Australian Government

Takeovers Panel

Reasons for Decision
CMI Limited 01R
[2011] ATP 5

Catchwords:

Review – decline to conduct proceedings - association – family – structural links – gift – course of discussions and negotiations - unacceptable circumstances

Corporations Act 2001 (Cth), sections 9, 12, 15, 657EA

GoldLink IncomePlus Limited 04R [2009] ATP 3, Multiplex Prime Property Fund 03R [2009] ATP 23, Tully Sugar Limited 01R [2010] ATP 1

Brockman Resources Limited [2011] ATP 3, Viento Group Limited [2011] ATP 1

Bateman v Newhaven Park Stud Ltd [2004] NSWSC 566, Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd (1995) 16 ACSR 501, Elders IXL v National Companies and Securities Commission [1987] VR 1, Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors (1984) 14 ACLR 456

INTRODUCTION

1. The Panel, David Bennett AC QC, Catherine Brenner and Kathleen Farrell (sitting President), declined to conduct proceedings on an application by Tinkerbell Enterprises Pty Ltd and Leanne Catelan to review the decision of the initial Panel in *CMI Limited 01*.[1] The review Panel agreed with the initial Panel and considered that there was no reasonable prospect of the review Panel coming to a different conclusion.

2. In these reasons, the following definitions apply.

applicants	Tinkerbell and Ms Leanne Catelan
CMI	CMI Limited
Farallon	Farallon Capital Pty Ltd
RP Prospects	RP Prospects Pty Ltd
Tinkerbell	Tinkerbell Enterprises Pty Ltd as trustee for the Leanne Catelan Trust

FACTS

3. On 6 January 2011, Mr Gerry Pauley and Dr Gordon Elkington, shareholders of CMI, applied for a declaration of unacceptable circumstances. They submitted that, among other things, Ms Leanne Catelan and her father, Mr Raymond Catelan, were associates and that the purchase of 9.22% of CMI by Tinkerbell as trustee for the

[1] [2011] ATP 4

Leanne Catelan Trust was made in breach of s606.[2] The facts in the initial matter are set out in the initial Panel's reasons.[3]

4. The initial Panel made a declaration of unacceptable circumstances. It considered that Ms Leanne Catelan and Mr Raymond Catelan were associated:

   (a) under section 12(2)(b) for the purpose of controlling or influencing the conduct of CMI's affairs, or

   (b) under section 12(2)(c) in relation to the affairs of CMI.

5. The initial Panel said:

> *A relevant agreement must exist for the purpose of controlling or influencing the composition of a company's board or the conduct of its affairs. Acting in concert must exist in relation to a company's affairs. 'Affairs of a company' are broadly defined and include, among other things, the acquisition and ownership of shares. In our view, Mr Raymond Catelan and Ms Leanne Catelan were acting, or proposing to act, in concert in relation to the acquisition of the 9.22% of CMI acquired from Farallon, or they had or proposed to enter a relevant agreement in relation to the acquisition. With the acquisition of a further 9.22%, the holdings, if aggregated, are almost 50%. In the context of control this is a significant acquisition of a substantial interest in CMI.*[4]

And:

> *Considering the whole of the material, based on our expertise and drawing appropriate inferences, we conclude that Ms Leanne Catelan and Mr Raymond Catelan are not acting independently in relation to the investment by Tinkerbell in CMI. Either there was an agreement, arrangement or understanding between them for the purpose of the ownership of the 9.22% parcel of shares in CMI or they were acting in concert in relation to the ownership of that parcel or both. In addition, we have no evidence that their relationship has changed since the time the shares were acquired from Farallon.*[5]

6. The conclusions of the initial Panel are set out in its reasons.

7. The initial Panel made final orders on 25 February 2011, the effect which included:

   (a) vesting of the 9.22% of CMI held by Tinkerbell in the Commonwealth for ASIC to sell and remit the net proceeds to Tinkerbell, and

   (b) requiring disclosure of the association between Ms Leanne Catelan and Mr Raymond Catelan.

