



**Australian Government**

**Takeovers Panel**

**Reasons for Decision  
Keybridge Capital Limited 07  
[2020] ATP 11**

**Catchwords:**

*Withdrawal of application – consent to withdraw an application – incorrect acceptance– suspension of proceedings*

*Australian Securities and Investments Commission Act (2001) (Cth), section 201A*

*Australian Securities and Investments Commission Regulations (2001) (Cth), regulations 16, 20*

*Procedural Rules 3.1.1, 3.4.1*

*Keybridge Capital Limited 04, 05 & 06 [2020] ATP 6, Lepidico Limited [2017] ATP 11, Freshtel Holdings Limited [2016] ATP 15*

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

## INTRODUCTION

1. The Panel, Chelsey Drake, Bruce McLennan and Sharon Warburton (sitting President), consented to a request from Bentley Capital Limited and Scarborough Equities Pty Ltd to withdraw their application in relation to the affairs of Keybridge Capital Limited. The application primarily concerned incorrect acceptances by the Applicants into a takeover bid for Keybridge made by Aurora Funds Management Limited as responsible entity of the Aurora Dividend Income Trust. During the proceedings, the Applicants reobtained the relevant Keybridge shares. Given this and other changes in circumstances, the Panel consented to the withdrawal request.
2. In these reasons, the following definitions apply.

ADIT	Aurora Funds Management Limited as responsible entity of the Aurora Dividend Income Trust
ADIT's Bid	has the meaning given in paragraph 5
Applicants	Bentley and Scarborough
ASIC Act	<i>Australian Securities and Investments Commission Act (2001) (Cth)</i>
ASIC Regulations	<i>Australian Securities and Investments Commission Regulations (2001) (Cth)</i>
Bentley	Bentley Capital Limited
CHESS	Clearing House Electronic Subregister System
Disputed Acceptances	has the meaning given in paragraph 10

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Keybridge	Keybridge Capital Limited
Scarborough	Scarborough Equities Pty Ltd
WAM Active	WAM Active Limited
WAM Active's Bid	has the meaning given in paragraph 4

### FACTS

3. Keybridge is an ASX listed company (ASX code: KBC).
4. On 13 December 2019, WAM Active announced an off-market takeover bid for all the shares in Keybridge (**WAM Active's Bid**). WAM Active's Bid opened on 3 January 2020.<sup>1</sup>
5. On 8 January 2020, ADIT announced an intention to make an off-market takeover bid for all the shares in Keybridge (**ADIT's Bid**). ADIT's Bid opened on 6 March 2020.
6. On 28 February 2020, the Applicants emailed WAM Active accepting into WAM Active's Bid for the entirety of their Keybridge holdings<sup>2</sup> and posted acceptance forms to WAM Active's share registry.
7. On 3 March 2020, Bentley released an ASX announcement stating that: "*Bentley confirms that it has lodged acceptances in respect of all of its 31,700,000 Keybridge shares into the WAA 6.9c Offer*".
8. On 6 March 2020, the Applicants instructed their broker to convert their holdings in Keybridge, which were issuer sponsored at that time, to the Applicants' broker's CHESSE holder identification number for each of the Applicants.<sup>3</sup>
9. On 9 March 2020, WAM Active advised the Applicants to ask their broker to accept into WAM Active's bid via CHESSE. The Applicants subsequently instructed their broker to accept into WAM Active's Bid.
10. On 10 March 2020, the Applicants' broker incorrectly accepted into ADIT's Bid (instead of accepting into WAM Active's bid) in relation to the entirety of the Applicants' Keybridge holdings via CHESSE takeover messages sent to the share registry appointed to manage ADIT's Bid (**Disputed Acceptances**).
11. On 12 March 2020:
  - (a) ADIT lodged a notice of initial substantial holder disclosing that it had a relevant interest in 32,881,173 Keybridge shares (including 31,700,000 shares that had accepted into ADIT's Bid, being the Disputed Acceptances)

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<sup>1</sup> WAM Active's Bid was purportedly open when the events the subject of the Applicants' application occurred, but the Panel subsequently declared that WAM Active's Bid closed on 3 March 2020 subject to defeating conditions (see *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6 and *Keybridge Capital Limited 08R, 09R and 10R*)

<sup>2</sup> 31,700,000 Keybridge shares in aggregate

<sup>3</sup> It appeared that the Applicants encountered difficulties in having their acceptances processed into WAM Active's Bid, in relation to their issuer sponsored holdings. For more background, see *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6 at [28] and [55] to [72]

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- (b) as a result of ADIT's notice of initial substantial holder, the Applicants became aware that their Keybridge shares had been accepted into ADIT's Bid
- (c) the Applicants' broker:
  - (i) contacted ADIT's registry to advise that the Disputed Acceptances had been sent incorrectly and that the acceptance code for ADIT's Bid had been entered in error and
  - (ii) sought to reverse the Disputed Acceptances via CHES
- (d) the Applicants' lawyers wrote to ADIT to confirm that the Applicants' broker had sent the Disputed Acceptances erroneously and to request that ADIT's substantial holder notice be withdrawn and
- (e) Bentley released an ASX announcement stating that: *"Bentley has ascertained that its Broker made an administrative error in the process of accepting into the WAA Offer via CHES and had inadvertently accepted into the ADIT Offer. The Broker has advised Bentley that it is seeking to correct this administrative error via CHES"*.

