



Australian Government

Takeovers Panel

**Reasons for Decision
Virtus Health Limited 02
[2022] ATP 7**

Catchwords:

Decline to commence proceedings – lock-up devices – process and exclusivity deed – exclusive due diligence – no-talk – ‘fiduciary out’ – non-binding indicative proposal – superior proposal

Corporations Act 2001 (Cth), section 602

Guidance Note 7 – Lock-up devices

Virtus Health Limited 01 [2022] ATP 5, GBST Holdings Limited [2019] ATP 15, Babcock & Brown Communities Group Limited 02 [2008] ATP 26, Volante Group Limited 01 [2006] ATP 2, Goodman Fielder Ltd 02 [2003] ATP 5

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

INTRODUCTION

1. The Panel, Teresa Dyson, Richard Hunt (sitting President) and James Stewart, declined to conduct proceedings on an application concerning the exclusivity arrangements entered in relation to a non-binding, indicative proposal to acquire all the issued shares in Virtus by way of a scheme of arrangement in the context of a competing proposal. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

Amended Process Deed has the meaning given in paragraph 9

BGH BGH Capital Pty Ltd in its capacity as manager or adviser to each of the constituent entities of the BGH Capital Fund I

CapVest CapVest Partners LLP

CapVest Proposal has the meaning given in paragraph 5

Fiduciary Out has the meaning given in paragraph 6

Panel Orders has the meaning given in paragraph 8

Process Deed the Process Deed between CapVest and Virtus announced by Virtus on 20 January 2022

Revised BGH Proposal has the meaning given in paragraph 10

Revised CapVest Proposal has the meaning given in paragraph 11

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Standstill has the meaning given in paragraph 8
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 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. The swap was settled on 9 February 2022 giving Oceania Equity Investments Pty Ltd a direct holding representing 19.99% of total Virtus shares.
5. On 20 January 2022, Virtus announced that it had:
 - (a) received a non-binding, indicative proposal from CapVest to acquire all the issued shares in Virtus by way of a scheme of arrangement at \$7.60 cash per share, 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”* (**CapVest Proposal**) and
 - (b) entered into the Process Deed, which was attached to the announcement.
6. The Process Deed contains a number of exclusivity arrangements, including:
 - (a) no shop, no talk and no due diligence provisions, subject to a fiduciary carve out (**Fiduciary Out**) that applied from *“the date which is 15 Business Days after the Data Room Open Date”*
 - (b) a notification obligation 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”*, as defined in the Process Deed.
7. On 2 February 2022, BGH applied to the Panel (*Virtus Health Limited 01¹*) submitting that Virtus' entry into the Process Deed, and the exclusivity arrangements it contained, hindered, or were likely to hinder, the acquisition of control of Virtus taking place in an efficient, competitive and informed market, and may deprive

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Virtus shareholders of the opportunity to participate in the benefits of a competing proposal.

8. On 23 February 2022, the Panel made a declaration of unacceptable circumstances finding that certain aspects of the exclusivity arrangements in the Process Deed had an anti-competitive effect. The Panel made final orders (**Panel Orders**) including that:
 - (a) Virtus and CapVest be prohibited from entering into (in effect) a scheme implementation agreement under which CapVest would acquire Virtus (and prohibiting CapVest from announcing an intention to make, or making, a takeover bid) for Virtus until the expiry of 10 Business Days after the date that the ASX announcement is made disclosing all material terms of the amended Process Deed (**Standstill**) and
 - (b) the Process Deed be amended to ensure (among other things) that it is clear that the Fiduciary Out is effective to create an exception to the no talk and no due diligence clauses *“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”*.
9. On 24 February 2022, Virtus publicly released a copy of the amended Process Deed agreed with CapVest (**Amended Process Deed**).
10. On 28 February 2022, BGH provided a confidential revised proposal to Virtus to acquire 100% of the outstanding share capital in Virtus by way of a scheme of arrangement at \$7.65 per Virtus share (**Revised BGH Proposal**). Virtus announced the Revised BGH Proposal to ASX on the same day and noted that the Virtus Board was yet to evaluate the Revised BGH Proposal.
11. On 1 March 2022, Virtus announced to ASX that it had received a revised proposal from CapVest to acquire control of Virtus via an acquisition of 100% of its share capital by way of a scheme of arrangement at \$7.80 per Virtus share or an acquisition of at least 50.1% of its share capital by way of an alternative transaction structure, such as an off-market takeover bid, at \$7.70 per Virtus share (**Revised CapVest Proposal**). Virtus also stated in its announcement (among other things) that:
 - (a) *“a substantial level of due diligence has now been undertaken by CapVest”* and that CapVest *“expects to be in a position to enter into an implementation agreement by 11 March 2022”* and
 - (b) *“...the Virtus Board has determined that it will not be engaging with [BGH] in respect of [the Revised BGH Proposal], given the Revised CapVest Proposal is superior to the Revised BGH Proposal”*.

