seven Network offer. The email stated: “Let’s wrap this up next week. Leave it with me.” McWilliam replied: “Thanks Harold – agree and thanks.” Seven West provided two further amended offers in October 2012. Wood refused to agree a deal, including because he considered the rights fee offered by Seven Network too low.
10. On 1 November 2012, Seven Network made a revised offer for the broadcast rights. The fees remained unchanged. On 16 November 2012 McWilliam emailed Lewis and Tim Worner (Seven Network’s CEO) stating that he had received a call from Mitchell “saying it would be okay and

that they would sign our document.” On the same day, IMG offered to acquire both the domestic and the international broadcast rights for seven years for a total fee of \$210 million.

11. Wood was interested in using the IMG offer as a means of creating competitive tension. Following a discussion between McWilliam and Mitchell, McWilliam informed Seven Network executives on 2 December 2012 that “[t]he plain fact is the ceo of tennis australia does not want to do this deal. Harold [Mitchell] had to also jump on him [Wood] appointing IMG to sell the rights ... We have to hope harold can carry the board. We should know tomorrow.”
12. The TA board met on the following day, 3 December 2012. The board was told of the Seven Network offer. Mitchell had persuaded Wood not to provide the board with a copy of the IMG offer. The board was told of the IMG offer but given no details. Mitchell told the meeting that the Seven Network offer was reasonable and that the IMG offer should not be considered because IMG was an agent not a broadcaster, it could not be trusted, and its offer was “too conditional”. The interest of Network Ten and Nine Entertainment was mentioned but not discussed in any detail.
13. Following the TA board meeting, Wood was concerned that the board had not been provided with full information about the IMG offer. He asked Darren Pearce (TA’s Director of Media) to prepare an email to Healy setting out those concerns. In a draft email, Pearce (i) recorded that legal advice had been obtained about management’s responsibility for providing full information to the board about the grant of the broadcast rights; (ii) stated Wood’s intention to share the detail of the IMG offer with the board; (iii) stated that Wood’s view was that TA should reject the Seven Network offer; and (iv) advised that “while Harold’s views are well known...there is also a lot of other evidence that needs to be considered in any deliberation.”
14. In late December 2012, Steven Ayles (TA’s Commercial Director) prepared a paper to be given to the TA board setting out what TA should seek to achieve in relation to the sale of its domestic broadcast rights. The paper (i) observed that there is “plenty of competitive tension” in the market between free to air broadcasters, pay TV broadcasters and digital broadcasters; (ii) provided a detailed analysis of the Seven Network and IMG offers; and (iii) recommended that TA reject both offers and, because of the “exclusive negotiating period”, commence that process with Seven Network. Ayles’ paper annexed several documents, including the Gemba report, the IMG advice and offer and Seven Network’s offer. Both Mitchell and Healy were aware of the Ayles paper.
15. In late 2012, McWilliam met with Mitchell to discuss the broadcast rights. McWilliam reported to Seven Network executives that Mitchell “insists it is all going to plan.”
16. On 10 January 2013, Wood requested IMG to make separate offers for the domestic and international broadcast rights. On 1 March 2013 IMG responded by offering to acquire the domestic rights for five years at a fee of \$30 million per annum. Both Mitchell and Healy were aware of IMG’s second offer.

