



Australian Government

Takeovers Panel

**Reasons for Decision
Freshtel Holdings Limited
[2016] ATP 15**

Catchwords:

Withdrawal of application – entitlement offer – shortfall facility – disclosure – frustrating action – consent to withdraw an application – media canvassing

Corporations Act 2001 (Cth), sections 602, 652C

ASIC Act 2001 (Cth), section 195

Guidance Note 12 – Frustrating action

Gondwana Resources Limited [2014] ATP 9, Austock Group Limited [2012] ATP 12, Rey Resources Limited [2009] ATP 14, Babcock & Brown Communities Group [2008] ATP 25, Just Group Limited [2008] ATP 22, Australian Leisure & Hospitality Group Limited 02 [2004] ATP 21, Online Advantage Limited [2002] ATP 14, BreakFree Ltd (No. 2) [2003] ATP 30

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

INTRODUCTION

1. The Panel, Chelsey Drake, Christian Johnston (sitting President) and Jeremy Leibler, consented to a request by Dominet Digital Corporation Pty Ltd to withdraw its application in relation to the affairs of Freshtel Holdings Limited. The application concerned an entitlement offer announced by Freshtel during an on-market takeover bid by Dominet for all the shares of Freshtel. Freshtel and Dominet agreed to a resolution and the Panel was satisfied that it addressed the concerns raised in the application. Given the change in circumstances, the Panel consented to the withdrawal request.
2. In these reasons, the following definitions apply.

Dominet Dominet Digital Corporation Pty Ltd
Freshtel Freshtel Holdings Limited

FACTS

3. Freshtel is an ASX listed company (ASX code: FRE). It has a sub-contracted voice over internet protocol business and is otherwise searching for an appropriate investment opportunity.
4. Freshtel was the subject of an on-market takeover bid by Dominet at \$0.001 per share. The bid was announced and opened on 19 November 2015. It was due to close on 30 September 2016. The board of Freshtel recommended that shareholders reject the bid.

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5. On 19 August 2016, Freshtel announced a non-renounceable entitlement offer of 1 for 3 shares at an issue price of \$0.001 per share (together with 1 free attaching option exercisable at \$0.0025 for every 8 shares subscribed for and issued) to raise up to approximately \$375,000. Entitlements under the offer equated to 25% of total shares post-offer. The entitlement offer was fully underwritten by Patersons Securities Limited.
6. On 22 August 2016, Freshtel lodged the entitlement offer prospectus with ASIC.
7. The prospectus provided that any entitlement not taken up under the entitlement offer would form a separate shortfall offer that would remain open for up to 3 months. The directors of Freshtel reserved the right to issue securities under the shortfall offer *“at their absolute discretion”* and shareholders were advised not to *“apply for Shortfall Securities unless instructed to do so by the Directors”*.
8. On 26 August 2016, Freshtel lodged a supplementary prospectus with ASIC. The supplementary prospectus disclosed that the underwriting was fully sub-underwritten by six parties. Three of those parties were specifically identified in the supplementary prospectus because each could potentially hold a substantial interest in Freshtel if they were to take up all of their sub-underwriting commitments as follows:
 - CPS Capital Group Pty Ltd could potentially obtain voting power of 10.68% and
 - associates, Nightfall Pty Ltd and Willowdale Holdings Pty Ltd, could potentially obtain aggregate voting power of 9.28%. Freshtel disclosed that Nightfall and Willowdale are entities controlled by Mr Stephen Tomsic, a representative of Patersons.

APPLICATION

Declaration sought

9. By application dated 24 August 2016, Dominet sought a declaration of unacceptable circumstances. Dominet submitted that:
 - (a) the shortfall offer was structured so as to deny a reasonable and equal opportunity for shareholders to participate in the offer of a substantial interest in Freshtel. Dominet submitted that it had been advised by Freshtel that it could not participate in the shortfall offer and by the underwriter that it could not participate as a sub-underwriter or as a client of the underwriter
 - (b) the entitlement offer was designed to stymie Dominet’s takeover bid and
 - (c) there were deficiencies in the prospectus disclosure including in relation to effect on control, purposes of the offer, risk factors, underwriting terms and intentions.
10. Dominet submitted that the effect of the circumstances was that an acquisition of a substantial interest in Freshtel would occur in a market that was not efficient,

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competitive and informed (contrary to s602(a)¹) and when shareholders do not have a reasonable and equal opportunity to participate in the benefits of the share and option issues (contrary to s602(c)).

