Australian Government

Takeovers Panel

Reasons for Decision
Virtus Health Limited
[2022] ATP 5

Catchwords:

Declaration – orders – lock-up devices – process and exclusivity deed – exclusive due diligence – no-talk – 'fiduciary out' - non-binding indicative proposal – superior proposal – break fee – efficient, competitive and informed market – disclosure

Corporations Act 2001 (Cth), sections 602, 657A

Guidance Note 7 – Lock-up devices, Guidance Note 19 – Insider Participation in Control Transactions

AusNet Services Limited 01 [2021] ATP 9, Pacific Energy Limited [2019] ATP 20, GBST Holdings Limited [2019] ATP 15, Ross Human Directions Ltd [2010] ATP 8, Goodman Fielder Limited 02 [2003] ATP 5

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	**YES**	**YES**	**YES**	**YES**	**NO**

INTRODUCTION

1. The Panel, Teresa Dyson, Richard Hunt (sitting President) and James Stewart, made a declaration of unacceptable circumstances in relation to the affairs of Virtus. The application concerned the exclusivity arrangements Virtus entered into with a potential bidder who had submitted a non-binding, indicative proposal to acquire all the issued shares in Virtus by way of a scheme of arrangement (or proceed with an alternative transaction structure which requires acceptance by Virtus shareholders with 50.1% of its shares). The Panel declared the circumstances unacceptable having considered that the exclusivity arrangements, taken as a whole, and having regard to the factual matrix of this matter, inhibited or were likely to inhibit the acquisition of control over voting shares in Virtus taking place in an efficient, competitive and informed market. The Panel made orders including (a) prohibiting Virtus and the potential bidder from entering into (in effect) a scheme implementation agreement for a limited period and (b) that certain of the exclusivity arrangements be of no force and effect unless they were amended to ensure it was clear that the 'fiduciary out' was effective to create an exception in certain circumstances.

2. In these reasons, the following definitions apply.

Alternative Transaction	has the meaning given in paragraph 7
BGH	BGH Capital Pty Ltd in its capacity as manager or adviser to each of the constituent entities of the BGH Capital Fund I
BGH Proposal	has the meaning given in paragraph 4
Binding Proposal Break Fee	has the meaning given in paragraph 13

CapVest	CapVest Partners LLP
CapVest Proposal	has the meaning given in paragraph 7
Competing Proposal	is defined in the Process Deed and includes any transaction under which a person other than CapVest acquires control over Virtus
Competing Proposal Break Fee	has the meaning given in paragraph 14
Data Room Open Date	has the meaning given in paragraph 8
Diligence Period	has the meaning given in paragraph 13
End Date	has the meaning given in paragraph 14
Exclusivity Arrangements	the exclusivity arrangements set out in the Process Deed, as summarised in paragraphs 8 to 15
Exclusivity Period	has the meaning given in paragraph 8
Fiduciary Out	has the meaning given in paragraph 12
Non-Public Information Provision	has the meaning given in paragraph 15
Process Deed	the Process Deed between CapVest and Virtus announced by Virtus on 20 January 2022
Scheme	has the meaning given in paragraph 7
Virtus	Virtus Health Limited

FACTS

3. Virtus is an ASX listed company (ASX code: VRT). Virtus is a healthcare services company which provides assisted reproductive technology.

4. On 14 December 2021, Virtus announced that:

   (a) it had received an unsolicited, non-binding indication of interest from BGH to acquire all the issued shares in Virtus by way of scheme of arrangement at $7.10 cash per share (**BGH Proposal**) and

   (b) BGH had acquired a 9.99% interest in Virtus, held by Oceania Equity Investments Pty Ltd, a related entity of BGH, and had entered into a total return swap with UBS that was yet to settle, representing a further 10% interest in Virtus.

5. On 17 December 2021, representatives of BGH met with a representative of Virtus in order to present further detail in relation to the BGH Proposal.

6. On 22 December 2021, a representative of Virtus informed BGH that Virtus would consider the BGH Proposal and reconnect with BGH in mid-January 2022. However,

Virtus did not revert to BGH with any further material communications in relation to the BGH Proposal.

7. On 20 January 2022, Virtus announced that it had:

   (a) received a non-binding, indicative proposal from CapVest (**CapVest Proposal**) to acquire all the issued shares in Virtus by way of a scheme of arrangement at $7.60 cash per share (**Scheme**), or "*an alternative transaction structure which only requires acceptance by 50.1% of Virtus shareholders, such as an off-market takeover bid with a 50.1% minimum acceptance condition, offering $7.50 cash per share*" (**Alternative Transaction**) and

   (b) entered into the Process Deed with CapVest, attached to the announcement.

8. The Process Deed provides for an exclusivity period, which applies from the date of the Process Deed "*to the date that is 40 Business Days after the Data Room Open Date*" (**Exclusivity Period**). The Data Room Open Date is defined in the Process Deed to mean "*the first Business Day after the date on which Virtus gives notice to CapVest in accordance with clause 2.4(a) and such data room is open and made available to CapVest*" (**Data Room Open Date**).

9. The Process Deed contains a number of exclusivity arrangements that apply during the Exclusivity Period, including:

   (a) no shop, no-talk and no due diligence provisions

   (b) a notification obligation

   (c) a matching right and

   (d) an information pass through provision.

