Neutral Citation Number: [2024] EWHC 3044 (Ch)

Case No: CR-2024-004942

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

IN THE MATTER OF MWB GROUP HOLDINGS PLC.
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/11/2024

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

- -

Between :

THE PANEL ON TAKEOVERS AND MERGERS	**Claimant**
- and -	
(1) MR. RICHARD GARY BALFOUR-LYNN	**Defendants**
(2) MR. JAGTAR SINGH	
(3) MR. GUY RICHARD ASPLAND-ROBINSON	

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- -

ALAN MACLEAN K.C., BARNABY LOWE (instructed by **Gibson, Dunn & Crutcher UK LLP**) for the **Claimant**
RICHARD BALFOUR-LYNN in Person
GUY ASPLAND-ROBINSON in Person
JAGTAR SINGH not appearing

Hearing dates: 20 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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CHIEF INSOLVENCY AND COMPANEIS COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. By a Part 8 Claim dated 20 August 2024, amended by order of ICC Judge Burton on 26 September 2024, and re-amended by consent on 12 November 2024, the Claimant (the "Panel") asks this court to make orders to secure compliance with rulings made by the Panel's Hearings Committee at various times in 2023.

2. The Claim is made pursuant to the Companies Act 2006 (the "Act") in compliance with CPR PD 49A.

3. Following a member's complaint, the Panel investigated the acquisition of shares by the Defendants in MWB Group Holdings Plc ("MWB"). The Panel's Hearings Committee subsequently held hearings and directed the defendants to pay compensation for breaching the City Code on Takeovers and Mergers (the "Code")"Code.

4. The Hearings Committee directed that the Defendants be jointly and severally liable to pay £850,000 in respect of fees and third-party expenses as are reasonably incurred by the compensation scheme administrator and compensation with interest in the sum ultimately calculated at £43,996,510.92.

5. The Claim form is supported by the evidence of Mr Crawshay, Deputy Director General of the Panel.

The parties

6. The Defendants were members of MWB, and held various positions in MWB. Mr Crawshay says:

> "The First Defendant, Mr Balfour-Lynn, is one of the two founders of Warwick Balfour Properties Plc, a commercial and residential property development and investment company which, as its operations expanded, changed its name to Marylebone Warwick Balfour Group Plc. 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. During the relevant period, Mr Balfour-Lynn was the chief executive of MWB, and the chairman of the following subsidiaries of MWB: Liberty Retail Plc ("Liberty"), MWB Business Exchange Plc ("MWB Business Exchange") and MWB Malmaison Holdings Limited ("Malmaison")… [Mr Singh] was one of the joint finance directors of MWB and a non-executive director of Liberty, MWB Business Exchange and Malmaison…Mr Aspland-Robinson was an executive director of MWB Business Exchange."

7. Mr. Balfour-Lynn appointed Messrs. David Rubin and David Birne, insolvency practitioners at Begbies Traynor (London) LLP as nominees in respect of an Individual

Voluntary Arrangement proposal by Mr. Balfour-Lynn. On 30 July 2024 Begbies wrote to the Takeover proposing that Mr Balfour-Lynn was willing to enter into a voluntary arrangement where he would pay £2 million to the Panel over a period of five years. Begbies explained that the payments were to be made by Mr Balfour-Lynn's wife. In court Mr Balfour-Lynn informed me that his wife is a wealthy individual and had never been reliant on his income. In response the Panel's solicitors, Gibson Dunn & Crutcher UK LLP, wrote explaining that the Panel was not a creditor of Mr Balfour-Lynn. It is the shareholders of MWB that are entitled to compensation. In response, Mr. Balfour-Lynn withdrew his proposal and, after several months of correspondence, no further Code-compliant proposal has been submitted.

8. On 17 January 2022, Mr. Aspland-Robinson was adjudged bankrupt.

9. On 28 July 2022, Mr. Singh was adjudged bankrupt.

10. The Official Receiver, as Trustee-in-Bankruptcy of Mr. Aspland-Robinson, did not attend the hearing.

11. Mr. Hunt of Griffins, as Trustee-in-Bankruptcy of Mr. Singh, attended the hearing through one of his colleagues, Mr. Jain, but did not participate.

