# TAKEOVER APPEAL BOARD

IN THE MATTER OF

MWB GROUP HOLDINGS PLC

DECISION OF THE TAKEOVER APPEAL BOARD ON THE APPEAL OF MR RICHARD BALFOUR-LYNN FROM THE RULING OF THE HEARINGS COMMITTEE

Rt Hon Lord Collins of Mapesbury, FBA, LLD (Chair)
Rt Hon Sir John Mummery
Rt Hon Dame Elizabeth Gloster, DBE

## Introduction

1. This is an appeal to the Takeover Appeal Board ("the Board") by Mr Richard Balfour-Lynn ("Mr Balfour-Lynn") from that part of the Ruling of the Hearings Committee ("the Committee") of the Panel on Takeovers and Mergers ("the Panel") dated 22 December 2023 ("the Ruling"), by which it directed that he (among others) should pay to all shareholders of MWB Group Holdings PLC ("MWB"), who were on the register of shareholders on 12 January 2010 (other than those who were disclosed or undisclosed members of the 1997 Concert Party, as defined below) compensation at the rate of 40 pence per share, subject to credit being given by shareholders who sold their shares after 12 January 2010 for the proceeds of sale. In a Supplementary Ruling dated 16 February 2024 the Committee accepted the Executive's calculation that the maximum principal sum potentially payable (before credit is given by qualifying shareholders for the proceeds of sale of shares or compensation already received) is £32,590,457.20.

2. On 16 December 2022, the Executive of the Panel ("the Executive") initiated disciplinary proceedings against (among others) Mr Balfour-Lynn, at the material time the chief executive of MWB. At a procedural hearing of 23 February 2023 Mr Balfour-Lynn stated through counsel that he would neither admit nor challenge any aspect of the Executive's case against him and would confine himself to contesting the claim for compensation. On this appeal Mr Balfour-Lynn does not appeal against the finding

that he breached Rule 9 of the City Code on Takeovers and Mergers ("the Code"), nor against the disciplinary sanction that he should receive a 5 year "cold-shoulder."

3. By agreement between the parties, the appeal has been conducted on the papers without an oral hearing.

**Background**

4. The background to the appeal, as set out in findings by the Committee in the Ruling, is as follows.

5. In 1982 Mr Balfour-Lynn had been one of the two founders of Warwick Balfour Properties Plc (subsequently called Marylebone Warwick Balfour Group Plc), a company formed as a commercial and residential property company and investment company.

6. In June 1997 Marylebone Warwick Balfour Group Plc merged with Ex-Lands Properties plc ("Ex-Lands"), a listed public company, in a reverse takeover in which the shares in Marylebone Warwick Balfour Group Plc were sold to Ex-Lands in exchange for shares in Ex-Lands, which assumed the name of Marylebone Warwick Balfour Group Plc.

7. Following a consultation with the Executive, Mr Balfour-Lynn and other shareholders in the former Marylebone Warwick Balfour Group Plc were treated as acting in concert with each other in relation to their acquisition of shares in what became the new Marylebone Warwick Balfour Group Plc. The Concert Party (including subsequently Mr Blurton, the former finance director of Ex-Lands and later joint finance director of the merged entity) was subsequently referred to as the "1997 Concert Party."

8. In February 2008, Marylebone Warwick Balfour Group Plc underwent a capital reorganisation as a result of which MWB was formed as the new group holding company.

9. By early 2009 MWB had outstanding £30 million nominal of unsecured 9.75% loan notes which were to be redeemed during 2012 (the "Loan Notes"). The Loan Notes

were listed on the Official List and admitted to trading on the Main Market of the London Stock Exchange. The loan stock Trust Deed contained a gearing requirement, which capped MWB's maximum permitted gearing by limiting the group's net debt to a multiple of four times the adjusted shareholders' funds. Breach of the gearing covenant would have accelerated payment of the £30 million loan notes and also involved cross-defaults. At that time 51% of the Loan Notes were held by a subsidiary of GLG Partners Inc ("GLG"). GLG's Loan Notes were subsequently acquired by Mr Balfour-Lynn's associates including Mr Aspland-Robinson (an executive director of an MWB subsidiary) and Mr Eker (Mr Balfour-Lynn's uncle, who held the Loan Notes on trust for Mr Balfour-Lynn as beneficiary) at a discount to their nominal value. The Loan Notes of Mr Aspland-Robison and Mr Eker were subsequently transferred to the Audley Companies (as later defined).

10. MWB resolved by the summer or early autumn of 2009 to raise capital in a placing and for a proportion of the Loan Notes acquired from GLG to be purchased for cancellation by MWB at their nominal value so as to enable the Loan Note holders to use the proceeds to acquire shares in the placing.