10. Under the notification obligation (clause 4.11 of the Process Deed), Virtus must "*promptly, and in any event within 1 Business Day of the approach*" notify CapVest if it receives an approach with respect to a Competing Proposal and must disclose to CapVest:

    "*(i) the fact that the approach has been made;*

    (ii) all material terms and conditions of, and the nature of, the Competing Proposal, including as to value and price;

    (iii) the details of the person making the approach (and if different, details of and the identity of the proposed bidder or acquirer), the material terms of the Competing Proposal and any material updates to the proposal, to allow Virtus to properly exercise its right under clause 4.9 [Matching or superior CapVest proposal]".

11. The matching right is set out in clauses 4.8 and 4.9 of the Process Deed. Under clause 4.8, before Virtus can enter into any legally binding agreement to give effect to any

Competing Proposal, it must have complied with its notification obligation under clause 4.11 and "*Virtus must give CapVest (or any of its Affiliates) until the Cut Off Date to provide a matching or superior proposal to the terms of the Competing Proposal, and the Virtus Board must not publicly recommend, endorse or support a Competing Proposal prior to the Cut Off Date*". The Cut Off Date is defined as being 5 business days after the date of the provision of such information. The Process Deed further provides that each successive modification of any Competing Proposal "*will constitute a new Competing Proposal for the purposes of the requirements under this clause 4.8 and clause 4.11*". The matching right also operates so that, if CapVest provides a counterproposal to Virtus, Virtus must procure that the Virtus board will determine whether, "*acting reasonably and in good faith, the CapVest Counterproposal would provide an equivalent or superior outcome to Virtus shareholders as a whole compared with the Competing Proposal*" and notify CapVest of such determination within 2 business days. If the Virtus board determines that is the case, then "*for a period of 3 Business Days after Virtus delivers to CapVest the notice referred to in clause 4.9(a), Virtus and CapVest must use their best endeavours to agree the transaction documentation required to implement the CapVest Counterproposal as soon as reasonably practicable*" (clause 4.9).

12. A fiduciary carve out (**Fiduciary Out**) applies to the no-talk and no due diligence restrictions from "*the date which is 15 Business Days after the Data Room Open Date*".

13. A break fee of $2 million applies if, before the end of a period defined as from the date of the Process Deed to a date that is 10 business days after the date on which the Exclusivity Period ends (**Diligence Period**), CapVest gives to Virtus (among other things) an executed implementation agreement that has been negotiated in good faith with Virtus and "*Virtus does not, within 4 Business Days of receiving the executed agreement, execute and return the agreement to CapVest*" (absent a Competing Proposal) (**Binding Proposal Break Fee**).

14. A break fee of $4 million applies if (among other things) Virtus has received a Competing Proposal during the Diligence Period and on or before the date that is four months after the last day of the Diligence Period (**End Date**) has entered into "*any legally binding agreement to give effect to a Superior Proposal*" or "*a person (either alone or with other persons) has made, or has publicly announced their proposal to make, a takeover bid under Chapter 6 of the Corporations Act for ordinary shares in*" Virtus and such a takeover bid has been recommended by the Virtus board (**Competing Proposal Break Fee**).

15. Under the Process Deed, Virtus must promptly provide to CapVest any non-public information about the business or affairs of the Virtus group that is provided or made available to any person in connection with an actual, proposed or potential Competing Proposal and which has not previously been provided to CapVest (**Non-Public Information Provision**).

16. The date on which the Data Room Open Date was likely to occur was not disclosed by Virtus in its announcement of 20 January 2022.

APPLICATION

Declaration sought

17. By application dated 2 February 2022, BGH sought a declaration of unacceptable circumstances. BGH submitted that (among other things)[1]:

    (a) Virtus' entry into the Process Deed without "*attempting to meaningfully engage with BGH*" following the BGH Proposal "*or otherwise facilitating an effective auction process*" for Virtus had a "*significant adverse impact on competition for control*" of Virtus

    (b) the Process Deed provides CapVest with "*an effective 10-11 week exclusivity period*", including a period of "*absolute exclusivity*" as the no-talk and no due diligence restrictions do not contain a fiduciary out for Virtus to respond to any competing or superior proposal until the date which is 15 business days after the Data Room Open Date

    (c) the inclusion of the Non-Public Information Provision and matching right provisions in the Process Deed "*stifle the environment in which a competing proposal might otherwise be developed, as it chills any competing bidder's willingness to progress a competing proposal that is more developed and superior to the CapVest Proposal, particularly in circumstances where the proposal from CapVest is only non-binding and indicative*"

    (d) the Competing Proposal Break Fee applies "*during a period of approximately 6 months after the date of the Process Deed*" and is payable "*regardless of whether CapVest ultimately delivers a binding proposal and regardless of the quantum of actual costs incurred by CapVest in pursuing the CapVest Proposal*" and is double the Binding Proposal Break Fee amount of $2 million.

Final orders sought

18. BGH sought final orders that the Process Deed be amended to the effect that:

    (a) the 'absolute exclusivity provisions' be removed, such that the no-talk and no due diligence provisions are subject to a customary fiduciary out throughout their duration

    (b) the Non-Public Information Provision and matching right provisions be removed and

    (c) the Competing Proposal Break Fee be removed, or failing that, amended such that it would operate as a cost recovery provision reflective of the actual and reasonable third party adviser costs incurred by CapVest, up to a cap of $2 million (consistent with the amount of the Binding Proposal Break Fee).

[1] The application did not relate to, and we did not consider, any issues in relation to the proposed Scheme or Alternative Transaction or any other aspect of the CapVest Proposal

DISCUSSION

19. We have considered all the material, but address specifically only that part of the material we consider necessary to explain our reasoning.

Decision to conduct proceedings

20. Virtus and CapVest[2] each made a preliminary submission in response to the application, submitting that we should decline to conduct proceedings.

