A Bad Deal in the Boardroom

Case Study Notes

November 2014

CharlesRussell Speechlys

QUOTED COMPANIES ALLIANCE

Contents

Important notice

The legal information included in this document is correct to the best of our knowledge and belief at the time of going to press. It is, however, specific to the case study and only suitable as a general guide to the issues raised within the case study. We recommend that specific professional advice is sought before any action is taken.

This case study was enacted at the "Bad Deal in the Boardroom" seminar held on 6 November 2014. The scenario and the answers given highlight issues that arise in practice, but do not seek to be comprehensive, nor necessarily to reflect the advice Charles Russell Speechlys would have given if instructed to advise. The events which unfolded during the case study were acted out by an experienced panel to highlight issues, and do not represent how the panel members would necessarily react to the various situations in practice.

The story: background

Briefing note as distributed to the audience

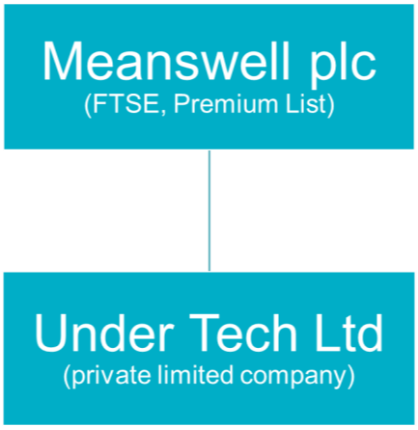
Meanswell plc is a premium listed company that specialises in the creation and support of tablet and smart phone applications.

Last year was particularly difficult for the company. Its results were poor, both at a trading level with the loss of a major client and as a result of the cost of a move to a new corporate HQ in central London. This led to a significant drop in the share price, which it is struggling to recover from and has dismayed investors. Meanswell also received a private warning from the UKLA for late announcements of the loss of its client and of the HQ overspend, so there is particular sensitivity to announcement obligations. As a result, the board was strengthened by the appointment of two new non-executives (including Andrew) with a mix of professional and industry expertise.

The company undertook an urgent review of strategy, which set out a number of potential actions. These potential actions included the closure of one site in the UK and the sale of Under Tech, a loss making subsidiary (the options are still being considered and have not been announced). It is thought that a trade buyer may see an opportunity to turn around Under Tech and so pay a good price, which will help Meanswell by providing working capital to invest in the core business.

The company's corporate finance adviser has found a potential trade buyer, Buy Mobile, which is interested in investigating a purchase of Under Tech. The FD has separately been approached by a second potential buyer, App Screen. App Screen heard about the opportunity from Andrew, one of Meanswell's new non-executives, who is also on App Screen's board.

Other relevant background information is that a key institutional shareholder, with 10% of the vote, continues to be unhappy with Meanswell's poor performance and has been expressing its concerns to the Chairman. It was only narrowly persuaded at the last moment not to vote against the advisory resolution on the company's remuneration report at the AGM earlier in the year and the Chairman is keen to rebuild the relationship.



The cast: key individuals and entities

Key individuals and entities involved in the case study

The Board of Meanswell plc	The Advisers to Meanswell plc
Michael Marx Chairman *(Chief Executive Officer, Development Securities PLC)*	**Jeremy Ellis** Corporate Finance *(Corporate Finance Director, Investec)*
Tom Shaw Finance Director *(Partner, Charles Russell Speechlys)*	**Harry Chathli** Financial PR and Media *(Director, Luther Pendragon)*
Andrew Collins Non-Executive Director *(Partner, Charles Russell Speechlys)*	**David Hicks** Legal *(Partner, Charles Russell Speechlys)*
Adam Carling Chief Executive *(Partner, Charles Russell Speechlys)*	
Jodie Dennis General Counsel and Company Secretary *(Associate, Charles Russell Speechlys)*	

The Group	Potential Buyers
Meanswell plc Premium List	**App Screen** Andrew member of board
Under Tech Ltd Private subsidiary	**Buy Mobile** Introduced by CF Adviser

The context: continuing obligations

Directors of publicly traded companies have obligations both to their shareholders and to the market

