



Australian Government

Takeovers Panel

**Reasons for Decision
Multiplex Prime Property Fund 05
[2017] ATP 4**

Catchwords:

Consent to vary undertakings in notices of appearance – court proceedings - functus officio – confidentiality

Corporations Act 2001 (Cth), sections 657C, 657EA

ASIC Act 2001 (Cth), sections 127, 201A

Michael Wilson and Partners Limited v Robert Colin Nicholls [2008] NSWSC 521

Multiplex Prime Property Fund 03R [2009] ATP 23, Multiplex Prime Property Fund 03 [2009] ATP 22, Multiplex Prime Property Fund 04 [2009] ATP 21, Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Precious Metals Australia Limited [2002] ATP 5

| Interim order | IO undertaking | Conduct | Declaration | Final order | Undertaking |
|---------------|----------------|---------|-------------|-------------|-------------|
| NA | NA | NA | NA | NA | NA |

INTRODUCTION

1. The Panel, Lee Dewhirst, Andrew Lumsden and Vickki McFadden (sitting President) declined to give consent to vary undertakings in notices of appearance given in Panel applications in relation to the affairs of Multiplex Prime Property Fund.

2. In these reasons, the following definitions apply.

- ASH Australian Style Holdings Pty Ltd
- ASI Australian Style Investments Pty Ltd (now known as ACN 109 510 198 Pty Ltd (in liquidation))
- ASI Trust Australian Style Investments Unit Trust
- Brookfield Brookfield Capital Management Limited
- Multiplex Prime Multiplex Prime Property Fund (now known as Brookfield Prime Property Fund)
- Multiplex Prime proceedings Panel proceedings concerning applications made in 2009 in relation to the affairs of Multiplex Prime¹
- undertakings Undertakings in notices of appearance given in the Multiplex Prime proceedings

FACTS

3. In 2009, four applications under s657C² and one review application under s657EA were made in relation to the affairs of Multiplex Prime. In *Multiplex Prime Property*

¹ *Multiplex Prime Property Fund 01 and 02 [2009] ATP 18, Multiplex Prime Property Fund 03 [2009] ATP 22, Multiplex Prime Property Fund 03R [2009] ATP 23 and Multiplex Prime Property Fund 04 [2009] ATP 21*

Takeovers Panel

Reasons - Multiplex Prime Property Fund 05 [2017] ATP 4

Fund 01 and 02 the Panel considered (among other things) whether an on market bid by ASI was coercive. In *Multiplex Prime Property Fund 03, 03R and 04*, the Panel considered (among other things) whether a 178 for 1 pro rata entitlement offer by Multiplex Prime had an unacceptable control effect.

4. ASI was:
 - (a) a party and submitted notices of appearance in *Multiplex Prime Property Fund 01 and 02*
 - (b) the applicant and submitted notices of appearance in *Multiplex Prime Property Fund 03 and 03R* and
 - (c) not a party in *Multiplex Prime Property Fund 04*. The application was made by Grocon Investment Management Pty Ltd.
5. ASH has instituted proceedings in the Supreme Court of New South Wales against Brookfield and its directors for (among other things) breaches of statutory duties in chapter 5C (**Supreme Court proceedings**).

APPLICATION

6. By application dated 13 March 2017, ASH sought the Panel's consent under ASIC Act s201A(2) to vary the undertakings "*to which it is subject*" to allow it to use material the subject of the undertakings in the Supreme Court proceedings.³ ASH submitted that it was acting in the Supreme Court proceedings as trustee for the ASI Trust and it holds the property previously held by ASI (which was the former trustee⁴ of the ASI Trust).⁵
7. The undertakings given by ASI:
 - (a) were in favour of the Panel and the other parties to the Multiplex Prime proceedings from time to time and
 - (b) provided (among other things) that ASI would not at any time:
 - (i) "*use or disclose any confidential information disclosed to it by the Panel or another party otherwise than in accordance with the procedural rules governing Panel proceedings and applicable law; or*

² 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)

³ ASIC Act s201A(2) provides that a person may withdraw or vary a written undertaking given to the Panel relevant to Panel proceedings by that person at any time, but only with the consent of the Panel

⁴ according to ASH. Brookfield disputed that ASI had been replaced by ASH as trustee of the ASI Trust

⁵ The documents in the Multiplex Prime proceedings were in the possession of ASI in 2009, but were now only in the possession of ASH's lawyers in their capacity as the solicitors for Grocon Investment Management Pty Ltd in the Multiplex Prime proceedings. Grocon Investment Management Pty Ltd supported ASH's application for Panel consent to vary the undertakings and if consent was given, consented to providing those documents to ASH

Takeovers Panel

Reasons - Multiplex Prime Property Fund 05 [2017] ATP 4

- (ii) *publish any submissions or evidence made or given to, or any matters contained in documents lodged with, the Panel in contravention of any direction given by the Panel.*⁶

8. ASH submitted that it would support the Panel's consent to the variation of undertakings being expressed such that the Panel consented to the variation of each undertaking given by all parties in the Multiplex Prime proceedings.⁷

