IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-000798
[2018] NZHC 817

IN THE MATTER	of a claim pursuant to r 49 of the Takeovers Code
IN THE MATTER	of a counterclaim under the Companies Act 1993
BETWEEN	ABANO HEALTHCARE GROUP LIMITED Plaintiff
AND	HEALTHCARE PARTNERS HOLDINGS LIMITED Defendant

Hearing: 16 – 20 April 2018

Counsel: DJ Cooper and EF Armstrong for Plaintiff
MR Crotty and AJ Nelder for Defendant

Judgment: 27 April 2018

JUDGMENT OF DOWNS J

This judgment was delivered by me on Friday, 27 April 2018 at 3 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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Wilson Harle, Auckland.
Russell McVeagh, Auckland.
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The case

[1] Put broadly, a "takeover" of a company is when the company is acquired—with its blessing or otherwise—through the purchase of shares from its shareholders. Rules exist. These comprise the Takeovers Code (the Code). Rule 49(2) of the Code provides for the recovery of, from the offeror seeking to acquire the shares, "expenses properly incurred by the target company in relation to ... a takeover notice".

[2] Abano Healthcare Group Ltd (Abano) incurred unreimbursed expenditure of $429,007.55 in relation to a failed takeover attempt by Healthcare Partners Holdings Ltd (Healthcare Partners).[1] It contends Healthcare Partners is liable to pay this sum. Healthcare Partners argues the related expenses were not properly incurred. And excessive.

[3] Central to all this is a 1972 decision, *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*.[2] In that case, Wilson J drew a distinction between expenses

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[1] Abano's total expenditure was higher, but it "set-off" a dividend payable to Healthcare Partners as a (minority) shareholder of Abano. Healthcare Partners filed a counterclaim in relation to the set-off. The parties agreed at trial no adjudication is required on this issue, as it is largely moot.

[2] *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd* [1972] NZLR 806.

of a target company countering arguments in favour of a takeover, and expenses directed at "resisting a takeover bid".[3]

Background

[4] Abano operates, and invests in, healthcare and medical services businesses here and Australia. The company is worth approximately $250 million. It is listed on the New Zealand Stock Exchange.

[5] Healthcare Partners was incorporated in November 2016 to make a partial takeover offer of Abano's shares. Healthcare Partners held 19.02 percent of Abano's shares. It wanted to acquire a controlling shareholding of 50.01 percent.

[6] Healthcare Partners is owned by interests associated with its directors, Mr Peter Hutson, Mrs Arnia Hutson and Mr James Reeves. Mr Hutson was director of Abano from 2008 until late 2013. During that year, Mr Hutson, Mrs Hutson and Mr Reeves explored the possibility of acquiring Abano with an Australian firm. Mr Hutson considered Abano's Board of Directors—and Abano—were not performing. The Board disagreed, both in relation to performance and desirability of acquisition. A takeover in conjunction with the Australian firm was then mooted. Nothing eventuated, but the relationship between Abano and Mr Hutson soured. Mr Hutson resigned as a director at the request of the Board on 19 September 2013.

[7] From November 2013, Mr Hutson and Mr Reeves agitated for change (as shareholders) in relation to Abano on the bases it was underperforming and poorly led. Misreporting was implied. Mr Hutson and Mr Reeves said Abano had "demonstrated increasing disregard for the truth"; likewise, its directors in relation to their "fiduciary duties". An independent report was dismissed as "fundamentally flawed". Reliability "and accuracy" of market information were questioned.

[8] In 2014, Mr Hutson and Mr Reeves gave Abano's chairman, Mr Trevor Janes, an ultimatum: encourage Abano's sale or resign. When Mr Janes did neither, Mr Hutson and Mr Reeves called for his resignation. Mr Reeves told assembled

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3 *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*, above n 2, at 811.

shareholders Mr Janes lacked "requisite skills"; Abano had incurred a "debt mountain"; and the company had a pattern of producing "misleading" information. Mr Reeves described a recent Abano newsletter as "a sick joke". Mr Hutson said a recent valuation of the company was neither credible nor accurate. The motion to remove Mr Janes failed.

[9] Other instances of public acrimony need not be recorded. It is sufficient to observe those connected to Healthcare Partners have been steadfast in their view Abano requires change in relation to both governance and direction. Abano considers these criticisms unfair and misleading. This judgment is not a referendum on which view is correct.

[10] Such is the context for the attempted takeover.

The attempted takeover

[11] On 4 November 2016 Healthcare Partners gave notice—as required by the Code—of its intention to make an offer to acquire 30.99 percent of Abano's shares. Abano contended the notice was invalid. Healthcare Partners issued a second notice on 7 November 2016. Again, Abano objected to its validity. On 24 November 2016 Healthcare Partners issued a third notice. Healthcare Partners initially offered $10 per share. It later increased its offer to $10.16 in recognition of an Abano dividend of 16 cents per share.

[12] Abano's Board quickly reached the view the offer was not in Abano's best interests or that of its shareholders.[4]

[13] From 30 November 2016, Abano sent invoices, initially without supporting information, to Healthcare Partners in relation to its takeover notice. Healthcare Partners did not respond.

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4 Healthcare Partners notes this conclusion was reached before Abano obtained the independent advisor's report. True, but its early communication(s) to shareholders did no more than advise them to wait until that report was available.

[14] On 14 December 2016 Abano published, as required by the Code, a target company statement. Abano recommended its shareholders reject Healthcare Partners' offer.

[15] On 23 January 2017 Abano announced it had "set-off" the dividend payable to Healthcare Partners, given the latter's non-payment of Abano's takeover notice expenses.

[16] On 26 January 2017 Abano issued a statutory demand in respect of its remaining expenses, which it later withdrew. Healthcare Partners extended its offer until March.