11. In its final form the placing involved raising £27.5 million in equity, an issue price in the placing of 30p per MWB share, the "conversion" of £7.5 million nominal of the Loan Notes held by the Audley Companies into 25 million shares of MWB, and the investing of some £5.42 million in the placing by MWB's senior management and their associates with a similar investment by Pyrrho Investments Ltd, a BVI company with its principal business in Hong Kong, a significant shareholder.

12. On 1 June 2009 Mr Aspland-Robinson acquired 1,811,385 MWB shares, 2.5% of MWB's then issued share capital, at 40p per share, for a total consideration of £724,554, of which £500,000 was advanced by Mr Balfour-Lynn.

13. Mr Aspland-Robinson acted in concert with the 1997 Concert Party in acquiring the shares. The acquisition triggered an obligation to make a mandatory offer under Rule 9.1 of the Code, which was not made.

14. During November or early December 2009, Mr Aspland-Robinson and Mr Eker acquired respectively two BVI companies, Audley Investments Portfolio Limited ("AIPL") and Audley Capital Development Limited ("ACDL" and together with AIPL "the Audley Companies"), as nominees for holding the Loan Notes purchased by Mr Aspland-Robinson and the Loan Notes of Mr Eker which he held on trust for Mr Balfour-Lynn as beneficiary.

15. The names of the Audley Companies were chosen to give the false impression that they were entities controlled or managed by Audley Capital Advisors LLP, an FSA regulated investment adviser and ultimate parent of a number of funds incorporated in Guernsey, or by Mr Julian Treger, one of its founding partners. Mr Treger was, or became, aware of the use of the Audley Capital name for the vehicles incorporated to hold the shares, which was intended to disguise and conceal the interests in the relevant shares of Mr Balfour-Lynn and his associates.

16. The proposed acquisition of shares in the placing by MWB management would increase the interest of the 1997 Concert Party from a disclosed position as of October 2009 of 29.81%, to 33.51% of MWB's share capital.

17. Consequently, in October 2009, Panmure Gordon, MWB's corporate advisers, sought permission from the Executive to seek the approval of MWB's independent shareholders in general meeting for a whitewash waiver of the obligation to extend a Rule 9 offer following the proposed increase of the 1997 Concert Party's stake from 29.81% to 33.51% of MWB's share capital (the "Whitewash Resolution").

18. Panmure Gordon also sought confirmation that Audley Capital/Mr Treger would not be regarded as acting in concert with the 1997 Concert Party in acquiring 25 million new MWB shares in the placing by conversion into equity of £7.5 million nominal of their Loan Notes. Panmure Gordon had been led to believe, in common with Pyrrho and the wider board of MWB, that Mr Treger/Audley Capital managed or controlled the Loan Notes acquired from GLG and subsequently transferred to the Audley Companies.

19. In consequence, the Rule 9 waiver obtained in reliance upon the representation that the 1997 Concert Party was increasing its shareholding from just under 30% of MWB to 33.51% of its enlarged share capital, was dishonestly induced and obtained.

20. The placing was announced on 17 December 2009. The Prospectus and Shareholders Circular posted that day announced the issue of 91,666,667 "New Units" at a price of 30 pence per New Unit to raise £27.5 million in gross proceeds. The Regulatory News Service announcement of 17 December 2009 stated (inter alia) that (1) over 75% of Loan Stock holders had irrevocably agreed to vote in favour of amending the gearing covenants to increase the permitted level of group borrowing from four to five times adjusted shareholders' funds; (2) if the members of the 1997 Concert Party were to subscribe for the New Units in performance of their undertakings, the 1997 Concert Party would hold 33.51% of MWB's enlarged issued share capital and accordingly, subject to the Whitewash Resolution being passed on a poll by independent shareholders, would be obliged to make a general offer under Rule 9 of the Code; (3) subject to the Whitewash Resolution being passed by independent shareholders, the Takeover Panel had agreed to waive the requirement that the members of the 1997 Concert Party make a general offer to all shareholders.

21. The Whitewash Resolution was passed on 11 January 2010, and the placing closed on 12 January 2010. This scheme enabled Mr Balfour-Lynn and his associates, the ultimate beneficiaries of the Loan Notes which were converted into shares in the placing, to make a large undisclosed profit at the expense of MWB.

22. Upon the closing of the placing Mr Balfour-Lynn and his associates held 50.33% of MWB's issued share capital, and a Rule 9 offer should have been announced on 12 January 2010.

23. MWB went into administration on 21 November 2012 and in November 2013 it went into voluntary liquidation. It was dissolved and removed from the Register of Companies on 15 April 2018.

24. The Committee found that a false market in the shares of MWB existed from the closing of the placing until MWB entered into administration, as throughout this period

the market remained oblivious to the fact that MWB's senior management had surreptitiously acquired statutory control of the company. The shareholders of MWB were misled into believing that the Audley Companies were independent shareholders, whereas in fact their shares were controlled by MWB's senior directors.

