



In the matter of Golden Circle Limited 02

[2007] ATP 24

Catchwords:

Notice of meeting – shareholder approval of proposal – change to constitution – convertible notes – adequacy of disclosure – commercial detriment of delay – decline to commence proceedings – delay in bringing application – timeliness

Corporations Act 2001 – sections 602(b)(iii), 657A(2)(a), 657A(2)(b)

Golden Circle Limited – Merim Pty Ltd – Anchorage Capital Partners – Coca Cola Amatil Ltd – Pure & Natural Beverages

INTRODUCTION

1. The Panel, Guy Alexander (President), Teresa Handicott and Chris Photakis, declined to commence proceedings.
2. In these reasons the following definitions apply.

Term	Meaning
Anchorage	Anchorage Capital Partners Pty Ltd
Anchorage proposal	Proposed recapitalisation and refinancing of Golden Circle by Anchorage, which included the cancellation of certain existing convertible notes and Anchorage subscribing for a 35% shareholding in Golden Circle at \$0.80 per share
Application	application by Merim dated 24 October 2007 concerning the affairs of Golden Circle
CCA	Coca Cola Amatil Ltd, through its subsidiary SPC Ardmona Ltd
Golden Circle	Golden Circle Limited
Merim	Merim Pty Ltd
P & N proposal	A conditional takeover proposal from Pure & Natural for all of the shares in Golden Circle at \$1.05 per share
Pure & Natural	A consortium of a PE firm and Pure & Natural Beverages
Shareholder meeting	Shareholders' meeting convened by Golden Circle for 29 October 2007 to seek approval for the Anchorage proposal

3. In these proceedings the Panel :
 - (a) adopted the published procedural rules and
 - (b) consented to parties being represented by their commercial lawyers.

DISCUSSION

Facts

4. Golden Circle operates a financial market in its ordinary shares in accordance with an Australian Market Licence (Golden Circle Limited) 2004 granted on 17 August 2004 under the Act.¹ Golden Circle's constitution contains restrictions on registration of shares to non-growers.
5. On 1 April 2005, Golden Circle shareholders approved the issue of convertible notes to B&B Golden Circle Holdings Pty Ltd and Babcock & Brown Direct Investment Fund Limited, after amending the constitution to allow for the conversion of the notes. The notes were for a minimum term of 3 years, with a right to redeem on an Event of Default, or at the company's option after the 3 years. They carried a right to convert (among other things) if there was an Event of Default or the company sought to redeem them.
6. On 10 September 2007, Golden Circle informed shareholders that the Board unanimously recommended the Anchorage proposal, under which (among other things):
 - (a) Anchorage would acquire all the convertible notes (and options)
 - (b) Golden Circle would redeem all but one of the notes early, at a discount, and certain options would be cancelled
 - (c) Anchorage would subscribe for shares equivalent to 35% of the capital of Golden Circle at \$0.80 per share and
 - (d) GE Commercial Finance would provide a debt facility to Golden Circle.
7. On 26 September 2007, Golden Circle informed shareholders that it had received a conditional offer by CCA for all the shares in Golden Circle. The offer was subsequently revised twice.² The offer in final form was, subject to conditions, for all the shares at \$1.00 per share.
8. On 4 October 2007, Golden Circle convened a shareholders' meeting for 29 October 2007 to seek approval of the Anchorage proposal. The explanatory statement discussed the CCA proposal and informed shareholders that the board had rejected the CCA proposal. The explanatory statement was accompanied by an independent expert's report by Ernst & Young Transaction Advisory Services Limited.
9. On 23 October 2007, Golden Circle informed shareholders that it had received the P&N proposal, and the second revision of the CCA proposal, each of which the board had rejected.

¹ Unless otherwise indicated, references in these reasons are to the Corporations Act 2001 (Cth).

² On 4 October and 18 October 2007.

Takeovers Panel

Reasons for Decision – Golden Circle Limited 02

Application

10. Merim, a 'holder' of 6% of Golden Circle's ordinary shares³, submitted in its application that Golden Circle:
 - (a) had not provided shareholders with sufficient information on the comparative advantages and disadvantages of the CCA and P & N proposals compared to the Anchorage proposal and
 - (b) was, in effect, seeking to amend its constitution without a special resolution of shareholders.
11. Merim sought final orders that :
 - (a) the meeting be postponed to enable full and proper disclosure and
 - (b) the business of the meeting be amended to include a special resolution to amend the constitution.
12. Merim sought interim orders delaying the meeting and, until the application was decided, preventing any action that may have resulted in Anchorage acquiring a relevant interest in any Golden Circle voting shares it did not already have a relevant interest in.

Decision

13. The Panel considered that the Notice of Meeting should have included more information about the comparative advantages and disadvantages of the Anchorage proposal and the CCA proposal, and the directors' reasons for considering that the Anchorage proposal was superior.
14. However, the Panel took into account a number of factors which suggested that no action should be taken to delay the meeting:
 - (a) Shareholders had been aware of the essential terms of the CCA proposal since receipt of the 4 October explanatory statement, had been provided with copies of the correspondence with CCA in the explanatory statement, and had updates by way of announcements and correspondence from Golden Circle on 22 and 23 October 2007.
 - (b) It appeared that shareholders had been made aware of the terms of the P&N proposal as soon as practicable.
 - (c) The Panel sought information about whether any shareholders had queried, or complained to, the company about the proposals or about the level of information provided. It was informed that no shareholders, other than Merim, had contacted Golden Circle except to support the board's endorsement of the Anchorage proposal.
 - (d) The application by Merim had been made late in the notice period for the meeting, some 3 weeks after the date of the notice and 5 days before the

³ On 18 May 2007, Merim had made an offer under Division 5A of Part 7.9 and received acceptances from shareholders holding approximately 6% of Golden Circle's shares. It cannot be registered due to a restriction in the Golden Circle constitution, but holds irrevocable power of attorney to exercise the voting rights attaching to the shares.

Takeovers Panel

Reasons for Decision – Golden Circle Limited 02

meeting was due to be held. In deciding whether to commence proceedings, the Panel (among other things) weighs up the possible prejudice to each of the parties affected by any action it might take. When an application is made late in a process, the prejudice to one or other party is likely to be greater and the Panel requires more cogent reason to intervene.

- (e) Golden Circle submitted that there was a material risk that the Anchorage proposal might terminate if the meeting was postponed.
 - (f) The Panel considered there was enough time to get additional information to shareholders who attend the meeting. While it would be too late for proxies to be changed,⁴ it regarded the information deficiencies in this case as not so severe that the meeting should be delayed in all the circumstances.
15. Therefore, the Panel indicated to the parties that it was minded to commence proceedings, but would not if Golden Circle made additional disclosure concerning the comparative merits of the proposals and the board's reasons for recommending the Anchorage proposal over the two alternative proposals.
16. Golden Circle agreed to:
- (a) e-mail a letter⁵ updating shareholders on the matters in paragraph 15
 - (b) post the update on its website for shareholders on 26 October 2007 (ie, the next day) and
 - (c) make the update available at the meeting on 29 October 2007.
17. The Panel decided it would not commence proceedings in respect of the claim concerning amendment of the constitution. It considered this a question of legal construction more appropriately dealt with through the courts if Merim wished to pursue this course of action.
18. In light of the above, the Panel decided not to commence proceedings.

Guy Alexander

President of the Sitting Panel

Date of decision 29 October 2007

Date reasons published 28 November 2007

⁴ Under the constitution, proxies had to be received 2 clear business days before the time for the meeting: cl 12.9.

⁵ By email to shareholders on its emailing list.