[17] On 3 March 2017 the offer expired. And failed. Healthcare Partners received acceptances for only 3.56 percent of Abano's shareholding. Healthcare Partners beat a retreat. On 18 August 2017 it sold all of its shares in Abano.

The Code; r 49 in context

[18] Section 19 of the Takeovers Act 1993 envisages, and provides for, the Code. The Takeovers Act formed part of a package of company law legislation, including the Companies Act 1993 and Financial Reporting Act 1993, designed to modernise corporate law.

[19] The Code came into effect on 1 July 2001. It applies to code companies—in practice, those on the New Zealand Stock Exchange—and companies of 50 or more shareholders.[5] Before its advent, takeovers were only loosely regulated.

[20] The Code creates "the fundamental rule".[6] The rule prevents any person becoming the holder or controller of more than 20 percent of the voting rights in a code company. The rule is subject to exceptions. The first exception is when an offeror seeks to acquire a code company through a "full offer": acquiring all shares in the company.[7] A second exception is when the offeror makes a "partial offer" in

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[5] Takeovers Code, r 3A(1).
[6] Rule 6.
[7] Rule 7(a).

relation to the code company's shares—the situation here.[8] Both require the offeror to give notice.[9]

[21] A partial offer must be for a "specified percentage" of the shares in the target company.[10] If the offeror does not already hold or control more than 50 percent of the company's shareholding, the specified percentage must bring the offeror such control. The facts offer a convenient example. Healthcare Partners held 19.02 percent of Abano's shares. To acquire a controlling shareholding, it needed an additional 30.99 percent, the proportion sought.

[22] Partial offers are uncommon. And, complex. If the offeror receives acceptances for shares greater than the specified percentage, the Code contains a mechanism for scaling acceptances. So, shares are acquired from each accepting shareholder on a pro rata basis to achieve the specified percentage.[11] If scaling occurs, every accepting shareholder sells some, but not all shares.

[23] To use this case as an example, if 40 percent of shareholders had agreed to Healthcare Partners' offer, scaling would take effect because:

(a) It already owned 19.02 percent of Abano's shares.

(b) Its offer related to an additional 30.99 percent of Abano's shares.

(c) There would be surplus acceptances of 9.01 percent. These would be offset against all acceptances on a pro rata basis.

[24] Partial offers have price implications. In a takeover situation, an offeror expects to pay a premium for obtaining control of the target company. Consequently, its offer price is often much higher than the target company's (share) trading price. Scaling, however, can affect the premium. Using the example above, everyone who agreed to sell shares to Healthcare Partners at the (original) offer price of $10 would

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8 Takeovers Code, r 7(b).
9 Rule 41.
10 Rule 9.
11 Rules 12 and 14.

not be able to sell all their shares because of scaling, with the result the $10 price would, obviously, only attach to those shares actually purchased by Healthcare Partners. Moreover, the value of the remaining shareholding might fall, as it would constitute a minority one only. Similarly, the target company would be under the control of the offeror, and subject to its untested vision.

[25] The directors of a target company in relation to either a full or partial offer must obtain a report from an independent advisor on the offer's merits.[12] The independent advisor must be approved by the Takeovers Panel, a specialist body established as a Crown entity under the Takeovers Act.

[26] A target company has other obligations as well. It must, within 14 days of the dispatch of the takeover offer, prepare and send to shareholders a "target company statement".[13] The statement must contain a variety of information, including the directors' recommendation in relation to the offer, and the independent advisor's report.[14]

[27] A target company is not precluded from resisting a takeover—a topic on which the Code is silent—but it may not engage in "defensive tactics".[15] Rule 38(1) of the Code provides:

> If a code company has received a takeover notice or has reason to believe that a bona fide offer is imminent, the directors of the company must not take or permit any action, in relation to the affairs of the code company, that could effectively result in—
>
> (a) An offer being frustrated; or
>
> (b) The holders of equity securities of the code company being denied an opportunity to decide on the merits of an offer.

[28] The Takeovers Panel has issued a Guidance Note on its approach to r 38. The Guidance Note cites as examples of impermissible defensive tactics:

(a) Acquiring or disposing of a major asset.

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12 Takeovers Code, r 21.
13 Rule 46.
14 Schedule 2.
15 Rule 39 creates exceptions to the prohibition of defensive tactics.

(b) Incurring a material new liability or making a material change to an existing liability.

(c) Declaring an abnormally large or unusual dividend or other form of capital distribution.

(d) Undertaking material issues of new shares or re-purchases of existing shares or material issues of convertible securities.

(e) Entering an agreement with a third party that confers material economic benefits on the target company which are available only to one particular bidder.

(f) Acquiring an asset that would render the offer subject to regulatory approval (for example, under the Overseas Investment Act 2005).

[29] The Code contains a broad prohibition on misleading and deceptive conduct. Rule 64 provides:

> **Misleading or deceptive conduct**
>
> (1) A person must not engage in conduct that is—
>
> (a) conduct in relation to any transaction or event that is regulated by this code; and
>
> (b) misleading or deceptive or likely to mislead or deceive.
>
> (2) A person must not engage in conduct that is—
>
> (a) incidental or preliminary to a transaction or event that is or is likely to be regulated by this code; and
>
> (b) misleading or deceptive or likely to mislead or deceive.

The rule bears obvious similarity to s 9 of the Fair Trading Act 1986.

[30] As to r 49(2), it provides:

> **Reimbursement of directors and target company**
>
> ….
>
> (2) The target company may recover from the offeror, as a debt due to the target company, any expenses properly incurred by the target company in relation to an offer or a takeover notice, whether as a result of refunds made under sub-clause (1) or otherwise.

