

RE TITAN HILLS AUSTRALIA LTD & ORS**Corporations and Securities Panel.****Decision handed down 20 December 1991**

Before: P Jooste (President) and P O'Donohue (Member). **P Jooste (President) and P O'Donohue (Member):**

Introduction

On 4 July 1991 the Australian Securities Commission (ASC) made application to the Corporations and Securities Panel (Panel) seeking declarations under Section 733(3) of the Corporations Law in relation to certain acquisitions of shares in Titan Hills Australia Ltd. (Titan Hills) and Precision Data Holdings Ltd. (PDHL) and conduct engaged in by certain persons in relation to the specified acquisitions.

On 16 December 1991 the ASC formally amended its application so as to seek a declaration in respect of two acquisitions only, namely:

- the acquisition by Titan Hills of shares in PDHL pursuant to the takeover scheme constituted by offers dated 8 May 1991 (acquisition 2); and
- the acquisition by Dabby Pty. Ltd. (Dabby) of 12,821,004 shares in Titan Hills on 9 May 1991 upon acceptance by Dabby of the takeover offers (acquisition 3).

The ASC also applied for a declaration that the following conduct was unacceptable:

- conduct engaged in by Godfrey Cullen, Maxwell Latimer, Dabby and Gary Graco in relation to each of the above acquisitions.

In these reasons we shall refer to Titan Hills, PDHL, Dabby and Messrs Cullen Latimer and Graco collectively as the Cullen interests.

At the commencement of the hearing, Counsel for the ASC and the Cullen interests respectively agreed that, in this matter, the relevant unacceptable circumstances for the purposes of section 732(c) of the Corporations Law would be constituted by:

- (a) the non provision to Bessemer O'Duill Pty. Ltd. of information relevant to the preparation of its report dated 9 April 1991 and in particular, the information contained in or arising from the Ernst & Young reports dated 7 January 1991, 6 March 1991 (two reports), 4 April 1991 and 26 April 1991

or

- (b) the failure to disclose to shareholders of Titan Hills relevant information which may have affected consideration by those shareholders of that report.

(Exhibit T1) Particulars (see revised ASC submission 3.2)

Subsequently, the Panel was asked by Counsel for the Cullen interests, with the concurrence of Counsel for the ASC, to determine a preliminary question of law, stated as follows:

“whether the matters set out in exhibit T1 are capable of constituting unacceptable circumstances within the meaning of S. 732(c) of the Corporations Law (Law) relative to the acquisitions referred to in paragraphs (2) and/or (3) of the ASC application, and the conduct relative to either or both of those acquisitions.”

On 10 December 1991 the Panel concluded that, in the particular circumstances before it, the preliminary question of law would be answered as follows:

- “(i) Yes in relation to the acquisition referred to in paragraph (3) of the ASC's amended application and conduct relative to that acquisition; and
- (ii) No in relation to the acquisition referred to in paragraph (2) of the ASC's amended application and conduct relative thereto.”

In reaching the above conclusion the Panel also formed the view that the acquisition of shares by Dabby in Titan Hills was a substantial interest within the meaning of S. 732(c).

Acquisition 2

The ASC's request for a declaration in respect of acquisition 2 was affected by the Panel's ruling on the preliminary question of law on 10 December 1991. Accordingly, the ASC reformulated its case against the background of the ruling. The ASC submitted that if the Panel were satisfied that unacceptable circumstances had occurred in relation to the acquisition of shares by Dabby in Titan Hills, in that the shareholders and directors of Titan Hills were not supplied with enough information for them to assess the merits of a proposal under which Dabby would acquire a substantial interest in Titan Hills, then the Panel may rely on this finding of unacceptable circumstances also in relation to the acquisition of shares by Titan Hills in PDHL and declare the acquisition by Titan Hills of shares in PDHL to have been an unacceptable acquisition. The ASC maintained that notwithstanding the Panel's earlier ruling about acquisition (2), the words in relation to in S. 733(3)(a)(i) admitted of such a construction. The Panel cannot accept that submission.

The Panel's earlier ruling in relation to acquisition 2 has the necessary consequence in this particular case that no finding of unacceptable circumstances can be made in respect of acquisition (2). In the Panel's view, S. 733(3)(a)(i) does not permit an acquisition of shares in a company to be declared unacceptable in circumstances where the direct acquisition of those shares is not capable of constituting unacceptable circumstances within the meaning of S. 732.