**Jurisdiction of the Board**

25. Under Rule 2.8 of the Rules of the Takeover Appeal Board "…appeals shall be by way of a rehearing of those matters contested in the appeal."

26. The Introduction to the Rules also states that the Board

> (6) …shall ensure that appeals in respect of rulings on the interpretation, application or effect of the Code are conducted according to law.

**The relevant provisions of the Code and the General Principles**

27. The main points in the detailed written submissions of both sides in this appeal turn on the interpretation, application and effect of two key provisions in the Code - namely Rules 9 and 23 - to facts found by the Committee, which are not the subject of the appeal by Mr Balfour-Lynn.

28. Rule 9 imposes a requirement to make a cash offer for shares in a company and defines who is primarily responsible for making the offer. At the material time (the current version is the same in all material respects) it provided:

> 9.1 WHEN A MANDATORY OFFER IS REQUIRED AND WHO IS PRIMARILY RESPONSIBLE FOR MAKING IT
>
> Except with the consent of the Panel, when:
>
> (a) 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 him are interested) carry 30% or more of the voting rights of a company; or

(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 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. Offers for different classes of equity share capital must be comparable; the Panel should be consulted in advance in such cases.

…

9.3 CONDITIONS AND CONSENTS

Except with the consent of the Panel (see Note 3):

(a) offers made under this Rule 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; …

…….

9.5 CONSIDERATION TO BE OFFERED

(a) An offer made under Rule 9 must, in respect of each class of share capital involved, 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 Panel should be consulted where there is more than one class of share capital involved.

(b) If, after an announcement of an offer made under Rule 9 for a class of share capital and before the offer closes for acceptance, the offeror or any person acting in concert with it acquires any interest in shares of that class at above the offer price, it shall increase its offer for that class to not less than the highest price paid for the interest in shares so acquired. Immediately after the acquisition, an appropriate announcement must be made in accordance with Rule 7.1.

> (c) In certain circumstances, the Panel may determine that the highest price calculated under paragraphs (a) and (b) should be adjusted. (See Note 3.)
>
> (d) The cash offer or the cash alternative must remain open after the offer has become or been declared unconditional as to acceptances for not less than 14 days after the date on which it would otherwise have expired (see Rule 31.4).

29. By Rule 23:

> Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of an offer. Such information must be available to shareholders early enough to enable them to make a decision in good time. No relevant information should be withheld from them. The obligation of the offeror in these respects towards the shareholders of the offeree company is no less than an offeror's obligation towards its own shareholders.

30. The Code is based on General Principles expressed in broad terms and to be applied to achieve the underlying purpose of the Code. In that connection the spirit, as well as the letter, must be observed.

31. By General Principles 2 and 4:

> 2. The holders of the securities of an offeree company (which is defined to include a potential offeree company) must have sufficient time and information to enable them to reach a properly informed decision on the bid;
>
> …
>
> 4. False markets must not be created in the securities of the offeree company
> …in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.

32. The combined effect of Rule 9, Rule 23 and the General Principles is that shareholders must be given sufficient information and advice to enable them to reach a properly informed decision as to the merits or demerits of the offer.

33. Other provisions of the Code which are relevant are the following.

34. First, Section 9 of the Introduction provides:

> **PROVIDING INFORMATION AND ASSISTANCE TO THE PANEL AND THE PANEL'S POWERS TO REQUIRE DOCUMENTS AND INFORMATION**
>
> This section sets out the rules according to which persons dealing with the Panel must provide information and assistance to the Panel.
>
> **(a) Dealings with and assisting the Panel**
>
> The Panel expects any person dealing with it to do so in an open and co operative way. It also 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.
>
> A person is entitled to resist providing information or documents on the grounds of legal professional privilege.
>
> **Where a matter has been determined by the Panel and a person becomes aware that information they supplied to the Panel was incorrect, incomplete or misleading, that person must promptly contact the Panel to correct the position**. In addition, where a determination of the Panel has continuing effect (such as the grant of exempt status or a concert party ruling), the party or parties to that determination must promptly notify the Panel of any new information unless they reasonably consider that it would not be likely to have been relevant to that determination. (Emphasis supplied.)

**Companies Act 2006, section 954 and section 10 of the Code**

35. Under section 954 of the Companies Act 2006, Rules may confer on the Takeover Panel power

> …. to order a person to pay such compensation as it thinks just and reasonable if he is in breach of a rule the effect of which is to require the payment of money.

36. Second, Section 10 of the Introduction to the Code contains provisions for enforcing the Code. They include a wide discretionary power to make compensation rulings against a person who has breached the requirements of (inter alia) Rule 9:

> …the Panel may make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In addition, the Panel may make a ruling requiring simple or compound interest to be paid at a rate and for a period (including in respect of any period prior to the date of the ruling and until payment) to be determined.

