



Australian Government

Takeovers Panel

**Reasons for Decision
Vintage Energy Limited
[2024] ATP 5**

Catchwords:

Decline to conduct proceedings – rights issue – board spill – effect on control – need for funds – underwriting – sub-underwriting

Corporations Act 2001 (Cth), sections 203D, 249D, 708AA

Guidance Note 17: Rights issues, Guidance Note 12: Frustrating action, Procedural Rules r17(2)

Accelerate Resources Limited 01 & 02 [2020] ATP 7, Factor Therapeutics Limited [2019] ATP 5, MMA Offshore Limited [2017] ATP 21, Resource Generation Limited [2015] ATP 1, Tempus Resources Limited [2024] ATP 1, Tempus Resources Limited 02R [2024] ATP 2, Virgin Australia Holdings Limited [2013] ATP 15, Bisalloy Steel Group Limited [2008] ATP 29

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

INTRODUCTION

1. The Panel, James Burchnall, Louise Higgins and Marina Kelman (sitting President), declined to conduct proceedings on an application by Keybridge Capital Limited in relation to the affairs of Vintage Energy Limited. The application concerned a placement and non-renounceable entitlement offer announced by Vintage on 25 March 2024, being around the time that the Applicant gave section 203D¹ and section 249D notices to the company, as announced on 27 March 2024. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Applicant	Keybridge Capital Limited
Capital Raise	means the Placement and the Rights Issue
Institutional Capital Raise	has the meaning given in paragraph 9
Institutional Rights Issue	has the meaning given in paragraph 5
Offer Price	has the meaning given in paragraph 5
Placement	has the meaning given in paragraph 5
Regal	Regal Funds Management Pty Ltd

¹ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth), and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

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Requisition Notices	has the meaning given in paragraph 8
Retail Rights Issue	has the meaning given in paragraph 5
Rights Issue	has the meaning given in paragraph 5
Section 249D Meeting	has the meaning given in paragraph 8
Vintage	Vintage Energy Limited

FACTS

3. Vintage is an ASX listed company (ASX code: VEN) in the oil and gas industry.
4. The Applicant is a shareholder in Vintage. As at the time of the application, the Applicant had voting power of approximately 5.2% in Vintage.
5. On 25 March 2024, Vintage announced its intention to undertake an \$8.0 million capital raising comprising a \$1.3 million institutional placement (**Placement**) and a \$6.7 million accelerated non-renounceable entitlement offer to subscribe for 1 new Vintage share for every 1.3 ordinary Vintage shares held (**Rights Issue**) at an issue price of \$0.01 per share (**Offer Price**). The Rights Issue comprised two phases: an accelerated institutional component to raise approximately \$0.87 million (**Institutional Rights Issue**) and a retail component for eligible retail shareholders to raise approximately \$5.83 million (**Retail Rights Issue**). Vintage stated that funds raised from the Capital Raise would be allocated predominately towards the drilling of two appraisal wells; Odin-2 and Odin-3, and, if successful, the completion and connection of one of those wells to increase gas production and sales from the Odin gas field.
6. Also on 25 March 2024, Vintage announced an ‘Appendix 3B - Proposed issue of securities’ in relation to the Capital Raise (**Initial Appendix 3B**). The Initial Appendix 3B stated as follows on page 4 under the heading ‘Describe the limits on over – subscription’:
 - (i) *Eligible Shareholders with up to 1,000,000 Shares as at the Record Date may apply for additional New Shares up to a maximum of 1,000,000 (\$10,000) (excluding their Entitlement); and*
 - (ii) *all other Eligible Shareholders with more than 1,000,000 Shares as at the Record Date may only apply for Additional Shares equal to up to 20% of their Entitlement.*
7. On 25 March 2024, Vintage announced a cleansing notice under section 708AA(2)(f) in relation to the Rights Issue (**Initial Cleansing Notice**) which stated as follows on page 2 under paragraph (f):
 - (f) *given the structure of the Entitlement Offer, the potential effect that the issue of the New Shares will have on the control of the Company is as follows:*

...

