THE TAKEOVER PANEL
HEARINGS COMMITTEE

2007/18

WORLD TELEVISION GROUP PLC
("WTV" or "THE COMPANY")

WTV SHAREHOLDERS' ACTION GROUP
("WTVSAG")

HEARINGS COMMITTEE DECISION

1. SUMMARY

The issue in this appeal is whether or not the conversion into shares in April 2007 of convertible loan notes issued by WTV by a group of shareholders alleged to be a concert party triggered an obligation on that group to make a bid for the shares of the Company in accordance with Rule 9 of the Takeover Code.

The Executive has ruled that no such obligation arose and that decision is challenged by WTVSAG.

The first question is whether at the time of the conversion there was simply a single concert party within the meaning of Rule 9 which together already had before conversion an interest in more than 50% of the shares in WTV or whether, within that concert party, there was a sub concert party which at the time of conversion had an interest in either less than 30% or between 30% and 50% of the shares in WTV.

In the former case, no bid would be required under Rule 9 (unless the balance between the group has changed significantly). In the latter case, a bid would normally be required from the members of the sub concert party, no dispensation from the provisions of Rule 9 having been obtained through a vote of the independent shareholders when the convertible loan notes were issued.

The second question is whether, if there is simply a single concert party, there has been a change to the balance within that party for the purposes of Note 4 on Rule 9 and thus potentially an offer obligation.

The Hearings Committee (“the Committee”) dismissed the appeal for the reasons which follow.

2. THE TAKEOVER CODE

2.1 General Principle 1

This provides

> **"All holders of the securities of an offeree company of the same class must be afforded equivalent treatment; moreover, if a person acquires control of a company, the other holders of securities must be protected."**

2.2 Mandatory Offers

The Code requires that, unless the Panel agrees otherwise, when a person acquires an interest in shares which, when taken together with the interests in shares held by persons acting in concert with him, gives that person effective control of the company, that person is required to make an offer in cash to the other shareholders at the highest price paid by him during the preceding 12 months ("the offer obligation"). Effective control for the purposes of the relevant provisions of the Code is set at 30% or more of the voting rights of the Company.

The Code similarly requires that, if the shares in which a person (together with persons acting in concert with him) is interested carry at least 30% of the voting rights of the company but not more than 50% of those rights, no member of the concert party may acquire an interest in any of the shares carrying voting rights in the company without incurring an offer obligation.

Thus, the Code imposes an offer obligation both on the acquisition of control at 30% and upon the consolidation of control at a point within the 30% to 50% band of a company's voting rights.

However, whilst a person (together with persons acting in concert with him) holds an interest in shares carrying more than 50% of a company's voting rights, he has statutory control of the company and no offer obligation normally arises from further acquisitions of interests in shares by any member of the concert party.

Agreeing to act in concert without acquiring more shares does not result in an offer obligation even if thereby the combined shareholdings exceed the Code thresholds.

The relevant provisions of the Code are as follows:

2.3 Definitions

"Acting in concert"

> *"This definition has particular relevance to mandatory offers and further guidance with regard to behaviour which constitutes acting in concert is given in the Notes on Rule 9.1.*
>
> Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other…"

Without prejudice to the general application of this definition, various persons are according to the Definitions section to be presumed to be acting in concert with other persons in the same category. Other presumptions may according to the Executive be applied in practice. One of these is that the vendors of a private company shall be presumed to be acting in concert when the private company is sold to a Code company and they receive, as consideration, shares in that company. This is because

the vendors of the private company are considered likely to have co-operated together both in becoming shareholders in the private company and in agreeing a sale of the private company to the Code company; and also that they are likely to continue to co-operate together once they become shareholders in the Code company.

Although not formally publicised, the Executive believes that this is well understood by the market and is a common feature of whitewash arrangements (as to which see below). Like other presumptions it is capable of rebuttal.

2.4 Rule 9.1

Rule 9.1 provides as follows:

> **"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…."

The Notes on Rule 9.1 include the following provisions:

"NOTES ON RULE 9.1

PERSONS ACTING IN CONCERT

The majority of questions which arise in the context of Rule 9 relate to persons acting in concert. The definition of ''acting in concert'' contains a list of persons who are presumed to be acting in concert unless the contrary is established. Without prejudice to the general application of the definition, the following Notes illustrate how the Rule and definition are interpreted by the Panel. Any Panel view expressed in relation to ''acting in concert'' can relate only to the Code and should not be taken as guidance on any other statutory or regulatory provisions."

"*1. Coming together to act in concert*

Acting in concert requires the co-operation of two or more parties. When a party has acquired an interest in shares without the knowledge of other persons with whom he subsequently comes together to co-operate as a group to obtain or consolidate control of a company, and the shares in which they are interested at the time of coming together carry 30% or more of the voting rights in that company, the Panel will not normally require a general offer to be made under this Rule. Such parties having once come together, however, the provisions of the Rule will apply so that: –

(a) if the shares in which they are interested together carry less than 30% of the voting rights in that company, an obligation to make an offer will arise if any member of that group acquires an interest in any further shares so that

the shares in which they are interested together carry 30% or more of such voting rights; or

(b) if the shares in which they are interested together carry 30% or more of the voting rights in that company and they do not hold shares carrying more than 50% of the voting rights in that company, no member of that group may acquire an interest in any other shares carrying voting rights in that company without incurring a similar obligation."

