Feature

KEY POINTS

- In the contest to acquire Expro International Group PLC ('Expro') dissenting Expro shareholders sought, following the expiration of a 'put up or shut up' deadline pertaining to a competing bidder, an adjournment of the court hearing required to sanction a scheme of arrangement.
- The court did not wish to allow the court process involved in a scheme of arrangement to be used to undermine the certainty that the Takeover Code seeks to introduce into the offer process and thereby create a different regime from that which applies to contractual takeover offers.
- The court is bound to consider any material change in circumstances following the shareholder vote when considering whether to sanction a scheme of arrangement.
- An increased proposal does not necessarily constitute a material change in circumstances if an offeror's interest is known to shareholders at the time of the shareholder vote.

Authors Leon Ferera and Hannah Mehta

Scheming to get around the Takeover Code: does it work?

The recent contest to acquire Expro highlights how the court process involved in a scheme of arrangement could potentially be used to undermine the certainty that the Takeover Code seeks to introduce into the offer process. Leon Ferera and Hannah Mehta explain how, in the Expro example, this issue was averted.

INTRODUCTION

A fundamental principle underlying the City Code on Takeovers and Mergers (the *Takeover Code*) and the basis on which the Panel on Takeovers and Mergers (the *Takeover Panel*) regulates takeovers that fall within its jurisdiction is that certainty for shareholders and the market is key to the orderly conduct of a bid. However, the arrival on the scene of a competing bidder can cause great uncertainty and confusion and the Takeover Code therefore seeks to address this by setting out a strict timetable and procedures to govern such a situation. The fact that a takeover offer implemented by way of a scheme of arrangement is subject to a jurisdiction in addition to that of the Takeover Panel, namely the jurisdiction of the court, might, especially in the case of competitive schemes of arrangement, be said to undermine the certainty that the Takeover Code seeks to impose, not least because the involvement of the court in the process provides a ready forum for dissent and litigation which is not the case with contractual offers.

The recent contest between Umbrellastream Limited (*Umbrellastream*) and Halliburton Company (*Halliburton*) to acquire Expro International Group PLC (*Expro*) highlighted, and has now clarified, this potential issue.

THE 'OFFERS' FOR EXPRO

On 17 April, a recommended offer for Expro by Umbrellastream of 1,435 pence per Expro share was announced. The offer was to be implemented by way of a scheme of arrangement. The following day, Halliburton announced that it was conducting due diligence with a view possibly to making a competing offer for Expro.

Subsequently, on 23 May, Expro announced that it had received a private proposal from Halliburton of 1,525 pence per Expro share but that the proposal did not amount to a firm intention to make an offer and was subject to pre-conditions. Expro shareholders were then informed that:

- Expro would seek the adjournment of the shareholder meetings convened to approve the scheme from 2 June to 9 June;
- Umbrellastream had agreed to increase its offer by 115 pence to 1,550 pence per Expro share; and
- the implementation agreement previously entered into between Expro and Umbrellastream in relation to the scheme had been amended to provide that Expro would not postpone or adjourn the shareholder meetings to be held on 9 June or the court hearings fixed for 23 and 25 June required to effect the Umbrellastream scheme. This prohibition was subject to an independent competing offeror not announcing a higher r 2.5 cash offer on or before 20 June, this being the date imposed by the Takeover Panel, without objection from Halliburton, by which Halliburton had to 'put up or shut up', in other words formally withdraw from the process or announce a binding firm intention to make an offer for Expro.

On 9 June, Expro shareholders, in the knowledge that Halliburton had put forward a non-binding proposal of 1,525 pence per Expro share to the Expro board, voted to approve the Umbrellastream scheme. Following that, on 13 June, Umbrellastream unilaterally improved its offer from 1,550 pence to 1,615 pence per Expro share.

On 20 June, being, as mentioned, the 'put up or shut up' date imposed on Halliburton, Halliburton made a last-minute private proposal to Expro, but did not announce a firm intention to make an offer, to acquire Expro by way of a scheme of arrangement at a price of 1,625 pence per Expro share, that is ten pence per Expro share more than Umbrellastream was offering. The proposal was conditional on, *inter alia*, the independent board of Expro agreeing to convene the requisite shareholder meetings to allow Expro shareholders to consider its proposal and also to delay the court hearings scheduled to sanction the Umbrellastream scheme. The independent board of Expro decided not to proceed with Halliburton's proposal. Halliburton consequently announced that it had terminated discussions but reserved the right to make a future offer for Expro in certain circumstances.

