Australian Government
Takeovers Panel

Reasons for Decision
Touch Holdings Limited
[2013] ATP 3

Catchwords:

Association – relevant agreement – relevant interest – section 602 principles – shareholder approval – funding arrangements – voting power – common directorships – family links – declaration – orders cancelling contract

Corporations Act 2001 (Cth), sections 9, 12, 64, 602, 606, 608, 610(3), 611, 657A, 657B, 657C, 657D

ASIC Class Order CO 04/631

Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd [2012] NSWSC 1318, *Gjergja v Cooper* [1987] VicRp 15; [1987] VR 167, *Waldron v MG Securities (A/Asia) Ltd* [1975] VicRp 52; [1975] VR 508

World Oil Resources Limited [2013] ATP 1, *Crescent Gold Limited 02* [2011] ATP 14, *Viento Group Ltd* [2011] ATP 1, *Regis Resources Ltd* [2009] ATP 7, *Boulder Steel Limited* [2008] ATP 24, *BigAir Group Limited* [2008] ATP 12, *Mount Gibson Iron Limited* [2008] ATP 4, *Rusina Mining NL* [2006] ATP 13, *Bridgewater Lake Estate Ltd* [2006] ATP 3, *Austral Coal Limited 03* [2005] ATP 14, *National Foods Limited 01* [2005] ATP 8

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
No	**No**	**Yes**	**Yes**	**Yes**	**No**

INTRODUCTION

1. The Panel, Sophie Mitchell, Laurie Shervington and Andrew Sisson (sitting President), made a declaration of unacceptable circumstances in relation to the affairs of Touch Holdings Limited. The Panel considered that shareholders in Touch connected with Mr Adrian Cleeve were associated, that the share sale agreement between Sabatica and the purchasers was a relevant agreement creating an association, and that shares were acquired in breach of s606.[1] The Panel (by majority) was not satisfied that shareholders in Touch connected with Mr Duncan Saville were associated. The Panel cancelled the share sale agreement.

2. In these reasons, the following definitions apply.

Applicant	Mr Philip Course
ATC	ATC Capital Pty Ltd
Cleevecorp	Cleevecorp Pty Ltd as trustee of The Cleeve Trust
Cleeve Group	Cleeve Group Pty Ltd as trustee of The Cleeve Group Trust
GPG	Guinness Peat Group plc
GPIC	General Provincial Insurance Company Limited
Kekal	Kekal Capital Ltd Co

[1] References are to the *Corporations Act 2001* (Cth) unless otherwise specified

Sabatica	Sabatica Pty Ltd
SSA	share sale agreement between Sabatica, Cleevecorp, ATC, Dr Allan Sullivan and Kekal
Touch	Touch Holdings Limited
Touch Network	Touch Network Investments Pty Ltd

FACTS

3. Touch is an unlisted public company with more than 50 members. The Applicant owns 200,000 shares (0.22%). He was the managing director of Touch until 9 April 2008.

4. Prior to November 2012, Sabatica (a wholly-owned subsidiary of GPG) owned 52,111,459 shares in Touch (56.04%), Touch Network owned 24,000,000 shares (25.81%) and Cleevecorp owned 2,790,672 shares (3%).

5. The directors of Touch include Mr Adrian Cleeve, Mr Michael Jefferies and Mr Duncan Saville.

6. On 11 February 2011, GPG announced that it was planning an orderly sell down of its investment portfolio. Mr Adrian Cleeve approached GPG to enquire about the proposed sale process.

7. In about November 2011, Touch received an approach from a large listed public company about acquiring all Touch's shares. Discussions ended in about June 2012. Touch then engaged an advisor to review the company and provide a list of prospective investors. This process was unsuccessful.

8. In July 2012, 3 of Touch's directors approached GPG with a proposal for each of them to acquire part of Sabatica's shareholding. The directors were Mr Adrian Cleeve, Mr Calvert and Mr Tyabji. The parties failed to agree terms.

9. In October 2012, Mr Adrian Cleeve again approached GPG with a proposal for 3 syndicate members (unnamed, but described as "*unrelated parties*") to acquire Sabatica's shares. This approach ultimately led to entry into the SSA.

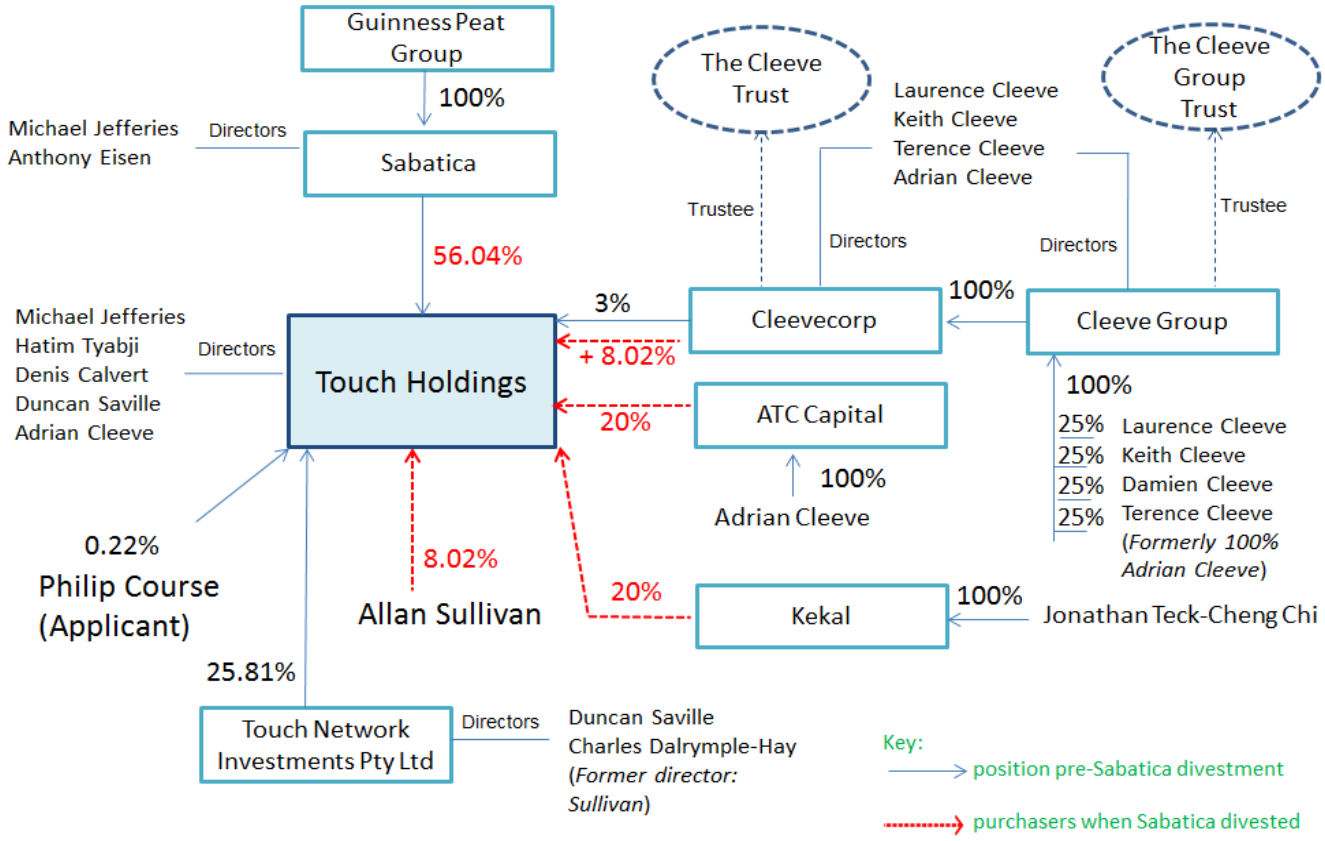
10. In November 2012, Sabatica entered into the SSA with the following entities to sell its shareholding in Touch:

Entity	**Purchase**
Cleevecorp	7,455,729 shares (8.02%, taking its holding to 11.02%)
ATC	18,600,000 shares (20%)
Dr Allan Sullivan	7,455,730 shares (8.02%)
Kekal	18,600,000 shares (20%).

11. On 2 January 2013, GPG announced that it had completed its divestment of shares in Touch. It did not identify to whom.

12. On 17 January 2013, Touch notified its shareholders that the sale had "*now occurred*" and provided an updated top 10 shareholder list.

