

# THE TAKEOVER PANEL

## NORTON OPAX PLC

### 1 Ruling

The Panel met on 1 February 1989, to hear an appeal by Norton Opax PLC ("Norton Opax") against a decision of the Panel Executive, which ruled that Bowater Industries PLC ("Bowater") should dispose of shares representing 0.6% of the voting rights in Norton Opax to remedy a breach of Substantial Acquisition Rule 1 ("SAR 1"). Norton Opax submitted that Bowater should sell sufficient shares to reduce the proportion of the voting rights exercisable by it to below 15%. The Panel dismissed the appeal and confirmed the Executive's ruling. It required that Bowater dispose of the relevant shares by 5.00 pm on Monday 6 February.

### 2 The Facts

On 11 January 1989, Bishopsgate Investment Trust PLC ("Bishopsgate") announced that it was looking for a purchaser for its interest in Norton Opax and invited tenders at a price of 195p per ordinary share and 103p per preference share. These shares represented approximately 23.8% of the voting rights. Bowater, which wished to purchase the Norton Opax shares but was not prepared to pay the tender price, decided to submit an offer at 170p per ordinary share and 90p per preference share. The papers were prepared on 19 January. Since the "tender" was at below the specified price, strictly speaking it should be regarded simply as an offer but in all respects other than the price the documentation accorded with the tender terms.

On Friday 20 January, Mr Lyon, the Chief Executive of Bowater, heard a rumour that the tender, which Bowater had thought would be unlikely to succeed, would in fact fail. He sought

to contact Bowater's advisers in relation to the tender with a view to arranging a purchase of ordinary shares in the market. But the advisers were unavailable and Bowater therefore requested Hoare Govett to make the purchases. Mr Lyon gave authority to Hoare Govett to buy shares up to a financial limit of £5mn and at a price not exceeding 175p. He took this decision to purchase because he considered that Bowater would be able to make a profit on the shares purchased in the market, so as to cover the expenses incurred in connection with its tender.

Hoare Govett were aware of the tender. They were also made aware of Bowater's view that the tender would fail. But Bowater had not given instructions for the tender to be withdrawn. Both it and Hoare Govett were aware that the tender had not been rejected.

Between 10.00 am and 12 noon, Hoare Govett made four separate purchases of blocks of shares totalling one million shares, or 0.6% of the voting rights of Norton Opax. Neither Bowater, nor Hoare Govett, gave any thought whatsoever to the Substantial Acquisition Rules and their implications in the event that the tender succeeded.

The tender was duly formally lodged at 10.40 am. At 1.20 pm Bowater learnt that its offer had been accepted. Hoare Govett immediately gave instructions that no further buying should take place, to avoid any possible insider dealing.

On 24 January the Chairmen and Chief Executives of the two companies met. Each subsequently issued announcements. Bowater stated that it had no present intention to make a general offer for the remainder of the share capital. Norton Opax stated: "At a friendly and constructive meeting today between the Chairmen and Chief Executives of Norton Opax and Bowater Industries there was agreement to set up a series of meetings to explore the opportunities within each company to

assist the other achieve their growth plans. Norton Opax welcomed Bowater Industries as a supportive and responsible shareholder."

There was no hint in this public statement that Norton Opax considered its shareholders damaged by the purchases which we have detailed, but Norton Opax nevertheless complained to the Panel that there had been a breach of SAR 1 and contended that Bowater should sell down its holding to below 15%.

3. The Substantial Acquisition Rules.

SAR 1 provides as follows:-

"Except as permitted by Rule 2, a person may not, in any period of 7 days, acquire shares carrying voting rights in a company, or rights over such shares, representing 10% or more of the voting rights if such acquisition, when aggregated with any shares or rights over shares which he already holds, would carry 15% or more, but less than 30%, of the voting rights of that company."

Substantial Acquisition Rule 2 provides certain exceptions to the restrictions in SAR 1. In particular, it permits an acquisition which breaches those restrictions if it is made from a single shareholder and is the only acquisition within any period of seven days.

The purpose of the Substantial Acquisition Rules is twofold. First, they are intended to enable small shareholders to participate in any premium which may be payable in connection with the establishment or consolidation of a large holding in a listed company. Secondly, they are designed to give management time to consider the position in the interests of shareholders and take any appropriate action before a large shareholder has established or consolidated its position.

