



In the Matter of GoldLink IncomePlus Limited 02

[2008] ATP 19

Catchwords:

Proportional takeover bid - escalator agreement - minimum bid price rule - deficiencies in disclosure - decline to commence proceedings - no likelihood of unacceptable circumstances - remedied circumstances - amended agreement

GoldLink IncomePlus Limited - Emerald Capital Limited

Corporations Act 2001 - 602, 621(3), 622, 657A, 657C, 657D, 657E

INTRODUCTION

1. The Panel, Elizabeth Alexander (sitting President), Andrew Lumsden and Robert Johanson, declined to conduct proceedings because there was no reasonable prospect that it would make a declaration of unacceptable circumstances. The circumstances complained of had been remedied by amending the share sale agreement and further disclosure in the bidder's statement.
2. In these reasons the following definitions apply.

Term	Meaning
Emerald	Emerald Capital Limited (formerly New Opportunity Limited)
GoldLink	GoldLink IncomePlus Limited
Challenger	Challenger Managed Investments Limited

DISCUSSION

Facts

3. GoldLink is a public company listed on the ASX (ASX code: GLI). GoldLink is the subject of a proportional off-market takeover bid by Emerald to acquire 45% of each shareholder's shares at \$0.23 per share.
4. On 18 April 2008, Emerald and Challenger entered into a share sale agreement, under which Emerald acquired a relevant interest in 16,127,843 GoldLink shares at \$0.21 per share. Clause 3.2 of the share sale agreement provided for an increase in the purchase price to \$0.26 or \$0.235 per share, where certain conditions were satisfied on or prior to 15 October 2008 or 15 December 2008 respectively. However, in the event of a takeover being made by Emerald, clause 3.3 of the agreement capped any increase in the purchase price so that it did not exceed the consideration under the takeover bid.¹
5. On 27 June 2008, GoldLink wrote to Emerald, raising concerns about the operation of clauses 3.2 and 3.3 of the share sale agreement. GoldLink alleged that clause 3.3 of

¹ A copy of the original share sale agreement was attached to the substantial holding notice of Emerald dated 21 April 2008.

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the share sale agreement was void under s622 of the Corporations Act and, therefore, GoldLink would be required to increase its bid price to either \$0.26 or \$0.235 per share if that increased consideration became payable under the share sale agreement.

6. On 29 June 2008, Emerald responded that the share sale agreement had been varied and referred to section 7.3(b) of the bidder's statement, which provided that under the terms of the share sale agreement (as varied), the purchase price could only be increased by \$0.02 per share to \$0.23 (being the same price offered under Emerald's takeover bid), in the event that either:
 - (a) Emerald obtained board control of GoldLink on or prior to 15 December 2008 or
 - (b) the board of directors of GoldLink approved the proposal that had been put forward by Emerald for GoldLink to remain as an alternative investment company.
7. It appeared that Emerald and Challenger had agreed to amend the share sale agreement on 18 June 2008, being the date Emerald announced its bid for GoldLink.

Application

8. By application dated 9 July 2008, GoldLink submitted that the conduct of Emerald constituted unacceptable circumstances on the basis that:
 - (a) clause 3.3 was an escalator provision and, therefore, void under s622 of the Corporations Act.² Accordingly, the consideration offered under the takeover bid did not satisfy the minimum bid price rule in s621(3), as Emerald had failed to offer the same consideration under the bid as it had agreed to pay under the share sale agreement. As an extension of this argument, GoldLink submitted that s621(5) was not applicable. Emerald's subsequent amendments to the share sale agreement did not change this and were merely an attempt to circumvent the operation of the minimum bid price rule and
 - (b) Emerald failed to disclose in the bidder's statement full details of the share sale agreement, the changes to that agreement and the circumstances leading to those changes.

Interim Orders

9. GoldLink sought an interim order that Emerald provide GoldLink with:
 - (a) copies of all agreements, arrangements and understandings relating to the share sale agreement
 - (b) an explanation of the circumstances leading up to the variation of the share sale agreement and
 - (c) a statement regarding whether Challenger was aware that clause 3.3 of the original share sale agreement was void under s622 and the effect this had on clause 3.2 when it agreed to its variation.

Final Orders

10. GoldLink sought final orders that Emerald be required to disclose in its bidder's statement:

² Unless otherwise indicated, references in these reasons are to the *Corporations Act 2001* (Cth)

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- (a) full details of the share sale agreement and the changes to the agreement, including the circumstances leading to those changes and
- (b) statements to the effect that the consideration under the takeover bid will be increased in accordance with the terms of the share sale agreement as originally executed.

DECISION

Minimum Bid Price Rule

11. Even if a contravention of s621(3) may have occurred (which the Panel did not need to consider), the Panel considered that it was unlikely to make a declaration of unacceptable circumstances in this case. In the Panel's view, the amendments made to the share sale agreement had the effect that Challenger would not receive consideration additional to that offered to GoldLink shareholders under the takeover bid. In the circumstances, it was difficult to see how the "equality principle" in s602 was offended, as no GoldLink shareholder that accepted the bid would receive less consideration than Challenger.
12. Further, the Panel was not persuaded that, as GoldLink submitted, Emerald's amendments to the share sale agreement were an attempt to circumvent the operation of the minimum bid price rule. In the Panel's view, there was no evidence to suggest that Emerald had such an intention.

Disclosure

13. GoldLink submitted that Emerald failed to disclose full details of the share sale agreement, the changes to that agreement and the circumstances leading to those changes in its bidder's statement. In particular, GoldLink submitted that due to the significant amendments made to the share sale agreement and the requirements of ss636(1)(h) and (i), such information was material to GoldLink shareholders in determining whether to accept the takeover offer.
14. The Panel is aware that Emerald prepared supplementary disclosure following correspondence between the parties. The Panel reviewed the supplementary disclosure concerning this issue and was satisfied that the changes provided sufficient details of the original share sale agreement and the amendments to it.
15. The Panel was not persuaded that the circumstances leading to the amendments to the share sale agreement should also be disclosed in the bidder's statement. In its view, Emerald's proposed amendments were sufficient.

Conclusion

16. For the above reasons, the Panel concluded there was no reasonable prospect that it would make a declaration of unacceptable circumstances if it conducted proceedings. Accordingly, the Panel declined to conduct proceedings.

Elizabeth Alexander
President of the Sitting Panel
Decision dated 15 July 2008
Reasons published 16 July 2008