Australian Government

Takeovers Panel

Reasons for Decision
GBST Holdings Limited
[2019] ATP 15

Catchwords:

Decline to conduct proceedings – lock-up devices – process and exclusivity deed – exclusive due diligence – non-binding indicative proposal – superior proposal – efficient, competitive and informed market – undertaking – disclosure

Guidance Note 7 – Lock-up devices

BC Iron Limited [2011] ATP 6, Ross Human Directions Ltd [2010] ATP 8, Goodman Fielder Limited 02 [2003] ATP 5

Takeovers Panel's 2010-2011 Annual Report

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	YES

INTRODUCTION

1. The Panel, Tracey Horton AO (sitting President), Bruce McLennan and David Williamson, declined to conduct proceedings on an application by Kiwi Holdco CayCo, Ltd in relation to the affairs of GBST Holdings Limited. The application concerned the process adopted by GBST in granting exclusivity to a potential bidder with the view to entering into a scheme implementation agreement giving effect to the non-binding indicative proposal received from that bidder. The Panel did not consider the process unacceptable and nothing prompted it to second guess a well advised GBST Board. Accordingly, there was no reasonable prospect that it would make a declaration. The Panel accepted an undertaking to disclose a copy of the process and exclusivity deed in order to ensure a better informed market.

2. In these reasons, the following definitions apply.

Bravura	Bravura Solutions Limited (ASX: BVS)
FNZ	Kiwi Holdco CayCo, Ltd, as the group holding company of the FNZ Group
FNZ First Proposal	has the meaning in paragraph 10
FNZ Second Proposal	has the meaning in paragraph 13
FNZ Third Proposal	has the meaning in paragraph 16
GBST	GBST Holdings Limited (ASX: GBT)
GBST Board	the board of directors of GBST
SS&C	SS&C Technologies, Inc. (NASDAQ: SSNC)
SS&C Process Deed	the process and exclusivity deed between GBST and SS&C, as amended

FACTS

3. GBST is an ASX listed company. It is a specialist financial technology company which provides administration and transaction processing software for retail wealth management organisations and global and regional investment banks.

4. On 12 April 2019, GBST announced it had received an unsolicited non-binding indicative proposal from Bravura to acquire 100% of GBST via a cash or cash and scrip alternative offer at $2.50 per share.

5. On 19 June 2019, GBST announced that Bravura had revised its proposal to $2.72 per share cash after a period of limited engagement with GBST, including the provision of a management presentation and a follow-up Q&A session with GBST's CFO.

6. On 24 June 2019, FNZ sought to engage with GBST in relation to a non-binding indicative proposal, with discussions following on 25 and 26 June 2019.

7. On 26 June 2019, GBST's financial adviser notified FNZ's financial adviser by email that the GBST Board had decided to provide interested parties with an opportunity to secure exclusivity to conduct due diligence, and *"as a first step"*, indicative proposals were to be submitted by 4.15pm on 3 July 2019. The email specified the elements a proposal should include:

   (a) the offer price to acquire 100% of GBST for cash

   (b) the amount of any exclusivity deposit fee that the interested party would be willing to provide GBST in order to gain access to exclusivity and due diligence

   (c) lists of both confirmatory and commercially sensitive due diligence items required as part of a two phase due diligence process

   (d) other details that demonstrate certainty of the bid (funding sources, conditions to completion, etc.) and

   (e) a mark-up of the form of non-disclosure agreement and process and exclusivity deed provided by GBST.

8. On 27 June 2019, GBST announced that Bravura had further revised its proposal to $3.00 per share cash conditional on execution of an exclusivity deed prior to 4:00pm on 28 June 2019. The announcement also noted that after receiving Bravura's revised indicative proposal on 19 June 2019, GBST had approached a number of other parties expressing an interest in GBST and, as already communicated to Bravura and other interested parties, the GBST Board had determined to conduct *"a confidential formal process with respect to its strategic options, including the potential to provide a period of exclusive due diligence access"*. It disclosed the deadline for submissions and described the key elements to be covered in a proposal (being those described in paragraph 7).

