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# UK Public M&A Update

Q1 2017

# Contents

# Overview

Nine firm offers were announced in Q1 2017 (compared to 11 in Q1 2016 and 19 in Q4 2016) with a combined offer value of £10.75bn (a significant decrease compared to £23bn in Q1 2016 and nearly £15bn in Q4 2016). Six of these offers were in cash including one with a stub equity alternative, one cash and shares with a mix and match facility (Tesco/ Booker) and two all-share mergers.

In the last quarter, Ashurst mandates have included advising (i) J.P. Morgan Cazenove and Credit Suisse as financial advisers and corporate brokers to John Wood Group on its £2.225bn recommended takeover of Amec Wheeler Foster and (ii) Credit Suisse as financial adviser to Betsson on its recommended bid for NetPlay TV.

A summary of the key features of each announced offer is set out in a table in the Appendix.

| | |
|---|---|
| Announced bids | 9 |
| Recommended on announcement | 8 |
| Schemes of arrangement | 5 |
| Average of bid premia (% unweighted) | 15.86 |
| Average of bid premia (% weighted) | 9.65 |

During Q1, the High Court ruled on share splitting in the **Re Dee Valley Group plc** case. We also encountered a tale of two concert party investigations with the Takeover Panel (the **Panel**) imposing a cold-shouldering order on Mr Bob Morton and Mr John Garner and the Panel and the Takeover Appeal Board (**TAB**) imposing a Rule 9 mandatory bid obligation on Mr David King with respect to an acquisition of shares in Rangers International Football Club. Further details of these developments are set out in the News Digest on pages 3 to 11 of this publication.

# News digest

## Re Dee Valley Group PLC [2017] EWHC 184 (Ch) – Share splitting by target shareholder to defeat scheme of arrangement

In **Re Dee Valley Group plc**, the High Court sanctioned a scheme of arrangement to implement Severn Trent's takeover of Dee Valley notwithstanding the exercise of a share-splitting exercise aimed at augmenting the number of shareholders voting against the scheme at the Court meeting (which resulted in the Companies Act "majority in number" test not being met).

### Background

By way of reminder, a members' scheme of arrangement (which is the type of scheme that is used to implement a takeover) has to be approved by the members of the target company or of the relevant class concerned at a meeting convened at the direction of the Court (referred to as the **Court meeting**). The scheme must be approved at the Court meeting by a majority in number (the **majority in number test**) representing 75% in value (the **value test**) of the members or class of members voting (s.899(1) of the Companies Act 2006). As a consequence of this dual test, a few large shareholders cannot defeat the will of a large body of small shareholders who wish to oppose a scheme.

In late 2016, Ancala Fornia and Severn Trent announced competing bids for Dee Valley culminating in Severn Trent's recommended 1,825 pence per share cash offer being put to Dee Valley shareholders at a Court meeting on 12 January 2017.

Following the convening of the Court meeting, an individual shareholder (Mr Cashmore) who opposed the scheme bought Dee Valley shares which he subsequently gifted to 443 separate individuals (employees and customers of Dee Valley opposed to the change of ownership of the company), resulting in each such individual shareholder holding a single Dee Valley share. The share transfers were delivered in bulk to Dee Valley's registrar on 3 January 2017 ahead of the scheme record date.

At the Court meeting, the 75% value test was exceeded, but the majority in number test was not met as 466 out of the 828 members present either in person or by proxy voted against the scheme. On 10 January 2017 ahead of the Court meeting, Dee Valley had taken the precaution of applying ex parte to the Companies Court Registrar for an

order to give the chairman of the Court meeting permission to reject the votes of any member of Dee Valley holding a share or shares derived by way of transfer from Mr Cashmore. The order was granted and the chairman of the Court meeting exercised his discretion to reject the votes of any member who derived their shareholding from Mr Cashmore. He thereby excluded the votes of the 434 individual shareholders and reported the result of the Court meeting on the basis that the scheme had been approved by 363 members holding 1,454,463 shares in favour to 32 members holding 213,513 shares against. He also reported (as was required by the Registrar's order) that, had the individual votes not been rejected, the resolution would not have been passed by the simple majority in number prescribed by s.899(1) of the Companies Act, because only 363 members would have voted in favour, but 466 members would have voted against.

