THE TAKEOVER PANEL

Midland-Yorkshire Holdings Limited ("MYH")

Croda International Limited ("Croda")

On 25th March, 1975 Croda announced that it had agreed to acquire for cash at 360p per share, 32.6% of the ordinary share capital of MYH and that it would be making an offer to acquire the remaining ordinary shares of MYH, other than 5.6% already owned by Croda.

On 18th April an offer document was circulated by S.G. Warburg & Co. Limited ("Warburgs") on behalf of Croda containing offers to acquire the ordinary shares of MYH on the basis of 7 new ordinary shares of Croda ("the share offer") or 360p in cash ("the cash offer") for each Ordinary Share of MYH, and 75p in cash for each of the 6% Cumulative Preference Shares of MYH, which each carried one vote.

The offers for the ordinary shares were conditional upon acceptances (in the manner specified in the offer document) being received on or before 9th May, 1975 (or a later date to be decided by Croda) in respect of so many shares of MYH as together with shares held by Croda would carry more than 50% of the votes. The share offer was subject to certain other conditions which have since been fulfilled.

The offer document provided that "to accept the Ordinary Offers" MYH shareholders "should complete the accompanying. . . Form of Acceptance and Transfer in accordance with the instructions printed thereon (which instructions shall be deemed to form part of the Ordinary Offers) and forward the completed Form" to the receiving registrars "as soon as possible but in any event so as to arrive not later than 3 p.m. on 9th May, 1975". The instructions on the Form of Acceptance and Transfer stated that "the completed Form of Acceptance and Transfer. . . must be forwarded to "the receiving registrars" and should arrive as soon as possible but not later than 3 p.m. on Friday, 9th May, 1975".

In Appendix V to the offer document it was stated that "All references in this document or in the Form of Acceptance and Transfer to 9th May, 1975 shall (where the context so permits) if the offer. . . shall be extended be deemed to refer to the expiry date of the offer as so revised or extended".

In a letter to MYH shareholders dated 14th May, Croda stated that it had "extended the period for accepting to Tuesday, 20th May". In a further letter dated 23rd May, Croda confirmed that "the offers have been extended until Friday, 30th May but in no circumstances will they be extended beyond 30th May unless they have become unconditional by that date".

The letter of 23rd May also stated that "Because the preference shares of (MYH) also carry votes, acceptances in respect of a further 68,785 Ordinary or Preference Shares of (MYH) are needed for the offers to succeed by becoming unconditional".

On 27th May, the financial advisers to MYH, Hill Samuel & Co. Limited ("Hill Samuel"), informed the Panel executive that L. Messel & Co. ("Messels"), who were, the stockbrokers to Croda, had been in touch with a number of shareholders of MYH to inform those shareholders that Messels had an investment, client who might be prepared to purchase MYH shares for cash at prices considerably in excess of Croda's cash offer price.

On 28th May, representatives of Messels and of Warburgs met the Panel, executive and explained that Messels had a non-discretionary investment client who had been for a long time a consistent buyer of Croda shares and who saw Croda's offer for MYH as affording the possibility of acquiring Croda shares at a discount as compared with their then market price, since the market price of MYH had been consistently lower than the value of Croda's share offer. It was explained that this investment client did not wish to hold MYH shares, so that Messels, on behalf of that client, were therefore seeking to purchase a block of MYH shares which would be large enough, once they had been assented to Croda's offer, to cause Croda's offers to become unconditional as to acceptances.

The Panel executive noted that the investment client did not fall within any of the groups of persons who would be presumed "under the Code to be acting in concert with Croda. The Panel executive spoke with the Investment Manager of the investment client who was able to confirm that the buying order had emanated from himself, and that he was in no way a discretionary investment client of Messels nor was he acting in concert with Croda.

On this basis, the Panel executive decided that the client should not be deemed to be acting in concert with Croda, since he was motivated exclusively by investment considerations, and that he was not pursuant to an agreement or understanding (whether formal or informal) actively co-operating with Croda to obtain or consolidate

control of MYH as required by the definition. In reaching their decision, the Panel executive had regard to Rule 31 of the Code which specifically envisages that during an offer period brokers to an offeror or an offeree company may continue to deal for the account of investment clients, subject to disclosure to the Stock Exchange and to the Panel.

The Panel executive informed Warburgs on 28th May and Hill Samuel subsequently of their decisions.

Shortly, after 3. p.m. on 30th May Messels telephoned the Panel executive to say that they now knew that sufficient acceptances had been received so that Croda's offers had become unconditional. They wished to know whether, since this was not yet public knowledge, it would be proper for them to continue to buy shares in the market for their clients. The executive suggested that they should not do so until the announcement had been made since they were in possession of privileged information.

At about 5 p.m. on Friday, 30th May, Warburgs announced that Croda's offers had become unconditional, Croda having held 859,750 ordinary, shares of MYH before the offer was posted and by 3 p.m. that day, having received acceptances in respect of 310,692 ordinary shares and 3,346 preference shares of MYH These 1,173,788 shares together represented 50.11% of the total voting rights of MYH. Later that evening, Hill Samuel warned the Panel executive that, in view of the fact that the Croda offers had gone unconditional by such a small margin, they might wish to call for an investigation into certain late dealings in the shares of MYH and into acceptances of the Croda offers.