"*4. Acquisition of interests in shares by members of a group acting in concert*

While the Panel accepts that the concept of persons acting in concert recognises a group as being the equivalent of a single person, the membership of such groups may change at any time. This being the case, there will be circumstances when the acquisition of an interest in shares by one member of a group acting in concert from another member will result in the acquirer of the interest in shares having an obligation to make an offer. Whenever a group acting in concert is interested in shares which together carry 30% or more of the voting rights in a company and as a result of an acquisition of an interest in shares from another member of the group a single member comes to be interested in shares carrying 30% or more or, if already interested in shares carrying over 30%, acquires an interest in any other shares carrying voting rights, the factors which the Panel will take into account in considering whether to waive the obligation to make an offer include:-

(a) whether the leader of the group or the member with the largest individual interest in shares has changed and whether the balance between the interests in the group has changed significantly;

(b) the price paid for the interest in shares acquired; and

(c) the relationship between the persons acting in concert and how long they have been acting in concert.

When the group is interested in shares carrying 30% or more of the voting rights in a company but does not hold shares carrying more than 50% of such voting rights, an offer obligation will arise if an interest in any other shares carrying voting rights is acquired from non-members of the group. When the group holds shares carrying over 50% of the voting rights in a company, no obligations normally arise from acquisitions by any member of the group. However, subject to considerations similar to those set out in the previous paragraph, the Panel may regard as giving rise to an obligation to make an offer the acquisition by a single member of the group of an interest in shares sufficient to increase the shares carrying voting rights in which he is interested to 30% or more or, if he is already interested in 30% or more, which increases the percentage of shares carrying voting rights in which he is interested..."

2.5 Convertible securities

Where a person holds securities which are convertible into new shares he is not treated as interested in the new shares which may be issued on conversion unless or until conversion takes place, whereupon he will become interested in the new shares. In other words, it is the conversion into voting shares, not the issue of convertible securities, which would be relevant for the purposes of triggering any Rule 9 bid. Thus Note 10 on Rule 9.1 provides as follows:

"*10. Convertible securities, warrants and options*

In general, the acquisition of securities convertible into, warrants in respect of, or options or other rights to subscribe for, new shares does not give rise to an obligation under this Rule to make a general offer but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of an interest in shares for the purpose of the Rule..."

2.6 The so-called “whitewash” procedure

The Panel has been willing to waive the requirement to make an offer where the obligation to do so would otherwise arise not as a result of share purchases, but as a result of the issue by the company of new shares. But this is subject to certain conditions which include approval by a vote of independent shareholders taken on a poll at a general meeting of the company.

Before the meeting, shareholders must be sent a circular which describes the proposed transaction and the proposed Rule 9 waiver. This circular must be approved by the Executive and include advice from the company's independent adviser regarding the proposed transaction, details of the controlling position which it will create and an explanation of the effect which it will have on shareholders generally.

Details of these provisions are contained in the lengthy Note 1 on Dispensations from Rule 9.

2.7 Whitewash for convertible issues

Under Note 10 on Rule 9.1, where a whitewash is sought from the obligation to make a mandatory offer following the exercise of conversion or subscription rights, that waiver must be obtained at the time that the convertible securities, or rights to subscribe for new shares carrying voting rights, are issued (and not at the time of conversion or exercise, respectively). This is because it is only at the time of issue of the convertible securities or subscription rights that the shareholders in the Code company can properly weigh the benefit of the additional funding raised against the fact that control of the company may be obtained or consolidated as a result.

The second paragraph of Note 10 on Rule 9.1 provides as follows:

> “*The Panel will not normally require an offer to be made following the exercise of conversion or subscription rights provided that the issue of convertible securities, or rights to subscribe for new shares carrying voting rights, to the person exercising the rights is approved by a vote of independent*

shareholders in general meeting in the manner described in Note 1 of the Notes on Dispensations from Rule 9. However, if the potential controller proposes to acquire any interest in further voting shares following the relevant meeting, the Panel should be consulted to establish the number of shares to which the waiver will be deemed to apply."

3. BACKGROUND

3.1 Early Development of WTL

WTL is a company which was founded in 1991 by Peter Sibley and Andrew Booth who remained its sole shareholders until 2000, when they sought new investors to fund further development. A 30% stake in the company was acquired by Gerald Smith and Salahi Ozturk (or companies owned or controlled by them) and Robert Newman.

By October 2003, Sibley and Booth each owned 35% of WTL. Of the remaining 30%, Newman and his business partner Peter Solbeck each owned 14.25% and Ozturk owned 1.5%.

Solbeck became a non-executive Board member of WTL in March 2003 and Newman regularly attended Board meetings as an observer.

In May 2004, Booth decided to sell shares representing 20% of WTL. Half of these shares were repurchased by WTL and cancelled. The others were purchased by Newman, Solbeck and other friends and acquaintances of Newman. Following these transactions the shareholdings were approximately as follows and remained so until immediately before the reverse takeover of WTL by WTV in August 2004:

	Shareholding (%)
Sibley	38.8
Booth	16.6
Newman	18.5
Solbeck (Archdream Ltd)*	17.6
Lonsdale (Arvon Ltd)*	3.7
Bartlett*	1.8
Ozturk	1.7
Walker*	0.5
TIMSL*	0.4
Wharmby*	0.2
Other (Unidentified)	0.1
Total	**100.0**

* Introduced to WTL by Newman.

3.2 Reverse Takeover of WTL by WTV

In August 2004, WTV (then named Virtue Broadcasting PLC), a company previously unconnected with WTL, acquired WTL in a recommended cash and shares transaction. The vendors of WTL received £1 million in cash and 440,800,265 WTV shares representing 58% of the enlarged WTV. Sibley and Booth received all the cash and proportionately fewer shares than the other vendors. WTV was an AIM-listed company and following the transaction the enlarged group was itself admitted to trading on AIM. It is a Code company.