**The Committee's Ruling**

37. In the Ruling the Committee found that Mr Balfour-Lynn was liable for breach of Rule 9 of the Code, and that he had an obligation to make a mandatory cash offer to the shareholders on 12 January 2010 to purchase their shares in MWB at a price of 40p per share.

38. The main findings and conclusions of the Committee on the issue of compensation may be summarised as follows.

(1) The Committee had jurisdiction to order compensation, as a breach of Rule 9 involved the "breach of a rule the effect of which is to require the payment of money" within the meaning of section 954 of the Companies Act 2006.

(2) The Remedial Subjects, who included Mr Balfour-Lynn, were in breach of the requirement to make a cash offer to other shareholders.

(3) Compensation should be ordered against Mr Balfour-Lynn as one of the Remedial Subjects, who were jointly and severally liable for payment of compensation.

(4) On the issue of the contingent liability to pay compensation, it was common ground that the discretionary power in Section 10 had to be exercised in accordance with common law principles of compensation for loss, that the provisions in the Code were compensatory rather than penal in nature, and that the assessment of loss involved asking what the response of the shareholders would have been if the offer under Rule 9 had been made on 12 January 2010.

(5) Had the true facts been apparent to shareholders, as they would have been had a Rule 9 offer been announced on 12 January 2010 (followed, pursuant to Rule 23 of the Code and General Principle 2, by the provision of sufficient information and advice to enable shareholders to reach a properly informed decision as to the merits or demerits of the offer) offeree shareholders would have accepted the offer and transferred their shares to the Remedial Subjects. That was because, as the Committee explained:

(a) a false market in the shares of MWB existed from the closing of the placing until MWB entered into administration as throughout this period the market remained oblivious to the fact that MWB's senior management had surreptitiously acquired statutory control of the company; see e.g. paragraphs 253 and 269;

(b) it was the Committee's view that:

> 254. …offerees would likely have accepted such an offer in exchange for their shares notwithstanding they were trading at or marginally above the notional offer price when the offer was announced and posted. In reality, once senior management obtains statutory control, it is able to

> control composition of the board and matters such as dividends without fear of interference from shareholders in general meeting. Few, if any, shareholders would have been content with that.

(6) The Committee rejected the submission of Mr Balfour-Lynn that the MWB shareholders had suffered no compensable loss, because, in accepting the notional offer, they would have had to give benefit for the value of the shares at that time and MWB's shares had traded at or above the notional offer price during at least the three months following 12 January 2010. In particular, the Committee rejected the argument that the MWB shares held outside the 1997 Concert Party had a value equal to their market price.

(7) The Committee considered and rejected the submission of the Executive that there was "a continuing breach" of Rule 9. It held that the breach occurred once only and that was on 12 January 2010. It concluded:

> 261 Mr Polley [counsel for Mr Balfour-Lynn] rejected the contention that failure to extend an offer under Rule 9 involved a continuing breach. Although the question is quite finely balanced, the Committee concludes that Mr Polley was correct in submitting that the failure to extend a Rule 9 offer was a failure that occurred once only, on 12 January 2010 when an offer ought to have been announced, thereby initiating an offer process. The fact that that breach went unremedied after 12 January 2010 does not mean that the breach occurred repeatedly thereafter from day to day.

(8) The Committee also concluded:

> 270 …Had a Rule 9 offer been extended on 12 January 2010 or at any time thereafter, and had that offer been accompanied by the information that the Code requires in order to enable shareholders to make a fully informed decision, then the Committee is confident the shareholders would have accepted the offer irrespective of the contemporary prices at which the shares were trading…

(9) The Committee decided that in the circumstances an assessment of compensation (as at 21 November 2012, that being the date when MWB went

into administration), would best give effect to the compensation principle. By that date the shares of MWB had lost all value. The Committee therefore directed the Remedial Subjects to pay all the shareholders of MWB who were on the register of shareholders on 12 January 2010 compensation at the rate of 40p per share but giving credit for the proceeds of sale of shares sold after 12 January 2010.

**Mr Balfour-Lynn's appeal**

39. Mr Balfour-Lynn does not appeal from the finding that he was one of the persons responsible for the breach of Rule 9. His appeal is solely concerned with the ruling of the Committee that he is jointly and severally liable pay substantial compensation to the former shareholders in the offeree company referred to as MWB.

40. Mr Balfour-Lynn contends that the ruling that he is liable to pay £32.5 million in compensation for breaches of that Rule to the former MWB shareholders, to whom a cash offer should have been made in January 2010, should be set aside on the ground that the breach of Rule 9 did not cause any loss to those shareholders. The arguments concentrate on criticisms of paragraphs 228 to 273 of the Ruling.

41. The main submissions on the issue of compensation set out at length in the Notice of Appeal, the Reply and a late exchange of letters can, for the purposes of this Ruling be stated shortly as follows.

