Ref: 777-aeB / #124574

BEFORE THE TAKEOVERS PANEL

IN THE MATTER OF The Takeovers Act 1993 and
The Takeovers Code

AND

IN THE MATTER OF A meeting held under section 32 of the Takeovers Act 1993 to determine whether the Takeovers Panel ("the Panel") was satisfied that:

(1) Radius Properties Limited ("Radius Properties") and/or the directors of Radius Properties had acted in compliance with rule 64 of the Takeovers Code ("the Code") in relation to not disclosing to Radius Properties' shareholders information about a potential offer by Radius Residential Care Limited ("Radius Care") to purchase the assets of Radius Properties; and

(2) Montagu Investment Holdings Limited ("Montagu") and/or the director of Montagu had acted in compliance with rule 64 of the Code in relation to not disclosing to Radius Properties' shareholders information about a potential offer by Radius Care to purchase the assets of Radius Properties.

MEETING: 1 March 2013

MEMBERS: R A Coupe (Chairman)

C G Blanchard

D M Flacks

S M Horner

COUNSEL ASSISTING: P Radich

STENOGRAPHER: J Kennedy

APPEARANCES: G Kemble and D Raudkivi appearing for Radius Properties

A Wallace and M Busch appearing for Montagu

B Keene QC and N Scott appearing for Radius Care

IN ATTENDANCE: M Shanahan representing R Kent

R Kent (Radius Properties shareholder)

D Glenn, S Maier and S Maier (directors of Radius Properties)

C Priscott (director of Montagu)

B Cree, D Cook and A Hannon (directors of Radius Care)

M Bearsley, A Hudson and L Mehrtens (Panel executive)

DETERMINATION AND STATEMENT OF REASONS

19 April 2013

Background

1. Radius Properties is an investment company focused on the ownership and leasing of real estate assets in the aged care sector in New Zealand. Radius Properties is a Code company as it has 50 or more shareholders and 50 or more share parcels.

2. The directors of Radius Properties are David Glenn, Sandy Maier and Sherry Maier. The Radius Properties business is managed by Ascot Capital Management Limited, a company owned by David Glenn and Craig Priscott.

3. Montagu is a vehicle that was formed for holding shares in Radius Properties. Mr Priscott is the director of Montagu. At the time of the takeover offer (which is described below), Montagu held 19.99% of the voting rights in Radius Properties, which it had acquired in November 2012 at $0.42 per share.

4. Harald McPike holds the majority of the shares in Montagu (approximately 64%) and Hosel Holdings Limited ("Hosel") holds the remaining shares. Hosel's shareholders are Craig Priscott, David Glenn and Maier Family Trustees Limited (Sandy and Sherry Maier are the beneficiaries of this trust).

5. Radius Care is a rest home operator that leases all of Radius Properties' properties. Despite having a commonality of name, Radius Care is an unrelated company to Radius Properties. Mr Brien Cree is the Chief Executive, a director and the majority shareholder of Radius Care.

6. Mr Robert Wayne Kent is a Radius Properties shareholder.

Montagu's partial takeover offer and Radius Care's asset offer

7. In November 2012, Montagu wrote to Radius Properties' shareholders offering to acquire up to 19.99% of the shares in Radius Properties, essentially on a 'first in, first served' basis. Montagu received acceptances in respect of more than 20% of the Radius Properties shares and ultimately took up 19.99%. This acquisition was not a Code regulated transaction.

8. On 19 December 2012, Mr Cree and Mr Glenn met at a restaurant in Auckland to discuss various matters (the "December meeting").

9. On 24 December 2012, Montagu gave notice of its intention to make a partial takeover offer for 50.001% of the voting securities in Radius Properties (being 37.508% of the fully paid ordinary shares in Radius Properties not already held or controlled by Montagu). Radius Properties dispatched to the Radius Properties shareholders a notice of receipt of a takeover offer that same day. The notice stated that "*shareholders may wish to wait until they receive a copy of the target company statement (including the independent adviser's report) before taking any further action in relation to the Intended Offer."*

10. On 5 January 2013, Montagu made its takeover offer to shareholders, with an offer price of $0.42 per share. The offer document contained the following statements:

    (a) *"…* [the Montagu partial takeover offer will] *give all shareholders a second chance";*

    (b) *"…I urge you to accept this Offer as soon as possible"; and*

    (c) *"**Last Opportunity to sell shares for some time?***

    In the letter to shareholders from the Radius [Properties] *board that accompanied the earlier offer, the Board stated that it "has no current intention to seek a liquidity event…".*

Consequently, this may be the last chance investors have to sell their Radius [Properties] shares for some time."

11. On 16 January 2013, Radius Properties received a written offer from Radius Care to purchase all of Radius Properties' assets for $23.76 million (the equivalent of $0.59 per share) (the "Radius Care asset offer"). The board understood that to accept the Radius Care asset offer would likely be a defensive tactic and a breach of rule 38 of the Code, unless the transaction was approved by Radius Properties' shareholders in accordance with rule 39. Further, it understood that the transaction would be a 'major transaction' under the Companies Act 1993 and would require the approval of shareholders by special resolution.

12. Radius Properties notified its shareholders of the Radius Care asset offer in its target company statement which was sent on 18 January 2013. Montagu had received acceptances for 13.16% of all Radius Properties shares by the time Radius Properties shareholders were notified about the Radius Care asset offer.

