



Australian Government

Takeovers Panel

**Reasons for Decision
Ludowici Limited 01R(a) and (b)¹
[2012] ATP 4**

Catchwords:

Review – two applications – declaration of initial Panel – decline to conduct proceedings – last and final statement – truth in takeovers – efficient, competitive and informed market – scheme of arrangement – appropriate remedy

Corporations Act 2001 (Cth), sections 602, 657EA, 657D

ASIC Regulatory Guide 25 – Takeovers: false and misleading statements

Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16, regulation 20

CMI Limited 01R [2011] ATP 6, Tully Sugar Limited 01R [2010] ATP 1, Multiplex Prime Property Fund 03R [2009] ATP 23, GoldLink IncomePlus Limited 04R [2009] ATP 3

INTRODUCTION

1. The review Panel, Graham Bradley AM (sitting President), Norman O’Bryan AM SC and Mike Roche, declined to conduct proceedings in relation to two review applications² made following a declaration of unacceptable circumstances in relation to the affairs of Ludowici Limited that the initial Panel made in *Ludowici Limited* [2012] ATP 3. 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.

FLS	FLSmidth & Co. A/S
FLS review	Review application made by FLS dated 1 March 2012
Ludowici	Ludowici Limited
Reuters article	An article published by Reuters Copenhagen on 23 January 2012 entitled: “FLSmidth says A\$7.20 per share Ludowici bid final”
Weir	The Weir Group PLC
Weir review	Review application made by Weir dated 29 February 2012

FACTS

3. Ludowici is an ASX listed company (ASX code: LDW).

4. The facts are set out in the decision of the initial Panel.³

¹ May be cited as Ludowici Limited 01R

² (a) by the Weir Group PLC dated 29 February 2012; and (b) by FLSmidth & Co. A/S dated 1 March 2012

³ [2012] ATP 3

5. The initial Panel made a declaration of unacceptable circumstances. It made final orders on 28 February 2012, the effect of which included that FLS compensate shareholders who had knowledge of and relied upon the Reuters article for the net number of Ludowici shares they sold during the period between publication of the Reuters article and its correction.
6. The conclusions of the initial Panel are set out in its reasons.

REVIEW APPLICATIONS

7. If we had conducted proceedings, we would have heard the Weir review and the FLS review together since they related to the same initial Panel decision, identical facts and overlapping remedies.⁴ Accordingly we considered whether to conduct proceedings on each review at the same time.

Weir review

8. By application dated 29 February 2012, Weir sought a review of the decision of the initial Panel to make the final orders it did. It submitted that FLS had failed to immediately correct the Reuters article and the appropriate remedy for a breach of the ‘truth in takeovers’ policy was “*not a compensation order but rather an order which has the effect of preventing the bidder from benefiting from its statement which breaches the policy.*”
9. Weir submitted that the ‘truth in takeovers’ policy relevantly stated: “*Market participants that make a last and final statement should be held to it, as with a promise.*”⁵ Accordingly, Weir submitted that the only appropriate order was one which prevented FLS increasing its indicative offer price above \$7.20 for 6 months from the date (if any) shareholders vote down Weir’s proposed scheme.

Interim order sought

10. Weir sought an interim order that FLS not announce, make, propose or participate in a takeover bid, scheme of arrangement or any other transaction which may result in it acquiring control of Ludowici, under which Ludowici shareholders are given the opportunity of receiving more than \$11 per Ludowici share.
11. The effect of this interim order would be to prevent a further increase in the indicative offer price by FLS.

Final orders sought

12. Weir sought final orders to the effect that:
 - (a) the initial Panel's orders be set aside and

⁴ Regulation 16, *Australian Securities and Investment Commission Regulations 2001* (Cth)

⁵ ASIC Regulatory Guide 25, “Takeovers: false and misleading statements”, at [25.9]. Also see [25.4] where it states: “A ‘last and final statement’ is a statement made by a market participant that it will or will not do something in the course of the bid. One example is a statement by a bidder that it will not improve the consideration offered under its bid (‘no increase statement’)”

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- (b) for 6 months from the date (if any) on which Ludowici shareholders vote down Weir's scheme of arrangement –
 - (i) FLS not make, propose or participate in a takeover bid, scheme of arrangement or any other transaction under which Ludowici shareholders are given the opportunity of receiving more than \$7.20 per Ludowici share and
 - (ii) FLS not have any discussions with Ludowici in relation to, or take any steps towards implementation of, a transaction above \$7.20 per Ludowici share.

