

THE TAKEOVER PANEL

Trafalgar House Investments Limited, and The Cementation Company Limited

Kleinwort, Benson Limited have appealed to the City Panel against a decision at the Executive level in regard to a transaction in which they being the financial advisers to Trafalgar House Investments Limited, purchased a substantial block of shares from a single seller for cash whereas the Trafalgar bid was in paper.

The facts as presented to the Panel appeared to be as follows:-

On 20th January 1970 Bovis Holdings Limited announced an offer for Cementation in Bovis shares and loan stock (convertible in part) of about 14s. 3d. per Cementation share compared with the then market price of about 12s. Trafalgar announced a competitive bid (also in shares and convertible stock) on 3rd February 1970 and an auction developed in which Tarmac Derby Limited made a momentary appearance. Altogether seven bids or increased bids were announced.

As at 16th March Trafalgar's offer for Cementation was worth about 19s. 6d. and that of Bovis about 21s. 1d. Nevertheless, on that day Cementation confirmed that it was recommending shareholders to accept the Trafalgar offer. The price difference between the two offers enabled Samuel Montagu on behalf of Bovis to buy Cementation shares heavily in the market, and on 18th March they announced that they had accumulated 25. 9% of the ordinary capital at prices of up to just over 20s. Shortly after this announcement Trafalgar raised its bid to about 22s., still as to about two-thirds in Trafalgar ordinary shares and as to about one-third in loan stock with subscription/conversion rights.

On 20th March Bovis announced that it was not increasing its offer again and Kleinwort Benson announced almost simultaneously that they had agreed to buy the Samuel Montagu holding of 3,634,500 ordinary shares of Cementation at 20s. 9d. per share (the Trafalgar bid then having an ascribed value of 21s. 10d.) At the same time, Kleinwort Benson discontinued their own purchases in the market. On 20th March Cementation shares closed at around 19s. 6d.

The Panel Executive took the view that if arrangements were not made for the same cash consideration to be made available to other Cementation shareholders Kleinwort Benson would be in breach of the Code. Kleinwort Benson were so informed late on the afternoon of 20th March, and immediately indicated their wish to appeal against this decision.

The Panel think it right to say immediately that they have no doubt that Kleinwort Benson acted in completely good faith throughout. As was to be expected they made clear from the outset that they would immediately accept the Panel's decision without seeking to involve their clients or anyone else.

The Panel has given careful consideration to all the circumstances but whilst recognising that the case is one of difficulty, in which it may be thought that the Code is not as explicit as it might be made, they have no doubt that the purchase of this block of shares without subsequent similar arrangements for all shareholders would have involved a breach of General Principle 8 of the Code which enjoins upon all concerned that "all shareholders of the same class of an offeree company shall be treated similarly by an offeror company".

The Panel think it right in this context to refer to Rules 29 and 31. Before commenting upon these Rules, however, it must be stated as is indeed made clear in the introduction to the Code, that the General Principles prevail; the Rules must be interpreted in the light of the General Principles and as being applications of them to particular situations.

There is in fact no conflict between General Principle 8 and the Rules. Rule 31 is intended to apply to purchases in the market (or otherwise) in which it is open to the general body of shareholders to take part, and even as to these it requires the value of the offer to be raised to a comparable figure in the event of the purchases being at a price higher than the current value. The Rule is not however, intended to permit the purchase (otherwise than on "similar" terms) of a critical block of shares from a specific shareholder, as opposed to the amassing of shares from a number of separate holders, although in the aggregate the shares so accumulated might be significant. It is, of course, true that the Code pursuant to its general policy of not unduly fettering the market (as expressed in Rule 29), does not prohibit an offeror company or its associates from purchasing for cash, although the bid is a paper one. But the liberty to make such purchases exists only where any shareholder so minded is, during the currency of the cash purchases, able to take advantage of them. That was not this case. In the circumstances of the purchase here the Panel could not regard the cash transaction as "similar" to the paper bid within the meaning of General Principle 8, although at the material time the paper bid was valued at 1s. 1d. a share more than the cash price.

Paper bids which are not underwritten for cash are in their nature much subject to market fluctuations and the Panel feels that it must apply General Principle 8 strictly in such cases. Kleinwort Benson accordingly immediately

offered to provide a cash alternative of 20s. 9d. for each uncommitted Cementation share (including those already assented to the offer) at their own expense. The Panel adds that, although not itself bound by such decisions, the Executive had in fact in two unpublished earlier cases involving similar problems ruled in the same sense.

Under the Code as it has been hitherto applied only the purchaser of shares in circumstances like the present (or his associates) have been regarded as being concerned with the Code. The Panel have it in mind to study the implications of this situation and think it right to put those, who in the course of future take-over transactions sell critical blocks of shares upon terms not available or better than those available to the generality of shareholders of the same class, upon enquiry as to the application of the Code to their case. The Panel Executive is always anxious to assist in any case of possible doubt.

24th March 1970.