

THE TAKEOVER PANEL

HEARINGS COMMITTEE

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

RULING OF THE CHAIRMAN OF THE HEARINGS COMMITTEE

This Panel Statement sets out a Ruling of the Chairman of the Hearings Committee (“the Committee”) issued on 21 June 2018.

INTRODUCTION

1. This is an application by the Executive of the Takeover Panel (“the Executive”) under Rule 2 of the Rules of Procedure of the Hearings Committee (“the Rules”) for a ruling rejecting a request that the Committee be convened.
2. The request that the Committee be convened was made on 11 June 2018 in an email from Mr King to the Executive. In that email Mr King requested that the Committee be convened to review the Executive’s refusal to agree his request for an extension of time to send an offer document to Rangers shareholders pursuant to rule 24.1 of the City Code on Takeovers and Mergers (“the Code”). Both Mr King’s request for an extension of time and the Executive’s ruling refusing that request were communicated by email on 26 April 2018.
3. Rule 2 of the Rules is entitled PRELIMINARY MATTERS and states:

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

(a) that the person making the request is not affected by the ruling of the Executive;

- (b) that the person making the request does not have a sufficient interest in the matter;
- (c) that the request was not validly notified; or
- (d) that the matter has no reasonable prospect of success.

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

4. The Executive relies on sub-paragraphs (c) and (d) of Rule 2.1.
5. Rule 1.2 sets out the time limits for making a request that the Committee be convened to review a ruling of the Executive. That rule provides for the Executive and the Committee to be notified of the request:

“...as soon as possible and in any event:

- (a) within such reasonable time as has been stipulated by the Executive. Such time may, depending on the circumstances, range from a few hours to the one month period referred to in paragraph (b); or
- (b) in the absence of such stipulation, within such time period as is reasonable in all the circumstances of the case, which period shall not be longer than one month from the event giving rise to the request for review, unless such period has been extended by the Executive.”

6. Accordingly, when the Executive does not stipulate a time limit for requesting a review of a ruling, one month from the date of the event to which objection is taken is the maximum allowed for notifying a request to convene the Committee unless the Executive extends that limit. Pursuant to Rule 1.3, notification of a request is deemed to have been made upon receipt of an email to the Takeover Panel Support Group.
7. As explained more fully below, it is apparent from the email correspondence passing between the Executive and Mr King that the event giving rise to the request for a review was the Executive’s rejection on 26 April 2018 of Mr King’s earlier request of the same day for an extension of the time allowed under rule 24.1 of the Code for sending an offer document to shareholders of Rangers in performance of his obligations under rule 9 of the Code. It is also apparent from the correspondence that it was not until 11 June 2018 (more than six weeks later) that Mr King made a request

that the Committee be convened to review the Executive's decision to refuse an extension of time.

DOCUMENTS FILED IN CONNECTION WITH THE APPLICATION

8. The Executive's application is supported by submissions in writing dated 13 June 2018. The grounds on which Mr King resists the application were in turn set out in submissions made by email on 18 June 2018. In addition, at my request, I have been provided with copies of the interlocutors and interdict made by the Court of Session along with copies of the correspondence passing between Mr King and the Executive during the period commencing shortly before Mr King's statement of intention to make an offer on 29 March 2018 and ending with his request of 26 April 2018 for an extension of time for publishing an offer document. I have also read correspondence between the Executive and the London branch of Investec the significance of which is explained below. On 20 June 2018, Mr King provided brief additional comments on documents produced by the Executive which he had not previously seen.

BACKGROUND

9. The earlier history of this matter need not be recounted in detail as it is fully set out in previous rulings of the Takeover Appeal Board ("TAB") and the Committee and in judgments of the Outer House and the Inner House of the Court of Session.
10. On 7 June 2016, after a lengthy investigation, the Executive ruled that Mr King had been acting in concert with Messrs Letham, Taylor and Park in procuring the purchase by New Oasis Asset Management ("NOAL") of 14.57% of the shares of Rangers. That purchase was effected on 2 January 2015. The result, as found by the Executive, was that Mr King and the persons with whom he was held to be acting in concert controlled the voting rights attaching to more than 30% of the issued share capital of Rangers. The Executive concluded that Mr King thereby incurred an obligation under rule 9 of the Code to procure the making of an offer for all Rangers shares not held by NOAL or by those with whom he had acted in concert. The Executive also ruled that the offer price should be 20 pence per share.

