



NZX Regulation Decision

Hellaby Holdings Limited (HBY)

Application for a waiver from NZX Main Board Listing Rule 9.2.1

22 June 2016



Waiver from NZX Main Board Listing Rule 9.2.1

Decision

1. Subject to the conditions set out in paragraph 2 below, and on the basis that the information provided by Hellaby Holdings Limited (**HBY**) is complete and accurate in all material respects, NZX Regulation (**NZXR**) grants HBY a waiver from NZX Main Board Listing Rule (**Rule**) 9.2.1 to the extent required to allow HBY to enter into the Transaction without obtaining shareholder approval.
2. The waiver in paragraph 1 above is provided on the conditions that:
 - (a) Mr Clarke is excluded from all meetings of the Board from 18 May 2016 to the extent that all, or any part of such meetings relate to the Transaction;
 - (b) the Board delegates authority for the internal management of the Transaction for HBY to Chief Financial Officer, Richard Jolly, who shall be responsible to report directly to the Board on all matters relating to the Transaction;
 - (c) Mr Clarke does not vote on any resolution to enter into the Transaction;
 - (d) the Non-Interested Directors of HBY certify to NZXR that:
 - i. Mr Clarke took no part in the decision to enter into the Transaction;
 - ii. HBY has not been influenced in its decision to enter into the Transaction by the existence of the Relationship between Mr Clarke and Mr Ross;
 - iii. the terms and conditions of the final Transaction documentation (including the sale and purchase agreement) have been negotiated on an arm's length and commercial basis;
 - iv. the terms and conditions of the Transaction are identical for all the Vendors and do not favour any Related Party of HBY over other Vendors; and
 - v. in the case of the Non-Interested Directors who vote in favour of the resolution to enter into the Transaction, entry into, and the terms and conditions of, the Transaction are in the best interests of HBY, and are fair and reasonable to HBY's shareholders who are not Associated Persons of Mr Clarke; and
 - (e) the waiver, its conditions and the implications of this waiver are disclosed in HBY's next half-year report and annual report.
3. The information on which this decision is based is set out in Appendix One to this decision. This waiver will not apply if that information is not or ceases to be full and accurate in all material respects.
4. The Rules to which this decision relates are set out in Appendix Two to this decision.



Reasons

5. In coming to the decision to provide the waiver set out in paragraph 1 above, NZXR has considered that:
 - (a) Rule 9.2.1 seeks to regulate transactions where a Related Party to a Material Transaction may gain favourable consideration due to their relationship with the Issuer. NZXR may waive the requirement to obtain approval of a Material Transaction if it is satisfied that the involvement of any Related Party is plainly unlikely to have influenced the promotion of, or the decision to enter into, the transaction. The granting of this waiver will not offend the policy behind Rule 9.2.1;
 - (b) HBY has submitted, and NZXR has no reason not to accept, that the Related Party is plainly unlikely to have influenced entry into or the terms of the Transaction, as:
 - i. neither Mr Clarke nor the Clarke Family Trust is a Vendor in the Transaction, and will therefore not derive any value directly from entry into the Transaction, other than as a shareholder of HBY. The interests of Mr Clarke and the Clarke Family Trust are aligned with the interests of other shareholders;
 - ii. Mr Clarke will be excluded from the due diligence investigations, the negotiations of any formal, binding sale and purchase agreement and all decision making at both management and board level regarding HBY's entry into the Transaction. The Transaction will be subject to HBY's usual commercial, financial and legal due diligence protocols for its proposed investments; and
 - iii. the Transaction will involve all Vendors and the purchase of all shares in TBS will be on identical terms and conditions in respect of each Vendor. Therefore the corporate trustee of RIT (which is part-owned by Mr Ross) will not receive preferential terms relative to the other Vendors;
 - (c) the certifications provided by HBY's Non-Interested Directors as a condition of the waiver provide comfort that the Transaction will be negotiated, and entered into, on an arm's length commercial basis and that entry into the Transaction will be in the best interests of HBY; and
 - (d) there is precedent for this decision.

Confidentiality

6. HBY has requested that its application, and NZXR's decision, be kept confidential until the Transaction is signed and announced.
7. In accordance with Footnote 1 to Rule 1.11.2, NZXR grants HBY's request.



