

THE TAKEOVER PANEL

MINORCO ("MINORCO") / CONSOLIDATED GOLD FIELDS PLC ("CONSGOLD")

The Issue

On 19 October, the Secretary of State for Trade and Industry appointed Inspectors under Section 442 of the Companies Act 1985 to investigate and report upon the membership of Consgold and also under Section 177 of the Financial Services Act 1986 to investigate possible contravention of the Company Securities (Insider Dealing) Act 1985 in regard to Consgold securities. Consgold thereupon asked the Panel to rule that the bid by Minorco for Consgold, which had been announced on 21 September, should lapse pending the outcome of that enquiry. The executive ruled, in a situation in which there was no precedent under the Code, that the bid should not be required to lapse and Consgold appealed to the full Panel against this decision.

Background and facts

At the time of the bid, Minorco already owned some 29% of the shares in Consgold. Prior to the announcement of the bid, there was substantial increased activity in options over Consgold's shares. There was also a very considerable increase in activity in dealings in the shares of Consgold. In the three days before the announcement, turnover in Consgold shares on the London market increased to approximately four times the average level of turnover in the preceding month. Turnover in Johannesburg, although much lower in absolute terms, is said to have increased by approximately fifteen times in the same period. This greatly enhanced turnover so shortly before the bid is obviously a cause of much legitimate concern, and will fall to be investigated by the Inspectors in their enquiry. The announcement of the enquiry necessarily implies that the Secretary of State accepted,

pursuant to Section 177 of the Financial Services Act 1986, that "there are circumstances suggesting that there may have been a contravention of Sections 1, 2, 4 or 5 of the Company Securities (Insider Dealing) Act 1985". The parties to this appeal accepted that there was circumstantial evidence suggesting insider dealing by someone, and that it fell to be investigated with the fullest rigour. In addition to investigating whether there has been insider dealing, the powers of the Inspectors, under the terms of Section 442 of the Companies Act, extend to the investigation of any circumstances suggesting the existence of an arrangement or understanding, which is relevant to the purposes of the investigation and, accordingly, the Inspectors are entitled to consider whether there have been any dealings by associates of parties to the bid. We have been informed that the terms of reference of the Inspectors expressly require them in the present case to consider whether a "concert party" exists under Section 204 of the Companies Act.

Consgold have also made representations to the Office of Fair Trading, and so to the Secretary of State, that the bid should be referred to the Monopolies and Mergers Commission for consideration under the Fair Trading Act 1973. The principal concern expressed has been the effect which the substantial South African ownership of Minorco might have on the future of Consgold. We understand that the Secretary of State will rule shortly on the question as to whether the bid should be referred. The Panel's principal function is the separate one of seeking to ensure fairness to shareholders in the conduct of a bid. It is concerned to ensure compliance with the Principles of the Code and the Rules as they give effect to those Principles, and the Panel is not involved with those considerations of wider public interest which fall to be decided by the Secretary of State with accountability to the public through Parliament.

Submissions of the Parties

The problem before the Panel is how the bid should be treated in the light of the commencement of the DTI enquiry under Sections 442 and 177. Consgold essentially submitted that the bid should be required to lapse, since it was not at present known whether conduct by Minorco or their associates had contributed to any insider dealing or whether Minorco was acting in concert with any such insiders. Minorco by contrast submitted that the establishment of the enquiry did not of itself suggest that there was any evidence of insider dealing by Minorco, or their associates, nor fault on their part. Minorco considered that it would be inappropriate for the Panel to take the serious step of allowing the bid to lapse where no breach of the Code had been established against them.

These very clearly presented submissions highlight the problem for the Panel. The Panel cannot know at the present stage what are the facts with regard to the allegations of insider dealing, and the parties recognise that these can only be investigated by the Inspectors appointed by the DTI with the benefit of their statutory powers. Yet, even before the Inspectors embark on their task, the Panel has been required to decide an issue with irreversible consequences either way.

Considerations leading to the decision

Consgold makes no positive allegations of insider dealing by Minorco or their associates. Nor are they able to suggest positively that there is an undisclosed concert party between Minorco and their associates. Minorco has asserted in their written submission to the Panel that they have taken every step prior to and during the course of the offer to ensure that the Code has been fully complied with; that all dealings required to be disclosed under the Code were contained in Minorco's offer document dated 4 October; that no dealings in the shares or options of Consgold took place by any party acting in concert with Minorco who was privy to information about the offer; and

that no recommendation was made by any person who was privy to information regarding the possible offer by Minorco to any other person as to dealing in Consgold securities. Minorco has also adduced supporting affidavit evidence from the following persons:

Julian Ogilvie Thompson

Sir Michael Edwardes

J R B Phillimore

Anthony W Lea

Henry R Slack

These affidavits have been lodged with the Panel.

