OUTER HOUSE, COURT OF SESSION

[2017] CSOH 156

P341/17

OPINION OF LORD BANNATYNE

In the cause

THE PANEL ON TAKEOVERS AND MERGERS

Petitioner

against

DAVID CUNNINGHAM KING

Respondent

Petitioner: McNeill QC, Delibegovic-Broome QC; Dentons UKMEA LLP
Respondent: Lord Davidson of Glen Clova; Lindsays

22 December 2017

Introduction

[1] The petitioner is The Panel on Takeover and Mergers ("the Panel"). It supervises and regulates takeovers and other matters pursuant to Chapter 1 of Part 28 of the Companies Act 2006 ("the Act").

[2] The Panel, in the Petition before the court, seeks an order under section 955 of the Act ordaining the respondent to announce in accordance with The City Code on Takeovers and Mergers ("the Code"), within 30 days of the date of the court's order, and thereafter make in accordance with the Code, a mandatory offer at a price of 20p per share for all the

issued ordinary share capital of Rangers International Football Club Plc ("Rangers") not already controlled by him, Mr George Letham, Mr George Taylor, and Mr Douglas Park.

Legislative Context

[3] Section 955 of the Act provides, among other things, as follows:

> "(1) If, on the application of the Panel, the court is satisfied -
> (a) that there is a reasonable likelihood that a person will contravene a rule-based requirement, or
> (b) that a person has contravened a rule-based requirement or a disclosure requirement, the court may make any order it thinks fit to secure compliance with the requirement.
>
> (2) In subsection (1) 'the court' means the High Court or, in Scotland, the Court of Session.
>
> ...
>
> (4) In this section -
> 'contravene' includes fail to comply;
> …
> 'rule-based requirement' means a requirement imposed by or under rules."

The Panel and the Code

[4] The Panel was established as an independent body in 1968, with its main function being to issue and administer the Code. Its powers were put on a statutory footing by the Act, in implementation of the Directive on Takeover Bids (2004/25/EC) ("the Directive"). Its statutory functions are as set out in Part 28 of the Act between sections 942 and 965. In terms of sections 943 and 944 of the Act, the Panel must make rules, giving effect to certain parts of the Directive and may also make certain other rules. In terms of section 951, those rules must provide for decisions of the Panel to be subject to review by a committee of the Panel ("the Hearings Committee"), and for a right of appeal against the decision of the Hearings

Committee to an independent tribunal ("Takeover Appeal Board") or ("TAB"). The rules made by the Panel are set out in the Code.

[5] The Code applies, among other things, to takeover and merger transactions of public companies with registered offices in the United Kingdom, if any of their securities are admitted to trading on a regulated market or multilateral trading facility, such as the Alternative Investment Market ("AIM"), in the United Kingdom. The Code also applies in respect of the acts and omissions of any person in connection with the takeover or merger of a relevant company or any matter to which the Code applies.

[6] At the time relevant to the matters giving rise to the present proceedings, the securities of Rangers were admitted to trading on AIM. The Code applies therefore to the respondent's dealings in Rangers securities.

[7] The day to day work of takeover supervision and regulation is carried out by the Panel's Executive ("the Executive"), pursuant to authority delegated to it by the Panel, in terms of the Second Resolution dated 10 January 2007. The executive is headed by the Director General, who is an officer of the Panel.

[8] So far as the present proceedings are concerned the provision of the Code which is of materiality is Rule 9.1 which provides that when:

> "... any person acquires, whether by a series of transactions over a period of time or not, an interest in shares which (taken together with shares in which persons acting in concert with them are interested) carry 30% or more of the voting rights of a company ... such person shall extend offers, on the basis set out in Rules 9.3, 9.4 and 9.5, to the holders of any class of equity share capital whether voting or non-voting and also to the holders of any other class of transferable securities carrying voting rights..."

The Background

[9] The present proceedings arise out of a series of rulings made by the Executive, the Hearings Committee and TAB with respect to the respondent.

[10] The respondent has been found to have acted in concert with certain other parties, namely: Letham, Taylor and Park, in respect of his acquisition of shares in Rangers, and therefore obliged to make a mandatory offer, in accordance with Rule 9 of the Code, for all of the Rangers issued share capital not already owned by him or the concert parties.

[11] This finding was first made by the executive on 7 June 2016. It was upheld by the Hearings Committee on 5 December 2016 and then further upheld by the TAB on 13 March 2017.

[12] The TAB decision required the respondent to announce the making of a mandatory offer by 12 April 2017, and thereafter make the offer in accordance with the Code. The respondent has failed to comply with the TAB decision and the Panel now submits that the court should in accordance with section 955 pronounce the order sought.

The Trusts

[13] In the course of submissions reference was made to certain Trusts. It was not contentious that the respondent was the generator of the wealth these Trusts enjoy. The broad structure of the Trusts was also not in dispute and is this:

New Oasis Asset Limited ("NOAL") at all material times was a company incorporated in the British Virgin Islands and wholly owned by Sovereign Trust International Limited ("Sovereign Trust") established under the laws of Guernsey; that the assets of the Trust included the one share in NOAL. There is in addition a South African based trust: the King Family Trust ("KFT").

