THE TAKEOVER PANEL

TSB GROUP PLC ("TSB") /
DEWEY WARREN HOLDINGS PLC ("DWH") /
HOGG ROBINSON & GARDNER MOUNTAIN PLC ("HRG INSURANCE") /
HOGG ROBINSON PLC ("HR TRAVEL")

This case arose on appeal by Barings, on behalf of HRG Insurance and HR Travel, against a ruling of the Panel executive to the effect that the restrictions of Rule 35.1 of the Code do not apply to any new offer by TSB or DWH for either of those companies.

The decision of the full Panel concerning the application of Rule 35.1 in this case was announced on 31st July. The Panel's decision was that, except with the consent of the Panel, neither TSB nor DWH, nor any other person acting in concert with either of them, may make an offer for either HRG Insurance or HR Travel prior to 1st February 1988. A copy of the Panel's statement of 31st July is attached.

The circumstances of the case were highly unusual, and were well publicised in advance of the Panel hearing. It is therefore thought appropriate to set out the reasons for the decision in some detail.

THE ISSUE

The Panel was concerned with the application of Rule 35.1 which provides as follows:-

"35.1 Delay of 12 months before subsequent offer

Except with the consent of the Panel, where an offer has been announced or posted but has not become unconditional in all respects, the offeror and persons acting in concert with it may not within 12 months from the date on which such offer is withdrawn or lapses either:-

(a) make an offer for the offeree company; or

(b) acquire any shares of the offeree company if the offeror or persons acting in concert with it would thereby become obliged under Rule 9 to make an offer."

The Panel's approach to the application of this Rule, including consideration of whether a dispensation should be granted, must have regard to the proper method of approach to individual rules which is stated in the Introduction to the General Principles of the Code as follows:-

"It is impracticable to devise Rules in sufficient detail to cover all circumstances which can arise in take-over or merger transactions. Accordingly, persons engaged in such transactions should be aware that the spirit as well as the precise wording of the General Principles and the ensuing Rules must be observed. Moreover, it must be accepted that the General Principles and the spirit of the Code will apply in areas or circumstances not explicitly covered by any Rule."

This statement in turn accords with the general emphasis of the Code. The overriding obligation is to comply with the General Principles which are designed to ensure fair treatment of all shareholders. Many of the Rules are specific examples of the way in which those General Principles should operate, and are accordingly to be construed in the light of the general objectives contained in the Principles.

THE FACTS

The unusual background facts are important to an understanding of the Panel's decision.

In mid-May 1987 TSB approached the Chairman of Hogg Robinson Group with a view to discussing a possible offer. Such approach was rejected by the board of Hogg Robinson Group.

On 25th June Hogg Robinson Group announced its intention of restructuring the group. A proposal to this effect had been in preparation for a considerable time before the approach by TSB in May. So it was in no way consequential on that approach. A circular of 4th July to Hogg Robinson Group shareholders set out proposals to divide the then existing group into two separate entities by means of a demerger. The effect of such proposed demerger was to distribute, to shareholders of Hogg Robinson Group, shares in a new holding company, HR Travel, which would conduct the travel and other activities of the then group; the insurance broking, together with certain other activities, would continue to be carried on by HRG Insurance, in which shareholders would continue to own their existing shares. These proposals were conditional upon the approval of shareholders of Hogg Robinson Group.

On 17th July TSB, advised by Lazards, announced an offer for the then Hogg Robinson Group. The terms of the offer were 600p per share in cash, with a proposed loan note alternative. The announcement included a statement by TSB that, subject to a reservation in the event of a competitive bid, it would not increase its offer. This statement, as will become apparent, is one to which the Panel attached considerable importance in reaching its decision.

TSB made plain to Hogg Robinson shareholders, both in the announcement and in other communications, that the offer would not proceed if the demerger proposals were approved by Hogg Robinson shareholders at the Extraordinary General Meeting of 27th July.

