

2002 BCSECCOM 104

COR#02/012

Reasons

Everest Investors 15, LLC et al and Del Cano Properties Trust

Section 161(1) of the *Securities Act*, RSBC 1996, c. 418

Hearing

Panel	Douglas M. Hyndman Adrienne Salvail-Lopez John K. Graf	Chair Commissioner Commissioner
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Date of Hearing November 16, 2001

Date of Decision November 16, 2001

Date of Reasons February 1, 2002

Appearing

D. Geoffrey Cowper, Q.C.
Tracey M. Cohen

For Everest Investors 15, LLC

Neil de Gelder, Q.C.
Stephen J. Mulhall

For the Special Committee of the Board of
Trustees of Del Cano Properties Trust

Stephen D. Wortley

For Del Cano Properties Trust

James A. (Sasha) Angus
Patricia A.A. Taylor
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For Commission Staff

Reasons for Decision

Introduction

[para 1]

On November 16, 2001, the British Columbia Securities Commission heard an application by Everest Investors 15, LLC for orders under section 161(1) of the *Securities Act*, R.S.B.C. 1996, c. 418 in respect of its take over bid for the priority preferred shares of Del Cano Properties Trust. Everest announced its bid on October 9, 2001. The bid was to expire on November 14, 2001.

2002 BCSECCOM 104

[para 2]

On September 17, 2001, in anticipation of the bid, Del Cano asked a special committee of its trustees to review the bid and search for alternative transactions. On September 26, 2001, Del Cano's trustees adopted a shareholder rights plan. The rights plan provides that the rights will separate and trade apart from the shares on the 10th day after the announcement of a bid that is not a "permitted bid". The Everest bid was not a permitted bid. However, Del Cano's trustees extended the separation date several times during October and November.

[para 3]

On November 16, 2001, Del Cano announced a definitive agreement to sell its assets to Alliance Communities, LLC. The agreement was subject to conditions, including completion of due diligence by November 28, 2001. The agreement was scheduled to close on December 19, 2001. Del Cano also announced a further extension of the separation date under its rights plan to November 23, 2001.

[para 4]

At the hearing later on November 16, 2001, Everest applied for orders under section 161(1) of the Act:

1. cease trading Del Cano's rights plan, and
2. requiring Del Cano to disclose its agreement with Alliance and information about its relationship with Alliance.

[para 5]

Everest and the Del Cano special committee submitted evidence and made submissions. Commission staff also made submissions. The Del Cano special committee said it would issue a trustees' circular within a few days to explain the Alliance agreement and compare it to the Everest bid. Everest said it would extend its bid to November 29, 2001, if we cease traded Del Cano's rights plan.

[para 6]

Later that day, we issued our decision, 2001 BCSECCOM 1082, in which we said at paragraph 8:

If Everest extends its bid to no earlier than November 29, 2001, we will issue an order cease trading the Del Cano shareholder rights plan unless Del Cano issues a news release by noon, Pacific Standard Time, on November 23, 2001, confirming that it has waived the plan for the Everest bid.

We dismiss Everest's application for orders requiring additional disclosure by Del Cano.

2002 BCSECCOM 104

[para 7]

These are our reasons for the decision.

Background

[para 8]

Everest is part of a diversified real estate oriented investment banking group known as Everest Properties. Everest Properties and its affiliates manage a portfolio of 2,450 residential apartment units located in eight US states and 514,000 square feet of self storage facilities located in four US states.

[para 9]

Del Cano is a real estate investment trust that owns and operates 11 apartment building complexes in Arizona and California. Del Cano has 4,237.6 priority voting preferred shares, held by approximately 690 shareholders. Trades in the shares are reported on the Canadian Unlisted Board.

[para 10]

On March 9, 2001, Everest Properties wrote to Del Cano's shareholders indicating that it intended to make an offer for the shares. On August 30, a representative of Everest Properties met with the two independent trustees of Del Cano to discuss Everest Properties' interest in Del Cano. That day, Everest Properties issued a news release stating that it and two of the funds it manages had acquired 14.2% of the shares.

[para 11]

On September 17, in anticipation of Everest's bid, Del Cano asked a special committee, composed of its two independent trustees, to review the bid and search for alternative transactions. One alternative already under consideration was an expression of interest in acquiring all the shares that had been made to Del Cano in early September. Also on September 17, the special committee retained independent counsel.

[para 12]

On September 19, Everest Properties issued a news release stating that a fund it manages had acquired 2.7% of the shares.

2002 BCSECCOM 104

[para 13]

On September 26, Del Cano's trustees adopted a shareholders rights plan. Under the rights plan, one right was issued for each share outstanding and each share issued after that date. Each right entitles the holder to acquire for \$12,000 shares having a value of \$24,000. The rights separate and can be exercised, or trade apart from the shares, 10 days after the announcement of a take over bid that is not a "permitted bid" or immediately after a person acquires 20% or more of the shares other than through a permitted bid. The trustees may extend the separation date. A permitted bid has to meet several requirements, including that the bid remain open for at least 75 days.

