Takeovers Panel

Reasons for Decision Colonial First State Property Trust Group 03

In the matter of Colonial First State Property Trust Group 03
[2002] ATP 17

Catchwords:

Stapled securities and options as bid consideration – consideration obligations – referral of question of law to court – misleading and "triumphalist" press statements

Corporations Act 2001 (Cth), sections 620(1), 657A(1), 659A and 670F

These are our reasons for deciding not to make any declaration of unacceptable circumstances in response to an application by the Responsible Entity for the Colonial First State Property Trust Group in relation to Mirvac Funds Limited's takeover bid for the Colonial Funds. The Colonial Responsible Entity alleged that Mirvac was unable, under Mirvac's constitution, to offer or issue the stapled securities and options over those securities that it (Mirvac) was offering as consideration under its bid.

1. The application sought urgent interim orders to restrain Mirvac Funds Limited (**Mirvac**) from processing any acceptances by Colonial unitholders of offers under Mirvac's takeover bid for the four funds which make up the Colonial First State Property Trust Group (**Colonial)** or exercise any votes or other rights in relation to such shares. The application was made by CFS Managed Property Limited (**Colonial Responsible Entity**) on 24 September 2002. The Colonial Responsible Entity also applied for a declaration that the Mirvac bid (under the replacement bidder's statement given by Mirvac on 23 September) constituted unacceptable circumstances because Mirvac, under its constitution (**Mirvac Fund Constitution**), was unable to offer or issue the securities offered as consideration under its bid.

2. The sitting Panel for the application was Ms Jennifer Seabrook (sitting President), Ms Karen Wood (sitting Deputy President) and Ms Teresa Handicott.

SUMMARY

3. Mirvac had dispatched takeover offers on 23 September for all of the units in the four Colonial Funds. It offered Colonial unitholders two cash and scrip (Mirvac stapled securities) alternatives as well as options over Mirvac stapled securities, as consideration under its bid.

4. The Colonial Responsible Entity asserted that under the Mirvac Fund's Constitution, Mirvac was unable to offer the stapled securities and options under its bid because:

   a. Mirvac was offering to issue its own stapled securities, as consideration for the Colonial units, for less than the weighted average market price of Mirvac stapled securities for the 5 business days immediately prior to the issue of the Mirvac securities. The Colonial Responsible Entity asserted that this would be in breach of paragraph 4.4 of Mirvac Fund Constitution;

b. The Mirvac Fund Constitution made no provision for the consideration for the issue of options over Mirvac stapled securities as required under section 601GA(1)(a) of the Corporations Act (**Act**); and

c. The options were interests in the Mirvac Fund and the consideration proposed was not in accordance with paragraph 4.4 of the Mirvac Fund Constitution.

5. The Colonial Responsible Entity pointed to a statement in the Mirvac bidder's statement that "goodwill amounting to approximately $211 million (100% scenario) …. would arise". It asserted that this was further evidence that the consideration received for the Mirvac stapled securities would be less than the weighted market price of Mirvac stapled securities.

6. The Panel decided not to make any interim orders restraining the process of the Mirvac bid or the rapidly approaching[1] meetings to consider the proposal to merge the Colonial Funds with Commonwealth Property Office Fund and Gandel Retail Trust (**Merger Proposal**). The Panel advised the parties of its interim decision in this matter on 25 September 2002. That decision was to refer a central element of the matter to the court as a question of law, and not to make any interim orders. Mirvac offered undertakings in relation to the processing of acceptances which facilitated this decision.

7. The Panel decided that the legal issue of whether Mirvac had the power to issue the stapled securities and options offered under its bid was central to its decision of whether unacceptable circumstances existed. It decided to refer those questions to the Federal Court under section 659A of the Act, and applied on 25 September 2002.

8. The Federal Court on 2 October 2002 decided that Mirvac could issue the stapled securities but that the Mirvac offer was not capable of giving rise to a contract binding on Mirvac to issue options. It also decided on the assumed facts[2] it was open to the directors of Mirvac reasonably to form the opinion that to modify[3] the Mirvac Fund Constitution to allow issue of the options would not adversely affect the rights of Mirvac Fund members. . In the mean time (on 30 September 2002), the Colonial unitholders voted to approve the Merger Proposal and Mirvac sought and obtained ASIC's consent to withdraw its offers on 3 October 2002.