21. Virtus submitted that we should not conduct proceedings including because:

    (a) the circumstances referred to in the application "*do not hinder, and in fact promote, competition*" that would not have otherwise existed in the context of BGH's pre-bid stake and helped secure an alternative at a "*considerable premium to the BGH Proposal*" from CapVest

    (b) the Virtus board considered the limited period of hard exclusivity would allow plenty of time and opportunity for BGH (or other bidders) to engage with Virtus after this 3-week period had expired

    (c) the Virtus board also considered the impact that the *"break fee provided for under the Process Deed would have on alternative proposals"* and concluded that "*this was a reasonable amount to pay in order to facilitate the CapVest Proposal at a significant premium to the BGH Proposal*" and

    (d) orders which amend the Process Deed or prevent the parties to it from complying with its terms may put at risk CapVest's willingness to continue to spend time and money on pursuing the CapVest Proposal without the protections that the parties negotiated at arms' length.

22. Virtus also submitted that CapVest "*recognised that there was not a level playing field given the BGH stake and, accordingly, insisted upon a range of protections in order to be willing to put forward the CapVest Proposal. Significantly, CapVest made it clear that it would not engage any further nor would it formally table the CapVest Proposal if Virtus advised BGH that it was considering an alternative proposal*".

23. In our view, the application raised concerns that warranted consideration, including the lack of 'fiduciary out' to the no-talk[3] and no due diligence restrictions for some of their duration, the effectiveness of the 'fiduciary out' and, more broadly, the exclusivity arrangements taken as a whole in the context of a non-binding bid. Accordingly, we decided to conduct proceedings.

Undertakings

24. During the course of the proceedings, we accepted undertakings (in lieu of interim orders) from Virtus and CapVest not to enter into any legally binding agreement under which CapVest would acquire Virtus and for CapVest not to announce an

---

[2] CapVest made submissions refuting BGH's allegations in relation to CapVest's bona fides as a bidder and the deliverability of the CapVest Proposal. We considered that here it was reasonable to assume that Virtus would undertake its own due diligence on this question

[3] *AusNet Services Limited 01* [2021] ATP 9 at [68]

intention to make, or make, a takeover bid for Virtus, until the determination of the proceedings.

Effect of the Exclusivity Arrangements

25. ASIC submitted that the application of Guidance Note 7 and a principles-based approach to the Process Deed lead to the conclusion that the Process Deed is "*anti-competitive as a whole, and to such an extent that it gives rise to unacceptable circumstances.*"

26. We consider that the Exclusivity Arrangements, considered as a whole, and having regard to the factual matrix of this matter, inhibit or are likely to inhibit the acquisition of control over voting shares in Virtus taking place in an efficient, competitive and informed market for the reasons discussed below.

Disclosure of Data Room Open Date

27. Virtus and CapVest submitted that the Data Room Open Date occurred on 31 January 2022 and that the Fiduciary Out applied from 21 February 2022.

28. Guidance Note 7 provides that the "*existence and nature of any lock-up device should normally be disclosed no later than when the relevant control proposal is announced*" including all the relevant terms.[4]

29. Virtus submitted that "*[d]isclosure of the date on which the Data Room Open Date occurred is neither relevant to, nor could it be reasonably expected to have a material effect on, the price or value of Virtus' securities*" and that "*[t]o the extent the date may be relevant to an interested bidder, any bidder could on reading the Process Deed (which was disclosed in full to the market at the time it was entered into) clearly understand that the Data Room Open Date was expected to occur on 31 January 2022… In the absence of any statement to the contrary, any reasonable interested party would understand that 31 January 2022 was the Data Room Open Date*".

30. It was not clear to us from a reading of the Process Deed or Virtus' announcements to ASX when the Data Room Open Date occurred and accordingly the date on which the Fiduciary Out came into effect.

Hard exclusivity

31. The Fiduciary Out did not apply during the period from 20 January 2022[5] to 20 February 2022, meaning that CapVest effectively had the benefit of 'hard exclusivity' in relation to the no-talk and no due diligence restrictions during this period of over 4 weeks.[6]

32. Guidance Note 7 states (at [27]) that "*[i]n the absence of an effective 'fiduciary' out, a no-talk restriction is likely to give rise to unacceptable circumstances*" and (at [24]) that

[4] Guidance Note 7 – Lock-up devices at [35]
[5] Being the date the Process Deed was entered into
[6] That said, in relation to the no due diligence restriction, we note that, in practice, CapVest's competitive advantage may have been limited during the initial days while the data room was being populated

"*[s]afeguards (including 'fiduciary' outs) applicable to no-talk restrictions apply similarly to no-due-diligence restrictions*".

33. In *AusNet Services Limited 01*[7], the Panel considered that a no-talk restriction that was not subject to a 'fiduciary out' during the entire exclusivity period, which applied for a minimum of 8 weeks, led (among other things) to unacceptable circumstances. The Panel noted at [42]:

> "*The absence of a 'fiduciary out' for the entire Exclusivity Period was particularly concerning as it had the effect of preventing AusNet from discussing any proposal received (including a proposal that is unsolicited, made publicly and superior to the existing proposal). In our view, the absence of a 'fiduciary out' in these circumstances could unduly inhibit competition for control of [AusNet] and reduce the likelihood a competing proposal emerging.*"

34. We agree with the Panel's views in *AusNet Services Limited 01* and are concerned with the fact that, in this matter, the Fiduciary Out did not apply for a period of time during the Exclusivity Period.

35. ASIC submitted that even where the Process Deed contains a fiduciary out that applies after a period of time has elapsed, the existence of the exclusivity arrangements without a fiduciary out in the intervening period "*could impact on the likelihood of such a proposal eventuating*". We agree.

