

# A MATTER OF PERCEPTION



*The devil has the most appealing face,  
and the most persuasive arguments.*

**N**ed Evans, chairman of Macmillan, introduced Henry Kravis to the board with a flair that suggested the raising of a genie from a bottle. With Henry beside him, Ned told everyone that Henry's firm was offering to buy Macmillan for \$85 a share, an aggregate price of about \$2.3 billion. Ned and his three senior managers would hold about 20 percent of the equity of the company after the buyout. There seemed little doubt that the price was compelling and would end the six-month takeover battle for the company, a fight in which the board had been severely criticized. As the board contemplated peace with honor, Ned adroitly turned the meeting over to Henry.

Henry needed no introduction. In the decade since Henry had participated in founding Kohlberg, Kravis & Roberts and made his first leveraged buyout, he'd purchased over thirty companies for \$35 billion and become a legend. Upon entering the Macmillan boardroom, Henry had worked the room, while his staff waited

behind him. With a bright smile he acknowledged everyone he knew, warmly shaking hands, individually addressing each person. I felt his graciousness at the opposite end of the board table as he caught my eye and said hello to me by name. It was a moment in which the business community, and the people I knew, seemed to have matured and taken on all the assurance and command of prosperous middle age. Henry currently had available to him a fund of over \$5.6 billion for equity investments, which provided over \$55 billion of capital to make purchases of companies when leveraged with bank and other borrowings. Sitting a few feet away from Henry was Bruce Wasserstein, engaged by the board to evaluate Henry's proposal. Bruce had become, in the past decade, one of the preeminent investment bankers in America, the head of his own firm, Wasserstein, Perrella & Co., a top-tier banking firm. In the same period Ned Evans had emerged as a major business figure and helped Macmillan grow from an enterprise with a market value of less than \$200 million to one in excess of \$2.3 billion.

On this Monday morning, September 12, 1988, everyone was poised for success. Optimism could clearly be treated as realistic, since Robert Maxwell, the British entrepreneur and publisher, had finally been outbid by Henry. Maxwell, a large man, grandly self-made to mirror his own physical proportions, had previously tried to extend his publishing empire in the United States by mounting unsuccessful takeovers of Harcourt Brace Jovanovich and Bell & Howell. His frustrations had made him tenacious in the contest for control of Macmillan. In business matters he was determined and without sentiment. But Maxwell seemed to have uncharacteristically set the basis for the contest now coming to an end.

As usual, the board meeting had begun precisely on time. It was to be a two-hour meeting, and after the meeting there would be lunch for the directors in the commodious Macmillan dining rooms. The agenda, definitively set, would be adhered to strictly. Before Henry's entrance, Ned Evans had brought the board up to date on the auction process for the company. There had been six bidders, McGraw-Hill, Gulf & Western, Rupert Murdoch (through News America Corp.), Robert Bass, Robert Maxwell, and Henry Kravis, the most recent entrant. On Thursday, September 8, Bruce

Wasserstein had called all the potential players and told them that “the matter seems to be drawing to a close” and asked them to submit their best bid by 5:30 p.m. on Friday, September 9. Only Henry and Maxwell were expected to bid.

Maxwell was making a hostile tender offer for the company at \$80 a share (which was his initial bid that had put the company in play), and that price had set the floor bid, dissuading all others, except Henry. In response to Bruce’s request for final bids, Maxwell submitted a further bid of \$84, topping his own bid by \$120 million, designed to be high enough to end the auction for the company. With the bid, he sent a letter, one of the most remarkable letters that any of us had ever seen. It said simply, but in quaint terms, that if the board got an offer of over \$84 that was fully financed, he’d withdraw his offer. It was both peevish and arrogant, and was saying: This is what the company is worth; if you can get a higher price, take it; it’s not worth my chasing it at more than \$84. Of course, he thought his bid was preemptive and didn’t expect anybody to be willing to pay more. But that remained to be seen, and nothing in his proposal prevented the seeking of higher bids. Thereafter, Ned, in direct discussions with Henry, who had been studying Macmillan and watching the contest for weeks, persuaded Henry to offer \$85. A year after the market crash of October 1987, with mergers still in full swing, there seemed to be no price limits. It was Maxwell’s averring his limit that was the final inducement to Henry to declare himself. Henry was in the enviable position of being able to flex his economic muscle, avoid an auction, and get the prize with certainty.

Each director had in front of him Maxwell’s letter, and everyone asked whether he meant what he said. The only reasonable response was: If he didn’t mean it, why did he bother to say it? Could he change his mind? Yes, but why would he corner himself, only to look foolish and indecisive if he were to change his mind? No, he meant what he said. Yes or no, it all came out in the same place: at \$85 Maxwell should withdraw. Ned and Henry believed that. Besides, everyone in the room knew that Henry was going to try to turn the screw on Maxwell with some request for a lockup arrangement that would make it more difficult, if not impossible, for Maxwell to bid further. The bidders were strong-willed men com-

mitted to success. That was the reason Henry was here and presenting the buyout proposal himself. One of my jobs, representing the board, was to keep the turning screw from pinching unreasonably.

According to the agenda, after Henry's presentation, Ned and the management involved in the buyout would step out of the room with Henry, and the independent directors would meet to discuss the transaction. Bruce Wasserstein would evaluate the bid for the board and then the board would take a vote. It was fascinating watching Henry go through his polished routine. He was a man used to winning bidding contests and he'd stretched to offer \$85 to buy the company. Henry would soon begin angling for an advantage over Maxwell to ensure his victory.

THIS MEETING, NOMINALLY dealing with the sale of Macmillan, was a celebration of Ned Evans. Everyone had looked to Ned to understand the company's value and prospects. And Henry was relying on Ned's assurance that after paying such a high price he'd be able to continue the company's growth. The success of Macmillan was a direct outgrowth of Ned's effort to distinguish himself from his father, Thomas Mellon Evans. For much of his career he'd worked with his father—first at Evans & Co., the old man's investment vehicle, then at H. K. Porter, the cornerstone of the industrial empire. His participation alongside the old man in the hostile takeovers of Missouri Portland Cement and Fansteel (a manufacturer of mining tools) created the impression in the business community that the world would have to suffer another Evans.

