

Reasons for Decision Advance Property Fund

In the matter of Advance Property Fund
[2000] ATP 7

Catchwords:

Delay in making application - whether the Panel should extend time - whether bookbuild prejudiced reasonable and equal opportunity - whether Panel can consider insider trading - whether collateral benefits provided by pre-bid agreement or relationship agreement

Corporations Law (Cth) sections 602(c), 623, 657A(1), 657C(3), 659B, 1002G

Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty Ltd (1994) 51 FCR 554

These are our reasons for our decision to refuse the application under section 657A and 657D of the Corporations Law by Mirvac Funds Limited (*Mirvac*) for a declaration and orders in relation to Advance Property Fund (*Advance*).

INTRODUCTION

1. The Panel in this matter comprises Ian Ramsay (sitting President), Alice McCleary (sitting Deputy President) and Jennifer Seabrook.
2. The matter concerns competing off-market takeover bids for all of the units in Advance Property Fund (*Advance*) by Mirvac Funds Limited (*Mirvac*) and Stockland Property Management Ltd (*Stockland*).¹

BACKGROUND

3. St George Bank Limited (*St George*) owns all the shares in Advance Asset Management Limited (*AAML*), which is the responsible entity for the Advance Property Fund (*APF*).
4. Robert Hamilton, Managing Director of Mirvac and his advisers from Salomon Smith Barney, first met with Frank Conroy, Chairman of St George to discuss a proposal for the merger of Advance and Mirvac on 2 May 2000. At that meeting it was arranged that another meeting would be held to discuss the proposed merger further.
5. That meeting took place on 2 June 2000. In attendance were Robert Hamilton, Managing Director of Mirvac; Dennis Broit, Finance Director of Mirvac and their advisers, Trevor Rowe and Matthew Howison of

¹ The consideration under each of these bids includes stapled securities of a company and one or more trusts. References to their securities are to those stapled securities and references to the bidders include references to the responsible entities of the trusts.

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Salomon Smith Barney. Also present were Ed O’Neal, Chief Executive Officer and Managing Director of St George; and Richard Cawsey, Chairman of AAML. At that meeting St George’s representatives made a number of comments concerning the fact that Advance was strategic to St George. In an statement provided by Robert Hamilton to the Panel, he says that during the course of the meeting:

“Mr Cawsey stated that [St George] may be willing to consider an arrangement with Mirvac which would involve Mirvac-developed properties being sold to [Advance] and that [St George] was already considering a similar structure involving [St George’s] clients, who would be loaned money to develop properties which would then be vended into[Advance]. At this point Mr Broit said words to the effect of “Perhaps we should let Advance unitholders decide which is the best strategy for them”. Shortly thereafter the meeting ceased, with Mr O’Neal saying that St George would “get back to” Mirvac in relation to its proposal.”

6. However, Mirvac heard nothing further from St George and so on 16 June 2000, Mirvac wrote to St George concerning its proposal to merge Mirvac and Advance. Mirvac requested a response from St George by 26 June 2000 and reserved Mirvac’s rights to consider alternative proposals. Specifically the letter stated that such alternatives “*could include an off market bid for issued units in Advance Trust*”.
7. On 23 June 2000, having revalued the fund assets as at 30 June 2000, AAML announced that the net tangible assets of Advance were equivalent to \$1.58 per Advance unit.
8. Prior to 26 June 2000, St George owned 44,287,224 Advance units, or approximately 9.39% of the issued units in Advance.
9. On 26 June 2000 St George announced to the Australian Stock Exchange (ASX) that it had mandated UBS Warburg to manage a process to acquire units in Advance to raise St George’s current holding. This was done by a bookbuild (the *Bookbuild*) in which St George invited prospective vendors to tender to sell units to it, and paid all the vendors \$1.50 per unit. In this way, St George acquired 47,500,000 Advance units, being approximately 10.08% of the Advance units then on issue, increasing its total holding of units in Advance to approximately 19.47%. The vendors were mainly financial institutions including Commonwealth Bank of Australia, Rothschild Australia Holdings Pty Limited, Deutsche Asset Management (Australia) Limited and UBS Asset Management Limited. The prevailing market price for Advance units on 26 June was \$1.41.

