



Australian Government

Takeovers Panel

Reasons for Decision

RHG Limited

[2013] ATP 10

Catchwords:

Decline to conduct proceedings – collateral benefits – disclosure – buyback – efficient, competitive and informed market – equal opportunity – scheme of arrangement – voting power

Corporations Act 2001 (Cth), section 602

Sovereign Life Assurance Company v Dodd [1892] 2 QB 573

GN7 Lock-up devices, GN21 Collateral benefits

Ross Human Directions Limited [2010] ATP 8, Citect Corporation Limited [2006] ATP 6

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

INTRODUCTION

1. The Panel, Hamish Douglass (sitting President), John Keeves and Francesca Lee, declined to conduct proceedings on an application by Australian Mortgage Acquisition Company Pty Ltd and Resimac Limited in relation to the affairs of RHG Limited. The application concerned competing scheme proposals and whether Cadence, as a shareholder that would likely be excluded from voting on the Pepper/Cadence scheme because it was receiving collateral benefits, should be excluded from voting on the Resimac Syndicate rival scheme.

The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable or make the final orders sought.

2. In these reasons, the following definitions apply.

Cadence	Cadence Capital Limited
Pepper	Pepper Australia Pty Ltd
Pepper/Cadence scheme	scheme proposal by Pepper and Cadence to acquire 100% of RHG shares
Resimac Syndicate	Australian Mortgage Acquisition Company Pty Ltd and Resimac Limited
Resimac Syndicate scheme	scheme proposal by the Resimac Syndicate to acquire 100% of RHG shares
RHG	RHG Limited

FACTS

3. RHG is an ASX listed company (ASX code: RHG).
4. On 8 July 2013, RHG entered into a merger implementation deed with the Resimac Syndicate under which it would acquire 100% of RHG shares for \$0.441 cash per share,¹ through a scheme of arrangement.
5. On 10 July 2013, Pepper submitted a binding offer to acquire 100% of RHG shares for \$0.46 cash per share, through a scheme of arrangement.
6. On 15 July 2013, RHG and the Resimac Syndicate revised their merger implementation deed, with the scheme consideration increased to \$0.48 cash per share.
7. Cadence has a 17.1% interest in RHG.
8. On 15 August 2013, Pepper and Cadence announced a proposal for Pepper to acquire RHG for \$0.35 cash per share plus one Cadence share for every 10 RHG shares.² Pepper/Cadence valued their offer at \$0.4965 per share.³
9. Under the proposal Cadence would receive cash of \$0.49 per share as it could not receive shares in itself, and Pepper would pay Cadence \$1.40 cash for each new Cadence share issued to RHG shareholders.
10. Cadence would not acquire any interest in RHG shares or RHG assets under the Pepper/Cadence proposal.
11. Cadence stated that as a consequence of “*this superior proposal*” it did not support the then current Resimac Syndicate proposal and intended to vote against it at the relevant scheme meeting.
12. On 16 August 2013, RHG lodged a draft scheme booklet with ASIC, based on the then current merger implementation deed with the Resimac Syndicate.
13. On 23 August 2013, RHG received a proposal from the Resimac Syndicate to increase the scheme consideration to \$0.495 cash per share.
14. On 29 August 2013, RHG announced that it had accepted the 23 August 2013 proposal and that the merger implementation deed had been revised accordingly.
15. On 4 September 2013, RHG lodged an updated draft scheme booklet with ASIC, based on the current merger implementation deed with the Resimac Syndicate.
16. There is no first court hearing currently scheduled.

¹ RHG also declared a 3.0 cps dividend due to be paid on 22 August 2013. The scheme consideration was not to be reduced by the amount of the dividend. Subsequent proposals (and counter proposals) were also put on an ex-dividend basis

² Or \$0.42 cash per share plus 1 Cadence share for every 20 RHG shares, if the relevant approvals for the issue of Cadence shares sufficient to offer the 1:10 ratio cannot be obtained

³ Based on the Cadence closing share price on 15 August 2013 of \$1.465

17. On 9 September 2013, RHG announced it had received a further proposal from Pepper/Cadence, involving:
 - (a) consideration of \$0.36 cash per share plus 1 Cadence share for every 10 RHG shares⁴ for shareholders other than Cadence and
 - (b) consideration of \$0.50 cash per share for Cadence. Pepper would pay Cadence \$1.40 cash for each new Cadence share issued to RHG shareholders and
 - (c) Cadence stated that its board had approved a buyback program for up to 10% of the Cadence shares on issue and may implement the buyback should Cadence's share price trade materially below net tangible assets.
18. Pepper/Cadence valued their offer at \$0.508 per share.⁵
19. Cadence stated that as a consequence of the revised offer it did not support the Resimac Syndicate scheme and intended to vote against it at the relevant scheme meeting.
20. RHG has not announced which of the current proposals it considers superior.