Physically, the two men were different. Ned, much taller than Tom, was described by *Fortune* magazine as a stocky George Hamilton. But over time the family likenesses, always mildly present, became more pronounced. As Ned matured, he became heavier, his face became round, and then his body also proportionately rounded, leading almost inevitably to his becoming a larger version of the old man. He even had Tom's temper, which sparked and then flashed like his father's. Nothing set him apart, and working closely with the old man made any deviation difficult.

If Ned wanted to distinguish himself and not bear his father's

baggage, he would have to fundamentally depart from his father's business style. In 1979, at age thirty-seven, Ned hadn't set out to achieve independence through buying control of Macmillan. He had more modest aims—mainly to turn a quick profit from 5 or 10 percent of the stock of the company. With the stock trading at about \$10 a share, and the book value at \$16, the company fit within Tom Evans's criteria, a company with good earnings potential selling well below the book value of its assets. By 1979 such companies were already hard to find; most companies were trading in the market at a premium to book value, and it was easy for Ned to convince Tom to overlook the fact that the assets were largely intangibles, such as contract rights rather than manufacturing facilities. The Macmillan stock had gone from a high of \$51 in 1967 to a low of \$3.00 in the mid-1970s, reflecting severe operating problems. Ned had done his homework in finding Macmillan as a target, and had properly diagnosed its ills: a series of poor acquisitions in the early 1970s made by Raymond Hagel, the sixty-three-year-old chief executive officer. Hagel hadn't acted fast enough to correct his mistakes. Substantial pruning of a number of the businesses would have to be effected (a polite way of saying they would have to be sold or liquidated). Stripped down, there would remain a core publishing business and, at that time, an education business through the Berlitz language schools and the Katharine Gibbs secretarial schools, making the stock a good investment. The old man agreed to the stock purchases, and this endeavor became, at age seventy, Tom Evans's last major hostile acquisition.

When H. K. Porter acquired over 5 percent of Macmillan in March 1979, the board reacted to Tom Evans's reputation as a corporate raider by immediately beginning to look for a White Knight. Ned was interested in profiting from a sale and showed the necessary patience during the spring and most of the summer of 1979 while the Macmillan board continued to conduct a reasonable search for a buyer. At the end of August, Mattel, diversifying from Barbie dolls and other toys, offered a deal that included cash, stock, and some debentures, worth an estimated \$24.50 a share. Within a week after the announcement, ABC, the television network, made a counterproposal to acquire Macmillan. The ABC bid

at \$25 only marginally topped the Mattel bid, but its securities were of better quality, making it the superior buyer. In arbitraging the transaction, Ned increased his position slightly, remaining under 10 percent so that he had the flexibility to sell without being subject to limitations on short-swing profits.

ABC, however, was suffering from internal politics, and there was clear resistance to the transaction from a number of important officers in the company. The deal collapsed at the end of November 1979, leaving Ned disappointed and with an important and tough decision to make. Should he sell or merely hold his position? Or should he buy? The stock, as high as \$21 in anticipation of the deal, had dropped to about \$13.50, reflecting few prospects for another deal. The market was confused about what would happen to Macmillan and there was a lot of stock for sale. Confusion carries opportunity. Ned began buying until he held about 15 percent of the company. He told the old man that with the large stock position they would be in a better position to influence management and work out the company's problems, including selling the poor businesses. Macmillan, still looking to avoid being acquired by Tom Evans and face the dismantling of the company, tried to patch up the deal with Mattel, the rejected suitor. Mattel declined, and Macmillan was damaged goods.

With the stock declining, all the disappointments of the large stockholders on the board came to the fore. Knowing that the management had consistently miscalculated the company's prospects, the board didn't have faith in the commitment of the management to revitalize the company. Tom and Ned had more at stake than anyone, and the board agreed to meet with Ned. Totally versed in the business, Ned explained to the members where the business had gone wrong, and told them that he was ready to make the necessary corrections, which were too deep and painful for the management to make. The board members recognized that they had found someone who understood the business and was committed to it. Ned was appointed to the board, and the board was restructured.

In the change, Ned was made the head of the powerful Executive Committee, which ran the company. Within a short time Hagel

resigned and Ned took his place as chief executive officer. In that transition, Ned was able to politely step off his father's ship, H. K. Porter, and take command of his own vessel, which, although in trouble, could be guided again into full and promising service. That step away from his father's command was an important one toward total independence, and seemed gracefully executed, without squabble or outward rancor. As he made the move, he committed Porter to further investments, increasing Porter's position to 20 percent of the outstanding shares.

Ned's instincts were correct in buying additional shares of Macmillan when the price of the stock was down, for it assured control and was a good investment. But as soon as he began selling the poor businesses, the old man wanted to realize on his investment by selling his stock. Publishing and education weren't the kinds of businesses that the old man was interested in being in for the long term. All the worth of Macmillan was in goodwill, contract rights, know-how, and other intangibles, things that he was uncomfortable with and found difficult to value. Hard assets like plant, equipment, and real estate can be sold when businesses are not performing, but with soft assets there is no such market underpinning, and the businesses either have to work well or suffer losses. With the old man interested in selling, it was clear that, although Ned was the chief executive officer, the old man controlled the company. If he sold his block of stock, there would be a new owner and Ned would be dismissed, and he'd be working again for his father. It was as simple as that, and the old man had relatively little patience: he'd sell, and soon.

In June 1982, less than two years after Ned took over control, Macmillan repurchased Tom Evans's stake in the company, paying him about \$50 million for stock for which he'd paid about \$37 million, giving him his desired profit. The stock purchased by the company was canceled, severing the business connection between the two men, and Ned lost the security of a 20 percent shareholder.