[31] New Zealand is apparently unique in permitting a target company to recover takeover expenses from an offeror. The rule can be traced to s 11 of the Companies Amendment Act 1963, and remains materially unchanged. Australia eschewed our approach in 1969 out of fear it implied "an offeror is in the wrong" in making a takeover.[16] Extrinsic legislative material offers little insight on how the provision was intended to operate. Which leads to the only case directly on point.[17]

Canterbury Frozen Meat

[32] *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd* involved a claim for the recovery of approximately $27,000 under s 11(2) of the Companies Amendment Act 1963.[18] In 1968, Waitaki Farmers' Freezing Company sought to acquire Canterbury Frozen Meat Company. By April 1969, its bid had failed. Canterbury Frozen Meat Company engaged a host of advisors to resist the takeover: solicitors, a business consultant, a chartered accountant, an auditor, and a public relations consultant.

[33] Wilson J gave a brief oral decision. The Judge then released a written judgment as his oral decision had been "a rash undertaking";[19] some of his language was "per incuriam"; and, to do "justice to the excellent argument" of counsel.[20]

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16 Company Law Advisory Committee (Aust) *Second Interim Report: Disclosure of substantial shareholdings and takeover bids* (Commonwealth Government Printing Office, Canberra, 1969) at [45].

17 *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*, above n 2. *Canterbury Frozen Meat* was applied by Master Thomson in *Exicom Staff Investments Ltd v Venture Developers Ltd* HC Wellington M200/01, 26 February 2002.

18 *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*, above n 2.

19 At 807.

20 At 812.

[34] The Judge closely analysed the 1963 legislation. He considered nothing in the Act encouraged or discouraged the acceptance of an offer. Rather:[21]

> Everything points to the legislature's intention [shareholders] should be enabled to make a proper decision in their own interests, based on adequate information.

[35] A "single consistent test" could be discerned.[22] If an expense under s 11(2) was "incurred for the purpose of ensuring that the [shareholders] have a free and informed choice to accept or reject the offers … it is recoverable".[23] However, if the expense was "incurred for any other purpose, it is not".[24]

[36] The Judge identified several categories of recoverable expenditure:[25]

> It follows, then that the expenditure which an offeree company may recover under s 11(2) would include the following categories:
>
> 1. Expenditure incurred in and incidental to the fulfilment of its obligations under s 5 and s 7(2) of the Act.
>
> 2. Expenditure incurred in countering propaganda by the offeror which is calculated to influence the offerees' choice.
>
> 3. Expenditure incurred otherwise for the purposes of safeguarding the offerees' interests in relation to the scheme, as (for instance) in keeping them informed of developments which might affect the value of the shares.
>
> 4. Expenditure incurred in reimbursing directors under s 11(1).

[37] Category 2 remains self-explanatory, and is consistent with preservation of freedom of shareholder choice. So too category 3. However, categories 1 and 4 are broad, and potentially unconnected to the posited test. Indeed, category 1 involves more technical requirements; target company obligations vis-à-vis notices and the like. It follows Wilson J's schema does not necessarily sit comfortably with a "single consistent test".

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21 *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*, above n 2, at 810.
22 At 812.
23 At 812.
24 At 812.
25 At 813.

[38] But the test had reach. The Judge drew a distinction between expenses of a target company countering arguments in favour of a takeover, and expenses directed at "resisting a takeover bid".[26] The former was "proper" and recoverable as protecting "informed freedom of choice"; the latter improper and not.[27] The Judge said: "[t]here is nothing in the Act to indicate that, in a war between an offeror and an offeree company for control of the latter, reparations are payable by an unsuccessful offeror".[28]

[39] The Judge acknowledged his oral decision might have suggested otherwise, at least when the target company was to be "put out of business" by the offeror.[29] But having examined the Act, the Judge considered nothing therein implied "the expense of resisting a takeover bid" was recoverable.[30] Rather, this was "a normal business risk".[31]

[40] The Judge also offered broader guidance on when an expense was allowable:[32]

(a) The claimant must establish the expense: "comes under one of the four categories of expenditure previously listed"; "it was reasonable to incur expenses by engaging in that kind of activity; [and] it was reasonable to spend that amount on that kind of activity".

(b) Reasonableness was to be assessed "with reference to the circumstances obtaining at the time when it was incurred and will not limit either the kind or the amount of expenditure to what, in the light of events, provide to be strictly necessary."

(c) The Court was not to be "an auditor or a taxing master"; it would allow proper expenses "on broad lines rather than by scrutinising every dollar and cent expended".

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26 *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*, above n 2, at 811.
27 At 810.
28 At 812.
29 At 812.
30 At 812.
31 At 812.
32 At 815.

[41] The Judge's observations at (b) imply the identified categories of expenditure are not closed. Those at (a) imply otherwise.

[42] Wilson J allowed some expenses, dismissed others, and allowed some in part.

A fresh look?

[43] The parties agree recoverability turns, at least in part, on whether *Canterbury Frozen Meat* should be applied or revisited. Abano submits the case is not free from difficulty. And, even if correctly decided in 1972, re-appraisal is warranted; much has changed since then. Healthcare Partners contends *Canterbury Frozen Meat* has stood the test of time, particularly as the rule has not changed. Indeed, maintenance of its language is likely attributable to the case.

[44] The argument for Healthcare Partners would have force if *Canterbury Frozen Meat* had been in mind when r 49 was lifted from the 1963 Companies Amendment Act. But there is nothing to suggest it was. The report to the Minister of Justice in relation to the draft Code said nothing about *Canterbury Frozen Meat*. Or, recoverability of expenditure. Materially, the report was prepared by the Takeovers Panel, the specialist body in this context.