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(iii) the Entitlement Offer will include a Top-Up Offer through which Eligible Shareholders who take up their entitlement in full are also able to participate in a further offer of additional New Shares, being the New Shares that have been initially offered to Eligible Shares under the Entitlement Offer and have not been taken up by them;

...

(v) it is not expected that the issue of New Shares under the Offer will have a material effect or consequence on the control of VEN;

...

(vii) it is not currently anticipated that any shareholder of the Company or investor, will increase their relevant interest above 20% as a result of participating in the Capital Raising.

8. On 27 March 2024, Vintage announced that it had received notices under section 203D and section 249D from the Applicant seeking the removal of each of the 3 directors of Vintage and the appointment of two nominees of the Applicant as directors (**Requisition Notices**). The announcement stated that the directors of Vintage are required to call a general meeting to consider the resolutions (**Section 249D Meeting**) within 21 days of receipt of the Requisition Notices and to hold that meeting within two months after receipt of the Requisition Notices.²
9. Also on 27 March 2024, Vintage announced completion of the Placement and Institutional Rights Issue (together, the **Institutional Capital Raise**) and that settlement of the Institutional Capital Raise was scheduled for Friday, 5 April 2024 with the new Vintage shares being issued and commencing trading on Monday, 8 April 2024. Vintage also announced that the Retail Rights Issue would open on Wednesday, 27 March 2024 and that settlement of the Retail Rights Issue was scheduled for Friday, 3 May 2024 with the new Vintage shares being issued and commencing trading on Monday, 8 May 2024.
10. Also on 27 March 2024, Vintage announced an 'Appendix 3B - Proposed issue of securities' in relation to the Capital Raise (**Supplementary Appendix 3B**) which stated that the Retail Rights Issue was fully underwritten and that Vintage had changed the allocation policy for over-subscription under the Retail Rights Issue such that all eligible shareholders who had taken up their entitlement in full may apply for additional new Vintage shares up to a maximum of 100% of their entitlement.
11. Also on 27 March 2024, Vintage announced a cleansing notice under section 708AA(2)(f) in relation to the Rights Issue (**Supplementary Cleansing Notice**) which stated as follows on page 2 under paragraph (f):

² On 15 April 2024, Vintage announced that it considered that there were defects in the Requisition Notices which Keybridge did not rectify. Accordingly Vintage concluded that the Requisition Notices were invalid and accordingly will not convene the Section 249D Meeting. On 9 April 2024, Keybridge lodged an ASIC Form 605 with the ASX advising that it has ceased to be a substantial shareholder in Vintage.

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(f) given the structure of the Entitlement Offer, the potential effect that the issue of the New Shares will have on the control of the Company is as follows:

...

(ii) the issue of New Shares to the Underwriters or sub-underwriters may increase the voting power of each of the Underwriters or sub-underwriters in the Company. The Underwriters have advised the Company that a number of professional and sophisticated investors have agreed to underwrite the Entitlement Offer;

(iii) except as detailed in paragraph (iv) below, the maximum voting power for each sub-underwriter will not exceed 9.9% assuming there is no uptake of shares under the Retail Entitlement Offer;

(iv) Regal Funds Management Pty Ltd ACN 107 576 821 (Regal) has agreed to act as sub-underwriter to a maximum amount of 325,000,000 New Shares. As a result, Regal's potential maximum voting power increases from 6.57% to 24.74%. This maximum increase assumes a 100% shortfall under the Entitlement Offer and does not take into account any increase that may arise from participation by the sub-underwriters in the Top-Up Facility. If a substantial proportion of retail shareholders choose to take up their entitlements, then Regal may be diluted rather than have its shareholding increased ...

