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Shareholders left in the lurch: unacceptable circumstances?

Tony Stumm, Partner

The facts

This newsletter reviews the recent decision of the Full Court of the Federal Court of Australia on the court's adjudication as to whether '*unacceptable conduct*' occurred regarding the acquisition of timeshares in an unlisted public company called The President's Club Limited (**TPC**). TPC operated a timeshare scheme at the Hyatt Coolum, now known as the Palmer Coolum Resort. A full report can be found citing the reference *Queensland North Australia Pty Ltd v Takeovers Panel* [2015] FCAFC 68.

Background

TPC had leasing rights for 80 years over property owned by two community title body corporates called '*The President's Club Golf Community Titles Scheme*' and '*The President's Club Tennis Community Titles Scheme*'. People who wanted to participate in the timeshare scheme were required to purchase 13 shares in TPC and an interest in either of the above community titles schemes. Coeur de Lion Investments Pty Ltd (**CDLI**) owned 41.4% of the shares in TPC and CDLI in turn was owned by Coeur de Lion Holdings Pty Ltd (**CDLH**). Interests associated with Mr Clive Palmer owned 2.9% of TPC, with numerous shareholders owning the residual 55.7% of TPC shares.

Because of associations and relationships, the Palmer interests were entitled to a significant interest in the CDLI shares, effectively giving Mr Palmer a 41.4% interest in TPC. Queensland North Australia Pty Ltd (**QNA**) acquired a 41.4% interest in TPC when it acquired CDLI in July 2011 and QNA later acquired a further 2.9% interest in TPC.

Ultimately, on 12 April 2012, QNA (associated with Mr Palmer) lodged a bidder's statement for the TPC shares it did not own plus other interests. Approximately five weeks later, QNA lodged a replacement bidder's statement with Australian Securities and Investments Commission (**ASIC**), but the bid was substantially the same. On 26 June 2012, TPC lodged an application with the Takeovers Panel seeking a declaration of unacceptable circumstances. Section 657A of the *Corporations Act 2001* (Cth) (**Corporations Act**) enables the Takeovers Panel to rule upon whether unacceptable circumstances have occurred which, if declared, can prevent a takeover bid from proceeding.

What happened?

The Takeovers Panel made an order for unacceptable circumstances which was subsequently the subject of an appeal to a single judge of the Federal Court. Another appeal then ensued to the Full Court of the Federal Court (summarised in this newsletter).

The Full Court examined whether there was a problem under s 657B of the Corporations Act because an unacceptable circumstances declaration can only be made either within three months after the circumstances occurred or within one month after the unacceptable circumstances application had been made. However, the Takeovers Panel has the power to extend the time for applying for an unacceptable circumstances declaration.

Ongoing unacceptable circumstances

The novel issue was that the unacceptable circumstances were ongoing, initially arising out of QNA's acquisition of shares in CDLH to give QNA a 41.4% entitlement interest in TPC. Because the QNA's acquisition from CDLA occurred in July 2011 and March 2012, QNA had now acquired more than 19.99% of TPC's shares which was in breach of s 606(1)(c) of the Corporations Act without any of the exemptions applying. The 'mischief' thereby caused was not remedied and the effect of the mischief continued unabated (i.e. an unlawful share acquisition). It was therefore found that the acquisitions made by QNA occurred in July 2011 and March 2012. As TPC's application for a declaration of unacceptable circumstances was made in June 2011, this created a problem for TPC under the time limits under ss 657B and 657C(3). However, the Takeovers Panel extended the time to make the application until 26 June 2012 (s 657C(3)(b)).

Effect of the circumstances were unacceptable circumstances

The mischief or effect of the circumstances declared to be unacceptable circumstances by the Takeovers Panel was the continued entitlement by QNA to 44.3% of the TPC where that entitlement had not been gained by one of the allowable exemptions under Chapter 6 of the Corporations Act. Ordinarily, this would be enough for the TPC to establish unacceptable circumstances. However, irregularities were found by the court with the Takeovers Panel's decision to grant TPC an extension of time to seek an unacceptable circumstances declaration.

Who won?

Because the appellants (QNA and associates) had not been provided with natural justice before the Takeovers Panel when the Takeovers Panel granted an extension of time (s 657C(3)(b)), the court referred the matter back to the Takeovers Panel for further hearing so that, impliedly, the appellants be given the opportunity to be heard on the extension of time application (s 657(C)(3)(b)) and on the need to extend the time within which unacceptable



circumstances can be declared (s 657B)). This resulted in the declaration of unacceptable circumstances being set aside and the whole process restarted again subject to ASIC and TPC having continuing interest.

Lessons learned

Unacceptable circumstances are usually associated with dubious tactics employed by companies bidding for listed companies. It is something of a novelty for time sharing companies to be embroiled in such stoushes.

Whilst the court did not openly discuss 'unacceptable circumstances' to the extent of creating new law, it does seem trite that unacceptable circumstances were found to exist, but not actioned. Instead, the court found that there were flaws in the way that the Takeovers Panel applied its extension power under s 657C(3)(b) without considering the need for a consequential extension under s 657B. Many would say this was a technical finding only and leaves the shareholders of TPC in the 'lurch'.

The mere association of Clive Palmer with QNA will no doubt attract ongoing public interest, if, as expected, the matter is referred back to the Takeovers Panel.

Author



Tony Stumm
Partner

P: (07) 3000 8402
E: tstumm@carternewell.com

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Brisbane

Level 13, 215 Adelaide Street
Brisbane QLD Australia 4000

GPO Box 2232, Brisbane QLD 4001

Sydney

Level 6, 60 Pitt Street,
Sydney NSW Australia 2000

Phone +61 2 9241 6808

Phone +61 7 3000 8300

Client feedback feedback@carternewell.com

ABN 70 144 715 010

www.carternewell.com

