THE TAKEOVER PANEL

B.A.T. INDUSTRIES p.l.c.

Reasons for the decision of the Appeal Committee (The Right Honourable The Lord Roskill, Mr Geoffrey Williams and Mr John Webster) dismissing the appeal of B.A.T. Industries p.l.c. ("BAT") against the ruling of the Panel dated 15 September 1989, subject to making certain variations in that ruling.

1 This appeal by BAT, brought by leave of the Panel, arises from the Panel's ruling in favour of Hoylake Investments Limited ("Hoylake") granting Hoylake consent pursuant to Rule 35.1(a) of the Code that, if and when it became lawful "as a matter of US law" for Hoylake to complete its offer for BAT, Hoylake should be entitled within 21 days to announce a fresh offer subject to certain conditions which the Panel laid down.

2 This ruling was the second of two rulings made by the Panel. The first ruling rejected a claim by Hoylake that certain activities of BAT and Farmers Group, Inc. ("Farmers") seeking to influence the outcome in the United States of Hoylake's offer did not constitute frustrating action contrary to General Principle 7 of the Code. The Panel in this ruling upheld an earlier ruling by the Executive. There was no appeal by Hoylake against that ruling.

3 It follows that in this appeal the only question we have to decide is whether to uphold or reverse the Panel's ruling granting the necessary consent to Hoylake under Rule 35.1 (a).

4 The Panel described this case as "extremely difficult". It was for this reason that somewhat exceptionally leave to appeal was given. We agree that this appeal raises extremely difficult issues and has an importance beyond its importance to the parties immediately involved.

5 The background of the controversy is well known. The Hoylake bid itself was controversial in more ways than one. The Panel's ruling has given rise to controversy and considerable differences of opinion between those who regard it as plainly right and those who regard it as at best doubtfully correct or possibly setting a dangerous precedent. The factual background is detailed in the Panel's ruling. There has been no serious challenge to the Panel's primary findings of fact. What have been vigorously challenged by BAT are the conclusions reached by the Panel founded upon those findings. We shall not therefore lengthen these reasons by repeating those primary findings. These have been well publicised.

6 In the light of certain submissions made to us by the Executive we think we should first set out how we see the functions of the Appeal Committee in an appeal of this nature. The Executive submitted that we ought only to exercise what it described as supervisory jurisdiction over the Panel. That is to say that we ought not to regard ourselves as carrying out the ordinary functions of an appellate tribunal but only be prepared to interfere in the same circumstances as those in which the Courts in judicial review proceedings would interfere with a decision of an administrative tribunal. Though Hoylake understandably supported this approach we unhesitatingly reject it. So to hold would not only greatly constrain the activities of the Appeal Committee but would mean that a would be appellant could not hope to secure relief from the Appeal Committee other than the relief which he could also get from the

Courts in judicial review proceedings. We find nothing in the Introduction to the Code which deals with the creation and functions of the Appeal Committee which constrains its activities in the manner suggested. So to hold would in effect involve the Appeal Committee only interfering if it thought that the Panel had reached a "perverse" conclusion. That is to say a conclusion which no reasonable tribunal could have reached on the primary facts found. We do not regard our jurisdiction as so restricted.

7 We regard our functions as those of any appellate tribunal subject only to a possible restriction on the hearing of fresh evidence. We must listen to the criticisms made of the Panel's decision and give such weight to those criticisms as we think right. If we conclude that the Panel's decision is wrong, remembering it is for an appellant to show that the decision is wrong, we should and indeed must interfere. But when the decision appealed from involves the exercise of a discretion given by the Code to the Panel we ought not to interfere with that exercise of discretion unless we are satisfied that it has been wrongly exercised or that in exercising it the Panel has disregarded some important factor or proceeded upon some wrong principle. It is not enough in our view to justify the Appeal Committee interfering with the exercise of a discretion by the Panel merely that the Appeal Committee itself thought that it might or even would have exercised that discretion differently.