APPLICATION

12. By application dated 30 March 2024, the Applicant sought a declaration of unacceptable circumstances. The Applicant submitted (among other things) that:
- (a) Vintage was raising significantly more than is necessary and that other funding options were available that were less costly and less dilutive for shareholders.
 - (b) The Capital Raise was unnecessary, at an unreasonable discount to fair value and was announced in circumstances where the Vintage Board was facing imminent removal.
 - (c) In the absence of a discernible requirement for the funds raised via the Capital Raise, the Capital Raise was an unacceptable frustrating action to the applicant's section 249D notice.
 - (d) Vintage's reliance on section 611 Item 10 resulted in an unacceptable change of control because (among other things):
 - (i) Vintage was raising more capital than it requires
 - (ii) the Rights Issue was non-renounceable and had arbitrarily restricted retail shareholders' participation in a shortfall/top-up facility
 - (iii) other expressions of interest from potential underwriters (including from the Applicant) were rejected, when that interest would have negated the need to rely upon the exception in section 611 Item 10.

Interim orders sought

13. The Applicant sought interim orders to the effect that Vintage must:

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- (a) defer the settlement of the Institutional Capital Raise and the issue and allotment of the new Vintage shares under the Institutional Capital Raise and
- (b) not commence the Retail Rights Issue, until the completion of Panel proceedings.

Final orders sought

14. The Applicant sought final orders to the effect that Vintage must:
- (a) cancel the Placement or, alternatively, scale back all oversubscriptions to the Placement using a consistent formula
 - (b) scale back the Rights Issue to only the amount required
 - (c) accept underwriting offers from existing shareholders on equal terms to other underwriters
 - (d) remove the restriction on oversubscriptions by existing shareholders under the top-up facility for the Retail Rights Issue and
 - (e) cap costs of the Capital Raise at 3% of the funds raised or a market rate determined by the Panel.

DISCUSSION

Interim orders

15. Given the Institutional Capital Raise was scheduled to settle on 5 April 2024, the President³ considered the interim order requested by the Applicant to stay the settlement of the Institutional Capital Raise on an urgent basis. The President decided to decline to make this interim order.
16. The President then considered the other interim orders requested by the Applicant and invited submissions on the request. In response to the President's request, Vintage and the Applicant made submissions on the Applicant's request for interim orders. The Applicant objected to the President receiving or considering Vintage's submissions on the basis that Vintage's submissions were affected by an alleged conflict of interest resulting from Vintage's legal representatives acting for another company in separate Court proceedings brought against the Applicant. The Applicant claimed that certain submissions made by Vintage were only known to Vintage because of Vintage's legal representatives' other role acting against the Applicant in separate Court proceedings.
17. The President decided not to receive Vintage's submissions on the basis that they were alleged to contain matters informed by the alleged conflict issue. The President did, however, ask Vintage preliminary questions relating to:
- (a) the effect of a short term pause on the settlement of the Institutional Capital Raise until a sitting Panel was appointed and could consider the matter

³ For the purposes of paragraphs 15-21, "President" refers to the substantive President of the Panel, Alex Cartel.

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- (b) Vintage’s ability to use the funds raised via the Capital Raise for the Odin-3 project and
 - (c) the Applicant’s pro-rata participation in the Placement.
18. The Applicant again objected to the President receiving or considering Vintage’s responses to the President’s preliminary questions on the basis that Vintage’s responses were affected by its legal representatives’ alleged conflict of interest.
19. For the purposes of considering the Applicant’s request for interim orders, the President only received and considered the materials that were not alleged to contain matters informed by Vintage’s legal representatives’ alleged conflict. The President received and considered:
- (a) the Applicant’s application and preliminary submissions on interim orders and
 - (b) Vintage’s responses to the President’s preliminary questions regarding the ability for Vintage to use the funds raised via the Capital Raise for the Odin-3 project and the Applicant’s pro-rata participation in the Placement.
20. The President decided to decline to make any interim orders. The President considered that it was not appropriate or necessary to make any interim orders in the circumstances on the basis that any issues with the Capital Raise could be dealt with by final orders of a sitting Panel. In making this decision, the President noted that the Retail Rights Issue remained open for 3 weeks after the date of the President’s decision and the majority of the shares to be issued by Vintage will be issued under the Retail Rights Issue.
21. The President did, however, note that there were two features of the Rights Issue that did cause him some concern, including that:
- (a) retail shareholders’ participation in the top-up facility was capped at 100% of their respective entitlement and
 - (b) an existing shareholder, Regal, was acting as a sub-underwriter and therefore may receive a greater number of shares through the underwriting process than other shareholders who have a capped entitlement.