17. In February 2013, shortly before a TA board meeting on 4 March, Kerry Stokes (Seven Network's Chairman) wrote in an internal email to senior executives: "Make no mistake, they [Network Ten] are after the tennis – they will pay a big cheque to start with a marque ... We need to make sure we are there at this board meeting - let's not take any chances. I reckon the delay has been so Ten and Foxtel can ready with a bid." McWilliam responded: "I will call Harold again about this. I am also worried. Harold swears we r safe but I will get onto him again." McWilliam also reported that Network Ten had recently borrowed \$80 million.
18. At its meeting on 4 March 2013, the TA board was not provided with the Gemba valuation or Ayles' paper. Nor was the board provided with a copy of IMG's recent separate offer for the domestic broadcast rights. On Mitchell's recommendation, the board resolved to establish a sub-committee to be chaired by Mitchell to oversee the negotiation of the broadcast rights and report back to the board. The subcommittee membership included Healy.
19. Senior management of TA prepared a draft plan of how the sub-committee could conduct the selection process for the broadcast rights. The paper contained a summary of the Gemba valuation; recorded the need to create "competitive tension" to maximise the rights fees; and observed that under the then current agreement with Seven Network, TA's rights were significantly undervalued. Wood sent a copy of the plan to Mitchell and Healy. Mitchell emailed Wood instructing him not to send the paper to members of the sub-committee and stating that "any framework documentation that we might commence would only be in a manner that I suggest." In fact, Mitchell did not convene any meetings of the sub-committee and it conducted no business.
20. Around this time, both Nine Entertainment and Network Ten made bids for the rights to broadcast cricket matches, then held by Nine Entertainment. Network Ten's bid was \$550 million. Ultimately, Cricket Australia awarded Nine Entertainment the rights to broadcast international matches for \$450 million and Network Ten the rights for the domestic T20 competition for \$100 million. Nine Entertainment secured the international rights by matching Network Ten's offer thanks to its contractual right of last refusal.
21. Network Ten's bid caused Gemba to send a presentation to TA on 15 May 2013 about its significance. The presentation stated: "... a significant amount of 'new' money has entered the sports rights fee market ... Regardless of the outcome for the Cricket bid process, the current situation suggests that the conditions are favourable for Tennis Australia to step change the value of its own domestic broadcast deal."
22. On 17 May 2013, Seven Network made a further offer to acquire the domestic broadcast rights for \$195 million, with a cash component of \$173 million. The TA board met on 20 May 2013 to consider this offer. Both Mitchell and Wood recommended that the offer be accepted. Mitchell told the board that Nine Entertainment would not be interested in acquiring the broadcast rights as it was committed to acquiring the cricket rights. Mitchell also told the board that Network Ten

was not in a sound financial position and could not afford to pay for the rights. Mitchell said that the sub-committee recommended that the Seven Network offer be accepted. The TA board resolved to accept the offer and on 29 May 2013, TA and Seven Network signed contracts.

23. In 2018 TA put the broadcast rights for 2019 to 2023 to tender and awarded them to Nine Entertainment for \$300 million. Shortly thereafter Seven Network and Foxtel won the cricket rights for \$1.2 billion.

Summary of relief sought

24. ASIC claims the relief specified in the originating process, being declarations, civil penalties, disqualification orders and costs.

Primary legal grounds for relief

25. Mitchell and Healy each breached s 180(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**) by: (a) withholding material information from the TA board when it was considering whether or not to grant the domestic broadcast rights to Seven Network, including the interest of persons other than Seven Network in the rights; (b) failing to ensure that the TA board was fully informed about the value of the domestic broadcast rights, the interest of persons other than Seven Network in acquiring those rights and the best method of marketing those rights; (c) failing to advise the TA board that it was likely to obtain better terms if TA put the domestic broadcast rights out to competitive tender; and (d) failing to ensure that the sub-committee appointed by the TA board in March 2013 to advise it about the grant of the broadcast rights carried out its functions.
26. Mitchell breached s 182(1) and 183(1) of the *Corporations Act* in that he improperly used his position as a director of TA and improperly used information obtained by him in that capacity to advantage Seven Network. He did this by the conduct referred to in the preceding paragraph and by: (a) passing on to Seven Network confidential information about the interest of its competitors in the broadcast rights; (b) passing on to Seven Network confidential information about the views and negotiating position of the TA management and board regarding the granting of the broadcast rights; (c) downplaying to the TA board the interest of persons other than Seven Network in the broadcast rights and their capacity to perform an agreement for the rights; (d) failing to inform the TA board of Seven Network's concerns over the interest of Network Ten in acquiring the rights; and (e) encouraging the TA board to conclude an agreement with Seven Network instead of putting the broadcast rights out to competitive tender.

Harm suffered

27. The contraventions caused harm to TA by depriving it of the opportunity to receive higher fees for the domestic broadcast rights that it could have obtained by a competitive tender.

Date: 16 November 2018