THE TAKEOVER PANEL

MR ANDREW P DRUMMOND AND MR ROBERT D PRENTICE
RE DUNDEE FOOTBALL CLUB PLC

Reasons for the decision of the Appeal Committee (The Right Honourable The Lord Roskill, Chairman, Mr D J Challen and Mr J D Webster).

1 The Appeal Committee met on 25 March 1992 to hear appeals by Mr Drummond and Mr Prentice from a decision of the Panel reached after its hearing of 26 February 1992 of disciplinary proceedings instituted by the Executive against the appellants. A copy of the Panel's decision and its reasons is attached.

2 The appellants chose not to appear or to be represented before the Appeal Committee. They had not appeared or been represented before the Panel. Both before us and before the Panel, the appellants contented themselves with written submissions in support of their appeals. They were supplied with copies of the Executive's written submissions to us and sent us further written submissions in reply. We have considered the submissions both before us and previously before the Panel with especial care in view of the fact that the appellants elected neither to appear nor to be represented.

3 The disciplinary proceedings arose out of transactions in the shares of Dundee Football Club PLC ("Dundee") on 9 September 1991. The details of those transactions, of the companies respectively concerned and of the respective relationships of the appellants with those companies are fully set out in the Panel's reasons for its decision that the appellants had been parties to a breach of Rule 9.1 of the Code. They do not require repetition by us especially as there was no challenge by the appellants to those facts.

4 The appellants' principal attack upon the Panel's decision that they had been guilty of a breach of Rule 9.1, in that they had been acting in concert together for those purchases of the shares in Dundee, was that the purchases had been made by the companies concerned and not by the appellants as individuals. Hence it was argued that on no account could the appellants as individuals have broken Rule 9.1. It was also said that the transactions were separate transactions and not part of a single concerted transaction. In addition Mr Prentice denied knowledge of the detailed provisions of the Code.

5 In our view, as in the view of the Panel, if these were concerted transactions the appellants cannot escape responsibility for a breach of Rule 9.1 because the transactions were effected through companies which they control and not by themselves as individuals. In order to determine whether Rule 9.1 has been broken it is entirely proper to break through the corporate veil of companies which are in truth only the creatures of those individuals who control them and to determine whether in reality there has been concerted action by those individuals. We therefore have no hesitation in rejecting the argument advanced under this head.

6 As regards Mr Prentice's contention that he was unaware of the detailed provisions of the Code we can only say that if an individual or a company which he controls engages in takeover transactions, he ignores the provisions of the Code at his peril. That the Code is not statutory is irrelevant. It was established for the protection of shareholders and especially of minority shareholders and such persons are and remain entitled to that protection.

7 The next question is whether these were connected transactions. The Panel stated that it was in no doubt that each of the appellants was in breach of Rule 9.1. It regarded the evidence pointing to that conclusion as

"overwhelming". The Panel listed six separate facts which in its view pointed to the conclusion that these transactions were in truth but a single transaction. We agree that those six facts point clearly to that conclusion. The Panel might well have also pointed to the possible significance of the fact that Clackallan (Mr Drummond's company) and Dalelane (Mr Prentice's company) each bought 29.9% of the shares in Dundee and also bought their percentages at different prices. We find it difficult to accept that no significance is to be attached to that percentage figure.

8 Mr Prentice in his most recent submission to us stated that the idea for the takeover came from him and not from Mr Drummond. The evidence given to the Panel by a Mr Cook who had a controlling interest in the vendor company and who was called by the Executive to give evidence before the Panel stated that it was Mr Drummond who first expressed interest in the proposed takeover. The appellants attack the credibility of Mr Cook and seek to criticise the Panel for having (as they contend) relied on his evidence. Mr Cook's credibility may or may not be open to challenge. If his evidence were accepted it would be most unfavourable to the appellants' present contentions. But in its reasons the Panel nowhere relies upon Mr Cook's evidence. We have of course read it but like the Panel we do not rely on it in support of the conclusion which, like the Panel, we have reached namely that the appellants were in breach of Rule 9.1.

