> Because of the long and involved procedure, it is virtually impossible to shorten the period of time between initial formulation of a scheme of arrangement and its becoming effective by Court Order below eight weeks. During those eight weeks each individual creditor can exercise all the rights and remedies available to him against the company debtor …
>
> The insolvent company's inability—particularly if it is a trading company—to hold the position (that is to prevent winding up or the random seizure of assets by individual creditors) during the period necessary for the devising and processing of a scheme, makes it extremely difficult for even the most uncomplicated scheme of arrangement to be launched. A straightforward moratorium on the payment of debts to unsecured creditors for a limited period, or such a moratorium coupled with a composition, say the reduction of all debts by 25%, may be the plainest good sense for all concerned, but it often cannot be done …
>
> The Court is heavily involved in the procedure under section [425]. There are two distinct phases. First, the convening of the necessary meetings of creditors and contributories and, secondly, the petition to the Court for the sanctioning of the scheme as approved by the appropriate majorities at the meetings …
>
> [We] believe that the Court procedure could be substantially streamlined and greatly improved. We cannot believe that there is the need for quite so many applications to, or attendances on, the Court. We doubt whether painstaking perusal of documents by Court officials with little or no experience of commerce or finance provides any real protection for creditors or contributories.

(p. 753) **2.** The report of the Insolvency Service's Review Group on Company Rescue and Business Reconstruction Mechanisms (May 2000) proposed that consideration be given to augmenting what is now CA 2006 Pt 26 by introducing the option of a moratorium while a scheme for a composition between a company and its creditors is being put together. This idea has now been dropped. Is that wise?
3. The Company Law Review (CLR) queried whether there was any real point in preserving the distinction between the IA 1986 s 110 and the CA 2006 Pt 26[18]procedures, and suggested there might be a case for combining the two, giving the company the option of choosing between providing cash appraisal rights for dissenting members or seeking the sanction of the court.
4. The CLR doubted whether the IA 1986 s 111 system of cash appraisal which provides for compulsory arbitration without recourse to a court is compatible with the Human Rights Act.[19]
5. The CLR considered that there may be a case for introducing a statutory procedure (as is available in New Zealand) which would allow wholly owned companies within the same group to merge with each other or with their holding company without the need for court approval and with little more formality than the approval of all the directors, a declaration of solvency and appropriate notification to creditors.

There is no reform embedded in the new CA 2006 Pt 26 itself to meet these various criticisms. However, certain procedures introduced into IA 1986 over the years do meet some of the needs identified earlier. These measures include the statutory procedures for company voluntary arrangements (CVAs), with and without moratorium periods (IA 1986 Pt I and Sch A1), and also for administrations (IA 1986 Pt II): see 'General issues', pp 767ff.[20]

Takeovers

Where a company acquires control over another by buying all or a majority holding of its shares, this is termed a '*takeover*'.[21] A general offer to buy addressed to all the members of a company is called a '*takeover bid*'. This is by far the commonest method used in this country for merging one corporate business with another. The two companies are usually referred to respectively as the '*offeror*' company or '*bidder*' and the '*target*' or '*offeree*' company.

If the target is a private company, control can usually only be exercised by a group holding more than 50% of the voting shares. Moreover, the target will probably have a provision in its articles authorising the directors to refuse

to register a transfer of shares. It follows that a takeover of a private company usually requires the agreement of the directors.

On the other hand, if the target is a listed company, control can often be exercised by the holder of fewer than 50% of the voting shares because the other shareholders are either apathetic or lack coordination. But the bidder is unlikely to be able to acquire the necessary shareholding simply by purchases on the Stock Exchange. It is usually necessary to send a circular (a takeover bid) to the target's members offering to buy their shares.

(p. 754) For many years, economists have argued about whether takeovers and mergers are beneficial for the economy. The argument in favour is essentially that assets should be owned and/or managed in the most productive way possible: less productive or efficient ownership and/or management should be replaced by a more efficient one, via a takeover. Takeovers thus form part of the market for corporate ownership and control of assets.[22] On the other hand, empirical evidence suggests that underperforming management is not a primary inducement to a takeover, so the bids do not have a disciplining effect. And even where there is such an effect, the mechanism has been described as costly, disruptive and counterproductive in motivating long-term good corporate governance.[23]

Regulation of takeovers

CA 2006 Pt 28 deals with the regulation of takeovers. Apart from Ch 3,[24] its provisions are new.[25] It implements the European Directive on Takeover Bids (2004/25/EC) (the Takeovers Directive), takes account of criticisms and comments from the CLR and the Department of Trade and Industry,[26] and applies some of the rules beyond the sphere of operation required by the Directive.

