



**In the matter of Aliquot Asset Management Limited
[2003] ATP 19**

Catchwords:

Appointment of nominee directors – relevant interest – insufficient support for conclusion of unacceptable circumstances – termination of proceedings

Corporations Act 2001 (Cth), subsection 606(1), 602, 608(1) and 657A(1)

THESE ARE OUR REASONS FOR DECLINING TO COMMENCE PROCEEDINGS IN RELATION TO AN APPLICATION BY A SHAREHOLDER (SHAREHOLDER) OF ALIQUOT ASSET MANAGEMENT LIMITED (ALIQUOT) CONCERNING THE APPOINTMENT OF DIRECTORS OF EQUITILINK ELINK LIMITED (EQUITILINK) AS ADDITIONAL DIRECTORS OF ALIQUOT.

1. The application was made by the Shareholder on 22 April 2003.
2. The sitting Panel for the application was Mr Peter Cameron (sitting President), Ms Alice McCleary (sitting Deputy President) and Mr Andrew Lumsden.
3. The Panel decided not to conduct proceedings in relation to the application.
4. The Panel advised the parties of its decision in this matter on 2 May 2003.

Background

5. The following is a description of the facts underlying the application, which has largely been taken from the application.
6. Aliquot is a public, listed company with a property management services business. At the relevant time, Asset Backed Holdings Limited (**Asset Backed**) held 25.5% of Aliquot's shares and had a relevant interest in 25.9% of Aliquot's shares. EquitiLink held 18.3% of Aliquot's shares.
7. As at 20 December 2002, the directors of Aliquot were Michael Delaney Perrot, Peter Ernest Huston and Antony Leonard Rigoll. Each of these directors was also a director of Asset Backed.

Meeting to appoint EquitiLink's nominees

8. On 20 December 2002, EquitiLink requisitioned a meeting of shareholders to be held on 18 February 2003 for the purpose of removing each of Aliquot's directors and appointing Paul Crowther, Bruce Burrell and Andrew Brown (each of whom is a director of EquitiLink) as directors in their place.
9. At the commencement of the meeting on 18 February 2003, the chairman announced that EquitiLink had withdrawn the proposed resolutions and that there was no business to be transacted at the meeting.

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10. Later on 18 February, Aliquot and EquitiLink announced that Paul Crowther, Bruce Burrell and Andrew Brown had been appointed as additional directors of Aliquot.

The application

11. The application made the following allegations:
 - (a) that on or before 18 February 2003, the directors of each of Aliquot, Asset Backed and EquitiLink had entered into an agreement under which in consideration of the withdrawal by EquitiLink of the resolution proposed to be considered at the meeting of Aliquot, the directors of Aliquot agreed to appoint EquitiLink's nominees as additional directors of Aliquot.
 - (b) that as a result of the alleged agreement, each of Asset Backed and EquitiLink acquired a relevant interest in the shares of the other; and
 - (c) that therefore Asset Backed's voting power in Aliquot increased from 25.9% to 44.2% and EquitiLink's voting power in Aliquot increased from 18.3% to 44.2% in contravention of section 606(1) of the Corporations Act (**Act**).
12. The application also submitted that the conduct of Asset Backed and EquitiLink infringed the Eggleston principles set out in section 602 of the Act because Asset Backed and EquitiLink acquired effective control over one another's voting shares in Aliquot otherwise than in an efficient, competitive and informed market. The application submitted that the general body of shareholders was not given a reasonable opportunity to consider the proposal under which Asset Backed and EquitiLink acquired their additional interest in Aliquot, and no opportunity to participate in any benefits accruing to Asset Backed and EquitiLink by virtue of the proposal.
13. The application sought an order that Asset Backed make a takeover bid for the shares of Aliquot at a price which the Panel regards as appropriate having regard to the prices at which Aliquot's shares have traded recently in the market place. Alternatively, the application sought an order that EquitiLink, or Asset Backed and EquitiLink jointly, make such a takeover bid.