COURT SANCTION

Following approval by a target's shareholders, a scheme must then be sanctioned by the

High Court. In exercising its discretion, the court must be satisfied that:

- each class of shareholder has been fairly represented by those attending the shareholder meeting;
- such shareholders have acted in good faith;
- the statutory provisions of the applicable Companies Act have been observed; and
- the approval of the scheme is reasonable (*Re Anglo – Continental Supply Co Ltd* [1922] 2 Ch 723).

Despite having the discretion to refuse to sanction a scheme, it is rare for a court not to give its sanction and courts generally only refuse to sanction a scheme either at the request of the directors of the target company (for example Forward Technology Industries PLC) or when the court decides that a class of shareholder has not been fairly represented (for example in *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), [2005] All ER (D) 290 (Jul)).

DISSENTIENT SHAREHOLDERS

Two funds that owned approximately 15 per cent of Expro and that were supported by a number of additional shareholders holding a further 7 per cent of Expro were not satisfied that the independent board of Expro had acted properly in rejecting Halliburton's proposal. Sandell Asset Management that, together with Mason Capital Management, led the dissentient shareholders, stated that, 'in the interests of shareholder democracy' an adjournment of the proceedings was required to give the independent board of Expro 'time to reflect on the implications of Halliburton's proposition'. In court they claimed that Halliburton's proposal of 20 June constituted a material change in circumstances and therefore the court should not attach the same weight to the result of the shareholder vote on 9 June that it normally would have done. They argued that an accelerated auction process under r 32.5 of the Takeover Code was the most appropriate way to conclude the situation satisfactorily as it could lead to an even higher offer for Expro being made. The two funds therefore petitioned the court to delay the court hearings to sanction the Umbrellastream scheme.

In addition to the questions raised relating to the directors' exercise of their fiduciary duties and the question of whether a material change in circumstances had occurred, the actions of the dissentient shareholders in seeking an adjournment and a delay to the timetable would, if successful, arguably have perpetuated the uncertainty facing Expro shareholders, thus undermining the certainty which the Takeover Panel and the Takeover Code seek to impose on the offer process. This would, in effect, have resulted in contractual takeover offers and takeovers offers implemented by way of schemes of arrangement being subject to different treatment.

EXPRO'S DEFENCE

Expro defended the action taken by its independent board. It remarked that Halliburton's proposal was subject to execution risk, not least because there was a risk that antitrust clearance would be required in the US and that a material adverse change in circumstances could occur during the intervening period. These factors could result in the Halliburton bid not being consummated and in circumstances in which Umbrellastream's offer might have lapsed, not least because there was also no guarantee that Umbrellastream would be prepared to participate in the accelerated auction process.

The independent board of Expro also argued that the Umbrellastream offer was not subject to this uncertainty. In addition, if the Halliburton scheme did become effective, Expro shareholders would be unlikely to receive the consideration due to them until, at the earliest, early September, that is two months later than under the Umbrellastream scheme. Even depositing Umbrellastream's price in an ordinary high street bank account during that period would yield more than ten pence.

An Expro spokesperson stated that, having considered their fiduciary duties, 'the independent directors did not consider the 10p [per share] adequately took into account the timing and execution risks associated with the Halliburton proposal and that it therefore did not constitute a superior offer for Expro shareholders'.

THE VIEW OF THE COURT: THE COURT PROCESS SHOULD NOT BE USED TO UNDERMINE THE TAKEOVER CODE TIMETABLE

The High Court adjourned the court hearing scheduled for 23 June to 26 June in order to consider the arguments of the two funds and a statement submitted by Halliburton.

At the adjourned hearing, Richards J refused the dissentient shareholders' request for an adjournment and sanctioned the Umbrellastream scheme.

Richards J noted his support of the Expro board's assessment of the relative benefits and risks of the competing offers stating that he could 'not accept the criticisms of the board made by the shareholders'. He considered the claims that a material change in circumstances had occurred and acknowledged that the court is bound to take account of any such changes when determining whether to sanction a scheme. He held that no such material change in circumstances had occurred since the Expro shareholders' meeting on 9 June. In his view, when the Expro shareholders had approved the scheme on 9 June they had done so knowing of Halliburton's interest and they had also been told that the court hearings would not be adjourned unless a firm intention to make a cash offer was announced by 20 June. To order an adjournment in such circumstances would go against the shareholders' wishes expressed on 9 June and the wishes of the independent board of Expro who were 'doing no more than what they told shareholders they would do'.