Appendix One

1. HBY is a Listed Issuer with Securities Quoted on the NZX Main Board.
2. HBY is considering acquiring all of the shares of TBS Group Limited (**TBS**) (the **Transaction**).
3. HBY was invited to participate in the formal sale process for TBS by Grant Samuel & Associates Limited (**Grant Samuel**), who have been appointed by TBS shareholders' (the **Vendors**) as representatives for the Transaction. Grant Samuel prepared and distributed an information memorandum for TBS to a limited number of prospective purchasers, including HBY, and sought indicative non-binding offers from those purchasers on the basis of which one or more of them would be invited to undertake due diligence.
4. HBY reacted to the opportunity presented, believing that the acquisition of TBS would complement its strategy to grow its Resource Services Group.
5. At the time of the waiver application, HBY had submitted two non-binding indicative offers (**NBIO**) dated 16 December 2015 and 1 April 2016, to purchase all of the shares of TBS and commenced due diligence for the Transaction on the basis of the second, replacement NBIO on a confidential and exclusive basis.
6. The terms of the second, replacement NBIO were negotiated between Grant Samuel and HBY (by HBY's Chief Investment Officer, Greg Batkin). All subsequent negotiations in respect of any binding sale and purchase agreement, and other formal Transaction documentation between HBY and the Vendors, have been led by HBY Chief Financial Officer, Richard Jolly (and not Mr Clarke), and Mr Jolly has reported directly to the Board on all matters relating to the Transaction.
7. The non-binding indicative purchase price for the Transaction (subject to full due diligence) is \$45 million, plus a potential earn out payment of up to \$6 million. Pursuant to Rule 7.3.5, \$4.5 million plus 50% of the earn out payment (if any) will be fulfilled through the issue of new HBY shares to the Vendors. The new HBY shares will be subject to escrow arrangements that will prohibit the Vendors from trading those shares for at least a 12 month period following their issuance.
8. For the purposes of Rule 9.2.1, there is Related Party relationship because:
 - (a) Alan Clarke is the Managing Director and Chief Executive Officer of HBY;
 - (b) Christopher Ross is the Chairman of the Board and non-executive Director of TBS;
 - (c) Mr Ross will be an indirect party to the Transaction in his capacity as a Director and shareholder of the corporate trustee of the Ross Investment Trust (**RIT**), which is one of the three Vendors. RIT holds 45.6% of TBS shares;
 - (d) Mr Ross is a trustee of the Clarke Family Trust, which is Mr Clarke's family trust and in respect of which Mr Clarke is the settlor, a trustee and a beneficiary.

Mr Ross is therefore a Related Party of HBY, under Rule 9.2.3(c), on the basis that he is deemed to be an Associated Person of Mr Clarke under Rule 1.8.3(b).

9. Other than Mr Clarke the Directors of HBY (the **Non-Interested Directors**) are not Associated Persons of any TBS shareholder, and no HBY Director holds any interest in TBS.
10. As at the date of this waiver decision, HBY's Average Market Capitalisation is NZ\$240,323,040. The non-binding indicative purchase price for the Transaction is \$45 million plus a potential earn out payment of up to \$6 million and will equate to approximately 21% of HBY's Average Market Capitalisation, in excess of the 10% prescribed by Rule 9.2.2(a). Accordingly the Transaction is a Material Transaction.



Appendix Two

Rule 1.8 Associated Persons

- 1.8.1 In the Rules, a person is an Associated Person of another person if the first person is associated with the other in terms of Rules 1.8.2 to 1.8.6.
- 1.8.2 A person (the “first person”) is associated with another person (the “second person”) if, in making a decision or exercising a power affecting an Issuer, the first person could be influenced as a consequence of an Arrangement or relationship existing between, or involving, the first person and the second person.
- 1.8.3 Without limiting Rule 1.8.2, the first person is associated with the second person if
- ...
- (b) the first person is a spouse, domestic companion, child or parent of the second person, or a nominee or trustee for any of them or for the second person;

Rule 9.2 Transactions with Related Parties

- 9.2.1 An Issuer shall not enter into a Material Transaction if a Related Party is, or is likely to become:
- (a) a direct or indirect party to the Material Transaction, or to at least one of a related series of transactions of which the Material Transaction forms part; or
- ...
- unless that Material Transaction is approved by an Ordinary Resolution of the Issuer.
- 9.2.2 For the purposes of Rule 9.2.1 “Material Transaction” means a transaction or a related series of transactions whereby an Issuer:
- (a) purchases or otherwise acquires, gains, leases (as lessor or lessee) or sells or otherwise disposes of, assets having an Aggregate Net Value in excess of 10% of the Average Market Capitalisation of the Issuer; or
- ...
- 9.2.3 For the purposes of Rule 9.2.1, “Related Party” means a person who is at the time of a Material Transaction, or was at any time within six months before a Material Transaction:
- (a) a Director or executive officer of the Issuer or any of its Subsidiaries; or
- ...
- (c) an Associated Person of the Issuer or any of the persons referred to in (a) or (b), other than a person who becomes an Associated Person as a consequence of the Material Transaction itself (or an intention or proposal to enter into the Material Transaction itself);

