THE TAKEOVER PANEL

CANARY WHARF GROUP PLC

Background

1. The underlying transaction which gives rise to this appeal is the possible acquisition of Canary Wharf Group plc **("Canary Wharf").** That company is now the subject of two competing offers; one from Songbird Acquisition Limited **("Songbird")** and the other from CWG Acquisition Limited **("CWG")**.

2. The shareholders in the parent of Songbird will include real estate investment funds sponsored by Morgan Stanley, entities linked to Mr Simon Glick, the Whitehall funds sponsored by The Goldman Sachs Group, Inc. and a subsidiary of The British Land Company plc **("British Land").** The Songbird offer replaces a proposal announced on 5 December 2003 by Silvestor UK Properties Limited **("Silvestor")** which was to be implemented by a scheme of arrangement under Section 425 of the Companies Act 1985. On 19 March 2004 Silvestor announced that British Land had agreed to join the consortium, and that Silvestor and British Land had agreed the terms of a joint venture in respect of certain retail assets of Canary Wharf subject to Silvestor's bid being successful. British Land may indirectly hold approximately 19.5% of the voting rights of Songbird under the current proposals if Songbird is successful in obtaining Canary Wharf.

3. The CWG offer was first announced on 5 February 2004. CWG has been formed by a consortium led by Brascan Corporation **("Brascan").** Mr Paul Reichmann will also be an investor. Each is currently interested in approximately 9% of the issued share capital of Canary Wharf.

4. On 7 April 2004, in order to secure an orderly resolution to the competitive situation, the Executive announced an agreed open auction procedure to be concluded by 16 April 2004. Final offers have now been made: each offeror

revised its offer on each day of the auction procedure with Songbird being substituted for Silvestor on the final day. Both offers will contain a 50% acceptance condition and offer documents must be posted no later than 23 April 2004. The offers with their alternatives each comprise a mixture of cash and shares but in different amounts and on different terms. On 19 April 2004 an independent committee of the board of Canary Wharf announced that it intended to recommend the Songbird offer to Canary Wharf shareholders.

5. The market-makers of UBS Limited ("UBS" which expression includes UBS AG and its subsidiaries) currently hold approximately 7.7% of the issued share capital of Canary Wharf. These shares are currently held substantially as a hedge in respect of financial exposure under certain long contracts for difference which UBS has written in favour of hedge fund clients. These contracts for difference were mostly written prior to UBS learning of British Land joining Songbird on 19 March 2004. The Executive ruled on 23 March 2004 that the UBS exempt market-maker was connected to Silvestor by reason of the relationship between UBS and British Land. The effect of this ruling was that the market-makers of UBS fell under Rule 38 of the Code which concerns "connected" market-makers. UBS market-makers have exempt status under the Panel regime which breaks the presumption of concertedness that would otherwise apply in respect of a group's market-making operations so that the group's normal dealing activities in relevant securities can continue without consequence under the Code for the group's corporate finance clients who are involved in offers. There are, however, certain restrictions imposed on connected market-makers which benefit from exempt status, and these are now set out in Rule 38.

6. In particular, Rule 38.3 provides:

"Securities owned by an exempt market-maker connected with the offeror must not be assented to the offer until the offer is unconditional as to acceptances".

Rule 38.4 contains a similar restriction on voting on an offer when the connection with the offeror exists.

7. Accordingly UBS market-makers could not by virtue of Rule 38.4 vote the shares in favour of the proposed scheme of arrangement. When the Silvestor proposal was dropped and replaced by the Songbird proposal, the Executive reiterated its view that the relevant connection existed and accordingly that under Rule 38.3 the Canary Wharf shares owned by UBS's exempt market-makers could not be assented to the Songbird offer before the offer is unconditional as to acceptances.

UBS's appeal

8. UBS has challenged both decisions of the Executive by appeal to the Panel. This ruling focuses on the latter decision, which is the one relevant to the current state of affairs. UBS's appeal is opposed by the Executive and by CWG. It is supported by submissions by Morgan Stanley & Co. Limited and N M Rothschild & Sons Limited on behalf of Songbird and also by British Land and Canary Wharf.

9. All parties agree that British Land is acting in concert with Songbird. The essential question in this appeal is whether UBS, although not advising British Land in relation to the Songbird offer should, by virtue of the relationship it does have with British Land, nevertheless be regarded as acting in concert with British Land, and so with Songbird.

Relevant provisions of the Code

10. The definition of "acting in concert" in the Code provides as follows:

> "Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), actively co-operate, through the acquisition by any of them of shares in a company, to obtain or consolidate control (as defined below) of that company."