    (1) The Committee wrongly applied the compensatory principle. It should have given credit for the value of the shares that the shareholders would have had to transfer to the Remedial Subjects on 12 January 2010. On an orthodox application of the compensatory principle, Mr Balfour-Lynn's breach of Rule 9 caused the shareholders no loss, as any of them accepting an offer on 12 January 2010 would have had to transfer shares worth at least 40p per share to the Remedial Subjects in exchange. At that time the shares in MWB had been trading in the market at 40p per share. The shareholders would have to give credit for the value of their shares at the time of the offer.

(2) Alternatively, there was no evidence to establish loss at the date of the breach on 12 January 2010, that being the relevant date for the assessment of compensation: see *Smith New Court Securities Limited v Citibank N.A.* [1997] AC 254 for the general rule that in tort or contract damages are assessed at the date of breach.

(3) Any loss sustained by shareholders was outside the scope of the Remedial Subjects' duty under Rule 9 because it was caused by MWB's entry into insolvency on 21 November 2012. The insolvency was independent of the breaches of Rule 9. The Committee failed to consider or address that argument. Further, even if that was the correct date for assessment, the result would be that the shareholders suffered no loss.

(4) The power to order compensation under Section 10(c) should be exercised consistently with the approach taken in 1989 in the case of *Guinness plc/The Distillers Company*, which was indistinguishable on the facts. In that case, the Panel concluded that no compensation was payable to former Distillers shareholders who retained their new shares during a substantial period in which they were trading at an equivalent price at least equal to that which Guinness ought to have offered under Rule 11 of the Code. The Panel there found that Distillers shareholders who accepted Guinness's actual offer would inevitably have accepted the increased offer which ought to have been made under Rule 11. In contrast, Distillers shareholders who retained their new shares during a period at which they were trading at prices at least equivalent to the price that should have been offered under Rule 11 would probably not have accepted an enhanced offer had it been made. The Committee failed to address the argument that the Panel was bound to exercise its power to order compensation consistently with its decision in that instance. It should have concluded that no compensation was payable.

(5) The point on "a false market" in MWB shares at 12 January 2010 relied on by the Committee made no difference.

**The Executive's submissions**

42. The main submissions of the Executive in its Response to the appeal, the Rejoinder and the exchange of letters can be shortly stated as follows.

(1) The price at which the shares in MWB were trading in January 2010 was irrelevant to the question whether the mandatory offer should be made. The shareholders were entitled to receive that offer.

(2) On the findings of the Committee the Remedial Subjects dishonestly concealed their breaches of the Code and their acquisition of statutory control of MWB. They dishonestly induced and obtained a Rule 9 waiver and a false market existed in MWB's shares. That state of affairs persisted over the course of several years.

(3) The MWB shareholders continued to be the victims of that dishonesty, suffered loss and were entitled to have compensation assessed as at the date when MWB went into administration in 2012. They were denied the benefit of the unconditional mandatory offer to which they were entitled under Rule 9.

(4) Contrary to the view taken by the Committee, there was a continuing obligation on the Remedial Subjects as at the date of administration of MWB to make a mandatory offer in accordance with Rule 9.

(5) Further the salient cause of the shareholders' loss was the failure of the Remedial Subjects to make the mandatory offer in 2010 and not MWB's entry into administration in 2012. Assessment of compensation at that later date when the loss crystallised would best give effect to the application of the compensatory principle to the loss flowing from breach of Rule 9.

(6) As for the Mr Balfour-Lynn's reliance on inconsistency with the *Guinness* ruling the position was that that case involved a different provision of the

Code, namely Rule 11, and not the Rule 9 requirement of a mandatory offer for the shares.

**Discussion and conclusions**

**Common law compensation principle**

43. It was common ground before the Committee, and is common ground on this appeal, that the Panel's power under section 954(1) of the Act "to order a person to pay such compensation as it thinks just and reasonable" is a power that must be exercised in accordance with established common law principles regarding compensation for loss.

44. In the view of the Board, a breach of Rule 9 is most closely analogous to breach of statutory duty, and not breach of contract.

45. Both parties made extensive citations to both the Committee and the Board of precedents on the application of the common law compensatory principle to cases on the liability of a wrongdoer for the consequences of a wrongful conduct.

46. The leading authority on the damages issues on this appeal is *South Australia Asset Management Corp v York Montague Ltd (SAAMCO)* [1997] AC 191, from which the following propositions (adapted to the circumstances of this appeal) can be derived:

(1) It is necessary to determine the scope of the duty by reference to the kind of damage from which A must take care to save B harmless.

(2) The scope of the duty, in the sense of the consequences for which the wrongdoer is responsible, is that which the law regards as best giving effect to the obligations imposed on the wrongdoer by the valuer.

(3) Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy, and normally the law limits liability to those consequences which are attributable to that which made the act wrongful.

