M&A Litigation 2019

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LEXOLOGY
Getting The Deal Through

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Published by
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Tel: +44 20 3780 4147
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First published 2018
Second edition
ISBN 978-1-83862-120-9

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Lexology Getting The Deal Through is delighted to publish the second edition of *M&A Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Austria and China.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William M Regan, Jon M Talotta and Ryan M Philp of Hogan Lovells US LLP, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
May 2019

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United Kingdom

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TYPES OF SHAREHOLDERS' CLAIMS

Main claims

1 Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.

Directors owe duties under the Companies Act 2006 (CA 2006) and also owe fiduciary duties to the company they serve. In respect of an M&A transaction, the most important duties owed by a director are:

- to act in a way that he or she considers, in good faith, would promote the success of the company for the benefit of the shareholders as a whole;
- not to exercise his or her powers for an improper purpose, such as issuing new shares in the company for the purpose of reducing the influence of dissenting shareholders;
- to avoid conflicts between his or her own interests and those of the company, and to declare any interest he or she may have in the proposed transaction;
- to exercise independent judgement; and
- to exercise reasonable care, skill and diligence.

The most likely claim against a director or officer is that, in pursuing a transaction, he or she acted in breach of one or more of these duties.

As a general proposition, such duties are owed to the company, and the cause of action therefore vests in the company and not in any individual shareholder. Furthermore, individual shareholders are, on the whole, prevented from disputing any course of conduct by the company that has been approved by a majority of shareholders.

However, there are certain specific remedies available to individual shareholders, which are principally a derivative claim by a shareholder on behalf of a company; an unfair prejudice petition by a shareholder; and a petition for the company to be wound up on just and equitable grounds.

These remedies require court action, and there are high hurdles to overcome to get proceedings for these started in the courts (explained further in question 2) . For these reasons, claims for these remedies are not particularly prevalent in the English courts.

In rare cases, a shareholder may also have a direct cause of action against the directors or officers, or against third parties, on the basis that a duty that was owed personally to him or her has been breached. For example, a shareholder who voted on a transaction on the basis of a company circular that he or she subsequently alleges to have been misleading may seek a remedy directly from the directors in his or her own name. A director may also owe a fiduciary duty to a shareholder depending on the existence of a special factual relationship, for example in relation to the disclosure of material facts or an obligation to use commercial or confidential information to benefit the shareholders. However, a court will not permit a shareholder to make such a claim where the loss he or she is seeking to remedy is merely a reflection of a loss suffered by the company (eg, a diminution in the value of the shareholder's shares) – which in practice can be a real stumbling block for shareholders seeking to bring claims.

Finally, a shareholder in a public company may have a claim against a director responsible for listing particulars and prospectuses if the shareholder acquired or contracted to acquire securities to which they applied, and he or she has suffered loss as a result of any untrue or misleading statements in the particulars or prospectus, or through any omission of information otherwise required to be included (section 90, Financial Services and Markets Act 2000 (FSMA)).

Requirements for successful claims

2 For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?

First, a derivative claim against a director or third party can be pursued by a shareholder on behalf of a company, if a court gives permission, where there has been any actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director (or shadow director) of the company. For example, by causing the company to engage in corrupt or illegal conduct, or in respect of fraudulent accounting irregularities. A claimant must obtain permission from the court to continue a derivative claim, which the court may give at its discretion. The claimant shareholder must be able to demonstrate that he or she has a prima facie case. The court must refuse permission if it considers that a person acting in accordance with the statutory duty to promote the company's success would not seek to continue the claim, or if the act or omission complained of has been authorised or ratified by the company (and the court may in fact adjourn the proceedings to allow such ratification to be obtained); the court may also refuse permission based on a number of other factors including the absence of good faith by the applicant in bringing the claim or the availability of a personal remedy which the applicant could bring against the company in his own name.

Second, a petition alleging unfair prejudice can be brought by a shareholder where the company's affairs are being conducted in a manner that is unfairly prejudicial to the interests of some or all of its shareholders as shareholders; or a current or proposed act or omission would be unfairly prejudicial to the interests of some or all of its shareholders as shareholders.