36. Virtus submitted that it acknowledged "the *lack of fiduciary out for the initial limited period contains anticompetitive elements when considered in isolation*" but:

> "*…as the Panel has acknowledged in GBST Holdings Limited*[8] *and Ross Human Directions Ltd,*[9] *it takes a principles based approach and while deal protection measures "obviously have an anti-competitive element, they can, if subject to certain basic structural requirements, indirectly facilitate competition for control in the sense that, but for those deal protection measures, many bidders will be unwilling to proceed to make a bid". That is very much the case here – the lack of a fiduciary out for a 3 week period following opening of the data room was assessed by the Virtus Board to be a reasonable concession to make, given it did not prevent the opportunity for an auction to take place after the expiry of the period, in order to have CapVest make the CapVest Proposal and undertake the work required to put itself in a position to turn that into a binding offer.*" (footnotes in the original)

37. We agree that we should take a principles-based approach. Guidance Note 7 states that the Panel will consider (among other things) "*the potential benefits to target shareholders of the agreement and the reasons why target directors are satisfied of the commercial and competitive benefits to shareholders of entering the agreement*".[10] We acknowledge that the Panel generally prefers not to second guess a target board's decision to enter into exclusivity arrangements.[11] However, in accordance with

---

[7] [2021] ATP 9
[8] See *GBST Holdings Limited* [2019] ATP 15 at [35]
[9] See *Ross Human Directions Ltd* [2010] ATP 8 at [26]
[10] Guidance Note 7 – Lock-up devices at [18]; *Pacific Energy Limited* [2019] ATP 20 at [34]
[11] See *GBST Holdings Limited* [2019] ATP 15 at [36]

Guidance Note 7, the Panel will engage in circumstances where elements of the arrangements have an unacceptable effect on competition for control[12], such as the absence of a fiduciary out in relation to a no-talk and no due diligence restriction, albeit for a limited period.

Effectiveness of the Fiduciary Out with notification and matching provisions

38. We consider that the effectiveness of the Fiduciary Out is unclear in circumstances where CapVest matches any genuine Competing Proposal with another non-binding proposal.

39. BGH submitted that CapVest can simply increase the value of its existing non-binding proposal without being required to make any meaningful commitment to Virtus or its shareholders and in doing so preclude Virtus from effectively engaging with the competing bidder.

40. Guidance Note 7 (at [27]) refers to the need for an "effective" fiduciary out in the context of a no-talk restriction (and (at [24]) by extension, a no due diligence restriction).

41. Under clause 4.6 of the Process Deed, the Fiduciary Out is enlivened where "*…the Virtus Board has determined, in good faith and acting reasonably that:*

> *(a) after consultation with its financial advisors, such a genuine Competing Proposal is, or could reasonably be considered to become, a Superior Proposal; and*
>
> *(b) after receiving written legal advice from its external legal advisers failing to respond to such a genuine Competing Proposal would, or would be reasonably likely to, constitute a breach of the Virtus Board's fiduciary or statutory obligations.*"

42. "Superior Proposal" is defined as follows (emphasis added):

> "*…a bona fide Competing Proposal (and not resulting from a breach by Virtus (or any of its Affiliates or Representatives) of any of its obligations under this document) which the Virtus Board, acting in good faith in the interests of Virtus and its shareholders, and after taking advice from its legal and financial advisers, determines:*
>
> > *(a) is reasonably capable of being valued and completed taking into account all aspects of the Competing Proposal, including any timing considerations, its conditions, the identity, reputation and financial condition of the person making such proposal, and all relevant legal, regulatory and financial matters; and*
> >
> > *(b) would be more favourable to Virtus shareholders (as a whole)* ***than the latest proposal provided by CapVest to Virtus****, taking into account all aspects of the Competing Proposal and the latest proposal provided by CapVest to Virtus, including the identity, reputation and financial condition of the person making such proposal, legal, regulatory and financial matters, certainty and any other matters affecting the probability of the relevant proposal being completed in accordance with its terms.*"

[12] See *Ross Human Directions Ltd* [2010] ATP 8 at [26] to [28]

43. Under the notification obligation in clause 4.11, Virtus must inform CapVest of any approach with respect to a Competing Proposal "*promptly, and in any event, within 1 Business Day of the approach*".

44. We are concerned that the requirement for a Superior Proposal to be more favourable to Virtus shareholders (as a whole) than the latest proposal provided by CapVest to Virtus would enable CapVest to match, or exceed, any genuine Competing Proposal each time one is made so that such Competing Proposal never becomes a Superior Proposal and therefore does not trigger the Fiduciary Out. The short timeframe provided under the notification obligation and requirement to disclose the identity of the proponent of a Competing Proposal exacerbated the potential for this to occur by removing the Virtus Board's ability to control the timing of the notification and disclosure of the identity of the competing bidder to CapVest in the context of the timing of the Virtus Board's decision as to whether the Fiduciary Out applied. While this is how notification and matching rights operate in implementation agreements, our concern here lies in the fact that any counterproposal by CapVest need not be binding. This potentially makes matching any counterproposal easier and quicker with no binding commitment required. CapVest may ultimately provide no binding commitment or a binding commitment at a lower price than its counterproposal after having been in a position to effectively ensure that any (or a specific) competing bidder is denied access to the Virtus Board and due diligence information that is required to progress a competing proposal.

45. ASIC submitted that, in accordance with Guidance Note 7 at [14], the matching rights and notification obligation may increase the anti-competitive effect of the Process Deed.