APPLICATION

21. By application dated 25 September 2013, the Resimac Syndicate sought a declaration of unacceptable circumstances. The Resimac Syndicate submitted that Cadence would receive collateral benefits under the Pepper/Cadence scheme and that such benefits had induced Cadence to agree to vote against the Resimac Syndicate scheme.
22. The Resimac Syndicate submitted that as a result RHG shareholders would be denied the opportunity to participate in the Resimac Syndicate's superior offer and the Resimac Syndicate would be denied the opportunity to compete for control of RHG.
23. The Resimac Syndicate also submitted that Cadence's announcements regarding the potential buyback were vague, offered illusory benefits and lacked detail.

Final orders sought

24. The Resimac Syndicate sought final orders to the effect that Cadence be restrained from voting against the Resimac Syndicate scheme of arrangement unless the RHG board has withdrawn its recommendation of the Resimac Syndicate offer, and that Cadence make additional disclosure in relation to the details of its proposed buyback.

DISCUSSION

Jurisdiction

25. In *Ross Human Directions*⁶ the Panel stated at [19]: *While the Panel generally is reluctant to conduct proceedings in connection with a scheme of arrangement if a court has commenced*

⁴ Or \$0.43 cash per share plus 1 Cadence share for every 20 RHG shares, if the relevant approvals for the issue of Cadence shares sufficient to offer the 1:10 ratio cannot be obtained

⁵ Based on the Cadence closing share price on 6 September 2013 of \$1.48

⁶ [2010] ATP 8

scrutiny of the scheme, the court is yet to do so here and the Panel has previously conducted proceedings in that situation. We agree with this approach. In this matter the Court had not yet commenced scrutiny of the scheme.

Pepper/Cadence scheme – collateral benefits

26. The Pepper/Cadence scheme offers cash/scrip consideration to RHG shareholders other than Cadence, and cash consideration to Cadence. The Pepper/Cadence scheme includes the placement of Cadence shares for cash. The Resimac Syndicate submitted that these differences involve the provision of collateral benefits to Cadence in its capacity as a RHG shareholder.
27. If the Pepper/Cadence scheme proceeds, the Court can be expected to place Cadence in a separate class for voting purposes, on the basis that their rights are “*so dissimilar as to make it impossible for them to consult together with a view as to their common interest.*”⁷ Pepper and Cadence have stated that they expect this to occur.
28. Guidance Note 21 *Collateral Benefits* states at [35]: “*A collateral benefit is unlikely to give rise to a declaration of unacceptable circumstances if it is approved by fully-informed, non-associated security holders.*” This would be the case if the Pepper/Cadence scheme proceeds.
29. If the Eggleston principles were not satisfied, it may be appropriate for us to consider a scheme of arrangement that would not be permitted if conducted under Chapter 6.⁸ However, that is not the case here.
30. Further, in the event that ASIC considers the arrangement would not be fair to disinterested shareholders it would be open for ASIC to decline to give its ‘no objection’ letter⁹ or appear at Court.

Resimac Syndicate scheme

31. Under the Resimac Syndicate scheme, Cadence would be treated identically to other RHG shareholders.
32. The Resimac Syndicate submitted that Cadence “*will seek to use its negative vote to remove the AMAC/Resimac Offer from contention, leaving the Pepper Offer as the only remaining viable proposal for RHG shareholders, despite its inferiority.*”
33. Cadence submitted that “*[t]here is no legal or policy basis on which any alleged collateral benefits in relation to one scheme of arrangement would prevent a shareholder from voting on another scheme of arrangement.*”
34. The only impact of the Pepper/Cadence arrangement on the Resimac Syndicate scheme is that Cadence is able to vote against it. Cadence’s 17.1% shareholding is likely, as a practical matter, able to block the Resimac Syndicate scheme on its own (although in theory a 75% majority by number of shares could still be achieved).

