



NZX Regulation Decision

Abano Healthcare Group Limited (ABA)

Application for a waiver from NZX Main Board Listing Rule
9.2.1

26 May 2016



Waiver from NZX Main Board Listing Rule 9.2.1

Decision

1. On the basis that the information provided by Abano Healthcare Group Limited (**ABA**) is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants ABA a waiver from NZX Main Board Listing Rule (**Rule**) 9.2.1, to the extent that ABA would be required to obtain shareholder approval for the Transaction.
2. The waiver in paragraph 1 is provided on the following conditions:
 - a. ABA's directors, certify to NZX that:
 - i. they are not interested in the Transaction (other than immaterial indirect interests by way of shareholdings in ABA);
 - ii. ABA will pay and receive (as the case may be) fair value from the Transaction;
 - iii. the terms of the Transaction are in the best interests of ABA, and it is fair and reasonable to ABA's shareholders (other than ABA shareholders who are Associated Persons of the Hutson Trustees);
 - iv. the Hutson Trustees had no influence over ABA's decision to give, or the terms of, the Sale Notice;
 - v. neither the Hutson Trustees, nor their Associated Persons, were directly or indirectly involved in the negotiations between ABA and the Bidder which gave rise to the Sale Notice on the terms proposed;
 - vi. the decision to give the Sale Notice was unanimously approved by ABA's directors; and
 - b. this waiver, its conditions and the implications of this waiver are disclosed in ABA's next half-year report and annual report.
3. The information on which this decision is based is set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
4. Capitalised terms which have not been defined in this decision have the meanings given to them in the Rules.
5. The Rule to which this decision relates is set out in Appendix Two to this decision.

Reasons

6. In coming to the decision to provide the waiver set out in paragraph 1 above, NZXR has considered that:
 - a. the policy behind Rule 9.2.1 is to regulate transactions where a Related Party to a Material Transaction may gain favourable consideration due to its relationship with the Issuer. NZXR may waive the requirement to obtain the approval of a resolution for the purposes of Rule 9.2.1 if it is satisfied that the involvement of a Related Party to the transaction was unlikely to have influenced the promotion of, or the decision to enter into, the transaction. The granting of this waiver will not offend the policy behind Rule 9.2.1;

- b. ABA has submitted, and NZXR has no reason not to accept, that it considered the preliminary non-binding offer from the Bidder to be financially attractive. Before it could proceed any further with the Bidder, ABA was required to serve the Sale Notice to the other shareholders of Bay International in accordance with the Deed. As a result, ABA served the Sale Notice, for the sole purpose of complying with the pre-emptive rights of the Hutson Trustees and the Wright Trustees;
- c. the conditions in paragraph 2(a)(iv) and (v) above, gives NZXR comfort that neither the Hutson Trustees nor their Associated Persons, were directly or indirectly involved in the negotiations between the Bidder and ABA, and that the Hutson Trustees had no influence, over the ABA Board's decision to issue the Sale Notice, or its terms. On this basis, NZXR is comfortable with the view that the Hutson Trustees did not exert any undue influence on ABA's decision to sell its holding in Bay International, on the terms of the Sale Notice; and
- d. the conditions in paragraph 2(a)(ii) and (iii) above, gives NZXR comfort that the terms of the Sale Notice are in the best interests of ABA, and that they are fair to ABA's shareholders. These conditions are supported by ABA's advice, which NZXR has no reason not to accept, that the price in the Sale Notice is within the valuation range provided by the Bidder when it issued its preliminary non-binding offer to ABA. On this basis, NZXR therefore considers it unlikely that there will be any transfer of value from ABA to the Hutson Trustees.

Confidentiality

- 7. ABA has requested that NZXR keep this waiver confidential until it announces that the Transaction has become unconditional. In accordance with Footnote 1 to Rule 1.11.2 NZXR grants ABA's request.



