FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 30
P341/17

Lord President
Lord Drummond Young
Lord Glennie

OPINION OF THE COURT

delivered by LORD DRUMMOND YOUNG

in the reclaiming motion

by

PANEL ON TAKEOVERS AND MERGERS

Petitioner and Respondent

against

DAVID CUNNINGHAM KING

Respondent and Reclaimer

Petitioner and Respondent: Johnston QC, Delibegovic-Broome QC; Dentons UKMEA
Respondent and Reclaimer: Lord Davidson of Glenclova QC; Lindsays

28 February 2018

[1] The respondent, the Panel on Takeovers and Mergers ("the Panel"), is charged with the administration of the City Code on Takeovers and Mergers ("the Code"), which regulates company takeovers and certain other matters specified in Chapter 1 of Part 28 of the Companies Act 2006. The Code applies in particular to takeovers of companies whose securities are admitted to trading on a regulated market or multilateral trading facility.

Rangers International Football Club PLC ("Rangers") is such a company; at the material time its shares were listed and traded on the Alternative Investment Market, although they are currently suspended. The present case is concerned with the acquisition on 31 December 2014 and 2 January 2015 of shares in Rangers amounting to 34.05% of the total issued share capital in the company.

[2] Those transactions were investigated by the Panel. On 7 June 2016 the Executive of the Panel held that those shares were acquired by a group of persons acting in concert and that the reclaimer, David King, acting through a company called New Oasis Asset Management Ltd ("NOAL"), was one of those persons. Because the reclaimer was the person whose acquisition of shares (through NOAL) took the total holding of the concert party above 30%, the Executive held that he was obliged to make a mandatory offer in accordance with rule 9 of the Code for all of Rangers' issued share capital not already owned by him or by the other members of the concert party. It further ruled that, in accordance with rule 9.5(c) of the Code, the offer price should be 20p per Rangers share.

[3] The reclaimer requested that the Executive's decision should be reviewed by the Panel's Hearings Committee, but on 5 December 2016 that Committee upheld the Executive's ruling and directed the reclaimer that within 30 days he should announce an offer for the shares in Rangers not already owned by himself or the concert party pursuant to rule 9 of the Code. The reclaimer appealed against that ruling to the Takeover Appeal Board, which is a tribunal independent of the Panel constituted under rules promulgated pursuant to section 951(3) of the Companies Act 2006; those rules confer a right of appeal to the Board. On 30 March 2017 the Board dismissed the appeal and affirmed the ruling of the Hearings Committee, only varying the date by which the reclaimer should comply with the order.

[4] The Panel thereafter applied to the Court for an order under section 955 of the Companies Act 2006 ordaining the reclaimer to announce a mandatory offer in accordance with the Code within 30 days of the date of the Court's order and thereafter to make such an offer at a price of 20p per share for all of the issued ordinary share capital of Rangers not already controlled by the reclaimer or the three other members of the concert party. On 22 December 2017 the Lord Ordinary made such an order, and the present reclaiming motion has been enrolled against his decision.

[5] Two principal arguments are now presented on behalf of the reclaimer. First, it is contended that the funds that were used to purchase the shares were not those of the reclaimer but were trust funds held by NOAL for the purposes of a Guernsey trust. Consequently it is submitted that the reclaimer is unable to access the funds, and will therefore be unable to pay the requisite price if his offer should be accepted by any shareholders. This amounts in effect to an argument of impecuniosity. Secondly, it is contended that the orders made by the Hearings Committee and the Takeover Appeal Board would not serve any practical purpose. Such an offer was to be made at a price of 20p per share, but the shares in Rangers were currently trading at approximately 25p per share. We will consider those arguments in due course. First, however, we will discuss the relevant provisions of the City Code and the statutory mechanism provided in section 955 of the Companies Act 2006 for enforcement of the Code. Secondly, we will set out the factual background and certain important findings that were made by the Hearings Committee and the Takeover Appeal Board. Thereafter we will consider each of the foregoing arguments.

The City Code on Takeovers and Mergers

[6] The City Code has existed since 1968. Its present form is largely based on the

Directive on Takeover Bids (2004/25/EC) of the European Parliament and of the Council, which took effect in 21 April 2004, although that Directive is substantially in accordance with the Code as it has been developed since 1968. The Code is now promulgated by the Panel pursuant to section 943 of the Companies Act 2006.

