THE TAKEOVER PANEL

CANARY WHARF GROUP PLC

Background

1. The transaction which is the subject of these appeals involved the possible acquisition of Canary Wharf Group plc ("**Canary Wharf**"). At the time of the hearing of the appeals by the Takeover Panel (the "**Panel**") on 20 May 2004, Canary Wharf was the subject of competing offers from two offerors, Songbird Acquisition Limited ("**Songbird**") and CWG Acquisition Limited ("**CWG**").

2. The Panel gave its decisions with a brief summary of the reasons to the parties on the day of the appeals, shortly after reaching its conclusions, and later that day issued a Statement (Panel Statement 2004/14) announcing the results of the appeals but not at that stage giving reasons. Since the appeals, on 21 May 2004 Songbird has declared its offer unconditional in all respects and CWG's offer has lapsed.

3. The Panel is now in this Statement setting out in detail the reasons for the decisions which it reached.

4. Songbird is a company which, if successful in acquiring Canary Wharf, would on completion be owned by a consortium led by funds managed by Morgan Stanley Real Estate IV International limited partnerships and Mr. Simon Glick (the "**MSREF consortium**" or **"MSREF"**). This consortium was originally bidding through a vehicle called Silvestor UK Properties Limited ("**Silvestor**"). Mr. Glick (with his family interests) was at the time of the appeals interested in approximately 14% of the existing issued share capital of Canary Wharf. The MSREF consortium has been advised by Morgan Stanley and N M Rothschild.

5. CWG is a company which, if it had been successful in acquiring Canary Wharf, would on completion have been owned by a consortium led by Brascan Corporation ("**Brascan**"). Mr. Paul Reichmann, a proposed investor in CWG, is a director and formerly the executive chairman of Canary Wharf. Each of Brascan and Mr. Reichmann (with his family interests) was at the time of the appeals interested in approximately 9% of the issued share capital of Canary Wharf. CWG has been advised by Deutsche Bank and Merrill Lynch.

6. At all material times companies held by a trust for the benefit of HRH Prince Alwaleed Bin Talal Bin Abdulaziz Al Saud and family ("**Kingdom**") held approximately 2.3% of the issued share capital of Canary Wharf.

7. On 6 June 2003, the board of Canary Wharf announced that it had been approached by a number of parties in relation to a possible offer for Canary Wharf and had formed an independent committee of the board (the "**Independent Committee**") in order to deal with any potential bids and to analyse other options. As a result of this announcement, an offer period commenced in relation to Canary Wharf.

8. Subsequently, between 5 December 2003 and 19 March 2004, Silvestor and CWG announced competing offers for Canary Wharf shares. All the offers of Silvestor were to be implemented under a scheme of arrangement (the "**Scheme**") under section 425 of the Companies Act 1985 and thus required approval by a majority in number representing 75% in value of Canary Wharf shareholders present and entitled to vote. The offers of CWG were in conventional takeover form containing an acceptance condition with a minimum of 50%.

9. On 5 December 2003 Kingdom executed a deed of irrevocable undertaking addressed to and in favour of Silvestor (the "**December irrevocable**") in respect of its Canary Wharf shareholding. This irrevocable was duly disclosed to the market as required by The City Code on Takeovers and Mergers (the "**Code**").

10. By the December irrevocable, Kingdom undertook, subject to certain conditions, to vote Kingdom's shares in favour of the Scheme unless an improvement on Silvestor's terms was announced by a third party. The irrevocable contained provisions restricting dealings in Kingdom's Canary Wharf shares and precluding the acquisition by Kingdom of additional shares whilst the Scheme was current.

11. In order to provide an orderly framework for resolution of competing offers and on the basis of Rule 32.5 of the Code, detailed negotiations as to the rules by which this could be achieved were conducted by the Executive with the MSREF consortium, CWG and Canary Wharf.

12. On 7 April 2004 the Executive announced that Silvestor, CWG and Canary Wharf had, with the consent of the Executive, agreed a procedure under which Silvestor and CWG would be able to revise their offers through open auction. The rules established in this way (the "**Auction Rules**") expressly contemplated that offers by Silvestor might be by way of offer and not by way of a scheme of arrangement.