9. Following the Federal Court's decision, the Panel sought submissions from parties as to whether there were any issues still to be resolved. The Panel decided that there were no remaining substantive issues to be resolved and it was able to finally determine the proceedings.

---

[1] The Meetings were due to be held on 30 September and could not feasibly or logistically be deferred.

[2] It should be noted that the Commonwealth and Colonial Responsible Entities expressly did not accept all of the facts put forward by Mirvac.

[3] Without any need to hold a meeting of Mirvac unitholders.

10. The Panel advised parties of its final decision, not to make any declaration, given the decisions of the court and the Colonial unitholders, on 11 October 2002. It decided that, in these circumstances, after the question of law was resolved by the court, and Mirvac withdrew offers under its bid, it would not be in the public interest to make any declaration of unacceptable circumstances.

11. However, it stated that persons announcing takeover bids should only do so after careful consideration and where they were sure that they would be able to fulfil their obligations under the proposed bid. The Panel noted that Mirvac had advised it in these proceedings that it had received senior counsel's advice prior to announcing its bid, that it did have the power to issue the securities offered under its bid.

BACKGROUND

12. On 11 September Mirvac lodged a bidder's statement with the Australian Securities and Investments Commission (**ASIC**) and the Colonial Responsible Entity. The bidder's statement would be available for dispatch on Thursday 26 September.

13. Meetings of the Colonial Funds unitholders (**Meetings**) were due to be held on Monday 30 September[4] to vote on the Merger Proposal. The closing date for receipt of proxies was Friday 27 September for mail and hand deliveries and 9:00 a.m. on Saturday 28 September for lodgment by fax.

14. In correspondence between them leading up to this application, the Colonial Responsible Entity raised a number of disclosure issues and constitutional issues with Mirvac in relation to Mirvac's bidder's statement.

15. Mirvac offered as consideration under its bid:

- 20.8 cents cash for each Colonial unit plus one Mirvac Security for every 1.89 Colonial units

or

- 0.8 cents cash for each Colonial unit plus one Mirvac Security for every 1.73 Colonial units

plus, in each case,

- one Mirvac Option for every 14 Colonial units.

16. On Monday 23 September Mirvac lodged a replacement bidder's statement (**Replacement Bidder's Statement**) with ASIC. It appeared to deal with many of the issues which had been in contention between the parties concerning disclosure, except, crucially, the subject of this application. That was the ability of Mirvac to offer and issue the stapled securities and options over such stapled securities which were the consideration it was offering under its bid.

---

[4] The Meetings were originally scheduled to be held on 3 September. The Meetings had been previously postponed until 10 September and then until 30 September.

17. After various consultations[5] ASIC consented[6] to Mirvac dispatching offers under the Replacement Bidder's Statement on 23 September. The Commonwealth Responsible Entity applied on 23 September for interim orders restraining the dispatch of the Mirvac bidder's statement and offers until the Commonwealth Responsible Entity had made this application. This was the Colonial 02 matter.

18. The Panel in the Colonial 02 matter decided not to make those interim orders and advised the Commonwealth Responsible Entity on the evening of 23 September. It said that the impending meeting of Colonial unitholders to consider the proposed merger of the Colonial, Commonwealth and Gandel funds, on 30 September 2002, meant that delaying dispatch would likely cause more harm to Colonial unitholders than the alleged deficiencies in the bid and disclosure. The Panel considered that Colonial and Commonwealth could inform Colonial unitholders of the risks involved, and the Panel and the court may be able to provide Colonial unitholders with more definitive information by the time of the meeting. The Panel has provided its reasons for its decision. They are available on its website at www.takeovers.gov.au/decisions/……asp .

19. Mirvac had made two applications in relation to the Merger Proposal on 30 August 2002 and 2 September 2002. Further background information on the circumstances leading up to this application can be found in the Panel's published reasons in relation to those two applications on the Panel's website at: http://www.takeovers.gov.au/Content/Decisions/2002/colonial_101002.asp .

20. In its Replacement Bidder's Statement on 23 September, Mirvac further increased the consideration offered under its bid, declared its offers to be free from any conditions and advised that it would pay consideration five business days after the receipt of acceptances.