9. The deadline for indicative proposals was brought forward on two occasions, first to 4:00pm on 28 June 2019 and second (with approximately an hour's notice) to 2:00pm on 28 June 2019.[1]

[1] As submitted by FNZ

10. On 28 June 2019, FNZ submitted a non-binding indicative cash proposal at $3.15 per share (on the basis up to $0.35 of that could be paid by GBST as a special dividend giving GBST shareholders the benefit of franking credits), accompanied by a mark-up of the draft process and exclusivity deed (**FNZ First Proposal**).

11. FNZ was informed on 30 June 2019 that the GBST Board had decided not to proceed with the FNZ First Proposal.

12. On 1 July 2019, GBST announced that it had received a non-binding indicative cash proposal from SS&C to acquire GBST at $3.25 per share via a scheme of arrangement and had entered into the SS&C Process Deed containing a four-week exclusivity period. The announcement stated that the SS&C Process Deed included customary exclusivity provisions *"including no-shop, no-talk and no-due diligence restrictions (the no-talk and no-due diligence restrictions being subject to a customary fiduciary carve-out)"* and an obligation to *"notify SS&C if it receives any superior proposal during the exclusivity period in which case SS&C has the right to match…within 5 business days after it receives notice…"*

13. Later that same day, FNZ submitted a revised non-binding indicative proposal at $3.50 per share with a proposed exclusivity period of three weeks (reduced from its previous proposal of four weeks) (**FNZ Second Proposal**). FNZ stressed in the FNZ Second Proposal that should due diligence access for any other potential bidder proceed, this had the potential to erode the value of the GBST business to FNZ. FNZ separately asked that the due diligence be halted and was told that the data room had not yet been opened.

14. On 3 July 2019, GBST announced that SS&C had increased its non-binding indicative proposal to $3.60 per share and that the SS&C Process Deed had been amended by reducing the exclusivity period from four to three weeks.

15. On 4 July 2019, FNZ's lawyers asked for confirmation that the data room would not be opened to SS&C, but was told the next day by GBST's lawyers that it had been opened on 4 July 2019 for phase 1 due diligence.

16. On 5 July 2019, FNZ submitted a further revised non-binding indicative proposal at $3.65 per share (**FNZ Third Proposal**). FNZ indicated to GBST before submitting the proposal that it needed to see the full terms of the SS&C Process Deed and SS&C's due diligence request lists to assess how to best structure its proposal. GBST refused FNZ's request to release the SS&C Process Deed on ASX.

17. On 8 July 2019, very shortly before the application was made, GBST announced that it had received the FNZ Third Proposal and, after consideration, the GBST Board had resolved not to proceed with that proposal, stating that it *"remains of the view that it is in the best interests of GBST and its shareholders to continue to facilitate the receipt of a binding offer from SS&C reflecting the terms of its last proposal and which is capable of being put to shareholders."* The announcement included a summary of the process and decision considerations taken by the GBST Board in relation to each of FNZ's proposals. In relation to the FNZ Third Proposal, GBST stated that although the indicative price was $0.05 per share higher than SS&C's proposal made on 3 July

2019, the GBST Board concluded that SS&C's proposal continued to be superior having regard to a range of other criteria including:

(a) the scope of due diligence requested in both phases

(b) the potential impact on GBST's commercial position should FNZ be provided with access to due diligence and subsequently withdraw its non-binding offer

(c) the terms and quantum of the exclusivity break fee and

(d) other provisions of FNZ's proposed process and exclusivity deed.

18. Noting FNZ's concern regarding due diligence access expressed in paragraph 13 above, GBST's announcement stated that the GBST Board had some concerns as to whether FNZ's latest proposal (which involved a $0.50 per share increase in a one-week period) could be converted into a binding proposal, given that FNZ was aware that due diligence access had already commenced for SS&C.

