Australian Government
Takeovers Panel

Reasons for Decision

Drillsearch Energy Limited 01

[2009] ATP 10

Catchwords:

Letters to shareholders – private correspondence - primarily a board dispute - decline to conduct proceedings - no reasonable prospect it would declare unacceptable circumstances –clarification by target company – minor transgressions in the context

Corporations Act 2001 (Cth), sections 657C

McKerlie v Drillsearch Energy Ltd [2009] NSWSC 488;

Bell Resources Ltd v BHP Co Ltd [1986] ASC 55-489; (1986) ATPR 40-702

Pinnacle VRB Ltd No 9 [2001] ATP 25

INTRODUCTION

1. The Panel, Guy Alexander, John Fast and Chris Photakis (sitting President), declined to conduct proceedings on an application by Beach in relation to the affairs of Drillsearch. The Panel considered there was no reasonable prospect it would declare unacceptable circumstances, given that Drillsearch had made a clarifying announcement to ASX on 3 June 2009 (after the application was made) and subsequently agreed to dispatch a copy of the announcement.

2. In these reasons, the following definitions apply.

Term	Meaning
Beach	Beach Petroleum Limited
Drillsearch	Drillsearch Energy Limited

FACTS

3. Beach is an ASX listed company (ASX code: BPT). Drillsearch is an ASX listed company (ASX code: DLS).

4. On 5 May 2009, Beach announced an off market scrip takeover bid for Drillsearch Energy Limited.

5. On 15 May 2009, Beach lodged its bidder's statement with ASIC.

6. On 29 May 2009, Beach lodged a supplementary and replacement bidder's statement with ASIC.[1]

7. Also on 29 May 2009, Beach became aware that two documents had been sent to Drillsearch shareholders:

   (a) a letter to shareholders, dated 27 May 2009, from Mr Jim McKerlie, an independent director of Drillsearch. The letter was on Drillsearch stationery,

[1] Not yet dispatched to shareholders.

although it also stated that it was from Mr McKerlie as an independent director; and

(b) an undated message from Mr Philip Kelso, the former managing director of Drillsearch.

8. Both Mr McKerlie's letter and Mr Kelso's message related to the current Drillsearch Board dispute.

9. Mr McKerlie's letter opens: "*Mr B K Choo and I, in our capacity of directors of Drillsearch, and with the support of a large number of shareholders, have called for a General Meeting to remove Messrs Simpson, Wicks and Langusch (the "**Simpson Block**") as directors of the Company. This letter outlines why I took this action.*" The eighth bullet point in the letter says: "*The **bid by Beach is opportunistic** and has come at a share price low point. It is my personal view that the Beach bid has come about, at least in part, because of the disarray at Drillsearch. The Company has lost its way under the Simpson Block and the Beach offer **undervalues the Company's true worth. I believe the removal of the Simpson Block and the removal of the Board instability** it has created is critical to the successful defence of Drillsearch; **you can show Beach you believe in the future of an independent Drillsearch by removing the Simpson Block.***" (original emphasis)

10. Mr Keslo's message, after making a similar point that shareholders should "*Oppose the Beach takeover offer to make sure the Simpson Block (Messrs Simpson, Wicks and Langusch) don't allow the company to be taken over cheaply*", says that there are four steps shareholders must take. The fourth is not to accept the current Beach offer.

11. Resolutions for the removal of all five directors will be considered at an extraordinary general meeting of the company to be held on 10 June 2009. The meeting and the board dispute have been the subject of court proceedings between the parties.[2]

12. On 3 June, 2009, Drillsearch issued a clarifying announcement to the ASX titled "*Clarification with respect to certain shareholder correspondence*". It said that the letter dated 27 June 2009 from Mr McKerlie and the undated message from Mr Kelso were not correspondence from Drillsearch, reflected the personal views of the authors, and did not necessarily set out the views of Drillsearch or other members of the Drillsearch board.

APPLICATION

13. By application dated 1 June 2009, Beach sought a declaration of unacceptable circumstances. It submitted that Mr McKerlie's letter was misleading and deceptive because it created an impression that it was an official communication from Drillsearch and also did not disclose any reasonable basis for:

(a) the statement that he and Mr Choo have "the support of a large number of shareholders"

(b) the statement "Drillsearch is worth considerably more than the Beach offer"

(c) his view that the Beach offer was "opportunistic"

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[2] *McKerlie v Drillsearch Energy Ltd* [2009] NSWSC 488

(d) the statement "the Beach offer undervalues [Drillsearch's] true worth" and

(e) the statement that he "will vigorously defend the Beach takeover".

14. Beach submitted that Mr Kelso's message was misleading and deceptive because it did not disclose any reasonable basis for:

(a) the statement "[his] companies and associates are in the top 10 shareholders of [Drillsearch]"

(b) why the Beach offer should be opposed or not accepted

(c) why the Beach offer is opportunistic and "laughably low"

(d) the statement "[Drillsearch] is a valuable company"

and other statements.

15. Beach submitted that, by making the statements without bases, particularly where shareholders had yet to receive guidance from the target board, the documents gave rise to unacceptable circumstances.

