THE TAKEOVER PANEL

The Consolidated Signal Company Limited/
Venesta International Limited

The City Panel has considered a reference to it of a case involving, in the first place, the interpretation of Rule 33 of the City Code, a Rule which sometimes presents difficulty in its application to the facts of a particular case. This reference has illustrated that difficulty.

The undisputed facts (others are disputed) are that on 19th October 1971 Ozalid Company Limited ("Ozalid") announced their intention to make an offer for the whole of the issued share capital of Venesta International Limited ("Venesta") and for that part of the issued share capital of Keizer Venesta Limited ("Keizer") which was not already owned by Venesta. The offer for Venesta was to be partly in shares and partly in convertible unsecured loan stock. It valued the Venesta shares at about 42p. The price of Venesta shares rose on the market to over 50p against this offer. Earlier in the year they had been as low as 18p, although historically they had once reached a high of 78p. On 20th October the Directors of Venesta, having consulted Hambros Bank Limited, advised rejection of this offer on the grounds that it was "far below the true value of the group". By 25th October the Venesta shares were traded at around 55p. On 2nd November, pursuant to an arrangement made a few days earlier, The Consolidated Signal Company Limited ("Consolidated") privately purchased a block of 1,000,000 Venesta shares at 55p.

Consolidated is an investment company, the majority of whose shares are held by Williams Hudson Group Limited ("Williams Hudson"), 44% of whose shares are in turn held by Argo Caribbean Group Limited ("Argo Caribbean"), a Bahamian company controlled by the trustees of a Mr. David Rowland's family settlement. Piercing the several corporate veils involved, the individual behind Consolidated is, therefore, Mr. Rowland who was stated to be investment adviser to Consolidated, his advice being in practice usually followed. It was reported in the press on 7th November that Mr. Rowland had made the purchase referred to in the preceding paragraph. Consolidated had at this time a large sum to re-invest from the proceeds of the realisation of

another investment. Between 2nd and 9th November Consolidated bought further Venesta shares on the market totalling in all 130,000 shares at 54p. It was stated by a director of Consolidated that the investment in Venesta was, compared with their other investments, a very substantial one.

On 17th November the Boards of Norcros Limited ("Norcros"), Venesta and Keizer announced that terms had been agreed in principle for offers to be made by Norcros for the Venesta and Keizer capitals. These offers, which were to be recommended by the boards of Venesta and Keizer, were partly in shares and partly in unsecured loan stock and the Venesta offer valued the Venesta shares at approximately 52p. Following this announcement Consolidated had, as later appeared, bought Venesta shares actively in the market at prices ranging from 50-56p.

On 29th November the brokers to Consolidated announced that Consolidated had acquired over 10% of the Venesta capital. They consequently became "associates" within the meaning of the Code. On 26th November the Norcros offer document was posted and on 9th December Ozalid announced that its offers had lapsed. On 15th December Consolidated announced in the press that they together with an institutional associate had acquired 24% of the issued capital of Venesta and that they regarded the Norcros offer as inadequate and intended to refuse it. The Board of Norcros immediately issued an announcement challenging the Consolidated statement. This announcement played down the value of the Venesta shares and stated that the Norcros offer would not be increased: it would however be declared unconditional if acceptances in respect of more than 50% of the Venesta shares were received by 17th December. Consolidated continued its active purchases of Venesta and by 17th December they, together with associates, had acquired just over 50% of the issued capital at prices ranging up to 57p. On that date Consolidated's brokers announced that Consolidated and their associates had acquired what was described as "legal control" of Venesta.

