

THE TAKEOVER PANEL

HEARINGS COMMITTEE

RANGERS INTERNATIONAL FOOTBALL CLUB PLC (“RANGERS”) AND MR DAVID CUNNINGHAM KING (“MR KING”)

RULING OF THE CHAIRMAN OF THE HEARINGS COMMITTEE

This Panel Statement sets out the Ruling of the Chairman of the Hearings Committee issued on 26 November 2018.

INTRODUCTION – THE ISSUE

1. The issue on this application is whether I should reject a request to convene the Hearings Committee (“the Committee”) under the powers conferred by Rule 2 of the Rules of Procedure of the Committee (“the Committee’s Rules”). In relevant part Rule 2 states as follows:

“2.1 The chairman of a hearing or prospective hearing may, without convening the Hearings Committee, reject a request that the Hearings Committee be convened on any matter if he or she considers:

.....

(d) that the matter has no reasonable prospect of success.

2.2 In such cases, the chairman of the hearing may determine the application or request without an oral hearing.”

2. A request to convene the Committee has been made by Mr King and was communicated to the Executive of the Takeover Panel (“the Executive”) by email sent on 31 October 2018. The decision which Mr King wants the Committee to review is a ruling of the Executive made on 2 October 2018 by which the Executive confirmed that Mr King’s obligation to procure a mandatory offer for the shares of Rangers under Rule 9.1 of the Takeover Code (“the Code”) should extend to the holders of new shares issued with the consent of shareholders given at an EGM of Rangers on 31 August 2018. The proposal approved at the EGM was for a non-pre-emptive placing at 20 pence per share to increase Rangers’ issued share capital from approximately 81.5 million to approximately 144.6 million shares.

3. In submissions served on 9 November 2018 the Executive contended in summary that the requested review of its decision had no reasonable prospect of success as:
 - (i) The Code is clear that an offer must extend to new shares issued during an offer period;
 - (ii) Mr King and the board of Rangers were made aware of this by the Executive on several occasions before the relevant resolutions were put to and passed by shareholders at the EGM and the new shares subsequently issued and allotted;
 - (iii) Mr King's own announcement of a firm intention to make an offer under Rule 2.7 of the Code had stated that the offer would extend to any further Rangers shares issued or unconditionally allotted whilst the offer remained open for acceptance; and
 - (iv) At the relevant EGM, New Oasis Asset Management ("NOAL"), the vehicle by which Mr King procured the purchase of shares of Rangers, voted in favour of resolutions authorising the issue of new shares.
4. In a submission served on 18 November 2018 Mr King contended that the Executive's direction that his Rule 9 offer should extend to the new shares was, in effect, irrational and contrary to the wishes of Rangers shareholders. Mr King maintained that the Executive's ruling frustrated his ability to comply with his obligation under an interlocutor of the Inner House which ordained he make a Rule 9 Code-compliant offer to holders of shares of Rangers. He also maintained that the Executive's attempt to prevent a full hearing of the Committee by recourse to Rule 2 of the Committee's Rules was purely tactical and intended to avoid the transparency and scrutiny that such a hearing would involve.
5. Mr King having suggested that Rangers would have relevant submissions to make, on 19 November 2018 I offered Mr Blair, the Company Secretary of Rangers, the opportunity to serve submissions supplementing those of Mr King provided they were served by 5pm Thursday 22 November. Mr Blair is familiar with this matter and with much of the relevant

correspondence and had, for example, appeared and made submissions on behalf of Rangers at the hearing before the Committee referred to below. At Mr Blair's request I granted two short extensions of time for serving submissions but refused a request for a third extension beyond 5pm Friday 23 November 2018. As explained at the time, my reasons for refusing a further extension were that I thought it desirable that there should be no further delay in resolving this issue and, in my view, given his familiarity with the matter, Mr Blair had had sufficient time.