[7] Certain features of the Directive are of importance for present purposes. In particular, recital (9) requires member states to take necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. Such protection should be ensured by obliging the person who has acquired control to make an offer to all the holders of the company's securities for all of their holdings at an equitable price. Article 3 states a number of general principles that apply to takeover bids; these are substantially reproduced in the general principles that apply to the Code (section B of the Introduction to the Code, discussed at paragraph [9] below). Article 5 requires member states to ensure that, where a person or concert party comes to hold securities in excess of a specified percentage of voting rights, such a person should be required to make a bid for the remaining securities, "as a means of protecting the minority shareholders of that company". The price offered to the remaining shareholders is to be the highest price for the same securities paid by the offeror or by the offeror's concert party over a period of between six and twelve months prior to the bid, although that is subject to variation in some circumstances.

[8] The Code now implements the Directive. Its purpose is set out in paragraph 2(a) of the Introduction. This provides as follows:

> "The Code is designed principally to ensure that shareholders in an offeree company are treated fairly and are not denied an opportunity to decide on the merits of a takeover and that shareholders in the offeree company of the same class are afforded equivalent treatment by an offeror. The Code also provides an orderly framework

> within which takeovers are conducted. In addition, it is designed to promote, in conjunction with other regulatory regimes, the integrity of the financial markets.
>
> The Code is not concerned with the financial or commercial advantages or disadvantages of a takeover. These are matters for the offeree company and its shareholders".

[9] The Introduction also states the general principles on which the Code is based. These essentially represent standards of commercial behaviour, and correspond to those found in article 3 of the Directive. They apply to takeovers and other matters to which the Code applies. The Introduction further indicates, in paragraph 2(b), that the rules in the Code are not framed in technical language and "are to be interpreted to achieve their underlying purpose. Therefore, their spirit must be observed as well as their letter". Two of the general principles (stated in section B of the Introduction) are material for present purposes:

> "1. All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected …
>
> 5. An offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration, if such is offered, and after taking all reasonable measures to secure the implementation of any other type of consideration".

These principles represent elementary standards of commercial fairness. When a bid is made for a class of shares in a company, all holders of shares in that class should be treated equally; and a bid should only be made if the offeror has adequate resources to implement it.

[10] The provision of the Code that is material for present purposes is Rule 9. Rule 9.1 provides as follows:

> "Except with the consent of the Panel, when:…
>
> (b) any person, together with persons acting in concert with him, is interested in shares which in the aggregate carry not less than 30% of the voting rights of a

> company but does not hold shares carrying more than 50% of such voting rights and such person, or any person acting in concert with him, acquires an interest in any other shares which increases the percentage of shares carrying voting rights in which he is interested,
>
> such person shall extend offers, on the basis set out in the Rules 9.3, 9.4 and 9.5, to the holders of any class of equity share capital whether voting or non-voting…".

Rule 9.5 requires that an offer made under rule 9 should be in cash or be accompanied by a cash alternative "at not less than the highest price paid by the offeror or any person acting in concert with it for any interest in shares of that class during the 12 months prior to the announcement of that offer". The policy considerations that underlie rule 9 are discussed subsequently, but for present purposes, two features of the rule are important. First, it applies both to the acquisition of shares by a single person and to the acquisition of shares by persons acting in concert (commonly referred to as a "concert party"). Secondly, it applies in terms to the member of a concert party whose acquisition of shares in the company takes the total holding of the concert party above the 30% threshold. The expression "acting in concert" is defined in section C1 of the Code. This gives a general definition, and then continues:

> "Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:
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> …
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> (5) a person, the person's close relatives, and the related trusts of any of them, all with each other…".

[11] Rule 9 is of central importance to the Code, essentially for the reasons set out in section B of the Introduction. The Code is designed to ensure that all shareholders in a company are accorded equivalent treatment. If that is not done there is the obvious danger that those in control of a company will favour some shareholders at the expense of others,

which is quite contrary to elementary conceptions of commercial morality. Rule 9 is intended to achieve equal treatment of shareholders in a takeover. Moreover, it enables existing shareholders who are not supporters of the takeover to realize their shareholdings; in this way the rule protects dissenting shareholders from the consequences of a takeover.

