



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Bentley Capital Limited 01R  
[2011] ATP 13**

**Catchwords:**

*Acting in concert - association - association hurdle - common directorships - common investments - common shareholdings - de novo review - decline to make a declaration - deemed relevant interests - efficient, competitive and informed market - equal opportunity - facilitation - failure to disclose - family links - new facts - orders - proxy - relevant agreement - relevant interest - review of Panel decision - shareholder approval - structural links - substantial holding - timing of application - unacceptable circumstances - undertaking - voting power*

*Corporations Act 2001 (Cth), sections 9, 12, 16, 53, 249F, 606, 608(3), 610, Item 7 and Item 9 of 611, 657A, 657EA, 671B*

*Corporations Regulation 6.10.01*

*ASIC Act section 201A*

*Guidance Note 2*

*ASX Listing Rule 7.7.1*

*Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors (1984) 14 ACLR 456*

*Bentley Capital Limited [2011] ATP 8, CMI Limited 01R [2011] ATP 5, Mount Gibson Iron Limited [2008] ATP 4, Summit Resources Ltd [2007] ATP 9, Alinta Limited 01R [2006] ATP 19, Re National Foods Ltd (No 1) [2005] ATP 8, LV Living Ltd [2005] ATP 5, Winepros Limited [2002] ATP 18, Pinnacle VRB Ltd (No 5) [2001] ATP 14*

**INTRODUCTION**

1. The review Panel, Ewen Crouch, Robert Johanson and Ian Ramsay (sitting President), accepted undertakings in relation to the affairs of Bentley Capital Limited. The review application sought a review of the initial Panel's decision in *Bentley Capital Limited* [2011] ATP 8, which concerned whether parties were associates in relation to Bentley.<sup>1</sup> The initial Panel was not satisfied that it could draw the necessary inferences and find the alleged associations, and so was not satisfied that the circumstances were unacceptable. On additional material the review Panel was minded to declare the circumstances unacceptable as it was satisfied that parties were associated in relation to Bentley,<sup>2</sup> resulting in the acquisition of shares otherwise than in accordance with Chapter 6. However, the parties offered undertakings to remedy the unacceptable circumstances, which the Panel accepted.

2. In these reasons, the following definitions apply.

applicants	Bellwether Investments Pty Ltd and Mr Jim Craig
Bentley	Bentley Capital Limited

<sup>1</sup> And alleged breaches of s606 and s671B. References are to the *Corporations Act 2001 (Cth)* unless otherwise indicated

<sup>2</sup> And that Mr and Mrs Chaudhri were associates in relation to Queste Communications Ltd

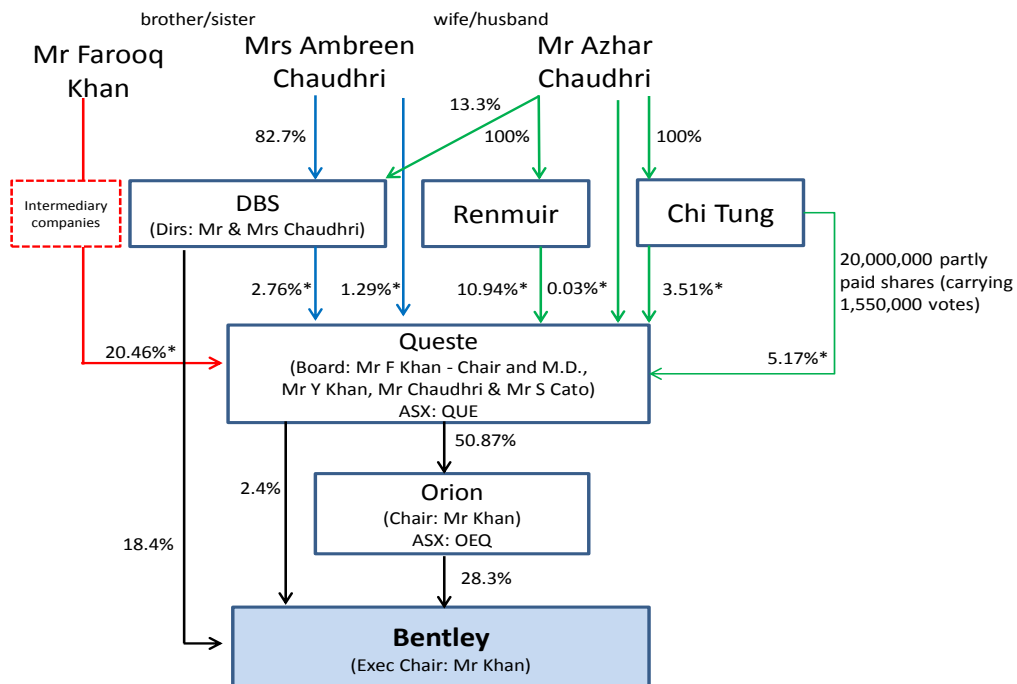
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DBS	Data Base Systems Limited
Orion	Orion Equities Limited
Queste	Queste Communications Limited
Strike	Strike Resources Limited (formerly Fast Scout Limited)

### FACTS

3. Bentley is an ASX listed company (ASX code: BEL). Mr Farooq Khan is the Chairman of Bentley. Mr Christopher Ryan and Mr William Johnson are non-executive directors of Bentley.
4. Queste is an ASX listed company (ASX code: QUE). Mr Khan is the Chairman and Managing Director of Queste. Mr Yakoob Khan (Mr Farooq Khan's brother), Mr Azhar Chaudhri (Mr Farooq Khan's brother-in-law) and Mr Simon Cato are also directors of Queste.
5. Orion is an ASX listed company (ASX code: OEQ). Mr Farooq Khan is the Chairman of Orion. Mr Yakoob Khan, Mr Victor Ho<sup>3</sup> and Mr Johnson are also directors of Orion.
6. Shareholdings in the companies and various relationships between the parties are shown in the following diagram:



\* Note: Percentages shown in Queste are voting power taking into account the 28,404,879 ordinary shares on issue and the 1,550,000 votes attached to the partly paid shares.

<sup>3</sup> Mr Ho is also the company secretary of Orion, Bentley and Queste

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7. The partly paid shares in Queste carry voting rights proportional to the amount of paid up capital on those shares. Mr Chaudhri, through Chi Tung Investments Ltd, holds 20,000,000 partly paid shares in Queste which carry 1,550,000 votes that are able to be cast on a resolution for the election of directors in Queste.
8. During June, July and August 2009, DBS acquired 10.451% of the ordinary shares in Bentley.
9. On or about 7 April 2011, DBS acquired a further 8.036% of the ordinary shares in Bentley.

## APPLICATION

### Declaration sought

10. By application dated 3 May 2011, the applicants sought a declaration of unacceptable circumstances in relation to the affairs of Bentley. They submitted that Mr Khan, his sister Mrs Chaudhri (and her husband Mr Chaudhri) and their controlled/ associated entities (including Queste, Orion and DBS):
  - (a) were associated and had acquired shares otherwise than in accordance with Chapter 6 and
  - (b) had failed to lodge substantial holder notices disclosing their association and aggregated voting power.
11. The initial Panel conducted proceedings and, on balance, declined to make a declaration of unacceptable circumstances in relation to the affairs of Bentley.<sup>4</sup> It said:

*69. In the face of a denial of an association (as here), there needs to be sufficient material that points to the contrary. We are not satisfied that there is sufficient material in this case.*

*70. Accordingly, on balance, we are not satisfied on the material available to us that we could draw the necessary inferences and find the alleged associations. Therefore we are not satisfied that the circumstances in this case are unacceptable.*
12. On 24 May 2011, the applicants sought the President's consent<sup>5</sup> to apply for a review of the decision made by the initial Panel. The President consented on 24 May 2011.
13. By application dated 24 May 2011, the applicants sought a review of the initial Panel's decision.<sup>6</sup> The application sought that the review Panel set aside the decision of the initial Panel and substitute a declaration of unacceptable circumstances in relation to the affairs of Bentley.

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<sup>4</sup> Bentley Capital Limited [2011] ATP 8

<sup>5</sup> s657EA(2)

<sup>6</sup> Corporations Regulation 6.10.01

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14. The applicants submitted:

*The buying by Mrs Chaudhri in 2009 was done at a time when Mr Khan's control of the company was in the balance. Mr Khan exclusively co-ordinated and handled the buying for Mrs Chaudhri. Mr Khan had control of voting Mrs Chaudhri's shares. Mrs Chaudhri has been a passive conduit for control being consolidated in the Khan-Chaudhri family. However the recent purchase by Mrs Chaudhri of a further 8.5% puts control beyond doubt with no offer to minority shareholders or any other opportunity to participate. The control implications of both the 2009 and 2011 purchases are continuing.*

15. The applicants also included material under a heading "New Facts". They submitted that, since the original Panel matter, it had become clear to them that:

*... Mrs Chaudhri purchased shares **in breach of the Corporations Act** leaving aside Mr Khan's holding and the association between Mr Khan and Mrs Chaudhri. Mr and Mrs Chaudhri are associated and (taking into account the partly paid shares held by Mr Chaudhri) each have voting power of more than 20% in Queste, giving them a deemed relevant interest in Orion's 28.3% holding in Bentley. Therefore, Mrs Chaudhri's purchases in 2009 and 2011 are in clear breach of the 20% rule.*

*In addition it has also become clear to the applicant that Queste has a direct holding in Bentley of approx. 2.4% not disclosed to the initial panel. **This in fact brings the combined interest of the Khan/Chaudhri family to over 49%**. (Original emphasis)*

16. The significance of this is that, if Mr and Mrs Chaudhri are associated in relation to Queste, there is an alternative basis on which there might be a declaration of unacceptable circumstances in relation to Bentley. It may have other consequences in companies other than Bentley, but we would not pursue those in this review proceeding.

#### **Final orders sought**

17. The applicants sought final orders to the effect that:
- (a) Mr Khan, Mr and Mrs Chaudhri and their controlled entities lodge substantial holder notices disclosing their association and aggregate voting power and
  - (b) the shares acquired in breach of the Corporations Act be vested in ASIC and sold.

## **DISCUSSION**

### **Preliminary submissions as to review**

18. Mr Khan submitted that the review application was a new application based on an alleged association between Mr and Mrs Chaudhri, as opposed to the initial application that focused on an alleged association between Mr Khan and Mrs Chaudhri.

