

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

IN THE MATTER OF BARONDENE PTY LIMITED

BARONDENE PTY LIMITED                      Applicant  
(ACN 097 461 964)

and

BREAKFREE LIMITED    Respondent  
(ACN 100 072 704)

and

AUSTRALIAN SECURITIES AND INVESTMENT  
COMMISSION AS AMICUS CURIAE

BRISBANE

..DATE 08/12/2003

- [1] HER HONOUR: This is an application by the applicant which has made a cash takeover bid dated 25 October 2003 in respect of the shares of the respondent.
- [2] Basically the offer is to buy the shares in the respondent for \$1.51 each in cash on the terms set out in the offer document.
- [3] The application is made under Sections 1322 or 1325D of the Corporations Act 2001. The applicant seeks an order that the variation made by the applicant to the period for acceptance of its bid by which the period was extended to 15 December 2003 is valid, notwithstanding that notice of the variation has not been received by everyone to whom offers were made under the bid pursuant to Section 650D (l) (c) (ii) of the Act.
- [4] The originating application and supporting affidavit of Ms Hutson were filed by leave today. The relief sought in the application was opposed by the respondent. Ms Binstead of ASIC appeared as amicus curiae and indicated that ASIC had no objection to the orders that were sought.
- [5] The applicant decided on 21 November 2003 to extend the period for acceptance of the offers from 1 December 2003 to 15 December 2003.

- [6] The Notice of Extension of Offer period was provided to ASIC, the ASX and the respondent. The notice was also required under Section 650D (l) (c) (ii) to be given to the shareholders.
- [7] Ms Hutson deposes to causing the Notice of Extension and letters to the shareholders dated 25 November 2003, to be sent to the Share Registry Manager of the applicant's share registry picture partners.
- [8] Ms Hutson, who is the chairman of the applicant's board of directors in addition to being a solicitor at the applicant's solicitors caused the last of the documents to be delivered to Pitcher Partners on 25 November 2003. In view of the conversation that Ms Hutson had with the share registry manager prior to despatching the documents to Pitcher Partners, she believed that Pitcher Partners would have despatched those copies of the notice of extension and letter to shareholders to all the shareholders before the expiry of the offer without the extension on 1 December 2003.
- [9] Ms Hutson had no further discussions with any person from Pitcher Partners, however, regarding this matter and it appears that no person from Pitcher Partners had made any enquiries of Ms Hutson.
- [10] On 5 December 2003 Ms Hutson received an email from the solicitors for the respondent that alerted her to the possibility that the notices had not been sent to shareholders. Late on 5 December 2003 Ms Hutson found out from the share registry manager of Pitcher Partners that the registry had not received the handwritten notice from Ms Hutson dated 25 November 2003 advising that the notice of extension could be despatched to the shareholders with the letter to shareholders dated 25 November 2003.
- [11] The notices were sent this morning, 8 December 2003. On 8 December 2003 the applicant lodged a further notice of extension with ASIC, the ASX and the respondent pursuant to section 650D of the Corporations Act to further extend the time limit for acceptance of the offer until 5 p.m. on 24 December 2003.
- [12] Ms Binstead of ASIC indicated that as far as ASIC was concerned, despite the failure of the applicant to notify the shareholders of the extension of the period for acceptances to 15 December there was a live bid from the applicant from ASIC 1 s knowledge of the matter, that the ASX had been notified of the extension and that the major shareholders were aware of the extension. Ms Binstead pointed out that the only people who may have been misled as to whether the bid was still on foot were small shareholders who had not taken advantage of contact with their brokers or by checking the ASX site in relation to Breakfree Ltd or ASIC's internet site from which information could have been obtained about the extension until 15 December.
- [13] It appears from Exhibit 1, which was a document produced by the respondent, that 119,150 shares were traded between 2 December 2003 and 5 December 2003. Further shares are likely to have been traded today, possibly by some shareholders in ignorance that the bid remains on foot, and as the notices to the shareholders about the extension

until 15 December were only despatched today, it may be that some shareholders will sell their shares tomorrow in ignorance that the bid remains on foot.