Sir Geoffrey Vos, Chancellor of the High Court, held that the chairman of the Court meeting was justified in concluding that the only possible explanation for the conduct of those shareholders, in each accepting a gift of a single share immediately after the convening of the Court meeting, was to promote a share manipulation strategy to defeat the scheme. The Court was entitled to protect the integrity of the Court meeting against manipulative practices such as share-splitting that would frustrate its statutory purpose. The Court concluded that the chairman of the Court meeting was right to reject the votes of the individual shareholders who derived their shareholding from the share-splitting exercise.

The Court also held that it had been appropriate for Dee Valley to have applied to the Registrar for directions once it became evident that share splitting had occurred, with the only apparent aim being to defeat the scheme.

The Court did not go so far as to characterise vote manipulation as dishonest in itself, and nor did the Court consider that the actions of the individual shareholders were dishonest. However, the Court agreed with the judgment of Lam J in the Hong Kong

bidder share-splitting case of **Re PCCW Limited** [2009] 3 HKC 292 (**PCCW**) that share splitting undermines "the underlying spirit of the dual requirements prescribed by the legislature as pre-conditions for scheme approval". The Court also agreed with Barma J's comment in the same case that "arrangements made so as to artificially boost the number of shareholders voting in favour of a scheme of arrangement" are objectionable. Note that since the PCCW case, the law has been changed in Hong Kong to repeal the majority in number test. A similar amendment was considered, but rejected, in the UK in 2006.

## Comment

This is the first reported case in the UK on share splitting. Whilst this decision protects the utility of schemes of arrangement to implement takeovers, it is not without controversy. Prior to this decision, commentators generally held the view that the Court would be powerless to sanction a scheme in the face of share splitting undertaken to defeat a scheme.

The circumstances of this case are only likely to arise very rarely, in practice, given the very closed nature of Dee Valley's share register.

The case is reported at: http://www.bailii.org/ew/cases/EWHC/Ch/2017/184.html

## Panel Statement 2017/1 - Decision by the Hearings Committee to cold-shoulder Mr Bob Morton and Mr John Garner

In January 2017, the Panel published Panel Statement 2017/1 setting out the Hearings Committee's decision to cold-shoulder Mr Bob Morton and Mr John Garner for deliberately attempting to mislead the Panel. The Panel's case against Morton and Garner was that they systematically provided to the Panel information which they knew to be false in the course of an investigation into a potential breach by Morton of an obligation to announce a Rule 9 mandatory bid for Hubco Investments plc (**Hubco**).

### Background

In July 2013, at a time when Morton already held 28.32% of Hubco (indirectly through Morton family trusts), Morton instructed his broker, Investec, to purchase 300,000 Hubco shares representing a stake of 3.38% on behalf of another Morton family trust, Groundlinks Limited.

The Panel's public censure of Morton in February 2015 caused Investec to undertake a review of previous transactions in which they had acted for Morton. Later that month, Investec called Morton to tell him that the July 2013 Hubco purchase had taken the interests of the Morton family to 31.6% and to advise him to notify and seek the advice of the Panel.

Morton then sought to demonstrate that the 300,000 Hubco shares were in fact bought for and on behalf of his son's friend, Garner, and not Groundlinks. Morton represented to the Panel that the purchase of the Hubco shares had been funded by Morton in 2013 against a promissory note from Garner. In fact the promissory note had been drafted in March 2015 but backdated to the date of the alleged arrangement as part of Morton's plan to cover up the Groundlinks purchase. The Groundlinks shares were transferred to Garner in March 2015. Later that month, a Morton family trust purchased shares in Garner's online retail company effectively reimbursing Garner the cost of the Hubco shares.

