

THE TAKEOVER PANEL

The Kaduna Syndicate Limited ("Kaduna")

The Panel on Take-overs and Mergers met on 27th April 1977 to consider an appeal by Kaduna against a ruling by the Panel executive. The executive had found that Mr. A. Ferguson and Mr. G.W. Jarvill and companies associated with them, having acquired between them more than 30% of the share capital of Kaduna, should properly be regarded as persons acting in concert under the Take-over Code and had therefore, under the strict requirements of Rule 34, incurred an obligation to make a cash offer at 17½p for all the Kaduna shares which they did not own. The executive decided in the circumstances that it was appropriate to exercise its discretion and to dispense with the mandatory bid requirement subject to certain safe- guards.

Kaduna is a mining company, with interests in Nigeria and with holdings of cash and quoted investments in the United Kingdom. Temple Investment and Finance Company Limited ("Temple Investments"), registered in the Channel Islands, is owned by Mr. Ferguson's wife and children, and Mr. & Mrs. Ferguson are directors. Sterling Bank Limited, registered in Anguilla, is wholly owned by Temple Investments. Mr. Ferguson (a mining engineer) and Mr. Jarvill (an accountant) have been close business associates for many years.

In May 1975, Temple Investments, at the instance of Mr. Ferguson, bought 29.5 per cent of the equity of Kaduna from an investment company at a price of 17½p per share, which was about 5p over the then market price. Mr. Ferguson joined the board of Kaduna in October 1975. Between May 1975 and January 1977, further Kaduna shares were purchased in the name of Sterling Bank.

By 23rd September 1975, Temple Investments and Sterling Bank had acquired more than 30 per cent of the Kaduna equity. The instructions to buy for Sterling Bank usually emanated from Mr. Ferguson but on a number of occasions were given by Mr. Jarvill. By 21st January 1977 when purchases ceased, Sterling Bank had bought 300,000 shares (8.7 per cent of the Kaduna equity). The board of Kaduna, being aware of the beneficial ownership of the shares bought by Temple Investments, made various enquiries about the purchases by Sterling Bank. Mr. Ferguson, however, did not divulge the full details of his relationship with Sterling Bank and did not go beyond saying that the shares were in friendly hands.

On 31st March 1977 Energy Finance & General Trust Limited, on behalf of The Selukwe Gold Mining and Finance Company Limited ("Selukwe"), announced an offer for the share capital of Kaduna and said that Mr. Ferguson and one other shareholder (this was in fact Mr. Jarvill) had irrevocably committed their holdings (38.25 per cent in all) to the Selukwe offer. The offer was in the form of Selukwe shares, with units of participation to be realised later when the value of Kaduna's Nigerian assets was established. Ignoring the units of participation, the Selukwe offer valued each Kaduna share at about 13p.

Mr. Ferguson and Mr. Jarvill informed the Panel that the Kaduna shares in the name of Sterling Bank were bought for Mr. Jarvill, who had decided to follow Mr. Ferguson in buying shares in Kaduna particularly as the market price (10p to 12p) was substantially less than the price paid by Temple Investments. Sterling Bank had advanced loans to Mr. Jarvill which have now been repaid and the 300,000 shares have now been transferred to him.

Mr. Ferguson said that he was aware of the obligations that would flow from the acquisition by Temple Investments of more than 30 per cent of the Kaduna equity but he claimed that at the material times he did not know the details of the Code and was not aware of the concept of acting in concert and therefore that an obligation to make a general offer might have arisen under Rule 34.

Kaduna argued that Mr. Ferguson and Mr. Jarvill were plainly acting in concert and because Temple Investment's acquisition had stopped just short of 30 per cent and because Mr. Ferguson had been reticent about his close link with Sterling Bank it was evident that he was aware that it was not only in the case of direct purchases by a single person that the Code could impose obligations.

The Panel confirms the executive's findings that Temple Investments (with Mr. Ferguson as director) and Mr. Jarvill were acting in concert within the meaning of the City Code and that the purchases on behalf of Mr. Jarvill gave rise to an obligation under Rule 34. On the question whether, and if so on what conditions, the Panel should exercise its discretion to relieve the parties of this obligation, the Panel considers that Mr. Ferguson, as a director of a public listed company, ought to have been aware of the obligations that arise under the Code but has decided that in all the circumstances it was inappropriate to insist on a cash offer.

The Panel, however, considers that the 300,000 shares bought on behalf of Mr. Jarvill in circumstances where obligations under Rule 34 arose or had already arisen, should not now be allowed to influence the outcome of the Selukwe offer. Accordingly, at the request of the Panel, Selukwe has agreed that an acceptance in respect of these 300,000 shares to its offer (which was posted to Kaduna shareholders, on 27th April 1977) should be disregarded for the purpose of deciding whether or not Selukwe has sufficient shares to declare its offer unconditional. Thus, on the assumption that acceptances are received in respect of these shares, Selukwe will not exercise its discretion to declare its offer unconditional until its holding would thereby exceed 2,025,391 shares (approximately 58.7% of the share capital of Kaduna).

Further, the Panel confirms the condition imposed by the executive that, should the bid from Selukwe fail to go unconditional, the combined holding of Temple Investments, Sterling Bank and Mr. Jarvill should be reduced within a reasonable period to below 30 per cent by the disposal of the requisite number of shares to persons not acting in concert with Mr. Ferguson or Mr. Jarvill within the meaning of the Code.

5th May 1977