THE TAKEOVER PANEL

STATEMENT OF THE APPEALS COMMITTEE OF THE PANEL ON TAKE-OVERS AND MERGERS

This is a complicated case. In order to make the point of the appeal clear, it is desirable to recapitulate the history omitting many details which are to be found in the more comprehensive statement issued by the Panel dated 27th August, 1969. Leasco (Leasco Data Processing Equipment Corporation, a United States corporation) announced on the 18th June that they would offer, or procure a subsidiary company to offer, for all the shares in Pergamon (Pergamon Press Ltd., an English company), of which Mr. Robert Maxwell is the Chairman and Managing Director. This announcement followed a written agreement in which Mr. Maxwell undertook to accept or procure the acceptance of the Leasco offer by Mr. Maxwell and the Maxwell family interests which amounted to upwards of four million shares (about 31% of Pergamon's equity).

Leasco and Mr. Maxwell then had protracted negotiations over the form of the offer documents, and 14 different drafts were discussed. Then on August 21st Leasco withdrew from its proposed offer. At the request of the Panel executive both parties issued public statements and a meeting of the full Panel was called to consider the circumstances arising from the announcement of the proposed bid and its subsequent withdrawal.

The finding of the full Panel was as follows:-

"The Panel is satisfied that Leasco's decision to withdraw from the proposed offer was the result not so much of any single factor as of the cumulative effect of a series of difficulties and doubts which eventually destroyed their confidence. The agreement between Mr. Maxwell and Leasco involved the former's employment by Leasco as Chief Executive in charge of their foreign interests, including Pergamon, and his appointment as Vice Chairman of the parent board in the United States. The arrangement contemplated was, therefore, one to the success of which personal confidence was essential. The Panel is satisfied that by 21st August, when Leasco withdrew from their proposed offer, this confidence had been wholly dissipated; that indeed this breakdown of confidence was mutual is shown by the fact that on or about 18th August Mr. Maxwell himself was proposing to terminate all negotiations and had prepared a press announcement to that effect.

In all the circumstances the Panel accepts Leasco's explanation for its withdrawal from the proposed offer. It has directed that Leasco should not make any further purchase of Pergamon shares without the Panel's sanction and this restriction has been accepted on behalf of Leasco. Nonetheless the Panel wishes to reiterate its view as to the seriousness of a withdrawal from an offer once announced because of the false market which may have been created."

The Panel then went on to deal with the question of whether

Pergamon shareholders had been adequately informed of certain matters. It said:-

"In the course of its investigation of the circumstances leading to the withdrawal of the proposed Leasco offer, matters came to the notice of the Panel to which, even if the express provisions of the City Code were not attracted, the Panel would feel bound to call attention. These concerned the question whether the Board of Pergamon had properly discharged its obligation to inform its shareholders sufficiently in regard to the affairs of their company.

It must be made clear that the Panel possesses no general supervisory powers to ensure that directors of public companies make full disclosure to their shareholders of all relevant matters. This is indeed a most important duty of directors and that it should have been continuously discharged becomes a matter of especial importance as soon as any question arises of an offer for shares. It is for this reason that under its constitution the City Panel's interest in the matter of disclosure is attracted whenever a question arises of a prospective offer, as well as during the course of negotiations about an offer or in the aftermath of an offer which has been made. It may be suggested that the Panel is only concerned with disclosure in the offer document (if indeed one materializes) or in any reply made by the offeree company, but the Panel considers this too narrow a view. When the intention to make an offer is publicly announced share prices are likely to be significantly affected and directors of companies should realise that in order that shareholders may protect their interests in the interim and be able to form a reasonable assessment of the value of their holdings in the event of an offer being made, or on the contrary of an expected offer not materializing, they should be kept continuously informed about the affairs of their company. It is not only in offer documents or replies that full disclosure is called for, although it is only in the context of an offer situation that the Panel can draw attention to any inadequacy of disclosure. Observance to the full of this obligation to disclose is essential if public confidence in the securities market is to be maintained.