FLS review

13. By application dated 1 March 2012, FLS sought a review of the initial Panel's decision to make a declaration and orders. It submitted that the review Panel should set aside the initial Panel's declaration. It further submitted in the alternative that, if the review Panel did not set aside the declaration of the initial Panel, it should set aside the initial Panel's orders and make orders as in paragraph 14(b) below.

Final orders sought

14. FLS did not seek interim orders. It sought final orders to the effect that:
- (a) the initial Panel's declaration of unacceptable circumstances be set aside or
 - (b) alternatively, if the declaration remains, the initial Panel's orders be set aside and new orders be made that either no compensation is payable or compensation is payable only if the scheme of arrangement between it and Ludowici becomes effective.

Interim orders

15. On 1 March 2012, the Acting President made interim orders (Annexure A), at the request of Weir, to the effect that pending determination of Weir's review application:
- (a) neither FLS nor Weir announce, make, propose or participate in a takeover bid, scheme of arrangement or other transaction above those currently announced⁶ and
 - (b) neither FLS nor Weir acquire, or take any steps to acquire, any interest in any Ludowici shares or derivatives relating to Ludowici shares.
16. The reasoning of the Acting President, as noted in the media release announcing the interim orders dated 1 March, was:

FLS has had an opportunity to rely on its matching right and now has a binding scheme implementation agreement with Ludowici. Weir has had an opportunity to

⁶ A\$11.00 per Ludowici share by FLS and A\$10.00 per Ludowici share by Weir

bid again and has made a \$10.00 (less dividends) per share offer conditional on the Panel ordering that FLS cannot increase its offer beyond \$7.20.

17. On 6 March 2012, the Acting President made further interim orders (Annexure B), at the request of FLS, that orders 1-13 of the initial Panel's orders be stayed.
18. The interim orders maintained the status quo while the review Panel considered the review applications.

DISCUSSION

Preliminary submissions

19. FLS made a preliminary submission in respect of the Weir review. It submitted that the review Panel should decline to conduct proceedings because the Weir review was unable to achieve what it sought. The reason was that Weir sought to review only the initial Panel's orders, not its declaration of unacceptable circumstances. FLS submitted that since the initial Panel's declaration was not based on a finding that FLS had made a 'last and final statement', the declaration would not support the order Weir wanted (that FLS be held to its original indicative offer of \$7.20).
20. Weir made a preliminary submission in respect of the FLS review. It submitted that the 'truth in takeovers' policy should be applied in this case. While perhaps not precisely within the terms of Procedural Rule 6.1.1⁷ we considered the preliminary submission was sufficiently directed at the issue of whether we should conduct proceedings.
21. Ludowici made preliminary submissions on each of the review applications. In relation to the Weir review, it submitted there was no order better suited to ameliorate the unacceptable circumstances found than the one made by the initial Panel. In relation to the FLS review, it submitted that the initial Panel's orders facilitated an ongoing efficient, competitive and informed market for Ludowici shares and there should be no further delay in putting a transaction before shareholders. Accordingly, it submitted, in respect of each review application the review Panel should decline to conduct proceedings.

Conduct proceedings on the review applications?

22. A review Panel can decline to conduct proceedings and allow the initial Panel's decision to stand in an appropriate case.⁸ We do so here. We do not think there is any reasonable likelihood that either of the review applications would result in a different outcome to that reached by the initial Panel.
23. We have considered the matter on its merits, including:

⁷ "A party may make preliminary submissions concerning whether the Panel should conduct proceedings in relation to an application..."

⁸ *GoldLink IncomePlus Limited 04R* [2009] ATP 3, *Multiplex Prime Property Fund 03R* [2009] ATP 23, *Tully Sugar Limited 01R* [2010] ATP 1, *CMI Limited 01R* [2011] ATP 6 (judicial review is pending)

