

THE TAKEOVER PANEL

**SERVICE CORPORATION INTERNATIONAL PLC ("SCI")
GREAT SOUTHERN GROUP PLC ("GSG")
THE LOEWEN GROUP INC ("LOEWEN")**

The Panel met today to hear an appeal by Loewen against rulings by the Executive:-

- (a) that a competitive situation arose in the SCI offer for GSG upon the announcement that GSG was holding talks with another potential offeror; and
- (b) that, as a competitive situation had arisen, a dispensation should be granted to SCI permitting it to increase its offer in reliance on a reservation to its "no increase statement" which had been included in its offer document but which had been omitted from its press release the previous day.

Background

Approximately 56% of the issued ordinary share capital of GSG is owned by a private company, J D Field & Sons Ltd ("Field"), which is not subject to the Code.

On 9 June 1994 SCI announced cash offers to acquire the whole of the issued share capitals of both GSG and Field. The formal documents were posted on 21 June. The initial offer was at 600p for each GSG ordinary share. The offer was not recommended by GSG.

On Tuesday 2 August SCI issued a press release announcing an "increased and final cash offer" at 680p per GSG ordinary share. SCI then acquired substantial numbers of the issued ordinary and convertible shares of GSG through the market.

By Wednesday lunchtime, 3 August, SCI owned some 21.6% of the issued ordinary share capital of GSG and some 67.6% of its issued convertible share capital, giving SCI in aggregate approximately 29.8% of GSG's fully diluted share capital.

SCI published and posted the offer documents containing its increased and final cash offers for both GSG and Field on the Wednesday afternoon. These documents each contained a letter to shareholders from the Chairman of SCI, which stated that "These increased offers are final and will not be further increased except in the highly unlikely event of a competitive situation arising". As a result of a mistake, this reservation to the "no increase statement" had been omitted from the press release made on the previous day.

Also on the Wednesday afternoon GSG announced that discussions were taking place with another company which might or might not lead to an offer being made for GSG. The SCI offer documents for GSG and Field were printed and were in the process of distribution before the talks announcement was made.

Discussions between GSG and Field and each of SCI and Loewen took place over the weekend as a result of which it appeared that SCI was willing to offer a higher price than Loewen. Further it appeared that GSG was prepared to recommend a revised offer from SCI at 775p per GSG ordinary share and Field was prepared to enter into an irrevocable commitment to accept the offer in respect of its 56% shareholding in GSG. SCI's ability to proceed with its increased offer depended upon rulings made by the Executive as described below. These rulings were appealed by Loewen.

On Monday 8 August GSG shares were suspended until a press release was issued by SCI announcing the proposed recommended revised offers and details of the irrevocable undertaking, both of which were stated to be subject to a precondition being the Panel's decision at the hearing held today.

Executive Rulings

The Executive, having considered representations from all parties, ruled as follows:-

- (a) that a competitive situation had arisen in this case as a result of the talks announcement; and
- (b) that, since wholly exceptional circumstances existed in this case and arrangements had been agreed for SCI to pay compensation to shareholders who sold shares on the Tuesday or Wednesday and who might have been misled by the press release, the fairest result for all GSG shareholders was achieved by allowing SCI, by way of dispensation, to increase its offer for GSG.

Panel Decision

Competitive Situation

The Panel was of the view that a 'competitive situation' arose in the circumstances of the present case. Note 2 to Rule 32.2 does not indicate the circumstances in which a competitive situation arises, but the Panel was of the view that the existence of a competitive situation is not restricted until after the announcement of a firm intention to make a competitive offer; a talks announcement could give rise to a competitive situation.

Dispensation

The Panel's discretion to grant a dispensation to an offeror to increase its bid after a "no increase statement" had been made, but where such statement had not been accompanied by a specific reservation of the right to increase its bid should a competitive situation arise, could only be exercised in "wholly exceptional circumstances".

In the present case the Panel was satisfied, and there was no evidence to the contrary, both that SCI fully intended to make a reservation in the event of a competitive situation arising (as set out in its offer documents) and that the omission of the reservation was attributable to a genuine mistake, however regrettable the mistake might be.

Further, arrangements had been made to compensate those shareholders entitled to the protection of Rule 32.2 but who might otherwise have been prejudiced by the grant of a dispensation.

In addition, the independent financial advisers to the GSG board, and the board itself, believed that a dispensation would be in the best interests of all GSG shareholders.

But for the fact that there had been a genuine mistake, the circumstances of the present case could not have been "wholly exceptional"; but since there was such a mistake, and having regard to the fact that arrangements had been made for compensation and to the fact that it was believed that a dispensation would be in the best interests of all GSG shareholders, the Panel was satisfied that wholly exceptional circumstances did arise in the particular circumstances of the present case. Consequently the Panel was of the view that a dispensation should be granted.

Accordingly the appeal was dismissed.

Loewen applied for leave to appeal to the Appeal Committee, but the Panel refused to grant leave.

10 August 1994