13. Montagu notified Radius Properties' board that it would vote against the Radius Care asset offer should it be put to shareholders for approval. Montagu's 19.99% shareholding would make it challenging, but not impossible, to pass a special resolution to approve the Radius Care asset offer. Assuming no shareholders, other than Montagu, voted against the sale to Radius Care, approximately 75% of the remaining shares not held by Montagu would be required to be voted in favour of the resolution.

14. On 28 January 2012, Montagu extended the closing date of its takeover offer from 12 February 2013 to 27 February 2013 (and subsequently further extended the closing date to 2 March 2013) and entered into intra-bid lock-up agreements with several Radius Properties' shareholders under which the shareholders agreed to sell their shares in Radius Properties to Montagu if Montagu increased its offer price over an agreed threshold.

15. On 31 January 2013, Radius Care delivered to Radius Properties an unconditional agreement for sale and purchase of all of the real estate properties and interests owned

by Radius Properties. Radius Care also undertook not to withdraw its asset offer before 6 March 2013 to enable Radius Properties to hold a special meeting for shareholders to vote on the asset offer.

16. On 14 February 2013, Montagu increased its takeover offer price to $0.56 per share, triggering the lock-up agreements. In its notice of variation given under rule 28 of the Code, Montagu announced that once all acceptances were submitted, Montagu would have satisfied the minimum acceptance condition for its takeover offer.

17. On 15 February 2013, Mr Kent filed High Court proceedings in respect of the Montagu offer claiming that Radius Properties and its directors and Montagu and its director had breached various provisions of the Companies Act and that accordingly the Court should order that the takeover process cease. All of the parties to the proceedings provided affidavits of evidence to the Court. While the substantive proceedings did not involve the Code, the effect of any injunctive relief given by the Court could have intersected with the takeover process under the Code. For this reason, the Panel decided to appear as a party to the proceedings to bring this jurisdictional issue to the Court's attention. Mr Paul Radich appeared for the Panel.

18. On 18 February 2013, Radius Care increased the price of its asset offer to approximately $24.8 million (equal to approximately $0.62 – $0.63 per share) and Radius Properties dispatched a notice of meeting for shareholders to vote on the Radius Care asset offer. Radius Properties held the shareholder meeting on 5 March 2013. Ultimately, the resolution was not passed.

Complaints

19. The Panel received the following three letters of complaint regarding the actions of Radius Properties, its directors and Montagu and its director:

    (a) Anderson Creagh Lai ("ACL") complaints on behalf of Mr Kent, dated 13 February 2013;

(b) Kensington Swan ("KS") complaints on behalf of Mr Cree, dated 14 February 2013; and

(c) Further complaints from Mr Kent dated 18 February 2013.

20. The complaints were put to Radius Properties and Montagu and each provided the Panel with responses to the complaints, including a statutory declaration from Mr Glenn on behalf of Radius Properties and its directors.

21. The Panel met on 18 February 2013 to consider all of the complaints and requested that the Panel be given additional information to enable it to decide whether to take enforcement action. The Panel requested that Mr Cree of Radius Care clarify his recollection of the December meeting (referred to in paragraph 8, above) in the form of a statutory declaration.

22. After receiving Mr Cree's declaration, the Panel met again on 21 February 2013 and decided that no enforcement action was required in regard to any of the complaints apart from those complaints that related to matters arising from the December meeting.

23. The Panel considered that the threshold for calling a section 32 meeting may have been met in relation to the complaints regarding matters arising from the December meeting. However, the Panel noted that the Montagu partial offer was, in effect, a hostile contested bid. The Panel noted its policy set out in *Code Word 22*, which provides that:

(a) the Panel dislikes being drawn into a takeover contest through tit-for-tat complaints;

(b) protagonists in a contested or hostile takeover must convince the Panel that its resources would be properly used if it acts on their complaint; and

(c) a complainant's formal request that the Panel convene a section 32 meeting to determine whether there has been a breach of the Code is always taken very

seriously by the Panel but complainants should be aware that they may have to pay the Panel's expenses if, as a result of a section 32 meeting, the Panel determines that the Code has not been breached.

24. The Panel decided that it would be prepared to call a section 32 meeting if a formal request for one was made. The complainants were advised of this decision by letter on 21 February 2013.

Statutory provisions for meeting of Panel

25. The relevant provisions of the Takeovers Act for a meeting of the Panel in respect of its enforcement powers are sections 32 and 35.

26. Section 32 provides:

> ***"32 Panel's powers in respect of compliance with takeovers code***
>
> *(1) The Panel may at any time, if it considers that a person may not have acted or may not be acting or may intend not to act in compliance with the takeovers code, after giving that person such written notice of the meeting as the Panel considers appropriate in the circumstances, but in no case exceeding 7 days, hold a meeting for the purpose of determining whether to exercise its powers under this section.*
>
> ….
>
> *(3) Following the meeting specified in subsection (1) of this section, the Panel may make a determination—*
>
> *(a) that it is satisfied that the person has acted or is acting or intends to act in compliance with the takeovers code; or*
>
> *(b) that it is not satisfied that the person has acted or is acting or intends to act in compliance with the takeovers code.*
>
> …"

27. Section 35(3) of the Act provides:

*"35 **Persons who may apply***

....