Having ruled on the preliminary question of law at the request of the Parties, the Panel is not prepared to accede to the request made by counsel for the ASC to refer this further submission to the Federal Court as a question of law.

Acquisition 3

Section 732 of the Corporations Law provides, in part, that:

- “For the purposes of [Part 6.9], unacceptable circumstances shall be taken to have occurred if, and only if:
- (a) ...
 - (b) ...
 - (c) the shareholders and directors of a company were not supplied with enough information for them to assess the merits of a proposal under which a person would acquire a substantial interest in the company;
 - (d) ...,”

Having found that Dabby did acquire a substantial interest in Titan Hills on or about 9 May 1991 by way of acceptance of the takeover offer made by Titan Hills, the question now before the Panel is whether the shareholders and directors of Titan Hills were supplied with enough information for them to assess the merits of the proposal under which Dabby would acquire a substantial interest in Titan Hills.

In its reasons delivered on 10 December 1991 the Panel found that the relevant proposal for the purposes of S. 732(c) was the proposal recorded in the resolution that was put to, and passed by, the meeting of shareholders of Titan Hills on 7 May 1991. At the meeting, the shareholders were

required to consider and decide on the merits of the proposal against the background of the Information Memorandum dated 19 April 1991 and the report prepared by the independent expert, Mr P Lewinsky of Bessemer O'Duill Pty. Ltd. dated 9 April 1991, copies of which had been sent to them with the Notice of Meeting. The board of Titan Hills had requested Bessemer O'Duill to provide an independent expert's opinion as to whether the proposed takeover of PDHL was fair and reasonable to the non-associated shareholders of Titan Hills (that is, shareholders who were not associated with the Cullen interests), for the purpose of compliance with Australian Stock Exchange Ltd. listing rule 3J(3).

In paragraph 3 of their report, Bessemer O'Duill detailed the information which had been provided to them when preparing the report, and stated that they had also relied upon published and unpublished financial and other information on Titan Hills and PDHL which had been supplemented by discussions with the independent directors of Titan Hills, Mr Michael Street and Mr Gary Graco and senior executives of PDHL. Bessemer O'Duill recorded the fact that in the preparation of the report they had relied to a significant extent upon information provided by the senior management, consultants and boards of Titan Hills and PDHL and that whilst they had not undertaken a detailed audit of the information, they believed following the discussions they had had with senior management and consultants, that the information supplied was reasonable and not false or misleading and that no information had been withheld from them.

The opinion expressed by Mr Lewinsky in the Bessemer O'Duill report was that the proposed offer was not fair but he believed that the proposed takeover may be considered reasonable.

It is clear from the evidence before the Panel that Bessemer O'Duill, and in particular Mr Lewinsky, was not informed by Mr Graco or Mr Street or otherwise made aware of the role which Ernst & Young played in relation to PDHL.

Ernst & Young had been commissioned by PDHL on 18 December 1990 at the instigation of its bankers, the ANZ Banking Group Limited (ANZ), to conduct a business planning and financial review of (PDHL) and its related group of companies ... (and) an assessment of the profitability and viability of the companies of the group.

The Panel accepts that the role performed by Ernst & Young was different to that required of the independent expert. In his submissions, Senior Counsel for the Cullen interests emphasised that the Ernst & Young review was directed to the position of PDHL in a close down situation whereas Bessemer O'Duill were asked to express an opinion as to whether the takeover offer was fair and reasonable. Whilst that was so, the Panel is nevertheless satisfied that all material information ought to have been made available to the independent expert in order that he might be given the opportunity to decide the relevance of the information to the task before him. At the very least, Bessemer O'Duill ought to have been informed that PDHL had commissioned the Ernst & Young review at the instigation of the ANZ and that Ernst & Young had prepared the reports dated 7 January 1991, 6 March 1991 (two reports) and 4 and 26 April 1991.