Correspondence with the Respondent after 13 March 2017

[14] Certain issues arose with respect to correspondence between the Panel and the respondent after the 13 March 2017 decision. This correspondence was as follows:

[15] The Panel advised the respondent on 24 March 2017, in an answer to an inquiry made by him, that an offer by NOAL would be acceptable instead of an offer by him, but that any such offer would need to be made by the relevant deadline that had been set for the respondent and in accordance with the Code, with the responsibility for compliance with the 13 March 2017 decision remaining with the respondent.

[16] On 25 March 2017, the respondent wrote by email to the Panel informing it that, among other things:

> "I have not determined my options re taking your decision under review etc but I can confirm that from a purely practical perspective it is impossible for me to comply with the time-frames specified. That aspect is not a matter of choice ..."

[17] In response to that email, the Panel emailed the respondent on 27 March 2017 saying among other things that:

> "As has been made clear, the Panel review process has been exhausted and the TAB has ruled that you must announce an offer in compliance with Rule 9 of the Code by 12 April 2017, being the deadline which the TAB has set (and, therefore, in accordance with the Code, publish an offer document and formally make the offer not more than 28 days after that announcement) ..."

[18] The respondent emailed back the same date stating:

> "As you are aware I have other legal review options and I am seriously considering this route."

The Issues

[19] The issues for the courts determination are these:

1. What, on a proper construction of section 995 of the Act, is the ambit of the court's discretion?
2. If the court has discretion to refuse the order, should the court in the exercise of that discretion refuse the order sought?

Submissions on behalf of the Panel

[20] With respect to the first issue Mr McNeill analysed section 995 in this way:

It can only be engaged when the Panel makes an application.

[21] For present purposes the important part of the provision is this:

"the court may make any order it thinks fit to secure compliance with the requirement."

[22] It is important to note what the provision does not say. In particular it does not say:

"the court may make any order it thinks fit."

[23] Rather the court's discretion is circumscribed by the addition of the words:

"to secure compliance with the requirement".

[24] This latter phrase is of considerable importance in arriving at a correct construction of the provision. He submitted that it had this effect: the court had to pronounce an order securing compliance. It was not an option available to the court not to pronounce an order. Not pronouncing an order did not secure compliance with the requirement.

[25] The word "may" in this provision did not give the court discretion as to whether it pronounced an order or not. The word "may" in the context of this provision only gave the court discretion as to the terms of the order which it pronounced and nothing further.

[26] The foregoing construction of the provision he submitted fitted with the structure of Chapter 1 of Part 28 of the Act. In terms of this part of the Act there was a decision of the executive; then a decision of the Hearings Committee and lastly a decision of the TAB. The court's function thereafter in terms of section 955 was to enforce compliance by the pronouncing of an order and nothing further.

[27] That the court's function was, as above described, was supported by this: only the Panel could make an application. This provision did not allow a party who had lost before the various committees of the Panel to bring matters before the court as a form of appeal.

[28] The court's role here is to be the final protector of compliance and it performs that role by pronouncing an order which secures compliance with the requirement.

[29] Mr McNeill, further directed the court's attention to Gower's Principles of Modern Company Law at paragraph 28.9 and Weinberg and Blank on Takeovers and Mergers at 4024/3. These were generally considered to be the two main commentators in this area. It was illuminating to note that neither commentator referred to the court having the power to refuse an application and not to pronounce an order.

[30] Lastly Mr McNeil submitted that the court may find some assistance in considering the ambit of its power, by reference to the position prior to the Act. At paragraph 4-1017 in Weinberg and Blank the authors consider the decision in *Ex parte Datafin Plc* [1987] QB 815. They drew from their consideration of the judgment a number of points Mr McNeill wished to emphasise:

> "The *Datafin* case is important because it established that the Panel is a body which is subject to Judicial Review. This should not be understood to mean that the courts of law will operate as a court of appeal from Panel decisions; rather they will operate as a court of review. This serves to limit the extent to which the courts will be willing to interfere with the findings of the Panel."
>
> ...

> It should be clear from the above that the scope for judicial review of Panel decisions is carefully and narrowly demarcated."
>
> ...
>
> It is the general tenor of the judgment that the court will only set aside a Panel decision if this is in the public interest."

In the context of his reference to *Datafin* Mr McNeill also drew to my attention the government's Explanatory Notes to the Act which state in regards to section 955 as follows:

> "It is expected that in accordance with usual practice, the court will not, in exercising its jurisdiction under this section, rehear substantively the matter or examine the issues giving rise to the ruling or, as the case may be, request for documents or information except on 'judicial review principles', where there has been an error of law or procedure."

[31] In conclusion, it was his positon, that on a sound construction of the provision the court could not as sought by the respondent exercise its discretion and make no order. The court was not given that power in terms of the provision.

[32] On the assumption that the court was against him, in relation to his argument in respect of the first issue, he turned to the substance of the respondent's argument that the court should exercise its discretion and not pronounce an order. He looked first at the issue raised by the respondent that he did not have "free personal funds" to make the offer.

[33] In reply to this Mr McNeill began by saying: in so far as the point made by the respondent in his affidavit between paragraphs 10-12, sought to deny contravention on the ground that it was not him, but his family Trust, which made the purchase of the shares in Rangers, this point had already been argued and adverse findings made and it was not open to the respondent to reargue at this stage. He referred the court to paragraphs 69—74 and 94 of the Hearings Committee ruling and paragraphs 44, 49(2), 77—87 and 103(11) of the TAB decision.