(3) Where a request is made to the Panel to hold a meeting under section 32(1) of this Act and the Panel does not, within 14 days after receiving the request, make a determination under section 32(3) of this Act, the following persons may make an application to the Court under section 33F, 33I, or 33K—

…

(c) a member or security holder of the code company concerned:

…

(e) a person who, at any time within the period of 6 months before the making of the application, has made an offer or offers to acquire securities in the specified company in accordance with the takeovers code:"

…

(f) with the leave of the Court, any other person.

…"

Mr Kent and Radius Care's requests for a section 32 meeting

28. On Friday, 22 February 2013 the Panel received requests on behalf of Mr Kent and Radius Care (together, "the complainants") from their legal counsel (ACL and KS respectively) that the Panel convene a meeting under section 32 of the Takeovers Act ("section 32 meeting") to determine complaints alleging breaches of rule 64 of the Code by Radius Properties, its directors and Montagu and its director. These complaints related to the information provided to Radius Properties' shareholders between 24 December 2012, the date of Montagu's takeover notice, and 18 January 2013, the date of Radius Properties' target company statement.

29. The complaints relating to Radius Properties were made by both complainants, and focused on the information allegedly imparted by Mr Cree to Mr Glenn at the December meeting. The complainants alleged that Mr Cree had told Mr Glenn of Radius Care's intention to make an asset offer for Radius Properties' properties. The

complainants asserted that if Mr Glenn did have this knowledge, it should have been disclosed to shareholders when Radius Properties received Montagu's notice of its intention to make a partial takeover offer for Radius Properties. The complainants alleged that failure to disclose this information to shareholders was a breach of rule 64 of the Code by omission.

30. Mr Kent further alleged that if Mr Glenn knew of Radius Care's intention to make an asset offer, then he must have imparted this information to Mr Priscott due to their close business relationship. The complainants asserted that, if Mr Priscott – as Montagu's sole director – was aware of Radius Care's intention to make an asset offer for Radius Properties, then statements made by Montagu to shareholders relating to limited liquidity opportunities for Radius Properties (see paragraph 10 above) were likely to be misleading or deceptive under rule 64 of the Code as Montagu (through Mr Priscott) was aware of a full liquidity opportunity by Radius Care.

The Panel agrees to a formal request to hold meeting under section 32

31. The Panel met on 22 February 2013 to consider the complainants' allegations. Under section 32(1) of the Act, the Panel must consider that "*a person may not have acted, or may not be acting or may intend not to act in compliance with the [Code]*" in order to decide to hold a section 32 meeting. The Panel refers to this as the "threshold test" for holding a section 32 meeting.

32. The Panel considered the information and evidence received from the complainants and from Radius Properties and Montagu in relation to the December meeting. As a result, the Panel decided that the threshold test was met and that it would convene a meeting pursuant to section 32(1) of the Act to consider issues arising in respect of the allegations made in the complainants' requests to convene a section 32 meeting.

33. The Panel considered that:

(a) Radius Properties and/or the directors of Radius Properties may not have acted or may not be acting or may intend not to act in compliance with rule 64 of the Code in relation to not disclosing to Radius Properties shareholders

information about a potential offer by Radius Care to purchase the assets of Radius Properties; and

(b) Montagu and/or the directors of Montagu may not have acted or may not be acting or may intend not to act in compliance with rule 64 of the Code in relation to not disclosing to Radius Properties shareholders information about a potential offer by Radius Care to purchase the assets of Radius Properties.

34. On 22 February 2013 the Panel gave written notice to Radius Properties, Radius Care, Montagu and Mr Kent that it would hold a section 32 meeting to determine whether the Panel was satisfied that Radius Properties, its directors and Montagu and its director had acted in compliance with the Code. The notice advised that the section 32 meeting would be held on 1 March 2013.

35. At the same time as giving notice of the section 32 meeting, the Panel summonsed Radius Properties, Radius Care, Montagu, Mr Glenn and Mr Cree to attend the section 32 meeting. The Panel also summonsed documents held by Radius Properties, Mr Glenn, Radius Care, Mr Cree and Montagu relating to the Montagu partial takeover offer, the Radius Care asset offer and the December meeting. The Panel received all summonsed documents in advance of the meeting.

36. The Panel retained Mr Paul Radich as Counsel assisting the Panel in relation to the section 32 meeting.

37. On 26 February 2013 the Panel received written submissions in response to the complaints from Russell McVeagh on behalf of Radius Properties and from Lowndes Jordan on behalf of Montagu. The Panel received submissions from KS on behalf of Radius Care on 27 February 2013.

38. Russell McVeagh made submissions on behalf of Radius Properties and its directors, including the following points:

(a) Radius Properties, and the directors of Radius Properties, had no knowledge of a potential offer by Radius Care prior to receipt of the indicative offer on 16 January 2013;

(b) Mr Glenn's views on the discussions with Mr Cree at the December meeting, and on the meaning and significance of them, and his resulting (implicit) conclusion that no disclosure was required to Radius Properties' shareholders of those discussions, were honestly held, reasonably formed, and not demonstrably wrong.[1] Mr Glenn's recollections of the meeting were supported by notes he made immediately following that meeting;

(c) Mr Glenn's views on this matter should be respected, consistently with the determination ("Horizon Determination") of the Panel dated 10 May 2010 concerning Horizon Energy Distribution Limited;