At a meeting on Monday, 2nd June between the Panel executive and representatives of Hill Samuel and of MYH, the latter were informed that there had been included in the acceptances as announced by Warburgs on 30th May, an acceptance in respect of 2,900 ordinary shares of MYH (representing some 0.12% of the total, voting rights) which shares had been bought by Messels on behalf of the investment client referred to above at about 1,30 p.m. on that day. Of these 2,900 ordinary shares, 2,300 had been purchased in the market, and 600 had been purchased from another non-discretionary client of Messels who had that day given them an order to sell. These shares had been purchased at a price of 476p each. Upon these shares being assented to the Croda share offer, the client

would therefore receive a total of 20,300 new ordinary shares of Croda at an effective price of 65p. per share as compared with a current market quote of 68/70p. Further acceptances had been received after 3 p.m. on 30th May, so that by midnight Croda held or had actually received acceptances in respect of an aggregate of some 50.39% of the voting rights of MYH.

Hill Samuel thereupon gave notice on behalf of MYH that they wished to appeal to the full Panel on the following grounds:-

(a) that the Panel executive were incorrect in reaching the conclusion that the investment client of Messels who purchased the 2,900 ordinary shares of MYH on 30th May had not been acting in concert with Croda so that either:

(i) the acceptance by that client should be held invalid so that the offer had never become unconditional by 3 p.m. on 30th May; or, failing this,

(ii) under Rule 32 of the Code, Croda should be required to increase the cash offered to MYH shareholders from 360p. per ordinary share to 476p.; and

(b) that, in view of the close result, there should be an independent scrutiny of the acceptance forms comprising the acceptances as announced by Warburgs at 5 p.m.

A meeting of the full Panel was held on 4th June to consider the matter.

At this hearing it was strongly argued by Hill Samuel on behalf of MYH that in all the circumstances the purchase by the investment client of Messels should be regarded as being a purchase by a person acting in concert with Croda and that therefore, having regard to Rule 22 of the Code and the sections of Practice Note 7 relating to that Rule and to the terms of Warburgs' letter dated 23rd May, the investment client must, be treated as not having accepted the offer and the offers should therefore be deemed to have lapsed.

Hill Samuel pointed to those sections of Practice Note 7 which read as follows:-

(i) "Where an offeror states that in any event the offer will lapse after, a specified date unless it has by then been declared or become unconditional, the offeror will not subsequently be permitted to extend the offer period"; and

(ii) "If expressions such as '. . . . . the offer will not be further improved. . .' or '. . . . our offer remains at Xp. per share and it will not be raised. . .' are included in documents sent to offeree shareholders, the offeror will not subsequently be permitted to revise its offer".

Hill Samuel argued that, since

(i) on 30th May Messels as Croda's brokers were aware of how many shares were required to be assented to the Croda offers for those offers to become unconditional,

(ii) Messels were not only Croda's brokers, but also the brokers to the investment client and the same partner of Messels was active in both capacities, and

(iii) the motive of Messels in purchasing the 2,900 shares was to make it possible for Croda to declare its offers unconditional,

the investment client, alternatively Messels, must be deemed to have been acting in concert with Croda.

It therefore followed that, since Croda had stated in the circular letter of 23rd May that "the offers definitely will not be increased and accordingly no increase would now be permitted by the Panel on Take-overs and Mergers", neither Croda, nor any person acting in concert with Croda, was thereafter permitted to purchase share at more than 360p per share in cash because otherwise Croda would be required by Rule 32 of the Code to increase their offer to other shareholders, which would be a breach of the requirements in Practice Note 7.

In the alternative, Hill Samuel argued that if the investment client was held by the Panel to be acting in concert but the Panel felt that the investment client was nevertheless entitled on 30th May to purchase shares at a price in excess of 360p, then the price payable to accepting shareholders should be increased to the price paid by such client (namely 476p per share) under the provisions of Rule 32 of the Code which states that:

> "If the offerer or any person acting in concert with the offeror purchases shares in the market or otherwise during the offer period at above the offer price. . . then it shall increase its offer to not less than the highest price. . . paid for the shares so acquired".

The next issue raised by Hill Samuel related to the time during 30th May at which Croda was required to have received acceptances in excess of 50% of the voting rights of' MYH in order that their offer should become unconditional. Hill Samuel argued that the relevant moment was 3 p.m. on 30th May, rather than midnight as suggested by Croda. In support of their argument, Hill Samuel, pointed to the condition in Appendix V to the offer document, the text of which has been quoted above. They pointed out that the last time for acceptance was stated to be 3 p.m. on 9th May, 1975 in a number of places both in the offer document and on the Form of Acceptance and Transfer, and that in the letters of 14th and 23rd May the period for accepting the offers was stated to have been extended to Tuesday, 20th May and Friday, 30th May respectively. In neither of these two letters was any particular time of the day mentioned, so that a shareholder of MYH should have assumed that

the relevant time of the day had not been altered and was 3 p.m.