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[2] References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

[3] [2011] ATP 4
[4] [2011] ATP 4 at [108]
[5] [2011] ATP 4 at [119]

8. The applicants sought a stay of the initial Panel's final orders. On 25 February 2011, the President stayed the initial Panel's orders[6] to preserve the position pending consideration by a review Panel.

REVIEW APPLICATION

9. By application dated 24 February 2011, Tinkerbell and Ms Leanne Catelan sought a review of the initial Panel's decision.

10. The applicants submitted that the decision of the initial Panel should be set aside because, among other things:

    (a) there was no 'common purpose' or 'shared goal', and no evidence of such, in respect of the affairs of CMI between Mr Raymond Catelan and the applicants (ie, Tinkerbell and Ms Leanne Catelan)

    (b) there was no evidence adduced as to the possible effect that Tinkerbell's acquisition of Farallon's shares might have on the control of CMI and

    (c) the basis for concluding that an association existed was expressed in the declaration of unacceptable circumstances in the alternative. Consequently, it was uncertain which of sections 12(2)(b) or 12(2)(c) have been satisfied. Further, the initial Panel did not identify what the terms of the relevant agreement were or how the parties were acting in concert.

DISCUSSION

11. A review Panel can decline to conduct proceedings and allow the initial Panel's decision to stand in an appropriate case.[7] We do so here. We do not think there is any reasonable likelihood that the review application will result in a different outcome to that of the initial Panel.

12. We have considered the matter on its merits as well as looking at the specific arguments raised. We have considered:

    (a) all the material before the initial Panel including the initial application, the briefs and other communications to the parties, and the submissions and rebuttals

    (b) the initial Panel's decision email, draft reasons for decision and submissions as to fact and unfair prejudice on the draft reasons and

    (c) the review application.

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[6] Other than order 5, which generally restricted disposal, transfer, charging or voting of the sale shares

[7] *GoldLink IncomePlus Limited 04R* [2009] ATP 3, *Multiplex Prime Property Fund 03R* [2009] ATP 23, *Tully Sugar Limited 01R* [2010] ATP 1

Common Purpose

13. The applicants submitted that there was no 'common purpose' or 'shared goal', or evidence of such, in respect of the affairs of CMI between Mr Raymond Catelan and the applicants.

14. We disagree. The inferences and findings made by the initial Panel indicate a common purpose relating to the ownership of the 9.22% parcel. The evidence allowed clear inferences to be drawn, which the initial Panel drew, and which we would draw as well.

15. We accept that there is no direct evidence of an agreement. But the material very strongly supports the inference that the associated parties were acting in concert. Alternatively, we think it strongly supports the inference that the associated parties had an understanding amounting to a relevant agreement.

16. In *Bateman,*[8] Barrett J considered a number of association cases and articulated a helpful way to look at the association test. The case concerned an interlocutory hearing to restrain completion of certain transactions under which the company bought back shares from the shareholders and the shareholders bought real estate from the company. The plaintiffs alleged that the resolution to enable the buy-back was ineffective because associates of the relevant shareholders voted in favour. The parties were held not to be associates.

17. The test of association that applied in that case was s15 of the Corporations Act, which includes the test:

> *15. The associate reference includes a reference to:*
>
> *(a) a person in concert with whom the primary person is acting, or proposes to act;*
>
> *(b) ...*

18. Barrett J said:

> *A point to be made at once in relation to these questions is that the mere fact of family relationship should be left to one side. King George V and Kaiser Wilhelm II were first cousins. They did not act in concert between August 1914 and November 1918 and probably at other times as well. In the absence of evidence of agreement or dependency or actual influence implying commonality of action, family relationships, like the personal friendships considered in the Elders IXL case (above), of themselves prove nothing relevant to an inquiry such as the present.* (emphasis added)[9]

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[8] *Bateman v Newhaven Park Stud Ltd* [2004] NSWSC 566 (references omitted)

[9] *Bateman* at [34]. The *Elders IXL* reference is *Elders IXL v National Companies and Securities Commission* [1987] VR 1

19. The family relationship here involves elements of dependency, as established on the material before the initial Panel. The relationship was also not a "mere fact", but one of a number of facts.