13. On 13 April 2004, Kingdom provided an additional deed of irrevocable undertaking dated 12 April 2004 addressed to and in favour of Songbird (the "**April irrevocable**") which recited that Songbird was considering making an offer to acquire Canary Wharf by way of takeover offer. Provided such an offer was made at not less than 292 pence per share and subject to certain other conditions Kingdom undertook to accept Songbird's offer and not to deal in its shares in Canary Wharf except under this offer. The April irrevocable was to lapse if no press announcement of this offer was made by 5p.m. on 16 April 2004. The April irrevocable, like the December irrevocable, allowed Kingdom to accept a higher competing offer. Unlike the December irrevocable, the April irrevocable was not disclosed to the market within the time specified in the Code (i.e. by 12 noon on the following business day) and so was not known to CWG at that time.

14. The auction period was specified by the rules as 5p.m. on 13 April to 5p.m. on 16 April. The auction rules included in rule 13 provisions concerning the acquisition by either bidder of Canary Wharf shares or warrants (or any rights to acquire shares or warrants). The parties put forward competing proposals during the auction period.

15. By the close of the auction period, Songbird (in place of Silvestor) and CWG had made their final proposals and revised documentation was posted to shareholders on 23 April as the auction rules required. Songbird's proposal, unlike all previous Silvestor proposals, was a conventional takeover offer and not by way of a scheme of arrangement. Kingdom's April irrevocable applied to this proposal. In its announcement of its final offer by 5p.m. on 16 April pursuant to Rule 2.5 of the Code, Songbird prominently referred to the existence of the April irrevocable and set out its key terms.

The position at the time of hearing the appeals

16. The Executive had ruled that the failure by Songbird to disclose the April irrevocable as required was a breach of Note 6 on Rule 8, though the breach was technical and inadvertent and was not such as to justify re-opening the auction process to enable the parties to make fresh bids. Morgan Stanley and N M Rothschild on behalf of Songbird had appealed against the Executive's ruling, contending that there was no breach of Note 6 because the April irrevocable was not a new undertaking. It was seen by Songbird's advisers as one of the "confirmatory" documents which contained no "new" arrangements. They considered that the auction process should not be re-opened even if the Panel were to hold that there was a breach of Note 6.

17. The Executive considered that rule 13 of the Auction Rules did not prevent the bidders from obtaining irrevocables of the sort in question, i.e. the April irrevocable, during the auction process.

18. CWG contended (in agreement with the Executive) that there was a breach of Note 6. However, they went further and said that:

(1) press releases by Silvestor on 14 and 15 April announcing revised offers failed to disclose details of Kingdom's April irrevocable and were thus also in breach of Rule 2.5(b)(vii) of the Code;

(2) these also gave the impression that the MSREF consortium intended to proceed exclusively by way of a scheme of arrangement;

(3) in Songbird's offer document of 23 April no disclosure was made that the April irrevocable had been executed on 12 April;

(4) the Executive's view of rule 13 of the Auction Rules (i.e. that the rule did not preclude the taking of irrevocables during the auction period) was and is wrong; and

(5) the Executive's communications of this view to the MSREF consortium and to Canary Wharf but not to CWG was unfair, and led CWG to rely upon the absence of the disclosure to the market of the additional irrevocable from Kingdom when determining CWG's acquisition strategy.

The cumulative effect of this, said CWG, was that the auction process was "fatally flawed", so that the auction should be re-opened enabling them to make (as they affirmed they would) an offer in excess of 295 pence in cash to Canary Wharf shareholders, thus outbidding Songbird's current cash offer.

19. Accordingly, CWG appealed against the Executive's ruling that the auction process should not be re-opened.

Issues before the Panel

20. These were:

(a) Was Songbird in breach of Note 6 on Rule 8 of the Code by failing to disclose on 13 April 2004 the details of the April irrevocable?

(b) Did the MSREF consortium breach Rule 2.5(b)(vii) of the Code in the announcements of 14 and 15 April which failed to disclose details of the April irrevocable, and give a misleading impression of an intention to proceed by way of a scheme of arrangement?

(c) Did the Executive misinterpret rule 13 of the Auction Rules, then act unfairly in communicating its view to some parties but not to CWG?

(d) What remedy if any in the light of the answers to the questions above should the Panel prescribe?

