



Australian Government

Takeovers Panel

Reasons for Decision

Lepidico Limited

[2017] ATP 11

Catchwords:

Withdrawal of application – consent to withdraw an application – independent expert’s report – supplementary disclosure – withdrawal rights

Corporations Act 2001 (Cth) section 640

Australian Securities and Investments Commission Regulatory Guide 9: Takeover bids; Regulatory Guide 111: Content of expert reports; Regulatory Guide 112: Independence of experts; Procedural Rule 3.4.1 Note 1

Freshtel Holdings Limited [2016] ATP 15

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
No	No	Yes	No	No	No

INTRODUCTION

1. The Panel, Alex Cartel, Elizabeth Hallett (sitting President) and Rebecca Maslen-Stannage, consented to a request by the Australian Securities and Investments Commission to withdraw its application in relation to the affairs of Lepidico Limited. Lepidico was the subject of an off-market takeover bid by Lithium Australia NL. The application concerned a report prepared by Leadenhall Corporate Advisory Pty Ltd reviewing the independent expert’s report included in Lepidico’s target’s statement. Lithium retracted the Leadenhall report and offered withdrawal rights to Lepidico shareholders who had accepted Lithium’s offer following Leadenhall’s report. Given the change in circumstances, the Panel consented to the withdrawal request.

2. In these reasons, the following definitions apply.

Bid	Lithium’s off-market bid for Lepidico offering one fully paid Lithium share for every 13.25 fully paid Lepidico shares
BDO	BDO Corporate Finance (WA) Pty Ltd
Leadenhall	Leadenhall Corporate Advisory Pty Ltd
Lepidico	Lepidico Limited
Lithium	Lithium Australia NL

FACTS

3. Both Lepidico (ASX code: LPD) and Lithium (ASX code: LIT) are ASX listed Western Australian-based lithium explorers and developers.

4. On 6 February 2017, Lithium announced the Bid.

5. On 28 March 2017, Lepidico released its target's statement recommending that Lepidico's shareholders reject the Bid. BDO prepared an independent expert's report and opined the Bid was "*neither fair nor reasonable*". BDO's independent expert's report accompanied Lepidico's target statement.
6. On 29 March 2017, Lithium engaged Leadenhall to undertake a review of BDO's independent expert's report.
7. On 7 April 2017, Lithium lodged a second supplementary bidder's statement that stated, among other things, that "*Leadenhall believes that BDO's opinion should have been that Lithium Australia's Takeover Offer is FAIR AND REASONABLE*".
8. Leadenhall's report reviewing BDO's independent expert's report accompanied Lithium's second supplementary bidder's statement. The Leadenhall report noted that its analysis was based solely on the content of BDO's report. Leadenhall acknowledged that it had not undertaken any independent analysis and did not have access to any underlying documents or the financial models used by BDO.¹
9. In its report, Leadenhall identified its concerns with the BDO independent expert's report. Under a sub-heading titled "*Opinion*", Leadenhall stated "*Based on the information and analysis provided in the BDO IER, we believe the opinion should have been that the Lithium Takeover Offer is fair and reasonable.*"²
10. On 10 April 2017, Lepidico released a supplementary target's statement which stated that BDO had reviewed Lithium's second supplementary bidder's statement and Leadenhall's report. BDO confirmed that "*there is no information contained in either document which would cause BDO to amend or change its analysis, methodology, or opinion.*"
11. Also on 10 April 2017, Lithium's second supplementary bidder's statement and the Leadenhall report were reported on by the West Australian and Business News. The by-line for the West Australian article noted that the article was sponsored.
12. Both articles stated that "*Leadenhall Corporate Advisory... concluded the independent expert should have found the bid to be fair and reasonable*".
13. Each day from 11 to 15 April 2017 (inclusive), Lithium shared the Business News article on Twitter, tweeting "*Review finds our Lepidico takeover bid fair and reasonable*".

APPLICATION

Declaration sought

14. By application dated 6 June 2017, ASIC sought a declaration of unacceptable circumstances. ASIC submitted that it was concerned that:
 - (a) Leadenhall did not have objectively reasonable grounds to provide an opinion on the Bid and therefore its report was misleading and
 - (b) Leadenhall was "*arguably not independent*".

¹ Page 5 of Leadenhall's report dated 6 April 2017

² Page 7 of Leadenhall's report dated 6 April 2017

Final orders sought

15. ASIC sought final orders that:
- (a) Leadenhall provide Lithium with a letter retracting the statements made by Leadenhall about its opinion on the Bid
 - (b) Lithium dispatch updated disclosure to Lepidico’s shareholders disclosing the need for Leadenhall’s letter and
 - (c) Lithium provide withdrawal rights to all Lepidico shareholders who accepted the Bid on or after 7 April 2017.