[45] Changed circumstances mean r 49 is ripe for fresh appraisal. Takeovers were only loosely regulated when *Canterbury Frozen Meat* was decided; now there is an embracing code. Much else has happened since 1972 too. The corporate legislative environment is very different. Think, for example, of the Securities Act 1978, the Securities Markets Act 1988, the Companies Act 1993, and the Financial Reporting Act 1993. Consequently, the corporate environment is now more regulated. And complex. Both attract cost.

[46] The Takeovers Panel has identified other changes since the advent of *Canterbury Frozen Meat*:[33]

(a) Greater expectations on company directors by shareholders.

[33] Takeovers Panel, "Code Word" No 24, December 2008 at 3.1.

(b) Greater public scrutiny of the performance of target company directors.

(c) A more litigious commercial environment.

[47] All of this suggests a fresh look is necessary.

How should r 49 be applied?

[48] As will be recalled, r 49(2) provides:

> **Reimbursement of directors and target company**
>
> …
>
> (2) The target company may recover from the offeror, as a debt due to the target company, any expenses properly incurred by the target company in relation to an offer or a takeover notice, whether as a result of refunds made under sub-clause (1) or otherwise.

[49] Five things will be noted about the text.

[50] First, use of the term "any" implies full recovery of properly incurred expenditure. The rule could have been framed with reference to categories of expenditure. It was not. Consequently, a target company may recover all its properly incurred expenses in relation to an offer or a takeover notice.

[51] Second, expenses must be "properly incurred" (by the target company) in relation to an offer or takeover notice. Self-evidently, other expenditure is not recoverable. A distinction between the two is anticipated, and created. More about this shortly.

[52] Third, the same phrase implies expenses must be reasonable. The rule could not, for example, envisage the engagement of a consultant with an instruction—explicit or otherwise—to charge as much as he, she or it liked on the basis the expense would be borne by the offeror. Similarly, to be "properly" incurred, the expense must be proportionate. Abano offered the helpful example of nationwide television commercials by the target company as a means of communicating with shareholders, which, it accepted, would be a disproportionate expense. The relevant opinion in relation to a takeover is that of shareholders, not that of the nation.

[53] Reasonableness and proportionality should, however, be assessed with reference to circumstances at the time and not comfort of hindsight. The latter would be inconsistent with full recovery, the rule's animating premise.

[54] Fourth, properly incurred expenditure must be "in relation to an offer or a takeover notice". Other expenditure, even if it occurs simultaneously, is not recoverable by the target company.

[55] Fifth, the phrase "in relation to" is broad and compendious. Usage implies recoverability of (properly incurred) expenses by the target company in relation to the takeover process as against, for example, recoverability of compliance costs vis-à-vis the takeover notice itself. Healthcare Partners did not contend otherwise.

[56] As observed, extrinsic legislative material offers little insight on purpose. However, purpose is discernible from the Code itself, which places considerable responsibilities on a target company. It, through its directors, must obtain a report from an independent advisor on the merits of the offer. Similarly, the target company's directors must make a formal recommendation to shareholders whether to accept the offer. Both must be prepared and conveyed quickly; within 14 days of the dispatch of the takeover offer.[34] All of this occurs within a strict regulatory environment, and in the context of heightened public scrutiny of corporates and directors. For these reasons, target companies are likely to require help from not inexpensive advisors, analysts, consultants and experts, all within a potentially tight timeframe.

[57] Rule 49(2) recognises as much. It also recognises such cost "can be quite disproportionate to the size or assets of the target company."[35] In short, r 49(2) acknowledges properly incurred expenditure in relation to a takeover notice is not a normal incident of the target company's business, and hence not an expense the target company should bear. It follows—as the Takeover Panel has observed—the rule should be "applied in a manner which reflects the realities of a modern takeover and enables all properly incurred expenses to be recovered".[36]

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34 Takeovers Code, r 46 and Sch 2.
35 Takeovers Panel, "Code Word" No 24, December 2008 at 3.3.
36 At 3.3.

[58] Contrary to the view in Australia, none of this implies "an offeror is in the wrong". Rather, it is to consider fair that extraordinary cost is better placed on the party seeking to obtain corporate control.

Properly incurred expenditure and "resisting" a takeover bid

[59] What then is the boundary of "properly incurred" expenditure? As will be recalled, in *Canterbury Frozen Meat* Wilson J held expenditure to resist a hostile takeover not properly incurred, whereas expenditure to inform shareholders of the directors' point of view, including "propaganda" to rebut that of the offeror, properly incurred.[37] Healthcare Partners contends the distinction should be maintained, essentially because of the vitality of the reasoning in that case. Abano contends the distinction is difficult to apply in practice and wrong in principle:

> The directors of a target company are entitled and obliged to form a view on the merits of the offer. They are entitled and obliged to advise shareholders of that opinion. Where the directors form a clear view that an offer is not in the best interests of shareholders (and/or the target company), the directors are entitled to seek to persuade shareholders to that view.
>
> Whenever this occurs, there will necessarily be two parties with different views, each seeking to persuade shareholders accordingly. The offeror will of course be promoting its offer and seeking to persuade shareholders of the benefits of acceptance. The target directors will seek to do the same to advance their different view that it is in the interests of shareholders to reject the offer. It is fully to be expected that each side will use all available means to communicate its message effectively and forcefully. Neither side is acting improperly in taking any of those steps (providing, of course, that they do not breach rule 64 of the Code).

[60] The distinction is at best elusive. As Abano submits, the view a takeover is not in the shareholders' best interests is inseparable from the view a takeover should be rejected, and in turn inseparable from so-called target company "resistance". The obvious example arises when a target company engages a public relations consultant to communicate the company's view to shareholders. Such engagement, and all that follows, can be characterised as resistance to a takeover when the brief is to highlight why the takeover should be rejected. But this is only because the directors of the target company reasonably believe it is in the best interests of the company—and its

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[37] *Canterbury Frozen Meat Co Ltd v Waitaki Farmers' Freezing Co Ltd*, above n 2, at 813.

shareholders—to do so. Consequently, actions to "resist" a takeover and those to "preserve" shareholder choice are typically coterminous and indistinguishable.