12. As regards the Claimant, it was established as an independent body in 1968, with its main function being to issue and administer the Code. In 2006, the Panel was put on a statutory footing by Part 28 of the Act. It establishes the Takeover Panel, which oversees and regulates takeovers and mergers, makes rule and regulations that give effect to the general principles of takeovers, specifies the percentage of voting rights that constitutes control of a company and implements the European Directive on takeover Bids (2004/25/EC), which sets out the framework for conducting takeover bids prior to the withdrawal of the United Kingdom from the European Union.

13. The Code applies, among other things, to takeover and merger transactions of public companies with registered offices in the United Kingdom, if any of their securities are admitted to trading on a regulated market or multilateral trading facility, such as the Alternative Investment Market in the United Kingdom. The Code also applies in respect of the acts and omissions of any person in connection with the takeover or merger of a relevant company or any matter to which the Code applies.

14. The day to day work of takeover supervision and regulation is carried out by the Panel's Executive (the "Executive"), pursuant to authority delegated to it by the Panel, in terms of the Second Resolution dated 10 January 2007. The executive is headed by the Director General, who is an officer of the Panel.

15. Sections 943 and 944 of the Act provide for rules to be made by the Panel. The Code forms a part of the rules.

16. Section 951(3) of the Act requires that the rules made by the Panel must provide for decisions of the Panel to be subject to review by a committee of the Panel known as the "Hearings Committee". There is a right of appeal against a decision of the Hearings Committee ("Committee") to an independent tribunal, known as the "Takeover Appeal Board".

17. Mr Crawshay explains that the purpose of the Code is:

> "…principally to ensure that shareholders in an offeree company are treated fairly, are not denied an opportunity to decide on the merits of a takeover, and that shareholders of the same class in the offeree company are afforded equivalent treatment by an offeror."

18. His position is that the Panel made a clear decision that the Defendants contravened the Code and made consequential rulings.

Investigation and the Rulings

19. On 15 December 2011, the Panel received a complaint from Pyrrho Investments Limited ("Pyrrho"), a family investment fund based in Hong Kong, in relation to dealings in MWB shares. Mr Crawshay says:

> "Pyrrho alleged that, since 2009, there had been an undisclosed concert party in existence, and that this group had gained control over MWB in breach of the Code. At the time of the complaint, Pyrrho was the largest single shareholder in MWB, holding 24.4% of MWB's issued share capital. Following receipt of the complaint, the Executive commenced its investigation into MWB. 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. On 16 December 2022, the Executive initiated proceedings before the Hearings Committee against the Defendants and eight other individuals, setting out the Executive's conclusion that serious breaches of the Code had taken place…"

20. The Defendants had failed to comply with Rule 9 of the Code which required them to make an offer to "the holders of any class of equity share capital whether voting or non-voting and … to the holders of any other class of transferable securities carrying voting rights". The obligation to make an unconditional offer arises where:

> "…any person acquires an interest in shares which (taken together with shares in which the person or any person acting in concert with that person is interested) carry 30% or more of the voting rights of a company; or any person, together with persons acting in concert with that person, 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 that person, acquires an interest in any other shares which increases the percentage of shares carrying voting rights in which that person is interested".

21. Mr Crawshay explains that the usual practice, where there has been a breach of Rule 9, is for the Executive to require the contravening party to make an offer to shareholders who

are not members of the concert party. The Panel has other powers to require a compensation payment, to impose censure and disciplinary action.

22. A compensation requirement may be made pursuant to section 10 (c) of the Introduction to the Code ("section 10(c)"):

> "Where a person has breached the requirements of any of Rules [...] 9, [...) of the Code, 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."

23. Two hearings of the Committee were held: (i) the first from 30 October 2023 to 17 November 2023, following which the "Ruling" dated 22 December 2023 was handed down; and (ii) the second on 31 January 2024, following which the "Supplementary Ruling" dated 16 February 2024 was handed down.