Frustrating action

22. Part of the Applicant’s complaint is essentially that the Capital Raise was designed to “frustrate” the resolutions to be considered at the upcoming Section 249D Meeting. *Guidance Note 12: Frustrating action (GN 12)* sets out the Panel’s approach to frustrating action. As observed in *Accelerate Resources Limited 01 & 02*⁴ and *Tempus Resources Limited*,⁵ GN 12 relates to actions that could frustrate a bid or potential bid. There is no reference to board control situations in GN 12.
23. The Panel recently considered entitlement offers in the context of section 249D notices in *Tempus Resources Limited*,⁶ where the Panel considered a rights issue made

⁴ [2020] ATP 7 at [38]

⁵ [2024] ATP 1

⁶ [2024] ATP 1 at [25]

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by Tempus shortly before the applicant gave a section 249D notice to the company. The Panel declined to conduct proceedings and noted that when Tempus resolved to proceed with the Rights Issue it had no knowledge that the requisitioning shareholders intended to submit a notice to spill the board.⁷

24. Here we do not consider that the Capital Raise was designed to “frustrate” the Applicant’s Requisition Notices, given the Applicant submitted that it had advised Vintage that it would submit the Requisition Notices to replace the Vintage Board if Vintage undertook the Capital Raise at a discounted price. In essence, the Requisition Notices were designed to at least partially frustrate the Capital Raise, not the other way around as the Applicant submits.
25. On the materials provided, there is in our view nothing to suggest that the circumstances relating to the Rights Issue would be likely to impact voting at the Section 249D Meeting in an unacceptable way.

Need for funds

26. As set out above, the Applicant made submissions to the effect that Vintage was raising more funds than it reasonably required and that Vintage would not be able to use the funds raised for Odin-3 in accordance with its publicly disclosed intention. As noted above, we queried whether Vintage could use the funds raised for the drilling of Odin-3, as Vintage’s preliminary submissions on interim orders did not address the Applicant’s submissions on this matter. In response, Vintage acknowledged that drilling of Odin-3 would only commence following the drilling of Odin-2 and submitted that it is impractical to conduct a separate capital raising to fund Odin-3 in the short period of time between completion of drilling for Odin-2 and commencement for Odin-3, and that a delay in securing funding would introduce further market risk to any future hypothetical fundraising.
27. *Guidance Note 17: Rights issues (GN 17)* sets out the Panel’s approach to rights issues. GN 17 sets out the Panel’s view that “*where there is a clear need for funds that has not been contrived, a rights issue resulting in a control effect will generally not be unacceptable (in the absence of other issues) provided the rights issue is structured appropriately and an appropriate dispersion strategy has been put in place.*”⁸
28. In our view the material supported the conclusion that Vintage had a genuine need for funds and that the Capital Raise was not contrived. While we acknowledge that the need for funds is not a safe harbour,⁹ on the materials provided there was nothing that suggested to us the Vintage’s board’s decision to proceed with the Capital Raise was unreasonable. We note that it is not uncommon for companies to raise capital for multiple projects at one time rather than undertaking two separate capital raisings in quick succession which may be costly and attract greater market risk.

⁷ [2024] ATP 1 at [30]

⁸ *Guidance Note 17: Rights issues* at [10]

⁹ See *Guidance Note 17: Rights issues* at [12]