[34] Secondly, and in any event, the suggestion that the respondent does not have personal funds to finance the offer is irrelevant.

[35] In expanding on this point he argued that: before the respondent proceeded to conclude negotiations to purchase the number of shares that took him over the 30% stake in Rangers, the respondent was warned by Mr Letham in the following terms:

> "Dave just a reminder that after we buy Laxey today we will hold 19.7%. We really only want to buy Artemis 10% if it (sic) the intention to stay under 30% otherwise we will have to make a mandatory offer..." (Email of 08:03 on 31 December 2014)

However, despite this warning the respondent went ahead and bought not merely 10% but 14.57% of Rangers shares on 2 January 2015.

[36] Against that background it was not open to the respondent before this court to rely on his supposed impecuniosity as a reason for not having to comply with the Code. He had decided to buy the above amount of shares in Rangers, which would take him over the 30% limit, in the full knowledge of the consequences of such a course of action with respect to a mandatory offer.

[37] Mr McNeill then went on to examine the effects on the Code, if he were wrong in his submission, that such a consideration was irrelevant. His position was that if the Code were to be unenforceable, where parties in question, claimed to be unable to afford to comply with its provisions, the whole takeover system in the United Kingdom would be undermined. It would be open to everyone to do whatever they wished to do in the context of the acquisition of shares, and claim later that they could not afford to comply with the rules. In particular they could claim that they were unable to comply with the rules by structuring their affairs, whether before or after acquisition, in such a way that their wealth was held in trusts or other vehicles. Such a result would be entirely against the public interest which was of considerable importance in this area.

[38] In any event the contention that funds were unavailable to the respondent was not tenable. The background to the positon advanced by the respondent with respect to availability of funds was this: the issue was first raised in the respondent's note. There had been correspondence between the respondent and the Panel, which is not denied by contradiction by the respondent in answer 14 to the Petition, in which the Panel indicated that an offer by NOAL which was the company instructed by the King Family Trustees to purchase shares representing 14.57% of Rangers on 2 January 2015, would be acceptable. The respondent in response to that position did not raise the issue of alleged lack of access to funds.

[39] Further it should be noted that the TAB found that the respondent indicated to his broker, Cantor Fitzgerald that funds were freely available at his discretion, and had personally instructed that the shares be put into the name of NOAL, specifically instructing Sovereign Trust "we now need to get an account opened on behalf of NOAL with Cantor's and provide the various KYC docs etc" (see: TAB decision paragraph 103(10)).

[40] It was evident from the above that the respondent had *de facto* control over the Trust funds.

[41] In further support of that position Mr McNeill drew the court's attention to this: when the respondent wished to buy shares in Rangers in late 2014 Sovereign Trust accepted his direction to fund the purchase via its wholly owned subsidiary NOAL. Now that the respondent does not wish to comply with his obligations under the Code by making the offer for the remaining Rangers shares outside his concert party, it seems Sovereign is not content to distribute Trust funds for the purpose of making such an offer. That position, he submitted, appeared to evidence, rather than deny, the respondent's *de facto* control of the family Trust funds. Under this head he concluded by saying that it is appropriate for the

court to grant the orders sought; and there is no material suggestion that the order, if granted, will be futile (see: *R (on the application of C)* v *Secretary of State for Justice* 2009 2 WLR 1039).

[42] Mr McNeill then looked at the respondent's second detailed point as to why the court, in the exercise of its discretion, should not pronounce the order, namely: in essence that the Rangers share price at present is well above the price at which the Panel seeks an offer to be made. The respondent goes on to argue that in these circumstances no shareholder will therefore take up such an offer and it is thus futile to grant the order.

[43] Mr McNeill began by referring to the general principles which underlie the Code, namely it seeks to protect all the shareholders in all the relevant companies by, among other things, imposing an obligation to treat them all fairly (see: paragraph 2(a) of the Introduction, General Principle 1 and Rule 9 of the Code; Article 5 of the Directive).

[44] It is important to understand that the Code does not compel shareholders to accept an offer in terms of Rule 9. It simply requires that, control of Rangers having been obtained by the respondent, shareholders have the opportunity to sell their shares to him at the same price as he obtained control, having formed their own view on the merits of the offer. It is the shareholders themselves who are the best judges of what is of benefit to them. Once there is a finding that persons are acting in concert then the consequences under the Code flow from that.

[45] Moreover, Rangers shares now only trade on a matched bargain platform called JP Jenkins. The ability of shareholders to sell their shares is thus dependent on their being sufficient corresponding interests from purchasers willing to buy. Therefore, the JP Jenkins platform might not be capable of providing an exit in respect of all the shares held by one or more shareholders at a particular point in time. Likewise, in an illiquid market, offeree

company shareholders with large shareholdings might be prepared to discount their holdings in order to divest themselves. A mandatory offer by the respondent would oblige him, subject to reaching a 50% threshold to purchase all the shares for which the offer was accepted and not already held by him and the concert parties, at the price of 20p per share.

