



## BURGES SALMON

October 2009

### PREY OR PREDATOR?

### Hostile Takeover Offers

**Are you ready to defend a hostile takeover offer for your company or are you considering launching a hostile bid for another company?**

It is a director's nightmare to learn that another company is launching a hostile takeover offer for his company. To keep the number of sleepless nights to a minimum, you need to be prepared. Last year, we acted for **Newbury Racecourse plc's** independent directors in successfully defending a hostile bid for Newbury and outline below some key ways of responding to an unwelcome approach.

Equally, if you have a target in your own sights and are considering making a hostile bid, there are a number of points to bear in mind. Having acted earlier this year for **UKRD Group** on its successful hostile takeover offer for **The Local Radio Company PLC** (the last publicly listed UK radio broadcaster), we also outline below some issues for a potential bidder to consider ahead of formally launching its offer.

#### **The best defence is a good offence....**

The success of a hostile takeover often depends on catching the target off guard. Under the City Code on Takeovers and Mergers (the "City Code"), a target only has a fortnight to respond once the bidder has posted its offer document to target shareholders. That two week period is therefore absolutely critical to the target's continuing independence.

Although there is a limit to how much can be achieved in advance, a potential target should consider undertaking the following preparations in order to be able to react as efficiently and effectively as possible:-

- 1 **Analyse potential bidders** - look at your competitors and identify those you consider likely to launch a bid. This will be useful if the defence involves attacking the bidder. It will also assist you to identify any potential white knights.
- 2 **Target shareholder base - be vigilant!** - a target's institutional shareholders will often determine whether a hostile bid will succeed. It is essential that you are in regular contact with your key shareholders. In addition, maintain regular contact with your brokers and registrars so that you are advised immediately of any significant movement in your share register and/or your share price. This can alert you to the existence of a potential predator.

**Disclaimer:** This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

Burges Salmon LLP Narrow Quay House Narrow Quay Bristol BS1 4AH  
 tel: +44 (0) 117 939 2000 fax: +44 (0) 117 902 4400  
 Chancery Exchange 10 Furnival Street London EC4A 1AB  
 tel: +44 (0) 20 7685 1200 fax: +44 (0) 20 7685 1266  
[www.burges-salmon.com](http://www.burges-salmon.com)



Burges Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is regulated by the Solicitors Regulation Authority  
 A list of the members, all of whom are solicitors, may be inspected at our registered office: Narrow Quay House, Narrow Quay, Bristol BS1 4AH

- 3 **Assemble an advisory team** - appoint all necessary advisers (eg; financial advisers, corporate brokers, lawyers and financial PR consultants) - assembling the right team takes precious time which a hostile takeover target does not have.
- 4 **Defence manual** - to assist the target board of directors with the administration of the defence and ensure that the defence is controlled and organised. Typically, a defence manual will include (i) the contact details of the target's directors and advisers, (ii) draft press announcements and (iii) a list of do's and don'ts for the target company spokesmen.
- 5 **Target directors' duties and responsibilities** - in addition to their statutory duties under the Companies Act 2006, the target's directors need to understand their duties under the City Code. The target's legal advisers should prepare a memorandum in advance so that the directors are aware of their responsibilities from the outset. In addition, draft forms of responsibility and authority should be prepared.
- 6 **Defence strategy and circular** - critically analyse your business and consider whether there are any vulnerabilities that a bidder may target. You will need to consider your attitude to the offer and advise your shareholders accordingly. If you choose not to recommend the bid, your defence circular will need to convince target shareholders not to accept the offer so compile effective arguments for your continued independence in advance.

The City Code sets out specific contents requirements for defence circulars. These should be considered in advance as they will necessitate the collation of detailed background information regarding the target - you should keep this up to date. The target board will also need to justify its valuation of the target and that the offer price undervalues the target. Be aware that if any valuation report is included in the defence circular it will need to comply with the specific contents requirements of the City Code.

#### **Let hostilities commence....**

If, on the other hand, you are looking to take advantage of the current economic climate when share prices are lower and companies are perhaps more vulnerable to an unsolicited bid, you also need to be prepared. Sound planning is essential to the success of a takeover:

1. **Bidder strategy** - hostile bids have a notoriously low success rate. Price is the single most important factor in the success of a hostile bid. Target shareholders will be reluctant to sell their shares at a discount and where commercially viable the bidder should offer a significant premium to the current share price. The bidder should also have a commercially sound strategy to show the benefits of a takeover for the target business.
2. **Bidder directors' duties and responsibilities** - the bidder's directors need to be made aware of their duties under the City Code. One key rule is that a bidder is not able to offer special deals with favourable conditions to some shareholders but not others - all shareholders must be treated fairly and equally.

3. **Stakebuilding** - building a stake in the target may improve the chances of your bid succeeding. Be aware though that, under the City Code and otherwise, stakebuilding may be restricted and may impact the bid itself. Note there are also timing restrictions and disclosure obligations that are triggered by stakebuilding. Consult your advisers at an early stage.
4. **Proxy solicitation** - in a fiercely fought takeover battle, each target shareholder's acceptance is vital. Consider engaging proxy agents to contact target shareholders to communicate the right message in order to secure those crucial acceptances.
5. **Timetable** - as noted above, a target only has 14 days to respond to an offer document. Consider posting your offer document to target shareholders as soon as possible after formally announcing your bid to keep the target's time to prepare its response to an absolute minimum.
6. **Organisation and co-ordination** - a hostile takeover is very fast paced. Appoint a committee of the board at an early stage to deal with the day to day running of the bid and ensure your advisers are in regular contact with you and each other so that the bidder can react to events quickly and effectively.

For further information on any of the matters raised above, please contact :

**Alan Barr** on +44 (0)117 939 2255 email: alan.barr@burges-salmon.com

**Chris Godfrey** on +44 (0)117 939 2219 email: chris.godfrey@burges-salmon.com

**Nick Graves** on +44 (0)117 939 2200 email: nick.graves@burges-salmon.com

**Rupert Weston** on +44 (0)117 939 2228 email: rupert.weston@burges-salmon.com

**Dominic Davis** on +44 (0) 117 902 7196 email: dominic.davis@burges-salmon.com