At this time, the Executive considered that a concert party ("the Concert Party") existed consisting of all the vendors of WTL identified above, applying the general presumption that vendors of a private company should be treated as such (see paragraph 2.3 above).

The Executive also considered that there were two separate concert parties ("sub concert parties") within the one consisting of all the vendors.

The sub concert parties considered by the Executive to exist were as follows:

(a) the Founders' sub concert party

This consisted of Sibley and Booth, the original founders of WTL, who held after the transaction 30.8% of the voting rights in WTV;

(b) the Investors' sub concert party

This consisted of all the other members of the Concert Party, who together held 27.7% of the voting rights in WTV.

Based upon the Executive's rulings, it was necessary to obtain the Panel's waiver of the offer obligation(s) that would otherwise arise under Rule 9. The grant of this waiver was in turn dependent upon a vote of the independent shareholders of WTV (see paragraph 2.6 above). This vote was duly passed on 18 August 2004.

After summarising the provisions of Rule 9, the letter from the Independent Director to the shareholders of WTV stated:

"The members of the Concert Party are deemed to be acting in concert for the for the purpose of the City Code. On completion of the Proposals, the members of the Concert Party will between them own 440,221,306 shares representing approximately 58.44 per cent. of the Company's enlarged issued voting share capital.

In addition, the Panel regards Mr Sibley and Mr Booth who together founded the World business in 1991, as being a sub concert party which will, on completion of the Proposals, own 231,868,979 shares representing approximately 30.78 per cent. of the Company's enlarged issued voting share capital.

Furthermore Mr Newman, Archdream Limited, Arvon Limited, Mr Bartlett, Mr Walker, Mr Ozturk, Mr Wharmby and Treve Investment Management

Service Limited [(“TIMSL”)], who have all acquired shares in World since 2000, are regarded as another sub concert party and on completion of the Proposals will own 208,352,327 shares representing approximately 27.66 per cent. of the Company's enlarged issued voting share capital.

The Panel has agreed, however, to waive the obligation to make a general offer that would otherwise arise as a result of the Proposals, subject to the approval of independent shareholders."

The document set out the following wording (which had been approved by the Executive):

"Following completion of the Proposals, the members of the Concert Party will between them hold more than 50 per cent. of the Company's voting share capital and (for so long as they continue to be treated as acting in concert) may, subject as mentioned below, accordingly increase their aggregate share holding without any further obligation under Rule 9 to make a general offer.

Notwithstanding the waiver, the members of the Concert Party will not be able, without incurring an obligation under Rule 9 to make a general offer to shareholders, to increase their holdings in the Company if: a) to do so, any individual member of the Concert Party, or either sub Concert Party in aggregate, would come to hold 30 per cent. or more of the voting rights of the Company; or b) at the relevant time, the individual member of the Concert Party, or the relevant sub Concert Party in aggregate, holds not less than 30 per cent. but not more than 50 per cent. of the voting rights of the Company.

In addition, for so long as the Founders' sub Concert Party holding remains between 30 and 50 per cent. of the issued share capital of the Company, no member of the Founders' sub Concert Party, will, as a result, be entitled to purchase further shares without triggering any obligation under Rule 9 of the City Code to make a general offer to the other shareholders of the Company.

In addition, no individual member of the Investors' sub Concert Party can acquire additional shares which, when taken together with shares already held by him and other shares held by other members of the Investors' Concert Party, would result in the Investors' sub Concert Party holding shares carrying 30 per cent. or more of the voting rights of the Company."

The independent shareholders passed the necessary resolution, the Panel granted the necessary waiver and the transaction proceeded.

The shareholdings in WTV following this transaction were approximately as follows:

	Shareholding (%)
Sibley	22.3
Booth	8.5
“Founders”	**30.8**
Newman	11.5
Solbeck (Archdream Ltd)	10.9
Lonsdale (Arvon Ltd)	2.3
Bartlett	1.2
Ozturk	1.0
Walker	0.3
TIMSL	0.2
Wharmby	0.1
“Investors”	**27.7**
Total Concert Party	**58.4**
Original WTV shareholders	41.6
Total	**100.0**

Following the reverse takeover, Sibley and Booth joined the board of WTV as Executive Directors and Bartlett as Non Executive Director.

3.3 The issue of convertible loan notes in 2004 ("the 2004 Notes")

In November 2004, after negotiations with the Concert Party, WTV issued convertible loan notes with a nominal value of £1,110,000. They were redeemable at £1.15 per £1 of nominal value (£1,276,500 in aggregate) on or after November 2006. They were convertible, at each holder's option, at a rate of 1 ordinary share for every 1p of redemption value, effectively at any time.

When issuing the 2004 Notes, the Company assumed that the Executive's position in relation to the Concert Party and the sub concert parties remained as before, but this was not tested as the Executive was not consulted and indeed was not made aware of the issue until the end of 2006. The Company's assumption was reflected in an announcement made when the 2004 Notes were issued. The terms of that announcement in respect of the Code requirements were inaccurate in suggesting that a whitewash would be needed on conversion to avoid a mandatory bid under Rule 9. No whitewash was sought or obtained, but in any event that did not become relevant as the 2004 Notes were redeemed in 2007 (see paragraph 3.7 below).