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19. Mrs Chaudhri made a similar submission, adding that the review application denied her an opportunity for review if the alleged association between herself and Mr Chaudhri was found by the review Panel.
20. The initial application said in the overview of the circumstances:
  1. *Mr Farooq Khan, his sister Mrs Ambreen Chaudhri (and her husband) and their controlled/associated entities (including Queste Communications Ltd, Orion Equities Ltd and Data Base Systems Limited) are associated and are consolidating control of Bentley without disclosure to the market and in breach of s606 of the Act.*
21. We think that the alleged association between Mr and Mrs Chaudhri in relation to Queste is not new. The circumstances complained of in the initial application included an alleged association between Mr and Mrs Chaudhri in relation to Queste, although it was not pursued.
22. Mr Khan's preliminary submission to the review Panel included the following statement:

*... the Application contains a heading 'New Facts' which actually does not relate to new facts at all. The information referred to under that heading relates principally to matters of fact that were referred to in the initial Application (for example the shareholdings of Mr Chaudhri and DBS in Queste). The Applicant has chosen to treat these matters as some form of new revelation whereas the underlying facts were referred to in the initial Application (arising as they do from information openly dealt with on the public record).*

*If the Applicant wishes to raise these matters and allegations (which are not based on new facts) it should do so by way of a fresh Application, not a review Application.*
23. We take from Mr Khan's submission that they were not new facts, but that the alleged association between Mr and Mrs Chaudhri was a new allegation. We do not agree.
24. In any event, review proceedings are a *de novo* consideration on the merits.<sup>7</sup> They are based on the facts found at the time of the review, not those before the initial Panel. We doubt that, if the alleged association was a new allegation, our inquiries should be constrained, but we do not need to decide this given our view that it was included in the initial application.

#### **Preliminary submissions as to conducting proceedings**

25. Mr Khan also submitted that the review Panel should not conduct proceedings based on new allegations which were unsupported by any evidence. For the reasons given above, we do not consider that there were new allegations.
26. Like the initial Panel, we conducted proceedings in relation to the acquisition of shares in Bentley by DBS in April 2011 and treated the previous transactions as part of the factual matrix.

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<sup>7</sup> GN 2 at [28], *Alinta Limited 01R* [2006] ATP 19 at [26]

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### Statement of preliminary findings

27. The review proceeding is a *de novo* consideration. We have considered the matter on the information now available and exercised our own discretion.
28. We have been provided with:
  - (a) the material before the initial Panel and
  - (b) the decision media release, decision email and the reasons of the initial Panel.
29. As part of these proceedings we obtained the following additional materials:
  - (a) the review application
  - (b) further preliminary submissions
  - (c) submissions and rebuttals on our brief and
  - (d) submissions and rebuttals on our statement of preliminary findings. Having considered the material, we made preliminary findings and invited comments on them. The applicants, Mrs Chaudhri and Mr Khan made submissions on the statement of preliminary findings. Our conclusions follow consideration of responses.
30. We considered the cumulative effect of the material and drew the necessary inferences.

### Associates

31. Section 12 sets out the tests for association as applied to Chapter 6. There are two relevant tests here, sections 12(2)(b) and (c). They provide:

*For the purposes of the application of the associate reference in relation to the designated body, a person (the **second person**) is an associate of the primary person if, and only if, one or more of the following paragraphs applies:*

- (b) the second person is a person with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs;*
  - (c) the second person is a person with whom the primary person is acting, or proposing to act, in concert in relation to the designated body's affairs.*
32. In essence, these tests provide that B is an associate of A if (and only if) B is a person with whom A:
    - has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of a company's board or the conduct of its affairs or
    - is acting or proposing to act in concert in relation to a company's affairs.
  33. A relevant agreement is an agreement, arrangement or understanding:
    - (a) whether formal or informal or partly formal and partly informal and

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- (b) whether written or oral or partly written and partly oral and
  - (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.<sup>8</sup>
34. As stated by the Panel in *CMI Limited 01R*,<sup>9</sup> the cases make it clear that there is significant overlap between the concepts of “*acting in concert*” and “*relevant agreement*” in s12. The Panel there said: “*Perhaps the alternatives in s12 are intended as degrees of “understanding”, or put another way, steps along a continuum.*” The alternatives owe something of their existence to the iterative development of this area of the law.
35. An understanding means an understanding – “*plainly a word of wide import*”<sup>10</sup> – as to some common purpose or object in relation to the company in question.
36. Thus we are considering whether there has been “*the accumulation and exercise of voting power*”<sup>11</sup> or “*control or influence [over] the conduct of a company's affairs ... aimed at exerting pervasive control or influence over the company's direction and management.*”<sup>12</sup>
37. The affairs of a company include its business operations.<sup>13</sup> Section 12 does not require that an agreement or concerted action relate expressly to shares or the exercise of votes attached to shares. It aggregates the voting power of people who are co-operating in ways which might be advanced by the use of such power.<sup>14</sup>
38. In *Mount Gibson Iron Limited*,<sup>15</sup> the Panel said circumstances which are relevant to establishing an association include:
- (a) a shared goal or purpose
  - (b) prior collaborative conduct
  - (c) structural links
  - (d) common investments and dealings
  - (e) common knowledge of relevant facts and
  - (f) actions which are uncommercial.
39. Often this requires the Panel “*to draw inferences from patterns of behaviour, commercial logic and other evidence suggestive of association.*”<sup>16</sup>

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<sup>8</sup> Section 9

<sup>9</sup> [2011] ATP 5 at [33]-[34]. The Panel decision is subject to judicial review in the Federal Court

<sup>10</sup> *Adsteam Building Industries Pty Ltd & Anor v The Queensland Cement and Lime Co Ltd & Ors* (1984) 14 ACLR 456 at 459

<sup>11</sup> *LV Living Ltd* [2005] ATP 5

<sup>12</sup> *Re National Foods Ltd (No 1)* [2005] ATP 8 at [55]-[58]

<sup>13</sup> *LV Living Ltd* [2005] ATP 5 at [76]: “*Both under the ordinary meaning of ‘affairs’ and the extended meaning conferred under regulation 1.0.18 of the Corporations Regulations and section 53, the affairs of a body corporate include its business operations*”

<sup>14</sup> *National Foods*, fn 12

<sup>15</sup> [2008] ATP 4

<sup>16</sup> *Winepros Limited* [2002] ATP 18 at [27]

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40. The associations alleged by the applicants can be separated into an alleged association between:
- (a) Mrs Chaudhri and Mr Chaudhri (and their controlled entities) in relation to Queste and
  - (b) Mr Khan, Mrs Chaudhri (and Mr Chaudhri) and their controlled and associated entities in relation to Bentley.
41. We conducted proceedings in relation to the acquisition of Bentley shares in April 2011 and treated the 2009 acquisitions as part of the factual matrix. We did not consider whether the acquisitions and circumstances in 2009 constituted unacceptable circumstances. The legislation establishing the Panel was designed to promote the prompt resolution of disputes. The 2009 acquisitions occurred too long ago and have been known to the applicants for some time.
42. We are primarily concerned with whether Mr Khan, Mrs Chaudhri (and Mr Chaudhri) and their controlled and associated entities are associated in relation to Bentley. If they are, there is an aggregation of voting power in Bentley. An association between Mr and Mrs Chaudhri in relation to Queste was considered by us as an additional way of aggregating voting power in Bentley, giving rise to unacceptable circumstances.
43. In the review application, the applicants submitted that the fact that "*Mr and Mrs Chaudhri are associated was not disputed*". However, Mrs Chaudhri and Mr Chaudhri disputed in the review proceedings that they were associates in relation to Queste and Bentley.

#### **Conclusion on association in relation to Bentley**

44. For the reasons that follow, we are satisfied that Mr Khan, Mrs Chaudhri and DBS are associated in relation to Bentley.

#### **Family links**

*Ambreen Chaudhri and Azhar Chaudhri*

45. Mrs Chaudhri and Mr Chaudhri are married and live in Pakistan. Mrs Chaudhri submitted "*I live in Pakistan where my husband and family reside.*" They apparently maintain a family home in Pakistan, although Mrs Chaudhri submitted that she had no (financial) interest in it.
46. Mrs Chaudhri submitted that "*A decision was made by Mr Chaudhri and I some years ago to separate our financial affairs.*" Similarly, Mr Chaudhri submitted that he and Mrs Chaudhri had "*made a decision years ago to separate our assets and our business affairs.*"
47. Both Mrs and Mr Chaudhri submitted that they maintained separate bank accounts, invested through separate private companies, held property both in Pakistan and Perth separately and, as Mrs Chaudhri submitted, "*exercise judgement with respect to our commercial and financial affairs independently.*"
48. Mrs Chaudhri primarily invests through DBS. Mr Chaudhri primarily invests through Renmuir Holdings Ltd and Chi Tung.



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49. While they maintain separate investments, they also share common investments.
50. Mr Chaudhri submitted *"We respect each others (sic) holdings as we are shareholders in the same entities but we try and separate out what we do in relation to each and act without reference to each other."*
51. It appeared from the submissions in the review proceedings that Mrs and Mr Chaudhri had prepared their submissions together or at least had conferred before submitting them. For example, Mrs Chaudhri's submissions in relation to question 4(b) of the review brief stated *"Details of Mr Chaudhri's business interests are outlined in his submission. I have no interest in any of those concerns."*
52. In response to preliminary findings, Mrs Chaudhri submitted that they had not conferred, but they had discussed the claims against them, and so she *"was aware, because he told me so, that he would be providing to the Panel information about his business interests."* Mr Khan submitted that the Panel should not draw an adverse inference from the fact that a husband and wife talk about, or even consult, on such a matter. He submitted that Mr and Mrs Chaudhri's submissions reflected *"what one would ordinarily expect a husband and wife to do."* This, he submitted, did not make them associates.
53. We agree that the mere fact of being husband and wife does not make two people associates, despite the weight of human experience that might normally suggest otherwise. However here there is much more.

#### *Ambreen Chaudhri and Farrooq Khan*

54. Mr Khan and Mrs Chaudhri are brother and sister.
55. This, too, does not automatically make the persons associates. But in this case there is much more to this as well.
56. Overall, the family links make one part of the factual matrix.