12. On 13 March 2020:

- (a) the Applicants' broker emailed ADIT's registry noting that its CHES reversal request had been rejected and
- (b) Keybridge released an ASX announcement attaching a notice from ADIT dated 12 March 2020 declaring ADIT's Bid free from all its defeating conditions and confirming ADIT's voting power in respect of 32,881,173 Keybridge shares.

## APPLICATION

### Declaration sought

13. By application dated 16 March 2020, the Applicants sought a declaration of unacceptable circumstances. The Applicants submitted that:

- (a) the acquisition of control or potential control of Keybridge was not taking place in an efficient, competitive and informed market because:
  - (i) *"the Disputed Acceptances were clearly made other than in accordance with the intentions of their beneficial owners"* and
  - (ii) *"the effect of the Disputed Acceptances being processed by Aurora is that a departure from Bentley's last and final statement that it had accepted the off-market takeover bid from WAM Active will have occurred contrary to ASIC's 'truth in takeovers' policy"* and
- (b) *"unacceptable circumstances exist in relation to the ADIT Bid including that: ... the funding arrangements disclosed by ADIT in the ADIT Bidder's Statement do not provide sufficient certainty that ADIT will be able to perform its obligations under the ADIT Bid if a substantial proportion of the offers under the bid are accepted"*.

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### Final orders sought

14. The Applicants sought final orders:
- (a) to the effect that the Disputed Acceptances be reversed and any contracts between the Applicants and ADIT arising as a result of the Disputed Acceptances be cancelled and
  - (b) either ADIT's bid "be cancelled by reason of contravening section 631(2) of the Corporations Act 2001 (Cth) or otherwise giving rise to unacceptable circumstances by reason of the lack of certainty around availability of funding" or "ADIT lodge with ASIC and send supplementary disclosure in a form acceptable to the Panel".

### DISCUSSION

#### Interim orders

15. On 13 March 2020, prior to the Applicants making their application to the Panel on 16 March 2020, WAM Active emailed the Panel executive and stated that:

*This morning Aurora Funds Management Limited (Aurora) as Responsible Entity of the Aurora Dividend Income Trust (ADIT) announced that ADIT's off market bid for Keybridge (ADIT Offer) had been freed of all defeating conditions and released a section 650F notice suggesting ADIT holds a relevant interest in 32,881,173 KBC shares. This includes 31,700,000 KBC shares held by Bentley (Bentley Shares). Aurora was on notice when it release[d] this announcement that the Bentley Shares:*

- (a) *had already been accepted into WAM Active's bid, and therefore could not be accepted into the ADIT Bid (Bentley announced this acceptance on 3 March 2020); and*
- (b) *were 'accepted' into the ADIT Offer in error. Bentley released an ASX announcement (attached) to this effect yesterday.*

*Aurora's actions are misleading and WAM Active is concerned that, having declared the ADIT Offer unconditional, Aurora will now transfer ownership of the Bentley Shares it knows were accepted into the ADIT Offer in error.*

16. WAM Active applied "for urgent interim orders prohibiting the processing and transfer of the takeover offer acceptances received by Aurora in respect of the ADIT Offer". WAM Active also stated that: "To the extent required, WAM Active undertakes to promptly apply to the Panel for a new declaration of unacceptable circumstances in relation to the ADIT Offer".
17. Bentley made a submission supportive of WAM Active's interim order request, and submitted that it intended to lodge a Panel application in relation to the Disputed Acceptances. Given that this foreshadowed application was subsequently made by the Applicants (including Bentley), it was not necessary for us to call on the undertaking from WAM Active referred to in paragraph 16.
18. ADIT submitted that it "confirms that it was not intending to process the acceptances and in any case undertakes not to process any acceptances until the Panel proceedings are concluded".