13. Various relationships between the parties are shown in the following diagram.



APPLICATION

14. By application made to the Panel on 5 April 2013, the Applicant sought a declaration of unacceptable circumstances.

15. The Applicant submitted that**:**

> *… the acquisition of the Sabatica Shares by Cleeve (by himself and his associates) and by Saville (by himself and/or his associates), has increased their voting interests in and control of the Company from a combined 28.81% of the Company's capital to a combined 84.85% of the Company's capital without any of the other shareholders of the Company (including the Applicant) having been given any disclosure or notice of and without their knowledge as to the Sabatica Shares being available for purchase by any of them but with the availability for sale of the Sabatica Shares only being relevantly known to Cleeve, Saville and Jefferies in their capacities as directors of the Company.*

16. The Applicant submitted that the effect of the circumstances was that there have been acquisitions of shares in Touch in breach of s606 and Touch shareholders had not been informed in relation to transactions which had an effect on the control of Touch.

Interim orders sought

17. The Applicant did not seek any interim orders.

Final orders sought

18. The Applicant sought final orders that:

    (a) each of Cleevecorp, ATC, Dr Sullivan and Kekal divest the shares they acquired from Sabatica

    (b) those shares be sold on the open market by ASIC on such terms as ASIC may impose and

    (c) Mr Adrian Cleeve, ATC, Cleevecorp, Mr Saville, Kekal and Dr Sullivan (and any persons or entities respectively associated with any of them) be prohibited from purchasing those shares.

DISCUSSION

Association hurdle

19. In essence, the Applicant's case was that:

    (a) Mr Adrian Cleeve, ATC and Cleevecorp are associates (with voting power of 31.02% in Touch shares) based on family links and common directorships which it identified and

    (b) Dr Allan Sullivan, Mr Jonathan Teck-Cheng Chi, Kekal, Mr Duncan Saville and Touch Network are associates (with voting power of 53.83% in Touch shares) based on long-standing personal and professional relationships which it identified

    combining to voting power of 84.85% in Touch shares.

20. Before the Panel will conduct proceedings on the issue of association, there must be a sufficient body of material demonstrated by the applicant, together with inferences that might be drawn (for example from partial evidence, patterns of behaviour and a lack of a commercially viable explanation), to support the Panel conducting proceedings.[2]

21. On balance we decided to seek further information from the parties. That identified that the sale occurred by a single document. We were satisfied that there was a sufficient body of material and conducted proceedings.

Application timing

22. Under s657C(3), an application for a declaration must be made "*within 2 months after the circumstances have occurred*" or such longer period determined by the Panel.

23. A number of parties made submissions that the application was outside the time permitted by s657C(3).

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[2] *Mount Gibson Iron Limited* [2008] ATP 4 at [15]. See also *Regis Resources Ltd* [2009] ATP 7, *Boulder Steel Limited* [2008] ATP 24, *BigAir Group Limited* [2008] ATP 12, *Rusina Mining NL* [2006] ATP 13

24. Sabatica submitted in response to the brief that the relevant circumstances were the entry into the SSA. It further submitted, "*Even if it is argued by the Applicant that the relevant circumstances should, in fairness, be considered to have arisen when the Applicant was first made aware of the sale of Sabatica's holding, this occurred on 17 January 2013….*" The application was made on 5 April. On Sabatica's calculations, this would put it approximately 3 weeks outside the time limit.

25. Cleevecorp similarly submitted that the Applicant was aware of the sale on 17 January 2013.

26. Sabatica further submitted that the Applicant had not sought an extension of time. We do not think an applicant is necessarily required to do so. It is a matter for the Panel to extend time. In any event, when the point was taken the Applicant in rebuttal submissions said it would lodge any formal application for an extension of time directed or required by the Panel.

27. The Applicant submitted that there was "*deliberate obfuscation, avoidance and delay*", so the period should "*only be deemed to commence*" on 14 March 2013 (i.e. when the Applicant received a written response from Mr Adrian Cleeve to his initial inquiries). The application outlines the Applicant's attempts to obtain information. He commenced making enquiries of Touch on 8 January 2013, and made further enquiries on 22 February 2013 and 4 March 2013. He received replies on 7 and 14 March 2013 but obtained little of the information he was seeking.

28. The subject matter of the application relates to an undisclosed association (or associations), non-disclosure of which is alleged to be continuing. It also relates to allegations of contraventions of s606 that (if established) are continuing. We take the view, consistent for example with *Viento Group,*[3] that the application was made within time.

29. Alternatively, for avoidance of doubt, we extend time for making the application to the date it was made. In extending the time we take into account the principles the Panel stated in *Austral Coal 03*:

    (a) it should not exercise that discretion lightly. *"The time limit was set by the legislature to provide certainty to market participants in the context of takeovers that actions could not be challenged indefinitely"*[4] and

    (b) unacceptable circumstances should not go unremedied because their existence was hidden. *"It would be undesirable for Glencore's application to be allowed to go unheard because it was lodged outside the 2 month time limit, if:*

        a. essential matters supporting Glencore's case first came to light during the 2 month period preceding the application; and

        b. Glencore's application made credible allegations of clear, serious and ongoing unacceptable circumstances."[5]

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[3] *Viento Group Ltd* [2011] ATP 1 at [30]. See also *World Oil Resources Limited* [2013] ATP 1 at [22] and [23]
[4] *Austral Coal Limited 03* [2005] ATP 14 at [18]

30. In *Austral Coal 03* no reasonable basis for the allegations was presented and the Panel declined to extend time.[6] In this case we think there is a reasonable basis.

31. Under s657B, the Panel must make a declaration within 3 months after the circumstances occur or 1 month after the application is made (whichever ends last). Accordingly, on one reading of the provision, having extended time to the date on which the application was made we had 1 month from that date to make a declaration (if one was to be made).

Preliminary findings

32. Having considered the application, and all submissions and rebuttals, we made preliminary findings and invited comments on them. Our conclusions follow consideration of the responses.

33. We considered the cumulative effect of the material and drew appropriate inferences. In doing so we had in mind that we must be satisfied by logical and probative material and the potential seriousness of a finding of association.

Association test

34. Section 12 sets out the tests for association as they apply to Chapter 6. There are two relevant tests here:

    (a) s12(2)(b) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or conduct of its affairs and

    (b) s12(2)(c) - which provides, in essence, that B is an associate of A if (and only if) B is a person with whom A is acting or proposing to act in concert in relation to the company's affairs.

Our conclusions on the associations

35. The Panel is a specialist, peer review tribunal. When making an assessment of all the material in this matter, we have relied on our skills and experience as practitioners (which has been made known to the parties) and as members of the sitting Panel.

36. We are unanimously of the view that:

    (a) Mr Adrian Cleeve, ATC and Cleevecorp are associated under s12(2)(b) for the purpose of controlling or influencing the conduct of Touch's affairs and under s12(2)(c) in relation to the affairs of Touch (for convenience referred to as the "Cleeve association") and

    (b) the SSA is a relevant agreement for the purpose of controlling or influencing the conduct of Touch's affairs and controlling or influencing the composition of its board. By reason of the SSA:

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[5] Ibid at [19]

[6] The Panel would have declined to commence proceedings if the application had been made within time: para [30]

(i) Cleevecorp, ATC, Dr Sullivan and Kekal are associated in relation to Touch and

(ii) Sabatica is associated with each of Cleevecorp, ATC, Dr Sullivan and Kekal in relation to Touch.

37. Accordingly, the voting power of Cleevecorp, ATC, Dr Sullivan and Kekal in Touch has increased from 20% or below to more than 20% other than through one of the exceptions in s611.

38. By majority, we are not satisfied that Dr Allan Sullivan, Mr Jonathan Teck-Cheng Chi (Kekal) and Mr Duncan Saville are associated themselves, or with the Cleeve association, in relation to Touch. Mr Shervington's view is that those parties are associated themselves and with the Cleeve association in relation to Touch, and he separately sets out his reasons for this conclusion.

The Cleeve association

39. Messrs Adrian, Laurence, Keith, Terence and Damien Cleeve are brothers.

40. Mr Adrian Cleeve is:

(a) the sole director and shareholder of ATC. ATC was "*incorporated for the purpose of acquiring shares in Touch Holdings*"

(b) the Managing Director of Touch (having been appointed on 9 April 2008)

(c) a director of Cleevecorp, along with Messrs Laurence, Keith and Terence Cleeve. Cleevecorp only holds investments in Touch and

(d) a director of Cleeve Group, along with Messrs Laurence, Keith and Terence Cleeve. Cleeve Group owns Cleevecorp.