Macmillan became Ned's life and it changed his life. In the eight or so years that he ran Macmillan, he made sixty-five acquisitions, all negotiated, none hostile. Each was small, but incrementally they created, from the starting embryo, three major enterprises under

the name Macmillan: an information company, an education company, and a publishing company. There was a personal cost to this strategy because Ned wasn't comfortable negotiating. He had neither the affability nor the winsome ease necessary to cajole concessions. But where the old man would respond to an emotional seller by being dictatorial, Ned would find enough flexibility to get the deal done. For Ned, the prize was worth the game, and in making that effort he showed more control over himself than the old man.

The constraints Ned imposed on himself he imposed on others. Most of all, he needed to assert control, like the old man. But there was a difference between the two: if the old man was in charge, he was never fastidious about it; Ned governed through sustained control. Nothing happened at Macmillan without his knowing about it. Meetings were always short, with a strict agenda. Brief meetings were governable and without surprises. Ned had seen enough meetings disrupted, especially by his father, to be wary. Brevity suited him, for he was basically a man of very few words. When he spoke, it was thoughtful. Most of the time he listened.

His concentration and effort in those eight years made Macmillan one of the ten best-performing companies on the New York Stock Exchange, with record growth rates each year. Not only was the performance exceptional, the vision was also remarkable and quite different from his father's. If the old man had held on to his investment in Macmillan, it would have been worth about \$500 million, more than his entire net worth. Ned had decidedly found his own path, well away from smokestacks and bent metal, and had broken new ground. But being a public company is like being a white leopard, Ned told me. Everybody wants you and there's no way of keeping free.

HENRY'S BUYOUT PRESENTATION in the boardroom had two parts. The first was to give absolute assurance about his firm's ability to effect the transaction. While this transaction was sizable, it was small relative to the amount of capital to which Henry had access. In addition, he had in attendance bankers from Drexel Burnham and Merrill Lynch to give assurances that there would be no prob-



lem in placing the bonds necessary to do the transaction. Their presence was to satisfy Maxwell's condition in his letter that the money for the bid was readily available. Then Henry told the board how impressed he was with the management of Macmillan, Ned and his team. All the words of praise justified the 20 percent equity participation of the management.

In short order, Henry began the second part of his agenda, angling for fees and his expenses if Maxwell made a higher bid. His estimated expenses, largely for paying commitment fees to lenders to raise \$2 billion in capital, came to \$40 million, about \$1.30 a share. In addition, he asked for a fee of \$29 million for his firm if Maxwell raised his bid over \$85, which translated into approximately another \$1.00 a share. Thus, if Maxwell bid \$86, then Henry would get \$69 million from the company, or about \$2.30 a share, and Maxwell would have to pay the equivalent of \$88.30, even though the shareholders were getting \$86. Henry's fees and expenses created a significant hurdle for Maxwell. If Maxwell had second thoughts, they would have to include the company's paying Henry \$69 million.

Henry was leaving nothing to chance, for he then additionally asked for what is known as a crown jewel option. As its name implied, he wanted to be able to buy the best pieces, in this case about \$1 billion of selected assets from the information side of the business, in the event that Maxwell raised his bid to \$86 and got control of the company. Maxwell would then be in the unenviable position of having to sell Henry the crown jewels, largely unique assets, that he'd just bought. Even if the option was at a fair price meant to compensate the Macmillan treasury for the assets sold, in reality it would not do so. The taxes on the gain from the sale would be significant, and even if similar assets could be purchased, there wouldn't be enough cash remaining to buy them. Maxwell wouldn't buy under such circumstances. Thus, the grant of the option to Henry would be an absolute bar to further bidding by Maxwell, even if the \$69 million in fees and expenses was not.

Ordinarily, boards don't grant crown jewel options and end the auction process. If there was a time, however, when a crown jewel option could be fairly contemplated by the board, it was at this juncture, because Maxwell had indicated that if his bid was topped,

he wouldn't bid again anyway. It would be totally reasonable for the board to grant it. The problem with granting the option was that it ended the takeover battle definitively, leaving no opportunity for Maxwell to have second thoughts.

This was the most important decision for all of us to make. It was now time for Ned to leave the room, but he lingered longer than he should have according to his agenda, knowing that once he left the room, unguided discussion would occur. But as planned and prescribed, he finally got up and said, "The management will leave now," smiling as he left his seat in the center of the board table, with his staff following. It was as if he were leaving his only child alone with strangers.

NED FOUND HIMSELF in the position of abandoning his fate to the will of others because Macmillan had to be put up for sale. The early-warning signal of a possible takeover of Macmillan came when Robert Maxwell made a bid to acquire Harcourt Brace Jovanovich about two years before. Attention had now been focused on publishing and information companies. Worse, Maxwell wasn't able to achieve his objective, and Ned reasoned that Maxwell would eventually turn to Macmillan. Ned began at that point to have Charlie McCurdy, his financial officer, prepare business plans for recapitalizing Macmillan. His objective was to keep the company public, if he could, but in any event to acquire control of the company in a recapitalization. In all his various plans Ned and his team wound up with control of at least a majority of the shares. It was a strategy that he would keep on the shelf in case it was needed. In March 1988, Robert M. Bass acquired a stock position in Macmillan of about 8 percent, which he claimed he was holding for investment. Slowly, Bass increased his position to just under 10 percent, leaving himself free to take short-swing profits if they became available. Ned had been given less than six years to foster the company's growth after he'd cut himself free from his father.

