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# STEERING A CAREFUL TAKEOVER PATH

When the founder of New Zealand's retirement village industry wanted to sell his holding in listed company Metlifecare Limited, Simpson Grierson's Corporate team had to steer a careful path through some unusual 'drag along' provisions to successfully execute one of the more complicated strategic deals of 2005.

Metlifecare is New Zealand's largest retirement village owner and operator with a portfolio of 13 villages, nine nursing homes and six hospitals providing a range of care for more than 2,000 residents. It also owns a substantial land bank with the potential for significant further development. Metlifecare established the retirement village business model in New Zealand, targeting the self-funded retiree market through the sale and resale of retirement units. The success of Metlifecare, and others who followed, has led to the aged-care sector becoming a highly attractive new investment class.

In late 2004, Metlifecare founder Cliff Cook sought to sell his 25 per cent stake. As a long-term client of Simpson Grierson, he approached Partner Peter Hinton and Senior Associate Michael Pollard to assist. At the same time he engaged Andrew Barclay and Mark Green of Goldman Sachs |BWere to run an auction process to identify potential buyers and establish the best market price for his shares before making an approach to 35 per cent shareholder Todd Lifecare, part of the Todd Corporation.

Todd Lifecare was crucial to Cook executing any successful sale because when Todd took its stake in Metlifecare in 1999 Cook and Todd had entered into an unusual 'pre-emptive' agreement. The agreement effectively meant that neither party could sell its shareholding to a third party without first offering it to the other. In the event that the offer was not taken up, the selling shareholder was entitled to sell not just its shares, but also the shares of the other party. This is known as a **'DRAG-ALONG'** right.

The pre-emptive agreement was a public document and its existence led to significant market speculation about the likely outcome of any deal not just because Todd had the right to buy out Cook but because if Todd turned down the opportunity, it created, as one commentator put it, a **'JUICY INSTANT MAJORITY STAKE'** for Cook to market to potential buyers. The other key point about the agreement was that it was entered into before the Takeovers Code took effect. There were questions about its enforceability as it was difficult to interpret

in the context of the Takeovers Code. Some business media expressed the view that the agreement destined Cook to remain a shareholder indefinitely. We were determined to prove them wrong.

Todd Corporation is generally credited with keeping a low profile and playing its cards close to its chest. While it may have wanted to maintain the status quo, it was about to be faced with a stark choice – either buy Cook's stake itself or hand Cook the power to sell not only his but also its own shares as a single package. There was no public indication of which option it was likely to favour. Critically, Cook could only force Todd to accept a cash bid and he

was, at least arguably, precluded under the agreement from having an interest in the bidder. In addition, any offer for Todd's shares had to be unconditional.

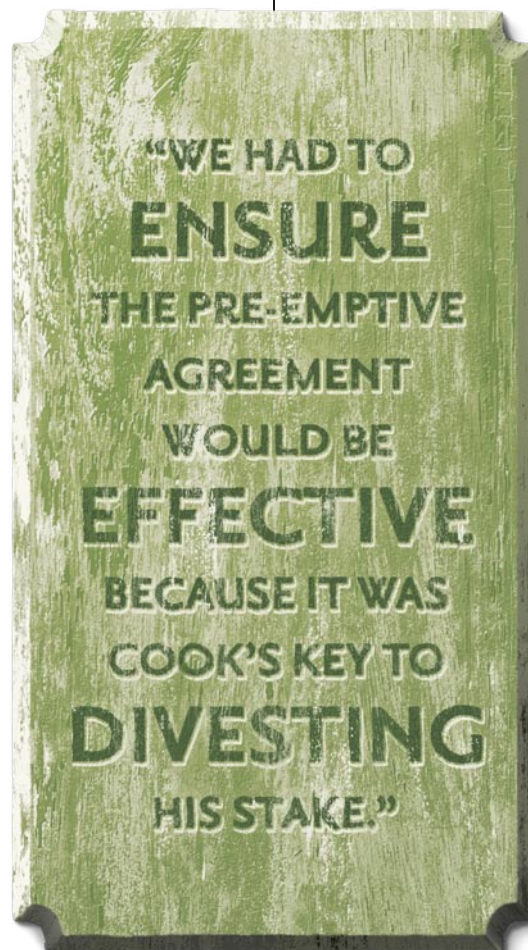
The pre-emptive agreement was a crucial tool for Cook because selling a 25 per cent stake in Metlifecare without the support of Todd was a difficult proposition for two reasons:

- ◆ As Cook's stake exceeded 20 per cent, any purchase by a third party would be subject to the Takeovers Code, meaning the buyer would potentially have to make an offer for the whole company (and achieve at least 50 per cent). This was viewed as very difficult in light of Todd's stake and the fact that the third largest shareholder might wish to retain its sizeable 11.5 per cent shareholding (which it subsequently did).
- ◆ Todd's controlling stake in the company affected the overall marketability of Cook's shareholding.