41. Mr Keith Cleeve was the founder of the original Touch business and is a senior officer of Touch.

42. Cleeve Group is now ultimately owned by Messrs Laurence, Keith, Terence and Damien Cleeve. It was previously owned by Mr Adrian Cleeve (holding the shares as trustee manager).

43. Notwithstanding earlier misgivings, when asked by Mr Adrian Cleeve "*if it would be interested*" in acquiring further Touch shares, Cleevecorp did so as one of the purchasers under the SSA.

44. Cleevecorp is trustee of The Cleeve Trust, a discretionary trust. Cleevecorp provided evidence that on 22 May 2000, Mr Adrian Cleeve relinquished any interest in The Cleeve Trust.

45. The accounts of The Cleeve Trust show that Mr Adrian Cleeve and each of his brothers have provided loans to, and received loans from, The Cleeve Trust. These include an unsecured loan from The Cleeve Trust to Mr Adrian Cleeve for $577,337 and a loan from "*A.Cleeve*" to The Cleeve Trust for $300,000. Cleevecorp submitted that the loan to Mr Adrian Cleeve was an unsecured loan at a commercial rate of interest and is repayable. It submitted that this loan is not a relevant indicator of association. We do not agree. It is a structural link.

46. As a trustee, Cleevecorp owes fiduciary obligations to The Cleeve Trust. In relation to the funding arrangements for the SSA, Cleevecorp did not provide the Panel with any documents other than the loan agreement, despite it being the acquisition of an investment that included a loan incurring a liability of $386,303. This investment more than tripled the trust's exposure to Touch.

47. Even if Mr Adrian Cleeve is not a beneficiary under the Cleeve Trust, Cleevecorp did not indicate whether he is a beneficiary under The Cleeve Group Trust, also a discretionary trust. Cleevecorp is wholly owned by Cleeve Group and Cleeve Group is trustee of The Cleeve Group Trust.

48. The funding and negotiation arrangements for the purchase of Sabatica's shares are almost identical for each purchaser. Mr Adrian Cleeve did all the negotiating for Cleevecorp. He signed the SSA as one of the directors of Cleevecorp. He also signed under power of attorney for Dr Sullivan and Kekal.

49. There are further connections:

    (a) Mr Adrian Cleeve provided a personal guarantee to GPIC (the lender to all purchasers) in respect of Cleevecorp's loan to fund its acquisition of Touch shares. Mr Cleeve submitted that he did so because Cleevecorp insisted

    (b) Mr Adrian Cleeve was required (and agreed) to obtain life insurance under both the ATC and Cleevecorp loans, with GPIC granted the right to take an assignment and

    (c) the borrower contact details under the Cleevecorp loan show ATC. Mr Adrian Cleeve submitted that this was because he negotiated the loans and was a director of Cleevecorp.

50. Cleevecorp submitted that these connections can be replaced. That may be so, but they exist. Moreover, they impose potentially significant personal obligations on Mr Adrian Cleeve, yet he is not an owner of shares in Cleevecorp or a beneficiary of The Cleeve Trust.

51. Mr Adrian Cleeve approached GPG on 3 occasions to enquire about the sale.

52. In the term sheet prepared by Mr Adrian Cleeve for the last approach, Mr Cleeve referred to 3 syndicate members, described as "*unrelated parties*". None of them are named; however, it was noted that syndicate member No. 3 held 2,790,672 shares. The only shareholder with this number of shares was Cleevecorp.[7]

53. In response to our brief, Cleevecorp denied its involvement at the term sheet stage. It submitted that it was not until "*the Term Sheet did not proceed… [that] Adrian Cleeve asked if Cleevecorp would be interested in acquiring further shares in Touch Holdings*". Cleevecorp repeated its denial of involvement at the term sheet stage when responding to our preliminary findings. Cleevecorp submitted that Mr Adrian Cleeve did not have actual or implied authority to speak for Cleevecorp. Cleevecorp proceeded with the deal, albeit for a different number of shares.

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[7] From the Top 15 shareholder list dated 7 July 2011

54. In our view, if Cleevecorp's denial is correct, Mr Adrian Cleeve must have been treating Cleevecorp as an entity he could speak for without needing authority. Nothing has been produced to show that Cleevecorp took any issue with Mr Adrian Cleeve exceeding his authority.

55. Cleevecorp submitted that it did not have discussions with Mr Adrian Cleeve during the negotiation of the transaction. Mr Adrian Cleeve submitted that he "*represented the purchasers in the negotiation and finalisation of the draft agreement*".

56. The lack of distinction drawn between Mr Adrian Cleeve's shares (held in ATC) and Cleevecorp's shares was further apparent in Kekal's submission. Kekal was one of the purchasers introduced to the transaction by Mr Saville. Kekal submitted that, when discussing the acquisition of Touch shares, Mr Saville had said "*it was intended that the current Managing Director [Mr Adrian Cleeve] would take up a portion, Allan Sullivan…would take up a portion, and that Kekal could take a portion*". Mr Saville did not mention to Kekal that Cleevecorp was a purchaser.

57. Further, Mr Adrian Cleeve stated in an email to Mr Saville that he had "*a process that would allow the acquisition [of Sabatica's shares in Touch] without requiring additional steps and shareholder approval*."

58. Mr Adrian Cleeve submitted that there was no common purpose in relation to the affairs of Touch or to influence the composition of its board or the conduct of its affairs.

59. We do not agree that there was no common purpose. When considering the sum of all the parts including the family relationship, structural links, Mr Adrian Cleeve's substantial involvement in Cleevecorp, the conduct of Mr Adrian Cleeve and Cleevecorp in negotiating the SSA and the funding arrangements, we infer an association between Mr Adrian Cleeve (ATC) and Cleevecorp.

60. This gives Mr Adrian Cleeve (ATC) and Cleevecorp voting power of 31.02% in Touch shares.

Association by the Share Sale Agreement

61. The SSA was entered in November 2012 and contains the following clauses:

    (a) Clause 3.5,

    3.5 Conduct of business

    From the date of this Agreement to and including 31 December 2013, the Company must, and each Purchaser must use its shareholding to ensure that the Company does:

    (a) conduct the Business in the ordinary course of business as it had done prior to the date of this Agreement;

    (b) maintain its corporate existence and not permit an Event of Default to occur;

    (c) not sell or acquire any assets (other than trading assets sold in the ordinary course of business) having an individual or aggregate value of more than $50,000;

    (d) not cease to carry on, or materially decrease the operations or trading activity of, the Business;

(e) not enter into any material agreement, arrangement or understanding on terms less favourable to a Group company than arm's length terms;

(f) not amend any existing material agreement, arrangement or understanding on terms less favourable to a Group company than the terms of the agreement, arrangement or understanding immediately prior to the date of this Agreement;

(g) not implement any practice, or engage in any conduct, or allow a Group company to do so, which has the purpose or effect of reducing FY 2013 EBITDA (including by deferring EBITDA to a later period) where, in the ordinary course, FY 2013 EBITDA would not have been so reduced.

(b) Clause 3.7,

3.7 Arrangements pending payment of Deferred Consideration

Until the earlier of:

(a) the parties determining that no Deferred Consideration is payable; and

(b) if Deferred Consideration is payable, full payment by the relevant Purchaser to the Vendor of its portion of the Deferred Consideration,

that date being the ***Release Date****, the following provisions apply in relation to each Purchaser:*

(c) between Completion and the Release Date, that Purchaser must not transfer or purport to transfer its Sale Shares to any other person without the consent of the Vendor. The Company agrees to refuse to register a transfer made in contravention of this clause;

(d) if paragraph (b) applies - from the date that payment of the Deferred Consideration is due under this Agreement until the Release Date the Purchaser irrevocably appoints the Vendor as its proxy to vote on its behalf at any meeting of the Company, to requisition a meeting, and to exercise all related rights and powers in connection with its Sale Shares. The relevant Purchaser agrees not to attend any meeting in person during that period or to grant any other proxy that would conflict with the appointment in this clause; and

(e) if paragraph (b) applies - from the date that payment of the Deferred Consideration is due under this Agreement until the Release Date the Purchaser assigns to the Vendor the right to be paid and to receive all payments, distributions, rights and benefits in connection with its Sale Shares. The Company agrees to provide any such payments, distributions, rights and benefits to the Vendor until the Vendor advises that the relevant Purchaser's Deferred Consideration has been satisfied. The amount of Deferred Consideration owed by a Purchaser to the Vendor will be reduced by the cash amount of any payment or distribution made to the Vendor under the terms of this assignment.

