In the matter of Normandy Mining Limited 06 [2001] ATP 32

Catchwords:

Review of Panel decision – competing takeover bids – acquisition of interposed entities – lock-up agreement – agreement between major shareholder and bidder – collateral benefit – equality of opportunity to share in benefits – break fee – restriction on disposal following exercise of option – shareholders in two companies – benefit to directors

Corporations Act 2001 (Cth), sections 602, 621, 622 and 623

Sagasco Amadeus Pty Ltd v Magellan Petroleum Pty Ltd (1993) 113 ALR 23
Boral Energy Resources Limited v TU Australia (Queensland) Pty Ltd (1998) 16 ACLC 1199
Aberfoyle Limited v Western Metals Limited (1998) 156 ALR 68

These are our reasons for our decision to refuse an application by AngloGold Limited under section 657EA of the *Corporations Act 2001* for review of a decision in Normandy Mining Limited (No. 4) (**Normandy (No. 4)**) to refuse a declaration of unacceptable circumstances and orders in relation to the takeovers by Newmont Mining Corporation of Normandy Mining Limited ABN 86 009 295 765 (**Normandy**) and Franco-Nevada Mining Corporation Limited.

Background

1. The Panel was constituted by Annabelle Bennett SC (sitting President), Michael Tilley and Trevor Rowe.

2. The relevant facts are set out at length in the published reasons for the decision in Normandy (No. 4).

3. On 5 November 2001, AngloGold made an off-market bid for Normandy, offering its own scrip as consideration. On 29 November AngloGold declared that bid unconditional. At the time of our decision, it was due to close on 4 January 2002. It closed on 18 January.

Newmont's Two Mergers

4. On 14 November 2001 Newmont Mining Corporation (**Newmont**) announced a takeover bid for all of the issued shares in Normandy.[1] At the same time, Newmont announced the proposed acquisition of Franco-Nevada Mining Corporation Limited (**Franco-Nevada**) by a Plan of Arrangement under Canadian law, under which Franco-Nevada shareholders would receive Newmont scrip in exchange for their shares in Franco-Nevada.

[1] Offers under this bid were sent on 21 December 2001 and closed on 26 February 2002.

5. Franco-Nevada is listed on the Toronto Stock Exchange. Its market capitalization is about twice that of Normandy. It invests in the gold (and other metal) sector, sometimes by acquiring properties or taking equity in other parties in the sector, but more often by holding royalties based on their production.

Terms of the Option

6. The 14 November announcement also disclosed that Franco-Nevada had granted Newmont an option over 19.9% of the shares in Normandy held by Franco-Nevada (the **Normandy parcel**) These shares were issued to Franco-Nevada earlier in 2001 in exchange for cash and operational assets, with the approval of Normandy shareholders.

7. Franco-Nevada granted Newmont the option over the Normandy parcel in consideration of Newmont agreeing to the Plan of Arrangement. On exercise of the option, Newmont would be required to issue to Franco-Nevada 3.85 shares in itself for every 100 Normandy shares in the Normandy parcel. Newmont also could require Franco-Nevada to accept the Normandy parcel into Newmont's bid for Normandy.

8. The exercise price payable by Newmont under the option was equivalent but not identical to the consideration initially announced under the Newmont bid for Normandy. Under the terms of the option agreement the exercise price under the option would not exceed the consideration payable under the Newmont bid for Normandy. The consideration payable under the Newmont bid could be increased (and in fact it was increased) to exceed the exercise price under the option without affecting the exercise price of the option. In addition, the option could, be exercised in circumstances where not all of the conditions of the bid had been satisfied or waived.

9. In its 14 November announcement, Newmont said that, in addition to the scrip component of the consideration, it would pay 5 cents cash per share if it obtained acceptances for 90% of the shares in Normandy. Newmont later dropped this conditional 5 cents cash component and added 40 cents cash per share, unconditionally. On exercise of the option, Franco-Nevada would not have received an equivalent to either of these cash components.