9 The Executive further charged Mr Drummond but not Mr Prentice with failing to cooperate with the Executive in investigating the transactions in question. The Panel found this charge established. Mr Drummond complains of this conclusion. We have read most carefully his submissions on this issue. We have also read in detail the correspondence which the Executive sent to him and the questions which the Executive invited him to answer.

Essentially his answer to the charge is that he could not have given the information sought without infringing the professional privilege attaching to any information in his possession.

10 Mr Drummond asserts the claim to professional privilege but gives no details enabling us to determine whether the claim could be well founded. In his letter on Dundee's writing paper dated 4 December he said that his firm played no part in advising Dundee "in any way in connection with the change of shareholding" on 9 September 1991. In his letter of 24 December 1991 on the same writing paper he said that his firm did not act as "Legal Agents in the purchase of any Shares" in Dundee. The Executive were seeking to investigate the transactions of 9 September 1991. In our view, as in that of the Panel, Mr Drummond was involved in those transactions as an individual and on the information vouchsafed to us we can see no justification for the claim to withhold the information on the grounds that to have given it would have infringed some professional privilege. We therefore agree with the Panel's conclusion on this issue.

11 We therefore turn to the question of what, if any, penalties should be imposed upon the appellants. The Panel, composed on this occasion of twelve members of very wide and differing experiences, stated that it was satisfied that there had been "serious and deliberate breaches of the Code". It held that "there was a deliberate attempt to conceal concertedness of action, with the intention of avoiding the obligations of Rule 9". It took the view that it was "necessary to impose severe sanctions". The appellants were ordered to be subjected to public censure. In addition further sanctions were ordered to be imposed to prevent future access by the appellants to certain facilities of the securities markets.

12 The appellants complained bitterly of the penalty of public censure, saying that that possibility had never been put forward in the correspondence sent to them by the Executive last autumn. It is correct that it was not. But we do not see why the Executive should have drawn attention to this possibility. In Section 3(d) of the Introduction to the Code which deals with disciplinary proceedings public censure is specifically mentioned as one of a number of sanctions which the Panel may impose in the event of a breach of any of the provisions of the Code. The question of penalty is a matter for the Panel and not for the Executive. The Panel clearly took a serious view of the appellants' conduct and we see no reason for interfering with its unanimous decision that public censure was merited and should be imposed. As already mentioned the Panel also imposed further sanctions designed to prevent future access by the appellants to certain facilities of the securities markets. It is we think necessary for us to deal with the question of the imposition of such sanctions in some detail. We begin by referring to certain relevant provisions in the Code. Paragraph 1(c) of the Introduction deals with the enforcement of the Code. It reads:-

"The Code has not, and does not seek to have, the force of law. It has, however, been acknowledged by both government and other regulatory authorities that those who seek to take advantage of the facilities of the securities markets in the United Kingdom should conduct themselves in matters relating to takeovers in accordance with best business standards and so according to the Code.

Therefore, those who do not so conduct themselves may find that, by way of sanction, the facilities of those markets are withheld. In particular, the Securities and Investments Board ("SIB") and the self-regulating organisations recognised under the Financial Services Act 1986 ("SROs") may require that those subject to their

jurisdiction should not act in a takeover for any person who does not appear likely to comply with those standards. Moreover, if a person authorised by SIB or an SRO to carry on an investment business fails to comply with the Code or a ruling of the Panel, that may lead to the withdrawal of authorisation".

13 It is we think important to distinguish between those functions which properly belong to the Panel on the one hand and those which properly belong to the SIB, the self-regulating organisations and recognised professional bodies ("RPBs") on the other. The Panel deals with breaches of the Code. The other bodies deal with the imposition of certain sanctions which will or may follow from a prior determination by the Panel of one or more breaches of the Code. The functions are distinct but they are closely interwoven since all relate to the effective policing of activities in the securities markets. All the bodies concerned do and must work closely together in order to ensure that the correct result is ultimately achieved.