The Takeovers Directive lays down, for the first time, minimum EU rules concerning the regulation of takeovers of companies whose shares are traded on a regulated market. It aims to strengthen the single market in financial services by facilitating cross-border restructuring and enhancing minority shareholder protection. It contains:

- **(i)** general principles that apply to the conduct of takeover bids;
- **(ii)** a regulatory framework for bodies that supervise takeover bids (in the UK, the Panel on Takeovers and Mergers ('the Panel'));
- **(iii)** basic rules about takeover bids (eg when a bid must be made, the price that must be paid to members, the contents of offer documents prepared by the bidder, requirements to inform employees and the time period a bid will be open for);
- **(iv)** provisions restricting barriers to takeovers (eg action that might be taken to prevent a takeover by a company or its board of directors);
- **(v)** disclosure requirements for companies whose shares are traded on a regulated market; and
- **(vi)** provisions dealing with the problems of, and for, residual minority members following a successful takeover bid (ie 'squeeze-out' and 'sell-out' provisions).

The Panel on Takeovers and Mergers

The Takeovers Directive requires certain significant structural changes to UK practices.

Since 1968, takeover regulation in the UK has been overseen by the Panel. The Panel's function is to ensure that shareholders are treated fairly and placed in a position to decide on the merits of a takeover, and that shareholders of the same class are afforded equivalent treatment by an offeror. The Panel administers rules contained in the City Code on Takeovers and **(p. 755)** Mergers ('the Takeover Code'), which historically had no legal force.[27] The Takeover Code was prepared and first issued in 1968 by representatives of various City bodies, including the Bank of England, the Stock Exchange and the Issuing Houses Association, as a statement of the principles of commercial morality which those taking part in a takeover were expected to follow. The Takeover Code is not concerned with the financial or commercial advantages of a takeover, nor does it seek to encourage or discourage takeovers in general. These are matters for the company and its shareholders. Wider questions of public interest are dealt with by the Competition Commission, the Office of Fair Trading, the Department for Business, Innovation and Skills (BIS) or the European Commission. The latest version of the Takeover Code (the 10th edition) is dated 19 September 2011.

There are six General Principles governing the Takeover Code:

(i) All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected.
(ii) The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the bid; where it advises the holders of securities, the board of the offeree company must give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business.
(iii) The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.
(iv) False markets must not be created in the securities of the offeree company, of the offeror company or of any other company concerned by the bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.
(v) An offeror must announce a bid only after ensuring that he or she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration.
(vi) An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a bid for its securities.

The Takeovers Directive requires certain regulatory activities of the Panel to be placed within a legal framework. CA 2006 Pt 28 seeks to do this in a way that retains the considerable strengths of the previous system of takeover regulation overseen by the Panel, including:

(i) flexibility, speed and certainty in decision-making;
(ii) independence and regulatory autonomy;
(iii) principles-based regulation;
(iv) involvement of key City and business participants in developing takeover rules and the regulatory framework;
(v) professional expertise in regulatory activities, notably through Panel membership and secondments; and
(vi) consensual approach to regulation amongst those involved in the markets.

(p. 756) Part 28 therefore provides a statutory underpinning to the regulatory activities of the Panel, but leaves the Panel with considerable scope to decide its internal structures and operational framework. The Panel remains an unincorporated body. As such, it has rights and obligations under common law, supplemented by the relevant legislative provisions. It has power to make rules in relation to takeover regulation, and will continue to make rulings on the interpretation, application and effect of the Takeover Code and to give directions (CA 2006 ss 943–946).

Decisions of the Panel are in principle subject to judicial review. However, the court will not normally intervene while the Panel is actively dealing with a matter, but will only grant relief of a declaratory nature after the event.

[15.10] R v Panel on Take-overs and Mergers, ex p Datafin plc [1987] QB 815 (Court of Appeal)[28]

The facts are immaterial, although some of the descriptions of the Panel are now out of date, given the changes implemented by CA 2006 Pt 28.

> SIR JOHN DONALDSON MR: The Panel on Take-overs and Mergers is a truly remarkable body. Perched on the 20th floor of the Stock Exchange building in the City of London, both literally and metaphorically it oversees and regulates a very important part of the United Kingdom financial market. Yet it performs this function without visible means of legal support.
>
> The panel is an unincorporated association without legal personality … It has no statutory, prerogative or common law powers and it is not in contractual relationship with the financial market or with those who

deal in that market.