11. On 5 December 2016, the Committee upheld the Executive's ruling and directed Mr King to announce an intention to make an offer by 4 January 2017. Other than as regards the announcement date, the offer was to comply with the Executive's ruling of 7 June 2016. Mr King appealed the Committee's ruling to the TAB which, by its ruling of 13 March 2017, upheld the ruling of the Committee apart from varying the date for announcing the offer to 12 April 2017 (i.e. within 30 days of the TAB's decision).
12. Mr King failed to procure the making of an offer in accordance with the TAB's ruling. Accordingly, the Executive applied to the Outer House of the Court of Session under section 955 of the Companies Act 2006 for an order (or interlocutor) enforcing the requirement to make an offer. By its interlocutor of 22 December 2017, the Outer House ordained Mr King to announce in accordance with the Code within thirty days and thereafter make in accordance with the Code, a mandatory offer at a price of 20 pence per share for the entire issued share capital of Rangers not already controlled by him, Mr Letham, Mr Taylor and Mr Park.
13. Mr King then appealed to the Inner House which, by its interlocutor of 28 February 2018, upheld the ruling of the Outer House and affirmed the interlocutor of the Outer House subject to an amendment intended to clarify that the offer should also exclude shares of Rangers owned by NOAL.
14. By rule 24.1(a) of the Code, except with the consent of the Panel, an offeror must, within 28 days of the announcement of a firm intention to make an offer under rule 2.7, send an offer document to shareholders of the offeree. Under rule 2.7(d), where the offer is for cash or includes an element of cash, the announcement must include confirmation by the offeror's financial adviser or other appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer. Rule 24.8 of the Code imposes an equivalent cash confirmation requirement in relation to the offer document itself. The purpose of these requirements would seem to be clear, namely to ensure that if a cash offer is accepted the funds are readily available to enable it to be performed.

15. On 29 March 2018, an announcement was published stating the intention of Laird Investments (Proprietary) Limited (“Laird”) to make an offer at 20 pence per share in cash for all the ordinary issued share capital of Rangers not already controlled by Mr King or NOAL or by Messrs Letham, Taylor and Park. The announcement described Laird as a private company, ultimately owned by a trust of which Mr King and his family are beneficiaries. Mr King is resident in South Africa and the announcement also described Laird as a South African-based business.
16. Notwithstanding the consideration was to take the form of cash, the announcement did not contain the third party confirmation required by rule 2.7(d) that resources were available to satisfy full acceptance. This prompted the Executive to correspond with Mr King with the object of eliciting how he proposed to send an offer document complying with rule 24 and containing, in particular, the third party confirmation stipulated by rule 24.8. Because both Mr King and Laird were based in South Africa, the Executive’s position was that this should involve confirmation from a bank or other appropriate third party that the cash required to satisfy acceptance of the offer was available in the UK. Although the Executive had no objection to the use of Laird as the vehicle for making the offer, its position was that the cash confirmation required by rule 24.8 would necessarily involve a bank or other appropriate third party confirming the availability of cash in the UK to enable the offer to be executed.
17. Having on 29 March 2018 announced an intention to make an offer, the 28 days’ time limit stipulated by rule 24.1 for publishing an offer document would expire on 26 April 2018 unless the Executive were in the meantime to reach some agreement to the contrary. In the event, having become concerned that Mr King might publish an offer document without the requisite cash confirmation, on 24 April 2018 the Executive applied for and obtained an interim interdict from the Outer House preventing Mr King from publishing in his own name or that of Laird an offer document that did not contain a rule 24.8 cash confirmation from a third party considered by the Executive to be appropriate for the purpose. The interim interdict did not suspend or modify the interlocutor of the Inner House of 28 February 2018 under which Mr King was obliged to announce an intention to make an offer by 30 March 2018 and thereafter to send an offer document to shareholders in accordance with the Code; it merely prevented the publishing of an offer document that did not comply with rule 24.8. As

to a third party acceptable to the Executive for the purpose of providing a cash confirmation, it appears from the correspondence as explained in more detail below, that on 11 April 2018 the Executive had suggested to Mr King that he instruct Investec to open a UK sterling account on Laird's behalf with a view to Investec providing the necessary cash confirmation.