The Committee Ruling

24. The introduction to the Ruling explains that the allegation made against the Defendants is that in the period 2009 to 2010 they acted in concert to acquire shares in MWB. The acquired shares, when added to the existing shares held by the concert party, amounted to 50.33% of MWB's issued share capital. The acquisition was fronted by Audley Capital Advisors LLP which was designed to mislead shareholders. The Executive alleged that by sham sales of two corporate vehicles which had been incorporated to hold the relevant shares, the members of the undisclosed concert party contrived to give the impression that they had divested themselves of whatever interests they had previously held in those shares.

25. The Ruling states [10-19]:

> "This is the first occasion upon which the Committee has been asked to order the payment of compensation under the powers conferred by section 954(1) of the Act and section 10(c)…
>
> 11. Apart from Mr Blurton, against whom the Executive advances a limited and less serious case, each of the other Respondents is accused of misleading the Executive during its investigation into the material transactions contrary to section 9(a) of the Introduction to the Code ("section 9(a)"). As set out below, section 9(a) sets the standards of conduct which are to be met by anyone dealing with the Takeover Panel…
>
> 15. Following a procedural hearing held on 23 February 2023, the Chairman of the Committee issued a procedural programme

> leading to a hearing of the substantive issues which commenced on 30 October 2023 and lasted for 15 days.
>
> 16. At the procedural hearing of 23 February, Mr Eker admitted through counsel that he had lied to the Executive during its investigation and admitted the case against him in its entirety, including, in particular, that the shares of MWB held, as explained below, by a BVI corporate vehicle owned by Mr Eker were in truth beneficially owned by Mr Balfour-Lynn who had indirectly funded their acquisition.
>
> 17. For his part, at the same hearing 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. As the Executive's claim against Mr Eker for compensation was advanced as an alternative case to cover the possibility that the Executive failed to establish Mr Balfour-Lynn's beneficial interest in the shares held by the BVI vehicle owned by Mr Eker, the compensation claim against Mr Eker was withdrawn in light of the concessions made at the procedural hearing…
>
> 19. The procedural directions issued on 27 February 2023 provided for exchange of response and reply submissions followed by service of witness statements. It emerged from these exchanges that neither Mr Singh nor Mr Aspland-Robinson would be serving witness statements or giving evidence and, like Mr Balfour-Lynn, they would not be mounting a positive challenge to the facts alleged against them by the Executive…"

26. The Committee found:

> "There can be no doubt that Mr Bafour-Lynn, Mr Singh, Mr Aspland-Robinson and Mr Eker were acting in concert in acquiring in the placing through the vehicles of AIPL and ACDL shares amounting to some 15.2% of MWB's enlarged share capital. Irrespective of the professional and personal relationships that existed between them, the source of funds establishes their concerted action. Mr Balfour-Lynn provided all the funds for the shares acquired by Mr Eker's company, ACDL, with the result that Mr Balfour-Lynn became sole beneficial owner of ACDL's shares. Mr Singh, Mr Balfour-Lynn and Mr Aspland-Robinson together provided the funds for the shares acquired by Mr Aspland-Robinson's company, AIPL with the result that they each acquired beneficial interests in the shares of AIPL in proportion to their respective contributions to their purchase price. Similarly, in acquiring 2.5% of MWB's issued share capital on 1 June 2009 with the assistance of funds advanced by Mr Balfour-Lynn, for the reasons previously stated

> Mr Aspland-Robinson was undoubtedly acting in concert with both Mr Balfour-Lynn and Singh."

27. The Committee took specialist advice from Andrew Thornton KC and Ben Shaw KC on the issue of jurisdiction under section 954 of the Act. It was common ground that section 954(1) of the Act provides a discretion to order compensation.

28. Satisfied that it had jurisdiction, the Committee observed [227] that the documentary evidence was so overwhelming that no positive challenge could be mounted to challenge the intent of the Defendants to obtain control over MWB by deceit and avoidance of the Takeover Rules. The Committee observed [269]:

> "The present is a classic instance of a case where Remedial Subjects' fraud continued to influence the shareholders of MWB and the value of their shares. For the reasons explained above, 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. Pyrrho's misapprehension as to the independent status of the Audley Investors appears to have been shared by the financial press, the independent directors, the Panel and the market generally. It is to be inferred from this that the shareholders of MWB were misled into believing that Audley Investors were independent shareholders whereas in fact their shares were controlled by MWB's senior directors."

