CERTICOM V. RIM: IMPACT OF A CONFIDENTIALITY COVENANT ON AN UNSOLICITED TAKEOVER BID

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On January 19, 2009, Justice Hoy of the Ontario Superior Court of Justice released her decision in *Certicom Corp. v. Research in Motion Limited* and ruled that Research In Motion Limited ("**RIM**") was enjoined from taking any steps to advance its hostile take-over bid of Certicom Corp. ("**Certicom**") even though a "standstill" covenant, under which RIM agreed to not make a hostile bid for a fixed period, expired prior to the commencement of the bid. The case turned on the interpretation of two non-disclosure agreements in the context of a hostile take-over bid.

Background

In February 2007, Certicom and RIM discussed the possible acquisition of Certicom by RIM. As a result, Certicom and RIM entered into a non-disclosure agreement on July 11, 2007 (the "**2007 NDA**"). The 2007 NDA limited the use of confidential information provided within six months of its execution other than to assess the desirability of establishing a business or contractual relationship between RIM and Certicom, which expressly included a form of business combination between the companies. The 2007 NDA also contained a standstill provision pursuant to which RIM agreed not to make a hostile take-over bid for Certicom for a 12-month period.

Certicom and RIM executed a second non-disclosure agreement on June 17, 2008 (the "**2008 NDA**"). The 2008 NDA was a standard form non-disclosure agreement signed in the ordinary course of business, was not in contemplation of an acquisition and did not contain a standstill provision. The 2008 NDA limited the use of confidential information disclosed within three years following execution to certain permitted purposes during a five-year term. It provided that confidential information disclosed could only be used to assess the desirability of establishing a business or contractual relationship between RIM and Certicom. Unlike the 2007 NDA, the 2008 NDA did not expressly include the language referring to some form of a business combination between the companies.

No agreement was reached between RIM and Certicom regarding the merger of the companies and in December 2008, RIM launched a hostile take-over bid for Certicom. The standstill provision in the 2007 NDA expired before RIM launched its bid, but the confidentiality provisions of the 2007 NDA and the 2008 NDA remained in effect. Certicom applied to the Court to enjoin RIM from continuing its hostile bid, arguing that RIM had breached the 2007 NDA and the 2008 NDA by using confidential information to assess the desirability of launching a bid for Certicom.

Following the injunction imposed by the Court, RIM withdrew its offer for the shares of Certicom and on January 23, 2009, Certicom announced a transaction with VeriSign, Inc. ("**VeriSign**") pursuant to which VeriSign had agreed to acquire Certicom's shares at a cash price of $2.10 per share. RIM submitted a superior offer and on February 10, 2009 Certicom announced that it entered into an arrangement agreement with RIM under which RIM would acquire all of Certicom's shares at $3.00 per share. Although RIM achieved its ultimate goal of acquiring Certicom, Justice Hoy's decision has important implications for the drafting of non-disclosure agreements going forward.

Issue

At issue in the case was whether a hostile take-over bid was some form of a business combination between the parties and whether the confidential information acquired pursuant to the 2007 NDA and the 2008 NDA could be used by RIM for the purpose of assessing the desirability of a hostile take-over bid.

The Ruling

Justice Hoy noted that a hostile take-over bid is not a business combination nor a business or contractual relationship between RIM and Certicom. Accordingly, any confidential information acquired pursuant to the 2007 NDA and the 2008 NDA could not be used for assessing the prospect of a hostile bid. It was held that a takeover bid would only amount to a business combination between the parties if Certicom consented to the transaction.

Justice Hoy also discussed the difference between the purpose of a confidentiality agreement and a standstill agreement. Justice Hoy held that both standstill obligations and confidentiality obligations can operate to prevent a hostile take-over bid, however, they work differently. A confidentiality agreement facilitates the exchange of information, but can limit the purposes for which that information may be used. Standstill agreements prevent hostile take-over bids or other unsolicited offers from parties with whom a company has had strategic discussions. Justice Hoy stated that standstill agreements typically remove the need to prove whether information that has been exchanged is confidential at all, or that confidential information has been misused in connection with a bid. A standstill provision is better protection, removing the need for proof, and costly litigation. Nevertheless, a confidentiality provision can independently prohibit the use of the information disclosed for the purpose of assessing the desirability of a hostile bid and thereby hamper the ability to make an unsolicited bid.

In the case, Justice Hoy concluded that the standstill and the confidentiality provisions were to be interpreted as separate clauses, providing different protections for different periods of time. Justice Hoy held that the confidentiality agreements prohibited the use of information disclosed pursuant to the 2007 NDA and 2008 NDA to make a hostile take-over bid. After the standstill provision expired, Certicom was left with the protection of the confidentiality clause, which required proof of disclosure and proof of use of confidential information. At that time, RIM also had the option to launch a hostile take-over bid, provided that it had not received, and used, any confidential information in assessing the bid.

Implications

The decision demonstrates that parties should take particular care in drafting non-disclosure agreements.

Both standstill provisions and confidentiality provisions can be used to prevent unsolicited bids. It cannot be assumed that a hostile bid is permitted after the expiry of any standstill provision. Consequently, care should be taken in drafting confidentiality agreements to account for the permitted uses of confidential information after the expiry of a standstill clause. It is important for a purchaser to consider whether it intends to maintain the possibility of launching an unsolicited bid. A purchaser may also negotiate a short expiry period for confidentiality obligations. On the other hand, a potential target may draft a confidentiality provision to leave open the possibility of Justice Hoy's interpretation, and thereby circumvent a hostile bid.

As a purchaser, another important lesson may be learned from the decision. The purchaser may maintain the possibility of commencing a hostile bid by establishing walls within the organization and limiting access to the confidential information.