[61] This is the experience of those in the field. Abano called Mr Peter Hinton, a senior corporate lawyer and company director, as an expert witness. Mr Hinton has considerable experience with takeovers, and has acted for both target companies and offerors. His evidence was illuminating:

> The Court:
>
> Q. Mr Hinton, you don't directly address the issue of public relations consultants or companies in your testimony. Am I right to think that if there is a takeover notice, partial or otherwise, and the takeover is regarded as hostile, that can give rise to something of a public relations war?
>
> A. Yes.
>
> Q. How common is that in your experience?
>
> A. Invariably common, or invariable.
>
> Q. And is that because the acquiring party and the target company is each seeking to advance, perhaps aggressively, its perspective as to where the best interests of the shareholders lie?
>
> A. Yes, I think that is the same as persuading the shareholders to their point of view.
>
> Q. You'll be aware no doubt that Wilson J, in *Canterbury Frozen Meat*, a case decided some time ago, reached the conclusion that expenses for resisting a takeover bid are not recoverable, and might I be right in thinking that the distinction between resisting a takeover bid and informing shareholders about the undesirability of a bid could be a very fine distinction in practice?
>
> A. You would be entirely correct on that, we have struggled with that in practice.
>
> Q. Might it on occasions be gossamer thin?
>
> A. It could be thin to the extent that one could claim to be under one and motivated by the other.

[62] A related difficulty arises. Evidence of "resistance" will almost always be available when a takeover is hostile. And if a test for non-recoverability, much time will be spent examining—and then arguing about—target company correspondence,

especially entrails of email, with a view to establishing the correct taxonomy of associated expenditure. This has resource implications for those involved. And Courts.

[63] The boundary of properly incurred expenditure should, instead, be determined with reference to the Code. Materially, it says nothing about "resisting" a takeover offer. The Code does, however, prohibit defensive tactics and misleading or deceptive conduct; see the discussion at [27]–[29]. These behaviours do not give rise to recoverable expenditure for the obvious reasons the target company should not be engaging in them, and to permit recovery for such expenditure would be contrary to public policy as expressed by the rules of the Code.

[64] These prohibitions did not exist at the time of *Canterbury Frozen Meat*. Indeed, it is entirely possible Wilson J drew the distinction in question with a view to discouraging conduct now regulated by the Code, in what was then only a loosely regulated environment.

[65] To recapitulate, the true boundary between properly incurred expenses and other unrecoverable expenses lies not with an elusive common law distinction, but rather with articulated behaviours expressly prohibited by the Code: defensive tactics and misleading or deceptive conduct. It follows conduct hitherto regarded as "resisting" should not, without more, disqualify as unrecoverable otherwise properly incurred expenditure of the target company in relation to an offer or takeover notice.

[66] For completeness, the Takeovers Panel appears to have reached the same view:[38]

> **Expenses for resisting a takeover bid**
>
> 4.10 In *Canterbury Frozen Meat* the Court took the view that expenses incurred for the purpose of resisting a takeover bid are not recoverable. In the Panel's view, a distinction needs to be made between:
>
> - First, expenses incurred by the board of the target company in *resisting a bid* by engaging in defensive tactics which are not permitted by rule 38 of the Code. The Panel considers that these expenses are what the Court considered as being not properly

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[38] Takeovers Panel, "Code Word" No 24, December 2008 at 4.10 and 4.11.

> incurred in *Canterbury Frozen Meat*. These expenses, which may include items such as the costs of sale of key assets, are not recoverable under rule 49(2); and
>
> - Second, expenses incurred by the board of the target company in resisting a takeover bid considered by the board not to be in the interests of shareholders of the target company. These expenses, mostly related to communications with shareholders, should be recoverable under Category 2 above, as they are incurred in trying to ensure that shareholders are fully informed when making a decision as to whether to accept or reject a takeover offer. There should be clear justification for employing the use of PR consultants and/or public notices in substitution for, or in addition to, direct communication with shareholders.
>
> 4.11 Expenses incurred in *resisting a bid* are not always easily identifiable as falling within either of these categories. Whether they are *properly incurred* will turn on an objective view of the reason why they were considered by the board to be necessary.

[67] Now the disputed expenses.

The expenses

Forsyth Barr Ltd

[68] It is common for a target company to seek advice and assistance from an investment bank. Abano promptly retained Forsyth Barr Ltd (Forsyth Barr). Forsyth Barr's engagement letter of 4 November 2016 recorded its anticipated services:

> As Financial Adviser, Forsyth Barr will assist Abano in deciding on the appropriate response to the takeover offer. Key components of the role would likely involve the following:
>
> (a) assisting in the development and refinement of Abano's financial model and forecasts to be used by the independent expert;
>
> (b) assisting the Company and its legal advisors in updating the Board of the Company in relation to the Transaction and in preparing any necessary Board papers, including valuation advice;
>
> (c) assisting the Company's legal advisors in the preparation of a target company statement and other relevant documentation ("Transaction Documents") and liaising with the independent appraiser;
>
> (d) assisting the Company to develop and implement an effective marketing and communication strategy with the Company's shareholders and the market in relation to the Transaction;

(e) providing the Company with regular market feedback in relation to the Transaction including daily updates and analysis on trading in Abano shares;

(f) assisting in liaising with the bidder and their advisers; and

(g) providing any other advice to the Company as required and mutually agreed between the parties.

Mr Richard Keys, Abano's Chief Executive Officer, gave evidence Forsyth Barr provided these services, save perhaps (f).