29. The Committee concluded that the appropriate date for the assessment of compensation was the date MWB entered Administration namely 21 November 2012. The reasoning for the date is that all the value in MWB (which was to move to a creditors' voluntary liquidation) had been lost. It found that the Defendants were to pay all shareholders of MWB who were not part of the concert party but on the register of shareholders on 12 January 2010 at a rate of 40 pence per share. Some members had sold their shares after 12 January 2010 making necessary an adjustment. The Committee made all Defendants jointly and severally liable.

30. In the Supplemental Ruling, the Committee directed the Defendants to make the following payments on a joint and several basis:

    30.1. (i) a payment of £850,000 by 1pm (UK time) on 13 August 2024;

    30.2. (ii) a payment of £10 million by 1pm (UK time) on 30 August 2024;

    30.3. (iii) a payment of £10 million by 1pm (UK time) on 30 September 2024; and

    30.4. (iv) a payment to be calculated by the scheme administrator, which was ultimately determined to be £23,996,510.92 by 1pm (UK time) on 30 October 2024.

31. On 26 July 2024 the direction and ruling of the Committee was upheld on appeal to the Takeover Appeal Board, an independent board comprising Lord Collins of Mapesbury, Sir John Mummery and Dame Elizabeth Gloster. The Appeal Board confirmed the

Committee's decision that the Panel has the ability retrospectively to impose an order for compensation in an amount which the relevant shareholders would have received at the time of the offer if the relevant rule had been complied with.

32. Mr Balfour-Lynn argued that the Committee had wrong applied the compensatory principle. The Appeal Board rejected his argument that the shareholders had suffered no loss as a result of the breach of Rule 9 as they would have had to transfer the shares to the Defendants. The transfer of shares would have been a transfer of equal value to the 40 pence per share compensation directed by the Committee. The Appeal Board explained that the award directed by the Committee was compensatory as the Defendants had created a false market from the closing of the placing until MWB entered administration. This was because the market remained oblivious to the deceit and the shareholders lost something valuable; the chance to accept a cash offer.

33. The Appeal Board concluded [73] that the Committee Ruling was unimpeachable, there had been a breach of Rule 9 and compensation had been properly directed under section 10:

> "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."

34. The hearing today is not an appeal against the decision of the Appeal Board. Accordingly the Ruling of the Committee as upheld on appeal constitutes the facts upon which the court is invited to make an order pursuant to section 955 of the Act.

Legal analysis

35. Section 955 of the Act provides the court with a discretion to make an order to secure compliance with a rule:

> "(1) If, on the application of the Panel, the court is satisfied –
>
> […]
>
> (b) that a person has contravened a rule-based requirement […]
>
> the court may make any order it thinks fit to secure compliance with the requirement.
>
> […]

> (4) In this section –
>
> "contravene" includes fail to comply;
>
> […]
>
> "rule-based requirement" means a requirement imposed by or under rules."

36. There has been only one judicial consideration of section 955 of the Act. The Panel decided that Mr King had contravened the Code by acting with others to acquire more than 30% of the paid up share capital in Rangers International Football Club plc. The company had not entered an insolvency process and thus the Board directed Mr King to comply with the Code and make an offer to shareholders. The matter came before the Outer House of the Court of Session (the "Outer House") to decide the issue of enforcement under section 955 of the Act: *Panel on Takeovers and Mergers v. King* [2017] C.S.O.H. 156; [2018] S.L.T. 79.

37. In *King* it was argued that a section 955 order should not be made as Mr King was without funds to pay. The impecuniosity argument advanced did not impress Lord Bannatyne. The Outer House found [69], on a purposive construction of section 955, that the court has a discretion to refuse to grant an order.