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- (a) all the material before the initial Panel, including Weir’s initial application, the briefs, submissions and rebuttals
 - (b) the initial Panel's decision email and draft reasons for decision and
 - (c) the Weir review and the FLS review and all the preliminary submissions.
24. FLS submitted that, notwithstanding the headline, the Reuters article did not contain any statement by Mr Rasmussen that could be reasonably construed as a ‘last and final statement’. We agree with that submission. The interview took place on the day FLS had announced its bid proposal and signed the Process Agreement which contained an express right to match any higher bid. The proposal was at a premium of approximately 100% to Ludowici’s pre-announcement market price and no competing bid had yet been made. In our view, the answer “no” to the question asked by the Reuters reporter (as reported “*if he would consider raising the bid*”), in the context of the transaction, did not amount to a ‘last and final statement’ by FLS.
25. Nevertheless, principally because of its headline, the Reuters article was likely to create uncertainty and had the potential to mislead or confuse investors about the finality of FLS’s proposed offer price. The article required prompt correction by FLS to ensure that the market was operating on reliable, accurate information. The effect of the failure to correct the Reuters article was that transactions in Ludowici shares did not take place in an efficient, competitive and informed market.
26. As the initial Panel noted, the Reuters article should have been corrected immediately after FLS became aware of it on 23 January 2012. It was not.
27. As the initial Panel also noted, the Reuters article might also have been corrected immediately after FLS obtained legal advice on 24 January 2012. Again, it was not.
28. The initial Panel was satisfied that the circumstances had an adverse effect on the market, and so are we.
29. We note the following paragraph in the initial Panel's reasons:⁹
- The [‘truth in takeovers’] policy does not expressly apply to schemes of arrangement. This may be because of the significant differences between takeovers and that form of control transaction. Nevertheless, ASIC keeps a watchful eye on statements made in the context of schemes. Weir submitted “we ask how this policy cannot apply to schemes?” We agree that, generally, the policy should apply in a scheme context. But its application may be different to its application in a takeover context. We believe that the policy should be applied in the circumstances of this case.*
30. We understand that to mean that there is no reason why, as a matter of policy, ‘truth in takeovers’ principles should not apply in the context of a control

⁹ [2012] ATP 3 at [39], footnotes omitted

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transaction undertaken by way of scheme of arrangement. We agree with that view.

31. We also agree with the initial Panel that the appropriate way to protect the interests of those persons who were adversely affected by the unacceptable circumstances is by an order for compensation in the terms laid down by the initial Panel. In our view, the orders made are justified and not unfairly prejudicial to any party.
32. FLS submitted in its preliminary submission that it would seek to withdraw the FLS review if we were minded not to conduct proceedings on the Weir review. There is no need for us to consider whether to consent to withdrawal of the application.¹⁰

DECISION

33. For the reasons above, we do not consider that there is any reasonable prospect that either of the review applications will result in a different outcome to that of the initial Panel. We agree with the declaration and orders of the initial Panel.
34. Accordingly, we decline to conduct proceedings in relation to the applications 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.
35. As the matter is now determined, the interim orders are lifted.

Graham Bradley

President of the review Panel

Decision dated 9 March 2012

Reasons published 13 March 2012

¹⁰ Procedural Rule 3.4.1 provides that an applicant may only withdraw its application with the consent of the Panel or, if the request is made before the appointment of a Panel, the President

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Advisers

Party	Advisers
FLSmith & Co. A/S	Ashurst Australia FIH Partners
Ludowici Limited	Gilbert and Tobin ICS Advisory
The Weir Group PLC	Freehills UBS



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Annexure A
CORPORATIONS ACT
SECTION 657EA
INTERIM ORDERS

Ludowici Limited 01R

The Weir Group PLC made a review application to the Panel dated 29 February 2012 in relation to the affairs of Ludowici Limited (Ludowici).

The Acting President **ORDERS**:

1. FLSmidth & Co A/S not announce, make, propose or participate in a takeover bid, scheme of arrangement or other transaction which may result in FLS acquiring control of Ludowici, under which Ludowici shareholders are given the opportunity of receiving more than A\$11.00 per Ludowici share.
2. The Weir Group PLC not announce, make, propose or participate in a takeover bid, scheme of arrangement or other transaction which may result in The Weir Group PLC acquiring control of Ludowici, under which Ludowici shareholders are given the opportunity of receiving more than A\$10.00 per Ludowici share.
3. FLSmidth & Co A/S not acquire, or take any steps to acquire, any interest in any Ludowici shares or derivatives relating to Ludowici shares.
4. The Weir Group PLC not acquire, or take any steps to acquire, any interest in any Ludowici shares or derivatives relating to Ludowici shares.
5. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of these interim orders.

Allan Bulman
Director
with authority of Graham Bradley AM
Acting President
Dated 1 March 2012



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Annexure B
CORPORATIONS ACT
SECTION 657EA
INTERIM ORDERS

Ludowici Limited 01R(a) & (b)

Both The Weir Group PLC and FLSmith & Co. A/S made review applications to the Panel dated 29 February 2012 and 1 March 2012 respectively, in relation to the affairs of Ludowici Limited.

The Acting President **ORDERS**:

1. That orders 1-13 of the orders made in the matter of Ludowici Limited 01 on 28 February 2012, are stayed.
2. These interim orders have effect until the earliest of:
 - (i) further order of the Panel
 - (ii) the determination of the review proceedings and
 - (iii) 2 months from the date of these interim orders.

Alan Shaw
Counsel
with authority of Graham Bradley AM
Acting President
Dated 6 March 2012