THE TAKEOVER PANEL

BARKER & DOBSON GROUP p.l.c. ("BARKER & DOBSON") /
THE DEE CORPORATION PLC ("DEE")

The full Panel met on 27 January to hear an appeal by Dee in connection with the offer for Dee by Barker & Dobson. Dee contended that Barker & Dobson had failed to comply with the Code's provisions as to sufficiency of information, and standards of care and accuracy in preparing its documents, to such an extent that the Panel should require the offer to lapse. The Panel executive had ruled that Barker & Dobson were not in breach of the Code.

The Panel decided that the appeal failed. The Panel's reasons are given at the end of this statement. In the view of the Panel, the information given enables shareholders, assisted by the board of Dee and its advisers, to form their own judgement as to whether the offer should be accepted.

THE OFFER

Barker & Dobson announced its offer for Dee on 17 December 1987. The terms of the offer were: for every 20 ordinary shares in Dee, 11 new shares in Barker & Dobson and £28.07 in cash. The offer valued Dee (on the basis of Barker & Dobson's share price as at close of business on 16 December 1987 of 165p) at £2,040mn. Of this amount £l,250mn would be provided in cash and £790mn in shares.

The cash was to be provided under a syndicated loan facility arranged by Barker & Dobson's financial advisers, Kleinwort Benson Limited ("Kleinwort Benson").

THE CODE

General Principles 4 and 5, which are given more detailed effect in Rules 23.1 and 23.2, in essence require that sufficient information must be given to shareholders to enable them to reach a properly informed decision and that there must be sufficient time for the shareholders to reach that decision. This requires that no relevant information should be withheld from them. The obligation of the offeror towards the shareholders of the offeree company is no less than the offeror's obligation towards its own shareholders. Moreover, documents have to be prepared with the highest standards of care and accuracy, and information adequately and fairly presented. This full disclosure, involving as it does the offeree company receiving independent advice, is a fundamental element in the Code and must be stringently complied with.

It is extremely important that information should be clear; where appropriate, views may be expressed in strong terms. But it is equally important that tendentious or extravagant statements should be avoided. Such statements can confuse shareholders. In the present case the wording used in certain circulars and press releases was sufficiently strong to cause the executive to remind both parties of the need to avoid language which is not in compliance with Code standards.

In considering whether adequate information has been given, the Panel recognises that the dynamic of the exchanges between the parties has the effect of analysing and drawing to the attention of shareholders the impact and implications of information given. Sometimes there may be competing views of the effect of information, for example, as to the reliability of forecasts or the reality of assumptions made. In general, however, provided information is available for analysis it is for the shareholders to decide which of the arguments of the parties they prefer. In addition, the Panel places considerable weight on the responsibility statements made by boards of directors in regard to the contents of documents, and the general duty of financial advisers to ensure that documents comply with the standards of

the Code. In addition the Code requires the advisers to an offeror to confirm the availability of any cash necessary to satisfy full acceptance of the offer.

The offer was announced by press release on 17 December 1987. There was a brief reference in that press release that Kleinwort Benson, as advisers to Barker & Dobson, had arranged a syndicate of banks to provide loan facilities for the full amount of the cash element of the offer, with a further working capital facility. On 21 December the formal offer, including a letter to shareholders, was posted by Barker & Dobson. The Code recognises that a listed company offering securities as consideration must comply with the requirements of The Stock Exchange's Admission of Securities to Listing, generally known as the Yellow Book. This required Barker & Dobson to publish in its listing particulars a summary of the principal contents of each material contract entered into by any member of the group within the two years immediately preceding the publication of the listing particulars, to include particulars of dates, parties, terms and conditions. Under Rule 26 of the Code, copies of those material contracts are to be available for inspection during the offer period, and must be supplied to the other party. This recognises the importance of the role of the offeree's financial adviser in communicating to shareholders its views on the effect of those contracts.

In the case of this offer, the loan agreement was summarised in Barker & Dobson's listing particulars which form part of the documents sent to shareholders. The summary contained details of the amounts of the facility, the interest rates, the repayment terms, the security to be given for the facility, the fees payable and certain undertakings. The agreement has been put on display in accordance with the requirements of the Code. The Stock Exchange had approved the listing particulars as complying with the requirements as to contents set out in the Yellow Book.