Breach of Rule 8 by Songbird

21. Rule 8 of the Code concerns the disclosure of dealings in relevant securities during the offer period. Rule 8.l(a) provides as follows:

> "Dealings in relevant securities by an offeror or the offeree company, and by any associates, for their own account during an offer period must be publicly disclosed in accordance with Notes 3, 4 and 5.".

22. Note 1 on the Rule provides that in any case of doubt as to the application of Rule 8 the Panel should be consulted; Note 3 requires any dealing disclosure to be made in the manner specified in Note 4 and made by no later than 12 noon on the business day following the date of the transaction; and Note 5 details the information that must normally be included in a disclosure (such as the identity of the person dealing and, if relevant, details of any arrangements required by Note 6).

23. Note 6 provides:

"6. Indemnity and other arrangements

(a) For the purpose of this Note, an arrangement includes indemnity or option arrangements, and any agreement or understanding, formal or informal, of whatever nature, relating to relevant securities which may be an inducement to deal or refrain from dealing.

...

(b) When an arrangement exists with any offeror, with the offeree company or with an associate of any offeror or of the offeree company in relation to relevant securities, details of such arrangement must be publicly disclosed, whether or not any dealing takes place.

...".

24. The Panel understands that the practice of the Executive is to require disclosure of irrevocables which may be inducements to deal or refrain from dealing. Whilst the Code Committee is currently considering a proposal by the Executive to specify this in an amendment to the Code to ensure that all practitioners are aware of this, the wording *"agreement or understanding, formal or informal, of whatever nature, relating to relevant securities which may be an inducement to deal or refrain from dealing"* is already widely drafted. In the Panel's view the wording of Note 6 does require that the obtaining by an offeror during the offer period of an irrevocable undertaking to accept its offer be publicly disclosed if such irrevocables contain inducements to deal or refrain from dealing.

25. The December irrevocable included the following inducements not to deal:

    (1) if Kingdom disposed of its Canary Wharf shares (otherwise than as permitted by the terms of the irrevocable) it could not comply with the irrevocable (paragraph l(iii)); and

    (2) Kingdom could not acquire shares or other securities etc. in Canary Wharf prior to the Scheme taking effect, and if it did (in breach of this

obligation) those shares and securities etc. would be subject to the irrevocable (paragraph 1(vi)).

26. The MSREF consortium admitted that these provisions were inducements to refrain from dealing and, as stated above, Silvestor did publicly disclose the December irrevocable in accordance with the Code. However, MSREF argued that there was nevertheless no obligation to disclose the April irrevocable since it did not create "new" inducements and irrevocables per se are not disclosable under Rule 8. The argument was based on the wording of Rule 2.5.

27. Rule 2.5(b) requires that:

> "When a firm intention to make an offer is announced, the announcement must contain:-
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> ...
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> (iii) details of any existing holding in the offeree company:
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> ...
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> *(c)* in respect of which the offeror has received an irrevocable commitment to accept the offer;
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> ...
>
> (vii) details of any arrangement of the kind referred to in Note 6(b) on Rule 8; and
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> ...".

28. The MSREF consortium suggested that these provisions distinguish between irrevocable commitments and arrangements under Note 6(b) on Rule 8 and said:

> "Accordingly, an irrevocable must be disclosed under Note 6 only when, as is often the case, it creates new 'arrangements' that fall within the Note.".

29. The MSREF consortium said that the inducements in the April irrevocable were "precisely the same" as those in the December irrevocable, and since there were no new inducements and "irrevocables per se are not announceable" there was no requirement to announce the April irrevocable under Note 6.

30. The Panel rejects the MSREF consortium's arguments on this point. There may be some overlap between the provisions of Rules 2.5(b)(iii) and 2.5(b)(vii), but the latter is clearly wider in scope and acts as a sweeping-up provision for matters not dealt with earlier. What is important is the wide wording of Note 6 on Rule 8 which, as the Panel has already indicated, covers irrevocables.

