



Australian Government

Takeovers Panel

**Reasons for Decision
Cardinal Resources Limited 05
[2020] ATP 24**

Catchwords:

Decline to conduct proceedings – takeover bid – relevant interest – relevant agreement – agreement, arrangement or understanding – contravention of s606 – truth in takeovers – last and final statements

Corporations Act 2001 (Cth), section 9 (definition of ‘relevant agreement’), 606, 608

ASIC Regulatory Guide 5: Relevant interests and substantial holding notices

Corebell Pty Ltd v New Zealand Insurance Co Ltd (1988) 13 ACLR 349

Ambassador Oil and Gas Limited 01 [2014] ATP 14, MYOB Limited [2008] ATP 27

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

INTRODUCTION

1. The Panel, Jeremy Leibler, Karen Phin (sitting President) and Sarah Rennie, declined to conduct proceedings on an application by Shandong Gold Mining (HongKong) Co., Limited in relation to the affairs of Cardinal. Cardinal is the subject of competing takeover bids from Nord Gold S.E. and Shandong. The application concerned whether Nordgold had come to an agreement, arrangement or understanding that MM Asset Management Inc. would accept into Nordgold’s bid for Cardinal in consideration for Nordgold increasing the offer price under its bid, leading to a breach of section 606.¹ The Panel considered that Shandong did not provide sufficient probative material to justify the Panel making further enquiries and considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Accepted Shares	has the meaning given in paragraph 9
Cardinal	Cardinal Resources Limited
Corporations Act	<i>Corporations Act 2001 (Cth)</i>
MMAM	MM Asset Management Inc.
MMAM Form 605	has the meaning given in paragraph 10
MMAM’s Further Purchases	has the meaning given in paragraph 11

¹ 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)

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MMAM Stake	has the meaning given in paragraph 10
Nordgold	Nord Gold S.E.
Nordgold Form 604	has the meaning given in paragraph 9
Nordgold Offer	has the meaning given in paragraph 6
Nordgold Price Increase	has the meaning given in paragraph 8
Shandong	Shandong Gold Mining (HongKong) Co., Limited
Shandong Offer	has the meaning given in paragraph 7

FACTS

3. Cardinal is a company listed on the ASX and Toronto Stock Exchange (ASX/TSX code: CDV).
4. On 16 March 2020, Cardinal announced that it had received a non-binding, indicative and conditional proposal from Nordgold to acquire all of the ordinary shares of Cardinal at A\$0.45775 per share. That announcement attached a Form 603 *Notice of initial substantial holder* which disclosed that Nordgold then held a total relevant interest of 19.9% in Cardinal.
5. On 18 June 2020, Cardinal announced that it had entered into a Bid Implementation Agreement with Shandong, pursuant to which Shandong agreed to acquire all of the ordinary shares of Cardinal at A\$0.60 per share by way of an off-market takeover bid.
6. On 15 July 2020, Nordgold made an unconditional on-market takeover bid to acquire all of the ordinary shares of Cardinal at A\$0.66 per share (**Nordgold Offer**). Nordgold lodged its Bidder's Statement with ASIC on the same day.
7. On 22 July 2020, Cardinal announced that it had received a revised and improved proposal for an off-market takeover from Shandong to acquire all of the ordinary shares of Cardinal at A\$0.70 per share (**Shandong Offer**). Shandong's Bidder's Statement was lodged with ASIC on 11 August 2020.
8. On 2 September 2020, Nordgold increased the offer price of the Nordgold Offer from A\$0.66 to A\$0.90 per Cardinal share (**Nordgold Price Increase**).
9. On 3 September 2020, Nordgold released a Form 604 *Notice of change of interests of substantial holder* (**Nordgold Form 604**) which disclosed that on 2 September 2020, it acquired 44,983,095 ordinary shares in Cardinal² (**Accepted Shares**) as a result of acceptances received under the Nordgold Offer. The Nordgold Form 604 disclosed that Nordgold's relevant interest in Cardinal increased from 18.71% to 28.39%.
10. On 4 September 2020, MMAM released a Form 605 *Notice of ceasing to be a substantial holder* (**MMAM Form 605**) which disclosed that on 2 September 2020, it had disposed of 48,520,066 shares in Cardinal via a series of on-market transactions at an average price of A\$0.9007 per share (**MMAM Stake**).