[His Lordship read extracts from the City Code, and continued:] 'Self-regulation' is an emotive term. It is also ambiguous. An individual who voluntarily regulates his life in accordance with stated principles, because he believes that this is morally right and also, perhaps, in his own long-term interests, or a group of individuals who do so, are practising self-regulation. But it can mean something quite different. It can connote a system whereby a group of people, acting in concert, use their collective power to force themselves and others to comply with a code of conduct of their own devising. This is not necessarily morally wrong or contrary to the public interest, unlawful or even undesirable. But it is very different.

The panel is a self-regulating body in the latter sense. Lacking any authority de jure, it exercises immense power de facto by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers, by waiving or modifying the application of the code in particular circumstances, by investigating and reporting upon alleged breaches of the code and by the application or threat of sanctions. These sanctions are no less effective because they are applied indirectly and lack a legally enforceable base.

The principal issue in this appeal, and only issue which may matter in the longer term, is whether this remarkable body is above the law. Its respectability is beyond question. So is its bona fides. I do not doubt for one moment that it is intended to, and does, operate in the public interest and that the enormously wide discretion which it arrogates to itself is necessary if it is to function efficiently and effectively. Whilst not wishing to become involved in the political controversy on the relative merits of self-regulation and governmental or statutory regulation, I am content to assume for the purposes of this appeal that self-regulation is preferable in the public interest. But that said, what is to happen if the panel goes off the rails? Suppose, perish the thought, that it were to use its powers in a way which was manifestly unfair. What then?…

(p. 757) [His Lordship outlined the facts of the case and continued:] It will be seen that there are three principal issues, viz: (a) Are the decisions of the panel susceptible to judicial review? This is the 'jurisdictional' issue. (b) If so, how in principle is that jurisdiction to be exercised given the nature of the panel's activities and the fact that it is an essential part of the machinery of a market in which time is money in a very real sense? This might be described as the 'practical' issue. (c) If the jurisdictional issue is answered favourably to the applicants, is this a case in which relief should be granted and, if so, in what form?…

The jurisdictional issue

As I have said, the panel is a truly remarkable body, performing its function without visible means of legal support. But the operative word is 'visible', although perhaps I should have used the word 'direct'. Invisible or indirect support there is in abundance. Not only is a breach of the code, so found by the panel, ipso facto an act of misconduct by a member of the Stock Exchange, and the same may be true of other bodies represented on the panel, but the admission of shares to the Official List may be withheld in the event of such a breach. This is interesting and significant for listing of securities is a statutory function performed by the Stock Exchange in pursuance of … [and he went on to name various regulations and rules now incorporated in the Financial Services Act 1986].

… The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions …

The issue is thus whether the historic supervisory jurisdiction of the Queen's courts extends to such a body discharging such functions, including some which are quasi-judicial in their nature, as part of such a system. Mr Alexander, for the panel, submits that it does not. He says that this jurisdiction only extends to bodies whose power is derived from legislation or the exercise of the prerogative. Mr Lever, for the applicants, submits that this is too narrow a view and that regard has to be had not only to the source of the body's power, but also to whether it operates as an integral part of a system which has a public law

character, is supported by public law in that public law sanctions are applied if its edicts are ignored and performs what might be described as public law functions.

[His Lordship referred to the analogous position of the Criminal Injuries Compensation Board, which had been considered by the Divisional Court in *R v Criminal Injuries Compensation Board, ex p Lain*,[29] and continued:] In fact, given its novelty, the panel fits surprisingly well into the format which this court had in mind in the*Criminal Injuries Compensation Board* case. It is without doubt performing a public duty and an important one. This is clear from the expressed willingness of the Secretary of State for Trade and Industry to limit legislation in the field of take-overs and mergers and to use the panel as the centrepiece of his regulation of that market. The rights of citizens are indirectly affected by its decisions … At least in its determination of whether there has been a breach of the code, it has a duty to act judicially and it asserts that its raison d'être is to do equity between one shareholder and another. Its source of power is only partly based upon moral persuasion and the assent of institutions and their members, the bottom line being the statutory powers exercised by the Department of Trade and Industry and the Bank of England. In this context I should be very disappointed if the courts could not recognise the realities of executive power and allowed their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted …

In reaching my conclusion that the court has jurisdiction to entertain applications for the judicial review of decisions of the panel, I have said nothing about the substantial arguments of Mr Alexander based upon the practical problems which are involved. These, in my judgment, go not to the existence of the jurisdiction, but to how it should be exercised and to that I now turn.