Interim order sought

11. Dominet sought an interim order to delay the opening and closing dates of the entitlement offer pending determination of its application.
12. The President of the Panel made an interim order (Annexure A) on 29 August 2016 to prevent dispatch of the prospectus and any supplementary or replacement prospectus.
13. In its preliminary submission, Freshtel submitted that the interim order would have the effect of delaying its fund raising and this would be materially prejudicial to Freshtel and its shareholders. The President of the Panel considered, among other things, the amount of cash Freshtel had on hand and the likelihood of Patersons terminating the underwriting agreement.² She considered that more harm arose from the dispatch of the prospectus and supplementary prospectus than from a short delay pending a determination by the sitting Panel of the issues raised by the application. While normally dispatch would not be delayed, in this case Freshtel's media release (see paragraph 33) coupled with the prospect of information deficiencies in the prospectus material³ and the fact of the bid, tipped the balance of convenience in favour of maintaining the status quo. The President considered that the sitting Panel (once appointed) could reconsider the interim order when considering whether to conduct proceedings. The President indicated to the parties that she was minded to make the interim order and invited submissions. No opposing submission was received.
14. We did not need to reconsider the interim order because we consented to the request to withdraw the application prior to deciding whether to conduct proceedings. The interim order came to an end upon the application being withdrawn.
15. Freshtel made a request for an interim order restricting Dominet from receiving any more acceptances under its takeover bid (by requiring suspension of trading in Freshtel shares). It submitted that the Panel proceedings should not be used "*as an artifice to coerce acceptances under a takeover offer*". The President left consideration of this issue to the sitting Panel.
16. We did not need to consider this request because we consented to the withdrawal of the application prior to deciding whether to conduct proceedings.

¹ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

² She noted also that Dominet's application had triggered a termination event under the terms of the underwriting agreement

³ Incorporating the supplementary prospectus

Final orders sought

17. Dominet sought final orders to prevent the entitlement offer from proceeding or, alternatively, that it not proceed without a priority shortfall facility for shareholders.

DISCUSSION

Decision to conduct proceedings

18. Freshtel made a preliminary submission that, if the application was considered in isolation (leaving aside the Dominet takeover bid), the Panel should not conduct proceedings because:
- (a) the directors of Freshtel took reasonable steps to minimise the potential control effect of the entitlement offer
 - (b) there were no change in control concerns as a result of the structure of the entitlement offer and the sub-underwriting commitments and
 - (c) all shareholders of Freshtel (including Dominet) would be able to maintain their existing holding in Freshtel by taking up their entitlements.
19. We met to consider whether to conduct proceedings but needed further information before making that decision. Prior to sending our request for further information, Freshtel advised us that it was in discussions with Dominet regarding a second supplementary prospectus to allay Dominet’s concerns about the structure of the entitlement offer and that, if agreement could be reached, Dominet would seek to withdraw its application. We agreed to hold off sending our request for information pending the outcome of the parties’ negotiations.
20. Shortly thereafter Freshtel and Dominet informed us that they had agreed the following:
- (a) a form of second supplementary prospectus which disclosed that:
 - (i) shortfall securities would be allocated by the underwriter (following reasonable consultation with Freshtel) and
 - (ii) if the underwriter’s right to allocate shortfall securities was terminated, then Freshtel would allocate the shortfall securities to shareholders applying for shortfall and, if the number of shortfall securities applied for exceeded the shortfall, it would allocate shortfall securities proportionally among applying shareholders according to their respective proportionate shareholdings in Freshtel
 - (b) upon lodgement of the second supplementary prospectus, Dominet would withdraw its application and takeover offer⁴ and
 - (c) pursuant to a Deed of Undertaking, subject to the lodgement of the second supplementary prospectus, Dominet would:

⁴ Dominet withdrew the unaccepted offers made under its on-market bid in accordance with s652C(i)(d) on the basis of Freshtel’s decision to undertake an underwritten entitlements offer, enter into the underwriting agreement and include the shortfall offer

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- (i) on the entitlement offer proceeding, not requisition a meeting of shareholders or seek to remove the current directors of Freshtel on or prior to 31 December 2016
- (ii) on the entitlement offer proceeding, not sell or transfer any of its Freshtel shares or options, other than through an on-market sale or unless the transferee agreed to be subject to the restrictions in clause (c)(i) above and
- (iii) from withdrawal of its takeover offer to 30 September 2016, not purchase any shares in Freshtel on-market.