(d) In the Horizon Determination, the Panel considered that an omission of information would be in breach of rule 64 if disclosure would be reasonably expected by the intended recipients of the disclosure (in this case, Radius Properties shareholders) and if the information would be material to those intended recipients (in this case, because it would be material to a consideration of the Montagu offer);

(e) The statements said to have been made by Mr Cree are vague and imprecise and they did not constitute "material information" for Radius Properties shareholders in evaluating the Montagu offer; and

(f) It is not reasonable that a Radius Properties shareholder would expect disclosure of these statements to be made. It would have been quite extraordinary if Radius Properties had released a disclosure to Radius Properties' shareholders setting out the purported disclosure of Radius Care's asset offer intentions and the circumstances in which they had been made (at a

[1] In the Panel's view, this aspect of the submission does not address the correct principles for considering omissions to disclose information under rule 64. The submission applies the legal test for misleading conduct through a statement of opinion, rather than to the legal test for an omission to disclose when a person who holds material information fails to disclose it. The test for "knowledge" comes from other areas of the common law.

Christmas lunch, with no formal or written follow up, even by email at any time before the 16 January 2013 asset offer being made), and any such disclosure would have had to have been so caveated (particularly given the requirements of rule 38) as to render it meaningless.

39. The submissions by KS on behalf of Radius Care alleged, amongst other things, inaction by the Radius Properties directors in relation to notifying shareholders of the potential Radius Care asset offer after receiving Montagu's takeover notice. KS's submissions canvassed the preparations behind the Radius Care asset offer leading up to the December meeting and compared the Radius Care asset offer to the Montagu takeover offer. KS submitted that the Radius Properties directors knew or ought reasonably to have known that:

(a) The best way to maximise value for shareholders was for Radius Properties to court Radius Care;

(b) Radius Care had twice declined to surrender its first rights of refusal on the Radius Properties properties that it leased, demonstrating that it valued that 'interest' in the properties;

(c) Radius Care had well informed views of the market value of the properties; and

(d) Radius Care had a real interest in securing the properties and was seriously considering a bid.

40. KS further submitted that Mr Glenn left the December meeting aware that Radius Care was seriously considering making an offer and that such an offer would allow shareholders an alternative to the Montagu takeover offer. The failure to disclose that information, it was said, was misleading and deceptive in terms of rule 64 of the Code.

41. Lowndes Jordan on behalf of Montagu and its director, Craig Priscott, submitted that when Montagu made its takeover offer, neither Montagu nor Mr Priscott had any

knowledge of any possible offer for the Radius Properties assets from Radius Care. Lowndes Jordan disclosed that, subsequent to the December meeting, Mr Glenn briefly discussed the meeting with Mr Priscott but Mr Glenn did not disclose any information to the effect that Radius Care might be considering making an offer for the purchase of Radius Properties' assets.

The Panel's determination of issues at the section 32 meeting

42. The section 32 meeting was held in Auckland on Friday 1 March 2013. All persons giving evidence at the meeting did so under oath. The witnesses were excluded from the meeting room until they had given evidence. A transcript of the proceedings was taken and was subsequently distributed to the parties to the hearing.

43. The witnesses, their respective counsel, Mr Radich and all other attendees left the meeting at 2.05 p.m. The Panel requested that Ms Bearsley, Mr Hudson and Miss Mehrtens of the Panel executive remain to assist with administrative matters.

44. The Panel deliberated at the end of the section 32 meeting and gave its determination before 5.00 p.m. on 1 March 2013 of the two matters considered during the meeting. The Panel's determination and its reasons are set out below.

Rule 64 and relevant jurisprudence

45. The issues considered by the Panel at the section 32 meeting concerned the prohibition in rule 64 of the Code against misleading or deceptive conduct in relation to transactions regulated by the Code.

46. Rule 64 of the Code provides:

> ***"64 Misleading or deceptive conduct***
>
> *(1) A person must not engage in conduct that is—*
>
> *(a) Conduct in relation to any transaction or event that is regulated by this code; and*
>
> *(b) Misleading or deceptive or likely to mislead or deceive.*

(2) A person must not engage in conduct that is—

(a) Incidental or preliminary to a transaction or event that is or is likely to be regulated by this code; and

(b) Misleading or deceptive or likely to mislead or deceive."

47. "*Engaging in conduct*" is defined by rule 2(2) of the Code:

*"**engaging in conduct** means doing or refusing to do an act, and includes,-*

(a) Omitting to do an act; or

(b) Making it known that an act will or will not be done."

48. Rule 64 is similar in wording to the civil prohibition against misleading or deceptive conduct in trade in section 9 of the Fair Trading Act 1986. The jurisprudence surrounding section 9 of the Fair Trading Act is relevant to rule 64 of the Code.

49. When considering conduct in relation to rule 64, the Panel must first determine whether the particular conduct falls within the scope of rule 64. If the conduct does fall within the scope of rule 64 the Panel must then decide whether it is satisfied or whether it is not satisfied that the conduct complied with rule 64. These steps are described in more detail below.

50. When deciding whether conduct falls within the scope of rule 64 the Panel addresses two questions:

(a) Does the allegation relate to "*engaging in conduct*" (noting that an omission to do something can constitute "*engaging in conduct*")?; and

(b) Is the alleged conduct:

(i) Related to a transaction or event that is regulated by the Code; or

(ii) Incidental or preliminary to a transaction or event that is, or is likely to be, regulated by the Code?