The Respondent's Reply

[46] On the issue of the court's powers the response by Lord Davidson was a short one: it is axiomatic that where a statute provides that the court "may make an order" such as in section 995 of the Act, the court has a discretion as to whether it does or does not pronounce an order. Thus in the present Petition the court has such a discretion. Such a discretion is a wide one that permits the court to take into account many considerations including the utility of pronouncing the relevant remedy (see generally *Credit Suisse* v *Allerdale Borough Council* 1997 QB 306).

[47] The court on a proper understanding of the provision was not obliged to make an order. It was open to the court to make no order. If Parliament had intended to fetter the court, in the way as advanced by Mr McNeill, then Parliament would have said that in clear language. It has quite clearly not done that.

[48] He described the court's role as a hybrid one. It was co-opted into an administrative procedure. In these circumstances the court has an administrative law function. In that context the court always has a discretion as to whether it grants the order sought.

[49] The words:

> "any order it thinks fit to secure compliance with the requirement"

did not narrow the court's discretion. These words did not refer to the court's general discretion given by the use of the word "may" in the provision.

[50] It was for these reasons his position was that the court had a discretion not to make an order.

[51] It was his position that the pronouncing of the order sought would serve no practical purpose, and merely impose a burden on the respondent. It would be unfair to pronounce such an order. Thus the court should exercise its discretion and not make an order.

[52] Examples of the court exercising its discretion not to provide a remedy where making an order served no purpose may be found in: *R (on the application of Edwards)* v *Environmental Agency No 2* 2008 UKHL 22. He accepted that refusal of a discretionary remedy is exceptional but exceptional circumstances he submitted existed in the present case, such as the futility of an order and the respondent's inability to comply with the order.

[53] His submission that the pronouncing of an order would serve no practical purpose and would be unfair was developed in terms of two detailed chapters.

[54] First the respondent did not have free personal funds and was therefore not in a position to fulfil the order.

[55] He was unable to comply with the order which required him to have such free personal funds.

[56] Lord Davidson directed the court's attention to the respondent's affidavit and the accompanying documents from the representatives of the trusts.

[57] He submitted that the respondent is a separate legal person from the Trusts. He had no funds outside the Trust. The assets from which he supports his lifestyle are all trust assets.

[58] There were two Trusts, the KFT and Sovereign. The respondent's position was as set out at paragraph 9 of his affidavit:

> "...my family and I are now the beneficiaries of a discretionary offshore and a discretionary onshore trust that had been sanctioned by SARS and that jointly continue to own and manage the family investments."

[59] Neither Trust was prepared to provide the funds to make the offer (see: the letter from the Trustees of the KFT 7/1 of process and the letter from the director of Sovereign 7/2 of process).

[60] In these circumstances the respondent cannot finance the offer. In addition the respondent would not be in a position to instruct the relative professionals to make the offer. The relative professionals would not accept instructions from the respondent where he was not in a positon to meets their fees and costs, which he is not.

[61] The respondent would not be in a positon to comply with among others Rule 24(3)(f) of the Code. He would not be in a positon to set out in the offer how it would be financed. Moreover he would not be able to comply with Rule 24(8) of the Code relative to third party confirmation of the financing of the offer.

[62] Lord Davidson went on to submit that the result of non-compliance would be that the respondent would be found in contempt. This supported the argument that the court should not grant the order where it could not be fulfilled and the court was aware of this.

[63] Making an order in addition would not achieve the purpose of section 955. It merely would impose a penalty on the respondent.

[64] Lord Davidson on the issue of the discretion which the court had not to grant such an order and the circumstances in which that should be exercised referred again to *Credit Suisse* v *Allerdale Borough Council* and in particular directed the court's attention to page 355 in the judgment of Hobhouse LJ, who when considering the issue of the court's discretion to grant or withhold remedies in proceedings for Judicial Review said this:

> "the grant of what may be the appropriate remedies in an application for judicial review is a matter for the discretion of this court. ...
>
> The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act: see, for example, *Agricultural, Horticultural and Forestry Industry Training Board v. Aylesbury Mushrooms Ltd.* (1972] l W.L.R. 190."

[65] Lord Davidson also drew the court's attention to the speech of Lord Hoffman in *R (on the application of Edwards and another)* v *Environment Agency and others* at paragraph 63 where he made the following observations as to when a court should grant or refuse a remedy sought by way of Judicial Review:

> "63 It is well settled that 'the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary' (Lord Roskill in *Inland Revenue Commissioners v National Federation of Self- Employed and Small Businesses Ltd [1982] AC 617*, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So in *Berkeley v Secretary of State for the Environment [2001] 2 AC 603* it was conceded and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. The relevant domestic legislation provided that in such a case the grant of permission was to be treated as not within the powers of the Town and Country Planning Act 1990. Lord Bingham of Cornhill said (at p.608) that even in a domestic context, the discretion of the court to do other than quash the relevant order 'where such excessive exercise of power is shown' is very narrow. The Treaty obligation to give effect to European law reinforces this conclusion. I made similar observations at p. 616. But I agree with the observation of Carnwath LJ in Bown v Secretary of State for Transport, Local Government and the Regions [2004] Env LR 509, 526, that the speeches in Berkeley need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In Berkeley, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same."

[66] By parity of reasoning, from what was said by Hobhouse LJ and Lord Hoffman, Lord Davidson submitted that the orders sought in the present case should not be granted.

