

THE TAKEOVER PANEL

PROPOSED OFFERS BY LUIRC CORP FOR MERLIN INTERNATIONAL PROPERTIES LIMITED

BACKGROUND

On 28 February 1991 the Boards of Luirc Corp ("Luirc") and Merlin International Properties Limited ("Merlin") announced the terms of recommended cash offers to be made by Fininvest Corporate Finance Limited ("Fininvest") on behalf of Luirc for Merlin. The offers valued Merlin at £2.9m. The announcement contained the following statement:

"Information on the Offeror.

The Offeror is a newly formed company incorporated in the British Virgin Islands with a nominal capital and is wholly owned by Estonia Venture Inc, a company also with a nominal capital incorporated in Switzerland. Monies will be loaned to the Offeror for the purposes of the offers by Bonaventure Investments Limited which is itself a wholly owned subsidiary of Sonnaire Finance SA whose controlling director and shareholder is Mr Peter Borgas and Fininvest Corporate Finance Limited has confirmed that sufficient monies will be available to the Offeror to satisfy the offers in full. The Offeror has not traded."

On 28 March an offer document was posted to Merlin shareholders. On 2 April Smith New Court Corporate Finance Limited ("Smith New Court"), advisers to Merlin, announced that the offer document had been despatched without the consent of the Board of Merlin and its advisers who were awaiting clarification of Luirc's financing arrangements. On 4 April Smith New Court and Fininvest issued a joint announcement informing Merlin shareholders that the offer document had been posted in error and should accordingly be ignored.

The announcement then referred to the existence of a loan agreement in draft form between Bonaventure Investments Limited ("Bonaventure"), the lender of funds to Luirc, Estonia Ventures Inc ("Estonia"), the guarantor of such funds, and Luirc, under which funds were to be made conditionally available to Luirc but not in accordance with Rule 24.7 of the Code.

Fininvest was unable to satisfy the Panel Executive that funds would be irrevocably available to satisfy the offers in full, and accordingly the Executive consented to the offeror withdrawing the offers.

The Executive has investigated the circumstances in which Fininvest announced the offers on 28 February and confirmed that "sufficient monies will be available to the Offeror to satisfy the offers in full".

SUMMARY OF FINDINGS

The person representing Luirc, the offeror, in the United Kingdom was Mr Arthur Oakes who was principally responsible for negotiating the terms of the offers and instructing Fininvest, a member of the SFA, to act on behalf of Luirc. Fininvest's sole Director is Mr Geoffrey Pearson.

A letter from Bonaventure to Fininvest dated 28 February, the day on which the offers were announced, confirmed that funds in excess of £4m were available for Luirc to complete the offers. In January, Smith New Court had received two letters along similar lines from Sonnaire Finance SA both of which were copied to Fininvest; Smith New Court had also received a letter from Bonaventure's bank in the Channel Islands confirming that at that time Bonaventure had more than £4m in its account, apparently unencumbered. However, by the date of the announcement, no loan agreement had been negotiated between Bonaventure, Estonia and Luirc and at no time was there any irrevocable commitment on the part of Bonaventure to provide Luirc

with funds to meet the offers. The only comfort which the letters that had been received could have given was the knowledge that at a particular point in time there were funds in the lender's bank account.

The Executive received evidence from the solicitors acting for Estonia and Luirc that they advised Fininvest that, before any announcement was made, the lender should provide an irrevocable undertaking to commit funds to the offers. Notwithstanding such advice, no such undertaking was requested by Fininvest and the offers were announced.

Smith New Court's position is that it did not regard it as its duty to ensure that finance was irrevocably available to Luirc and the Executive is satisfied that this point was made clear to Fininvest on a number of occasions prior to the announcement of the offers. The Executive accepts that no such obligation attached to Smith New Court.

Fininvest and Mr Arthur Oakes have contended that the letter from Bonaventure of 28 February and the other letters provided sufficient comfort to enable the offers to be announced. They further contended that the negotiation of a formal loan agreement could properly be left to the period between the announcement of the offers and the posting of the offer document.

THE EXECUTIVE'S DECISION

The Executive does not consider that an announcement should have been made before Fininvest had received an irrevocable commitment from Bonaventure to provide funds to Luirc for the purpose of the offers. The Executive rejects the contentions of Fininvest and Mr Arthur Oakes referred to above.

General Principle 3 states:

"An offeror should only announce an offer after the most careful and responsible consideration. Such an announcement should be made only when the offeror has every reason to believe that it can and will continue to be able to implement the offer: responsibility in this connection also rests on the financial adviser to the offeror".

Compliance with this General Principle is of great importance. The announcement of an offer is always highly significant for the offeree company and will usually affect its share price. If the offer is subsequently withdrawn, at the very least a false market in the shares in the offeree company is likely to have been created.

The Executive's view is that, when a financial adviser is acting for a newly created offeror, such as an off-the-shelf overseas company, the standard of care required under General Principle 3 clearly has an additional dimension. In short, the only way in which such an offeror and its financial adviser can be sure that funds will be available is to have an irrevocable commitment from a party upon whom reliance can reasonably be placed, for example a bank, at the time of the announcement of the offer.

In this case, the Executive considers that neither Fininvest nor Mr Arthur Oakes discharged the duty imposed upon them by the Code and accordingly they are criticised. Fininvest and Mr Arthur Oakes have accepted the Executive's ruling.

1 May 1991