



**In the matter of Forest Place Group Limited  
[2004] ATP 03**

**Catchwords:**

*Pre-bid agreement – payment for termination of contracts with directors – collateral benefit – experts report regarding value of contracts – insufficient support for conclusion of unacceptable circumstances – termination of proceedings*

*Corporations Act 2001 (Cth), sections 623, 657A, 657C, 657D, 657E*

**On 12 February 2003, the Panel issued the following Media Release concerning an application in relation to the affairs of Forest Place Group Limited. The Panel will not be publishing additional reasons in relation to this matter.**

## **THE PROCEEDINGS**

1. The Panel has considered the application (**Application**) from Peter Joseph O’Shea and John Patrick O’Shea (the **Applicants**) dated 7 January 2004 alleging unacceptable circumstances in relation to the affairs of Forest Place Group Limited (**FPG**).

## **APPLICATION**

2. The Applicants are shareholders in FPG. The Applicants allege that unacceptable circumstances arise as a result of entry by two of the directors of FPG, Francis Withey and Raymond Munro (the **Directors**), into a pre-bid agreement (**Pre-bid Agreement**) with FKP Limited (**FKP**) on 7 November 2003.
3. The Pre-bid Agreement provides for FKP to make a takeover offer for all of the issued capital of FPG. This bid was made under offers dated 4 December 2003 for a consideration of 50 cents per share.
4. Subject to FKP’s bid becoming unconditional and FKP obtaining a relevant interest in more than 50% of the shares in FPG, the Pre-bid Agreement also provides for FKP to make payments to companies controlled by the Directors in consideration of the termination of a marketing agreement and a design and construction agreement with FPG (**Existing Agreements**) and the assignment of rights under certain related agreements.
5. On 22 December 2003, FKP declared its offer unconditional. At the time of declaring its offer unconditional, FKP also announced that all acceptances received on or before 31 December 2003 would be paid by 20 January 2004.
6. The Applicants sought orders that:
  - the parties to the Pre-bid Agreement be prevented from performing the requirement of that agreement that provides for the termination of the Existing Agreements and monetary consideration for the termination of those agreements; and

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- the consideration under FKP's bid be increased to take account of the amounts paid under the Pre-bid Agreement, which the Applicants put at 4 cents per share.
7. The Panel considered that the materials provided with the Application did not allow it to conclude that the termination payments did, or did not, involve a collateral benefit in contravention of section 623 of the Corporations Act 2001 (*Cth*) (**Act**).
  8. The Panel agreed to commence proceedings in relation to the application on the basis of assurances from the Applicants that they would provide additional evidence supporting the Application concerning the Pre-bid Agreement. The additional information received by the Panel was the report (**Report**) of an expert, retained by the Applicants, regarding the present values of the Existing Agreements based on information provided by all interested parties. The Panel thanks the expert for his thorough and informative analysis and thanks the parties for their co-operation in providing information to the expert in a timely and comprehensive manner. All parties were given an opportunity to review the Report and make submissions regarding any factual inaccuracies contained in the Report.
  9. The expert concluded in the Report that, having regard to the limited contractual rights to terminate the Existing Agreements, the amounts payable under the Pre-bid Agreement for the termination of the Existing Agreements fairly represent the present value of those agreements. The Panel has, therefore, decided that neither the Report nor any other information it has been given supports a conclusion that the amounts payable under the Pre-bid Agreement for the termination of the Existing Agreements involve impermissible collateral benefits.

## DECISION

10. Accordingly, the Sitting Panel has terminated proceedings on the Application and dismisses the Application on the basis that there was no prospect that it would regard the circumstances identified in the Application as being unacceptable.

## INTERIM ORDERS

11. Given the proceedings before the Panel, FKP sought an interim order to defer making acceptance payments until further order of the Panel. In order to preserve the existing circumstances while the Application was considered, the Panel made interim orders on 20 January 2004 restraining FKP from giving effect to the relevant clause of the Pre-bid Agreement and from paying consideration or transferring shares under the contracts arising from acceptances under the bid while the proceedings continued.
12. The Panel considered any prejudice to shareholders resulting from the interim orders to be reasonable, since the orders preserved the status quo and the scope for the Panel to make any final orders required by the circumstances and the proceedings concerned a possible benefit to shareholders (other than the Directors) through an increase in the bid consideration.
13. As the sitting Panel has now determined proceedings in relation to the Application, the Interim Orders cease to have effect as of the date of this release in accordance

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with section 657E(2) of the Act. The parties are therefore required to comply with the contractual obligations under the bid and the Pre-Bid Agreement.

14. The Panel received an application seeking alternate interim orders. The Panel declines to make alternate interim orders, on the basis that the original interim orders have now ceased to have effect.
15. The sitting Panel is Alison Lansley (sitting President), Elizabeth Alexander (deputy President) and Celia Searle.

**Alison Lansley**

**President of the Sitting Panel**

**Decision dated 12 February 2004**

**Reasons published 25 February 2004**