Enforcement of the Code

[12] The Code has force of law by virtue of Part 28 of the Companies Act 2006. The Panel is responsible for the administration of the Code, and through its Executive it issues rulings on the conduct of those involved in takeover bids. That occurs in the manner found in the present case: the initial ruling is by the Panel's Executive, and there is a right on the part of any person subject to the Panel's ruling to seek review by the Hearings Committee. That is followed by a right of appeal to the Takeover Appeal Board. The resulting ruling is binding on all persons who are subject to it. If any such person does not comply with the ruling, however, further enforcement is necessary. The mechanism for such enforcement is provided in section 955 of the Companies Act 2006, which so far as material is in the following terms:

> "**Enforcement by the court**
>
> (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 … in Scotland, the Court of Session …"

[13] The function of section 955 is to provide a mechanism for the enforcement of rulings by the Panel. It is not concerned with review of those rulings or with a system of appeal against the rulings. Review of the Panel's rulings is entrusted to the Hearings Committee by section 951(1) of the Companies Act 2006 and by Appendix 9 to the Code. From the Hearings Committee there is a right of appeal to the Takeover Appeal Board in accordance with section 951(3) of the same Act. Both review and the right of appeal are subject to the Rules of the Takeover Panel; these are set out in the Code. The Takeover Appeal Board is independent of the Panel, and its Chairman and Deputy Chairman have usually held high judicial office, and are appointed by the Master of the Rolls. Other members of the Board usually have knowledge and experience of takeovers and the Code, and are appointed by the Chairman. The Board is entrusted, according to its Rules, with ensuring that appeals in respect of rulings, on the interpretation, application or effect of the Code are conducted according to law. Such hearings take the form of rehearings; thus there is an opportunity for full review of the decisions of the Panel and the Hearings Committee on questions of both law and fact. That right of appeal, to an expert tribunal, provides an obvious justification for the restriction of the Court's power of enforcement.

[14] Nevertheless, any power to enforce rulings is likely to involve an element of discretion in the body charged with enforcement. Section 955(1) empowers the court to "make any order it thinks fit" to secure compliance with a requirement of the Panel. That clearly involves an element of discretion as to the form of order that is made. Before the Lord Ordinary the reclaimer contended that the Court's discretion extended to refusing to grant any remedy. That was disputed by the Panel. The Lord Ordinary held that such a discretion existed; in so holding he followed observations by Sir John Donaldson MR in *R* v

Panel on Takeovers and Mergers, Ex parte Datafin PLC, [1987] QB 815, at 840. In the hearing before us the Panel conceded that the Lord Ordinary was correct on this matter.

[15] In our opinion that concession was correctly made. We consider that the Court's discretion under section 955 extends not merely to the form of the order that is made but whether to make any order to secure compliance with a requirement of the Panel. As was pointed out in *Datafin*, in dealing with public law decisions the Court must have an ultimate discretion as to whether it should set them aside, and might refuse to do so in the public interest, even if the decision itself were *ultra vires*. That approach seems directly applicable to the Court's function under section 955. Nevertheless, in the application of that section we would expect that cases where the Court decides not to enforce a ruling by the Panel would be rare, especially where the Panel's ruling has been upheld by the Hearings Committee and the Takeover Appeal Board. The most obvious case where enforcement might be refused is where material changes in circumstances have occurred subsequently to the last decision by those bodies. For example, subsequently to the relevant decisions, the offeror might have become insolvent, or an offer by a third party for the relevant shares might have been made. It is only in such relatively exceptional cases that the discretion to refuse a remedy is likely to be relevant. Otherwise, the Court's function is to enforce the rulings of the Panel.

Events giving rise to the present proceedings

[16] The following facts were found by the Panel's Executive, whose findings were upheld by the Hearings Committee and the Takeover Appeal Board. The Board, in particular, provided a helpful and succinct account of the facts found, and in what follows we have relied largely on its decision.

[17] The reclaimer was born in Scotland but for many years has been resident in South Africa. The contention made against him by the Panel is that on 2 January 2015 he acquired shares amounting to 14.57% of the issued share capital in Rangers. The shares purchased on that date were acquired by NOAL which is, as indicated above, a company registered in the British Virgin Islands. NOAL was incorporated in October 2013 and is wholly owned by Sovereign Trust International Ltd ("Sovereign Trust"), a company incorporated in Gibraltar. The sole director of NOAL is Sovereign Management Ltd, another Gibraltar company. Sovereign Trust is the trustee of a Guernsey trust known as the Glencoe Investments Trust ("Glencoe"). Glencoe was established in September 1996 by the reclaimer for the benefit of himself and members of his family. The assets of Glencoe include the single issued share in NOAL.

[18] On 31 December 2014 three individuals, Mr George Letham, a Scottish businessman, Mr George Taylor, a businessman in Hong Kong where there exists a Rangers Supporters Club, and Mr Douglas Park, another Scottish businessman, acquired interests in shares in Rangers which amounted to 19.48% of the issued shares, taking account of certain shares which Mr Taylor held already. The reclaimer had held shares in the old Rangers club before it went into administration in 2012, and was in touch with Mr Letham from the summer of 2014 onwards about possible acquisition of further shares. Proposals for the acquisition of shares were discussed by the two men, but came to nothing. Nevertheless both Mr Letham and the reclaimer remained in touch with each other. In December 2014 an opportunity arose to acquire Rangers shares from a major existing shareholder, Laxey Partners Ltd. Laxey was unwilling to sell its shares to the reclaimer, but was willing to sell the shares to Mr Letham, Mr Taylor and Mr Park. It was Laxey's shares that were acquired by those three individuals on 31 December 2014.