REFUSAL OF REQUEST FOR AN EXTENSION OF TIME – COMMENCEMENT OF CONTEMPT PROCEEDINGS

18. It was not until the last day stipulated by rule 24.1 of the Code for sending an offer document to Rangers shareholders that Mr King applied to the Executive for an extension of time. Mr King's reason for seeking an extension was Laird's inability to transfer money out of South Africa for possible completion of the share purchase transactions without approval under South African exchange control regulations.
19. In South Africa foreign exchange transactions are subject to exchange control regulations which limit the amount of money residents may transfer out of the country without approval. Under these regulations, approval would be required for Laird to transfer to an account in a UK bank the funds required for completion of the offer and to convert those funds into sterling.
20. In his email seeking an extension of time, Mr King stated that the contingent nature of the share purchase (the fact that the offer may or may not be accepted) meant that Laird would have to repatriate all or some of the funds if the offer were not to be accepted. It was, he said, this aspect of the transaction that took it outside existing approvals and guidelines and meant that specific approval would be necessary. Mr King referred to the Executive's prior approval of Investec as an appropriate third party and stated that, upon the Executive's agreement to an extension, he would immediately instruct Investec to apply for approval and deal with the necessary "know your client" paperwork prior to confirming to the Executive that this had been done. Mr King said that Investec had estimated that obtaining the requisite approval could take up to six weeks. Mr King ended his request by observing that it would not be in the interests of Rangers shareholders if he could not make the offer and if, by

reason of the exchange control constraints, he were to remain unable to comply with the court's interlocutor.

21. By its email in reply sent later on the same day, the Executive refused the request for an extension of time under rule 24.1 of the Code. It stated that Mr King had been aware since 28 February 2018 of his obligation under an interlocutor of the court to make an offer in accordance with the Code and that he had had enough time since then to obtain all the consents necessary for cash confirmation to be given. As regards Mr King's offer to instruct Investec if his request for an extension were granted, the Executive pointed out that in a telephone conversation of 11 April 2018 he had undertaken to start the process of engaging Investec on that same day, but no evidence had been forthcoming that Investec had been instructed to seek the necessary exchange control approvals and give the requisite cash confirmation.
22. The Executive went on to refer to an email of the previous day in which it had stated its intention to initiate contempt proceedings were Mr King to fail to procure the publication of an offer in accordance with the Code within the time stipulated. It stated that in the circumstances it would initiate contempt proceedings in the Court of Session on 27 April 2018 if by midnight on 26 April 2018 Mr King had failed to publish a Code compliant offer.
23. In its email of 26 April 2018, however, the Executive went on to state that, notwithstanding the above, if Mr King could satisfy it that he had irrevocably instructed Investec or other appropriate third party to seek all necessary consents and authorisations for transferring the monies into a UK bank account and to provide the requisite cash confirmation, then, provided Investec or other appropriate third party confirmed such instructions directly to the Executive, it would not seek a date for the substantive contempt of court hearing before 8 June 2018 (that being the date falling six weeks after 27 April 2018).
24. In the event, process in the contempt proceedings appears to have been served on Mr King in South Africa on 8 June 2018. This seems to have prompted Mr King's request of 11 June 2018 to have the Committee convened for a review of the Executive's refusal to agree an extension of time. In the meantime, Mr King had produced no

evidence to show that he had instructed Investec to seek the necessary exchange control consents or to confirm its willingness to receive the consideration monies into a UK account with a view to giving the requisite cash confirmation. It is noteworthy that, in his submissions of 18 June 2018 Mr King does not maintain that he has now instructed Investec to do this.

ORAL HEARING?

25. I have power under Rule 2.2 to determine this application on documents without an oral hearing. I am satisfied that in this case the matter may be determined fairly on the documents without an oral hearing. The issue does not turn on any dispute of primary fact and Mr King made it clear in his submission of 18 June 2018 that his position “reconciles exactly with the correspondence” – which I have read. In its submissions of 13 June 2018 the Executive asked me to determine the matter without an oral hearing and Mr King does not suggest otherwise.

FAILURE TO REQUEST A COMMITTEE HEARING WITHIN THE TIME ALLOWED UNDER THE RULES

26. As explained above, the Executive relies upon Mr King’s failure to notify a request for the Committee to be convened within one month of the event giving rise to the request for review.
27. As is clear from Rule 1.2, one month from the event giving rise to the request for a review is a long-stop limit, the primary obligation being to request a review as soon as possible and in any event within such reasonable time as has been stipulated by the Executive, which, depending upon the circumstances, may range from a few hours to a month.
28. Given the purpose of the Code and the context in which it operates, there are good reasons for requiring requests to review decisions of the Executive to be notified quickly. I am unable, therefore, to accept Mr King’s submission that the Executive’s objection under Rule 2.1(c) is a purely technical objection and, as such, devoid of

merit. The effective operation of the Code requires time limits for reviewing decisions of the Executive or appealing decisions of the Committee to be respected.

