Australian Government

Takeovers Panel

Reasons for Decision
Moreton Resources Limited (in Liquidation) (Receivers Appointed) (Subject to Deed of Company Arrangement) 03
[2022] ATP 19

Catchwords:

Decline to conduct proceedings – company under external administration – jurisdiction of the Panel – poorly drafted application

Corporations Act 2001 (Cth), sections s198G, 602, 657A

Takeovers Panel Procedural Rules 2020, Rule 12(1)(b)

Smoke Alarms Holdings Limited 03 [2022] ATP 3, Virgin Australia Holdings Limited (Administrators Appointed) 02 [2022] ATP 12

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

INTRODUCTION

1. The Panel, Tracey Horton AO (sitting President), John McGlue and David Williamson declined to conduct proceedings on an application by the board of Moreton Resources Limited (in Liquidation) (Receivers Appointed) (Subject to Deed of Company Arrangement) in relation to the affairs of Moreton. The application (among other things) sought a final order that the appointment of receivers of Moreton be set aside. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Applicants	The directors of Moreton
Moreton	Moreton Resources Limited (in Liquidation) (Receivers Appointed) (Subject to Deed of Company Arrangement)
Receivers	Mr Darryl Kirk and Mr Matthew Joiner of Cor Cordis

FACTS

3. Moreton is a company under various forms of external administration. The Applicants submitted that Moreton has approximately 2,100 members.

4. On 10 June 2020, Mr Grant Sparks and Mr David Orr of Deloitte Financial Advisory Pty Ltd were appointed joint and several administrators of Moreton. Messrs Sparks and Orr were subsequently appointed liquidators of Moreton on 15 July 2020.

5. On 3 May 2022, Mr David Hambleton and Ms Kaily Chau of Rodgers Reidy (Qld) Pty Ltd were appointed joint and several administrators of Moreton.

6. On 25 May 2022, the Receivers were appointed under the terms of a secured debenture deed (**Secured Debenture Deed**).

7. On 7 June 2022, a deed of company arrangement was executed. Mr David Hambleton and Ms Kaily Chau were appointed deed administrators.

APPLICATION

8. By application dated 4 July 2022 (received on 5 July 2022), the Applicants sought a declaration of unacceptable circumstances.

9. The Applicants sought interim orders that:

   (a) the appointment of the Receivers be set aside and

   (b) the Receivers and their solicitors *"be ordered to hand over Company records and documents as request (sic) by Moreton"*.

10. The Applicants sought final orders that:

   (a) the appointment of the Receivers *"is a coercive and controlling mechanism, and therefore no such further appointment is possible"*

   (b) *"the purported agreement dated 27 November 2019, between Morton Resources Limited, 113 Wickham Terrace Pty Ltd, Feitelson Holdings Pty Ltd, Phillip Anthony Feitelson is set aside and has no effect, including any purported securities or enforcement of debts outlined in that agreement, against Moreton Resources Limited"*

   (c) *"the matters, conduct and concerns raised in this application be referred to ASIC to investigate and seek to determine if and should further action be taken by the regulator, in regard to potential breaches of, but not limited to, the Corporations Act 2001, Corporations Law Amendment (ASX) Act 1997 or the Australian Securities and Investments Commission Act 2001"* and

   (d) *"all past and present Directors, Employees and advisors fulfil their obligations under the Corporations Act 2001, in giving effect to and assisting with the endeavours of order [described in (c)] including the provision of all records"*.

DISCUSSION

11. Rule 12(1)(b) of the Panel's Procedural Rules provides that an application must *"set out the relevant circumstances and the key reasons as to why those circumstances are alleged to be unacceptable"*. As noted in *Smoke Alarms Holdings Limited 03*[1], it is important that an application to the Panel includes *"information to aid the Panel in considering the application (for example, submissions in support of each claim of unacceptability)"*.