In April 2015, Investec reported the Groundlinks purchase to the Panel, it having become clear by then that Morton was not going to report the matter himself despite Investec's advice that he should do so.

The Panel interviewed Morton and Garner and sought further information from Morton's solicitor and the Morton family trusts. According to the Panel Executive, Morton and Garner invented the arrangement between them in order to avert a perceived risk that the purchase had triggered a Rule 9 mandatory bid obligation.

## Co-operating with the Panel

Section 9(a) of the Introduction to the Code states that:

"The Panel expects any person dealing with it to do so in an open and co-operative way. It also expects prompt co-operation and assistance from persons dealing with it and those to whom enquiries and other requests are directed. In dealing with the Panel, a person must disclose to the Panel any information known to them and relevant to the matter being considered by the Panel (and correct or update that information if it changes). ***A person dealing with the Panel or to whom enquiries or requests are directed must take all reasonable care not to provide incorrect, incomplete or misleading information to the Panel...***" (emphasis added)

## Hearings Committee ruling

The Hearings Committee was in no doubt that Morton had attempted to mislead the Panel Executive about the existence and execution in 2013 of the promissory note. The Hearings Committee concluded that both Morton and Garner had "lied systematically about the date on which the promissory note was produced and signed and the circumstances in which it was created". The Hearings Committee considered that whilst subsequently, in July 2016, "Morton suffered an acute episode of illness and ... has experienced severe chronic health problems ever since ... at the material times his health and age afforded no conceivable excuse for the dishonest representations made".

The Hearings Committee ruled that the attempted deception of the Panel Executive in the course of its investigation merited the cold-shouldering of Morton and Garner for periods of six years and two years respectively. Cold-shouldering is the most serious disciplinary power exercisable by the Panel declaring the offender to be a person who in the opinion of the Panel is not likely to comply with the Code. The cold-shouldering order means that regulated firms must not act for Morton and Garner, or their principals, on any transactions to which the Code applies. Firms must inform their approved persons not to deal with these individuals on Code transactions.

The irony in this case is that in fact there had been no breach of Rule 9 as the Panel Executive found that, at the time of the Groundlinks purchase, Morton and his concert parties already held more than 50% of Hubco's shares and therefore had purchasing freedom. As a consequence the disciplinary action being brought by the Panel related to Morton and Garner's duplicitous conduct as opposed to an investigation into a Rule 9 breach.

The ruling of the Hearings Committee of the Panel can be viewed at:
http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/01/2017-1.pdf

The FCA's Statement on Takeover Panel 'Cold-Shouldering' can be viewed at:
https://www.fca.org.uk/publication/corporate/statement-on-takeover-panel-cold-shouldering.pdf

## Takeover Appeal Board 2017/1 and Panel Statement 2017/4 – Dismissal of appeals by Mr King and requirement for Mr King to announce a mandatory offer for Rangers International Football Club Plc

In March 2017, the Panel published Panel Statement 2017/4 and the TAB published Statement 2017/1 setting out their decisions to dismiss appeals by Mr King and requiring him to launch a Rule 9 mandatory bid for Rangers International Football Club Plc (**Rangers**).

### Background

In January 2015, King acquired shares representing 14.57% of Rangers share capital from three institutional investors via a family trust vehicle, New Oasis Asset Limited (**NOAL**), at a price of 20 pence per share two days after his alleged concert party (Mr Letham and his associates) acquired a 19.48% stake. The acquisitions produced an aggregate holding of 34.05% exceeding the 30% control threshold thereby triggering a Rule 9 mandatory bid obligation.

After the purchase of the shares in Rangers, the existing directors of Rangers were removed by the shareholders vote at a general meeting in March 2015 and Mr King's nominees were appointed as directors of Rangers. In May 2015 Mr King was appointed chairman of Rangers.