APPLICATION

Interim orders

21. The Colonial Responsible Entity sought interim orders under section 657E of the Act that until final orders were made, Mirvac be restrained from processing any acceptances by Colonial unitholders of offers under Mirvac's takeover bid or exercising any of its rights or powers in relation to such an acceptance.

Declaration sought

22. The Colonial Responsible Entity also sought a declaration under section 657A of the Act that the proposed acquisition by Mirvac of all the Colonial units under its takeover bid to which Mirvac's Replacement Bidder's Statement dated 23 September

---

[5] ASIC advised parties on Friday 20 September of Mirvac's proposal to lodge the Replacement Bidder's Statement and gave parties until 4.00 p.m. on Monday 23 September to provide any submissions on ASIC's decision whether or not to consent.

[6] Under ASIC Class Order 00/344.

2002 related constituted unacceptable circumstances in relation to the affairs of Colonial.

Final orders

23. The Colonial Responsible Entity also sought final orders under section 657D of the Act that:

    (a) unless and until Mirvac convenes and holds a proper meeting of unitholders in the Mirvac Fund at which unitholders in the Mirvac Fund:

        (i) amend the constitution of Mirvac to include the provision set out in paragraph (i) of ASIC instrument 01/1276;

        (ii) amend the constitution of the Mirvac Fund to deal with options, including the manner in which the exercise price and the strike price are to be determined; and

        (iii) approve the issue of Mirvac Securities (as defined in the Replacement Bidder's Statement) and Mirvac Options (as so defined) in accordance with subparagraphs (C), (F), (G) and (H) of that paragraph and if necessary, having regard to the amendments referred to in (ii) above, approve the issue of Mirvac options (as so defined),

    Mirvac be restrained from:

        (A) acquiring Colonial units pursuant to its takeover bid; and

        (B) processing any acceptance by any Colonial unitholder of any offer under Mirvac's takeover bid;

    (2) Such further or other orders as the Panel considers appropriate.

Referral to Court

24. The Colonial Responsible Entity also requested in its application that the Panel refer the issue of validity of Mirvac's offer of stapled securities and options to the Court for decision under section 659A of the Act.

DISCUSSION

Referral

25. The Panel considered that the application raised material questions that could affect an efficient, competitive and informed market for control of the Colonial Funds, and therefore the Panel's jurisdiction was invoked to determine whether unacceptable circumstances had occurred and whether or not the Panel should make such a declaration.

26. It also recognised that the issue of whether or not Mirvac was legally entitled to issue the securities offered under its bid was a decision that was integral to the occurrence or otherwise of unacceptable circumstances, and was a decision which should

properly be decided by a court. The Panel decided that it should find an answer to the legal issue of whether Mirvac was entitled to offer and issue the securities before it determined the issue of unacceptable circumstances.

27. The Panel considered that the issue was not one of takeovers law and did not directly concern the Panel's own procedures or powers and was one that was better dealt with by the Court than by the Panel. It therefore advised the parties that it would refer the matter to the Federal Court as soon as practicable.

28. The Panel advised parties that it would instruct its solicitors to draft an initial Originating Process, Case Stated and Question of Law. The Panel provided these documents to the parties and invited them to attend the Court to appear and present arguments to the Court. The Panel received comments on the Originating Process and all parties appeared at the Federal Court hearing.

29. Mirvac provided a statement of facts as background to the question of law which the Court was asked to consider. Colonial and Commonwealth did not agree with all of the facts asserted by Mirvac and reserved their right to contest any decision if it was based on the disputed facts.

30. The Panel applied to the Federal Court on 25 September. Mr Justice Conti commenced hearing the matter at 11.30 a.m. on Thursday 26 September and continued hearings through the next day. Justice Conti delivered his judgement on Wednesday 2 October 2002.

Question of Law

31. The questions put to the Federal Court were:

Issue of Stapled Securities and Options

1. Having regard to the Constitution of the Mirvac Property Trust and the provisions of the Corporations Act 2001, would Mirvac Funds Limited, as the responsible entity of the Mirvac Property Trust, be lawfully entitled to issue Mirvac stapled securities to unitholders in the Colonial First State Property Trust Group who accept Mirvac Group's offer to acquire all of the units in the four unit trusts comprising the Colonial First State Property Trust Group, as set out in Mirvac Group's Bidder's Statement lodged with the Australian Securities and Investments Commission on 11 September 2002 and the revised Bidder's Statement lodged with the Australian Securities and Investments Commission on 23 September 2002?