Evidence was given before the Panel about the investigations conducted by the ASC during which Mr Lewinsky was apprised of the role which Ernst & Young played and was given the opportunity to study the various Ernst & Young reports. The transcripts of those investigations show that, at that time (although perhaps with the benefit of hindsight), Mr Lewinsky regarded the Ernst & Young reports as relevant to the task he had been asked to perform in March and April of 1991, in respect of both access to and knowledge of the existence of those reports. Mr Lewinsky said that, taken as a whole, the views expressed by Ernst & Young from early January to late April 1991 were pertinent to the general profitability and trading of PDHL. He also said that a number of issues would have caused us to undertake a more rigorous analysis of the information provided -- probably more rigorous than under most circumstances, and would probably have caused us to at least talk to the bank ... definitely to Ernst & Young but possibly to the bank, but I don't know what would have come out of that conversation with Ernst & Young.

Mr Lewinsky also said that whilst he could not form a view as to the extent to which his report would have differed, he indicated that it was likely that he would have elaborated with more detail regarding the issue with the bank and the relationship with Dabby. As Mr Lewinsky did not give oral evidence before the Panel it is not possible to assess precisely how and to what extent the opinion formed by Bessemer O'Duill might have been affected if they had had knowledge of the role of Ernst & Young and been provided with copies of the Ernst & Young reports.

To assist the Panel in this regard, Counsel for the Cullen interests called Mr Andrew Campbell, of Price Waterhouse Corporate Finance Pty. Ltd., to give evidence about the role of an independent expert and the manner in which he or she fulfils an expert's obligations. In his statement Mr Campbell expressed the view that even if Bessemer O'Duill had been shown the Ernst & Young material and been given the opportunity to discuss the report, their conclusion would still be similar to that previously provided to Titan Hills' shareholders. In this respect Mr Campbell's evidence appears to be clearly at odds with that given by Mr Lewinsky during the ASC investigations. When he gave evidence before the Panel on 16 December 1991, Mr Campbell was asked by Senior Counsel for the Cullen interests whether if he had been appointed as the expert in this matter for the purposes of a 3J(3) report, he would have had any undue concerns about not having the Ernst & Young reports proffered or volunteered to him by the company. Mr Campbell answered saying on balance, I don't think so, but I would have asked about relationships with bankers, ... and in those circumstances relevant information might well have been offered.

Whilst the Panel does not wish to speculate as to what Mr Lewinsky may or may not have done had he been aware of the role of Ernst & Young and their reports, the Panel is of the view that at the very least, given the tight time parameters in which Mr Lewinsky was asked to prepare the independent expert's report, he ought to have been made aware of the fact that Ernst & Young had been commissioned at the instigation of the bank to conduct the review of PDHL.

Turning then to the position of the independent directors who recommended the proposal to Titan Hills' shareholders on 19 April, 1991 it appears that Mr Street was unaware of the existence of the Ernst & Young reports. During an ASC investigation conducted earlier this year, Mr Street was asked whether he knew if any accountants had been requested to provide a report to either the Titan Hills or PDHL directors as to the viability of PDHL. Mr Street said that the only reports concerning the financial viability and the financial affairs of PDHL that he had received were the Panell Kerr Forster report, internal projections prepared by Mr Graco and the report of the independent expert Bessemer O'Duill. Subsequently Mr Street acknowledged that he was aware of the commissioning of a report by Duesburys concerning an earlier proposal involving Computer Control Centre Ltd. but that he had not been provided with a copy of the statement of facts which had been prepared by Duesburys.

Once again, the Panel does not wish to speculate about what Mr Street may have said or done had he been aware of the Ernst & Young review and the reports. The fact that he was not apprised of the review and given the opportunity to consider the reports is of concern to the Panel in the context of appropriate business conduct.

The main thrust of the ASC's case concerning the failure to inform Bessemer O'Duill of the role and reports of Ernst & Young was directed to the other independent director, Mr Gary Graco. It is clear from the evidence given by Mr Graco that he made a decision not to inform Bessemer O'Duill about the role performed by Ernst & Young and the existence of their reports but the Panel is satisfied that his decision was nothing other than an honest business judgment. Having heard oral evidence from Mr Graco about how he made his decision the Panel is of the view that his decision probably reflected an error of judgment but could not be characterised as sharp conduct or as a calculated or concerted effort to deprive the independent expert of the relevant information.