Appendix One

1. Abano Healthcare Group Limited (**ABA**) is Listed with its ordinary shares Quoted on the NZX Main Board.
2. As at 20 May 2016, ABA had an Average Market Capitalisation of approximately \$162.7 million.
3. ABA owns 50% of Bay International Limited's (**Bay International**) ordinary shares on issue. Bay International's other shareholders are Peter Lionel Hutson, Anya Lee Hutson and Lewis Thomas Grant, as trustees of the SF No. 2 Trust (together, the **Hutson Trustees**) with a 39% interest in Bay, and Scott Eric Wright, Alison McRae Wright and Kevin David Pitfield, as trustees of the Scott and Alison Wright Family Trust (together, the **Wright Trustees**).
4. In 2013, Mr Peter Hutson aligned with Archer Capital, an Australian private equity firm, and promoted a takeover proposal for ABA. The ABA Board saw the proposal as inadequate, and it did not proceed. The ABA Board asked Mr Hutson to resign as a Director of ABA, which he did in September 2013. Mr Hutson has not been a Director of ABA since.
5. All of Bay International's shareholders are subject to a shareholders' deed (**Deed**). Among other things, the Deed gives each shareholder pre-emptive rights, the broad effect of which is to require a shareholder in Bay International to offer that shareholder's shares to the other shareholders first, before selling to a third-party. As such, ABA is not able to sell its shares in Bay International to a third-party, without first offering them to the Hutson Trustees and the Wright Trustees for purchase.
6. An independent third-party bidder (**Bidder**) contacted ABA and expressed an interest in acquiring ABA's entire holding in Bay International. On 18 March 2016, the Bidder made an unsolicited "preliminary non-binding offer" for ABA's holding in Bay International; in its preliminary non-binding offer, the Bidder had valued ABA's holding in Bay International at \$30 or above. The \$32 million figure referred to in paragraph 8(b) below was at the upper end of the Bidder's price range.
7. The Bidder advised ABA that it had no discussions with Mr Hutson prior to providing ABA with the preliminary non-binding offer, and that there were no arrangements between the Bidder and Mr Hutson or the Hutson Trustees.
8. On 27 April 2016, ABA provided the Hutson Trustees and the Wright Trustees with a sale notice (**Sale Notice**), in accordance with the Deed's terms. The Sale Notice contained the following terms of sale:
 - a. a cash payment of \$11,455,155 to ABA in exchange for ABA's entire holding in Bay International, as well as an undertaking from the purchaser that it would procure Bay International's repayment of ABA's shareholder loans at a face value of \$20,544,845 (**Option One**); or
 - b. a cash payment of \$32 million to ABA, in exchange for ABA's entire holding in Bay International, as well as ABA's assignment of its shareholder loans with Bay International to the purchaser (**Option Two**).
9. On 20 May 2016, the Hutson Trustees notified ABA that they had accepted the Sale Notice on behalf of the SF No.2 Trust, and on the terms proposed under Option Two (**Transaction**).
10. There was no negotiation between ABA and the Hutson Trustees regarding the price or the terms of the Transaction.

11. The Sale Notice and the Deed contain all of the terms of the Transaction; there are no ancillary or side arrangements between ABA and the Hutson Trustees. The Hutson Trustees will not receive any warranties or indemnities from ABA.
12. The Transaction is due to be settled on the date that is 15 business days after any waiver from NZXR is granted.
13. The Transaction has an Aggregate Net Value of \$32 million, which is in excess of 10% of ABA's Average Market Capitalisation. On this basis, the Transaction is a Material Transaction for the purposes of Rule 9.2.2(a).
14. Healthcare Industry Limited (**Healthcare**) is the beneficial owner of 14.32% of all of ABA's shares on issue. Accordingly, Healthcare is a Related Party of ABA, for the purposes of Rule 9.2.3(b).
15. ABA understands that all of the shares in Healthcare are owned by the Hutson Trustees, in their capacities as trustees of the SF No. 2 Trust, as well as in their capacities as trustees of other trusts. As such, the Hutson Trustees are Related Parties of ABA, for the purposes of Rules 9.2.3(c) and 1.8.2.
16. The Deed, among other things, governs the pre-emptive rights of Bay International shareholders' over each other's holdings in Bay International. As ABA and the Hutson Trustees are parties to the Deed, the Hutson Trustees are Related Parties of ABA, for the purposes of Rules 9.2.3(c) and 1.8.3(c).