31. It is sufficient to say first (as is not disputed) that, if the April irrevocable contained new "inducements", it should have been disclosed on 13 April. Secondly, in the Panel's view the arrangements, and therefore the "inducements to deal or refrain from dealing", in that irrevocable were indeed new. The undertakings contained in it were dependent upon a different type of offer being made on terms which required acceptance by significantly fewer shareholders. The April irrevocable involved taking as consideration for Kingdom's shareholdings equity in a vehicle which might acquire a significantly smaller percentage of the equity of Canary Wharf than that which would follow if the scheme of arrangement route was pursued and was successful. It follows that the April irrevocable should have been disclosed.

32. Any disciplinary action in respect of the breach of Rule 8 by those concerned is a matter in the first instance for the Executive.

The circumstances in which the breach occurred

33. The Panel is satisfied on the basis of the material before it that:

(a) when the April irrevocable was obtained the members of the MSREF consortium were contemplating restructuring their proposal to make

through Songbird a conventional takeover offer during the auction period;

(b) their advisers wished to ensure that Kingdom would commit its shares to such an offer just as it had done to the Scheme proposal. They regarded the April irrevocable as confirming an existing arrangement but something which needed to be put in place before MSREF made their final bid on 16 April. Much documentation had apparently to be executed in a relatively short period and it was convenient to obtain the new Kingdom irrevocable on 12 April in advance of any offer which the consortium might decide to make on 16 April. MSREF and their advisers should have realised, but did not, that the April irrevocable, containing new inducements, required an announcement. However, though the breach of the Code is regrettable, the Panel was not persuaded that the delay in disclosing the April irrevocable between 13 and 16 April was purposeful;

(c) the Executive was not, as it should have been, consulted on this point; and

(d) the April irrevocable could legitimately have been obtained on 16 April (as to this see below) and then disclosed at the end of the bidding process without breach of the Code.

CWG's arguments concerning the breach of Rule 8

34. CWG suggested first that the breach was "compounded" by the repeated failure of the MSREF consortium to disclose the April irrevocable in Rule 2.5 announcements made by Silvestor on 14 and 15 April. It said that those announcements were "misleading"; they demonstrated an intention of the MSREF consortium to proceed exclusively by way of a scheme of arrangement when in fact it was not intending to do so.

35. In the Panel's view this point adds nothing to the gravity of the breach, and does not sustain the weight which CWG sought to put upon it. The degree of seriousness of the breach remained constant throughout the auction period. Nor is it right to suggest that by making offers on the basis of a scheme of arrangement the MSREF consortium thereby implied that it would not adopt a different approach. It was open to any party to make bids in different terms up to the end of the auction period. CWG also complained that Songbird's offer document of 23 April did not reveal that the April irrevocable had been signed on 12 April. This is not in itself significant; the text, including the date of execution, of the April irrevocable was available shortly thereafter.

36. CWG secondly contended, as indicated above, that the Executive, having misinterpreted rule 13 of the Auction Rules, communicated its view to Lazard and Clifford Chance (representing Canary Wharf) and to the MSREF consortium but not to CWG. This was said to have been unfair, to have deprived Canary Wharf shareholders of the results of a proper and fair auction procedure and to have created an uneven playing field.

37. This point is misconceived for a number of reasons. First, the Executive did not in the Panel's view misinterpret rule 13 of the Auction Rules. That rule provides:

> "Neither bidder (nor any person acting in concert with it) may acquire any Canary Wharf shares or warrants (or any rights to acquire shares or warrants) after 5.00pm on Tuesday 13 April until the end of the Auction Procedure, other than with the consent of the Panel. Thereafter until the end of the offer period, and other than with the consent of the Panel, neither bidder (nor any person acting in concert with it) may acquire any Canary Wharf shares or warrants (or any rights to acquire shares or warrants) on better terms than those made available under its offer. These restrictions shall not prevent the Reichmann interests being able to acquire Canary Wharf shares by exercising the Reichmann warrants.".

38. This rule quite specifically dealt only with the acquisition by either bidder of Canary Wharf shares or warrants (or any rights to acquire shares or warrants) during the auction process. It did not purport to prevent the bidders from obtaining irrevocables in respect of offers made or proposed to be made. (Ironically, in the course of the discussions leading to the Auction Rules the MSREF consortium had attempted but failed to persuade the Executive that the taking of irrevocables during the auction process should be precluded). The Executive was correct in saying that rule 13 did not prevent the bidders from obtaining irrevocables of the kind in question, and in the course of their discussions with advisers to both Canary Wharf and the MSREF consortium communicated this view.