46. We agree with ASIC's submission and further consider that the notification obligation may increase the anti-competitive effect of the no-talk restriction and limit the effectiveness of the Fiduciary Out.

Non-Public Information Provision

47. BGH submitted that the scope of the Non-Public Information Provision was "*very broad and would provide CapVest with a significant degree of visibility of the status and scope of the due diligence process being undertaken by BGH or any other bidder for Virtus*".

48. Virtus submitted that (emphasis added) "*[w]hile there is no general requirement in Australia that a target company must provide equal access to information about the target to rival bidders*[13]*,* ***in the absence of exceptional circumstances where it is necessary to protect certain commercially sensitive information from a particular bidder****, it is difficult to imagine circumstances where the Virtus Board would discriminate between bidders in respect of the information it made available for due diligence (particularly at the stage of an approach being a Potentially Superior Proposal). In these circumstances, the Virtus Board would likely seek to ensure equal access to information to facilitate the best outcome for Virtus and its shareholders from an auction process.*" (footnote in the original)

[13] See Guidance Note 19 and *Goodman Fielder Limited 02* [2003] ATP 5 at [84] to [96].

49. We accept that a target has a proprietary interest in its confidential information and its "*directors have a right and obligation to use it for the best advantage of the company*".[14] However here we are concerned that the Non-Public Information Provision may increase the anti-competitive effect of the no-talk restriction and limit the effectiveness of the Fiduciary Out without a carve out for exceptional circumstances.

Length of the Exclusivity Arrangements

50. ASIC submitted that it considers that the current duration of the Exclusivity Arrangements may exacerbate the anti-competitive effect of the agreement.

51. In *AusNet Services Limited 01*[15], the Panel considered that an exclusivity period of a minimum of 8 weeks was at the longer end of market practice.

52. We are concerned that, in this instance, the mechanisms set out in the Process Deed around the articulation of the Exclusivity Period, the Diligence Period and the End Date mean some of the Exclusivity Arrangements are in place for a number of months.

53. We consider that the duration of the Exclusivity Arrangements, which are granted in respect of an indicative proposal with no guarantee that Virtus shareholders would receive a binding bid at the indicative price under the CapVest Proposal or at all, exacerbates the anti-competitive effect of such arrangements.

Break fee

54. We also queried the break fee arrangements, in particular the Competing Proposal Break Fee, under the Process Deed.

55. ASIC submitted that it is difficult to justify a break fee in a process deed that goes beyond reimbursing a bidder's actual or reasonable costs, because the bidder has made no commitment to the target to pursue any proposal or a proposal at any particular price.

56. CapVest submitted that "*As to where a [break fee in a] process deed sits at or under 1% should be a matter for the specific circumstances… Here the fee is a maximum of 0.5% of enterprise value, and is given against a potential $43.6 million uplift in shareholder value. It is very much expense reimbursement in nature.*" In its rebuttal submissions it stated "*CapVest again confirms that its expected costs to signing a definitive agreement will more than exceed the A$4 million work fee based on agreed fee arrangements with third party due diligence advisers and other consultants.*"

57. We asked CapVest to explain the basis for forming the expectation that such costs would exceed $4 million and why, in light of this, it agreed to the Binding Proposal Break Fee in the amount of $2 million. In response CapVest submitted that it "*…requested a $4 million fee in all trigger circumstances. The basis for CapVest's request was costs reimbursement.*" However, CapVest submitted that Virtus rejected this proposal and stated it would only accept a $2 million fee in the event Virtus did not

[14] *Goodman Fielder Limited 02* [2003] ATP 5 at [87]
[15] [2021] ATP 9 at [44]

execute an implementation agreement executed by CapVest "*to protect against CapVest putting forward an out-of-market agreement with no intention of entering a binding deal*."

58. CapVest also submitted that it was prepared to provide a statutory declaration in relation to why its expected costs to the signing of an implementation agreement are in excess of $4 million.

59. On balance, in the circumstances we decided not to take this matter further noting CapVest's submissions that its costs would exceed $4 million, and that both break fees were under the Panel's 1% break fee guidance[16]. In reaching this decision, we discussed whether the Panel's 1% break fee guidance, or a different threshold, was appropriate for a process deed where no binding commitment has been made by the bidder but did not have to make a decision on these lines given the circumstances.

Context in which Exclusivity Arrangements were entered

Non-binding bid stage

60. We note that the exclusivity arrangements were granted in respect of an indicative proposal and there is no guarantee that Virtus shareholders would receive a binding bid at the indicative price under the CapVest Proposal or at all.

61. BGH submitted that:

> "*In a scheme implementation agreement, such restrictions are agreed in consideration for a bidder binding and committing itself to proceed with a control transaction, typically without any conditionality that is within its control. The Panel and market tolerates the anti-competitive effect of lock up devices in these circumstances given the binding transaction secured, but should be cautious in tolerating them prior to a binding transaction where nothing is secured*."

62. BGH further submitted that the terms of the CapVest Proposal remain subject to due diligence, financing and other conditions. BGH stated that if no agreement on a scheme implementation agreement is reached between Virtus and CapVest, Virtus shareholders are left with a non-binding proposal and no transaction, having turned away a potential counterparty.