The complaining shareholder must be able to show that unfair prejudice has in fact been suffered. Unfair prejudice petitions may be appropriate in many different circumstances, for example where a shareholder has an expectation to be included in the management of a company but has been excluded; in the case of excessive remuneration of the directors, inadequate payment of dividends or loss of confidence in the management of the company; or, in respect of an M&A transaction, if the directors take action to thwart a prospective transaction that is in the company's interests. A court will decide on a case-by-case basis whether a petitioning shareholder has adduced sufficient evidence to establish the relevant unfair prejudice and its seriousness.

On a successful derivative action or unfair prejudice claim, the court has a wide discretion to impose such remedy as it sees fit. In particular, it can order a company to refrain from or carry out particular acts – although it is unlikely that a court would order an M&A transaction to be stopped or to force one to go ahead. A court could also order, in respect of an unfair prejudice petition, that the petitioner's shares in the company be purchased at a fair price.

Third, a petition for the company to be wound up on just and equitable grounds can be brought by a shareholder. The just and equitable grounds are not exhaustively defined, but can include circumstances where there has been a justifiable loss of confidence in the management arising from serious mismanagement, or mismanagement which frustrates proper and legitimate expectations. It is important to note that an order will not be made where another remedy is available to the petitioner: this is a remedy of last resort and therefore rarely granted.

All breaches of duty (statutory or fiduciary) are capable of ratification by an ordinary resolution of the shareholders (over 50 per cent of votes cast) at a general meeting if there is full disclosure of all material circumstances, which in practice can nullify any claim centred on that breach of duty by a minority shareholder who did not support the ratification (however, see question 14).

Publicly traded or privately held corporations

3 | Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?

Shareholders in publicly traded and private companies are equally eligible to bring the claims explained in questions 1 and 2. In addition, further claims or grounds for claims may arise:

- in respect of public companies, by virtue of their regulation by the Takeover Code and, where their shares are publicly traded, the UK Listing Rules or the AIM Company Rules and related legislation that applies to quoted companies such as the Market Abuse Regulation. For example, Class 1 and related-party transactions by publicly traded companies require shareholder approval; and
- in respect of private companies, by virtue of any additional obligations or restrictions imposed under the company's articles of association or any shareholders' agreement.

Form of transaction

4 | Do the types of claims that shareholders can bring differ depending on the form of the transaction?

The basis of any claim is likely to be as explained in questions 1 and 2. However, the formulation of the claim may differ depending on the form of the transaction complained about. For example, in the case of a tender offer, the bidder makes an offer to the target's shareholders and the shareholders are the selling parties who approve the transaction, whereas, in the case of an acquisition or disposal by a company of a business or the share capital of a subsidiary, it is the company that is the party to the relevant transaction and its board of directors makes the decision to buy or sell.

Negotiated or hostile transaction

5 | Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?

In principle, the types of claims available would not differ. However, similarly to question 4, the nature of the transaction may affect the formulation of a claim because acceptance of a hostile offer for a public company would not, at least when made, be recommended by the directors of the target company and the offer would be successful only if a sufficient number of shareholders accepted the offer (however, see question 1 in relation to a potential claim for misleading statements). A negotiated transaction would normally require only the approval of the board of directors of the selling company (in the case of an asset or subsidiary sale or purchase, if shareholder approval is not required by the UK Listing Rules, or any shareholders' agreement or the company's articles of association).

Party suffering loss

6 | Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?

This is a critical issue in English law where a shareholder tries to commence a personal claim against a director or a third party. As explained in question 1, he or she will be precluded from making such a claim if the loss he or she is looking to recover is merely reflective of loss suffered by the company that it can claim for in its own name (eg, a diminution in the value of his or her shareholding). Such circumstances, however, are not prima facie a bar to a shareholder commencing a derivative claim, unfair prejudice petition or petition for winding up.

COLLECTIVE AND DERIVATION LITIGATION

Class or collective actions

7 | Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?

Collective action by shareholders is possible under English law. First, a shareholder is able to bring or continue a claim as a representative for one or more other persons with the same interest in that claim. Second, a court may consolidate claims by multiple claimants together, using its case management powers, or claims can be brought jointly. Third, a court may make a group litigation order whereby multiple claims giving rise to the same issues are grouped together and managed according to specialist procedural rules.

