



Australian Government

Takeovers Panel

Reasons for Decision

Ainsworth Game Technology Limited 03

[2016] ATP 10

Catchwords:

Decline to conduct proceedings – information – Panel’s reasons – adjournment of meeting – item 7 vote – efficient competitive and informed market – Eggleston principles – matters not relevant to vote decision – sufficient information available

Corporations Act 2001 (Cth), sections 602, 611 item 7, 657A

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

Guidance Note 4: Remedies General

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

INTRODUCTION

1. The Panel, Richard Hunt, Andrew Lumsden and Vickki McFadden (sitting President), declined to conduct proceedings on an application relating to *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9. The application concerned the adjournment of the shareholders’ meeting to vote on the sale of AGI’s chairman’s controlling stake in AGI under item 7 of s611¹ and whether shareholders in AGI had sufficient time to consider the reasons of the sitting Panel in that matter (in our reasons referred to as the “**first Panel**”²) before the deadline for proxies closed.
2. In our reasons, the following definitions apply.

- AGI** Ainsworth Game Technology Limited
- Fortress** Fortress Centaurus Global Master Fund Ltd
- transaction** Proposed sale of 52.52% of AGI by Mr Leonard Ainsworth to Novomatic AG, as announced by AGI on 23 February 2016

FACTS

3. AGI is an ASX listed company (ASX code: AGI).
4. The background to this application is set out in *Ainsworth Game Technology Limited 01 & 02* [2016] ATP 9. In brief:
 - (a) the chairman of AGI, Mr Leonard Ainsworth, entered into a share sale and purchase agreement pursuant to which he agreed to sell 52.52% of AGI (being

¹ References are to the *Corporations Act 2001* (Cth)

² Tracey Horton, Ron Malek (sitting President) and John Sheahan QC

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his entire holding in AGI at the time) to Novomatic for \$2.75 cash per share, subject to shareholder approval under item 7

- (b) Mr Ainsworth's wife, Mrs Margarete Ainsworth, the second largest shareholder in AGI indirectly holding 8.96%, had proposed to vote on the resolution to approve the transaction and had lodged a proxy in favour
- (c) Mr Ainsworth's sons collectively hold 2.51% of AGI, of which 1.45% was included in the transaction
- (d) ASIC and Fortress each made an application to the Panel seeking a declaration of unacceptable circumstances in relation to the affairs of AGI
- (e) ASIC submitted that Mrs Ainsworth could not vote in favour because she was an associate of Mr Ainsworth. Fortress submitted that neither Mrs Ainsworth nor the sons could vote in favour, either by reason of association or because they were not (and would not be seen to be) disinterested shareholders and "*confidence in the integrity of the market for corporate control demands that they be excluded from voting in favour*"
- (f) the first Panel heard the 01 and 02 matters together and considered the voting position of Mrs Ainsworth and the sons. It made preliminary findings to the effect that Mrs Ainsworth should not be able to vote in favour. Following provision of the preliminary findings to the parties, the first Panel was offered, and accepted, undertakings to the effect that Mrs Ainsworth would withdraw her proxy and not vote. In the first Panel's opinion, this sufficiently resolved the issues.

5. On 10 June 2016, AGI announced on ASX that:

- (a) the meeting was to be adjourned to 9.30am on Monday, 27 June 2016
- (b) the proxy deadline was 9.30am on 25 June 2016, and explained how previously lodged proxies could be changed
- (c) Mrs Ainsworth's indirect holding would not be voted (and the proxy that had already been lodged would be withdrawn) and
- (d) after completion of the transaction, the combined holding of Mr Ainsworth and (indirectly) Mrs Ainsworth would be 10.15% which could represent a blocking stake for the purposes of Chapter 6A.

6. On 15 June 2016, the first Panel published its decision on the Panel's website and on ASX.

7. At approximately 1.15pm on Friday, 24 June 2016 the first Panel published its reasons on the Panel's website.

8. At approximately 11.58pm on Friday, 24 June 2016 Fortress submitted this application.

9. The AGI shareholders' meeting was scheduled for 9.30am on Monday, 27 June 2016.

APPLICATION

Declaration sought

10. Fortress submitted that the publication of the Panel's reasons in the 01 and 02 proceedings provided "*very limited opportunity (if any)*" for AGI shareholders who are permitted to vote on the item 7 resolution to:
 - (a) *be made aware of the Reasons;*
 - (b) *read the Reasons;*
 - (c) *consider the Reasons and reconsider the information in the notice of meeting and the accompanying independent expert's report in light of the Reasons;*
 - (d) *obtain any professional advice they may require; and*
 - (e) *should they wish to do so, amend their proxy instructions.*
11. It submitted that the matter was unusual and receipt by AGI shareholders of the first Panel's reasons was particularly relevant to their voting decisions.
12. Accordingly:
 - (a) *"the necessary information for shareholders to assess the merits of the proposal was not given to shareholders early enough for them to have a reasonable time to consider and respond to the resolution", contrary to s602(b)(iii) and*
 - (b) *"for the same reasons (combined with the fact that the transaction, if implemented, will result in Novomatic acquiring a controlling shareholding), the circumstances are unacceptable under section 657A(2)(a)(i) having regard to the effect of the circumstances on the control of AGI".*

Interim order sought

13. Fortress sought an interim order requiring that the meeting be adjourned until the conclusion of these 03 proceedings.