Duties to Shareholders	Duties to the Market
Companies Act 2006 Codified general duties owed to the company (i.e. to shareholders): Promote the success of the company (s172) Act within powers (s171) Exercise independent judgement (s173) Exercise reasonable care, skill and diligence (s174) Avoid conflicts of interest (s175) Not to accept benefits from third parties (s176) Declare interests in transactions or arrangements with the company (s177)	**Listing Principles and Listing Rules** Listing Principles High level principles, such as: - establish and maintain adequate procedures, systems and controls to enable compliance (Principle 1) - deal with the FCA in an open and co-operative manner (Principle 2) Split into Listing Principles which apply to both Premium and Standard listed companies and Premium Listing Principles which apply only to companies with a Premium Listing Can be separately enforced by the FCA, if, for example, a specific technical rule breach cannot be found (e.g. FCA fine of Prudential per Final Notice dated 27 March 2013)
Other specific duties/rules, such as: Shareholder approval for substantial property transactions and long term service contracts (ss190 to 196 and 188 respectively) Restrictions on loans to directors (ss197 to 214) Nb. legislation can extend liability beyond shareholders in respect of e.g. health and safety and where the company is in financial difficulty	Listing Rules Chapter 9 covers key continuing obligations, including various specific notifications, compliance with the Disclosure and Transparency Rules and Model Code (see below), reporting and corporate governance Chapters 10 to 13 set out additional continuing obligations in relation to transactions, related party transactions, share buybacks and circulars Nb. The case study focussed on the Main Market, but the AIM Rules cover similar areas, albeit that the system for control and enforcement is focussed on the role of the Nomad in “policing” companies

Duties to Shareholders	Duties to the Market
Common law rules and equitable principles These continue to be relevant, both in interpreting the duties codified in the Companies Act 2006 (see above) and for those duties that were not codified but continue to apply, for example: Duty of confidentiality (to keep company information confidential) Duty of undivided loyalty (includes duty to make available information that is relevant to the company's business)	**Market Abuse and control of Inside Information** Protecting investors by ensuring a properly functioning market in which all participants have equal access to the information they need to make informed investment decisions Obligation to disclose inside information Disclosure and Transparency Rules requirements in relation to disclosure and control of "inside information" (DTR2) Primary obligation to disclose "inside information" via a Regulatory Information Service as soon as possible Disclosure can be delayed in certain circumstances Nb. similar requirements apply for AIM traded companies under AIM Rule 11 Other DTRs cover transactions by "PDMRs", financial reporting, notifications of changes in voting rights etc. Share dealing / control of inside information Insider dealing is a criminal offence under the Criminal Justice Act 1993 The Financial Services and Markets Act 2000 sets out civil offences for misuse of information (overlapping with the Criminal Justice Act) and market manipulation The FCA Code of Market Conduct contains guidance on Market Abuse offences The Model Code forms part of the Listing Rules and places additional dealing restrictions on persons discharging managerial responsibilities ("PDMRs") to ensure that they do not abuse, and do not place themselves under suspicion of abusing, inside information that they may be thought to have Nb. Market Abuse and Criminal Justice Act offences can also be committed in respect of AIM traded companies and AIM Rule 21 requires individuals equivalent to PDMRs to comply with dealing restrictions

Scene 1: directors' conflicts

Andrew (NED) declares his interest in the potential sale of Under Tech due to his position as a director of App Screen

The Chairman is not impressed that Andrew, also a director of App Screen, discussed the potential sale of Under Tech with App Screen's chairman.

The board needs to decide how to deal with the situation. We assume that the company's articles of association set out that the board can impose restrictions on Andrew's use of confidential information, withhold papers and absent him from all or parts of meetings as part of the authorisation of the conflict situation.

Note that here we are not talking about an offer under the Takeover Code, as the potential transaction is for the sale of the unlisted subsidiary, which has always been a private company.

Conflict of interest due to Andrew's position on boards of both Meanswell plc and App Screen

Conflicting duties

Andrew has conflicting duties to e.g. (i) keep Meanswell plc's information confidential and (ii) disclose all relevant information to App Screen.

Authorisation for situational conflict

Andrew's position on the board of App Screen should have been pre-authorised by Meanswell on his appointment to avoid a breach of duty under s175 of the Companies Act 2006. Provisions in articles are required to be able to permit withholding of confidential information obtained as director of App Screen from Meanswell and vice versa (which cannot be done through enabling resolutions alone). Part of the process of considering authorisation should have been to ensure that similar provisions were in place for App Screen to allow Meanswell's information to be kept confidential.

