

THE TAKEOVER PANEL

ST. MARTINS PROPERTY CORPORATION LIMITED/

THE PROPRIETORS OF HAY'S WHARF LIMITED

STATEMENT

On 9th November, 1973 St. Martins Property Corporation Limited ("St. Martins") entered into an agreement (subject to the consent of trustees of the existing St. Martins convertible loan stock which was duly given) to purchase from Lockfold Limited ("Lockfold") and certain other clients of Lazard Brothers & Co. Limited about 32% of the ordinary share capital of The Proprietors of Hay's Wharf Limited ("Hay's Wharf") on the basis of ordinary shares and new convertible loan stock giving the Hay's Wharf shares an approximate value of £4 per share. St. Martins already held about 2% of the Hay's Wharf shares and this purchase consequently gave St. Martins a holding of 34.5% of the ordinary capital of Hay's Wharf. The purchase therefore attracted the operation of Rule 34 of the Code which imposes a mandatory obligation on companies placing themselves in the position of St. Martins to extend an unconditional offer on the same terms to the holders of the remaining shares. This obligation was not disputed.

It appeared that St. Martins had sufficient authorised but unissued capital to satisfy the purchase of the 32% but that shareholders' approval for the issue of additional capital would be required for the acquisition of the remaining shares. No importance appears to have been attached to this requirement at the time and the advisers to Hay's Wharf seemed then, indeed, to have been unaware of the need for a shareholders' meeting.

On 14th November an announcement was put out jointly by St. Martins and Hay's Wharf reciting the agreement to purchase the 32% on the terms indicated and stating explicitly that the Panel on Take-overs and Mergers had ruled that, under Rule 34 of the Code, St. Martins must extend an offer on the same terms to all other shareholders. Hay's Wharf told its shareholders that the underlying value of their shares was substantially in excess of the St. Martins offer and advised them to take no action but await a further communication.

On 17th December the then Chancellor of the Exchequer announced the Government's intention to impose new and more onerous taxation upon property developers and on 28th December S. G. Warburg & Co. Limited, St. Martins' advisers, informed the Panel that as a result of changes outside the board's control, and in particular the announcement by the Chancellor of the Exchequer, the directors of St. Martins were no longer able to advise their shareholders to approve the increase in share capital required to implement the offer.

On these facts the whole matter came before the Panel on 2nd January and, at the request of St. Martins, there was a further hearing on 4th January. The Panel reached a decision on 7th January which it communicated to both parties. St. Martins made further proposals which were discussed with the parties on 15th January and the Panel reached its final conclusion (which confirmed that communicated to the parties on 7th January) on that day. The relevant General Principles and Rules of the City Code immediately applicable are General Principles 1 and 2 and Rules 8, 10 and 34. On the basis of these General Principles and Rules, the Panel decided that St. Martins as such had an obligation to make an offer for the outstanding Hay's Wharf shares on the same terms as those afforded to the holders of the 32% which they had purchased. The reasons for this decision were communicated to the parties on 16th January. St. Martins sought the leave of the Panel to appeal against this decision and on 16th January the Panel considered this application and decided, entirely exceptionally, to give leave to appeal, not from any belief that there was substance in the grounds disclosed but because the Panel did not wish to leave St. Martins with any sense of grievance. St. Martins were informed that if there was an appeal the Panel proposed, in view of the uncertainty which might then affect the market for some time, to recommend to The Stock Exchange that the quotations of both St. Martins and Hay's Wharf should be suspended. In the event the directors of St. Martins did not pursue the appeal but announced that they would call an extraordinary general meeting of shareholders and place before them a resolution for the creation of the necessary additional capital.

Some six weeks went by and on 1st March St. Martins issued a circular letter to shareholders which accompanied the notice convening the extraordinary general meeting. In that letter it was explained that the directors of St. Martins had accepted the ruling of the Panel that a general offer under the Code must be made for the outstanding Hay's Wharf shares, that it was, however, the duty of the directors of St. Martins to inform shareholders that it was not now in their

financial interest to buy further Hay's Wharf shares on the terms indicated, but that a failure so to do would involve the company in a breach of the City Code. The directors recommended that shareholders should vote for the increase in capital required to implement the general offer.

On 25th March the extraordinary general meeting of St. Martins shareholders took place and a resolution authorising the issue of additional capital was put and defeated on a show of hands. Proxies had been received representing over 17.8 million shares in favour of the resolution and 22.7 million shares against it. The Panel has been informed that to the knowledge of St. Martins a block of approximately 4.5 million shares, not included in the above figures, was to be represented at the meeting. Had a poll been taken those shares (and possibly others) would, as the Chairman knew, have been voted in favour of the resolution. Under the St. Martins Articles of Association although the Chairman of the meeting can require a poll, a poll can only be demanded by shareholders if not less than three (or one holding 10%) submit a written requisition. No such requisition was put in; and although the desirability of a poll was suggested, the Chairman did not require one. No poll was therefore taken. The Panel has no knowledge whether, had there been a poll, the result would have been different.

It is not disputed that the shareholders of a company are in such circumstances free to vote as they choose and may, if they think fit, put their own immediate financial interests before the desirability of complying with the requirements of the City Code. Nor can it be said in this case that the directors of St. Martins are themselves in breach of the Code. It is true that they showed little enthusiasm for the company's obligation to make a general offer but it cannot be said that the directors acted improperly and without regard at least to the letter of the obligations resting upon directors in such circumstances as set out in the Panel's General Statement dated 13th March.