16. Lastly, Beach submitted that Drillsearch should have prevented the letter from Mr McKerlie being sent to Drillsearch shareholders and should have corrected or clarified both documents from Mr McKerlie and Mr Kelso.

17. The effect of these circumstances, Beach submitted, was that there was a deficiency of information, inhibiting an efficient, competitive and informed market in Drillsearch shares, and shareholders did not have the information necessary to make an informed decision.

Orders sought

18. Beach sought final orders, including that:

(a) Mr McKerlie and Mr Kelso send correcting letters to Drillsearch shareholders retracting and apologising for statements made and providing additional information within 48 hours of the Panel making the order

(b) Drillsearch send a letter to all Drillsearch shareholders concerning the documents from Mr McKerlie and Mr Kelso within 48 hours of the Panel making the order and

(c) the authors of the documents provide particulars of the shareholders associated or supporting them (as the case may be) and substantial shareholder notices as required.

DISCUSSION

19. In *Pinnacle VRB Ltd No 9*[3], the Panel said:

> *29. The Panel notes that in takeovers it is preferable that all material information that shareholders may require to make their decision is provided to the market in bidder's and target's statements (whether initial or supplementary) rather than in ad hoc or*

[3] [2001] ATP 25 at [31]

> *piecemeal correspondence so as to minimize the risk of shareholders being misled or confused.*
>
> *30. The Panel considers that information sent to target shareholders should avoid use of emotive or intemperate language.…*
>
> *31. The Panel is also concerned that any person putting information before target shareholders in relation to a takeover offer should take considerable care to ascertain that the facts they assert are correct and can be verified....*

20. We reaffirm the importance of bidders and targets, and persons connected with them, following the well-established procedures for laying information before shareholders during a takeover.

21. The purpose of the letter from Mr McKerlie and the message from Mr Kelso was to detail the alleged past actions of the other faction on the Drillsearch board and to make the case for their removal. The letter from Mr McKerlie included what were, in the context of the letter, minor references to the Beach takeover bid, such as statements that Drillsearch was worth considerably more than the Beach offer, and that the bid had been timed to take advantage of the disarray on the Drillsearch board.

22. The message from Mr Kelso also included statements to the effect that the Drillsearch board issues needed to be resolved in order to properly defend Drillsearch from an undervalued bid.

23. In our opinion, it is reasonably clear that Mr McKerlie's letter was not primarily directed at the Beach bid, but at the current Board dispute. It is now clear that it is a personal view, given the announcement by Drillsearch that the letter from Mr McKerlie was not from the company, even though on a Drillsearch letterhead. We think it is likely that a reasonable shareholder would understand the letter as one from an independent director addressing the behaviour of other directors. Even if a shareholder took away a different understanding, the clarification by Drillsearch has remedied that, although as the documents were sent to shareholders we think it is important that the clarification is also sent to shareholders. Drillsearch has agreed to do this.

24. Having said that, we do not encourage this type of communication about a bid from a director of the target in his personal capacity. The risk of misunderstanding is too high. And, as noted, piecemeal or ad hoc communications increase that risk. We also do not encourage the adoption of context - in this case stationery that looks like company stationery - which increases the risk that shareholders will misunderstand that a communication is official.

25. Mr Kelso's message is even more clearly a personal communication. It is headed "a message to shareholders from Philip Kelso; former managing director of Drillsearch". Again, the references to the Beach bid occur in the context of the board dispute, and would be reasonably understood in that way in our opinion. Indeed, immediately following one of the statements complained of, the following appears:

> *"I would prefer to see Drillsearch remain independent and grow but a properly priced takeover bid from Beach or another player after a Board restructure may be the best option".*

26. Accordingly, in our view, it is likely that a shareholder would understand the message as a personal opinion from someone who knows something of the target company but is no longer connected with it. And again, if a shareholder took away a different understanding, Drillsearch has clarified the position.

27. If the statements went too far, they represent only a small transgression. Certainly that is so in the context of all the communications that have occurred about the bid. Moreover, the target's statement will, in due course, include Mr McKerlie's opinion about the Beach bid. If Mr McKerlie gives a recommendation in the target's statement in relation to the Beach bid, that recommendation will need to be accompanied by detailed reasons for his recommendation.

Conclusion

28. Looking at the documents as a whole we are not satisfied that reasonable shareholders would be likely to be misled about the bid, and even if some might be, the clarification, once sent to shareholders, in our view sufficiently remedies the situation by making it clear that these are personal opinions only.

29. Individuals can provide their own opinions in a bid contest. If they do, they should use temperate language having taken care to ensure the factual accuracy of what they say. We understand the desire for a certain rhetorical flourish in the heat of a contest, but this should not overwhelm the need for solid information on which shareholders can rely.[4] In this case we are not satisfied that flourish has prevailed.

DECISION

30. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the Australian Securities and Investments Commission Regulations 2001 (Cth).

31. Given that we made no declaration of unacceptable circumstances, we make no final orders, including as to costs.

Chris Photakis
President of the Sitting Panel
Decision dated 9 June 2009
Reasons published 10 June 2009

[4] In *Bell Resources Ltd v BHP Co Ltd* [1986] FCA 163 at [21] the Court accepted that the note of optimism in a forecast the subject of a misleading and deceptive claim did not exceed that the opinion was firmly held.