Andrew's discussion with App Screen, which prompted their approach to Tom, was contrary to Meanswell's policy and the conditions attached to his authorisation, so there is in fact a breach of s175 even though his position on the board of App Screen was authorised correctly at the time.

Declaration of interest in potential transaction

In addition to s175, there is a requirement to declare his interest under s177 of the Companies Act 2006. It is sufficient for other directors to be aware, but good form to declare (or confirm information up to date) at start of meeting.

Practical measures

A record should be maintained of interests declared by directors and situational conflicts authorised, including any conditions attached to authorisation, and

Andrew should have been briefed on the required procedure to comply with those conditions and Meanswell's policy.

Notwithstanding procedures to protect information, the advice was that Andrew; (i) is not involved in discussions in relation to the potential sale of Under Tech; (ii) should absent himself from discussions when they move to the next stage; and (iii) should not be able to access board papers in relation to the discussions or subsequent negotiations. He will still need sufficient information to perform his duties as a director of Meanswell, but it can be made clear that all such information must until further notice be kept confidential from App Screen.

Scene 2: confidentiality and control of Inside Information

The Board's approach to controlling information flow to the potential buyers and to the market

Having excluded Andrew from the remainder of the discussions concerning the potential sale of Under Tech, the Board turns to controlling information that might be disclosed to the Buyer and considers if it is in possession of inside information that might have to be announced to the market.

The assumption here is that a sale would be a fairly material transaction for Meanswell plc, so the Board are certainly concerned about their obligations in respect inside information, especially given the previous warning from the UKLA.

Confidentiality arrangements with potential buyers

Confidentiality agreements
Meanswell should ensure that there is a confidentiality agreement in place with each of the potential buyers. This is important whether or not there is inside information involved.

Practicalities of compliance
Confidentiality agreements should set out practical measures to control information through use of code names, controlling individuals who can be contacted on each side, use of secure data site with print control, and ensuring information is anonymised (especially at early stages) etc.

There are likely to be technical breaches of confidentiality obligations to third parties to a certain extent where investigations are being made prior to a potential sale, but these should be considered in relation to the type of information and the parties involved. For example, where there are contracts with public bodies or government departments one may well seek consent before sharing any confidential information.

Data protection
Anonymise sensitive personal data in particular – for example consider employees in relation to e.g. PHI details.

Control of inside information and announcements
See below on whether this is inside information and the importance of confidentiality in the context of delaying announcement.

Provisions should be considered acknowledging that the confidential information may be inside information and that it will not be used for dealing.

Note requirement to establish effective arrangements to deny access to inside information other than those who require access due to their functions within the issuer (DTR 2.6.1R).

Is the potential sale and related discussions inside information?

What is "inside information"?

For these purposes, the definition for "inside information" can be found at s118C of the Financial Services and Markets Act 2000, the key parts of which are extracted below.

Definition of "inside information" – extracts from s118C of FSMA 2000:

…

(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which -

(a) is not generally available,

(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and

(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.

…

(5) Information is precise if it—

(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and

(b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.

(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

The application of the definition above is fact dependent and must be considered in the context of the European legislation from which elements are derived and cases, both in Europe and England, which set out principles of interpretation for applying the various tests. The recent decision in *Ian Hannam v FCA [2014] UKUT 0233 (TCC)* (**Hannam**), which was referred to during the case study, highlights that it is a question of judgement and there is rarely an easy binary answer in this area.

Here the information is not generally available and relates to Meanswell plc (an issuer of qualifying investments), so that the key points considered were whether the information was precise and would, if generally available, be likely to have a significant effect on the price of Meanswell's shares.

We have looked at each of those key elements below, as discussed during the case study. This does not seek to be exhaustive, but highlights how some of the key tests might be applied in practice.

Is the information "precise"?

Existence of circumstances

Here there are clearly circumstances that exist or may reasonably be expected to come into existence, being the fact of the discussions taking place and potential sale of Under Tech.

"*may reasonably be expected*":

The Court of Justice of the European Union held in *Geltl v Daimler [2012]* that "may reasonably be expected" means that, on the basis of an overall assessment of the factors at the time, there is a "reasonable prospect" of something occurring.

In the decision of the Upper Tribunal in *Ian Hannam v FCA [2014] UKUT 0233 (TCC)*, the Tribunal considered that a "reasonable prospect" does not have to be "more likely than not", but must not be "fanciful", so the bar is fairly low.

