



Australian Government

Takeovers Panel

**Reasons for Decision
Kasbah Resources Limited 01R
[2017] ATP 1**

Catchwords:

Association – decline to conduct proceedings – placement – scheme of arrangement – common shareholdings – nominee directors

Corporations Act 2001 (Cth), sections 12, 606, 657EA(2)

Kasbah Resources Limited, in the matter of Kasbah Resources Limited (No 2) [2016] FCA 1518

Kasbah Resources Limited 01 [2016] ATP 19

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

1. The review Panel, Elizabeth Hallett, Rod Halstead and Michelle Jablko (sitting President), declined to conduct proceedings on a review application by Lois Lane Investments Pty Ltd, Bloom Financial Advice Pty Ltd and others¹ in relation to the affairs of Kasbah Resources Limited. The review application concerned whether a placement to Pala Investments Limited contravened s606² because of an association between Pala and Lion Selection Group Limited. The review Panel considered the materials provided to the initial Panel, as well as further materials and preliminary submissions received from parties, but found that there was insufficient material to justify the review Panel making further enquiries.

2. In these reasons, the following definitions apply.

African Lion	African Lion 3 Limited
AMR	Asian Mineral Resources Limited
Bloom Financial	Bloom Financial Advice Pty Ltd
Kasbah	Kasbah Resources Limited
Lion Selection	Lion Selection Group Limited
Pala	Pala Investments Limited
Scheme	proposed Kasbah scheme of arrangement for AMR to acquire all the ordinary shares in Kasbah

¹ Metropolis Pty Ltd, D & P Buckley Pty Ltd, Braham Consolidated Pty Ltd, Braham Investments Pty Ltd, Andrew Kibbis, PA & RL Wines Pty Ltd, Infinity Australasia Pty Ltd, M & A Isaacs Pty Ltd, S Loader Pty Ltd, Teringa George Pty Ltd, FE & RB Pty Ltd, GB & CH Pty Ltd, Laurence Basel, Casey William McGrath, R & T Robin Pty Ltd, Boris & Betty Pty Ltd, Nirvana Now Pty Ltd, K & F Falconer Pty Ltd, M & R Haddon Pty Ltd, Matthew Haddon, Angela Orsaris and Joseph Christopher Marsilis, Finnian Group Pty Ltd and Quadra Pty Ltd

² Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Takeovers Panel

Reasons - Kasbah Resources Limited 01R [2017] ATP 1

FACTS

3. The facts are set out in *Kasbah Resources Limited 01*.³ Briefly:
- (a) On 11 August 2016, Kasbah and AMR announced that they had entered into a scheme implementation agreement for AMR to acquire all the ordinary shares in Kasbah under the Scheme. As a result of a change in the independent expert's conclusion in relation to the scheme, Kasbah disclosed on 9 December 2016 that a condition precedent for the satisfaction of the scheme was "*currently incapable of being satisfied*". On 12 December 2016, Kasbah announced that the Federal Court had dismissed its application for approval of the Scheme.⁴
 - (b) On 19 December 2016, Kasbah announced a placement of its issued capital to Pala (amounting to 19.9% of Kasbah) and that Pala had offered to underwrite a renounceable rights issue in Kasbah. The placement agreement allowed Pala to nominate 2 persons to the Kasbah board⁵ and gave Pala the benefit of anti-dilution rights, subject to ASX granting a waiver.
 - (c) When the initial Panel application was made on 19 December 2016, Pala had a 72.2% interest in AMR. Lion Selection had a 5.1% interest in AMR, held directly and through Asia Lion Limited. Lion Selection also had a relevant interest in 15.7% of Kasbah, through its 23.6% holding in African Lion. The applicants submitted in their initial Panel application, among other things, that Pala was associated with Lion Selection and the placement would contravene s606.
 - (d) On 23 December 2016, the initial Panel declined to conduct proceedings and Pala was issued the placement shares.

APPLICATION

4. By application dated 24 December 2016, the applicants sought a review of the initial Panel's decision. The Acting President consented to the review on 28 December 2016.⁶
5. The applicants submitted, among other things, that:
- (a) The initial Panel appeared to accept the proposition that there was evidence that Pala and Lion Selection were associates in relation to the Scheme and it was reasonable to infer that the association was continuing.
 - (b) There was further material, not before the initial Panel, supporting an inference of association between Pala and Lion Selection, including the placement agreement released to the market on 28 December 2016. The applicants referred to matters including: (i) the placement agreement had been drafted by the law firm acting for AMR in relation to the Scheme and (ii) condition precedents requiring board changes and the appointment of an interim Chief Executive Officer nominated by Pala (the applicants submitted it is reasonable to assume

³ [2016] ATP 19

⁴ *Kasbah Resources Limited, in the matter of Kasbah Resources Limited (No 2)* [2016] FCA 1518

⁵ for so long as it held in aggregate such number of shares, options or other equity securities convertible into shares in Kasbah which was no less than 10% of the fully diluted share capital of Kasbah

⁶ s657EA(2)

Takeovers Panel

Reasons - Kasbah Resources Limited 01R [2017] ATP 1

that Pala nominated Mr Richard Hedstrom, said to be a long-standing associate of Mr Widdup, a director of Lion Selection and AMR).