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10. Also on 26 June St George responded to Mirvac's letter of 16 June and advised that St George was not prepared to participate in discussions with Mirvac in relation to a proposed merger with Advance.
11. On 20 July, Mr Hamilton of Mirvac was quoted in the media as saying that Mirvac "had spoken to several trust managers [about possible mergers] but was not in advanced negotiation with any party".
12. On 8 August 2000, by ASX and media announcement, Mirvac (the responsible entity for Mirvac Property Trust) publicly announced its intention to make an off market takeover bid for issued units in Advance. Mirvac offered 1 new Mirvac security for each 2.15 Advance units held (*Mirvac Bid*).
13. On 14 August 2000, UBS Warburg (AAML's advisers) approached Stockland as part of their mandate to endeavour to procure a higher bid for Advance unitholders.
14. On 16 August 2000 Stockland, St George and AAML held preliminary discussions in relation to a possible takeover bid by Stockland for Advance. They held further substantive discussions on 28 August 2000.
15. The next day, 29 August 2000, Mirvac lodged its bidder's statement with ASIC.
16. On 1 September 2000 Stockland announced its intention to make a takeover offer for all the issued units in Advance (*Stockland Bid*). On the same day Stockland announced that it had entered into:
 - (a) a pre-bid acceptance agreement with St George in relation to approximately 19.0% of the issued units in Advance (*Pre-Bid Agreement*); and
 - (b) a relationship agreement with St George (*Relationship Agreement*) whereby selected staff of AAML would be offered employment by Stockland and Stockland would provide property services and access to property development opportunities to St George.
17. Under the Pre-Bid Agreement, St George must accept an unconditional offer by Stockland for its units in Advance, if certain terms are offered and the bid is announced within two days. St George must accept the offer at Stockland's request, or once Stockland has a relevant interest in another 31% of Advance. St George cannot accept a competing offer unless, on the last day of the competing offer, Stockland has not requested St George to accept Stockland's offer or has not received acceptances for 31% of Advance.

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18. Stockland lodged its bidder's statement with ASIC on 11 September 2000.
19. On 18 September 2000, Advance lodged its target's statement with ASIC. Mirvac lodged its application with the Panel later that same day.

RELIEF SOUGHT

20. Mirvac sought the following orders in its application to the Panel:

Procedural Orders

- (a) An order under section 657C(3) of the Corporations Law that the time for the making of the application be extended to the date of the Application.
- (b) An order that the Panel grant Mirvac leave to be legally represented in any proceedings, under section 194 of the *Australian Securities and Investments Commission Act 1989* (Cth).
- (c) An order under section 657D(2)(d) of the Corporations Law that St George and Stockland bear the costs of Mirvac of these proceedings in such proportions as the Panel thinks fit.

Substantive Orders

- (d) A declaration under section 657A of the Corporations Law that the circumstances of the acquisition by St George of 47,500,000 Advance units on 26 June 2000 was unacceptable.
- (e) An order under section 657B of the Corporations Law that St George provide to each of the vendors of Advance units which it acquired on 26 June 2000 the right to acquire from St George those Advance units at the same price at which they were sold to St George on that date, being \$1.50.
- (f) A declaration under section 657A of the Corporations Law that the circumstances of entry into the Pre-Bid Agreement between St George and Stockland on 1 September 2000 were unacceptable.
- (g) An order under section 657D of the Corporations Law that St George and Stockland must not perform nor attempt to perform the terms of the Pre-Bid Agreement and that such agreement be set aside;
- (h) A declaration under section 657A of the Corporations Law that the circumstances of the entry into the Relationship Agreement between St George and Stockland on 1 September 2000 were unacceptable.

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- (i) An order under section 657D of the Corporations Law that St George and Stockland must not perform nor attempt to perform the terms of the Relationship Agreement and that such agreement be set aside.
- (j) Further or alternatively to (h) and (i), an order under section 657D of the Corporations Law that Stockland prepare and lodge a new “Notice of Initial Substantial Holder” or a supplementary bidder’s statement attaching a full copy of the Relationship Agreement.
- (k) Further or other declarations or orders that the Panel considers appropriate.

PURCHASE OF ADVANCE UNITS BY ST GEORGE

- 21. Mirvac applied for a declaration that the Bookbuild had given rise to unacceptable circumstances in relation to the affairs of Advance, because by selling to St George, the vendors had lost the opportunity to participate in the benefits accruing to unitholders under the bid.

Request for extension of time

- 22. The Bookbuild took place on 26 June and Mirvac’s application was made on 19 September, nearly 3 months later. Under subsection 657C(3), an application for a declaration that circumstances are unacceptable must be made within two months after the circumstances occur, unless the Panel extends time to make the application.
- 23. St George and Stockland submitted that no extension should be given, as Mirvac had waited too long before applying, Stockland had in the meantime acted in reliance on the *status quo* and Mirvac’s application was without merit.
- 24. Mirvac submitted that the circumstances to which the application related included the Stockland bid and Stockland’s agreements with St George. Since these occurred on or about 1 September, no extension of time was required and (if an extension was required) Mirvac had not waited unduly long.

