THE TAKEOVER PANEL

STOREHOUSE PLC

The Issue

The full Panel met yesterday to consider an appeal by Barclays de Zoete Wedd, on behalf of the Edelman Group, against a decision of the Panel Executive, which had ruled as follows:-

a) Mr Edelman must by 14 July or, if later, two weeks after the publication of the Storehouse Annual Report and Accounts (which is expected shortly), either announce a firm intention to make an offer (in accordance with Rule 2.5) or announce that he has decided not to make an offer; and

b) if Mr Edelman announces that he has decided not to make an offer, he will be prohibited from making an offer for twelve months.

Mr Edelman accepted the first part of this ruling, but appealed against the second part.

The Ruling

Mr Edelman indicated publicly on numerous occasions in early 1989 that he was a possible bidder for Storehouse. In the light of his statements, the Panel Executive required him to make an announcement clarifying his intentions, which he duly did, first on 7 February 1989 and again on 31 March 1989. In the latter announcement there was a statement that "included amongst the options being considered is a bid for Storehouse . . .". This announcement caused an offer period to

commence. On 9 June, Mr Edelman wrote to the board of Storehouse setting out terms upon which, subject to certain conditions precedent, the Edelman Group was prepared to make an offer. This announcement did not amount to a firm offer. The Executive considered that the uncertainty as to Mr Edelman's intentions had continued long enough and should be brought to an end. This is why Mr Edelman has been required to make up his mind whether to bid by 14 July.

In this context, the issue which arises is whether Mr Edelman should be permitted to announce by 14 July that he has decided not to make an offer without being required to stand by that announcement, in the absence of a bid by a third party, for a twelve month period. It is a normal requirement of the Code under Rule 35.1 that, where an offer has been announced but has not become unconditional, the offeror will normally not be allowed to bid again for a year. This is because it is regarded as being in the interests of shareholders that the company should not be in a prolonged state of siege, distracting management from operating to full effectiveness. The Panel considers that, on the facts of this case, the same approach should be applied if Mr Edelman decides not to make an offer.

The effect of Mr Edelman's statements over a considerable number of months, during which he has consistently indicated that an offer might be forthcoming, has inevitably been to distract management and create uncertainty in the conduct of the business of Storehouse. The pressures have been similar to those which would have existed if there had been an actual bid. They may have been somewhat less intense than would be the case during the conduct of a defence against an actual offer, but the timescale has extended over a considerable number of months and for longer than a normal offer period. We accept the view of Storehouse that prolongation of the uncertainty created by Mr Edelman's conduct would be bad for

senior management, impede recruitment, increase the prospect of staff leaving the company, harm morale amongst store managers and their staff, and have a destabilising effect on the company. This would be detrimental to the interests of the company, and perhaps especially so in a period where management has to tackle a number of problems against the background of a market which is currently difficult for retailers.

Mr Edelman, who has indicated a meticulous concern to comply with the Code, has accepted the decision that he should be required to decide whether or not to bid by 14 July. He accepts that, for this order to be effective, the Panel would need to fix some period during which he could not bid, but not the twelve months required by Rule 35. The Panel considers, however, that it is in the interests of shareholders that, if Mr Edelman does not bid by 14 July he should in principle be precluded from doing so for twelve months. This will prevent a situation continuing in which Mr Edelman could indicate publicly that he might bid for the company at any moment, which would inevitably have a destabilising effect upon the company. We consider it must be in the interests of shareholders, to enable the company to be run without distraction, that Mr Edelman should be required to reach a firm decision which will remain binding on him and anybody acting in concert with him for twelve months. The Panel accordingly dismisses the appeal but would add that Mr Edelman will be entitled to apply for a dispensation if circumstances arise during the twelve month period equivalent to those which would lead to a dispensation under Rule 35.1 (such as a recommendation by the board of the offeree company or an offer by a third party). We set out our reasons more fully below.

