

THE TAKEOVER PANEL

The National Coal Board Pension Funds /

The British Investment Trust Limited

The Panel on Take-overs and Mergers met on 10th November 1977 to consider an appeal by the British Investment Trust Limited ("BIT"), represented by Robert Fleming & Co Limited ("Flemings"), against a ruling by the Panel executive relating to the effect of Rules 33 and 34 on market purchases of BIT shares by the National Coal Board Pension Funds ("NCBPF"), represented by S.G. Warburg & Co Limited ("Warburgs").

On 26th October 1977 NCBPF announced an offer for BIT shares under which they will pay in cash the equivalent of 98 per cent of the net asset value per share on the date on which the offer becomes wholly unconditional. The net asset value would be determined by a formula which was set out in the press announcement.

Warburgs proposed and Flemings accepted, that for the purpose of Rule 32 the price paid by NCBPF for shares purchased in the market during the offer period should be judged against the formula value on the day of the purchase. If the price exceeded the then current value of the offer, then that higher price - expressed as a variant of the 98 per cent - would be reflected in an increase in the offer terms.

The difference between the two advisers arose on the application to this case of Rules 33 and 34, which say in effect that if the offeror buys 15 per cent of the voting rights of the offeree shares during the offer period or within 12 months before or if he acquires in all 30 per cent of the voting rights he must make an offer in cash at the highest price paid in the offer period or the 12 months before. Warburgs argued

agreed interpretation of Rule 32 should be applied for the purposes of determining the "highest price paid" in the context of Rules 33 and 34. Flemings argued that Rules 33 and 34 imposed a further obligation which might oblige the NCBPF to offer a fixed price as an alternative to the price to be offered under the formula.

The Panel has no objection to the interpretation of Rule 32 which the parties have agreed to adopt. In regard to the application of Rules 33 and 34, the Panel considers that, in the event of an offeror buying in the market, as he is entitled to do, and acquiring shares of the offeree company carrying more than 15 per cent (under Rule 33) or 30 per cent (under Rule 34) of the voting rights these Rules should apply to formula bids so as to create an absolute obligation to pay the highest price in pence as opposed to the highest percentage under the formula. The price paid under the offer should be the higher of the formula price as at the date when the offer goes unconditional and the highest cash price paid in respect of acquisitions to which Rules 33 and 34 apply. Moreover the price per share fixed when the bid goes unconditional should be available to late acceptors.

Formula bids raise a number of issues which may have to engage the attention of the Panel. For the purposes of the present case, the Panel has accepted the general principle of formula bids in offers for investment trust companies, but does not consider that formula bids should be made which give the offeror, but not the offeree shareholder, the right to abandon the bid if there is an alteration in market values as compared with those obtaining when the bid was announced. This therefore means that the provision in the NCBPF proposals which confers on them the right to withdraw if market values should change by more than a given percentage during the currency of the offer will either have to be waived or matched by a reciprocal right of withdrawal for accepting shareholders.

10th November 1977