² Comprising 8.55% of the shares in Cardinal

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11. The MMAM Form 605 also disclosed that on 2 September 2020, MMAM acquired a total of 3,176,369 Cardinal shares at a price of A\$0.91 per share via a series of on-market transactions (**MMAM's Further Purchases**).
12. On 7 September 2020, Shandong increased the offer price of the Shandong Offer from A\$0.70 to A\$1.00 per Cardinal share.
13. On 21 September 2020, Shandong wrote to Nordgold alleging (in effect) that the MMAM Form 605, taken together with the Nordgold Form 604 and trading data from 2 September 2020, indicated that the Accepted Shares were delivered exclusively to Nordgold by MMAM. In Shandong's view, *"the inescapable inference from these facts is that there was an agreement, arrangement or understanding between Nordgold and MMAM to the effect that MMAM would tender the Acceptance Shares into the Nordgold Offer in consideration for the [Nordgold] Offer Price Increase."*
14. On 23 September 2020, Nordgold responded to Shandong's letter and denied any agreement, arrangement or understanding with MMAM. It stated that Nordgold (through its financial adviser) had discussed with MMAM its position in relation to the takeover bids for Cardinal prior to 2 September 2020, but that these discussions were *"preliminary in nature"* and that the *"statements made... were not statements of intention"* and *"did not bind either Nordgold or MMAM, nor was there any consensus or adoption between them of a common purpose or object."*
15. On 19 October 2020, Shandong lodged its Second Supplementary Bidder's Statement in respect of the Shandong Offer stating that the offer price of A\$1.00 per Cardinal share is *"best and final in the absence of a higher competing offer"*.

APPLICATION

16. By application dated 30 October 2020, Shandong sought a declaration of unacceptable circumstances. Shandong submitted (among other things) that:
 - (a) MMAM and Nordgold had come to an agreement, arrangement or understanding in respect of the MMAM Stake that MMAM would accept into the Nordgold Offer in consideration for the Nordgold Price Increase.
 - (b) Accordingly, Nordgold had acquired a relevant interest in the MMAM Stake prior to MMAM accepting into the Nordgold Offer, which resulted in Nordgold's voting power in Cardinal exceeding 20% in breach of section 606.
 - (c) Shandong's best and final statement was made in circumstances where there was not an efficient, competitive and informed market and Shandong had been deprived of the opportunity to compete for the MMAM Stake.

Final orders sought

17. Shandong sought final orders that:
 - (a) MMAM's acceptance of the Nordgold Offer be unwound and that the Accepted Shares be returned to MMAM (in exchange for A\$0.90 per Cardinal share)
 - (b) Shandong be released from its best and final statement and
 - (c) Shandong be able to raise its offer price above A\$1.00 per share under the

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Shandong Offer.

DISCUSSION

18. We have considered all the material, but address only specifically that part of the material we consider necessary to explain our reasoning. References to submissions from Shandong are to submissions in its application. References to submissions from Nordgold are to submissions in its preliminary submissions (which submitted that the Panel should decline to conduct proceedings).

Relevant agreement and section 606

19. Section 606 prohibits acquisitions of relevant interests above 20% except as permitted by section 611.
20. Section 608(1) provides that a person has a relevant interest in securities if they have power to dispose of, or control the exercise of a power to dispose of, the securities.
21. Section 608(2)(b) further provides that power or control may arise under a trust, agreement or practice (alone or in combination), whether enforceable or not. In ASIC Regulatory Guide 5: *Relevant interests and substantial holding notices*, it is stated that³ “an agreement in this context means a relevant agreement: s9.”
22. The definition of 'relevant agreement' in section 9 refers to:
“an agreement, arrangement or understanding:
a. whether formal or informal or partly formal and partly informal; and
b. whether written or oral or partly written and partly oral; and
c. whether or not having legal or equitable force and whether or not based on legal or equitable rights.”
23. Shandong submitted that there was a relevant agreement between Nordgold and MMAM in respect of the MMAM Stake. It submitted that:
(a) The trading data from 2 September 2020 “shows that the Accepted Shares were transacted between MMAM’s broker and Nordgold’s broker in 5 tranches between 10:02:40am and 10:03:08am (AEST) on 2 September 2020 (i.e. immediately following the open of trading in Cardinal shares at 10:02:08am (AEST)...)” and that the 5 tranches were “the exact amount of Cardinal Shares disclosed in the Nordgold Form 604 as acquired from acceptances received under the Nordgold Offer”.
(b) “... it is clear from an analysis of the trading data on 2 September 2020, together with the Nordgold Form 604 and the MMAM Form 605, that MMAM... rushed to accept into the A\$0.90 Nordgold Offer shortly after the Nordgold Price Increase was announced in a manner that maximised the portion of the MMAM Stake that could be accepted into the Nordgold Offer, even though that resulted in MMAM receiving a lower price and a lower total sum for the MMAM Stake.”