In June 1988, Robert Bass sent a letter to Ned offering to acquire the company for \$64 a share. The company was then trading in the \$50 range. In preparing to respond, Ned engaged me and my firm to represent the independent directors. He then proposed a

recapitalization plan to the board, the one he had on the shelf. After we met with him and the board, the board approved a plan that was much more modest than anything Ned had contemplated. Macmillan was to be split into two businesses, publishing and information services, and Ned's (and the management's) interest was to be concentrated principally in the information company, which was continuing to grow. As a group, Ned and the management would hold about 38 percent of the equity of that segment, and agree not to increase their stock position for at least three years. The recapitalization was worth about \$64.50 to the shareholders, slightly more than Bass's proposal. However, the public shareholders would retain a significant equity interest in both segments, rather than being cashed out, making the plan more attractive to them than the Bass buyout proposal.

Ned and I met with Bass following the announcement of the recapitalization in an attempt to induce him to go along with the plan. Robert Bass was about forty years old, slightly younger than Ned, and very pale, with gray hair that was fast becoming white. He was slim, almost frail, and didn't look like he had the energy to wield the billions of dollars that he had at his command. Ned had prepared himself thoroughly for the meeting. He'd gone through all of Bass's deals and was prepared to compliment him on the transactions, which was all preparatory to Ned's trying to convince Bass to take his profit and allow the recapitalization to be completed. Bass was curt and didn't take well to compliments, aware that they were manipulative. Ned had a simple message, which he'd worked out in the anguish of trying to find common ground for the meeting, which was: "If you start out hostile, you'll never again do a negotiated transaction." Ned tried to explain to Bass that he'd abandoned the hostile route for Macmillan because it was very costly and left no assurance that you would get what you were seeking. Ned tried to explain how hard it was to put the image of the hostile raider behind him and how rewarding it had been for Macmillan to do only negotiated, friendly transactions. Bass was not interested in Ned's commentary. It was all beside the point. He acted as if he were waiting for the national anthem to finish and for the ball game to begin.

"What are you seeking?" I asked Bass.

"I want the company," he said.

"What do you bring to the party?" I asked.

"What do you mean?" he asked.

"What is it that you think you can provide that is different from what's being done or that can be done better?"

"I think the company's a good buy," he said. "I'm prepared to pay value for it." He had a benign smile that belied his indifference to anyone else's interests and used that mask of politeness to avoid addressing any of the issues.

"There is no good reason to sell it," I said, making my point directly to pierce the smile. "It has good management and the shareholders are still participating in the growing company." Even as I spoke, I saw him stiffen at the suggestion that he should have second thoughts, and his eyes became impenetrable. I said, "There's every reason to resist selling it."

"It's a public company, which means it's for sale. And as shareholders, we don't like the recapitalization arrangements," he said, refusing to justify his actions. From Bass's perspective, one that I first fully understood from Tom Evans, he was entitled to take a profit wherever he found it, without considering the effects on a flourishing company.

The meeting was a failure, and promptly thereafter Bass made a tender offer for the company at \$73.50. In addition, he brought a lawsuit in Delaware, where Macmillan was incorporated, to enjoin the recapitalization. The Bass bid to buy the company sparked Maxwell's interest and he bid \$80 in a tender offer. Here was an opportunity that Maxwell didn't want to lose: to buy a major publishing and information services company. The Delaware Chancery Court, Chancellor Jack Jacobs presiding, faced with a bid of \$80 against a recapitalization valued at \$64.50, enjoined the arrangement and criticized the board for being too permissive with management in allowing them to take 38 percent of one segment of the company, which the court saw as a controlling interest. Chancellor Jacobs treated the recapitalization like a sale, refusing to follow the precedent of the South Carolina court in the Multimedia case. The court's criticism made the board and all of us sensitive about acting in any way that appeared to favor management.

Ned, seeing that it was likely that Maxwell would purchase the

company, searched for other buyers. He decided to sell to Robert Bass or Henry Kravis, not concerned that Bass had triggered the takeover process. Either group would give him and his team an equity stake in Macmillan. He invited Bass to bid again, but the \$82 to \$83 range was as high as Bass would go, and Ned figured \$83 would probably be topped by Maxwell. Henry Kravis, Ned decided, had the capability to be the highest bidder. In the meantime, the board sought bids from all other interested buyers, but as the prices escalated in the contest it became obvious that only Henry Kravis would compete with Maxwell.

ONCE NED AND his team left the room, the board discussed the issues. The question was whether you believed Maxwell's letter. If you believed it, then it didn't matter what you gave Henry. You might as well give him what he asked for and not antagonize him. But if you believed that Maxwell might change his mind, then the board's obligation to the stockholders was not to terminate the auction. Bruce told the board that Henry could be given half of what he wanted, the fees and expenses. At \$69 million, they came out to only 2.5 percent of the total transaction costs, which wasn't a crippling tax to impose on the transaction to induce Henry's bid. There was, however, no rational basis for stopping the auction with a crown jewel option if there was the possibility of an additional bid by Maxwell, unless Henry wouldn't bid at all without it. The court's criticism of the recapitalization plan and Bruce's lecture hardened the board to deny the crown jewel option, leaving it up to Henry to insist that there was no deal without it.

We called Ned back into the boardroom for the full board meeting, and I told him the decision of the independent directors. They had approved the transaction but couldn't approve the crown jewel option. The question now was whether Henry was prepared to go forward with the deal on that basis.

"Henry has placed only one deal on the table," Ned said. "The option is part of it."

"It's not acceptable the way it is," I said.

Ned didn't argue and, understanding the sensitivities of the board, accepted the result rather graciously. He left the room to

talk to Henry. Within a few minutes he came back and told us that Henry would make the deal without the crown jewel option. Finally, it had been done: Maxwell had been outbid at \$85 a share, and an elegant solution, with honor, had been achieved. Buoyant goodwill was everywhere present in the room. The meeting was adjourned for the board to eat lunch.