21. Before deciding to consent to the request for withdrawal, we asked some questions of the parties.

Potential control impact

22. While the prospectus described the entitlement offer as being “fully underwritten”, the prospectus also stated that the underwriter would not have voting power in excess of 20% after the issue of the shortfall. The prospectus did not disclose the potential for the voting power of the underwriter to go to 25% if there was no take-up of entitlements and all sub-underwriters defaulted on their obligations. Freshtel agreed to clarify this inconsistency in the second supplementary prospectus.
23. After clarifying that Patersons could potentially hold more than 20% of Freshtel, it was clear that the entitlement offer involved a control transaction. We sought further information about, and became satisfied that, the sub-underwriting arrangements were sufficient to reduce the risk that this potential control effect would eventuate.
24. We also considered whether the sub-underwriters potentially taking a substantial interest in Freshtel, in the context of a takeover bid, was a control transaction. We noted, in particular, *Rey Resources Limited* where the Panel stated:
- In the context of a takeover bid, the acquisition by a single party of a 12% interest is significant. It is potentially key to whether the bidder will be able to proceed to compulsory acquisition...⁵*
25. We queried whether the 10% blocking stake to compulsory acquisition was an appropriate measure of control in the context of an unconditional, on-market bid where the bidder cannot expect to obtain a certain minimum percentage of shares. However, we did not need to decide this issue; CPS Capital Group Pty Ltd’s proposed dispersion strategy and the priority allocation of shortfall agreed to be given to Dominet (see below) meant that it was unlikely that any person would obtain over 10% of Freshtel.

⁵ [2009] ATP 14 at [16] (footnote omitted)

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Shortfall facility

26. We asked Freshtel to make further disclosure in the second supplementary prospectus regarding the allocation of shortfall under the shortfall facility, which it did. In addition, it disclosed that Patersons had agreed to allocate to Dominet from the shortfall (in priority to the sub-underwriters) a certain number of shares and options, subject to sufficient shortfall being available and the satisfaction of certain conditions.

Other disclosure

27. We were informed that Mr Tomsic of Patersons introduced a business opportunity to Mr Peter Buttery, a director of Freshtel. Freshtel advised that there was a connection to Mr Buttery because a part owner of the project had previously sat on a board with Mr Buttery. The Freshtel board decided against proceeding with the project. We asked whether disclosure was required in relation to the business opportunity. Freshtel submitted that no disclosure was required and we decided that we did not need to take this any further.

Frustrating action

28. We considered Dominet's submission that the entitlement offer stymied its takeover bid. Our preliminary view was that this was not a frustrating action under Guidance Note 12 – Frustrating action because the bid was unconditional and, therefore, the entitlement offer did not trigger a condition of a bid. However, in our view, the action could still be unacceptable.⁶ Given the parties' agreement and Dominet's proposed withdrawal of its bid, we did not need to decide this issue.

Consent to withdraw an application

29. In light of the parties' agreement on Dominet's participation in the entitlement offer, the revised disclosure and the withdrawal of the takeover bid, Dominet requested our consent to withdraw its application.⁷
30. The Panel's position has long been that it may refuse consent to withdraw an application if there is reason to suspect that unacceptable circumstances will occur or continue to occur. It has done so rarely - on only two occasions.⁸ There are often good reasons not to withhold consent.
31. Panel consent safeguards the public interest by protecting against the adverse effects of unacceptable circumstances that could otherwise remain unremedied as a result of a unilaterally withdrawn application. It may act as a "brake" to stop undue pressure to withdraw the application being brought to bear on an applicant.

