

THE TAKEOVER PANEL

TRAFALGAR HOUSE PLC ("TRAFALGAR HOUSE") / DAVY CORPORATION PLC ("DAVY")

1. SUMMARY

In the light of the various announcements and circulars by Trafalgar House and Midland & Scottish Resources plc ("MSR") concerning their legal dispute over completion of the Emerald Field contract, and following requests by certain former Davy shareholders and representations by Kleinwort Benson Limited and J Henry Schroder Wagg & Co. Limited on behalf of Trafalgar House and Davy respectively, the Executive has investigated whether statements made in the Trafalgar House/Davy offer document of June 1991 relating to the circumstances in which the second tranche of consideration is to be paid to Davy shareholders were inadequate and, therefore, misleading.

The Executive's conclusion is that the offer document did not create a misleading impression of the circumstances in which the second tranche of consideration would be payable to Davy shareholders; and, therefore, that there was no breach of the Code. However, it is of the view that Trafalgar House has a continuing obligation to use all reasonable endeavours to obtain payment under the Emerald Field contract so that, among other things, the former Davy shareholders can receive the second tranche of consideration conditionally offered to them.

This is a highly technical and complex contractual matter which has recently been the subject of a judgement by the Court of Appeal. The Executive's conclusions have no bearing on the parties' rights in law.

2. BACKGROUND

On 25 June 1991, Trafalgar House announced a recommended cash offer (the "Offer") for the whole of the issued share capital of Davy. Trafalgar House was advised by Kleinwort Benson Limited ("Kleinwort Benson") and Davy by J Henry Schroder Wagg & Co. Limited ("Schroders"). The consideration for the Davy shares was an immediate payment of 50p and a deferred payment of 45p (the "Second Payment"). The Offer was declared wholly unconditional on 23 July 1991.

The offer document contained a letter dated 28 June 1991 from the then chairman of Davy, Sir Alistair Frame. This letter stated, inter alia, that:

"[The] Second Payment is contingent on, and will be paid 21 days after, Davy Offshore Limited ("DOL") becoming entitled to draw down the first amount payable under a letter of credit relating to the Emerald Field contract. The Emerald Field contract is now scheduled to be completed by 31st October 1991, which would enable the first amount under the letter of credit to be drawn down which in turn would trigger the Second Payment of 45p per share".

The offer document also contained a letter from Kleinwort Benson which, in setting out the terms of the offer, stated:

"The Second Payment is contingent on Davy Offshore Limited becoming entitled to draw down the first amount payable under a letter of credit relating to the Emerald Field contract and will be paid 21 days thereafter".

The Emerald Field contract is an agreement under which,

inter alia, DOL (now a wholly-owned subsidiary of Trafalgar House) is converting a semi-submersible drilling rig for North Sea service as a floating production platform. DOL's client is Emerald Field Contracting Limited ("EFCL"), a wholly-owned subsidiary of MSR. As explained in the offer document, the completion and satisfactory handover of the Emerald Field floating production platform, and DOL's subsequent entitlement to draw down monies under the letter of credit relating to the Emerald Field contract (the "Letter of Credit"), determines whether and when the Second Payment (of 45p per Davy share) becomes due and payable.

Although the letter from Sir Alistair Frame referred to above indicated that the Emerald Field contract was scheduled to be completed by 31 October 1991, completion has not yet taken place. A legal dispute has arisen between DOL and EFCL as to the correct interpretation of the Emerald Field contract with regard to the timing of the passing of title to, and payment for, the equipment being delivered under the contract. This dispute has recently been the subject of a judgement by the Court of Appeal. In addition, statements have been made by both sides as to the effect of a re-financing undertaken by EFCL on its ability to satisfy certain of the conditions attached to a loan to be guaranteed by the Department of Trade and Industry under Section 10 of the Industry Act 1972 (the "Section 10 Certificate"), which Certificate is one of the conditions to be satisfied to enable draw down to take place under the Letter of Credit.

3. CODE ISSUES AND THE EXECUTIVE'S CONCLUSIONS

The Panel is not concerned in, or with, the legal proceedings. It is, and can only be, concerned with Code issues. Therefore, the issue with which the Executive has concerned itself is whether the statements made in

the Trafalgar House/Davy offer document relating to the circumstances in which the second tranche of consideration is to be paid to Davy shareholders were inadequate and, therefore, misleading (in breach of General Principle 4 and/or Rule 19 of the Code).

General Principle 4 of the Code provides:

"Shareholders must be given sufficient information and advice to enable them to reach a properly informed decision and must have sufficient time to do so. No relevant information should be withheld from them".

Rule 19.1 (in accordance with General Principle 5) provides:

"Each document or advertisement issued, or statement made, during the course of an offer must, as is the case with a prospectus, satisfy the highest standards of accuracy and the information given must be adequately and fairly presented. This applies whether it is issued by the company direct or by an adviser on its behalf".

The Executive has investigated the knowledge, and expectations, of each of Trafalgar House, Davy and MSR in relation to completion and draw down under the Letter of Credit both at the time Trafalgar House launched its offer for Davy and until the offer became unconditional. Against that background, the Executive has considered the statements made in the offer document and reached the following conclusions:

- (a) Trafalgar House and, so far as relevant, Davy undertook appropriate due diligence as to the status of the Emerald Field contract;

- (b) at all relevant times, none of Trafalgar House, Davy or MSR expected that payment to DOL under the Emerald Field contract would be otherwise than under the Letter of Credit;
- (c) Trafalgar House/Davy made it clear in the offer document that payment of the second tranche of the consideration was contingent on DOL becoming entitled to draw down the first amount under the Letter of Credit; and that draw down under the Letter of Credit was conditional on completion under the Emerald Field contract; and
- (d) there did not need to be specific disclosure of the conditions to be satisfied in order for completion (and, therefore, draw down) to take place for the following reasons:
 - (i) Trafalgar House and Davy reasonably believed that those conditions would be satisfied;
 - (ii) a contract of the size and complexity of the Emerald Field contract was always going to be full of conditions; and
 - (iii) the full terms of the contract and the Letter of Credit were on display and so were available for inspection by the Davy shareholders.

4. COMPLETION

The Executive understands that Trafalgar House is continuing to work towards contractual completion of the Emerald Field contract and draw down under the Letter of Credit as soon as possible. It has stated so publicly and the Executive believes that Trafalgar House has an obligation to do so.

The Letter of Credit expires on 30 June 1992. Trafalgar House has emphasised to the Executive that it has a strong mutual interest with the former Davy shareholders in obtaining payment under the Letter of Credit given, in particular, that it is now incurring substantial legal costs in endeavouring to secure such payment, as well as interest and other costs as a consequence of the delay. It has also reiterated its undertaking set out in the offer document to use all reasonable endeavours to ensure that DOL complies with its obligations under the Emerald Field contract and to use all reasonable endeavours to prevent any change being made to the Emerald Field contract which would make entitlement under the Letter of Credit more difficult to obtain.

11 March 1992