Specific enough

The information must be specific enough to enable a conclusion to be drawn as to the possible effect of that event on the price of Meanswell's shares, not the general commercial effect or impact on Under Tech or its prospects.

"enabling a conclusion to be drawn":

Hannam confirmed the approach previously adopted in *Massey v FSA [2011]* that it should be possible to tell which direction the price will move, not just that it will have an effect.

However, an investor does not need to be able to assess the affect "with confidence", and (though not relevant here) neither does the information have to be wholly accurate.

For the case study we established that an investor would be able to conclude that the potential sale and related discussions would move the price of Meanswell's shares upwards.

Is the information likely to have a significant effect on price?

The "reasonable investor" test

The "reasonable investor test" at s118C(6) provides a definition of what would be "likely to have a significant effect on price".

According to the Tribunal in Hannam, the "reasonable investor" does not necessarily have experience of a particular market/sector, just access to generally available information, which he would take into account. He would not take into account information which would have no significant effect on price, and information must still have a "significant effect on the price".

What is "significant"?

There is no particular materiality threshold for significance. In particular there is no percentage movement in price below which the effect will never be considered "significant", whether 10% or some smaller percentage.

DTR 2.2.4G (2) for example (in the context of announcing inside information) outlines that "*...there is no figure (percentage change or otherwise) that can be set for any issuer when determining what constitutes a significant effect on the price of the financial instruments as this will vary from issuer to issuer…".* This was confirmed by the UKLA in Technical Note 521.1 and by the Tribunal in Hannam.

UKLA Technical Note 521.1 (UKLA/TN/521.1)

"*We are aware that some market practitioners may consider 10% as a threshold for impact on the price of an issuer's financial instruments. This is not the case. Similarly, we do not necessarily see it as appropriate, in this context, that a 10% variation in underlying financial information (e.g., operating profit, or projected operating profit) should be used as the threshold for making an announcement.*"

Hannam analysed "significant" by contrast to "insignificant", or "trivial". The "reasonable investor" would take into account information that has a non-trivial effect on price. So, as set out by the Tribunal in Hannam, the test would be that the potential effect on price must be more than trivial, which is again a fairly low bar.

In our case study, this test was considered to have been satisfied; whilst we would not be able to tell exactly what the increase in price of Meanswell's shares price would be, we could say that it would be more than trivial.

What is "likely"?

Having established that we thought that the effect would be "significant" we then looked at how likely that effect would be.

There is no definition in either the Market Abuse Directive or FSMA as to what "likely" means in this context. CESR (now the European Securities and Markets Authority (ESMA)) guidance is that "*mere possibility*" is not sufficient, but "*it is not necessary that there should be a degree of possibility close to certainty*".

The meaning of "*likely*" according to Hannam

In Hannam a "*mere possibility*" (per the CESR guidance) was explained as "*one which would provoke, if suggested as something which might happen, the reaction `well, it might happen; anything can happen; but this is highly unlikely*'". The Tribunal suggested that "likely" in this context is something between 5% and 95% probable; it specifically rejected the 50% probability test (i.e. that it should be more probable than not), noting it would also be difficult to apply in practice as it would be too fine a distinction. However, it went on to say (which is perhaps a more helpful formulation than focusing on particular percentage), that it should be a real and not fanciful prospect that the information would have an effect on the price.

Here, given the background of the poor trading and losses made by Under Tech, we concluded that the test was met and that the information would be "likely" to have a significant effect on price (and that a reasonable investor would take it into account).

Was it inside information?

Yes, based on the analysis above we concluded that the information was of a precise nature and, if generally available, would have a more than "fanciful" chance of increasing the price of Meanswell's shares by a more than "trivial" amount.

Is there a requirement to announce?

Obligation to announce

We established that this is inside information.

DTR 2.1R of the Disclosure and Transparency Rules requires inside information to be notified to a Regulatory Information Service as soon as possible.

The question is therefore whether Meanswell can delay disclosure.

Delaying disclosure

DTR2.5 sets out the circumstances under which disclosure of inside information can be delayed (which is derived from Article 6 of the Market Abuse Directive).

Meanswell may delay disclosure "such as not to prejudice its legitimate interests" provided that:

(i) such omission would not be likely to mislead the public; and

(ii) Meanswell can ensure the confidentiality of the information.