19. The announcement also stated: "*The Board notes that while it is always open for any party to put forward a proposal for GBST, it sees limited benefit for shareholders in receiving further non-binding, indicative, conditional and incomplete proposals, or in engaging in an indefinite back and forth process of revised non-binding indicative proposals that provide no greater level of certainty for GBST shareholders. The Board remains focussed on securing a binding proposal to put to shareholders, which was the objective of the process described above.*"

APPLICATION

Declaration sought

20. By application dated 8 July 2019, FNZ sought a declaration of unacceptable circumstances. FNZ submitted that three matters regarding the SS&C Process Deed were unacceptable:

(a) the premature entry into the SS&C Process Deed, contrary to the best interests of GBST shareholders, "*without facilitating a proper auction process designed to achieve the best price*" (and where the purported auction process was still in progress), and where providing due diligence access to SS&C would materially reduce the value of GBST to all other bidders

(b) the inclusion of a matching right where SS&C's proposal was only non-binding and indicative in circumstances where the market for control of GBST had not been adequately tested, and where GBST was required to continue to provide due diligence access to SS&C during the matching right period despite being on notice that FNZ was willing to negotiate on price and that giving due diligence access to another bidder would materially reduce the value of GBST to FNZ and

(c) the manner in which GBST had been (or had not been) implementing the fiduciary carve-outs in the SS&C Process Deed consistent with the best interests of GBST shareholders.

21. FNZ submitted that the effect of the circumstances was that the potential acquisition of control of GBST was not taking place in an efficient, competitive and informed market, GBST shareholders had been denied an opportunity to benefit from any

superior proposal that may have been submitted had GBST conducted an auction with a level playing field and GBST shareholders were continuing to be disadvantaged by GBST continuing to provide value destructive due diligence access to SS&C.

22. FNZ supplemented its application approximately three hours after making its application by reference to GBST's 8 July 2019 announcement. It submitted that the matters described in the announcement were a continuation of the unacceptable circumstances. It submitted that GBST had not raised with FNZ the non-price issues described in paragraph 17 above and accordingly, GBST was not focused on getting the best price. FNZ also submitted that there was nothing approximating a 'formal tender process' and the language expressed in paragraph 19 above confirmed that GBST was *"shutting down the process again"*.

Interim orders sought

23. FNZ sought urgent interim orders to suspend the operation of the SS&C Process Deed to in effect restrain any further due diligence by SS&C or the negotiation of any agreement with SS&C for the potential change in control of GBST pending determination of its application.

24. The acting substantive President (Tracey Horton AO) considered whether to make an interim order immediately suspending any access to the due diligence data room by SS&C and its representatives and advisers in order to maintain the status quo pending determination of the application or further order.

25. FNZ supported the potential interim order submitting that if due diligence continued it would devalue GBST to FNZ and *"the damage [would] be done"*.

26. GBST submitted that FNZ's application did not warrant any such order, there was no evidence that FNZ would be prejudiced if SS&C started its due diligence (even if the Panel did subsequently find that such due diligence needed to be discontinued) and it was unclear what effect the interim order would have on SS&C's non-binding indicative proposal and SS&C's obligations under the SS&C Process Deed.

27. The acting substantive President weighed on the one hand the applicant's concerns that if diligence continued this would devalue GBST to FNZ and on the other hand GBST's concerns regarding the uncertainty of the effect of the interim order on SS&C's non-binding indicative proposal. On balance, she did not consider it appropriate to suspend due diligence on an urgent basis noting GBST's concerns, the two phase diligence process and that interim orders may be considered again by the sitting Panel once appointed.

28. We declined to conduct proceedings and accordingly, did not need to make a decision on interim orders.

Final orders sought

29. FNZ sought final orders to cancel the SS&C Process Deed.

DISCUSSION

30. GBST submitted that the Panel should not conduct proceedings including because:

    (a) providing SS&C with an exclusivity period to see if it could put forward a binding proposal did not mean that the potential acquisition of control of GBST was not taking place in an efficient, competitive and informed market – even if at the end of that period a binding implementation agreement was entered into with SS&C, the recommendation of the GBST Board would always be subject to no superior proposal emerging

    (b) FNZ provided no evidence that GBST giving due diligence to SS&C would devalue GBST, noting that SS&C was subject to a binding confidentiality agreement with GBST where SS&C could only use due diligence information for the sole purpose of an agreed transaction between the parties and

    (c) the GBST Board genuinely believed that there were other factors which meant that the SS&C proposal was superior including the GBST Board's views around the greater risk to the company of providing due diligence to FNZ than SS&C if a binding proposal did not eventuate (having regard to FNZ's more onerous due diligence requirements).

