



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Kasbah Resources Limited  
[2016] ATP 19**

**Catchwords:**

*Association – decline to conduct proceedings – placement – scheme of arrangement – common shareholdings – nominee directors*

*Corporations Act 2001 (Cth), sections 12, 606*

*Kasbah Resources Limited, in the matter of Kasbah Resources Limited (No 2) [2016] FCA 1518, Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd [2013] NSWCA 231*

*Sovereign Gold Company Limited [2016] ATP 12, World Oil Resources Limited [2013] ATP 1, CMI Limited [2011] ATP 4, Viento Group Limited [2011] ATP 1*

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

**INTRODUCTION**

1. The Panel, Alex Cartel, Peter Day (sitting President) and Robert McKenzie, declined to conduct proceedings on an application by Lois Lane Investments Pty Ltd and Bloom Financial Advice Pty Ltd in relation to the affairs of Kasbah Resources Limited. The application concerned whether a placement to Pala Investments Limited would contravene s606<sup>1</sup> because of an association between Pala and Lion Selection Group Limited. The Panel considered that the applicants did not provide sufficient material and considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

African Lion	African Lion 3 Limited
AMR	Asian Mineral Resources Limited
Bloom Financial	Bloom Financial Advice Pty Ltd
Kasbah	Kasbah Resources Limited
Lion Selection	Lion Selection Group Limited
Pala	Pala Investments Limited
Scheme	proposed Kasbah scheme of arrangement for AMR to acquire all the ordinary shares in Kasbah

<sup>1</sup> Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

## FACTS

3. Kasbah is an ASX listed company (ASX code : KAS) and is primarily focussed on tin exploration and development assets.
4. On 11 August 2016, Kasbah and AMR announced that they had entered into a scheme implementation agreement for AMR to acquire all the ordinary shares in Kasbah under the Scheme.
5. AMR (TSX-V code : ASN) is a Canadian company that explores and develops nickel assets in Vietnam. Pala has a 72.2% interest in AMR. Lion Selection has a 5.1% interest in AMR, held directly and through Asia Lion Limited. Lion Selection also has a relevant interest in 15.7% of Kasbah, through its 23.6% holding in African Lion.
6. On 9 December 2016, Kasbah announced that following receipt of a third party expert's analysis, Kasbah's expert advised it had made a fundamental error and changed its conclusion in relation to the Scheme from "*fair and reasonable*" to "*not fair, but reasonable*" for Kasbah shareholders. Kasbah disclosed that it considered that a condition precedent for the satisfaction of the Scheme was "*currently incapable of being satisfied*" and it "*would consult in good faith with AMR to determine if there is a means for the Scheme or an alternative transaction to be agreed between the parties*".
7. On 10 December 2016, Kasbah invited Bloom Financial (one of the applicants) to submit an alternative funding proposal for Kasbah. Bloom Financial submitted a proposal on a confidential basis that was the subject of further correspondence and culminated in Kasbah sending Bloom Financial a confidentiality deed for signing as a pre-cursor to providing financial information in relation to Kasbah.
8. On 12 December 2016, Kasbah announced that the Federal Court had dismissed its application for approval of the Scheme.<sup>2</sup>
9. The applicants allege that, on 18 December 2016, the Chairman and Managing Director of Kasbah telephoned Mr David Willis, the Principal of Bloom Financial, advising him that Kasbah was considering entering into a transaction with Pala on substantially the same terms as that proposed by Bloom Financial on the basis that Kasbah did not believe that Bloom Financial had the necessary financial resources to back the proposal it had made. Whilst the phone call was in progress, Mr Willis emailed to Kasbah a letter from the National Australia Bank confirming that Bloom Financial had funds in excess of \$6 million available.
10. On 19 December 2016, Kasbah announced that it had agreed to enter into a placement with Pala and Pala had offered to underwrite a renounceable rights issue in Kasbah. The key terms of the placement included the following:
  - (a) Pala would become the largest shareholder in Kasbah with a direct shareholding of 19.9%.
  - (b) Pala would be entitled to two Kasbah board seats. The first nominee to be appointed would be Mr Stephen Gill, a former director of AMR.

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<sup>2</sup> *Kasbah Resources Limited, in the matter of Kasbah Resources Limited (No 2)* [2016] FCA 1518

- (c) All but three of the existing board members of Kasbah would stand down, with one of the three remaining directors being the nominee of Lion Selection.
- (d) Subject to ASX approval, Pala would be given a right to maintain its percentage holding in Kasbah which would otherwise be in breach of the ASX Listing Rules.