The Panel cannot evaluate the truth or otherwise of Minorco's assertions. It must always be possible that, however distinguished the deponent, the affidavit might prove to be inaccurate. It must also always be possible that the Inspectors' report will disclose that there was an inadvertent leak from Minorco as a result of which someone unconnected with the company entered into share transactions. The Panel considers, however, that these statements and affidavits are relevant to its decision. The contents of Minorco's statements were unequivocal and, if for any reason they turned out during the course of the DTI enquiry to be inaccurate or to have been made irresponsibly, this could give rise to very serious consequences. The propriety of Minorco continuing to be listed on The Stock Exchange would no doubt have to be considered, and advisers in this country who are subject to the jurisdiction of one or other of the regulatory organisations could be required to "cold shoulder" Minorco. If affidavits were false, proceedings for perjury could follow. If Minorco or any representative was found to have engaged in insider dealing, the remedies of the criminal law are available. So if Minorco have in any way behaved improperly there are considerable sanctions available. Whilst these sanctions would not be the same as if any misconduct was discovered during the course of the bid, they would enable the regulatory authorities retrospectively to impose severe penalties for any impropriety.

Consgold suggested that the effect of the insider dealing would have been to increase the proportion of the share capital of Consgold which might be in speculative hands, and that since Minorco already own almost 30% of Consgold a holding of even a small amount by insiders could have a decisive effect. They suggested that the market may have been "destabilised" by insider dealing. The Panel is unconvinced of the strength of this argument. There are many events which can affect the commitment of shareholders before or during the takeover period. In general, all shareholders will want to get the best value for their shareholdings. At any one time a company's shareholders will always comprise a mixture of long and short-term holders. Speculation may increase the proportion of the latter, but this speculation may be caused by a variety of entirely legitimate events such as the announcement of the presence of a new significant shareholder and, not least, the announcement of an offer. It seems to the Panel therefore that a contested takeover is always likely to encourage the presence of short-term holders and that to a degree this is an inevitable consequence of listed company status. Accordingly the so called "destabilising" effect may well be the subject of exaggerated fears by Consgold and unless any insiders were proved to be acting in concert with Minorco no breach of the Code is implied.

Consgold argued that the position should be treated in the same way as when a reference is made by the Secretary of State to the Monopolies and Mergers Commission, in which case the bid automatically lapses. The Panel does not find this a convincing analogy. Where a reference is made to the Monopolies and Mergers Commission, a potential outcome is always that following such a reference the Secretary of State will decide that the bid is potentially against the public interest and should therefore not take place. To protect the position during the reference the Secretary of State has power, pending the Monopolies and Mergers Commission report, to require the bid to lapse. The Rule in the Code that a bid should lapse in such circumstances is designed to reflect the statutory provision, and is clearly sensible where one outcome of the reference may be that the bid

is prevented. By contrast the appointment of Inspectors under Section 442 or Section 177 does not give the Secretary of State express statutory power to prevent the bid.

The Panel finds this a deeply concerning case. It is obviously undesirable for the reputation of financial markets that bids for large public companies should be conducted against the background of an enquiry into possible insider dealing. Moreover, if that enquiry were to show that Minorco or its associates had engaged in insider dealing or that there was a concealed "concert party", then control of the company would already have passed and the Code and criminal consequences could only be disciplinary. On the other hand, it would seem inappropriate to resolve the issue adversely to Minorco when the enquiry may reveal no conduct on their part which could have justified their being required to lapse the bid. Moreover, to require the bid to lapse would prevent all those shareholders in Consgold who had in no way behaved improperly from considering a bid for their company on its merits.

It is obviously unfortunate that the true factual position cannot be established speedily. But inevitably the enquiry by the Inspectors will take some time, particularly as co-operation will have to be sought from foreign regulators and attempts made to track down the identity of beneficial owners. We do not think it is either fair to Minorco or, more cogently, fair to all shareholders in Consgold, that the bid should be caused to lapse. The circumstances in which the Panel may require a bid to lapse are set out in the Rules and, whilst these are not necessarily exhaustive, great care should be taken before they are added to. In the present case, where no specific breach of the Principles or Rules on the part of Minorco has been established, the Panel does not consider that it would be justified in requiring the bid to lapse.

Consgold put forward a very much secondary contention that the Panel should preclude Minorco from buying shares in the market and impose a higher level of acceptances than the usual 50%

before the bid could go unconditional. They recognised, however, in argument, that if they failed in their main contention, it would be difficult to support this alternative. We therefore do not set out the other reasons which would have led us to conclude in any event that these alternative proposals were unsatisfactory.

The Panel accordingly dismisses the appeal.

24 October 1988