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19. WAM Active's interim order request was put to the Acting President on an urgent basis. The Acting President made interim orders to the effect requested by WAM Active (Annexure A) in order to maintain the status quo pending the determination of the application (once received) by the sitting Panel (once appointed).
20. In relation to ADIT's offer of an undertaking, the Acting President considered it prudent for the decision as to whether to accept that undertaking to be made by the sitting Panel (once appointed), particularly given that no application for a declaration of unacceptable circumstances had been made at the time the Acting President considered the interim orders request.<sup>4</sup>
21. The Acting President's interim orders were expressed to have effect until the earliest of further order of the Acting President or the Panel, the determination of the proceedings and 2 months from the date of the interim orders (the interim orders were dated 13 March 2020).
22. On 13 May 2020, in order to maintain the status quo and in effect refresh the Acting President's interim orders (in light of their pending expiry), we made interim orders in the same terms (Annexure B).

#### Decision to suspend proceedings

23. As at the date of the application, Keybridge was the subject of three additional Panel applications.<sup>5</sup>
24. Given the number of matters in dispute, and the fact that orders were being sought in the other Panel applications which could affect the utility of conducting proceedings on this matter,<sup>6</sup> we asked the parties for submissions regarding whether we should make a direction under regulation 16(1) of the ASIC Regulations that the proceedings be suspended<sup>7</sup> until the earlier of:
  - (a) the determination of the *Keybridge Capital Limited 04, 05 & 06*<sup>8</sup> proceedings and
  - (b) further determination of the Panel lifting the suspension.
25. We received submissions from the Applicants and ADIT, and both were supportive of the proceedings being suspended. On 24 March 2020, we made the relevant direction. On that date, we also declined a request from the Applicants that these proceedings be heard together with the *Keybridge Capital Limited 04, 05 & 06* proceedings.<sup>9</sup> We declined that request as it would have been premature to decide the issues in these proceedings (including whether to conduct proceedings) before the outcome of the *Keybridge Capital Limited 04, 05 & 06* proceedings was known (as

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<sup>4</sup> Section 201A of the ASIC Act allows the Panel to accept a written undertaking "in Panel proceedings"

<sup>5</sup> Which were heard together in *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6

<sup>6</sup> For instance, in WAM Active's application dated 14 February 2020 (*Keybridge Capital Limited 04*), WAM Active sought final orders including that ADIT withdraw its bid "unless it is able to establish to the Panel's satisfaction that it has adequate funding for 100% of KBC Shares"

<sup>7</sup> See regulation 16(1)(i) of the ASIC Regulations

<sup>8</sup> [2020] ATP 6

<sup>9</sup> The Panel has the power to hear matters together under regulation 16(1)(a) of the ASIC Regulations

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the outcome of the other proceedings could affect the utility of conducting proceedings on this matter). We also sought to avoid unreasonably delaying the *Keybridge Capital Limited 04, 05 & 06* proceedings.<sup>10</sup>

26. On 7 April 2020, the Panel in *Keybridge Capital Limited 04, 05 & 06* made a declaration of unacceptable circumstances in relation to a number of matters. On 9 April 2020, the Panel made orders in those proceedings, which had the effect of automatically lifting our suspension direction (given the terms of our direction). A number of review applications were then made in respect of the decisions of the *Keybridge Capital Limited 04, 05 & 06* Panel.<sup>11</sup>
27. On 21 April 2020, in light of the aforementioned review applications, we sought submissions in relation to whether these proceedings should remain suspended. We received submissions from Keybridge, Bentley, ADIT and WAM Active. Keybridge, Bentley and Aurora were in favour of keeping these proceedings suspended for reasons including that the review applications “*may result in an outcome whereby the ADIT Bid is cancelled and all acceptances received voided or the Initial Panel’s Orders are confirmed*” and that “*the Panel should conclude Keybridge 08R, 09R & 10R prior to revisiting Keybridge 07, for the same reasons that Keybridge 07 was originally suspended*”. WAM Active was in favour of lifting the suspension.
28. On 30 April 2020, for the same reasons that we made the initial suspension direction, we directed under regulation 16(1) of the ASIC Regulations that the proceedings be suspended until the earlier of:
  - (a) the determination of the *Keybridge Capital Limited 08R, 09R and 10R*<sup>12</sup> proceedings and
  - (b) further determination of the Panel lifting the suspension.

#### Consent to withdraw the application

29. On 20 May 2020, the review Panel in *Keybridge Capital Limited 08R, 09R and 10R* affirmed the declaration and orders made in *Keybridge Capital Limited 04, 05 & 06*, which had the effect of automatically lifting our suspension direction (given the terms of our direction). One of the affirmed orders granted a withdrawal right to each person that had accepted into ADIT’s Bid.
30. With these proceedings no longer suspended, we then sought submissions as to whether we should conduct proceedings under regulation 20.<sup>13</sup>
31. Prior to receiving any such submissions, the Applicants informed us that: “*ADIT/Automic appears to have processed Bentley and Scarborough’s CHESSE Broker’s previous withdrawals from the ADIT Bid*” and “*Upon Bentley and Scarborough being satisfied that its withdrawal from the ADIT Bid has been completed ... we will withdraw our*