It is relevant to observe that throughout Barker & Dobson have been advised by Kleinwort Benson and, on legal issues, by Lovell White & King. Kleinwort Benson has been separately advised by

Slaughter and May. Each of those firms of solicitors has confirmed that, in settling the listing particulars, proper consideration was given to Section 146(1) of the Financial Services Act 1986 which provides that listing particulars must contain:-

> "all such information as investors and their professional advisers would reasonably require, and reasonably expect to find there, for the purpose of making an informed assessment of -
>
> (a) the assets and liabilities, financial position, profits and losses and prospects of the issuer of the securities; and
>
> (b) the rights attaching to those securities."

The offer document contained confirmation by Kleinwort Benson that:

> "Kleinwort Benson is satisfied that the necessary resources are available to Barker & Dobson to enable it to satisfy the consideration under the offer in full."

This reflects Rule 24.7 of the Code which provides:

> "When the offer is for cash or includes an element of cash, the offer document must include confirmation by an appropriate third party (eg the offeror's bank or financial adviser) that resources are available to the offeror sufficient to satisfy full acceptance of the offer . . ."

Copies of the loan agreement were made available to Dee's advisers in accordance with the Code. This facilitates the duty of the advisers to the offeree company in analysing the information provided by the offeror and to assist the shareholders in interpreting that information. On 4 January, Dee wrote to its own shareholders advising them to reject the bid in terms which concluded with the statement that "your board and their financial advisers have judged the offer to be inadequate . . .".

On 5 January, Dee wrote to shareholders in Barker & Dobson. Appendix 1 to that letter contains criticisms by Dee of the financing arrangements, and indicates that Dee's advisers felt

able to draw shareholders' attention to the risks involved in those arrangements. A copy of this letter of 5 January was also sent to Dee shareholders who, from that day at latest, have therefore known the view their board and advisers took as to the consequences of accepting the Barker & Dobson offer.

On 14 January Dee wrote again to its shareholders. The thrust of this letter was that Barker & Dobson would be in breach of two covenants in the loan agreement if it succeeded in its attempt to take over Dee. There was a further press release on 21 January maintaining the contention.

Barker & Dobson has responded to these statements by a number of press releases and circulars, and in particular by a press release issued on 17 January, in which it sets out its contentions as to why Barker & Dobson would not be in breach of the loan agreement if the bid were to succeed. Barker & Dobson also wrote fully to Dee's shareholders on 26 January, with details of its plans for the future of Dee's business.

THE DECISION

Dee's complaint essentially stems from the nature of the financing arrangements of the bid, which makes the loan agreement and its terms of critical importance. Dee complained that its shareholders did not have sufficient information to judge the merits of the offer and that Barker & Dobson would necessarily be in breach of the borrowing covenant in the loan agreement once the bid became unconditional. Barker & Dobson, advised by Kleinwort Benson, contended that it had taken sufficient care in formulating the offer, that it would not be in breach of the loan agreement, and that it had complied with the information requirements of the Code.

It is not the task of the Panel to decide whether Dee shareholders should accept the Barker & Dobson bid. Where there are rival views on the effect of the information made available, shareholders have to decide for themselves which they would prefer. So the Panel will not debate the strength of the

arguments for the two parties. It was satisfied that Barker & Dobson has made available the information which could properly be required to Code standards. The Panel emphasises that this decision implies no view whatsoever of the soundness of the rival arguments which are being addressed to shareholders. This decision should not be used by either party as supporting its case. All the Panel has decided is that Barker & Dobson has complied with the information requirements of the Code.

The Panel adds that it would require an unusual case for it to order an offer to lapse on the ground of the failure to supply enough information. In the normal case, assuming the parties are seeking in good faith to comply with the requirements of the Code, the Panel would require any deficiency to be made good. It would not lightly deprive shareholders of the opportunity to consider a bid on its merits if the further information can be given.

28 January 1988