#### **Structural links**

57. There were historical structural links involving DBS.
58. Mr and Mrs Chaudhri were the founders of DBS, with Mr Khan and Mr Grewe. Upon incorporation, Mr Chaudhri held 25% of the shares in DBS and Mr Khan held 50% of the shares on trust for Mrs Chaudhri.
59. Mr Chaudhri submitted that in 2004 he decided to reduce his involvement in the affairs of DBS as part of the decision to separate his and Mrs Chaudhri's financial affairs. As part of this financial separation, the trust arrangements with Mr Khan over Mrs Chaudhri's shares in DBS were unwound. Also, in 2004, Mrs Chaudhri's relevant interest in DBS went from 50% to 82.45% and Mr Chaudhri's went from 25% to 13.45%.
60. Mr Chaudhri submitted that he was now *"a minority shareholder in that company and exercise no control or influence over that company save for providing some free administrative support."*
61. Mrs Chaudhri submitted *"I am the majority shareholder in Database, holding over 82% of its issued shares, and have authority to make investment decisions for DBS."*

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62. There remain structural links involving DBS. These include:
- (a) Mr Chaudhri remains on the board of DBS. Mrs Chaudhri and Mr Chaudhri are the only directors of DBS
  - (b) Mr Chaudhri was listed as the contact on a number of proxy forms lodged by DBS in relation to Bentley (there were three in 2009)
  - (c) Both Mrs and Mr Chaudhri were the signatories on substantial shareholder notices lodged by DBS in relation to Strike between 2005 and 2008.<sup>17</sup> Mr Chaudhri signed the substantial holder notice dated 13 August 2008 as a director of DBS. Mrs Chaudhri signed as an individual, having a relevant interest pursuant to s608(3)
  - (d) Mr Chaudhri's signature is required for transfers from DBS's account to third parties. Mrs Chaudhri submitted that DBS maintained a *"bank account with Bankwest ... operated as a "Patersons Money Market Account" for the benefit of DBS by Patersons and, under the requirements of Patersons, authority from both directors of DBS, i.e. my husband and myself, is required for any transfer from that account to any other party"* and
  - (e) Mr Chaudhri performs *"some free administrative support"* for DBS.
63. Mr Khan submitted that being a director did not automatically make that person an associate of the company. He also submitted that providing *"basic administrative facilities"* did not make that person an associate, given that, under s16(1), a person is not an associate of another person merely because of the proper performance of functions attaching to a professional capacity or business relationship.
64. Each of these taken singly may be true. However, we are concerned with the totality of the position.

#### **Representation in this proceeding**

65. We also note that the submissions to the initial Panel on behalf of Mrs and Mr Chaudhri and DBS were made by the same law firm, which acted for all those persons. At the time of the initial Panel's brief, they were not parties and were invited to respond to questions.
66. In the review proceedings, where the alleged association between Mrs and Mr Chaudhri was scrutinised, that same law firm made submissions on behalf of Mrs Chaudhri only. Mr Chaudhri made separate submissions (on the brief) on his own behalf. In the review, Mrs Chaudhri filed a notice of appearance. Mr Chaudhri did not.
67. Mrs Chaudhri submitted that she had a long-standing relationship with the firm and the questions had been put by the initial Panel to them jointly. We do not think this explains the change. Rather, we think, on balance, that it was done to give an appearance of separation.

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<sup>17</sup> Substantial holder notices in relation to Strike dated 22 August 2005, 22 September 2005, 26 April 2006, 30 May 2007, 4 January 2008, 26 May 2008, 31 July 2008 and 13 August 2008

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### Common investments and dealings

68. Mr Khan, Mrs Chaudhri and Mr Chaudhri (or entities controlled by them) hold or have held shareholdings in a number of Australian listed entities at the same time.
69. In Fast Scout (later Strike), Mr Khan and Mr Chaudhri were promoters and founding directors.<sup>18</sup>
70. DBS held over 99% of the shares in Fast Scout prior to the IPO and 58.97% of the shares upon listing.<sup>19</sup> At this time, Mrs Chaudhri had a beneficial interest in 50% of the shares in DBS (held on trust for her by Mr Khan) and Mr Chaudhri held 25% of the shares in DBS. Moreover, Mr Khan, Mr Chaudhri and Mrs Chaudhri were all directors of DBS.<sup>20</sup>
71. After the IPO in 2000, DBS was the majority (58.97%) shareholder of Strike.<sup>21</sup> Mr Chaudhri resigned as a director of Fast Scout in September 2005. In 2006, Fast Scout changed from a technology company to a mining company.<sup>22</sup> At this time, DBS held 47.7%.<sup>23</sup> Mrs Chaudhri submitted *"My brother suggested that Database cease its involvement as a dotcom company and that he would be able to resurrect it as a mining company. I have no understanding of the mining business but backed my brothers (sic) confidence"*.
72. We take this to mean DBS would cease being involved in Fast Scout when it became Strike. DBS has sold down to its holding to 7.02%.<sup>24</sup>
73. Mr Khan, Mrs Chaudhri, Mr Chaudhri and/or entities controlled by them hold shares in Strike. Mr Chaudhri's shareholding in Strike (through Renmuir<sup>25</sup>) was only partially disclosed when the parties were asked about common shareholdings. In response to a question by us about co-investments, Mr Chaudhri referred to the acquisition on market of shares in Fast Scout by Renmuir, which he prefaced as *"not a co-investment."* In response to a question about common shareholdings by the initial Panel, Mr Chaudhri referred to the *"nominal shareholding"* of 20 shares in Fast Scout upon its establishment.
74. In Queste, Mr Khan, Mrs Chaudhri, Mr Chaudhri and/or entities controlled by them hold shares. Mr Khan and Mr Chaudhri were promoters and founding directors. They remain directors. Mr Khan is the Chairman and Managing Director. Mr Chaudhri's shares in Queste are predominantly held through Renmuir and Chi Tung. At the time of Queste's IPO, the shares in Renmuir and Chi Tung were held

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<sup>18</sup> Page 20 of the Fast Scout prospectus dated 12 January 2000

<sup>19</sup> Page 12 of the Fast Scout prospectus dated 12 January 2000 and the 'Top 20 shareholders & Distribution Schedule' of shareholders released on ASX on 3 March 2000

<sup>20</sup> Page 69 of the Fast Scout prospectus dated 12 January 2000 discloses that Mr Khan, Mr Chaudhri and Mr Grewe were directors of DBS. Mrs Chaudhri in submissions said she has been a director at all relevant times

<sup>21</sup> Page 12 of the Fast Scout prospectus dated 12 January 2000 and the 'Top 20 shareholders & Distribution Schedule' of shareholders released on ASX on 3 March 2000

<sup>22</sup> Fast Scout prospectus dated 23 December 2005

<sup>23</sup> Page 16 of the Fast Scout prospectus dated 23 December 2005

<sup>24</sup> Page 13 of the Strike March 2011 Quarterly Report

<sup>25</sup> Page 13 of the Strike March 2011 Quarterly Report

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on trust (by an unnamed nominee) for Mr Khan. Mr Khan then held the beneficial interest in the shares in Renmuir and Chi Tung on trust for Mr Chaudhri. Mrs Chaudhri subscribed for shares in the IPO of Queste in 1998, at the request of Mr Khan as the company needed spread to obtain listing, acquired further shares in 2003 and caused DBS to acquire further shares in 2010.

75. Thus, it appears that each of Mr and Mrs Chaudhri held shares in the other's companies. As Mr Chaudhri submitted:

*Though difficult to express, I would liken how we treat each others interest in DataBase's investments in Strike and Bentley (as for my wife) and Queste (as for me) as follows:*

*Queste is my baby and DataBase and what it invests in is hers and we studiously avoid stepping onto each others "turf". We respect each others holdings as we are shareholders in the same entities but we try and separate out what we do in relation to each and act without reference to each other. To do otherwise has and will likely lead to quite firm and differing business opinions on the direction of each investment/ company, which we both seek to avoid as this has been an issue in the past.*

76. Mr Chaudhri clearly ascribes an importance to these investments of himself and Mrs Chaudhri. They have cross-involvement in each other's investments.
77. Alara Resources Limited was spun out of Strike in 2007. Mr Khan is a director of Alara. Mr Khan, Mrs Chaudhri, Mr Chaudhri and/or entities controlled by them held shares in Alara. As a shareholder of Strike, DBS was issued shares in Alara and was a top 10 shareholder<sup>26</sup> until these shares were sold in late 2010. The others remain shareholders. Mr Khan submitted that this evidenced "that [Mr and Mrs Chaudhri] act in quite a different manner in relation to investments and without reference to each other." We think it says nothing about whether they refer to each other in connection with their investments and does not necessarily indicate that they have different approaches in investment styles.
78. In Bentley, Mr Khan, and Mr and Mrs Chaudhri, hold, or have a relevant interest in, shares.<sup>27</sup> Mr Khan approached Mrs Chaudhri in 2009 and again in 2011 to acquire shares in Bentley. Mrs Chaudhri submitted "Given that [Mr Khan] had made Database a small fortune and given that I have great respect for his business skills, I was persuaded to back him and become a shareholder in the Company". We discuss Bentley in more detail below.
79. In short, there are a number of common investments and dealings, although there are also separate investments and dealings. We do not consider that an association is necessarily undermined by examples of separate investments or dealings. And not all the common investments and dealings are in shares. For example, Mrs Chaudhri is part owner of a shop and flat complex in Perth with her siblings, including Mr Khan.

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<sup>26</sup> Top 20 shareholder lists in the each of the 2007, 2008, 2009 and 2010 Annual Reports for Alara

<sup>27</sup> Mr Chaudhri has a relevant interest in Bentley shares due to the association found between him and Mrs Chaudhri in relation to Queste by virtue of s608(3)(a) and (b)

80. Mr Khan acknowledged common investments in his response to preliminary findings: *"There have been a number of common investments and dealings between Mr Khan, Mrs Chaudhri, Mr Chaudhri and various companies controlled by those parties."*

81. He also acknowledged prior collaborative conduct:

*The prior collaborative conduct occurred in relation to the IPO of two "dot com companies" in March 2000 (in the case of Fast Scout) and November 1998 (in the case of Queste). Along with most other early "dot com companies" the business models of those two companies failed long ago and those companies have long since taken a different course. Since those times there has been no collaborative conduct between Mr Khan and either Mrs Chaudhri (apart from his facilitation of her investment in Bentley and their joint investment in property in Perth via a gift from their parents) or Mr Chaudhri (apart from presumably the discharge by both gentlemen of their duties as directors of Queste to guide the direction of that company for the benefit of all of its shareholders).*

82. The common investments and dealings in our view support an inference of association in relation to Bentley.

#### **Association in relation to Bentley**

83. The applicants submitted that Mrs Chaudhri (via DBS) acquired shares in Bentley in breach of s606, taking her and Mr Khan in aggregate to approximately 49% control of Bentley. This was because Mr Khan had a relevant interest in approximately 30.7% and Mrs Chaudhri (via DBS) acquired approximately 10.45% in 2009 and a further approximately 8% in April 2011. It is the acquisition in April 2011 that we are concerned with.

84. On 24 August 2009, a substantial holding notice was lodged indicating that DBS and Mrs Chaudhri had acquired a relevant interest in shares and voting power of 8.356% in Bentley.<sup>28</sup> On 26 August 2009, this increased to 10.451% by on-market acquisitions.<sup>29</sup> On 11 April 2011, DBS and Mrs Chaudhri lodged a further substantial holding notice indicating that this had increased to 18.487%.<sup>30</sup>

85. The chronology in relation to the 2009 acquisitions is as follows:

- (a) In March 2009, Bentley completed a merger with Scarborough Equities Limited. At this time, Bentley shareholders also approved a new investment mandate.
- (b) In late May 2009, Mr Barnett and another shareholder, who together controlled 6% of Bentley, wrote to the board seeking that the company convene a general meeting to approve a return of capital as they were dissatisfied with the new investment mandate. No meeting was held to consider the return of capital.

