

# THE TAKEOVER PANEL

## THE MARINA DEVELOPMENT GROUP PLC ("MARINA")

### 1 The Panel's decision

The full Panel met on 16 February and dismissed an appeal by Marina against a ruling by the Executive that (i) funds managed by John Govett & Co ("Govett") were not acting in concert with Local London Group PLC ("Local London") in relation to the offer dated 7 February by Local London for all the issued shares (other than the 25.3% then held by Local London) of The Marina Development Group PLC ("Marina") and (ii) that Local London had not acquired any rights over the shares in Marina owned by Govett prior to those shares being accepted to the offer on 7 February.

### 2 The Background

In January 1989, Local London, which then held 25.3% of the issued share capital of Marina, was contemplating making a general offer for Marina and, through its advisers Rowe & Pitman, it approached Govett with a view to obtaining an indication of whether Govett would be minded to accept that offer in respect of the 17.7% of the issued share capital of Marina held by its managed funds. Following discussions during January as to the terms of such an offer and the form which it might take, a meeting took place on 31 January at which Govett indicated its willingness to accept an offer immediately on receiving the offer document incorporating the revised terms then proposed by Local London. This willingness was confirmed by letter dated 3 February from Rowe & Pitman to Govett. The letter - which was countersigned by Govett - stated that, notwithstanding the foregoing, Local London had no legal obligation to make such an offer and, if such an offer was made, the Govett funds would not

be under any binding obligation to accept it. It was thus made clear that the letter did not constitute a contractually binding agreement.

Local London announced its offer on 7 February and, within minutes of the announcement being made, posted its offer document. It then hand delivered copies of that document to Govett and, by lunchtime, Govett had accepted the offer. The offer consideration consisted of new Convertible Preference shares in Local London without any alternative cash offer.

Meanwhile, Local London was buying shares in the market and, by about 11am, had acquired 4.6%, thus increasing its holding in Marina to 29.95%. Accordingly, by the afternoon of 7 February, Local London held, or held acceptances in respect of, 47.7% of the issued share capital of Marina.

Marina, through its advisers, immediately complained to the Panel Executive. First, it argued that Govett was acting in concert with Local London and that, because the concert party held between 30% and 50% of the Marina share capital, the purchase of more than 2% of that capital on 7 February gave rise to an obligation on Local London to introduce a cash alternative to its offer (pursuant to Rule 9.1 (b) of the Code). Secondly, Marina argued that, irrespective of whether Govett was acting in concert with it, Local London had breached the restrictions on acquisitions of shares and rights over shares contained in Rule 5.1.

### 3 The Code issues

#### (a) Rule 9.1 (b)

Rule 9.1 (b) provides that:-

"when . . . any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires in any period of

12 months additional shares carrying more than 2% of the voting rights, such person shall extend offers . . . to the holders of any class of equity share capital . . ."

This is supplemented by Rule 9.5 which, among other things, states that the offer must be in cash.

Local London held, and still holds, less than 30% of Marina's share capital so, unless Govett was acting in concert with it, Rule 9.1 (b) would not be relevant. If, on the other hand, Govett was acting in concert with Local London, the combined holding would have been 43% immediately before the market purchases of more than 2% on 7 February and an obligation would then have been incurred under that Rule. It was, therefore, necessary for the Panel to decide whether a concert party existed.

The Code states that:-

"Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively cooperate, through the acquisition by any of them of shares in a company, to obtain or consolidate control . . . of that company".

Marina contended that there was clear evidence, in the circumstances surrounding the arrangements between Local London and Govett outlined above, of an agreement or understanding between Local London and Govett pursuant to which they actively cooperated to obtain control of Marina and that, therefore, Govett was acting in concert with Local London. In particular, Marina suggested that the contacts between Local London and Govett in the period immediately before the announcement of the offer coupled with the prompt acceptance of the offer by Govett pointed to the existence of a concert party.

The Panel was unable to accept this conclusion. The Panel considered that there was, indeed, an understanding - although not a contractual agreement - reached between Local London and Govett in the letter dated 3 February but this

understanding did not, so far as Govett was concerned, have the objective, through active cooperation with Local London, of obtaining or consolidating control of Marina; rather Govett's purpose in entering into the discussions in January leading up to the letter of 3 February was to secure an offer for its shares on the most favourable terms obtainable and in a form (convertible preference shares) suitable to the investment requirement of its funds, whilst retaining an indirect interest in Marina through high yielding convertible preference shares in its holding company. It is not the practice of the Panel to interpret the Code as requiring a person who expresses an intention to accept an offer (or enter into an irrevocable commitment to do so) to be regarded as acting in concert with the offeror - an interpretation which would extend the concept of "acting in concert" to cover a commercial arrangement between an offeror and a shareholder in an offeree company, such as that in the present case, which was never intended to be included. For these reasons, the Panel has reached the conclusion that Govett did not actively cooperate with Local London to obtain control of Marina and was not, therefore, acting in concert with Local London in relation to the offer.

(b) Rule 5.1

As mentioned above, Marina argued before the Panel that, irrespective of whether Govett was acting in concert with it, Local London had breached the restrictions on acquisitions of shares and rights over shares contained in Rule 5.1. Rule 5.1 (a) provides that except as permitted by Rule 5.2:-

"when a person . . . holds shares or rights over shares which in the aggregate carry less than 30% of the voting rights of a company, he may not acquire any shares carrying voting rights in that company or any rights over such shares which, when aggregated with the shares or rights over shares, which he already holds, would carry 30% or more of the voting rights".

Rule 5.2 (d) provides that the restrictions in Rule 5.1 do not apply to an acquisition by way of acceptance of an offer - and consequently the acceptance of the offer by Govett on 7 February could not result in a breach of Rule 5.1.

The question, however, arises as to whether, before acceptance of the offer by Govett, Local London acquired "rights over" the shares held by the Govett funds. If it did so, there was a breach of Rule 5.1; if it did not do so, there was no such breach.

The definition section of the Code states that the expression "rights over shares" includes any right acquired by a person by virtue of an agreement to purchase shares or an option to acquire shares or an irrevocable commitment to accept an offer to be made by him. Accordingly, it is necessary to decide whether the arrangement embodied in the letter of 3 February amounted to an "irrevocable commitment" to accept the offer. Marina argued that the arrangement under which Govett was to accept the offer immediately it was made was understood by the parties to be "morally binding" and that the arrangement amounted to an "informal irrevocable undertaking" of a nature prohibited by the spirit, if not the wording, of Rule 5.

It is doubtless the case that when a major fund manager indicates its intention to accept an offer it will, in the ordinary way, consider itself under a moral obligation to do so but the Panel does not believe that it follows that it would be right to extend Rule 5.1 to cover expressions of intention or non-legally binding understandings - not least because the fiduciary duties of fund managers and others will always override any non-legally binding commitments they may have entered into.

In the Panel's view the arrangements contained in the letter of 3 February did not amount to an "irrevocable commitment" to accept the Local London offer and, accordingly, Local

London did not acquire any rights over the shares held by the Govett funds prior to the acceptance of the offer in respect of those shares on 7 February. It follows that Local London did not breach the restrictions on the acquisition of shares and rights over shares contained in Rule 5.1.

17 February 1989