Whether Unacceptable

10. AngloGold alleged that these agreements gave rise to unacceptable circumstances in relation to the affairs of Normandy, as follows:

    (a) the shares subject to the option were a substantial interest in Normandy;

    (b) although the exercise price for the option was no more than the consideration under the bid, Franco-Nevada in addition received a benefit in exchange for the grant of the option, namely Newmont's entry into the Plan of Arrangement;

(c) the terms of the Plan of Arrangement were unreasonably and uncommercially favourable to the Franco-Nevada shareholders, giving rise to a benefit worth, in AngloGold's submission, not less than $1 per Normandy share (for comparison, at the time of our proceedings, the AngloGold and Newmont bids valued each Normandy share at roughly $1.40);

(d) since Newmont was only induced to agree to the Plan by the grant of the option, the value of the consideration Newmont has agreed to give to Franco-Nevada for the Normandy parcel, for the purposes of section 621 of the *Corporations Act 2001* (Act), is the sum of the values of that benefit and of the exercise price;

(e) when that adjustment is made, Newmont agreed to acquire the Normandy parcel on terms more favourable than it offered to other shareholders in Normandy;

(f) since the agreement was made during the four months preceding the making of the Normandy bid, Newmont's failure to offer equal value to other shareholders was unacceptable because it contravened section 621, because it avoided that section or because it contravened section 623 in that it was a collateral benefit offered to induce Franco-Nevada shareholders to dispose of their interest in the Normandy parcel.

11. In support of that analysis, AngloGold submitted an extensive valuation report on Franco-Nevada by KPMG Corporate Finance. That report concluded that the terms on which Newmont had agreed to acquire Franco-Nevada shares under the proposed plan of arrangement offered Franco-Nevada shareholders a premium over Franco-Nevada's net asset value of at least $1 per Normandy share. KPMG and Anglogold asserted that that all of that premium should be applied to the portion offered for the Normandy shares. Applying that analysis, Newmont's bid for Normandy should have been increased by not less than $1.

Collateral Benefit Argument at First Instance

12. In Normandy (No. 4), this argument was discussed as the collateral benefit argument, as follows:

"25. The collateral benefit argument relates to the consideration given by Newmont to Franco-Nevada for the grant of the option under the Lock-Up Agreement. The argument is that while the exercise price of the option is the same as the consideration under the bid for Normandy (as originally announced, other than the 5 cents per share cash payable if Newmont obtained 90% acceptances), Newmont also agreed to acquire Franco-Nevada under the Plan of Arrangement, and the benefit being received by Franco-Nevada for the shares includes this benefit, as well as the exercise price of the option.

26. AngloGold asserts that this was an additional benefit given to the Franco-Nevada shareholders in exchange for the Normandy parcel, as shown by the fact that the Plan is conditional on the success of Newmont's bid for Normandy,

by the recital in the Lock-Up agreement that Franco-Nevada granted the option to induce Newmont to enter into the Plan and similar statements of the parties, and by the fact that the market value of the scrip Newmont is offering for Franco-Nevada greatly exceeds Franco-Nevada's net asset backing.

27. … If the merger between Newmont and Franco-Nevada cannot be characterised as the acquisition of the Normandy parcel by Newmont, then benefits given by Newmont to the Franco-Nevada shareholders under the merger cannot be characterised as collateral to that acquisition.

28. In addition, the merger and the exercise are effectively alternatives, and it makes no sense to add together the benefits from both. On the one hand, if the merger does not proceed, Franco-Nevada shareholders will derive no benefit from it. In that case, if Newmont exercises the option over the Normandy parcel, all that Franco-Nevada or its shareholders will receive is the exercise price under the option. On the other hand, if the merger proceeds, it makes no difference to the shareholders in Franco-Nevada whether Newmont exercises the option over the Normandy parcel. The parcel and the consideration for it will remain within the enlarged Newmont.

…

31. … the Plan of Arrangement should not be characterized as the acquisition of the Normandy parcel. In addition, there was no evidence to indicate that the Plan was on anything other than arm's-length terms, and therefore no evidence that it was collateral to the Normandy bid. In particular, the condition in the Plan that Newmont obtain 50.1% acceptances for the Normandy bid need mean no more than that Newmont is unwilling to acquire Franco-Nevada on these terms, while it has a minority position in Normandy. We note that Franco-Nevada also has the benefit of the condition, however."

Analysis

13. We agree that unacceptable circumstances would arise if a bidder avoided the policy of section 621 of the Act by a stratagem such as AngloGold describes. For example, a bidder might acquire an option over a springboard parcel for $1 per share, with an exercise price of a further $1 per share, and then bid for the whole of the target company at $1 per share in purported compliance with section 621. In that imaginary case, the bid would need to be at not less than $2 per share.

14. We believe this view is supported by the approach of the courts in *Sagasco Amadeus Pty Ltd v Magellan Petroleum Australia Pty Ltd* (1993) 113 ALR 23, *Boral Energy Resources Limited v TU Australia (Queensland) Pty Ltd* (1998) 16 ACLC 1199 and *Aberfoyle Limited v Western Metals Limited* (1998) 156 ALR 68.

