



In the Matter of Babcock & Brown Communities Group 02

[2008] ATP 26

Catchwords:

Directors' duties – fiduciary duty – superior proposal – implementation agreement – shareholder approval

Babcock & Brown Communities Group – The Prime Retirement and Aged Care Property Trust – Australian Property Custodian Holdings Limited – Lend Lease Corporation Limited – Babcock & Brown International Pty Limited

Corporations Act 2001 (Cth) sections – 657A – 657D

ASIC Act 2001 sections – 201A

INTRODUCTION

1. The Panel, Hamish Douglass, Andrew Lumsden (sitting President) and Robert Sultan, declined to conduct proceedings on an application from Prime concerning the affairs of BBC. The Panel did not consider there was a reasonable likelihood of finding unacceptable circumstances as it was for the independent directors of BBC, not the Panel, to determine what constituted a superior proposal.
2. In these reasons, all terms have the same meaning as the terms in the Panel's published reasons for its decision in *Babcock & Brown Communities Group 01*.¹

BACKGROUND

Facts

3. In *Babcock & Brown Communities Group 01*, the Panel accepted an undertaking from BBC, Lend Lease Corporation and Babcock and Brown International Pty Limited. The undertaking included that the Lend Lease proposal be amended to require BBC security holder approval before stage 1 was implemented if a superior proposal² was announced before 5pm on 17 November 2008 (see [TP08/100](#)).
4. By letter dated 13 November 2008, Prime asked the independent directors of BBC to form the opinion that the Prime bid was a superior proposal to the Lend Lease proposal.
5. BBC wrote to Prime on 17 November 2008 informing it that the independent directors remained of the opinion that the Prime bid did not represent a superior proposal.

¹ *Babcock & Brown Communities Group* [2008] ATP 25

Application

6. By application dated 18 November 2008, Prime sought a declaration that the decision of the BBC independent directors not to regard the Prime proposal as superior constituted unacceptable circumstances.

Orders Sought

7. Prime sought:
 - (a) an interim order that, pending the Panel's determination of the application, stage 1 of the Lend Lease proposal not proceed and
 - (b) a final order that BBC not proceed with the transactions in stage 1 of the Lend Lease proposal (that is, those within its control) without BBC security holder approval.

DISCUSSION

8. Prime submitted that, since the date of the undertaking, circumstances surrounding its offer had materially changed. It submitted that:
 - (a) the offer had been declared unconditional and
 - (b) the market prices of BBC and Prime securities had changed such that the Prime bid was at a premium that did not exist at the time of the Panel's decision in *Babcock & Brown Communities Group 01*.

Therefore, Prime submitted, the Prime bid was now a superior proposal to the Lend Lease proposal and the independent directors of BBC were wrong to reject the Prime bid as not being a superior proposal.

9. In a preliminary submission, BBC outlined several factors that the independent directors had taken into account when considering whether the Prime bid was superior to the Lend Lease proposal, all of which had been extensively outlined in the target's statement and subsequent correspondence with shareholders.
10. We consider that the question of what is a superior proposal in this case, (which involves an assessment of the merits of the Prime bid relative to the Lend Lease proposal) is a matter for the independent directors of BBC, not the Panel. The undertaking which the Panel accepted defined "superior proposal" in the following terms:

A proposal is a superior proposal if the independent directors form the opinion, reasonably formed in good faith and for a proper purpose based on their fiduciary duties, that it is a superior proposal to the Lend Lease proposal announced on 1 October 2008.
11. In any event, there was no material before us to suggest that the independent directors had not discharged their duties, and indeed there was material to suggest that they had considered a range of factors.
12. Prime did not ask us to make an application to the Court under s201A(3) of the ASIC Act. Even if it had, we would not have accepted such a submission, on the evidence provided.

DECISION

13. For these reasons, we did not consider that there was any reasonable prospect of a declaration of unacceptable circumstances.
14. Accordingly, we decided not to conduct proceedings in relation to the application under Regulation 20 of the ASIC Regulations.

ORDERS

15. As we have made no declaration of unacceptable circumstances, we make no orders.

Andrew Lumsden

President of the Sitting Panel

Decision dated 19 November 2008

Reasons published 19 November 2008