20. Barrett J also said:

> *It is against this sixfold factual background, as presented by the plaintiffs, that I must approach the question whether R J Kelly was acting in concert with JWK Nominees Pty Ltd in respect of voting on the s.257D(1)(a) resolution on 26 May 2004. That question may, in light of the case law, be expressed in various ways. Was there an understanding between R J Kelly and JWK Nominees Pty Ltd as to their common purpose or object in relation to the matter of voting? Was there knowing conduct resulting from communication between R J Kelly and JWK Nominees Pty Ltd on the matter of voting, as distinct from corresponding or parallel actions occurring simultaneously? Was there a consensual adoption of an understanding common to R J Kelly and JWK Nominees Pty Ltd on the matter of voting? Was there some mutual contemporaneous engagement in relation to that matter? Alternatively, was there no more than spontaneous and independent action on the part of each?*

21. Having considered that there was nothing of a structural kind beyond the sibling relationship, and no direct evidence of communications or common intentions actually or knowingly shared (as distinct from coinciding), Barrett J was not satisfied of association.

22. In the matter before us, there are structural links as well as the family relationship involving elements of dependency and other facts indicating association. There is the course of discussions and negotiations regarding the acquisition from Farallon. There is the funding of the acquisition. There is the size of the investment (relative to other investments, as it was submitted that it represented, on a cost basis, 65.8% of Ms Catelan's total current share portfolio). There is the coincidence of the acquisition around the time when there was agitation for board change (a very significant factor, we think). There is the fact of a very significant shareholding, in a company of which Ms Catelan's father is CEO and the major shareholder, which would have a significant impact on control. There is the fact that Ms Catelan is employed at CMI and works for her father in the role of Assistant to the Managing Director. A majority of the board at CMI is Mr Raymond Catelan, his nephew Mr Richard Catelan and Mr Danny Herceg who has acted as Mr Raymond Catelan's legal adviser. Two members of the board, Mr Raymond Catelan and Mr Richard Catelan, hold senior management positions also.

23. The initial Panel did not enquire into other shareholdings of Ms Catelan. We noted, however, that in a submission on the supplementary brief, Tinkerbell submitted "*The acquisition of shares from [Farallon] does not represent Ms Catelan's only shareholding. Ms Catelan's share portfolio includes shares in BigAir, CLEVER (subject currently to a takeover by BigAir) and CEC Group in addition to her shareholding in CMI.*" All these shareholdings are in companies in which her father was either involved or had a relevant interest.

24. *Adsteam*[10] concerned an application to strike out a statement of claim. It was alleged that the understanding in question was that shares would be acquired by one or more of the defendants with a view to ensuring that control of the conduct of the company's affairs would pass to one of them. The court drew on the principles from conspiracy cases, namely that it was extremely unlikely that the plaintiffs would be in a position to adduce direct evidence but, rather, proof rested upon inference deduced from acts done in pursuance of an apparent common purpose. The court said:

> *Understanding is plainly a word of wide import... My view is that it is sufficiently wide to encompass and subsume the other expressions used in s7(4)(b) [of the Companies (Acquisition of Shares) Code], namely agreement, arrangement and undertaking. In other words, I cannot see that there could be an agreement, arrangement or undertaking independently or the existence of at least an understanding among those involved....*
>
> *Much the same conclusion is true of the allegation of "acting in concert" in the same paragraph of the pleading and particulars. As at present advised I cannot see that it is possible for persons to "act in concert" towards an end or object, or even simply to act in concert, unless there is at least an understanding between them as to their common purpose or object. The expression in question evokes the notion of joint actors, or perhaps even joint tortfeasors, as to which it is settled that there must be "concerted action to a common end"... It therefore seems to me that the express reference, whether in the pleadings in this case or in s7(4)(c) itself, to persons "acting in concert" adds little if anything to what is already comprehended by the expression "understanding" in s7(4)(b).*

25. The initial Panel drew the inferences that allowed it to conclude that there was a consensual adoption of an understanding common to Ms Leanne Catelan and Mr Raymond Catelan concerning the ownership of the 9.22% parcel of shares acquired from Farallon. In our view, the material allowed them to do so and we would form the same conclusion.