Any new claimant must actively 'opt-in' to benefit from the collective action being brought.

On a successful collective action according to any of the three methods above, judgment will be binding on all claimants involved.

Notably, there have historically been very few collective shareholder actions in the UK. This may arise, in part, because English law does not make any presumption of reliance (such as a 'fraud-on-the-market' doctrine) by any shareholder on the company's conduct giving rise to the alleged loss; individual reliance must be shown by each claimant shareholder. There is also a limited body of English jurisprudence regarding the correct calculation of damages in collective actions. However, this may change in light of an increasing public sentiment in the UK to hold the directing minds of a company 'to account'.

Derivative litigation

8 | Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?

As explained in questions 1 and 2, a shareholder can bring a derivative action on behalf of a company in limited circumstances.

INTERIM RELIEF AND EARLY DISMISSAL

Injunctive or other interim relief

9 What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?

It would be open to a shareholder to seek (final) injunctive or interim relief to prevent a transaction closing, and the courts have a wide discretion to make appropriate orders if:

- in the case of an interim injunction:
  - there is a serious issue to be tried; and
  - the balance of convenience requires that an order be made, namely that damages would not be an adequate remedy if the claimant were to succeed at trial, a cross-undertaking in damages would adequately protect the respondent from any relief subsequently judged to have been wrongly granted and any other factors relevant to the balance of convenience justify the making of the order sought; and
- in the case of a final injunction at the conclusion of a trial where a claimant has established a legal or equitable right and the court considers it just to exercise its discretion to make such an order.

The same tests apply whether the injunction sought is prohibitory (requiring a person not to carry out a wrongful act) or mandatory (requiring a person not to continue a wrongful omission, or to undo the consequences of a wrongful act), although historically the courts are more reluctant to grant the latter.

As explained in questions 1 and 2, a court also has a wide discretion to grant an appropriate remedy on a successful derivative claim or unfair prejudice petition. However, a court is unlikely to make an order preventing a transaction from closing, and is further unlikely to modify or redraft the terms of a proposed transaction.

Early dismissal of shareholder complaint

10 May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?

If a shareholder complains by making a derivative claim, he or she must seek the permission of the court to continue that claim (explained further in question 2).

Furthermore, a defendant or respondent to a derivative claim, unfair prejudice petition or petition for winding up could apply for its early dismissal by:

- applying for summary judgment on the claim where, on the basis of either a relevant point of law or the evidence adduced, the claimant has no real prospect of succeeding in his or her claim, and there is no other compelling reason why the claim should wait to be disposed of at trial; or
- applying for a strike-out of the claimant's statement of case where:
  - it discloses no reasonable ground for being brought;
  - it is an abuse of the court's process;
  - it is otherwise likely to obstruct the just disposal of proceedings; or
  - there has been a failure to comply with a procedural rule.

ADVISERS AND COUNTERPARTIES

Claims against third-party advisers

11 Can shareholders bring claims against third-party advisers that assist in M&A transactions?

A shareholder may be able to bring a claim against a third-party deal adviser if he or she can establish that he or she was owed:

- a duty of care by that third party not to be negligent because the damage he or she has suffered was foreseeable, there was sufficient proximity between him or her and the adviser, and it is fair, just and reasonable in the circumstances for a duty of care to be imposed; or
- a duty of care by that third party not to make negligent misstatements where the adviser assumed a responsibility towards the shareholder.

In practice, it may be difficult to establish that a third-party deal adviser did owe a shareholder a relevant duty of care: the tests to be satisfied are restrictive. In addition, such an adviser usually contracts directly with the company, and in such circumstances the courts have rarely found that a collateral duty is owed in favour of a shareholder. Furthermore, if the company has a readily available remedy against the adviser for all of the loss suffered as a result of the wrongdoing, then the shareholder's personal claim will be barred under the principle of reflective loss (as explained further in questions 1 and 6).

Claims against counterparties

12 Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?

In principle, a shareholder could bring a derivative claim or an unfair prejudice petition against a director and a third party (eg, a counterparty to an M&A transaction) who participated in the director's wrongdoing where the claim arises out of the director's breach or the shareholder obtains the court's permission. On either cause of action, the court could order relief against a third party.

