The forgotten postscript

*In an age when shareholder empowerment is high on the business agenda, it's more important than ever that every person with a stake in a company is able to exercise his or her rights. **Stephen Page** looks at the treatment of so-called 'dissentient' shareholders.*

Imagine, if you will, that you're a director on the board of a company which has been courted by a rival business, with a view to acquisition.

The terms of the bid have been favourable, votes have been obtained and the acquisition approved. Job done. Now, all that's left to be done is a simple matter of the registrar managing the mechanics with your shareholders, yes? Well, not quite.

After every acquisition or rights issue there will be a small but often significant number of shareholders who did not actually receive the cash or shares to which they were entitled. These are what's known as 'dissentient' shareholders, and will typically include shareholders who have moved and not informed the registrar; deceased shareholders where the executor or next of kin is not aware the shareholding exists; and shareholders who simply do not understand or are otherwise unable to complete the intimidating documentation that will invariably surround any corporate action.

In the strict sense, then, dissenting shareholders are those who have not assented to a formal takeover offer where the acquiring company, or offeror, effectively received acceptances for not less than nine-tenths in value of the shares not held at the time of the offer being made. The term 'dissentient' is a bit of a misnomer, as it would be difficult to describe any of these three groups as actually showing dissent. Forgetfulness, perhaps, in not remembering to notify the registrar of a change of address. Carelessness, even, for not leaving a clear inventory of their assets when they died. Or perhaps simply unfortunate, because they were unable to cope with the complex documentation. But dissenting? Definitely not.

At first glance, this might appear to be mere semantics, but look at it another way: it could easily be argued that corporate UK is collectively, if unintentionally, guilty of punishing 'dissenters' (who have in reality shown absolutely no dissent) by making little or no effective effort to provide them with the money or shares to which they are legally entitled. For many companies, the issue of dissenting shareholders appears some way down the corporate agenda.

Acquisitions

There are two principal legal frameworks within which companies can be acquired in the UK, both of which have implications for dissenting shareholders.

The first is an arrangement and reconstruction under SS.425 to 427A of the Companies Act 1985 (and possibly S.110 of the Insolvency Act 1986). The second is a takeover offer regulated by the Takeover Code and involving SS.428 to 430F of the Companies Act 1985. The position of dissenting shareholders will vary according to which of these frameworks is used.

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Arrangements and reconstructions

Unlike takeover bids regulated by the Takeover Code, acquisitions under SS.425 to 427A must essentially be consensual, but this does not mean there cannot be dissenting shareholders.

A key reason for electing, where possible, to effect an agreed takeover under SS.425 to 427A is the requirement for a 75 per cent level of acceptance, as opposed to the 90 per cent required for takeovers regulated by the Takeover Code.

A simple form of acquisition using a company reconstruction is the distribution *in specie* of shares in a subsidiary – for example, where company X has a subsidiary, company Y, and the shares in Y are distributed to the shareholders of X pro rata to the number of shares held in X. If a reconstruction cannot be undertaken by a straightforward distribution in specie of shares – because there were insufficient distributable reserves, for example – and a straightforward transfer of an undertaking is also ruled out, a reconstruction under S.110 of the Insolvency Act 1986 may offer a solution.

So-called 'S.110 schemes' have been popular with insolvency practitioners for many years as they are generally simpler and less expensive than the alternatives as there is no requirement to seek court approval. A typical S.110 scheme would involve a private company being placed into members' voluntary liquidation, with the liquidator being authorised to transfer the whole or part of the 'selling' company's undertaking or assets to another company, in exchange for shares in the 'acquiring' company. These shares are transferred to the selling company's shareholders.

One significant drawback with a scheme of this sort is that it is not possible where there are dissenting shareholders. Although a 75 per cent vote (that is, by special resolution) of the members is binding, in practical terms this may not be enough given statutory rights afforded to dissenting shareholders. Provided, not unreasonably, they do not vote in favour of the S.110 scheme, dissenting shareholders have the right within seven days of the special resolution approving the scheme to write to the liquidator expressing their dissent. If written notice is received, the liquidator must then either withdraw the scheme or acquire the interests of the dissenting shareholders at a price determined by agreement or arbitration.

Even if no written notice of dissent is given to the liquidator, a dissentient shareholder cannot be forced to accept shares in the acquiring company. In such cases, the shares in question must either be held on trust for the dissenting members or sold, with the proceeds returned to them. If the shares are acquired by the liquidator, it has been held that the dissenting shareholders are entitled to receive a sum equivalent to the break-up value of the company (the value, in other words, which would fall to be distributed if the company was wound up).

Because of problems with dissenting shareholders that can beset company acquisitions under S.110 schemes, advisers may instead consider adopting a scheme under S.425 of the Companies Act 1985. S.425 embraces not only reconstructions and amalgamations but what the Companies Act calls 'compromises or arrangements' as well. Under a S.425 scheme, a 75 per cent 'yes' vote will, if sanctioned by the court, generally be binding even upon those parties, including creditors, who voted against the scheme or otherwise abstained. A S.425 scheme will not receive court approval, however, if it is being used to circumvent the rights of dissenting shareholders that would otherwise exist under a S.110 scheme.

Assuming this not to be the case, the binding nature of S.425 schemes goes to the heart of the compromise which lies at their core. This, allied to their flexibility, can make S.425 schemes attractive as a means of effecting company acquisitions.

The Takeover Code and company legislation

Historically, few provisions relating to takeover regulation have been included in company legislation, with the only substantive corporate law until recently being SS.428 to 430F of the Companies Act 1985.

