

THE TAKEOVER PANEL

**BABCOCK & WILCOX LIMITED ("BABCOGK")/
WOODALL-DUCKHAM GROUP LIMITED
("WOODALL-DUCKHAM")**

At a meeting on 30th January, the full Panel, under the Chairmanship of Lord Shawcross, considered an application by Woodall-Duckham that the offer by Babcock for the ordinary share capital of Woodall-Duckham should be treated as having lapsed and should not be replaced by a new offer.

On 30th November 1972, Babcock made an offer of 120p for the ordinary shares of Woodall-Duckham. Under Rule 22 of the City Code this offer lapsed unless it became or was declared unconditional by 3.30 p.m. on the 60th day after the offer was posted, namely on 29th January 1973.

By 3.30 p.m. on 29th January 1973, Babcock had acceptances in respect of 45.99 per cent of the issued ordinary share capital. Babcock had also agreed before 3.30 p.m. on 29th January to acquire a further 4.77 per cent of the ordinary shares from two holders at 125p per share, bringing the total to 50.76 per cent of the issued ordinary share capital. This purchase was in effect one transaction, as the sale by each holder was conditional on the sale by the other. The board of Babcock at a meeting held at mid-day on 29th January had agreed to declare the offer unconditional if the company were to receive acceptances which together with shares acquired amounted to over 50 per cent of the ordinary shares by 3.30 p.m. on that day. Babcock announced late that afternoon that the offer had become unconditional.

Woodall-Duckham asked that the offer should be regarded as having lapsed on two grounds:-

- (1) that Babcock had failed to declare the offer unconditional by 3.30 p.m. on 29th January, contrary to Rule 22 of the Code; and
- (2) that the purchase by Babcock on 29th January at 125p contravened a Panel ruling given on 18th January that the offeror should not

purchase shares of the offeree company above the offer price of 120p after the 46th day from the posting of the offer.

Declaration that an offer is unconditional

In the circumstances of this offer, Rule 22 provides that no offer shall be capable of becoming or being declared unconditional after 3.30 p.m. on the 60th day after the date when the offer is initially posted. Rule 24 requires the offeror to give fuller particulars to the Stock Exchange by 9.30 a.m. on the following day.

The reference to "becoming unconditional" in Rule 22 relates to the usual provision in offer documents that the offer will become unconditional if acceptances are received in respect of 90 per cent of the shares. The reference to "being declared unconditional" relates to the usual provision that the offeror may decide to make the offer unconditional on some percentage of acceptances exceeding 50 per cent but less than 90 per cent. The Panel considers that it was the intention of the drafters of the Code that the offeror should make a public statement as to the outcome of the offer by 3.30 p.m. on the 60th day. There is, however, admittedly some ambiguity in the wording since the word "declare" has to cover both the decision by the offeror and the announcement of his decision. These difficulties are not helped by references to announcements of the decision (as distinct from a declaration) in Rules 24 and 25. There is the further point that, as the board of Babcock had decided at mid-day to make the offer unconditional on receipt of over 50 per cent acceptances, it is arguable that the offer automatically became unconditional when the acceptances exceeded 50 per cent before 3.30 p.m. In these circumstances, and as the holders of more than 50 per cent of the ordinary shares had in fact, before 3.30 p.m. on 29th January, either accepted the offer or agreed to sell their shares to Babcock, the Panel does not see its way to agree that the transaction can be nullified because of the absence of a public statement by 3.30 p.m. The Panel will, however, suggest to the City Working Party that the Rules should be made more explicit on the next revision and meantime the

Panel wishes all practitioners to give effect to the intention of the Code by ensuring that in any similar case the offeror announces the outcome of the offer publicly by 3.30 p.m. on the 60th day.

Purchases of shares

In the previous appeal in this case, which the Panel heard on 18th January, the Panel decided to issue a considered statement on the case but, for the convenience of the parties, the Chairman indicated at the end of the hearing the broad reasons for the decision. He added, as an additional point for guidance that did not arise specifically out of that appeal, that an offeror should not purchase shares in the offeree company after the 46th day at above the offer price.

In the course of that appeal, the point had been made that an offeror cannot make a revised offer after the 46th day because of the combined effect of two separate provisions of Rule 22: first, the provision that an offer shall not be capable of becoming or being declared unconditional after the 60th day and, second the provision that a revised offer must be kept open for at least 14 days. An offeror cannot be certain that a revised offer made after the 46th day will remain open for at least 14 days since whether it does or does not will depend upon whether the offer becomes unconditional by the 60th day; hence the ruling that a revised offer must be made not later than the 46th day.

Rule 32 provides that an offeror who purchases shares at above the offer price must increase his offer to not less than the highest price paid and that such highest price must be notified to the shareholders of the offeree company at least 14 days before the offer closes. The Panel was concerned at the hearing on 18th January to make it clear that, by reason of the provisions of Rule 22 and Rule 32, an offeror cannot purchase shares at above the offer price after the 46th day.

There is, however, one exceptional circumstance in which the offeror may purchase shares above the offer price after the 46th day. If after that day (other than in the case of an offer in which a "shut-off" notice has been given under Rule 23) the offeror purchases, in one transaction, shares at above the offer price which carry him beyond

50 per cent, and he immediately declares the offer unconditional, the offer can and indeed must, under Rule 23, remain open for a further period of at least 14 days. Thus the Rule 32 requirement is satisfied. In response to a request for information, the Panel executive had informed Lazard Brothers & Co. Ltd., acting for Babcock, of this exception some time before 29th January and confirmed the point in response to a further enquiry by Lazards at about 2.00 p.m. on 29th January. The point was also made in the considered statement by the Panel in explanation of their 18th January decision which was published on 29th January though not until after 3.30 p.m.

In this matter, the Panel confirms the interpretation of the Code contained in the statement they issued on 29th January. It was unfortunate, as events worked out, that the attention of Kleinwort Benson Limited was not drawn earlier to the exception to the general ruling against purchases above the offer price after the 46th day but the Panel do not consider that Woodall-Duckham were thereby placed, to any appreciable degree, in an unfavourable position.

Finding

It is not within the competence of the Panel to express any view as to legal implications but the Panel considers that so far as the Rules of the City Code are concerned the Babcock offer had become unconditional on or before 3.30 p.m. on 29th January in view of the fact that at that time Babcock had agreed to acquire or received acceptances in respect of more than 50 per cent of the ordinary shares of Woodall- Duckham.

13th February 1973.