In the meantime Consolidated, when they had acquired over 10% of the Venesta capital, had consulted the Panel executive. They assured the Director General that they had no commercial relationship with Venesta, that they regarded the Norcros offer as inadequate and had no intention of accepting it and that they wished to buy further shares in the market to protect the

investment which they had by this time established but that they were uncertain of their position under Rule 33 of the Code. They said that they did not intend to make an offer themselves. The Panel executive ruled that Rule 33 did not restrict a shareholder whose inherent interest was no different from that of any other shareholder and that there was no objection under the Rule to the purchase of shares to protect an investment or to encourage a higher offer. On 14th December they again consulted the Panel executive and were told that the rules did not forbid purchases over 50%.

For the removal of doubt it is perhaps convenient at this point to make clear the status of rulings at the executive level. In the normal course they become immediately effective and if several rulings are given in the same sense on some point of general interest but without particular publicity, a Practice Note may be issued explaining the view taken. If immediately appealed: against the matter is in suspense pending the hearing of the appeal which we always seek to arrange with the utmost expedition. If the appeal is not successful, or if there is no appeal, the ruling stands. If, however, it later turns out that the ruling was obtained by the concealment of material facts or by misrepresentation, then, as is the case with any court or tribunal, either the Panel executive or the full Panel can set it a side with retroactive effect. This would be the case with the executive ruling now under review, or indeed with our own decision upon it.

It is precisely because some such allegation was made in the present case that the full Panel has felt it necessary to give such anxious and prolonged consideration to this matter.

The suggestion that the Consolidated purchases of Venesta shares were not being made purely for investment purposes seems first to have been made in an article in The Observer on 28th November - that was two days after the ruling by the Panel executive. This article specifically alleged that Mr. Rowland had intended to make a bid for Venesta himself in mid 1972 "by which time he expected to have completed the revamp of his master company, Williams Hudson". The article stated that Mr. Rowland had said that "there are lots of areas where Venesta and Hudson overlap, on top of which Venesta is well off for assets, Rowland's staple diet". The article went on to say that it

was because Hudson and Venesta had things in common that Rowland had bought his Venesta stake not through his private company, Argo Caribbean, but through the Williams Hudson offshoot Consolidated "which is little more than a cash deposit box these days". Until the hearing before us the article was never formally contradicted.

Venesta, no doubt encouraged by this article, on 20th December asked that the whole matter should be referred to the full Panel. This was of course after Consolidated had, in reliance on the Panel executive's ruling, purchased their holding of Venesta shares. Venesta had therefore to ask for a ruling which would have retroactive effect. This they did ask for on the ground that the Panel executive had been misled; that Consolidated's objective had always been to obtain control of Venesta and that this was a commercial rather than an investment objective. They contended that the spirit and rules of the Code had been "openly flouted". They also argued that irrespective of any ulterior motive a purchaser of shares on the market who, whether in a bid situation or not, had as his objective obtaining control of the company whose shares he was buying must, if he did by such purchases obtain control make an offer for the remaining shares. This on the ground that to stop at the purchase of 51% must inevitably result in the 49% minority shareholders being left, so to speak, out in the cold and would neglect the Code's requirement that all shareholders should be treated equally. They referred in particular to shareholders who had accepted the bid by Norcros and who were therefore unable to sell their shares in the market during the time when Consolidated and its associates were buying shares.

The full Panel has given careful consideration to all their submissions. We can say at once that we are clear that the present Rules do not impose any obligation on an individual who has acquired control by a series of purchases in the market to endeavour to obtain the remaining shares. There have been many cases in the past where control has been acquired in this way, without any offer being made to the rest of the shareholders. We therefore reject this general proposition as a ground of appeal against the executive ruling.

The allegation that the executive was deliberately misled and the Code flouted is however a grave matter and manifestly within our jurisdiction to consider. We must reiterate that any such allegation, if established, would certainly be a ground on which a ruling, whether at the executive or at the full Panel level, would be set a side. Moreover we reserve the right fully to

investigate and probe into any such allegation which is responsibly put before us. The onus of establishing such a position must, however, lie upon the party alleging it and it is in the nature of things not an easy one to discharge. Venesta has not succeeded in discharging it in the present case.