14 We think, with great respect, that the wording of the penultimate paragraph of the Panel's decision does not clearly distinguish between the different functions. This appears to have been recognised since the hearing before the Panel. The Executive suggested to us - and the appellants have been given notice of the suggestion - that that paragraph should be amended to read:-

"In the Panel's view neither Mr Drummond nor Mr Prentice nor any company which is, directly or indirectly controlled by either or both of them, is likely to comply with standards of conduct for the time being expected in the United Kingdom concerning the practices of those involved in takeovers and mergers. The Securities and Investments Board, the Self-Regulating Organisations and the Recognised Professional Bodies will be reminding

authorised persons of the consequent restrictions imposed by the "cold shouldering" rules of these bodies in connection with transactions regulated by the City Code and the Rules Governing Substantial Acquisitions of Shares."

15 The appellants complain of the Executive's action, claiming that they were attempting to alter the Panel's decision before the appeal was heard and that this is not just. We think the appellants have misunderstood the position. What is sought is the correct order in the event that the appeal should fail on the merits. The remaining question is simply how effect should be given to the decision of the Panel that further sanctions should be imposed beyond public censure if we were to take the view that such further sanctions were required. In agreement with the Panel we do take that view.

16 We therefore conclude that the Panel's decision should be affirmed and the appeal is dismissed subject only to the following changes in that decision.

(1) The penultimate paragraph should be deleted.

(2) That paragraph should be replaced by the following paragraph:-

"In the Panel's view neither of the appellants nor any company which is directly or indirectly controlled by either or both of them is likely to comply with the standards of conduct for the time being expected in the United Kingdom concerning the practices of those involved in takeovers and mergers. The Panel will therefore report its conclusion as to the appellants to the Securities and Investments Board, the Self-Regulating Organisations and the Recognised Professional Bodies for appropriate action by each of them in the light of their several rules (commonly known as "cold-shouldering rules") in connection with

transactions regulated by the City Code and the Rules Governing Substantial Acquisitions of Shares."

26 March 1992

PANEL DECISION AND REASONS FOR DECISION

The Panel met on 26 February 1992 to hear charges by the Executive against Mr Andrew P Drummond and Mr Robert D Prentice, both of Langlands, Glamis Road, Forfar, Tayside, in relation to alleged breaches of the City Code on Takeovers and Mergers (the "City Code") in respect of certain transactions in the shares of Dundee Football Club PLC ("Dundee FC").

On 9 September 1991 three newly formed companies, Clackallan Limited ("Clackallan"), Dalelane Limited ("Dalelane") and Bankvale Limited ("Bankvale"), purchased from Liveintac Limited ("Liveintac") 2,473,730 ordinary shares in Dundee FC representing 82.46% of the company's issued share capital.

Clackallan purchased 899,999 ordinary shares (representing 29.99%) at a price of 8.33p per share, Dalelane purchased 899,999 ordinary shares (representing 29.99%) at a price of 41.67p per share and Bankvale purchased 673,732 ordinary shares (representing 22.46%) at a price of 44.53p per share. On an aggregated basis the purchases were made at an average price of 30.32p per share.

Liveintac is a company whose issued shares are owned by Mr Angus J Cook and his wife.

Clackallan is a company of which Mr Drummond is the sole director and the registered holder of 99% of the issued shares, the remaining 1% being held by Prendrum Holdings Limited ("Prendrum").

Dalelane is a company of which Mr Prentice is the sole director and the registered holder of 99% of the issued shares, the remaining 1% being held by Prendrum.

Bankvale is a company whose issued shares are owned equally by the Bridley Trust and the Coupar Trust. The identity of the trustees, as at 9 September 1991, is not known but it is known that by 10 January 1992 Mr Drummond and Mr Prentice were the sole trustees of the Coupar Trust and the Bridley Trust respectively. The identity of the beneficiaries of these trusts is unknown to the Panel. The sole director of Bankvale between 1 October and 10 December 1991 was Mr I R G Gellatly although his appointment on 1 October purported to be back-dated to 14 August 1991.