63. We agree, noting that in *AusNet Services Limited 01*, the Panel considered that:

> "*there is no compelling reason why Guidance Note 7 should not apply in the circumstances of this matter. Indeed, we see force in the argument that the anti-competitive impact of deal protection measures can be more significant in the context of non-binding proposals.*"

Pre-bid stake

64. Virtus submitted that "*[t]he opportunities for an auction for control had been significantly reduced as a result of BGH tabling the BGH Proposal immediately after acquiring a 19.99%*

[16] See Guidance Note 7 – Lock-up devices at [9] to [11]

pre-bid stake" and that "*[w]ithout the Process Deed, the Virtus board genuinely believed CapVest would not make the CapVest Proposal.*"

65. CapVest submitted that "*the Process Deed levels the playing field for CapVest by allowing CapVest to improve its understanding of Virtus and the Australian market in which it operates, noting that [it] did not yet have the same detailed understanding demonstrated by BGH in acquiring its 19.9% interest*". CapVest also submitted that "*[t]he Process Deed creates the potential for Virtus shareholders to receive superior value to that which would have existed if BGH's pre-bid stake had chilled competing proposals.*"

66. BGH submitted that "*[f]or the Panel to sanction anti-competitive conduct by a target board simply because a bidder holds a pre-bid stake would set a dangerous precedent.*"

67. ASIC submitted that if the Panel were to have regard to BGH's pre-bid stake as a factor justifying the deal protection measures contained in the Process Deed, as a device to level the playing field, it would abrogate the right afforded under s606 to acquire up to 19.99% of an entity.

68. We acknowledge that in the context where one of the bidders has a pre-bid stake, the company might consider it is more difficult to create an effective auction process. However, Virtus did not provide feedback to BGH in relation to the BGH Proposal prior to entering into the Process Deed with CapVest, which weakens the argument in this context.

69. In any event, we do not consider a 19.99% pre-bid stake to be a threshold which justifies a competing bidder requiring the insertion of anti-competitive deal protection mechanisms.

70. Guidance Note 7 provides that a no-talk restriction is "*less likely to give rise to unacceptable circumstances if the target has conducted an effective auction process before agreeing to it*".[17] Conducting a formal auction process provides the benefit of obtaining a proposal at a price that has been market tested before entering any restriction agreements. There is no requirement for a potential target to solicit offers or run a formal process in order to effect an auction. But here, with two credible bidders at hand, there was no attempt by Virtus to stimulate competition, say by providing feedback to BGH in relation to the BGH Proposal and creating the opportunity for an improved offer, prior to entering into exclusivity arrangements with CapVest that effectively locked out any competing bidder for a period of over 4 weeks. We consider this a relevant factor in assessing whether the Exclusivity Arrangements give rise to unacceptable circumstances.

DECISION

Declaration

71. It appears to us that the circumstances are unacceptable:

    (a) having regard to the effect that the Panel is satisfied they have had, are having, will have or are likely to have on:

[17] Guidance Note 7 – Lock-up devices at [28]. See also *AusNet Services Limited 01* [2021] ATP 9 at [49]

(i) the control, or potential control, of Virtus or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Virtus

(b) further or in the alternative, having regard to the purposes of Chapter 6 set out in section 602[18].

72. Accordingly, we made the declaration set out in Annexure A and consider that it is not against the public interest to do so. We had regard to the matters in section 657A(3).

Orders

73. Following the declaration, we made the final orders set out in Annexure B. Under s657D, the Panel is empowered to make 'any order'[19] if 4 tests are met:

(a) it has made a declaration under s657A. This was done on 23 February 2022.

(b) it must not make an order if it is satisfied that the order would unfairly prejudice any person. For the reasons below, we are satisfied that our orders do not unfairly prejudice any person.

(c) it gives any person to whom the proposed order would be directed, the parties and ASIC an opportunity to make submissions. This was done on 17 February 2022. Each party and ASIC made submissions and (with the exception of ASIC) rebuttals.

(d) it considers the orders appropriate to either protect the rights and interests of persons affected by the unacceptable circumstances, or any other rights or interests of those persons. We consider that the orders do this for the reasons below.

74. Order 1 prohibits Virtus and CapVest from entering into (in effect) a scheme implementation agreement to acquire Virtus, and prohibits CapVest from making a takeover bid for Virtus, for 10 business days after Virtus has disclosed in a market announcement the changes made to the Exclusivity Arrangements under Order 2. This standstill provides a catch-up period to BGH or another competing bidder to make a Competing Proposal notwithstanding that the period of 'absolute exclusivity' under the Process Deed had ended at the time we made our orders.

75. We originally proposed a standstill period of 20 business days after the date of the orders. Virtus submitted that "*in circumstances where the Panel has received no direct evidence or statement of intention from BGH or any other bidder that it intends to make a Potential Superior Proposal, it is unfairly prejudicial to Virtus shareholders to unnecessarily delay the ability for Virtus and CapVest to enter into an implementation agreement*". Virtus requested (in effect) that any standstill fall away if no genuine Competing Proposal was made within 5 business days after the date of the orders.

---

[18] All references are to the *Corporations Act 2001* (Cth) unless otherwise stated

[19] Including a remedial order but other than an order requiring a person to comply with a provision of Chapters 6, 6A, 6B or 6C

76. We understand BGH's unwillingness to put forward another proposal in light of the Exclusivity Arrangements and during the course of the proceedings and therefore, do not agree that any standstill should be conditional on a Competing Proposal being made within a short period of time. However, given the time that had passed, we considered that a reduced overall standstill period was sufficient.

77. Order 2 provides that certain of the Exclusivity Arrangements be of no force and effect unless certain amendments are made to them to reduce the anti-competitive effect of those provisions.

78. In relation to the effectiveness of the 'fiduciary out', we wanted to ensure that Virtus had the ability to determine whether to exercise its 'fiduciary out' in respect of a Competing Proposal and have the ability to engage with and grant due diligence to a competing bidder that provides a Competing Proposal (that is, or could reasonably be considered to become, a Superior Proposal) notwithstanding that the Competing Proposal may not be more favourable than a matching or superior proposal made by CapVest.

