



**In the matters of Golden West Resources Limited 03 and 04**

**[2008] ATP 1**

**Catchwords:**

*Mistake – substantial interest – unauthorised acceptance – last and final statement – misleading conduct – reversal of acceptance – mistaken belief – inference drawn by the market – uninformed market – substantial holder notices – beneficial owner – shares accepted under terms of pledge – interim orders – postponing general meeting – section 249D Notice – vocal opponent of offer – market effect – period of time – intentions of shareholder*

*Corporations Act 2001 – sections 657A(2)(a), 657A(2)(b)*

*Pinnacle VRB Limited (No. 10) [2001] ATP*

*Pinnacle VRB Limited (No. 11) [2001] ATP*

**INTRODUCTION**

1. The Panel, Alison Lansley, Andrew Lumsden (Sitting President) and Chris Photakis, declined to make a declaration of unacceptable circumstances.
2. In these reasons the following definitions apply.

<b>Term</b>	<b>Meaning</b>
Disputed Acceptance	the acceptance on 7 January 2008 of 7,500,000 shares registered in the name of ANZ Nominees Limited, as sub-custodian for Falak, representing approximately 7.12% of GWR's total issued capital
Fairstar	Fairstar Resources Limited
Falak	Falak Holding LLC
Falak Application	application by Falak dated 31 January 2008 concerning the affairs of GWR (Golden West Resources Limited 04)
Falak shares	7,500,000 GWR shares beneficially owned by Falak that were held by ANZ Nominees Limited as sub-custodian
Fortis	Fortis Banque Luxembourg SA
GWR	Golden West Resources Limited
GWR Application	application by GWR dated 30 January 2008 concerning its affairs (Golden West Resources Limited 03)
Offer	off-market scrip takeover bid for all of the ordinary shares in GWR dated 15 October 2007

3. In these proceedings the Panel :
  - (a) adopted the published procedural rules; and

- (b) consented to parties being represented by their commercial lawyers.
4. The Panel directed that the GWR Application and the Falak Application were related and were to be considered in the same proceeding.

## DISCUSSION

### Facts

5. On 4 September 2007 Fairstar announced its intention to make the Offer. The Offer was 5 Fairstar shares for each GWR share.
6. On 7 November 2007 Falak gave a written undertaking to GWR not to accept the Offer in the absence of, among other things, an increase in the consideration.
7. On 13 November 2007 GWR's independent bid committee recommended GWR shareholders reject the Offer.
8. By announcements dated 15, 20, and 27 November 2007 GWR announced that it had written commitments from shareholders that they would reject the Offer. While slightly differently worded, the effect of two announcements dated 15 and 20 November was that GWR had written commitments from shareholders endorsing its decision to reject the Offer. A second announcement dated 20 November (released on 21 November) was more detailed. It said:
- " The Company has now received written commitments from shareholders representing a total of 27.85% of Golden West shares that they do not intend to accept the current Fairstar offer....*
- Under the terms of the rejection agreements, each of the rejecting shareholders has undertaken not to accept the offer by Fairstar. The undertaking is irrevocable and remains in full force and effect until:*
- *the offer is withdrawn*
  - *GWR's directors recommended that shareholders accept the offer*
  - *the consideration under the offer is varied."*
9. On 3 December 2007 a further announcement was made by GWR (dated 30 November 2007) which included a statement to the effect that irrevocable notices undertaking to reject the offer had been received.
10. Falak was identified in three of the announcements.
11. On 11 December 2007 Fairstar increased its Offer to 7 Fairstar shares for each GWR share.
12. On the same date, Falak orally advised GWR's advisers that it would not accept the Fairstar offer as increased. This was not communicated to the market.
13. The Falak shares, representing approximately 7.12% of Fairstar<sup>1</sup>, were pledged to Fortis as security for a loan.
14. On 17 December 2007, Fortis' Luxembourg office sent a facsimile to Fortis' Dubai office advising of the Offer and asking for instructions whether to accept the Offer.

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<sup>1</sup> At 25 January 2008 issued share capital of 105,336,513 shares.