Final orders sought

14. Fortress sought final orders:
 - (a) that shareholders be sent via express post or (where email addresses are available) by email, a summary of the first Panel's reasons in a form agreed with the Panel, together with a link to the full reasons and
 - (b) if not already satisfied through interim orders, the meeting be adjourned until 10 clear days after shareholders receive the summary.

DISCUSSION

15. The application was sent to the Panel at 11.58pm on Friday, 24 June 2016 and was received at midnight. The executive and parties had been advised to expect it.
16. On Saturday 25 June 2016, we considered whether to make an interim order and whether to conduct proceedings, the questions being clearly linked.

Conduct proceedings question

17. Note 2 to the Procedural Rules provides that, as part of making the decision about whether to conduct proceedings, among other things a Panel will consider, and we did consider:
 - (a) whether the claims would give rise to unacceptable circumstances if established
 - (b) the strength of the preliminary evidence and
 - (c) whether the application is out of time and, if not, whether it is timely.
18. In our view, it is unlikely that the claims will give rise to unacceptable circumstances if established. The 01 and 02 proceeding concerned voting and the market is already sufficiently informed of the matters material to the first Panel's decision about voting. It is sufficiently informed because:
 - (a) on 10 June 2016 AGI made an announcement that, among other things, Mrs Ainsworth would not vote at the meeting and following the transaction, Mr and Mrs Ainsworth would hold 10.15% of AGI if their holdings are combined and
 - (b) on 15 June 2016, the Panel issued a media release identifying in short form the first Panel's conclusions and attaching copies of the undertakings provided to and accepted by that Panel. That media release was published on the Panel's website and on the ASX Market Announcements Platform.
19. Shareholders have had plenty of opportunity to understand what voting restrictions will apply at the meeting and, in our view, the first Panel's reasons would be unlikely to influence their decision how to vote at the meeting any more than the restrictions themselves will.
20. Fortress submitted that the first Panel's description of the family controlled nature of the AGI business could significantly influence the weight that shareholders may be willing to place on the directors' recommendation.
21. Shareholders were at all times aware that Mr Ainsworth controlled more than 50% of AGI and that other family members held significant stakes in AGI, so must have been aware that AGI was family controlled, even assuming that this is a relevant matter to their voting. We found nothing in the reasons of the first Panel that questioned the independence of AGI's directors or their recommendation.
22. Fortress also submitted that the first Panel's view of AGI's "*evasive approach to its disclosure about the DRP*" again could influence the weight that shareholders place on the directors' recommendation. In our view this does not follow.
23. Lastly, Fortress submitted that the first Panel's reasons identified a previously undisclosed pattern of collaborative conduct between Mr and Mrs Ainsworth, which could be relevant to a shareholders evaluation of the control dynamics in AGI if the resolution is not passed. The Panel's media release made clear the first Panel's preliminary view that it was prepared to infer that Mr Ainsworth and Mrs Ainsworth were associates in relation to the affairs of AGI. Otherwise,

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collaborative conduct is a matter for the future, if it becomes relevant, and the reasons will have been available for sufficient time in that event.

24. Given the previous disclosures that have been made and our view of the relevance of the first Panel's reasons to the decision for shareholders, we do not think the circumstances described in the application would give rise to unacceptable circumstances, if established. The market and shareholders are already sufficiently informed of matters material to the decision about voting. They have known since 10 June 2016 that Mrs Ainsworth will not vote and of the 10.15% blocking stake. Additional disclosure of the matters raised in the application is not material and would be unlikely to affect the position.

Interim order question

25. Guidance Note 4 provides that "*Interim orders are usually made to prevent unacceptable circumstances from happening, continuing or getting worse while proceedings are conducted.*"³
26. We decided not to conduct proceedings. There is no need for an interim order. If there is to be a review of our decision it would need to take place on Sunday, prior to the meeting on Monday, and the review Panel could further consider the request for an interim order.
27. As things stand, the meeting of AGI shareholders scheduled to take place at 9.30am on Monday, 27 June 2016 has not been prevented from proceeding by any order of the Panel.

DECISION

28. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. 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).
29. Our decision was communicated to the parties on Saturday evening, 25 June 2016 and to the market on Monday 27 June 2016 prior to the meeting time.
30. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any final orders, including as to costs.

³ Guidance Note 4 'Remedies General' at [10]

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Post script

31. After we made our decision a preliminary submission was lodged by AGI.⁴ We did not take it into account.

Vicki McFadden
President of the sitting Panel
Decision dated 25 June 2016
Reasons published 30 June 2016

Advisers

Party	Advisers
Fortress Centaurus Global Master Fund Ltd	Johnson Winter & Slattery

⁴ The parties had been advised of our meeting time