79. Virtus made no specific submissions on Order 2 other than to reiterate that, "*[w]hile Virtus does not object to the Panel proposing to order that certain clauses of the Process Deed be of no force and effect, Virtus requests that the Panel be mindful of the fact that, at present, the best offer that has been presented to Virtus is from CapVest and of any material adverse effect the Panel's extensive order could have on Virtus shareholders to the extent it dampens CapVest's willingness to continue in the potential auction for control that the Virtus board has attempted to create*".

80. Our orders allow Virtus room to negotiate the amendments we are seeking with CapVest. While it may be more advantageous to Virtus not to do so and let certain of the Exclusivity Arrangements be of no further force or effect, Virtus has some discretion to limit the effect of our orders on CapVest's rights under the Process Deed and accordingly, CapVest's willingness to continue to pursue the proposed transaction.

81. BGH submitted that additional orders should be made to amend the Process Deed to the effect that the break fee (other than the Binding Proposal Break Fee) be removed or capped at $2 million and the matching right be removed.

82. We were not satisfied that the additional orders requested by BGH were necessary to address the unacceptable circumstances in connection with the Process Deed.

Richard Hunt
President of the sitting Panel
Decision dated 23 February 2022
Reasons given to parties 8 April 2022
Reasons published 13 April 2022

Advisers

Party	Advisers
BGH	Allens
Virtus	Gilbert + Tobin
CapVest	Ashurst

Australian Government
Takeovers Panel

Annexure A

CORPORATIONS ACT
SECTION 657A
DECLARATION OF UNACCEPTABLE CIRCUMSTANCES

VIRTUS HEALTH LIMITED

CIRCUMSTANCES

1. On 14 December 2021, Virtus Health Limited (**Virtus**) announced that:

   (a) it had received an unsolicited, non-binding indication of interest from BGH Capital Pty Ltd (**BGH**) to acquire all the issued shares in Virtus by way of scheme of arrangement at $7.10 cash per share and

   (b) BGH had acquired a 9.99% interest in Virtus, held by Oceania Equity Investments Pty Ltd, a related entity of BGH, and had entered into a total return swap with UBS that was yet to settle, representing a further 10% interest in Virtus.

2. On 17 December 2021, representatives of BGH met with a representative of Virtus in order to present further detail in relation to BGH's proposal. On 22 December 2021, a representative of Virtus informed BGH that Virtus would consider BGH's proposal and reconnect with BGH in mid-January 2022. However, Virtus did not revert to BGH with any further material communications in relation to BGH's proposal.

3. On 20 January 2022, Virtus announced that it had:

   (a) received a non-binding, indicative proposal from CapVest Partners LLP (**CapVest**) to acquire all the issued shares in Virtus by way of a scheme of arrangement at $7.60 cash per share. Virtus stated "*CapVest has also indicated it is willing to proceed with an alternative transaction structure which only requires acceptance by 50.1% of Virtus shareholders, such as an off-market takeover bid with a 50.1% minimum acceptance condition, offering $7.50 cash per share*" and

   (b) entered into a process deed with CapVest (**Process Deed**), attached to the announcement, various aspects of which are summarised below.

4. The Process Deed provides for an exclusivity period, which applies from the date of the Process Deed "*to the date that is 40 Business Days after the Data Room Open Date*" (**Exclusivity Period**). The Data Room Open Date is defined in the Process Deed to mean "*the first Business Day after the date on which Virtus gives notice to CapVest in*

accordance with clause 2.4(a) and such data room is open and made available to CapVest" (**Data Room Open Date**).

5. The Process Deed contains a number of exclusivity arrangements that apply during the Exclusivity Period, including:

   (a) no shop, no talk and no due diligence provisions

   (b) a notification obligation, with the obligation on Virtus to provide to CapVest (among other things) details of the person making the approach and *"all material terms and conditions of, and the nature of, the Competing Proposal, including as to value and price"* and

   (c) a matching right, which applies to Virtus proposing to enter into an agreement to give effect to a Competing Proposal during the Exclusivity Period.

6. A fiduciary carve out (**Fiduciary Out**) applies to the no talk and no due diligence restrictions from "*the date which is 15 Business Days after the Data Room Open Date*".

7. A break fee of $2 million applies if before the end of a period defined as from the date of the Process Deed to a date that is 10 business days after the date on which the Exclusivity Period ends (**Diligence Period**), CapVest gives to Virtus (among other things) an implementation agreement and "*Virtus does not, within 4 Business Days of receiving the executed agreement, execute and return the agreement to CapVest*".

8. A break fee of $4 million applies if (among other things) Virtus has received a competing proposal during the Diligence Period and on or before the date that is four months after the last day of the Diligence Period (**End Date**) has entered into "*any legally binding agreement to give effect to a Superior Proposal*" or "*a person (either alone or with other persons) has made, or has publicly announced their proposal to make, a takeover bid under Chapter 6 of the Corporations Act for ordinary shares in*" Virtus and such a takeover bid has been recommended by the Virtus board.

9. Under the Process Deed, Virtus must promptly provide to CapVest any non-public information about the business or affairs of the Virtus Group that is provided or made available to any person in connection with an actual, proposed or potential Competing Proposal and which has not previously been provided to CapVest (**Non-Public Information Provision**).

10. The date on which the Data Room Open Date occurred, being 31 January 2022 (and accordingly the date on which the Fiduciary Out came into effect, being 21 February 2022), was unclear as it was not publicly disclosed by Virtus to the market.