26. *Bank of Western Australia*[11] concerned whether a sale of shares on-market was in breach of a Mareva injunction. The injunction allowed for the sale of shares on the stock exchange to anyone who was not a related party or associate of the defendant. The court said:

> *The phrase "acting in concert" connotes knowing conduct the result of communication between parties and not simultaneous actions occurring contemporaneously. Of course, the statutory definition expands that concept by including a proposal so to act. However, in the context of this case the allegation is of a bilateral arrangement. "Acting in concert" involves at least an understanding between the parties as to a common purpose or object... It is necessary that the understanding should be consensual and that there should be some adoption of it. However, it is not essential*

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[10] *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors* (1984) 14 ACLR 456 at 459 (references omitted)

[11] *Bank of Western Australia Ltd v Ocean Trawlers Pty Ltd* (1995) 16 ACSR 501 (references omitted)

> *that the parties are committed to it or bound to support it. An arrangement or understanding can be informal as well as unenforceable and the parties may be free to withdraw from it or to act inconsistently with it notwithstanding their adoption of it... Such an understanding may be proved by inference from the circumstances surrounding the impugned transaction and from what the parties have done as well as by direct evidence....*

27. The initial Panel drew inferences from the circumstances and what the parties did (and did not do).

Effect

28. They also submitted that there was no evidence adduced as to the possible effect that Tinkerbell's acquisition of Farallon's shares might have on the control of CMI.

29. When aggregated, the holdings of Ms Leanne Catelan, Mr Raymond Catelan and their interests amount to almost 50% of the shares of CMI. This combined holding clearly has an effect, or potential effect, on the control of CMI.

30. In our view, the acquisition of this substantial interest has a significant effect on the control of CMI. The parcel alone is almost enough to block compulsory acquisition, but more importantly it takes the holdings of the associated parties to almost 50% of CMI. Mr Raymond Catelan's holding of 36%, while a significant control block, could still be defeated, unlikely though that may be. Aggregated, defeat is nigh on impossible.

31. There was no direct evidence of the terms of the understanding. But that is not required. Ms Catelan would have known what was expected of her, namely that she would not work against the interests of her father in respect of the holding of the shares. We infer that she acquired the shares on the basis of such an understanding. In our view the cases do not suggest that this level of 'uncertainty' about the circumstances means that there cannot be an association found.

Alternatives

32. The applicants submitted that the declaration of unacceptable circumstances made by the initial Panel was uncertain because it expressed the association as an alternative (either under s12(2)(b) or s12(2)(c)). The applicants submitted that if s12(2)(b) was relied upon, the initial Panel did not identify the terms of the relevant agreement. If s12(2)(c) was being relied upon, the decision was "*based on nothing more than mere suspicion, prejudice and fantasy.*"

33. In our view, the cases make it clear that there is significant overlap between the concepts of "acting in concert" and "relevant agreement", given that the latter is defined as:

> *An agreement, arrangement or understanding:*
>
> *(a) whether formal or informal or partly formal and partly informal; and*

(b) whether written or oral or partly written and partly oral; and

(c) the whether or not having legal or equitable force and whether or not based on legal or equitable rights.[12]

34. Perhaps the alternatives in s12 are intended as degrees of "understanding", or put another way, steps along a continuum.

35. As we understand the initial Panel's reasons, the material is not sufficiently clear to determine definitively where on the continuum the understanding in this case comes to rest. It is at least an "acting in concert" and may well be "a relevant agreement". We may have expressed the alternatives in the declaration slightly differently (namely as a finding of acting in concert and, in the alternative, a finding also of a relevant agreement), but think it is sufficiently clear that a variation is not required.

36. We think the initial Panel identified the understanding sufficiently and it was not based on "suspicion, prejudice and fantasy".

