

THE TAKEOVER PANEL

MARC GREGORY LIMITED ("MARC GREGORY")/ GREENCOAT PROPERTIES LIMITED ("GREENCOAT")

The Panel on Take-overs and Mergers met on Thursday, 12th July, 1973 to consider a request by Greencoat Properties Limited that a private company, Marc Gregory Limited, should be required under the terms of the City Code to make an offer for the ordinary shares in Greencoat which that company and those acting in concert with it did not already own. The case, which involves the question of what constitutes "acting in concert" for the purpose of the City Code, as well as the interpretation of Rule 34, was referred by the executive to the full Panel for decision.

Marc Gregory is controlled by the trustees of the Donald Hawe Foundation, a charitable trust. On 21st November, 1972 the trustees, together with J.E. Lesser (Properties) Limited (a party admittedly acting in concert with them) bought shares in Greencoat at a price of 36½p from two shareholders, of whom one was J.H. Vavasseur & Co. Ltd. With a small previous holding, the result was that Marc Gregory (which we regard for these purposes as including the trustees of the Donald Hawe Foundation) and Lesser held just under 30% of the issued share capital. This transaction, which had been cleared with the Panel executive, was obviously intended to secure as large a measure of control over Greencoat as could be obtained without incurring the obligation to make a general offer.

Rule 34 provides that, except in a case specifically approved by the Panel, the purchaser from a limited number of sellers of a significant holding or holdings which confer effective control must extend an offer to the remaining shareholders. The Rule is an essential feature of the Code and, in one form or another, is of long standing. It gives effect to General Principle 8 that all shareholders must be treated similarly by an offeror. If an offeror could secure control of a company by a limited number of purchases, the value of the remaining shares would be less, since the element of control would have gone.

In the normal case, and in the absence of any other known large group of shareholders, the Rule 34 obligation is treated as arising when, as a result of a selective purchase, the holding of the purchaser amounts to 30% or more of the issued share capital.

The 30% limit applied here because the remaining shares in Greencoat were widely spread.

Marc Gregory were aiming at securing control of Greencoat. That was admittedly the object of their selective purchases in November, 1972. From that time until May this year there were sporadic discussions between the two companies about some form of merger. Greencoat eventually broke off these talks and Marc Gregory then requisitioned an Extraordinary General Meeting, to be held in August, when they would seek to gain a majority on the Board. Their ability so to do would naturally be the greater the larger the number of shares controlled by them or by others acting in concert with them.

In the course of the weeks following 21st November Marc Gregory, again after clearance with the Panel executive, made a number of fairly small purchases in the market which brought their total holding from 29.6% up to 32½%. Such market purchases (unlike further selective purchases from a limited number of sellers) have not been regarded as bringing Rule 34 into operation, notwithstanding that the purchaser has already secured by selective purchases a holding falling just short of 30%. It may seem a little artificial that a purchaser should be allowed to bring himself by selective purchases within an ace of securing the 30% figure at which the Panel, inevitably arbitrarily, sets the "control" position and then be able to obtain that "control" point by a purchase or purchases in the market. Justification for the practice rests upon the principle of not fettering the market beyond what is essential for the purposes of the Code and upon the theory that all shareholders have the opportunity of selling when purchases are made in the market. If, however, market purchases were to bring the total holding of the purchaser and those acting in concert with him to 40% or over, Rule 35 would require a general offer to be made. The question which arises in the present case is whether a selective purchase, after a party has already brought himself over the 30% point by a minimal number of market purchases, should bring Rule 34 into operation.

After the sale of shares on 21st November, 1972 Vavasour held 500,000 shares (1½% of the issued share capital) which Marc Gregory could not purchase without bringing Rule 34 into operation. Vavasour told Marc Gregory that, although under no obligation to do so, they would hold the shares for six months and they did during those ensuing six months approach Marc Gregory several times to see whether that company wanted them. There were business links between Marc Gregory and J.A. Pye (Oxford) Limited and Mr. Graham Pye, a director of Pye, asked Mr. Hawe from time to time about the progress of the Greencoat negotiations. Early in May, 1973, after further talk about the negotiations, Mr. Hawe told Mr. Pye that Vavasour had a parcel of shares in Greencoat which they would be willing to sell but which he could not buy. Mr. Pye decided to buy these shares, arranged finance for the purpose through a merchant bank and made the purchase at 32p per share.