[67] Secondly Lord Davidson argued that an offer at 20 pence would achieve no practical result. Given the price at which Rangers shares were currently trading no Rangers shareholder would accept an offer at 20 pence. Accordingly for this further reason the order should be refused. Once more the granting of an order would achieve nothing; it would have no practical effect.

[68] Lord Davidson's fallback positon was this: if the court had any doubt about the respondent's ability to finance the offer, or had any doubts about the effect of such an order given the trading price of Rangers shares then the court should not grant the order, but rather at this point continue the matter for evidence to be led on these particular issues.

Discussion

The First Issue

[69] I am persuaded that the court has a discretion to refuse to grant an order sought in terms of section 955 of the Act.

[70] It appears to me that the court has such a discretion for the following reasons:

[71] First the wording of the section is that the court "may make an order". I believe that Lord Davidson is correct in arguing that where a provision is worded in this way the court has a discretion whether to pronounce or not pronounce the order sought. In constructing the provision in this way the court is according to the word "may" its normal and ordinary meaning as a matter of ordinary English.

[72] Secondly, if Parliament had intended that the court should not have such a discretion I consider it would have expressed that intention in the clearest language. On no view does the language of the provision clearly take away the court's discretion to refuse the granting of the order sought.

[73] Thirdly, any order in terms of section 955 is backed by sanctions for contempt of court. Where the court can impose such sanctions for failure to comply with its order I do not believe that Parliament would have intended that the court's function should be limited merely to deciding what type of order should be pronounced and not to have discretion to refuse the order. I think it likely in those circumstances that parliament intended that the court should have a discretion as to whether it should or should not make an order.

[74] Fourthly, Mr McNeill recognised that the word "may" must be given some content and so he argued that it gives the court discretion but only a very limited discretion, namely: as to the type of order which the court pronounces in order to secure compliance with the requirement and not as to whether or not to grant such an order. On this analysis the scope of the discretion given to the court is confined in essence to the precise terms of the order it pronounces.

[75] I am satisfied that Mr McNeill's contended for construction is not a sound one. If Parliament's intention had been as he contended then I consider that the word "may" in the provision would have been replaced with the word "shall". If worded in that way the clause would have given no discretion to the court as to whether it pronounced an order but the words "any order it thinks fit" would have given the court discretion as to the type of order which it pronounced. The words "any order it thinks fit" are sufficient on their own to give the court discretion as to what type of order it should pronounce without the necessity for the word "may" earlier in the provision. Or put another way the word "may" in the construction of the provision advanced by Mr McNeill adds nothing to the terms of the provision. On the reading of the provision he is advancing the word "may" becomes unnecessary. The way the provision is constructed and the actual language of it is clearly to

this effect: that "may" refers to the issue of granting or not granting the order sought and not to the precise nature and content of any order which the court pronounces.

[76] Fifthly, Mr McNeill argued that the words "to secure compliance with the requirement" limited the court's discretion. The effect of these words he submitted was this: the court had no option but to pronounce an order as only by doing so could the court "secure compliance with the requirement". I do not think this is a correct construction. The said words I believe are a limitation on what order the court decides to make after it has decided to make an order. Thus, if the court decides to make an order then it should be in such terms, as the court believes necessary/fit "to secure compliance with the requirement". These words do not refer back to the issue of whether or not the court should grant an order.

[77] Sixthly, although Mr McNeill never expressly stated this, I consider, that his argument came in essence to be this: "may" should be construed as "shall". There is a whole line of jurisprudence on this issue. I was not taken to any of the authorities on this issue. This again I believe supports the view that the construction contended for by Lord Davidson should be preferred.

[78] Seventhly, Mr McNeill argued that the structure of Part 28 of the Act and in particular the various hearings required in terms of that part of the Act when taken together with section 955 only allowing the Panel to apply for an order are matters which point strongly to the court's function being no wider than to secure compliance by the pronouncing of an order.

[79] I recognise that it is proper to seek to construe the clause by reference to the structure of Part 28 of the Act and the intended purpose of the clause.

[80] The intent of the provision clearly is to provide a means whereby the Panel can seek to have its decisions enforced. However, that does not mean that the court's function is to

act as no more than a rubberstamp, which I think is the effect of the submission made by Mr McNeill.

[81] The court I believe, in nearly all cases, if asked by the Panel to enforce its decision by granting an order will do so. However, there may be very rare cases where it may not do so.

[82] I do not believe that in holding that the court has discretion to refuse to pronounce an order, in what undoubtedly would be very exceptional circumstances, undermines the functioning of the Panel.

[83] I have borne in mind when considering the scope of the court's function in terms of this section the observations of Sir John Donaldson MR in *Datafin* at 840 A-C where he said this:

> "I think that it is important that all who are concerned with takeover bids should have well in mind a very special feature of public law decisions, such as those of the Panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction. Furthermore, the court has an ultimate discretion whether to set them aside and may refuse to do so in the public interest, notwithstanding that it holds and declares the decision to have been made *ultra vires*: see, for example *Reg* v *Monopolies and Mergers Commission, ex parte Argyle Group Plc* [1986] 1 W.L.R 73. That case...further illustrates an awareness that such decisions affect a very wide public which will not be parties to the dispute and that their interests have to be taken into account as much as those of the immediate disputants."