⁶ See, for example, *Babcock & Brown Communities Group* [2008] ATP 25 at [29]-[36] and *Gondwana Resources Limited* [2014] ATP 9 at [31]

⁷ Procedural Rule 3.4.1 (made under s195 of the ASIC Act) requires an applicant to obtain the consent of the Panel to withdraw its application

⁸ *Online Advantage Limited* [2002] ATP 14 and *Austock Group Limited* [2012] ATP 12

DECISION

32. Given the parties' agreement and the additional disclosure provided by Freshtel in response to our concerns, we considered that it was not against the public interest to consent to the applicant withdrawing its application.

Other matters

Media canvassing

33. Prior to becoming a party to the proceeding and submitting a Notice of Appearance (which contains confidentiality and media canvassing undertakings), Freshtel made an ASX announcement titled "Response to Application to the Takeovers Panel and Prospectus Clarification". In the announcement, Freshtel set out submissions on why the Panel should decline to conduct proceedings in the matter. It also referred to material that it had given to the Panel but had not sent to the parties in the matter, despite a request from the Panel executive to do so.
34. The Panel's policy on media canvassing was made clear in *Just Group Limited* where the Panel stated: "*Panel proceedings are assisted if parties refrain from publicly debating issues that are before the Panel.*"⁹ The Panel has also stated it expects that parties will not attempt to avoid the undertakings by briefing the media prior to lodging a Notice of Appearance.¹⁰
35. Freshtel submitted that the announcement did not offend the spirit of the media canvassing undertakings because its release was not intended to "*attempt to avoid the undertakings*" or "*adversely affect its ability to resolve disputes as quickly and efficiently as possible.*"¹¹ It submitted that the announcement was released for the purpose of keeping its shareholders informed of the current status of the Panel application because it was concerned that the application may be used as a tool to pressure shareholders into accepting Dominet's bid. It also submitted that the announcement (including referencing materials not given to all parties) was not an abuse of process because it was released to the ASX and was therefore publicly available information.
36. We do not accept Freshtel's submissions. We consider that Freshtel's announcement offended the spirit of the media canvassing undertakings in light of the fact that Freshtel knew that it was going to be a party to the matter. The announcement (including the reference to materials not given to all parties) was inappropriate. As noted in *Australian Leisure & Hospitality Group Limited 02*: "*The Panel believes that its ability to resolve disputes as quickly and efficiently as possible will be adversely affected if parties seek to use publicity in any way and disapproves of any attempt by a party to use publicity to influence a decision of the Panel or detract from its authority.*"¹²

⁹ [2008] ATP 22 at [32]

¹⁰ See the Panel's media release TP10/48 "Confidentiality media canvassing undertakings" and website

¹¹ Referring to the Panel's media release TP10/48 "Confidentiality media canvassing undertakings"

¹² [2004] ATP 21 at [44]

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37. We further note that where comments are made in breach of the media canvassing undertakings, those comments become part of the factual background of the proceeding and may be a relevant consideration for the Panel (see paragraph 13).¹³

Christian Johnston
President of the sitting Panel
Decision dated 1 September 2016
Reasons published 16 September 2016

Advisers

Party	Advisers
Dominet Digital Corporation Pty Ltd	HWL Ebsworth
Freshtel Holdings Limited	Steinepreis Paganin

¹³ See, for example, *BreakFree Ltd (No. 2)* [2003] ATP 30 at [49]-[51]



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Annexure A
CORPORATIONS ACT
SECTION 657E
INTERIM ORDER

Freshtel Holdings Limited

Dominet Digital Corporation Pty Ltd made an application to the Panel dated 24 August 2016 in relation to the affairs of Freshtel Holdings Limited (**Freshtel**).

The President ORDERS that:

1. Without the consent of the President or sitting Panel (when appointed), Freshtel not dispatch to shareholders the prospectus lodged with ASIC on 19 August 2016 (including any supplementary or replacement prospectus) relating to its proposed non-renounceable entitlement offer.
2. This interim order has effect until the earliest of:
 - (i) further order of the President or the Panel
 - (ii) the determination of the proceedings and
 - (iii) 2 months from the date of this interim order.

Allan Bulman
Director, Takeovers Panel
with authority of Vickki McFadden
President
Dated 29 August 2016