Finally Hill Samuel submitted that, in view of the small margin by which the offers had gone unconditional, there should be an independent scrutiny of the acceptances in order to satisfy MYH that by 3 p.m. on 30th May all acceptances included in the Warburgs announcement of 5 p.m. were valid.

In reply to these submissions, Warburgs claimed, first, that the appeal by MYH was out of time, since Warburgs and Messels had given to the executive all the relevant facts relating to the proposed transaction on behalf of Messels' investment client and the executive had ruled that such a proposal would not either contravene the Code or give rise to any additonal obligations on Croda.

Secondly, Warburgs maintained that the Panel executive had been correct to conclude that the investment client of Messels was not acting in concert with Croda in relation to the bid for MYH.

Thirdly, Warburgs claimed that the operative time by which the Croda offers had to go unconditional on 30th May was not 3 p.m., but was midnight. In support of this argument, they pointed out that no time was mentioned in either of the circulars dated 14th and 23rd May. Accordingly, they considered that Croda would be entitled to include any acceptances received at any time during that day.

Fourthly, they pointed out that both they and the receiving registrars had checked acceptances which had been received by 3 p.m. on 30th May, and that they were both satisfied that it was in order to include all acceptances that had been counted.

The full Panel gave most anxious consideration to this case. Whilst recognising the force and even merit of the argument that the investment client of Messels should have been deemed to be acting in concert with Croda in relation to the transactions on the 30th May in respect of the 2900 ordinary shares in MYH, it felt that the provisions of the Code in regard to concert parties were somewhat equivocal in their application to transactions conducted by associates of the offeror or offeree on account of non-discretionary investment clients. Whatever view they might have reached had the matter been at large the full Panel has concluded that in all the circumstances of the present case and having regard to the fact that there had been full disclosure to the Panel executive, it would not be equitable to upset the ruling of the executive, and to hold that a concert party situation had arisen. In so holding the Panel have had regard to the balance of equity as between the parties concerned.

Contrary to the view sometimes expressed in ill informed quarters, it is very rarely that the facts and circumstances in one case are identical with those in another even though the same Rules of the Code may be involved. In all cases the Panel seeks to administer the Rules so as to achieve in the circumstances of each particular case as near an equitable solution as is possible in accordance with the spirit of the Code. It is necessary, therefore, to emphasize that the present decision must not be regarded as a precedent in other cases not presenting identical features. On the contrary, the Panel wishes to make it clear that where associates of an offeror or offeree, acting with the advantage of information which they have received in that capacity and which has not been made generally public, solicit investment clients or third parties with a view to affecting the result of the offer both they and those whom they solicit may be at risk of being held concert parties within the meaning of the Code. Whilst not seeking to fetter the freedom of the market, the Panel would deprecate any action by a broker or professional adviser acting on the instructions of one of the parties to an offer situation taking any initiative involving the use of information not known to the public with the intention of affecting the outcome. In any such case the Panel must reserve the right, according to the facts of each case, to hold that the investment client and the associate are concert parties with the consequences which the Rules involve.

The Panel also concluded on the facts of this case that, even if it had held that the investment client of Messels had acted in concert with Croda, it would not have been possible to set aside the acceptance in respect of the shares involved. Furthermore, having regard to the terms of Practice Note 7 which states, in relation to Rules 22, 32, 33 and 34, that:

> "An offer may not be revised after the 46th day, nor may shares be purchased above the offer price after that day except where. . . . the offeror purchases, in one transaction, shares at above the offer price which carry him beyond 50% and he immediately declares the offer unconditional",

it would in fact have been open to Croda to have purchased shares in one transaction at above the offer price, if these had carried Croda beyond 50% so that the offer became immediately unconditional at the higher price, notwithstanding that the letter of 23rd May stated that the offers would not be increased. But this is not in fact what they did.

The Panel considered that as a matter of good market practice the Rules as to the time by which, if at all, Croda's offer had to become unconditional on May 30th was undoubtedly 3 p.m. That hour had been referred to at several points of the original offer document and was also specified in the form of Acceptance and Transfer sent to MYH shareholders with that document and also with the subsequent letters which although extending the date for acceptance made no alteration of the time on that date. It may be that if the offerors had wished to extend the time for acceptance to midnight on a particular date (not being the 60th day after the offer) they could have done so. Had they wished, however, to change the final hour for acceptances from 3 p.m. on the date specified they should have so stated in clear terms. In the absence of any such explicit statement the Panel has no doubt that the time of 3 p.m. as originally fixed stands and that offers received after that time are irrelevant in the present context.

Finally, on the question of scrutiny of acceptances, the Panel decided that, in this particular case, there was no reason to depart from the established principle that where the acceptances are received and scrutinised by a reputable and independent firm, the Panel will not call for an independent scrutiny in the absence of any evidence which could reasonably cast some doubt on whether all the acceptances counted were in a form which enabled the offeror to count them as valid.

18th June, 1975.