38. As part of his reasoning, Lord Bannatyne thought [84] that the observation of Sir John Donaldson in *Ex parte Datafin Plc* [1987] QB 815 "can be read across when considering the ambit of the court's powers in terms of section 955". The observation Lord Bannatyne was referring to the observation that, decisions of the Panel subsist until set aside (similar to a court order), are of significant public interest and subject to judicial review [840 A-C]:

> "I think that it is important that all who are concerned with takeover bids should have well in mind a very special feature of public law decisions, such as those of the Panel, namely that however wrong they may be, however lacking in jurisdiction they may be, they subsist and remain fully effective unless and until they are set aside by a court of competent jurisdiction. Furthermore, the court has an ultimate discretion whether to set them aside and may refuse to do so in the public interest, notwithstanding that it holds and declares the decision to have been made ultra vires: see, for example Reg v Monopolies and Mergers Commission, ex parte Argyle Group Plc [1986] 1 W.L.R 73. That case ... further illustrates an awareness that such decisions affect a very wide public which will not be parties to the dispute and that their interests have to be taken into account as much as those of the immediate disputants."

39. Lord Bannatyne found on a claim made pursuant to section 955, following a decision of the Committee, that it is usual to make an order. Only in "very exceptional circumstances" [82] would a court exercise its discretion not to make an order.

40. The decision of the Outer House was upheld by the Inner House of the Court of Session (the "Inner House"): *Panel on Takeovers and Mergers v. King* [2018] C.S.I.H. 30; [2018]

S.C. 459. On the issue of the discretion Lord Drummond Young said that it would be a "rare" case where an order would not be made. He observed [14]:

> "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."

41. And on the issue of the exercise of discretion under section 955 of the Act [15]:

> "…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." (my emphasis)

42. In my view the discretion provided to the court is at large. Although the factual matrix may persuade a court to make any section 955 order in the majority of cases, there will be circumstances where the discretion will be exercised against making such an order. I do not think it helpful to add an additional language to the statutory wording such as "in exceptional circumstances", "very exceptional circumstances" or "rare cases". The court will have to balance relevant factors in the usual way. Factors that weigh in favour of making an section 955 order include a thorough investigation by the Executive, a hearing by a properly constituted Committee, the admissions (denials and non-admissions) made by the defendants, the outcome of an appeal to the Takeover Appeal Board and the observations made by Sir John Donaldson in *Datafin plc*. Factors that may weigh against may include an offer made for the shares following a Panel ruling. The discretion is to be exercised with the public policy in mind namely, to ensure that shareholders in an offeree company are treated fairly, are not denied an opportunity to decide on the merits of a takeover, and that shareholders of the same class in the offeree company are afforded equivalent treatment by an offeror.

43. In this case two of the Defendants have been adjudged bankrupt and the third claims he cannot (nor is it realistic for him to) meet the liability. In my view the exercise of discretion should not be weakened adding additional terms nor should the factors I have mentioned be simply brushed aside on the basis that the discretion should be rarely exercised against the making of a section 955 order.

Discussion

Mr Balfour-Lynn

44. Mr Balfour-Lynn carefully took me through submissions he had prepared. He explained to the court that Pyrrho, the original complainant, was one of the public shareholders in MWB.

He said that Pyrrho held just under 25% of MWB's share capital and would vote down any proposal for a voluntary arrangement. He felt that Pyrrho, a Chinese owned company, "had it in for him" as it had a long history of being antagonistic to the board of directors. He drew my attention to his non bankrupt status and explained that he did not want to be adjudged bankrupt. He thought that bankruptcy would scar his reputation as a businessman and said that his ego would be bruised. He felt that the Panel, had it accepted it was a creditor, could have gone further to help him with his proposals for an arrangement. He said it was in the best interests of the shareholders as a whole that they receive something. He has no assets that will be available to creditors in the event of his bankruptcy.