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<sup>28</sup> Form 603 for Bentley dated 24 August 2009

<sup>29</sup> Form 604 for Bentley dated 27 August 2009

<sup>30</sup> Form 604 for Bentley dated 11 April 2011

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- (c) Mr Khan approached Mrs Chaudhri to see whether DBS would be interested in acquiring the shares that the disgruntled shareholders may have been willing to sell.
  - (d) On 18 June 2009, DBS started to acquire shares in Bentley.<sup>31</sup> Mr Khan had been suggesting that she buy stock in Bentley for some time. Mrs Chaudhri had given instructions to her stockbroker to acquire up to 10% of the shares in Bentley on market, provided that the average price was no greater than 34 cents per share.
  - (e) Between 18 June 2009 and 31 July 2009, DBS acquired 933,055 shares in Bentley on market at an average price of 28.7 cents per share.<sup>32</sup>
  - (f) In June 2009, Mr Barnett and other shareholders requisitioned a general meeting of Bentley to remove Mr Khan and Mr Johnson from the Bentley board. It is unclear when the prospect of the requisition was first raised with the board, but certainly the timing of DBS starting to acquire shares in Bentley is coincidental at the least.
  - (g) On 7 August 2009, the general meeting to consider the removal of Mr Khan and Mr Johnson from the Bentley board was held and the resolutions to effect their removal were defeated.
  - (h) On 14 August 2009, Bentley announced that some shareholders still favoured a return of capital first proposed by Mr Barnett and that it would convene a general meeting to consider an off-market share buy-back. The Bentley board did not support the buy-back.<sup>33</sup>
  - (i) On 19 August 2009, DBS acquired a further 4,056,396 shares in Bentley on market at 33.9 cents per share.<sup>34</sup>
  - (j) On 26 August 2009, DBS acquired a further 1,500,000 shares in Bentley on market for a total of \$447,697.50 (an average price of 29.85 cents per share).<sup>35</sup> On 26 August 2009, Mr Barnett sold 1,500,000 Bentley shares on market.<sup>36</sup> The volume of Bentley shares traded on ASX on 26 August 2009 was 1,500,000. This indicates that DBS acquired the Bentley shares that Mr Barnett sold on ASX on 26 August 2009.
  - (k) On 9 October 2009, the general meeting was held to consider the off-market buy-back and the resolution to approve the buy-back was defeated.
86. The applicants submitted that *“The buying by Mrs Chaudhri in 2009 was done at a time when Mr Khan’s control of the company was in the balance”* and that the timing of these acquisitions was demonstrative of an association between Mr Khan and Mrs Chaudhri in relation to Bentley.

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<sup>31</sup> Form 603 for Bentley dated 24 August 2009

<sup>32</sup> Form 603 for Bentley dated 24 August 2009

<sup>33</sup> Notice of meeting for the extraordinary general meeting to consider the buy-back proposal released on ASX on 9 September 2009

<sup>34</sup> Form 603 for Bentley dated 24 August 2009

<sup>35</sup> Form 604 for Bentley dated 27 August 2009

<sup>36</sup> Form 605 for Bentley dated 27 August 2009

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87. Mr Khan submitted that he encouraged DBS to acquire the shares in Bentley so as to ensure that *“all shareholders were supportive of the new direction of the company and that if any shareholders were not supportive, to assist them in exiting the register of the company in favour of those that were supportive of the new direction.”* However, he denied controlling Bentley.
88. Mrs Chaudhri submitted that the *“investment made by Database Systems, at my direction, in Bentley Capital Ltd, were made solely on a commercial basis to make money”*. In support of these submissions, Mrs Chaudhri also submitted that:
- (a) she had great confidence in her brother’s commercial acumen
  - (b) she supported the new investment mandate
  - (c) the NTA backing of Bentley had fallen only 14% during the global financial crisis while the Australian market had fallen 35%
  - (d) Bentley had a long record of paying dividends and
  - (e) the price of Bentley shares was less than its NTA backing.
89. Between 1 January 2009 and 17 June 2009, shares in Bentley traded on ASX between a low of 20 cents per share and a high of 26 cents per share. We note that the price Mrs Chaudhri was prepared to pay in June 2009 may have been below the NTA per share of Bentley and that she was acquiring shares at the time Bentley had announced the proposed resolution to consider buying back shares at 35 cents per share. We note also that to flush out a large parcel in a thinly traded stock may require the buyer to pay a higher price. However, Mrs Chaudhri’s instructions were to buy on market, but at an average price no more than approximately 30% above the highest price in the last 6 months.
90. DBS was willing to pay a price for shares in Bentley that exceeded the previously prevailing market price. In our experience, Mrs Chaudhri’s preparedness to pay above the previously prevailing price seems uncommercial unless she and Mr Khan were acting in concert, or perhaps had an agreement, arrangement or understanding in relation to Bentley.
91. The monetary value of the investment by DBS in Bentley was \$3,746,766, which is a significant amount. Mrs Chaudhri could be expected to be “supportive” as she was responding to her brother’s encouragement to buy shares. This is strengthened by their family relationship. The acquisitions were commenced around the time when shareholders were seeking to remove Mr Khan from the board, and in fact DBS’s proxy was cast against his removal.
92. We infer that DBS would use its voting power to influence the affairs of Bentley consistently with Mr Khan's objectives, and that the acquisition of the shares in 2009 was probably done pursuant to Mrs Chaudhri and Mr Khan acting in concert, or perhaps having a relevant agreement, in relation to the Bentley.
93. Mrs Chaudhri submitted that each of the investments by DBS in Bentley occurred without any involvement of Mr Chaudhri.

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94. Mr Khan, on the other hand, submitted that Mrs Chaudhri had never said there were no discussions between her and her husband in relation to Bentley.
95. It seems unlikely, in our view, that there would have been no discussions of such a significant monetary investment by DBS. Mrs Chaudhri has acknowledged that she and Mr Chaudhri did discuss common investments. We infer that they discussed this investment.

#### *Proxies*

96. The applicants submitted that *"Mrs Chaudhri provided to Mr Khan open proxies in relation to her Bentley shares, allowing Mr Khan complete discretion as to how they be voted."*
97. Mr Khan submitted that *"Section 16(1)(d) of the Corporations Act provides that (in summary) a person is not an associate of another person merely because one has appointed the other to vote as a proxy (otherwise than for valuable consideration)."*
98. We agree that a proxy for one meeting does not, on its own, give rise to an association. However, here there is much more.
99. We asked the parties to provide a copy of the document appointing Mr Khan as proxy for DBS for the extraordinary general meeting of Bentley on 9 October 2009. We also asked the parties to provide other documents effecting the appointment of a proxy by Mrs Chaudhri (or entities associated with her). Bentley held a number of meetings in 2009:
  - (a) on 7 August 2009, the meeting requisitioned by shareholders to consider removing Mr Khan and Mr Johnson from the Bentley board
  - (b) on 9 October 2009, to consider approving the buy-back and
  - (c) on 20 November 2009, the AGM which included resolutions for the re-election of Messrs Johnson and Simpson and the election of Mr Moffat as directors.
100. We were provided with documents in response to our request. Information regarding the proxies was not before the initial Panel.
101. The general meeting of Bentley to remove Mr Khan and Mr Johnson was held on 7 August 2009. DBS gave a proxy appointing Mr Khan (as Chairman) as its proxy. The voting instructions on the proxy form directed the proxy to vote against the resolutions to remove Mr Khan and Mr Johnson from the Bentley board. Mrs Chaudhri submitted that her faith in her brother caused her to direct the proxy vote against his removal. Mr Chaudhri was listed as the contact in relation to the proxy and he co-signed it. We understand that Mr Khan voted DBS's shares in accordance with these instructions. The resolutions effecting the removal of Mr Khan and Mr Johnson both failed. Approximately 27 million shares (72.5% of the votes cast) voted against each resolution and approximately 10 million shares (27.5% of the votes cast) voted for the resolutions.
102. In our view, the directed proxy following the acquisitions of shares (above the previously prevailing market price) explains the intention behind the acquisitions.



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103. The subsequent acquisition of shares, including from Mr Barnett who had agitated for a return of capital and then removal of directors, is similarly explained.
104. The general meeting of Bentley to consider the buy-back was held on 9 October 2009. Initially, a return of capital had been proposed as part of the board spill requisition above. The return of capital was for almost all of the company's capital and would therefore have effectively been the end for Bentley as a viable listed investment company.<sup>37</sup> The return of capital proposal had not been put to the vote and this general meeting was called by the board of Bentley to address the issue. The proposed buy-back was limited to \$8.75 million out of the company's \$28 million net tangible assets at the time of announcement.<sup>38</sup> However, the board of Bentley, including Mr Khan, recommended that shareholders vote against the buy-back proposal.<sup>39</sup> DBS appointed Mr Khan as its proxy. This was an open proxy as the voting instructions had not been completed. Mr Chaudhri was listed as the contact in relation to the proxy and he co-signed it. Mr Khan did not cast the votes attached to the 7,481,544 shares that DBS held on the resolution. The resolution failed with 21,849,521 shares (55% of the votes cast) voted against the resolution and 17,619,279 (45%) voted for the resolution.
105. Of this, the initial Panel said:
43. ... Further, Mr Khan submitted that, if the 2009 buy-back resolution had been approved and the buy-back had proceeded, the percentage holding of Orion would have increased from 28.7% to 44% and that his opposition to the buy-back undermined the applicants' submission that Mr Khan and Mrs Chaudhri were working together to acquire control of Bentley. This submission has some merit.
106. We understand the position adopted by the initial Panel, but having explored the proxy issue closely (which proxy form was not before the initial Panel), we think there are a number of reasons why the shares may not have been voted, including that Mr Khan was opposed to the buy-back as it would have removed capital from Bentley, and DBS's votes were not needed to defeat the proposal.
107. There was a post-it note attached to the copy of this proxy form retained by DBS, which read: "Azhar, Farooq called chasing this. Please sign and send to Victor [the company secretary] or Farooq. Please don't tick any boxes as I haven't decided what to do, Ambi". Mrs Chaudhri submitted that this evidenced her independent decision.
108. Mrs Chaudhri is an experienced businesswoman, holds postgraduate qualifications, and has studied law. We infer that she is well aware of the effect of an open proxy.
109. We infer from the post-it note that Mr Khan was chasing the proxy from DBS to shore up support for his (and the board's) position that shareholders not approve the buy-back proposal. Whether DBS's shares needed to be voted could have been decided when all the proxies were in. Ultimately, Mr Khan did not require the

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<sup>37</sup> ASX announcement released by Bentley on 14 August 2009

<sup>38</sup> ASX announcement released by Bentley on 14 August 2009

<sup>39</sup> Notice of meeting for the general meeting to consider the buy-back released on ASX on 9 September 2009

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support of DBS. Accordingly, the view could be taken that the open nature of the proxy does not necessarily support an independent decision. We take the view that the decision may have been taken by Mrs Chaudhri without involving Mr Chaudhri, but not without involving Mr Khan. However, Mr Chaudhri must have at least acquiesced as he is a director of DBS, was the person who lodged it and is the contact named on it.