2. Having regard to the Constitution of the Mirvac Property Trust and the provisions of the Corporations Act 2001, would Mirvac Funds Limited, as the responsible entity of the Mirvac Property Trust, be lawfully entitled to issue options to subscribe for stapled securities in the Mirvac Property Trust to unitholders in the Colonial First State Property Trust Group who accept Mirvac Group's offer to acquire all of the units in the four unit trusts comprising the Colonial First State Property Trust Group, as set out in Mirvac Group's Bidder's Statement lodged with the Australian Securities and Investments Commission

on 11 September 2002 and the revised Bidder's Statement lodged with the Australian Securities and Investments Commission on 23 September 2002?

3. Is the offer constituted by the Replacement Bidder's Statement capable of acceptance so as to give rise to a contract binding on Mirvac Funds Limited to issue the Mirvac Securities and Mirvac Options consistently with the Constitution of the Mirvac Property Trust?

4. On the assumption that the facts contained in Mirvac's statement of facts are correct can the directors of Mirvac reasonably consider that the alteration to the Mirvac Fund Constitution which is set out below will not adversely affect members' rights?

Interim orders

32. The interim orders that the Colonial Responsible Entity sought related to voting and processing of acceptances by Mirvac. The Panel received undertaking from Mirvac on 24 September that it would not exercise any votes from acceptances at the Meetings on Monday 30 September. Mirvac also advised the Panel that to assist the Panel's proceedings, it would not process any acceptances or issue securities until after the Meetings, by which time it was anticipated that the question of law would be resolved.

33. On that basis, the Panel decided not to make any interim orders prior to the Meetings. However, the Panel advised that it was prepared to make an interim order in relation to processing acceptances to preserve the status quo until the issue was resolved if Mirvac might be required, under the terms of its offer, to commence processing acceptances and paying consideration to offerees.

34. The Panel considered that the undertaking provided by Mirvac meant that any Colonial Funds unitholder who had accepted the Mirvac offer could still attend, or give a proxy, for the Monday Meetings. Colonial Funds unitholders could lodge proxies by fax up until 9.00 a.m. AEST on Saturday 28 September 2002.

35. The Panel advised parties, Colonial unitholders and the market by Media Release on Wednesday 25 September 2002.

THE CONSTITUTIONAL ISSUES

36. The Colonial Responsible Entity submitted that the issue of stapled securities and options as consideration under Mirvac's takeover bid in the manner described in the Replacement Bidder's Statement would be invalid under the Mirvac Fund's constitution.

37. The Colonial Responsible Entity also pointed to sections 169 and 170 of the Act to support its argument that the issue of options was in fact an issue of interests in Mirvac stapled securities and that as such the proposed issue of options was not allowed under the Mirvac Fund constitution.

38. In correspondence leading up to the proceedings and the reference to the Court, Mirvac offered to the Panel and the other parties to make any constitutional amendments required to permit it to issue the bid consideration. However, as its power to do so was one of the issues in contention, it did not appear that such action would adequately address the uncertainty.

39. The following paragraphs are a summary, largely taken from the Colonial Responsible Entity's application, which set out the issues in contention concerning Mirvac's ability to offer and issue the Mirvac stapled securities and options over its stapled securities that Mirvac was offering as consideration for Colonial units under its takeover bid. The issues and facts are largely agreed by the parties, although the interpretations and deductions were clearly in contention. Colonial's submissions are used as a convenient exposition of issues, albeit written from one party's perspective, rather than any adoption by the Panel.

Colonial Responsible Entity's Submissions

3.2 Issue of Mirvac Securities

Mirvac's solicitors, in responding to queries raised by the lawyers for CMIL suggested that the entitlement of Mirvac Limited ("**Mirvac**") and Mirvac to issue the Mirvac Securities arises under clause 4.4 of the Mirvac Fund Constitution (being the annexure to the Supplemental Deed Poll of 1 November 2001) (the "Mirvac Fund **Constitution**").