The facsimile stated that in the absence of a response by 7 January 2008 it would take the default action, being to accept the Offer. No response was received by that date.

15. On 7 January 2008 Fortis' Luxembourg office gave instructions to ANZ Nominees to accept the Falak shares into the Offer.
16. On 21 December 2007 Falak requisitioned a general meeting of GWR under section 249D of the Corporations Act. It sought to remove some of the board and have one of its nominees elected. The meeting was called by GWR for 8 February 2008.
17. On 8 January 2008 Falak instructed Fortis' Dubai branch to vote in relation to the meeting. Fortis' Dubai branch communicated this to Fortis' Luxembourg branch on the same day.
18. On 9 January 2008 Fairstar through its registry processed the Offer and issued Fairstar shares to ANZ Nominees Limited as custodian as consideration under the Offer.
19. On 11 January 2008, Fairstar announced to ASX by Form 604 that acceptances had been received for 8,905,129 GWR shares and an increase in Fairstar's relevant interests in GWR shares from 25.806% to 33.974%.
20. On 18 January 2008 Falak contacted Fortis regarding the lodgement of a proxy in respect of the Falak shares for the GWR general meeting. Fortis' Dubai branch emailed to Falak a notice from Fortis' Luxembourg branch advising of the proxy lodgement procedure. The email also indicated there had been a "share conversion" issue, which turned out to be a reference to the Offer and the Disputed Acceptance.
21. On 21 January 2008 a copy of the facsimile referred to in paragraph 14 was given to Falak. This was the first occasion that Falak had received a copy of that facsimile.

### **Interim orders**

#### *GWR Application*

22. In the GWR Application, GWR sought interim orders that Fairstar not exercise any rights attached to the affected shares and Falak be allowed to exercise any voting rights or other rights attached to the shares.

#### *Falak Application*

23. In the Falak Application, Falak sought interim orders that:
  - (a) Fairstar not exercise any rights attached to the affected shares; and
  - (b) GWR postpone the general meeting scheduled to be held on 5 February 2008 pending the Panel's decision.

#### *Interim Orders made*

24. On 1 February 2008 the Panel made interim orders to preserve the status quo pending the Panel's decision. The interim orders were that:
  - (a) GWR postpone its general meeting scheduled for 5 February 2008 to 19 February 2008.
  - (b) Fairstar not dispose of, transfer or charge any of the Falak shares.

- (c) Fairstar not take any further steps to issue, or to complete the issue of, any Fairstar shares as consideration for acceptance into the Offer of the Falak shares.
- (d) Falak not dispose of, transfer or grant any further charge over any of the Fairstar shares that may have been issued as consideration for acceptance into the Offer of the Falak shares.

**Final orders sought**

- 25. Each of GWR and Falak sought final orders to the effect that the Disputed Acceptance be reversed.

**GWR Application**

- 26. GWR sought a declaration of unacceptable circumstances on the basis that Falak had made last and final statements that it would not accept the Offer and the acceptance was a departure from the statements.

*Undertaking not to accept and market announcements*

- 27. GWR submitted that the written commitment it had received from Falak not to accept the Offer and the announcements it made in reliance on the commitment was a last and final statement
- 28. The written commitment was conditional on, among other things, Fairstar not increasing the Offer and Fairstar did subsequently increase the Offer. By the announcement on 21 November 2007 and the target's statement<sup>2</sup>, it was clear that the written commitments were conditional on the Offer not being increased. The market would not have had any misunderstanding about the conditionality of the commitment.
- 29. The Panel considered accordingly that there was no relevant last and final statement once the offer was varied.

*Oral confirmation to GWR*

- 30. GWR further submitted that there was a last and final statement by reason of Falak giving oral confirmation to GWR that it would not accept the Offer as increased (from 5 to 7 Fairstar shares for each GWR share) and GWR relying on this and not making a further statement to the market that Falak was no longer precluded from accepting the bid.
- 31. The Panel did not accept this submission. While the Panel would not rule out the possibility of an omission amounting to confirmation of a previous last and final statement, it does not think that the circumstances here warrant such a conclusion. Here the understanding of the market from previous market announcements was clear and the market would not have assumed the last and final statement to continue to apply when a clear and proximate condition to it had been triggered.

