

GAME ON: ASIC HITS THE JACKPOT IN THE PANEL IN THE AINSWORTH MATTER

22 July 2016 | Australia, Brisbane, Melbourne, Perth, Sydney
Legal Briefings - By **Tony Damian** and **Nicole Backhouse**

The Takeovers Panel accepted undertakings (relatively late in the process) from Mrs Ainsworth (a 8.96% shareholder) to, amongst other things, refrain from voting on the transaction pursuant to which her husband would sell his controlling stake in Ainsworth Game Technology for a price which had a 33% premium over market.

- The Panel in its preliminary findings found that Mr and Mrs Ainsworth were associates and that even if they were not associates, that the Panel would have found that a vote by Mrs Ainsworth in support of the transaction would have been unacceptable.
- The Panel will only use its policy based powers to prevent particular shareholders from casting votes on the grounds of 'special interest' in the most obvious and extreme cases.

The Takeovers Panel has recently published its preliminary findings in the Ainsworth Game Technology Limited matter. The Panel did not need to make any final findings because of an undertaking volunteered by Mrs Ainsworth. The preliminary findings clarify the Panel's approach to assessing association between spouses but again indicates that the Panel will only use its policy based powers to prevent particular shareholders from voting on the grounds of 'special interest' in the most obvious and extreme cases.

FACTS

Ainsworth Game Technology Limited (**AGI**) is listed on the Australian Securities Exchange. Mr Leonard Ainsworth is the controlling shareholder of AGI and holds 53.71% of AGI. His wife, Mrs Margarete Ainsworth controls 8.96% of AGI and is the second largest shareholder. Mr and Mrs Ainsworth's sons (**Sons**) collectively hold 2.51% of AGI.

On 23 February 2016, AGI announced that Mr Ainsworth had entered into a conditional share sale agreement pursuant to which he proposed to sell his entire stake at the time (which was 52.52% of AGI) to Novomatic AG (**Transaction**). The purchase price included a 33% control premium for Mr Ainsworth's stake (it is expected that Mr Ainsworth will receive close to \$500 million from the Transaction).

The Transaction required shareholder approval under item 7 of section 611 of the Corporations Act (the **Resolution**).

A notice of meeting and explanatory memorandum in relation to the Resolution was made available on ASX on 4 May 2016. In the notice of meeting, the independent directors of AGI included a statement, to the effect that, the independent directors were of the view that neither Mrs Ainsworth, nor the Sons were associates of Mr Ainsworth and that they were therefore eligible to vote on the Resolution.

The Panel noted that before applications were made to the Panel, both applicants in the present proceedings, being ASIC and Fortress Centaurus Global Master Fund Ltd (Fortress) had raised their concerns about the associations between Mr and Mrs Ainsworth and Mr Ainsworth and his Sons (in the case of **Fortress**) directly with AGI. The independent directors did not change their views based on those discussions.

Accordingly on 13 May 2016, in a rare (but not unprecedented) move ASIC made an application to the Panel on the basis that Mr and Mrs Ainsworth were associates and therefore Mrs Ainsworth should be excluded from voting on the Resolution. On 17 May 2016, Fortress submitted its own application to the Panel on the basis that both Mrs Ainsworth and the Sons were associates of Mr Ainsworth and that they should all be excluded from voting. In the alternate, Fortress submitted that even if Mrs Ainsworth and the Sons were not associates of Mr Ainsworth, owing to their relationship with Mr Ainsworth and their private interests in the outcome of the transaction, they were not disinterested shareholders and so should be precluded from voting on the grounds of unacceptability.

The Panel decided to conduct proceedings in relation to the alleged association between Mr and Mrs Ainsworth but not in relation to the alleged association between Mr Ainsworth and his Sons. In addition, the Panel considered that the policy questions raised by Fortress were worthy of consideration.

The Panel provided its preliminary findings to all of the parties for review and comment. Following that, Mrs Ainsworth made a number of undertakings to the Panel which addressed the issues raised in the preliminary findings including that she would not vote her stake on the Resolution. The Panel accepted those undertakings and accordingly did not need to conclude the proceedings. Nonetheless the Panel thought that it was important that the market have the benefit of the preliminary findings.

ASSOCIATION BETWEEN MR AND MRS AINSWORTH

The preliminary findings give an overview of the enquiries to be made to assess whether spouses will be considered associates for the purposes of Chapter 6 of the Corporations Act.

