



Australian Government

Takeovers Panel

Reasons for Decision

Keybridge Capital Limited (Administrator Appointed) 16 and Benjamin Hornigold Ltd 14 [2025] ATP 8

Catchwords:

*Decline to conduct proceedings – board spill – requisition notice – frustrating action – concurrent proceedings Corporations Act 2001 (Cth), sections 249F, 436A, 657C(2)
Australian Securities and Investments Commission Regulations 2001 (Cth), regulation 16
Takeovers Panel Procedural Rules 2020, Rule 20
Takeovers Panel Procedural Guidelines 2020, 4.6
Tower Software Engineering Pty Limited; Pendant Software Pty Limited v Harwood [2006] FCA 717
Lantern Hotel Group [2014] ATP 6, LV Living Limited [2005] ATP 5*

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

INTRODUCTION

1. The Panel, Michael Lishman, Rebecca Maslen-Stannage (sitting President) and Emma-Jane Newton declined to conduct proceedings on two applications from Benjamin Hornigold Ltd – one in relation to the affairs of Keybridge Capital Limited (Administrator Appointed) and the other in relation to its own affairs. The two applications (heard together) concerned (among other matters) allegations that the incumbent Keybridge directors had taken steps to frustrate their replacement with new directors at a requisitioned meeting of Keybridge shareholders, alleged undisclosed relevant interests in Keybridge and Benjamin Hornigold, and alleged undisclosed associations or concert party behaviours in relation to Keybridge and Benjamin Hornigold. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.

2. In these reasons, the following definitions apply.

- Benjamin Hornigold** Benjamin Hornigold Ltd
- Capital Raising Meeting** has the meaning given in paragraph 7
- Director and Administrator Proceedings** has the meaning given in paragraph 19(a)(ii)

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Incumbent Keybridge Directors	has the meaning given in paragraph 6
Injunctive Relief Application	has the meaning given in paragraph 19(a)(i)
Keybridge	Keybridge Capital Limited (Administrator Appointed)
Proposed Keybridge Directors	has the meaning given in paragraph 6
Resolution 7	has the meaning given in paragraph 7
S249F Meeting	has the meaning given in paragraph 6
WAM Active	WAM Active Limited
Yowie	Yowie Group Ltd

FACTS

- Keybridge and Benjamin Hornigold are ASX listed companies (ASX codes: KBC and BHD respectively).
- WAM Active holds a relevant interest in 45.45% of Keybridge, while Keybridge holds a relevant interest in 19.59% of Benjamin Hornigold (according to their respective most recent substantial holder notices).
- Keybridge also holds a relevant interest in 78.359% of Yowie.¹ Two of the three directors of Yowie (Messrs Nicholas Bolton and John Patton) are directors of Keybridge.²
- On 19 December 2024, Keybridge received a notice from WAM Active under section 249F³ to requisition a general meeting of Keybridge shareholders (**S249F Meeting**) to move resolutions to replace Messrs Nicholas Bolton, Antony Catalano, John Patton and Richard Dukes (**Incumbent Keybridge Directors**) with Messrs Sulieman Ravell, Geoff Wilson, Jesse Hamilton and Martyn McCathie (**Proposed Keybridge Directors**). The S249F Meeting was scheduled to be held on 10 February 2025.
- On 6 January 2025, Keybridge made an announcement stating that it had:
 - issued 2,581,816 shares to unspecified sophisticated and professional investors at an issue price of 5.5c per share, raising \$142,000 and
 - called a general meeting to be held on 3 February 2025 (**Capital Raising Meeting**), to consider (among other things) the “*ratification of the above \$142,000 share placement*” and “*a resolution seeking shareholder approval for the issue of a*

¹ According to Keybridge’s 2024 Annual Report

² The remaining director of Yowie is an executive director

³ 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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further \$1.56 million to related parties of the company, Wilson Asset Management and Messrs Mr Bolton and Mr Catalano” (Resolution 7).