8 The wider importance of this appeal lies in the problems which arise when the timetable laid down by the Code comes into conflict with the regulatory requirements of the laws of a foreign country, by no means always the United States, to the laws of which an offeree company or a subsidiary or sub-subsidiary of an offeree company is immediately subject. It was strenuously argued on behalf of BAT that in the

present case there was or at least should have been no such conflict. The Code timetable could have been complied with but for Hoylake's own action. They had, it was said, put forward a controversial bid supported by inadequate capital resources and their proclaimed strategy revealed an initial failure to comply with General Principle 3. If they themselves proclaimed a strategy which in practice precluded compliance with the timetable of the Code they should not be entitled to have indulgence extended to them under Rule 35.1 (a). Their strategy involved adding debt to BAT which must raise doubts in the mind of any regulatory authority as to the propriety of a suggested change of control of Farmers. To make matters worse it was said that Hoylake had advanced successive arguments in regulatory proceedings, the nature of some of which made it inevitable that those proceedings should be protracted and thus the Code timetable not complied with. Hoylake had asserted a want of jurisdiction in the regulatory authorities. Alternatively they argued that BAT fell within certain relevant exceptions. These and various other arguments, cumulative or alternative, all combined to make delay inevitable.

9 This part of the argument for BAT was well summarised by saying that the whole purpose of the Code was to ensure an orderly framework in the control of takeover bids. The Panel's decision had reduced this orderly framework to "a disorderly tangle". Hoylake's difficulties were of their own making and it was not right for the Panel to help them "pick up the pieces" by the exercise of the discretion accorded by Rule 35.1 (a).

10 It was also said that there was no finding by the Panel that the ownership of Farmers made BAT bid-proof and that without such a finding there ought not to have been a grant of an extension. It is correct that there is no such finding.

Indeed we do not see how such a finding could properly have been made by the Panel. If such a finding had properly been made it would clearly have been a relevant factor in considering whether or not to grant an extension since the Code is not designed to make offeree companies bid-proof. But in our view the absence of such a finding does not preclude the grant of such an extension if the circumstances of the particular case justify it.

11 There is no doubt that the Code has to be applied by the Panel in ever-changing situations. There is no doubt that the development of the application of the Code should be both orderly and consistent. But reliance on absence of precedent for a particular decision is not an argument which readily appeals in an ever-changing situation such as exists in the world of takeover bids today. There is never a precedent for a particular course of action until a particular course of action has been adopted at least once. There can be no doubt that the development of what Sir James Goldsmith called "globalisation" (the word was his) can now easily give rise to what he called "mismatch" (also his word). By this phrase we understood him to mean that the evolution of takeovers of companies with extensive overseas interests and the recent increase in their number is more likely to give rise to potential conflicts between the Code timetable and the necessity for complying with the requirements of local regulatory authorities. This is no doubt true. It follows that it must behove an intending offeror to make sure before he announces his offer that so far as lies in his power he has done all that is reasonably possible to enable him to comply with the Code timetable. If, even so, it may be impossible for him to comply with the Code timetable he should consult the Executive as to the best way of proceeding. If he has not or does not, he is likely to be held to be the author of his own misfortunes and exceedingly unlikely to be accorded the indulgence of an

escape from his predicament by the grant of an extension under Rule 35.1 (a). When this point was put to Sir James Goldsmith he expressly agreed that in such a case the offeror could not reasonably expect to be granted that indulgence.

12 It was clear to us that Hoylake felt strongly that part at least of the delay in the United States was due to the activities of BAT and Farmers especially in their participation in the pending regulatory proceedings in the nine states. BAT riposted that once the "frustration" issue had been determined in their favour it was wrong for the Panel and would be wrong for us in considering to what extent Hoylake were the authors of their own misfortunes to have any regard whatever to the actions taken in those proceedings by BAT and Farmers. We disagree. We agree with and endorse what the Panel said in this connection. In considering to what extent Hoylake are to blame for the delay it must be relevant for the Panel and for us to look and see what other factors have contributed to that delay.

13 BAT referred us to the Note on Rules 35.1 and 35.2. They said correctly that there were four dispensations there mentioned and claimed that the Panel by its decision had added a fifth. We have no hesitation in rejecting this argument. The reference to those four dispensations is preceded by a sentence which shows quite clearly that those are dispensations which would "normally" be granted but the four are no more than illustrations of the "normal" practice. The list is neither definitive nor exhaustive.

