

BRICKWORKS WELCOMES FEDERAL COURT RULING ON CROSS SHAREHOLDING

Brickworks (ASX: BKW) today welcomed the Federal Court of Australia's rejection of Perpetual's claim that Brickworks has engaged in oppressive conduct, including by reason of the existence of its cross-shareholding structure with Soul Pattinson (ASX:SOL).

In giving reasons for her judgement, Justice Jagot found that "weighing all of the circumstances, reasonable directors would not consider maintenance of the cross-shareholding to date to be unfair or oppressive. Accordingly, Perpetual's claim must be rejected" and ordered that Perpetual pay Brickworks' costs.

The basis for this finding is set out in the attached extract of the judgement. Justice Jagot has ordered that publication of full reasons for her judgement be suppressed for 48 hours to give the parties an opportunity to notify the Court whether there is any confidential matter disclosed in her reasons and an explanation of why the matter continues to be confidential.

Commenting on today's decision Brickworks' Lead Independent Director Robert Webster said: "We welcome today's decision and hope that this distracting litigation and unnecessary cost will now be behind us.

"We firmly believe that the cross-shareholding structure benefits shareholders – a fact clearly demonstrated by Brickworks' superior performance to the All Ordinaries Accumulation Index which has increased 10.5% per annum over the past 48 years compared to Brickworks' 11.9% total shareholder return.

"We are pleased that Justice Jagot has concluded that on any reasonable view of the evidence, the Directors of Brickworks have diligently considered the structures of the companies with their obligation to act in the best interests of Brickworks firmly in mind.

"I would like to take this opportunity to thank shareholders for their patience during this hearing and I look forward to continuing to execute on our strategy for delivering growth and increasing shareholder returns."

Ends

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About Brickworks Limited: Brickworks was listed on the Australian Securities Exchange in 1962, has paid a dividend every year since then, and is an ASX200 company. It has three Groups - Building Products, Land and Development, and Investments. The Building Products Group includes Australia's largest bricks producer Austral Bricks, Austral Masonry, Bristle Roofing, Austral Precast, Auswest Timbers and Specialised Building Systems. The Land and Development operation maximises value from surplus land and redundant building products sites. Investments include a 42.72% holding in Washington H. Soul Pattinson & Company.

www.brickworks.com.au

ORDERS

NSD 2387 of 2013

BETWEEN: **RBC INVESTOR SERVICES AUSTRALIA NOMINEES PTY
LIMITED ACN 097 125 123 AS NOMINEE FOR RBC
INVESTOR SERVICES TRUST IN ITS CAPACITY AS
CUSTODIAN FOR PERPETUAL INVESTMENT
MANAGEMENT LIMITED ACN 000 866 535**
Cross-Claimant

AND: **BRICKWORKS LIMITED ACN 000 028 526**
First Cross-Respondent

**WASHINGTON H SOUL PATTINSON AND COMPANY
LIMITED ACN 000 002 728**
Second Cross-Respondent

JUDGE: **JAGOT J**

DATE OF ORDER: **10 JULY 2017**

THE COURT ORDERS THAT:

1. The second cross-claim be dismissed.
2. The cross-claimant pay the cross-defendants' costs of the second cross-claim as agreed or taxed.
3. Publication of the reasons for judgment apart from paragraphs 1 to 5 other than to the parties and their legal representatives be suppressed for 48 hours to give the parties an opportunity to notify the Associate to Jagot J whether there is any confidential matter disclosed in the reasons and an explanation of why the matter continues to be confidential.
4. Any application to vary order 2 may be made within 14 days by way of email to the Associate to Jagot J, copied to the parties, which includes details of the costs order sought and a proposed timetable for resolving the issue of costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. OVERVIEW

