

THE TAKEOVER PANEL

TOZER, KEMSLEY & MILLBOURN (HOLDINGS) PLC ("TOZER") / MOLINS PLC ("MOLINS")

The full Panel met on 29 June to consider an appeal by Lazard Brothers & Co, Ltd ("Lazards"), on behalf of Molins, against the view of the Panel executive that J Henry Schroder Wagg & Co Ltd ("Schroders") and Hoare Govett Ltd ("Hoare Govett") should not be prevented from continuing to act for Tozer in Tozer's offer for Molins.

The principal facts underlying the appeal were as follows. In November 1985 an offer was made to acquire the whole of the share capital of Molins by a management buyout consortium. Schroders were financial advisers to the consortium and Schroders then received material confidential information relating to Molins in the normal course, including long-term projections in relation to Molins' business. Hoare Govett, as stockbrokers to Molins at the time, had a preliminary involvement in the management buyout proposals. They were found by the Panel not to have received similar confidential information. The management buyout did not proceed and after that time Schroders had no material involvement with Molins. Hoare Govett ceased to be brokers to Molins in May 1986.

Schroders, who had acted for companies in the same group as Tozer since August 1986, were first consulted by Tozer in May 1987 concerning a possible offer for Molins. Schroders did not initiate the offer nor carry out any analysis of Molins for Tozer prior to that time. The Schroders personnel acting for Tozer are substantially different from those who acted with regard to the buyout transaction. Schroders also took steps to isolate confidential documentary information previously obtained from

Molins so that it could not be available to those advising Tozer. Molins and Lazards accepted Schroders' assurances that the position has been dealt with in this way.

The principal issue which fell to be determined by the Panel was whether, in all the circumstances of this case, the possession of relevant confidential information, if that were found to be the case, required that Schroders or Hoare Govett should cease to act for Tozer in connection with this offer.

Hoare Govett were not given any material confidential information. Accordingly the Panel confirmed the view of the executive that Hoare Govett should not be prevented from continuing to act.

As regards Schroders, the Panel considered that the issue of their ability to continue to act as financial advisers to Tozer is not covered either by the General Principles or by the Rules of the Code. Nevertheless, the issue does affect good standards of business behaviour, with which the Panel is concerned as indicated in the Introduction to the Code. The Panel therefore considers it appropriate to express its view but without making a formal ruling.

The general issue of principle raised, therefore, is whether it is proper to resolve potential problems of conflict of interest through taking steps internally to isolate information within a corporate finance organisation. Following the emergence of dual capacity in the City, strict segregation is insisted upon by the regulatory authorities as between corporate finance, market-making and investment advisory functions. This not only underlines the general concerns about avoidance of conflicts of interest before they can arise but gives guidance on the approach to this particular problem. A potential conflict of interest can only be avoided where such strict segregation of businesses exists and has been approved by the relevant authorities.

So the Panel considers that it is inappropriate for a corporate finance organisation or other adviser to seek to resolve problems of conflict of interest simply by isolating information internally.

Confidential documents and other information are supplied to the organisation acting as a corporate finance house and not just to individuals within that organisation. The organisation should respect that confidence by, if necessary, declining to act rather than by the alternative route of adopting internal measures to keep information separate. In any event, there will, in addition to documents, often be informal, internal discussion of situations which may lead to the dissemination of information within an organisation. This emphasises that potential problems cannot be guaranteed to be resolved by the simple isolation of documents or by the assignment of different personnel to act against the party who had previously supplied the information.

In this case, Schroders accepted that they had received confidential information from Molins but submitted that it would be likely to have become out of date. The Panel accepts that in many situations information would, after an interval of perhaps 18 months, have become of little practical value and so might cease to be relevant. In this case, however, the management buyout involved the disclosure of very detailed information. Molins' business involves long-range product development which meant that its future forecasts, financial and otherwise, might have greater significance than is often the case. It was common ground that the information disclosed included forecasts of market shares, sales, cash flows and accounting information to 1989. It also included a confidential memorandum prepared by Morgan Guaranty with financial forecasts to 1993. Schroders further submitted that the substance of such information must have already been published.

It is the Panel's view, in this particular case, that Schroders as an organisation retained confidential material information and should have declined to accept instructions from Tozer to act in relation to the offer for Molins. It is emphasised that this

view was formed in the context of a novel and difficult situation and the Panel recognises that Schroders considered the position carefully and sought to act entirely properly. The hearing revealed that Schroders had minimised the risk of any actual abuse of the information in their possession, and this was made plain to Molins and its advisers. The offer remains current and is being actively contested. It is important that shareholders of Molins should have a full opportunity of evaluating the arguments. With these points in mind, the Panel considers that a greater disadvantage could well be suffered by shareholders of Molins and of Tozer if the offer were interrupted by Schroders resigning now than by Schroders continuing to act.

The Panel will in due course consider the extent to which any change to the Code is appropriate.

30 June 1987