In view of what follows it is right that the Panel should state at this point that nothing in the information before it casts doubt on the standing or future prospects of Pergamon, a company which under the energetic leadership of Mr. Maxwell has made notable progress. Nor is there any suggestion at all of personal misconduct on Mr. Maxwell's part.

In the opinion of the Panel, however, there are substantial grounds for questioning whether the shareholders of Pergamon were in fact given at the appropriate times all the information about the affairs of their company which, in the circumstances, they would reasonably be entitled to expect. The Panel emphasises that it is the information made available to Pergamon shareholders rather than to Leasco with which it is in the present context mainly concerned.

Two matters in particular have been considered by the Panel: both may have contributed to the confusion that Leasco eventually felt about the affairs of Pergamon and both appear at first sight to be matters on which there may have been a failure in proper disclosure to shareholders."

The first of these two matters was the affairs of ILSC (International Learning Systems Corporation Ltd.) a company which was owned jointly by Pergamon and British Printing Corporation Limited and of which Mr. Maxwell was Chairman, and, latterly, Chief Executive. The second of these two matters related to the relationship between Pergamon and certain companies owned by Maxwell family interests, one of such companies being Maxwell Scientific International Inc.

The affairs of ILSC and the dealings of Pergamon with MSI could have affected the profits of Pergamon. With regard to MSI, the Panel maintained that it was of the utmost importance that all such transactions should have been handled objectively and at arm's length and concluded that the course of dealing in question extended over a considerable period of time, that the transactions were numerous and,' as Mr. Maxwell had made clear, involved, and that, if full analysis were to be undertaken, a most detailed examination would be necessary. It pointed out that the Panel had neither the power nor the resources to conduct the kind of investigation required to reach any firm conclusion.

It concluded:-

"The Panel repeats that there is no suggestion of any personal misconduct and indeed it recognises that a full investigation may well show that all the transactions in question have been conducted with complete propriety and that Pergamon shareholders were informed about them as adequately as in the circumstances they could reasonably expect. But having regard to all the circumstances, and not only to the public concern already referred to, the Panel considers that the public interest does require that the true position should be established by an independent investigation. Nothing less will re-establish the position of Pergamon and in the long run protect the interests of its shareholders.

The Panel has, therefore, decided to call the attention of the Board of Trade to these matters with a view to that Department exercising its power to enquire whether in fact the members of Pergamon have been given all the information with respect to that company's affairs which they might reasonably expect to receive."

In its statement the Panel noted that Mr. Maxwell on behalf of Pergamon wished to appeal against the Panel's decision on a limited point of principle. The normal practice would be for a statement not to be published when an appeal is sought. Mr. Maxwell however stated that he had no objection whatever to the immediate publication of the Panel's report.

On September 9th the Board of Trade appointed inspectors to make an enquiry.

Mr. Maxwell on behalf of Pergamon has now formulated the appeal by letter of his Solicitors dated 11th September. The procedure as outlined in the Policy Statement expressly gives a right of appeal in cases of disciplinary action or censure for breach of the Code.

Technically the present case does not fall within this area. But it appeared to us from what was said by the Panel at the end of the hearing that it considered that the appeal ought to be heard by us. We ourselves also took the view that the appeal ought to be heard. Mr. Maxwell was naturally anxious that it should be heard. We have therefore heard it, on the basis that it is a valid appeal which we are entitled to hear.

The appeal falls under two main heads. The first is that however broadly the provisions of the City Code on Take-overs and Mergers are interpreted, they relate only to the conduct of companies, their professional advisers and associates in the course of take-over and merger situations.

The second is that there was a failure of natural justice in that Pergamon was given no warning or insufficient warning that such matters as those criticised in the Panel's statement would be the subject of investigation and that Mr. Maxwell was therefore caught unprepared on this aspect of the case and could not take the steps to meet it which he would otherwise have done. The letter elaborates this head in considerable detail.