The effect of the Rules is that Bowater were entitled to seek to purchase the Bishopsgate shares in one block, provided that they did not make any other acquisition within a period of seven days. The market purchases, however, meant that Bowater became in breach of the Rules once its tender succeeded.

#### 4 The Executive's Ruling and the Appeal

The Executive ruled as follows:-

- (a) that a breach of SAR1 had occurred;
- (b) that Bowater must sell the million shares which it had bought in the market on Friday 20 January and that this sale should be made by 5.00 pm on Tuesday 31 January;
- (c) that the sale must be through a broker unconnected with Bowater and agreed with the Panel in advance;
- (d) that the sale must be into the market to parties independent of Bowater;
- (e) that there must be no agreements or understandings relating to the re-purchase of the relevant shares or other arrangements connected with them;
- (f) that Bowater must not purchase any Norton Opax shares until the expiry of seven days after completion of the sale of the one million shares; and
- (g) that any appeal had to be lodged by 5.00 pm on Friday 27 January.

Bowater indicated that it did not intend to appeal. Norton Opax, however, lodged an appeal. The Executive requested that there should be no publicity pending the appeal, and the advisers acknowledged and accepted these requests. Unfortunately, there was a leak of the Panel Executive's conclusions. As is so often the case, it has been impossible to establish conclusively where the leak came from, but undoubtedly the effect of the leak was to cause publicity which was damaging for Bowater and very damaging for Hoare Govett. This was compounded by comments attributed to the Chief Executive of Norton Opax which appeared in the Press on Tuesday 31 January.

Before deciding to appeal, Norton Opax, acting through Samuel Montagu, informed Bowater that it would not appeal if: (i) Bowater undertook not to purchase any more Norton Opax shares for three months, and (ii) Bowater undertook not to make a takeover offer for one year.

Samuel Montagu indicated that any such agreement would be subject to the approval of the Panel. They were right to include this reservation. Whilst private law civil claims affect only the parties and can be settled by them on such terms as they think appropriate, issues which arise under the Code have implications for shareholders. Any attempt to use a right of appeal as a bargaining counter would only be justified if the effect of the bargain was to give the shareholders the protection which the particular provision of the Code was designed to provide. So any such potential bargain over Code rights should not be made without consultation with the Panel. The same principles apply in relation to the Substantial Acquisition Rules.

The nature of the proposed bargain does, however, cast light upon the object of this appeal. Norton Opax frankly admitted during the hearing that the suggestions put to Bowater were not designed in any way to advance the objectives of the Substantial Acquisition Rules, but were rather intended to

secure their wider purpose of lessening the prospect of a takeover bid. We consider that the appeal had the same purpose.

## 5 The Reasons for the Panel's Decision

Norton Opax submitted that the breach of the Rules consisted in the acquisition of the 23.8% stake under the tender offer to Bishopsgate. Whilst it accepted that this acquisition would not have constituted a breach but for the purchase of the million shares, it submitted that the Code should be applied stringently so as to require Bowater to sell down to below 15%.

Bowater submitted that this would be inappropriate. It was fully entitled to tender for the 23.8%. It was the mistake in purchasing the million shares without regard to the Substantial Acquisition Rules which had caused the breach. This breach would be remedied by requiring it to sell down that stake.

The Panel considers that this approach is realistic. In deciding on the appropriate consequences, it is right to look, as a matter of reality, to the cause of the breach and not simply have regard to the fact that the acquisition of the 23.8% chronologically triggered the breach. In common sense, the cause of the breach was the purchase of the million shares and a sale of these shares would satisfy the objectives of the Substantial Acquisition Rules.

Whilst the Panel is aware of the unfavourable comments which Bowater and Hoare Govett have received and Bowater, on behalf of itself and its advisers, has expressed regret for the breach of the Substantial Acquisition Rules, the Panel must add its own comment. It is wholly unsatisfactory that a leading firm of stockbrokers acting for a leading public company should engage in market purchases without giving any

thought as to the implications which such purchases might have under the Substantial Acquisition Rules. Higher standards of competence are to be expected.

2 February 1989