In the result all the members of the Concert Party (other than TIMSL and Simon Wharmby who in the aggregate held only approximately 0.3% of the voting share capital of the Company) subscribed for the Notes, holding in total 97% of the Notes. The participations of the Concert Party members were not directly proportionate to their shareholdings, but reflected personal circumstances and wishes. The other 3% was subscribed for by Colin Weinberg (a stockbroker of Walker Crips who had been introduced to the Company by his friend Newman) and two of his firm's clients.

3.4 Equalisation of Sibley's and Booth's shareholdings

In July 2005, Sibley sold shares representing approximately 7.3% of WTV to Booth. The Executive understands that it had been Sibley and Booth's intention, dating back to when they founded WTL, to maintain equal shareholdings as far as possible. When

Booth sold some of his shareholding in May 2004 for personal reasons, there was an understanding that, should his personal circumstances change, Sibley would be receptive to selling shares to him to redress the balance of holdings between them.

3.5 The agreement not to demand repayment or redemption of the 2004 Notes until after 31 May 2007

In view of pressure on the Company's financial position in the Spring of 2006, negotiations took place between the Company on the one hand and Newman, Solbeck and Lonsdale as representatives of the Concert Party on the other. These led to an announcement on 28 April 2006 that the Company had obtained written undertakings from not less than 75% of the 2004 Notes in nominal value, which would be binding on all the Note holders, that they would not demand redemption or repayment until after 31 May 2007.

Once again, the Executive was not consulted about this and only became aware of the facts at the end of 2006. As in 2004, the announcement of April 2006 seems to have assumed that the Executive's view remained the same as it had been in August 2004 and continued incorrectly to suggest that it did not need to seek a whitewash to waive the requirements of Rule 9 until conversion.

3.6 The events of 2006

As it became clear that without further financing it would not be possible to redeem the Notes after 31 May 2007, the Company explored various cost saving initiatives and possibilities of refinancing the 2004 Notes. When approached by the Company's financial advisers to discuss the possible consequences of a placing of new equity with the Concert Party, the Executive pointed out that it was not necessarily the case that the analysis of 2004 would still be applicable in 2006, but the point was left unresolved as the idea of such a placing was not pursued.

On 21 December 2006, the Company announced that Sibley and Booth would relinquish their roles as Executive Directors and Vice Chairmen and become Non Executive Directors with effect from 1 January 2007.

In January 2007, as part of exploring the financing options available, Steve Garvey, the WTV CEO, asked Booth whether he and Sibley might consider participating in a financing package that did not involve the other members of the Concert Party. Booth declined to do so because he felt they were committed to acting together with the rest of the Concert Party and had no wish to act independently from them, and this was later confirmed by Sibley himself.

Ultimately, following various discussions and meetings involving the Company and/or members of the Concert Party, none of the financing proposals investigated was agreeable to both the Company and the Concert Party.

3.7 Issue of new convertible loan notes ("the 2007 Notes")

As 31 May 2007 approached, the Company entered into negotiations with the Concert Party on the terms of a second loan note issue, the proceeds of which would be used largely to redeem the 2004 Notes. The Company was keen to negotiate a security with no early redemption rights so as to relieve the pressure on the Company's immediate viability and also to raise some additional liquid funds to advance various development projects.

Tim Lonsdale and Fladgate Fielder, the Concert Party's legal advisers, were principally responsible for negotiating the terms of the 2007 Notes on behalf of the Concert Party. Garvey and the Company's legal advisers, Taylor Wessing, represented the Company.

After some negotiation, terms for the 2007 Notes were agreed. The Company received cash of £1.935 million (before expenses), of which approximately £1.2 million was used to redeem the 2004 Notes. The 2007 Notes had a zero coupon and were convertible at any time at a conversion price of 0.25p per share, a discount to the market share price at the time of issue, which was 0.425p. They were redeemable at any time after 31 January 2009 (or earlier on insolvency or if the relevant authorities to convert were not obtained).

The subscribers for the 2007 Notes were the same as those who subscribed for the 2004 Notes other than the clients of Walker Crips. As in 2004, participation in the 2007 Notes was not directly proportional to existing interests in shares. The effect of this on shareholdings in the event of conversion was as follows:

	Shareholding (%) On issue	**Redemption value (£)**	**Shareholding (%) If converted**
Sibley	14.9	248,633	12.8
Booth	14.9	248,633	12.8
"Founders"	**29.8**	**497,266**	**25.6**
Newman (inc. RIHL*)	11.3	562,178	18.7
Solbeck (Archdream Ltd)	10.8	562,178	18.4
Lonsdale (Arvon Ltd)	2.3	202,703	5.9
Bartlett	1.1	202,703	5.4
Ozturk	0.0	101,350	2.4
Walker	0.3	60,811	1.6
TIMSL	0.2	0	0.1
Wharmby	0.1	0	0.1
Weinberg	0.0	60,811	1.5
"Investors"	**26.1**	**1,752,734**	**54.1**
Total Concert Party	**55.9**	**2,250,000**	**79.7**
Other	44.1	0	20.3
Total	**100.0**	**2,250,000**	**100.0**

*Rorke Investment Holdings Limited ("RIHL") is a company under the control of Newman to which he transferred shares amounting to approximately 10.4% of the Company's voting share capital at the time that the 2007 Notes were issued.

Each participating member of the Concert Party signed an agreement not to exercise his right to conversion unless (i) a majority by value (including the proposer)

consented to that person converting or (ii) a majority by value (including the proposer) agreed to convert, in which case all would automatically convert.