[para 14]

On October 1, Everest Properties' representative met again with Del Cano's two independent trustees, now acting as Del Cano's special committee. Everest Properties asked if Del Cano would support an offer of US\$4,800 per share to be made to 51% of the shareholders. The special committee said that it could support only an offer made to all the shareholders.

[para 15]

On October 9, Everest announced its bid for all the shares of Del Cano for US\$5,000 per share. The bid was to expire on November 14.

[para 16]

The Everest bid was not a permitted bid under Del Cano's rights plan. However, Del Cano's trustees extended the separation date under the plan several times during the following two months.

[para 17]

On October 12, the special committee retained CIBC World Markets, Inc. as its financial adviser and to solicit competing offers.

[para 18]

On October 17, Del Cano issued a news release recommending rejection of Everest's offer.

[para 19]

On October 22, Del Cano held a special meeting of shareholders to consider the settlement of litigation unrelated to the bid. The shareholders were not asked to approve the rights plan. However, there was an informal discussion after the meeting about the bid and the process for obtaining, and prospects for, better offers. None of the shareholders present objected to the existence or continued operation of the rights plan.

[para 20]

2002 BCSECCOM 104

On October 23, Del Cano's trustees issued a circular responding to the bid. They recommended the shareholders reject the offer. The circular included an opinion from CIBC World Markets that the price offered by Everest was inadequate.

[para 21]

On November 9, Everest issued a notice increasing its offer price to US\$5,100 per share and extending its offer to November 19.

[para 22]

On November 13, Del Cano's trustees issued their circular responding to Everest's November 9 notice. They disclosed that Del Cano had received three proposals to purchase the trust's assets for US\$106 million, which would produce a cash distribution to shareholders of approximately US\$7,400 per share. They also disclosed that they had entered into an exclusivity agreement with one of the parties and were negotiating a definitive agreement.

[para 23]

On November 16, Del Cano issued a news release announcing a definitive agreement for the sale of their assets. The news release read in part as follows:

The Special Committee of the Board of Trustees is pleased to announce the completion of a definitive agreement for the sale of Del Cano's portfolio to *Alliance Communities, LLC* of Phoenix, Arizona. The Trust owns eleven residential properties in Phoenix, Arizona and Southern California, with a total of 2,270 rental units.

"The sale price of US\$106 million will produce total cash distributions to Shareholders, after expenses, of approximately US\$7,400 per share," explained Special Committee Chairman James Clark. "We believe this sale maximizes shareholder returns and provides a very favourable alternative for Shareholders to a sale of their shares."

The agreement is scheduled to close on December 19, 2001 and cash will be distributed to shareholders after closing. Details of the definitive agreement and tax implications will be presented to Shareholders in a Trustees' Circular to be distributed to Shareholders next week.

The Trust, through its financial advisor CIBC World Markets, had received 63 expressions of interest following an unsolicited take-over bid launched by Everest in mid-October. The inadequate Everest bid was rejected by the Board of Trustees and *Alliance's* proposal was one of three leading proposals considered in detail and ultimately moved along to a definitive agreement.

CIBC World Markets has delivered its opinion that the transaction is fair from a financial point of view to the Shareholders of the Trust.

2002 BCSECCOM 104

Completion of the sale is subject to completion by *Alliance* of customary due diligence on or before November 28, 2001 and lender approval of Alliance's assumption of the mortgages over the Trust's properties.

...

Further to its news releases of October 18, October 23, November 1 and November 9, 2001, the Trust wishes to announce that the Separation Time under the Trust's Shareholder Rights Plan has been extended by the Trustees from November 16, 2001 to November 23, 2001.

[para 24]

Later that morning, at the hearing, the Del Cano special committee confirmed that it would issue a trustees' circular within a few days to explain the Alliance agreement and compare it to the Everest bid.

[para 25]

The special committee also submitted several affidavits. One was from the chair of the special committee indicating, among other things, that he knew of no shareholder other than Everest who objected to the continued operation of the rights plan. Two were from Del Cano shareholders holding a total of 16 shares and indicating their support for the continued operation of the rights plan.

[para 26]

Everest advised that if the Commission cease traded the rights plan, Everest would extend its bid to November 29.

Analysis and Conclusions

[para 27]

At the hearing, Everest applied for orders:

1. under section 161(1)(b) of the Act, cease trading the rights plan, and
2. under section 161(1)(e)(ii) of the Act, requiring Del Cano to disclose its agreement with Alliance and information about its relationship with Alliance.

[para 28]

Cease trade of shareholders rights plan

The issue before us was whether it was in the public interest for us to make orders that would terminate the operation of Del Cano's rights plan against the Everest bid and thus allow the bid to proceed for consideration by the shareholders of Del Cano.

[para 29]

The Commission faced this issue most recently in *Re Royal Host Real Estate Trust and Canadian Hotel Income Properties Real Estate Investment Trust*, a joint hearing before

2002 BCSECCOM 104

the British Columbia, Alberta and Ontario securities commissions. Our Commission issued reasons for the decision in that case at [1999] 47 BCSC Weekly Summary 43. The Alberta and Ontario commissions concurred with our reasons.