Pollard says: "The Code overlay did give rise to a number of difficult issues. Whilst the need to be able to deliver 50 per cent was obviously a deal breaker, fitting the prescriptive timetabling

requirements of the pre-emptive agreement within the statutory requirements of the Code was also a challenge. We had to ensure the pre-emptive agreement would be effective because it was Cook's key to divesting his stake."

In order to run a comprehensive sales process, Cook required the assistance of the company to give prospective bidders access to due diligence information. The Metlifecare board consisted of three independent directors, two Todd appointees and Cook. With Todd not having indicated which way it would go, it was important that



Cook be able to run a sales process independently of Todd. To ensure that, a committee of independent directors was formed to oversee Metlifecare's involvement in the sale of Cook's shareholding.

The sales process involved more than 10 parties considering an information memorandum prepared on Metlifecare and selected parties being provided with access to due diligence materials through Simpson Grierson's electronic data room capabilities. Goldman Sachs |BWere worked with the various bidders simultaneously on options, timetables and indicative prices.

With both Cook and Todd being 'substantial shareholders' under the Securities Markets Act any change in either's interest in the Company had to be disclosed. This meant that the pre-emptive notice and Todd's response had to be disclosed to the market, making this a very public sales process and resulting in a good deal of public speculation about how the process would pan out.

After receiving indicative bids, Cook made an initial pre-emptive offer to Todd at \$3.72 per share. Todd did not accept the offer which indicated to Cook that Todd might be a possible seller at this price. However, the sales process was not sufficiently advanced at that stage to push forward and further negotiations were required with the various bidders which remained interested in Metlifecare.

One of the issues for bidders was the limited degree of control they had over the process. Because of the size of Cook's and Todd's respective stakes and the pre-emptive agreement, it was impossible for a bidder to take control of Metlifecare independently. Even a negotiated deal with Cook still left a bidder exposed to Todd taking up its pre-emptive right to Cook's shares, leaving the bidder with no deal. The requirements of the pre-emptive agreement also impacted bidders' preferred transaction structures. Bids had to be unconditional at the time any drag along right was to be exercised. This meant that normal takeover conditionality would likely have to drop away earlier than might usually be the case. In addition, as noted earlier, Cook couldn't be involved with any bidder.

Hinton says: "It was crucial to get the bidders comfortable with proceeding with a cash bid that did not involve any interest being retained by Cook. Most bidders wanted Cook's continued involvement because of his experience and expertise in the industry, but the reality was that if we involved him we risked not being able to invoke the drag along rights."

Ultimately the process identified Retirement Villages New Zealand Limited – a joint venture between Australia's FKP Property Group and Macquarie Bank Limited – as the preferred purchaser. At this stage, Todd's intentions remained unclear and RVNZ remained subject to the risk that Todd might pre-empt and force RVNZ out of the process.

Consistent with normal takeovers practice, Simpson Grierson together with Goldman Sachs |BWere and RVNZ's advisers negotiated a pre-bid agreement between RVNZ and Todd. The pre-bid agreement included relatively standard provisions requiring RVNZ to commit to making the agreed offer and Cook to accepting that offer (subject to certain pre-conditions). The agreement also defined the process

by which Cook would make his pre-emptive offer to Todd and, should Todd not accept, the process by which the drag along clause would be invoked requiring Todd to sell to RVNZ. The pre-bid agreement provided that the offer was to be priced at \$3.75 per share.

Cook considered that this price could be increased further if Todd was willing to give greater certainty to the process and commit to selling by entering into a pre-bid agreement with RVNZ and Cook. At the same time as the pre-bid agreement was entered into, Cook served a further pre-bid notice on Todd at the bid price.

This time Todd (perhaps recognising that Cook was committed to selling) responded by engaging in further negotiations which resulted in RVNZ agreeing to raise its bid to \$3.90 in return for Todd's commitment to enter into a pre-bid agreement and accept the offer.

Off the back of the pre-bid agreement with both Cook and Todd, RVNZ launched its offer in early November 2005. Based on the number of shares in issue, this equated to a deal value of approximately \$341 million. The offer was immediately unconditional and closed in late December with RVNZ then having acquired just over 81 per cent of the shareholding in Metlifecare.

This deal was the final result of 12 months of effort by Cliff Cook and his team of advisers. The deal demonstrated that the Code can be made to work in the context of agreements entered into well before the Code came into effect. It was a good outcome for our client and one of which all the interested parties can be proud.

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