It adds:

"Without prejudice to the general application of this definition, the following persons will be presumed to be persons acting in concert with other persons in the same category unless the contrary is established:-

(5) a financial or other professional adviser (including a stockbroker)* with its client in respect of the shareholdings of the adviser and persons controlling, controlled by or under the same control as the adviser (except in the capacity of an exempt market-maker);".

This provision is referred to below as "presumption (5)".

11. The definition of "Connected fund managers and market-makers" provides as follows:

"A fund manager or market-maker will be connected with an offeror or the offeree company, as the case may be, if the fund manager or market-maker is controlled by, controls or is under the same control as:-

(1) an offeror;

(2) the offeree company;

(3) any bank or financial or other professional advisers (including stockbrokers)* to an offeror or the offeree company; or

(4) an investor in a consortium (e.g. through a vehicle company formed for the purpose of making an offer)."

12. The asterisk in both definitions refers to Note 2 of the Notes on Definitions which in part provides:

"References to "financial and other professional advisers (including stockbrokers)", in relation to a party to an offer, do not include an organisation

which has stood down, because of a conflict of interest or otherwise, from acting for that party in connection with the offer. If the organisation is to have a continuing involvement with that party during the offer, the Panel must be consulted. Unless the Panel is satisfied that the involvement is entirely unconnected with the offer, the above exclusion will not normally apply."

13. Questions of exempt status apart, the terms "acting in concert" and "connected" at least for present purposes have the same meaning and effect and therefore when the presumption of concertedness in relation to a particular adviser is rebutted, a market-maker under the same control as that adviser should not be regarded as connected to the offeror.

14. Financial and other professional advisers (including stockbrokers) to a person acting in concert would normally themselves be presumed to be acting in concert with the offeror.

15. Where a market-maker is connected to an offeror, Rule 38 applies. Rule 38 provides as follows:

"38.1 **Prohibited Dealings**

An exempt market-maker connected with an offeror or the offeree company must not carry out any dealings with the purpose of assisting the offeror or the offeree company, as the case may be.

38.2 **Dealings between offerors and connected exempt market-makers**

An offeror and any person acting in concert with it must not deal as principal with an exempt market-maker connected with the offeror in relevant securities (as defined in Rule 8) of the offeree company during the offer period. It will generally be for the advisers to the offeror to ensure compliance with this Rule rather than the market-maker.

38.3 **Assenting securities**

Securities owned by an exempt market-maker connected with the offeror must not be assented to the offer until the offer is unconditional as to acceptances.

38.4 **Voting**

Securities owned by an exempt market-maker connected with an offeror or the offeree company must not be voted in the context of an offer.

38.5 **Disclosure of dealings**

Dealings in relevant securities (as defined in Rule 8) by an exempt market-maker connected with an offeror or the offeree company should be aggregated and disclosed to a RIS and the Panel not later than 12 noon on the business day following the date of the transactions, stating the following details:-

(i) total purchases and sales;

(ii) the highest and lowest prices paid and received; and

(iii) whether the connection is with an offeror or the offeree company.

In the case of dealings in options or derivatives, full details should be given so that the nature of the dealings can be fully understood (see Note 5 on Rule 8)."

16. The provisions of Rule 38 were introduced in 1986 as part of a regime governing the regulation of market-makers designed to enable them to engage in dealings in shares during an offer period without consequences for the group's corporate finance clients who might be involved in offers.

17. The regime seeks to ensure by Rule 38 that notwithstanding the exemption of market-makers a loop-hole should not be created through which a market-maker connected with an offeror would have the opportunity to assist the offeror to circumvent Rules of the Code (e.g. Rules 6, 9 and 11). Since the regime was

established, the importance of market-makers has greatly increased relative to other activities in investment banks, and in line with the development of sophisticated financial instruments. Also the relationship between the advisory side of investment banks and their clients has evolved to be less permanent or exclusive than it used to be. Advisory clients are now more inclined to seek transaction-based advice than to regard themselves (or to be regarded by others) as using the services of a particular investment bank.

The application of the Code

18. In circumstances like the present, where the investment bank is not involved in advising on the underlying transaction but has a relationship with a client who is a party to the offer, it is for consideration whether or not the investment bank should as a result of that relationship be held to be itself acting in concert with the offeror. The starting point is that presumption (5) applies "unless the contrary is established".