Clause 4.4 of the Mirvac Fund Constitution has effect by virtue of clause 4.1(b), which provides:

> "*Subject to clause 19.1 and clause 30A.2(a), a Unit must only be issued at an application price:*
>
> *(a)…;*
>
> *(b) subject to paragraphs (c), (d) and (e), while Units are Officially Quoted as part of a Stapled Security, in accordance with clause 4.4;*
>
> *(c) …*"

Clause 4.4 provides:

> "*Where clause 4.1(b) applies, a Stapled Security must only be issued at an application price for the Stapled Security equal to the weighted average Market Price of Stapled Securities during the 5 Business Days immediately prior to the date on which or as at which the application price for the Stapled Security is to be calculated. In this case, the Manager must determine what part of the application price of a Stapled Security is to represent the application price of the Unit.*"

These provisions are an essential element of the Constitution by reason of section 601GA(1)(a) of the Act, which provides that the constitution of a registered managed investment scheme such as the Mirvac Fund must:

> "*make adequate provision for:*
>
> *(a) the consideration that is to be paid to acquire an interest in the scheme; ...*"

3.3 As we understand the argument, Mirvac's lawyers suggest that at the relevant time, the application price for a Mirvac Security will be determined by reference to the market price calculation referred to in clause 4.4. To facilitate the discussion, we assume that price to be $4.00. If a Mirvac Security was to be issued at that time for a cash consideration, $4.00 in cash would need to be received by Mirvac. In this case, however, the consideration being provided by an accepting CFT unitholder is not cash but CFT Units. The market value of CFT Units to be received by Mirvac as consideration for the issue of the Mirvac Securities is accepted to be less than the application price for the Mirvac Securities[7].

[7] It should be noted that Mirvac did not agree or accept that the market value of Colonial units to be acquired was less than the value of Mirvac securities offered.

Clause 5.3 of the Mirvac Fund Trust Deed allows the Mirvac Fund to issue Mirvac Securities for a consideration other than cash – it provides:

> *"Payment in respect of an application in a form acceptable to the Manager, or a transfer of property of a kind acceptable to the Manager and able to be vested in the Manager or a custodian appointed by it (accompanied by a recent valuation of the property, if the Manager requires), must*
>
> *(a) accompany the application;*
>
> *(b) be received by or made available to the Manager or the Custodian within such period before or after the Manager receives the application form as the Manager determines from time to time; or*
>
> *(c) ...*
>
> *If the Manager accepts a transfer of property other than cash, any costs associated with the valuation or transfer of the property are payable or reimbursable out of the Assets or payable by the Member concerned, as the Manager decides."*

We consider that there is no ability under clause 4.4 for Mirvac to issue Mirvac Securities at any price lower than the application price determined in accordance with that clause. Where Mirvac agrees to accept a consideration other than cash for the issue of Mirvac Securities, Mirvac must be satisfied on reasonable grounds that the value being received for each Mirvac Security being issued for that non-cash consideration is at least equal to the application price, as the reference to "valuation" in clause 5.3 suggests.

We note that the policy of ASIC in relation to section 601GA(1)(a) specifically states:

> *"We will not generally give relief so interests in a trust can be issued at your discretion at a discount or at an increased price as this would not be consistent with the policy of the Law. We do not accept that, because companies can issue shares at a discount or a premium, similar treatment should be applied to issuing units in a scheme in the form of a trust. Unitholders in a trust have different rights from shareholders. Unitholders in a trust place their funds under your control to invest their funds. The scheme property is held for the benefit of the members. By contrast, shareholders supply capital for running a company. Shareholders are not beneficially or legally entitled to the assets of the company."* (ASIC Policy Statement 134.31).

Although ASIC has provided some limited relief for quoted securities (and in particular for Mirvac in Class Order 98/52 and ASIC Instrument 01/1276 (a copy of which is attached and marked "G")) these do not relate to clause 4.4 and the general observations made by ASIC in PS 134 apply in this case.

Therefore, Mirvac and Mirvac are seeking to issue Mirvac Securities in return for consideration which on any reasonable analysis has a lower, or at least different, value than the application price for the relevant Mirvac Securities to be issued.