The ASC was critical of Mr Cullen for having put forward Mr Graco as an independent director of Titan Hills and as the contact point for Bessemer O'Duill. Mr Cullen gave evidence to the effect that Mr Graco was an appropriate choice because he had no financial interest in PDHL, had expressed himself to be independent, and was not otherwise associated with the Cullen interests. Accordingly, the Panel is not satisfied that Mr Cullen's conduct was unacceptable conduct in the circumstances.

A similar argument was made by the ASC against Mr Latimer concerning his passivity in connection with Mr Graco's appointment. The Panel is not satisfied that Mr Latimer's conduct was unacceptable conduct.

Conclusions

In light of the foregoing, the Panel is satisfied that the fact that Bessemer O'Duill were not made aware of the role of Ernst & Young and were not provided with copies of their reports dated 7 January, 6 March (two reports), 4 and 26 April, 1991, constituted unacceptable circumstances in respect of acquisition 3, in that the shareholders and directors of Titan Hills were not supplied with enough information to enable them to assess the merits of the proposal whereby Dabby acquired a substantial interest in Titan Hills.

After having regard to the matters referred to in Section 733(3)(a) the Panel must consider the matters set out in sub paragraph (b) of that section, namely the matters referred to in Section 731, any other matters the Panel considers relevant and whether it is in the public interest that the Panel exercise its discretion to declare an acquisition or conduct to have been an unacceptable acquisition or unacceptable conduct, as the case may be.

The Panel has heard full submissions made on behalf of each of the parties in relation to the matters referred to in Section 731 and the public interest factor.

Both counsel for the ASC and the Cullen interests have urged the Panel to have regard to what they described as the ameliorating conduct set out in the further witness statement of Mr Graco dated 6 December 1991 (details annexed). Senior Counsel for the Cullen interests described the ameliorating conduct as embracing measures which will provide pecuniary advantage to non-associated shareholders in Titan Hills. He pointed out that whilst the Panel is not in a position to evaluate the precise extent of the advantage that will accrue to those non-associated shareholders, it is nevertheless clear that it is an attempt, made without any concession of responsibility or impropriety, to redress or dispel any suggestion of disadvantage to those shareholders. He said that the pendency of the ASC's application before the Panel produced the undertakings given by the Cullen interests which constitute the ameliorating conduct.

The Panel notes that Counsel for the ASC expressed the view that the ameliorating conduct was such as to produce a not unacceptable resolution of the matter.

In reaching its decision the Panel has taken note of all the matters comprising the ameliorating conduct and has also had regard to the attitude of the ASC.

For all of the above reasons the Panel is not satisfied that any declaration ought to be made in regard to acquisition 3 or any conduct in relation thereto.

ANNEXURE: EXTRACT FROM THE FURTHER WITNESS STATEMENT OF MR GRACO DATED 6 DECEMBER 1991**Further conduct which Keydata has undertaken to carry out:**

As a result of extensive negotiation with the ASC, the Keydata interests will undertake to the Federal Court of Australia (in a manner satisfactory to the ASC) in terms to the following effect:

- (i) That Cinzoni Pty. Ltd. will distribute pro rata and free of charge all of its shareholding in Keydata Corporation Ltd. (Keydata) to original and non-associated Keydata shareholders being those shareholders who were shareholders prior to the acquisition and are still on the register as shareholders.
- (ii) That Keydata will distribute to all of its shareholders 50 per cent of the net proceeds of its present proceeding against Coopers & Lybrand and other defendants issued out of the Commercial List of the Supreme Court of New South Wales. These proceedings relate to actions that Keydata has instituted against various professional persons and others involved in the original flotation of Budget Corporation Ltd. (the original name of Keydata). In these proceedings Keydata is seeking damages in an amount of \$23 million plus interest from those defendants. Keydata has received advice from Senior Counsel that its prospects of success are good.
- (iii) In addition to the distribution of 50 per cent of all net profits, Keydata will distribute an additional 4 cents per share to each original and non-associated Keydata shareholder referred to above.
- (iv) For the purposes of this undertaking only Keydata has agreed with the ASC that it will regard Gallivan Investments Ltd. and Serenar Nominees Pty. Ltd. as not being entitled to participate in any form in the initial distribution of 50 per cent of the net profit or the additional 4 cents per shareholding on the basis that for the purposes of this undertaking they would not fulfil that qualification.
- (v) It is considered that the value of this package to the original and non-associated shareholders is approximately \$2 million or about 10 cents per share.