45. There are several reasons why Mr Balfour-Lynn's claim of impecuniosity is insufficient to justify no section 955 order. First, he has not produced, with full disclosure, a list of assets and liabilities. Secondly, there is a good public interest reason why inability to pay should weigh very lightly in the balance of discretion. As Lord Bannatyne, sitting in the Outer House in *King* eloquently explained [98]:

> "…if the court were not to grant the application on the basis of the respondent's alleged impecuniosity it would materially undermine the working of the Panel ... it would allow parties to circumvent Rule 9 by arranging their financial affairs in such a way that when they were called on to comply with their obligations in terms of Rule 9 they could say they did not have the funds to comply with that rule… it would not allow the Panel to fulfil one of its principle functions of achieving fairness of treatment amongst shareholders."

46. Mr Balfour-Lynn, an intelligent and articulate man, did not say a section 955 order should not be made due to his inability to meet the debt. He recognised that there is a difference between liability to pay and ability to pay. He accepted the facts found by the Committee and acknowledged to the court that he had made mistakes.

47. In my judgment there are no substantive factors that weigh against making a section 955 order against Mr Balfour-Lynn.

Mr Singh and Mr Aspland-Robinson

48. In the case of Mr Singh and Mr Aspland-Robinson Trustees-in-Bankruptcy have been appointed in respect of each of them. Section 306 of the Insolvency Act 1986 provides:

> "(1)The bankrupt's estate shall vest in the trustee immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee."

49. The vesting takes place automatically without conveyance. The bankrupt's estate comprises all property belonging to or vested in the bankrupt, or in which the bankrupt has an interest, at the date the bankruptcy order was made. The definition of a bankrupt's estate (as well as some important exclusions) is contained in section 283 of the Insolvency Act. Property comprising the bankruptcy estate is widely defined in section 436 of the Insolvency Act and covers tangible and intangible assets.

50. A bankruptcy creditor is anyone to whom the debtor owes a bankruptcy debt. The definition of a creditor is provided by section 383 of the Insolvency Act as follows (where relevant):

s. 381 (1)"Creditor"—

> "(a)in relation to a bankrupt, means a person to whom any of the bankruptcy debts is owed (being, in the case of an amount falling within paragraph (c) of the definition in section 382(1)…and
>
> (b)in relation to an individual to whom a bankruptcy petition relates, means a person who would be a creditor in the bankruptcy if a bankruptcy order were made on that petition."

51. Section 382 of the Insolvency Act provides:

> "(1)"Bankruptcy debt", in relation to a bankrupt, means (subject to the next subsection) any of the following—
>
> (a)any debt or liability to which he is subject at the commencement of the bankruptcy, (b)any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy… and (d)any interest provable as mentioned in section 322(2) in Chapter IV of Part IX.
>
> (2)In determining for the purposes of any provision in this Group of Parts whether any liability in tort is a bankruptcy debt, the bankrupt is deemed to become subject to that liability by reason of an obligation incurred at the time when the cause of action accrued.
>
> (3)For the purposes of references in this Group of Parts to a debt or liability, it is immaterial whether the debt or liability is present or future, whether it is certain or contingent or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion; and references in this Group of Parts to owing a debt are to be read accordingly.
>
> (4)In this Group of Parts, except in so far as the context otherwise requires, "liability" means (subject to subsection (3) above) a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution."

52. To crudely summarise a bankruptcy debt is one where the debtor owes a debt at the date of the bankruptcy order or is under an obligation incurred by the debtor before the bankruptcy order, but which falls due after the date of the order.

53. By section 285(3) of the Insolvency Act a creditor holding a bankruptcy debt has no further remedy against the bankrupt or his property once an adjudication or bankruptcy is made.

54. In my judgment this factor may weigh heavily against the making of a section 955 order. The reason is that if a liability existed prior to the making of a bankruptcy order the creditor is to prove in the bankruptcy. An order is unlikely to enhance the ability to prove following a decision of the Committee and in some cases following such a decision and an appeal (it has not been argued that it will). In simple terms there would be no point in making an order to secure compliance when the debt has been absorbed by an intervening bankruptcy. This is likely to be what Lord Drummond Young had in mind in the *King* decision [15]. However, I bear in mind I have not been addressed on the issue. There may be some circumstances where an section 955 order promotes the public policy underlying the Code notwithstanding insolvency.