WITHIN A DAY, and despite his letter, Maxwell increased his tender offer to \$86.80 a share in cash, \$1.80 per share more than the \$85 face value of the KKR bid, and Maxwell was prepared to absorb the \$69 million that Henry would get on top of all that. There was going to be another round of bidding, if Henry could be convinced to go higher. But Henry wasn't going to be tractable this time. Given the higher bid, the board directed its financial advisers, Wasserstein Perrella and Lazard, to contact the interested bidders. On Friday, September 23, Bruce Wasserstein called all six potential bidders and told them that if they were interested in participating, the bids should be submitted by 5:30 p.m. on Monday, September 26, 1988. This was meant to be the final round.

Everybody knew that he was in an endgame and each move would be examined. Maxwell's financial adviser was Robert Pirie, head of Rothschild's U.S. operations. Pirie had been a partner at Skadden Arps, the firm that acted as Maxwell's lawyers, and an adversary of mine on a number of occasions. He was a mature, battle-scarred veteran with the personality to advise and stand up to Maxwell. Pirie had said to Wasserstein that the process favored Henry's firm, KKR. Keeping that accusation in mind, we made sure that all our steps were carefully thought through. Pirie wanted an open-bidding procedure, as at an auction house, where he could know the other bids and could bid against them. KKR wanted to have one final round of blind, or sealed, bids and was again requesting a crown jewel option in the event its bid was accepted, which would enforce the one-round procedure.

The board had to encourage KKR; otherwise there wouldn't be another round. The board, therefore, had to entertain the request for a crown jewel option, the grant of which would assure that there would be a last round and not a series of anticlimaxes that

would discourage KKR. While one final round would most likely extract the highest price, it played into Pirie's contention that KKR would be tipped or otherwise advantaged. To make the best record, Bruce Wasserstein prepared a script which was to be read by him and Steve Gollub of Lazard to Maxwell's representatives and to KKR's representatives on the telephone. The script was straightforward, but very detailed, beginning with the salutation "Hi" and, in retrospect, the ironically inaccurate phrase of Bruce's that "the matter appears to be drawing to a close." Each bidder was then advised that bids should be submitted by 5:30 p.m. on Monday, September 26, and was told to put in his best bid, stating all conditions.

Maxwell and KKR both bid. Maxwell's bid was \$89 per share in cash for all the shares, \$5 a share (or over \$150 million) more than the \$84 he'd said was the highest price he'd be willing to pay. KKR's bid had a face amount of \$89.50 per share, and although higher than Maxwell's by a nominal \$0.50, KKR's bid was deemed worth approximately \$89.05 to \$89.10 when the securities were evaluated. Ned was informed of the bids.

While the one-round strategy had worked and the prices were in the stratosphere, the bids were too close to declare a winner. A situation like this was often resolved like a tie, by holding another round. But in this case, in addition to annoying the competing bidders already tortured by the ratcheting process, there was a further problem in requesting another round. KKR had added to its bid what is known as a "no-shop clause," which meant that its bid could not be disclosed to anybody in any manner. In requesting another round of bidding and telling people the bids were too close to call, we would in effect be violating the no-shop clause. After talking to Bruce Wasserstein, I advised him that choosing one bidder over the other in a tie was more disruptive than another round, and we should override the no-shop clause. Also, we didn't have to address KKR's request for a crown jewel option by holding another round.

We all met at Bruce Wasserstein's office at about 7:30 p.m. on that Monday and prepared another script just as detailed as the first (with the same introduction of Bruce's about the matter drawing to a close). In an artful attempt not to conflict with KKR's no-

shop provision, Bruce and Steve Gollub were to say the following: "We are not in a position at this time to recommend any bid. If you would like to increase your price, let us know by 10 p.m." That was code for: The bids are substantially the same and we're compelled to hold another round. Both parties were to be told the same thing. In addition, KKR was to be told that if its bid included a lockup proposal, it should focus on price. The statement was meant to say that a crown jewel option would be granted only if the bid was reasonably higher than the competing bid. It took us about fifteen or twenty minutes to work out the script to everyone's satisfaction. Shortly after 8 p.m., having made all necessary arrangements, we were in a position to call Pirie, who was acting for Maxwell, and to call Mike Tokarz, a partner of Henry's at KKR.

We thought we were in total control of the auction at that time. What we didn't know was that Ned Evans had already called Henry and reached Tokarz. Also on the call with Ned was Bill Reilly, the president of Macmillan, and Evans's personal lawyer. Ned told Tokarz that Maxwell had bid \$89 all cash. Tokarz responded, "Great. We've won." After an awkward silence Reilly told Tokarz, "Well, it's a little close." At that point Tokarz realized the call wasn't an official communication of the results of the auction, and he quickly ended the conversation.

The official call to Tokarz was made at 8:20 p.m. by Bruce, who assiduously followed the script. The first thing Tokarz said was: "Aren't you violating our no-shop arrangement?" Bruce told him that we didn't think we were doing that, and if we were, we had no choice. There was a long pause, as if he was trying to figure out whether there was any way he could enforce it. His choice was either to withdraw or to bid again. In that hesitancy, not knowing what he knew, we saw him suggesting to us that it was possible for him to withdraw and that it was being seriously considered.

"What are you telling Maxwell?" he asked.

"The same thing we told you," Bruce said.

"Exactly the same thing?" His inquiry was harsh and suspicious. Clearly, he was disturbed that there was to be yet another round, for he was hoping to end the auction without having to pay more money.

"Exactly the same thing," Bruce said.



We told him he had until 10 p.m. to respond, and Bruce then called Pirie at about 8:30. Pirie told us that he was going out to dinner and mentioned a new Manhattan hot spot on the West Side. For his client in London, it was 3:30 a.m., and he asked us if he could be given additional time, until midnight in New York, to reach Maxwell. The difference between 3:30 a.m. and 5:30 a.m. might allow Maxwell to awaken at his normal time, and would give Pirie time for dinner. After that conversation we got back to Tokarz and told him that the deadline had now been extended until midnight.