8. The notice of meeting stated that “[i]n accordance with the Listing Rules, no votes may be cast on this resolution by persons and/or parties who will participate in the issue of equity securities under Resolution 7”.
9. The following events subsequently occurred in relation to the Capital Raising Meeting:
 - (a) On 20 January 2025, WAM Active made an application to the Supreme Court of New South Wales seeking urgent interlocutory relief to (among other things) enable it to vote on Resolution 7 at the Capital Raising Meeting in circumstances where it does not participate in the capital raising.
 - (b) On 31 January 2025, the Court granted the relief sought, initially scheduling a final hearing for 10 February 2025.
 - (c) Keybridge subsequently postponed the Capital Raising Meeting twice – first on 4 February 2025 (to 18 February) and again on 17 February 2025 (to 27 February).
 - (d) On 5 February 2025, the Court vacated the 10 February 2025 hearing to a later date.
10. On the morning of the S249F Meeting (10 February 2025), Keybridge made announcements stating that:
 - (a) Yowie “*via an independent sub-committee, formally demanded the repayment of the outstanding loan balance, being \$4.6 million (Loan), with repayment to be made by 5.00pm on 7 February 2025 ... The Company was unable to reach a formal agreement regarding an extension or restructuring of the Loan given the restrictions around its future capital raising capability*” and
 - (b) its board of directors “*unanimously resolved to appoint Mr Gideon Rathner from Lowe Lippmann Chartered Accountants as Voluntary Administrator of the Company pursuant to section 436A*”.
11. At the S249F Meeting, Mr Patton as chair adjourned the meeting to a later date. According to a file note prepared by Mr Ravell (annexed to Benjamin Hornigold’s applications):
 - (a) “[Mr Patton] made it clear that he would be adjourning today’s meeting based on:
 - *That shareholders are not currently properly informed.*
 - *The new directors had not had chance to review the impact of the company being in Voluntary Administration. To which I later responded that 3 of the incoming directors were present and had not withdrawn our consents, so is not a reason to adjourn.*
 - *That the Administrator appointed needed time to consider the administration process*” and

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- (b) immediately after Mr Patton purported to adjourn the meeting, *“Jesse Hamilton from WAM immediately put forward a motion to continue the meeting, that there were more than 50% of shareholders of the company in attendance, they elected a new Chairman... then they continued through the resolutions”*.
12. On 11 February 2025, Keybridge made an announcement that *“[t]o enable the orderly progression of the Administration, notice is given that the adjourned meeting will be reconvened on 22 April 2025”*.
13. On 27 February 2025, Keybridge held the Capital Raising Meeting. According to Keybridge, the resolution ratifying the previous issue of 2,581,816 shares to sophisticated and professional investors was passed, however Resolution 7 was not put due to the ongoing proceedings regarding the Capital Raising Meeting referred to in paragraph 9.

APPLICATIONS

Declaration sought

14. Benjamin Hornigold submitted a single application dated 21 February 2025 seeking a declaration of unacceptable circumstances in relation to the affairs of Keybridge and its own affairs. It acknowledged that this effectively constituted two separate applications, and we decided to deal with the applications together under regulation 16(1)(a) of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
15. In its applications, Benjamin Hornigold submitted (among other things) that:
- (a) The Incumbent Keybridge Directors *“have taken numerous actions to thwart or frustrate the [Proposed] Keybridge Directors from taking office as Directors of Keybridge, which alone or together comprise unacceptable circumstances in relation to Keybridge”*.
- (b) The above actions *“also comprise unacceptable circumstances in relation to [Benjamin Hornigold], since they impact at least the 19.59% shareholding in [Benjamin Hornigold] held or controlled by Keybridge, and when considered with further undisclosed relevant interests by Bolton in [Benjamin Hornigold], it means that there is a control-threshold stake (of more than 20% of [Benjamin Hornigold] shares) controlled by the concert parties undertaking those unacceptable actions”*.
- (c) Mr Bolton’s voting power in Keybridge has not been fully disclosed.
- (d) There are *“material undisclosed associations or concert party behaviours in relation to both Keybridge Shares and [Benjamin Hornigold] Shares which are adversely impacting the efficient, competitive and informed market for [Benjamin Hornigold] shares, in frustration of the purposes reflected in section 602”*.