3.8 The Executive's conclusion and the Company's announcement

The Executive was consulted by the Company again at this time in relation to the concert party analysis and to the requirement to obtain a Rule 9 waiver on issue of the 2007 Notes to the Concert Party. The Executive concluded that there was a single Concert Party (to which the Executive now presumed Weinberg to belong, since Weinberg was a friend of Newman and had been introduced to the Company by Newman) holding over 50% of the voting share capital of the Company. By contrast with 2004, the Executive saw no grounds for treating any sub groups as if they were, effectively, concert parties in their own right. This was following a review of the manner of the negotiations for the refinancing and other events of 2006 which, in the Executive's view, supported by the Company, demonstrated that the entire Concert Party had become a single source of control. The Executive said therefore that the Concert Party would have buying freedom, subject to Note 4 on Rule 9.1, and would be free to acquire further interests in shares, either directly or by way of converting loan notes, without triggering a Rule 9 bid obligation.

On this basis, the Company and the Concert Party did not seek a whitewash at the time of the issue of the 2007 Notes. The Independent Directors have nevertheless indicated to the Executive that they have little doubt that a whitewash would have been approved by independent shareholders, as this was the only financing option open to the Company if it were to remain solvent.

The Company's announcement of the issue of the 2007 Notes was reviewed by the Executive prior to its release. The announcement detailed the terms of the 2007 Notes, identified who was subscribing for them and highlighted their potential impact on the Company's shareholder base. The announcement included the following wording:

> "the Panel has confirmed that [the subscribers for the 2007 Notes plus TIMSL, RIHL and Wharmby] are deemed to be a concert party for the purposes of the

> Code. Since 2004, Mr C Weinberg has been deemed by the Panel to have joined the Concert Party.
>
> "Following completion of the Refinancing the members of the Concert Party will between them continue to hold more than 50% of the Company's voting share capital and (for so long as they continue to be treated as acting in concert) may accordingly increase their aggregate interest in shares without incurring any obligation under Rule 9 to make a general offer, although individual members of the Concert Party will not be able to increase their percentage interest in shares through or between a Rule 9 threshold without Panel consent."

It is to be noted that there was no reference to the sub concert parties which the Executive had considered to exist when it ruled in August 2004.

This announcement was released on 26 January 2007 and the 2007 Notes were also issued on this date. The necessary authorities to issue the shares which would arise on conversion of the 2007 Notes and to disapply pre-emption rights were subsequently obtained at an EGM held by the Company on 28 March 2007 by an overwhelming majority of the votes cast.

3.9 Delisting proposal: conversion of the 2007 Notes

The Board of the Company, having with the support of the Concert Party decided to cancel the AIM quotation in order to reduce costs and free up management time, proposed to seek approval for this at the AGM on 13 June 2007.

The Concert Party members decided to convert the 2007 Notes and accordingly Tony Bartlett on their behalf gave notice to the Company on 25 April 2007 at a Board Meeting. The Company announced this early on the following morning and its allotment of new shares to the Concert Party took place on 27 April 2007.

3.10 Representations from WTVSAG

Peter Hagerty approached the Executive on 30 April 2007 introducing himself as a shareholder and a representative of WTVSAG. He said that, in addition to himself and the family trust of which he was the Executor, the group represented 70 independent shareholders and at least 4.5% of the shares in WTV. Hagerty told the Committee that this group now represents 99 shareholders.

Hagerty challenged the ruling given by the Executive in January 2007. Accordingly, the Executive commenced a review of that ruling; the Company meanwhile has not proceeded with the proposal to cancel the AIM quotation, and the Concert Party agreed not to vote the shares issued on conversion of the 2007 Notes at the Company's AGM.

4. THE EXECUTIVE'S CONCLUSIONS

4.1 The concert party

The Executive explained its position as follows. It ruled in January 2007 that there was a concert party owning over 50% of the Company. As a consequence, the Concert Party had the ability to acquire further shares in the Company, subject to Note 4 on Rule 9.1. That Note provides that, when a concert party has an interest in shares which carry over 50% of the voting rights of a company, it generally has buying freedom. The question of whether a mandatory bid was required would only arise when a single member of the concert party acquired an interest in shares which carried over 30% of the voting rights (or, if already interested in 30% or more, increased the percentage of shares in which he was interested). This had not happened in this case. Note 4 was therefore not in point and the question of a mandatory bid being required did not arise.

After hearing from Hagerty on behalf of WTVSAG, the Executive closely re-examined the facts by speaking to every member of the concert party (except TIMSL, which owned only 0.2% pre conversion, which was uncontactable), as well as the Concert Party's legal adviser, the Company and the Company's financial adviser.

This review confirmed the Executive in its view that the subscribers for the 2007 Notes plus TIMSL and Wharmby constituted a single concert party which, prior to the issue and conversion of the 2007 Notes, owned over 55% of the Company.

In coming to this conclusion, the Executive took into account the following factors:

4.1.1 The Concert Party's actions

The recent actions of the Concert Party appeared to reflect the approach of a group of individuals jointly exercising control over a company in which they were collectively the majority owners. They had:

- invested together in the 2004 Notes;
- later agreed not to redeem the 2004 Notes on or shortly after their earliest redemption date;
- actively co-operated since late 2006 in considering refinancing proposals that were under consideration by the Company;
- formulated their own alternative plans for such refinancing, agreeing between themselves the terms on which they would invest, negotiating such terms with the Company, and all (except TIMSL and Wharmby) participating in that investment;
- unanimously agreed to support the Board's decision to cancel the quotation of the Company's shares on AIM; and
- agreed between themselves that they would all exercise their conversion rights as one.