If the shareholder was seeking recovery of loss from a third party unconnected with any wrongdoing by a director, he or she may have a personal claim against the party concerned if he or she could establish that he or she was owed an independent duty by that party, and the loss he or she is seeking to recover is not merely reflective of the company's loss.

LIMITATIONS ON CLAIMS

Limitations of liability in corporation's constitution documents

13 What impact do the corporation's constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?

Directors have a duty to comply with a company's constitutional documents, which may impose more rigorous standards than those in the CA 2006.

English law does not allow a director's duties or liabilities to be diluted or limited by the company's articles of association.

Statutory or regulatory limitations on claims

14 | Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?

A derivative claim may not be brought where the act or omission has been authorised or ratified by the company. In respect of such authorisation or ratification, the vote of the director whose actions are being challenged or of any connected person must be disregarded.

An act or omission complained of cannot be authorised or ratified if it can be regarded as a 'fraud upon the minority', for example where the complaining shareholder has no other remedy and the directors have used their power to benefit themselves at the expense of the company, or where the relevant action involves an attempt by majority shareholders to expropriate shares held by the minority.

Authorisation or ratification does not preclude an unfair prejudice petition.

A court also has the power to relieve a director of liability entirely or in part in any proceedings for negligence, default, breach of trust or duty if it appears that he or she acted honestly and reasonably and, having regard to all of the circumstances, he or she ought fairly to be excused under section 1157(1) CA 2006. If a director suspects that a claim may be made against him or her, he or she can apply for preemptive relief. Relief is likely to be granted only in limited circumstances, such as where a director has acted honestly and on legal advice and had no alternative course of action.

Common law limitations on claims

15 | Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?

The CA 2006 requires that a director, in carrying out and complying with his or her duties, exercises the care, skill and diligence of a reasonably diligent person. The director must satisfy an objective test: that he or she has acted with the general knowledge, skill and experience that can reasonably be expected of a person carrying out the functions carried out by that director. He or she must also satisfy a subjective test: that he or she has acted with the general knowledge, skill and experience that he or she actually has.

The duties imposed on directors allow, prima facie, for the scrutiny of directors' conduct by the courts. For example, an allegation that a director has acted in breach of his or her duty to promote the success of the company for the benefit of its shareholders as a whole ostensibly requires the courts to examine the reasoning of the director, and the factors that he or she took into account in managing the company, and in taking decisions and acting in the way he or she did.

The intention behind the legislation is to impose a high standard on directors. However, a court is likely to be slow to second-guess a director's good faith discretionary decision.

Note also our comments in question 14 regarding the court's ability to relieve a director of liability.

STANDARD OF LIABILITY

General standard

16 | What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?

See question 15.

Type of transaction

17 | Does the standard vary depending on the type of transaction at issue?

No.

Type of consideration

18 | Does the standard vary depending on the type of consideration being paid to the seller's shareholders?

No.

Potential conflicts of interest

19 | Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?

The standard of care owed by a director does not vary depending on whether he or she has a potential conflict of interest in connection with an M&A transaction.

However, a director has a duty to notify the other directors of any interest he or she may have in a proposed transaction or arrangement with the company, and (save to the extent authorised by shareholders or, where permitted, the other directors) to avoid an actual or potential conflict as regards matters other than a proposed transaction where in either case the situation can reasonably be regarded as likely to give rise to a conflict of interest. In addition, the company's articles of association will often contain provisions regulating the situation and, in most cases where a director has any material conflict in relation to a proposed transaction, he or she will either as a matter of law or best practice recuse him or herself from any board decisions regarding the matter.

Controlling shareholders

20 | Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared rateably with all shareholders?

As explained in question 19, the applicable standard of care does not vary.

Where the company is involved in the transaction, its directors will have a duty to ensure that the transaction is in the interests of the company as a whole and not just that of the controlling shareholder.

INDEMNITIES

Legal restrictions on indemnities

21 | Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?

The CA 2006 prohibits a company from indemnifying or exempting a director of the company, or of an associated company, from any liability in connection with any negligence, default, breach of duty or breach of trust by him or her in relation to the company.