BACKGROUND

6. This matter has a long history which is set out in various published Panel Statements and judgments of the Inner and Outer Houses of the Court of Session and which I need not recount in detail. In outline, the background is as follows.
7. On 7 June 2016, the Executive ruled that Mr King had been acting in concert with Messrs Letham, Taylor and Park in procuring the purchase by NOAL of 14.57% of the shares of Rangers. That purchase was effected on 2 January 2015. The result, as found by the Executive, was that Mr King and the persons with whom he was held to be acting in concert controlled the voting rights attaching to more than 30% of the issued share capital of Rangers. The Executive concluded that Mr King had thus incurred an obligation under Rule 9 of the Code to procure the making of an offer for all Rangers shares not held by NOAL or by those with whom he had acted in concert. The Executive also ruled that the offer price should be 20 pence per share.
8. On 5 December 2016, the Committee upheld the Executive's ruling and directed Mr King to announce an intention to make an offer by 4 January 2017. Other than as regards the announcement date, the offer was to comply with the Executive's ruling of 7 June 2016.
9. Mr King appealed against the Committee's ruling to the Takeover Appeal Board ("TAB") which, by its ruling of 13 March 2017, upheld the ruling of the Committee apart from varying to 12 April 2017 the date for announcing the offer.

10. Mr King failed to procure the making of an offer in accordance with the TAB's ruling. Accordingly, the Executive applied to the Outer House of the Court of Session under section 955 of the Companies Act 2006 for an order (or interlocutor) enforcing the requirement to make an offer. By its interlocutor of 22 December 2017, the Outer House ordained Mr King to announce in accordance with the Code within thirty days and thereafter make in accordance with the Code, a mandatory offer at a price of 20 pence per share for the entire issued share capital of Rangers not already controlled by him, Mr Letham, Mr Taylor and Mr Park.

11. Mr King then appealed to the Inner House which, by its interlocutor of 28 February 2018, upheld the ruling of the Outer House and affirmed the interlocutor of the Outer House subject to an amendment intended to clarify that in addition to shares held by the three individuals with whom Mr King acted in concert, the offer should also not apply to shares held by NOAL.

12. On 11 January 2018, the Executive wrote to Mr Blair to explain the Code implications for Mr King's obligation to procure a Rule 9 offer were a new share issue to proceed. As that letter explained, Rangers was in an "offer period" as defined in the Code. The result was that Rule 21.1 of the Code prevented Rangers (the offeree) from issuing new shares without obtaining shareholder approval in a general meeting. The letter went on to explain that the Rule 21.1 prohibition on an offeree issuing new shares during an offer period will normally be waived by the Panel if the offeror consents. Accordingly, it was made clear to the directors of Rangers that were the shareholders to consent in general meeting to the issue of new shares and Mr King (through NOAL) were in turn to give his consent, Mr King's obligation to procure the making of a Code-compliant offer would extend to the new shares once they were issued (apart from any new shares issued to NOAL or to others with whom he had acted in concert).

13. On 29 March 2018, Laird Investments (Proprietary) Limited ("Laird") announced a firm intention to make an offer for the shares of Rangers at 20 pence per share in cash pursuant to Rule 2.7 of the Code. The announcement described Laird as a South African-based private company ultimately owned by a trust of which Mr King and his family are beneficiaries. The announcement also said that:

“The offer will extend to all RIFC Shares, which are not held by members of the Concert Party and further RIFC shares, which are issued or unconditionally allotted whilst the Offer remains open for acceptance”.

Accordingly, it was made clear in the Rule 2.7 announcement that if new shares were to be issued or unconditionally allotted before the offer closed Laird’s Rule 9 offer would extend to all such shares not held by members of Mr King’s concert party. It is, I understand, standard practice to include such a statement in a Rule 2.7 announcement.

14. By Rule 24.1(a) of the Code, except with the consent of the Panel, an offeror must, within 28 days of the announcement of a firm intention to make an offer under Rule 2.7, send an offer document to shareholders of the offeree. The effect of this in this case was that time for posting a Code-compliant offer document would expire on 26 April 2018. In the event, no offer document has been sent to Rangers shareholders because cash confirmation in a form and from an entity acceptable to the Executive has not been forthcoming. Rule 24.8 of the Code provides that, where the offer is for cash or includes an element of cash, the offer document must include confirmation by an appropriate third party that resources are available to the offeror sufficient to satisfy acceptance in full of the offer. In its exchanges with Mr King, the Executive’s consistent position was that, where the funds to satisfy acceptance of the offer were to come from South Africa, cash confirmation would require the party in question to confirm that the cash required to satisfy the offer was available within the UK.