Richards J noted the rarity of the Takeover Panel being represented in the court proceedings. Having introduced new provisions to the Takeover Code in January 2008 to codify the Takeover Panel's practice, and clarify the Takeover Code timetable, relating to schemes in order to provide greater certainty for market participants, the Takeover Panel was concerned that a successful application for an adjournment by the dissentient shareholders to the

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Biog box

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court might result, in the case of schemes of arrangement as opposed to contractual offers, in the creation of precisely the kind of uncertainty which the Takeover Code, including the provisions introduced in January 2008, had sought to eliminate or reduce. Richards J agreed with the Takeover Panel that this would be counter-productive and would perpetuate the uncertainty facing Expro shareholders. He commented that 'I … have concern that there should, if possible, be a common approach to the conduct of bids, whether they are structured as an offer or as a scheme. I would not think it desirable that the court procedure involved in a scheme should allow in an undesirable level of uncertainty which the provisions of the [Takeover] Code have successfully reduced or eliminated in the case of ordinary offers'.

The points of interest that emerged from this case are, first, that a material change in circumstances which occurs after the shareholder vote to approve a scheme will be borne in mind by a court in exercising its discretion as to whether or not to sanction a scheme. In addition, if shareholders are aware of a potential bidder's interest in a target company at the time of the shareholder vote to approve the scheme, a later proposal by that bidder will not necessarily constitute a material change in circumstances. However, the key point which emerged is that the judge was keen for the court process involved in a scheme – and the easy forum which that might otherwise provide for tactical litigation – not to result in the creation of a two-track process, one for contractual offers and one for schemes, merely because the latter required the involvement of the courts. The court process is not meant to serve as a means to create added uncertainty and undermine the function of the Takeover Panel and the Takeover Code in regulating the timetable and process applicable to UK public takeovers. The Takeover Panel could therefore note in its latest annual report, undoubtedly with some relief, that 'it does not appear that there is any current likelihood of the courts playing a more active role in determining the outcome of offers'. ■

VALIDITY OF BANK GUARANTEE

SEA EMERALD SA V PROMINVESTBANK – JOINT STOCKPOINT COMMERCIAL INDUSTRIAL & INVESTMENT BANK [2008] EWHC 1979 (COMM) (QUEEN'S BENCH DIVISION, COMMERCIAL COURT) (ANDREW SMITH J) (11 AUGUST 2008)

FACTS

This was a claim under an English law guarantee (the 'Guarantee') signed by the late Mr NT Skock ('S'), an employee of Commercial Industrial Investment Bank (Joint Stock Company), which traded as Prominvestbank (the 'Bank'). The Guarantee was provided to Sea Emerald SA, a Panamanian shipping company (the 'Buyer') and was in respect of obligations of a Ukranian shipyard (the 'Yard') under an English law shipbuilding contract for the construction and purchase of a vessel. The Bank's head office was in Kiev, Ukraine. S was head of the Nikolaev regional department of the Bank for several years before his death.

The Guarantee was signed by S and the director general of the Yard in both a Russian version and an English version. The Buyer had no dealings directly with the Bank. The loans to the Yard were so large that they must have required head office authorisation. Early in 2006, the Buyer learned that the Ukranian State had suspended financial support for the Yard and the Buyer then made demand under the Guarantee. The Bank sought a declaration that the Guarantee was invalid.

CONCLUSION

The Buyer had raised three arguments with which the court disagreed:

- S had actual or inferred actual authority: This was a matter of Ukranian law. No officer or employee of the Bank, other than the chairman of the Bank's management board, was authorised to act without power of attorney. Internal Bank regulations did not confer any relevant authority upon S. In addition, it was unusual for departments to issue guarantees of any kind at the relevant time. There was expert evidence that Ukrainian banks did not authorise branches to issue guarantees, this being usually a head office function. The Bank had disclosed copies of none of the refund guarantees the Buyer says S issued to its group of companies. The head office would have kept all copies on file and would have charged a fee of 6 per cent of the value of the Guarantee for as long as it was valid. There was no internal reporting of the potential liability under the Guarantee and no receipt of any fee by the Bank from the Yard for providing the Guarantee.
- S's action was ratified by the Bank: Ratification may have been implied or expressed and it operated as a unilateral manifestation of will. However, the Buyer could not show that the Guarantee was adopted by the Bank's chairman or management board. Although the head office knew of the lending, there was no evidence it knew of the Guarantee. There was no manifestation of an intention to adopt it.
- S had ostensible authority: The Bank did not hold S out as having authority to enter into a refund guarantee of the kind and in the amount of the Guarantee. Neither the Buyer nor the Yard relied upon any representation by the Bank as to S's authority.

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