110. Mrs Chaudhri submitted that it was more inconvenient to have DBS's company secretary, who was resident in Malaysia and had been the company secretary since incorporation, sign a proxy than Mr Chaudhri.
111. Mrs Chaudhri also submitted that all DBS's records were maintained at her husband's office because it avoided her having to duplicate an office and the power supply was more reliable in Islamabad than Rawalpindi.
112. Mr Khan submitted that it was common commercial practice for companies to follow up shareholders to submit their proxies for general meetings in favour of the board's recommendations. We agree, and alone this fact would not be determinative. But it is part of a matrix of facts.
113. The initial Panel found that "*While the proxy raised questions, we consider that, even if there was an association between these parties in 2009 in relation to voting at a particular meeting, there was insufficient logical and probative material to suggest that an association is continuing*".<sup>40</sup>
114. In response to preliminary findings, Mr Khan submitted that voting as he was instructed by Mrs Chaudhri was "*a standing practice that where Mrs Chaudhri gives an open proxy to her brother she will subsequently tell how to vote, otherwise he will not vote the shares.*" This is a continuing arrangement and in our view supports an inference of association in relation to Bentley.
115. The annual general meeting of Bentley was held on 20 November 2009. DBS appointed Mr Khan as its proxy. This was an open proxy as the voting instructions had not been completed. Mr Khan voted DBS's 7,481,544 shares in favour of all resolutions except the election of Mr Moffat to the board. We have not been told whether Mrs Chaudhri contacted Mr Khan to instruct him how to vote the shares.
116. Bentley submitted that DBS did not lodge a proxy for the 2010 AGM and did not vote by corporate representative. Mr Khan's re-election as a director did not require the support of DBS. The resolution considering the re-election of Mr Khan was passed on a show of hands; however, the proxy votes received prior to the meeting indicated that 23,287,379 proxies (96.7%) were in favour of his re-election and 696,305 (2.9%) were against.
117. In our view, the voting of the shares by DBS in 2009 show support for Mr Khan throughout this period.
118. The acquisition of Bentley shares by DBS in April 2011 (which we discuss next) is consistent with the pattern. Indeed, if the previous transactions are not sufficient to

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<sup>40</sup> Bentley Capital Limited [2001] ATP 8 at [68]

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enable an inference of association to be drawn, the acquisition in April 2011 goes further in that direction and makes the inference stronger.

#### *Facilitation of the sale of the Simpson parcel to DBS*

119. Mr Peter Simpson was a director of Bentley from September 2005 until his death on 21 October 2010.<sup>41</sup> Mr Simpson or the Simpson family had an interest in a large parcel of shares in Bentley.
120. In December 2010, the Simpson family engaged the stockbroking firm Taylor Collison Limited to sell the Simpson family's shareholding in Bentley (**Simpson parcel**). Mr Hamish Nairn was a director of Taylor Collison and was responsible for the sale of the Simpson parcel. Mr Nairn provided a signed witness statement to the applicants. It was provided to the initial Panel by the applicants on 5 May 2011. Mr Khan submitted that his recollection of discussions with Mr Nairn was "*broadly consistent, although not identical with, Mr Nairn's statement*".
121. Mr Nairn's preferred strategy was to find a buyer for the entire Simpson parcel as Bentley was an illiquid stock. In early March 2011, Mr Nairn approached Mr Khan, as Chairman of Bentley, to suggest that Bentley buy-back the Simpson parcel. Bentley was not willing to do so, although Mr Khan submitted that he supported doing so.
122. In mid-March 2011, Mr Khan offered to acquire the Simpson parcel in exchange for "*a combination of cash and shares in ITS Capital Investments (ASX:ITS)*". On 17 March 2011, Mr Nairn advised Mr Khan that the Simpson family was not willing to sell on the terms proposed.
123. In late-March 2011, Mr Khan informed Mr Nairn that he was meeting someone who may be interested in acquiring the Simpson parcel and asked the price at which the Simpson family may be willing to sell. On 1 April 2011, Mr Nairn responded that the Simpson family would be willing to sell 6.53 million shares at 25 cents per share.
124. Mr Khan discussed the purchase of the Simpson parcel with Mrs Chaudhri.
125. Mrs Chaudhri submitted:

*With respect to the most recent purchase of shares in [Bentley], my brother approached me advising that the estate of Peter Simpson (a director of [Bentley] who had passed away) was a seller of shares and whether (sic) I would be interested in buying approx 6.5m shares in [Bentley]. He said he felt obliged to tell me that he had as Chairman of [Bentley] sought to have [Bentley] buy back the shares but that the board and investment committee of [Bentley] had rejected this. He was also interested himself once [Bentley] declined but could not reach terms on a sale.*

126. Mr Nairn and Mr Khan had several conversations in the period leading up to the eventual sale of the Simpson parcel to DBS. During these conversations Mr Nairn

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<sup>41</sup> Bentley ASX announcement dated 27 October 2010

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and Mr Khan negotiated terms of the sale including the price and number of shares the subject of the sale.

127. On 7 April 2011, Mr Nairn and Mr Khan agreed that Mr Khan's (undisclosed) purchaser would acquire 6 million Bentley shares from the Simpson family at 22 cents per share (ie \$1.32 million). Mr Nairn then spoke to Mr Troy Valentine of Patersons Securities Limited, DBS's stock broker, at Mr Khan's request in order to co-ordinate putting the sale through the market.
128. On 7 April 2011, DBS acquired 5,940,000 shares in Bentley on market for \$1,306,800 (ie 22 cents per share).<sup>42</sup> On 7 April 2011, Rochester No 39 Pty Ltd (a company associated with the Simpson family) sold 6,372,575 shares in Bentley on market.<sup>43</sup> The volume of shares traded on ASX on 7 April 2011 was 6,449,363. This indicates that most, if not all, the 5,940,000 shares in Bentley that DBS acquired on 7 April 2011 were from the Simpson family.
129. During the negotiations, the identity of Mr Khan's purchaser was not disclosed to Mr Nairn and it seems that at no point did Mrs Chaudhri have any direct contact with Mr Nairn. We infer that Mr Khan led the negotiations on behalf of DBS.
130. We see no valid reason for not disclosing who the purchaser might have been. Mr Khan submitted that, as it was a cash sale, the identity of the purchaser was "*completely irrelevant.*" According to his witness statement in the initial proceeding, Mr Nairn had reservations about selling to Mr Khan and his wife as he "*could not see how Mr Khan could himself buy the stock as it was over the 3% threshold.*" Clearly, Mr Nairn was conscious of the Corporations Act. Given his previous concern, it is unlikely that the identity of the purchaser would have been completely irrelevant to Mr Nairn. Putting the transaction through the market, rather than doing an off-market trade, would conceal the identity of the purchaser until after the transaction.
131. The applicants submitted that "*Mr Khan encouraged and was the sole facilitator and negotiator of Mrs Chaudhri/DBS' purchases of Bentley shares in 2009 and 2011.*" (Original emphasis)
132. The applicants pointed to s53(e) of the Act, which defines "*affairs of a body corporate*" to include the ownership of shares. In this respect, the applicants submitted that Mr Khan's facilitation of the sale of the Bentley shares held by the Simpson family in 2011 demonstrated the association between Mr Khan, Mr Chaudhri, Mrs Chaudhri and DBS.
133. We asked Mr Khan whether he had approached any other potential purchasers when facilitating the sale of the Simpson parcel. Mr Khan submitted that, beyond taking Mr Nairn's proposal that Bentley buy-back the Simpson parcel to the board and offering to acquire the shares himself, he approached only Mrs Chaudhri. In our view, each of his three proposals for the Simpson parcel had a beneficial control impact in relation to Bentley for him.

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<sup>42</sup> Form 604 for Bentley dated 8 April 2011

<sup>43</sup> Form 605 for Bentley dated 8 April 2011

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134. We also asked Mr Khan whether he had involved the Bentley board when facilitating the sale. Bentley submitted that Mr Khan had not involved the board in relation to the facilitation of the sale of the Simpson parcel.
135. We note that Mr Ryan, another director, had sought to facilitate the sale to another investor.
136. In our view the history of DBS's involvement with Bentley, the fact that Mr Khan did all the negotiating for this parcel of shares (which, even within parameters, goes beyond merely facilitating), the fact that the identity of the purchaser was not made known and Mrs Chaudhri's support for her brother, all point to the acquisition being in furtherance of the parties acting in concert, or perhaps having a relevant agreement, in relation to the affairs of Bentley.
137. The initial Panel found that "*facilitation is not, of itself, conclusive of an association. Of course, in doing so the Chairman must be very careful not to cross a line dividing a willing investor from an associated party, particularly where the Chairman has a relevant interest in a substantial number of shares in the company (as is the case here)*".<sup>44</sup>
138. In our view, Mr Khan crossed that line when facilitating the purchase of the shares by DBS.
139. We have no reason to believe that Mrs Chaudhri did not discuss this investment with Mr Chaudhri, a director of DBS and her husband, as she had done on other occasions.

#### Other issues

##### *History of responses to the Panel*

140. The applicants submitted to the initial Panel that "*Our understanding is none of Mr Chaudhri, Mrs Chaudhri or DBS appear in the Top 20 of any other ASX listed company, other than those companies of which Mr Khan is a Director*".
141. The initial Panel asked Mr Khan, Mrs Chaudhri and Mr Chaudhri (and the entities associated with each of them) to provide details of all common directorships, common shareholdings and other arrangements regarding Australian listed companies. The questions were:
10. *Please provide details of all common directorships in Australian listed companies (past and present) between:*
    - (a) *Mrs Chaudhri (or her nominee) and Mr Khan (or his nominee) and*
    - (b) *Mr Chaudhri (or his nominee) and Mr Khan (or his nominee).*
  11. *Please provide details of all common shareholdings in Australian listed companies (past and present) between:*
    - (a) *Mrs Chaudhri (or entities associated with her) and Mr Khan (or entities associated with him) and*
    - (b) *Mr Chaudhri (or entities associated with him) and Mr Khan (or entities associated with him).*

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<sup>44</sup> Bentley Capital Limited [2001] ATP 8 at [41]

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12. *Please provide details of any other arrangements relating to holdings in Australian listed companies (past and present), such as trust or nominee arrangements, between:*
- (a) *Mrs Chaudhri (or entities associated with her) and Mr Khan (or entities associated with him) and*
  - (b) *Mr Chaudhri (or entities associated with him) and Mr Khan (or entities associated with him).*

142. The responses were in some cases incomplete and in other cases inaccurate.

### *Common shareholdings*

143. Mr Khan submitted that Mr Chaudhri and he previously each had a nominal shareholding in Fast Scout, which they had received as directors prior to its IPO. Mrs and Mr Chaudhri and DBS submitted something similar – that Mr Khan and Mr Chaudhri had only a nominal shareholding (20 shares) in Fast Scout upon its establishment.