15. On 14 June 2018, the Executive wrote to Mr Blair and an independent director of Rangers explaining the basis upon which it would be prepared to disapply the prohibition in Rule 21.1 on issuing new shares during an offer period. By that letter the Executive agreed to disapply the Rule 21.1 prohibition pursuant to Rule 21.1(c)(iii), that is to say, if holders of shares carrying at least 50% of the voting rights state in writing that they approve the proposed action and would vote in favour of any resolution to that effect at a general meeting. In its letter the Executive attached certain conditions to its agreement, including that the circular to shareholders should set out:

“

(v) an explanation that Mr King’s mandatory offer obligation will extend to the enlarged share capital following the placing;

- (vi) an explanation that, on the basis that placees subscribing at 20p per share are unlikely to accept the offer from Mr King or Laird at 20p per share, the placing would substantially increase the number of acceptances from existing shareholders needed for such an offer to become unconditional as to acceptances,¹ and hence make such an offer less likely to succeed...”.

16. On 22 August 2018 Mr King wrote to the Executive complaining that it had:

“...prematurely reached a decision to compel an offer for the expanded shares before the increase in capital has even been considered by RIFC’s shareholders and before any submissions might be made on my behalf about the appropriateness or not of such a step”.

17. The Executive replied by email on the same date stating that it had on two previous occasions pointed out the implications for Mr King’s obligations to procure an offer if an issue of new shares were to proceed after having been approved by shareholders and, accordingly, that there was nothing new in the position it was adopting.

18. In the event, shareholder approval was obtained at the Rangers EGM on 31 August 2018. The Executive maintains, and this has not been disputed by Mr King, that NOAL, the vehicle of Mr King’s family trust, voted in favour of the resolution. It is clear, therefore, that the placing proceeded with Mr King’s consent.

19. Allotment of the new shares following board approval was announced on Rangers’ website on 29 September 2018. From the list of subscribers and their respective holdings posted on the website, it appears that those with whom Mr King had been found to be acting in concert (NOAL and Messrs Park, Letham and Taylor) were allotted a proportion of the new shares equivalent or similar to the percentage of Rangers’ pre-existing issued share capital already held by them. There were nine other subscribers. From the correspondence it appears that the effect of the placing was to convert existing soft loans into equity as well as to raise share capital. The result was a substantial increase in Rangers’ issued share capital.

20. It is unlikely (Mr King would say, inconceivable) that recent subscribers for new shares at 20p per share would accept an offer from Laird to purchase those shares at 20p per share. In light of this, the Executive has suggested to Mr King in correspondence that if placees of the

¹ As to which, see Rule 9.3 of the Code (below).

new shares were to give irrevocable undertakings that they would not accept Laird's Rule 9 offer then, once a suitable party had been put forward to provide cash confirmation under Rule 24.8, the Executive might be prepared to explore with that party ways in which the cash confirmer could discharge its responsibility by relying on undertakings from the placees of new shares not to accept the offer. That, so the Executive suggests, would address the practical difficulty that, as a result of the placing, the mandatory offer which Mr King is required to procure exceeds the cash resources currently at Laird's disposal.

21. For his part, in an email to the Executive of 8 October 2018, Mr King described the Executive's suggestion as the sensible introduction of an idea which he intended to pursue. In his submissions of 18 November 2018 he followed this up by saying that he now had "irrevocable letters from the shareholders who participated in the rights issue that they will not accept such an offer even if made". It seems, therefore, that by this route the placing may not have the consequence that a cash confirmer would now need increased funds at its disposal in the UK in order to discharge its responsibilities under Rule 24.8.