- [14] The respondent opposed the application for a number of reasons. One of the reasons is that shareholders have sold their shares after the expiry of the bid without receiving any formal notice of extension, so that expiry of the bid may have been taken by them to have been at close of business on 1 December 2003. The bid could have been extended at any time up until its expiry on 1 December.
- [15] Mr O'Shea, of senior counsel for the respondent, therefore relies on the delay being a minimum of 7 days and, in fact, is greater as the intention was to despatch the notice of extension on the 25th of November. Mr O'Shea refers to the observation of Lee J in Diamond Rose NL v. Striker Resources NL (1998) 166 ALR 373 at 378, which suggests that an extension of two to five days may test the limits of an excusable period.
- [16] That was an application, however, under the equivalent to section 1325D. I consider that this application should be dealt with under section 1322 (4) (d) in relation to extending the time for the doing of an act; that is the despatching of the notices. One of the reasons that I consider it preferable that the application proceed under that provision is that during submissions the possibility of protecting the shareholders who have sold their shares since close of business on 1 December 2003 was raised and the suggestion was made that a condition could be fashioned to protect those shareholders who possibly may have sold their shares in ignorance that the bid for \$1.51 remained on foot. I have much more confidence in making an order that is conditional under section 1322(4) paragraph (d) than under section 1325D.
- [17] My attention was drawn to Pinnacle VRB Limited v. Reliable Power Inc (2001) 19 ACLC 1450. An extension under section 1322(4), in relation to the extension of an offer under section 650D, was ordered. The non-compliance in that case was minor and unintentional and a prime consideration for making the order was that the right of the shareholders to choose be maintained. I consider that a relevant consideration in this case. Although the delay by the applicant is much greater than in the Diamond Rose case, in this matter the notice of extension was given, not only to the respondent and ASIC, but also to the ASX, which is some notice to the market.
- [18] The respondent also relied on the fact that the notice under Section 650D that was despatched to the shareholders today in relation to extending the acceptance period to 15 December was deficient in that it did not comply with Section 630 (2) (b) (ii).
- [19] That notice stated in numbered paragraph 3:
- "The offers have not been freed from the conditions specified in clause 7.6 of the offers on the date of this notice."
- [20] The failure that is relied by the respondent is that the provision to which I have referred requires that if the offer period is extended by a period, as soon as practicable after the extension the bidder must give a notice that states "whether the offers have been freed

from the condition" and "whether so far as the bidder knows the condition has been fulfilled on the date the notice under this subsection is given".

- [21] The reference to condition is to a defeating condition included in the off-market bid. There are a number of defeating conditions in this offer. There is some substance, it appears, in the respondent's argument that it is not sufficient for the applicant to have specified simply that the offers have not been freed from the conditions specified in clause 7.6 of the offers.
- [22] The notice has only been despatched today. There is still time for the applicant to give a notice that complies with the second part of Section 630 subsection 2 paragraph (b) (ii).
- [23] In any case, the applicant has to give a notice complying with that provision in relation to the further extension of the offer period to 24 December 2003.
- [24] I do not consider what appears to be a technical lack of compliance with Section 630 (2) (b) (ii) which was not a matter that was apparent to the ASIC is a matter which precludes the exercise of the power to extend the period for giving the notice of extension to the shareholders.
- [25] What must be satisfied in order to exercise the power to extend under Section 1322 (4) (d) are the matters set out in Section 1322 (6). There is no suggestion that it was anything other than inadvertence that caused the notices not to have been despatched to the shareholders. The solicitors for the applicant should have checked the Registry manager got the note giving the instruction to send out the notices to the shareholders. One wonders why the Registry manager had not reverted to the applicant's solicitors in view of what had happened between them as of 24 November 2003.
- [26] In any case, the material does not suggest that there has been anything other than honest conduct on behalf of the applicant and the failure for the notices to be despatched is a matter that has occurred as a result of oversight and lack of following up of instructions.
- [27] What I was concerned with in submissions was whether any substantial injustice has been or is likely to be caused to any person. It could only be the shareholders who have sold their shares after 1 December, possibly in ignorance that the bid remains on foot and who have sold their shares for less than \$1.51 who could have been prejudiced by the failure of the applicant to comply with Section 650D in despatching the notice to shareholders on or soon after 25 November 2003 and certainly by 1 December 2003.
- [28] That possible prejudice can be addressed by the undertaking to compensate those shareholders which the applicant has indicated that it is prepared to give through its solicitors. I am, therefore, satisfied that this is an appropriate case to make the order of the order that is sought by the applicant under section 1322 (4) (d) of the Corporations Act.
- [29] The orders that I make are: upon the undertaking given by the solicitors for the applicant that if the offer made on 25 October 2003 becomes unconditional that the

applicant will pay within 14 days of the offer becoming unconditional to the vendors of shares in the respondent who sold those shares on market on and from 2 December 2003 until close of business on 9 December 2003 at less than a \$1.51 per share the difference in price between that sale price and \$1.51, it is ordered that:

- (1) Pursuant to section 1322 (4) (d) of the Corporations Act 2001 the period for the applicant to give the notice of extension of offer period dated 21 November 2003 be extended until 5 pm on Monday, 8 December 2003;
- (2) The time for service of this originating application be abridged;
- (3) Liberty to apply by either party or ASIC on notice to the others;
- (4) The applicant pay the costs of the respondent of the application to be assessed.