4.1.2 The manner in which the 2007 Notes were negotiated

The Concert Party had given Lonsdale prime responsibility for negotiating the terms of the 2007 Notes on behalf of the entire Concert Party. There were no bilateral or separate negotiations or arrangements between the Company and any member of the Concert Party. Moreover, the Concert Party had been represented in relation to those negotiations by a single firm of legal advisers.

4.1.3 Booth's and Sibley's commitment to the Concert Party

(see paragraph 3.6 above)

4.1.4 Consistent views expressed by Concert Party members

Of those contacted by the Executive, all but one (Wharmby, who owned only 0.1% pre-conversion) had explained that they saw themselves as acting together in respect of their controlling interest in the Company. A number had also volunteered that they did not necessarily feel that they were acting in concert in August 2004, although they were not inclined to contest the Executive's presumption that they were part of a concert party at that time. However, they had expressed the clear view that for some time they have been acting together to exercise control over the Company, some arguing that they had actively been acting together since Autumn 2004 when the provision of financial support for the Company by the Concert Party was first discussed.

4.1.5 The Company treated all the parties as one

The Company and its adviser, Brewin Dolphin, had confirmed that, in discussing the proposed refinancing, they had throughout considered the members of the Concert Party to be acting as one. It was for this reason that the Company had suggested that there should be discussions between other potential investors and the Concert Party since, in the Company’s view, there could be no way forward without the agreement of this unified group, which

owned 55.9% of the Company and was therefore in a position to block any refinancing proposals with which it did not agree.

The Executive's conclusion on the existence of the Concert Party was supported by the independent members of the Board of the Company and their financial advisers, and by the Concert Party. That was not challenged by Hagerty nor by WTVSAG.

4.2 The sub concert parties

The Executive considers that the ruling in 2004 on the existence of the Founders' sub concert party and the Investors' sub concert party was the result of applying the standard presumption (which was not rebutted) that the vendors of a private company should be presumed to be acting in concert when that company is sold to a Code company and they receive as consideration shares in the latter. There was, the Executive contends, no evidence to support that presumption, but there was evidence that the members within each of the Founders' and Investors' sub groups had close connections with one another. The two groups had invested in WTL at materially different times of its development and had materially different involvements in the Company. Accordingly, a prudent approach was taken and, in addition to treating the vendors of WTL as a concert party, each of the smaller groups was treated by the Executive as a concert party in its own right.

The Executive considered that in reaching the decision now under appeal it should base itself on the current facts, and that those facts were materially different from those pertaining in 2004.

In particular it noted:

(a) that it was almost 3 years since the whitewash transaction;

(b) that all members of the Concert Party had been working together, possibly since November 2004 but certainly since the commencement of the more recent round of financing discussions;

(c) the factors set out in paragraph 4.1 above which all support the existence of a single homogenous group.

The Executive thus considered that there was solid evidence of a single large concert party and no grounds for identifying a sub group. It did not consider that it should be constrained by the 2004 ruling in coming to this conclusion, nor was it bound by the wording of the 2004 whitewash circular.

4.3 The position of other parties

4.3.1 The Company

The Company contends that the Executive has taken the correct view by concluding that there is a single concert party.

Its Chief Executive Officer, Steve Garvey, told the Committee:

(a) in reaching agreement in 2006 with the Concert Party to extend the terms of the 2004 Notes to 31 May 2007, his main contact with the Concert Party was Newman who secured the agreement of all other members of the Concert Party;

(b) when seeking financing in late 2006 and early 2007 as an alternative to simple extension of the terms of the 2004 Notes he suggested to Booth on 3 January 2007 that Booth and Sibley could negotiate independently of the other concert party members, but Booth declined this, saying that he and Sibley took the view that their interests were best served within the Concert Party, and that Newman and Lonsdale were authorised to negotiate on their behalf. Sibley later confirmed this;

(c) at no time during his term as CEO had he seen any evidence of more than one concert party. Its members have, in his experience, always functioned as a single entity, and all agreed to the same terms in his negotiations with them;

(d) the members of the Concert Party have provided two rounds of funding to the Company since the takeover, and have always had a single legal adviser.

He said: "I know that if I speak to one of them I am speaking to all of them.".

The Company's financial adviser, Brewin Dolphin, through Neil Baldwin, told the Committee that they were in regular contact with the Company during the latter part of 2006 and the early part of 2007 when Garvey was negotiating with the Concert Party and its representatives. Baldwin's overriding impression from these negotiations and from his earlier involvement over the period 2004 to 2007 had been that the Concert Party had acted as one entity and not as two separate sub concert parties. He points out that all the major members of the Concert Party subscribed to the 2004 Notes, invested in the 2007 Notes and co-ordinated the decision to convert the 2007 Notes. He concluded that throughout the whole post acquisition period Brewin Dolphin had not observed any behaviour by the Concert Party which would indicate that they operated other than as a single entity.

4.3.2 The Concert Party

The Concert Party supports the Executive's position. Its solicitors Fladgate Fielder, accompanied by Tony Bartlett, whilst not necessarily agreeing that the conclusion in 2004 that there were two sub concert parties was correct, did accept that there were two points material to that decision:

(1) the association between the Founders' group and the Investors' group was relatively short; and

(2) Booth and Sibley did receive some cash consideration on the sale of their shares, in addition to WTV (formerly Virtue) shares, whereas the Investors' group received WTV shares only.

They also pointed out that, prior to the takeover, Booth and Sibley had been Joint Chief Executives of WTL and that company's only Executive Directors. The enlarged group appointed a new Chief Executive Officer, and WTV's Finance

Director and Chairman remained in post. Booth and Sibley became Executive Directors of WTV.