I left Bruce's offices to go to dinner myself and then to go home. The arrangement I had with Bruce was that he could call me if he needed to talk to me. He would accept bids until midnight, and if there was any problem I would be told about it. At 10:30 that evening, Pirie called Bruce to ask if Macmillan had received a bid higher than Maxwell's. He said, "If you have a higher bid, then please inform us of that bid and we will tell you promptly whether we will raise our bid to top the bid. If you don't have a higher bid, then regard this as our highest bid." After a pause, he asked, "Will you get back to us?" His statement was stilted, fodder for his anticipated legal case.

Bruce responded, "We've gotten back to you. If you have anything further to say, tell us by midnight."

Bruce knew that he hadn't directly answered Pirie, but he felt he had no other choice; otherwise he'd be shopping KKR's bid. That would risk KKR's bid being withdrawn, leaving Maxwell as the only bidder. Bruce called me and I told him that Pirie was trying to set us up. "I know," he said. We both pondered the inevitable collision if KKR bid again. We felt that as long as Pirie was given every opportunity to bid and we were careful, the appropriateness of the procedures we were following would be upheld in court. I told Bruce that he should call Pirie back (so there would be no misunderstanding) and tell him that Macmillan wasn't in a position to inform him which bid was higher and that Pirie should call in his highest bid by midnight. Bruce called Pirie back and conveyed that information to him.

Pirie didn't submit a bid. The strategy of not bidding left two chances to win. If he already had the high bid, he would take the

company; if not, he would take his case to court based on arguments detailing unfair procedures. Once before, Pirie had won a company, SCM, by challenging the mechanics.

Before midnight KKR submitted a bid of \$90, face amount, which we valued at about \$89.80. To be accepted, the bid required that KKR be granted a crown jewel option. Since KKR's was the high bid, we continued to negotiate with the firm (without telling KKR the amount of Maxwell's bid) and got it to raise its bid by another nickel to \$90.05. We also continued to negotiate with Skadden Arps, Maxwell's lawyers, over the terms of the merger agreement with Maxwell in the event that KKR for one reason or another withdrew its bid.

The Macmillan board met at 9 a.m. on Tuesday, September 27, to consider both bids. At that time, Maxwell publicly announced, for the opening of trading on the New York Stock Exchange, that he'd bid \$89 cash. The announcement was meant to put pressure on the board to accept the all-cash bid. The tack taken by Maxwell was consistent with his position that all bids should be announced. Public disclosure, however, put Maxwell in a position to be topped by Henry, if Henry hadn't already done so.

The boardroom was crowded. Not only were the board members there, they were surrounded by investment banking advisers (three firms: Wasserstein Perrella; Lazard; and First Boston) and legal counsel (four legal firms: Wachtell Lipton and Delaware counsel for the board; Weil Gotshal and Kirkpatrick Lockhart for the management).

Henry Kravis appeared and made a presentation telling us that the granting of a crown jewel option to KKR was an essential part of his bid. Without the option there was no bid. It was clear from his presentation that he regretted not insisting on it when he'd bid \$85 a share.

After Henry left the room, the board was concerned about whether we had to ask Maxwell if he wanted to bid again, since he'd stood firm at \$89. We told the board that if we asked Maxwell whether he wanted to bid again we would be violating the rules we'd set out for the bidding and would lose KKR's bid. If KKR dropped, then Maxwell wouldn't be induced to raise his bid. He could even lower his bid. Everyone knew that Macmillan had

once failed to be sold because a bidder, Mattel, had been disdained.

I explained our dilemma to the board. If we accepted \$89 in cash, the board wouldn't be subject to any criticism. As a matter of business judgment, an all-cash bid at these bidding levels could be preferred. If we accepted the higher KKR bid with the crown jewel option, and thus stopped the auction, we could be open to criticism—if Maxwell subsequently raised his bid, subject to the court's striking down the crown jewel option. But the only way to get Maxwell to raise his bid was to accept the \$89.80 that KKR offered.

I told the board that if the court found, after Maxwell raised over \$90, that the option was an improper impediment to the auction, then the court would also find that the auction hadn't been fairly conducted. In such a finding, the board would be subject to criticism and probably so would the advisers. Making the picture darker was my assessment that a crown jewel option had never been sustained in the face of a higher bid. The courts have always been result-oriented. If Maxwell raised his bid, he had a good chance of winning. The bidding contest presented difficult decisions. The good news was that the shareholders were benefiting. After my bleak statement of the situation, I asked Ned Evans to leave the room.

When Ned was out of the room, the board members asked Bruce and me, as advisers, whether we felt that the procedures that had been followed were fair. That was the right question. We told them that we'd been careful and followed equitable procedures. We described them at length, the details showing that Maxwell had every opportunity to top the bid if he wanted to do so. With Ned back in the room, we outlined our conclusion that the procedures were fair. None of us knew about Ned's conversation with Henry's partner, Mike Tokarz. The board approved the transaction with the option, and we announced it, leaving Maxwell to decide whether to bid again.

MAXWELL PROMPTLY BID \$90.25 in cash and challenged the crown jewel option in court as having been illegally granted. Interestingly,

Robert Bass joined Maxwell in bringing the court action. Bass stood to make about \$80 million (or about \$30 a share on his 10 percent stock position) whoever won, but he was looking without sentiment for the extra profit of about \$0.25 a share. His actions in this whole affair were always entirely consistent.

Although Bass had joined Maxwell, we were confident of winning, until we found out that Ned had called Henry. The information was given to us while we were preparing a report to the SEC on the transaction. KKR, which had to file a similar report, informed us that they had been told at approximately 8 p.m. on the 26th about Maxwell's bid. The question was whether Ned's call was material to the bidding and should be disclosed. I thought the call made no real difference, since Maxwell had soon thereafter been told that there was a tie and even announced his bid the next day. But I knew that once the legal challenge started, Maxwell's lawyers would probably find out about the call, and if it was not disclosed in the filing it would look like we were hiding something. Any hint of a cover-up would make the information look more powerful than it was. We decided to disclose the call before Maxwell's lawyers began their discovery routines.