Prendrum is a company whose issued shares are owned by Mr Drummond and Mr Prentice who are also the only directors of the company.

On 8 November 1991:-

(a) the 899,999 ordinary shares owned by Clackallan were re-registered into the name of Mr Drummond as trustee and nominee of Clackallan for nil consideration;

(b) the 899,999 ordinary shares owned by Dalelane were re-registered into the name of Mr Prentice as trustee and nominee of Dalelane for nil consideration; and

(c) the 665,932 ordinary shares (after a sale of 7,800 shares to various unconnected parties) were re-registered into the name of Prendrum as trustee and nominee of Bankvale for nil consideration.

On 14 November and 10 December 1991 Prendrum, with the consent of Bankvale, sold 2,850 ordinary shares in Dundee FC to various unconnected parties.

On 11 December 1991 Continental Sports Corporation Limited ("CSCL"), a company controlled by the family of Mr Ronald N Dixon, purchased at a price of 38.88p per share

from Mr Drummond, Mr Prentice and Prendrum (with the respective consents of Clackallan, Dalelane and Bankvale) 899,999 ordinary shares in Dundee FC (representing 29.99%).

On the same date CSCL entered into an agreement with Mr Drummond/Clackallan, Mr Prentice/Dalelane and Prendrum/Bankvale which gave CSCL the option to purchase a further 900,001 ordinary shares in Dundee FC (representing 30.0%) at 38.9p per share.

On 10 January 1992 Mr Prentice, with the consent of Dalelane, sold 450,000 ordinary shares in Dundee FC to the Bridley Trust at 30p per share. On the same date Prendrum, with the consent of Bankvale, sold 331,541 ordinary shares in Dundee FC to the Coupar Trust at 30p per share.

On 25 January 1992 CSCL entered into a Minute of Agreement with Clackallan, the Bridley Trust and the Coupar Trust in which the number of shares covered by the earlier option agreement was increased to 1,231,541. On the same day CSCL exercised its option and purchased 1,231,541 ordinary shares in Dundee FC. This increased CSCL's shareholding in Dundee FC from 29.99% to 71.04%.

On 27 January 1992 CSCL announced a cash offer at 38.88p per share for the ordinary shares in Dundee FC not owned by it, pursuant to Rule 9.1 of the City Code. The offer closed on 19 February 1992 with acceptances having been received in respect of 0.17% of Dundee FC's issued share capital.

Mr Drummond's residual holding is 331,540 ordinary shares in Dundee FC (representing 11.05%). Neither Mr Prentice, Dalelane, Bankvale, Prendrum, the Bridley Trust nor the Coupar Trust currently hold any shares in Dundee FC.

In the light of certain submissions made to it, the Executive investigated allegations that Mr Drummond and Mr Prentice had actively co-operated through the acquisition of shares in

Dundee FC to obtain control of that company and that they had been parties to a breach of Rule 9.1 of the City Code.

The City Code defines persons acting in concert as follows:

> "Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control (as defined below) of that company."

Control is defined in the City Code as follows:

> "Control means a holding, or aggregate holdings, of shares carrying 30% or more of the voting rights (as defined below) of a company, irrespective of whether the holding or holdings gives de facto control."

Rule 9.1 of the City Code provides as follows:

> "Except with the consent of the Panel, when:-
> (a) any person acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company; . . .
>
> such person shall extend offers, on the basis set out in Rules 9.3, 9.4 and 9.5, to the holders of any class of equity share capital whether voting or non-voting and also to the holders of any class of voting non-equity share capital in which such person or persons acting in concert with him hold shares."