The first point is the contention that the Panel strayed beyond its proper sphere. The Panels statement shows that it was well aware of the fact that its task was to deal with the take-over situation and that a possible view was that it was only concerned with the disclosure in the offer document or in any reply made by the offeree company. But it rejected that view as being too narrow. One of the main objects of the Panel is to secure fair treatment for the investing public. This object can be seen plainly to run through the City Code. In particular paragraph 3 of the General Principles says "Shareholders shall have in their possession sufficient evidence, facts and opinions upon which an adequate judgement and decision can be reached, and shall have sufficient time to make an assessment and decision. No relevant information shall be withheld from them." And paragraph 5 says that "It must be the object of all parties to a take-over or merger transaction to use every endeavour to prevent the creation of a false market in the shares of an offeror or offeree company."

Mr. Pearson a director of Robert Fleming & Co. Ltd. in giving his evidence before us said "I would certainly have expected that the Panel would have enquired into the background information because it seems to me that in the situation which developed it would only have been half an enquiry if it had dealt with disclosure at one particular moment of time……. Therefore I certainly expected the Panel would enquire into all relevant published documents." We agree with that view of the matter.

Information given at the time of a bid cannot be wholly divorced from pre-bid information which the shareholder has given or ought to have been given. The full Panel made a careful investigation as to the take-over situation. But this was inevitably limited by an inability to conduct a long and detailed enquiry into the accounts of inter-related companies. The Panel was composed of eleven persons of standing and experience in the City of London. Their collective knowledge and judgement were very weighty. In their investigation they found a situation which in their opinion called for an enquiry by the Board of Trade in the interests of everybody

concerned. The problem which they consciously faced was whether they should take a narrow view, suppress that opinion as not being their business, and, as it were, 'pass by on the other side'. They considered that their duty to the public did not allow them to take that course. They, therefore, expressed the opinion they had formed. In the particular circumstances of every case it must be a question of fact and degree whether such an expression of opinion is justifiable. In this the importance of the suggested non-disclosure and its relevance to the existing and future situation of the company would be factors to be considered. That question of fact and degree must be decided in the light of fairness and commonsense. That decision in this case was made by men whose knowledge of the City made them particularly suitable to form such a judgement. We think that the course taken by the full Panel was reasonable in the circumstances and we see no reason to differ from it.

The second main head of appeal demands more consideration of det il. Was there a failure of natural justice in that Pergamon did not have a fair warning and opportunity of answering the criticism so far as it is to be implied from the Panel's expression of opinion that the situation called for a Board of Trade enquiry? The Panel's investigations are 'domestic' and rightly free from technical formalities. For that reason it is perhaps all the more important that it should be seen to observe the 'rules of natural justice' as they are described in some legal cases. This wide expression means that everything must be done which fairness and commonsense should demand. One of these requirements is that no one should be condemned or criticised unless he fully understands what is being said against him and is given a fair chance of answering it.

If we had come to the conclusion that Pergamon had not had fair play in this matter, we should, of course, accept Mr. Maxwell's contention that it was wrong for the Panel to make the observations of which he complains. Mr. Maxwell addressed us with great ability and at some length and we have given careful consideration to his observations and arguments. We cannot, however, accept the conclusion which he urges upon us.

In our view the most forcible argument on Pergamon's side can be put thus. If, (contrary to Mr. Maxwell's contention) the full Panel could give so wide a scope to its enquiry, it must give adequate notice both of the matters into which it was going to enquire, and of the possibility of a recommendation for a Board of Trade enquiry. A fortiori would this be so if the Director General of the Panel intended to press for or suggest such an enquiry.

In the present case however, we are satisfied that Mr. Maxwell was aware that a Board of Trade enquiry was being suggested by the Director General and that the alleged non-disclosure set out in the Leasco notice was going to be discussed at the hearing. Leasco in withdrawing had relied, amongst other things, on three points. Messrs. N. M. Rothschild & Sons had said, in giving reasons for the decision, "Amongst these are:- 1. The position of International Learning Systems Corporation Ltd. 2. The trading relationship between Pergamon and Maxwell Scientific International Inc. a company controlled by Maxwell family trust interests.

3. The composition of the published forecast earnings by Pergamon

for 1969."