Discussion

14. The primary issue for the Panel was whether the circumstances described above could potentially constitute unacceptable circumstances, and whether there was any prospect of the Panel being provided with evidence of such unacceptable circumstances.
15. The Panel's preliminary view was that as EquitiLink was the holder of 18.3% of Aliquot's shares, it was not unusual for EquitiLink to desire some board representation. It does not generally constitute unacceptable circumstances for a company board to exercise its powers to appoint additional directors in order to give board representation to a large shareholder. The application did not provide any evidence of an agreement between Asset Backed, EquitiLink and Aliquot in relation

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to the exercise of voting power over shares held by Asset Backed or EquitiLink or which otherwise would give rise to unacceptable circumstances.

16. The application alone did not raise sufficient concern that there was a transaction in relation to voting shares so as to warrant the commencement of proceedings. Nevertheless, the Panel decided to conduct preliminary inquiries to assist it determine whether or not to commence proceedings.

Arrangement

17. In considering whether or not to commence proceedings, the Panel examined the 2002 Financial Report of Asset Backed. At page 4 of that document, the directors of Asset Backed state:

Aliquot Asset Management Limited and its management system was recognised by other shareholders during the year and an attempt was made to change the board of Aliquot Asset Management Limited. Ultimately, an arrangement was entered into with Aliquot Asset Management Limited's other major shareholder EquitiLink eLink Ltd, which is a Brisbane based company, and new board members were appointed to the board of Aliquot Asset Management Limited. This occurred subsequent to our Financial Year, but has already benefited Aliquot Asset Management Limited.

18. The Panel asked Aliquot, Asset Backed and EquitiLink to provide a copy of the arrangement entered into between them. If the arrangement was not reduced to writing, the Panel asked Aliquot, Asset Backed and EquitiLink to provide a statement giving full and accurate details of the arrangement.
19. The Panel received responses from Aliquot and EquitiLink. According to those responses, the following events took place in connection with the appointment of EquitiLink's nominees to the board of Aliquot and its management.
 - (a) When EquitiLink originally requisitioned the general meeting to replace the directors of Aliquot, EquitiLink made a number of public announcements that were released to the ASX and which contained allegations about Aliquot and its management (which caused Aliquot to issue proceedings against EquitiLink).
 - (b) On 18 February 2003, after all proxies had been counted, but before the start of the meeting, the directors of EquitiLink and members of the Australian Shareholders Association attended the registered office of Aliquot. It was clear at that time that the resolutions sought by EquitiLink would not be successful.
 - (c) In the ensuing discussions between EquitiLink and the directors of Aliquot, it was acknowledged that the allegations published by EquitiLink were seen to be damaging to Aliquot. EquitiLink decided to withdraw the resolutions and the board of Aliquot decided to invite the EquitiLink nominees to join Aliquot's board to provide them with an opportunity to review any of the matters on which they had previously raised concerns. At the same time, there were certain business opportunities being considered by EquitiLink that Aliquot might be able to benefit from.

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- (d) The proceedings in relation to EquitiLink's allegations remain although Aliquot notes that efforts are being exerted to settle the dispute.
 - (e) Aliquot took advice from experienced, external commercial lawyers in its actions.
20. According to the response of Aliquot and EquitiLink, the reference to "an arrangement" was a reference to the matters referred to above in paragraph 19. EquitiLink submitted that all arrangements were solely between EquitiLink and Aliquot, and did not involve Asset Backed or any agreements in relation to voting shares.
 21. The information received from Aliquot and EquitiLink was consistent with the facts set out in the application.
 22. The information received from Aliquot and EquitiLink supported the Panel's preliminary view that Aliquot was entitled to appoint nominees of a large shareholder to its board. That information did not support any inference of a breach of section 606 of the Act or of the principles set out in section 602 of the Act.
 23. The Panel considers that the application does not disclose matters that come within the Panel's area of concern and that having regard to the nature of the issues raised in the application it is not appropriate for the Panel to commence proceedings. The events narrated in the application do not disclose any transaction in relation to shares in Aliquot, or in relation to the control of Aliquot. The more detailed account that the Panel received from Aliquot and EquitiLink does not support an inference that such a transaction underlay these events. The application provides no evidence of the unacceptable circumstances it alleges, and provides no basis for considering that any such evidence will be obtainable.

Decision

24. The Panel declined to conduct proceedings on the application before it.
25. The Panel consented to the parties being represented by their commercial solicitors.

Peter Cameron

Sitting President

16 May 2003