55. The first issue that presents itself is whether the liability arising by reason of the Ruling is a bankruptcy debt. Mr Singh and Mr Aspland-Robinson were adjudged bankrupt in 2022. The Ruling did not take place until the end of 2023.

56. In *Re Nortel Companies and others* [2013] UKSC 52 the Supreme Court was asked to determine whether a Financial Support Direction and/or Contribution Notice issued by the Pensions Regulator, pursuant to ss. 43 and 47 Pensions Act 2004 respectively, after a company had gone into administration gave rise to a provable debt. For the contribution to be a provable debt it needed to be classified as a contingent debt at the time of the insolvency.

57. Lord Neuberger (with whom Lords Mance, Clarke, and Toulson agreed) held [72] that the liability imposed by the issuing of a Financial Support Direction and/or Contribution Notice was a "liability under an enactment" within the meaning of the Insolvency Rules 1986, r. 13.12(4). Lord Neuberger held [77]:

> "However, the mere fact that a company could become under a liability pursuant to a provision in a statute which was in force before the insolvency event, cannot mean that, where the liability arises after the insolvency event, it falls within rule 13.12(1)(b). It would be dangerous to try and suggest a universally applicable formula, given the many different statutory and other liabilities and obligations which could exist. However, I would suggest that, at least normally, in order for a company to have incurred a relevant "obligation" under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If these two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b)".

58. In summary, a debtor will be under an obligation if, at the date of the bankruptcy order, they faced a real prospect of becoming the subject of a payment liability arising from a legal duty or relationship (for example, a contractual obligation or a relationship imposed by a statutory scheme), or where the obligation arises in respect of some duty to a third party (such as, a liability in tort).

59. I note that section 281 of the Insolvency Act is silent on the effect of discharge on a liability arising from a decision of the Panel. There may be good policy reasons, as alluded to by Lord Bannatyne in *King* [98], why such a liability should survive discharge. That is a matter for the policy arm of the Insolvency Service.

60. I have not been addressed by the Trustees-in-Bankruptcy of Mr Singh or Mr Aspland-Robinson on the issue of contingent liability and neither have I been asked to decide the issue. The court would require more information to understand when and how Mr Singh and Mr Aspland-Robinson became subject to a legal duty and the point at which they became vulnerable to the extent that there was a real prospect that the liability was incurred (rather than it being enforced). Nevertheless it seems to me that it is at least arguable that MWB's shareholders became contingent creditors at the time Defendants obtained more than 30% of MWB's shareholding and failed to make an offer in breach of Rule 9 of the Code. Alternatively there is at least an arguable case that the shareholders became contingent creditors when the Committee concluded that the appropriate date of compensation was the date MWB entered Administration namely, 21 November 2012.

61. Weighing the discretion vested in the court by reason of section 955 of the Act, having regard to the public policy, the long and complex investigation by the Executive, the Ruling of the Committee, the admissions made by the Defendants in the course of the hearing, the outcome of an appeal to the Takeover Appeal Board, on one side and on the other the timing of the liability that has arisen but importantly in this case observing that the bankruptcy issue is not strictly before me, and there being no submissions that an order should not be made, I find there is good reason to justify making a section 955 order as it will promote the policy to ensure that shareholders in an offeree company are treated fairly, and that shareholders of the same class in the offeree company are afforded equivalent treatment by an offeror.

Conclusion

62. In conclusion, Mr Singh, Mr Aspland-Robinson and Mr Balfour-Lynn are subject to directions from the Panel to make payments totalling £44,846,510.92. They have failed to do so.

63. In accordance with section 955 of the Act I make orders to secure compliance with the requirement to make payment.

64. I shall direct the Panel to serve a copy of this judgment on the Trustees-in-Bankruptcy of Mr Singh and/or Mr Aspland-Robinson. This will enable them to take legal advice and/or seek directions from the court as to whether any debt arising from the breach of Rule 9 of the Code, and the subsequent decisions made by the Panel, is provable in the bankruptcy estates.

65. The Claimant shall have carriage of the order.