47. Whether the effect of fraud was to make the wrongdoer liable for all loss suffered (which has been the subject of conflicting decisions) was left open in *SAAMCO*.

48. But in another decision of the House of Lords, *Livingstone v. Rawyards Coal* Co (1880) 5 App. Cas. 25 (which is described in McGregor on Damages (21st ed) at 2-003 as the case in which the general rule on compensation had its origin and has been "consistently referred to or cited with approval" and has "stood the test of time"), Lord Blackburn referred (at 39) to the general rule

> …that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.
>
> and added that the general rule
>
> …must be qualified by a great many things which may arise - such for instance, as by the consideration whether the damage has been maliciously done, or whether it was done with full knowledge that the person doing it was doing wrong. There could be no doubt that there you would say that everything would be taken into view that would go most against the wilful wrongdoer…

49. What was and is in dispute is *how* that principle should be applied to a compensation ruling under Section 10 in this, the first case of its kind to come before the Committee or the Board.

50. The context in this case is a regulatory scheme established under the authority of statute. The relevant rules, including those relating to compensation rulings, are set out in the Code made by an independent supervisory authority with regulatory functions in relation to takeovers. The statutory functions of the Panel are set out in primary legislation, Chapter 1 of Part 28 of the Companies Act 2006.

51. As stated above, the Code is based on General Principles expressed in broad terms and to be applied to achieve the underlying purpose of the Code. In that connection the spirit, as well as the letter, must be observed.

52. It has been seen above that the effect of the General Principles is that in the present context shareholders (which is defined to include a potential offeree company) must have sufficient information to enable them to reach a properly informed decision, and false markets must not be created in the relevant shares. The Code is designed to promote, in conjunction with other regulatory regimes, both the integrity (and transparency) of financial markets and fairness in dealings with shareholders.

53. The commercial context of company takeovers colours the interpretation, application and effect of (a) the Rule 9 requirement of a mandatory cash offer to shareholders, (b) the Section 10 power to make a compensation ruling in an amount that is "just and reasonable" and (c) the common law principle of compensation for loss.

54. The purpose of Rule 9 is material to the measurement of just and reasonable compensation. The Code was made for the protection of shareholders. The object of that (and other Rules) was fairness to shareholders by providing for their ability to make informed decisions about their shares in the target company. The rationale of the requirement of a mandatory cash offer for shares in the circumstances specified was protective of the shareholders.

55. Under Rule 9 and in the circumstances of this case the Remedial Subjects were required to make and the shareholders in MWB were entitled to receive a cash offer of 40p per share for their shares. However, unknown to the shareholders (and to the authorities), the Remedial Subjects (a) were parties to a clandestine concert party, (b) had secured statutory control of MWB and (c) were not prepared to make the offer to shareholders as required by the Code.

56. If the required offer had been made, the shareholders in MWB would have been able to make an informed decision about the offer, and no question of a loss suffered by them on the sale of their shares would have arisen. But, as the cash offer was never made, those shareholders were never able to accept a 40p per share offer from the Remedial Subjects. The continuing fraudulent concealment by the Remedial Subjects of their concert party and their control of MWB meant that the other shareholders were

never in a position before their shares became worthless on the administration of MWB in 2012 to make informed decisions about their shares.

57. The context of Section 10 is also material. It is a provision for enforcing the Code. It confers a wide discretionary power to make an order for payment of compensation for breach of (inter alia) Rule 9 and in such amount as the Panel thinks "just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with."

58. The crucial question is *how* the common law compensation principle affects the amount of what is "just and reasonable compensation." It was common ground before the Committee that the principle was relevant in the sense that a ruling under Section10(c) is for "compensation." It is not a ruling for restitution or the imposition of a penalty.

59. While that is clearly correct, it does not determine how the compensation principle applies to the breach of a requirement in a regulatory scheme for the fair treatment of shareholders on the takeover of a company.

60. The two leading cases (cited above) recognise that, in determining the measure of compensation for loss, the relevant circumstances include matters such as the conduct of the wrongdoer and what Lord Hoffmann described in *SAAMCO* as the possible justification of "some special policy."

61. In the Board's judgment the critical relevant circumstances here, by reference to which compensation has to be determined, are that:

(1) First, the Remedial Subjects remained under a *continuing* obligation until the date of administration to disclose to the Panel (and therefore the market) the existence of the Concert Party, which they had fraudulently concealed. That *continuing* obligation to disclose arose by reason of:

(a) their obligation under Section 9 of the Introduction to the Code **"**Where a matter has been determined by the Panel and a person

becomes aware that information they supplied to the Panel was incorrect, incomplete or misleading …. promptly [to] contact the Panel to correct the position";

(b) their obligation under General Principle 4 not to permit the creation (or continued existence) of a false market in the shares of an offeree company; as the Committee correctly found, there was a false market in the shares of MWB from the closing of the placing until MWB entered into administration, because the market remained oblivious to the fact that MWB's senior management had surreptitiously acquired statutory control of the company;

(c) the fact that, in the absence of disclosure by the Remedial Subjects, they were (on the facts found by the Committee) party to a continuing conspiracy to allow a false market in the shares to persist;

(2) Second, the protective policies of the Code as exemplified in Section 2 of the Introduction are designed principally to ensure that shareholders are treated fairly and given appropriate information.