"Legitimate interests"

"*legitimate*" under DTR2

DTR2.5.3R states that legitimate interests may, in particular, relate to negotiations in course, or related elements where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure.

DTR2.5.5G states that an issuer should not be obliged to disclose impending developments that could be jeopardized by premature disclosure.

The Tribunal in Hannam rejected that industry practice could be cited as a justification for delay (i.e. it is usual not to announce at this stage of discussions), but held it was reasonable to delay to avoid misleading the market.

Here, we concluded that the discussions and potential sale of Under Tech did not yet need to be announced. However, the importance of the following were noted:

(i) maintaining confidentiality (see discussions above on ensuring the potential buyers enter into confidentiality agreements);

(ii) ongoing monitoring, in case the situation should change the analysis (see DTR2.5.2G(1)); and

(iii) preparation of a holding announcement.

Ongoing monitoring

There should be ongoing monitoring of media and market prices for leaks.

UKLA Technical Note 520.1 (UKLA/TN/520.1)

"*While an issuer may not be required to respond to a rumour that is false, when speculation or market rumour is largely accurate, it is unlikely that an issuer will be able to continue to delay announcement of inside information… inaccuracies of some aspects of a story may not in themselves be justification for non-disclosure*…"

However, note that the knowledge that rumour or speculation is false is not of itself inside information, or if it is inside information it would be capable of being delayed in most cases (see DTR2.7.3G).

Listing Principle 1 confirms that "*a listed company must take reasonable steps to establish and maintain adequate procedures, systems and controls to enable it to comply with its obligations*".

Holding announcement

Meanswell would have to put in place measures which enable public disclosure as soon as possible in case it is not able to ensure confidentiality (DTR 2.6.2R).

DTR 2.6.3G suggests that issuers should prepare a holding announcement to disclose if there is any actual or potential breach of confidence with as much detail as possible, reasons why a fuller announcement cannot be made and an undertaking to announce further detail as soon as possible (DTR2.2.9G).

UKLA Technical Note 520.1 (UKLA/TN/520.1)

"*Should a leak occur and a full announcement not be possible, any holding announcement should be meaningful and, at minimum, reflect the extent to which a leak or rumour is truthful. We will challenge holding statements that do not sufficiently reflect the leak. We do recognise in time critical situations, there can be a tension between timeliness and completeness, and in working with issuers and advisers in managing a particular market situation, we may seek commitments as to planned timetables for announcements and the contents of these*."

Does Meanswell have to announce the discussions and potential sale of Under Tech?

We concluded that it did not have to announce at this stage, but that a holding announcement should be prepared and interaction with the buyer (who we would ensure had signed a confidentiality agreement) would be restricted to Tom only at this stage.

The Board were also left to review what had been said in the annual report and accounts about Meanswell's trading prospects and financial condition, so that they were clear what was last said to the market (there had been no subsequent trading announcements).

Scene 3: discussions with major shareholder

Sounding out the major shareholder

Michael raised the issue of the major shareholder who nearly caused Meanswell a lot of trouble at the AGM earlier in the year. He thought a potential sale should be good news for them, but didn't want take the discussions with potential buyers too far if they were completely against the idea and felt it was premature to be thinking about a sale.

The Board then considered if it was able to discuss the potential sale with the major shareholder, given that it was inside information.

The Rules: selective disclosure
Ordinarily, were Meanswell to disclose inside information to a major shareholder it would have to release that information to a Regulatory Information Service (see DTR2.5.6R).

However, here Meanswell is delaying disclosure (pursuant to DTR2.5.1R) and so it is possible to selectively disclose to certain categories of person provided that they owe a duty of confidentiality. Those categories include major shareholders (see DTR2.5.7G).

Selective disclosure must be made in accordance with the disclosure rules (see DTR2.2.10G) and as noted above there must be a duty of confidentiality owed by the major shareholder to Meanswell. The advice given was that this should ideally be in writing so that compliance can be evidenced (particularly given comments made in Hannam).

Generally, Meanswell must ensure that responsibility for communications is clear and that relevant people are aware of the procedures. There should be a consistent procedure for determining what is inside information and for its release under the overall responsibility of the board (see UKLA Technical Note 521.1).

Holding announcement
Meanswell has already resolved to prepare a holding announcement, but note that it is a particular requirement of selective disclosure (under DTR2.6.3G), and there should be ongoing monitoring of media and market prices for leaks. If there are rumours that suggest a breach of confidence Meanswell should make an announcement as soon as possible.