51. If both questions are answered in the affirmative, the alleged conduct falls within the scope of the rule. The Panel then must consider whether it is satisfied that the conduct complied with rule 64.

52. This involves an inquiry into whether the alleged conduct "*was misleading or deceptive or likely to mislead or deceive*". The question must be examined objectively, and in the particular circumstances of the matter, which will depend on the context, including the characteristics of the person or persons said to be affected.[2]

53. This involves consideration of the following:

(a) The definition of the target audience(s) of the conduct at issue:

(i) There may be more than one distinct audience for the impugned conduct;

(ii) For the conduct to be misleading, the nature of the members of the target audience is relevant. Conduct towards a sophisticated business person may be less likely to be objectively regarded as being capable of misleading or deceiving than similar conduct directed towards, for example, a consumer.[3]

(b) The circumstances in which the conduct occurred and the person or persons likely to be affected by it.[4] Would a reasonable person in the claimant's, or in the target audience members', situation be likely to have been misled or deceived? This involves taking the hypothetical reasonable member of each target audience and asking whether it would be reasonable for that person to be led to an erroneous assumption or misconception as a result of the conduct.

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[2] *Red Eagle Corporation Ltd v Richard Ellis* [2010] NZSC 20, at paragraph [28].
[3] Idem; *Taco Company of Australia Inc v Taco Bell PTY Ltd* (1982) 42 ALR 177, at 202 in relation to the public at large, the matter is to be considered by reference to all who come within the section "including the astute and the gullible, the intelligent and the not so intelligent…".
[4] Idem *Red Eagle*; *Goldsboro v Walker* [1993] 1 NZLR 394 at 401.

(c) It is not necessary to establish that the conduct actually misled or deceived anyone.

(d) If the conduct objectively had the capacity to mislead or deceive the hypothetical reasonable person in one or more of the target audiences, then there will have been a breach of rule 64. If someone was in fact misled or deceived, that may well be enough to show that the requisite capacity existed.[5]

54. An omission to disclose information may be misleading where, in the circumstances, there would have been a reasonable expectation that the material information known to the holder would be disclosed. The reasonable expectation is the expectation of the reasonable target audience member, viewed objectively.

Issues before the Panel

55. The two issues considered by the Panel were whether it was satisfied that:

(a) Radius Properties and/or the directors of Radius Properties had acted in compliance with rule 64 of the Code in relation to not disclosing to Radius Properties' shareholders information about a potential offer by Radius Care to purchase the assets of Radius Properties; and

(b) Montagu and/or the directors of Montagu had acted in compliance with rule 64 of the Code in relation to not disclosing to Radius Properties shareholders information about a potential offer by Radius Care to purchase the assets of Radius Properties.

56. The information allegedly conveyed at the December meeting by Mr Cree to Mr Glenn about Radius Care's potential asset offer for Radius Properties was central to the question of whether the Panel was satisfied that Radius Properties and/or its directors had acted in compliance with the Code.

[5] Idem *Red Eagle*.

57. The relationship between Mr Glenn and Mr Priscott and particularly any disclosure by Mr Glenn, of information known to him, to Mr Priscott of Radius Care's intention to make an asset offer for Radius Properties was central to the question of whether the Panel was satisfied that Montagu and/or its director had acted in compliance with the Code.

58. As both issues turned on Mr Glenn's level of knowledge of a potential asset offer for Radius Properties' properties by Radius Care discussed at the December meeting with Mr Cree, the issues are considered together below.

Facts (relevant to both issues), ascertained from evidence provided to the Panel

59. Messrs Cree and Glenn had each provided the Panel with statutory declarations describing the December meeting and had attached to those declarations copies of the notes taken that each of them had made after the meeting, together with receipts and email correspondence leading up to the meeting. The statutory declarations offered markedly different accounts of the level of knowledge Mr Glenn had (as described in his evidence), or must have had (as described in Mr Cree's evidence) of Radius Care's potential asset offer after the December meeting.

60. In his declaration dated 15 February 2013, Mr Glenn described how in August 2012, Mr Maier had discussed with Mr Glenn a presentation by Mr Cree that he had attended in relation to UCG Investments Limited ("UCG") (a company which owns and operates rest homes). Mr Glenn said that, at the presentation, Mr Maier had inferred that a key point of Mr Cree's presentation was Radius Care's "*fundamental and longstanding business model of 'never owning property'*" and that accordingly, it was Mr Glenn's understanding before the December meeting that Radius Care was not interested in acquiring any properties.

61. Mr Glenn declared that at the meeting, he and Mr Cree discussed:

(a) Montagu's recently completed bid for Radius Properties shares;

(b) Radius Care's failed bid for UCG;

(c) Occupancy issues and general property issues; and

(d) Christmas holiday plans.

62. Mr Glenn declared that he asked Mr Cree if he was interested in "*making a bid*" for Radius Properties and that "*Mr Cree said no, on the basis that Radius Care had spent its money on other things*" (meaning land in Matua and Timaru) and that *"[Mr Cree] could not see the purpose of a bid"*. *Mr Glenn noted that from this, he "understood that [Mr Cree] wanted Radius Care to stick to its core business of operating rest homes*".

