



Australian Government

Takeovers Panel

MEDIA RELEASE

No: TP16/78

Wednesday, 30 November 2016

Merlin Diamonds Limited – Declaration of Unacceptable Circumstances

The Panel has made a declaration of unacceptable circumstances (Annexure A) following an application dated 31 October 2016 by Mr Thomas Reddicliffe in relation to the affairs of Merlin Diamonds Limited (see [TP16/76](#)).

Background

Between 23 June 2016 and 12 July 2016, Merlin entered into secured note deeds with Regals Fund LP, Chabad Properties Pty Ltd and NRMZ Pty Ltd for the issue of notes and options.

At a general meeting of Merlin held on 6 September 2016, a resolution relating to the issue of convertible notes and options to Regals was defeated. Resolutions relating to the issue of other convertible notes and options, including to Chabad Properties and NRMZ, were passed.

The Panel considered that circumstances were unacceptable because (among other things):

- Mr Mordechai Gutnick and Mr Joseph Gutnick are associated
- Mr Mordechai Gutnick and Regals are associated. Mr Mordechai Gutnick and Regals had an understanding that Regals would convert some of its notes and Mr Mordechai Gutnick would arrange for the new shares to be issued in time to be voted and Regals would vote the new shares in favour of the resolutions at Merlin's 6 September 2016 meeting and
- the explanatory memorandum for Merlin's 6 September 2016 meeting wrongly disclosed, in relation to the convertible notes and options, that the relevant secured note deeds required that the conversion of the convertible notes could not result in a noteholder holding more than 19.9% of the issued shares in Merlin at the time of conversion, in the absence of shareholder approval. The secured note deeds did not contain this requirement.

The Panel considered the circumstances (including the matters summarised above) led to (i) the market not being efficient, competitive and informed (ii) the shareholders of Merlin not knowing the identity of persons who have acquired a

substantial interest in Merlin or being provided with enough information to enable them to assess the merits of a proposal which would result in persons acquiring a substantial interest in Merlin and (iii) contraventions of chapters 6 and 6C of the *Corporations Act 2001* (Cth).

The Panel did not consider it against the public interest to make the declaration, and in making it had regard to the matters in s657A(3).

Orders

The Panel is considering what, if any, final orders to make and will publish details in due course. The Panel will examine the voting at Merlin's Annual General Meeting held today when considering the question of final orders. The Panel may consider accepting undertakings in lieu of orders.

The Panel has varied its interim orders made on 7 November 2016 (see [TP16/77](#)) to clarify that Regals, Chabad Properties and other persons referred to in the interim orders must not convert any convertible notes or exercise any options that they hold and that any existing noteholder must not rely on any right they may have to require redemption of any notes as a consequence of the application to the Panel, the declaration, the interim orders or any final orders made (Annexure B).

The sitting Panel was James Dickson (President), Shirley In't Veld and Karen Phin.

The Panel will publish its reasons for the decision in due course on its website www.takeovers.gov.au.

Allan Bulman
Director, Takeovers Panel
Level 10, 63 Exhibition Street
Melbourne VIC 3000
Ph: +61 3 9655 3597
allan.bulman@takeovers.gov.au



Australian Government

Takeovers Panel

ANNEXURE A

CORPORATIONS ACT

SECTION 657A

DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

MERLIN DIAMONDS LIMITED

CIRCUMSTANCES

1. On 23 June 2016, Merlin Diamonds Limited (**Merlin**) entered into a secured note deed with Regals Fund LP (**Regals**) for the issue of 1,307,537 notes and 87,169,569 options over Merlin shares. Regals is managed exclusively by Mr David Slager. As at 23 June 2016, Regals had a relevant interest in 25,162,755 Merlin shares.
2. On 28 June 2016, Merlin entered into a secured note deed with Chabad Properties Pty Ltd as trustee of the Machon Chaim College Fund (**Chabad Properties**) for the issue of 1,100,000 notes and 73,333,700 options over Merlin shares. The directors of Chabad Properties are Mr Mordechai Gutnick and Ms Stera Gutnick. Joseph Gutnick ceased to be a director on 7 July 2016. As at 28 June 2016, Mr Joseph Gutnick, Ms Stera Gutnick and Mr Mordechai Gutnick each held one third of the shares in Chabad Properties.
3. On 30 June 2016, Merlin entered into a further secured note deed with Chabad Properties for the issue of 900,000 notes and 60,000,300 options over Merlin shares.
4. On or around 4 July 2016, Mr Slager agreed by email to lend Mr Mordechai Gutnick \$300,000 (USD) interest free to buy shares in Merlin.
5. On or around 8 July 2016, Mr Joseph Gutnick became bankrupt. On 7 July 2016, Mr Joseph Gutnick resigned as a director of Merlin and Mr Mordechai Gutnick was appointed as a director of Merlin on the same date.
6. On 12 July 2016, Merlin entered into a secured note deed with NRMZ Pty Ltd as trustee of the NRMZ family trust (**NRMZ**) for the issue of 392,054 notes and 26,137,064 options over Merlin shares. Mr Mordechai Gutnick is the sole shareholder and director of NRMZ.
7. On 2 August 2016, Merlin issued a notice of meeting for a general meeting to be held on 6 September 2016 (**6 September general meeting**) which included the following resolutions:
 - (a) To approve Merlin *“in accordance with ASX Listing Rule 7.1 and for all other purposes, issuing 1,307,537 convertible notes at a price of \$1 per convertible note and 87,157,133 options”* to Regals. Regals was excluded from voting on this resolution.