³ At paragraph [5.30]

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24. Shandong further submitted that *“it is well understood that, in the absence of an agreement, arrangement or understanding, it is at odds with commercially rational behaviour and common market practice not to hold off accepting an offer until late in a bid period”*.⁴ In this case, Shandong submitted that MMAM’s conduct was not commercially rational when taking into consideration (among other things) that:
- (a) MMAM acted immediately, from the open of trading in Cardinal shares, to sell the entirety of the MMAM Stake within 1.5 hours of the Nordgold Price Increase being announced to the market and outside of MMAM’s normal business hours.⁵
 - (b) *“There were good prospects of the competitive bidding process continuing and greater value subsequently becoming available”*, noting that at the time, the Nordgold Offer was to remain open for a further 8 days after the sale of the MMAM Stake.
 - (c) A material volume of the Accepted Shares could have been sold on-market at a price higher than A\$0.90 per share at a later time on 2 September 2020 or after that date.
 - (d) MMAM’s Further Purchases indicates that MMAM *“was compelled to sell to Nordgold notwithstanding it believed there was value in Cardinal shares above A\$0.90 per share at which it sold.”*
25. In response, Nordgold submitted that Shandong’s submissions ignored important circumstances that would make it *“entirely economically rational”* for MMAM to sell the MMAM Stake at A\$0.90 per share. It submitted (among other things) that:
- (a) At that time, there was significant uncertainty as to whether the Shandong Offer would complete *“as it remained highly conditional (including being subject to a 50.1% minimum acceptance condition). Shandong had also not yet been relieved by the Canadian securities regulators from complying with onerous take-over bid requirements under Canadian law, including a non-waivable 50.1% minimum acceptance condition”*.
 - (b) The Nordgold Price Increase *“was a significant 28.6% (approx.) increase on Shandong Gold’s then current bid price of \$0.70.”*
 - (c) *“Given MMAM’s much lower average buy-in price, selling its stake at \$0.90 per share would allow it to realise a significant profit to deploy capital elsewhere...”*
26. We agree with Nordgold’s submissions. There were economically rational reasons for MMAM’s disposal of the MMAM Stake following the Nordgold Price Increase, including because the Shandong Offer continued to be subject to a 50.1% minimum acceptance condition at that time.

⁴ Citing *MYOB Limited* [2008] ATP 27 at [21] and *Ambassador Oil and Gas Limited 01* [2014] ATP 14 at [48]

⁵ MMAM is located in Toronto, Canada

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27. We also do not consider that the trades undertaken by MMAM after the announcement of the Nordgold Price Increase evidence that MMAM was giving effect to any pre-arrangement with Nordgold. In respect of the Nordgold Offer, there was no assurance that the MMAM Stake would necessarily be acquired by Nordgold given that, in the context of a market bid, the orders from sellers are placed in a queue and subsequently matched in terms of price and time priority to the bidder's offer or orders from other buyers. On the material before us, we are not prepared to infer that the trades occurred other than in the ordinary course of trading.
28. We also note that Shandong submitted that the alleged arrangement between MMAM and Nordgold was substantially similar to an example given in ASIC Regulatory Guide 5. In that example: "*A representative of Bid Co Ltd and a major shareholder of Target Ltd agree during a telephone conversation that the major holder will accept the bid and that Bid Co Ltd will increase the offer to \$1.10 and declare it unconditional.*"⁶ In that circumstance, ASIC notes that as a result of the relevant agreement to acquire the major holder's shares concluded during the telephone conversation, the relevant interest is acquired as a result of the relevant agreement rather than the acceptance of the bid (citing *Corebell Pty Ltd v New Zealand Insurance Co Ltd* (1988) 13 ACLR 349).
29. In this case, we do not consider that the material before us suggested that the discussions between Nordgold's financial adviser and MMAM prior to 2 September 2020 went beyond canvassing MMAM's views on the competing bids for Cardinal.
30. Based on the above submissions, without more, we do not infer that the behaviour of MMAM was giving effect to a pre-agreement that Nordgold had extracted from MMAM in consideration for the promise of the Nordgold Price Increase.
31. Accordingly, in our view, Shandong did not provide sufficient probative material to justify the Panel making further enquiries as to whether Nordgold had acquired a relevant interest in the MMAM Stake prior to MMAM accepting into the Nordgold Offer, leading to a contravention of section 606.

DECISION

32. 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 applications under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

⁶ At paragraph [5.33]

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33. 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.

**Karen Phin
President of the sitting Panel
Decision dated 16 November 2020
Reasons given to parties 1 December 2020
Reasons published 3 December 2020**

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Advisers

Party	Advisers
Nordgold	DLA Piper
Cardinal	HopgoodGanim Lawyers
Shandong	King & Wood Mallesons
MMAM	Ashurst