(p. 758) *The practical issue*

… In many cases of judicial review where the time scale is far more extended than in the financial markets, the decision-maker who learns that someone is seeking leave to challenge his decision may well seek to preserve the status quo meanwhile and, in particular, may not seek to enforce his decision pending a consideration of the matter by the court. If leave is granted, the court has the necessary authority to make orders designed to achieve this result, but usually the decision-maker will give undertakings in lieu. All this is but good administrative practice. However, against the background of the time scales of the financial market, the courts would not expect the panel or those who should comply with its decisions to act similarly. In that context the panel and those affected should treat its decisions as valid and binding, unless and until they are set aside. Above all they should ignore any application for leave to apply of which they become aware, since to do otherwise would enable such applications to be used as a mere ploy in take-over battles which would be a serious abuse of the process of the court and could not be adequately penalised by awards of costs.

[His Lordship referred to the various functions of the Panel and expressed the opinion that it was unlikely that the courts would often have occasion to intervene. He continued:] Nothing that I have said can fetter or is intended to or should be construed as fettering the discretion of any court to which application is made for leave to apply for judicial review of a decision of the panel or which, leave having been granted, is charged with the duty of considering such an application. Nevertheless, I wish to make it clear beyond a peradventure that in the light of the special nature of the panel, its functions, the market in which it is operating, the time scales which are inherent in that market and the need to safeguard the position of third parties, who may be numbered in thousands, all of whom are entitled to continue to trade upon an assumption of the validity of the panel's rules and decisions, unless and until they are quashed by the court, I should expect the relationship between the panel and the court to be historic rather than contemporaneous. I should expect the court to allow contemporary decisions to take their course, considering the complaint and intervening, if at all, later and in retrospect by declaratory orders which would enable the panel not to repeat any error and would relieve individuals of the disciplinary consequences of any erroneous finding of breach of the rules. This would provide a workable and valuable partnership between the courts and the panel in the public interest and would avoid all of the perils to which Mr Alexander alluded.

[His Lordship then ruled that a case for intervention in the present instance had not been made out.]

LLOYD and NICHOLLS LJJ delivered concurring judgments.

➢ Notes

1. On two occasions since *Datafin* the Court of Appeal has declined to intervene by way of judicial review in decisions of the Panel. See *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1990] 1 QB 146, CA and *R v Panel on Take-overs and Mergers, ex p Fayed* [1992] BCLC 938, CA. However, in the *Guinness* case the Panel did not escape criticism, some of its decisions being condemned as 'insensitive and unwise'.

2. It should be borne in mind that not all takeovers are contested: many are settled by agreement between the respective boards and accepted by the members without opposition. Also (more particularly in the case of smaller companies), a change of control is commonly effected by a simple share sale and purchase agreement concluded between the outgoing and incoming members. (Although 'simple' may not be a particularly apt word to use here: the documents in these transactions often run to hundreds of pages!) For reference, see G Stedman, J Jones and J Cadman, *Shareholders' Agreements* (4th edn, 2003).

(p. 759) Restricting barriers to takeovers

The Takeovers Directive seeks to override certain steps that may be taken by companies both prior to and during a takeover bid which have the aim of frustrating a bid, including:

(i) Pre-bid defences (Takeovers Directive Art 11): this provides 'breakthrough provisions' that will defeat strategies including differential share structures under which minority shareholders exercise disproportionate voting rights, limitations on share ownership and restrictions on transfer of shares set out in the company's articles or in contractual agreements. Companies with voting shares traded on a regulated market may opt in to these breakthrough provisions should they wish to do so (CA 2006 ss 966–972); the Directive rules are not compulsory.
(ii) Post-bid defences (Takeovers Directive Art 9): the management of a target company cannot take action to frustrate a bid (eg by sale of the company's key assets) without the approval of the members at the time of the bid. The rules banning this type of defensive action are contained in the Takeover Code.

Disclosure requirements

CA 2006 Pt 28, Ch 4 (s 992) amends the 1985 Act in relation to the content of annual reports of companies traded on a regulated market, compelling disclosure of matters such as the share and control structures of companies. Note also the new requirements under the Takeover Code, namely in relation to the disclosure of offer-related fees and expenses, the disclosure of financial and other information, and the public display of certain offer documents after the announcement of an offer. There are also additional rules requiring the disclosure by offeror and offeree companies of the offeror's intentions and plans regarding the offeree company and its employees.

