

THE TAKEOVER PANEL

British Investment Trust Limited ("BIT")

At a meeting on 12th October 1978 the Panel considered an appeal lodged by certain holders of securities in BIT against an earlier decision of the Panel executive. The Panel dismissed the appeal and upheld the executive's decision.

The appeal was lodged by Mr. J.C.F. Campbell (on behalf of himself and five discretionary investment clients) and by Mr. D. Fawcett (on behalf of himself and three others). The appellants, who are all clients of Northcote & Co, stockbrokers, are variously holders of preference stock, ordinary shares and non-convertible debentures of BIT.

The appellants contended that failure to implement certain intentions expressed in the document issued by Black Diamonds Pension Funds Limited on 14th November 1977, containing its offers to acquire the ordinary share and preference stock capital of BIT, was contrary to Rule 15 of the Code and represented an infringement of General Principle 12. The intentions referred to were contained in a passage in the offer document which read as follows:-

"The offers are being made with a view to NCBPF [the National Coal Board Pension Funds] obtaining a portfolio of listed investments and properties, which complements their existing portfolios, on terms which are fair both to NCBPF and to BITS shareholders. Accordingly, after the Offers become unconditional and proposals to be put to Convertible Debenture Stockholders have been implemented, it is the present intention that the portfolio of BITS will be transferred to NCBPF.

Although the registration of the portfolio securities of BITS will have changed, it is the intention of NCBPF to maintain and develop an investment presence in Scotland. Thus the existing relationships

of BITS with the Scottish investment community will continue and increase. NCBPF have already assured the board of BIT that the present employment of the managers and employees in Scotland will continue and their rights (including pension rights) will be fully safeguarded."

The appellants argued that the statements, made in conformity with the requirements of Rule 15 that the offeror should state its intentions regarding the continuation of the business of the offeree company and any major changes to be introduced in the business (including any redeployment of the fixed assets of the offeree), effectively constituted an intention by NCBPF to discontinue the BIT business and to transfer its investments to NCBPF.

The appellants also represented that the objective of obtaining a portfolio of investments and the intention to transfer the portfolio to NCBPF could not have been accomplished without the liquidation of BIT (involving repayment of debenture stocks at par, of preference capital at 110p per £1 nominal and participation by ordinary shareholders in the realisation of the residual assets).

It was their further contention that failure to implement such intentions was contrary to General Principle 12 of the Code which requires take-over documents to be prepared with the same standard of care as appropriate to a prospectus issued under the Companies Act 1948.

In considering these arguments, the Panel could find no grounds to hold that the statement of "present intention" by the offeror should be interpreted so as to create a binding obligation. The words used clearly indicated a degree of uncertainty and were sufficient to alert shareholders, or those dealing in the offeree securities after the announcement of the offer, to the possibility that the offeror might in fact pursue a different course in the light of the circumstances prevailing after the conclusion of the offer.

In the event the offer went unconditional on 12th December 1977 at an acceptance level of 75.8% of the equity and then closed, so that a sizeable minority interest became an inevitability. The possibility of a change in the offeror's intention was made plain by various statements issued on and after 20th December 1977 to the effect that NCBPF would continue to run BIT "in its present form for the time

being and that its policy will be designed to benefit all shareholders alike. Should any change in the form of BIT be considered in the future the board of BIT will take the interests of all shareholders into account." The circular from the independent directors of BIT to preference stockholders dated 5th January 1978 put the position beyond doubt:

"Stockholders are therefore faced with a decision whether to accept a certain 90p now or to decline the preference offer in the hope that BIT will be wound up or the capital repaid, so producing 110p per £1 nominal of Preference Stock. The NCBPF have expressed the intention that BIT will continue in its present form for the time being and therefore it seems unlikely that a winding up of BIT is an immediate prospect.

Non-acceptance of the preference offer involves the risk of a decline in the market value of your holding, although not in our view to the levels prevailing prior to the original approach.

On the information available to us we, and our financial advisers, Robert Fleming & Co Limited, recommend acceptance of the preference offer."

Even had the offeror's intention to transfer the portfolio been expressed in much more positive terms, the Panel would have been unable to share the appellants' conviction that such a transfer could only have resulted in, or have been dependent upon, the liquidation of BIT.

Nor has the Panel been able to find any evidence, by reference to comments made at the time in the financial press or in stockbrokers' circulars, that it was generally held that the offeror's statements in the offer document comprised a commitment to transfer the portfolio or that any inference arose from the document indicating the likelihood of liquidation. Neither did the board of BIT and its advisers, in advising shareholders to reject the offer, suggest that shareholders had an alternative choice of participation in a winding up if the offer nonetheless succeeded.

The appellants drew attention to the contemporaneous offer by the British Rail Pension Funds for the Edinburgh and Dundee Investment Company Limited ("E&D") in which the offeror stated its intention that, on the offers succeeding, "the investment portfolio of E&D. . . be transferred at market value to [the pension funds] and that E&D be subsequently wound up". The appellants claimed that the conjunction in that case of the intention to transfer the portfolio with the intention to liquidate E&D gave support to their argument that the former intention must inevitably incorporate the latter effect. The Panel considers this argument ill founded. The presence of a specific intention to liquidate in the E&D case merely emphasises the absence of any such stated intention in the offer for BIT.

The Panel also took note of the extent and the sequence of acquisition of the appellants' holdings in BIT. One appellant held 1,600 ordinary shares in BIT throughout the offer period; the other nine appellants purchased 500 ordinary shares on 21st December 1977 and 7,684 shares between 6th April and 13th September 1978; a total of £3049 nominal of preference stock was purchased between 7th March and 10th August 1978; and a total of £19,010 in nominal value of debenture stocks of BIT were purchased between 14th December 1977 and 14th September 1978 (£15,010 on dates after 13th July 1978). The bulk of the appellants' holdings was thus clearly acquired long after NCBPF had made it clear that it planned to continue BIT in its present form.

The Panel concluded that there had been no failure, as alleged, on the part of the offeror to comply with the Code, and as previously stated the appeal was dismissed. The appellants were informed of this decision following the Panel meeting through their stockbrokers.

20th October 1978