Structure of the Capital Raise

29. On the materials provided, there is in our view nothing to suggest that the structure of the Placement or Rights Issue was unacceptable or otherwise has an unacceptable control effect. The following aspects of the Rights Issue were in line with the Panel's guidance in GN 17:¹⁰
30. While the Rights Issue was non-renounceable, the Capital Raise contained a dispersion strategy (a top-up facility) and also had the following features:
- (a) professional underwriters were engaged by the company, and several professional sub-underwriters were engaged by the underwriters¹¹
 - (b) the underwriters (and sub-underwriters) receive entitlements under the dispersion strategy after all other requests have been satisfied¹² and
 - (c) sufficient time and disclosure was given to shareholders and other investors to assess the shares being offered.¹³
31. The Retail Rights Offer included a top-up facility with the following features:
- (a) Vintage's shareholders can apply to double their entitlement in advance of determining the shortfall available to the underwriters and their sub-underwriters¹⁴
 - (b) where top-up facility applications exceed the number of shares available, shortfall shares are allocated to shareholder applicants in proportion to their respective shareholdings¹⁵ and
 - (c) Vintage submitted that "*the 100% cap on shareholders' participation in the top-up facility does not materially restrict the ability of shareholders to participate or the effectiveness of the facility to mitigate any control effect*".¹⁶
32. Noting the potential control effect described in paragraph 11, we queried what was the prospect of Regal's (or any other Vintage shareholder's) relevant interest or voting power in Vintage increasing above 20% as a participating shareholder under the Capital Raise or through the sub-underwriting. Vintage advised that Regal had

¹⁰ See *Guidance Note 17: Rights issues* at [7] and [8]

¹¹ See *Guidance Note 17: Rights issues* at [8(a)]. In *Bisalloy Steel Group Limited* [2008] ATP 29 the Panel said that reasonable steps to minimise the potential control impact of a rights issue may include appointing a number of underwriters ([2008] ATP 29 at [23]). Here, Vintage confirmed that Regal is a professional sub-underwriter and was only one of multiple sub-underwriters appointed by the underwriters to the Rights Issue.

¹² See *Guidance Note 17: Rights issues* at [8(b)]

¹³ See *Guidance Note 17: Rights issues* at [8(c)]

¹⁴ See *Guidance Note 17: Rights issues* at [7(b)(i)]

¹⁵ See *Guidance Note 17: Rights issues* at [7(b)(ii)]

¹⁶ See *Guidance Note 17: Rights issues* at [7(b)(ii)]. In *Virgin Australia Holdings Limited* [2013] ATP 15 the Panel considered that the imposition of a 40% retail cap and sub-underwriting arrangements would maintain the relative positions of the company's largest shareholders and would not disadvantage retail shareholders on a proportionate basis ([2013] ATP 15 at [41]). The Panel in *Virgin* also stated that: "*While there may have been other structures that may have been more advantageous to retail shareholders, it is not the Panel's role to determine whether an alternative transaction structure would have been preferable. It is the Panel's role to determine whether the actual transaction structure is unacceptable. In all the circumstances we do not consider the cap unacceptable.*"

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participated in the Institutional Rights Issue up to 50% of its entitlement and Regal's current relevant interest and voting power in Vintage is 7.175%. By participating in the Institutional Rights Issue, Vintage advised that Regal is not able to participate in the Retail Rights Issue or, consequently, the top up facility and will only participate further as a sub-underwriter. Vintage submitted that the prospect of Regal's (or any shareholder's) relevant interest or voting power in Vintage increasing above 20% as a result of the Capital Raise is "remote, at best". Vintage submitted that "even if there is a 78.23% shortfall from the total entitlement offer flowing through to the four sub-underwriters, with Regal receiving a full pro rata allocation, Regal's relevant interest will still remain below 20%." While this means it is nevertheless possible for Regal's voting power to increase above 20%, we consider that the Capital Raise is not likely to have a material effect on the control of Vintage given the dispersion strategy and underwriting and sub-underwriting arrangements.