⁷ *Sovereign Life Assurance Company v Dodd* [1892] 2 QB 573 at 583

⁸ References are to the *Corporations Act 2001 (Cth)* unless otherwise stated

⁹ ASIC would consider a broad range of factors in deciding whether to issue its ‘no objection’ letter: see ASIC Regulatory Guide 60 *Schemes of arrangement*

35. It is a basic right of a shareholder to vote against a transaction that would result in the disposal of its shares, if it wishes to do so. A shareholder is generally free to take into account whatever factors it sees fit, including extraneous commercial interests, in deciding that a transaction is not in its interests.¹⁰
36. It is the nature of commercial transactions that one bidder's transaction may be blocked by another bidder that holds or controls sufficient voting power, or can secure the support of a major shareholder.
37. It may be unacceptable to 'lock-up' a transaction by securing the support of a shareholder that has a greater than 20% interest, but it is unlikely to be unacceptable to do so with a shareholder that has a less than 20% interest, as is the situation here.¹¹
38. In *Citect Corporation Limited*,¹² the Panel accepted undertakings from a bidder to not vote shares against a rival scheme:
- The Panel accepted this undertaking on the basis that the undertaking would protect the interests of SEAH (as a rival for control of Citect) and other Citect shareholders. The Panel considered that the undertaking would also remedy any unfair advantage which TCEP might be considered to have gained over SEAH in the competition for control of Citect by the Acquisitions. If TCEP gained a sufficient advantage over SEAH it would likely adversely affect the competition for control of Citect and thus adversely affect the remaining shareholders of Citect who would likely be harmed by receiving a lower price for their shares if one competitor was unfairly knocked out.*¹³
39. In *Citect Corporation Limited* the undertaking related to shares the bidder had acquired through a breach of s623. In this matter there is no breach of Chapter 6, no unacceptable circumstances surrounding Cadence's acquisition of its RHG shares and any benefits given to Cadence by Pepper would need to be approved by disinterested shareholders (see paragraph 28). Accordingly, we do not consider that if Cadence votes against the Resimac Syndicate scheme that would result in the Resimac Syndicate being "unfairly knocked out".

Possible orders if unacceptable circumstances were found

40. Even if we found unacceptable circumstances because of the collateral benefits proposed to be provided to Cadence, it would be very difficult to justify depriving Cadence of its right to vote in relation to the Resimac Syndicate scheme. As a general principle, we think the Panel should be cautious when considering whether to deprive shareholders of their rights.
41. If the Resimac Syndicate scheme proceeds and Cadence is not permitted to vote due to a Panel order it could lead to a situation where Cadence's RHG shares are compulsorily acquired in circumstances where it has not had an opportunity to vote

¹⁰ In appropriate cases a resolution carried as a result of extraneous interests of the majority could be challenged, for example on the basis of oppression, but that is not the situation here

¹¹ Guidance Note 7 *Lock-up Devices*, [33] – [34]

¹² [2006] ATP 6

¹³ At [94]

on the proposal. We do not consider this would be appropriate in these circumstances.

Disclosure in relation to the potential buyback

42. Cadence’s disclosure in relation to the potential buyback was limited.
43. The Resimac Syndicate submitted Cadence should disclose the details of the buyback, including whether it would be off-market (and, if so, whether it would be selective, equal access or minimum holding) or on-market, approvals required, the potential participation of RHG shareholders and the buyback price.
44. Cadence submitted that the orders sought would *“not provide any productive result, because the terms...have simply not been determined by the [Cadence] Board at this stage. When they have been, they will be disclosed.”*
45. While it is clearly difficult to disclose terms that have not yet been finalised, we expect details of the proposed buyback to be fully disclosed to shareholders in the scheme documentation.
46. Any scheme documentation will be reviewed by ASIC and the Court before being sent to shareholders. We conclude that this provides adequate opportunity for any disclosure concerns to be addressed.

DECISION

47. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances or make the final orders sought (or orders having any similar effect). Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

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

Hamish Douglass
President of the sitting Panel
Decision dated 2 October 2013
Reasons published 9 October 2013

Takeovers Panel

Reasons - RHG Limited
[2013] ATP 10

Advisers

Party	Advisers
Australian Mortgage Acquisition Company Pty Ltd	Baker & McKenzie
Cadence Capital Limited	Minter Ellison
Pepper Australia Pty Ltd	Gilbert + Tobin
Resimac Limited	Herbert Smith Freehills
RHG Limited	King & Wood Mallesons