- (b) To approve Merlin *“in accordance with ASX Listing Rules 7.1 and 10.11 and for all other purposes, issuing 392,054 convertible notes at a price of \$1 per convertible note and 26,137,064 options”* to NRMZ.
 - (c) To approve Merlin *“in accordance with ASX Listing Rules 7.1 and 10.11 and for all other purposes, issuing 2,000,000 convertible notes at a price of \$1 per convertible note and 133,333,333 options”* to Chabad Properties.
 - (d) To approve Merlin *“in accordance with ASX Listing Rule 7.1 and for all other purposes”* placing a further 2,000,000 convertible notes at a price of \$1 per convertible note and 133,333,333 options.
8. The explanatory memorandum for the 6 September general meeting disclosed in relation to the resolutions for the issue of convertible notes and options to Regals, NRMZ and Chabad Properties that the secured note deeds have *“a requirement that the conversion of the convertible notes cannot result in [the noteholder] holding more than 19.9% of the issued shares of the Company at the time of conversion, unless shareholder approval is obtained”*. There was no such requirement in the secured note deeds.
 9. On or about 28 August 2016, Mr Mordechai Gutnick asked Mr Slager to vote Regals' shares in favour of the resolutions to be put to the 6 September general meeting that Regals could vote on, and sent a text message to him stating *“it's a necessity that we get your votes and the convertible note passes without a problem”*. Regals voted in favour of the resolutions (that Regals could vote on) on or about 30 August 2016.
 10. On or about 29 August 2016, Merlin received a requisition under s249D¹ seeking to remove and replace each of the directors of Merlin.
 11. On 31 August 2016, Mr Mordechai Gutnick initiated by text message a telephone conversation with Mr Slager, during which Mr Slager told Mr Mordechai Gutnick that he wanted to convert notes into shares for the purpose of further supporting the resolutions. On 1 September 2016, 750,000 convertible notes held by Regals were converted into 50,000,000 Merlin shares.
 12. Regals subsequently voted its additional 50,000,000 Merlin shares in favour of the resolutions to be put to the 6 September general meeting that Regals could vote on.
 13. The Panel considers that Mr Mordechai Gutnick and Regals have an agreement, arrangement or understanding in relation to the affairs of Merlin and are associated under s12(2)(b). In addition, Mr Mordechai Gutnick and Regals are acting in concert in relation to Merlin's affairs and are associated under s12(2)(c).
 14. The Panel considers that Mr Mordechai Gutnick and Mr Joseph Gutnick have an agreement, arrangement or understanding in relation to the affairs of Merlin and are associated under s12(2)(b). In addition, Mr Mordechai Gutnick and Mr Joseph Gutnick are acting in concert in relation to Merlin's affairs and are associated under s12(2)(c).
 15. Immediately prior to 31 August 2016 and the issue of 50,000,000 Merlin shares to Regals:
 - (a) Regals had a relevant interest in approximately 5.58% of issued Merlin shares.

¹ References are to the *Corporations Act 2001* (Cth)

- (b) Mr Joseph Gutnick had a relevant interest in approximately 14.39% of issued Merlin shares, as a result of his power to control the voting of Merlin shares held by Great Central Gold Limited (**GCG**), Mazil Pty Ltd (**Mazil**) and Trinity Management Group Pty Ltd (**TMG**).
 - (c) Mr Mordechai Gutnick had a relevant interest in approximately 0.7% of issued Merlin shares, as a result of his power to control the voting of Merlin shares held by Atlantic Holdings (Aust) Pty Ltd and Morzev Pty Ltd (**Morzev**).
16. Immediately after the issue of the 50,000,000 Merlin shares to Regals, Mr Mordechai Gutnick had voting power in Merlin of approximately 28.22%.