3.4 How does Mirvac seek to justify this? It appears from correspondence and from discussions with the lawyers for Mirvac that, in essence, although knowing that the CFT Units have a lower value than the application price mandated by clause 4.4, Mirvac is treating the CFT Units as having a value equal to the application price so that they can be acquired in return for an issue of Mirvac Securities in the ratio set out in the Replacement Bidder's Statement. This then creates an accounting issue – there is a value that Mirvac will

have provided by the issue of the Mirvac Securities which is greater than the fair value of the CFT Units acquired. In accordance with ordinary accounting principles this constitutes goodwill. As appears from page 62 of the Statement "goodwill amounting to approximately $211 million (100% scenario) and $105.711 million (50.1% scenario) would arise". That goodwill arises because the issue price for the Mirvac Securities determined in accordance with clause 4.4 of the Mirvac Fund Constitution is greater than the "fair value" of the CFT Units. These accounting issues are discussed in paragraphs 5.7.2(d) and 5.7.3(b) of the Statement.

We consider that this accounting disclosure demonstrates that the fair value of CFT Units is acknowledged by Mirvac not to be sufficient to justify the application price for the relevant Mirvac Securities. In effect, while the "kind" of property (CFT Units) may be acceptable, it is not, under the structure set out in the Statement sufficient to satisfy the obligation for an issue "at an application price for the [Mirvac] Security equal to" the applicable market price. (clause 4.4).

For these reasons, we consider that the proposed issue of Mirvac Securities would not be consistent with the provisions of the Mirvac Fund Constitution on which the lawyers for Mirvac purport to rely. We consider that the existence of the goodwill component described above demonstrates that the property being received by Mirvac in consideration of the issue of the Mirvac Securities has a value that is less than that of the relevant application price.

We note that the lawyers for Mirvac do not rely on any other power under the Mirvac Fund Constitution to justify the issue of the Mirvac Securities.

3.5 Proposed issue of Mirvac Options

The lawyers for Mirvac assert that Mirvac is entitled to issue options to subscribe for Mirvac Securities by reason of clauses 10 and 4.8 of the Mirvac Fund Constitution. We also understand that Mirvac's lawyers assert that clause 4 is not strictly relevant in relation to an option to subscribe for a Mirvac Security because it is not itself an interest in a managed investment scheme and only becomes one on exercise of the option and issue of the relevant Mirvac Securities (and, presumably, on the basis that if Mirvac failed to issue the relevant Mirvac Securities following exercise of a Mirvac Option, the exercising option holder's sole remedy would be in damages). These assertions give rise to a number of issues.

3.5.1 ***Options as interests***: Section 9 of the Act defines an interest in a managed investment scheme to be:

> "*a right to benefits produced by the scheme (whether the right is actual, prospective or contingent and whether it is enforceable or not)*".

Options to subscribe for units in a scheme confer a right to the benefits of the scheme which are both prospective and contingent and are therefore interests in the scheme. In this regard, it does not matter that the option does not confer rights that make the holder of the option a beneficiary of the Mirvac Fund – the contract that would arise on issue of a Mirvac Option confers rights against Mirvac the value of which varies by reference to the performance of the Mirvac Fund and so entitles the holder of the benefits produced by the Mirvac Fund (especially as Mirvac would be entitled to the indemnity in the Mirvac Fund's Constitution if it failed to issue a Mirvac Security on a valid exercise of a Mirvac Option and was required to pay damages as a consequence).

ASIC also appears to take the view that options are interests in a scheme: see Class Order 98/52 which, in certain circumstances treats options to subscribe for interests in a scheme as interests in the scheme.

Relevantly, Mirvac also takes this view. On 17 September 2001 ASIC granted, at Mirvac's request, a specific exemption and declaration pursuant to paragraph 601QA(1)(b) of the Act in substantially the same form as Class Order 98/52, save that it applied to Mirvac's Stapled Securities (see Annexure 21). In paragraphs (iii), (iv) and (v) of the instrument it is expressly recognised that options to subscribe for Mirvac Stapled Securities are interests in the scheme.

3.5.2 ***Power to issue options***: Under section 601GA(1)(a) of the Act, the constitution of a registered investment scheme must make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. In the case of options, the constitution must make such adequate provision in relation to the acquisition of a unit in the scheme as well as, if an option is itself an interest in the scheme, in relation to the acquisition of an option.

As the options are expressed to be a right to acquire Mirvac Securities (each of which includes a unit in the Mirvac Fund) at a specific price ($4.50) at a future time (October 2004), but the only provision in the Mirvac Fund constitution for determining the consideration that is to be paid to acquire units in the scheme is set out in clause 4.4 as being a market price, it is clear that the constitution does not make adequate provision to determine the consideration to be paid to acquire the units on the exercise of the options.