(3) Third, the Panel has power, as set out in Section 10 of the Introduction, to make a ruling requiring the person concerned to pay, within such period as is specified, to the holders, or former holders, of securities of the offeree company such amount as it thinks just and reasonable so as to ensure that such holders receive what they would have been entitled to receive if the relevant Rule had been complied with. In other words, the Panel has the ability *retrospectively* to impose an order for compensation in an amount which the relevant shareholder would have received at the time of the offer if the relevant rule had been complied with.

62. Against that background, the Board has no difficulty in rejecting the arguments of Mr Balfour-Lynn to the effect that the Committee wrongly applied the compensatory principle. The Board addresses his arguments as follows.

63. His first argument is that the other non-concert party shareholders suffered no loss as a result of the breach of Rule 9 because the then market value of the shares in MWB (trading at 40p per share as at 12 January 2010) meant that the shareholders would not have suffered any loss in consequences of the breach of the requirement to make a cash offer at 40p per share. That, he argues, was because any of them accepting an offer on 12 January 2010 would have had to transfer shares worth at least 40p per share to the Remedial Subjects in exchange. Accordingly, Mr Balfour-Lynn argues that the award of the Committee was not compensatory.

64. In the Board's judgment, that approach ignores the following critical points:

(1) the factual finding of the Committee as set out above that, in fact, the so-called market value of 40p per share in January 2010 was not a true market value at the relevant time, because the market did not know of the undisclosed concert party;

(2) the factual finding of the Committee that any shareholder properly informed as to the concert party would have sold their shares not only at the time of the placement, but also at any time up until administration, had a compliant offer been made, because of concerns about being a minority shareholder in a company where the concert party had effective control;

(3) that, had the true position been disclosed at any time prior to administration, the Panel would have required the Remedial Subjects to have made an offer to the remaining shareholders at 40p per share or otherwise to have compensated them;

(4) the fact that any shareholders who did in fact sell their shares in the intervening period between January 2010 and 21 November 2012 have to give credit for the proceeds of any such sales;

(5) the fact that shareholders are being compensated for the loss of the continuing opportunity to accept a cash bid of 40p per share, as a result of the continuing misrepresentations/failures to disclose on the part of the Remedial Subjects.

65. When that analysis is applied, there is no difficulty in characterising the Committee's award as compensatory. As the Committee found, there was a false market in the shares of MWB from the closing of the placing until MWB entered into administration, because the market remained oblivious to the fact that MWB's senior management had surreptitiously acquired statutory control of the company. The effect was that shareholders lost from January 2010 to November 2012 something valuable to which, if the relevant facts had been disclosed at any time, they were entitled - namely a cash offer as would have been required by Rule 9, subject to giving credit in respect of any proceeds of sale of relevant shares in the period.

66. Mr Balfour-Lynn's second argument was that there was no evidence to establish loss as at the date of the breach on 12 January 2010, on the grounds that that was the relevant date for the assessment of compensation. In this context he relied on *Smith New Court Securities Limited v Citibank N.A.* [1997] AC 254 for the general rule that in tort or contract damages are assessed at the date of breach.

67. Again, for similar reasons, this argument misses the point. First, as the Board has already pointed out, the correct approach here is to ascertain what damages are appropriate for breach of a statutory duty, or a breach which is analogous to a breach of statutory duty; this is not a case of breach of contract. Second, this is a case, as the Board has already pointed out, where there was, on any basis, a continuing obligation on the part of the Remedial Subjects up until the date of the administration to disclose to the Panel the true position in relation to the existence of the concert party. As the Committee found, there was a false market in the shares of MWB from the closing of the placing until MWB entered into administration. That continuing obligation to disclose the true position existed irrespective of whether there was any continuing obligation to make a mandatory offer under Rule 9 (as argued by the Executive) – an issue which it is not necessary to decide. Third, and in any event, *Smith New Court Securities Limited v Citibank N.A.* itself envisages that in certain circumstances, even in a contractual situation, where a fraudulent misrepresentation has been made, the

general approach as to determining the market value of the relevant shares as at the date of the breach may not always be appropriate and it may be appropriate to ascertain the quantum of loss as at a later date.

