



Australian Government

Takeovers Panel

**Reasons for Decision
Multiplex Prime Property Fund 04
2009 ATP 21**

Catchwords:

Entitlement Offer – Cash out facility - control effect - efficient competitive and informed market - reasonable and equal opportunity to participate in benefits of a proposal – uninformed market – application not timely – prejudice to unit holders – Multiplex Prime Property Fund - Brookfield Multiplex Capital Management – Grocon Investment Management Pty Ltd – decline to conduct proceedings

Corporations Act 2001 (Cth), sections 602, 611, 657A, 657C(2)(d)

ASIC Regulation 21(1)

GN 8 – Matter Procedures

Blue Energy Ltd [2009] ATP 15, International All Sports Ltd 01R [2009] ATP 5, Golden Circle 02 [2007] ATP 24, Magna Pacific (Holdings) Limited 05 [2007] ATP 16, Pinnacle VRB Ltd No 08 [2001] ATP 17

INTRODUCTION

1. The Panel, Stephen Creese, Sophie Mitchell and Ian Ramsay (sitting President) declined to conduct proceedings. The application concerned a 178:1 pro rata Entitlement Offer by Multiplex and a conditional ‘cash-out’ facility for unit holders. The applicant submitted that these amounted to a ‘back door’ takeover of Multiplex, that alternatives had not been explored and that the waiver of a loan to value ratio breach had not been negotiated forcefully enough with Multiplex’s financiers so as to allow Grocon’s alternative to be pursued. The Panel considered that the application was too late, overlapped another proceeding involving the parties and in any event it was unlikely to grant the orders sought by the applicant.

2. In these reasons, the following definitions apply.

Australian Style	Australian Style Investments Pty Ltd
BMCM	Brookfield Multiplex Capital Management Ltd as responsible entity for Multiplex
BMCS	Brookfield Multiplex Capital Securities Ltd as trustee for Brookfield Multiplex PPF Investment No 2 Trust, the underwriter of the Entitlement Offer
Entitlement Offer	a pro-rata offer of 178 units for every unit held at \$0.001 payable on application and a further \$0.02237 payable in June 2011, announced by Multiplex on 24 August 2009 and approved by unit holders on 7 October 2009
Grocon	Grocon Investment Management Pty Ltd
Multiplex	Multiplex Prime Property Fund
Oaktree	Oaktree Capital Management Pte Ltd
GO	The Grocon and Oaktree consortium

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FACTS

3. Multiplex is a listed managed investment scheme (ASX Code: MAFCA). BMCM is the responsible entity for Multiplex. Units in the fund are partly paid with the second instalment of 40 cents due in June 2011.
4. Decisions in respect of the Entitlement Offer were taken by the independent directors of BMCM.
5. On 30 July 2009 Multiplex announced that it was in breach of its loan to value ratio (LVR) covenants with its financiers. The full terms of the loans have not been disclosed to the market.
6. The financiers have waived the breach. The waiver currently applies until 16 November 2009.
7. On 24 August 2009, Multiplex announced an Entitlement Offer of 50,154,148,106 partly paid units to raise \$50.15 million. Of that amount, \$44.7 million will be used to reduce the debt and cure the LVR breach. The balance is mostly taken up in costs and fees.
8. On completion of the Entitlement Offer the amount outstanding on partly paid units will be reduced from 40 cents to 0.2237 cents per unit. Because the offer ratio is 178:1, to maintain the same proportionate holding, a unit holder must pay 17.8 cents to acquire the extra 178 units. The unit holder will then be liable for 0.2237 cents per unit on the increased number of units (ie, there will be 179 units on issue where previously there was one, so the total call due in 2011 is 40.04 cents).
9. The Entitlement Offer included the possibility of a 'cash out' facility under which BMCS would buy units from existing unit holders at 0.1 cent per unit, subject to certain conditions.
10. On 7 October 2009, unit holders approved the making of the Entitlement Offer under the ASX listing rules. The votes of substantial holders were required to be disregarded by ASX.
11. On 8 October 2009, Multiplex released the Entitlement Offer booklet. According to the chairman's letter, "*The Independent Directors have determined that the most appropriate course of action is to raise capital via the Entitlement Offer*".¹
12. Since 30 July 2009, GO has put alternative recapitalisation proposals to BMCM. Negotiations continue in respect of confidentiality and standstill arrangements to cover access to due diligence information and other matters.
13. On 9 October 2009, Multiplex announced to the market that GO had submitted a recapitalisation proposal but it had been rejected as GO had been "*unable to demonstrate that [they have] the support of the Funds existing financiers*" and had not "*been able to procure new sources of debt funding to provide funding certainty*".