[69] Healthcare Partners contends the full amount of Forsyth Barr's fee—about which more shortly—is not recoverable as Forsyth Barr was engaged to resist the takeover. Healthcare Partners notes two pieces of correspondence from Forsyth Barr to Abano referred to "the takeover defence role", the "defence strategy" and to "rebutting the points made in the draft takeover document".

[70] Other than the identified references, there is no evidence Forsyth Barr did anything other than the tasks identified in its engagement letter.[39] All of those related to the takeover offer and were, on their face, recoverable. Moreover, even if Forsyth Barr had a role in resisting the takeover, which is not established on the evidence, such a role is not necessarily incompatible with otherwise properly incurred expenditure; see [59]–[66].

[71] Forsyth Barr's fee was $375,000.[40] It comprised a fixed fee of $100,000 per month for three months, and then a monthly fee of $75,000 for one month. Mr Keys refused to commit Abano to paying Forsyth Barr a success fee, by which Forsyth Barr would have received a handsome sum if a new bidder completed a takeover of Abano with the latter's support.

[72] Healthcare Partners contends the fee is excessive. It submits Mr Key's stance in relation to the success fee likely contributed to a higher monthly premium, as

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[39] Mr Hinton said reference by investment banks and others to a "defence" role is common; while it could refer to "complete opposition" to a takeover, equally such usage could reflect "American parlance where they do talk about takeover defence".

[40] Plus disbursements.

evidenced by Forsyth Barr's 2013 fee of $20,000 (to prepare a valuation model in relation to Mr Hutson's proposed purchase with the Australian entity).

[73] I consider Forsyth Barr's fee reasonable. True, Most New Zealanders could not afford it. However, the context is a large corporate one; Abano was and remains listed on the New Zealand Stock Exchange:

(a) Mr Hinton said in his experience, Forsyth Barr's fee was "well within the normal range of fees paid by target companies to investment banks". And, "at the lower end of [the] range for a takeover offer of this nature". I accept this evidence.

(b) Healthcare Partners retained its own investment bank to assist it in relation to the proposed takeover. Its amended fee was more than $3 million (payable if the takeover offer succeeded).

(c) Forsyth Barr's 2013 fee has only modest relevance. That work was more confined as a takeover offer had not been made.

(d) Mr Keys attempted to negotiate a lower fee with Forsyth Barr, but was unsuccessful. Contrary to Healthcare Partners' submission, this is a not a case in which the target company accepted a hefty fee from an investment bank in the knowledge another would pick up the tab.

Ms Jackie Ellis

[74] Abano engaged Ms Jackie Ellis of Ellis & Co to provide public relations services. Ms Ellis specialises in investor relations communications for corporate clients. Her fee was $67,137.01. Mr Hinton said a "public relations war" is "invariable" in this setting. Healthcare Partners' retention of its own public relations consultants underscores the accuracy of this observation.

[75] Healthcare Partners contends approximately half of Ms Ellis' fee should not be recoverable as much of her work was directed at defeating the takeover offer from the outset. Healthcare Partners argues Ms Ellis and Abano adopted "an aggressive defence

strategy", in which Mr Hutson and Mr Reeves were portrayed, among other things, as "dissident shareholders" and "agitators".

[76] This characterisation is available to elements of the evidence. For example, on 12 November 2016 Abano and Ms Ellis corresponded about the desirability of Mr Hutson and Mr Reeves being seen in the manner above, without such portrayal emerging "from company spokespeople". Internal Abano email in December that year and January the next imply the company contemplated portraying Healthcare Partners as "bad debtors", but the approach was not pursued with Ms Ellis or publicly.

[77] The submission fails. Abano acted this way because it reasonably believed it was in its shareholders' best interests to reject the offer. Mr Hutson and Mr Reeves had been sharply critical of Abano; see [6]–[9]. And, their takeover offer vis-à-vis Healthcare Partners' was yet another chapter in the story. As observed earlier, resistance to a bid is typically coterminous and indistinguishable from preservation of shareholder choice.

[78] In any event, Ms Ellis' communications to shareholders were balanced. There is no suggestion anything she published on behalf of Abano was misleading or deceptive.

[79] Healthcare Partners observes not all proposed communications were published by Ms Ellis; Ms Ellis was used to provide communications to Abano's staff about the offer; and much time was spent in ensuring published communications had the right language. None of this is surprising, or unreasonable. Abano had to ensure none of its language was misleading or deceptive; its messages necessarily had many authors; and those to staff formed only a small proportion of the cost. Focus remained on shareholders.

[80] Materially, Healthcare Partners has not identified any *disproportionate* advertising. Ultimately, its complaint reduces to the proposition Healthcare Partners should not have to pay for Abano's successful public relations campaign. However, r 49 proceeds on the assumption exceptional (reasonable and proportionate) cost is better borne by the offeror.

Directors' fees

[81] Directors' fees in relation to the takeover offer total $74,400. Abano's shareholders had, since 2007, approved an annual pool of funds for additional remuneration of directors' extraordinary duties. Healthcare Partners contends "takeovers are part of the ordinary course of business for a Code company"; therefore, no allowance should be made for them.

[82] The submission has some support from the Takeovers Panel. Its Guidance Note in relation to expenses observes additional directors' duties in relation to a takeover offer are "an ordinary risk of holding office",[41] though it may be "proper and reasonable" for additional compensation of directors if a takeover offer attracts "legal and commercial complexity".[42]

[83] As observed earlier, r 49(2) proceeds on the assumption cost in this context is more fairly borne by the offeror. No reason exists to draw a distinction in relation to directors' fees, particularly given:

(a) The undisputed expert evidence of Mr Hinton that "takeovers blow directors and their lifestyles out of the water in ways that no other transaction or dealing that I have experienced can".