33. In light of the potential control effect of the Capital Raise, we were concerned that participation in the top-up facility for the Retail Rights Issue was capped at 100% of a shareholder's entitlement. In response to our query on this matter, Vintage submitted that it and the joint lead managers considered that:
 - (a) the 100% cap "represented a fair opportunity for all shareholders to participate on an equal basis without one or two shareholders potentially seeking all of the shortfall and consequently participating at a disproportionately higher level, with associated control concerns" and
 - (b) in any event, "it was considered unlikely that a large number of shareholders would be willing to take up greater than an additional 100% of their entitlement."
34. Vintage submitted that Vintage's directors "will not be exercising any discretion regarding the shortfall in a manner likely to exacerbate a potential unacceptable control effect, except to the extent they consider necessary (acting reasonably) to prevent the issue of shares contrary to law or the ASX Listing Rules."¹⁷
35. Given that we consider that the Capital Raise is not likely to have a material effect on the control of Vintage, we consider the approach taken by Vintage to be reasonable in the circumstances. We were not persuaded that conducting a deeper inquiry into the circumstances relating to the Placement or Rights Issue was warranted in the circumstances.
36. However, it gave us some pause that the potential control effect of the Capital Raise was only disclosed in the Supplemental Cleansing Statement and not the offer booklet for the Retail Rights Issue released by Vintage on 3 April 2024. We consider that it would have been good practice for Vintage to have disclosed in its offer booklet the potential for Regal to increase its relevant interest/voting power above 20%, together with example scenarios of how the shortfall from the Rights Issue would affect the ultimate voting power of Regal.

¹⁷ See Guidance Note 17: Rights issues at [7(b)(iii)]

Vintage legal representation

37. We had some initial concerns regarding Vintage’s legal representatives’ alleged conflict. Accordingly, for the purposes of considering whether we were minded to conduct proceedings, we initially decided to receive only the materials that were not alleged to be affected by the conflict of interest.
38. Once we had reached a view as to whether we would be minded to conduct proceedings on the information made available to us, we decided to receive the additional materials and instructed the executive to provide to us all of the materials submitted by the Applicant and Vintage. The additional materials did not alter our views.
39. The fact that Vintage instructed legal representatives who were not its commercial lawyers acting in relation to the Capital Raise, along with the nature and tenor of Vintage’s preliminary submissions on interim orders which included submissions about the Applicant rather than whether the Rights Issue complied with Guidance Note 17, delayed proceedings and raised a *prima facie* issue as to whether the Panel should grant leave to Vintage’s legal representatives.
40. Under section 194 of the *Australian Securities and Investments Commission Act 2001* (Cth), the Panel’s leave is required for legal representation. In granting leave for legal representation, the Panel considers how it might be assisted by the legal advisers seeking to represent a party, including whether any potential conflict of interest may compromise the information that is made available to it.¹⁸
41. We are concerned that Vintage’s legal representatives are acting in a matter against the Applicant at the same time as representing Vintage in this matter. In particular, we are concerned that it may be implausible for a party’s legal representatives to comply with the Panel’s confidentiality rules¹⁹ where the party’s legal representatives (and particularly the same individual practitioner(s)) are also acting against another party to the proceedings in a separate matter (e.g. in Court litigation or other Panel proceedings), as the party’s legal representatives may become aware of certain information through these proceedings that cannot be separated in their mind while acting in the concurrent matter against the other party.
42. We are also concerned that Vintage’s legal representatives are not the commercial solicitors acting for Vintage in relation to the Capital Raise.²⁰ We note that, if we were minded to conduct proceedings, it would be preferable for Vintage’s commercial solicitors acting in relation to its Capital Raise to also act for Vintage in the Panel proceedings as it is conceivable that any orders made by the Panel may require changes to offer disclosure or the offer structure.
43. However, we consider that it is not necessary to make a decision as to whether to grant leave to Vintage’s legal representatives on the basis that we decided to decline

¹⁸ See *The Market Herald Limited* [2023] ATP 7 at [279]-[298] and *Avalon Minerals Limited* [2013] ATP 11 at [130]-[146].

¹⁹ *Procedural Rules* Part 6

²⁰ *Procedural Rules* at [17(2)]

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to conduct proceedings on this matter. If we were minded to conduct proceedings, we may have made further enquiries.

DECISION

44. 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).

Orders

45. 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.

Marina Kelman

President of the sitting Panel

Decision dated 16 April 2024

Reasons given to parties 30 April 2024

Reasons published 1 May 2024

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Advisers

Party	Advisers
Vintage	-
Keybridge	-