## APPLICATION

### Declaration sought

11. By application dated 19 December 2016, Lois Lane Investments Pty Ltd and Bloom Financial<sup>3</sup> sought a declaration of unacceptable circumstances. The applicants submitted that Pala and Lion Selection were associates because of the following (among other things):
  - (a) AMR, a company controlled by Pala, *“was a party to the Scheme”* and *“a lender to Kasbah as part of the Scheme”*
  - (b) Lion Selection is a 5.1% shareholder in AMR and, through African Lion, has an interest in 15.7% of Kasbah. The applicants provided an announcement from AMR dated 1 March 2012 in relation to Pala’s initial investment in AMR which stated that Pala had entered into a voting and support agreement with Asia Lion Limited
  - (c) Mr Mike Brook is a nominee of Lion Selection on the Kasbah board
  - (d) Mr Robin Widdup is a nominee of Lion Selection on the AMR board. The applicants submitted that Mr Widdup informed Mr Willis of Bloom Financial that *“he was actively involved in the preparation of the Scheme Booklet for Kasbah and was in daily contact with AMR”* and later offered to provide Mr Willis an introduction to Mr Richard Hedstrom (who, according to Kasbah’s announcement on 19 December 2016, would join Kasbah as Interim Chief Executive Officer on terms to be agreed) and
  - (e) Lion Selection’s nominee on the Kasbah board recommended the Scheme to Kasbah shareholders and African Lion voted in favour of the Scheme.
12. The applicants submitted that the effect of the circumstances was that if the placement to Pala proceeds the combined holding of the associated parties in Kasbah will exceed 35.6% of Kasbah resulting in a contravention of s606.

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<sup>3</sup> On 22 December 2016 we accepted the applicants’ request to add the following additional applicants - Metropolis Pty Ltd, D & P Buckley Pty Ltd, Braham Consolidated Pty Ltd, Braham Investments Pty Ltd, Andrew Kibbis, PA & RL Wines Pty Ltd, Infinity Australasia Pty Ltd, M & A Isaacs Pty Ltd, S Loader Pty Ltd, Teringa George Pty Ltd, FE & RB Pty Ltd, GB & CH Pty Ltd, Laurence Basel, Casey William McGrath, R & T Robin Pty Ltd, Boris & Betty Pty Ltd, Nirvana Now Pty Ltd, K & F Falconer Pty Ltd, M & R Haddon Pty Ltd, Matthew Haddon, Angela Orsaris and Joseph Christopher Marsilis, Finnian Group Pty Ltd and Quadra Pty Ltd

**Interim order sought**

13. The applicants sought an interim order restraining Kasbah from making the announced placement to Pala until such time as the Panel has had the opportunity to consider the application.
14. The Acting President considered the request and decided not to make an interim order. The Acting President was satisfied that the remedies available to the Panel would be sufficient to reverse the unacceptable circumstances alleged, if established, including by final orders for divestment, and noted that Pala should take that risk into account if it decided to proceed with the placement.

**Final orders sought**

15. The applicants sought a final order restraining Kasbah from making the announced placement to Pala.
16. Alternatively (if the placement to Pala proceeded) the applicants sought orders that:
  - (a) to the extent shares (or a relevant interest in shares) have been acquired in breach of section 606, the acquirer of that relevant interest be required to dispose of the relevant shares or relevant interest to unassociated parties (whether by vesting those shares in ASIC or otherwise) and
  - (b) until such time as such shares (or relevant interest) are disposed of the holders of those shares be precluded from exercising any voting rights in relation to those shares.

**DISCUSSION**

**Preliminary submissions**

17. Kasbah made a preliminary submission that the Panel should not conduct proceedings, since (among other things):
  - (a) the applicants provided no evidence that Pala and Lion Selection were associated
  - (b) other than a voting support agreement in 2012 in relation to a single transaction relating to AMR,<sup>4</sup> no evidence was presented of any relationship between Pala and Lion Selection
  - (c) with the Scheme not proceeding, Kasbah had an immediate need for funds. The placement was scheduled to complete on 21 December 2016 and the agreement could be terminated by Pala if the placement does not complete before 31 December 2016 (however, due to the holiday season, Pala was only able to complete the placement before 23 December 2016)
  - (d) Kasbah directors took financial and legal advice in deciding to proceed with Pala's funding proposal, which had advantages including:
    - (i) it was a binding offer capable of acceptance (the applicants' was a non-binding proposal conditional on due diligence)