Contravention of s606

17. As a result of the acquisition of a relevant interest in 50,000,000 Merlin shares by Regals on 1 September 2016, the voting power of Mr Mordechai Gutnick in Merlin increased above 20%. None of the exceptions in s611 applied and accordingly s606 was contravened.

Contraventions of s671B

18. In contravention of s671B:
- (a) No substantial holder notice has been lodged disclosing Mr Mordechai Gutnick's voting power in Merlin and association with Mr Joseph Gutnick and Regals in relation to Merlin.
 - (b) The notice of change of interests of substantial holder lodged by Regals on 6 September 2016 is deficient because, among other things, it does not disclose Regals' association with Mr Mordechai Gutnick.

6 September general meeting

19. The Panel considers that the explanatory memorandum for the 6 September general meeting was misleading as Merlin shareholders were not informed that the holders of the notes and options the subject of the resolutions would have the capacity to convert their convertible notes and exercise their options to increase their voting power in Merlin above 20% in reliance on item 9 of s611.
20. Mr Joseph Gutnick has 50% voting power in Mazil and a 50% interest (held jointly with Ms Stera Gutnick) in GCG. At the 6 September general meeting Mazil and GCG voted in favour of issuing convertible notes and options to Chabad Properties and NRMZ. The decision to vote the Merlin shares held by each of Mazil and GCG was made by Mr Joseph Gutnick.
21. TMG is the trustee of the Merlin Diamonds Employee Share Trust under the Merlin Diamonds Employee Share Trust Deed. It is the registered holder of 18,000,000 Merlin shares. Mr Joseph Gutnick instructed Merlin's company secretary to ask TMG to vote the 18,000,000 shares in favour of all resolutions at the 6 September general meeting, which it did.
22. Mr Mordechai Gutnick is the sole shareholder and sole director of Morzev which holds 76,923 shares in Merlin. Morzev voted in favour of all the resolutions at the 6 September general meeting.
23. At the 6 September general meeting, the resolution to issue convertible notes and options to Regals was defeated. The resolutions to issue convertible notes and

options to Chabad Properties and NRMZ were passed.² Those resolutions would not have passed if:

- (a) the 50,000,000 Merlin shares issued to Regals and all the Merlin shares held by Mazil, GCG and Morzev had not been voted in favour³ or
- (b) all the Merlin shares held by Regals had not been voted in favour⁴ or
- (c) all the Merlin shares held by Mazil, GCG, Morzev and TMG had not been voted in favour.⁵

EFFECT

24. It appears to the Panel that:

- (a) the acquisition of control over voting shares in Merlin has not taken place in an efficient, competitive and informed market
- (b) the holders of shares in Merlin do not know the identity of persons who have acquired a substantial interest in Merlin and
- (c) the holders of shares in Merlin have not been given enough information to enable them to assess the merits of a proposal which would result in persons acquiring a substantial interest in Merlin.

CONCLUSION

25. It appears to the Panel that the circumstances are unacceptable circumstances:

- (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:
 - (i) the control, or potential control, of Merlin or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Merlin
- (b) in the alternative, having regard to the purposes of Chapter 6 set out in section 602
- (c) in the further alternative, because they constituted, constitute, will constitute or are likely to constitute a contravention of a provision of Chapter 6 or of Chapter 6C of the Act.

26. The Panel considers that it is not against the public interest to make a declaration of unacceptable circumstances. It has had regard to the matters in section 657A(3).

² The resolution approving the issue of convertible notes and options to NRMZ became redundant because prior to the meeting NRMZ transferred the relevant underlying notes and the notes were converted into Merlin shares

³ In relation to the resolution approving the issue of convertible notes and options to Chabad Properties, votes cast for would have been 44.05% of total votes, assuming open proxies were cast in favour

⁴ In relation to the resolution approving the issue of convertible notes and options to Chabad Properties, votes cast for would have been 47.74% of total votes, assuming open proxies were cast in favour

⁵ In relation to the resolution approving the issue of convertible notes and options to Chabad Properties, votes cast for would have been 49.30% of total votes, assuming open proxies were cast in favour

DECLARATION

The Panel declares that the circumstances constitute unacceptable circumstances in relation to the affairs of Merlin.