'Virtual bids'

With a desire to counter prolonged 'virtual bid' periods—that is, where a potential offeror announces its intention to make an offer but without providing a firm commitment to do so—the recent amendments to the Takeover Code now require the offeree company to make an announcement identifying any potential offerors (Rule 2.4). This is supplemented by the 'put up or shut up' procedure (Rule 2.6(a)). Within 28 days from an announcement under Rule 2.4, the identified potential offeror must publically provide a firm response, that is, either make a formal offer, or announce that it does not seek to proceed forward. It may, however, seek the Panel's consent for an extension of the deadline.

Mandatory offer rules

The Takeover Code recognises that a public company may be controlled by holders of less than 50% of its voting rights. It therefore requires that a person (or persons acting in concert) who gains 30% of the voting rights in a public company must make a takeover bid for all the voting shares (Rule 9.1). The price that has to be offered is the highest price at which the offeror (or persons acting in concert with it) has dealt in the offeree's shares in the 12 months preceding the announcement of the mandatory offer. This rule is designed to prevent an offeror obtaining a controlling interest at a premium price from a few large members and then buying out the remaining small members cheaply.

Deal protection measures and inducement fees

Previously, offeree companies might have provided offerors certain 'inducement fees' (which payment may or may not be conditional upon the success of the takeover). The latest edition of **(p. 760)** the Takeover Code, however, now prohibits (subject to five exceptions contained in Rule 21.2(b)) any form of such payments. It is said that similar arrangements may deter potential offerors (thus limiting available offer choices) and/or encourage offerors to put forward a less favourable offer (both, it seems, will go the detriment of the offeree shareholders) (Rule 21.2).

Position of minority members following a takeover

The concepts of '*squeeze-out*' and '*sell-out*'[30] are designed to address the problems of, and for, residual minority members following a successful takeover bid. Squeeze-out rights (CA 2006 s 979) enable a successful bidder to purchase compulsorily the shares of remaining minority members who have not accepted the bid. Sell-out rights (CA 2006 s 983) enable minority members to require the majority member to purchase their shares. Because these procedures involve compulsory sale or acquisition of shares against the will of the holder or the acquirer, higher thresholds apply to the exercise of such rights, there are protective rules on the price that must be paid for the shares and the procedure can be challenged in the court (CA 2006 s 986).

CA 2006 Pt 28, Ch 3 introduces some changes to the 1985 Act to ensure compliance with the Takeovers Directive and to implement certain recommendations from the CLR. Chapter 3 applies to all companies and all bids within the ambit of Pt 28, whether or not the Takeovers Directive requires this.

Grounds on which the court will interfere in a squeeze-out.

CA 2006 s 986, like its predecessors, does not specify the grounds on which a court will interfere. Given the similar wording of the provisions, the earlier cases on this issue remain relevant.

[15.11] Re Grierson Oldham and Adams Ltd [1968] Ch 17 (Chancery Division)

The company, which dealt in wines and spirits, had been the subject of a successful takeover bid by John Holt & Co (Liverpool) Ltd. The offer made by Holts of 6 *s* [30p] per 2 *s* [10p] ordinary share had been accepted by 99.9% of the shareholders, and notice had been given of Holt's intention to acquire the remaining shares compulsorily at the same price pursuant to CA 1948 s 209 [CA 2006 ss 979 and 986]. The applicants, who had paid between 6 *s* 7 *d* [33p] and 6 *s* 9 *d* [34p] per share for their holdings, objected on the ground that the price offered was unfair to them; but the court declined to intervene.

> PLOWMAN J: The contentions which are put forward by the applicants fall under two main heads. In the first place it is said that the price of 6 *s* a share is unfair, taking into account the assets and future prospects of the company and the advantages which will accrue to Holts by the take-over; and secondly, that it is unfair to the applicants that they should be compelled to sell their shares at a loss. Before considering those contentions in more detail, there are two or three general observations which I should make and which I think are justified by the authorities on this section to which I have been referred.
>
> The first general observation is that the onus of proof here is fairly and squarely on the applicants, and indeed they accepted that that is so. The onus of proof is on them to establish, if they can, that the offer was unfair …
>
> The second general observation which seems to me to be relevant is this: that since this is not a case of a

purchase of assets, but of a purchase of shares, the market price on the stock exchange of those shares is cogent evidence of their true value; not conclusive evidence, of course, but cogent **(p. 761)** evidence … And in this case it is a formidable onus that the applicants have set out to discharge, bearing in mind that not only was the offer price above the stock exchange price, but that over 99% of the ordinary shareholders accepted the offer.