144. However, as noted earlier, DBS held over 99% of the shares in Fast Scout prior to the IPO and 58.97% of the shares upon listing. At this time, Mrs Chaudhri had a beneficial interest in 50% of the shares in DBS (held on trust for her by Mr Khan) and Mr Chaudhri held 25% of the shares in DBS. Moreover, Mr Khan, Mr Chaudhri and Mrs Chaudhri were all directors of DBS.

145. Mr Khan submitted that the shares he held in DBS on trust for Mrs Chaudhri and the shares in DBS held by Mr Chaudhri were not shareholdings in Australian listed companies. Mrs Chaudhri submitted that their joint submission to the initial Panel had been “*accurate, but it was inadvertently incomplete*”. She submitted that the extent of DBS’s investment in Fast Scout was a matter of public record.

146. It was clear what the initial Panel was trying to find out by its brief and the answers were technical and misleading. The submissions to the initial Panel were, in our view, inaccurate.

### *Other arrangements*

147. Both Mr Khan, and jointly Mr and Mrs Chaudhri, also responded to the brief by the initial Panel that there were no other arrangements or relationships other than disclosed on the public record in terms of Fast Scout and Queste.

148. We consider it unusual that they would each answer the question in this same way. It seems apparent, and we infer, that the response by Mrs and Mr Chaudhri (who made joint submissions to the initial brief) and Mr Khan had been co-ordinated.

149. Moreover, the responses to the initial Panel were curt and did not identify or explain these other arrangements. While information was provided when directly asked for, this gave us a sense that each part of the factual matrix was not being revealed until its disclosure could no longer be avoided.

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150. The information provided to us regarding these other arrangement included:
- (a) Mrs Chaudhri's shareholding in DBS (the controlling shareholder of Fast Scout) was initially held by Mr Khan as trustee for her and
  - (b) Mr Chaudhri's shareholding in Queste is predominantly held through Renmuir and Chi Tung. At the time of Queste's IPO, the shares in Renmuir and Chi Tung were held on trust (by an unnamed nominee) for Mr Khan. Mr Khan then held the beneficial interest in the shares in Renmuir and Chi Tung on trust for Mr Chaudhri.
151. Neither Mrs Chaudhri nor Mr Khan produced copies of the trust deeds. Mrs Chaudhri, in response to preliminary findings, submitted that she was not asked to produce it. But she was asked about common investments and common shareholdings and it formed part of that history.
152. The trust structure involving Mr Khan holding shares for Mrs Chaudhri was unwound in April 2004. The trust structure involving Mr Khan holding interests for Mr Chaudhri was unwound in 2002. No explanation has been given why the trust structures were used or unwound.
153. By providing incomplete or inaccurate responses to the initial Panel, Mr Khan, on the one hand, and Mr and Mrs Chaudhri and DBS on the other hand, attempted not to reveal the extent of these past investments and structural links.
154. These investments and structural links are evidence in support of an association between Mr Khan and Mr and Mrs Chaudhri and DBS.
155. Such an association would make us more prepared to draw the inference of an association in relation to Bentley. The lack of clarity surrounding responses to questions by the initial Panel adds weight to such inference.

#### *Investments not involving Mr Khan*

156. We also asked whether Mrs Chaudhri, Mr Chaudhri and DBS had invested in any companies not involving Mr Khan.
157. Mrs Chaudhri submitted that, prior to May 2009, she had engaged in active share trading in a number of ASX listed stocks not involving Mr Khan. Mr Chaudhri submitted that he had business interests in Pakistan in property development, agriculture, brick manufacturing and car importation not involving Mr Khan.
158. No details were given as to whether DBS had invested in any companies not involving Mr Khan. However, it is clear that there are many investments made by Mrs Chaudhri, Mr Chaudhri and DBS in Australian companies that involve Mr Khan.

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#### *Partly paid shares in Queste*

159. In Mr Chaudhri's case, the investment in the partly paid shares in Queste supports an inference of an association in relation to Bentley. At Queste's IPO, Mr Chaudhri had 16 million of the partly paid shares. Another investor had 4 million: these were transferred to Mr Khan, who sold them to Mr Chaudhri, in the following way:
- (a) In late June 2002, the three co-promoters of Queste associated with the Australian Finance Group wanted to step down as directors and sell their fully paid shares and their 4,000,000 partly paid shares. They indicated a firm desire to sell the two parcels in one block.
  - (b) Mr Khan took the partly paid shares for \$2,579 as the price of the overall transaction (the VWAP for Queste fully paid shares was 3.82 cents per share on total volumes of 1,424,999 shares). Mr Chaudhri had also expressed an interest in the purchase of the partly paid shares. Mr Khan felt that Queste's 48.82% controlling interest in Central Exchange Ltd (now Orion) could significantly increase in value, adding value to the partly paid shares.
  - (c) Central Exchange was to convert to a mining company and acquire Juniper Resources Limited, but failed to raise the minimum subscription it needed under a prospectus dated 1 August 2002. This led Mr Khan to seek to dispose of the partly paid shares which he then felt had an unacceptable liability attaching to them without any prospect of upside by way of Central Exchange converting to a mining company.
  - (d) Mr Khan approached Mr Chaudhri, who acquired the partly paid shares for the same nominal amount Mr Khan had paid for them (the VWAP for Queste fully paid shares was 3.4 cents per share on total volumes of 38,000 shares).
160. At the time of the transfer to Mr Chaudhri, the fully paid shares in Queste were trading around 3.5 cents, and Mr Khan submitted that the real value of the partly paid shares was "*at best nominal*". Mr Khan submitted that he disposed of the partly paid shares "*because he considered the significant liability attached to the shares for the unpaid amount of the shares presented too great a risk when compared to the potential value of the shares*".
161. We asked Mr Chaudhri why he acquired these shares given the liability attaching to them. Mr Chaudhri submitted that he was comfortable with the risk exposure as he believed in the VOIP technology that Queste was developing and he placed value in one of the legacy mining assets that Orion held (Queste then owned 48% of Orion).
162. Subsequently:
- (a) In 2004, Queste's board (except Mr Chaudhri) felt that full value was not being reflected in the share price. It was felt that the gap could have been attributed to the 20 million partly paid shares on issue, "*which was creating and would continue to create a value shift from the holders of ordinary shares to the holder of the partly paid shares as the NTA of Queste increased.*"
  - (b) Queste entered into negotiations with Mr Chaudhri, led by the Chairman Mr Khan, to resolve that issue.



## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

- (c) In 2005 and in 2006, Queste's Annual Reports stated the desire to cancel the shares and that negotiations with Mr Chaudhri were continuing.
  - (d) Queste and Mr Chaudhri could not reach agreement.
  - (e) Following the failure to reach agreement, Queste made a call on the partly paid shares, which was paid by Chi Tung.
163. Mr Khan submitted that this was "*a clear indication that each of those parties are quite separate and distinct, act without reference to each other and pursue their own commercial objectives.*" We do not agree. The shares passed from Mr Khan to Mr Chaudhri, a 'negotiation' then took place to cancel them which was 'unsuccessful', and now approximately 1.5 cents per share has been called. But there have been no further calls, even though Mr Khan and the majority of the board felt that the shares shifted value from the holders of the fully paid shares.
164. This is another example of intra-family dealing and supports an inference of association in relation to Bentley.

#### Association in relation to Queste

165. In addition, we examine whether Mr and Mrs Chaudhri are associates in relation to Queste. If so, the acquisition of Bentley shares by DBS on 7 April 2011 would contravene or give rise to a contravention of the Corporations Act. Queste controls Orion. Orion holds 28.3% of the shares in Bentley. Therefore, by virtue of s608(3)(b), Queste has a relevant interest in the 28.3% of Bentley that Orion holds.<sup>45</sup>
166. Mr and Mrs Chaudhri, if associated, have aggregated voting power in Queste over 20%. Therefore, by virtue of s608(3)(a), they each would have a relevant interest in the 28.3% of Bentley that Orion holds. Mrs Chaudhri controls DBS. Accordingly, the acquisition of the Simpson parcel would contravene or give rise to a contravention of s606.
167. Mr Chaudhri was a founder and promoter of Queste, together with Mr Farooq Khan and Mr Yacoob Khan and others. Mr Chaudhri has been a director of Queste since its IPO in 1998. Mr Khan holds over 20% of the voting power in Queste.
168. In 1998, Mrs Chaudhri acquired 215,000 ordinary fully paid shares in Queste. She acquired them in the IPO of that company, at the request of Mr Khan, as the company needed spread to obtain listing. In 2003, she acquired a further 171,000 ordinary fully paid shares on market. In October 2010, DBS acquired 826,950 ordinary fully paid shares in Queste.
169. Taking into account also the votes attaching to the partly paid shares, DBS's holding in Queste gives it voting power of 2.76% and Mrs Chaudhri's direct holding gives her a further 1.29%.
170. Mr Chaudhri, through Renmuir and Chi Tung, has voting power over 19.63% (including all the partly paid shares) and directly he has voting power over another 0.03%.