¹ Independent Chairman's Letter, page 2 of the Entitlement Offer Offer Booklet dated 7 October 2009

APPLICATION

14. By application dated 15 October 2009, Grocon sought a declaration of unacceptable circumstances in relation to the Entitlement Offer, the cash out facility and the potential control effect that, it submits, will result.
15. It submitted, among other things, that the Entitlement Offer and cash out facility may result in the Brookfield Multiplex Group acquiring control or increasing existing control to more than 90% in circumstances where:
 - (a) the market was not efficient, competitive and informed. This was because BMCM had hindered the efforts of GO putting forward an alternative recapitalisation proposal and
 - (b) not all members of Multiplex have a reasonable and equal opportunity to participate in the benefits accruing to the Brookfield Multiplex Group. This was because unit holders have not had adequately explained to them the Entitlement Offer and its consequences or GO's alternative proposal.
16. Grocon also submitted that alternatives to the Entitlement Offer, including the GO proposal, had not been fully explored or disclosed, so the market for units was misinformed and this was otherwise unacceptable. Further, it submitted that the independent directors of BMCM had not negotiated an extension to the waiver as forcefully as they could have.
17. The application also relies on the grounds stated in the application by Australian Style dated 9 October 2009, namely the Multiplex Prime Property Fund 03 proceeding.²
18. In a preliminary submission, BMCM submitted (among other things) that:
 - (a) Grocon had no standing to make the application as it had not made a bid and was not a unit holder
 - (b) the application amounted to an abuse of process in that it sought to exert commercial pressure on an entity via a "bear hug". It submitted that the Panel was effectively being asked to suspend the Entitlement Offer to strengthen GO's incomplete proposal and
 - (c) the application added nothing to the Multiplex Prime Property Fund 03 proceeding.
19. BMCS made a preliminary submission (among other things) that:
 - (a) Grocon had unreasonably delayed making its application
 - (b) the application raised essentially the same substantive issues as the Multiplex Prime Property Fund 03 proceeding and

² See [TP 09/78](#). We are also the Panel appointed for the Multiplex Prime Property Fund 03 proceeding, and have decided to conduct proceedings on that application. However, this application is not part of that proceeding

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- (c) many of the submissions were directed at whether the directors of BMCM had failed to act in accordance with their fiduciary duties which would not, of itself, constitute unacceptable circumstances.
20. Grocon sought to make a response to each of the preliminary submissions, which the Panel agreed to accept. It submitted (among other things) that the relief sought in the two applications was quite different, although may raise similar issues, there had been no unreasonable delay and GO had been seeking to negotiate with BMCM since mid June 2009.

Interim orders sought

21. Grocon sought interim orders to the effect that:
- (a) BMCM not open the Entitlement Offer or suspend it
 - (b) BMCM send unit holders notification of the Panel proceedings and explain that a potential outcome was that the Entitlement Offer may not proceed, and it would be prudent for them to take no action until the proceedings had concluded
 - (c) BMCS not open the cash out facility or suspend it
 - (d) BMCS send unit holders notification of the Panel proceedings and explain that a potential outcome was that the cash out facility may not proceed, that another potential outcome was that members would be asked to consider an alternative proposal to the cash out facility, and it would be prudent for them to take no action until the proceedings have concluded
 - (e) BMCM be directed to permit Grocon to conduct due diligence, subject to the execution of a confidentiality agreement on reasonable and customary terms and
 - (f) the forbearance of the financiers be requested so as to permit a further reasonable extension of the current waiver and preparation of an alternative recapitalisation proposal by Grocon.

Final orders sought

22. Grocon sought final orders to the effect that:
- (a) the Entitlement Offer not open or be cancelled
 - (b) BMCM be directed to permit due diligence as above
 - (c) BMCM do all things reasonably requested by Grocon (or another party with capacity to prepare an alternative recapitalisation proposal) to facilitate due diligence
 - (d) BMCM retain an independent expert to provide written "fair and reasonable" reports comparing the Entitlement Offer and any alternative recapitalisation proposal
 - (e) the forbearance of financiers be requested as above and

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- (f) if the financiers do not grant an extension of the waiver, BMCM provide copies of all correspondence with them to the Panel and parties with a view to making further orders.