TSB had reached an Agreement, publicly declared, for the sale of Hogg Robinson Group's insurance broking activities to DWH. In a circular to Hogg Robinson shareholders, for the purposes of comparison with the 600p final offer, TSB attributed separate values to the respective activities of what were to become, if the demerger proceeded, HR Travel and HRG Insurance. Accordingly, if TSB's offer had been successful and the agreement with DWH had been completed, the result would have been similar to the result of separate offers for HR Travel and HRG Insurance, if they had been made following the demerger and had been successful. In either eventuality, TSB would have acquired the travel business, and DWH would have acquired the insurance business. This potential similarity of outcome between, on the one hand, a bid for Hogg Robinson Group and, on the other hand, fresh bids for the companies after demerger was another highly unusual feature of the case which was important to the Panel's decision.

On 27th July the shareholders of Hogg Robinson Group approved the demerger proposals and TSB's offer was withdrawn.

CONSULTATIONS WITH THE PANEL EXECUTIVE

At various times between 13th and 24th July, Lazards consulted the executive on the issue of the application of Rule 35.1 if the demerger proposals were approved and TSB's offer was withdrawn. Until 24th July, one business day before the Extraordinary General Meeting, Lazards required that these consultations were on a confidential basis and could not be made known to Barings, as advisers to Hogg Robinson Group. On 23rd and 24th July Barings, in their turn, raised the issue with the executive independently. Until then it had not been possible to obtain the views of all relevant parties. Even at 24th July, it was not strictly possible to receive the views of the management of HR Travel and HRG Insurance on the issue since such managements were not formally to be constituted until the demerger proposals were approved.

The executive accordingly took the view at that time that it was impossible to make a formal ruling on the issue. It had been emphasised to Lazards throughout consultations that no ruling could be made unless all relevant parties could be involved. The Panel would hope that, should a situation similar to the present arise in the future, a ruling could be given before shareholders in a company vote on a demerger proposal. It must be appreciated, however, by parties consulting the executive that, in order to obtain a ruling and to allow the processes of appeal to take their course when necessary, the issue must be raised at such a time and in such a way as to permit of consultation with all parties in due time. In saying this, the Panel implies no criticism of the approach made by Lazards in the present case.

RULE 35.1: GENERAL APPROACH

This Rule was introduced in the light of the Code requirement that an offer must either succeed or lapse no later than 60 days after the original offer document is posted. This requirement is now contained in Rule 31.6.

In order to give meaning to the 60 day Rule, it was necessary that a failed offeror should not be permitted to make a further offer for a reasonable time after an earlier offer had lapsed. This time was established as 12 months. The principle underlying Rule 35.1 is that, if the management of the company has to endure prolonged sieges by the same offeror after a failed bid, it would be unreasonably distracted from the conduct of the company's business. This would be to the detriment of the interests of its shareholders. Accordingly the Rule is designed to serve the interests of offeree company shareholders. It is nonetheless an exception to the accepted principle that shareholders should generally be free at all times to receive and consider offers made to them.

Thus it will be apparent from the history of the Rule that, when it was formulated, it dealt with the normal situation of an offeree company remaining in a constant form. It was not

concerned with the potential implications of the demerger such as occurred in the present case. The Panel, however, considers that in appropriate circumstances, where an offer for a company fails where it is competing with a demerger, the shareholders of the demerged company may require similar protection against protracted siege as is given to shareholders of an offeree company which is not restructured.

In the present case, the Panel considered that the nature of the demerger was specifically identified. It was very similar to the outcome of the TSB bid, if it had been successful, followed by the sale to DWH. In these circumstances, the reasons underlying the introduction of Rule 35.1 could apply to a fresh bid for the demerged companies even though such companies were not identical with the original offeree company. Indeed, it was clear that, if the siege of the Hogg Robinson Group had endured for a normal protracted period, it might well be proper to apply Rule 35.1 to any potential fresh bid for one of the demerged companies.

The Panel therefore had to consider whether, and if so to what extent, there was any justification for granting consent to TSB and DWH to bid within the 12 month period. The entitlement to grant such consent is contained within Rule 35 itself.