However, there is a specific exception that, subject to certain requirements, allows a company to indemnify directors in respect of liabilities arising from proceedings brought by third parties (eg, class actions or actions brought by shareholders following M&A or share issues). In addition, companies may purchase directors' and officers' insurance to protect directors from loss resulting from claims made against them in relation to the discharge of their duties as directors, and the constitution of a UK company will often expressly permit the purchase of such insurance (on which, see question 24).

M&A CLAUSES AND TERMS

Challenges to particular terms

22 Can shareholders challenge particular clauses or terms in M&A transaction documents?

A shareholder has no personal right to challenge the terms of an M&A transaction.

However, as explained in question 1, a director has a duty, inter alia, to act in the best interests of the company. If the particular M&A term is damaging to a company's interests, a shareholder may be able to raise an argument that in agreeing to it the director has breached this duty. However, the CA 2006 makes it clear that the decision as to what will promote the success of the company, and what constitutes such success, is one for a director's good faith judgement. As such, unless a director's good faith can be impugned, a court is unlikely to determine that a decision has not been properly made.

PRE-LITIGATION TOOLS AND PROCEDURE IN M&A LITIGATION

Shareholder vote

23 What impact does a shareholder vote have on M&A litigation in your jurisdiction?

See question 14.

Insurance

24 What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

Directors' and officers' (D&O) insurance policies typically cover the directors and officers of the company for claims made directly against them that are not subject to an indemnity from the company (known as 'Side A' cover); and the company itself in respect of any reimbursement or indemnity paid to the directors and officers arising from a claim against them (known as 'Side B' cover).

Whether directors and officers are able to rely on an indemnity from their company in particular circumstances will depend on the nature of the claim. As a result, Side A claims will typically be claims made against directors by the company itself or by shareholders, whereas Side B claims will typically be claims made by third parties.

In addition, D&O insurance policies usually provide cover in respect of directors' defence costs, so that the costs of defending a Side A or Side B claim that are reasonably incurred will typically be covered, subject to approval by insurers. If there is an open question as to cover under the policy, insurers may approve defence costs incurred subject to a reservation of rights.

Therefore, D&O insurance provides an important protection in respect of shareholder and derivative claims both for individual directors and officers (in cases where their company cannot indemnify them) and for the company itself (if it is in a position to provide an indemnity to the relevant directors or officers). Whether a particular shareholder claim will attract cover under any given D&O policy will of course depend on the nature of the claim and the specific terms of the relevant D&O policy.

Burden of proof

25 Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

The shareholder bringing the claim has the burden of proof, and the burden does not shift in the course of proceedings.

Pre-litigation tools

26 Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

A shareholder has limited rights to access company records or obtain company information. In particular, a shareholder has no general right to inspect documentation such as board minutes or general financial records.

Shareholders have a statutory right to receive copies of various reports and records that directors have statutory obligations to prepare or maintain, such as annual accounts and statutory registers. However, these documents may postdate any act or omission complained of, and may provide only limited information to assist a shareholder with his or her complaint.

A shareholder may apply for pre-action disclosure of company records before commencing a claim if:

- he or she and the respondent are likely to be parties to subsequent proceedings;
- the respondent's duty to give disclosure in any proceedings would extend to the requested documents; and
- the disclosure is desirable to dispose fairly of the proceedings, assist the resolution of the dispute and save costs. However, this is not an easy test to meet.

Furthermore, a company may argue that certain documents are privileged, although such claims will only be sustained if the document was created in connection with actual, threatened or contemplated litigation with the shareholder. Otherwise, a company has no general right of legal privilege against its shareholders.

Finally, a shareholder may be able to rely on a right to copies of documents or other information contained in a shareholders' agreement or the articles of association. Conversely, the articles of association or any shareholders' agreement may place additional restrictions on a shareholder's access to information.

Forum

27 Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

A company's articles of association can contain an enforceable choice of jurisdiction clause, which may dictate where any proceedings by a shareholder against the company or a director can be brought.

Otherwise, the appropriate forum would ordinarily be the company's place of incorporation.