The starting point in cases which turn on whether spouses or family members are associates, is that the mere fact that a group of people have a family connection is not of itself sufficient to prove association. This has been a long accepted principle in both case law and in decisions made the Panel. Nevertheless, the Panel considered that absent estrangement between spouses, the familial connection and in particular the fact that the relevant people are a married couple is significant. In finding that Mr and Mrs Ainsworth were associates the Panel considered the following factors as being relevant:

- **Shared goal or purpose** – in finding that there was a shared goal or purpose, the Panel placed weight on the fact that Mr Ainsworth had made statements to the press which referred to Mrs Ainsworth’s stake in AGI and that he and his wife’s stake were very tightly held. In addition, it was noted that Mrs Ainsworth could expect to benefit (directly or indirectly) from the increase in wealth of her husband as a result of the completion of the Transaction and that it would be unusual for one spouse to not support the other spouse in achieving his or her goals.
- **Structural links** – in finding significant structural links, the following were influential:
 - the close family relationship between Mr and Mrs Ainsworth, noting that they were married and had been together for 51 years;
 - AGI had been operated as a family controlled business and Mr and Mrs Ainsworth’s

conduct over this time supported that view. For example, there was no evidence provided that Mrs Ainsworth acted as an independent shareholder – much of her communication with AGI was through her husband and there was very limited engagement directly between AGI and Mrs Ainsworth, which was notable in view of the fact that she was the second largest shareholder;

- over a number of years Mr and Mrs Ainsworth have held common directorships and had shares in a number of common companies; and
- in earlier transactions involving AGI, Mrs Ainsworth had been classified as an associate of Mr Ainsworth and the Panel was of the view that nothing had changed since that time which would 'disassociate' them.
- **Common investments and dealing** – the Panel found that Mrs Ainsworth's initial investment in AGI was indirectly attributable to Mr Ainsworth and that her stake in AGI was her most significant investment, representing approximately 46% of her investment portfolio.
- **Uncommercial conduct** – a number of aspects of Mrs Ainsworth's conduct and the conduct towards Mrs Ainsworth by AGI and its advisers in relation to the Transaction were considered to be uncommercial including that neither AGI nor Novomatic AG approached Mrs Ainsworth to discuss the Transaction, which would be expected and consistent with market practice considering that Mrs Ainsworth was the largest voting shareholder and was particularly telling considering that AGI had been in contact with other shareholders. Additionally, Mrs Ainsworth did not seek any independent advice in relation to the Transaction and she submitted her vote just 5 days after the notice of meeting has been released to the market. The Panel viewed this conduct as anomalous with that of an independent shareholder in the position of Mrs Ainsworth and therefore did not believe that she was acting independently of Mr Ainsworth.
- **Blocking stake** – it was noted that because Mr Ainsworth retained a 1.19% interest in AGI after the Transaction (this was as a result of his participation in AGI's dividend reinvestment plan), Mr and Mrs Ainsworth would collectively control 10.15% of AGI which would give them a blocking stake should any party (including Novomatic AG) seek to move to full ownership of AGI.

On the basis of the above considerations that Panel was prepared to infer an association between Mr and Mrs Ainsworth and that she should therefore not be entitled to vote on the Resolution.

POLICY CONSIDERATIONS

In addition to the alleged association outlined above, Fortress had argued, in the alternative, that the Panel should disallow Mrs Ainsworth and the Sons from voting on the grounds of unacceptability as they were not disinterested shareholders. Fortress had submitted that the policy underlying item 7 of section 611 of the Corporations Act, was that transactions should be decided by only those shareholders who are, and who are seen to be, disinterested. One of the difficulties with the position put by Fortress is that there is no direct support for this approach in either the legislation or ASIC Regulatory Guide 74 'Acquisitions approved by members'.

The Panel, while recognising that the policy grounds argument need ventilation, has again shown a reluctance to use policy based arguments of unacceptability as a reason to preclude shareholders from exercising voting rights in all but the most obvious of cases. The Panel determined that, even if Mr and Mrs Ainsworth were not associates, that Mrs Ainsworth was sufficiently interested in the outcome of the Resolution by virtue of her connections to Mr Ainsworth and that on the grounds of unacceptability she should be precluded from voting in favour of the Resolution. In contrast, the Panel distinguished the Sons' position and found that there was not sufficient evidence presented to support the view that that were sufficiently interested (other than as shareholders) in the outcome of the Resolution.

AND THE RESULT WAS...

On 27 June 2016, AGI shareholders (excluding Mr and Mrs Ainsworth) approved the Resolution with 62% voting in favour. The share sale agreement is subject to a number of regulatory conditions and completion is not expected for some months.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



TONY DAMIAN
PARTNER, SYDNEY

+61 2 9225 5784
Tony.Damian@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021