*Section 249D Notice*

- 32. GWR further submitted that the serving of the notice under section 249D of the Corporations Act on GWR, the subsequent calling of a general meeting pursuant to that notice and the business of the meeting constituted a last and final statement. This

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<sup>2</sup> Section 9.7.

was based on there being an alleged inference from the notice of meeting that Falak would not accept the Offer.

33. The Panel did not accept this submission. The Panel did not consider that Falak made a last and final statement by serving a section 249D notice on GWR. Falak was entitled to requisition a meeting. While the market might assume that Falak would hold its shares and vote them at the meeting, there is no commitment by Falak to do so.
34. Falak submitted that its actions are likely to have led to a perception in the market that Falak would not accept the Offer, despite the increase. The Panel did not consider that such a perception was created. Assumptions may be made as to Falak's position, but the Panel was not satisfied that there was market misinformation merely because of a possible inference that Falak would not accept the increased Offer.

### Falak Application

35. Falak sought a declaration of unacceptable circumstances on the basis that the Disputed Acceptance was a mistake and the transfer of the Falak shares gave rise to unacceptable circumstances having regard to the effect on:
  - (a) the control, or potential control of GWR; and
  - (b) the acquisition of a substantial interest in GWR.
36. The mistake identified by Falak was the action by Fortis in instructing ANZ Nominees Limited to accept the Offer in the belief that instructions had been sought and not received from Falak, when in fact the request for instructions had never been delivered to Falak. The acceptance was inconsistent with the previous course of dealings between the parties.
37. Falak submitted that the reasoning in *Pinnacle VRB Limited (No 10)*<sup>3</sup> and *(No 11)*<sup>4</sup> applied squarely to the present circumstances.

#### *Mistake - Pinnacle (No. 10) and (No. 11)*

38. Falak submitted that Fortis' error lay in failing to send a request for instructions to Falak as beneficial owner and accordingly not receiving instructions from Falak, whereas in *Pinnacle (No. 10)* and *(No. 11)* a broker's clerk simply misinterpreted a series of ticks against client names as instructions to accept an offer. Nevertheless, Falak submitted that there was no relevant distinction between an unauthorised action in its case and the mistake in *Pinnacle (No. 10)* and *(No. 11)*.
39. Notwithstanding the different nature of the "mistake" in the two cases, the common element was the lack of intention to accept on the part of the beneficial owner of the shares. In *Pinnacle (No. 10)*, the Panel said:

*"The Panel considers that the acquisition of control or potential control of companies in Australia would not take place in an efficient, competitive and informed market if it were based on acceptances clearly made other than in accordance with the intentions of their beneficial owners."*

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<sup>3</sup> [2001] ATP 21a

<sup>4</sup> [2001] ATP 23. *Pinnacle (No. 11)* was the review of *Pinnacle (No. 10)*.