In view of the fact that Venesta relied in part on the allegations contained in The Observer article, however, we thought it right to invite Mr. Rowland to appear and to invite Consolidated to produce the relevant minute book and papers. Mr. Rowland has specifically denied that he had any ulterior motive apart from that of securing a profit on his investment in purchasing Venesta shares. It was not the case that he contemplated a commercial link between Venesta and Williams Hudson: in fact the two companies had little in common. He specifically assured us that the allegation in the article was untrue. The large purchases which Consolidated and their associates made on 16th and 17th December were occasioned by the unexpected announcement on the 15th that the Norcros offer would go unconditional upon receipt of over 50% acceptances. He thought the shares worth substantially more than the Norcros offer and did not wish to be locked into a minority position. Venesta's representatives had a full opportunity of questioning Mr. Rowland or of calling contradictory evidence. As it is, on the information before us, his evidence remains uncontradicted. It supports the factual basis on which the Panel executive gave its ruling. Mr. Rowland expressly acknowledged his obligation towards the minority shareholders of Venesta. The appeal by Venesta fails.

Before leaving the matter we must, however, make some general observations on the application of Rule 33. The Rule is inevitably imprecise and flexible so as to deal with developing bid situations. Those affected by it are invited to consult the Panel and when they do they may have to be given advice or a ruling which will be unknown to the other parties concerned in the take-over situation since to disclose the intended action (which the Panel had sanctioned as legitimate) before it had been taken might give others an unfair advantage or result in some distortion of the market. We wish therefore to make more generally clear to all concerned what we regard as the normal application of the Rule.

Basically Rule 33 is intended to prevent the frustration of a bona fide offer by a third party whose interests are not shared by the general body of shareholders of an offeree company. Where the third party purchases shares to protect his investment or in the hope of securing an increased offer or a better competing offer his interest is identical with that of the other shareholders - to secure a higher value for, or a growing stream of dividends from, his shares. Where, however, his purchases are intended either wholly or partly to protect or promote some other interest he may have - for instance an existing trading relationship with the offeree company which he suspects might be detrimentally affected by any transfer of control - the position is different. That is an ulterior purpose in which the rest of the shareholders have no interest and the achievement of which would not necessarily bring them any benefit. The Panel executive have on more than one occasion had to warn purchasers off the market if we may use such an expression, because they felt that the purchases were inspired by some such commercial or ulterior purpose which was of no common interest to shareholders as a whole and which might in fact be injurious to such shareholders if it resulted in the frustration of what would otherwise have seemed an attractive offer. Equally the Panel executive has on a number of occasions ruled that purchases by a director or large shareholder in the offeree company in order to fight off an unwelcome bid in the bona fide belief that it was inadequate or otherwise against the interests of the general body of shareholders were permissible under the Rules although the result was to defeat the offer.

The Panel, whilst hoping that these general examples will assist those concerned, realises that in some cases an assessment has to be made, sometimes with inadequate material and generally without consulting other parties, of the motives and intentions behind the actions of those whose purchases on the market are in question. Whilst defence againstan inadequate bid is one thing, the frustration of a bid for other than investment reasons is another. But the elucidation and establishment of the true motive underlying a transaction is often difficult and sometimes impossible. This sort of situation will no doubt be considered by the City Working Party. In the meantime we think it right to say that the Panel consider that in the case where a third party intervenes in a bid situation for an offeree company, in which prior to the announcement of the offer he had no interest, the Rule would justify the executive

requiring such third party, once he had secured 10% of the issued shares of the offeree company, to satisfy them affirmatively that he was buying for investment purposes only and would stop short of control. In an appropriate case the Panel executive might well permit further purchases to be made only up to a limited total or at a price not exceeding the value of the offer. In such a case therefore the intervener might have to consider the alternative of making a general offer.

The Panel re-iterates the importance of early consultation with the executive.

6th January, 1972.