Despite Mr. Maxwell's argument that these points had all been cleared by his Press Statement to Pergamon shareholders dated 22nd August, our opinion is that these points were bound to be discussed at the hearing of the full Panel when it considered the whole situation.

On the 22nd August, the Director General of the Panel spoke to Mr. Pearson of Robert Fleming & Co. Ltd. who were the Financial Advisers to Pergamon. In that capacity they had been the persons who handled all the dealings between the Panel and Pergamon with relation to the proposed take-over. They were thus the normal and recognised channel for information between the Panel and Pergamon.

Mr. Pearson gave evidence before us and he seemed to us an entirely honest witness. His evidence was to the following effect.

The Director General spoke to him on 22nd August and said that because of the offer and withdrawal by Leasco the public needed to know the true position in view of various allegations and remarks that had been made. He said that the best way of achieving this would be to ask the Board of Trade to appoint inspectors. If the company itself were to ask the Board of Trade it would look rather better. Mr. Pearson entirely agreed with all of this. He thought and still thinks that "this was the only obvious way of publicly arriving at the true position so that everyone would know exactly what that position was." In his (Mr. Pearson's) opinion if Pergamon asked the Board of Trade to appoint the inspectors it would help to show that the directors of Pergamon felt that there was absolutely nothing to hide. Mr. Pearson and his co-director Mr. Berry saw Mr. Maxwell and explained the situation to him. Mr. Maxwell however was not prepared to consider asking for a Board of Trade enquiry. He took the strongest exception to it as being unnecessary and damaging to the Company and said that he would contest any suggestion by the full Panel that there should be a Board of Trade enquiry. Mr. Pearson reported this to the Director General. His present recollection (though not a certainty) is that he reported Mr. Maxwell as saying that he would "fight it tooth and nail."

Mr. Maxwell complained to us that he had not been given the opportunity to have Mr. Briggs of Messrs. Chalmers, Impey & Co., (the Accountant partner responsible for the audits of Pergamon's accounts) present at the full Panel meeting. This was due to Robert Fleming & Co. Ltd. having said that he could return on Friday night 22nd August to his interrupted holiday on the Isle of Mull since it was not necessary for him to be present at the full Panel meeting on the Monday. Mr. Pearson acknowledged that, considering the matter with hindsight, this was unfortunate. But this was certainly not the fault of the Panel.

On Sunday the 24th August, Robert Fleming & Co. Ltd. announced that they had ceased to be financial advisers to Pergamon.

On Monday the 25th August Mr. Maxwell attended at the meeting of the full Panel.

He brought with him amongst others Mr. Tosh a junior partner of Mr. Briggs and Mr. Bennett, Financial Controller and Secretary of Pergamon. Neither then nor at any subsequent point in the hearing, did Mr. Maxwell request an adjournment to enable him to get Mr. Briggs there or to enable Mr. Maxwell to deal with any questions that had been raised. The hearing lasted (we were told) for two and a half very long days. We were also told, and it was not contested, that Mr. Maxwell spoke during that time for some nineteen hours. Had Mr. Maxwell asked for some adjournment to enable him to recall his accountant to answer questions, or in any other way to arm himself to speak on matters of which he had been taken unawares, we find it hard to believe that the Panel would not have helped him in this respect.

The Solicitors' letter setting out the grounds of complaint maintains that Pergamon were entitled to assume and did assume that the Panel would only direct its attention to the conduct of Pergamon and Leasco (and advisers) in relation to the take-over bid and its withdrawal and to matters occurring during the course of the bid and connected transactions. Having heard all the arguments and evidence we are satisfied that Mr. Maxwell was aware in advance of the meeting of the full Panel that the discussion would <u>not</u> be so confined and that a request for a Board of Trade enquiry would be considered. Take-over situations have to be dealt with at speed and in the circumstances we are satisfied that the notice was adequate.

Various subsidiary matters were raised by the Appellant. We have considered these but we do not feel that they add anything to the matters with which we have dealt specifically.

In our opinion this appeal fails.

18th September, 1969.