As the constitution does not make any provision for the consideration to be paid for the option itself, it is axiomatic that the constitution does not make adequate provision for the consideration that is to be paid for the interest in the scheme as required by section 601GA(1)(a) of the Act.

Pursuant to section 601GB of the Act, the constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity. The Mirvac Fund constitution does not contain legally enforceable provisions relating to the issue of options and the rights of the holders of them.

3.5.3 ***Application of clause 4***: Clause 4 is relevant to the issue of an option because of the requirement for a constitution to make adequate provision for the consideration that is to be paid to acquire an interest in the scheme. In our view, if that consideration is to be provided on exercise of an option, then the mechanism for determining the consideration to be provided must be fully set out in the Constitution in order to comply with section 601GA(1)(a) of the Act. This also seems to be the view of ASIC – see ASIC Policy Statement 134.47 and Class Order 98/52 paragraph (iv).

3.5.4 ***Clause 4.8***: The effect of clause 4.8 of the Mirvac Fund Constitution must be considered. Clause 4.8 provides:

> *"While Units or Stapled Securities are Officially Quoted, the Manager may at any time issue Units or Stapled Securities to any person, whether by way of a placement or otherwise, at a price and on terms determined by it, provided that the Manager complies with the Listing Rules applicable to the issue and the terms of any applicable ASIC relief and provided that while Stapling applies, the same persons are contemporaneously offered an identical numbers of Stapled Shares and Stapled Units which will be Stapled to the Units Offered."*

On its face, it suggests that Mirvac can choose any price as the issue price of Mirvac Securities. We consider that this clause can only be supported as being consistent with section 601GA(1)(a) to the extent that there is an applicable modification of that section made by ASIC in a relevant instrument pursuant to section 601QA. To the extent that an issue of Mirvac Securities is sought to be justified by reference to clause 4.8 alone (without reference to any ASIC modification to section 601GA(1)(a)), that clause cannot support the relevant issue as clause 4.8 on its own does not make "adequate provision for the consideration that is to be paid to acquire an interest in the scheme". That this is the case is also supported by the discussion in ASIC PS 134 at 134.28-134.31. We particularly note the observation by ASIC:

> "*To meet s601GA(1)(a), the consideration for acquiring interests needs to be set out in the Constitution so that it is independently verifiable. The Law requires provisions enabling calculation of the consideration to be set out in the Constitution so members have rights about the consideration for an issue of interests. This is because the consideration for an issue of an interest to another may affect the value of the member's interest.*"

This is precisely the issue in relation to an option – if the suggestion that clause 4.8 justifies the price for an issue of an option were correct, the structure set out in the rest of clause 4 which seeks to determine the price at which Mirvac Securities may be issued would be rendered illusory.

3.5.5 ***Clause 10***: Clause 10 of the Mirvac Fund constitution does not make any provision for the issue of options. Even if the view is taken that the issue of options is empowered under clause 10 (a view which would not appear to accord with the requirements of the Act), the pricing of any such option as well as the consideration to be paid on exercise of the option must comply with clause 4 and that clause must comply with the requirements of section 601GA(1) as set out above at 3.5.2 and 3.5.3.

3.5.6 ***Other provisions***: There are numerous other provisions in the Mirvac Fund constitution which do not contemplate options, such as section 5 (Application Procedure), section 7 (Meetings of Members), section 17 (Liability of Members) and section 29 (Stapling). As indicated above, any issue of options by the Mirvac Fund can only validly occur after these provisions are appropriately amended to accommodate the rights of option holders.

Federal Court Decision

40. Mr Justice Conti decided[8] that:

a. **First Question:** as Mirvac had formed the view that the non-cash consideration (i.e. the Colonial units) for acquisition of the Mirvac stapled securities was acceptable, the units in the Mirvac Fund would be issued at an application price in accordance with the scheme of clause 4.4 of the Mirvac Fund Constitution;

b. **Second Question:** the issue of options would constitute an issue of interests in the Mirvac scheme (as defined in section 9 of the Act) and the Mirvac Fund constitution did not make adequate provision for the consideration to be paid for the options, therefore the issue of options to take up units in Mirvac was not authorised by the Mirvac Fund Constitution;

c. **Third Question:** as the issue of options would not be authorised by the Mirvac Fund Constitution, the Mirvac offer was not capable of giving rise to a contract binding on Mirvac to issue the options offered as consideration under Mirvac's bid;

d. **Fourth Question:** assuming the facts as set out in the Panel's Originating Process and Mirvac's statement of facts, it was open to the directors of Mirvac reasonably to form the opinion that to modify the Mirvac Fund Constitution to allow issue of the options would not adversely affect the rights of Mirvac Fund members.