The third general observation which arises out of the arguments that have been put forward concerns the question whether the test of the fairness of the offer is fairness to the individual shareholder or fairness to the body of shareholders as a whole. In my judgment, the test of fairness is whether the offer is fair to the offerees as a body and not whether it is fair to a particular shareholder in the peculiar circumstances of his own case … It would quite obviously be impossible, at any rate in most cases, for the offeror to know the circumstances of every individual shareholder and, therefore, to frame an offer which would necessarily be fair to every individual shareholder in the peculiar circumstances of his case.

The other general observation, which arises from the *Sussex Brick case*,[31] is that the fact that the applicants may be able to demonstrate that the scheme is open to criticism, or is capable of improvement, is not enough to discharge the onus of proof which lies upon them. Vaisey J said:

> I agree that certain criticisms set out in the applicant's affidavit show that a good case could be made out for the formulation of a better scheme, of a fairer scheme, of one which would be more attractive to the shareholders if they could have understood the implications of the criticisms. I have no doubt at all that a better scheme could have been evolved, but is that enough?…
>
> A scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence. It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies to the extent of 100 per cent with the highest possible standards of fairness, equity and reason …
>
> It must be affirmatively established that, notwithstanding the view of the majority, the scheme is unfair, and that is a different thing from saying that it must be established that the scheme is not a very fair one or not a fair one: a scheme has to be shown affirmatively, patently, obviously and convincingly to be unfair.

With those general observations, let me refer in a little more detail to some of the points which have been put forward on the part of the applicants. They have complained that the market price was substantially higher than 6s a share for a number of years [His Lordship cited prices ranging up to 9 *s* 9 *d* [49p]]; equally, as Mr Gurney-Champion said, in each of those years the lowest price for the shares was under 6 *s*. But however that may be, it seems to me that the real point is, was 6 *s*a fair price at the time when the offer was made, namely, in September 1965?

Then Mr Gurney-Champion submitted that it was unfair that he should be compelled to sell these shares at a loss, particularly having regard to the fact that the loss would be one which was not available for capital gains tax purposes, for the reason that he had bought the shares before 6 April 1965, and on that day the price of the shares was less than the purchase price. If I am right in thinking that the question of unfairness has to be judged without reference to the particular circumstances of the applicant, then it seems to me that this argument is irrelevant, and I am bound to reject it because I have already indicated the view that the particular circumstances of the applicant is not a matter with which the court is concerned. What the court is concerned with is the fairness of the offer as a whole …

Squeeze-out provisions in s 979 may not be used by majority shareholders to expropriate a minority.

[15.12] Re Bugle Press Ltd [1961] Ch 270 (Court of Appeal)

The £ 10,000 issued share capital of Bugle Press Ltd was held as to 4,500 £ 1 shares each by Shaw and

Jackson ('the majority shareholders') and as to the remaining 1,000 shares by **(p. 762)** Treby. The majority shareholders formed a £ 100 company, Jackson & Shaw (Holdings) Ltd, which they caused to make an offer, addressed to the shareholders in Bugle Press Ltd, to purchase their holdings at £ 10 per share. After Shaw and Jackson had accepted this offer, and Treby had refused it on the ground that the price was too low, the offeror company gave Treby notice of its intention to purchase his holding compulsorily under CA 1948 s 209 [CA 2006 ss 979 and 986]. The Court of Appeal, affirming Buckley J, exercising the discretion conferred by the section, declared that the scheme was not binding on Treby.