The conclusion of the Executive following its investigations during the autumn of 1991 and the early part of this year was that Mr Drummond and Mr Prentice had acted in concert in

acquiring more than 30% of Dundee FC and that their failure to make an offer to the other shareholders of the company constituted a breach of Rule 9.1 of the City Code.

Accordingly the Executive instituted disciplinary proceedings against Mr Drummond and Mr Prentice in respect of the alleged breach of Rule 9.1 of the City Code and additionally against Mr Drummond in respect of his alleged failure to co-operate with the Executive during its investigation.

The Panel met on 26 February to hear the case. By the time of the meeting both Mr Drummond and Mr Prentice had indicated that they would not be attending the meeting and they were neither present nor represented at the meeting. The Director General addressed the Panel and called Mr Cook as a witness.

The Panel, having considered all the material made available to it including written submissions and letters from Mr Drummond and Mr Prentice, was in no doubt that Mr Drummond and Mr Prentice were each a party to a breach of Rule 9.1 of the Code. The evidence which pointed to a conclusion that, in the acquisition of shares on 9 September 1991, Mr Drummond and Mr Prentice were acting in concert, was overwhelming. The Panel principally had regard to the following matters:

(a) the evident linkage of Clackallan and Dalelane through Prendrum, a company jointly owned by Mr Drummond and Mr Prentice;

(b) the fact that Clackallan, Dalelane and Bankvale purchased their ordinary shares in Dundee FC on the same day but at different prices, from which it must reasonably be inferred that the purchases were in reality one transaction;

(c) in early December 1991 Mr Drummond gave a personal guarantee covering the whole of the aggregate

consideration payable to Liveintac by Clackallan, Dalelane and Bankvale;

(d) Mr Drummond and Mr Prentice share the same residential address;

(e) Clackallan, Dalelane and Bankvale had common registered office addresses throughout the period and on 6 November 1991 changed their registered offices from the address of Drummond Robbie & Gibson (a firm of solicitors of which Mr Drummond is one of the two partners) to 73 Overgate, Dundee; and

(f) Mr Gellatly stated to the Provisional Liquidator who had been appointed to Bankvale on 16 January 1992 that whilst he was a director of Bankvale he had acted upon Mr Drummond's instructions.

Mr Drummond and Mr Prentice each contended that they had not been personally involved in the purchase of any shares in Dundee FC, but the Panel had no doubt that both of them were 'persons' to whom the provisions of Rule 9.1 applied.

The Panel was also satisfied that Mr Drummond failed to co-operate with the Panel Executive in its investigation. Many communications, addressed by the Executive to Mr Drummond, were either allowed to go unanswered or were met with deliberate obstruction.

The Panel was further satisfied that these were serious and deliberate breaches of the Code. It may be that the minority shareholders (to whom an offer should have been made) have, in the way things have turned out, sustained no financial loss; but there was a deliberate attempt to conceal concertedness of action, with the intention of avoiding the obligations of Rule 9.

The Panel is of the view that it is necessary to impose severe sanctions. Accordingly, it has no hesitation in subjecting Mr Drummond and Mr Prentice to public censure for their conduct and intends that certain facilities of the securities markets should be withheld from them.

In the Panel's view neither Mr Drummond nor Mr Prentice nor any company which is in practice, directly or indirectly, controlled by either or both of them is likely to comply with standards of conduct for the time being expected in the United Kingdom concerning the practices of those involved in takeovers and mergers. Therefore, in accordance with Rule 2.12 of the Conduct of Business Rules of the Securities and Investments Board and the corresponding rules of the recognised Self-Regulating Organisations and the Recognised Professional Bodies, persons or firms authorised to conduct investment business are prohibited from acting for Mr Drummond or Mr Prentice or companies which are in practice, directly or indirectly, controlled by either or both of them in connection with transactions regulated by the City Code and the Rules Governing Substantial Acquisitions of Shares.

Mr Drummond is a practising solicitor and a member of the Law Society of Scotland. Accordingly the Panel makes a formal complaint to the Law Society of Scotland regarding the conduct of Mr Drummond.