19. The Executive suggest that a number of factors may be relevant to the question of whether the presumption has been rebutted. These include:

(a) the extent to which the adviser has carried out work for the client on the transaction for which it has not received any remuneration;

(b) the closeness and length of the advisory or broking relationship;

(c) the formality of the relationship (including whether the adviser is named in the company's annual report and accounts);

(d) whether the company has any other nominated advisers;

(e) whether the adviser acts as both corporate finance adviser and broker or just in one such capacity;

(f) the nature of the services provided by the adviser to the client;

(g) the remuneration which the adviser derives from its role in terms of advisory and other fees and, in the case of a broker, commission income;

(h) the importance of the client to the adviser, including the size and prestige of the client; and

(i) where an adviser has stood down or has offered to stand down, the reasons for so doing.

20. The factors which may be relevant will vary from case to case and this list is not exhaustive or definitive but the Panel agrees that the points suggested are relevant and helpful. Furthermore, the Panel rejects the suggestion of UBS that presumption (5) does not apply or is rebutted if it is clear that the investment bank concerned is not involved in the transaction either as a party or as an adviser to a party to the transaction. The wording of this presumption is wider than this. Logically, there is no reason why a person who has never advised on the transaction should not also be and remain within the presumption if the facts show that its wording applies to that person.

21. The Panel agrees with the general approach of the Executive to the question of whether or not the presumption is rebutted in this case. However, as will be seen below, the Panel takes on the particular facts of this case a different view and comes to a different conclusion as to whether or not UBS's exempt market-maker is to be presumed to be connected to British Land for the purposes of the offer.

The facts

22. The Panel had the benefit of detailed submissions both in writing and orally about the relationship between British Land and UBS. There is no material dispute about the facts. The question is whether, on balance, they rebut presumption (5}.

23. UBS is British Land's sole corporate broker and is named as such in British Land's last annual report and accounts. It has a long-standing relationship with British Land and maintains a regular dialogue with its management when consulted on a range of standard corporate broking matters. It provides ad hoc unpaid advice on specific issues and from time to time may work on potential advisory or capital market assignments some of which evolve into fee-paying mandates. UBS provided advice to British Land in connection with a dissident shareholder in 2002 and received a capital market commission on a securitisation and equity brokerage commission on a share buy back in 2003.

24. On 23 January 2004, British Land sought advice from UBS on a possible equity participation in a possible bid for Canary Wharf led by Mr. Paul Reichmann and on financing the proposed bid vehicle. UBS worked on this proposal for four days, but it came to nothing. British Land then asked UBS to arrange an introduction to Brascan, and UBS accordingly put British Land in touch with Brascan's financial adviser, Merrill Lynch, though it played no part in the discussions which followed.

25. British Land subsequently advised UBS that it was engaged in discussions with the Songbird consortium, but indicated that advice on this was not required from UBS. UBS only learned from the public announcement on 19 March that British Land had formally joined the Songbird consortium.

26. As UBS stressed, it is not and never has been advising British Land in connection with the Songbird bid or otherwise in connection with any proposal which is relevant and has no arrangements to do so. As corporate broker, UBS has a limited role. It pointed out that British Land has never paid a retainer fee specifically for UBS's services as corporate broker and British Land receives corporate advice on transactions from a number of different financial advisers. British Land is capable of using its own in-house resources on sizeable property transactions without recourse to external corporate advisers (and is doing so in relation to its involvement in Songbird). It has used other investment banks in

the last 20 or so months as much as it has used UBS. UBS has not received any advisory fees from British Land since 2002.

27. UBS's relationship with British Land has, like many other relationships between investment banks and their clients, evolved over time and although long-standing and close is neither exclusive nor permanent.

28. If the shares held by UBS's exempt market-makers were to be assented in a way designed to please British Land but otherwise contrary to the interests of UBS and its investment clients, it would be putting at risk the reputation of UBS's market-makers as well the advantages of the exemption enjoyed by UBS.

29. The shares held by UBS which we understand now amount to about 7.7% of Canary Wharfs issued share capital were for the most part acquired before UBS was aware that British Land had become involved in the Songbird consortium, and there is no suggestion that British Land have been involved directly or indirectly in any dealings by UBS in Canary Wharf's shares during the offer period. Nor that UBS's dealings with any of those shares have been or will be influenced by British Land or by UBS's relationship or hope of a relationship with British Land.

Conclusion

30. Although not specifically relevant to its decision in the current case, the Panel recognises that the Code Committee may wish to review issues raised by the evolution of market-making activities in relation to relevant provisions of the Code.

31. The Panel, on the evidence before it, concluded that, on balance, the facts are sufficiently compelling to rebut the presumption that would otherwise apply and that UBS is not acting in concert with British Land and accordingly UBS's market-makers should not be regarded as connected for the purposes of Rule 38.

32. The appeal is accordingly allowed.

23 April 2004