



**In the matter of Rivkin Financial Services Limited  
[2004] ATP 14**

**Catchwords:**

*association – “control”- excluded relevant interest – frustrating action – relevant interest – substantial holding notices – tracing notices – Panel declining to commence proceedings*

*Corporations Act 2001 (Cth) sections 12(2), 249D, 602, 609(1), 657A, 671B, 672A*

*Online Advantage Limited [2002] ATP 14, considered*

*Grand Hotel Group [2003] ATP 34, followed*

*Village Roadshow Limited [2004] ATP 4, cited*

*St Barbara Mines Limited 02 [2004] ATP 12, followed*

**These are the Panel’s reasons for declining to commence proceedings in relation to an application by Sofcom Limited in relation to the affairs of Rivkin Financial Services Limited. On 19 July 2004, the Panel issued a media release substantially to the following effect concerning the application.**

## **THE PROCEEDINGS**

1. The Panel has considered the application by Sofcom Limited (**Sofcom**) dated 8 July 2004 (the **Application**) alleging that unacceptable circumstances exist in relation to the affairs of Rivkin Financial Services Limited (**RFS**). The Panel's Media Release TP04/58 provides further details concerning the Application.
2. The Panel decided not to conduct proceedings in relation to the Application.

## **THE PANEL & PROCESS**

3. The President of the Panel appointed Simon McKeon (sitting President), Kathleen Farrell (sitting Deputy President) and Graham Bradley to be the sitting Panel to consider the Application.

## **BACKGROUND**

4. The Application alleged that unacceptable circumstances arose out of several transactions, involving principally share swaps between entities that appeared to have some pre-existing relationships. Sofcom asserted that these transactions resulted in the effective control of RFS passing to a small group of shareholders (who had no previous connection with RFS). The transactions the subject of the Application are summarised below.

### **Acquisition by Alan Davis Group Pty Ltd**

5. On 17 June 2004, Alan Davis Group Pty Ltd (**Alan Davis Group**) bought approximately 7.3 million ordinary shares in RFS (7.3% of RFS’ current issued share capital) from Mr Rene Rivkin, for \$1.6 million. Alan Davis Group paid \$200,000 on completion, with the balance payable on deferred payment terms.
6. Alan Davis Group lodged an ASIC form 603 with ASX on 21 June 2004 notifying its initial substantial holding in RFS. The form 603 attached a copy of the agreement

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with Mr Rivkin, which set out the terms on which the RFS shares were sold to Alan Davis Group and mortgaged back to Mr Rivkin to secure the balance of the purchase price.

7. Mr Rivkin lodged an ASIC form 605 with ASX dated 21 June 2004 notifying his ceasing to be a substantial holder in RFS.

#### Replacement of the RFS Board

8. Prior to the transactions described in the Application, the RFS Board comprised Messrs Jordan Rivkin, Shannon Rivkin, David Croll and Spiros Dassakis. On 18 June 2004, RFS announced that Mr Dassakis had resigned as a director.
9. On 21 June 2004, RFS announced that following the acquisition of a substantial interest by Alan Davis Group, the directors had appointed Mr Alan Andrew Davis as a director and chief executive officer of RFS.
10. On 2 July 2004, RFS announced that Messrs Jordan Rivkin, Shannon Rivkin and David Croll had retired from the RFS Board. In the same announcement, RFS announced that Messrs Lawrence Chartres and George Lister had been appointed to the Board. Mr Lister is a director of Alan Davis Group.

