

TITANIC II: SINKING SLOWLY - THE PRESIDENT'S CLUB JUDICIAL REVIEW IS DISMISSED

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Legal Briefings - By **Tony Damian**

SUMMARY

- The Takeovers Panel held that Clive Palmer and associates acquired in excess of 40% of The President's Club Limited (**TPC**) without complying with either the letter or the spirit of the Corporations Act 2001 (the **Act**).
- The TPC shareholders successfully obtained orders from the Panel in 2012 limiting the votes that may be cast by entities associated with Clive Palmer and specifying terms on which a follow on takeover bid could be made.
- Clive Palmer and associates sought judicial review of the decision, which was dismissed, again highlighting the difficulty in challenging Panel decisions. Nonetheless, nearly 3 years after the initial problematic acquisitions, TPC shareholders remain without an effective resolution to the matter.

The Federal Court of Australia recently dismissed the judicial review application lodged by Clive Palmer and his associates (together the **Palmer Entities**) in respect of the Takeovers Panel's declaration of unacceptable circumstances in relation to the affairs of TPC - which is part of the corporate structure for the Palmer Coolum Resort and home to Palmersaurus - the world's largest dinosaur park.

This judgment is the latest, but not last, chapter in an ongoing battle for control of the former Hyatt Regency Coolum Resort (now known as the Palmer Coolum Resort) and provides another example of the role that formal litigation processes can still play in takeovers.

In its judicial review application, the Palmer Entities raised 16 grounds of challenge to the Panel's decisions but they only pressed some of these at the hearing and in its written submissions. Justice Collier dismissed each ground of challenge and provided an overview of many of the fundamental principles underlying the regulation of public M&A in Australia and structural foundations of the Takeovers Panel in Australia and has again demonstrated that the courts will not overturn Panel decisions without good and proper reasons.

FACTS

To briefly recap the facts, TPC is an unlisted public company that operates a timeshare scheme for the Palmer Coolum Resort. The constitution and related arrangements of TPC contemplated that a shareholder in TPC would also own an interest in part of the leases (a **Villa Interest**) for the land from which the time share scheme operates. The effect of these arrangements was that the shares in TPC are effectively stapled to a corresponding Villa Interest (together the **Timeshare Interests**). Purchasers of the Timeshare Interests were required to execute a deed poll which bound them to sell their TPC Shares if they sold their Villa Interest and the constitution contained an equivalent requirement in relation to the transfer of shares.

TPC has one larger shareholder, Coeur de Lion Investments Pty Limited (**CDLI**), that holds 41.4% of the shares and which prior to the Palmer Entities involvement at the resort was a wholly owned subsidiary of Lend Lease, the developer. The remaining 58.6% of shares are widely held.

In 2005 for the purposes of obtaining exemptions from the managed investment schemes provisions of the Act, CDLI executed a deed poll in favour of the Australian Securities and Investments Commission (**ASIC**), which provided that CDLI would not exercise more than 10% of its voting rights on any resolution unless ASIC had provided its consent in writing or in other limited cases (the **Deed Poll**). CDLI could revoke the deed poll on 180 days' notice to ASIC and TPC.

In July 2011, the Palmer Entities acquired the holding company of CDLI which gave them an indirect ownership of the 41.4% stake in TPC that was held by CDLI. As TPC has more than 50 members, this upstream transaction was subject to Chapter 6 of the Act and needed to be structured to use one of the gateways permitted in section 606 of the Act, such as a takeover bid or a shareholder approved acquisition. The transaction was not so structured.

In September 2011, CDLI gave notice to ASIC and TPC that it intended to revoke the Deed Poll, with the revocation becoming effective on 13 March 2012, meaning that the Palmer Entities could vote the entire 41.4% stake on any resolution without ASIC's prior approval.

In March 2012, one of the Palmer Entities directly acquired a further 2.9% of TPC shares and corresponding Villa Interests.

