



In the matter of Kaefer Technologies Limited 02

[2004] ATP 16

Catchwords:

Voluntary administration – sale of assets by administrator – shareholder approval – jurisdiction of Panel – Panel declining to commence proceedings

*Corporations Act 2001 (Cth), section 208(1), 436A and 657A(2)
ASX Listing Rules, rule 10.1*

Kaefer Technologies Limited [2004] ATP 8

On 21 July 2004, the Panel issued a Media Release concerning an application in relation to the affairs of Kaefer Technologies Limited announcing its decision to decline to commence proceedings.

THE PROCEEDINGS

1. The Takeovers Panel (the **Panel**) has considered the application (the **Application**) by Gerald Francis Pauley and Gordon Bradley Elkington (the **Applicants**) dated 12 July 2004 alleging unacceptable circumstances in relation to the affairs of Kaefer Technologies Limited (Administrators appointed) (**KAE**). The Panel has decided not to commence proceedings in relation to the Application.

BACKGROUND

Parties and alleged unacceptable circumstances

2. KAE is a company listed on the official list of Australian Stock Exchange Limited (**ASX**). Its principal activities include the manufacture and installation of insulation products and the provision of engineering services, for mining and industrial services. On 22 April 2004, the directors of KAE appointed voluntary administrators (the Administrators) under section 436A of the *Corporations Act 2001* (Cth).¹
3. The Applicants, who are shareholders of KAE, alleged that unacceptable circumstances arose because:
 - (a) the Administrators proposed to sell the assets of KAE and its subsidiaries to Kaefer Isoliertechnik GmbH & Co KG (**KG**), a major shareholder of KAE; and
 - (b) the proposed sale (and the contractual terms of the proposed sale) by the Administrators of the assets of KAE and its subsidiaries to KG would be finalised without shareholder approval in contravention of Rule 10.1 of the ASX

¹ All statutory references are to the *Corporations Act 2001* (Cth), unless otherwise indicated.

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Listing Rules and section 208(1) thereby denying shareholders of their voting rights in respect of approving the proposed sale.

Orders sought

4. The Applicants sought an order from the Panel that any substantial sale of assets from KAE to KG be subject to the approval of shareholders other than KG, and that no such sale be executed or implemented until such approval has been given.

DISCUSSION

5. Mr Pauley (one of the Applicants) is a member of the committee of creditors in relation to the administration of KAE. Mr Pauley was informed in a briefing paper issued before the last meeting of that committee (9 July 2004) that the Administrators were at an advanced stage in negotiations with an interested party for the sale of the assets of KAE and its subsidiaries which was expected to be finalised shortly. The Applicants were concerned that the sale would proceed at a price which would provide no return to shareholders (although a price might be obtained for the listed shell in a subsequent transaction). The Applicants believed that the assets were to be sold to KG. In addition, the briefing paper indicated that the relevant terms of the sale agreement would be announced to ASX upon the agreement being finalised.
6. In their Application, the Applicants drew the Panel's attention to the possibility that Listing Rule 10.1 of the ASX Listing Rules and section 208(1) (both dealing with related party transactions) may apply to the transaction. The Applicants asserted that the Panel should intervene to enforce Listing Rule 10.1 and section 208(1) because the transaction would have the effect of a takeover without any offer being made to shareholders or other shareholder participation. If the sale were to proceed, the Applicants alleged that this would result in a transfer of assets of KAE to a related party at a price substantially below the independent valuation of KAE and in contravention of Listing Rule 10.1 and section 208(1).
7. Subsequent to the Application being made, the Panel noted that an announcement was made by KAE to ASX on 15 July 2004 stating that a sale agreement had been finalised whereby, among other things:
 - (a) Kaefer Integrated Services Pty Ltd (**KIS**) (a wholly owned subsidiary of KAE) would acquire KAE's patents, plant and equipment and current assets; and
 - (b) KG would acquire KAE's shares in KIS.
8. Upon considering the Application and preliminary submissions provided by the Applicants, KAE and KG, the Panel decided not to commence proceedings. The Panel makes the following comments:
 - (a) The materials provided to the Panel did not identify any circumstances relating to KAE that were unacceptable as a result of their effect on an acquisition or proposed acquisition by a person of a substantial interest in KAE as that concept is used in Chapter 6 (ie. a substantial interest in voting securities of KAE), or of their effect on the control or potential control of KAE in the sense used in Chapter 6 (ie. control as conferred by control over voting securities), or because they gave rise to a contravention of the takeover provisions.

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- (b) The Panel’s jurisdiction does not extend to regulating the affairs of companies in administration or conduct of company administrators under Part 5.3A. Any alleged impropriety in the conduct of a company administration is a matter for ASIC and/or the courts. Such an action may be brought by ASIC, in its discretion, or by disaffected shareholders or creditors.
- (c) The Panel considers that it may intervene in an administration under Part 5.3A if the administration was a device to allow parties to attain a goal relating to control through voting power without a bid, scheme of arrangement, substantial acquisition or other transaction involving shareholder participation. In such circumstances, it would be open to the Panel to require the parties to seek to attain their goals in ways which did not exclude the shareholders. The Panel previously decided that this was not case in this situation.² Nothing which has been submitted subsequently by the Applicants caused the Panel to take a different view in the context of the Application.

DECISION

- 9. Accordingly, the Panel decided not to commence proceedings in relation to the Application under Regulation 20 of the ASIC Regulations.
- 10. The sitting Panel was Andrew Lumsden (sitting President), Norman O’Byrne SC (deputy President) and Robyn Ahern.

Andrew Lumsden
President of the Sitting Panel
Decision dated 21 July 2004
Reasons published 30 July 2004

² See *Kaefer Technologies Limited* [2004] ATP 8.