#### Acquisition of interest in Network Limited

11. On 2 July 2004, RFS issued 5 million RFS shares and paid \$1 million cash to Network Limited (**Network**), as consideration for the issue to RFS of 10 million shares in Network under a mutual subscription agreement. RFS also made available to Network a loan of \$1 million.
12. On the same day, Network purchased the business and assets of No 1 Media Group Pty Ltd, owned by Mr Bill Cole and Mrs Maureen Cole. Consideration was paid by the allotment of 3.5 million Network shares and 3 million Network options to a company named Cole Kablow Superannuation Pty Ltd (**Cole Kablow**). The 3.5 million Network shares were then purchased from Cole Kablow by RFS, who issued 3.34 million RFS shares to Cole Kablow as consideration.
13. As a result of the above transactions (the **2 July Transactions**) and the previous acquisition of RFS shares by Alan Davis Group:
  - RFS holds 13.5 million shares in Network, representing 16.4% of Network's current issued share capital;
  - Alan Davis Group holds approximately 7.3 million shares in RFS, representing 7.3% of RFS' current issued share capital;
  - Network holds 5 million shares in RFS, representing 4.98% of RFS' current issued share capital; and
  - Cole Kablow holds 3.34 million in RFS, representing 3.3% of RFS' current issued share capital.
14. The details of the 2 July Transactions were disclosed in announcements made by both RFS and Network on 2 July 2004. RFS also lodged an ASIC form 603 notifying their initial substantial holding in Network on 6 July 2004. RFS' form 603 attached a copy of the mutual subscription agreement between Network and RFS, as well as the share sale agreement between Cole Kablow and RFS.

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#### Pre-existing relationships

15. The Application identified the following pre-existing relationships between Alan Davis Group, Network and Cole Kablow:
  - Network is the sole agent representing advertising billboards which are owned by Alan Davis Group;
  - both Mr Davis and Mr Lister hold shares in Network. According to the ASIC form 603 lodged by RFS in relation to its initial substantial holding in Network on 2 July 2004, Mr Davis holds 13,850 shares in Network and Mr Lister holds 38,000 shares (each holding being less than 0.05% of Network's issued share capital); and
  - Cole Kablow has the same registered office and principal place of business as Network. Cole Kablow was also a holder of shares in Network prior to the transactions on 2 July 2004. According to the list of Top 20 Shareholders in Network's 31 December 2003 Annual Report, Cole Kablow held 1,102,639 Network shares (approximately 1.3% of Network's issued capital).
16. The Application did not allege any connection between Mr Chartres and the Alan Davis Group.

## PANEL'S CONSIDERATION OF THE APPLICATION

#### Disclosure of relevant interests

17. The Panel did not consider that the relationships and shareholdings of Alan Davis Group, Network or Cole Kablow described in the Application, either alone or when taken together, were sufficient to support an inference that any or all of those persons are associates, within the meaning given in subsection 12(2) of the *Corporations Act 2001* (Cth) (the Act)<sup>1</sup>, in relation to the affairs of RFS.
18. The fact that Messrs Davis and Lister and Cole Kablow hold small parcels in Network does not support a conclusion that any of them, or Alan Davis Group, are associates of Network (which would require them to disclose Network's 4.98% holding in RFS as part of their own substantial holding in RFS). Similarly, there was no indication in the Application or any of the publicly available materials that would indicate that they are otherwise able to control the voting or disposal of the RFS shares held by Network.
19. Had the Application contained sufficient information to support an inference that any or all of Alan Davis Group, Network or Cole Kablow were associates for the purpose of subsection 12(2) in relation to RFS, and that there had therefore been insufficient disclosure regarding their respective relevant interests under section 671B, then the Panel may have decided to commence proceedings to investigate further. As indicated in the Panel's decision *Village Roadshow Limited* [2004] ATP 4, the Panel considers any contravention of the substantial holding and tracing notice provisions in Chapter 6C to be contrary to the policy objectives of section 602: i.e. that shareholders and directors of a company know the identity of any person who proposes to acquire a substantial interest in the company. If the Application had

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<sup>1</sup> In these reasons, all statutory references are to the Act, unless otherwise indicated.

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indicated that there had been inadequate responses to disclosure notices issued under section 672A (which can be given by the company or by ASIC, either of its own accord or upon a member's request) in respect of RFS (as was the case in *Village*), the Panel may have commenced proceedings.

20. However, based on the circumstances described in the Application, the Panel was unable to conclude that the market had been misinformed regarding the identity of persons acquiring substantial interests in RFS.