[19] On 31 December 2014 the reclaimer instructed Cantor Fitzgerald, an investment bank, in connection with the purchase of Rangers shares. Cantor Fitzgerald negotiated the purchase of shares from three institutional fund managers in the United Kingdom at a price of 20p per share. Emails of 27 and 31 December 2014 passed between the reclaimer and Mr Letham; these indicated that the reclaimer was aware of Mr Letham's intention to acquire Rangers shares from the institutional investors at the same time. As already noted, NOAL acquired 14.57 % of the shares in Rangers on 2 January 2015, at a price of 20p per share. The Takeover Appeal Board held that the transfer of the shares to NOAL was achieved by Cantor Fitzgerald in accordance with instructions that the reclaimer had given them. The result was that, if the acquisitions by Messrs Letham, Taylor and Park and the acquisition by NOAL were taken together, an aggregate holding of 34.05% of the issued shares in Rangers had resulted. In March 2015 an extraordinary general meeting of Rangers took place, at which the existing directors were removed and were replaced by nominees of the reclaimer. In May 2015 the reclaimer was appointed chairman of the company.

Investigation by the Panel and proceedings before the Hearings Committee and Takeover Appeal Board

[20] Thereafter the Panel Executive investigated allegations that the reclaimer had acted in concert with Messrs Letham, Taylor and Park, and that those acting in concert had acquired more than 30% of the voting rights in Rangers, thereby triggering rule 9 of the Code. The background to the acquisition of shares on 31 December 2014 and 2 January 2015 was investigated at length. The investigation was primarily concerned with establishing that the reclaimer had acted in concert with Messrs Letham, Taylor and Park, but certain of the findings are relevant to the two questions that are now live before the Court.

[21] So far as NOAL is concerned, the only ruling made by the Executive was that the reclaimer had through NOAL submitted a requisition notice on 16 January 2015 requiring Rangers to convene a general meeting to consider resolutions proposing the removal of the four existing directors and the appointment of the reclaimer and two others as directors. That ultimately occurred in 2015. At no point prior to the ruling by the Executive did the reclaimer raise any issues relating to the role or status of NOAL; nor did he produce any evidence that, in the acquisition of Rangers shares, NOAL had exercised judgment independently of him or had acted otherwise than as a corporate vehicle under his control. On the contrary, contemporaneous emails from the reclaimer in relation to the acquisitions referred to the reclaimer himself and not to any trust established by him. The status of NOAL was raised for the first time by the reclaimer on 21 October 2016. By that time the Executive had given its ruling and the reclaimer had requested a review of the ruling by the Hearings Committee. The reclaimer was informed that NOAL was entitled to apply to the Committee to be heard on the review, but no such application was ever made. The significant point for present purposes is that at the time when matters were considered by the Panel's Executive the reclaimer did not suggest that he had no control over the shares because they were under the control of NOAL as an independent entity.

[22] In the proceedings before the Takeover Appeal Board the reclaimer did assert that NOAL was a vitally interested party and that it should be invited to attend the hearing; he submitted that the whole process was absurd and meaningless if NOAL continued to be excluded. The reclaimer was invited to liaise with NOAL to have it contact the Board at the earliest opportunity if he wished to pursue its attendance. The reclaimer maintained that he had no standing to represent NOAL and that NOAL did not want to be represented by him. The hearing nevertheless took place. In its decision the Board considered the status of NOAL

and its interest in shares and voting rights in Rangers. The Board noted that NOAL had not sought to make any application to be heard or made any submissions. The reclaimer had submitted to both the Hearings Committee and the Board that the shares were owned by NOAL; that he had never been a director of NOAL; and that he was not in a position to advance its interests. The Board concluded that NOAL's holding of the shares in Rangers did not assist the reclaimer in his appeal against the ruling of the Panel Executive that he was acting in concert with Messrs Letham, Taylor and Park in the acquisition of the shares. First, it was not correct to suggest that NOAL had been excluded from proceedings. If NOAL wished to give evidence or makes admissions about the acquisition of the Rangers shares, either the company or the reclaimer could take the necessary steps or make applications which would enable NOAL to make submissions.

