



**In the matter of Golden West Resources Limited 04R**

**[2008] ATP 2**

**Catchwords:**

*Mistake – substantial interest – unauthorised acceptance – misleading conduct – reversal of acceptance – mistaken belief – market impression – uninformed market – substantial holder notices – beneficial owner – shares accepted under terms of pledge – interim orders – postponing general meeting – market effect – period of time – intentions of shareholder*

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

*Pinnacle VRB Limited (No. 10) [2001] ATP*

*Pinnacle VRB Limited (No. 11) [2001] ATP*

**INTRODUCTION**

1. The review Panel, Irene Lee, Simon McKeon (President) and Norman O’Bryan, declined to make a declaration of unacceptable circumstances.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Initial Application	application by Falak dated 31 January 2008 concerning the affairs of GWR (Golden West Resources Limited 04)
Review Application	Application by Falak dated 14 February 2008 for review of the initial Panel’s decision in Golden West Resources Limited 04
Disputed Acceptance	the acceptance on 7 January 2008 of 7,500,000 shares registered in the name of ANZ Nominees Limited, as sub-custodian for Falak, representing approximately 7.12% of GWR’s total issued capital
Fairstar	Fairstar Resources Limited
Falak	Falak Holding LLC
Falak shares	7,500,000 GWR shares beneficially owned by Falak that were held by ANZ Nominees Limited as sub-custodian
Fortis	Fortis Banque Luxembourg SA
GWR	Golden West Resources Limited
Offer	off-market scrip takeover bid for all of the ordinary shares in GWR dated 15 October 2007

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

4. GWR sought a review of the initial Panel's decision by application dated 13 February 2008. That review was based on Falak having made a last and final statement regarding its non-acceptance of the Offer. It subsequently sought and obtained the consent of the review Panel to withdraw that application. As a consequence, the review related only to whether unacceptable circumstances existed by reason of the Disputed Acceptance being a mistake (pursuant to Falak's applications) and whether the market had been misled as a result of the mistake.

## DISCUSSION

### Facts

5. On 4 September 2007 Fairstar announced its intention to make the Offer. The Offer was 5 Fairstar shares for each GWR share. GWR's independent bid committee subsequently recommended that GWR shareholders reject the Offer.
6. On 7 November 2007 Falak gave a written undertaking to GWR not to accept the Offer. The undertaking was conditional on, among other things, the consideration not being varied.
7. By announcements dated 15, 20, and 27 November 2007 GWR announced that it had written commitments from shareholders that they would reject the Offer. On 3 December 2007 a further announcement was made by GWR (dated 30 November 2007) which included a statement to the effect that irrevocable notices undertaking to reject the offer had been received.
8. Falak was identified in three of the announcements.
9. On 11 December 2007 Fairstar increased its Offer to 7 Fairstar shares for each GWR share.
10. On the same date, Falak orally advised GWR's advisers that it would not accept the Fairstar offer as increased. This was not communicated to the market.
11. The Falak shares, representing approximately 7.12% of Fairstar<sup>1</sup>, were pledged to Fortis as security for a loan. The pledge agreement provided that it was governed by the legislation of the Grand Duchy of Luxembourg. The general terms and conditions applicable to the pledge agreement provided (cl 23):

*"Unless otherwise instructed, the Bank automatically carries out the usual administrative tasks and corporate actions on the basis of the publications and the sources of information at its disposal.*

*The customer is responsible for taking every measure necessary to preserve the rights attached to the deposited financial instruments, in particular the giving of instructions for the execution of conversions, the exercise or the purchase or sale of subscription rights and the exercise of option or conversion rights. In the absence of instructions from the customer within the prescribed time, the Bank is entitled, but not obliged, to act according to its own judgement, provided the customer's account contains sufficient funds."*

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<sup>1</sup> At 25 January 2008 issued share capital of 105,336,513 shares.

