THE TAKEOVER PANEL

THE WEYBURN ENGINEERING COMPANY LIMITED ("WEYBURN")

The Panel on Take-overs and Mergers met on Wednesday, 25th July, 1973, to consider an appeal by Weyburn against a ruling by the Panel executive that Mr. P.R. Royston, Mr. F.H.P. Buckner and others acting in concert with them were not required by the City Code to make an offer to shareholders generally at the price at which shares had been purchased after the close of an unconditional offer at a lower price.

This is a further case in which the Panel has been asked to intervene because, it is said, effective control of a company was secured by the purchase of a block of shares from a particular source without the same offer being made to all shareholders.

The facts are not in doubt. In June, 1972 Mr. Buckner informed Weyburn that he and Mr. Royston held approximately 15% of the ordinary capital of Weyburn and were negotiating for the purchase from a single holder of a further 16%. Mr. Buckner consulted the Panel executive and was informed that, in the application of Rule 34, any acquisition of shares from a limited number of sellers resulting in the purchaser holding 30% or more of the capital would necessitate a general offer. Accordingly, Mr. Buckner and persons acting in concert with him acquired somewhat less than the whole of the 16% holding and on 20th July Mr. Buckner issued a public statement that he and his associates held 29.75% of the ordinary share capital of Weyburn, to be held as a long-term investment, and that they would seek representation on the Board.

On 14th September, Mr. Buckner and Mr. Royston requested the resignation of the then Chairman of Weyburn and of two non-executive Directors and the appointment of three of their own nominees. This request was refused and at an Extraordinary General Meeting on 4th November an attempt to secure control in this way was defeated on a poll in which 87% of the ordinary shares was voted and the holders of approximately 47% of the ordinary shares opposed Mr. Buckner and his associates. At the Annual General Meeting three months later proxies in favour of the re-election of two members of the existing Board represented just over 49% of the capital although at this meeting no controversial resolution appears to have been considered.

On 29th March, 1973 an announcement was made that Mr. Royston and Mr. Buckner with associates held 39.3% of the ordinary capital and that (presumably in intended compliance with Rule 34) they intended to make an offer for the rest at a price of 167½p. Weyburn contended before the Panel executive that in the special circumstances of that company a holding of 39% did not confer control and that any offer should therefore be conditional upon acceptances being received which, when added to their existing holdings, gave Mr. Royston and Mr. Buckner more than 50% of the capital. The Panel executive ruled that as Mr. Royston and Mr. Buckner had increased their holding from 29.75% to 39.3% partly by selective purchases, it must be assumed that they had secured effective control and under Rule 34 were entitled and required to make an unconditional offer. This decision was not appealed and an offer was made on their behalf by an associate company called CCC Securities Limited; when the offer closed on 6th June 44.8% of the ordinary share capital had been secured.

Subsequently on 25th June at a meeting of the parties Mr. Royston claimed that he and his associates had over 45% of the capital and that other shareholders had promised support which would bring him over 50%. He demanded the Board changes which he had previously proposed. This was refused, Weyburn arguing that the general meetings in November, 1972 and February, 1973 had shown that 45% did not in fact constitute effective control.

Messrs. Royston and Buckner then went back to the market further to build up their holding and on the 6th July they announced that during the preceding month they and their associates had purchased a further 67, 000 ordinary shares and thus held 50.35% of the ordinary capital. One of these purchases was of a block of 42, 000 shares purchased at 180½p on 5th July. The facts as to this are that they were purchased from a single seller who had without the knowledge of Mr. Royston and Mr. Buckner bought them during the offer period and from whom, after the end of the offer period, it had first been sought to obtain an undertaking to support the Royston/Buckner group.

Weyburn then asked the Panel executive to require a general offer to be made at the price of 180½p, on the grounds that Rule 34 applied. The Panel executive was not prepared so to rule and the matter now came before the Panel by way of appeal from this decision.

