Australian Government

Takeovers Panel

Reasons for Decision
Moreton Resources Limited (Administrators Appointed) 02
[2020] ATP 14

Catchwords:

Decline to conduct proceedings – company under administration – association – jurisdiction of the Panel

Corporations Act 2001 (Cth), sections 12, 602, 606, 657A, 657C

Quantum Graphite Limited (Subject to Deed of Company Arrangement) [2018] ATP 1, Merlin Diamonds Limited [2016] ATP 18, Sovereign Gold Company Limited [2016] ATP 12, Alesco Corporation Limited 01 and 02 [2012] ATP 14, CMI Limited 01R [2011] ATP 5, Mount Gibson Iron Limited [2008] ATP 4, Financial Resources Limited [2007] ATP 27, Kaefer Technologies Limited 02 [2004] ATP 16, Selwyn Mines Limited [2003] ATP 33, Pasminco Ltd (Administrators Appointed) [2002] ATP 6

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

INTRODUCTION

1. The Panel, Anthony Jarvis, Robert McKenzie and Tony Osmond (sitting President), declined to conduct proceedings on an application by Mr Alexander Jason Elks in relation to the affairs of Moreton Resources Limited (Administrators Appointed). The application concerned, among other things, the validity of the appointment of administrators to Moreton, whether two substantial shareholders of Moreton were associated, and whether those shareholders had contrived the appointment of the administrators to move the assets and interests of Moreton out of the company. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Administrators	Messrs Grant Sparks and David Orr from Deloitte in their capacity as joint and several administrators of Moreton and its subsidiaries
Applicant	Mr Alexander Jason Elks
Debentures	has the meaning given in paragraph 6
Deloitte	Deloitte Financial Advisory Pty Ltd
Feitelson DOCA	has the meaning given in paragraph 15
First Samuel	First Samuel Limited
Moreton	Moreton Resources Limited (Administrators Appointed)
Report to Creditors	has the meaning given in paragraph 15

FACTS

3. Moreton is an ASX listed company (ASX code: MRV). Its shares have been suspended from trading since 16 March 2020.

4. On 28 November 2013, Moreton announced that the Applicant had been appointed to its board of directors.

5. On 26 August 2016, Moreton announced that Mr Philip Anthony (Tony) Feitelson had been appointed to its board of directors.

6. On 31 May 2017, Moreton announced that "*Board members Mr Philip Feitelson and Mr Alexander Jason Elks, along with First Samuel Limited and A & J Consultancy Pty Ltd ("the financiers") have agreed to extend Moreton a debt facility for at least $6 million*". First Samuel was appointed as the security trustee in respect of this facility, which was structured as an issue of debentures (**Debentures**).

7. On 6 November 2018, Moreton announced that Mr Feitelson had resigned as a director of the company.

8. On 14 February 2019, Moreton announced that First Samuel "*has agreed to a total restructuring of their debt totalling $7,500,000 into a new facility which is broken into three tranches*".

9. On 16 October 2019, Moreton announced that the Applicant had resigned as a director of the company.

10. On 28 November 2019, Moreton announced that it was "*pleased to advise that additional financing has been secured with a significant shareholder, Tony Feitelson and associated parties, executing an Agreement to provide funding to the Company up to an amount of A$1M*". The funding was split into three tranches.

11. On 19 February 2020, Moreton announced that it was "*pleased to advise that the third and final tranche… has been received in full by the Company as part of the $1,000,000 financing facility announced [on 28 November 2019]*".

12. On 26 May 2020, Moreton announced that one of its directors had resigned. From this point in time, Moreton had two directors.

13. On 10 June 2020, Moreton announced that its "*board of directors have appointed Grant Sparks and David Orr of Deloitte Financial Advisory Pty Ltd as administrators of the Group*".

14. On 26 June 2020, Moreton announced that the "*Administrators have commenced a process to sell or recapitalise the Group and are seeking urgent expressions of interested parties… Non-Binding Indicative Offers (NBIO) for the recapitalisation of the Group or acquisition of its assets (in full or in part) are requested by 5pm 29 June 2020*".