The Facts

On 6 December 1988, as a result of notices under Section 212 of the Companies Act 1985, the Edelman Group was identified as a holder of 4.9% of Storehouse. In late December and early January, there was correspondence in which Mr Edelman sought discussions as to the future of Storehouse. One letter from Mr Edelman, which was later released to the press, included the following statement:-

> "During the past several months, my investment group and our merchant bankers Barclays de Zoete Wedd have conducted an in depth review of the assets and operations of Storehouse."

At the same time, press reports suggested that the Edelman Group had taken part in discussions with United Kingdom retailers "to see if they would be interested in taking parts of Storehouse if he launched a bid". (The Times: 28 December 1988). No denial was issued by Mr Edelman.

Press speculation and comment continued. This was based on a number of conversations by Mr Edelman with the media. In the course of these conversations the following statement appeared:-

> "There would be no difficulty in finding buyers for the other parts of the chain. I could identify buyers for every part."
> (The Times: 4 February 1989)

Mr Michael Julien, Chief Executive of Storehouse, responded, at about this time, by inviting Mr Edelman either to bid or to allow management to get on with its task, saying that he should "put up, or shut up". This prompted further comments from Mr Edelman:-

"Mr Edelman said he was keen to negotiate an agreed bid for Storehouse. "I am willing to meet [Michael Julien] and discuss the price."
The newspaper added its own comment that Mr Edelman's remarks "do at least keep the pot of speculation boiling".
(The Evening Standard: 6 February 1989)

"I have been told that I should make my approach through the proper channels. My merchant bankers, BZW, will be contacting Kleinwort Benson and I hope to be meeting Mr Julien as soon as possible. I would hope we could negotiate an agreed price in the best interests of shareholders".
(The Times: 7 February 1989)

"The best thing for shareholders would be to follow a plan of restructuring. But if the company prefers a bid, I am willing."
(Wall Street Journal: 7 February 1989)

Statements such as these were characterised by the Independent on 8 February as "keeping a hot potato on the boil".

At least some of this speculation was clearly caused by Mr Edelman's own actions. He, therefore, incurred an obligation under the Code to make an announcement, which was issued, at the request of the Executive, on 7 February. In this he said that he continued "to review all of the options available to him with respect to his investment in Storehouse". He also indicated that he wished "to meet the senior management to discuss with them plans that would be to the benefit of all Storehouse shareholders". This was followed by interviews during March. In a Channel 4 television interview on 5 March, Mr Edelman indicated that he foresaw some kind of movement towards changing management. On

15 March in an interview on BBC radio, he said: "I have spent my last couple of days in London . . . trying to find a new management for Storehouse and I think we are having some success." When asked what was wrong with Storehouse, he replied: "Mainly Mr Julien". The interview continued more in the same vein about the search for a new management. Implicit in these statements was that Mr Edelman, who had increased his share stake to over 7%, was contemplating achieving the control over the company which would enable him to change management.

On 6 March, Storehouse announced a property joint venture with London and Edinburgh Trust through a new company, Oppidan Estates Ltd. Barclays de Zoete Wedd, on behalf of the Edelman Group, complained to the Executive that this agreement constituted frustrating action under the terms of Rule 21 since, so it was said, the board of Storehouse should have believed that a bid for the company was imminent. The Panel Executive rejected the Barclays de Zoete Wedd complaint. But the making of the complaint is revealing, since it shows that Mr Edelman considered that as a result of his actions the company was in, or close to, a takeover situation to which the Code would apply.

On 31 March, after pressure from the Executive for clarification of Mr Edelman's intentions towards Storehouse, the Edelman Group issued another announcement. This stated

> "Included amongst the options being considered is a bid for Storehouse although no decision on this course of action will take place until the completion of further commercial research and assessment of the availability of funding."

This announcement, which did nothing to remove uncertainty, caused an offer period to commence and so Storehouse sent a copy of the announcement to its shareholders on 14 April.