REASONS FOR DECISION

The Panel rejected certain arguments advanced on behalf of HR Travel and HRG Insurance. It was suggested to the Panel that the management of Hogg Robinson Group had suffered the distraction of an offer since TSB's original approach in May rather than from the date of the offer: the Panel decided that in this case the period prior to announcement of the offer on 17th July was irrelevant. The period of siege lasted for 10 days, as opposed to, in a typical case, some 3 months. The Panel also did not accept the argument that account could be taken of stresses imposed on management by the preparations for demerger: these were in no way the consequence of the bid by TSB.

The Panel was concerned, however, that shareholders of HR Travel and HRG Insurance did not in the event have a full and proper opportunity to consider any offer for their shares in those companies as they are following demerger. The only offer which they have considered is a 600p final offer which was withdrawn upon demerger. That offer subsisted for only 10 days, and was not the subject of the normal full argument which enables shareholders to reach an informed decision after proper time for consideration.

It is possible that a substantial number of Hogg Robinson Group shareholders believed that either TSB or DWH would be free to make an offer for either HR Travel or HRG Insurance following the demerger. Moreover, since the reason put to shareholders for approving demerger was to increase the overall value of their investment by dividing it between two independent businesses, some shareholders may have approved the demerger with the prospect in mind that any future offer could be at a higher effective price than contained in the original offer. In all the circumstances, the suggestion of a protracted siege which normally justifies application of the Rule was of considerably less significance than is often the case.

The Panel did, however, attach some significance to the fact that TSB had announced its offer in the full knowledge that an Extraordinary General Meeting had already been convened only 10 days later to consider the demerger. TSB knew that, should the demerger proposals be approved, any subsequent offer for either of the demerged companies would have the consequence that the period in which the managements were under take-over pressure could be extended. In the context of this argument, it was accepted by TSB and DWH that those who became directors of the demerged companies had been actively involved in management prior to the demerger.

The Panel also regarded it as highly important that TSB had elected to state that its offer of 600p was final. The approach of the Panel to "no increase" statements is very clearly stated in the Code. It is well known by those regularly involved in

take-overs. Such a no increase statement may only be set aside if the right is reserved to do so in specific circumstances and if those circumstances arise. The reason for this approach can be summarised briefly. A no increase statement is designed to sway shareholders. Shareholders deal in the relevant shares in the belief that the statement will be adhered to. If such a statement is not adhered to, shareholders will have been misled, may well have acted on the statement and, if so, will suffer financially. It is necessary to ensure that offerors should not be able to circumvent full compliance with a no increase statement.

In this highly unusual situation, the Panel was thus confronted with a number of compelling but competing considerations. In the view of the Panel, all these factors needed to be given proper weight in its decision. The Panel was therefore concerned that it could be unfair to shareholders in the demerged companies to deprive them of the possible opportunity of an offer from TSB or DWH for 12 months. This weighed against giving full effect to the normal 12 month rule. However, to permit an immediate bid for a demerged company without a condition that there should be no increase in the effective bid would have been inconsistent with requiring respect for no increase statements. In addition, TSB or DWH would be enabled immediately to follow a bid for the entire group, which contemplated separation of the travel and insurance business in similar manner to the object of the demerger, with a bid for a demerged company. These factors weighed against the grant of unconditional consent for an immediate bid for either demerged company.

The Panel considered, only to reject, the possibility of granting consent to an immediate bid but imposing a requirement that there should be no effective increase over the previous bid. In the light of the demerger which included the raising of new capital for HR Travel, such a condition would have been difficult to operate in practice, would have been very unrealistic and would have been of disadvantage to shareholders in the demerged companies.

The Panel therefore considered that, in this novel situation, the competing considerations could only be given effect by striking a balance between the interests of the shareholders in being able to receive a bid, the importance of ensuring that companies were not subjected to more than one bid from the same offeror in quick succession, and the need to ensure that no increase statements are respected. The Panel considered that a restriction against a further bid for 6 months best gave effect to all these considerations.

For these reasons, the Panel ruled that TSB and DWH, and other persons acting in concert with either of them, should be restricted from making any offer for HR Travel or HRG Insurance before 1st February 1988, except with the consent of the Panel. The Panel would envisage giving such consent if a new offer during the period to 1st February were to be recommended by the board of the relevant company or in the event that a third party makes an offer.

4 August 1987