31. A target in a competitive situation would normally, in our experience, provide non-exclusive due diligence to two or more potential bidders. However, GBST explained in its 8 July 2019 announcement that a number of parties had declined an invitation to participate in a non-exclusive due diligence process on the basis that as they were "*direct competitors of GBST, provision of due diligence access to such parties would in their view materially reduce the value of GBST to them*". Noting this feedback, GBST explained that it "*formed the view that a limited period of exclusive due diligence access would be required in order to secure the best proposal for shareholders and in order to convert the non-binding, conditional interest that had been expressed into a binding offer that could be put to shareholders. The GBST Board was also conscious of wanting to give equal opportunity to all interested parties but was also aware of the risk that providing due diligence information to direct competitors of GBST, such as Bravura or FNZ, could potentially render the company in a commercially disadvantaged position going forward, should a party choose to withdraw their non-binding proposals after the receipt of commercially sensitive due diligence information*". GBST stated that it was on this basis that it undertook the confidential tender process.

32. FNZ submitted that the statements in paragraph 31 above by GBST were an acknowledgement by GBST of the risk of value erosion, rebutting GBST's submission that there was no evidence that GBST giving due diligence to SS&C would devalue GBST. We did not consider that sufficient material was presented supporting FNZ's view. In any event, it is clear from GBST's announcement that the GBST Board took this issue into account in making its decisions.

33. FNZ submitted that the process undertaken did not allow GBST to obtain the best price for target shareholders including by not engaging with FNZ at certain times during the process particularly in relation to price, by accelerating the deadline twice

for submitting an indicative proposal to secure exclusivity[2] or by favouring SS&C by providing it with exclusivity when it did. FNZ submitted that the effect of GBST's *"premature"* entry into the SS&C Process Deed on competition for control of GBST was significant.[3]

34. GBST submitted that *"it is a legitimate tool (and in fact, one of the only tools which a target board has) to trade due diligence access, including exclusive due diligence access, for an acceptable change of control proposal"*. The Panel made a similar (albeit broader) point in *Goodman Fielder Limited 02*:

> *In exchange for giving access to company information, the Goodman Fielder directors received valuable undertakings from prospective alternative buyers, requiring them to make only recommended or permitted bids. Goodman Fielder said that similar access for Burns Philp would give Burns Philp additional certainty and reduce its risk. On that basis Burns Philp should not expect to be given the information for free. Goodman Fielder said that more favourable terms for Goodman Fielder shareholders was the appropriate price for reducing Burns Philp's risks and uncertainty. Subject to the overriding requirement to comply with statutory and regulatory requirements it has set out above in relation to the other constraints on target directors, the Panel considers this is a reasonable position for a target board.*[4]

35. GBST submitted that the exclusivity here did not need to be subject to a fiduciary out, noting recent examples where that was the case, but this was something that GBST was able to negotiate with SS&C. It further submitted that *"it is up to the target board, acting in good faith, to determine whether a competing non-binding proposal is superior or not (and not for the competing bidder to dictate that)"*. The Panel has previously accepted that while deal protection measures *"obviously have an anti-competitive element, they can, if subject to certain basic structural requirements, indirectly facilitate competition for control in the sense that, but for those deal protection measures, many bidders will be unwilling to proceed to make a bid"*.[5] The Panel has decided not to adopt the UK Takeover Panel's approach of prohibiting deal protection measures (with only limited exceptions). Rather the Panel has adopted a principles based approach[6] and encouraged target directors to negotiate such measures and not necessarily accept deal protection measures as 'market practice'.[7]