15. On 8 July 2020, the Administrators provided a report to the creditors of Moreton (**Report to Creditors**), which stated among other things that the Administrators had "*received two proposals to deal with the Companies' assets through a [Deed of Company Arrangement]*". The Report to Creditors stated that the Administrators' preferred proposal was a proposal received from Mr Feitelson (**Feitelson DOCA**). The Feitelson DOCA provided, in summary, that:

(a) Mr Feitelson would make a cash contribution of up to $175,000 to facilitate a payment of a dividend to trade creditors of Moreton

(b) Mr Feitelson would compromise approximately $875,000 in respect of Debentures held by him and approximately $1.775m in unsecured loans advanced to Moreton by him

(c) First Samuel would compromise $4m owed to it by Moreton and waive its rights to repayment of an advance of $500,000 under a funding agreement with the Administrators

(d) the debt owed by Moreton to the Applicant would be compromised such that the Applicant would receive 6 cents in the dollar and

(e) all shares in a certain Moreton subsidiary (holding an asset called the "Granite Belt project") would be transferred to Mr Feitelson, with Mr Feitelson and First Samuel then entering into a shareholders agreement such that:

(i) Mr Feitelson would hold 91.5% of the subsidiary's shares

(ii) First Samuel would hold 7.5% of the subsidiary's shares and

(iii) trade creditors of Moreton would be issued 1% of the subsidiary's shares.

16. The Report to Creditors also convened the second meeting of Moreton's creditors to be held on 15 July 2020.

17. As at the date of the application, the most recent substantial holder notices lodged by First Samuel and Mr Feitelson (or entities related to him) disclosed that:

(a) the "*Feitelson Group*" had voting power of 29.241%[1] and

(b) First Samuel had voting power of 16.65%.[2]

APPLICATION

Declaration sought

18. By application dated 10 July 2020, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted that:

(a) First Samuel and Mr Feitelson "*combined currently hold over 50% equity in the company*" and had breached section 606[3]

(b) the appointment of the Administrators by the Moreton board was invalid on the basis that the Moreton board was inquorate at the time it resolved to appoint the Administrators

(c) the Administrators' recommendation in respect of the Feitelson DOCA was "*contrary to the obligations of the parties in the appointment, execution and the*

[1] As at 28 October 2019
[2] As at 1 October 2018
[3] 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)

recommendations of the said administrator" due to the failure to disclose certain alleged matters and

(d) "*the debts ontaken and funded by [Mr Feitelson] up to and including April/May 2020 were caveated that he could and did nominate a director… The market was not informed of the genuine conditions president [sic] of this funding even when the ASX sort [sic] to query it upon no fewer than three occasions"*.

19. The Applicant submitted, among other things, that the effect of the circumstances was that:

(a) "*As far as practicable, the holders of the relevant class of voting shares or interests all have not had a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal and recent actions by the major financier and a substantial holders by way of [First Samuel] and [Mr Feitelson] working in concert"* and

(b) "*… all other parties, through the actions of [Mr Feitelson], [First Samuel] and Company Directors are suffering detriment of a free and open market, and have done for the last 9 months, particularly the last three months and more so since the coercive and unlawful appointment of Deloitte Financial Advisory Services"*.

Interim orders sought

20. The Applicant sought interim orders that, in effect, all processes relating to the administration be put on hold and "*all controlling mechanisms, including all debt arrangements are frozen and cease to take effect*".

Final orders sought

21. The Applicant sought final orders including in effect that:

(a) Mr Feitelson and First Samuel make a takeover bid for Moreton (with a premium for control)

(b) the appointment of the Administrators be revoked and

(c) a voluntary administrator (nominated by the Applicant) be appointed to Moreton.

DISCUSSION

Effect of Moreton's administration

22. At the time of the application and our decision, Moreton was in administration.

23. In considering the effect of the administration on our proceedings, we were conscious of the Panel's statement in *Quantum Graphite Limited (Subject to Deed of Company Arrangement)*[4] that: "*It may be that the Panel will not often conduct proceedings on an application concerning the affairs of a company that is subject to a deed of company arrangement*". This principle is equally appropriate with respect to a company in administration, and we agree that while the Panel will not often conduct proceedings in such circumstances, there may be times where it is appropriate to do so.

[4] [2018] ATP 1

Accordingly, we consider that Moreton's administration does not, of itself, prevent us from considering the matter.