63. As to Mr Glenn's understanding of Radius Care's intentions after the December meeting, Mr Glenn declared that it was his *"clear impression following the meeting that Radius Care had no interest in, and was not considering, making an offer for Radius Properties as Radius Care's focus remained on operating, not owning, rest homes."* Mr Glenn further declared that when he next met with Mr Cree on 17 January 2013, Mr Cree said words to the effect that the December meeting had got him thinking that if he was going to bring the property and operational businesses together, he needed to "*do it now"*.

64. Mr Cree's statutory declaration dated 16 February 2013 was made in response to Mr Glenn's declaration and focused on the differences between their respective recollections of the December meeting. Mr Cree declared that Mr Glenn *"could not possibly have left the meeting in any doubt that Radius Care had been contemplating … a bid and was still looking at one"*.

65. In response to Mr Glenn's assertion that Radius Care had a business model of *"never owning property",* Mr Cree declared the importance he placed on ensuring that Radius Care has first rights of refusal in its leases with Radius Properties, and that this indicated that Radius Care might one day buy the properties. Mr Cree further noted that his UCG *"presentation contain[ed] no reference to this supposed business model"*.

66. Mr Cree declared that Mr Glenn had kept questioning him about Radius Care's UCG bid, particularly the property component and this led Mr Cree to form *"the opinion that [Mr Glenn] was thinking of causing Radius Properties to sell its properties – presumably at a profit after he and Mr Priscott (through Montagu) acquired shares in Radius Properties. The thrust of the questioning was such that Mr Glenn was looking to [Mr Cree] for whatever information he could get about the possible value of the Radius Properties properties if they went to market"*.

67. Mr Cree further declared that Mr Glenn's assertion that Radius Care had *"spent its money on other things"* was incorrect as the Matua and Timaru transactions had not constrained Radius Care from making a bid for Radius Properties' properties and that if anything, the Matua acquisition had improved the ability for Radius Care to fund an acquisition of Radius Properties' properties.

68. Importantly, Mr Cree declared that Mr Glenn's claim that Mr Cree had told him that Radius Care was not interested in bidding for Radius Properties was misleading because the comment was made *"strictly in relation to a bid for shares … Mr Glenn cannot have got the same impression in relation to assets"*. Mr Cree further notes that Mr Glenn "*cannot be surprised that [Radius Care's offer] was one made for assets and not shares*". Mr Cree asserted that Mr Glenn was aware that *"from Radius Care's perspective, it made sense to make an offer for the properties because the interest paid on any loan … was far less than the rental paid on those properties"*.

69. Mr Cree also declared that fellow Radius Care director Tony Hannon had contacted ANZ on 4 December 2012 to discuss refinancing Radius Care and the funding of a purchase of the Radius Properties properties. Mr Cree said that he *"told Mr Glenn that any offer for the properties would be conditional upon funding."*

70. At the section 32 meeting on 1 March 2013, the Panel heard evidence from Messrs Cree, Glenn and Priscott. Messrs Cree and Glenn each separately described the December meeting.

71. Mr Radich and Panel members questioned Mr Cree about his version of events, particularly about how serious Radius Care was at the time of the December meeting

about making an asset offer for Radius Properties and to what extent Mr Cree described this to Mr Glenn.

72. Mr Cree stated in his oral evidence in relation to the December meeting:

73. *"from my point of view I saw it as a property transaction and my concern was not around timing but around funding, you know, and … a letter that was subject to funding is not particularly concrete. In fact, some would argue that it's not concrete at all, so, you know, really until I was confident that it could be funded I wasn't going to submit that, that offer, in letter form or any other form."*

74. Mr Cree further stated:

"We were looking at doing something. I didn't sit there and say, hey, I've got a draft indicative offer sitting on my desk subject to finance. I didn't say that because, you know, to be honest I was not a hundred percent sure I would get that funding. So, that's how that part of the conversation came about. And then we began, he started asking me questions around who else might be interested in the properties, which, you know, it was a natural progression to discussing the properties."

75. When questioned by the Panel about the what was discussed when the matter of a potential property purchase was raised, Mr Cree responded that:

"the question put to me [by Mr Glenn] was, you know, would you look at doing, look at buying shares and I said no, but we're working, you know, we're looking at buying the properties but it's subject to funding, and I made that comment to him that Tony had gone to the bank and I didn't know if he would be successful or not, which, you know, was fair comment on the day because we hadn't had any feedback really from the bank."

76. The documents disclosed by Radius Care show that an indicative terms sheet was forwarded to Radius Care by its bankers for consideration on 21 December 2012.

77. In relation to the timing of the funding of the Radius Care asset offer, Mr Cree stated that *"in January [2013] I got the final sign off from credit through ANZ. So, in terms of submitting the offer, that was the point at which I was comfortable that I had the funding."*

78. The Panel asked Mr Cree in relation to the statement in Mr Cree's declaration that Mr Glenn was aware of Radius Care's long-standing interest in purchasing the Radius Properties properties, whether that was something that was discussed or if that was a more general comment than as was stated in Mr Cree's declaration. Mr Cree replied that *"It's a general comment."*

79. The Panel asked Mr Cree what action he had taken on the Radius Care asset offer upon learning of the Montagu takeover offer on 5 January 2013, to which Mr Cree responded that he had been on holiday at that time.

80. Once the Panel had concluded its questions for Mr Cree, Mr Glenn was called to give evidence on what had been discussed with Mr Cree at the December meeting.