Mr Edelman contended that he would not have agreed to make the statement of 31 March, 1989, if he had known that it would lead to his ultimately being required to refrain from bidding for twelve months from 14 July. He would have appealed to the full Panel. However, Barclays de Zoete Wedd accepted before the Panel that the Executive was fully entitled to require the making of such an announcement in the light of Mr Edelman's prior statements. We agree. It was important that such a statement should be made to preserve a fair market. We therefore do not accept Mr Edelman's submission that he was prejudiced by not then being told of all possible consequences which might follow from an ultimate decision not to bid.

At the end of May, the Executive requested Mr Edelman to put out a further announcement stating his current position and fixing a clear time by which he would have decided whether or not to bid for Storehouse. In early June the Executive indicated that it would regard Rule 35.1 as precluding an offer for twelve months if Mr Edelman did not announce an offer by the end date appearing in his announcement. Whilst discussions between the Executive and Mr Edelman's advisers as to the form of announcement were continuing, Mr Edelman, without consulting the Executive, published a letter to the board of Storehouse which set out terms upon which the Edelman Group was prepared, subject to certain conditions precedent, to make an offer "worth 185p per Storehouse Ordinary Share". The preconditions included both a recommendation by the board of directors of Storehouse and the finalisation of the relevant financing arrangements. Storehouse dismissed this offer speedily as being "neither an offer nor a firm intention to make an offer".

Rule 35.1 and its application

This Rule provides as follows:-

"Except with the consent of the Panel, where an offer has been announced or posted but has not become or been declared wholly unconditional and has been withdrawn or has lapsed, neither the offeror, nor any person who acted in concert with the offeror in the course of the original offer, nor any person who is subsequently acting in concert with any of them, may within twelve months from the date on which such offer is withdrawn or lapses either:-

(a) make an offer for the offeree company; or

(b) acquire any shares of the offeree company if the offeror or any such person would thereby become obliged under Rule 9 to make an offer."

The Rule reflects the fact that the Code lays down a strict timetable with regard to the conduct of offers. This timetable exists partly so that offeree companies should not be placed under siege for long periods of time. Rule 35.1 is a necessary adjunct to such a timetable, since if parties were not restricted from launching new offers, the 60 day limit on the length of time a bid can be outstanding would be to a considerable extent irrelevant. The restriction imposed by Rule 35.1 of the Code is designed to protect shareholders. The defence of a hostile offer takes up a large amount of management time and creates considerable uncertainty which may be damaging to the business of the offeree company. Obvious examples are that such an offer may make recruitment and the conclusion of contracts difficult and it can be bad for the morale of staff. None of this is in the interests of shareholders. This is why the Code recognises that there may be exceptional circumstances in which the interests of

shareholders may be served by preventing an offer from being made. The Rule is only designed to protect the management of an offeree company in so far as this is considered necessary to afford protection to shareholders. This has been made plain in previous decisions of the Panel.

Upon its strict wording Rule 35.1 only applies if an offer has actually been announced. This is clearly not the position in the present case. The Panel has recently considered at its Quarterly Meeting on 8 June whether there should be an addition to Rule 35 which makes it clear that it can apply where a person raises a possibility that an offer may be made but does not announce a firm intention one way or the other within a reasonable time. The full Panel considered that such a rule should be made to give effect to the purpose underlying Rule 35, and prevent an unduly long siege of the company and the distraction of management. This Rule is in the course of detailed formulation and will be published shortly. This proposal has, of course, no bearing on the present case.

Mr Edelman submitted that it was unreasonable that any change in approach by the Panel should be applied in a way which his advisers described as "retrospective". There is, in fact, already precedent for a similar approach to Rule 35.1. In 1987 in connection with the possible offer by Mountleigh for Storehouse, where there was no announcement of a firm offer, the conduct of Mountleigh gave rise to an offer period which existed for six weeks. The Executive ruled that Mountleigh was prevented by the purpose underlying Rule 35.1 from making an offer for twelve months. Mountleigh accepted this ruling.