12. On 17 December 2007, Fortis' Luxembourg office sent a facsimile to Fortis' Dubai office advising of the Offer and asking for instructions whether to accept the Offer. The facsimile stated that in the absence of a response by 7 January 2008 it would take the default action, being to accept the Offer. No response was received by that date, nor was there any evidence before the review Panel that the request for instructions had been sent to Falak.
13. On 21 December 2007 Falak requisitioned a general meeting of GWR under section 249D of the Corporations Act. It sought to remove some of the board and have one of its nominees elected. The meeting was called by GWR for 8 February 2008. It was postponed to 21 February 2008 pursuant to the review Panel's interim orders.<sup>2</sup>
14. On 7 January 2008 Fortis' Luxembourg office gave instructions to ANZ Nominees to accept the Falak shares into the Offer.
15. On 8 January 2008 Falak instructed Fortis' Dubai branch to vote in relation to the meeting. Fortis' Dubai branch communicated this to Fortis' Luxembourg branch on the same day.
16. On 9 January 2008 Fairstar through its registry processed the Offer and issued Fairstar shares to ANZ Nominees Limited as custodian as consideration under the Offer.
17. On 11 January 2008, Fairstar announced to ASX by Form 604 that acceptances had been received for 8,905,129 GWR shares and an increase in Fairstar's relevant interests in GWR shares from 25.806% to 33.974%.
18. On 18 January 2008 Falak contacted Fortis regarding the lodgement of a proxy in respect of the Falak shares for the GWR general meeting. Fortis' Dubai branch emailed to Falak a notice from Fortis' Luxembourg branch advising of the proxy lodgement procedure. The email also indicated there had been a "share conversion" issue, which turned out to be a reference to the Offer and the Disputed Acceptance.
19. On 21 January 2008 a copy of the facsimile referred to in paragraph 12 was given to Falak. This was the first occasion that Falak had received a copy of that facsimile. Falak then contacted Fairstar to seek a reversal of the Disputed Acceptance. Fairstar refused to reverse it.

### *Post-script*

20. On 21 February 2008, after the review Panel's decision, GWR announced that based on proxies received in relation to the general meeting, *"even if [Falak] had been successful in reversing [the Disputed Acceptance] the proxy numbers would still have been against all resolutions."* The announcement stated that the resolutions in the notice of meeting were not proposed by Falak or any other shareholder and the resolutions to remove GWR directors were not put to the meeting.

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<sup>2</sup> The initial Panel postponed the general meeting to 19 February 2008 pursuant to interim orders dated 1 February 2008.

**Interim orders**

21. Falak sought interim orders on the same terms as those made by the initial Panel, as well as an order that GWR postpone the general meeting to 21 February 2008. Interim orders were made in these terms on 15 February 2008.

**Final orders sought**

22. Falak sought final orders to the effect that the Disputed Acceptance be reversed.

**Application**

23. In the Initial Application, Falak sought a declaration of unacceptable circumstances on the basis that the Disputed Acceptance was a mistake and the unauthorised transfer of the Falak shares gave rise to unacceptable circumstances having regard to the effect on:
- (a) the control, or potential control of GWR; and
  - (b) the acquisition of a substantial interest in GWR.
24. The mistake identified by Falak was the action by Fortis in instructing ANZ Nominees Limited to accept the Offer in the belief that instructions had been sought and not received from Falak, when in fact the request for instructions had never been delivered to Falak. The previous course of dealings between the parties has established, according to Falak, a pattern of communication between it and Fortis' Dubai branch in respect of any required instructions.
25. Falak submitted that the reasoning in *Pinnacle VRB Limited (No 10)*<sup>3</sup> and *(No 11)*<sup>4</sup> applied squarely to the present circumstances. It submitted that delivery of the Disputed Acceptance was unauthorised and the result of a back office error.
26. Grounds of review, although a hearing *de novo*, were that GWR shareholders have been significantly affected and the capacity of Fairstar to influence the outcome of the upcoming general meeting was greatly increased, and that the actions of the parties warranted intervention in the same way as in *Pinnacle (No. 10)* and *(No. 11)*.

*Review application*

27. The Panel treats applications for review as hearings *de novo*: Guidance Note 2, paragraph 2.24. The review Panel reconsidered the matter on its merits on the facts as they stood at the time of the review. The review Panel considered:
- (a) the Initial Application, submissions and rebuttals;
  - (b) the Review Application, further submissions and rebuttals; and
  - (c) the reasons for decision of the initial Panel.

