

Moss Bros: The Difficulty of Invoking MAC Conditions in UK Public Takeovers

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The Takeover Panel (the Panel) has confirmed again in the Moss Bros case how difficult it is for bidders to invoke material adverse change conditions (MACs) and lapse offers in the UK.

On 12 March 2020, Brigadier Acquisition Company (a vehicle majority owned by Michael Shina, the owner of Crew Clothing) announced a firm intention to make an offer for Moss Bros, the UK menswear chain. The timing of the announcement was important, as the potential significance of COVID-19 was becoming apparent, and indeed this was noted in the announcement by Moss Bros.¹

The offer document (in the form of a circular for a scheme of arrangement) was published on 7 April, in which Brigadier noted that it believed the impact of COVID-19 had been materially adverse to Moss Bros, in particular given that Moss Bros had announced in its 23 March trading update that it was closing its stores.

The Moss Bros shareholder meetings to approve the transaction were scheduled for 29 April but on 22 April, Moss Bros announced that it had been informed by Brigadier that it was seeking a ruling from the Takeover Panel in order to invoke a condition of its offer and thereby lapse it.²

The last time the Panel had considered such a request was in 2001 in the aftermath of the September 11 terror attacks when WPP sought to invoke a MAC and lapse its offer for Tempus. In that case, both the Panel Executive and the Hearings Committee on appeal determined that WPP was not permitted to invoke the MAC condition. In its ruling, the Panel noted that the adverse change needed to be “of very considerable significance striking at the heart and purpose of the transaction in question” and analogous to frustration of a legal contract.³

Rule 13.5 of the Takeover Code sets out the test that the Panel applies where a bidder seeks to invoke a condition: The circumstances need to be of **material significance to the bidder in the context of the offer**. Guidance is given in Practice Statement No.5, which confirms that the standard is a high one (but not “analogous” to legal frustration as was stated in the WPP/Tempus ruling) and is judged by reference to the facts of each case at the time the relevant circumstances arise.

¹ In Section 6 (“Background to and reasons for the Moss Bros Directors’ recommendation”) the board of Moss Bros noted that “... recently, the highly uncertain, but potentially significant, impact of COVID-19” was a factor that had impacted Moss Bros’ operating and share price performance.

² Moss Bros proceeded to hold its shareholder meetings, where the transaction was approved by an overwhelming majority.

³ Panel Statement 2001/15.

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On 19 May, the Panel confirmed that it had ruled that Brigadier had not established that the circumstances that gave rise to its right to invoke a MAC were of material significance to it in the context of its offer and therefore, Brigadier was not permitted to lapse its offer.⁴ The Panel has not yet published detailed reasoning behind the decision, noting that Brigadier has a short period to request an appeal to the Hearings Committee.

The Panel's ruling in Brigadier/Moss Bros was unsurprising given the very high materiality threshold that must be satisfied in order for a bidder to be permitted to lapse an offer once it has been announced and the specific factors mentioned in the following paragraph. It also appears consistent with its position in WPP/Tempus.

⁴ Panel Statement 2020/4.

It would have been possible for Brigadier to have included a bespoke condition relating to COVID-19 and have drawn specific attention to it in the firm offer announcement. Instead, Brigadier sought to rely upon standard form conditions that did not specifically refer to the pandemic. The references to COVID-19 in the firm offer announcement and offer document also demonstrate that its potential impact was not entirely unforeseeable. These are factors that will have been taken into account by the Panel in its decision, along with the timing of the announcement when the effects of COVID-19 were already starting to be felt around the world.

Potential suitors for UK public companies should stay alert to the significant hurdles they face in trying to walk away from an offer once they have made a firm intention announcement.