DISCUSSION

Our concerns and decision to conduct proceedings

16. Lithium made a preliminary submission that it would not be appropriate for the Panel to conduct proceedings because:
- (a) Lepidico’s supplementary target’s statement of 10 April 2017 should have addressed ASIC’s issues with Leadenhall’s report
 - (b) Lithium only received minimal acceptances from Lepidico shareholders following the release of Leadenhall’s report
 - (c) the tweets had been deleted³ and
 - (d) Lithium would offer withdrawal rights to those Lepidico shareholders who had accepted the Bid since the release of Leadenhall’s report.
17. Leadenhall made a preliminary submission that it was clear from its report that Leadenhall was not providing an opinion on whether the Bid was fair and reasonable. Rather, Leadenhall said it was providing an opinion on what BDO should have concluded based on the information included in the BDO report.
18. ASIC has detailed guidance in relation to independent expert’s reports in ASIC RGs 111 and 112, which apply to reports required under the Corporations Act (including s640⁴) as well as reports commissioned voluntarily.⁵ We were concerned that Leadenhall’s report, in providing a critique on the BDO report, expressed a view on what BDO should have concluded without undertaking its own analysis in accordance with ASIC RG 111 and had the potential to mislead Lepidico shareholders.
19. Acknowledging that we did not receive submissions and rebuttals from all parties, we make two comments on the circumstances as we currently understand them:
- (a) In our experience Leadenhall’s approach of publicly expressing a view about what BDO should have concluded, particularly as they did not have the

³ Lithium later, in its submission in response to the Panel brief, submitted that the tweets had been deleted on either 8 or 9 June 2017

⁴ References are to the *Corporations Act 2001* (Cth) unless otherwise indicated

⁵ *Regulatory Guide 111: Content of expert reports* at [RG 111.1] and *Regulatory Guide 112: Independence of experts* at [RG 112.1]

information that BDO had, was unusual and we were troubled by its possible impact on future market practice. We considered that we should seek documents relating to Leadenhall's engagement by Lithium given ASIC's concerns relating to Leadenhall's independence.⁶

- (b) We were also concerned that the publicity of Leadenhall's report sponsored by Lithium⁷ and tweeting may have exacerbated the potential for Lepidico shareholders to be misled by the report. Further, such sponsorship and tweeting may undermine ASIC's policy that information in bids be disseminated in formal supplementary statements.⁸

20. Therefore we decided to conduct proceedings.

Consent to withdraw an application

21. On 15 June 2017, Lithium lodged a fourth supplementary bidder's statement that retracted the Leadenhall report and advised Lepidico shareholders not to rely on the report in making decisions with respect to the Bid.
22. On 19 June 2017, the Bid closed. Lithium received acceptances for approximately 0.6% of Lepidico shares excluding those required by the pre-bid acceptance agreements. Following the Bid, Lithium had a relevant interest in 15.82% of Lepidico.⁹
23. After lodging its supplementary bidder's statement and the Bid closing, Lithium sought confirmation from ASIC that the matter had been resolved to ASIC's satisfaction.
24. Following further discussions between ASIC and Lithium, Lithium agreed to offer withdrawal rights to shareholders who accepted the Bid from 7 April 2017 to 15 June 2017.
25. On 22 June 2017, Lithium made a market announcement disclosing a letter to be sent to Lepidico shareholders who accepted Lithium's Bid between 7 April 2017 and 15 June 2017 to offer those shareholders withdrawal rights. The form of this letter was agreed between Lithium and ASIC.
26. In light of the above, ASIC requested our consent to withdraw its application.
27. 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.¹⁰ We are satisfied in this case that any potential unacceptable circumstances have been remedied by the above events. We therefore consent to ASIC withdrawing its application and do not consider it to be against the public interest to do so.

⁶ We did not need to reach a conclusion on this issue for the reasons outlined in paragraphs 21 to 27

⁷ Lithium confirmed in submissions that it had sponsored the West Australian article

⁸ ASIC RG 9.345

⁹ Lepidico ASX announcement 28/06/2017

¹⁰ Procedural Rule 3.4.1 Note 1, *Freshtel Holdings Limited* [2016] ATP 15 at [29] to [31]

Other matters

28. In response to our brief, Lepidico also made submissions outlining its concerns about Lithium's disclosure regarding a particular technology process. Lepidico sought additional final orders that Lithium provide withdrawal rights to all Lepidico shareholders who had accepted the Bid, including those Lepidico shareholders who entered into pre-bid acceptance agreements with Lithium.
29. We make no comment on the merits of such a claim but consider that the unacceptable circumstances complained of by Lepidico regarding the technology process disclosure by Lithium would require a new application.

Elizabeth Hallett

President of the sitting Panel

Decision dated 26 June 2017

Reasons given to parties 5 July 2017

Reasons published 11 July 2017

Takeovers Panel

Reasons - Lepidico Limited
[2017] ATP 11

Advisers

Party	Advisers
Leadenhall	Johnson, Winter & Slattery
Lepidico	Steinepreis Paganin
Lithium	Bennett + Co