In any event, if the situation falls within the spirit of the General Principles or the Rules of the Code, the absence of a precedent would not be conclusive. The Panel is able to apply the Code flexibly so as to adapt to new situations as they arise. We must obviously take care not to take parties by

surprise, or go outside the objectives of the Code. In the present case, it is perfectly true that no General Principle covers the specific situation nor can the current Rule 35.1 be interpreted as applying to situations other than firm offers. The opening words of the Code, however, stress that it is intended to protect the interests of shareholders. Rule 35.1 has that objective. The Panel considers that the spirit of Rule 35.1 applies where a person puts the company under siege by protracted talk of a bid albeit that he may stop short of an actual offer. With these considerations in mind the Panel regards it as according with the purpose of Rule 35.1, and as in the interests of shareholders in Storehouse, to require Mr Edelman to remove the pressure from management and staff for a period if he decides not to bid.

In so deciding, we bear in mind that the Executive made its view known to Mr Edelman and his advisers at the beginning of June. They have now given Mr Edelman until 14 July, which in the light of the history of this case is a considerable time, to make up his mind one way or the other. He thus has been given ample time to make a decision knowing that the Executive considered that, if he does not bid, he will be barred from doing so for a twelve month period. He will have three weeks from our ruling to make his decision in full knowledge of the consequences.

Mr Edelman also submitted that the management had not suffered a prolonged state of siege or indeed any siege at all. He suggested that it was the poor performance of the company, critical comments by both analysts and editors in the press, and the presence of a number of potentially unwelcome shareholders on the register which had given rise to the problems of management. Mr Edelman pointed out that management had not been required to devote time to serious consideration of the specific terms or conditions of an offer or to conduct a defence. It was suggested that the reactions

of management stemmed from a desire to protect the company against potential bids in general rather than from the announcement of the Edelman Group.

Storehouse for its part submitted that the company had suffered major distraction and the disruption of its ordinary business similar to, but in fact more severe than, the pressure of a Code offer which takes place in a compressed timetable. The distraction of management will have continued for over six months by 14 July. Storehouse considered that the problem had been exacerbated by the high media profile adopted by the Edelman Group. Mr Edelman very fairly accepted at the hearing that his conduct could destabilise the company, although he added that it might improve the performance of management. We are satisfied that his actions have inevitably had a destabilising effect upon the conduct of the company's business. Storehouse pointed to the distraction of senior management, the need for an enhanced programme of internal communications, the difficulty of recruiting and retaining senior management and the loss of staff morale at levels well below senior management. There have also been significant financial costs, since the company has already had to undertake full defensive preparations and keep its advisers closely involved.

Storehouse in no way submitted that the company's structural or trading difficulties were caused by the activities of Mr Edelman. Mr Julien readily accepted that the Group had problems before Mr Edelman came on the scene and those problems will still need to be resolved if he does not bid. But there can be no doubt that his activities in the last few months, and in particular the creation of uncertainty as to whether there will be a bid and what he will do with the business if he succeeds, has created a considerable strain on the management and staff. In one sense, the siege is more demanding for management precisely because it comes at a time

when the company has to address other serious problems. We consider that this should not be allowed to continue beyond the duration of any bid which Mr Edelman may launch by 14 July.

Mr Edelman has been given ample, and possibly generous, time to make up his mind whether to bid. As long ago as January he said that he had conducted a review of the assets and operation of Storehouse. He has been talking, presumably genuinely, about a possible bid throughout this year. It is reasonable that he should make up his mind by 14 July and then, if he decides not to bid, stand by that position for a time. He suggested that it should be less than twelve months, since the company had not suffered the intensity of a full bid. But, as Mr Beevor, the Director General, said, "what the siege lacked in ferocity has been compensated for by its protracted timescale". We agree. The Panel sees no reason for departing from the normal twelve months period specified by Rule 35. The interests of shareholders demand an end for a year to this uncertainty which Mr Edelman has created and which has the effect, even if not the intent, of destabilising the company.

23 June 1989