RELEVANT PROVISIONS OF THE CODE

22. The first question is whether the provisions of the Code clearly indicate, so as to preclude reasonable argument to the contrary, that a mandatory offer under Rule 9 should extend to shares issued by the offeree during the offer period.
23. The Introduction to the Code states that the Rules are to be interpreted to achieve their underlying purpose and, therefore, that their spirit must be observed as well as their letter. The Rules give effect to the Code's General Principles and the Rules are in turn explained and supplemented by a series of Notes. The Takeover Panel's rule-making body is its Code Committee: it reviews and where necessary amends the Rules and Notes in light of experience and usually after public consultation.
24. Under the definition in the Code an "offer period" will commence when the first announcement is made of an offer or possible offer for a company and will end in various circumstances including when the offer has become or is declared unconditional as to acceptances. Thus, Rangers was in an offer period at the time of the placing and when the

new shares were issued and allotted, notwithstanding Mr King has not yet actually procured the making of a Rule 9 offer.

25. When one reads together those provisions of the Code which regulate the conditions and consents attaching to a Rule 9 offer along with those that control the issue of new shares by an offeree during an offer period, it becomes clear beyond reasonable argument to the contrary, that a Rule 9 offer will extend to the holders of shares issued during an offer period, provided such shares are issued in compliance with the Code.
26. Mandatory offers are regulated by Rule 9. Rule 9.3 regulates the “Conditions and Consents” of such offers and states in relevant part that:

“Except with the consent of the Panel

- (a) offers made under Rule 9 must be conditional only upon the offeror having received acceptances in respect of shares which, together with shares acquired or agreed to be acquired before or during the offer, will result in the offeror and any person acting in concert with it holding shares carrying more than 50% of the voting rights ...”.**

27. Note 1 of the Notes on Rule 9.3 states that:

“An offer made under this Rule should normally be unconditional when the offeror and persons acting in concert with it hold shares carrying more than 50% of the voting rights before the offer is made.”

This note is to be read in light of other provisions of the Code, including Rule 21.1 which, as explained below, places restrictions on the issue of new shares in the offeree during the course of an offer. Accordingly, an offer made under Rule 9 will normally become unconditional once the offeror and persons acting in concert with it hold shares carrying more than 50% of the voting rights before the offer is made, as new shares in the offeree cannot subsequently be issued without the consent of shareholders in general meeting and the conditions on which the Panel will agree to disapply this prohibition normally include the consent of the offeror. Furthermore, although Rangers is currently in an “offer period” as defined by the Code, an offer has not been made. As and when Mr King does procure a Code-compliant offer, those with voting rights as the holders of shares issued in the placing will have to be taken into account in determining whether that offer has become unconditional.

28. Note 2 on Rule 9.3 is headed “Acceptance condition” and applies Notes 2-7 on Rule 10 to offers made under Rule 9. Rule 10 regulates the acceptance condition of voluntary offers and Note 2, headed “New shares” states, where relevant, as follows:

“For the purpose of the acceptance condition, the offeror must take account of all shares carrying voting rights which are unconditionally allotted or issued before the offer is declared unconditional as to acceptances, whether pursuant to the exercise of conversion or subscription rights or otherwise”

29. Paragraphs 2 and 3 of Note 3 state as follows:

“The offeree company must immediately notify the offeror of any allotment or issue of shares and of the exercise of any such rights during the offer period and provide the offeror as soon as possible with all relevant details.

The offeror must make appropriate arrangements to ensure that any person to whom shares of a type to which the offer relates are unconditionally allotted or issued during the offer period will have an opportunity of accepting the offer in respect of such shares.”

30. Thus, the Code stipulates the acquisition of “statutory control” (the voting rights required for passing an ordinary resolution) as the sole condition to which a Rule 9 offer may be made subject. It then goes on to explain how this is to be determined. By applying Notes 2 and 3 on Rule 10 to Rule 9 offers, the Code provides that this condition of acceptance must take account of shares issued and allotted before an offer is declared unconditional and, consistently with this, that an offeror must make arrangements to ensure that persons to whom shares are allotted or issued during an offer period have the opportunity to accept the offer in respect of such shares.
31. It is for this reason that, consistently with standard practice, Laird’s Rule 2.7 announcement of an intention to make an offer stated that the offer would apply to shares issued or unconditionally allotted while the offer remained open for acceptance.
32. The issue of new shares by an offeree during an offer period may have two relevant consequences: it may make it more difficult for the offeror to secure the acceptances required for the offer to become unconditional and, in the case of cash offers or offers comprising a