24. The Panel in *Quantum Graphite* also said at [14]:

"We were mindful that the purposes of Chapter 6 may have limited relevance where a company is insolvent and no equity value remains in the shares.[5] *We were also concerned not to inappropriately obstruct action by the administrator to bring the company back to solvent operation.*[6] *However, as was noted in Pasminco Ltd (Administrators Appointed), there is no exception from section 606 for deeds of company arrangement and calls for an exception were rejected by CASAC in its 1998 report.*[7] *No change was made in that respect when Parliament "fine-tuned" Part 5.3A in 2007.*[8] *It follows that the requirements of Chapter 6 must not be ignored."*

25. Relevantly, the Panel in *Quantum Graphite* decided to conduct proceedings for reasons including that:

(a) the application contained credible allegations of potentially serious unacceptable circumstances on matters squarely within the Panel's jurisdiction and

(b) it was not clear to the Panel that the company's shares had no value.[9]

26. Having regard to the equity value of Moreton's shares, the Report to Creditors discloses that the return to unsecured creditors in a liquidation is between 1 cent in the dollar and nil. This implies that the equity value of Moreton's shares in a liquidation is nil.

27. The Applicant submitted that Moreton "*is awaiting an AAT ruling and a Land Court matter, which are both substantially complete, and the majority case awaiting decision from February 2020, whereby significant inflows if positive would be forthcoming to the Company, yet the purported administrator is essentially silent upon this $12,000,000 to $16,000,000 potential benefit in its creditors report*". However, the Applicant provided us with no material to substantiate the quantum of these claims or to enable us to make an assessment of the likelihood of the matters being resolved in Moreton's favour in the near future. We are not prepared to simply accept the Applicant's statements without supporting material, and we note the Report to Creditors refers to both matters so they were known to the Administrators.

28. The Applicant also disputed the Administrators' impartiality (which implicitly disputes the independence of the Administrators' assessment of the likely return to creditors) on the basis that Deloitte was "*acting as advisors of [Moreton], [First Samuel] and [Mr Feitelson] from Feb [2020] through to the formal appointment on 10 June 2020*".

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[5] *Pasminco Ltd (Administrators Appointed)* [2002] ATP 6 at [130]-[131]
[6] *Financial Resources Limited* [2007] ATP 27 at [45]
[7] [2002] ATP 6 at [81]-[88]. See Legal Committee of The Companies and Securities Advisory Committee, *Corporate Voluntary Administration* 1998 Chapter 9, recommendation 57
[8] *Corporations Amendment (Insolvency) Act 2007* (Cth). The Explanatory Memorandum does not discuss recommendation 57 but refers to and implements other recommendations in the 1998 CASAC report
[9] *Quantum Graphite Limited (Subject to Deed of Company Arrangement)* [2018] ATP 1 at [15]

29. Moreton submitted that:

"*The Administrators are experienced, independent insolvency practitioners. There are no matters that might compromise their independence in relation to the other principal parties referred to in the Elks Application, Mr Feitelson or First Samuel Limited.*"

30. We reviewed the Administrators' declaration of independence, relevant relationships and indemnities in the Report to Creditors. This declaration discloses various meetings and discussions in the time period identified by the Applicant, but in the opinion of the Administrators "*these meetings do not present a conflict or impediment as we do not consider ourselves to be bound to provide services to the Company in relation to this matter or in any way obligated to deliver a favourable outcome to any party*". The declaration states that the Administrators "*identified no real or potential risks to our independence*" and that the Administrators "*are not aware of any reasons that would prevent us from accepting this appointment*".

31. Given the disclosure in the Report to Creditors and Moreton's submission noted immediately above, we do not consider the Applicant has provided us with sufficient material for us to accept the Applicant's argument regarding the Administrators' impartiality.

32. Having regard to all of the material, we consider the Applicant did not provide us with a sufficient body of material to cause us to doubt the Administrators' assessment of the solvency of the company and the likely return to creditors (and, consequentially and indirectly, the value of the equity in the company). It is implicit in this view that it is appropriate to consider Moreton's equity value on a liquidation basis; there may be situations where it is not appropriate to solely consider the equity value of a company in administration in that way, but we are not satisfied this is such a case.

33. We were also mindful of comments made by the Panel in *Kaefer Technologies Limited 02*,[10] where the Panel said at [7(c)] that:

"*The Panel considers that it may intervene in an administration under Part 5.3A if the administration was a device to allow parties to attain a goal relating to control through voting power without a bid, scheme of arrangement, substantial acquisition or other transaction involving shareholder participation.*"

34. Having regard to whether the administration of Moreton was a 'device', the Report to Creditors discloses that the Administrators' preliminary view is that "*the Company may have been insolvent from at least January 2020*" and, from that point, "*the Companies were unable to procure any further funding and trade creditors remained largely unpaid to the date of the Administrators' appointment*". As Moreton entered administration in June, the prolonged length of the likely insolvency supports the view that the company's administration is bona fide and not a device. It should also be noted that the Administrators were appointed by Moreton's directors (as opposed to, relevantly, a secured creditor of Moreton) and there are policy and other legal reasons (for instance, insolvent trading liability) that are relevant to that decision (see

[10] [2004] ATP 16

also paragraphs 46 – 48 below). The Applicant did not provide us with a sufficient body of material to cause us to examine further whether the administration was a device for any person to gain control of Moreton or subvert the operation of Chapter 6.