Interim orders sought

16. Benjamin Hornigold sought an interim order that *“Keybridge, its Administrator and any officer of Keybridge be restrained forthwith from disposing or entering into ... any agreement, arrangement or understanding to dispose of any of Keybridge’s 19.59% interest in [Benjamin Hornigold] shares”*.

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Final orders sought

17. Benjamin Hornigold sought a final order that “Keybridge (and its Administrator) divest forthwith the full parcel of 19.59% [Benjamin Hornigold] shares in ASIC for sale or buyback”.

Preliminary submissions

18. On 21 February 2025, we received preliminary submissions from WAM Active. We did not receive preliminary submissions from any other interested parties.
19. WAM Active submitted that:
- (a) The applications seek orders in relation to matters currently subject of both:
 - (i) urgent injunctive relief sought by WAM Active and others and listed before the Supreme Court of New South Wales on 24 February 2025 (**Injunctive Relief Application**) and
 - (ii) final relief sought by WAM Active and others and set down for hearing on an expedited basis in the above proceedings in the Supreme Court of New South Wales on 5 and 6 March 2025 (**Director and Administrator Proceedings**).
 - (b) In the Injunctive Relief Application, WAM Active is seeking an injunction against Keybridge and its administrator from disposing of assets (which would include Keybridge’s shares in Benjamin Hornigold) without first giving WAM Active 7 days’ notice. This is intended to preserve the status quo pending the outcome of the Director and Administrator Proceedings to be heard the following week.
 - (c) In the Director and Administrator Proceedings, WAM Active is seeking orders that:
 - (i) the purported appointment of the Keybridge administrator was void or should end immediately
 - (ii) Mr Patton’s purported adjournment of the S249F Meeting was void
 - (iii) Messrs Bolton, Patton and Dukes were removed as directors at the S249F Meeting and
 - (iv) the Proposed Keybridge Directors were appointed as directors at the S249F Meeting.
20. Having regard to the above, WAM Active submitted that the Court proceedings overlap with the majority of the submissions contained in the applications (particularly in relation to the purported appointment of Keybridge’s administrator and purported adjournment of the S249F Meeting).
21. WAM Active also submitted that the outcome of the proceedings may have a material effect on whether orders from the Panel are still required or should be made. If WAM Active is successful, Keybridge’s new board would need to consider the matters raised in the applications, as well as Keybridge’s response to the applications if they are still on foot.

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Out of process submission from Benjamin Hornigold

22. We decided to accept an out of process rebuttal submission from Benjamin Hornigold.⁴ Among other things, Benjamin Hornigold submitted that:
- (a) *“WAM’s proceedings will not deal with the unacceptable circumstances surrounding Bolton accumulating a greater than 20% relevant interest in [Benjamin Hornigold] shares, and the non-disclosures surrounding the accumulation of that stake... the undisclosed acquisitions of a control-threshold level stake in [Benjamin Hornigold] in and of itself, merits proceedings and investigation by the Panel”.*
 - (b) The interim orders sought are not inconsistent with the orders sought in the Injunctive Relief Application.
 - (c) The final orders sought could be expressed to be *“subject to the Court varying any interlocutory order given in response to WAM’s application [to the Court]... to allow that vesting to occur”.*
 - (d) In any event, WAM Active *“will be obliged to raise with the Court the position sought by [Benjamin Hornigold] in its application, and the Court could take that position into account and the potential for Panel orders to be made in formulating any interlocutory order made”.*

Orders made in response to Injunctive Relief Application

23. On 26 February 2025 (before our first meeting), the Supreme Court of New South Wales made orders giving effect to those sought by WAM Active and others in the Injunctive Relief Application, subject to some minor caveats which are not relevant to these proceedings.