(c) Clause 7,

7. Other Obligations

(a) The Vendor agrees and undertakes to use its best endeavours to arrange that the current Chairman of the Company, Mike Jefferies (being a nominee of the Vendor), continue as Chairman of the Company until at least 31 March 2014.

(b) Each Purchaser severally agrees with the Vendor that it will not use its shareholding in the Company (including by voting) to remove Mike Jefferies as a director of the Company before 1 April 2014.

(d) Clause 13.7,

13.7 Obligations Several

The obligations of each Purchaser under this Agreement are several. Despite anything else in this Agreement, a Purchaser does not have rights as against any other Purchaser in relation to its Shares by reason of this Agreement.

62. The SSA also contains warranties, including Warranty 2.1(c) in Schedule 1:

Each Purchaser represents and warrants that:

(c) it is not an Associate of any other Purchaser or any other holder of Shares, and not a party to a relevant agreement (as defined in the Corporations Act) that would give any other person a Relevant Interest in its Sale Shares.

63. Clause 3.2, dealing with the purchase price, reflects the warranty by stating that "*Each Purchaser is a separate entity…. "*

64. Sabatica submitted that it "*went to an effort to ensure the purchasers…were not associates of one another before agreeing to a sale*". These efforts are reflected on the face of the SSA in some of the provisions, including Clause 13.7 and Warranty 2.1(c).

65. However, the materials submitted by the parties do not suggest that Sabatica made substantive efforts to ensure the purchasers were not associates (except by including clauses in the SSA). Sabatica has significant ongoing involvement with the purchasers under the SSA, including an entitlement of deferred consideration of up to $4 million, but did not apparently undertake any due diligence of them. Had it done so, it would have become apparent from an ASIC company search, for example, that Mr Adrian Cleeve had an involvement with Cleevecorp. We think a vendor in this situation would be likely to make further inquiries.

66. Mr Adrian Cleeve did all the negotiating of the SSA, which would also suggest that further inquiries should be made.

67. In our view, the SSA was used to facilitate the "process" of the purchasers acquiring Sabatica's shares without requiring shareholder approval.

68. That aside, 3 provisions in the SSA (clauses 3.5, 3.7 and 7(b)) are particularly problematic. They give parties power to control the exercise of a right to vote attached to securities and a power to control the disposal of securities: s608.

69. Sabatica submitted that these provisions were consistent with, and explained by, its commercial interests. That is true, but they go further. It submitted that it "*insisted on the inclusion of clause 3.5 and clause 7 to provide oversight and assurance that the Company would not do anything uncommercial which would adversely affect 2013 earnings so as to reduce the deferred consideration*". In other words, it insisted on an agreement about the conduct of Touch's affairs or the composition of its board for its benefit.

70. In *National Foods 01*,[8] there were rival bids for National Foods. One bidder entered a joint venture agreement with a supplier to National Foods that, if it got 100% of National Foods, it would undertake a joint venture with that supplier in respect of the distribution of certain dairy products. That agreement could be explained by the commercial interests of the parties, and still the Panel found that entry into it made the parties associates. While acknowledging that ss12(2)(b) and (c) should not be read unduly widely, the Panel said:

    … Section 12 does not, however, require that the agreement or concerted action relate expressly to shares in any way, or to the exercise of votes attached to shares. Rather, the legislature has decided to aggregate the voting power of people who are cooperating in ways which might be advanced by the use of such power.[9]

71. Mr Adrian Cleeve submitted that a moderate range of protections against manipulation of deferred consideration payable to a vendor in a share sale transaction was a common commercial practice of the sort that the Panel contemplated in *National Foods*. That Panel said:

    Paragraphs 12(2)(b) and (c) should not be read unduly widely, as many agreements relate to the conduct of a company's affairs, which should not ordinarily be treated as within the policy of the association provisions, and which have never been held to be associations. For instance, covenants in an arm's length loan agreement may intrude into the conduct of a borrower company's business and intellectual property agreements commonly intrude into the conduct of the licensee's business. At the same time, an agreement or concerted action in relation to a company's affairs may amount to an association, although it is not intended to confer total control over the conduct of the company's affairs: an agreement for the purpose of influencing the conduct of the company's affairs is enough, and the role of association is to extend the concept of a relevant interest in shares, which itself requires only imperfect control over their voting or disposal.[10]

72. The agreements contemplated in *National Foods* as not giving rise to an association were not of the same type as the one here.

73. Mr Adrian Cleeve submitted that the "*directors, major shareholders and prospective purchasers of Touch Holdings understood that the vendor [Sabatica] would require Mr Jefferies' retention on the board until the vendor had no further financial exposure to the company*". He further submitted that Sabatica "*would not have entertained the continuation of the entire [sale] process managed by the [Touch] board without*" this understanding.

74. ASIC submitted that:

    (a) clause 3.5 is "*a relevant agreement for the purpose of controlling or influencing the conduct of Touch Holdings' affairs*" and

    (b) clause 7 is "*a relevant agreement for the purpose of controlling or influencing the composition of the board*".

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[8] *National Foods Limited 01* [2005] ATP 8

[9] Ibid at [57]

[10] Ibid at [58]

75. ASIC also submitted that s606 prohibits the acquisition of a relevant interest through a transaction where the transaction results in an increase in voting power. Under s64, a reference to a person entering into a transaction includes entering into, or becoming a party to, a relevant agreement in relation to shares or securities. Under s9, a person who enters into, or becomes a party to, a relevant agreement in relation to voting shares or other securities is taken to enter into a transaction in relation to the shares or securities.

76. The SSA is a relevant agreement. Entry into the SSA constitutes a transaction. That transaction resulted in an increase in voting power.

77. Sabatica submitted that, if there was an association, it arose only after completion of the sale and therefore there was no breach of s606 because the voting power was acquired after the transaction. It submitted that s610(3) supported this interpretation. This submission (as did a number of the legal submissions arguing that there had been no s606 breach) surprised us.

78. Under s610(3), a transaction between existing associates will contravene s606 because the voting power is taken to have increased because of the transaction. We agree with ASIC that this does not deny s606 an application to a single transaction that both gives a relevant interest and creates an association. Of course, if the transaction simply evidences an association, s610(3) will apply.

79. A number of parties submitted that clauses 3.5 and 7 were included at the request of, and for the sole benefit of, Sabatica to achieve a commercial purpose. These submissions were largely consistent in articulating that commercial purpose, namely:

    (a) Touch was indebted to Sabatica for approximately $5 million. To "*ensure the solvency*" of the company, Sabatica agreed to extend the repayment date to 31 March 2014

    (b) the parties to the SSA agreed that an amount of deferred consideration may be payable

    (c) clauses 3.5 and 7 were included to protect Sabatica by ensuring that Touch "*would not do anything uncommercial*" which could affect the repayment of the loan or the amount of the deferred consideration and

    (d) the obligations "*are limited to time to when Sabatica has an interest in [Touch's] financial position*".

80. The critical question is whether the SSA is, or clauses of it are, a relevant agreement for either of the purposes set out in s12(2)(b) as submitted by ASIC above. To enliven the definition of associates requires the purpose of either (a) controlling or influencing the composition of the board or (b) controlling or influencing the conduct of affairs: *Perpetual Custodians*.[11] In that case, Stephenson J found that the purpose was only to acquire shares under the scheme of arrangement and what flowed from that was simply an effect. That is not the same as here, where the

[11] *Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd* [2012] NSWSC 1318

parties have agreed to conduct of business provisions and a specific board composition control provision. In our view, the SSA is an agreement (or evidence of one) for the purposes in s12(2)(b) or between all the parties to act in concert in relation to the affairs of Touch.

81. Five parties (Sabatica and the 4 purchasers) have as part of a transaction agreed to use 56% or more of the voting shares of Touch to control or influence its affairs or the composition of its board in a way that is to benefit Sabatica. Chapter 6 does not permit this. Moreover, it offends the purposes of chapter 6 set out in s602.

