



Australian Government

Takeovers Panel

Reasons for Decision
Multiplex Prime Property Fund 03R
2009 ATP 23

Catchwords:

Review application - Entitlement Offer - control effect - decline to conduct proceedings - Brookfield Multiplex Capital Management Ltd – Brookfield Multiplex Capital Securities Ltd – Australian Style Investments Pty Ltd - Grocon Investment Management Pty Ltd

Corporations Act 2001 (Cth), sections 602, items 10 and 13 of 611, 657EA

ASIC Regulation 21(2)

Multiplex Prime Property Fund 03 [2009] ATP 22, Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Regis Resources Ltd [2009] ATP 7, Perilya Ltd 02 [2009] ATP 1, Emperor Mines Ltd 01R [2004] ATP 27, PowerTel Limited 01 [2003] ATP 25, Pinnacle VRB Ltd (No. 8) [2001] ATP 17

Guidance Notes 2 (Reviewing decisions), 8 (Matter procedures), 17 (Rights Issues)

INTRODUCTION

1. The Panel, Geoff Brunson, Norman O’Byrne AM SC (sitting President) and Jennifer Seabrook declined to conduct proceedings on an application from Australian Style for a review of the initial Panel’s decision in *Multiplex Prime Property Fund 03*. The application concerned a 178:1 pro rata Entitlement Offer by Multiplex and a conditional ‘cash-out’ facility for unit holders who chose not to take up their entitlement. The review Panel agreed with the initial Panel’s decision and did not think there was any reasonable likelihood that the review application would result in a different outcome.

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 for listing rule purposes by unit holders on 7 October 2009
Grocon	Grocon Investment Management Pty Ltd
Multiplex	Multiplex Prime Property Fund

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FACTS

3. In these reasons, the facts set out in the initial Panel's reasons apply.¹

REVIEW APPLICATION

4. By review application dated 29 October 2009, Australian Style sought a review of the initial Panel's decision. The Acting President consented to the review.
5. Australian Style submitted a general ground of review (that the initial Panel had not appreciated the wider context of the Entitlement Offer, which was that it was fundamentally unacceptable) and a number of other grounds to the effect that the initial Panel had erred in various respects.
6. Australian Style sought interim orders that the Entitlement Offer be suspended. It sought final orders to the effect that BMCS not acquire further units in Multiplex unless it complied with an exception in section 611 other than items 10 or 13, the Entitlement Offer be withdrawn, applications or acceptances be returned, and the financiers be asked to forbear from enforcing their rights to allow for an alternative recapitalisation proposal.
7. Lengthy preliminary submissions were made. Responses were also made. Included were submissions that a lot of the material fell outside the Panel's rules, which was no doubt correct. Nevertheless, we decided to accept and consider all the material, except as noted in paragraph 8.
8. BMCM submitted in its preliminary submission that it was "*in possession of correspondence which confirms the lenders' intentions. That correspondence has today been provided to the Review Panel on a confidential basis. The lenders have provided it on the express proviso that it is not given to any party other than the Panel.*" This material was separately provided to the Panel executive. The executive confirmed with the solicitors for BMCM that this material could not be provided to all parties, and therefore did not forward it to us. We decided not to call for it as we relied on the statements made by BMCM in this regard in the non-confidential information provided.
9. Australian Style based its application on the decision e-mail forwarded to the parties immediately after the initial Panel's decision was made and before reasons were published. This decision briefly summarised the factors which, among other matters, the initial Panel considered important to its decision. On 29 October 2009, at the time of lodging the review application, draft reasons were not available. Draft reasons were provided on 30 October 2009. Australian Style asked in its review application that the basis for the application might be refreshed (or withdrawn) when the draft reasons were issued to the parties.² We met on 2 November 2009. No revised application was received.

¹ *Multiplex Prime Property Fund 03* [2009] ATP 22

² GN 8 at paragraph [8.84]

DISCUSSION

10. In appropriate cases, a review Panel can decline to conduct proceedings and allow the initial Panel's decision to stand.³ We do so in this matter.
11. We have considered the matter on its merits. We have considered:
 - (a) all the material before the initial Panel, including the initial application, the preliminary questions to parties and answers, the briefs to the parties, the submissions and rebuttals from the parties
 - (b) the initial Panel's decision email and draft reasons for decision and
 - (c) the review application and the preliminary submissions and responses.
12. Australian Style submitted that:

"The very purpose of the Panel and its processes appears to have been lost in the exigencies created and perpetuated by the acts and failures to act on the part of BMCM. A review Panel should be given the opportunity to re-consider the BMCM proposal for fixing the LVR breach from its foundations up, looking at it in the context of the lenders' actual intentions for enforcing their security rights in relation to the Fund, and taking into account the full reasons for the extraordinary position taken by the Australian Stock Exchange (ASX) in turning what was a renounceable rights issue into a non-renounceable one with an inexplicable voting exclusion applied to [Australian Style]".
13. In our view, the outcome of the initial Panel's proceedings is an entitlement offer which contains an open-ended dispersion strategy that complies with Guidance Note 17.
14. The review of a decision by ASX in respect of the application of a listing rule in a matter of this nature is not ordinarily a matter for the Panel. We note also that there is precedent for ASX's decision and that ASX was asked by Australian Style to review its decision but did not change its decision.
15. Australian Style also submitted that the financiers' deadline was of fundamental importance to the initial Panel and communications should be disclosed to all parties. That part of the initial Panel's draft reasons relied on by Australian Style says:

*"... We therefore reluctantly accept the structure. In other circumstances a massively dilutive rights issue such as this may not be acceptable. Nor, in this case, would we necessarily consider the structure acceptable if not for the fixed deadline imposed by the financiers."*⁴
16. We might not have stated that proposition as strongly had the matter come before us initially. We might have considered the structure (as amended by the undertakings given to the initial Panel) as acceptable even in the absence of this deadline. Nevertheless, the documentation received states that the financiers' current intentions are that the deadline will be enforced, even if (as we acknowledge) the financiers might change their current intentions. It does not change our view that the outcome of the initial Panel's proceedings was correct.

³ *GoldLink IncomePlus Limited 04R* [2009] ATP 3

⁴ *Multiplex Prime Property Fund 03* [2009] ATP 22 at [47]

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17. Guidance Note 8 sets out factors which a sitting Panel will consider when deciding whether to conduct proceedings. The factors include "*what remedies might be available to the Panel to address the alleged unacceptable circumstances*".⁵ This is one of the factors we considered. In our view, the remedies sought by Australian Style were not reasonably likely to be granted. No other orders even remotely approximating those sought by Australian Style seemed likely to us.⁶
18. We could see no basis for ordering that BMCS not acquire further units in Multiplex unless it complied with an exception in section 611 other than items 10 or 13. It is the underwriter of the Entitlement Offer. No other underwriter that was approached has accepted the underwriting. We would not order that the Entitlement Offer be withdrawn, given the circumstances of Multiplex. It follows that we would not order that applications or acceptances be returned. Even if we were minded to make an order that the financiers be asked to forbear from enforcing their rights to allow for an alternative recapitalisation proposal, although none exists at present, such an order is unlikely to be made because (assuming jurisdiction) it would be likely to be unfairly prejudicial to the financiers in the circumstances of this matter. We note the submissions and public statements that have been made regarding the 16 November 2009 deadline. The utility of such an order is, in our view, doubtful in these circumstances.
19. Submissions were made by BMCM and BMCS to the effect that Australian Style had not made its review application in a timely way. We do not accept those submissions. The regulations⁷ allow two days, which is a very short time, and the application was received within that time.

DECISION

20. Having regard to all the material, we agree with the initial Panel's decision.
21. Moreover, the likelihood of a suitable remedy other than the one arrived at in the initial Panel's proceedings is one of the factors we took into account when deciding whether to conduct proceedings on this application.
22. Accordingly, we decided not to conduct proceedings in relation to the review application under regulation 20 of the ASIC regulations. We are satisfied that it is not against the public interest to decline to conduct proceedings.
23. Given that we have decided not to conduct proceedings, we do not need to consider whether to make an interim order.
24. On 30 October 2009 Grocon lodged a Notice of Appearance. Because of our decision not to conduct proceedings we did not need to consider whether to accept it.

⁵ GN 8 at [8.45(d)]

⁶ This factor was relevant in the following examples: *Regis Resources Ltd* [2009] ATP 7 and *Perilya Ltd* 02 [2009] ATP 1

⁷ Corporations regulation 6.10.01 says "*For subsection 657EA(3) of the Act, an application for review of a decision of the Panel must not be made later than 2 business days after the date on which the decision was made*"

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25. The initial Panel made no orders as to costs and we also agree with this decision.

**Norman O'Bryan AM SC
President of the review Panel
Decision dated 4 November 2009
Reasons published 4 November 2009**