Corporate Law Update
11 - 17 March 2017

This week we look at a decision by the Takeover Panel that four individuals were acting in concert when they acquired shares in Rangers F.C., triggering a requirement for one of them to make a mandatory offer for the club. We also look at a recent case on "reasonable endeavours" clauses.

Takeover Panel requires cash offer for Rangers F.C.
The Takeover Panel's Appeal Board (the "**Appeal Board**") has ruled that Mr David King was acting in concert with three other individuals when a company owned by him acquired shares in the holding company of Rangers Football Club ("**Rangers**"). It also ruled that Mr King must make a full cash offer for the shares in Rangers under Rule 9 of the City Code on Takeovers and Mergers (the "**Code**").

A copy of the Appeal Board's decision can be found here, and the original ruling of the Hearings Committee can be found here.

Legal background
Under Rule 9 of the Code, when persons who are "acting in concert" acquire shares and, as a result, hold 30% or more of a company's issued shares, they (or one of them) must make an offer to acquire the remaining shares in the company.

The offer must be in cash or carry a cash alternative. The offer price may not be lower than the highest price that the offeror paid for shares in the company during the previous 12 months.

People are "acting in concert" if, pursuant to an agreement or understanding, they co-operate to obtain or consolidate control of a company or to frustrate the successful outcome of an offer for a company.

Since 2015, the Code has expressly stated that a person is deemed to be acting in concert with his close relatives and any of his or his relatives' related trusts. This merely codifies the position that the Takeover Panel has applied in practice for many years now.

The facts
On 31 December 2014, three individuals – Mr Letham, Mr Taylor and Mr Douglas Park – bought shares in Rangers at 20p per share which, along with the shares they already held, gave them collectively 19.48% of Rangers' issued shares.

On 2 January 2015, a vehicle called New Oasis Asset Limited ("**NOAL**") bought shares in Rangers, also at 20p per share, representing 14.57% of Rangers' issued shares. NOAL was a BVI company that was owned by a trust for Mr King and his family.

In March 2015, Rangers' directors were removed at a general meeting and Mr King's nominees were appointed in their place. In May 2015, Mr King became chairman. The Panel launched an investigation.

The decision
The Takeover Panel Executive and the Panel Hearings Committee both decided that Mr King, together with NOAL, had been acting in concert with Messrs Letham, Taylor and Park. Because their total combined shareholding in Rangers was 34.05%, the Executive ruled that Mr King was required to make an offer for the remaining shares in Rangers under Rule 9 of the Code.

Mr King appealed. The Appeal Board re-examined the circumstances and upheld the Executive's and the Committee's rulings. It said there was sufficient evidence, in the form of emails between Mr King and Mr Letham, to demonstrate that the parties had been acting in concert.

This was underscored by the fact that in October 2014 Mr King and Mr Letham had tried twice to consolidate control of Rangers but had, on both occasions, failed. The Appeal Board was prepared to take this previous behaviour into account when deciding whether the parties were still attempting to gain control of the company.

Interestingly, Mr King and Rangers had argued that there was no benefit to requiring an offer to be made under Rule 9. Mr King said that an offer at 20p per share would not benefit shareholders, whose shares were now worth far more than this. Rangers itself had also argued that a mandatory offer would benefit neither Rangers nor trading in its shares. Finally, Mr King had argued that his motivation throughout was to work together with supporters to improve corporate governance at Rangers.

However, the Appeal Board was not moved by these arguments. Rule 9 is triggered when the relevant threshold is met. The personal motivations of the persons who acquire shares in a company, and the benefit of a mandatory offer to shareholders, are irrelevant.

Mr King must now make a mandatory offer for the remaining shares in Rangers under Rule 9 of the Code at 20p per share by 12 April 2017.

Practical implications
The Appeal Board's decision is not surprising. Rule 9 is a fundamental provision of the Code which the Panel applies strictly. In reaching its conclusion, the Appeal Board has underscored the primary purpose of Rule 9 – to ensure that shareholders of a company are given the opportunity to cash out when one or more persons gain substantial control of the company.

The decision also highlights the breadth of the concert party provisions in the Code. The Appeal Board acknowledged that it will be rare that there is direct evidence of what passes between alleged concert parties. Instead, the Panel will use "common sense and relevant experience to make reasonable inferences from all the surrounding circumstances".

As always, persons acquiring shares in public companies will need to think carefully in order to understand whether the concert provisions are likely to apply to them.

High Court upholds reasonable endeavours obligation
In *Astor Management AG and another v Atalya Mining plc and others* [2017], the High Court upheld an obligation to use all reasonable endeavours to obtain a senior debt facility (although it found that there was no breach of that obligation).

What happened
Astor agreed to sell shares in a mining project to Atalaya (known then as EMED). Part of the price was deferred and payable only if EMED procured a senior debt facility to fund the restart of mining operations. EMED and two of its subsidiaries undertook to use "all reasonable endeavours" to obtain that facility, with one of EMED's subsidiaries acting as borrower. After various attempts, EMED was unable to secure the facility. Instead, it raised equity funds, which it loaned down to its subsidiary.

Astor argued that EMED had breached its endeavours obligation. Relying on previous decisions, EMED argued that the obligation was unenforceable because it did not contain sufficient objective criteria on which to decide whether EMED's endeavours had been reasonable.

However, the court decided that the obligation was enforceable. It said the court's role was to give legal effect to what the parties have agreed, and not to throw its hands in the air and refuse to do so because the task is not easy. In fact, the judge went so far as to suggest that it should "almost always" be possible to give sensible content to an undertaking to use reasonable endeavours.

Practical implications
The decision is significant for commercial contracts of all kinds. Contract parties often include endeavours obligations as a compromise when an outright obligation is unpalatable. They then need to decide whether to include any specific criteria to measure performance of that obligation.

Going forward, businesses should assume that even a broadly worded endeavours obligation will be binding. This in turn may lead to uncertainty over what a party must to do satisfy that obligation. By coupling an endeavours obligation with a requirement on a party to take certain specific steps, this uncertainty should be reduced.

Companies House releases "follow" service
Companies House has launched a new service called "Follow", which allows users to receive notifications whenever a new transaction is added or removed from an entity's file. The function is available through the free on-line service at https://beta.companieshouse.gov.uk/.

Once signed in, a green "Follow" button appears on each entity's file. Clicking this button will then prompt Companies House to deliver notifications when there is activity relating to that entity. The function appears to be available for companies and limited liability partnerships, but not for limited partnerships.

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