DISCUSSION

23. We do not need to consider whether Grocon has standing. Even assuming its interests are affected by the relevant circumstances³ we decline to conduct proceedings.
24. Grocon's application is made too late. According to Grocon's preliminary submission, GO put an initial recapitalisation proposal forward in mid-June 2009, revised it on 9 and 28 July, was rejected in mid-August, conveyed continued interest to BMCM on 17 August and put another revised proposal forward on 24 August 2009.
25. The Entitlement Offer was announced to the market on 24 August 2009, approved by unit holders on 7 October and was due to open on 19 October.⁴ On 3 September 2009 Australian Style announced a market bid for Multiplex as an alternative proposal, which was the subject of Panel proceedings.⁵
26. GO has not made, or announced, an alternative proposal. On 12 October 2009, it issued a press release saying that it was disappointed that its proposal of 2 October 2009 (which it outlined) was not recommended by the directors, but it has not put an alternative proposal to unit holders. For example, as BMCM submitted, "*It is always open to a party to launch, and the independent directors of [Multiplex's] responsible entity have no issue with [GO] launching, a bid for [Multiplex] (to which they can properly respond).*"
27. The application was not made until 15 October 2009. While we understand that negotiations of this type take time, GO was not getting anywhere and was aware of this. For example, in its letter to BMCM dated 2 October 2009, putting forward another proposal, GO said:
- "The Consortium is putting this proposal forward following previous unsuccessful attempts to engage with the independent [BMCM] directors in relation to the recapitalisation of [Multiplex]."*
28. Announcements to the market make clear statements that Multiplex is in financial need. Its financiers, a consortium of banks, have waived their rights under the LVR breach until 16 November 2009 but there is no certainty beyond that date. In an announcement to ASX on 8 October 2009, BMCM said "*Successful completion of the Entitlement Offer before the 16 November 2009 [sic] will enable the Fund to cure the covenant breaches under the debt facility.*"
29. We are prepared to accept for this purpose that Multiplex is in financial need.

³ Section 657C(2)(d). References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

⁴ On 20 October 2009 BMCM gave an undertaking in *Multiplex Prime Property Fund 03* not to process applications under the Entitlement Offer or cash-out facility unless, among other things, the proceedings are terminated, or the Panel is given two business days' notice if the undertaking is to be withdrawn (see [TP 09/81](#))

⁵ See *Multiplex Prime Property Fund 01 and 02* [2009] ATP 18

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30. We are also prepared to accept for this purpose that, if the LVR breach is not cured (one way or another), there is a risk that the final instalment of 40 cents per unit will be accelerated and that significant prejudice could be caused to existing unit holders.
31. Guidance Note 8 makes it clear that the Panel is likely to take into account the timing of an application when assessing whether or not to commence proceedings.⁶ What is required for a party to act with timeliness must be considered against the background of all the facts. In our opinion, the facts here include the need of Multiplex for funds, the announced Entitlement Offer, the unit holder approval,⁷ the existence of an alternative proposal (by Australian Style, albeit stopped), the obvious lack of progress on negotiations between GO and BMCM, the potential prejudice to unit holders if the LVR breach is not cured and the lack of a definite proposal by GO as an alternative. In this case we do not think the application was timely.
32. Moreover, the application seeks, in essence, to stop the Entitlement Offer (which unit holders have approved, at least for listing rule purposes) and to compel BMCM to allow GO to undertake due diligence and seek further forbearance of the financiers to the Fund. We do not think the Panel should go this far.
33. GO remains free to make a bid so it can progress an alternative proposal if it wishes.
34. Grocon submitted that alternatives to the Entitlement Offer had not been fully explored or disclosed and, among other things, that the independent directors of BMCM had not negotiated an extension to the waiver as forcefully as they could have. Even if we were to conduct proceedings, these raise issues regarding directors' duties and we do not think these would be matters that the Panel should address.⁸
35. BMCM and BMCS submitted that the application covered issues raised in *Multiplex Prime Property Fund 03*. The 03 application concerns primarily whether the Entitlement Offer is "*designed to effect a change of control of [Multiplex] without having to comply with the usual rules to make a takeover*". The first submission in the 04 application (ie, this proceeding) concerns whether the Entitlement Offer is "*... a flimsy veneer constructed to disguise the reality of a forced buy-out of units at literally the lowest possible price*". We agree that there is a significant area of overlap. Our interest - whether the Entitlement Offer and cash out facility affects, or is likely to affect, control, or potential control, of Multiplex more than is reasonably necessary for fundraising purposes - can be considered in the 03 proceeding. Grocon has become a party to that proceeding.

DECISION

36. 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

⁶ GN 8, Overview, paras [8.86] – [8.88]. See also *Blue Energy Ltd* [2009] ATP 15 at [30], *Golden Circle 02* [2007] ATP 24 at [14(d)]

⁷ We note that the votes of substantial holders, including Australian Style, were disregarded as required by ASX

⁸ *International All Sports Ltd 01R* [2009] ATP 5 [29] – [31], *Bowen Energy Ltd* [2007] ATP 22 at [33], *Magna Pacific (Holdings) Limited 05* [2007] ATP 16 at [11], but see *Pinnacle VRB Ltd No 08* [2001] ATP 17

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decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

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

Ian Ramsay

President of the Sitting Panel

Decision dated 21 October 2009

Reasons published 22 October 2009