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SHAREHOLDERS JUBILANT OVER JUBILEE MINES DECISION – DIRECTORS DESPONDENT!

A recent decision of the Supreme Court of Western Australia highlights the importance of the continuous disclosure obligations of publicly listed companies under the ASX Listing Rules and the Corporations Act 2001 (Cth) (“Act”). The decision has revealed a strong stance taken against companies that do not immediately disclose price-sensitive information to the market.

Current Law

Rule 3.1 of the ASX Listing Rules provides that once an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.

Section 674(2) of the Act requires listed companies to notify the ASX of information required to be disclosed under Rule 3.1 if that information:

- (a) is not generally available; and
- (b) is information that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of the publicly listed securities of the entity.

Facts of Jubilee Mines

Riley (as Trustee of the KER Trust) v Jubilee Mines NL [2006] WASC 199 involved a claim for damages against Jubilee Mines, a publicly listed company, for failing to comply with its continuous disclosure obligations under the Listing Rules and Corporations Law.

Mr Kim Riley was appointed a director and company secretary of Jubilee Mines at the date of listing, before resigning in 1993. At the time of Riley’s resignation, Riley’s private trust owned approximately 4.5 million shares in the company. Riley sold the majority of these shares between September 1994 and July 1995.

In August and September 1994, two of the directors of Jubilee Mines received two letters from Western Mining Corporation (“WMC”). WMC owned a mining tenement adjoining

one of Jubilee Mines' tenements. In the first letter, WMC advised Jubilee Mines that as a result of a boundary discrepancy, WMC had inadvertently drilled holes on the tenement owned by Jubilee Mines. In the second letter, WMC provided the results of the drill holes which showed a basis for further exploration work for nickel, however, did not actually establish that there was an economic deposit of nickel.

Jubilee Mines did not disclose the information contained in these letters to the ASX until 1996 when the company decided to drill test the deposit.

Riley claimed that these two letters contained information of a market sensitive nature which Jubilee Mines was obliged to release to the ASX. Riley claimed that Jubilee Mines breached the continuous disclosure obligations under the ASX Listing Rules and the Corporations Law. Riley also claimed that the company was negligent in failing to release the information.

Jubilee Mines: Decision & Implications

The court held that Jubilee Mines was required to disclose the information contained in the letters received from WMC under the ASX Listing Rules and the Corporations Law as it was information that a reasonable person would expect to have a material effect on the price or value of the shares, if the information was generally available.

The court granted an award of \$1.8 million to Riley which was based on the difference between the price he sold his shares for and the price the court considered he would have received had he kept them and sold them at a later date.

In relation to determining whether information should be seen as having a material effect on the price of securities, the court held that the law required that the information must influence persons "who commonly invest in securities" in deciding whether to buy or sell. It was not relevant to ask what a member of the general public might make of the information, nor was it relevant to consider information from the point of view of a stockbroker or geologist or mining entrepreneur. The court said that what is to be considered is the perspective of the person who "commonly", as opposed to occasionally or rarely, invests in securities.

Given that this case concerned the shares of a small entrepreneurial mining company, the court held that the notional person to be considered in this case was a person who commonly invests in small speculative investments or to make a small capital gain in the short term.

The court also held that information which might be market sensitive to a junior explorer would have no effect at all on the share price of a major mining house. In this case, the court took into account the fact that Jubilee Mines was in a market where trading volumes of stocks were limited and in which it was not possible to ascribe a value to the stock based upon underlying net assets. The court considered that in such a market, rumour is important and announcements, which for a large corporation would be unlikely to influence the share price, can materially effect the share price of smaller companies. Therefore, the fact that the information received from WMC only provided a basis for further exploration work, was sufficiently material to require disclosure.

The court found that the WMC information would have been likely to have influenced persons who invested in shares such as those of Jubilee Mines and consequently the price of Jubilee's stock. One of the most important factors in coming to this conclusion was that when the information was finally released in June 1996, Jubilee's share price rose from 19.5 cents to 27 cents.

Summary

The case reveals a low threshold for determining that information is of a price sensitive nature and requires disclosure. The decision suggests that if there is a question as to whether information should be released to the market, a company should err on the side of caution and release the information as soon as possible.

In addition to monetary penalties which may be imposed on companies under the Act (up to \$1 million), directors may face personal liability for failing to ensure that their company complies with the continuous disclosure provisions. The Act permits a court to fine a director up to \$200,000 if he or she is involved in a listed disclosing entity's contravention of section 674(2) of the Act. Directors should also be aware that the Jubilee Mines decision may result in increases in premiums for director and officer (D&O) liability insurance.

Jubilee Mines is an important decision which may encourage other current and former shareholders to commence similar proceedings against companies for failing to comply with their continuous disclosure obligations. This is especially so, given the recent High Court decision of *Campbell's Cash & Carry Pty Limited v Fostif Pty Limited* [2006] HCA 42, in which the High Court approved the actions of a litigation funder who promoted and funded a class action against tobacco wholesalers.

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