It remains the case, however, that because a majority of the St. Martins shareholders at the meeting chose to vote against the resolution the company as such is in breach of Rule 34 of the Code, and that, as the directors were made aware from the beginning, the company is liable to such sanction as the Panel sees fit to impose.

It is not in point to say that neither under the statutory Securities and Exchange Commission system which is in operation in the United States nor under such systems of control over stock market transactions as apply in other countries is a company obliged to make a general offer because it has purchased a controlling interest in a particular company. And it is not in point because the

City Code, in order to protect the interests of shareholders of offeree companies has imposed precisely this obligation upon companies in the United Kingdom. In this respect the practice (although not the law) in the United Kingdom is significantly in advance of that elsewhere. It is the firm intention of the Panel to maintain this practice which it believes to be in the long term interest of all concerned.

It has to be recognised, however, that the City Code is a voluntary one; this has advantages in that - as indeed in this instance - the Rules contained in it may go beyond or be at least in advance of anything which could be laid down in a statutory instrument and may be more readily adapted to changing circumstances as well as more quickly and flexibly administered. But voluntary rules inevitably suffer from the disadvantage that they depend in the main upon voluntary observance and often lack explicit sanctions which can be enforced against opposition. It is for this reason that the Panel - and, indeed, all the Institutions associated with it - attach the highest importance to a loyal observance of the Code and to support for the Panel's rulings by all concerned. This duty to observe the Code rests particularly, of course, upon directors of companies affected. But shareholders as well should recognise that if they wish their investments generally to be protected by orderly markets and integrity on the part of those whose conduct may affect them, there may be occasions when in spite of some immediate loss to their pockets they should accept and support the operations of the Code. The Panel is glad to see that in this case a large number of shareholders, notwithstanding possible short term economic disadvantages, supported its ruling.

It was suggested on behalf of Hay's Wharf that, in view of St. Martins' shareholders' disregard of the obligations under the Code, the Panel might order St. Martins to substitute for the share consideration in its offer an alternative form - e.g., cash or loan stock not requiring any authorisation by shareholders. Quite apart from the financial implications of such a course in the present difficult circumstances, the Panel considered that, in view of their shareholders' decision at the extraordinary general meeting, the directors of St. Martins could not properly (or possibly even legally) adopt such a course without going back to their shareholders who might give a further decision in the same sense. Other possible sanctions are either subject to similar considerations or, whilst imposing financial loss on St. Martins, would be likely also further to injure the shareholders of Hay's Wharf. Grave consideration was given by the Panel to the

possibility that it might recommend the Council of The Stock Exchange to suspend the listing of St. Martins shares. As at present advised, the Panel felt that so to do would impose hardship not only on the shareholders who had chosen to disregard the Panel's ruling but also on those who had (or who on a poll would have) supported it. This seemed at this stage to be an unfair course in the circumstances.

The Panel has, therefore, decided on a course with which the directors can comply without further recourse to shareholders, namely that:-

- (1) St. Martins shall not exercise the voting rights attached to its present holding until it has made a general offer to all shareholders in accordance with the requirements of Rule 34 on the same terms as those obtained by Lockfold.
- (2) St. Martins shall not acquire any further shares carrying voting rights or any other securities convertible into shares carrying voting rights until it has made such a general offer. This prohibition will not apply to the acquisition of shares or convertible securities under bonus or rights issues but such shares (and the shares derived from conversion of any convertible securities) will be treated, for the purposes of this ruling, as if they formed part of the present holding.
- (3) St. Martins shall not dispose of any part of its present holding (or any further shares derived from such holding under bonus or rights issues) until it has made such a general offer. St. Martins will, however, be entitled to accept a general offer made by an unconnected third party, but only with the consent of the Panel if that offer is not recommended by the Hay's Wharf board. This paragraph shall not prohibit St. Martins from disposing of new shares, nil paid, arising from any rights issue.

The Panel takes this opportunity of saying that in future any purchase which would give rise to a mandatory obligation under the Code to make a bid must expressly be made subject to any conditions which would apply to any consequential general offer. Moreover, in any case where shareholders are called upon to vote on a matter which may involve a Panel ruling, a poll should always be taken so that

all shareholders may share the responsibility of deciding what course their company should pursue in relation to the Code and in order to avoid any doubt about the view of the shareholders in question. It is a matter of regret to the Panel that Mr. Smith, the Chairman of St. Martins, while giving shareholders the opportunity of demanding a poll, did not himself require a poll to be taken, especially in view of a suggestion from a shareholder that he should do so. In the opinion of the Panel this constituted a grave error of judgment on the Chairman's part.

It is a matter of even greater regret that the Panel should have had to consider the personal conduct of Mr. Smith in giving evidence before it. Mr. Smith was less than frank in his replies to the questions put to him as to his knowledge of the way in which a large block of shares would be voted in the event of a poll. The Panel is entitled to expect absolute candour and full disclosure on the part of those who appear before it; Mr. Smith has acknowledged his fault in this respect and has apologised for it. He has marked his own view of its seriousness by retiring from the chairmanship and the board of St. Martins. In these circumstances the Panel refrains from further comment.

5th April, 1974.