



MOSS BROS GROUP PLC: THE TAKEOVER PANEL CONFIRMS IT IS VIRTUALLY IMPOSSIBLE TO RELY ON MOST CONDITIONS TO A TAKEOVER OFFER

It was announced on 12 March 2020 that Brigadier Acquisition Company Limited ("Brigadier"), a company majority-owned by Menoshi Shina, the owner of Crew Clothing, had made a recommended cash offer for Moss Bros Group PLC ("Moss Bros"), the menswear retail and hire business, at 22 pence per Moss Bros share, valuing Moss Bros (on a fully diluted basis) at approximately £22.6 million.

Brigadier's offer was to be effected by way of a scheme of arrangement under Part 26 of the Companies Act 2006 ("Scheme"). The scheme document was, accordingly, published on 7 April 2020 and contained, in Part 4, a typical array of conditions to the Scheme, including that:

- ...since 27 July 2019 there having been no material adverse change and no circumstance having arisen which would reasonably be expected to result in any material adverse change in, the business, assets, financial or trading position or profits, operational performance or prospects of any member of the Wider Moss Bros Group which is material in the context of the Wider Moss Bros Group taken as a whole; ...
- ...since 27 July 2019 there having been no contingent or other liability having arisen or increased other than in the ordinary course of business which is reasonably likely to affect adversely the business, assets, financial or trading position or profits of any member of the Wider Moss Bros Group to an extent which is material in the context of the Wider Moss Bros Group taken as a whole; ...

On 22 April 2020, Moss Bros released the following announcement:

The Board of [Moss Bros] announces that it has been informed by [Brigadier] that it is seeking a ruling from the Takeover Panel in order to invoke a condition of its offer and lapse its offer for Moss Bros (the "Offer"). The Board notes the requirements of Rule 13.5(a) of the Takeover Code, which states that [Brigadier] may not invoke a condition so as to cause the Offer not to proceed, to lapse or to be withdrawn, or so as to cause the Offer not to proceed, to lapse or be withdrawn, unless the circumstances which give rise to the right to invoke the condition are of material significance to [Brigadier] in the context of the Offer. The Board confirms that it will take all necessary action to make its case that those requirements have not been met and that the Offer should not therefore be permitted to lapse. ...

On 19 May 2020, the Takeover Panel published (in Panel Statement 2020/4) the ruling of the Takeover Panel Executive in response to Brigadier's submission of 22 April 2020. Brigadier had argued that it should be entitled to invoke four conditions to the Scheme, including the two set out above, on account of the impact on Moss Bros of the COVID-19 pandemic and related UK Government measures. Moss Bros had subsequently lodged its own submission with the Takeover Panel Executive arguing against those conditions being invoked.

The Takeover Panel Executive ruled that Brigadier had not established that the circumstances which gave rise to its right to invoke the relevant conditions were of material significance to Brigadier in the context of its offer as required by Rule 13.5(a) of the Takeover Code and, therefore, that Brigadier should not be permitted to invoke any of the relevant conditions.

This ruling is consistent with the stance taken by the Takeover Panel in the aftermath of 9/11, in the context of WPP Group PLC's ("WPP") offer for Tempus Group PLC ("Tempus") (see Panel Statement 2001/15). In that case, WPP sought to invoke the material adverse change condition in its offer for Tempus – contained in its offer document dated 10 September 2001 – and argued that there had been a material adverse change in the prospects of Tempus after the announcement of WPP's offer and, in particular, following the events in the United States on 11 September 2001. The key issue was whether WPP had established that there had been a material adverse change in the prospects of Tempus which was of material significance to WPP in the context of its offer for Tempus.

The Takeover Panel noted its statements from 1974 (see Panel Statement 1974/2), in the context of what is today covered by Rules 2.7(b), 13.1 and 13.5(a):

In general...the Panel considers that a change in economic and industrial conditions, or even in legislative policy, which may suggest that a proposed acquisition will not be as advantageous for the offeror company as was hoped when the intention to offer was first announced, is one of the hazards which has to be accepted in a takeover situation. Even in more normal conditions than now exist, markets are volatile and it must be expected that they will sometimes over a period show wide fluctuations, which may for a time put a different complexion on the economics of a particular offer. On the other hand, falls in market levels or depressions in the general economy are usually

followed after a time by recovery. Similarly, legislative policy depends upon the exigencies of the time. The Panel considers that a change in economic, industrial or political circumstances will not normally justify the withdrawal of an announced offer. To justify unilateral withdrawal, the Panel would normally require some circumstance of an entirely exceptional nature and amounting to something of the kind which would frustrate a legal contract. It must be remembered that the terms and timing of an announcement of intention to offer and of the posting of offer documents are, subject to the Code, entirely in the hands of the offeror. It is therefore right that an offeror shall accept the risk of a change of circumstances in the intervening period. Once an offer is announced, the market in the shares of the offeree company is likely to be, at least to some extent, supported by the price at which the offer has been fixed. It follows that withdrawal would contribute to the market having been a false one.

It was clear to the Takeover Panel that a temporary effect on profitability was not of itself sufficient. The adverse change had to be long lasting since a purchaser of 100 per cent of a company for strategic reasons was clearly investing for the long term and therefore something of material significance to such an offeror "in the context of the offer" had to be long term. In its offer document, WPP stated strongly that it believed that there was a variety of strategic and financial benefits arising from the takeover of Tempus which arose in a number of ways.

The Takeover Panel was of the view that it was hard to say that those strategic benefits no longer remained available to WPP noting, in particular, the fact that on 10 October 2001, WPP stated in its announcement that it "remained convinced of the strategic merits of combining WPP and Tempus". Furthermore, in the context of the offer such effects as there may have been on Tempus' prospects as a result of the events of 11 September and following, over anything other than the very short term, remained unclear in spite of the attention paid to them.



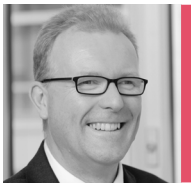


The Takeover Panel came to the conclusion, on the evidence before it, that WPP had failed to demonstrate that there had been a material adverse change in the context of the bid such as to entitle WPP to invoke the material adverse change condition in its offer.

The lesson to be drawn from the above is that the approach of the Takeover Panel as explained in 1974 and in the ruling in the WPP case in 2001 remains as valid today as before. Offerors should take heed of these statements and Takeover Panel decisions, as it seems clear that offerors will be required to press ahead with their offers, notwithstanding MAC conditions, in the absence of a circumstance "sufficient to frustrate a legal contract", a threshold which in the context of the Takeover Code neither 9/11 nor COVID-19 has been

deemed sufficient to meet. Accordingly, in general, it remains the case that offerors must assume, when contemplating an offer, that they will not be able to rely on any conditions to the offer or scheme of arrangement other than those relating to target shareholder acceptance levels, shareholder and/or court approval, admission of shares to trading or for competition law and certain other significant regulatory approvals.

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