15. If the Plan of Arrangement had been clearly structured to provide an excess benefit to the Franco-Nevada shareholders, there may have been a profit in the collateral transaction that we should have added to the exercise price to derive the overall price

for the Normandy parcel. We were unable, however, to apply this analysis to the facts in this matter.

16. The merger between Newmont and Franco-Nevada did not appear to be a stratagem to avoid compliance with section 621, nor did it appear that it had caused Newmont to breach the provision. None of the evidence presented to us suggested that it was anything other than a *bona fide* transaction on arm's-length terms. We have been shown nothing unreasonable or of concern in those terms, having regard to the market ranking of Franco-Nevada, the utility to Newmont of that company's business, assets and profits, and the fact that market prices for shares in both Newmont and Franco-Nevada have often been well in excess of net asset backing.

17. We note KPMG's conclusion that the market value of the Newmont shares to be received by Franco-Nevada shareholders is more than the net asset backing of their Franco-Nevada shares. However, that does not persuade us that Franco-Nevada shareholders are being paid an excess benefit. It is not appropriate to compare the market price of one share with the net asset backing of another share. Shares in both Franco-Nevada and Newmont have traded at prices above net asset values, and the terms of a merger need to take into account the market prices of the shares of the merging companies. It would be quite uncommercial to take into account only the market price of one company and only the balance sheet of the other, disregarding the balance sheet of the first company and the market price of the second.

18. We note ASIC's submission that a strategic downstream parcel may attract a premium, even if it forms only a small proportion of an upstream company's assets, and that Franco-Nevada's parcel of Normandy shares may have been strategic in that way. While we accept the possibility, for the reasons set out above, we are not satisfied that the consideration offered by Newmont for Franco-Nevada in fact included such a premium.

Other Arguments – Shareholder Overlap

19. For completeness, we should mention a subsidiary argument raised by AngloGold. It was premised on AngloGold's view that the consideration under the merger between Newmont and Franco-Nevada was more favourable than the consideration for the Normandy bid.

20. Some shareholders in Normandy also held shares in Franco-Nevada. It is unclear how many Normandy shares were involved, or who owned them beneficially. AngloGold submitted that people who held shares in both companies may have been induced to accept Newmont's bid for Normandy to improve the prospect that they would receive the consideration for their Franco-Nevada shares. Accepting the bid for their Normandy shares would help to satisfy the condition in the Plan of Arrangement that Newmont obtain 50.1% acceptances for the Normandy bid. This argument was rejected at first instance and was not elaborated in the review proceedings. We agree with the reasons for which it was rejected at first instance.

Purpose

21. The Normandy 06 Panel considered whether it was necessary for it to consider Newmont's purpose in proposing the Plan of Arrangement with Franco-Nevada. The Normandy 04 Panel did consider this issue and decided that the portion of the value of Franco-Nevada that the Normandy shares made up was too small to suggest that acquiring the Normandy shares was one of the main purposes of Newmont's acquisition of Franco-Nevada. The Normandy 04 Panel said in paragraph 18 of its reasons that the parcel was too small "to justify characterising the merger as essentially the acquisition of that parcel".

22. We looked at the values being offered to the different shareholders and found no inequality or inducement. Therefore, we did not find it necessary to address the issue of purpose which was the subject of comment in the reasons of the Normandy 04 Panel. We note that section 602(c) is framed in terms of an objective test. We consider that the proper question before us is whether, objectively, the bidder has complied with that principle. In some cases it may be relevant, in assessing that question, to consider the purpose of the bidder.

23. With respect to the acquisition of Franco-Nevada, we looked at the subject matter that Newmont was acquiring. We saw no reason not to accept that Newmont was seeking to acquire the whole of Franco-Nevada rather than specific parts of it. We did not find that the Franco-Nevada shareholders had been offered a benefit specifically for their interests in the Normandy shares held by Franco-Nevada; rather the offer was for Franco-Nevada as a whole. Accordingly, we found no greater benefit to the Franco-Nevada shareholders for their interests in Normandy shares (albeit indirect) compared to that offered to the other Normandy shareholders.

Conclusion

24. Accordingly, we affirmed the decision in Normandy 04. We declined to make the declaration and orders sought. We gave leave for the parties to be represented by their solicitors. There having been no declaration under section 657A, there can be no order for costs.

Annabelle Bennett
President of the Sitting Panel
Decision dated 21 December 2001
Reasons published 17 June 2002