During 2014, King and Letham had acted together on two unsuccessful proposals, one to acquire control through an equity fundraising and the other to acquire a blocking stake. Emails in December 2014 between King and Letham evidenced that each was aware of the other's intention to acquire Rangers shares at the same time and that the purchases had been co-ordinated.

## Executive ruling

In early 2015, the Panel Executive began to investigate allegations that King had acted in concert with Letham and his associates. In June 2016, following completion of interviews and other investigations, the Executive ruled that a concert party did exist and that King was the principal member of the group. The Executive directed King to make a mandatory bid at a price of 20 pence per share.

## Hearings Committee ruling

In December 2016, the Hearings Committee upheld the decision of the Executive concluding that King and Letham had co-operated with the objective of securing a change of control of the board of Rangers as the first step towards improving the fortunes of Rangers and that it should be King alone who should be required to make a mandatory bid at a price of 20 pence per share (even though the Rangers' share price was (and still is) trading at a significant premium to that price).

## TAB ruling

In January 2017, having reviewed emails which in the TAB's view provided overwhelming evidence of an understanding between King and Letham to co-operate and act in concert to obtain control of Rangers, the TAB upheld the Hearings Committee's decision save as to the deadline for the offer to be made which was amended to within 30 days of the TAB's decision (being 12 April 2017).

King made a number of submissions to the TAB to be considered at appeal including (i) there being no benefit to Rangers shareholders of an offer of 20 pence per share; (ii) questioning perceived procedural irregularities; and (iii) trying to distance himself from NOAL, his family trust vehicle arguing that he had no control over the voting

rights of the Rangers shares held by NOAL. The TAB ruled that in requiring a mandatory bid to be made, Rule 9 operates according to its own terms, which do not include considerations of whether the shareholders will benefit from an offer in a particular case. The TAB did not consider that there had been any irregularity in proceedings. The TAB argued (unsurprisingly) that King's repeated denial that he had any control over the voting rights in the Rangers shares was at odds with the evidence as to their acquisition and as to NOAL's requisition of a general meeting that led to King and his nominees constituting the Rangers board.

The Hearings Committee decision can be viewed at:
http://www.thetakeoverpanel.org.uk/wp-content/uploads/2017/01/2017-4.pdf

The TAB decision can be viewed at:
http://www.thetakeoverappealboard.org.uk/downloads/2017-01.pdf

# Contacts

For more information about any of the issues raised in this update please contact:

| Corporate Partners | Office | Telephone Number | Email |
|---|---|---|---|
| Rob Aird | London | +44 (0)20 7859 1726 | rob.aird@ashurst.com |
| Adrian Clark | London | +44 (0)20 7859 1767 | adrian.clark@ashurst.com |
| Simon Beddow | London | +44 (0)20 7859 1937 | simon.beddow@ashurst.com |
| Nick Bryans | London | +44 (0)20 7859 1504 | nick.bryans@ashurst.com |
| David Carter | London | +44 (0)20 7859 1012 | david.carter@ashurst.com |
| Nick Cheshire | London | +44 (0)20 7859 1811 | nick.cheshire@ashurst.com |
| Karen Davies | London | +44 (0)20 7859 3667 | karen.davies@ashurst.com |
| Richard Gubbins | London | +44 (0)20 7859 1252 | richard.gubbins@ashurst.com |
| Bruce Hanton | London | +44 (0)20 7859 1738 | bruce.hanton@ashurst.com |
| Nicholas Holmes | London | +44 (0)20 7859 2058 | nicholas.holmes@ashurst.com |
| Hiroyuki Iwamura | London | +44(0)20 7859 3244 | hiroyuki.iwamura@ashurst.com |
| Tom Mercer | London | +44 (0)20 7859 2988 | tom.mercer@ashurst.com |
| Robert Ogilvy Watson | London | +44 (0)20 7859 1960 | robert.ogilvywatson@ashurst.com |
| Nick Rainsford | London | +44 (0)20 7859 2914 | nick.rainsford@ashurst.com |
| Michael Robins | London | +44 (0)20 7859 1473 | michael.robins@ashurst.com |
| Dominic Ross | London | +44 (0)20 7859 1043 | dominic.ross@ashurst.com |
| Nick Williamson | London | +44 (0)20 7859 1894 | nick.williamson@ashurst.com |
| James Wood | London | +44 (0)20 7859 3695 | james.wood@ashurst.com |
| María José Menéndez | Spain | +34 (0)91 364 9867 | mariajose.menendez@ashurst.com |
| Bertrand Delaunay | France | +33 (0)1 53 53 53 90 | bertrand.delaunay@ashurst.com |
| Reinhard Eyring | Germany | +49 (0)69 97 11 27 77 | reinhard.eyring@ashurst.com |
| Arnaud Wtterwulghe | Belgium | +32 (0) 2 626 1914 | arnaud.wtterwulghe@ashurst.com |
| Renad Younes | Abu Dhabi/ Middle East | +971 (0)2 406 7217 | renad.younes@ashurst.com |
| Nick Terry | Australia | +61 (0)3 9679 3483 | nick.terry@ashurst.com |