14 Complaint was made of the analogy drawn by the Panel with the position under Rule 12 where a reference is made to the Monopolies and Mergers Commission. It was said that the suggested analogy between a reference to the Commission and the regulatory process was inept. In the former case the

dates of the Report and of any resulting decision of the Secretary of State upon it could be anticipated with reasonable accuracy. This was not the case with foreign regulatory authorities whose decisions might be subject to a series of appeals through the entirety of the relevant court structure. We agree that the analogy like most analogies is imperfect. But we think that the Panel in referring to Rule 12 intended no more than that the Rule illustrates a situation in which the subsequent imposition of statutory regulatory control can operate to prevent the ordinary and orderly running of the Code timetable.

15 BAT complained that one serious result of the Panel's ruling was that the constraints imposed by General Principle 7 and Rule 21 would continue to apply. BAT would be subjected to a state of siege until the situation created by the Panel's ruling was finally resolved. We have considered this submission with especial care and not without some measure of sympathy for securing the consent of shareholders to a particular course of action in the case of a company of the size of BAT is likely to be both protracted and expensive. But it must be remembered that the second paragraph of the Introduction to the General Principles in the Code provides: "While the boards of an offeror and the offeree company and their respective advisers have a duty to act in the best interests of their respective shareholders, these General Principles and the ensuing Rules will, inevitably, impinge on the freedom of action of boards and persons involved in offers; they must, therefore, accept that there are limitations in connection with offers on the manner in which the pursuit of those interests can be carried out."

In the light of the possible timescale we would expect the Executive and the Panel in considering any questions which arose under Rule 21 to have regard to the difficult

situation in which BAT could find themselves placed and to the possible dangers of an inflexible approach to the restrictions imposed by that Rule.

16 We have no hesitation in rejecting the arguments which we have already outlined in paragraphs 8 and 9 above that Hoylake were the authors of their own misfortunes and that for that reason alone should be denied the relevant extension under Rule 35.1 (a). We see no reason to interfere with the Panel's conclusions on this part of the case. We think as did the Panel that Hoylake had a genuine expectation when the offer was announced of being able to comply with the Code timetable and that expectation accorded with advice which they had received on the other side of the Atlantic. We are satisfied that the present problems arise because of the protraction of the several regulatory proceedings. BAT and Farmers are of course entitled to oppose Hoylake's applications in those proceedings. In our view there is a marked difference in principle between stating reasoned objections to a particular proposal and actions taken which are no more than mere delaying tactics. The Panel have made their views as to the taking of delaying tactics clear and we endorse what they have said in that respect.

17 We ought to mention two further matters if only for the sake of completeness. First it was suggested that this was a case in which Rule 31.7 might be invoked. We disagree. We think that generally speaking Rule 31.7 can usefully be invoked only where a short period of time is involved. Second, there was some discussion regarding Hoylake's intended sale of Farmers to Axa Midi Assurances. Having regard to what we were told about the contractual terms of that arrangement we do not think that that prospective sale affects any matters which we now have to decide.

18 We now return to what we regard as the single important issue to be decided. Did the interests of the BAT shareholders require that they should have the chance of considering an offer from Hoylake free from regulatory consents and within the Code timetable? The Panel answered this question in the affirmative. In principle we see no reason for disagreeing on the facts of this particular case. Subject therefore to what we have to say about the form of the ruling the appeal is dismissed. We think it right to add that had we been faced with the same situation as the Panel we would have exercised our discretion in the same way as they did.

19 It remains for us to consider other matters arising from the Panel's ruling which have led us to conclude that certain variations in the wording and on one point the substance of that ruling should be made. The relevant passages in the Panel's ruling are as follows:

> "We therefore consider that the balance is in favour of granting consent that, on the condition that it lapses its current bid as soon as reasonably practicable following this decision and the completion of any appeal against it, Hoylake should, if and when during the subsequent 12 months it becomes lawful as a matter of US law for Hoylake to complete its offer for BAT, be permitted within 21 days after the final clearance to announce a new offer for BAT.
>
> The principle of our ruling is that Hoylake should be entitled to make a new offer at any time within 21 days after it has become lawful as a matter of US law for it to complete its offer for BAT. The exact definition of this date, to remove any residual uncertainties as to precisely when Hoylake might be

free to offer again, will be determined by the Executive (subject, of course, to the right of appeal to the full Panel) after hearing the suggestions of Hoylake and the comments of BAT. Hoylake will be required to make an announcement as soon as this date is reached."