12. The Applicants have not set out in a clear way what the relevant circumstances are, why those circumstances are unacceptable, why the interim orders are needed to maintain the status quo or how the final orders remedy any unacceptable

[1] [2022] ATP 3 at [15]

circumstances. The following is what we consider to be their most coherent submission:

"On 8 June 2022, a newly appointed Board acting with the authority afforded under … s198G(3)(b) and (4)[2] being subject to a Deed of Company Arrangement (DOCA), sort to commence and undertake its statutory duties required as Officers of [Moreton], and to protect and promote the interest of [Moreton], its members and creditors above all others. Since that time, it has been subject to attempted coercion and control events, purportedly reliant upon a security interest asserted by the [Feitelson Group]. The events of the last 4 weeks have seen representatives of the [Feitelson Group] of Company's, being [Colin Biggers & Paisley] and [the Receivers] seek to control the Company upon the premise of an anti-competitive lock up device, that was purportedly entered in November 2019. In June 2020 this device has come to light which to date has been unknown to the market, regulators, members or creditors which effectively gave the [Feitelson Group] control of the Company since that time, which has been identified in the last 4 weeks. That matters however are matter for referral to ASIC and other regulatory bodies given the substantial and significant concerns in breaches of duties to which ASIC and ASX should be privy, and seek to act given the powers vested from the [Corporations Act (2001) Cth] and ASIC role, given the obligations of overseeing the ASX listing rules by ss793 and 1101B... It is clear there are multiple and sustained breaches of the listing rules. This is clear by the contemporaneous evidence outlined in the chronology."

The specific issues before the Takeovers Panel, are to remove the suppressive, coercive and controlling conduct of the [Feitelson Group, the Receivers and Colin Biggers & Paisley] to allow the Board to undertake its statutory duties and advancements in the interest of all members, creditors, third parties and regulators. Therefore, the Board seeks the intervention of the Takeovers Panel, to determine unacceptable circumstances pertaining to the recent control events since 8 June 2022, relying upon conduct contrary to s657A and the intent of s602... Not only has that lock-up device and uncommercial loan facility controlled the entity since November 2019, to June 2020, it now purports to control and substantially impact the Company's ability to operate in June and July 2022."[3]

13. The Receivers made a preliminary submission, submitting (among other things) that:

    (a) They "*were duly appointed by Melgear Pty Ltd (as Security Trustee) under the terms of a Secured Debenture Deed dated 24 May 2017*".

    (b) "*The Secured Debenture Deed, which formed part of the financial arrangements for the company, was registered on the Personal Property Securities Register on 10 October 2019*".

    (c) "*The assertion by the Applicant that the Secured Debenture Deed is 'an undisclosed contrived anti-competitive lock up device' is a complete nonsense.*

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[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)

[3] Typographical errors in the original quote. Removed text (ie "…") are superfluous references to the *Corporations Act 2001* (Cth). Text in square brackets unpack acronyms.

> *If the Applicant takes issue with the exercise rights by a security holder under an instrument that pre-dated its appointment by some 5 years and about which it now complains, it should seek relief from the court.*
>
> *This is not a matter in which the Takeovers Panel has jurisdiction.*
>
> *The secured creditor, Melgear, is entitled, as a matter of law, to exercise its rights to recover its secured debt without interference."*

14. In *Virgin Australia Holdings Limited (Administrators Appointed) 02*[4], the Panel considered (among other things) whether certain circumstances regarding the recapitalisation process conducted by the administrators of Virgin Australia Holdings Limited were unacceptable and had the effect of precluding an alternative deed of company arrangement being presented to creditors at the second creditors' meeting. In deciding to accept the withdrawal of the application, the Panel stated (among other things) that:

> *"In our view, there is nothing in the Corporations Act that prohibits the Panel from conducting proceedings on an application in relation to the affairs of a company in administration.* ***That said, proceedings will generally be unlikely to be conducted where a company is in administration, and no equity value remains in its shares.*** *The exercise of discretion to conduct proceedings depends on whether we consider there is any reasonable prospect that we would declare the specific circumstances before us to be unacceptable circumstances taking into account relevant public interest considerations"* (emphasis added).[5]

15. We consider that in this matter the Applicants have not provided sufficient material to suggest that we have jurisdiction or that any of the circumstances are unacceptable.

16. We received five notices to become a party. Given we have decided not to conduct proceedings, we have decided not to accept these notices to become a party. One of these notices was from a party to the deed of company arrangement who also provided a preliminary submission. We have decided to see the preliminary submission, which has not changed our conclusion above.

DECISION

17. 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).

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[4] [2020] ATP 12
[5] At [39]

18. 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.

Tracey Horton AO
President of the sitting Panel
Decision dated 12 July 2022
Reasons given to parties 12 July 2022
Reasons published 13 July 2022

Advisers

Party	Advisers
Applicants	Not advised