36. While in our experience the process adopted by GBST was not conventional, we do not consider the process unacceptable. Despite the concerns raised by FNZ, to date, GBST's process has led to significantly increased indicative offer prices to the benefit

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[2] GBST's 8 July 2019 announcement stated that tender process participants were contacted and encouraged to submit their proposals prior to 4:00pm on 28 June 2019 (the first acceleration of the deadline) because of the condition placed on Bravura's $3.00 proposal (see paragraph 10 above)

[3] Referring to Guidance Note 7 – Lock-up devices at [7]

[4] [2003] ATP 5 at [90]

[5] See *Ross Human Directions Ltd* [2010] ATP 8 at [26]

[6] See Guidance Note 7

[7] See the Review by the President (by President Farrell, now Justice Farrell), in the *Takeovers Panel's 2010-2011 Annual Report* at page 4

of GBST's shareholders. There is nothing that prompts us to second guess the GBST Board's decisions taken after receiving independent legal and financial advice, including to enter into the exclusivity arrangements with SS&C or to continue with the SS&C indicative proposal after having considered the FNZ Third Proposal. In addition, there is nothing to prevent third parties submitting a superior proposal to GBST to trigger the fiduciary out.

37. The Panel's policy provides that the *"existence and nature of any lock-up device should normally be disclosed"* including all the relevant terms,[8] however it does not require disclosure of the full agreement.

38. SS&C noted that market practice is mixed as to whether a process deed is released in full or summarised (as was done by GBST) and submitted that we should decline to conduct proceedings on this issue. It submitted that if we required disclosure of the full process deed, we would be making a significant departure from the Panel's policy.

39. ASIC submitted that the preferable approach would be disclosure of the full agreement. It submitted that *"inadequate disclosure of the restrictions themselves may increase the anti-competitive effect of the restrictions (as well as the notification obligations and matching rights)"* and *"may give rise to uncertainty regarding matters such as the likelihood a target will, or is able to, respond favourably to an approach or what information is likely to be forwarded to a rival. It also impedes the potential competing bidder's ability to form a view on whether the totality of the lock-up arrangements accord with the principles in GN 7. The uncertainty may reduce the likelihood that a competing bidder will want to make an approach"*.

40. ASIC submitted that merely disclosing the terms of a fiduciary out as 'customary' does not necessarily provide sufficient detail of the lock-up arrangement. Further, it submitted that as the circumstances of a potential competing bidder are unknown it may be difficult for a target providing a summary of relevant terms to assess what terms may have a deterrent effect if not fully disclosed.[9]

41. FNZ submitted (among other things) that full disclosure of the SS&C Process Deed would allow it to address three of the four non-price aspects of its proposal which the GBST Board had relied on to determine that the SS&C proposal was superior (see paragraph 17) and to understand the application of the fiduciary out.

42. We were minded to consider this issue, however GBST indicated its preparedness to release the SS&C Process Deed subject to redaction of certain commercially sensitive information which did not relate to the exclusivity provisions.

43. We accept that market practice is varied on whether a process deed is released in full (putting aside any redactions) or summarised. We accepted an undertaking on behalf of GBST that GBST disclose a copy of the SS&C Process Deed with limited redactions. We consider that full disclosure of the exclusivity arrangements here

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[8] Guidance Note 7 at [35]

[9] Referring to *BC Iron Limited* [2011] ATP 6

should assist FNZ and other potential bidders when assessing whether to make a competing offer and lead to a better informed market generally.

44. It remains an open question in what circumstances it may be sufficient to disclose a summary of a process deed instead of the process deed itself.

DECISION

Declaration

45. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).

Orders

46. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.

Tracey Horton AO
President of the sitting Panel
Decision dated 15 July 2019
Reasons given to parties 31 July 2019
Reasons published 5 August 2019

Advisers

Party	Advisers
FNZ	Herbert Smith Freehills
GBST	Allens
SS&C	Gilbert & Tobin