*Mistake - Pinnacle (No. 10) and (No. 11)*

28. Falak submitted that Fortis' error lay in failing to send a request for instructions to Falak as beneficial owner and accordingly not receiving instructions from Falak. In *Pinnacle (No. 10)* and *(No. 11)* a broker's clerk misinterpreted a series of ticks against

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<sup>3</sup> [2001] ATP 21a

<sup>4</sup> [2001] ATP 23. *Pinnacle (No. 11)* was the review of *Pinnacle (No. 10)*.

client names as instructions to accept an offer. Falak submitted that there was no relevant distinction between an unauthorised action in its case and the mistake in *Pinnacle (No. 10)* and *(No. 11)*.

29. The review Panel accepts (as did the initial Panel) that unwinding legally sound contracts is not a step to be taken lightly, although if there have been unacceptable circumstances it may be appropriate to do so and the Panel has power to do so.<sup>5</sup> In this respect the review Panel did not agree with Fairstar's submission to the initial Panel that a transaction involving a bona fide purchaser for value without notice should not, for that reason, be reversed. However the review Panel considered that to unwind such a transaction, except in the clearest circumstances, would introduce uncertainty into the Australian securities markets that would be detrimental to all market participants.
30. The review Panel considered that *Pinnacle (No. 10)* and *Pinnacle (No. 11)*, whilst correct, were decisions based on extraordinary circumstances which were not replicated in this case.
31. The review Panel considered the material that was before the initial Panel and the further material put before the review Panel and was not satisfied that the facts before it were sufficiently clear about the alleged mistake. Falak did not provide evidence concerning Fortis' position. Falak did provide evidence of the contractual arrangements concerning the pledge and how the Disputed Acceptance occurred, but while there was some evidence concerning steps taken by Falak before and after the alleged mistake, details of discussions between the two parties about the alleged mistake were not provided. It appeared to the Panel, without it having available expert evidence of how the agreement might be interpreted under Luxembourg law, that the agreement allowed Fortis to take certain actions without reference to Falak.
32. The review Panel would have expected Falak to produce cogent evidence that there was a mistake. Falak or Fortis would have to put such material before the Panel to establish facts similar to *Pinnacle (No. 10)* and *Pinnacle (No. 11)*. In *Pinnacle (No. 10)* and *Pinnacle (No. 11)*, there was clear evidence from the broker that it had made a mistake. The review Panel received no evidence of the view taken by Fortis. It also received no evidence of Falak's complaints or otherwise to Fortis.
33. The review Panel agreed with the decision of the initial Panel and did not consider that Fairstar had acted unreasonably in processing the Disputed Acceptance. Falak submitted that Fairstar had not responded to the Panel's brief regarding other examples of acceptances, and that an adverse inference should be drawn. Fairstar produced evidence to the initial Panel and further evidence to the review Panel to the effect that Disputed Acceptance was processed by its registry in the normal course of events. The review Panel did not agree with Falak's submission and did not draw any inference that the processing was "expeditious" for the purposes of making it more difficult to reverse the Disputed Acceptance. This also was a difference to *Pinnacle (No. 10)* and *Pinnacle (No. 11)*.

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<sup>5</sup> *Pinnacle (No. 10)* at para 30; *Pinnacle (No. 11)* at para 28.

*Misinformed market*

34. In the Initial Application, Falak submitted that if the Disputed Acceptance was not reversed, the result would be that GWR shareholders would have been misled by the actions of Falak and by GWR indicating that Falak would not accept the Offer. While the market may have drawn an inference from Falak's prior conduct that it was unlikely to accept the Offer, the review Panel considered that the market would have understood that Falak was free to do so.
35. Falak also submitted that the market had been misled because it was given the impression that a substantial holder of GWR had made a commercial decision to accept the Offer and that such an impression would be false because the acceptance was the result of a communications error. The review Panel did not consider that an impression in the market (if there was one) that a substantial holder had made a commercial decision to accept the Offer would give rise to unacceptable circumstances in this case. The review Panel also noted that there was not a large increase in acceptances of the Offer following Fairstar's announcement on 11 January 2008 that acceptances had been received increasing its relevant interests in GWR shares from 25.806% to 33.974%.
36. The review Panel noted ASIC's submissions that, in the absence of an adverse effect, the Panel should leave an unintended acceptance to the remedies the former holder might pursue against its agent or nominee.

**Decision**

37. The review Panel considered in the circumstances and for the reasons set out above, it should not make a declaration of unacceptable circumstances.

**Simon McKeon**

**President of the Panel**

**Date of decision: 20 February 2008**

**Date reasons published: 3 March 2008**