# Appendix: Announced* UK takeover bids (1 January to 31 March 2017)

| Target (Market) | Bidder | Bid value | Bid premium** | Recommended | Hostile | Rule 9 offer | Cash | Shares (L/U/A) | Other consideration | Mix and match | Offer*** | Partial Offer | Scheme | Offer-related arrangements | Formal sale process | Non-solicit undertakings**** | Matching/Topping rights**** | Shareholder vote | Profit forecast/QFBS |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Booker Group plc (Main Market) | Tesco plc | £3.7bn | 12.0% | • | | | • | •L | •[1] | • | | | • | ◊C[2] | | | | •[3] | •[4] |
| NetPlay TV plc (AIM) | Betsson AB (publ) | £26.4m | 12.5% | • | | | • | | | | | | • | ◊ | | | •[5] | | |
| FIH Group plc (AIM) | The Rowland Purpose Trust 2001 | £37.3m | 27.39% | • | | | • | | | | • | | | | | | | | •[6] |
| Industrial Multi Property Trust plc (Main Market) | Hansteen Holdings plc | £25.23m | 22.4% | • | | | • | | | | • | | | ◊[7] | | | | | |

1. Booker shareholders are expected to be entitled to receive a special dividend in respect of the financial year ending 24 March 2017 which Booker intends to pay instead of the annual B share scheme.
2. Tesco and Booker entered into a confidentiality and joint defense agreement to ensure that any disclosure of confidential information during the CMA approval process does not constitute a waiver of any privilege. The parties also entered into a clean team confidentiality agreement. Charles Wilson, the CEO of Booker, and Tesco entered into a lock-up agreement and a service agreement amendment deed.
3. The offer is subject to bidder shareholder approval as it constitutes a Class 1 transaction under the Listing Rules.
4. Statements made in the financial year ending 25 February 2017 are considered to be a profit forecast for the purposes of Rule 28 of the Code which was reported on by Deloitte LLP and Greenhill & Co International LLP in accordance with Rule 28.1(a) of the Code. The Rule 2.7 announcement also contains a quantified financial benefits statement (QFBS) reported on by Deliotte and Greenhill & Co.
5. Topping right in shareholder irrevocables (with a 10% improvement threshold).
6. Statements made in FIH's interim results are considered to be a profit forecast for the purposes of Rule 28 of the Code and directors' confirmations are included as required by Rule 28.1(c)(i) of the Code.
7. In a letter dated 16 February 2017, Hansteen granted IMPT an option to appoint Hansteen as its new investment adviser and manager, regardless of the outcome of the offer.