APPLICATION

Declaration sought

12. By application dated 3 March 2022, BGH sought a declaration of unacceptable circumstances. BGH submitted (in effect) that, notwithstanding the clear intent of the Panel Orders, the circumstances are continuing to “*unacceptably frustrate a proper auction process or competitive bidding environment and the advancement of any Superior Proposal for Virtus from BGH that could offer additional value and optionality to Virtus shareholders*”. BGH submitted that the lack of a competitive bidding environment was evidenced by:
- (a) Virtus disclosing the Revised BGH Proposal to CapVest (either via ASX announcement or privately)
 - (b) CapVest matching or improving its existing proposal and
 - (c) the Virtus board then dismissing the Revised BGH Proposal in preference to continuing to deal exclusively with CapVest, despite having the legal ability, as a result of the Panel Orders, to engage with both parties in parallel.
13. BGH also submitted that Virtus had indicated that it expects to enter into an implementation agreement with CapVest as soon as the Standstill expires, which could include stricter exclusivity terms and a more onerous break fee obligation and as a result BGH would have been excluded from any engagement and due diligence access throughout the entire period.

Interim order sought

14. BGH sought an interim order to the effect that the Standstill be extended pending determination of its application.

Final orders sought

15. BGH sought final orders to the effect that:
- (a) the no talk and no due diligence restrictions have no further force or effect, and otherwise the Fiduciary Out in the Amended Process Deed was and remains capable of being enlivened following the Revised BGH Proposal, such that in each case, Virtus must grant due diligence access to, and engage with, BGH in good faith in respect of the Revised BGH Proposal and
 - (b) Virtus and CapVest be subject to a standstill until the expiry of 20 business days after the date on which Virtus grants BGH and its representatives access to the entire virtual data room made available to CapVest and its representatives.

DISCUSSION

16. Prior to deciding whether to conduct proceedings, we requested further information from the parties including in relation to Virtus’ ability to:

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- (a) rely on the Fiduciary Out contained in clause 4.6 of the Amended Process Deed and
 - (b) otherwise engage with the BGH Revised Proposal under the Amended Process Deed.
17. Virtus submitted that the decision not to engage with BGH in relation to the Revised BGH Proposal was not made on the basis that Virtus could not rely on clause 4.6 of the Amended Process Deed. Virtus accepted that the Fiduciary Out under the Amended Process Deed permitted Virtus to engage with BGH on the Revised BGH Proposal. The reason instead why Virtus decided not to engage with BGH was because the Virtus board considered that such a decision was in the best interests of Virtus and its shareholders.
18. We note that the Panel on a number of occasions has recognised that it is for the target board to decide to whom and on what terms it provides access to due diligence.² While we make no comment on the merits of the Virtus board's decision not to engage with BGH in relation to the Revised BGH Proposal, we consider it unlikely that we would second guess the decision of the board in the circumstances.³
19. BGH submitted material to suggest that Virtus communicated to BGH on 2 March 2022 that it "*cannot* engage with BGH, as opposed to *will not*". We asked Virtus to explain the communication.
20. Virtus submitted that the communication was not in relation to the Revised BGH Proposal, but was made in response to a subsequent approach from BGH. At the relevant time, Virtus had already announced that its board had determined that it would not be engaging with BGH in respect of the Revised BGH Proposal. Virtus submitted that (in effect) with the board deciding that their duties did not require them to engage with BGH in relation to the BGH Revised Proposal, any subsequent engagement was again subject to the Amended Process Deed including the no shop restriction. We accept this submission.

DECISION

21. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

² Referencing *Volante Group Limited 01* [2006] ATP 2 at [31] and *Goodman Fielder Ltd 02* [2003] ATP 5 at [87] and [90]

³ See *GBST Holdings Limited* [2019] ATP 15 at [36]. See also *Babcock & Brown Communities Group Limited 02* [2008] ATP 26 at [10] and [11]

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22. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Richard Hunt
President of the sitting Panel
Decision dated 9 March 2022
Reasons given to parties 11 May 2022
Reasons published 13 May 2022

Advisers

Party	Advisers
BGH	Allens
Virtus	Gilbert + Tobin
CapVest	Ashurst