35. Our conclusions in paragraphs 32 and 34 above support the view that the purposes of Chapter 6 may have limited relevance to Moreton's circumstances, and consequentially reduce the prospect that we would declare any circumstances unacceptable. These are factors that weigh against exercising our discretion to conduct. However, credible allegations of potentially serious unacceptable circumstances on matters squarely within the Panel's jurisdiction would support exercising our discretion to conduct. We turn now to the specific allegations in the application.

Breach of section 606 and association

36. The Applicant submitted that:

    (a) the Feitelson DOCA "*crystalizes the control and joint interest*" of First Samuel and Mr Feitelson in Moreton

    (b) "*[First Samuel] have openly declared they are guided by and directed by [Mr Feitelson] thereby through a Debenture Agreement breaching Sec 602A and Sec 606 of the Corporations Act 2001*" and

    (c) "*the proposed [Feitelson DOCA] [is] contrived between the majority and substantial holders, which without the legitimacy of administration, is a poor attempt at a takeover*".

37. In support, the Applicant provided correspondence between himself and First Samuel, containing a statement from First Samuel that "*the exercise of First Samuel's powers as security trustee in connection with an event of default, including taking any enforcement action, requires instructions from Mr Feitelson (being the majority beneficiary)*".

38. In effect the Applicant submitted that Mr Feitelson and First Samuel are associated under section 12 and that Mr Feitelson has acquired a relevant interest in the Moreton shares held by First Samuel, thereby leading to a breach of section 606 as a result of the size of their combined holdings.

39. First Samuel submitted that:

    "*In addition to its capacity as a shareholder and creditor of Moreton Resources, First Samuel acts as security trustee for debentures held by Mr Feitelson and others of which Mr Feitelson is the majority debenture holder. First Samuel in the capacity of security trustee has from time to time sought the instruction of Mr Feitelson as the majority debenture holder, as required by the terms of the relevant security trust deed. This correspondence has been with Mr Feitelson in his capacity as a debenture holder, not shareholder, of Moreton Resources…*

    In relation to the Proposal put forward by Mr Feitelson, it is relevant that First Samuel was not aware of the terms of the Proposal before it was provided to the Administrators of Moreton Resources and First Samuel has advised the Administrators that it currently intends to vote against the Proposal."

40. The test applied by the Panel in deciding whether to conduct proceedings on an association matter is well established.[11] There are clearly structural links between First Samuel and Mr Feitelson, given First Samuel is the security trustee in respect of the Debentures (noting the Applicant is also a holder of Debentures). However, an association between a company and an individual requires those persons to either:

    (a) have, or propose to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or the conduct of its affairs or

    (b) be acting, or proposing to act, in concert in relation to a company's affairs.[12]

41. The mere fact that, as a result of security documents agreed some years previously, First Samuel (as security trustee) is required to act in accordance with the instructions of Mr Feitelson (as majority beneficiary of the security), does not necessarily support an inference that either of the above limbs are satisfied. There must be some understanding between First Samuel and Mr Feitelson for the purpose of controlling or influencing the composition of Moreton's board or the conduct of its affairs, or some understanding regarding acting in concert in relation to Moreton's affairs.[13]

42. The Applicant submitted, in effect, that the understanding in this matter is evidenced by the Feitelson DOCA proposing that First Samuel and Mr Feitelson will have a combined ownership stake of 99% in one of Moreton's subsidiaries (which would be received pursuant to the Feitelson DOCA, if approved by Moreton's creditors, rather than separately through their own actions). This submission relates to the time period post-appointment of the Administrators.

43. Given the Administrators (and not Moreton's directors) were controlling Moreton's affairs at the time the Applicant submitted First Samuel and Mr Feitelson had the necessary understanding, the Applicant's submission perhaps relates more to the 'acting in concert' association limb than the 'board composition/conduct of affairs' limb. The submitted understanding may also relate more to the affairs of Moreton's proprietary company subsidiary rather than the affairs of the listed entity as a whole (given the Feitelson DOCA effectively proposes a sale of that entity[14]). In any event, leaving aside that particular issue, the Applicant's position is difficult to sustain in light of First Samuel's submission that it:

    (a) was not consulted prior to the Feitelson DOCA being proposed and

    (b) had advised the Administrators it intended to vote against the Feitelson DOCA.