Appendix Two

Rule 9.2 Transactions with Related Parties

Rule 9.2.1 An Issuer shall not enter into a Material Transaction if a Related Party is, or is likely to become:

(a) a direct or indirect party to the Material Transaction, or to at least one of a related series of transactions of which the Material Transaction forms part; or

(b) in the case of a guarantee or other transaction of the nature referred to in paragraph (d) of the definition of Material Transaction, a direct or indirect beneficiary of such guarantee or other transaction,

unless that Material Transaction is approved by an Ordinary Resolution of the Issuer.

Rule 9.2.2 For the purposes of Rule 9.2.1, “Material Transaction” means a transaction or a related series of transactions whereby an Issuer:

(a) purchases or otherwise acquires, gains, leases (as lessor or lessee) or sells or otherwise disposes of, assets having an Aggregate Net Value in excess of 10% of the Average Market Capitalisation of the Issuer; or

(b) issues its own Securities or acquires its own Equity Securities having a market value in excess of 10% of the Average Market Capitalisation of that Issuer, save in the case of an issue pursuant to Rule 7.3.5 where only the market value of those Securities being issued to the Related Party or to any Employees of the Issuer are to be taken into account; or

(c) borrows, lends, pays, or receives, money, or incurs an obligation, of an amount in excess of 10% of the Average Market Capitalisation of the Issuer; or

(d) enters into any guarantee, indemnity, underwriting, or similar obligation, or gives any security, for or of obligations which could expose the Issuer to liability in excess of 10% of the Average Market Capitalisation of the Issuer; or

(e) provides or obtains any services (including without limitation obtaining underwriting of Securities or services as an Employee) in respect of which the actual gross cost to the Issuer in any financial year (ignoring any returns or benefits in connection with such services) is likely to exceed an amount equal to 1% of the Average Market Capitalisation of the Issuer; or

(f) amalgamates, except for amalgamations of a wholly owned Subsidiary with another wholly owned Subsidiary or with the Issuer:

(g) For the purposes of Rule 9.2.2(a), “Aggregate Net Value” means the net value of those assets calculated as the greater of the net tangible asset backing value (from the most recently published financial statements) or market value.

Rule 9.2.3 For the purposes of Rule 9.2.1, “Related Party” means a person who is at the time of a Material Transaction, or was at any time within six months before a Material Transaction:

(a) a Director or executive officer of the Issuer or any of its Subsidiaries; or

(b) the holder of a Relevant Interest in 10% or more of a Class of Equity Securities of the Issuer carrying Votes; or

(c) an Associated Person of the Issuer or any of the persons referred to in (a) or (b), other than a person who becomes an Associated Person as a consequence of the Material Transaction itself (or an intention or proposal to enter into the Material Transaction itself); or

(d) a person in respect of whom there are arrangements other than the Material Transaction itself, intended to result in that person becoming a person described in (a), (b), or (c), or of whom the attainment of such a status may reasonably be expected, other than as a consequence of the Material Transaction itself;

but a person is not a Related Party of an Issuer if:

(e) the only reason why that person would otherwise be a Related Party of the Issuer is that a Director or executive officer of the Issuer is also a Director of that person, so long as:

(i) not more than one third of the Directors of the Issuer are also Directors of that person; and

(ii) no Director or executive officer of the Issuer has a material direct or indirect economic interest in that person, other than by reason of receipt of reasonable Directors' fees or executive remuneration; or

(f) that person is a Subsidiary of, incorporated joint venture of, or unincorporated joint venture participant with, the Issuer and:

(i) no Related Party of the Issuer has or intends to obtain a material direct or indirect economic interest in that Subsidiary, incorporated joint venture, or unincorporated joint venture participant, other than by reason of receipt of reasonable Director's fees or executive remuneration; and

(ii) the Issuer is entitled to participate, directly or indirectly, in at least one half of the income or profits, and the assets, of that Subsidiary, incorporated joint venture, or unincorporated joint venture participant.