Expedited proceedings and discovery

28 Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

A court is able to expedite proceedings using its general case management powers, but this is a matter of judicial discretion and requires grounds of genuine urgency.

Generally, parties to English proceedings are obliged to give disclosure. This has traditionally been on the basis of what is called standard disclosure, comprising a reasonable search for and production of documents that:

- are within that party's control and on which he or she relies;
- adversely affect or support his or her or another party's case; or
- he or he is otherwise required to disclose under the English civil procedure rules.

Recent disclosure reforms (which apply to most commercial cases) have now introduced a menu of approaches to disclosure for a court to select on the basis of what is appropriate and proportionate in a particular case. The extent of a party's disclosure obligations under this new scheme could vary from a wide search for relevant material (akin to standard disclosure), to more narrow issue or request-based searches, or to 'known adverse documents' only.

Parties are not obliged to disclose documents that are legally privileged: see question 26 in relation to the assertion of privilege by a company against a shareholder. Issues can also arise where a party alleges that a document is not disclosable because it is not within his or her control, or does not fall within the test for standard disclosure (or whichever other test is ordered to apply), either of which may be contentious areas in an M&A dispute if a shareholder is seeking documents that arguably belong to a counterparty. Disclosure can be ordered against a non-party if the documents sought are likely either to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and such disclosure is necessary to dispose fairly of the claim or to save costs, which may prove useful to a shareholder in relation to a dispute over an M&A transaction.

Confidentiality obligations may be cited by a company in refusing to give disclosure of particular documents. However, in a recent decision it has been emphasised that the public interest in the fairness of proceedings accorded by the parties giving full disclosure of all relevant material overrides the public and/or private interest in maintaining a particular confidentiality. In *Omers Administration v Tesco plc* [2019], an ongoing shareholder class action against Tesco plc in the High Court brought under section 90A FSMA, it was held that Tesco must disclose documents that the Serious Fraud Office (SFO) had originally obtained from third parties (including interview transcripts and witness statements) in the context of a criminal investigation into a Tesco subsidiary. The SFO had subsequently provided these documents to Tesco's legal representatives on a confidential basis expressly for the use in negotiating a deferred prosecution agreement between the SFO and its subsidiary. Tesco argued, inter alia, that disclosure should be withheld on the basis of the public or private interests in the confidentiality of the materials given their source and the circumstances in which Tesco received them. Nevertheless, the court emphasised the primacy of full disclosure of relevant materials in ordering that the documents be disclosed.

If a party considers that inadequate disclosure has been given by another party, he or she can apply to the court for an order for specific disclosure requiring either the disclosure of particular documents that are currently absent, or that the party conduct specific searches for further documents that he or she is then obliged to disclose. If a party is still dissatisfied with the disclosure given, he or she has the following options:

- an application for contempt against the party giving disclosure, on the basis that the disclosure statement confirming the adequacy of disclosure given was falsely signed; or
- an application for disclosure of specific documents on an 'unless' basis: ie, unless the disclosure is made, that party will be sanctioned, for example, by having all or part of his or her claim struck out.

DAMAGES AND SETTLEMENTS

Damages

29 How are damages calculated in M&A litigation in your jurisdiction?

The calculation of damages depends on the nature of the claim, the alleged wrongdoing and the particular remedy that was sought at the outset.

The court has a wide discretion to order an appropriate remedy in respect of a successful derivative claim. The court could order a payment to the company in compensation for any loss suffered, an account of profits or an appropriate order against a third party joined to the proceedings.

In relation to an unfair prejudice petition, the court has a similarly wide discretion, but its purpose in granting relief is specifically to remedy the unfair prejudice suffered by the shareholder. This is a very wide discretion, and could result in, for example, an order for the purchase of the minority shareholder's shares by the majority at a fair value or price to be determined by the court or otherwise, (rarely) an order for the purchase of the majority's shares by the minority, an order for an inquiry for the benefit of the company, an order to authorise the bringing of civil proceedings on behalf of the company or an order to regulate the company's affairs in the future.

Settlements

30 What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

There are no special issues.