In support of the Executive's decision in 2007:

(a) they confirmed Garvey's evidence of his discussion with Booth in January 2007;

(b) the changed status of Booth and Sibley as Non Executive Directors, the collective negotiations by the subscribers for the 2007 Notes and the alignment of Booth's and Sibley's interests with those of the Investors' group were relevant factors;

(c) they noted the Conversion Agreement of 30 January 2007 in which all the subscribers to the 2007 Notes agreed not to convert their Notes to equity unless a majority by value of the 2007 Notes agreed to convert all the outstanding Notes or to allow individual conversion. This led on about 25 April to the notice to convert served on WTV by Tony Bartlett as attorney for the other members of the Concert Party, all of whom had consented to this course;

(d) Newman, Ozturk and Archdream Limited were shareholders in WTL prior to 2004. Messrs. Newman and Solbeck (for Archdream Limited) had attended quarterly board meetings as observers from March 2003. They, therefore, have a long history of working with Messrs. Booth and Sibley;

(e) Newman and Archdream Limited supported the buyback of WTL shares in April 2004 and introduced other investors to acquire shares from Booth in April 2004. Similarly Newman and his co-investors agreed to splitting WTL's share capital into two classes of shares in order to allow Messrs. Booth and Sibley to receive some cash consideration on the reverse takeover of WTL. These facts indicated a level of co-operation and trust between individuals in a single concert party;

(f) on the reverse into WTV, Messrs. Booth and Sibley ceased acting as joint chief executives; Messrs. Booth and Sibley increasingly saw the Investors' sub concert party as their ally in a number of disagreements at board level with WTV's management;

(g) when WTV required urgent funding in late 2004, it approached the concert party as the former shareholders of WTL following an approach that had been made to Messrs. Booth and Sibley. These persons (except Wharmby and TIMSL) subsequently invested in WTV collectively by subscribing for the 2004 Notes;

(h) those subscribers subsequently agreed, together, to defer the redemption date of the 2004 Notes;

(i) those subscribers had numerous conversations and meetings during 2006 as to realising their investment in WTV - these conversations invariably involved Bartlett, Booth, Lonsdale (for Arvon Limited), Newman, Sibley and Solbeck (for Archdream Limited);

(j) the subscribers for the 2004 Notes (except for the two clients of Walker Crips) agreed to subscribe for the 2007 Notes and in doing so repaid the 2004 Notes and provided further funding to WTV. It would have been open to any holder of the 2004 Notes to refuse, unilaterally, to advance further funds and to insist on redemption in May 2007;

(k) on 1 January 2007, Messrs. Booth and Sibley became Non Executive Directors of WTV. This illustrated, in part, their alignment with the "investors";

(l) in January 2007 Booth was approached by WTV to see if he and Sibley would sell some of their shares to assist a financing package. Booth refused on the basis that he and Sibley were acting collectively with the other holders of the 2004 Notes;

(m) the subscribers for the 2007 Notes entered into the Conversion Agreement so as to ensure that they acted collectively as regards conversion of the 2007 Notes; and

(n) the concert party has been represented by Fladgate Fielder since 2004, with all members of the party being invoiced for costs pro-rata to their shareholding interests, which suggests a commonality of interest among the concert party members.

They emphasised that Note 4 on Rule 9 contemplates changes in the membership of concert parties, which confirms that the Executive should act on the facts at the relevant time and is not bound by a previous decision on different facts.

Finally, the Concert Party said that it was entitled to rely upon the January 2007 decision and did so when subscribing for the 2007 Notes and subsequently converting them into WTV shares.

4.3.3 The case for the Appellant shareholders

The Appellants did not dispute the continued existence of the Concert Party in 2007. They considered however that the two groups identified in the ruling of 2004 as sub concert parties also continued to exist.

Whilst the Appellants did not dispute the substance of the factors relied upon by the Executive, the Company and the Concert Party as supporting the Executive's rulings in 2007, they contended that these provided "insufficient justification for unilaterally dissolving the Company's sub concert parties" and thus depriving investors of the protection of the "embargoes" which were expressed in the 2004 announcement which was the basis of the whitewash granted at that time. They said that for the Investors' sub concert party the overall Concert Party had been a flag of convenience.

They further relied upon:

(a) public announcements by the Company on 29 November 2004 and 28 April 2006 both of which referred to the need before any conversion of Loan Notes took place to seek a waiver of an offer obligation that would otherwise arise, and said that such a waiver would be subject to approval by independent shareholders of the Company;

(b) the possibility that the former Chairman of the Company and other directors might, if approached, support the continued existence of the two sub concert parties;

(c) their view that, in late 2006, financing proposals from other parties were immediately discouraged by the Chairman of the Company and negotiations for additional equity funding failed due to resistance from the Investors' sub concert party led by Newman who took a direct role in negotiations with the independent shareholders despite an alleged conflict of interest as holders of the loan notes whose replacement was under consideration;

(d) the Company's CEO's allegedly incorrect assertion that agreement with another party for financing could not be reached without the Concert Party's approval;

(e) the effect of the creation of the 2007 Notes "ostensibly to repay the first loan note ahead of time" was that on conversion the Investors' sub concert party which held 27.68% of the Company immediately after the takeover (and were restricted by the admission document from exceeding 30%) would obtain 54.09% of the ordinary shares of the Company and this would occur without a whitewash and without a vote by the independent shareholders.

Conversely, the Founders' sub concert party (whose participation over 30% was the only one sanctioned by independent shareholders in 2004) was reduced below 30% (to 25.62%) and they lost the ability to veto the actions of the Investors' sub concert party in controlling the Company.