6. On 29 December 2016, the applicants indicated they had just been advised that Mr Hedstrom had been working in the offices of Lion Selection for over six weeks. Lion Selection submitted in response that Mr Hedstrom had been present in its offices from time to time over the 4 weeks before Christmas under informal occupation arrangements similar to those “*that Lion affords to all of its investees from time to time*”.

Final orders sought

7. The applicants clarified on 5 January 2017 that they sought orders for divestiture of placement shares acquired above 20% by:
 - (a) vesting the shares in ASIC for sale or
 - (b) a sell down of the shares through a pro rata offer to all non-associated shareholders in Kasbah at the price at which Pala acquired the shares.

DISCUSSION

8. The grounds given in the review application appeared to us to have little merit. We did not consider that the material provided supported an inference that Pala and Lion Selection were associated in relation to the Scheme,⁷ or that such association would necessarily continue. Nor did we think that Pala using the same lawyers as AMR supported an inference of association between Pala and Lion Selection.
9. Nevertheless, our review is *de novo* and, in the light of the additional material which was not before the initial Panel, we decided to request further information in relation to the placement and the changes to Kasbah’s board and management. We received, and considered carefully before deciding whether to conduct proceedings, a substantial volume of material, including descriptions and copies of communications.
10. The applicants submitted that the further material provided “*revealed significant additional evidence of an association between Pala and Lion Selection*”. However, the applicants did not explain the nature of the alleged association, or how the material supported its existence.
11. Pala submitted that:
 - (a) The material showed that Kasbah was in urgent need for funding as a result of the failure of the Scheme and had contacted Pala to ask it to consider investing in Kasbah.
 - (b) Pala’s practice, similar to other mining investment funds, is to ascertain feedback from existing major or significant shareholders before investing in a listed entity. In that regard, Pala contacted Mr Widdup to ensure that the second largest shareholder (African Lion) did not have major concerns with its

⁷ Contrary to the argument of the applicants, we see little support in the reasons of the initial Panel for the proposition that there was evidence that Pala and Lion Selection were associated in relation to the Scheme: *Kasbah Resources Limited* [2016] ATP 19 at [20] – [23]

Takeovers Panel

Reasons - Kasbah Resources Limited 01R [2017] ATP 1

proposed investment. Pala also contacted the largest shareholder and the third largest shareholder was represented at the discussions with Kasbah by its nominee director.

- (c) Feedback was sought by Pala regarding the Kasbah board from Kasbah, Mr Widdup and other significant shareholders, but the materials did not support an inference of association or amount to any agreement to control or influence the Kasbah board.
 - (d) Mr Hedstrom was appointed by the Kasbah board, and not as a result of any agreement between Pala and Lion Selection.
12. In our view the communications between the representatives of Kasbah, Pala and Lion Selection were consistent with what might be expected in the circumstances between unassociated parties acting in their individual commercial interests. It was to be expected that Pala would consult with major shareholders prior to making such an investment in Kasbah. Provided such consultation stops short of understandings or agreements giving rise to association, it is unlikely to raise concerns for the Panel. Pala's communications assumed that any changes to the board and management of Kasbah would be made by the existing board, which appeared to be acting in the interests of the company. Pala appeared to have a strong negotiating position, allowing it to achieve its apparent commercial objectives without any need for agreements or understandings with existing shareholders giving rise to association. However, it is not surprising that Pala sought their views.
13. In these circumstances, without something more, we consider that such discussions are unlikely to establish or support an inference of an agreement or understanding indicative of association. Nor do they suggest anything we consider likely to justify making a declaration of unacceptable circumstances.
14. The applicants also submitted that there were omissions from the documents provided by the parties and that additional relevant material could be sought. That may be so, but nothing in the materials provided suggests to us that it would be likely to make a difference to our decision. Accordingly, we do not consider there is a sufficient basis to justify making further enquiries.

DECISION

15. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

16. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Michelle Jablko
President of the sitting Panel
Decision dated 16 January 2017
Reasons published 24 January 2017

Takeovers Panel

Reasons - Kasbah Resources Limited 01R
[2017] ATP 1

Advisers

Party	Advisers
Applicants	Bennett + Co
Kasbah	DLA Piper
Lion Selection	Thomson Geer
Pala	Ashurst Australia