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<sup>4</sup> which Lion Selection submitted has now terminated: see paragraph 18(c)

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- (ii) Pala was a reputable counterparty giving greater confidence with respect to future funding
  - (iii) Pala agreed to extend repayment of Kasbah's loan
  - (iv) Kasbah was able to agree a release with AMR of the Scheme implementation agreement avoiding a potential \$300,000 break fee payment and
  - (e) Kasbah considered the applicants had made the application to achieve a commercial outcome of delaying completion of Pala's funding and forcing acceptance of the applicants' less attractive proposal.
18. Lion Selection made a preliminary submission that (among other things):
- (a) it does not control the composition of African Lion's board
  - (b) Pala and Lion Selection have no relationship, other than their parallel, independent investments in AMR. African Lion's support for the Scheme is "*neither illuminating nor suggestive*" of an association and
  - (c) the arrangements in place between Pala and other parties in relation to the investment in AMR "*were standard support arrangements required by Pala to give them comfort that the placement would be supported by shareholders*" and were terminated in 2012.
19. Pala made a preliminary submission that (among other things):
- (a) the fact that African Lion has held an interest in Kasbah since 2009 and that Pala wanted to invest in that company without anything more is not sufficient to draw an inference that Pala and African Lion (which are both investment companies with a mandate to invest in mining and resources companies) were associates in relation to Kasbah
  - (b) Pala makes all its investment decisions through its investment committee. African Lion, Asian Lion and Lion Selection have no representatives on or involvement in that committee
  - (c) the board of Kasbah made a legitimate commercial determination to accept Pala's proposed investment and the application had been filed to frustrate this and force Kasbah to accept an inferior investment offer and
  - (d) Pala understands that Mr Widdup was invited on the due diligence committee of AMR in his capacity as a non-executive director of that company because of experience with Australian schemes of arrangement.

#### **Consideration of factors allegedly supporting association**

20. We considered these submissions in the light of the factors and criteria previous Panel decisions have treated as relevant in establishing association, including the circumstances identified in *Viento Group Limited*.<sup>5</sup> We are not satisfied that sufficient

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<sup>5</sup> [2011] ATP 1 at [120]. These factors have been discussed and applied in several Panel decisions including *CMI Limited* [2011] ATP 4, *World Oil Resources Limited* [2013] ATP 1 and *Sovereign Gold Company Limited* [2016] ATP 12

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material and evidence had been presented to satisfy those criteria. The factors relied on by the applicants placed weight on the common investment by Pala and Lion Selection in AMR. We consider that this common investment, of itself, does not provide sufficient if any support for the existence of association given that:

- (a) AMR is TSX-V listed
  - (b) Pala and Lion Selection are both investment companies, with the latter asserting distinct investment governance protocols for African Lion and
  - (c) Lion Selection only has a relevant interest in 5.1% of AMR.
21. Given Mr Widdup's role as a director of AMR, we do not think his alleged statements and conduct support an inference of association between Lion Selection and Pala. We are not satisfied that African Lion's support for the Scheme suggests that it had any purpose other than acting in what it perceived was its self-interest.<sup>6</sup>
  22. We do not see anything in the material provided by the applicants to suggest that Kasbah's decision to accept Pala's funding proposal over that of Bloom Financial was uncommercial, and note that there were additional commercial intentions expressed in the Bloom Financial proposal different from Pala's proposal.
  23. Consequently we are not satisfied that the applicants' allegations, if proven, would establish that Pala and Lion Selection were associated in relation to the Scheme or that any such association (if it existed) survived termination of the Scheme. In any case, having regard to s657A and s602, we do not consider that we would be likely to make a declaration of unacceptable circumstances on the basis of the circumstances alleged by the applicants. We note that Kasbah's proposed rights issue is not before us and we express no opinion on it.

## DECISION

24. 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).

**Peter Day**  
**President of the sitting Panel**  
**Decision dated 22 December 2016**  
**Reasons published 4 January 2017**

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<sup>6</sup> See *Perpetual Custodians Ltd as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli v IOOF Investment Management Ltd* [2013] NSWCA 231 at [100]

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### Advisers

Party	Advisers
Applicants	Bennett + Co
Kasbah	DLA Piper
Lion Selection	Thomson Geer
Pala	Ashurst Australia