82. It is unusual that the SSA would impose obligations on Touch given that Touch is not a party to it. Some of the purchasers have sought to address this, including for example:

    (a) Kekal's submission that clause 3.5 was "*misplaced*" and

    (b) Mr Adrian Cleeve's submission that clause 3.5 was included primarily to "*create a benchmark*" for the application of adjustments to the earnings calculations relevant to the deferred consideration.

83. These clauses protect Sabatica's commercial interests only if the purchasers vote their shares in a certain way (as they are obliged to do under the SSA). For example, the SSA would require the purchasers to vote against a resolution to remove Mr Jefferies as a director or vote against a resolution to wind up Touch. This would not simply be the actions of like-minded shareholders. There is a written, single agreement which compels the purchasers to act in a certain way in relation to the affairs of Touch. They have all agreed to this.

84. We have considered the SSA as a whole. While clauses 3.5 and 7 (and perhaps clause 3.7) may have a commercial purpose, they also serve another purpose of ensuring that the purchasers act together in relation to the affairs of, and the composition of the board of, Touch at the behest of Sabatica. This is quite different to the situation in *Crescent Gold*.[12] In that matter, the takeover offer contained a provision that acceptors appointed the bidder as their attorney to vote their shares if the bid became unconditional. The applicant there submitted that acceptors became associates of the bidder because it could control the voting of the shares if the offer became unconditional. Noting that parliament intended to limit association for the purposes of Chapter 6 to exclude agreements for the sale and purchase of shares, without more, the Panel said:

    In our view, acceptance of the takeover offer creates a relevant interest for the bidder, but not an association. Absent a case that there is a common goal of seeking to "control or influence the conduct of a company's affairs … aimed at exerting pervasive control or influence over the company's direction and management," we do not accept that an association as the legislation intends has been established here.[13]

85. Here there is more.

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[12] *Crescent Gold Limited 02* [2011] ATP 14

[13] Ibid at [39]

86. Based on our finding of association by reason of the SSA, the parties have voting power of 59.04% in Touch shares.

Sabatica and each purchaser

87. Under the SSA, Sabatica retains a relevant interest in the shares it sold. Clauses 3.5, 3.7 and 7 (discussed in paragraph 68) provide Sabatica with the power to control:

    (a) the voting rights attaching to the shares (s608(1)(b)) and

    (b) the disposal of the shares (s608(1)(c)).

88. The SSA is a relevant agreement between Sabatica and each purchaser.

89. ASIC has submitted that "*as a result of the association arising from the relevant agreements, each Purchaser will obtain additional voting power on account of the relevant interest Sabatica holds in Touch Holdings*".

90. We agree. On entry into the SSA, Sabatica acquired an additional relevant interest of 3% in Touch shares (which was Cleevecorp's shareholding prior to the transaction). This may have been permitted by the creep exception.

91. However, each purchaser is an associate of Sabatica. Accordingly, the voting power of each purchaser individually increased by Sabatica's relevant interest.

92. ASIC class order CO 04/631 ordinarily applies to share sale agreements to ensure that a purchaser does not acquire voting power derived from securities which the vendor retains, or the relevant interest which the vendor has in securities it has not sold to that purchaser. The class order does not apply here, in our view, because the SSA does more than simply sell shares.

93. It appears that each purchaser has contravened s606(1) as they have each acquired a relevant interest in shares in Touch through a transaction and because of that transaction, their voting power has increased from 20% or below to more than 20% otherwise than as permitted.

The Cleeve associates and Dr Sullivan, Mr Chi (Kekal) and Mr Saville (majority decision)

94. Mr Duncan Saville is a director of Touch Network, which holds 25.81% of Touch. He is a director of Touch.

95. Mr Saville submitted that he "*could himself have acquired additional Touch Holdings shares, and that any entity controlled by Mr Saville could have acquired Touch Holdings shares, to the extent of at least 3% increase permitted under the "creep" exception.*" Kekal submitted that Mr Saville "*mentioned to Mr Chi that…Mr Saville's entities represented about 25% of [Touch's'] issued share capital.*" We infer that Mr Saville controls Touch Network. This inference was not disputed by him in response to our preliminary findings.

96. Mr Saville was contacted by Mr Adrian Cleeve about acquiring part of Sabatica's shares in Touch.

97. When Mr Adrian Cleeve stated in the email to Mr Saville, referred to in paragraph 57, that he had a process for acquiring Sabatica's shares and would like to "*discuss*

the opportunity" with Mr Saville, Mr Saville responded that he was "*happy to participate*". He did not himself ultimately acquire any shares.

98. Mr Saville discussed the opportunity with Dr Sullivan and Mr Jonathan Teck-Cheng Chi. Mr Chi owns and controls Kekal.

99. When Mr Adrian Cleeve asked Mr Saville for the details of "*your entities*" for the purchase, Mr Saville replied with details of Dr Sullivan and Kekal.

100. Mr Saville has a longstanding professional and personal relationship with each of Dr Sullivan and Mr Chi, including:

    (a) Mr Saville and Dr Sullivan hold common directorships (and have held common directorships in a number of companies dating back to 2000)

    (b) Dr Sullivan consults to companies in which Mr Saville is an investor

    (c) Mr Saville provides investment advice to Dr Sullivan from time to time

    (d) Mr Chi was employed by Mr Saville from 1997 to 2000 and

    (e) Mr Chi provides corporate research and accounting services to a company with which Mr Saville is involved.

101. Mr Saville submitted that he participated so that "*Sabatica's parcel [was] being divested in a manner which would not see Sabatica's parcel come under the control of one entity or group…as that would effectively leave the fate of Touch Network's holding in the hands of that group which may have intentions or [sic] Touch Holdings which did not reflect that of Touch Networks [sic]*".

102. Each purchaser of Sabatica's shares funded the acquisition fully or predominantly by a loan from GPIC. GPIC is a New Zealand insurance company of which Mr Saville is a director. Approximately 79.5% of the gross premium revenue of GPIC is derived from companies in which Mr Saville was a director.

103. The terms of each loan are almost identical, including:

    (a) interest rate of 10% per annum

    (b) repayment date of 31 March 2014 (being the same date Sabatica's loan to Touch Holdings is due) and

    (c) GPIC was granted security over the shares.

104. The Applicant submitted that it is "*inconceivable*" that each of the borrowers "*independently found the same said lender to lend funds on limited (if any) security on identical terms without those borrowers and GPI[C]…having acted in concert for the express purpose of funding the acquisition of shares*".

105. Mr Saville submitted that it was clear that GPIC provided the funding, but there was no basis for an inference that the borrowers and the lender acted in concert.

106. In the case of the loan obtained by Kekal, Mr Chi submitted that while he "*thought he would fund [the share acquisition] himself, Mr Saville said that he would fund 100% given Mr Chi's and Mr Saville's good relationship over the years*".

107. Of particular interest was a "step-in" obligation in the funding. Under the SSA, the purchasers are required to pay, on a pro rata basis linked to the number of shares

they acquired, up to a maximum aggregate amount of $4 million to Sabatica as deferred consideration. Such amount is linked to the earnings performance of Touch for the 2013 financial year. Each loan contains a step-in obligation under which, if there is default, GPIC assumes the relevant borrower's obligations to pay any deferred consideration to Sabatica under the SSA. Initially, we had considered the lending arrangements to be uncommercial. However, Mr Saville submitted that it followed from the mechanism for calculating deferred consideration that the value of the shares would increase more than the amount of deferred consideration payable. Accordingly, he submitted, GPIC's position improved overall if it exercised its security in those circumstances. We, the majority, are persuaded by this, and no longer consider that the lending arrangements are uncommercial.

108. Both Cleevecorp and Dr Sullivan submitted that they did not have discussions with Mr Adrian Cleeve during the negotiation of the transaction. Mr Adrian Cleeve submitted that he "*represented the purchasers in the negotiation and finalisation of the draft agreement*".

109. Mr Saville was involved in negotiating the SSA, including the following email correspondence with Mr Adrian Cleeve:

Adrian Cleeve to Duncan Saville:

Hi Duncan,

Please find attached the current draft for your review.

Duncan Saville to Adrian Cleeve:

Adrian

Reads ok to me

Do we have the right to early pay GPG loans or cancel the guarantee? – assuming it suited us.

