THE TAKEOVER PANEL

The Panel met on 29th June 1978 to consider an appeal by W. Henshall & Sons (Addlestone) Limited ("Henshall") against a ruling by the Panel executive.

Henshall is a public listed company, manufacturing aircraft interior equipment, with an authorised capital of 3.5 million shares of 10p each, of which 2.5 million have been issued. Following the death of the former chairman, Mr. Cecil Henshall, in September 1977, the Henshall family shareholding totalled about 56.5 per cent and 12.3 per cent was held by Estate Duties Investment Trust ("EDITH").

On 9th May, 1978, Mrs. Vivienne Henshall (the late chairman's widow), Mr. Philip Henshall (his nephew and a non-executive director of Henshall) and trustees for family trusts sold their shares to Bovbourne Limited ("Bovbourne") for 20p per share. EDITH also sold their shares to Bovbourne at the same price. In this way, Bovbourne acquired 49.92 per cent of the Henshall share capital and issued an announcement that it was making an offer for the remaining shares at 20p. Bovbourne then bought further shares on the market which brought its holding to 50.02 per cent and on 23rd May posted its unconditional offer to the remaining shareholders.

On 24th May, Petford Limited ("Petford"), a private company incorporated in the Isle of Man and under the control of the private trusts of Mr. Joseph Murphy, announced a higher offer of 30p, conditional on over 50 per cent acceptances. Bovbourne responded with a statement that it had no intention of accepting the offer in respect of its 50.02 per cent holding. Petford then began buying in the market at prices in excess of 20p. On 8th June Petford issued their offer document. On 9th June, the Henshall board informed the Petford offer failed.

Meantime, the Henshall board asked the Panel executive to rule, in the interests of the Henshall shareholders, that Bovbourne should accept the Petford offer or match it, failing which, the Henshall board should be allowed, without seeking the consent of shareholders including Bovbourne, to acquire assets under the contro1 of the Murphy private trusts in return for 1 million authorised but unissued shares. The effect would be to dilute the Bovbourne shareholding sufficiently to make it likely that Petford's 30p offer would succeed. This the Panel executive refused to do.

One of the main purposes of the Code is to protect offeree shareholders, particularly shareholders, often with small holdings, who do not have ready access to expert advice. At the same time the Code points out that those who acquire shares in companies in which there are large shareholdings in related hands must accept that these large shareholdings will be influential in determining the future of the company.

The Henshall board contended that it was the duty of any director who received an offer for the purchase of his shares in circumstances which would create a "shut-out", to inform the board, presumably with the intention that the board could obtain independent advice. Reference was made to Rule 2.1 of the Model Code for Securities Transactions by Directors of Listed Companies issued by the Council of The Stock Exchange. This rule provides that a director should notify his chairman before dealing in shares of his own company.

Although The Stock Exchange intends to incorporate the Model Code into its Listing Agreement, it is not at present mandatory and is not embodied in the City Code on Take-overs and Mergers. In the circumstances of this case, the Panel did not feel called upon to comment on this matter, since its concern was whether there had been any failure on the part of the purchaser under the Take-over Code. There was no evidence that the purchaser had been guilty of any misrepresentation in the course of the negotiations and in the absence of bad faith the Panel did not believe that it was necessary for the purchaser to have responsibility for the actions of an individual vendor who was also a director.

General Principle 6 and Rule 4 of the City Code refer to the need for the board of the offeree company as a whole to obtain competent independent advice and not to any corresponding obligation on any independent directors.

As regards the relief specifically sought by Henshall, Rule 38 provides, inter alia, that, during the course of an offer, a board must not issue any authorised but unissued shares without the approval of shareholders in general meeting. In the present case, the Bovbourne holding of 50.02 per cent would mean that approval for such an issue would not be forthcoming at an EGM. The Rule dates from the first edition of the Code in 1968 and was designed to prevent the boards of offeree companies from thwarting bids by diluting an offeror's holding in the company or by giving another offeror, whom the board favoured, a holding in the company that facilitated the success of his offer. Even the fact that the favoured offer was higher in amount was not considered to justify steps of this kind. In the Panel's view, the same considerations apply now as in 1968 and they are not prepared to consent to a waiver of Rule 38 in the present case. The appeal was, therefore, rejected.

3rd July 1978