Should the Panel grant the extension of time ?

- 25. The factors we have to consider here are the reasons for the delay in applying, the prospects of the application succeeding, the public and private interest in finalising disputes and unfairness to parties who have relied on the status quo.

Prospects of the Application Succeeding

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26. The only consideration which is decisive against granting the extension is the merits of the underlying application. We deal with that in the next section.

Reason for Delay

27. Mirvac was aware of the Bookbuild on the day it took place. If the Bookbuild was the only relevant event and the application concerned Mirvac's position alone, that might be decisive. However, Mirvac submitted that the Bookbuild was not the only relevant event. Mirvac submitted that unacceptable circumstances arose from the Bookbuild taken together with the agreements between St George and Stockland. In addition, the outcome of the application could affect the position of a large number of other investors in Advance.
28. The benchmarks set by sections 657B and 657C are that applications should generally be made within 2 months of the relevant events occurring and dealt with within 3 months. The bid to which the application related was still open when the application was made, and we could have made a declaration by 26 September, within 3 months after the Bookbuild.

Effect on Interests

29. No innocent third party would have been adversely affected by an extension of time to apply for the declaration and orders. The nature of the application was such that St George would only have been adversely affected if it was seriously at fault. In itself, the extension would not have adversely affected Stockland or unitholders who had accepted Stockland's offers. In framing any orders, of course, the Panel would have had to consider their respective positions.
30. Accordingly, had Mirvac established a connection between the Bookbuild and Stockland's bid, we would have extended time to make the application.

Do unacceptable circumstances exist in relation to the Bookbuild ?

31. The basis for a declaration concerning the Bookbuild was that, by buying their units on 26 June, St George had excluded the vendors from sharing the benefits accruing to unitholders under the Mirvac and Stockland bids.
32. On the face of it, paragraph 602(c) requires only that unitholders at the time a bid is made have reasonable and equal opportunities to take part in that bid, not that unitholders as at some previous time be able to accept it. Such logic could obviously lead to an infinite regress.

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33. If the St George Bookbuild was in some way connected with either bid (for example, if it was done to support Stockland's bid, or to prevent Mirvac's bid, or to profit from either) the argument may be open that unacceptable circumstances arose because by selling into the Bookbuild, the vendors lost the opportunity to participate in either bid. Supposing for the sake of argument that such a finding is open in principle, we find no evidence of a connection to support it.
34. The uncontradicted evidence of both St George and Stockland is that they were first in touch about a possible bid by Stockland for Advance on 14 August 2000, when St George's financial advisers approached Stockland.
35. The evidence presented to us indicated that when Mirvac proposed a merger with Advance, there was a good deal of rumour and speculation concerning mergers between property trusts. Advance was mentioned in newspaper articles (and no doubt elsewhere) as a logical candidate for a merger. These rumours may partially explain why St George had to pay \$1.50 under the Bookbuild, as against a prevailing market price of \$1.41 and a net tangible asset backing of \$1.58.
36. The proposal that Mirvac put to St George was for an agreed merger. We accept Mirvac's evidence that its representatives mentioned to St George that it might make a hostile bid for Advance, but we agree with St George that those comments were insufficiently precise for St George to be able to conclude that Mirvac was likely to make a hostile bid soon. They were more in the nature of reserving Mirvac's rights. The delay in Mirvac's bid and Mr Hamilton's comments of 20 July lend further support to this view.
37. The vendors to St George under the Bookbuild were mainly financial institutions. They would have heard the same rumours as St George and had the same ability to assess them. We are not convinced that St George had materially more information concerning the possibility of a bid for Advance than the vendors.
38. This finding is specific to the facts as they were presented to us. It is a matter of fact and degree whether St George had a material information advantage over the vendors. The Panel might not come to the same conclusion in a case with different facts.

Overlap with Insider Trading

39. The case put forward by Mirvac on the Bookbuild included most of the elements of the offence of insider trading under section 1002G of the Corporations Law. No insider trading proceedings have been instituted in relation to the Bookbuild. We have no jurisdiction in relation to

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insider trading, and it was submitted that we should accordingly decline to involve ourselves with the Bookbuild at all.

40. We do not agree. One of our functions is to grant declarations and orders in relation to some fact situations which involve contraventions of Chapter 6, 6A, 6B or 6C, for which there exist criminal and civil remedies.² A Panel declaration or order may be the only remedy available during a bid: private parties may not bring civil actions in relation to a bid, during the bid, whether under Chapter 6, the rest of the Corporations Law or some other law.³
41. If a set of facts gives rise to unacceptable circumstances, we are obliged to make such declarations and orders as are justified under Part 6.10, even though the same set of facts might subsequently give rise to court proceedings for a contravention of the Corporations Law or some other law.