> LORD EVERSHED MR: Mr Instone [counsel for the offeror company] freely accepts that the mechanism of the section has here been invoked by means of the incorporation of this holding company, Jackson & Shaw (Holdings) Ltd, especially for the purpose, and in order to enable the two persons, Shaw and Jackson, to expropriate the shares of their minority colleague, Treby. He says that although that is undoubtedly true, nevertheless, in the result, the case does fall within the strict language of the section and falling within it the consequences must follow. If that argument is right, it would enable by a device of this kind the 90% majority of the shareholders always to get rid of a minority shareholder whom they did not happen to like. And that, as a matter of principle, would appear to be contrary to a fundamental principle of our law that prima facie, if a man has a legal right which is an absolute right, then he can do with it or not do with it what he will …
>
> [It] is, I think, relevant … to note that by the terms of the section itself one must have regard to what lies behind the invocation of the section … [It] seems to me plain that what the section is directed to is a case where there is a scheme or contract for the acquisition of a company, its amalgamation, reorganisation or the like, and where the offeror is independent of the shareholders in the transferor company or at least independent of that part or fraction of them from which the 90% is to be derived. Even, therefore, though the present case does fall strictly within the terms of s 209, the fact that the offeror, the transferee company, is for all practical purposes entirely equivalent to the nine-tenths of the shareholders who have accepted the offer, makes it in my judgment a case in which, for the purposes of exercising the court's discretion, the circumstances are special … It is no doubt true to say that it is still for the minority shareholder to establish that the discretion should be exercised in the way he seeks. That, I think … follows from the language of the section which uses the formula which I have already more than once read 'unless on an application made by the dissenting shareholder the court thinks fit to order otherwise'. But if the minority shareholder does show, as he shows here, that the offeror and the 90% of the transferor company's shareholders are the same, then as it seems to me he has, prima facie, shown that the court ought otherwise to order, since if it should not so do the result would be … that the section has been used not for the purpose of any scheme or contract properly so called or contemplated by the section but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority; and that, as it seems to me, is something for the purposes of which, prima facie, the court ought not to allow the section to be invoked—unless at any rate it were shown that there was some good reason in the interests of the company for so doing, for example, that the minority shareholder was in some way acting in a manner destructive or highly damaging to the interests of the company from some motives entirely of his own …
>
> HARMAN LJ delivered a concurring judgment.
>
> DONOVAN LJ concurred.

➢ Notes

1. In most cases of substantial identity of interest, the accepting members will be 'associates' of the offeror (CA 2006 s 988), so their shares will not count in the calculation of the 90% acceptance limit.

2. Another special circumstance (beyond substantial identity of interest, as illustrated in *Re Bugle Press Ltd*) is where insufficient information has been given to the members to enable **(p. 763)** them to evaluate the offer

properly: *Fiske Nominees Ltd v Dwyka Diamond Ltd* [2002] EWHC 770 (Ch), [2002] 2 BCLC 123. Note that the court may take into account the extent to which the bidder has made the disclosure required by the Takeover Code and otherwise complied with it, even where the company is a private company and so not subject to the Code.

3. Technical failures can derail a squeeze-out. In *Chez Nico (Restaurants) Ltd* [1992] BCLC 192, the squeeze-out letters invited the remaining members to *offer* their shares for purchase, and were accordingly only invitations to treat. The court held that CA 1985 ss 428ff [CA 2006 ss 979 and 986] did not apply, since the 'bidders' had not made an offer.

Directors' role in a takeover

The duties imposed on directors apply with equal force during a takeover. The position of directors of the target company has been the subject of judicial consideration in a variety of contexts:

(i) It is well established that directors may not use their powers (eg to issue further shares[32]) for improper purposes, and this may include their use as a defensive tactic to thwart a takeover bid (see *Hogg v Cramphorn Ltd* **[7.11]** and the other cases cited at pp 332ff.[33] The use of *any* defensive tactics by directors without members' approval is forbidden by the Takeover Code, Rule 21.
(ii) In addition, the directors owe fiduciary duties to the company and cannot use their powers to further their own personal interests (see conflicts of duty and interest rules).
(iii) On the other hand, the ruling in *Heron International Ltd v Lord Grade* **[7.07]** that the directors in that case owed fiduciary duties towards the company's *members*(as distinct from the company) cannot be taken to be of general application, since it turned upon the special article which gave the board control over the transfer of the voting shares.
(iv) In addition, in giving information relevant to the bid to their members—as they are required to do by the Takeover Code, for example—the directors must act in an honest way and not seek to mislead the members (*Gething v Kilner* [1972] 1 All ER 1166, [1972] 1 WLR 337). However, in forming its opinion on a particular offer, the board is not limited to consider a prescribed set of factors, and in particular, its opinion is not required to be based on the offer price as the determining factor (Rule 25.2, Note 1).
(v) The directors must not exercise their powers in such a way as to prevent the members obtaining the best price for the shares (*Heron International Ltd v Lord Grade***[7.07]**; *Re a Company (No 008699 of 1985)* **[15.13]**) although they are not under a positive duty to recommend and facilitate implementation of the highest offer (*Re a Company (No 008699 of 1985)* **[15.13]**; *Dawson International plc v Coats Patons plc* **[15.14]**).