29. Furthermore, Mr King has offered no adequate justification for waiting more than six weeks to request a review of the Executive's refusal to extend time. His claim that he held off making a formal request to convene the Committee while he attempted to persuade the Executive to reverse its decision, is unconvincing. That may explain a few days' delay but not six weeks and even then, the hope that a decision maker may reverse its decision can rarely, if ever, be a good reason for failing to comply with time limits for an appeal. Nor is it suggested that the Executive ever said anything to indicate that it might be prepared to reverse its decision to reject Mr King's request for an extension of time.
30. Finally, rejection of Mr King's request to convene the Committee will not deny Rangers shareholders the benefit of an offer to purchase their shares. Mr King does not require a reversal of the Executive's decision refusing him an extension of time under rule 24.1 in order to enable him to perform his obligation to procure the making of an offer under rule 9 of the Code. It is unreal to suggest that expiry of the rule 24.1 time limit effectively prevents him from making an offer when the Executive has unequivocally stated its position in its submission of 13 June 2018 that, subject to cash confirmation being provided, it is open to Mr King to procure the making of an offer that complies with the Code other than as to the rule 24.1 time limit. The Executive's objection is to further delay, not to the making of an offer as and when the cash is available in the UK to enable it to be satisfied.
31. Accordingly, Mr King's request that the Committee be convened was not validly notified within the meaning of 1.2 and 2.1(c) of the Rules and, in light of the circumstances to which I have referred, I reject his request that the Committee be convened to review the Executive's decision of 26 April 2018.

NO REASONABLE PROSPECT OF SUCCESS?

32. In view of my ruling under 2.1(c) of the Rules it is strictly unnecessary to consider whether a review of the Executive's decision to reject Mr King's application for an

extension of time would have a reasonable prospect of success: nevertheless, in deference to the arguments of both parties I propose to do so.

33. The correspondence bears out Mr King's claim that his proposed use of Laird as the vehicle for the offer was acceptable to the Executive. The correspondence also indicates that Mr King took steps to ensure that Laird was, or would be, put in sufficient funds in South Africa to enable it to meet its obligations if the offer were to be accepted.
34. But the correspondence does not support the suggestion that the Executive's insistence on cash confirmation, or what that would involve, was sprung upon Mr King at a late stage of the exchanges. On 27, 28 and 29 March 2018 Mr King was told that the announcement of an intention to make an offer (which under the interlocutor of the Inner House had to be made by 30 March 2018) must contain a cash confirmation from an appropriate third party in order to comply with the Code. In emails to the Executive dated 29 March 2018 from Mr Blair (the Company Secretary of Rangers and a partner of Anderson Strathern LLP) it was said that the cash confirmation wording would be addressed before the offer is sent out (i.e. before the rule 24.1 offer document was published). Mr Blair was not retained as Mr King's solicitor but he copied Mr King into these emails.
35. The Executive did not agree to an offer announcement being published without the cash confirmation required by rule 2.7(d) of the Code, but it appears, nevertheless, that it was given to believe that the matter would be covered satisfactorily in the published offer document. For the avoidance of doubt, on 4 April 2018 the Executive pointed out to Mr King that the offer announcement was deficient in various respects including, in particular, in failing to include cash confirmation by an appropriate third party. Mr King was told that while such deficiencies went un-rectified, steps would be in train to place the non-compliance before the court.
36. In an email of 6 April 2018, the Executive explained to Mr King that, to eliminate the risk of shareholders accepting an offer and then finding that the cash to satisfy it was not forthcoming, cash confirmation would in practice need to be provided by a UK financial adviser or bank stating that sterling funds were freely available in the UK

and could not be withdrawn or withheld if the offer were to become unconditional. That third party would, in turn, be required to confirm that it was aware of its responsibilities under the Code including, in particular, the risk it would assume if it failed to take reasonable steps to ensure that the cash was available. This explanation was repeated in a letter from the Executive to Mr King and Laird of 10 April 2018.