(b) The decision by Abano's shareholders to create and maintain a pool of funds for extraordinary directors' duties.

[84] But like other expenses under r 49, directors' fees must be reasonable and proportionate. And, these must reflect truly *additional* attendances resulting from the takeover or attempted takeover.

[85] Healthcare Partners contends there is no credible basis to determine how much time Abano's directors expended, for, Mr Keys asked for this information late in the piece.[43] True, this exercise was conducted largely after the fact. However, that does

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41 Takeovers Panel, "Code Word" No 24, December 2008 at 4.22.
42 At 4.23.
43 The issue was first raised at an Abano board meeting on 27 February 2017.

not make it unreliable. Mr Keys asked the directors for their additional time, which he calculated as a percentage of their ordinary duties over the period of the takeover. The proposed fee was then ameliorated to ensure it was conservative. Such methodology is unobjectionable.

[86] Healthcare Partners notes an email in the relevant chain between Mr Janes and Mr Keys recorded the figure was reduced with perception in mind; Mr Janes said: "optically would like to come in at about 50% of the $150K". But concerns about perception are not irrelevant, providing the expense is itself reasonable and proportionate. As to that, it is clear the takeover offer placed very burdensome demands on the directors well beyond those ordinarily required of them. Time was also tight.

[87] I consider the directors' fees reasonable.[44]

Legal fees

[88] Abano does not have any in-house lawyers. It engaged Harmos Horton Lusk Ltd (Harmos Horton), its usual solicitors, to act for it in relation to the takeover attempt. On 6 November 2016 Harmos Horton set out the services it anticipated providing Abano:

> We understand that the scope of our services will be to advise Abano on its response to the takeover notice received from Healthcare Partners Holdings Limited and any partial takeover offer that results, including advising on response approach and considerations, as well as Abano's legal obligations under the Takeovers Code, NZX Main Board Listing Rules, Companies Act and Financial Markets Conduct Act. These services are of a nature that in our view fall within the scope of costs that are recoverable from Healthcare Partners under the permissible reimbursement provisions of the Takeovers Code.

[89] Its fees came to $276,947.09.

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[44] Healthcare Partners placed weight on an email from Mr Janes to Mr Keys (dated 16 November 2016) which could be read as implying Mr Janes hoped to spread "confusion" through the media, a function antithetical to the duties of a director. Mr Keys said the correct construction was that Healthcare Partners had done this, hence the reference. Mr Janes did not give evidence. I consider the correct interpretation is that advanced by Healthcare Partners, for, this is what the email appears to suggest. However, the point goes nowhere: there is no evidence any of Abano's public observations in relation to the takeover offer was misleading or deceptive. Healthcare Partners did not contend otherwise.

[90] Harmos Horton provided a range of services:

(a) Advising Abano about its obligations and those of its directors in relation to the offer.

(b) Drafting formal resolutions in relation to the offer.

(c) Reviewing takeover documents, including to ensure they complied with the Code, and were not misleading or deceptive.

(d) Drafting, and assisting Abano to draft, documents required by the Code, including its company statement.

(e) Advising Abano on the appointment of other advisors, including the independent advisor required by the Code.

(f) Attending Board meetings during the offer period.

(g) Reviewing Abano's announcements and shareholder/investor communications during the offer period.

(h) Reviewing Healthcare Partners' (offer) communications.

(i) Corresponding with the Takeovers Panel, NZX and the Financial Markets Authority in relation to the takeover offer.

(j) Corresponding with the lawyers for Healthcare Partners.

[91] Healthcare Partners accepts Abano was entitled to seek and receive legal advice in relation to the takeover. But, it contends Harmos Horton's fee is excessive because:

(a) Abano has not waived privilege in relation to its legal advice. Assessment of Harmos Horton's fee is therefore problematical.

(b) Some of the services provided by Harmos Horton do not appear to fall within those contemplated by Wilson J in *Canterbury Frozen Meat*; for example, advising Abano its legal fees were recoverable under r 49.

Healthcare Partners emphasises Abano bears the onus of proof.

[92] Cases may arise in which maintenance of legal professional privilege by the target company poses an insuperable hurdle to proof related legal expenditure was properly incurred. This, however, is not one of them.

[93] The types of work undertaken by Harmos Horton are consistent with what one would anticipate in this context. Approached the other way, nothing stands out as unusual or out of place. The level of fee is consistent with market practice. Mr Hinton said the fees are:

> … at market rates and the total fees are within the range I would typically expect in a takeover transaction of this type. The nature of a takeover is such that it typically requires legal advice by senior lawyers (i.e. partners or directors) who, at least during the busiest period of the takeover, would communicate directly with the target company's Board and senior executives at least daily. It is common for a law firm to have two or sometimes more partners (or partner-equivalents) working on a takeover. The overall fees therefore tend to reflect this weighting of senior, rather than more junior, lawyers working on the transaction.

[94] Harmos Horton provided a 20-page schedule of its time. The schedule identifies the lawyers involved, their time, a brief narration of the corresponding task, the date for each, and categorisation according to *Canterbury Frozen Meat*. On 22 March 2017, Abano invited Healthcare Partners to raise "any specific concerns in respect of any narrated item". Healthcare Partners raised none until trial, and then only somewhat elliptically. Mr Nathanael Starrenberg, a director of Harmos Horton involved with the takeover, testified the schedule is accurate.

[95] I consider the fees reasonable and recoverable for the same reasons, with one addition: Mr Starrenberg and Mr Hinton said the offer's partial nature meant it was more complex than a full takeover offer. Complexity heightens cost.