39. There is no basis for complaining of an uneven playing field because of the Executive's actions in this regard. One of the Executive's most important functions (one which the Panel believes is at the heart of what the Executive does on a daily basis) is to give guidance to those involved in takeovers and mergers on the meaning and effect of provisions of the Code, its own rulings and other matters. It respects the confidence of those who seek such assistance and CWG and its advisers would surely expect nothing less. What the Executive may say to one party is not something which as a matter of course the other party can reasonably expect to learn. Had CWG done as the Code urges and made its own enquiry of the Executive on an important point, it would not now be complaining about an uneven playing field.

40. CWG's arguments on these and other points were not assisted by the surprising delay in raising their complaint. They learned of the existence of Kingdom's April irrevocable on 16 April from Songbird's announcement of its offer on that date and yet did not raise their complaint with the Executive until 28 April. The delay in raising what is now said to have been such a key factor in CWG's strategy was never satisfactorily explained.

The effect of the breach

41. CWG made full submissions about the "damage caused" during the auction process. When deciding what final offer to make in the auction CWG concluded that the MSREF consortium would have difficulty in succeeding with an acquisition by way of a scheme of arrangement because of the voting threshold when coupled with the support which CWG had for their own proposals. CWG cannot have supposed that the MSREF consortium were oblivious to the problems which CWG saw about their Scheme proposal or that MSREF would not, if it could, make its final offer in the form of a conventional takeover offer. Nevertheless, CWG believed that MSREF would have difficulties in moving to a conventional takeover offer where minority shareholdings might not be subject to compulsory acquisition and where MSREF would find it difficult to obtain sufficient financial support. CWG concluded that it was "highly unlikely" that the Silvester Scheme proposed could be restructured as a conventional takeover offer.

42. CWG said that in reaching this conclusion they debated both internally and then with CWG investors on 13 April the absence of an irrevocable from Kingdom in respect of a conventional takeover offer and that this was a "key factor" in determining the perceived inability of the MSREF consortium to restructure its offer as a takeover offer. Accordingly, they decided to improve only the equity alternative elements in their own offer and did not increase their all-cash offer by making an offer in excess of 295 pence per share although they had approval from their investors to do so.

43. There are difficulties about CWG's arguments. First, their assessment of the problems which the MSREF consortium would have in making a conventional takeover offer proved to be erroneous. The evidence confirmed that the necessary finance was available and, although it was calculated to take account of Kingdom's April irrevocable, would have been available even without the irrevocable.

44. Secondly, any conclusion by CWG that the MSREF consortium did not have, and more importantly could never have, an irrevocable from Kingdom in respect of a conventional takeover offer before the end of the auction was based and could only be based upon a misinterpretation of rule 13 of the Auction Rules. In reaching any such conclusion CWG relied upon an interpretation which had been arrived at without consulting the Executive and was wrong.

45. CWG's interpretation of auction rule 13 was flawed through no fault of the MSREF consortium and, as the Panel has said, through no fault of the Executive.

Considerations as to whether the auction should be re-opened

46. The Panel in addition to what has been said above took full account of all the matters outlined in the written and oral submissions of the parties to these appeals. The Panel did assume that, if the process were to be re-opened, that would, as CWG affirmed, lead to at least one higher cash bid than that on the table; but it would be to the prejudice of those who have dealt in the market since 16 April in reliance on what appeared to be a concluded auction process.

47. An auction was put in place after detailed discussions with and agreement by all concerned and was intended to bring finality to a long process. Throughout this process, and specifically to avoid the risk of disputes such as those which led to this appeal, the Executive was, as the parties knew, readily available to be consulted in confidence on any points of possible disagreement or uncertainty, and also to address any complaints concerning the conduct of the parties.

48. It would require exceptionally strong circumstances to re-open an established and completed auction process and such circumstances plainly did not exist in this case.

Conclusion

49. Accordingly:

(1) Songbird's appeal against the Executive's ruling that the failure to disclose Kingdom's April irrevocable in accordance with Note 6 on Rule 8 was a breach of the Code was dismissed.

(2) CWG's appeal against the Executive's ruling that the auction process should not be re-opened was dismissed.

24 May 2004