81. Mr Glenn began by describing his concern that *"in late November [2012] an intermediary had approached Radius Properties, refused to indicate who they were acting for, used informal means of communication, text and voice mail, and made unfounded and incorrect allegations around potentially an offer for Radius Properties. That didn't go anywhere, we never heard from them again but at the time I thought it might have been Mr Tony Hannon, which would be concerning for Radius Properties Limited"*. This had caused Mr Glenn to ask another Radius Care director, Mr Duncan Cook, about whether he knew of any offers planned for Radius Properties. Mr Glenn explained that Mr Cook did not indicate that he knew of any. Mr Glenn said he was suspicious about these comments as he believed Mr Hannon was behind the informal offer communications described above.

82. Mr Glenn was asked to explain the notes he had made after the December meeting, which were in the following terms:

1. Tony won't get backing.
2. RRCL Board discussed it.
3. Acquired Matua $2m. Acquired land in Timaru $1.2m – looking to build.
4. Occupancy at 90 – 91%.
5. UCG:
    a. covering interest
    b. occupancy based on large rooms
    c. 1000 – 800
    d. 98%
    e. had funder for properties
    f. told ANZ they are still there but ←
6. Isn't making a bid for RPL – "spent money on other things" – for what purpose. Stick to our knitting.
7. Hamilton – nurses cottage conversion to accommodation - $30k.
8. David Renwick lied. Six properties outside of UCG.
9. Peppertree - $3m.
10. Didn't ask for percentage that Montagu had.
    a. Congratulations on our bidding
    b. Secured good mgmt contract
11. talked about our rationale
    a. good cornerstone
    b. can build the coy
    c. CP in charge of M.
12. BC on holiday, boating etc.

83. In relation to Radius Care getting funding for a potential offer, Mr Glenn stated that:

"the first one 'Tony won't get backing', it follows on from the Duncan Cook discussion I just had with you in relation to, I believe that he may have been running around during that - because by that stage we hadn't heard from anyone but I just brought that up with Brien and just sort of in an offhand manner indicated that I didn't believe that Tony Hannon would be able to raise any money or get any backing for a bid, and had a bit of a laugh about that, and Brien agreed."

84. In relation to Mr Cree giving Mr Glenn an indication of an offer from Radius Care, Mr Glenn stated that:

"[Radius Properties] talked over the years with Brien about putting the properties and businesses back together. They are a natural fit, in my view. You can extract value from the land, they flow seamlessly together, eliminate costs et cetera. However, Radius Care had never given any strategic indication they would want to do that, but I thought it's now or never, sort of a little bit on the fact that the reference to Tony Hannon earlier, early in the month, and from my view if he had indicated that he had an interest, I would have had two bidders and he would have been in the starting line five days later rather than on the 16th. Now, that's a big leap as to whether he would have been at the starting line, I certainly would have discussed it with the Board."

85. In response to Mr Cree's assertions that Mr Glenn had said that *"the acquisition of Radius Properties properties by Radius Care was at some stage inevitable"*, Mr Glenn denied making the specific statement and said that he had instead made *"a general comment that I thought that the business and the properties are a natural fit"*.

86. The Panel asked Mr Glenn about when he became aware that, in fact, by the time he had lunch with Mr Cree there had been a lot of work done by Radius Care to put together a written offer. Mr Glenn responded that it was not until he saw the affidavits in relation to the High Court proceedings filed by Mr Kent, which were received approximately a week before the section 32 meeting.

87. In its notice given under rule 42 of the Code to shareholders of receipt of the takeover notice by Montagu, Radius Properties had stated that shareholders *"may not wish to accept"* the Montagu offer until they had read the target company statement and independent adviser's report. The Panel asked Mr Glenn if he gave consideration to being more explicit to the shareholders in saying to them that there would be no benefit to them for accepting the Montagu offer early. Mr Glenn answered that *"the firm direction came later once we knew that there was a competing offer"*.

88. The Panel then asked Mr Glenn to comment on the nature of his relationship with Mr Priscott and the nature of the communications between him and Mr Priscott.

Mr Glenn responded that he and Mr Priscott are business partners and friends and that *"It's business first pretty much."* Mr Glenn stated that the information he gathered from the December meeting was *"downloaded to Sandy Maier as the Board Chair and Mr Priscott as co-manager of Radius Properties Limited. My meeting with Mr Cree, I had the notes in front of me as I downloaded to them, so would have relayed to them exactly what was on my notes."*

89. The Panel asked Mr Glenn how he managed, or what arrangements Radius Properties has in place to manage, the inherent conflicts between Radius Properties, Montagu, Hosel, and all associated parties. Mr Glenn responded that it went back to June 2012 where Mr Priscott indicated to the board that he may be able to get some funding and wanted all the directors of Radius Properties to get involved. Hosel and Montagu were incorporated for these purposes and the directors left Mr Priscott to independently prepare the offer documents.

90. The Panel then asked Mr Priscott to give evidence in relation to the Montagu partial takeover offer, his relationship with Radius Properties and Mr Glenn and whether he had received any information about the potential Radius Care asset offer.

91. Mr Priscott's evidence corroborated Mr Glenn's evidence about events relating to the structure of Montagu and its partial takeover offer, and the Radius Properties directors' involvement being at arms length. Mr Priscott also stated that after the December meeting he had been briefed by Mr Glenn on Radius Care's position and it was his understanding that Radius Care was not going to make a bid. Mr Priscott also stated that he had no knowledge of the impending offer by Radius Care for Radius Properties' assets at the time the Montagu offer was made.