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<sup>45</sup> Queste also holds 2.4% of Bentley directly

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171. Mrs Chaudhri submitted that she *“was responsible for the decisions that caused DBS to acquire the Queste shares”* and that *“these shares were acquired on market in October 2010, and without reference to Mr Chaudhri, through my control of DataBase and my authority to conduct its investment affairs”*. In response to preliminary findings, Mrs Chaudhri submitted that she had delegated authority to make certain decisions on behalf of DBS and had *“now searched through my records and located the instrument by which I was granted that delegated authority”*. This was an instrument dated 11 July 2005 and signed by Mr and Mrs Chaudhri, Mr Yacoob Khan and Mr Ayaz Khan, *“being the holders of 100% of the issued capital of [DBS]”*. The document granted Mrs Chaudhri *“full delegated authority on the terms herein to act for and on behalf of the board of directors of the Company and to exercise all rights, powers and entitlements as the board of the Company may exercise on their own to the exclusion of all others.”* The power expressly did not extend to issuing further shares in DBS. The authority was to remain in force for as long as Mrs Chaudhri held at least 82.7% of DBS.
172. Mr Chaudhri was a director of DBS. Mr Khan submitted that to create an association between a director and a company required something more than simply being a director. We agree. Here, Mr Chaudhri is a director, minority shareholder, co-signatory in DBS, acts in an administrative capacity for DBS, shares common investments with Mrs Chaudhri and is her husband. Mr Chaudhri’s authorisation was not required to execute trades by DBS using the Patersons’ account, but was required for any transfer of funds to a third party. Her investment was in Queste - *“his baby”*.
173. Mr Chaudhri submitted *“the shares in Queste held by Renmuir and Chi Tung are mine and I regard myself as being an important and large shareholder of Queste due to my holding of fully paid shares and the leverage associated with the partly paid shares in Queste.”*
174. Moreover, Mr Chaudhri submitted that he *“was the founder of Queste and regard it as my creation”* and referred to Queste as *“his baby”*. Even if Mr Chaudhri’s authorisation was not needed for the acquisition by DBS of the shares, it is implausible that there would not be discussion with him of this subject by Mrs Chaudhri, particularly as Queste involved a significant investment and involvement on the part of Mr Chaudhri.
175. Mrs Chaudhri also submitted *“I have never entered into, or ever considered or discussed with my husband or anyone else, entering into any agreement about the composition of the board of Queste or its affairs.”* However she submitted that they do speak about each other’s finances, investments and business activities.
176. We infer that Mrs Chaudhri discussed Queste’s affairs, and DBS’s investment in Queste, with Mr Chaudhri. Mr Chaudhri and Mrs Chaudhri are husband and wife. They are the only directors of DBS. Despite the delegated authority, Mr Chaudhri continues to have a role in DBS because accessing DBS’s account for payments to third parties required the authorisation of both of them. He also handles administrative matters for DBS, despite it having a long-serving company secretary. Mrs Chaudhri was investing in Mr Chaudhri’s *“baby”*. Indeed, in response to preliminary findings, Mr Khan submitted that *“Mr Chaudhri as a*

## Takeovers Panel

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*director of DBS may well have been aware of the purchase and may have discussed it with Mrs Chaudhri."*

177. Mr Chaudhri submitted that, while he was a founder of DBS, he is now "a minority shareholder in that company and exercise (sic) no control or influence over that company save for providing some free administrative support." In our view, his involvement goes beyond that.
178. There is a history of common investments and continuing shared dealings between Mr and Mrs Chaudhri. Mrs Chaudhri submitted that she and Mr Chaudhri had separated their financial affairs and there were many examples of the absence of commonality in their investments. This may be so, but there are many examples of commonality. Their relationship and common investments and dealings suggest an alignment of interests. Without proper explanation or evidence, we cannot be satisfied by general statements that Mrs Chaudhri and Mr Chaudhri separated their financial affairs.
179. At least with respect to the common investments, we do not accept that they act without reference to one another. Indeed, Mrs Chaudhri, in response to the preliminary findings, acknowledged as much. She said:
- There is no basis for your statement that you do not accept that my husband and I act without reference to one another – if that is supposed to mean that we are both involved in each other's business decisions.... This does not mean that we do not tell each other anything about each other's finances or investment or business activities. Of course we do. However we do not involve ourselves in each other's business, including investment, decisions....*
180. We infer that Mrs Chaudhri discussed DBS's investment in Queste with Mr Chaudhri.
181. We infer that she did so because Mr and Mrs Chaudhri are associates, in that they at least act in concert and perhaps have a relevant agreement, in relation to Queste for the purpose of controlling or influencing the conduct of that company's affairs.

## DECISION

### Declaration

182. Circumstances which are relevant to establishing an association include:
- (a) a shared goal or purpose
  - (b) prior collaborative conduct
  - (c) structural links
  - (d) common investments and dealings
  - (e) common knowledge of relevant facts and
  - (f) actions which are uncommercial.<sup>46</sup>
183. Elements of each of these circumstances exist here.

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<sup>46</sup> *Mount Gibson Iron Limited* [2008] ATP 4

## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

184. The historical position, that we infer is continuing, supports the inferences we have been asked to draw in the application.
185. We infer that Mr Khan, Mrs Chaudhri and DBS were acting in concert, or perhaps had a relevant agreement, in relation to the conduct of Bentley's affairs in relation to the acquisition of Bentley shares by DBS on 7 April 2011.
186. It follows that the acquisition by DBS of the Simpson parcel in April 2011 contravened or gave rise to a contravention of s606.
187. As an additional basis for a conclusion that unacceptable circumstances exist in relation to the acquisition of Bentley shares in 2011, we infer that Mr Chaudhri and Mrs Chaudhri were acting or proposing to act in concert, or perhaps had a relevant agreement, in relation to the conduct of Queste's affairs.
188. Neither the association in relation to Bentley nor the association in relation to Queste has been disclosed.
189. The acquisition of the Simpson parcel was the acquisition of a substantial interest, otherwise than in accordance with Chapter 6, in circumstances where the market was unaware of the aggregated voting power. In our view, the acquisition of control over voting shares in Bentley did not take place in an efficient, competitive and informed market and the holders of Bentley shares did not have a reasonable and equal opportunity to participate in any benefits accruing to the associated parties.

#### Declaration and Orders?

190. Accordingly, having had regard to the matters in s657A(3), we were minded to declare that the circumstances were unacceptable. We informed the parties and provided a further brief inviting submissions as to proposed orders. The orders we proposed included disclosure of the association and the option of seeking an Item 7 approval, which if not taken or if approval was not obtained, would have been followed by divestiture of the shares.
191. We were then offered undertakings based on these proposed orders to remedy the unacceptable circumstances which, as settled, are in Annexures A and B. The effect of the undertakings includes that:
  - (a) disclosure will be made of the association in Bentley that the Panel found
  - (b) DBS will be prevented from exercising any votes attaching to the Simpson parcel
  - (c) shareholders in Bentley, other than Mr Farooq Khan, Mrs Ambreen Chaudhri, DBS and any of their associates (**Associated Parties**), Mr Chaudhri, Orion and Queste or any of their associates will be invited to consider whether the acquisition of the Simpson parcel should be approved under Item 7 of s611
  - (d) if the Item 7 approval is not obtained, the Simpson parcel will be divested by DBS. This will happen by way of pro rata offer to all shareholders other than the Associated Parties, Mr Chaudhri, Orion and Queste. Any of the Simpson parcel shares remaining will be transferred to a stockbroker appointed by

## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

ASIC for sale. The Associated Parties, Mr Chaudhri, Orion and Queste will not be permitted to re-acquire them and

- (e) None of the Associated Parties may take into account any relevant interest or voting power that any of them had in the Simpson parcel for the purpose of the 'creep' exemption in Item 9 of s611.
192. Mrs Chaudhri submitted that divesting a large parcel of shares in a thinly traded stock "*could drive the share price down.*" She therefore proposed the intermediate step of the pro rata offer to shareholders before the shares were divested.
193. If the share price is driven down, all shareholders, and likely the company itself, could be unfairly prejudiced. In many cases, that consequence may be unavoidable. In this case, we are prepared to accept the offer of this step.
194. The applicants submitted that "*The serious nature of the unacceptable circumstances in this matter and its effect on Bentley minority shareholders warrants the Panel making a declaration of unacceptable circumstances and orders.*" In *Pinnacle VRB Ltd (No 5)*,<sup>47</sup> the Panel preferred not to make a declaration of unacceptable circumstances unless it was necessary to found orders or was justified by bad faith in the conduct of the directors.<sup>48</sup>
195. While the nature of the unacceptable circumstances here is serious, the undertakings achieve what orders would have achieved, and indeed more because of the intermediate step of the pro rata offer, and we are prepared to accept them and not make the declaration of unacceptable circumstances we would otherwise have made.
196. Divestment of shares is a significant step. In many cases it may be warranted without the prior step of consideration by shareholders for Item 7 approval. In our orders brief, we invited parties to consider such a prior step. ASIC submitted that this type of order was a departure from previous orders in similar circumstances, and may raise issues. Although different circumstances, in *Pinnacle VRB Ltd (No. 5)* ratification was proposed for a transaction. We think that the prior step should be available to shareholders in this case. Coupled with the divestment of any remaining shares, those shareholders can decide on an informed basis with the benefit of an Independent Expert's Report and other specified information, whether they are prepared to allow DBS to keep the shares or not.
197. The applicants submitted that it was not sufficient to limit the remedy to the Simpson parcel. However, we conducted proceedings in respect of that parcel, having taken the view that the acquisition in 2009 occurred too long ago and could have been brought forward at that time by the applicants. The legislation seeks to promote prompt resolution of disputes. The applicants, indeed also other shareholders or ASIC, may have remedies in respect of any acquisitions earlier than the Simpson parcel.

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<sup>47</sup> [2001] ATP 14

<sup>48</sup> C/f *Summit Resources Ltd* [2007] ATP 9 where the Panel made a declaration but no orders

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### Reasons - Bentley Capital Limited 01R [2011] ATP 13

198. The applicants also submitted that the costs of the review application should be met as a review would not have been needed "*had the Associated Parties not withheld information from the initial Panel as the review Panel has found.*" Whist we have found that some submissions were incomplete or inaccurate, we were minded, on balance, not to make any costs orders. However, as we decided to accept undertakings we did not decide the issue.

#### Post Script

199. At 11 July 2011, one week after we accepted the undertakings, neither Mr Khan nor Mrs Chaudhri and DBS had lodged substantial holder notices as required in undertaking 1.1. Section 671B allows two business days as a reasonable period after becoming aware of information for making disclosure. Therefore, we think that undertakings to lodge a substantial holder notice "as soon as practicable" should have been complied with before 11 July. We informed the parties that we were considering Court orders to enforce the undertakings. The substantial holder notices were subsequently lodged. The tardiness in complying with their undertakings is disappointing.

**Ian Ramsay**  
**President of the sitting Panel**  
**Decision dated 6 July 2011**  
**Reasons published 13 July 2011**

<b>Party</b>	<b>Advisers</b>
Bellwether and Mr Craig	Gilbert + Tobin
Mrs Chaudhri	Paul Fletcher & Co
Mr Khan	Bennett + Co



**Australian Government**

**Takeovers Panel**

**Annexure A**

**AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION ACT 2001 (CTH)  
SECTION 201A  
UNDERTAKING**

**BENTLEY CAPITAL LIMITED 01R**

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), Database Systems Limited and Mrs Ambreen Chaudhri undertake to the Panel:

1. Substantial holding disclosure undertaking

1.1. The Associated Parties must, as soon as practicable, give notice of their substantial holding in relation to their voting power in Bentley and their association, including disclosing:

- (a) the name of each associate who has a relevant interest in voting shares in Bentley
- (a) the nature of their association
- (b) the relevant interest of each associate and
- (c) details of any relevant agreement through which they have a relevant interest in Bentley shares.