110. We had considered that he was reviewing the SSA on Touch's behalf, but Mr Saville submitted in response to our preliminary findings that "*the evidence is equally consistent with the true position, namely that Mr Saville was reviewing the SSA on behalf of GPIC, the proposed lender.*"

111. Kekal submitted that Mr Chi saw neither a copy of the draft SSA nor the final. The document was executed under a power of attorney by Mr Adrian Cleeve. At the time the SSA was signed, Mr Chi had not seen the loan agreement or the security agreement over the shares. Kekal submitted that "*with documentation drawn by a reputable law firm acting for a long-standing friend and fellow businessman, Mr Chi had no reason to doubt that the documentation and its subject matter was anything out of the ordinary.*"

112. Kekal also submitted that it was not at any relevant time aware of the statement by Mr Adrian Cleeve (in the email referred to in paragraph 57) about a process to acquire Sabatica's shares without requiring shareholder approval.

113. Dr Sullivan also appointed Mr Adrian Cleeve as his power of attorney to execute the SSA and submitted that this was "unremarkable". He was not aware, he submitted, that Mr Saville was a director of the lender (ie, GPIC). He submitted

that he was acting in his own interests and that "*there simply is no relevant agreement or concerted action in relation to Touch Holdings to which Sullivan is a party*".

114. Kekal submitted that Mr Chi had met Dr Sullivan only once.

115. Following the responses to our preliminary findings the material admits of the possibility that Mr Saville merely arranged for colleagues to take up the shares, and arranged funding for them on commercial terms.

116. After taking into account the seriousness of a finding of association, on balance we, the majority, are not satisfied that Dr Sullivan, Mr Chi (Kekal) and Mr Duncan Saville are associated themselves or with the Cleeve associates.

117. Two features seem important to us:

    (a) Mr Saville is on the board of Touch, yet Mr Adrian Cleeve did not approach him first. On the contrary, Mr Cleeve put forward 2 proposals to acquire the shares (neither of which included Mr Saville) before he put forward this third option to acquire the shares that included Mr Saville. This does not suggest association and

    (b) the funding of the loans by GPIC seemed uncommercial but has been explained in response to our preliminary findings in a way that now makes it clear that they are, in our view, commercial. This is equally consistent with Mr Saville merely facilitating a sale. Mr Saville has an interest in doing this so as not to have his existing 25.81% holding in Touch undermined.

118. As the Panel stated in *Bridgewater Lake Estate:*

    Where conduct is assessed as evidence of association, it is often difficult to tell whether the conduct merely reveals that people are separately following interests which coincide, or whether they are carrying out an agreement to pool voting power in pursuit of an agreed common goal.[14]

119. Consistent with the line of reasoning in that case, we considered that in respect of this association *"for each of the relevant alleged impugned transactions, on an individual basis, and for the pattern of transactions overall, there were bases or explanations which [we] could not say were unreasonable or uncommercial."*[15]

120. Of course, should the loans default and GPIC exercise its security and take up the shares, regardless of whether deferred consideration is paid, we might come to a different view, but that would be a new circumstance requiring a fresh application.

DECISION

121. It appears to us that the circumstances are unacceptable:

    (a) having regard to the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the control, or potential control, of Touch

    (b) having regard to the purposes of Chapter 6 set out in section 602 and

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[14] *Bridgewater Lake Estate Ltd* [2006] ATP 3 at [100]
[15] Ibid at [3]

(c) because they constitute or give rise to contraventions of section 606.

122. We made the declaration in Annexure A having considered that it is not against the public interest to do so. The SSA involved contravention of Chapter 6, and undisclosed association, each having a significant control effect on Touch. We had regard to the matters in s657A(3).

Orders

123. Following the declaration, we made the final orders in Annexure B. Under s657D the Panel's power to make orders is very wide. The Panel is empowered to make 'any order'[16] if 4 tests are met.

(a) It has made a declaration under s657A. This was done on 3 May 2013.

(b) It must not make an order if it is satisfied that the order would unfairly prejudice any person. As discussed below, we are satisfied that our orders do not unfairly prejudice any person.

(c) It gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 7 May 2013. Each party made submissions. Some made rebuttals.

(d) It considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. The orders do this by reversing the transaction.

124. We considered a number of alternatives.

(a) Divestment of the shares acquired by ATC and further orders that modified the SSA and restricted the voting of other parties. This would be a pragmatic solution. The Cleeve association was not merely technical. The acquisition by ATC of 20% occurred in a single transaction, and it was the acquisition that took the Cleeve associates over 20%.

Dr Sullivan supported this order. ASIC submitted that ordinarily divestment was the preferred order for a breach of s606, but in this instance the shares were in an unlisted entity with no ready market for its securities. Mr Saville submitted that such an order would unfairly prejudice GPIC, the remaining shareholders in Touch and Touch itself. Mr Adrian Cleeve made a similar submission. Sabatica added itself to the list of those that would be unfairly prejudiced.

(b) Cancellation of the SSA. This solution would be simple and remedy the unacceptable circumstances directly. Cancellation of an agreement in connection with the acquisition of securities is a 'remedial order': s9.

[16] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

Sabatica submitted that no adverse findings were made against it and such a solution would be unfairly prejudicial to it and to Touch (because of the impact that unwinding the funding of Touch contained in the SSA would have). Kekal submitted that it would be left out of pocket. Dr Sullivan submitted that the order would go "*way beyond what is required to remedy any breach*". On the contrary, it would exactly remedy the breach. ASIC submitted that in the circumstances this was the best alternative.

(c) Requiring shareholder approval for the acquisition of the shares by the purchasers, failing which the SSA would be cancelled.

Sabatica submitted that an alternative would be appropriate, namely shareholder approval for the acquisition by ATC (failing which its shares would be divested) together with variations to the SSA.

ASIC had concerns about an alternative involving post-transaction shareholder approval.

125. None of the alternatives are ideal. In *Gjergja v Cooper*[17] the majority addressed what is meant by 'unfair prejudice' by reference to *Waldron Securities*:

A person who is himself in breach of the Act would undoubtedly be prejudiced if for example he were restrained under s5B(1)(a)[18] *from carrying on a business theretofore carried on in contravention of the Act, but I do not think that it could be said that he was unfairly prejudiced.*[19]

126. McGarvie J in *Gjergja* looked at the question as "*the order to be made is that which the judge regards as the fairest order, having regard to the various interests to be reconciled and the considerations relevant to the exercise of the discretion.*"

127. Ormiston J in *Gjergja* said "*In the context of the present case the starting point must be that the parties had clearly contravened the provisions of the Code, and the obvious solution was the restoration of the status quo. It is difficult to see why the restoration of the position which applied before the contravention, and the consequences flowing from any order effecting that, should be considered unfair or as causing unfair prejudice, unless that restoration was likely to achieve nothing, or its benefits were so minimal or benefited so few shareholders, that the prejudice far outweighed the benefits likely to be attained.*"

128. Of the alternatives, we think that cancellation of the SSA provides the most appropriate solution. It restores the position before the contravention. It cannot be said to achieve nothing. Even if the SSA is redone as separate agreements there would need to be shareholder approval under s611 item 7.

129. The final orders that the Applicant sought would have a major impact on Touch and go further than we consider necessary.

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[17] *Gjergja v Cooper* [1987] VicRp 15; [1987] VR 167

[18] A section of the Securities Industry Act allowing the court to restrain a person from carrying on business as a securities dealer; however, under subs(2) "*the Court shall before making an order under subs(1) satisfy itself so far as it can reasonably do so, that the order will not unfairly prejudice any person*"

[19] *Waldron v MG Securities (A/Asia) Ltd* [1975] VicRp 52; [1975] VR 508

Other matters

130. By email dated 5 February 2013 the Applicant wrote to Mr Jefferies (as chairman of Touch), saying "*We have held initial discussions with the takeovers panel, and at first glance they and we see that the transaction and the sequence of communication around it seems highly irregular*." The Applicant in correspondence with the Panel executive was told nothing of the kind.

131. The Applicant explained that his email was the last in a series seeking an explanation about the sale of Sabatica's shares, none of which had been responded to, and that Mr Jefferies did not indicate any concern about the email; only raising it one month after the application had been made.

132. When this email was brought to the Panel's attention, the Applicant apologised, saying the email had not been proof-read carefully enough. It was not a question of proof-reading. The email was misleading and inappropriate.

