Takeover Panel sanctions: a rare case of the cold shoulder

After a long and complex investigation relating to events that took place in 2009 and 2010, and an 18-month disciplinary process, the Takeover Panel (the Panel) has imposed the rare sanction of "cold-shouldering". It imposed the sanction for periods varying from one to five years, against ten individuals, including Mr Richard Balfour-Lynn, the former chief executive of MWB Group Holdings PLC (MWB), Mr Jagtar Singh, a former joint finance director of MWB and Mr Richard Aspland-Robinson, a former senior executive director of an AIM listed subsidiary of MWB (the three individuals), as well as two lawyers working for a Swiss law firm.

The Panel also required the three individuals to pay compensation to former shareholders of MWB equal to the price at which a mandatory offer should have been made under Rule 9 of the Takeover Code (the Code) (Rule 9); a maximum sum that was calculated as approximately £32 million, less the sale proceeds received by those shareholders.

This is the first time that the Panel has awarded compensation under the powers conferred by section 954(1) of the Companies Act 2006 (2006 Act) and section 10(c) of the Code. It is only the fifth time that a cold-shouldering order has been issued, most recently in 2019 against Mr David King, the former chairman of Rangers International Football Club PLC.

Disciplinary powers and cold-shouldering

The Panel has statutory functions and powers by virtue of chapter 1 of Part 28 of the 2006 Act. For example, under section 10 of the Introduction to the Code, the Panel can make compliance rulings and seek enforcement by the courts (*section 946 and section 955, 2006 Act*). The Panel can censure a person either publicly or privately (*section 11, Introduction to the Code*). It can also make compensation orders for breaches of certain rules, including Rule 9.

The Panel may make a statement indicating that a person is someone who is not likely to comply with the Code, known as a "cold-shoulder" statement. This is regarded as the most serious of the Panel's sanctions because, as a result of MAR 4.3.1R and MAR 4.3.2G of the Financial Conduct Authority (FCA) Handbook, the FCA expects a regulated firm, such as an investment bank or financial adviser, not to act for such a person in connection with a transaction to which the Code applies.

In practice, this is a very serious fetter on the scope of the person's ability to conduct activities in relation to Code companies, and it is intended to be.

Introduction to the Code

Section 9(a) of the Introduction to the Takeover Code states that:

- The Takeover Panel (the Panel) expects any person dealing with it to do so in an open and co-operative way.
- The Panel expects prompt co-operation and assistance from persons dealing with it and those to whom enquiries and other requests are directed.
- In dealing with the Panel, a person must disclose to the Panel any information known to them and relevant to the matter being considered by the Panel, and correct or update that information if it changes.
- A person dealing with the Panel, or to whom enquiries or requests are directed, must take all reasonable care not to provide incorrect, incomplete or misleading information to the Panel.

MWB and breach of Rule 9

Rule 9 requires a mandatory offer to be made by a person who acquires or is interested in shares which, when aggregated with shares held by persons "acting in concert" with that person, carry 30% or more of the voting rights in a Code company. Concert parties are persons who, under an agreement or understanding, co-operate to obtain or consolidate "control" (as defined in the Code) of a company or to frustrate the successful outcome of an offer for a company.

The three individuals together originally held approximately 29.7% of shares carrying voting rights in MWB, a threshold slightly below the 30% level that would trigger a Rule 9 mandatory offer. However, in 2009 and 2010, their concert parties acquired further voting shares that pushed them substantially above the 30% shareholding threshold, but still without them making a Rule 9 mandatory offer.

Even if this had been done accidentally and transparently, it would have constituted a breach of Rule 9, but in circumstances of a genuine and honest mistake the Panel might well have ordered the parties to sell down to below 30%. This was the order it made, for example, in November 2015 in relation to shareholdings in Asia Resource Minerals plc (*www.thetakeoverpanel.org.uk/wp-content/uploads/2023/02/panel-statement-2015-15.pdf*).

However, here, the Panel found that the share acquisitions were concealed from the other directors of MWB and from the market through a series of sham transactions involving offshore entities. A waiver of the application of Rule 9 by the Panel (known as a "whitewash") was obtained through a vote by MWB's independent shareholders in January 2010 as part of a placing of shares by MWB. The Panel found that the whitewash waiver was dishonestly induced and obtained because shareholders thought that the relevant shareholding that they were asked to approve would be 33.51%; that is, they were not aware of the additional concert party stake that took the total shareholding to over 50%.

The Panel explained that section 9(a) of the Introduction to the Code has the status of a Rule of the Code (*see box "Introduction to the Code"*). As such, the dishonest behaviour of the three individuals was in clear breach of that section.

It also noteworthy that Mr Blurton, a former joint finance director of MWB, was given a

public statement of censure in relation to breaching section 6(b) of the Introduction to the Code for failing to consult the Panel when he was in "any doubt" as to whether a proposed course of action was in accordance with the Code. The Panel expects to be consulted in advance in all such circumstances and it has again shown that it may impose disciplinary sanctions for failure to consult, regardless of any substantive rule breaches.

The Panel Statements were published by the Panel on 30 July 2024 and include the dismissal by the Takeover Appeal Board of an appeal by Mr Balfour-Lynn against the compensation order.

The key takeaways

It is worth noting that the previous most recent cold-shouldering in 2019 of Mr King was also for a finding of a breach of Rule 9. Many of the Panel's investigations concern alleged breaches of Rule 9, particularly as a result of undisclosed concert parties and the MWB case is another example of the Panel's focus on this area.

The MWB case also emphasises the serious consequences of failures by companies and their advisers to observe the principles of openness, transparency and accuracy in dealing with the Panel and others. It serves as a stark reminder of the importance of consulting the Panel whenever there is any doubt as to whether a proposed action complies with the Code.

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The Panel Statements are available at www.thetakeoverpanel.org.uk/wp-content/uploads/2024/07/Panel-Statement-2024_17.pdf; www.thetakeoverappealboard.org.uk/wp-content/uploads/2024/07/TAB-Statement-2024-1.pdf; www.thetakeoverpanel.org.uk/wp-content/uploads/2024/07/Panel-Statement-2024_16.pdf.