THIRD PARTIES

Third parties preventing transactions

31 Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

Third parties are unlikely to have any direct causes of action in respect of an M&A transaction, but they may seek to intervene, for example, on the basis that the transaction is in breach of competition law, or that the board is acting improperly or not in the shareholders' best interests.

Such third parties might seek to buy shares in the company concerned in order to advance such arguments as a shareholder.

Third parties supporting transactions

32 Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

No.

UNSOLICITED OR UNWANTED PROPOSALS

Directors' duties

33 What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?

Where an M&A transaction involves the acquisition of assets from the company concerned, the directors of the company will need to determine whether entry into the transaction is in the company's interests and that there is no statutory or other legal requirement for the directors to involve shareholders in the decision (unless the company is party to an agreement that requires this or the transaction otherwise requires shareholder approval, for example, under the UK Listing Rules).

Where the proposed M&A transaction is the acquisition of the company's existing share capital (which would normally be effected by an offer to the company's shareholders in the case of most private companies), the directors of the company will normally not have any specific involvement in the transaction unless the company is subject to the UK City Code on Takeovers and Mergers (Code) or the company has a significant number of shareholders. The rules and general principles of the Code regulate the conduct of UK public takeovers, as well as certain takeovers where there is a shared jurisdiction between the UK and other EEA countries, and is administered by the Panel on Takeovers and Mergers. Under the Code, the directors of a target company must, inter alia:

- provide shareholders with their opinion on the offer and their reasons for forming their opinion;
- obtain competent independent advice as to whether the financial terms of the offer are fair and reasonable; and
- make known the substance of that advice to the shareholders.

COUNTERPARTIES' CLAIMS

Common types of claim

34 Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?

Litigation between counterparties to an M&A transaction may involve warranty claims and, in rare cases, misrepresentation claims. Where there are earn-out entitlements following an M&A transaction, litigation can ensue if the entitlements are disputed.

Differences from litigation brought by shareholders

35 How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?

Litigation between counterparties does not tend to involve issues concerning the correct claimants and defendants, which is a common feature of shareholder litigation. In addition, the issue of reflective loss (explained further in questions 1, 6 and 11) does not arise between counterparties.

UPDATE AND TRENDS

Key developments

36 What are the most current trends and developments in M&A litigation in your jurisdiction?

The significant growth in the litigation funding market in the UK is having an increasing effect in the shareholder litigation space.

Litigation funding is where a third party agrees to finance the legal costs of a litigant in return for a fee to be paid out of any proceeds if the litigation is successful. Litigation funding is legal in the UK, and there is now even a Code of Conduct of the Association of Litigation Funders designed to regulate and undoubtedly raise the profile of litigation funding in the UK. As at 2018, the estimated value of global assets under management by the 16 main litigation funders in the UK was over £1.5 billion (up from £180 million in 2009). Litigation funding can be an attractive prospect to litigants without access to significant legal budgets or those who wish to share the risk of litigation, or for commercial reasons.

Litigation funding has been behind a number of shareholder class actions in recent times, and it has the potential to get M&A litigation off the ground where it otherwise wouldn't.

As already mentioned above, there have also been a number of recent actions where shareholders have taken action collectively. Such collective action can be facilitated, in part, by the presence of litigation funding, and there is also an increasing market for boutique law firms who specialise in identifying cases ripe for collective action. Enormous tactical advantage can be achieved by taking collective action, and it has resulted in some positive settlements for shareholder litigants in the past few years.

However, one should not underestimate the practical implications of one firm managing collective claims by a multitude of claimants. The same procedural and evidential burdens of pursuing litigation in the English courts apply, and it is unlikely that a court would sympathise with incomplete pleadings, failures to comply with any court timetable, gaps in the evidence or an absence of key witnesses. The way in which collective claims are managed and pursued is therefore of vital importance to their success. It is also apparent that the management of collective claims could be ripe for abuse by unscrupulous individuals; this is another area of concern to be carefully managed for a successful collective action.

Finally, while the number of shareholder activism campaigns has remained relatively static in the UK, there is evidence that shareholders are adopting more US-style tactics to challenge issues such as remuneration and corporate governance. Such action is not necessarily litigious, but shareholder claims may be used if traction is not being gained by other methods.

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ISBN 978-1-83862-120-9