[84] I take the following from this passage, that the decisions of the Panel are subject to Judicial Review and that in those circumstances, the court has an ultimate discretion as to whether it pronounces an order. The court here is not dealing with Judicial Review and the observations predate Part 28 of the Act. Nevertheless I am persuaded that these observations can be read across when considering the ambit of the court's powers in terms of section 955 and tend to point to the ambit of the court powers including a power not to pronounce an order.

[85] For the foregoing reasons I hold that the answer to the first question is: the court has a discretion to refuse to grant an order in terms of section 955 and that the scope of the court's discretion is not confined in the way argued for by Mr McNeill. I am persuaded that this gives proper effect to the wording of the provision and the intention of the legislature.

Second Issue

[86] The next question was whether the court should exercise its discretion in favour of the respondent and not grant the order.

Impecuniosity

[87] In so far as the respondent's argument seeks to deny contravention on the ground that it was not him but the family Trust which made the purchase of the shares in Rangers, this is an argument not open to the respondent, in that as submitted by Mr McNeill, he is seeking to reopen matters where adverse findings have already been made.

[88] The court is not acting in the context of this provision as a court of appeal. The Panel is the body who is charged with the duty of evaluating the evidence and making findings of fact.

[89] Secondly, I consider the respondent's argument that he does not have funds to make the offer is irrelevant.

[90] When the respondent acting in concert bought shares in Rangers which took them over the 30% shareholding the respondent was aware that the purchase of such a shareholding would mean that a mandatory offer would be required in terms of the Code.

[91] As submitted by Mr McNeill it was made clear to the respondent in the email from Mr Letham at 0803 on 31 December 2014 that that would be the result of their actings.

[92] Lord Davidson sought to argue that it was not the respondent who wrote this email and accordingly of itself it did not show that he was aware of the consequence of proceeding. I am persuaded that there is no merit in that argument. The terms of the email are explicit. It could not be clearer in its terms. It is not arguable that a reasonable reader could misunderstand its meaning and effect. Moreover, the respondent on the basis of all the evidence before and the findings of the various hearings appears to be an experienced businessman who could properly be described as a sophisticated player in this area. To illustrate that he would have understood fully the terms of the email I would refer to the terms of certain further emails which were sent by him at or about the time of the said email from Mr Letham:

(a) in an email to a business associate on 9 October the respondent said:

> *"... I provide this high level proposal for 2 distinct purposes:*
>
> 1. *To· confirm that with immediate effect I am working with Paul* [Murray] *and George* [Letham] *on an exclusive 'consortium' basis.*
> 2. *To provide a high level outline of a proposal that we would like to put to the board.*
>
> .....
>
> *I now outline our high level proposal:*
>
> 1. *We will provide a minimum of GBP 16m as permanent capital to the club. 50% of the total will come from me and the other 50% on a combined basis from Paul, George, and other high net worth individuals. The fan groups will wish to make some contribution but I believe it will be symbolic rather than significant.*
> 2. *We are happy to consider 50% debt at a market rate and 50% equity at 20p per share. The debt will be for a minimum of 5 years. The debt should be secured against Ibrox and Murray Park with some flexibility for future funding if required. We will ensure that the fan groups support the security over Ibrox and do not task the board with a breach of prior commitments.*
> 3. *I am happy to commit to all the debt and ensure that, if required, it is in place prior to the AGM For this to happen we would require irrevocable undertakings that the share issue will proceed and that the board appointments will be ratified.*

4. *The board would be restructured to incorporate 4 of the existing board and we would make 4 nominations of which Paul and I would be 2. We would have the chair and I will be the nomination for that position. Due to other business interests George is not available for a board appointment.*

5. *There would be an immediate call to fans to support the club in all ways possible and we undertake to get vocal public support from key Rangers legends.*

6. *We will call on all fans to oppose Ashley's call for the removal of the executive.*

I confirm that Paul and George have approved the content of this email."

(b) in an email of 12 November from the respondent to another business associate which was copied to Messrs Murray and Letham he said as follows:

> *"..., thanks for your assistance so far. Are you able to confirm that the 2 institutions are amenable to a firm offer at 25p? ... My present inclination, and the basis for current discussions with Paul* [Murray] *and George* [Letham]*, is that we acquire sufficient shares in the market to form a block that amounts to 25% plus of the total shares in issue. In SA terms that would give us an effective 'negative control' over key decisions going forward even if we could not convince other shareholders to vote with us in certain instances. (In my view we would not be concert parties and there would be no pre-agreement to vote collectively but the nuance of this can be explored separately if necessary)".*

[93] The terms of the above are such that it cannot be said that the respondent would not have understood the terms of the email from Mr Letham warning of the results of a purchase of 30% of the shares in Rangers.

[94] Accordingly the respondent intentionally brought about a situation whereby 30% of the shares in Rangers were purchased by him and his concert party where he knew that this would result in a necessity to comply with Rule 9.

[95] The relevant time for him to consider whether he could comply with Rule 9 was prior to his taking part in the concert party which resulted in the ownership of more than 30% of Rangers shares. It is not open to him now to say to this court that he cannot comply with the requirement because of alleged impecuniosity.