92. The Panel invited Mr Kent to comment. Mr Kent described the difficulties that had been faced by shareholders in Radius Properties due to the illiquidity of the shares.

Oral submissions by Radius Properties, Radius Care and Montagu

93. The Panel was assisted at the section 32 meeting by brief oral submissions made on behalf of the parties by their legal advisers. Each party was then invited to put any questions they had to the witnesses through the Panel and its counsel.

Does rule 64 apply?

94. The two instances of conduct by Radius Properties, its directors and Montagu and its director that are alleged to have breached the Code are these:

(a) Radius Properties and its directors not disclosing the potential Radius Care asset offer to shareholders in the notice given under rule 42 of the Code of receipt of takeover notice; and

(b) if Montagu and/or its director were also aware of the Radius Care asset offer, Montagu making statements to the effect that there would be no other liquidity opportunities for Radius Properties shares.

Panel's consideration

95. The alleged non-disclosure by Radius Properties of the potential Radius Care asset offer is an allegation of an omission to do an act. As mentioned, the test to determine whether such omissions are misleading or deceptive in terms of rule 64 depends on the context, including the characteristics of the person or persons said to be affected.[6] For the conduct to be misleading, the nature of the members of the target audience is relevant. As has been noted, conduct towards a sophisticated business person may be less likely to be objectively regarded as being capable of misleading or deceiving than

[6] *Red Eagle Corporation Ltd v Richard Ellis* [2010] NZSC 20, at paragraph [28].

similar conduct directed towards, for example, a consumer.[7] The target audience in this case is Radius Properties shareholders.

96. An omission to disclose information (i.e., silence) may be misleading where, in the circumstances, there would have been a reasonable expectation that the material information known to the holder would be disclosed.

97. The three key aspects to this test for omission are:

(a) What was the nature of the information that was known to Mr Glenn/Radius Properties?

(b) Was the information that was known by Mr Glenn/Radius Properties material to the Radius Properties shareholders?

(c) Would the Radius Properties shareholders have a reasonable expectation of disclosure of what was known by Mr Glenn/Radius Properties?

Issues (b) and (c) need to be considered in the context and timing of the Montagu takeover offer.

98. The Panel determined, based on the evidence given by each of Messrs Cree, Glenn and Priscott that:

(a) While the Panel does not know exactly what was said at the December lunch meeting between Mr. Glenn and Mr. Cree, it is satisfied from Mr Cree's oral evidence that, at most, a very general comment was made which fell short of putting Mr Glenn on notice of a potential offer. It is satisfied from Mr Glenn's evidence that had he in fact known that there were two potential bidders (Montagu and Radius Care) he would have discussed that with the Radius Properties board, and that it was not until he saw the affidavits filed in the

[7] Idem; *Taco Company of Australia Inc v Taco Bell PTY Ltd* (1982) 42 ALR 177, at 202 in relation to the public at large, the matter is to be considered by reference to all who come within the section "including the astute and the gullible, the intelligent and the not so intelligent…".

related High Court proceeding that he was aware that Radius Care had, by mid-December, undertaken work to prepare a written offer;

(b) The nature of the information conveyed by Mr Cree to Mr Glenn at the December meeting relating to any potential Radius Care offer was too inconclusive to be considered material information for Radius Properties' shareholders and that, accordingly, there was not a reasonable expectation that the information imparted at the December meeting should be disclosed;

(c) Although it became clear on 16 January 2013 that Radius Properties in fact was preparing the asset offer at the time of the December meeting, that information was not known to Mr Glenn or Radius Properties and therefore there was no omission in disclosure;

(d) As the Panel determined that there was not sufficient information imparted to Mr Glenn that Radius Care would make an asset offer for Radius Properties, it follows that regardless of Mr Glenn and Mr Priscott's relationship, there is no evidence that Montagu and its director had information about the Radius Care asset offer that would affect its disclosure obligations to Radius Properties' shareholders; and

(e) Because what was known by Messrs Glenn and Priscott prior to 16 January 2013 about Radius Care's intention to make an offer to purchase the assets of Radius Properties fell short of being information that ought to have been disclosed, neither they nor Radius Properties and its directors, nor Montagu and its director engaged in conduct in relation to Montagu's partial takeover offer for Radius Properties that was misleading or deceptive or likely to mislead or deceive.

Panel determination

99. The Panel determines as follows:

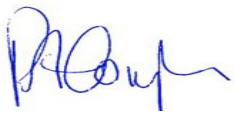
The Panel determines under section 32(3)(a) of the Act that it is satisfied that Radius Properties and its directors and Montagu and its director acted in compliance with rule 64 of the Code.

Costs

100. Under the Takeovers (Fees) Regulations 2001 the Panel may require payment to it of fees for work carried out by Panel members and staff and the costs of obtaining expert advice and assistance in relation to the section 32 meeting. The Panel has given guidance as to how it will apply those regulations in its Administrative Guidelines (3 November 2003). The Panel reserves its decision on the matter of fees and costs and will advise the parties in due course.

DATED at Auckland this 19th day of April 2013

SIGNED for and on behalf of the Panel
by the Chairperson



Richard Andrew Coupe