DISCUSSION

24. We have considered all the material presented to us in coming to our decision, but only specifically address those things that we consider necessary to explain our reasoning.

Court overlap

25. In *Lantern Hotel Group*,⁵ the Panel stated (at [17], footnotes omitted):
- The Panel will generally not conduct proceedings on an issue on which the Court has jurisdiction and has already commenced proceedings. This is on the basis that the Panel is keen to avoid duplicative proceedings.*⁶
26. This principle is reflected in paragraph 4.6(b) of the Panel’s Procedural Guidelines, which identifies *“whether the circumstances are the subject of court proceedings”* as a factor the Panel considers in deciding whether to conduct proceedings.

⁴ See Rule 20(1) of the Takeovers Panel Procedural Rules 2020

⁵ [2014] ATP 6

⁶ However the Panel and the Court can consider the same set of circumstances and, in doing so, are not necessarily *“impinging upon the jurisdictional turf”* of the other - see *Tower Software Engineering Pty Limited; Pendant Software Pty Limited v Harwood* [2006] FCA 717 at [44]

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27. In this instance, we consider that the circumstances outlined in the applications substantially overlap matters in the Injunctive Relief Application and the Director and Administrator Proceedings, or may be materially affected by the outcome of those proceedings.
28. We agree with WAM Active’s submission that the outcome of the Court proceedings may have a material effect on whether orders from the Panel are still required or should be made. As submitted by WAM Active, if WAM Active is successful, Keybridge’s new board would need to consider the matters raised in the applications, as well as Keybridge’s response to the applications if they are still on foot.
29. In our view, the Panel should apply a cautious approach to making orders which may have consequences in relation to litigation on foot. In any event, the Supreme Court of New South Wales is better placed to deal with most of the circumstances outlined in the applications as part of the Injunctive Relief Application and Director and Administrator Proceedings.
30. We also consider it relevant that:
 - (a) in response to the Injunctive Relief Application, the Court has already made orders that substantially cover the same ground as the interim orders sought by Benjamin Hornigold and
 - (b) WAM Active, despite sharing many of the same concerns raised by Benjamin Hornigold, appeared to suggest that we should decline to conduct proceedings given the substantial overlap with the existing Court proceedings.
31. Moreover, in relation to those matters not being dealt with directly in the Court proceedings (such as Mr Bolton’s and others’ alleged undisclosed relevant interests in Keybridge and Benjamin Hornigold, as well as the alleged undisclosed associations or concert party behaviours in relation to Keybridge and Benjamin Hornigold), we:
 - (a) had concerns regarding the strength of the evidence provided and
 - (b) considered that these matters form part of a broader dispute between Keybridge and WAM Active, and it is not appropriate in the circumstances to adjudicate on these discrete aspects of the broader conflict.⁷

Standing

32. Having already decided that there is no reasonable prospect that we would declare the circumstances unacceptable, we do not consider that it is necessary to consider and come to a decision on whether Benjamin Hornigold has standing under section 657C(2) to make an application in relation to the affairs of Keybridge.

⁷ See for example *LV Living Limited* [2005] ATP 5 at [55]-[56]

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DECISION

33. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances in relation to the affairs of Keybridge or Benjamin Hornigold. Accordingly, we have decided not to conduct proceedings in relation to both applications under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
34. Given that we have decided not to conduct proceedings, it is not appropriate to make any interim or final orders.

POSTSCRIPT

35. On 21 March 2025, the Supreme Court of New South Wales handed down its judgement in the Director and Administrator Proceedings (see *In the matter of Keybridge Capital Limited* [2025] NSWSC 240).

Rebecca Maslen-Stannage
President of the sitting Panel
Decision dated 11 March 2025
Reasons given to parties 19 March 2025
Reasons published 26 March 2025

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Advisers

Party	Advisers
Benjamin Hornigold Ltd	W Advisers
WAM Active Limited	Mills Oakley