#### **Cross-shareholdings of RFS and Network**

21. The Application did not raise any evidence regarding the mutual subscription agreement between RFS and Network that would support an inference that RFS had any ability to control the voting or disposal of the RFS shares held by Network which would give RFS a relevant interest in those shares, or that RFS and Network were associated in relation to those shares.
22. The Panel considers that cross-shareholdings between companies which have the effect of impeding an efficient, competitive and informed market for control of either company are likely to constitute unacceptable circumstances. However, on the facts presented in the Application, the Panel could not infer that Network's 4.98% holding in RFS has such an effect. In any event, the shareholding in RFS appears to be widely dispersed and so any person minded to seek control would not appear to be confronted with an insuperable blocking stake.

#### **Cole Kablow holding**

23. The Application did not provide any evidence which would have supported a finding that RFS had control over the voting or disposal of the Cole Kablow parcel of RFS shares, or that Cole Kablow was associated with RFS in relation to that parcel.

#### **Disclosure of cessation of relevant interest**

24. The Application asserted that Mr Rivkin's form 605 notice regarding his ceasing to be a substantial holder in RFS may have been wrong, as Mr Rivkin retains security over the RFS shares sold to Alan Davis Group for the balance of the purchase money. This security is not disclosed in Mr Rivkin's form 605 but, as indicated above, the terms of the security were disclosed in Alan Davis Group's form 603 notifying its initial substantial holding in RFS.
25. The Panel noted that Mr Rivkin's security may not constitute a relevant interest, if the exception in subsection 609(1) (for a security taken by a lender in the ordinary course of business) applies. The Panel did not consider it necessary to investigate the ASIC form 605 lodged by Mr Rivkin, because irrespective of whether or not Mr Rivkin continues to have a relevant interest by reason of the security, the existence of the security granted to Mr Rivkin had not been concealed and did not give rise to unacceptable circumstances.

#### **Changes to the RFS Board**

26. Based on the material provided in the Application, the Panel does not consider that the appointment of 2 associates of Alan Davis Group to the RFS Board, together with the retirement of 3 existing members of the Board, can constitute unacceptable circumstances, having regard to the control or potential control of RFS. Previous

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Panel decisions (such as *Grand Hotel Group* [2003] ATP 34 and more recently *St Barbara Mines Limited 02* [2004] ATP 12) have clearly stated that the Panel will not generally treat issues about the composition of a company's board as control issues for the purposes of section 657A, unless an accumulation of voting power was involved in contravention of section 606 or without proper disclosure under Chapter 6C. The Application does not support an inference of any relevant accumulation of voting power. A consistent approach was taken in *Online Advantage Limited* [2002] ATP 14, in which the co-ordinated replacement of the target board and sale of 53% of the shares in the target company supported the inference that the buying of the shares had been (at least in part) by associates.

#### Requisition of Meeting and Frustrating Action

27. The Application noted that the changes to the RFS Board and the transaction with Network took place after Sofcom had served RFS with a notice pursuant to section 249D requisitioning a general meeting of RFS to consider the removal of Mr Davis and Mr Shannon Rivkin as directors and the election of 3 Sofcom nominees as directors of RFS. The Panel understood that, at the time the Application was being considered, the circumstances relating to Sofcom's requisition notice were the subject of Federal Court proceedings.
28. The Application asserted that the various transactions between Network and RFS, in particular RFS' investment in Network, were inconsistent with RFS' previous investment strategy and represent a substantial change to RFS' existing business operations. The Panel was not satisfied that RFS' investment in Network was inconsistent with its previous business practices, as in its Annual Report for 2002 – 2003, RFS recorded a profit of \$4 million on the sale of a substantial investment in Rebel Sport. However, even if an inconsistency with RFS' previous business practices were established, that does not indicate that unacceptable circumstances exist.
29. Had the transactions which were the subject of the Application taken place following notification to RFS of a genuine potential offer under Chapter 6, the Panel may have been minded to commence proceedings and review those transactions more closely, in order to ensure that they did not constitute unacceptable frustrating action. However, activities undertaken by a company after receiving a notice from shareholders requisitioning a meeting, while potentially raising issues regarding directors duties, do not have the same effect on the market for control of the company as activities undertaken after notice of a genuine takeover offer.

#### DECISION

30. Accordingly, under Regulation 20 of the ASIC Regulations, the sitting Panel decided not to conduct proceedings on the Application.

**Simon McKeon**

**President of the Sitting Panel**

**Decision dated 19 July 2004**

**Reasons published 3 August 2004**