Furthermore, in contrast to the position under the 2004 Notes, the Investors' sub concert party held more than 75% of the 2007 Notes and thus effectively controlled them;

(f) the announcement of the creation of the 2007 Notes whilst acknowledging that the issue would be heavily dilutive to existing shareholders made no reference to either of the sub concert parties, or the "embargoes" on them, despite previous announcements recognising the embargoes, and investors' reliance on their existence;

(g) the identity of the Investors' sub concert party remained in 2007 substantially the same as it was in 2004. There were only minor changes;

(h) whilst accepting the fact that in the uptake of the 2007 Notes the Investors' sub concert party acted alongside the Founders to a greater or lesser extent, it was irrational to conclude that a tendency to act in concert with other sub concert parties destroyed the concept or identity of the Investors' sub concert party itself with the effect of depriving investors of their Rule 9 protection.

The Appellants argued, in short, that the effect of the issue of the 2007 Notes, and the subsequent conversion of those Notes into equity without a whitewash, was to trigger an offer obligation on the part of the Investors' sub group. In addition to relying, as it did throughout, on General Principle 1, the Appellants submitted that Note 4 on Rule 9.1 should be interpreted so that the reference to a single member included reference to a group of members, that the Investors' sub concert party was such a group, and that as such it remained distinct from the Founders' sub concert party. There had thus been a shift in the balance of power within the Concert Party. Having previously been controlled by the Founders, it was now controlled by the Investors led by Newman.

In support of the last point, it noted the number of investors who had been introduced by Newman.

5. THE COMMITTEE'S CONCLUSIONS

5.1 Whilst recognising that the concept of sub concert parties is not explicitly found in the Code, the Committee considers that the Executive was right for the reasons it has explained to adopt in 2004, for the protection of shareholders, a prudent approach and to rule as it did. The effect of that ruling was that the minority shareholders were protected against the possibility that either the Concert Party or separate groups with different backgrounds within it might cross a Rule 9 threshold.

5.2 Both the Code (the first sentence of Note 4 on Rule 9.1) and common sense confirm, however, that circumstances may change at any time. The Executive supported by the Company and the Concert Party says that that has happened here; and it is to be noted that the Company's submissions were said to have the support of those of its directors who are independent of the Concert Party.

5.3 For the reasons given by the Executive, together with the supplementary evidence from the Concert Party, the Committee considers that the Executive was right to rule in January 2007 as it did and following its review to confirm that ruling in June 2007. In short, the evidence demonstrated that, by that time and indeed well before then, it was no longer appropriate to treat the members of the Concert Party as two separate groups. They had become, spoke and acted as one.

5.4 Hagerty has suggested that for various reasons it was irrational and capricious for the Executive to reach its conclusion. The Committee cannot agree. The announcements by the Company in 2004 proposing the whitewash and dealing with the issue of the Loan Notes simply reflected the Executive's ruling earlier that year. The Company's announcement in April 2006 dealing with the deferment of the right to convert under the 2004 Notes was not the subject of any prior discussion with the Executive (as in the Committee's view it should have been), nor was the Executive aware of it. An assumption by the Company or its advisers that the Executive's view remained the same as it had been in August 2004 (see paragraph 3.5 above) cannot reasonably be regarded as precluding the Executive from ruling on the facts as it found them to be when consulted in 2007.

5.5 Hagerty also submitted that the final sentence of the penultimate paragraph of Note 4 on Rule 9.1 (commencing "However, subject to…") (see paragraph 2.4 above) was triggered by a change in the balance of shareholdings which after the conversion of the 2007 Notes led to members of the former Investors' sub concert party increasing their aggregate shareholding beyond a Rule 9 threshold.

5.6 There are significant difficulties with this argument. This sentence does enable the Panel to exercise a judgment (after taking account of various factors) as to whether to require a mandatory offer. But the Note says that this may only happen if "the acquisition by a single member of the group of an interest in shares" increases his interest in shares carrying voting rights to 30% or more or, if he is already interested in 30% or more, increases the percentage of shares carrying voting rights in which he is interested.

5.7 Even though no single member of the Investors' sub concert party increased his interest in shares beyond either of these thresholds, Hagerty suggests that that does not defeat his argument because a single member should be interpreted as extending to a group of members, and by aggregating Newman's shares with the investors introduced by him, the Rule 9 thresholds can be regarded as breached.

5.8 The Committee cannot accept this argument. It sees no reason to extend the meaning of this very plain phrase. However, even if this argument were accepted, in the Committee's view it leads nowhere, since the effect of it would be to reinstate the separate existence of the Investors' sub group distinct from the other members of the Concert Party, and to do so in spite of the compelling reasons to the contrary already accepted by the Committee. The conclusion that the previous sub concert parties have now become a single concert party, and the absence of any sufficient evidence that control of that concert party has moved, confirm the Committee's view that Hagerty's argument is not tenable.

5.9 Since the Committee has concluded that the Executive's view expressed in the 2007 ruling is correct, it follows that there has been no breach of the Code and

accordingly the question of remedy (upon which WTVSAG made submissions) does not arise.

5.10 The Committee wishes in conclusion to emphasise the importance of clear and accurate public announcements and of consulting the Executive when describing the operation of Code provisions in such announcements. It notes that the Company's public announcements in December 2004 and April 2006 were both inaccurate in describing the operation of Rule 9. Furthermore, the announcement in 2007 did not explicitly make clear, as in the Committee's view it should have done, the extent to which the 2004 ruling no longer applied.

5.11 The Committee concluded that the appeal should be dismissed.

9 July 2007