In the opinion of the Panel the appeal, whilst not lacking in merit, must fail. The Panel has already drawn the attention of the City Working Party, which is responsible for the terms of the Code, to the fact that ambiguities and inconsistencies have arisen in regard to the Rules relating to the building up of holdings by selective or by market purchases. The present

case may be thought to illustrate another anomaly in that whilst under Rule 21, which deals with an ordinary general offer, the offer may not be made unconditional until acceptances of over 50% of the equity have been received, under Rules 34 and 35, dealing with acquisitions made in the absence of a general offer, the assumption is that effective control arises with a lower holding than 50% and the offer which those Rules require to be made has to be unconditional. The Working Party has been invited to look at the operation of these Rules in the light of experience gained in their operation and to examine the underlying philosophy.

The present case turned on the practice of the Panel executive in the normal case arising under Rule 34 to regard a holding of 30% or more of the equity as conferring effective control. It was suggested on behalf of Weyburn that in the circumstances of the existing case effective control was only secured when the Royston/Buckner group had built up their holding of Weyburn shares to over 50% of the equity on 5th July and this could indeed be the reality of the matter; certainly the facts showed that 29.75% did not confer control on the Royston/Buckner group and it is clear that an additional 0.25% of the equity would not have done so. At what point if any between a holding of 30% and one exceeding 50% of the equity control actually passes in the case of any particular company can only be ascertained by putting the matter to the test of an actual vote. But the Panel has to deal with these matters objectively. In the normal case a holding of 30%, and in many cases less than 30%, would in practice confer control and the Panel's adoption of this percentage as the general criterion for the application of Rule 34 does usually reflect the reality of the matter. It is true that the 30% rule may be artificial and arbitrary; it is also true that it is not absolute. The Panel is not committed to its universal application and in special circumstances as, for instance, where it was shown that there was another single holding exceeding 30% the 30% criterion of control would not be applied. No doubt it was strongly arguable that because of the geographical concentration of the shareholders and of shareholder loyalty to the existing Board, Weyburn was not a normal case. The Panel executive were, however, not convinced of this argument; they were faced with a holding only just short of the 40% dealt with in Rule 35 and their decision that effective control had been secured was not challenged by appeal at the time.

In the view of the Panel, it cannot be challenged now. In view of the express terms of the Rule an offer made under Rule 34 has to be unconditional; the Panel executive has no discretion to require or permit a conditional offer. And once Rule 34 has been brought into operation and the offer period has

come to an end, it cannot again be invoked. As in the case of a general offer under Rule 21 or Rule 35, once the offer period has expired, market purchases whether selective or not are permissible and the effect of the Rule has been spent. Although in the present case the purchase of the 42, 000 shares on 5th July was a selective one on a "put through" from a single seller and certainly placed the fact of control beyond doubt, there was nothing in the Rules or practice of the Code to prevent it and the Panel suspects that in any event that the purchase would not have been critical to the reality of effective control. Whether it would have been more equitable if the Weyburn shareholders had all been offered the higher price paid for that block of shares is another matter. There is a limit beyond which the Panel, in interpreting the express Rules of the Code, cannot go in the search for what may appear to be the most equitable solution.

One further point which was raised in the case should be mentioned. It was said on behalf of Weyburn that the Panel executive made certain rulings on an ex parte basis and without informing Weyburn or giving them an opportunity to contest the ruling. Ex parte rulings are an inevitable feature of the day to day work of the Panel executive. The practice is, however, not to give such rulings in any case where a new and significant interpretation is put upon existing rules or where there is risk of injustice to other parties. In such a case the Panel executive always declines to rule in the absence of the party affected. In cases of doubt the Panel executive will always notify and hear the opposite party. The Panel considers that this practice was not departed from in the present case; the critical ruling was in fact made on the application by Weyburn that the offer to be made should be a conditional one.

The Appeal is, therefore, dismissed.