68. Likewise, the point which Mr Balfour-Lynn made as to the absence of any evidence was also unsound. The Committee was entitled to conclude that that which non-concert party shareholders had been deprived of was the opportunity, with full knowledge of all relevant facts in relation to the concert party, to sell their shares at 40p per share at any time between January 2010 and November 2012. That approach did not require factual or expert evidence as to individual shareholders' specific losses. Cases such as *Zurich Insurance Co plc v Hayward* [2017] AC 142 and *Devenish Nutrition Ltd v Sanofi-Aventis* [2009] Ch 390 demonstrate the wider principle that the victim of a fraud will not be prejudiced by evidential uncertainties created by the defendant and that a "broad axe" and "pragmatic view" is taken as to the degree of certainty and particularity with which damages must be pleaded and proved.

69. Mr Balfour-Lynn's third argument was that any loss sustained by shareholders was outside the scope of the Remedial Subjects' duty under Rule 9 because such loss was caused by MWB's entry into insolvency on 21 November 2012. He submitted that the insolvency was independent of the breaches of Rule 9 and that accordingly the quantum of damages was nil. For similar reasons to those given above the Board rejects this argument. As the Executive pointed out in its rejoinder submissions, the reality is that, if the existence of the concert party at the time of the whitewash had been revealed (even during the administration or the liquidation), the Remedial Subjects would then have been required by the Panel to make the mandatory offer at a price of 40p per share, which would have been unconditional and the overwhelming likelihood is that MWB shareholders would have accepted it. Alternatively, the Panel would have required the Remedial Subjects to pay compensation for the loss of the opportunity to have accepted such an offer.

70. Mr Balfour-Lynn's fourth argument was that the power to order compensation under Section 10(c) should be exercised consistently with the approach taken in 1989 in the case of *Guinness plc/The Distillers Company* ("*Guinness*"), which, he contended, was indistinguishable on the facts from the present case. He submitted that the Panel in

Guinness had concluded that no compensation was payable to former Distillers shareholders who retained their new shares during a substantial period in which they were trading at an equivalent price at least equal to that which Guinness ought to have offered under Rule 11 of the Code.

71. The Board accepts the submission of the Executive that there is nothing in the Committee's Ruling which is inconsistent with the approach in *Guinness*, which involved a completely different provision of the Code, viz. Rule 11. There is a material distinction not only between the facts of the two cases but also between a breach of Rule 11 (as in *Guinness*) and a breach of Rule 9 (as in the present case).

72. In the *Guinness* case:

(1) Guinness made a cash and paper offer for Distillers of five Guinness shares and 516p in cash for every three Distillers shares. The main offer was accompanied by a cash alternative offer of 630.3p per Distillers share. However, after Guinness's offer had become unconditional, the Panel determined that the purchase of shares during the offer period by a person which was subsequently determined to have been acting in concert with Guinness had triggered an obligation under Rule 11 for Guinness to have made a cash offer at 731p per share – i.e. such that the cash alternative should have been made at a price that was 100.7p per share higher than the price at which it was actually made;

(2) given that the Guinness offer for Distillers had become unconditional, the question that the Panel had to decide was whether (and, if so, in what amount) former Distillers shareholders should be compensated on account of the fact that the cash alternative should have been made on better terms than it was. The Panel determined that, where it could be inferred that a former Distillers shareholder would have accepted a cash alternative offer made at 731p per share, the shareholder should receive a "top up" payment equivalent to the difference in value between what the shareholder received (by way of offer consideration, if the shareholder accepted the offer, or by way of sale

proceeds, if the shareholder sold its Distillers shares in the market) and what the shareholder should have received; and

(3) the Panel decided that this inference could be drawn:

(a) in the case of shareholders who accepted the cash alternative or who sold their Distillers shares for cash in the market, by reference to the fact that they would clearly have accepted a cash alternative which delivered higher cash proceeds than those which they actually received; and

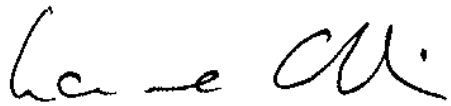
(b) in the case of shareholders who accepted the main shares and cash offer, by reference to whether they elected to sell their Guinness shares prior to those shares reaching a value which equated to the terms on which the cash alternative should have been made.

73. But as the Executive point out in their submissions, in the present case the facts are very different. Here, an obligation to make a mandatory offer under Rule 9 was triggered but no offer was made in compliance with that Rule (which would have required the publication of an offer document which included, among other things, details of the beneficial ownership of the Audley Companies and the true extent of the concert party's shareholdings, and of how those shareholdings in MWB had been acquired). As a result, there was no opportunity for former MWB shareholders to have (or not have) made an informed acceptance decision, and there were no subsequent actions on their part or other events which could be used as a proxy for establishing whether they should receive compensation and, if so, in what amount.

74. Accordingly, the Board does not consider that the pragmatic approach adopted in *Guinness* provides any guidance for the appropriate approach to compensation in the present case.

75. For the above reasons the appeal is dismissed.

For the Takeover Appeal Board



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Lord Collins of Mapesbury, FBA, LLD (Chair)

July 26th, 2024