- 1 In this case a major institutional investor contends that a cross shareholding between two large publicly listed Australian companies is oppressive to shareholders primarily because by allegedly disenfranchising minority shareholders the cross shareholding is said to entrench the incumbent boards and, as a result, the control of the “Millner family”, and depresses the price of shares in each company.
- 2 A finding of oppression is an outcome of an evaluative exercise in which potentially competing considerations are brought to account. This is why in an oppression suit a court asks whether reasonable directors would consider the impugned conduct unfair. The impugned conduct in the present case is the maintenance of the cross shareholding in the face of repeated attempts since 2011 by the investor, Perpetual, to have the cross shareholding dismantled.
- 3 In the present case it would be apparent to reasonable directors that the cross shareholding has a range of potential effects which should be considered in context. In particular, and as explained in these reasons:
 - (1) the cross shareholding has been in place for more than 40 years;
 - (2) the cross shareholding would not now be able to be created (or recreated if unwound) but is lawful because of transitional provisions in the legislation;
 - (3) Perpetual acquired its shares knowing the cross shareholding existed and, in its capacity as an institutional investor, presumably understood the implications of it;
 - (4) it is not apparent that the cross shareholding has caused any related party or improvident transaction;
 - (5) it is possible that the cross shareholding has contributed to shares in the companies trading at below net asset value per share, but whether that is so or not has not been demonstrated to date and the extent of any such contribution, if it exists, is presently unknown;
 - (6) the cross shareholding may reasonably be seen as having provided each company with material benefits as a result of diversification which has reduced earnings volatility;

- (7) there are available ways in which the cross sharing could be unwound which would not cause adverse tax consequences, but it is not possible to be satisfied on the presently available material that any proposal dismantling the cross shareholding will yield material longer term financial benefits to shareholders of either company;
- (8) Perpetual's attempt to prove that there is an agreement, arrangement or understanding between members of the "Millner family" and/or various members of the boards of each company to maintain the cross shareholding in order to entrench control of the companies by the incumbent boards and thus the Millner family has failed;
- (9) the cross shareholding has a range of other implications for both companies. In particular, the cross shareholding operates to discourage any takeover of the companies, impacts on liquidity, facilitates retention of board membership, and is a circumstance which, as the present case demonstrates, is capable of giving rise to actual and perceived conflicts of interest which require continued vigilance and prudent management. It does not, however, disenfranchise minority shareholders in either company who must generally be taken to have acquired their shares knowing that the majority shareholder in each company was the other company given that the cross shareholding was created in 1969;
- (10) in terms of takeover and liquidity implications, as noted, no demonstrable impact on the share prices of either company has been proved;
- (11) in terms of corporate governance implications, if the boards are perceived to be performing well, this could be characterised as a positive attribute of the cross shareholding by facilitating stability and thus decision-making with a view to longer term benefits. By the same token, if either or both of the boards are perceived to be under-performing, this could be characterised as a negative attribute of the cross shareholding by facilitating entrenchment of the boards despite lack of performance. Perceptions are likely to change depending on circumstances but the underlying governance issues remain that the cross shareholding facilitates retention of board membership and may give rise to potential actual or perceived conflicts of interest;
- (12) to date, there is no suggestion that either board has under-performed and, to the contrary, the consensus appears to be that both boards have performed well and both companies are well managed, lending weight to the perception that the cross shareholding, to date, has facilitated stability and a capacity for long term decision-making;

- (13) the cross shareholding is a complex structure which makes it more difficult than would otherwise be the case for market participants to assess the true value of the companies because it creates a form of valuation circularity;
- (14) a number of market analysts have recognised the range of implications of the cross shareholding, both positive (including earnings stability by reason of diversification, takeover defence, board stability and consequential capacity for long term decision-making) and negative (including lack of liquidity, entrenchment of boards, conflicts of interest, complexity, possible depression of share prices);
- (15) on any reasonable view of the evidence, the directors of each company have diligently considered the structure of the companies with their obligations to act in the best interests of the company firmly in mind;
- (16) there is good reason to infer that the directors of each company are committed to continuing to consider the structuring issues in future with their obligations to act in the best interests of the company firmly in mind;
- (17) Perpetual has been selling its shares in both companies and cannot suggest it is unable to continue to do so given the recent increases in share prices for both companies;
- (18) there is no evidence that any shareholder in either company other than Perpetual wishes orders to be made to the effect Perpetual seeks; and
- (19) the effect of the orders Perpetual seeks on other shareholders, in terms of share price, company performance, and dividend yields cannot be known.

4 Weighing all of the circumstances, reasonable directors would not consider maintenance of the cross shareholding to date to be unfair or oppressive. Accordingly, Perpetual's claim must be rejected.

5 My reasons follow.