# THE TAKEOVER PANEL

## BABCOCK & WILCOX LIMITED ("BABCOCK")/ WOODALL-DUCKHAM GROUP LIMITED (“WOODALL-DUCKHAM")

At a meeting on 18th January the full Panel, under the chairmanship of Lord Shawcross, considered an appeal by Babcock against a ruling by the Panel executive refusing permission for Babcock, if it should so wish, to make a new offer for the share capital of Woodall-Duckham in the event of its existing offer dated 30th November 1972 not becoming or being declared unconditional on or before 29th January, being the 60th day from the posting of such existing offer. The appeal failed. The detailed reasons are given below.

This is a case which although factually simple enough involves a final issue which is not altogether easy to resolve. Under Rule 22 of the City Code an offeror may not revise the offer without enabling shareholders to have 14 days to consider the revision. The offer, unless made unconditional, must terminate not later than the 60th day after its commencement; this means in practice that an offer cannot be revised after 46 days have elapsed since the posting of the offer document. The simple issue may then be stated thus. May an offeree company, having a substantial and particular reason - such as a forecast showing a considerable rise in profits - which, standing alone, might persuade shareholders to reject the offer, delay informing them of that reason until after the expiration of the 46 days and so deprive the offeror of the opportunity of answering by an increase in the offer?

We do not think that there is anything in the existing Principles, Rules or practice of the City Code which imposes any rigid timetable within which the offeree must disclose all the grounds upon which it advises shareholders to reject an offer. That does not in itself entirely dispose of the matter for the Rules do, as we have said, impose a strict timetable on the offeror. Thus he may keep his offer open for 60 days but if by that time it has not been made unconditional it lapses and cannot be revised or replaced by a new offer without the leave of the Panel which is not normally granted before at least six months have elapsed since the end of the 60 day offer period.

In this present case in a circular letter dated 15th December Woodall-Duckham advised their shareholders to reject the offer made by Babcock for their shares and made it clear that, inter alia, the prospects for 1973 were very much better than for 1972. They did not, however, at

that time put out anything in the nature of a formal profit forecast. On 11th January they sent a circular letter to shareholders saying that a forecast would be sent to shareholders before 29th January, the closing date of the offer (the 60th day). They also stated that they would forecast an increased dividend. At the date of the circular there were still four days of the offeror's 46 days to run.

On 15th January that period elapsed. The very following day, in a press announcement, Woodall-Duckham made a profit forecast and stated that a circular would be sent to shareholders on 22nd January. The announcement included an estimate of much increased profits based on which the offer (at 120p) represented a price/earnings ratio of between 10.9 and 9.1. The announcement also said that a dividend totalling at least 27½% compared with 20% paid in 1971 and 20½% forecast for 1972 would be recommended. Babcock's representative told us that this was a highly significant new factor but it was by this time too late for Babcock to revise their offer.

What then is to be done? The Panel consider that in a sense this is a matter of degree. In a case where an offeree company puts forward, after the expiration of the 46th day, any information which on the face of it affords a new, an unexpected and a substantial reason for the rejection of the offer and has delayed publishing that information because of tactical considerations and in order to make it impossible under the Code for the offeror to consider revising his offer the Panel might, but not always, give permission to the offeror to put out a new offer. That is because take-over procedures under the Code are designed to secure fair treatment for all concerned. A take-over is not a game in which the Code's Rules or timetables should be used to secure tactical advantages.

Permission for an immediate new offer to be made would, however, be given with reluctance for great importance is to be attached to the 60-day Rule. We would think it most undesirable to extend the period of uncertainty which the 60-day period already involves and which is not only likely to disrupt business activities but must be most worrying to management, staff and employees. 60 days is already a long enough period for that uncertainty to continue.

On the other hand shareholders are not to be deprived of the opportunity of considering a revised offer (nor must bona fide bids be frustrated) by an over rigid application of the Rules so as to secure a tactical advantage for one side, and certainly not by calculated manoeuvring within the timetable. In view, however, of the importance of not prolonging

the 60-day period, the onus of establishing that a new and unexpected and substantial factor has been introduced and that the timetable has been used in that way, falls heavily on the party who alleges it. Having given much anxious thought to this case we do not think that Babcock have discharged that onus.

The fact is that a good deal of information about Woodall-Duckham' s prospects for 1973 was already available. The last Annual Report and the interim statement in September 1972 had been bullish about the future and showed that the directors believed that 1973 would be a much better year than 1972. Still more specific information was put out in the circular of 15th December. 1972, due to a loss in the first half, had been a bad year; 1973 would be very much better. The order book was indicating a very satisfactory position. We think that on this Babcock would have been justified in assuming that, if any profit forecast were put out, it would compare very favourably with the previous year. But more was to come. Although there is no obligation on an offeree company to put out a profit forecast there is no objection to its doing so and on 11th January Woodall-Duckham did state that they would be making profit and increased dividend forecasts before the close of the offer. There were still four days to run in which Babcock could, if so minded, have revised their offer. They did not do so. On 16th January, however, when they no longer had that opportunity, the new forecast was published. The forecast gave particular and concrete effect to the more general statements as to improved prospects which had been made before. We do not think that it fell outside the necessarily wide parameters which might reasonably have been anticipated from those general statements. It was at least a coincidence that this forecast came out the very day after the time for revision had expired. Was it more? We do not consider that the forecast was in itself a startling new factor. Nor did the market. The merchant bank representing Woodall-Duckham told us that they could not conscientiously have put out the forecast before 16th January. It was indeed not alleged before us that there had been deliberate delay for tactical reasons. In all these circumstances we do not think that Babcock have established that the profit forecast constituted a new, an unexpected and a substantial factor, the publication of which had been deliberately delayed for purposes of tactical advantage and therefore we do not consider it desirable at this time to permit a new offer to be made.

Having said that we must emphasise again that our whole process is designed to secure fairness all round. We express the hope that all

relevant information will be placed before shareholders as early as practicable in order that shareholders shall in general have an adequate period in which to assess quietly the advantages of the original or any revised offer and the strength of the arguments against acceptance. Without laying down any new rulings in this matter we think that good practice on both sides will secure this result.

The Panel takes this opportunity of clarifying a point of interpretation arising under Rule 32. Rule 32 deals with the purchase of shares by the offeror at a price above the value of the offer and provides, inter alia, that shareholders of the offeree company must be notified in writing of any increased price payable under the Rule at least 14 days before the close of the offer. The Panel's view is that the combined effect of Rules 22 and 32 is to preclude an offeror purchasing shares above the offer value after the 46th day unless the purchase in itself is sufficient to ensure that the offer will be declared unconditional and may thus be kept open for the full 14 days.

29th January 1973.