40. The Panel accepts, as stated in *Pinnacle (No. 10)*<sup>5</sup>, that unwinding legally sound contracts is not a step to be taken lightly, although if there have been unacceptable circumstances it may be appropriate to do so and the Panel has power to do so.<sup>6</sup> But to do so except in the clearest of circumstances would introduce uncertainty into the Australian securities markets that would be detrimental to all market participants.
41. There are a number of relevant differences between the circumstances in *Pinnacle (No. 10)* and *(No. 11)* and the present circumstances.
- (a) In the present circumstances, a long time had passed since the Disputed Acceptance. Although the Panel accepted that Falak had not unduly delayed after it became aware of the Disputed Acceptance, a period of 23 days had elapsed (from 7 January 2008 to 31 January 2008) from the Disputed Acceptance to the making of its application.<sup>7</sup> In *Pinnacle (No. 10)* and *(No. 11)*, the action taken after the disputed acceptance was much sooner. In those applications, the disputed acceptances occurred on Saturday, 22 and Sunday, 23 September 2001 and the mistake was notified to the registry before the commencement of trading on Monday, 24 September. The Panel received the application on 26 September 2001. The period of time is important for a number of reasons. Reversing an acceptance that has been made a long time ago may have a greater impact on market certainty, and therefore a bigger destabilising effect on securities markets, than one that is quickly reversed. GWR submitted that nothing turned on the two week delay because there was no obvious change in the price or volume of GWR shares traded. The Panel however considered this as evidence of a lack of relevant effect. The passage of time allows a clearer picture of the effect that the allegedly unacceptable circumstances have had and this is addressed in (b).
- (b) There was no evidence of a significant market reaction to the Disputed Acceptance. In particular the level of acceptances did not significantly increase after the Disputed Acceptance, either on 11 January or on 29 January when the market was made aware of who the accepting shareholder was.
- (c) The Panel did not consider that Fairstar had acted unreasonably in processing the Disputed Acceptance. While it had processed the acceptance expeditiously, there was evidence from its registry that the processing was in the normal course of events. The Panel did not draw any inference that the expeditious processing was for the purposes of making it more difficult to reverse the Disputed Acceptance.
- (d) The Panel was not satisfied that the Disputed Acceptance was the result of a mistake of the same type as in *Pinnacle (No. 10)* and *(No. 11)*. Falak's submission referred to the Disputed Acceptance as an unauthorised action rather than a mistake. Falak submitted that the actions of Fortis were inconsistent with previous dealings. Fortis did not give any evidence or explanation to the Panel, which it could have done through Falak's submissions or by seeking to become

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<sup>5</sup> At para 30.

<sup>6</sup> *Pinnacle (No. 11)* at para 28.

<sup>7</sup> The GWR Application was made a day earlier on 30 January 2008.

a party. The Panel considers the type of actions taken by Fortis on the one hand and CSFB (in *Pinnacle (No. 10)* and *(No.11)*) on the other to be different.

42. In short, the Panel was not satisfied of any effect on GWR shareholders or on Falak, that warranted a declaration of unacceptable circumstances and was not satisfied that the circumstances were otherwise unacceptable having regard to the purposes of chapter 6 set out in section 602.
43. Moreover, the Panel did not consider that the case was the same as *Pinnacle (No. 10)* and *(No. 11)*. To this end the Panel noted in *Pinnacle (No. 10)* at paragraph 51:

*"The Panel does not consider that this decision should necessarily apply to other cases unless they involve a clearly unauthorised mistake, for a parcel of shares which the bidder considered significant and where the error was discovered very quickly and was notified to the bidder and to the market very quickly."*

*Misinformed market*

44. Falak submitted that if the Disputed Acceptance was not reversed, the result would be that GWR shareholders would have been misled by the actions of Falak and by GWR indicating that Falak would not accept the Offer.
45. Falak also submitted that the Disputed Acceptance affected the decisions of other GWR shareholders to accept the Offer because the decisions may be influenced by:
- (a) the apparent approval of the Offer by a substantial and informed shareholder (when in fact the shareholder did not approve it); and
  - (b) the new position as a controller or substantial holder achieved by Fairstar as a result of the Disputed Acceptance.
46. Between 11 January 2008 and 29 January 2008:
- (a) the market did not know whether the acceptances in the substantial holder notice on 11 January was by one or more shareholders;
  - (b) the market did not know that Falak had accepted the Offer; and
  - (c) there was not a significant impact on the level of acceptances resulting from the lodgment of the substantial holder notice on 11 January 2007.
47. The Panel considered that, while there may have been a reasonable belief in the market that Falak would not accept the Offer, that was no more than an inference that would have been drawn from conduct that fell short of a last and final statement. Had Falak simply changed its mind and decided to accept the Offer, the Panel would not have considered unacceptable circumstances to have arisen.

**Decision**

48. The Panel considered in the circumstances and for the reasons set out above, it should not make a declaration of unacceptable circumstances.

**Andrew Lumsden**

**President of the Sitting Panel**

**Date of decision: 12 February 2008**

**Date reasons published: 18 February 2008**