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[11] See *Mount Gibson Iron Limited* [2008] ATP 4 at [15]

[12] Section 12(2)(b), 12(2)(c)

[13] There is significant overlap between the concepts of "*acting in concert*" and "*relevant agreement*" in section 12; see *Sovereign Gold Company Limited* [2016] ATP 12 at [20] and *CMI Limited 01R* [2011] ATP 5 at [33]-[34]

[14] See also *Selwyn Mines Limited* [2003] ATP 33, where, in different circumstances, the Panel declined to conduct proceedings in connection with receivers selling certain assets, saying at [34] that the sale was in the ordinary course of a receivership, was known to the bidder and was not a frustrating action

44. In relation to the time period prior to the appointment of the Administrators, the Applicant did not provide us with sufficient material to evidence an understanding in relation to either relevant association limb (including in relation to the appointment of the Administrators).

45. Accordingly, the Applicant did not provide us with a sufficient body of material to justify us making further enquiries, including as to whether an association exists or existed between Mr Feitelson and First Samuel or whether there was otherwise a breach of section 606.

Matters relating to the administration of Moreton

46. The Applicant submitted that the appointment of the Administrators was invalid on the basis that Moreton only had two directors at the time its board resolved to make the appointment, and not the three required by section 201A and Moreton's constitution. The Applicant also submitted that the Administrators "*having this knowledge as at 11 June 2020, [have] failed to rectify or make good, and as such [are] breaching Sec 602*".

47. Moreton submitted that:

> "*The Administrators have been properly appointed at a quorate meeting of directors, in accordance with Moreton Resources' constitution and the Corporations Act. In any event, any challenge to the Administrators' appointment is properly a matter for the courts, rather than the Panel.*"

48. We agree with Moreton that a court, and not the Panel, is the proper forum to adjudicate upon the validity of the Moreton board's resolution appointing the Administrators. This is because the Panel determines whether circumstances are unacceptable having regard to the matters in section 657A; given our view expressed above in relation to the adequacy of material challenging the value of Moreton's equity and the bona fides of the administration, it is difficult to see how unacceptable circumstances could arise from the Administrators' appointment even if we accept the Applicant's argument that the board did not have the power to act.

Inadequate disclosure in the Report to Creditors

49. The Applicant made a number of submissions in relation to the disclosures made by the Administrators in the Report to Creditors, including that "*the Administrator[s] [have] failed to declare the combined interests of [Mr Feitelson] and [First Samuel], whom purport that they combined are acting under a Debenture Deed, however by doing so, that the parties have and are, operating with a 50% controlling interest of the Company and have failed to notify the market; make an associated takeover bid; nor declare the control and oversight they have had prior to Deloitte's appointment*".

50. We also consider that other regulators or a court are more appropriately placed to assess the adequacy of the disclosures made by the Administrators in the Report to Creditors.

Inadequate disclosure to ASX

51. The Applicant submitted that the alleged failure by Moreton to adequately disclose the conditions precedent to funding provided by Mr Feitelson (in November 2019)

failed "*to ensure a free, open and transparent market as per the intent of Sec 602 of the Corporations Act 2001*". The Panel has in the past considered ASX announcements and other public disclosures connected to matters within its jurisdiction.[15] However, it is not clear to us that the announcement referred to by the Applicant is so connected, and the adequacy of the disclosure may be more appropriately assessed by other regulators or a court. In any event, we also note that the relevant announcement was made more than two months prior to the date of the application.[16]

DECISION

52. 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).

Orders

53. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Tony Osmond
President of the sitting Panel
Decision dated 14 July 2020
Reasons given to parties 7 August 2020
Reasons published 12 August 2020

[15] See for example *Alesco Corporation Limited 01 and 02* [2012] ATP 14 and *Merlin Diamonds Limited* [2016] ATP 18

[16] See section 657C(3)

Advisers

Party	Advisers
Alexander Jason Elks	-
Moreton Resources Limited (Administrators Appointed)	Norton Rose Fulbright Australia
First Samuel Limited	Dentons Australia Limited
Mr Tony Feitelson	Colin Biggers & Paisley Lawyers