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The Takeover Bid

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Bonds, stocks, debentures and company shares have been bought and sold in large and small transactions over many years. These dealings were facilitated by the foundation of the Dublin Stock Exchange in 1793. More recently, schemes evolved for the acquisition of the entire issued share capital of a company. The immense profits to be gained and, occasionally, the disastrous losses incurred excited envy and concern. News of these transactions seeped from the financial pages to the news and gossip columns so that the media felt it necessary to educate the general public in the commercial language which these transactions spawned. In turn, the commercial expressions were themselves replaced by acronyms.

The essential transaction is the “Takeover Bid” (TOB). Frequently the bid is made by those controlling the business of the company. Understandably, this is classified as a “Management Buy-Out” (MBO). The unsolicited bid may be described as “Hostile”. Those who opposed the bid by the Predators – and that is how they would be described— might hope for or encourage an alternative or acceptable bidder, invariably and romantically described as “a Silver Knight” to intervene.

A more ruthless defence involves the laying of “Poison Pills”. This involved adjusting the capital structure of the company in such a way that voting rights or the remuneration of a minority of shareholders or directors would alter dramatically on the change in ownership of a majority holding. It is not only the lawyers who assist in the takeover offensive or defensive; public relations appear to play an equally important role. It is frequently suggested that the intending purchasers have no interest in or knowledge of the existing business or its employees but are intent only on quick financial gain. Again, it may be asserted in terms that are intended to be offensive rather than indecent that this profit is to be achieved by “Dividend Stripping”.

Whether a bid succeeds or not, the intending purchasers and the possible vendors require skilful and expensive financial assistance from those engaged in Mergers and Acquisitions (M&A). Where possible, the bidder will insist upon a full investigation by his accountants and lawyers of the books, stocks, records and history of the company involved. This is the procedure that attracts the description “Due Diligence”. Not only will the buyer seek to satisfy himself that the assets have the full value attributed to them and that the liabilities do not exceed the amounts stated under any heading, he will insist that the contract for the purchase of the shares, the “Takeover Agreement” (TOA), contains express warranties dealing exhaustively with such matters. The scope of such agreements was illustrated by the decisions of the High and Supreme Courts in *UPM Kymmene Corporation and other v BWG Ltd* (205/99:214/99).

The need for these investigations was illustrated dramatically some years ago when Allied Irish Bank acquired the share capital in an insurance company which, it emerged, had incurred horrendous liabilities.

Less dramatic, perhaps, is the problem of valuing stock in trade. The quality and marketability of such stock has always been a problem. That famous businessman, Mr Don Tidey, illustrated the problem some years ago in the context of a takeover agreement when he explained that his company purchased very large quantities of women's underwear in a variety of colours. Those coloured white and pink sold well. Those coloured purple found few purchasers. Mr Tidey contended that garments in that colour should be categorised as "Slow Moving" but not "Obsolete".

A distinguished businessman of an earlier generation engaged in the most dramatic commercial transaction of his time. Technically it was not a TOB. Rather it was the acquisition of the business, assets and good-will of a leading company, namely, Clery's and Company Ltd. By any standards, it represented an extraordinary commercial decision.

Clery's had been incorporated in 1898. Having been rebuilt after the destruction of O'Connell Street in 1916, it was a new and purpose-built department store. The Chairman and Managing Director was a distinguished and wealthy businessman Sir Christopher Nixon, who held the controlling interest in the company. In 1936, Clery's borrowed £200,000 from the Equity and Law Life Assurance Society of London to pay off various bank overdrafts. However, as war clouds gathered and the wages bill rose, financial problems became acute and there were difficulties in meeting the claims of creditors. To ward off these claims, Sir Christopher invited the debenture holder to appoint Mr Eustace Shott, a member of the firm of Craig Gardiner & Company, as receiver. He was so appointed in October 1940. One effort at sale involved negotiations with the prominent Cork merchant, Mr William Dwyer. He accepted an offer to act as manager for the receiver and in that way to assess the worth of the business with a view to purchasing it. This gambit did not produce a satisfactory outcome.

On 10th November 1940, the receiver invited Mr Denis Guiney to interest himself in the transaction. Two days later, the parties met again, and Mr Guiney agreed to purchase the business and assets for £222,500 subject only to one condition, namely, that the transaction be completed at once. The parties met once more on 15th November when Mr Shott persuaded Mr Guiney to increase his offer by £7,500 so that the ordinary creditors would receive one shilling in the pound. The contract for sale was dated 21st November 1940. On 29th November 1940, Clery's instituted proceedings contending, among other things, that the property was sold at an undervalue. Viewing the argument in the light of values stretching back fifty years, one might have thought that this contention was unanswerable. The wonderful twenty year old building in the main street of Dublin, with some forty departments, was included in the sale at £98,000! There were valuations suggesting that the figure might be higher but nobody could find a purchaser willing to pay them.

After a hearing that involved such distinguished lawyers as Cecil Lavery KC, and John A Costello KC, Mr Justice Gavin Duffy gave his judgment on 8th May 1941 dismissing the plaintiff's claim. The judgment was never reported in the law reports. It appeared to have been mislaid but was reconstituted from the original draft judgment traced by the librarian to the Incorporated Law Society, Mr Colm Gavin Duffy, son of the learned trial judge. The commercial wisdom and courage of Denis Guiney is recorded in that judgment in the following terms: -

“Mr Guiney’s methods were as unorthodox as they were direct. He consulted no valuer, brought in no accountant, required no special stock-taking. As I understand his method, he did not trouble about the company’s accounts, yet he felt he knew the causes of its distress and believed he could cure them; did not examine the place, nor have it examined, because he thought he had enough general knowledge of the space available and of the excellent equipment to take the suitability of the main building and its fixtures and fittings for granted. Those were solid assets and the stock, even if over-valued, was certainly worth a large sum. He had ascertained the approximate yearly trade done and so had the essential information to tell him what he could make the assets produce; he had particulars of the rent and rates and taxes; he knew he could reduce the running expenses, because he knew what the running expenses ought to be; he could count and trade his counts for cash to give him an advantage denied to the company. His own intimate knowledge of the trade, gained by personal experience, told him what profit was on sight on a given turnover with these economies under his personal management. And so he knew how much he could afford to give. This self confidence and the abstention from expert advice may seem reprehensible to the more cautious operators who follow the beaten track; but he was risking his own money, not the money of his critics”.





The name of the company, Clery's (1941) Ltd is one record of this historic commercial transaction. Another is the wonderful Warner cartoon caricaturing the main participants in the legal proceedings. We produce a copy of that cartoon. We are saved the embarrassment of seeking the identification of any of the parties as their names are given in block letters.



Many of the lawyers involved signed the original copy. The unique, signed copy was presented by Mrs Guiney, then in her one hundred and sixth year, to a member of the judiciary on his retirement. Hopefully that copy will be included some day in a forensic museum or similar archive. It records a landmark in commercial litigation.



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