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<sup>10</sup> See Procedural Rule 3.1.1, note 8

<sup>11</sup> The review applications became *Keybridge Capital Limited 08R, 09R and 10R*

<sup>12</sup> [2020] ATP 9

<sup>13</sup> Of the ASIC Regulations

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*Application in respect of Keybridge 07 on the basis that there is no longer a need to consider the application and orders sought in the matter”.*

32. The Applicants subsequently advised us that their withdrawals from ADIT’s Bid had been processed and that they sought to withdraw their application.
33. Under Procedural Rule 3.4.1, an application may only be withdrawn with the consent of the Panel. We sought submissions as to whether we should (or should not) consent to the Applicants’ request. ADIT requested more time (on three occasions) to make submissions on the basis that its registry “*has incorrectly released the Bentley/Scarborough acceptance*”. We granted the extension requests, but ultimately neither ADIT nor any other person made submissions against us consenting to the Applicants’ withdrawal request.
34. The Panel's position is that it may refuse consent to withdraw an application if there is reason to suspect that unacceptable circumstances will occur or continue to occur.<sup>14</sup> As the Panel said in *Freshtel Holdings*, “*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*”.<sup>15</sup>
35. We are satisfied in this case that changes in circumstances mean that any potential unacceptable circumstances identified in the application have been sufficiently remedied. This is because the Applicants have since reobtained the Keybridge shares the subject of the Disputed Acceptances, addressing the issue referred to in paragraph 13(a) above, and we consider that the matters in the application referred to in paragraph 13(b) above have otherwise been dealt with in the other proceedings.<sup>16</sup>

## DECISION

36. For the reasons above, we therefore consent to the Applicants withdrawing their application and do not consider it to be against the public interest to do so. At the time of consenting to the withdrawal request, we had not made a decision under regulation 20<sup>17</sup> whether to formally conduct proceedings in relation to the application, and do not need to do so in light of the withdrawal.

**Sharon Warburton**

**President of the sitting Panel**

**Decision dated 29 May 2020**

**Reasons given to parties 10 June 2020**

**Reasons published 15 June 2020**

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<sup>14</sup> See *Freshtel Holdings Limited* [2016] ATP 15 at [29] to [31] and *Lepidico Limited* [2017] ATP 11 at [27].

<sup>15</sup> *Freshtel Holdings Limited* [2016] ATP 15 at [31]

<sup>16</sup> See our discussion in *Keybridge Capital Limited 04, 05 & 06* [2020] ATP 6 at [79] to [94], which was affirmed by the review Panel

<sup>17</sup> Of the ASIC Regulations

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### Advisers

Party	Advisers
Bentley Capital Limited and Scarborough Equities Pty Limited	Squire Patton Boggs
Keybridge Capital Limited	Baker McKenzie
WAM Active Limited	Mont Lawyers Pty Limited
Hartleys Limited	Corrs Chambers Westgarth





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**Annexure A**

**CORPORATIONS ACT  
SECTION 657E  
INTERIM ORDERS**

**KEYBRIDGE CAPITAL LIMITED 07**

WAM Active Limited (**WAM Active**) has undertaken to make an application to the Panel in relation to the affairs of Keybridge Capital Limited (**Keybridge**) and has made an application for interim orders.

The Acting President ORDERS:

1. Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (**ADIT**) must not take any steps, or allow any steps to be taken, to process any acceptances or transfers received from Bentley Capital Limited or Scarborough Equities Pty Limited in relation to ADIT's bid for Keybridge.
2. These interim orders have effect until the earliest of:
  - (i) further order of the Acting President or the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Tania Mattei**  
**Counsel**  
**with authority of Richard Hunt**  
**Acting President**  
**Dated 13 March 2020**



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**Annexure B**

**CORPORATIONS ACT  
SECTION 657E  
INTERIM ORDERS**

**KEYBRIDGE CAPITAL LIMITED 07**

Bentley Capital Limited (**Bentley**) and Scarborough Equities Pty Limited (**Scarborough**) have made an application to the Panel in relation to the affairs of Keybridge Capital Limited (**Keybridge**).

The Panel ORDERS:

1. Aurora Funds Management Limited as responsible entity for the Aurora Dividend Income Trust (**ADIT**) must not take any steps, or allow any steps to be taken, to process any acceptances or transfers received from Bentley or Scarborough in relation to ADIT's bid for Keybridge.
2. These interim orders have effect until the earliest of:
  - (i) further order of the Panel
  - (ii) the determination of the proceedings and
  - (iii) 2 months from the date of these interim orders.

**Tania Mattei**  
**Counsel**  
**with authority of Sharon Warburton**  
**President of the sitting Panel**  
**Dated 13 May 2020**