cash element, it will increase the cash required to satisfy full acceptance of the offer and may make cash confirmation under Rule 24.8 more onerous. Rule 21.1 of the Code addresses this by prohibiting the issue of shares in the offeree during the course of an offer without the consent of shareholders in general meeting and by citing the consent of the offeror to the issue of shares or other action proposed by the offeree board as one of the conditions on which the Panel will normally agree to disapply the Rule 21.1 prohibitions. Rule 21.1, therefore, offers some protection to offerors against the risk that the funds required to satisfy acceptance will be increased by the issue of new shares in the offeree during an offer period.

33. It is not surprising that an offer under the Code should extend to the holders of shares carrying voting rights which are issued by an offeree during an offer period, as to hold otherwise would mean that an offer could become unconditional for acceptances without “statutory” control having passed to the offeror, something which Rules 9 and 10 of the Code plainly seek to avoid. Furthermore, General Principle 1 of the Code, which gives effect to the equivalent general principle in the EU Directive on Takeover Bids 2004/25/EC (“the Directive”) and which the Rule 9 regime is intended to implement, states that:

“All holders of the securities of an offeree company of the same class must be afforded equivalent treatment ...”

Giving effect to this principle demands that a Rule 9 offer extend to the holders of further shares of the same class issued legitimately by an offeree during an offer period – only then will all holders of securities of the same class be afforded equivalent treatment.

34. Accordingly, in my view any attempt to argue that the mandatory offer which Mr King is obliged to procure would not extend to the holders of shares acquired in the placing, would have no reasonable prospect of success.

WAIVER OR DEROGATION

35. Section 2(c) of the Introduction to the Code states that, provided the General Principles are respected in a case involving a Rule subject to the Directive, the Panel may derogate or grant

a waiver from the application of a Rule. The Directive sets out General Principles equivalent to those contained in the Code. The Panel may derogate from or waive a Rule either in the circumstances set out in the Rule itself or where it considers that the Rule would operate unduly harshly or in an unnecessarily restrictive or burdensome manner. Where the basis for the derogation or waiver is not set out in the Rule in question, the Panel is required to give reasons for its decision.

36. Had Mr King complied with the ruling of the TAB, a Code-compliant offer would have been announced on or before 12 April 2017. That offer would have closed long ago, well before any questions arose in connection with the placing. The interlocutors and judgments of the Court of Session make it clear that there was no justification for Mr King's failure to procure the making of an offer pursuant to the TAB's ruling. Such delay having occurred, Mr King was told in January and again in June of this year that if new shares in Rangers were to be issued before an offer closed, the offer would have to extend to any holders of new shares who were not members of his concert party. Consistently with this, Laird's Rule 2.7 announcement of 29 March 2018 stated that the offer would extend to any shares issued while the offer remained open for acceptance. At the Rangers EGM of 31 August 2018 NOAL voted in favour of the relevant resolutions: there were no doubt good commercial reasons for doing this but Mr King undoubtedly went ahead in full knowledge of the implications under the Code.
37. It seems to me that in circumstances such as these it would have been difficult if not impossible for the Executive on any principled basis to waive compliance with the obligation to extend the Rule 9 offer to holders of shares taken up in the placing. To do so would risk undermining the status or efficacy of the Code by disapplying it in order to accommodate default. In the event, the Executive has suggested a possible route for Laird's offer to proceed without the need for a party appointed for the purpose of Rule 24.8 to confirm the availability of additional cash within the UK, but that does not remove the requirement for the offer to extend to holders of new shares.
38. In the circumstances, in my view an attempt to persuade the Committee to waive Mr King's obligation to procure a Rule 9 offer to the holders of shares acquired in the placing would have no reasonable prospect of success.

CONCLUSION

39. I therefore dismiss Mr King's request to convene the Committee under Rule 2 of the Committee's Rules.

Signed: Michael Crane QC
Chairman of the Hearings Committee

26 November 2018

Date of this Panel Statement: 29 November 2018