This second paragraph repeats almost verbatim an earlier paragraph on page 3 of the Panel's ruling.

20 The wording of these passages seems to us to raise three matters. First the phrase "US law" is imprecise in a context where the relevant regulatory law is State law. Second, though it is left to the Executive and if necessary to the Panel to determine the exact relevant date it is not clear to us by reference to what precise factual position that date is to be determined. Third, as worded the ruling appears to envisage that the 21 days might start to run from a date more than 12 months from the date when the original bid would in any event have lapsed. If this be right, BAT might if the regulatory procedures are protracted beyond present expectations find itself subject to greater restrictions as for example under General Principle 7 and Rule 21 of the Code than would have applied if the original bid had lapsed and Hoylake had made another bid 12 months thereafter.

21 As to the first and second points the difficulties have been resolved by agreement between the parties and the Executive in the following terms:

"Under the Takeover Panel's decision dated 15 September 1989 Hoylake shall be entitled to make a new offer within 21 days of the first date upon which it is lawful, as a matter of insurance law in Arizona, California, Idaho, Illinois, Kansas, Ohio, Oregon, Texas and Washington, for Hoylake to

acquire control of B.A.T. Industries p.l.c. on the basis of the new offer (the "clearance date"). The clearance date shall be the first date when:

i) in each of the nine states the state insurance authority has approved such acquisition, declared such acquisition exempt, or declared the state statute inapplicable; or a US federal court has ruled the state statute unconstitutional, and

ii) there is no stay or other order of a US state or federal court that prohibits completion of such acquisition."

The word "first" which we have underlined in this passage was added at our suggestion to make the position clearer. BAT sought to add further words, namely: "It follows that the revised offer, when made, may not be conditional upon US Regulatory Consents nor upon the sale of Farmers to a party who at the time may require US Regulatory Consents." Hoylake understandably opposed this addition. We think their objection is well-founded. To add these words would leave Hoylake at risk in the event of a sudden change either in the law or in the attitude of regulatory authorities. We therefore think that the second paragraph of the Panel's ruling which we have quoted above should be re-worded. The complete re-wording, together with the further amendment set out in paragraph 23, will be found in the appendix. This will have the effect of replacing the second paragraph on page 3 of the Panel's ruling.

22 As regards the third point we think an overriding ceiling of twelve months should be added, in other words the clearance date must be not later than twelve months from a date we will discuss shortly. BAT then argued that the ceiling date should be six months from that date with an option to

Hoylake to apply to the Panel for a further six months extension if they could justify it. We disagree since, having heard the submissions, we do not think that this suggestion accords with the realities of the situation.

23 We think that the relevant clearance date should be not later than twelve months from the date of publication of our decision, that is to say not later than 28 September 1990. We therefore think that there should be added to the re-worded paragraph the sentence "the clearance date must be not later than 28 September 1990".

24 We should add that when this question was raised Hoylake accepted that there should be this twelve months ceiling date but opposed the suggested reduction to six months.

25 Subject to the matters dealt with in the preceding paragraphs the appeal is dismissed.

29 September 1989

B.A.T. INDUSTRIES p.l.c.

The Appendix

"The principle of our ruling is that Hoylake be entitled to make a new offer within 21 days of the first date upon which it is lawful, as a matter of insurance law in Arizona, California, Idaho, Illinois, Kansas, Ohio, Oregon, Texas and Washington for Hoylake to acquire control of B.A.T. Industries plc on the basis of the new offer (the "clearance date"). The clearance date shall be the first date when

i) in each of the nine states the state insurance authority has approved such acquisition, declared such acquisition exempt, or declared the state statute inapplicable; or a US federal court has ruled the state statute unconstitutional, and

ii) there is no stay or other order of a US State or federal court that prohibits completion of such acquisition.

For the purposes of this ruling, the clearance date must be not later than 28 September 1990. Thereafter the normal provisions of the Code will apply. Hoylake will be required to make an announcement as soon as the clearance date is reached."