The extracts which follow throw some light on the question, but each must be read in the light of the facts of the particular case.

(p. 764) [15.13] Re a Company (No 008699 of 1985) [1986] BCLC 383 (Chancery Division)

Rival takeover bids had been made for the shares in a private company, one (referred to in the judgment as 'the N bid') by a company controlled by the target company's own directors and another, higher, bid by a trade competitor. The chairman had sent a circular to the members urging them to accept the N bid and explaining, with reasons, why the higher bid could not succeed. In these proceedings it was claimed that the directors had been in breach of duty in not recommending the higher offer and in not taking steps to facilitate the chances of that offer being successful, and that these breaches of duty had been unfairly prejudicial to the company's shareholders so as to justify relief under CA 1985 s 459 [CA 2006 s 994].

> HOFFMANN J: I cannot accept the proposition that the board must inevitably be under a positive duty to recommend and take all steps within their power to facilitate whichever is the highest offer. In a case such as the present, where the directors propose to exercise their undoubted right as shareholders to accept the lower offer in respect of their own shares and, for understandable and fully disclosed reasons, hope in their

personal capacities that a majority of other shareholders will accept it as well, it seems to me that it would be artificial to say that they were under a positive duty to advise shareholders to accept the highest offer. The fact that they would get more money by taking the higher offer is hardly something which needs to be pointed out. I do not think that fairness can require more of the directors than to give the shareholders sufficient information and advice to enable them to reach a properly informed decision and to refrain from giving misleading advice or exercising their fiduciary powers in a way which would prevent or inhibit shareholders from choosing to take the better price. Thus I doubt whether it would have been unfair if the directors, on receipt of the rival bid, had issued a statement saying something along the following lines:

> Shareholders will have received both bids. We think that they contain sufficient information to enable shareholders to reach a properly informed decision and there is nothing which the board wish to add. As individual shareholders, your directors propose to accept the N bid and hope that other shareholders who have no contrary fiduciary duties will have sufficient family loyalty to do so also.

[His Lordship held, however, that the circular which the directors had in fact sent to the members was arguably misleading and that accordingly the petition should be allowed to proceed.]

[15.14] Dawson International plc v Coats Paton plc 1993 SLT 80, [1988] 4 BCC 305 (Court of Session (Outer House))

The facts are immaterial.

LORD CULLEN: At the outset I do not accept as a general proposition that a company can have no interest in the change of identity of its shareholders upon a take-over. It appears to me that there will be cases in which its agents, the directors, will see the take-over of its shares by a particular bidder as beneficial to the company. For example, it may provide the opportunity for integrating operations or obtaining additional resources. In other cases the directors will see a particular bid as not in the best interests of the company …

I next consider the proposition that in regard to the disposal of their shares on a take-over the directors were under a fiduciary duty to the shareholders and accordingly obliged to act in such a way as to further their best interests. It is well recognised that directors owe fiduciary duties to the company. Thus the directors have the duty of fiduciaries with respect to the property and funds of the company …

(p. 765) In contrast I see no good reason why it should be supposed that directors are, in general, under a fiduciary duty to shareholders, and in particular current shareholders with respect to the disposal of their shares in the most advantageous way. The directors are not normally the agents of the current shareholders. The cases and other authorities to which I was referred do not seem to me to establish any such fiduciary duty. It is contrary to statements in the standard textbooks … The absence of such a duty is demonstrated by the remarkable case of *Percival v Wright* **[7.05]**. I think it is important to emphasise that what I am being asked to consider is the alleged fiduciary duty of directors to current shareholders as sellers of their shares. This must not be confused with their duty to consider the interests of shareholders in the discharge of their duty to the company. What is in the interests of current shareholders as sellers of their shares may not necessarily coincide with what is in the interests of the company. The creation of parallel duties could lead to conflict. Directors have but one master, the company. Further it does not seem to me to be relevant to the present question to build an argument upon the rights, some of them very important rights, which shareholders have to take steps with a view to seeing that directors act in accordance with the constitution of the company and that their own interests are not unfairly prejudiced.

If on the other hand directors take it upon themselves to give advice to current shareholders, the cases cited to me show clearly that they have a duty to advise in good faith and not fraudulently, and not to mislead whether deliberately or carelessly. If they fail to do so the affected shareholders may have a