Colonial Meetings

41. On 30 September 2002, the Colonial unitholders passed all resolutions at the Colonial Meetings to approve the Merger Proposal. The Commonwealth and Gandel unitholders also passed the required resolutions to facilitate the Merger Proposal on the same day.

42. Subsequent to the Colonial Meetings, and in light of the Federal Court's decision that its offers were not capable of forming a binding contract, Mirvac sought, and gained, ASIC's consent to withdraw its offers. It did so on 3 October 2002.

Supplementary submissions

43. Following the Federal Court's decision, the Panel sent a supplementary brief to the parties asking, inter alia, whether:

    a. there remained any issues which required determination by the Panel;

    b. the decision of the Federal Court raised any issues on which the Panel should seek further submissions;

---

[8] http://cclsr.law.unimelb.edu.au/judgments/states/federal/2002/october/2002fca1219.html

http://www.austlii.edu.au/au/cases/cth/federal_ct/2002/1219.html

c. the Panel should invite the Colonial Responsible Entity to withdraw its application on the basis that the substrate no longer existed;

d. there were any findings the Panel should make.

44. The parties considered that there were no further substantive issues to be considered.

Discussion

45. The Panel has a number of times previously addressed the issue of market disturbance in relation to announcements of proposed takeover bids. The Panel considers that the announcement of an intention to make a takeover bid should only be made after the most careful and responsible consideration and when the bidder has every reason to believe that it can and will be able to implement the offer.

46. In light of this, the Panel notes that it would constitute unacceptable circumstances for a bidder to proceed publicly with a bid when it did not have constitutional power to issue the consideration offered. In this matter, Mirvac's advice to the Panel was that it had received Senior Counsel's advice[9] that it did have the requisite powers, before announcing its bid.

47. The Panel has considered the issue of funding for takeover bids in a number of proceedings, including the Pinnacle 04 and Taipan 10 proceedings. These Colonial 03 proceedings should warn persons considering announcing takeover bids that significant care is needed in considering announcing scrip bids where there are restrictions of any nature to the issue of securities.

Media release in relation to the Court's Findings

48. The Panel was concerned at Mirvac's media release on 2 October which stated that the Federal Court had confirmed the right of the Mirvac Group to issue securities as proposed in its offers. The release did not mention the defects in Mirvac's bid, in the form that the bid was made, that were clearly stated in the Court's findings. The Panel considered that the media release was misleading in that it did not advise that the court had found that the offers as formulated were incapable of acceptance. This is the more so where Mirvac had used those deficiencies in its application to ASIC for ASIC's consent for Mirvac to withdraw its takeover offers.

49. Release of misleading statements in relation to ongoing Panel matters is a continuing concern and the Panel is considering whether further guidance is required in this area, beyond the Panel's views set out in its Rules for Proceedings which are available on the Panel's website.

50. The Panel also stated that it was concerned at the use by Mirvac (and others previously) of triumphalist terms such as "vindicated" in relation to continuing Panel matters. Parties are unlikely to assist the timely and cooperative resolution of matters before the Panel by using inflammatory terms in public statements.

---

[9] Mirvac provided a copy of Senior Counsel's advice to the Panel and to the other parties.

DECISION

51. As a result of the decision, the Meetings, and Mirvac's withdrawal of its bid, the Panel decided that there were no longer any material issues in the proceedings that need to be resolved by the Panel. Accordingly, the Panel decided not to make any declaration of unacceptable circumstances in relation to this application.

52. The Panel consented to the parties being represented by their commercial solicitors.

53. The Panel expressed its gratitude to the Federal Court for resolving the question of law in such a timely manner.

Jennifer Seabrook
President of the Sitting Panel
Decision dated 11 October 2002
Reasons published 11 December 2002