Knowing that there would be a major confrontation in court, I sat down with my litigation partner, Bernie Nussbaum, to work out a strategy for the defense. Bernie had been involved in the matter from the outset and already knew all the ins and outs of the situation. He told me this was a case that should be argued by our Delaware counsel, Gil Sparks. Sparks had been in the boardroom for most of the critical meetings and knew the lengths to which we had gone in trying to make the auction fair. Importantly, Sparks was one of the preeminent Delaware lawyers, the one whom the state had looked to as its advocate when it defended the validity of its anti-takeover legislation in the federal courts. Bernie knew that Sparks's presence in the courtroom would assure the court of fair-minded intentions.

Bernie and I went through all the bidding steps with Sparks and showed him that by 8:30 p.m. the information that KKR had been given was totally canceled out by our calls to Maxwell. In our view, the board had acted in good faith throughout, aiming to benefit the shareholders. The board hadn't favored Evans. Indeed, the

board pushed the price to the limits. None of the board members should be tarred by the telephone call. Neither should KKR be punished.

"We should have another board meeting," Sparks said. He looked troubled.

"What for?" Bernie asked.

"To give the board a chance to decide, knowing what they know now, whether they would have voted for KKR's deal over Maxwell's."

"There was no \$90.25 offer on the table when they reviewed those contracts," I said.

"I know that," Sparks said firmly.

"KKR's offer was the highest," I said.

"I'm not asking you to change the facts," Sparks said.

"Then the result will be the same," I said.

"We can't know that. It's their decision. And we'll have a much stronger case," Sparks said, "if everyone has all the facts and a chance to discuss the decision, whatever the result."

"This is not going to be an easy meeting to hold," I said. "Ned is going to have to be out of the room entirely." Looking at Sparks, I saw that he was committed. The board had to be given another opportunity. "Ned is not going to want another meeting," I said.

"It doesn't matter what Ned wants," Bernie said. "This is what we have to do."

There was shrewdness in reconsidering the matter, but it was like whitewashing a crack: it wouldn't erase the flaw. The meeting, however, would be a reprimand to Ned, and the more he fought it, and I knew he would, the greater the reprimand.

I called Ned and told him that I wanted him to call a meeting of the board of directors in which he wouldn't participate. There was hesitation at his end, and I heard the catching of his breath, which was like a click on the phone.

"Why do we need a board meeting?" he asked sharply.

I explained it to him, knowing that his view was that the high bid, Maxwell's, would win in court. For him, the high always won. Cobbling reasons to justify a lower bid was sense gone awry.

"It's not necessary," he said acidly. "That meeting doesn't make

any sense.” His tone was belittling, all his personal defenses now in place.

“We’ve decided it has to be held,” I said. “It’s a meeting of the independent directors.”

“I’m not going to call it,” he said definitively.

“Then I’ll call it,” I said, “and have it in our offices.” What I was saying had to horrify him.

“It’s my board,” he said.

“The directors have to meet,” I answered. “We have to act to avoid criticism of the board. There’s no choice, Ned. It’s either at our offices or at your offices.” I paused, waiting for him to challenge me. He was breathing shallowly, very upset. I wanted more than anything then to close the conversation and get off the phone. I said, “That’s the only issue. The meeting should be held tomorrow.” He hung up on me.

Within a few minutes, Beverly Chell, the company general counsel, called to ask me why I felt we should have a meeting. It was always startling to realize that Beverly was one of Ned’s closest legal advisers. Tom Evans would never talk to a woman lawyer, yet Beverly had Ned’s confidence. I went over the whole matter with her, told her that there would be a meeting and that it was probably much more reasonable for Ned to call it and have it at his offices so that it didn’t look like the meeting was being called for the sole purpose of ganging up on him. That was the only way he could ameliorate its effect. She told me that they would call the meeting.

Ned appeared at the meeting as if the gathering was his idea and an opportunity for him to bring the board current on all events. He told the Board of his call to Mike Tokarz and explained that under the terms of the original contract with KKR (signed when they bid \$85) he was obligated to inform KKR of the bid. He hadn’t realized that there would be a further round of bidding that evening. After he finished speaking there was a long, uncomfortable silence. No one spoke or moved; everyone was waiting for him to leave. His well-tailored suit looked rumpled and his shirt was damp and wilted. When he left, he looked very tired.

After the door was shut, there was a long, contemplative silence.

“From what you now know, would you do anything differently?” I told the members that they could rescind the contract with KKR, if they wanted to do so. I then described the events as we knew them, including management’s arrangements. Ned’s stock and options and other payments would amount to upward of \$90 million on the sale of the company. Abe Gitlow, one of the original members of the Executive Committee that had appointed Ned to the board and a former dean of the NYU Business School, asked a series of questions. Abe, with a teacher’s perspective, had a way of defusing personal animosity while sharpening sensitivity. Slowly, all the questions were aired. No one tried to explain or justify Ned’s behavior. Everyone knew the case would be heard by Chancellor Jacobs, who had criticized the board’s recapitalization plan. These were proud, sensible business people who realized that their reputations were at stake and that, while they were a jury for the moment, they in turn would be judged. Always present in the room was the thought that if they acted now in favor of Maxwell, they could avoid the legal challenge. They were given every opportunity to rule against Ned, but concluded that they wouldn’t have done anything differently, and were bound by what they had done. Of all the possible decisions, that was the one that put them at risk for personal criticism. Gil Sparks and Bernie Nussbaum were sitting on either side of me when I told the board that it was a reasonable decision to make and we would defend it.

BEFORE THE COURT hearing, KKR and Ned Evans tried to settle with Maxwell, offering him some of the educational and information services businesses. He wasn’t interested. He wanted more businesses than they were prepared to offer. From the way he was acting it was inevitable that this would be a test case.