Costs

133. We do not make any costs orders.

Minority reasons

134. Mr Shervington's reasons on the Cleeve association and Dr Sullivan, Mr Chi (Kekal) and Mr Saville are below.

Andrew Sisson
President of the sitting Panel
Decision dated 3 May 2013 and 15 May 2013
Reasons published 27 May 2013

Minority reasons on the Cleeve association and Dr Sullivan, Mr Chi (Kekal) and Mr Saville

135. Unlike the majority, I am satisfied that Dr Sullivan, Mr Jonathan Teck-Cheng Chi (Kekal) and Mr Duncan Saville are associated themselves, or with the Cleeve association, in relation to Touch.

136. I have formed this view based on the overall weight of material, including:

    (a) the process of locating purchasers for Sabatica's parcel of Touch shares

    (b) the funding arrangements for the acquisitions and

    (c) the conduct of the parties in negotiating the SSA.

Process of locating purchasers

137. Prior to entry into the SSA, there were a number of approaches by Mr Adrian Cleeve to GPG regarding the sale of Sabatica's parcel of Touch shares. The approach that ultimately resulted in the entry into the SSA was made with Mr Saville's substantial support.

138. Mr Adrian Cleeve stated in an email to Mr Saville that he had "*a process that would allow the acquisition [of Sabatica's shares in Touch] without requiring additional steps and shareholder approval*" and that he would like to "*discuss the opportunity*" with Mr Saville.

139. Mr Saville stated that he was "*happy to participate*" and discussed the opportunity with Dr Sullivan and Kekal. He did not buy any shares himself.

140. Mr Adrian Cleeve asked Mr Saville for the details of "*your entities*", and Mr Saville provided the details of Dr Sullivan and Kekal. I infer that Mr Adrian Cleeve was seeking to find a way around shareholder approval for the acquisition of Sabatica's parcel of shares and involved Mr Saville in this process. Mr Saville participated in this process.

141. Mr Saville has a longstanding professional and personal relationship with each of Dr Sullivan and Mr Chi.

142. I, too, infer that Mr Saville controls Touch Network (see paragraph 95).

143. Mr Saville submitted that he participated so that "*Sabatica's parcel [was] being divested in a manner which would not see Sabatica's parcel come under the control of one entity or group…as that would effectively leave the fate of Touch Network's holding in the hands of that group which may have intentions or [sic] Touch Holdings which did not reflect that of Touch Networks [sic]*".

144. In response to our preliminary findings, Mr Saville explicitly stated that his interest *"in Touch Network's shareholding not being undermined is not controversial"*. I infer (based on the above and what follows) that in protecting this interest, Mr Saville was able to exert control over who acquired Sabatica shares.

145. The conduct of Mr Adrian Cleeve and Mr Saville suggests that they acted together in establishing a "syndicate" (or perhaps two "syndicates") of purchasers. Mr

Cleeve was looking to find a home for Sabatica's 56.04% interest. Mr Saville was looking to protect his 25.81% interest. Both sat on Touch's board. Mr Cleeve negotiated (see below) the transaction and Mr Saville funded (see below) the transaction. In my view, there is a significant community of interest and no coincidence in the arrangements.

Funding arrangements

146. Each purchaser funded the acquisition of shares in Touch fully (in the case of entities introduced by Mr Saville) or predominantly (in the case of entities introduced by Mr Adrian Cleeve) by loan from GPIC. The breakdown of the funding is as follows:

Purchaser	Purchase Price	Amount funded by GPIC
Cleevecorp	$429,218	$386,303 (90%)
ATC	$1,070,782	$963,697 (90%)
Dr Sullivan	$429,218	$429,218 (100%)
Kekal	$1,070,782	$1,070,782 (100%)

147. GPIC is a New Zealand insurance company of which Mr Saville is a director.

148. In addition to being a director of GPIC, approximately 79.5% of the gross premium revenue of GPIC is derived from companies in which Mr Saville was a director.

149. Mr Saville submitted that *"the amount of the funding provided to the purchasers by GPIC is not significant in the context of the activities of Mr Saville's business assets and the assets of those whom he advises"*. The submission suggests that GPIC is one of his vehicles. I infer that Mr Saville controls, or at least has a substantial influence on, GPIC and its business activities.

150. In response to our preliminary findings, Mr Adrian Cleeve submitted that he approached Mr Saville for advice and to assist in relation to Sabatica's divestment, and he asked Mr Saville to help him find finance for the acquisition on behalf of the purchasers after he had failed to raise finance from other sources.

151. The finance came from a company connected to Mr Saville. Thus:

    (a) Mr Saville referred Dr Sullivan to GPIC when discussing how the acquisition of Touch shares could be funded. Dr Sullivan submitted that he *"does not maintain that he independently found GPIC"*.

    (b) In the case of the loan obtained by Kekal, Mr Saville's role in funding the acquisition was made explicit. Mr Chi submitted that while he "*thought he would fund it [the share acquisition] himself, Mr Saville said that he would fund 100% given Mr Chi's and Mr Saville's good relationship over the years"*.

    (c) GPIC substantially funded ATC and Cleevecorp.

152. Mr Adrian Cleeve negotiated the terms of the funding with GPIC for all purchasers. The terms of each loan are almost identical. Cleevecorp insisted on Mr Adrian Cleeve personally guaranteeing its loan, which he did.

153. The Applicant submitted that it is "*inconceivable*" that each of the borrowers "*independently found the same said lender to lend funds on limited (if any) security on identical terms without those borrowers and GPI[C]…having acted in concert for the express purpose of funding the acquisition of shares*". I agree.

154. Each loan also contains an identical step-in obligation, which requires GPIC to assume the relevant borrower's obligation to pay any deferred consideration to Sabatica under the SSA.

155. To my mind, it is unclear why an arm's-length lender would agree to take on an additional liability of up to $4 million (assuming all of the borrowers default under the loan). Mr Adrian Cleeve submitted that "*it would not have been commercially acceptable to the borrowers to lose the benefit of the shares and be left with the burden of paying for them*". Perhaps, but it does not explain why GPIC agreed to the term. The majority are persuaded by Mr Saville's submission that GPIC's position improved overall if it exercised its security in circumstances where deferred consideration is payable. I am not persuaded. The step-in obligation imposes a significant obligation on GPIC, stretching its balance sheet, and makes deciding whether to exercise the security a bigger decision.

156. The total equity of GPIC at 31 March 2012 was NZ$9,928,000. The aggregate funding exposure of GPIC to the purchasers is almost NZ$8,200,000 (A$7 million). It is unusual for an insurance company to commit to lend almost 100% of its shareholder funds for the purposes of such a transaction.

157. The arranging of the loans supports the existence of collaborative conduct between Mr Saville and the purchasers and Mr Adrian Cleeve. I do not agree that the loans can be explained as being on commercial terms.

Negotiating the SSA

158. Dr Sullivan and Kekal granted a power of attorney to Mr Adrian Cleeve to execute the SSA. Kekal submitted that "*neither a copy nor a draft of the Agreement was provided to Mr Chi of Kekal on or prior to the grant of the Power of Attorney, on or prior to Mr Cleeve's execution of the Share Sale Agreement on Kekal's behalf or on or prior to the completion of the sale. A copy of the Share Sale Agreement was only provided to Kekal and Mr Chi following commencement of Panel enquires.*"

159. Kekal entered an agreement that imposed obligations, contained warranties with no liability cap, and involved a purchase price in excess of $1 million, without Mr Chi seeing even a draft. Mr Chi did not negotiate, he did not review the agreement, he did not sign the agreement, and he received the funding for the acquisition from GPIC. There is no evidence that he was familiar with Touch. In response to our brief Kekal prepared an "Investment Summary Note" for the Panel, but there is no evidence there were any pre-existing records or board minutes about the investment decision.

160. I infer that Kekal did not merely trust Mr Adrian Cleeve and Mr Saville; it was part of the "process" to avoid shareholder approval and Mr Chi had an agreement, arrangement or understanding with Mr Adrian Cleeve or Mr Saville (or both) or was acting in concert with one or both of them in relation to Touch.

161. Dr Sullivan submitted that he "*formed his own objective view*" of the investment and was not aware that Mr Saville was a director of GPIC. However, he did acknowledge that he did not independently find GPIC (but was referred by Mr Saville), and that Mr Adrian Cleeve signed the SSA under his power of attorney.

