M&A STANDPOINT

Lloyds/HBOS – lessons for boards and their advisers

The judgment published last Friday in the case of *Sharp v Blank* (also known as the *Lloyds-HBOS litigation*) is of utmost importance – and significant comfort – to listed company directors and their advisers in the context of M&A transactions. Our detailed briefing on the judgment can be found here.

The case arose from Lloyds' merger with HBOS, which was negotiated at the height of the financial crisis in 2008, and was primarily concerned with the reasonableness of the Lloyds' directors recommendation in its circular to shareholders that they vote in favour of the merger, and the question of whether certain disclosures made in the circular were complete and accurate.

The board recommendation

In dismissing the claims the Court has clearly established that a board's recommendation to shareholders will not give rise to liability if the recommendation lies within the spectrum of reasonable choices available to the board. A recommendation could only be impugned if the chosen course of action was one that a director acting with reasonable prudence would not have taken. In this context, the diligence procedures carried out by the company and its external advisers was of significant assistance in demonstrating that the recommendation lay within the range of reasonable choices.

Omissions in a shareholder circular

The Court has also established that even where a shareholder circular does contain a material inaccuracy or omission, the onus is on the claimants to establish that had the inaccuracy or omission been corrected, shareholders would not have approved the transaction. The Lloyds shareholders had failed to do so, in substantial part because the directors, with the benefit of knowledge of the relevant (undisclosed) matters, continued to support the transaction and because the risks involved in the transaction were disclosed in the circular in some detail. Both of these findings create significant hurdles for shareholder class actions against listed company directors. In our view they may well impact the willingness of litigation funders and insurers to support claims of this nature against well-advised companies.

Whilst the Court dismissed the shareholders claims in their entirety, it did find that in two respects the statement in Lloyds' circular that it contained no material omissions was a material misstatement (albeit that this was not causative of loss).

Lessons for companies and their advisers

The judgment demonstrates the importance of listed companies seeking and acting on advice from their professional advisers on difficult disclosure questions. That advice, while not determinative, will greatly assist a defence of a negligent misstatement claim. It also demonstrates the importance of ensuring that general disclosure principles are given appropriate consideration, even where a matter may not be required to be disclosed under specific disclosure requirements. This point is of relevance in interpreting regulatory disclosure rules under, for example, the EU Prospectus Regulation, UK Listing Rules and Takeover Code, as well as at common law.

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