THE TAKEOVER PANEL

TURNER & NEWALL PLC ("T&N") / AE PLC ("AE")

The full Panel held a series of meetings on 13 and 16 October dealing with various aspects of T&N's recently lapsed offer for AE.

In the context of this offer Hill Samuel & Co Ltd ("Hill Samuel"), a subsidiary of Hill Samuel Group PLC ("HSG"), acted as financial advisers to AE and Cazenove & Co ("Cazenove") acted as brokers to AE. The offer lapsed on 12 September, T&N having failed by some 1% to reach the 50% mark.

On 15 and 16 September, Cazenove completed a placing of approximately 10 mn AE ordinary shares at a price of 201p per share, as compared with 240p, the value of the T&N cash alternative. The Panel executive then commenced enquiries concerning that placing and any arrangements that lay behind it.

One issue in the hearings concerned an allegation that T&N and an arbitrageur who was active in the market during the bid were acting in concert. The Panel, having heard extensive evidence on the transactions from the parties concerned, concluded that they had not been acting in concert.

The other issues concerned various transactions which under the Code should have been, but were not, publicly disclosed and the consequences which should flow from these breaches of the Code.

The transactions were of two types. The first consisted of an arrangement entered into by HSG with Hill Samuel Investment Management Ltd ("HSIM"), another member of the Hill Samuel group, arising from an approach by HSIM regarding its perceived conflict of interest since AE is a pension fund client of HSIM. Under the arrangement HSIM agreed that it would neither assent shares held for a number of discretionary clients until the offer became unconditional as to acceptances nor sell these shares in the market and HSG undertook to make good on an eventual sale any shortfall between the price received and 240p, the amount of the T&N cash alternative. The shares covered by this arrangement amounted to some 2.3% of AE ordinary shares, some of which were included in the placing. It must be emphasised that such an arrangement was not in any way precluded by the provisions of the Code as they stand at present but the Panel executive, when it learned after the lapsing of the offer of the existence of this arrangement, ruled that the transactions concerned should have been disclosed under Rule 8.1. HSG appealed against this ruling. The full Panel concluded that the transaction undoubtedly constituted a "dealing" falling within the provisions of Rule 8.1 which require disclosure of any dealings by the offeree company and its associates. The Rule generally refers to purchases and sales, since these constitute the great bulk of the transactions which fall to be disclosed under this Rule, and the transaction in question was clearly not either a purchase or a sale. But Notes to the Rule make it clear that the Rule bears on a wider range of transactions than simply purchases and sales and expressly refer to option transactions; and the Panel noted that the effect of the transaction in question was scarcely to be distinguished from a put option so far as HSIM and its discretionary clients were concerned. The arrangement was not made known to AE. The Panel was informed that HSG addressed their minds to the question of whether disclosure was required and concluded that it was not. The Panel is at a loss to understand how, in the light of the provisions of this Rule, HSG came to that conclusion and deplores the fact that HSG did not test that conclusion by consulting the Panel executive as the Code urges that practitioners should do in any case of doubt.

The second type of transaction concerned two arrangements concluded between Hill Samuel and two clearing banks, of which Midland Bank was one, under which the banks concerned agreed to buy AE shares and Hill Samuel undertook to indemnify the banks within certain limits against any loss on the resale of their holdings. The number of shares purchased by Midland Bank under this arrangement amounted to only a fraction below 5% of AE ordinary shares and they were purchased at prices marginally in excess of the T&N cash alternative. All of these shares were included in the placing. The arrangements were not made known to AE until after they had been put in place and even then AE were not informed of their details. Here again it must be emphasised that the transactions were not precluded by any provision of the Code and that it was a question simply of disclosure obligations. Here again it is clear that minds were addressed to the question of disclosure, in this instance by a number of parties. Here again the Panel is at a loss to understand how it could have been concluded that there was not a requirement to disclose given the breadth of the definition of an "Associate" in the Code and given, as in the case of the HSIM arrangement, the direct financial interest which the arrangement gave to a member of the Hill Samuel group. It is relevant that Midland Bank was a principal banker to AE and that it is made clear by the definitions in the Code that such a banker is not to be regarded as an associate (and so brought within the disclosure provisions) where the relationship involves no more than the provision of normal commercial banking services; but by no stretch of interpretation is this transaction to be described as falling within normal commercial banking services. The second clearing bank concerned concluded that the transaction should be disclosed and did disclose it. Midland Bank (which maintains it was unaware of the other bank's decision) having discussed the question with Hill Samuel and with its own legal advisers concluded that there was no disclosure obligation. Hill Samuel and Cazenove, who were aware of the other bank's conclusion, nevertheless held to the view that no disclosure was required.

Against this background the Panel must deplore the fact that neither Hill Samuel nor Cazenove nor Midland Bank consulted the executive.

The Panel judges that in this whole matter of disclosure the actions of members of the Hill Samuel group, on whom the primary duty of disclosure rested, are deserving of censure. The Panel also considers that the way in which the members of the Hill Samuel group dealt with what they perceived as a conflict of interest within HSIM was mistaken.

The Panel judges that, in relation to the purchases by Midland Bank, Cazenove and Midland Bank must both share in the blame for the breach of the obligations to disclose. The frequent involvement of Cazenove as professional advisers in bid situations makes their lapse the more surprising.

The Panel underlines, yet again, the importance of consulting the executive in any unusual circumstances. Given the emphasis laid by the Code on the importance of the spirit as well as the letter of the Code and on the Panel itself as the proper source of interpretations, the seeking of legal advice cannot be regarded as a substitute for consultation.

The Panel believes, in the light of the circumstances of this case, that Rule 8 should for the future, and with immediate effect, be interpreted to require that where there are any indemnification arrangements of any kind involving an Associate the existence of such an arrangement as well as details of the relevant dealings should be disclosed. A formal amendment to the Notes to the Rules to this effect will be published in due course.

As to the consequences of the breaches of the Code, the Panel rejected a contention that, since AE were not a party to the breaches, the consequences determined by the Panel should not be

such that AE should be adversely affected by them. The Panel concluded that AE could not be dissociated from the actions of its principal advisers in this matter.

The margin by which the bid failed was a narrow one, of the order of 1%. The dealings which were not disclosed, but should have been, amounted in total to some 7.3% of the AE issued ordinary shares and all took place in the last 3 weeks of the offer. The Panel concluded that it could not be said that, had proper disclosure been made, the outcome would not have been different. It therefore concluded that, exceptionally, T&N should be exempted from the Rule (35.1) which bars the making of a further bid within 12 months from the lapsing of an offer; and that T&N should further be exempted until 12 September 1987 in any new offer for AE from:

(i) the provisions in Rule 5.1 of the Code governing the speed at which shares or rights over shares may be acquired;

(ii) the provisions in Rule 9.5 which set the price floor for a mandatory offer in the sense that prices paid for AE ordinary shares by T&N in the course of its original offer should be disregarded;

(iii) the provisions in Rule 11 containing the obligation to make a cash offer in certain circumstances.

The last two exemptions flow from the fact that changes, for example in market conditions, since the original offer lapsed could make valueless the right to make an early fresh offer, if the offer price had to reflect the prices paid during the currency of the original offer.

T&N will be required to consult fully with the Panel executive over any use made of these exemptions.

17 October 1986