[96] The respondent now seeks to say: that he has "no free funds" in order to allow him to make the offer required by Rule 9. This is not due to any change in his financial circumstances between the date when he and the concert party acquired 30% of Rangers shares and the date of the hearing before this court. He relies, in putting forward his having no funds, on the following in his affidavit:

> "3. From 1992, the offshore trust ('Glencoe') made investments and accumulated wealth in SA and internationally. My family and I were provided with properties and other assets as beneficiaries and our lifestyle was funded virtually 100% out of trust assets.
>
> ...
>
> 9. Consequently, my family and I are now the beneficiaries of a discretionary offshore and a discretionary onshore trust that have been sanctioned by SARS and that jointly continue to own and manage the family investments"

[97] He made the decision to obtain 30% shareholding in full knowledge of his financial position and how his financial affairs were structured and in full knowledge of the effect of Rule 9. In these circumstances the issue of his alleged inability due to his financial circumstances to make the offer required in terms of Rule 9 is nothing to the point, it is an irrelevant consideration.

[98] Moreover, I consider that Mr McNeill's submission that if the court were not to grant the application on the basis of the respondent's alleged impecuniosity it would materially undermine the working of the Panel is well founded. It seems to me that there is substantial force in Mr McNeill's submission that if the court were to follow a course as suggested by Lord Davidson it would allow parties to circumvent Rule 9 by arranging their financial affairs in such a way that when they were called on to comply with their obligations in terms of Rule 9 they could say they did not have the funds to comply with that rule. If that were to

be the case it would not allow the Panel to fulfil one of its principle functions of achieving fairness of treatment amongst shareholders.

[99] As observed by Sir John Donaldson MR in *Datafin* the public has a very significant interest in the proper operation of the Panel. Anything which tended to undermine the Panel's ability to properly police takeovers would in my judgment be entirely contrary to the public interest.

[100] The above consideration is important for two reasons: first it supports the view that on a sound analysis the respondent's argument on impecuniosity is irrelevant. Secondly, I consider that even if I am wrong in holding this to be an irrelevant factor, that in any event it would not be a factor that would cause the court to exercise its discretion in favour of the respondent. In the circumstances the public interest in favour of pronouncing the order would far outweigh the respondent's alleged impecuniosity based on the way he has arranged his financial affairs. Given the circumstances put forward by the respondent in support of his supposed impecuniosity they are of no significance. His impecuniosity is entirely self-generated and was known prior to the acquisition of the 30% of the shares. In these circumstances the factor founded on by the respondent could not outweigh the public interest.

[101] In Weinberg and Blank at paragraph 4-1024 the authors set out an example of where the Panel relieved parties from their obligations in terms of Rule 9. In *Kaduna Syndicate Limited* the group was relieved of its obligations in circumstances where it was shown that it was not fully aware of the concept of "acting in concert". The Panel thus took into account a broad issue of fairness. No such issue of fairness arises in the circumstances of the present case, given the time at which and the way in which the supposed impecuniosity arose.

[102] Therefore had the alleged impecuniosity been a relevant factor I would not have exercised my discretion in favour of the respondent.

[103] There is no factor arising from the circumstances of the respondent's alleged impecuniosity which suggests that this court in exercise of its discretion should not grant the order sought by the Panel.

[104] Beyond the above, had I thought impecuniosity a relevant consideration, I would have found that the respondent's alleged impecuniosity was not made out on the basis of the information before me.

[105] The respondent's position is that he has no assets outwith the Trusts. He goes on to argue that he has no control over the Trusts. He relied on the positon of the trusts as set forth in 7/1 and 7/2 of process that they would not, reading short, be willing to have trust funds used to fund the Rule 9 requirement.

[106] It is instructive to observe how the TAB dealt with this position.

[107] The TAB generally deal with this issue between paragraphs 77 and 87 of its decision (see: JB 3).

[108] The TAB begins at paragraph 77 by setting out the respondent's position:

> "We have referred to Mr King's position on the role and status of NOAL relating both to the acquisition of the shares in Rangers and to this appeal. We have noted that NOAL has not sought to make any application to be heard and has not made any submissions either to the Committee or to the Board, despite Mr King's stated understanding that NOAL would take steps to challenge the executive."

[109] The TAB goes on to say at paragraph 78 the following:

> "In his email to the Secretary of the Committee on 17 November 2016 Mr King explained that NOAL was the company that owned the shares; that it would have to provide the funds to meet any further acquisition of shares; that he had shared with NOAL his recent communications with the Secretary of the Hearings Committee; that he had never been a director of NOAL; that he had no legal capacity whatsoever; and that he was not in a position to advance its interest. He contended

> that NOAL should have been afforded the opportunity to make submissions, but have been excluded from an investigation directly affecting it."

[110] With respect to the position taken up by the respondent as I have above set out the TAB made the following finding at paragraph 84:

> "… it is clear from the evidence set out in 'Reasons for conclusions' below that it was Mr King who communicated with Mr Letham, Mr King who decided on the quantum of price of the share purchases, Mr King who contacted Cantor Fitzgerald to affect the purchases and Mr King who-within a day of the decision-caused his family trust to pay for the shares and put them into the name of NOAL. … in this case, over and above the presumption and the deeming, the contemporaneous evidence makes it plain that neither NOAL nor the family trust had any active role in the acquisition of the shares." (emphasis added).

[111] The above I believe sets out the effective *de facto* control that the respondent exercises in respect to the Trusts.