162. He has provided a statutory declaration confirming his submission that he had only one conversation with Mr Saville about the purchase, that he did not know that other purchasers were receiving funding from GPIC, and denying that Mr Adrian Cleeve represented him in negotiations. Dr Sullivan did not disclose the contents of the conversation with Mr Saville.

163. This has caused me more trouble than the purchase by Kekal. On balance, however, I infer that Dr Sullivan was part of the "syndicate" for the following reasons:

    (a) the material implicating Kekal is strong. Given that the transaction was introduced by Mr Saville to both Kekal and Dr Sullivan, there is a likelihood that Dr Sullivan was part of the same agreement, arrangement or understanding

    (b) the loan funding came from GPIC

    (c) Mr Adrian Cleeve signed the SSA on his behalf

    (d) we were not told what the conversation with Mr Saville entailed and

    (e) Dr Sullivan provided only limited information in response to questions, for example, only advising that he was referred to GPIC by Mr Saville once we had formed preliminary findings.

164. Mr Saville submitted that he was not a party to the SSA and that his response to a question in our brief about clauses in the SSA was provided "*based on analysis rather than involvement.*" However, we have been provided with email correspondence which appears to indicate that Mr Saville was in fact involved in negotiating the SSA, including the following:

    Adrian Cleeve to Duncan Saville:

    Hi Duncan,

    Please find attached the current draft for your review.

    Duncan Saville to Adrian Cleeve:

    Adrian

    Reads ok to me

    Do we have the right to early pay GPG loans or cancel the guarantee? – assuming it suited us.

165. Mr Saville submitted that he was reviewing the SSA on behalf of GPIC, as the lender to the purchasers. Be that as it may, his response to the brief was not accurate.

166. Mr Saville may have been wearing a number of hats when reviewing the SSA. Even if he did review the SSA on behalf of GPIC, he is a director of Touch and a director of Touch Network (which has 25.81% of Touch).

167. I infer that Mr Saville was involved in negotiating the SSA. I also infer from the references to "we" and "us" that Mr Saville and Mr Adrian Cleeve were acting together in relation to the acquisition of the 56.04% shareholding in Touch.

Conclusion

168. I found no reason in the further submissions and rebuttals to resile from the Panel's preliminary findings.

169. I think there is a "syndicate" (or perhaps two "syndicates") of purchasers. Considering the whole of the material I infer that Mr Saville (Touch Network), Cleevecorp, ATC, Dr Sullivan and Kekal:

    (a) have a relevant agreement for the purpose of controlling or influencing the composition of the Touch board or the conduct of its affairs and

    (b) are acting in concert in relation to Touch's affairs.

170. Based on my finding of association, the parties have voting power of 84.85% in Touch shares.

Laurie Shervington
Member of the sitting Panel

Advisers

Party	Advisers
Applicant	Nathan Kuperholz
Mr Jonathan Chi (Kekal)	Kemp Strang
Mr Adrian Cleeve (ATC)	HWL Ebsworth Lawyers
Cleevecorp	Rockwell Bates
Sabatica	Baker & McKenzie
Mr Duncan Saville	Church & Grace
Dr Allan Sullivan	Gilbert + Tobin
Touch	NA

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

TOUCH HOLDINGS LIMITED

CIRCUMSTANCES

1. Touch Holdings Ltd (**Touch**) is an unlisted public company with more than 50 members.
2. Sabatica Pty Ltd (**Sabatica**), a wholly-owned subsidiary of Guinness Peat Group plc (**GPG**), owned 52,111,459 shares in Touch, representing 56.04% of Touch's issued capital.
3. In November 2012, Sabatica entered a share sale agreement to sell its entire shareholding in Touch to the following entities:
   (a) Cleevecorp Pty Ltd as trustee of The Cleeve Trust (**Cleevecorp**), as to 7,455,729 shares (8.02%)
   (b) ATC Capital Pty Ltd (**ATC**), as to 18,600,000 shares (20.00%)
   (c) Mr Allan Sullivan, as to 7,455,730 shares (8.02%) and
   (d) Kekal Capital Ltd Co (**Kekal**), as to 18,600,000 shares (20.00%).
4. On 2 January 2013, GPG announced that it had completed the divestment.
5. Cleeve Group Pty Ltd (**Cleeve Group**) is owned in equal quarter-shares by Messrs Laurence Cleeve, Keith Cleeve, Terence Cleeve and Damien Cleeve.
6. Cleevecorp is wholly owned by Cleeve Group.
7. ATC is wholly owned by Mr Adrian Cleeve.
8. Kekal is wholly owned by Mr Jonathan Teck-Cheng Chi.
9. Messrs Adrian Cleeve, Laurence Cleeve, Keith Cleeve, Terence Cleeve and Damien Cleeve are brothers.
10. There are structural links between the brothers involving Cleevecorp, The Cleeve Trust and Cleeve Group (which is trustee of The Cleeve Group Trust). Mr Adrian Cleeve is a director of Cleeve Group and Cleevecorp. Mr Adrian Cleeve brought the investment in Touch to Cleevecorp. He had previously included Cleevecorp in a proposal to purchase all of Sabatica's shares (which was not successful). Mr Adrian Cleeve negotiated the purchases and guaranteed a loan from General Provincial Insurance Company Limited to Cleevecorp to fund its purchase.
11. The Panel considers that Mr Adrian Cleeve, ATC and Cleevecorp are associated:

(a) under section 12(2)(b)[20] for the purpose of controlling or influencing the conduct of Touch's affairs and

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

12. Further, the share sale agreement includes:

(a) clause 3.5, which provides that from the date of the agreement until 31 December 2013, Touch must, and each Purchaser "*must use its shareholding to ensure that the Company does*", conduct the business of Touch subject to certain restrictions (such as restrictions on the acquisition and disposal of assets greater than $50,000 and restrictions on entry into material contracts)

(b) clause 3.7, which provides that, pending payment of any deferred consideration, the purchasers must not transfer shares without Sabatica's consent and

(c) clause 7(b), which provides that each purchaser agrees to "*not use its shareholding in the Company (including by voting) to remove Mike Jefferies [Sabatica's nominee director] as a director of the Company before 1 April 2014*".

13. The share sale agreement is a relevant agreement for the purpose of:

(a) controlling or influencing the conduct of Touch's affairs and

(b) controlling or influencing the composition of its board.

14. The Panel considers that by reason of the share sale agreement Cleevecorp, ATC, Dr Sullivan and Kekal are associated:

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

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

15. The Panel considers that by reason of the share sale agreement Sabatica is associated with each of Cleevecorp, ATC, Dr Sullivan and Kekal:

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

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

16. The voting power of Cleevecorp, ATC, Dr Sullivan and Kekal in Touch has increased from below 20% to more than 20% other than through one of the exceptions in section 611.

17. It appears to the Panel that the circumstances are unacceptable having regard to:

(a) the effect that the Panel is satisfied the circumstances have had, are having, will have or are likely to have on the control, or potential control, of Touch

(b) the purposes of Chapter 6 set out in section 602 and

(c) because they constitute or give rise to contraventions of section 606.

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

18. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Touch.

Alan Shaw
Counsel
with authority of Andrew Sisson
President of the sitting Panel
Dated 3 May 2013

Australian Government
Takeovers Panel

Annexure B
CORPORATIONS ACT
SECTION 657D
ORDERS

TOUCH HOLDINGS LIMITED

The Panel made a declaration of unacceptable circumstances on 3 May 2013.

THE PANEL ORDERS

1. The share sale agreement entered into in November 2012 between Sabatica, ATC, Cleevecorp, Mr Allan Sullivan and Kekal is cancelled with effect from the date of these orders.
2. Within 10 business days of the date of these orders:
   (a) Sabatica must repay the money received under the share sale agreement and
   (b) the purchasers under the share sale agreement must provide share transfer forms and do whatever is necessary to complete the transfers.
3. In these orders the following terms apply.

ATC	ATC Capital Pty Ltd
Cleevecorp	Cleevecorp Pty Ltd as trustee of The Cleeve Trust
Kekal	Kekal Capital Ltd Co
Sabatica	Sabatica Pty Ltd

Alan Shaw
Counsel
with authority of Andrew Sisson
President of the sitting Panel
Dated 15 May 2013