[23] Secondly, so far as the substantive position was concerned, it was clear from the evidence accepted by the Panel Executive, the Committee and the Board that it was the reclaimer who communicated with Mr Letham, decided on the price for the share purchases, contacted Cantor Fitzgerald to effect purchases and, within a day of the decision to purchase, caused his family trust to pay for the shares and put them into the name of NOAL. In those circumstances

> "[t]he presumption usually applied in practice by the Takeover Panel and now codified in point (5) of the definition of 'Acting in Concert' is that a person and a related trust are acting in concert with each other. The same definition deems a person to be acting in concert with an 'affiliated person' which, in turn, is defined to include an undertaking over which the person exercises dominant influence or control. 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" (paragraph 84; and see paragraph [10] above).

Thirdly, the reclaimer had not produced any evidence, documentary or otherwise, to establish that NOAL, rather than the reclaimer himself, was the party who had been ultimately responsible for the acquisition of the shares.

[24] The foregoing evidence relates to the existence or otherwise of a concert party, but it is significant for present purposes because it amounts to a clear holding by the Takeover Appeal Board that NOAL was not truly independent of the reclaimer but was rather under his control, at least at a practical level. That is a matter of considerable importance in relation to the first of the grounds of appeal that are now advanced.

[25] The Takeover Appeal Board concluded that it was the reclaimer who acted in concert with Messrs Letham, Taylor and Park in the acquisition of shares in Rangers on 31 December 2014 and 2 January 2015 (paragraph 102). Reasons were given for this conclusion which are in part material to the present appeal (paragraph 103). The material provisions are as follows:

> "(1) There are a number of ways in which persons may act in concert … [T]he nature of 'acting in concert' called for a wide definition to cover, for example, tacit understandings or 'nods and winks' between persons co-operating to purchase shares in a company in order to obtain control of it.
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> (2) Direct evidence of what has passed between those alleged to have acted in concert is rare. The existence and nature of an understanding between persons and whether their actions were concerted or co-incidental are often matters calling for the use of common sense and relevant experience in making reasonable inferences from all the surrounding circumstances in evidence in the case. Those circumstances include the personal and working relationships between those who deny that they were acting in concert and their conduct.
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> (3) In this case there are in fact in evidence contemporaneous documents, mostly emails, passing between Mr King and Mr Letham. Those documents, when read in the context of their earlier cooperation in activities concerning Rangers … are material to the key issue of whether those acquisitions were (a) concerted or (b) coincidental.
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> …
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> (9) We agree with the Committee that 'it is clear from Mr Letham's emails to Mr King of 27 and 31 December 2014 that the two of them were co-operating directly

with a view to purchasing a block of shares which would affect a change of control' and that, when placed in the context of the consortium funding and blocking stake proposals in October 2014, 'the case for concluding that Messrs Letham and King, at least, were acting in concert in purchasing the relevant shares becomes overwhelming'.

(10) In the process of purchasing shares in Rangers from three selling institutions [the sellers to NOAL] down to and including 2 January 2015 … Mr King acted and gave instructions as the acquirer of the shares. In emails of 31 December 2014 to Cantor Fitzgerald he informed them that funds were freely available and he first introduced NOAL in connection with the purchase with the words 'we now need to get an account opened on behalf of NOAL with Cantors and provide the various KYC docs etc …'. The completed internal Cantor Fitzgerald KYC (Know Your Client) document produced to the Board at the hearing of the appeal named NOAL as the client, but described the 'deemed purpose of the business as to buy shares in RANGERS INTERNATIONAL FOOTBALL CLUB PLC for Mr Dave King.' On the same day Mr King sent an email to Sovereign Trust … about the shares being held by NOAL.

(11) In negotiating for the shares and instructing that the shares be put into the name of NOAL Mr King communicated with others and acted as if NOAL, Sovereign Trust and the Glencoe Investments Trust were under his control in relation to the Rangers shares and so he was acting in concert with them and they with him.

(12) In any event, by virtue of the operation of the presumption previously applied [as set out at paragraph [23] above] and now included in the Code, NOAL, Sovereign Trust and Glencoe Investments Trust are either presumed or deemed to have acted in concert with Mr King and, via Mr King, with those other persons with whom he had an understanding and was acting in concert ie Messrs Letham, Taylor and Park".

The foregoing findings are directed to the existence or otherwise of a concert party including the reclaimer, but they disclose in very clear terms that NOAL, as well as Sovereign Trust and Glencoe, was acting under the reclaimer's directions. That is wholly inconsistent with the submissions that NOAL, Sovereign Trust and Glencoe were independent of the reclaimer and that the reclaimer had no power to direct NOAL in relation to the acquisition of Rangers shares, including the acquisition of shares ordered by the Panel Executive and confirmed by the Hearings Committee and the Board.