DISCUSSION

9. ASH submitted that we should consider the principles that have been applied by courts asked to vary the common law implied undertaking by each party not to use documents produced by compulsory process for any collateral purpose. Under those principles the applicant must show that "*special circumstances*"⁸ exist. ASH submitted that "*special circumstances*" applied here because (among other things) the Multiplex Prime proceedings were finalised several years ago, the use of the material is for a specific and limited purpose (the Supreme Court proceedings), there was a commonality of issues between the Supreme Court proceedings and the Multiplex Prime proceedings, the Supreme Court proceedings would resolve matters that were raised but not dealt with in the Multiplex Prime proceedings and to provide consent would aid the just, quick and cheap resolution of the real issues in dispute in the Supreme Court proceedings.
10. Brookfield submitted that confidentiality undertakings provided as part of Panel proceedings are of central importance to the Panel's ability to decide disputes in an efficient and practical matter. They allow parties to be candid with the Panel in matters which will frequently involve the provision of sensitive confidential information which parties are generally⁹ under no obligation to disclose.¹⁰ Accordingly, the variation of confidentiality undertakings given in favour of the Panel and other parties to a proceeding should only be consented to where there are compelling reasons to do so.
11. ASIC submitted that, in its role as a regulator, it has a particular interest in ensuring the information it provides to the Panel to assist the Panel with proceedings is subject to appropriate confidentiality restrictions, referring to s127 of the *ASIC Act 2001* (Cth).¹¹
12. We agree with Brookfield's submission and consider that the Panel should only consent to vary undertakings in exceptional circumstances.

⁶ We, and the Panel in relation to the applications made in 2009, have not given any direction to ASI or ASH in respect of any such publication

⁷ ASH submitted it sought the consent being expressed in such a way so that all parties to the Multiplex Prime proceedings were in the same position in relation to the Supreme Court proceeding

⁸ *Michael Wilson and Partners Limited v Robert Colin Nicholls* [2008] NSWSC 521

⁹ except where compelled to disclose, for example by a summons under s192 of the ASIC Act

¹⁰ *Precious Metals Australia Limited* [2002] ATP 5 at [25]

¹¹ Following ASIC's submission, ASH sought to withdraw its application insofar as it related to material provided by ASIC in the Multiplex Prime proceedings

Takeovers Panel

Reasons - Multiplex Prime Property Fund 05 [2017] ATP 4

13. The Supreme Court proceedings provide the parties with processes through which they can obtain information. The court can exercise control over its processes for information discovery to deal with, for example, confidentiality or privilege claims. The Panel may inadvertently circumvent such control by the court where it consents to the variation of a confidentiality undertaking given by a party.
14. Both ASH and Brookfield submitted that they could use documents obtained under these court processes without any variation to the undertakings.¹² We agree. There is an express exception in the undertakings¹³ for the use or disclosure of information in accordance with “*applicable law*”.
15. As the Supreme Court proceedings are already on foot, ASH is able, and has not provided any reason why it would be unable, to utilise these existing court processes to use documents obtained under such processes.
16. In addition, if the Panel too readily consents to variation of undertakings, that may make parties in future Panel proceedings less willing to provide information to the Panel, compromising its ability to properly perform its functions going forward. It may also create an undesirable precedent, potentially allowing Panel proceedings to be used by parties for a collateral purpose.
17. We consider that ASH has not established that any special or exceptional circumstances exist in relation to the Supreme Court proceedings. ASH has not established, or provided material to suggest, that the parties to the Supreme Court proceedings will be unfairly disadvantaged by being required to obtain material received in the Multiplex Prime proceedings through the normal court processes. ASH did not specify:
 - (a) which particular confidential information or categories of confidential information provided as part of the Multiplex Prime proceedings it sought to use or disclose for the purposes of the Supreme Court proceedings
 - (b) which confidential information or categories of confidential information provided as part of the Multiplex Prime proceedings were relevant to its claims under the Supreme Court proceedings or
 - (c) how they would be disadvantaged in the Supreme Court proceedings by having to rely on the court processes already available to them. In particular, ASH did not suggest time was of the essence in respect of the Supreme Court proceedings (or that the Court would be unable to require timely disclosure), beyond a brief observation that by permitting use and disclosure of the documents received in the Multiplex Prime proceedings, we would aid the quick resolution of the issues in dispute in the Supreme Court proceedings.¹⁴

¹² ASH later submitted, in response to a submission by ASIC, that the Panel could consent to vary the undertakings to remove any doubt on this point

¹³ which followed the precedent in the Panel’s Rules for Proceedings dated 18 June 2004 (updated March 2005). The drafting of the undertaking under the current procedural rules makes this even clearer

¹⁴ according to ASH. Brookfield disputed the relevance of the documents received by ASI in the Multiplex Prime proceedings to the Supreme Court proceedings, submitting that only two passing references to the

Takeovers Panel

Reasons - Multiplex Prime Property Fund 05 [2017] ATP 4

18. There is an additional reason for us to be reticent about consenting to a variation of the undertakings. The undertakings were given in favour of the Panel and the other parties to each proceeding. It is not clear in this case¹⁵ that the Panel has power to vary unilaterally confidentiality undertakings given to other parties.¹⁶ If we were to grant consent to the variation of the undertakings, such consent may nonetheless have little or no effect without the consent of each other party to the undertakings.

Vicki McFadden

President of the sitting Panel

Decision dated 29 March 2017

Reasons given to parties 7 April 2017

Reasons published 11 April 2017

Multiplex Prime proceedings were made in the particulars subjoined to ASH's statement of claim in the Supreme Court proceedings

¹⁵ given the Panel is clearly functus officio in relation to the applications made in 2009

¹⁶ it is also not clear whether the Panel has power to consent to ASH varying an undertaking given by ASI, however we did not need to consider this given our other conclusions

Takeovers Panel

Reasons - Multiplex Prime Property Fund 05
[2017] ATP 4

Advisers

| Party | Advisers |
|------------|-----------------------|
| ASH | Atanaskovic Hartnell |
| Brookfield | King & Wood Mallesons |