The Chancery Court in Delaware considered all of Maxwell and Pirie’s arguments about the lack of fairness in the auction. Gil Sparks argued the case for the company, standing up to all the accusations. The court, after reviewing all aspects of Ned’s call, concluded that Messrs. Pirie and Maxwell were highly sophisticated businessmen experienced in the corporate takeover field and knew that to win the auction they would have to submit the highest bid

by the close of bidding. No complex auction procedure is ever perfect. Whatever its defects, the auction procedure afforded Maxwell his chance to submit his best offer. On that basis, the Chancery Court found for KKR and thus vindicated the Macmillan board.

Maxwell appealed, seeking the Olympian point of view of the Delaware Supreme Court. Everyone knew that no matter how the Chancery Court had decided, the Delaware Supreme Court would express its own opinion.

We urged everyone to settle. There was enough for everybody. Maxwell could take a large part of the company, and KKR could take another part of the company. Each would be able to get sufficient assets to make a difference to them. There were at least three substantial businesses: the publishing business, the educational business, and the information services business. Whoever bought the whole company would still be selling substantial assets, and there was no reason why the parties shouldn't be able to get together. But the decision of the lower court had affected the psychology of the situation. KKR felt that it had the edge, while Maxwell was still willing to gamble—and he felt he was right: he believed that favoritism had destroyed his chances. Moreover, on a business level, Maxwell seemed to have a refined sense of indifference about the purchase, which was present at the negotiating table. If he didn't get exactly what he wanted, he was prepared to walk away. It is very hard to negotiate with someone in that frame of mind. I concluded that a deal between the parties was unlikely.

Up to a half hour before oral argument, the parties continued to try to resolve their differences. I was asked by members of management to estimate how much time after the argument they would have to continue negotiating before the opinion came down. I told them the opinion would probably come down that same day or the next. But I added that in argument the justices might signal, by their questions, their point of view, which would tilt and likely destroy the negotiations.

Having won in the court below, Macmillan's and KKR's lawyers were confident. The confidence remained until Gil Sparks began his presentation. Sparks rose and addressed the court: "If it please the court, I am counsel for the outside directors."

Justice Moore immediately broke in from the bench: "As counsel



for the outside directors, are you and your clients disturbed that senior management of this company tipped the bid?"

Sparks: "My clients were disturbed. And in part—"

Not giving Sparks time to complete his answer, Justice Moore leaned over the bench and demanded, "Why didn't they fire them?"

Sparks: "Fire them?" Sparks was incredulous.

Before Sparks could recover, Justice Moore said, "Yes. It seems to me that if it was such a breach of duty . . ." And then Sparks tried to argue, but never got a chance. In the Manichaeic world of Justice Moore, where dark and light are at war with each other, Sparks was the devil that day. The devil has the most appealing face, and the most persuasive arguments. And Justice Moore, controlling the courtroom, wouldn't listen to them. He found that the board had been misled. Ned Evans hadn't told the board that he'd intervened in the process. As a consequence, the board didn't have adequate information at the appropriate time, tainting everything from the beginning. Moreover, the board had been too pliant, and the advisers, the lawyers and bankers, should never have allowed Evans and his management to participate in or be informed about the status of the bidding.

There was no way to answer those contentions because the court's word was final, without appeal. The only thing worse than hearing a damning opinion of the court, edged with outrage, is having to explain it to your clients, who had agonized over the same issues.

I visited Ned just before he closed up his office. Incredibly, everything that had filled his life for years had to be sorted into boxes.

ABOUT A MONTH after the court decision, I was in Bernie's office when he told me he had a confession to make about Macmillan.

"What brings this up?" I asked.

"I've been thinking about it," he said.

Macmillan had been on my mind too, and for a moment I turned my gaze to look out the large window of his corner office onto the East River, the Fifty-ninth Street Bridge, and, in the clearness of the day, north to Connecticut.

"I made a deal with God," he said, catching my eye. "My deal

was that if I can win only one case, let it be my cousin's case."

I looked at him and saw that he was in earnest. His cousin, an aide to Donald Manes in Queens, had been accused of bribing a public official. Bernie had worked on the defense and helped support the family. The cousin was convicted by the jury at trial and sentenced to three years in jail. On the appeal, which ran concurrently with the Macmillan cases, the court reversed the conviction for insufficient evidence and freed the cousin.

"How did you make this deal?" I asked.

He looked at me, his face flushed with the sincerity of his confession. "By praying," he said.

"You're not supposed to make deals with God."

"I know," he said, smiling, almost like a young boy caught leaving school early.

"Also, it was a poor deal. There were two Macmillan cases—the recapitalization, challenged by Bass, and the sale, challenged by Maxwell. If you had traded only one of them for your cousin's vindication, and I wouldn't have cared which one, you would have had a good result in both situations. Next time you're going to make one of those deals, please consult a lawyer."

"You'd represent me?" he asked.

"Why not," I said. "It would be an interesting opportunity."

"You realize," he said, "when you're really under pressure, the importance of your family."

"There's nothing like a sense of perspective," I said.

"Do you have any thoughts on what happened in the courtroom?" he asked.

"The court was responding to excesses," I said. "The excesses of leverage of companies, the high fees that the advisers get, and our visibility. The court can't control the economy or the size of the deals or the greed of the parties, all the vectors that make deals happen. But it can control the people that come before it. It's demanding that we make everything perfect."

"These deals can't be perfect," Bernie said. "They're too complicated and there are too many people involved."

"There'll always be deals. The pace and size will depend on the economy. The court told us all to be careful. We'll be careful, very careful."

“What’s going to happen to Ned?” he asked.

“Ned will start again,” I said. “He’s resilient. And his success with Macmillan assures him of all the opportunities that he wants.”

“I didn’t make a bad deal for myself,” Bernie said.

“You’re a sensible man.”