In simple terms, these sections provide that where one company makes an offer for all the outstanding shares of another company, and the offer is accepted in respect of not less than 90 per cent of the 'relevant shares' (essentially shares not held by the offeror at the time of the offer), the offering party may by notice acquire the non-assenting shares from those parties who for various reasons have not accepted the offer. Similarly, the non-assenting shareholders may subsequently require their shares to be purchased by the offeror on the same terms. For these reasons, SS.428 to 430F are sometimes referred to as 'squeeze

out' and 'sell out' rights.

Although this article is not concerned with the detailed requirements of SS.428 to 430F, it should be noted that the Takeovers Directive (Interim Implementation) Regulations 2006 (Part 5 and Schedule 2) have effectively repealed these sections for reasons concerned with the Takeovers Directive. This applies to all takeover offers made after 20 May 2006, being the latest date by which the Takeovers Directive was required to be implemented. SS 428 to 430F still live on, however, as they have been largely replicated with some modifications under the new Regulations, which will themselves be revoked when the takeover provisions of the Companies Bill are implemented (whenever that might be).

Section 430A CA 1985 (now included in the main in the above mentioned Regulations) provides that sums received in respect of a compulsory acquisition of non-assenting shares, together with any dividends or other sums accruing from any other consideration received from the shares, must be held in a separate bank account, bearing interest at an 'appropriate rate'. This sum will not include any unclaimed dividends which pre-date the takeover offer, as these funds represent a debt due from the offeree company and are therefore subject to its articles or the statute of limitations.

Payments into court

Companies in England and Wales with dissenting shareholders have a duty to make 'reasonable enquiries' at 'suitable intervals' to reunite holders with the sums due to them.

If the persons entitled cannot be determined within 12 years of the consideration – money or securities – being received (or if the offeree company is liquidated before then) the consideration, together with related interest, dividends or other benefits accruing from it, *must* be paid into court as a cash payment. If the consideration represents shares or some other security, they must at this stage be sold for cash. The only deductions a company can make from this cash sum are expenses for making reasonable enquiries to reunite entitled persons with the consideration due to them.

The legislation is silent as to what precisely constitutes 'reasonable enquiries' and 'reasonable efforts', so it falls to be a matter of judgement having regard to the particular circumstances. Capita Registrars, for example, offer a dissenting shareholder service which provides for chase-up letters to be sent at intervals of four, eight and ten years. Other registrars adopt a similar approach. It is presumed that letters sent by registrars to dissenting shareholders are mailed to their last known address as, rightly or wrongly, the courts do not require companies to extend their enquiries beyond this.

In England and Wales, the payment of monies into court follows the procedure used under the Trustee Act 1925, the payment itself being handled by the Court Funds Office. This procedure requires details to be provided of the consideration to be paid into court, together with the reasons for the dissentient balances, and the name and last known address of each dissentient shareholder.

Also included should be an analysis identifying how the amount to be paid to the court has been determined for each dissentient shareholder. This analysis should show accrued dividends and any other monies received; the number and nature of securities registered; and details of the costs defrayed and how such costs have been allocated between the dissentient balances. Finally it should include information on those attempts made by the company over the 12-year period to reunite the sum due with the dissenting shareholders (or to those persons who have since acquired a legal right to these sums).

On making a payment into court, the company is required to give notice to each holder entitled to the share consideration.

Under the Administration of Justice Act 1982, all funds received by the Court Funds Office are 'invested' with the National Debt Commissioners with a view to paying off the national debt. With this in mind, and given the extent of the UK's budget deficit, there is much collecting still to be done! By way of illustration, for the year ended 31 October 2004, approximately 25 payments by companies were made into court (under the provisions of S.430 (11)), involving 7,550 individual dissentient shareholdings with an aggregate total value of some £1.5 million.

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Dissenting shareholders may not exactly be boardroom favourites, but they are, or have been owners of the company, and as such should receive any entitlement due to them from corporate actions.

Do companies have a duty to make all reasonable effort to ensure they receive their money? Yes, of course they do, both on a legal and an ethical level. Do companies discharge that duty by writing to the same 'gone away' addresses every year for 10 years or more? Well, you can draw your own conclusions but for an increasing number of companies the answer is clearly 'no' and they are turning to specialist unification companies to tackle this problem.

Barclays is one such group who should be applauded for having taken up the challenge, and so far 12,000 shareholders and their beneficiaries are very glad it did, benefiting to the tune of more than £40 million over the past 18 months. Barclays and companies like it are setting new standards for good corporate governance in this area and it remains to be seen how many of their peers will follow that lead.

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Reuniting assets

Some companies are now getting to grips with the issue of forgotten shareholders.

Barclays for instance had over 17,000 dissentient shareholders following its acquisition of Woolwich plc in 2000. It has, however, taken a truly proactive approach and working with its Registrar and Assets Reunited (an asset reunification specialist) has now reduced that number to less than 5,000. This work has also directly reduced the number of Barclays 'gone away' shareholders by more than 50 per cent.

Lawrence Dickinson, Barclays' Deputy Company Secretary reiterated: 'returning unclaimed monies to our shareholders is a key element of Barclays private shareholder strategy. We have made fantastic progress in returning the assets from both our Rights Issues in 1985 and 1988 and the Woolwich acquisition in 2000 to the rightful owners. We have also been able to return over 70 per cent of the unclaimed cash from the demutualisation of the Woolwich Building Society.

Our view is that we have an obligation to return unclaimed monies to our shareholders. After all, it is their money.'

Isn't it time you did something about unclaimed assets?

Assets Reunited returning forgotten money and shares

Returning unclaimed assets not only fulfils a moral obligation, it also makes administration easier and sends out a positive message about corporate responsibility to customers, shareholders and employees.

As reunification experts we can help your company to return unclaimed assets efficiently and at no cost. To find out more about our highly professional services visit:

www.assetsreunited.co.uk
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