Directions given by the Panel, the Hearings Committee and the Takeover Appeal Board

[26] On the basis of the foregoing findings the Executive of the Panel decided that the reclaimer had been part of a concert party, and directed that the reclaimer should make a mandatory offer for the whole of Rangers' issued share capital that was not already owned by him or by the other members of the concert party, at a price of 20p per share. That decision was issued on 7 June 2016. It was reviewed by the Hearings Committee and in due course affirmed, by a decision dated by December 2016. The reclaimer appealed to the Takeover Appeal Board, which also affirmed the decision of the Panel Executive, on 30 March 2017. Proceedings before the Hearings Committee entailed a full review of the Executive's decision, and the proceedings before the Takeover Appeal Board amounted to a full appeal, in the form of a rehearing of the case against the reclaimer.

Proceedings in the Outer House

[27] Following the decision of the Takeover Appeal Board the Panel raised the present proceedings in the Court of Session. They take the form of a petition, presented in terms of section 955 of the Companies Act 2006, for an order enforcing the decisions of the Panel, the Committee and the Board. After hearing submissions the Lord Ordinary on 22 December 2017 pronounced an order ordaining the reclaimer to announce in accordance with the Code, within 30 days of the date of the Court's interlocutor, and thereafter to make a mandatory offer at a price of 20p per share for all of the issued ordinary share capital of Rangers not already controlled by him or by Messrs Letham, Taylor and Park. He held that the Court had a discretion to refuse to grant an order sought under section 955 of the 2006 Act, essentially on the basis of the wording of the statutory provision. He then considered the two substantive arguments advanced on behalf of the reclaimer, which are outlined in

paragraph [5] above and rejected them. A reclaiming motion has been enrolled against that decision.

[28] As we have already indicated, the Panel no longer contends that in considering an application under section 955 the court has no discretion as to whether or not to grant a remedy. Consequently two arguments remain live. The first of these is the reclaimer's contention that the funds used to purchase the Rangers shares were trust monies held by NOAL for the purposes of a Guernsey trust, with the result that the reclaimer is himself unable to access sufficient funds to make the mandatory offer. The second argument is that the orders made by the Hearings Committee and the Takeover Appeal Board would serve no practical purpose because the price specified in the order was too low to attract interest from other shareholders. That price was 20p per share, but Rangers shares were currently trading at a price of approximately 25p per share. For this reason the reclaimer submits that offering to purchase shares at that price would be a pointless, but costly, exercise, and a remedy under section 955 should be refused in the exercise of the court's discretion. We will consider each of these arguments in turn.

Alleged inability of reclaimer to access funds

[29] In view of the detailed findings in fact made by the Hearings Committee and on appeal by the Takeover Appeal Board, we are of opinion that the reclaimer's first argument should be rejected. Those findings are binding on the court. Proceedings under section 955 are not appellate in nature. They do not involve a rehearing of the issues before the Hearings Committee and the Takeover Appeal Board. It is possible that, if the reasoning of the Committee or the Board disclosed serious errors on its face, the court might have power to interfere with the findings of the Committee and the Board. In the present case, however,

it was not suggested that there were any such errors; indeed, the reasoning in both the ruling of the Committee and the decision of the Board appears to us to be fully justified on the basis of the information disclosed in those documents. Consequently the enforcement procedures must be conducted on the basis of the findings of fact made by the Committee and the Board.

[30] Those findings included the following. First, the reclaimer and Mr Letham were co-operating directly to purchase a block of shares that would effect a change of control over the Rangers board (Board's finding (9)). Secondly the reclaimer gave instructions as the acquirer of the shares; on 31 December 2014 he informed Cantor Fitzgerald that funds were freely available for the purchase of shares, and NOAL were introduced to Cantor Fitzgerald on the basis that they would participate in the acquisition of the shares (Board's finding (10)). Thirdly, in negotiating for the shares and instructing that they be put in the name of NOAL the reclaimer communicated with others as if NOAL, Sovereign Trust and the Glencoe Investments Trust were under his control in relation to the Rangers shares (Board's finding (11)). This finding appears to us to be of great importance; it demonstrates that the reclaimer was in practical charge of NOAL, Sovereign Trust and the Glencoe Investments Trust. We would add that there is no indication in the findings in fact of either the Committee or the Board that any person other than the reclaimer was in charge of or otherwise directing the activities of those three entities. We also note the finding of the Board (paragraph 84) that "the contemporaneous evidence makes it plain that neither NOAL nor the family trust had any active role in the acquisition of shares". That strongly negatives any argument that the reclaimer did not exercise control over NOAL or Glencoe.