Other grounds of the review

37. The applicants also submitted that, for other reasons, the decision of the initial Panel should be set aside.

38. They submitted that the initial Panel did not convene a conference, which could have resolved many of its concerns. In the initial proceedings, the parties were invited to address whether they wanted a conference. Tinkerbell submitted that it was not necessary for a conference to be held. In any event, the Panel has previously made findings of association without the need for a conference.[13]

39. We are satisfied as to the association on the basis of the material before us. A conference is not necessary.

40. They also submitted that there were fundamental errors in the findings of fact by the initial Panel in its preliminary findings. The first 'fundamental error' was that Ms Catelan did not work for her father but for CMI. We do not think anything turns on this, and note that the initial Panel made clear the sense in which it used the expression.

41. The second was that Ms Catelan was not dependent on financial contributions from her father but was an independent woman. The initial Panel made a finding in respect of the financial contribution to the acquisition against a background of the evidence concerning Ms Catelan's financial circumstances relating to the acquisition. It was, in our view, sufficient evidence of dependency.

42. The third 'fundamental error' was that the initial Panel found that the gift to Ms Catelan was larger than other gifts by Mr Raymond Catelan to his daughters. This was not an error. It was true. The evidence of a larger gift was to Mr Raymond Catelan's wife, as the initial Panel recognised.

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[12] Section 9

[13] See, for example, *Viento Group Limited* [2011] ATP 1, *Brockman Resources Limited* [2011] ATP 3

43. The fourth was a concern that the initial Panel raised regarding the preparation of the deed of gift. The initial Panel said it had been written formally, suggesting that it had been prepared by lawyers but noted Mr Raymond Catelan's submission that he had prepared it using a form he had previously used. It transpired that the deed appeared to be based on the precedent of Herceg Lawyers. The example made the initial Panel more prepared to draw an inference from the other material before it. We do not think anything more turns on this.

44. The last 'fundamental error' was that the initial Panel had misunderstood or misconstrued the interest of potential beneficiaries under a discretionary trust. The point being made was that "*the beneficiary of a discretionary trust does not have a proprietary interest in the property subject to the discretionary trust*" or "*a specific interest in any item of property held by the trust*". But it appears to us that the initial Panel was not seeking to establish such a point. The initial Panel referred to the trusts as an example of a structural link. It therefore did not appear to us that the initial Panel had misunderstood or misconstrued the position. We do not think anything more turns on this.

45. In summary, each preliminary finding that the applicants identified in their review application as a 'fundamental error' was clarified in the initial Panel's reasons (which were not available to the parties until after the review application was made). We think the issues have been adequately addressed by the initial Panel.

46. They also submitted that there were errors of law or policy in the initial Panel's decision. The first 'error' related to the position of beneficiaries under a discretionary trust. We have addressed this above. The second 'error' was that the evidence relied on suggested that the initial Panel did not look at the established criteria for conducting proceedings in association cases, but "*drew unnecessarily negative inferences from the conduct of third parties*." We do not agree. The association hurdle was met and then, from the material, the initial Panel drew inferences that were not "unnecessarily negative" but are clearly open.

47. The final submission of the applicants was that the initial Panel "*has exhibited an unfair prejudice*" against certain parties, for example by asking when and where the deed of gift was witnessed, by inferring that Mr Raymond Catelan had more involvement in the acquisition than was disclosed, and by its attitude to the initial submission by CMI. We do not agree that any unfair prejudice was displayed.

DECISION

48. For the reasons above, we do not consider that there is any reasonable prospect that the review application will result in a different outcome to that of the initial Panel.

49. Accordingly, we decline to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations* 2001 (Cth). We consider it is not against the public interest to do so.

Orders

50. The initial Panel made orders to require that Tinkerbell's 9.22% interest in CMI be vested in the Commonwealth for ASIC to sell and for disclosure to be made of the

association between Ms Leanne Catelan and Mr Raymond Catelan. We agree with the orders.

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

52. As the matter is now determined, the interim orders are lifted.

Kathleen Farrell
President of the sitting Panel
Decision dated 10 March 2011
Reasons published 15 March 2011

Party	**Advisers**
Tinkerbell and Ms Leanne Catelan	McCullough Robertson
CMI, Mr Colin Ryan and Mr Danny Herceg	Mallesons Stephen Jaques
Mr Richard Catelan	Not applicable
Mr Gerry Pauley and Dr Gordon Elkington	Not applicable