[96] As to *Canterbury Frozen Meat*, the issue is not whether the fees would be recoverable under it, but whether they satisfy the principles outlined earlier; see [50]-[58]. And, no objection could attach in principle to recovery of a legal fee directed at explaining r 49(2) expenses are recoverable, unless unreasonable time was expended on that task. Harmos Horton's schedule reveals this issue was the subject of advice on 13 and 15 December 2016, along with a host of other tasks: finalising the Target Company Statement; calling the Board in relation to that statement; reviewing Board Minutes of the meeting approving the Target Company Statement; reviewing the final Forsyth Barr "mandate letter"; and "discussions with Abano management". All this took 7.8 hours. Mr Starrenberg said most of this time would have been spent on matters other than advice about the fact of recoverability.

[97] Healthcare Partners contends Abano's challenge of the first and second takeover notices constitutes evidence of an "aggressive defence strategy". This characterisation is available to this strand of events. The better view, however, is that Abano was entitled to insist Healthcare Partners' notices were Code-complaint; its observations resulted in both being withdrawn and replaced with a third.

[98] Healthcare Partners observes Abano engaged in something of a game, as it raised its objections successively rather than globally. This argument is a variant of the "resistance" submission, for, it reduces to the proposition otherwise recoverable expenditure should be disallowed with reference to assessments of motive or purpose. Again, to accede to it would recreate a difficult distinction not contemplated by the Code, in an area better demarcated by its bright lines. The point can be illustrated with reference to a modest counterfactual. Had Abano's challenge to the takeover notices been meritless, its associated legal expense would be unreasonable not because of "resistance" but the unmeritorious nature of its challenge.

Remaining expenses

[99] Remaining expenses can be dealt with briefly.

[100] Mr Brendan O'Sullivan is an accountant who previously worked for Abano as its group financial controller. Abano engaged Mr O'Sullivan at an hourly rate of $90 to obtain and organise information for the independent advisor. Mr O'Sullivan's fee

was $21,420. Mr Tony Staub of Red Consulting Group Ltd was engaged to establish a "data room" to house information, in digital form, requested by the independent advisor. He charged $105 per hour, at a total cost of $2,931.75.

[101] Healthcare Partners contends both fees are unreasonable as a listed company such as Abano ought to have sufficient internal resources to cope, as well as financial records in a format that could be readily deployed to others.

[102] Mr Hinton said the use of external resources is "a normal and sensible practice given that takeovers place very considerable and urgent demands on the management of the target company", and it is "unusual for a target company to have ... spare management resources" on hand. I accept this evidence.

[103] Moreover, if each category of work had been performed by a large accountancy firm, the cost would have been much higher. The balance of Healthcare Partners' submission reduces to a criticism of Abano's internal business organisation.

[104] Abano engaged Merlin Consulting to identify Abano's shareholders who held shares in custodial entities. Merlin Consulting's fee was $2,725. Healthcare Partners contends this expense was unnecessary. However, Abano was entitled to communicate with its shareholders about the offer—the reason it engaged Merlin Consulting.

[105] The final expenses concern a "roadshow". Abano organised an investor roadshow. It gave presentations between 26 January 2017 and 2 February 2017 in Dunedin, Christchurch, Auckland, Wellington, Lower Hutt and Tauranga. The roadshow focused on the complexities of a partial takeover offer and how this might affect Abano's shareholders. Associated expenses came to $5,977.14.

[106] Healthcare Partners contends the cost was unnecessary, as "the same result could have been achieved with a phone call". That may be correct had the takeover offer been full rather than partial. And the implications of such an offer are not without complexity. Abano was entitled to convey this to its shareholders. It did so at only modest cost.

[107] The remaining expenses are reasonable and recoverable.

Orders

[108] Abano's claim is established.[45] Healthcare Partners is liable for:

(a) $429,007.55.

(b) Interest on this sum from the date Abano paid the expenses; and interest on the dividend amount from the date Abano paid the expenses to 23 January 2017.[46]

[109] Costs are reserved (Healthcare Partners having expressly asked to be heard on costs). Submissions of not more than seven pages are to be filed and served:

(a) From Abano by **5 pm Friday, 11 May 2018**.

(b) From Healthcare Partners by **5 pm Friday, 25 May 2018**.

[110] However, agreement on costs is encouraged.

Addendum: objection to Mr Hinton's evidence

[111] Healthcare Partners raised a (foreshadowed) trial objection to the admissibility of Mr Hinton's evidence. I heard the evidence on the basis admissibility was better determined after the fact.

[112] Mr Hinton's brief of evidence was served, as a reply brief, on 23 March 2018. Healthcare Partners submitted the brief was not a reply one in terms of the timetable, and therefore inadmissible. However, Healthcare Partners filed an amended statement of defence on 12 March 2018, and only then did its objections in relation to the expenses become clear. At trial, Healthcare Partners responsibly accepted it could

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45 For completeness, Healthcare Partners' counterclaim is dismissed.

46 Healthcare Partners contends interest should be payable only from when it received each invoice. The relevant date is when Abano paid each; r 49(2) contemplates full reimbursement.

have, but did not, retain its own expert in time for trial after receiving Mr Hinton's brief.

[113] Objection was also taken under ss 7 and 25 of the Evidence Act 2006. Healthcare Partners argued the evidence was not relevant or substantially helpful as reasonableness of expenditure was governed by *Canterbury Frozen Meat*, and Mr Hinton had not drawn a distinction between properly incurred expenditure and expenditure in resisting a takeover bid. These objections were overtaken by my conclusion applicable principle required revisitation.

[114] In any event, Mr Hinton's evidence was relevant and substantially helpful. He identified expenses typically sought in this context; their rationale; and whether those in question were consistent or otherwise with market practice, including cost. Mr Hinton did not express an opinion as to reasonableness.

[115] I thank counsel for the quality of their oral and written submissions.

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Downs J