Bruce Dyer
Counsel
with authority of James Dickson
President of the sitting Panel
Dated 29 November 2016



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Takeovers Panel

ANNEXURE B

CORPORATIONS ACT

SECTION 657E

VARIATION OF INTERIM ORDERS

MERLIN DIAMONDS LIMITED

The interim orders made on 7 November 2016 are varied by adding the following after Interim Order 1:

- “2. Each Noteholder must not rely on any right it may have to require redemption of any and all Notes held by it (including under clauses 9(h) and 10.1 of the Secured Noted Deed) as a consequence of the application to the Panel in this matter, the declaration of unacceptable circumstances, these interim orders or any final orders.
3. In these orders the following terms have the corresponding meaning:
- | | |
|-------------------|--|
| deal with | includes the conversion of any convertible securities into shares of Merlin or the exercise of any options into shares of Merlin |
| Noteholder | Chabad Properties Pty Ltd
Dovid L Szmerling and Nechama R Shmerling
L1 Capital Global Opportunities Master Fund
Martin Suman <Suman Family A/C>
Neil Richard Kaner
Regals Fund LP
Scintilla Capital Pty Ltd
Scintilla Strategic Investments Pty Ltd
Slade Technologies Pty Ltd <Embrey Family Superfund> |
| Notes | notes issued under a Secured Note Deed |
| Secured Note Deed | (i) in the case of Chabad Properties Pty Ltd, the Secured Note Deeds between Merlin and Chabad Properties Pty Ltd dated 28 June 2016 and 30 June 2016, respectively
(ii) in the case of Regals Fund LP, the Secured Note Deeds between Merlin and Regals Fund LP dated 23 June 2016 and 19 October 2016, respectively |

(iii) in the case of each other Noteholder, a Secured Note Deed between Merlin and the Noteholder entered into on or after 6 September 2016"

so that the interim orders as varied read:

**CORPORATIONS ACT
SECTION 657E
INTERIM ORDERS**

MERLIN DIAMONDS LIMITED

Mr Thomas Henry Reddicliffe made an application to the Panel dated 31 October 2016 in relation to the affairs of Merlin Diamonds Limited ("**Merlin**").

The Panel orders:

1. Without the consent of the Panel, each of the persons named in the schedule, and each of their respective associates, must not dispose of, transfer, charge or otherwise deal with any securities of Merlin in which they have a relevant interest.
2. Each Noteholder must not rely on any right it may have to require redemption of any and all Notes held by it (including under clauses 9(h) and 10.1 of the Secured Note Deed) as a consequence of the application to the Panel in this matter, the declaration of unacceptable circumstances, these interim orders or any final orders.
3. In these orders the following terms have the corresponding meaning:

deal with	includes the conversion of any convertible securities into shares of Merlin or the exercise of any options into shares of Merlin
Noteholder	Chabad Properties Pty Ltd Dovid L Szmerling and Nechama R Shmerling L1 Capital Global Opportunities Master Fund Martin Suman <Suman Family A/C> Neil Richard Kaner Regals Fund LP Scintilla Capital Pty Ltd Scintilla Strategic Investments Pty Ltd Slade Technologies Pty Ltd <Embrey Family Superfund>
Notes	notes issued under a Secured Note Deed
Secured Note Deed	(i) in the case of Chabad Properties Pty Ltd, the Secured Note Deeds between Merlin and Chabad Properties Pty Ltd dated 28 June 2016 and 30 June 2016, respectively

- (ii) in the case of Regals Fund LP, the Secured Note Deeds between Merlin and Regals Fund LP dated 23 June 2016 and 19 October 2016, respectively
- (iii) in the case of each other Noteholder, a Secured Note Deed between Merlin and the Noteholder entered into on or after 6 September 2016

4. These interim orders have effect until the earliest of:

- (i) further order of the Panel
- (ii) the determination of the proceedings and
- (iii) 2 months from the date of these interim orders.

Schedule

Regals Fund LP, a Delaware limited partnership

Mazil Pty Ltd ACN 166 570 270

Great Central Gold Limited

Trinity Management Group Pty Ltd ACN 089 073 361

Atlantic Holdings (Aust) Pty Ltd ACN 165 242 759

NRMZ Pty Ltd ACN 604 624 580

Chabad Properties Pty Ltd ACN 107 936 229

Mordechai Gutnick, director of Merlin

Joseph Gutnick, former director of Merlin

Allan Bulman

Director

with authority of James Dickson

President of the sitting Panel

Dated 29 November 2016