Wall crossing
Selective disclosure to the major shareholder would require their agreement to be "wall crossed" and so "brought inside". This would mean the shareholder would be unable to trade until it has been "cleansed" of the inside information by

Meanswell announcing or the potential sale being abandoned. Most institutional shareholders are reticent to be brought inside except for a very short period.

Potential reactions of the major shareholder

The potential reaction of an approach to the major shareholder was discussed, which might include:

(i) agreeing to be wall crossed. Discussions could go ahead to establish if it is supportive or if say it thinks that the sale may be premature and jeopardise value;

(ii) refusal to be wall crossed. Discussions could not go ahead, but the chance of a leak/rumour may have increased; and

(iii) the shareholder taking some kind of action to frustrate the sale, such as frustrating action under Code Rule 21. If the major shareholder was to make a "bona fide" offer then Under Tech could not be sold without shareholder approval; we have found that the Panel can be hard to persuade that an offer is not "bona fide" unless there is overwhelming evidence to the contrary. Alternatively, it may say look to requisition a general meeting, together with perhaps seeking changes to the Board.

It was noted that notwithstanding the potential issues, it would be important for Meanswell to keep control of the information flow and ensure that it has a plan in place for communications.

Scene 4: director dealings

Adam is in some financial difficulty and queries exercising options or stopping his trading plan

Adam is in some financial trouble and was hoping to exercise some of his options to help out. There was an invoice overdue for his children's school fees, and if he didn't pay next week they would lose their places for next year.

He also asks if he can at least stop his broker from carrying on buying shares under his trading plan. To put this into context, Adam obtained clearance from the Chairman for a written trading plan with his broker to help him meet his minimum shareholding requirement. Under the plan, his broker is increasing Adam's shareholding within agreed limits. This allows Adam to build up the shareholding gradually notwithstanding whether they are say in a close period around financial announcements, or here that there is inside information in existence.

Application of the Model Code
The Model Code applies to "persons discharging managerial responsibilities" (PDMRs), which includes all its directors, and imposes restrictions on their dealing in securities beyond those imposed by general law. It forms part of the Listing Rules (Annex 1 to Chapter 9 and see LR9.2.7R).

Under the Model Code, PDMRs must seek clearance from the relevant Board member(s) before they can deal in the company's shares. However, clearance must not be given during a "prohibited period", which is any period where there is inside information in existence and during "close periods" (being set periods up to announcement of financial results) except in certain exceptional circumstances.

Meanswell must require Adam (and its other PDMRs) to comply with the Model Code, and must take all proper and reasonable steps to ensure compliance. Companies may impose more rigorous restrictions if they wish (LR 9.2.8 and LR 9.2.9), but any such share dealing codes must meet the minimum requirements.

"Prohibited period" restrictions
Meanswell is in a prohibited period whilst there is inside information in existence, which we have established there is (see notes on Scene 2).

He is therefore prevented from being given clearance to deal. It does not matter here whether he is in "*severe financial difficulty*" or there are other "*exceptional circumstances*" as he is actually in possession of inside information. However, if he had not personally been in possession of inside information (say if he were a PDMR but not aware of the discussions or potential sale) these circumstances would not have been sufficiently "severe" or "exceptional" to allow clearance to be given in any case.

"Severe financial difficulty" and "exceptional circumstances"

Model Code

Paragraph 10 of the Model Code states that:

- a PDMR "*may be in severe financial difficulty if he has a pressing financial commitment that cannot be satisfied otherwise than by selling the relevant securities of the company*"; and

- "*a circumstance will be considered exceptional if the person in question is required by a court order to transfer or sell the securities of the company or there is some other overriding legal requirement for him to do so*".

These are very high thresholds to satisfy. Whilst Adam may be in a difficult situation, it cannot be said that his circumstances are sufficiently severe nor options sufficiently limited to be given clearance to deal. As above, in any case the exception is not available to Adam as he is actually in possession of inside information.

Trading Plan

Adam's trading plan will comprise a written plan under which his broker deals on Adam's behalf to buy Meanswell shares. It will:

(i) specify the number of shares, price and dates of the trades; or

(ii) give discretion to the broker to decide number of shares, price and dates (perhaps within a range); or

(iii) include a written formula or algorithm etc. to determine the number of shares, price and dates of the trades.