[112] The Panel goes on at paragraph 86 to say this:

> "Further, Mr King's repeated denial that he has any interest in those shares and any voting rights in Rangers is at odds with the evidence as to their acquisition and as to NOAL's requisition of an EGM that led to Mr King and his nominees constituting the Rangers Board, which both clearly indicate that Mr King had 'general control' over the shares within the terms of the courts definition of 'interest in securities'."

[113] This again shows the effective control the respondent has with respect to the affairs of the Trusts.

[114] As Mr McNeill pointed out, on two occasions the Trusts have been willing to provide money for the purchase of Rangers shares when the respondent wished them to do so. Now, suddenly, when the respondent does not wish to comply with the terms of Rule 9 the Trusts no longer are willing to provide any money. This tends, as Mr McNeill submitted to show actual *de facto* control over the trusts by the respondent rather than the opposite. I believe that Mr McNeill is correct in his submission that the respondent has *de facto* control

over the trusts. I recognise the legal distinction between the Trusts and the respondent. However, for the foregoing reasons that does not affect the *de facto* position.

[115] I do not accept on the information before me that because the respondent's assets have been placed within these Trusts, he has no *de facto* control over these Trusts, and therefore is impecunious and cannot therefore make an offer as required by Rule 9. To find to the contrary would be to go against the entire tenor of the findings at all stages in the proceedings before the Panel. That is not the function of this court. This is not an appeal court.

[116] Lord Davidson suggested that it may perhaps be the case, that the court would need to hear evidence on this particular issue. I do not believe that that is the case for the reasons stated above.

[117] Thus when Lord Davidson says that there is no utilitarian value in making an order as the respondent cannot afford to finance an offer, I do not accept this. I do not believe that there is any merit in the respondent's argument on efficacy on the basis of there being no funds available.

The Rangers Current Share Price

[118] The second issue under this head was the respondent's contention: if the offer was made, it would not be accepted by the Rangers shareholders.

[119] In short the respondent's position was this: the offer price of 20p was so far below the market price of the shares in Rangers that the shareholders would not accept it, if the offer were made and thus there was no utility in the order sort.

[120] I consider, that once more this is an irrelevant consideration.

[121] I have said earlier in this Opinion that the Code is designed principally to ensure that shareholders in an offeree company are treated fairly. Thus in the circumstances of the present case in order to achieve that aim the Code provides in terms of Rule 9: that where control of Rangers has been obtained in the circumstances set out, the respondent must make an offer to purchase the shares of the other shareholders at the price at which he gained control. Thereafter the shareholders have the option to sell their shares at that price.

[122] Within that framework it is not for the respondent to argue at what price an offer should be made. Nor within that framework is it for the respondent to argue that if the offer is made at the price of 20p no shareholder will take it up and therefore the making of that offer has no utilitarian value.

[123] The above is nothing to the point. The price of the offer is not determined by what the respondent currently believes regarding the market price of shares in Rangers. It is not for him to say whether Rangers shareholders may or may not accept an offer at that figure, if made.

[124] The above are not relevant considerations. Rule 9 requires an offer should be made at a price determined in terms of provisions of the rule in order to achieve fair treatment. Thereafter it is a matter for the shareholders to decide if they wish to accept an offer at that price. It is for the shareholders to decide on the merits of the offer, not for the respondent to seek to make that decision for them and thus avoid having to make the offer in terms of Rule 9. If this were a relevant factor it appeared to me to turn the rule on its head. It allowed the party in breach of the rule to decide at what level the offer should be made and beyond that to usurp the position of the shareholders as to whether that offer should be accepted. That in my judgment clearly showed the irrelevancy of the respondent's argument.

[125] As stated by the TAB:

> "In requiring a mandatory offer to be made Rule 9 operates according to its own terms. They do not include considerations of whether the shareholders will benefit from the offer in a particular case. The factor is not relevant to triggering an obligation to extend an offer under Rule 9.1."

I respectfully agree with these observations.

[126] A further point is the dispensation to Rule 9 at note 5 to which I was directed by Mr McNeill. It is to this effect:

> "The Panel will consider waiving the requirement for a general offer under this Rule where:
>
> (a) holders of shares carrying 50% or more of the voting rights state in writing that they would not accept such an offer; or
>
> (b) shares carrying 50% or more of the voting rights are already held by one other person."

As pointed out by Mr McNeill, the respondent has been in charge of the Rangers board for some two and a half years. If he wanted to put forward the position which he seemed to assert in these proceedings then there was a path open to him. The way forward for him was to seek a dispensation from the Panel.

[127] Even if this had been a relevant factor there was nothing under this head which would have caused me to exercise my discretion in favour of the respondent, given the public interest factors to which I have already made reference.

[128] I have not gone in to the arguments at what price level Rangers shareholders might or might not accept an offer. Had I thought this was a relevant consideration I would have required to hear evidence.

[129] Looking at the two grounds together, had they raised relevant issues, I would not have exercised my discretion in favour of the respondent for the reasons above set out.

Accordingly, having regard to all of the relevant circumstances, in exercise of my discretion, I grant the order sought.

Decision

[130] For the above reasons in respect of the first issue I find in favour of the respondent, however, in respect to the second issue, I find in favour of the panel and grant the order sought. I reserve all questions of expenses.