11. The Panel considers that the following aspects of the exclusivity arrangements in the Process Deed, taken together, have an anti-competitive effect:

   (a) the Fiduciary Out does not apply during the period from 20 January 2022 (being the date the Process Deed was entered into) to 20 February 2022

(b) the effectiveness of the Fiduciary Out is unclear in circumstances where CapVest matches any genuine Competing Proposal

(c) the notification obligation may increase the anti-competitive effect of the no-talk restriction and limit the effectiveness of the Fiduciary Out

(d) the Non-Public Information Provision was not subject to any exception which would allow for the protection of bidder sensitive information from CapVest in exceptional circumstances

(e) the Exclusivity Period, the Diligence Period and the End Date mean some of the exclusivity arrangements are in place for a number of months and

(f) the exclusivity arrangements are granted in respect of an indicative proposal and there is no guarantee that Virtus shareholders would receive a binding bid at the indicative price under CapVest's proposal or at all.

EFFECT

12. The Panel considers that the exclusivity arrangements, considered as a whole, and having regard to the factual matrix of this matter, inhibit or are likely to inhibit the acquisition of control over voting shares in Virtus taking place in an efficient, competitive and informed market.

CONCLUSION

13. 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 Virtus or

(ii) the acquisition, or proposed acquisition, by a person of a substantial interest in Virtus

(b) further or in the alternative, having regard to the purposes of Chapter 6 set out in section 602 *of the Corporations Act 2001* (Cth) (**Act**).

14. 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) of the Act.

DECLARATION

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

Tania Mattei
General Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 23 February 2022

Australian Government
Takeovers Panel

Annexure B

CORPORATIONS ACT
SECTION 657D
ORDERS

VIRTUS HEALTH LIMITED

The Panel made a declaration of unacceptable circumstances on 23 February 2022.

THE PANEL ORDERS

1. Virtus and CapVest (and its Associates) are prohibited from entering into any legally binding agreement to give effect to a Relevant Transaction, and CapVest is prohibited from announcing an intention to make, or making, a takeover bid for Virtus, on and from the date of these orders until the expiry of 10 Business Days after the date that the ASX announcement is made under Order 3.

2. Each of clauses 4.4 (No talk), 4.5 (No due diligence), 4.6 (Fiduciary carve out to the no talk and no diligence requirements), 4.7 (Non-public information) and 4.11 (Notification obligation) of the Process Deed between CapVest and Virtus announced by Virtus on 20 January 2022 (**Process Deed**) are of no force and effect as of 8:00pm (Melbourne time) on the date that is 2 Business Days after the date of these orders unless:

   (a) the Process Deed is amended in a form acceptable to the Panel and including any necessary consequential amendments (**Amended Process Deed**) to ensure that:

      (i) it is clear that the 'fiduciary out' in clause 4.6 is effective to create an exception to each of clauses 4.4 and 4.5 (in the context of the board of Virtus determining that it is in the best interests of Virtus shareholders for the board of Virtus to facilitate, or continue to facilitate, a Competing Proposal notwithstanding that the relevant Competing Proposal may not be more favourable to Virtus shareholders than any counter proposal made by CapVest), including but not limited to deleting or amending clause 4.11 so that it does not oblige Virtus to notify CapVest of a Competing Proposal until after the board of Virtus has determined whether the 'fiduciary out' in clause 4.6 applies and

      (ii) the requirement for Virtus to provide information to CapVest under clause 4.7 is subject to an exception which allows for the protection of bidder sensitive information from CapVest in exceptional circumstances and

   (b) Virtus provides a copy of the fully executed version of the Amended Process Deed to the Panel.

3. Virtus must, as soon as practicable after the date of these orders, and in any event within 3 Business Days after the date of these orders:

   (a) in the event that an Amended Process Deed is approved and provided to the Panel under Order 2, release an ASX announcement (in a form approved by the Panel) which discloses details of all material terms of the Amended Process Deed and discloses that the Data Room Open Date occurred on 31 January 2022 or

   (b) in the event that clauses 4.4, 4.5, 4.6, 4.7 and 4.11 of the Process Deed become of no force and effect under Order 2, release an ASX announcement (in a form approved by the Panel) which explains that clauses 4.4, 4.5, 4.6, 4.7 and 4.11 of the Process Deed have become of no force and effect and discloses that the Data Room Open Date occurred on 31 January 2022.

4. In these orders, the following definitions apply and capitalised terms used but not defined in these orders have the meaning given to them in the Process Deed:

Amended Process Deed	has the meaning given in Order 2(a)
CapVest	means CapVest Partners LLP
Process Deed	has the meaning given in Order 2
Relevant Transaction	means a transaction under which CapVest or its Affiliates (either alone or with any Associate) would: a) directly or indirectly acquire Voting Power in, or have a right to acquire a legal, beneficial or economic interest in, or control of, more than 20% of the securities in any member of the Virtus Group b) acquire Control of any member of the Virtus Group c) directly or indirectly acquire or become the holder of, or otherwise acquire or have a right to acquire a legal, beneficial or economic interest in, or control of, all or substantially all or a material part of the Business or assets of any member of the Virtus Group or d) otherwise directly or indirectly acquire, be stapled with or merge with Virtus,

	whether by way of a takeover bid, scheme of arrangement, shareholder approved acquisition, capital reduction, buy back, sale, lease or purchase of shares, other securities or assets, assignment of assets or liabilities, joint venture, dual listed company (or other synthetic merger), deed of company arrangements, any debt for equity arrangement or other transaction or arrangement
Virtus	means Virtus Health Limited.

Tania Mattei
General Counsel
with authority of Richard Hunt
President of the sitting Panel
Dated 23 February 2022