The key to trading plans is that they allow dealings to be made without the PDMR exercising any discretion in relation to the dealings, so that those dealings cannot be affected by any inside information that the PDMR may have.

It would have to have been subject to clearance under paragraph 4 of the Model Code and been entered into outside of a prohibited period. Further clearance is required to cancel or amend a trading plan. Again, clearance cannot be given during a prohibited period unless there are exceptional circumstances (see above).

Can Adam exercise his options or stop purchases under his trading plan?

No, for the reasons explained above, clearance cannot be given to Adam to deal or amend or cancel his trading plan whilst the prohibited period continues.

Scene 5: bad news

The Board considers if it can delay announcement of some bad news

Tom reports some bad news that has just been reported to him. One of Meanswell's top 10 clients has just given notice to cancel its contract.

However, the situation overall might not be so bad. It seems that Under Tech has the opportunity to pitch for an even larger client. That would be excellent news and would also help the negotiations and pricing if either of the potential buyers are interested.

The assumption is that although the market is aware of the difficult financial situation it is not expecting the loss of a large client from Meanswell plc's core business, such that the loss is inside information.

Delaying bad news

Whilst it is a question that is frequently aired, it is not possible to delay the announcement of bad news to package it with good news. This has been confirmed by the FCA/UKLA in both guidance and through sanctions in a number of cases.

UKLA Technical Note 521.1 (UKLA/TN/521.1)

"Issuers are reminded that there is a risk associated with balancing positive and negative news. We also remind issuers that justifying non-disclosure of information by offsetting negative and positive news is not acceptable. Issuers should continue to assess whether information held meets the tests for inside information and whether any announcement obligations arise.

It is generally not acceptable for issuers to attempt to choreograph the assessment and possible disclosure of various and offsetting information that may individually meet the tests for inside information. It is vital that issuers disclose all inside information they have in accordance with the Disclosure and Transparency Rules and do not attempt to delay the publication of negative news, for example, until there is off-setting positive news."

FSA/FCA sanctions for delay of bad news

Issuer	Date of notice	Sanction	Summary
Photo-Me International plc	21/06/2010	Company fined £500,000	*Breach of DTR 2.2.1R and LP 4 (LR 7.2.1)* 44 day delay disclosing information which significantly reduced chances of securing a large contract in time to benefit half-year results and also regarding poor actual sales. Waited to next scheduled quarterly board meeting to considered the effect of the inside information, after which a profit warning was issued.

Entertainment Rights plc	19/01/2009 (published 23/01/2009)	Company fined £245,000 (after 30% early settlement discount)	*Breach of DTR 2.2.1R and LP 4 (LR 7.2.1)* Terms of payment from a customer were varied to lower royalty margins and revise the payment profile, so that profits attributable to the agreement would be reduced by US$13.9 million. Board considered it too early to quantify the impact with certainty and that there would be various opportunities over the course of the year to mitigate the impact. Entertainment Rights issued an announcement after the impact of the variation had been quantified (at c£8m), but over 2 months after the variation had been signed.
Wolfson Microelectronics plc	19/01/2009 (published 20/01/2009)	Company fined £140,000 (after 30% early settlement discount)	*Breach of DTR 2.2.1R and LP 4 (LR 7.2.1)* Major customer informed Wolfson that (i) it would not be required to supply parts for future editions of two of its products, representing a loss of approximately 8% of its forecast revenue for 2008 and, at the same time (ii) that it expected to increase its demand in relation to another of its products. This overall position was expected to lead to revenue from that major customer remaining stable and line with the 2008 forecast. No announcement was made. Announced the negative news 17 days later having reconsidered and sought further advice. It had initially incorrectly offset good news with bad news to justify not announcing.
Woolworths Group plc	11/06/2008 (published 12/06/2008)	Company fined £350,000.	*Breach of DTR 2.2.1R and LP 4 (LR 7.2.1)* An agreement for the wholesale provision of entertainment products to Tesco was varied by deed on 20 December 2005. The effect of the variation was to increase the amount of retrospective discount paid to Tesco by an estimated £8 million which would result in a consequential reduction of over 10% in Woolworths' anticipated profits for the financial year. Although the variation of the contract became binding on 20 December 2005, it was not announced to the market until 18 January 2006 when Woolworths was making its scheduled Christmas trading update.

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