[para 30]

In *Royal Host*, we reviewed the past decisions of Canadian securities commissions on applications to terminate the operation of rights plans, or “poison pills”, adopted as defensive tactics in take over bids. We then summarized our approach to the application as follows:

The general principles we applied in making [the decision] are set out in National Policy 62-202 and have been interpreted in the series of decisions reviewed above. In the policy, we emphasize that the primary objective of the regulatory scheme governing take over bids is the protection of the bona fide interests of the shareholders of the target company. We recognize that the board of a target company facing a hostile bid may adopt defensive tactics in a genuine attempt to increase shareholder value. However, we also confirm that we will step in if their tactics appear likely to deny or severely limit the opportunity of the shareholders to respond to the bid.

In applying these principles to the determination of the public interest in a particular case, the challenge we face is finding the appropriate balance between permitting the directors to fulfill their duty to maximize shareholder value in the manner they see fit and protecting the right of the shareholders to decide whether to tender their shares to the bid. We can make this determination only after considering all of the relevant factors in that particular case. While it would be impossible to set out a list of all of the factors that might be relevant in cases of this kind, they frequently include:

- whether shareholder approval of the rights plan was obtained;
- when the plan was adopted;
- whether there is broad shareholder support for the continued operation of the plan;
- the size and complexity of the target company;
- the other defensive tactics, if any, implemented by the target company;
- the number of potential, viable offerors;
- the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
- the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
- the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
- the length of time since the bid was announced and made;
- the likelihood that the bid will not be extended if the rights plan is not terminated.

[para 31]

2002 BCSECCOM 104

In this case, as in *Royal Host*, we considered all of the relevant factors in determining whether it was time for the Del Cano rights plan to go. Those facts were as follows.

[para 32]

First, Del Cano did not obtain shareholder approval of its rights plan.

[para 33]

Second, we did not know whether the shareholders supported the continued operation of the rights plan. We recognized that no shareholders raised objections during the informal discussion following Del Cano's special meeting on October 22. However, we did not know how many shareholders had attended that meeting or whether they were still of the same view at the time of the hearing. We had before us affidavits in support of the continued operation of the rights plan from the holders of only 16 out of 4,237.6 shares.

[para 34]

Third, Del Cano had known for more than eight months of Everest's impending bid. Del Cano had been actively seeking a better bid or transaction since at least September 17.

[para 35]

Fourth, the Everest bid was announced on October 9 and would be extended to November 29, if we cease traded the rights plan. Thus, by the time the bid expired, it would have been open for acceptance for 52 days, far longer than the minimum 35 days required by the *Securities Rules*, BC Reg. 196/97.

[para 36]

Fifth, there was now an alternative on the table – the “definitive agreement” for the sale of Del Cano's assets to Alliance. The Del Cano special committee would issue a trustees' circular within a few days to explain the Alliance agreement and compare it to the Everest bid. Alliance was required to complete its due diligence, and remove that condition to the sale, on or before November 28. Therefore, by November 29, the Del Cano shareholders could make an informed choice on whether to tender their shares to the Everest bid or to retain their shares in anticipation of the sale of Del Cano's assets to Alliance.

[para 37]

After considering all of these factors, we concluded that it would be in the public interest to allow Del Cano's shareholders to make this choice. Therefore, we decided that, if Everest extended its bid for Del Cano's shares to expire no earlier than November 29, we would issue an order ceasing trading Del Cano's rights plan unless Del Cano issued a news release by noon, Pacific Standard Time, on November 23, confirming that it had waived the rights plan for the Everest bid.

[para 38]

Disclosure of Alliance agreement

2002 BCSECCOM 104

The issue before us was whether it was in the public interest for us to order Del Cano to disclose its agreement with Alliance and information about its relationship with Alliance.

[para 39]

The Del Cano special committee acknowledged that Del Cano was required to disclose in its trustees' circular all material facts in relation to these matters, but argued that it was not obliged to disclose the agreement itself.

[para 40]

We agreed with Del Cano's argument. Del Cano would be disclosing this information in its trustees' circular within a few days. If Everest reviewed the trustees' circular and believed that disclosure to be inadequate, it could make an application under section 114(1) of the Act.

[para 41]

Therefore, we denied Everest's application for disclosure.

Postscript

[para 42]

On November 19, Everest issued a notice extending its offer to November 29.

[para 43]

On November 21, Del Cano announced that:

- Alliance would not be proceeding with the agreement to purchase Del Cano's assets;
- the special committee continued to recommend that the shareholders reject the Everest offer because it was too low; and
- Del Cano had two other proposals from prospective buyers at a price of US\$106 million, as well as several expressions of interest.

[para 44]

On November 23, Del Cano announced that it had waived its rights plan for the Everest bid.

[para 45]

On November 30, Everest announced that it had acquired 320 shares under its bid.

[para 46]

On December 20, Del Cano announced an agreement to sell its assets to Aspen Square Management, Inc. for US\$107,550,000. That sale has not yet closed.

February 1, 2002

2002 BCSECCOM 104

[para 47]

For the Commission

Douglas M. Hyndman
Chair

Adrienne Salvail-Lopez
Commissioner

John K. Graf
Commissioner