[31] Furthermore, it is obvious that funds were made available to achieve the acquisition of 14.57% of the issued shares in Rangers on or immediately after to January 2015, at a price

of 20p per share; that followed the discussions referred to by the Board between the reclaimer and Mr Letham. That of itself indicates that funds were readily available to achieve the reclaimer's purposes. Finally, the Takeover Appeal Board notes (paragraph 103(14)) that the reclaimer had had ample opportunity to disclose documents and provide other evidence to rebut any inference that he was acting in concert with the other members of the concert party, but he did not do so. Evidence that the funds used to acquire the shares were not under the reclaimer's control but were rather controlled by other entities, in particular NOAL, would plainly be relevant to rebut the inference that the reclaimer was a member of the concert party; effective control over the funds used to acquire shares is clearly a vital element in the acquisition. Nevertheless no such evidence was produced. That supports the view that the reclaimer is the person who had effective control over the funds used to acquire the shares.

[32] In applying the Code, it is in our opinion important that the Panel, and likewise the Hearings Committee, the Takeover Appeal Board, and ultimately the court, should have regard to the reality and the substance of any takeover transaction. The need for such an approach is apparent from the Introduction to the Code (see paragraph [9] above), where it is stated that the rules in the Code are not expressed in technical language and are to be interpreted to achieve their underlying purpose; their spirit is to be observed as well as their letter. The Introduction further stresses the fundamental purpose of the Code in relation to takeovers; all shareholders of the same class of shares must be treated equally, and in the event that a person acquires control of a company the other shareholders must be protected.

[33] The foregoing considerations are of particular importance in cases such as the present. A range of legal entities, including trusts and companies, may be used to acquire and hold shares in a company and to provide the funds for such acquisition. Complex

arrangements may be set up that are intended to disguise who has true ownership and control, and who has truly provided the funds used to acquire shares. If the Code is to be properly administered, it is in our view essential that the Panel should be able to pierce through the structures that are used to hold shares and to finance their purchase in order to discover the person or persons who are truly in control of an offer to acquire shares and to identify the true source of and control over the funds that are used in making the purchase. If structures involving trusts, companies and other intermediaries are used, the Panel, and likewise the Committee and the Board, should be able to have regard to the substance of the transaction rather than formal structures that have the effect of concealing the reality. This is reflected in section C1 of the Code, which provides that a person, the person's close relatives, and the "related trusts" of any of them are presumed to be persons acting in concert. While that provision is not directly relevant to the issues before the Court, it illustrates a point of more general application: in applying the Code the Panel, together with the Committee, the Board and the courts, should have regard to the true structure and purpose of a transaction, disregarding the interposition of trusts and similar entities to conceal the reality of control and funding.

[34] In this connection, the Takeover Appeal Board observed (paragraph 103 of its decision) that persons may act in concert in a range of different ways, including tacit understandings or "nods and winks" between persons who cooperate to purchase shares in order to obtain control of a company. Direct evidence of what has passed among those alleged to have acted in concert is rare. To discover the reality of a transaction, and in particular whether it was concerted, common sense and experience must be used in making reasonable inferences from the surrounding circumstances that emerge in evidence. In our opinion exactly the same considerations apply when the availability and source of funds

must be determined. In the present case, the findings in fact demonstrate clearly in our opinion that it was the reclaimer who had true control over the funds used to acquire the Rangers shares that were placed in the name of NOAL. On that basis, it is probable that the reclaimer will continue to have control over the funds of NOAL, and indeed other assets of the Glencoe Investments Trust. We accordingly reject the contentions that the reclaimer is unable to access funds held by NOAL or Glencoe and that he is accordingly unable to pay the requisite price if the offer ordered by the Panel should be accepted by shareholders. On this basis the first argument for the reclaimer must fail.

Whether the order would serve a practical purpose

[35] The second argument for the reclaimer is that the order of the Panel, affirmed by the Hearings Committee and the Takeover Appeal Board, would not serve any practical purpose because it requires an offer at a price of 20p per share, when Rangers shares are currently trading at approximately 25p per share. In our opinion that argument must also be rejected.