Following on from these acquisitions, in April 2012 a Palmer Entity made a takeover bid for TPC and then purported to withdraw its bid after it had been lodged with ASIC. Negotiations with ASIC about the content of the disclosures in the bidder's statement (and replacement bidder's statements) and about contraventions of Chapter 6 of the Act continued for an extended period time, until TPC commenced proceedings in the Panel in June 2012.

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

The Panel found that the acquisitions in 2011 and 2012 by the Palmer Entities constituted ongoing unacceptable circumstances and made orders that CDLI could not exercise any voting rights attached to CDLI's entire stake in TPC and must not dispose of those shares until a bid, broadly on terms no less favourable than those in the original takeover offer (including with an offer price of at least \$65,013 per Timeshare Interest), was made and offers in respect of no less than 50% of shares held by independent shareholders were accepted.

JUDICIAL REVIEW

In the Federal Court, the Palmer Entities launched a multi-faceted challenge on the Panel's declaration of unacceptable circumstances and reasoning in support - with some arguments based on administrative law grounds while other simply sought to re-agitate the original issues in dispute. Each ground of challenge was dismissed. In the judgment the Federal Court has confirmed that:

- an acquisition of shares can lead to 'ongoing' circumstances which may be held to be unacceptable and that 'circumstances' are not limited to a single event or a specific transaction. The Palmer Entities had argued that an acquisition created a 'one off' event at which point in time, the time period for starting proceedings in the Panel commenced. Collier J held that the application to the Panel from TPC was with respect to ongoing circumstances and so questions of the timing of commencing proceedings was not relevant but did note that had the Panel needed to give an extension of time for proceedings to be commenced, natural justice would dictate that the Palmer Entities should have been allowed to make submissions on the decision to extend time;
- in assessing a person's voting power, it is necessary to consider only the rights and limits attached to the securities which are included the applicable constitution and not by reference to extraneous contractual arrangements that may be in place. The Palmer Entities had argued that because of the Deed Poll, CDLI's voting power in TPC was just 10%. Collier J highlighted that this argument was inconsistent with the broad concepts of 'voting shares' and 'voting power' in the Act. Collier J noted that ASIC had correctly submitted that if the Palmer Entities argument on this was accepted, it would permit any person to easily circumvent the law by simply executing a deed poll restricting voting

rights immediately prior to an acquisition and then post acquisition revoking that deed poll – this was clearly not within the contemplation of parliament when Chapter 6 was legislated and an incorrect reading of the law; and

- an acquisition which itself may be permitted under the Corporations Act (i.e. the March acquisition was a lawful acquisition under the creep provision) may nonetheless be problematic and can contribute to unacceptable circumstances. Here it was found the 2.9% acquisition in March 2012 assisted in consolidating control of TPC without offering any of the benefits of the control transaction to the broader group of shareholders.

Additionally, the Palmer Entities asserted that a number of conclusions drawn by the Panel were without evidentiary support – conclusions that were challenged included (1) that the Villa Interests were effectively stapled to the shares in TPC and (2) that the control premium for the remaining shareholders had been reduced by the acquisitions by the Palmer Entities. Collier J found sufficient evidentiary support for each conclusion within the reasons set out by the Panel, yet at the same time noted that because of the role of the Panel and the terms on which the Panel is required to consider matters, that many of the conclusions that the Panel may need to draw may in fact be matters of opinion which are not subject to the no evidence rule leaving little room for review under this head of challenge.

The Federal Court also rejected the Palmer Entities claim of apprehended bias against a Panel member. Collier J could not be persuaded of the 'logical connection' between a Panel member's position at a law firm which is representing parties in unrelated litigation against another Palmer interest and the 'meritorious consideration of the application' at hand.

WHERE TO NEXT FOR TPC SHAREHOLDERS?

On 26 June, the Takeovers Panel announced that the Palmer Entities have appealed the Federal Court decision. As for the other shareholders in TPC, although TPC has succeeded in both the Panel and in the Federal Court, and the Panel's original orders (for the time being) stand (including that the Palmer Entities stake has no voting rights), there is little else they can do but wait to see what happens next.

KEY CONTACTS

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



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