## Key

* This table includes details of takeovers, set out in chronological order, in respect of which a firm intention to make an offer has been announced under Rule 2.7 of the Code during the period under review. It excludes offers by existing majority shareholders for minority positions

** Premium of the offer price over the target's share price immediately prior to the commencement of the relevant offer period

*** Standard 90% (waivable) acceptance condition, unless otherwise stated

**** In shareholders' irrevocables (unless indicated otherwise)

◊ Permitted agreements under Rule 21.2 of the Code

A AIM traded shares

C Co-operation agreement/bid conduct agreement

F Break fee given under formal sale process or white knight dispensation

L Listed/traded shares

NP No premium given in offer documentation or nil premium

R Reverse break fee

S Standstill agreement

U Untraded shares

# Appendix: Announced* UK takeover bids (1 January to 31 March 2017)

| Target (Market) | Bidder | Bid value | Bid premium** | Recommended | Hostile | Rule 9 offer | Cash | Shares (L/U/A) | Other consideration | Mix and match | Offer*** | Partial Offer | Scheme | Offer-related arrangements | Formal sale process | Non-solicit undertakings**** | Matching/Topping rights**** | Shareholder vote | Profit forecast/QFBS |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Aberdeen Asset Management plc (Main Market) | Standard Life plc | £3.8bn | NP | • | | | | • | | | | | • | | | | | •[8] | •[9] |
| Amec Foster Wheeler plc (Main Market) | John Wood Group plc | £2.225bn | 15.3% | • | | | | •[10] | | | | | • | ◊[F] C[11] | | | | •[12] | •[13] |
| Panmure Gordon & Co. plc (AIM) | QInvest LLC and Atlas Merchant Capital LLC | £15.5m | 68.1% | • | | | • | •[14] | | | | | • | ◊[15] C | | | | | |
| Circle Holdings plc (AIM) | Toscafund Asset Management LLP and Penta Capital LLP | £75.2m | 25.0% | • | | | • | | | | • | | | ◊[16] | | | •[17] | | |
| Shawbrook Group plc (Main Market) | Pollen Street Capital Limited and BC Partners LLP | £842.4m | 24.2% | | • | | • | | | | •[18] | | | ◊ | | | | | |

8. The offer is subject to bidder shareholder approval as it constitutes a Class 1 transaction under the Listing Rules.
9. The Rule 2.7 announcement contains a QFBS, reported on by PricewaterhouseCoopers LLP and Goldman Sachs International as required by Rule 28.1(a) of the Code.
10. Amec Foster Wheeler shareholders will own approximately 44% and Wood Group shareholders will own approximately 56% of the combined group.
11. The parties entered into a clean team non-disclosure agreement governing the disclosure of competitively sensitive information, as well as a confidentiality and joint defence agreement.
12. The offer is subject to bidder shareholder approval as it constitutes a Class 1 transaction under the Listing Rules.
13. The Rule 2.7 announcement contains a QFBS, reported on by PricewaterhouseCoopers LLP, J.P. Morgan Cazenove and Credit Suisse International as required by Rule 28.1(a) of the Code.
14. As an alternative to the cash, eligible scheme shareholders may elect to receive unlisted shares in Bidco to an amount limited to 12.5% of Bidco share capital.
15. Atlas, QInvest and Bidco entered into a bid conduct agreement to secure the provision of cash funding to pay the consideration pursuant to the offer. The parties also entered into a share exchange agreement and Atlas and QInvest entered into a shareholders agreement with regards to the management and operation of Bidco. Shareholders who elect to receive the unlisted share alternative will be bound by the terms of the shareholders agreement.
16. Bidco and Toscafund entered into an exchange agreement which sets out the terms for the purchase of Bidco shares using the funds raised from the issue of loan notes to various Tosca funds. The parties agreed to the capitalisation of the loan notes into ordinary and preference shares in Bidco.
17. Topping right in shareholder irrevocables (with a 10% improvement threshold).
18. 50% +1 acceptance condition.

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**www.ashurst.com**

Broadwalk House, 5 Appold Street, London EC2A 2HA T: +44 (0)20 7638 1111 F: +44 (0)20 7638 1112 www.ashurst.com. 