[36] The primary reason is that the Code in general, and rule 9 in particular, is of great importance in the practical operation of the system of corporate governance. The Panel is charged with the administration of the Code. Consequently, if an order is made by the Panel for the acquisition of shares, the court should enforce it in the absence of exceptional circumstances. We consider below the sort of circumstances that might be exceptional. Nevertheless, the norm is enforcement. In this connection it is significant that the Code is not concerned merely with regulatory disputes between the Panel and those attempting to take over a listed company. It is concerned with the protection of the whole of the existing shareholders in such a company, and ensuring that in the event of a takeover offer the

interests of all shareholders are protected. That is clear from the terms of the Directive on Takeover Bids, which are summarized at paragraph [7] above. In particular, recital (9) of the Directive emphasizes the importance of protecting shareholders, in particular those with minority holdings, when control of a company has been acquired, and article 5 of the Directive is to similar effect. The Code itself provides in paragraph 2(a) that its principal purpose is to ensure the fair treatment of shareholders in an offeree company, so that such shareholders may decide on the merits of a takeover and may be afforded equivalent treatment by an offeror. As that paragraph indicates, a fundamental consideration is preserving "the integrity of the financial markets". These considerations are discussed in paragraph [8] above; they appear to us to be of fundamental importance to the need for strict enforcement of article 9 of the Code. This is an elementary matter of fairness; otherwise a takeover offer might benefit a selected group of shareholders. Moreover, when a company is taken over and new management is put in place, individual shareholders may not care for the new management and may wish to realize their shareholdings. The Code ensures that they are able to do so, at the same price as that offered to the shareholders who have already accepted the takeover offer.

[37] We have suggested that in exceptional circumstances the court might decline to enforce an order made by the Panel. "Exceptional circumstances" will, we think, almost invariably result from developments that have occurred after the 30% shareholding has been acquired. The situation that existed when the initial offer was made, and any developments prior to the time when 30% was acquired, should be reflected in the offer, and it is that offer that must be extended to other shareholders. Examples of exceptional circumstances might include the appointment of liquidators or the imposition of some other insolvency regime. In general, however, it is only events after the acquisition of 30% of the shares that could

justify non-enforcement. In the present case no such events were suggested on behalf of the reclaimer.

[38] Apart from the importance of enforcing the Code, it cannot in our opinion be said in the circumstances of the present case that the price offered to minority shareholders will necessarily be decisive. The reclaimer's argument on this point was considered by the Takeover Appeal Board and rejected, and weight must be placed on their view. Moreover, the difference in price between the 20p specified in the offer and what is said to be the current price of 25p is not great, and some shareholders may be anxious to realize their shares quickly and easily. Furthermore, shareholders in a football club are frequently driven by non-economic considerations. In these circumstances we do not think that it could be said that the offer ordered by the Panel will serve no practical purpose.

Form of order

[39] The Panel's Executive ruled on 7 June 2016 that the reclaimer must make a mandatory offer in accordance with rule 9 of the Code for all of Rangers' issued share capital not already owned by him or by Messrs Letham, Taylor and Park; and that the mandatory offer at 20p per share should be announced after 4 July 2016 and no later than 1 August 2016. That ruling was of course reviewed by the Hearings Committee, which on 5 December 2016 affirmed the decision of the Panel Executive, subject to the qualification that the offer for Rangers shares was to be announced within 30 days of the Committee's ruling (by 4 January 2017). That decision was appealed to the Takeover Appeal Board, which on 30 March 2017 affirmed the Executive's decision and directed an offer for shares within 30 days of the Board's decision (by 12 April 2017). It is that decision that the Panel seeks to

enforce in the Court, subject to an extension of the time within which a mandatory offer must be made. As we have already noted, the Lord Ordinary on 22 December 2017 pronounced an order in similar terms to the order of the Takeover Appeal Board, except that the time for making an order was extended to a period of 30 days from the Court's interlocutor and the shares were designed as all the issued ordinary share capital of Rangers "not already controlled" by the reclaimer and the other members of the concert party.

[40] At the hearing before us counsel for the reclaimer pointed out that a substantial number of shares, amounting to 14.57% of the total, are held by NOAL, and that in view of the various rulings that are under consideration it would not be appropriate for the reclaimer to make an offer for these shares. We agree with that contention, although we think that the problem is technically dealt with by the form of interlocutor pronounced by the Lord Ordinary, which referred to control rather than ownership. Nevertheless, to put matters beyond doubt, we propose to amend the operative ruling in such a way that the reclaimer is obliged to make a mandatory offer for the whole of the shares in Rangers not held by himself, by NOAL, by Mr Letham, Mr Taylor or Mr Park. Such an offer is to be made prior to a date 30 days after the date of the interlocutor to which this opinion relates.

[41] Subject to the foregoing modification in the order, we will refuse the reclaiming motion and pronounce an order in the terms indicated.