COLLATERAL BENEFITS

42. The issue with the Pre-Bid Agreement and the Relationship Agreement is whether they gave rise to unacceptable circumstances because they:
 - (a) conferred a benefit on St George which was not available to other unitholders in Advance; or
 - (b) prevented the acquisition of units in Advance taking place in a competitive market; or
 - (c) contravened a provision of Chapter 6, 6A, 6B or 6C.

The Pre-bid Agreement

43. We have set out a summary of the Pre-Bid Agreement above. We do not think that it conferred a benefit on St George. It committed St George to accepting Stockland's bid. By entering into it, St George obtained some certainty that Stockland would bid but largely gave up the chance of selling into a bid higher than any bid Stockland made. In itself, that is inoffensive: if any benefit changes hands, it passes from St George to Stockland, rather than the reverse. It is possible that St George will do worse than other unitholders if, for instance, Stockland acquires St George's units under the Pre-Bid Agreement and later accepts a higher bid for them. There is no suggestion that St George was constrained to enter into the agreement.

² Subsection 657A(1).

³ Section 659B.

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44. Nor do we think that by entering into the Pre-Bid Agreement St George prevented control of Advance passing in an efficient, competitive and informed market. The effect was to introduce a second bidder for Advance, which increases competition. The new bidder was given an advantage, which on its own tends to reduce competition, but not to such a degree as to prevent Mirvac's bid from succeeding. Both bidders have since improved their offers, which confirms that Stockland's entry marked an overall increase in competition.

The Relationship Agreement

45. We will deal separately with the property services and employment aspects of the Relationship Agreement. We observe first, however, that it is a short and plainly incomplete document, and that important details would have to be implied, or supplied by later agreement, to make it certain and complete. St George and Stockland submitted that it was in most respects little more than an agreement to agree. This accords with the incompleteness and imprecision of the agreement, and with it providing for a committee of executives of the two groups to meet regularly to oversee the progress of the relationship.

Property Services

46. The Agreement provides for Stockland to provide St George with property management services and asset management services and to introduce it to property development opportunities. These services will be provided for one year if Stockland's bid is made, and another two years if Stockland obtains control of Advance. St George is to pay \$500,000 for these services in each year, but the amount of services to be provided and how they are to be charged for is left entirely open.
47. It is notionally possible that St George will be provided with an unlimited amount of valuable services for a fixed price of \$500,000 per year, as a reward for entry into the Pre-Bid Agreement. On this reading, the agreement might have given rise to unacceptable circumstances. The agreement is too loosely structured for this reading to be plausible, however.
48. If St George is getting a premium from Stockland for its acceptance, one would expect the premium to be fairly clearly defined, but under this agreement, Stockland's obligations will have to be agreed from time to time - i.e. after Stockland no longer has to buy St George's acceptance. What St George is to pay under the agreement is far from clear, but it is impossible to extract from it an unequivocal assurance that St George will have the right to unlimited services for a flat \$500,000.

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49. We have received some specific submissions which support this view. In particular, St George at present obtains some similar services from AAML staff (staff it would lose or redeploy, if Stockland's bid succeeded), Stockland markets similar services to several Government departments on a fee for service basis and St George pays standard commissions to developers for mortgage business.

Employment of AAML Staff

50. The Relationship Agreement also provides for Stockland to offer employment to some of the staff of AAML. This was criticised by Mirvac as providing an unacceptable benefit to St George, on the basis that it might save St George significant redundancy payments.
51. We reject this submission. The direct benefit of such an offer being made is to the employee in question. It is well-established that benefits to employees as such are outside the policy of sections 602(c) and 623.⁴ Any benefit to St George from a saving in redundancy costs is an indirect and hypothetical side-effect of benefits given to the employees themselves. In any case, St George advise us that the redundancy costs would fall on Advance itself, not on the St George group, so the benefit is nil.

DECISION

52. For the reasons set out above, we have no basis on which to conclude that St George excluded any of the Bookbuild vendors from benefiting from the bids, or that it received a premium from Stockland to accept its bid. Accordingly, the application is dismissed without declaration or orders.
53. We granted all parties leave to be represented by their solicitors. We refuse Mirvac's application to extend time to bring the application concerning the Bookbuild. There will be no order for costs.

CONCLUSION

54. We thank all parties for prompt and helpful submissions.

Ian Ramsay

President of the Sitting Panel

Decision dated 28 September 2000

Reasons published 09 October, 2000

⁴ *Gantry Acquisition Corporation v Parker & Parsley Petroleum Australia Pty Ltd* (1994) 51 FCR 554.