In a written statement, the accuracy of which is accepted by Marc Gregory, Mr. Pye explained that he bought the shares because he believed that, if Marc Gregory was able to apply to the affairs of Greencoat its expertise in the optimum utilisation of property assets either through representation on its Board or by a merger, Greencoat would become much more profitable. He also believed that his purchase at 32p was cheap, as the shares had been as high as 45p in the previous six months. He did not, however, consider that he was acting in concert with Marc Gregory, since he had had no intention of becoming involved, directly or indirectly, in negotiations between Marc Gregory and Greencoat.

The Panel considers that the purchase of the remaining Vavasour block of shares by Pye was a transaction which should be regarded as having been done in concert with Marc Gregory. The Code defines persons acting in concert as "individuals or companies who actively co-operate to attain a common objective in relation to a take-over or merger transaction". The concept is no doubt not easy to apply in a marginal case but the Panel considers that it includes all cases where persons purchase shares with the prior and agreed intention of supporting one of their number in securing control of a company. That in so doing the purchaser concerned intends also to make a good investment and secure a profit is beside the point: that would normally be the case in any share purchase. The essence of the matter is the intention (whether as a matter of formal understanding or agreement or not), by the purchase of shares, to support or assist an attempt to secure control

of a company which to the knowledge of the purchaser at the time is likely to be taken by other shareholders, those others being aware of and accepting the support or assistance which the purchase is intended to make available. In the present case, Marc Gregory, who admittedly were seeking to obtain control of Greencoat, understood that Vavasieur, if they had retained any of their shares, would have supported an effort by Marc Gregory to obtain control. Vavasieur were, however, existing shareholders whose shares had not been bought with any such intention. A subsequently formed and unsolicited intention to support would not of itself be regarded as acting in concert with the shareholders to be supported although if active and agreed steps were taken to further the proposed attempt to secure control the case might be different. Where, however, deliberate action is taken, as by purchasing shares on the introduction or at the suggestion of the parties seeking control with the intention of voting them in favour of such an attempt, the concert party rules must be deemed to apply. In this case Pye were fully aware of the intention of Marc Gregory to secure control. They were expressly informed of the availability of the Vavasieur shares by Marc Gregory and knew that the latter would have bought them in order to strengthen their own position had the rules of the Code permitted. They bought them with the object of furthering the aims of Marc Gregory in regard to Greencoat albeit believing that in this way Greencoat would be more successful. The existing business links of Pye with Marc Gregory and the circumstances in which the purchase was decided upon are factors which must be given weight.

Although Rule 34 does not itself specifically refer to persons acting in concert, as a matter of practice the Panel has treated Rule 34 as including persons acting in concert with the purchaser. This can be seen from the Appendix to its last Annual Report, and the position has been understood and accepted by practitioners in this field. There is no difference in principle between Rule 34 and Rule 35 which in terms covers purchases by those acting in concert. Marc Gregory accepted that the holdings of Lesser, a party admittedly acting in concert on 21st November, had to be considered in connection with the 30% limit.

Rule 34 differs from Rule 35 in that it relates to selective purchases. Thus if a purchaser buys shares up to 25% in the market and then buys an additional 10% by selective purchases, this would normally bring Rule 34 into operation. It is irrelevant that the purchase which brings the shareholding over 30% is in the

market if thereafter further selective purchases are made. If a party seeking control were permitted to buy up to, say, 29.5% of the share capital by selective purchases and then having bought 0.6% of the remaining shares in the market were allowed to purchase a further 9% from a limited number of sellers without incurring an obligation to make a general offer, the spirit of Rule 34 would be violated. The applicability of Rule 34 in this case was well recognised by Marc Gregory: this was indeed the reason why they did not themselves purchase the remaining Vavasour shares.

Having reviewed all the facts, therefore, the Panel holds that Marc Gregory are required to make a general offer for the Greencoat shares and it has decided that in the special circumstances of this case (and without in any way creating a precedent in regard to the future interpretation of this Rule) that the general offer should be at not less than 32p per ordinary share, the price paid for the last significant purchase.

This case and others have brought to attention some ambiguities and inconsistencies in the Rules, notably in the treatment of the building up of holdings by selective purchases and by market purchases. Accordingly, the Panel will invite the City Working Party to examine the points raised by such cases.

24th July, 1973.