2. Standstill undertaking

2.1. Until either undertaking 4 or 5 is satisfied, the Associated Parties must not:

- (a) acquire any further shares or interests in shares in Bentley or otherwise increase their voting power in Bentley
- (b) dispose, transfer or grant any security interest over any shares or interests in shares in Bentley or
- (c) exercise any voting rights attaching to the Breach Shares.

3. Operation of shareholder approval and divestment undertakings

3.1. DBS must give written notice to Bentley and the Panel immediately these undertakings are accepted that DBS proposes to seek shareholder approval for the acquisition of the Breach Shares.

3.2. The Associated Parties will do all things necessary to cause the meeting to be conducted in accordance with undertaking 4.

## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

- 3.3. If Bentley shareholders fail to approve the acquisition of the Breach Shares, then undertaking 5 applies.
4. Shareholder approval undertaking
- 4.1. DBS must call, and arrange to hold, a general meeting of Bentley under s249F<sup>49</sup> to put before the members a resolution to consider, and if thought fit, to approve the acquisition of the Breach Shares pursuant to Item 7 of s611 in accordance with these undertakings.
- 4.2. DBS must commission an independent expert selected from a list provided by ASIC to prepare an independent expert's report.
- 4.3. DBS must prepare a notice of meeting and explanatory memorandum for the shareholder meeting that includes the following:
- (a) a statement that any votes cast on the resolution by any of the Associated Parties, Mr Azhar Chaudhri, Orion and Queste, or any of their associates, will be disregarded
  - (b) all material information known to any of the Associated Parties required for shareholders to consider the acquisition of the Breach Shares by DBS in April 2011, including
    - (i) the identity of DBS, its directors, and its associates
    - (ii) the voting power that DBS would have if the acquisition is approved
    - (iii) the voting power that each of the Associated Parties would have if the acquisition is approved
    - (iv) the voting power that DBS would have if the acquisition is not approved
    - (v) the voting power that each of the Associated Parties would have if the acquisition is not approved
    - (vi) the effect of the undertakings given to the Panel and
  - (c) a copy of the independent expert's report.
- 4.4. The notice of meeting and explanatory memorandum must be in a form reviewed by ASIC and to which it has no objection.
- 4.5. DBS must arrange for the meeting be held at an appropriate venue in the central business district of Sydney.
- 4.6. DBS must arrange for the meeting be chaired by either Mr Christopher Ryan or Mr William Johnson, or if neither Mr Ryan nor Mr Johnson is available, the meeting must be chaired by a person independent of the Associated Parties, Mr Azhar Chaudhri, Orion and Queste as elected by the meeting.

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<sup>49</sup> References are to the *Corporations Act 2001* (Cth), unless otherwise stated



## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

4.7. DBS must reimburse Bentley any costs that it incurs associated with the meeting.

5. Divestment undertaking

5.1. This undertaking takes effect upon the happening of the event in undertaking 3.3.

5.2. Following compliance with undertaking 5.3 DBS will invite offeree shareholders to purchase the Breach Shares at a price of \$0.22 per share on the following basis:

- (a) each offeree shareholder will be invited to acquire shares pro-rata to their shareholding in Bentley subject to paragraph (e);
- (b) any offeree shareholder will be entitled to apply for additional shares at a price of \$0.22 per share;
- (c) if not all shares available for purchase pursuant to paragraph (a) are taken up, any offeree shareholder who has applied to purchase additional shares pursuant to paragraph (b) shall be entitled to take up these additional shares subject to paragraphs (d) and (e);
- (d) in the event there are not enough shares to satisfy all applications under paragraph (b), those applications will be accepted pro rata to the holdings of those offeree shareholders prior to the offers;
- (e) no offeree shareholder shall be entitled to acquire more shares than they would otherwise be entitled to acquire pursuant to Chapter 6; and
- (f) the invitation to purchase shall be open to the offeree shareholders to accept for a period of no less than 21 days.

5.3. DBS will:

- (a) If the shareholders meeting referred to in undertaking 4 does not approve the acquisition, within 7 days of the date of that meeting prepare a draft form of offer to comply with undertaking 5.2 and provide it to Bentley for comments, which Bentley shall provide to DBS with 2 business days of receiving the draft from DBS;
- (b) within 9 business days after the date of the Bentley shareholders meeting referred to in paragraph (a) above submit the draft offer (after taking into consideration comments received from Bentley) to ASIC for its review prior to dispatch to Bentley shareholders;
- (c) within 7 days of ASIC having no objection dispatch those invitations to the offeree shareholders;
- (d) within 3 business days of the close of the invitation period (and third party invitation period referred to in undertaking 5.2(f) above) provide to the parties, Panel and ASIC details of all shares proposed to be transferred by DBS as a result of the invitations including details of the proposed transferees; and

## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

- (e) transfer the relevant shares upon receipt of 'no objection' statements from the Panel and ASIC and upon receipt of payment for the shares such payment to be held on account of DBS.
- 5.4. DBS must reimburse Bentley for any costs it incurs associated with the invitation to purchase the shares.
- 5.5. DBS agrees that any Breach Shares that have not been sold to offeree shareholders will be vested in the Appointed Seller on trust for DBS.
- 5.6. The Appointed Seller will be instructed to:
- (a) sell the remaining Breach Shares in accordance with these undertakings
  - (b) account to DBS for the proceeds of sale, net of the costs, fees and expenses of the sale and any costs, fees and expenses incurred by ASIC
  - (c) dispose of all of the remaining Breach Shares within 3 months from the date of its engagement
  - (d) use the most appropriate sale method to secure the best available sale price for the remaining Breach Shares reasonably available at that time in the context of complying with these undertakings, including the stipulated timeframe for the sale of the Breach Shares
  - (e) unless the Appointed Seller sells the remaining Breach Shares on market, obtain from any prospective purchaser of the remaining Breach Shares a statutory declaration that the prospective purchaser is not associated with any of the Associated Parties, Mr Azhar Chaudhri, Orion or Queste and
  - (f) not sell any of the remaining Breach Shares to the Associated Parties, Mr Azhar Chaudhri, Orion or Queste or any of their associates.
- 5.7. DBS and Mrs Chaudhri agree:
- (a) that neither they nor their associates will seek to acquire any of the remaining Breach Shares that may be sold on market and
  - (b) to use best endeavours to ensure that none of Mr Farooq Khan, Mr Azhar Chaudhri, Orion or Queste or any of their associates seek to acquire any of the remaining Breach Shares that may be sold on market.
- 5.8. None of the Associated Parties may take into account any relevant interest or voting power that any of them or their respective associates had, or have had, in the Breach Shares when calculating the voting power referred to in Item 9(b) of s611 of a person six months before an acquisition exempted under Item 9 of s611.
6. DBS and Mrs Chaudhri agree to confirm in writing to the Panel when they have satisfied their obligations under this undertaking.

## Takeovers Panel

Reasons - Bentley Capital Limited 01R

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### Interpretation

In this undertaking:

Term	Meaning
Appointed Seller	The investment bank or stock broker nominated by ASIC, who has first provided to ASIC a statutory declaration declaring that, after having made proper inquiries, the investment bank or stock broker is not aware of any interest, past, present, or prospective which could conflict with the proper performance of the functions in relation to the disposal of the remaining Breach Shares
ASIC	Australian Securities and Investments Commission
Associated Parties	In relation to Bentley means Mr Farooq Khan, Mrs Ambreen Chaudhri, DBS and any of their associates
Bentley	Bentley Capital Limited
Breach Shares	The 5,940,000 fully paid ordinary shares in Bentley acquired by DBS on or about 7 April 2011
DBS	Database Systems Limited
on market	in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing
offeree shareholders	Bentley shareholders other than: those registered in overseas jurisdictions where it is not reasonable as set out in listing rule 7.7.1 to make the invitation and the Associated Parties, Mr Azhar Chaudhri, Orion and Queste or any of their associates
Orion	Orion Equities Limited
Queste	Queste Communications Limited

Signed by Ambreen Chaudhri of 175A Sarwar Road, Rawalpindi with the authority, and on behalf, of DBS  
Dated 5 July 2011

Signed by Mrs Ambreen Chaudhri  
Dated 5 July 2011



**Australian Government**

**Takeovers Panel**

**ANNEXURE B**

**AUSTRALIAN SECURITIES AND  
INVESTMENTS COMMISSION ACT 2001 (CTH)  
SECTION 201A  
UNDERTAKING**

**BENTLEY CAPITAL LIMITED 01R**

Pursuant to section 201A of the *Australian Securities and Investments Commission Act 2001* (Cth), Mr Farooq Khan undertakes to the Panel:

1. Substantial holding disclosure undertaking

1.1. The Associated Parties must, as soon as practicable, give notice of their substantial holding in relation to their voting power in Bentley and their association, including disclosing:

- (a) the name of each associate who has a relevant interest in voting shares in Bentley
- (b) the nature of their association
- (c) the relevant interest of each associate and
- (d) details of any relevant agreement through which they have a relevant interest in Bentley shares.

2. Standstill undertaking

2.1. Until either undertaking 4 or 5 given by DBS and Mrs Chaudhri are satisfied, the Associated Parties must not:

- (a) acquire any further shares or interests in shares in Bentley or otherwise increase their voting power in Bentley; or
- (b) dispose, transfer or grant any security interest over any shares or interests in shares in Bentley.

## Takeovers Panel

### Reasons - Bentley Capital Limited 01R [2011] ATP 13

- 2.2. Until either undertaking 4 or 5 given by DBS and Mrs Chaudhri are satisfied, the Associated Parties will use their use best endeavours to ensure that none of Mr Azhar Chaudhri, Orion or Queste or any of their associates seek to acquire any of the remaining Breach Shares that may be sold on market.
- 2.3. Mr Farooq Khan agrees to confirm in writing to the Panel when he has satisfied his obligations under this undertaking.

#### Interpretation

In this undertaking:

<b>Term</b>	<b>Meaning</b>
Associated Parties	Mr Farooq Khan, Mrs Ambreen Chaudhri, DBS and any of their associates
Bentley	Bentley Capital Limited
Breach Shares	The 5,940,000 fully paid ordinary shares in Bentley acquired by DBS on or about 7 April 2011
DBS	Database Systems Limited
on market	in the ordinary course of trading on Australian Securities Exchange and not by crossing or special crossing

Signed by Mr Farooq Khan  
Dated 5 July 2011