37. On 11 April 2018, the Executive spoke to Mr King on the telephone. From the Executive's note of that conversation it appears that the Executive suggested that Mr King approach Investec to provide the requisite confirmation, having regard to the existing relationship in South Africa between Investec, Laird and Mr King's company, Micromega. Investec is evidently a bank which the Executive regarded as acceptable in principle for holding funds and giving cash confirmation. Mr King is recorded in the note as having agreed to start the process of engaging Investec that same day.
38. Indeed, from an email of 12 April 2018 from Mr King to Cornelia Kemp, an employee of Micromega, it appears that Mr King instructed Ms Kemp to contact Investec and find out what would be entailed in holding the funds in sterling in the UK. That email was forwarded to the Executive who thanked Mr King and asked him to keep them posted. On 16 April 2018, the Executive asked for an update on getting the money into an Investec UK sterling account and getting their corporate finance division to give the cash confirmation statement in the offer document.
39. On 18 April 2018 Mr King asked the Executive whether the opening of a sterling account with Investec in South Africa would be acceptable. The Executive replied on the same day saying that it would not, and repeating the requirement for there to be a sterling account in the UK to which recourse could be had, if necessary, for satisfaction of the offer. In a telephone call with the Executive on 20 April 2018, Mr King is recorded as saying that Investec would be coming back to him during the course of the day regarding the opening of a UK sterling account and providing the requisite cash confirmation. A further request for an update on this was made by email from the Executive to Mr King later on the same day.

40. It appears that it was not until 23 April 2018 that Mr King informed the Executive that there was an exchange control problem. In an email of that date Mr King told the Executive that, according to Investec, the transfer of sterling on a contingent basis to an account in the UK would require exchange control approval. As reported by Mr King, according to Investec the application would probably be successful but would take up to six weeks. On the same day, the Executive replied suggesting, amongst other things, that Mr King instruct without delay a third party acceptable to the Executive so that the Executive could then make clear to it what would be required.
41. It is apparent that Mr King did not instruct Investec to seek the necessary approval and did not put them in touch with the Executive for the purpose of discussing what would be required. Instead, on 24 April 2018, Mr King asked whether the Executive would accept Saxo Bank, a Danish bank which Mr King said had a London branch and which apparently was familiar with himself, his trust and Laird. Saxo Bank was not known to the member of the Executive with whom Mr King was corresponding and had no track record of acting or advising in relation to the Code. Accordingly, the Executive repeated its suggestion that Mr King instruct Investec and told him that the Executive would not consider accepting Saxo Bank as an alternative unless it were to receive from a senior employee of the bank an account of Saxo Bank's relevant experience and expertise and an explanation as to why it should be considered qualified to provide cash confirmation under rule 24.8 of the Code. This prompted a response from Mr King in which he told the Executive that if it refused to accept Saxo Bank or any other alternative for what he regarded as no good reason, then he would ask Rangers to agree to a postponement of the offer until exchange control approval could be obtained.
42. On the same day, the Executive obtained from the Outer House the interim interdict previously referred to. Finally, on 26 April 2018 Mr King made the request for an extension of time in which he offered to instruct Investec to seek the necessary exchange control approval provided the Executive agreed to the extension of time necessary to enable approval to be obtained.

43. It is against this background that I have to ask myself whether a review by the Committee of the Executive's rejection of Mr King's request for an extension of time would stand any reasonable prospect of success. In my judgment it clearly would not.
44. It was Mr King's obligation as a resident of South Africa and as the party obliged to procure a Code compliant offer, to ascertain at an early stage what if any exchange control difficulties he might face in publishing an offer and then promptly to start the process of dealing with them having first consulted the Executive. Mr King was alerted to the requirement of cash confirmation on 27 March 2018 before announcing his intention to procure the making of an offer. He was told on 6 April 2018 what cash confirmation would in practice involve. On 11 April 2018, Mr King appears to have agreed to instruct Investec with a view to the bank opening a UK sterling account and giving the necessary cash confirmation, yet it was not until 23 April 2018, after chasing by the Executive, that he raised the problem of exchange control approval. Even then, he appears not to have instructed Investec to obtain the necessary approval with a view to giving cash confirmation. Having regard also to the wider context and the fact that Mr King had previously failed to comply with the ruling of the TAB and failed to publish a Code compliant offer announcement in accordance with the interlocutor of the Inner House, it seems to me highly unlikely that a review by the Committee of the Executive's decision of 26 April 2018 would be successful. Such a review, in my view, would stand no reasonable prospect of success.
45. Accordingly, for this reason also I reject the request to convene the Committee.

Signed: Michael Crane QC

Chairman of the Hearings Committee

21 June 2018

Date of this Panel Statement: 4 July 2018