THE TAKEOVER PANEL

ALEXANDERS HOLDINGS PLC
(re-named Quays Group PLC)

ORB ESTATES PLC

MR GUY THOMAS

MR NICK GREENWOOD

MR DAVID BARTON

DECISION OF THE PANEL

Introduction

1. This appeal arises from the proposed acquisition by Alexanders Holdings PLC (re-named Quays Group PLC) ("Alexanders") of certain subsidiaries of Orb Estates PLC ("Orb Estates") as a result of which shares will be issued to Orb Estates amounting to approximately 75.1% of the enlarged share capital of Alexanders. The subsidiaries to be acquired by Alexanders (the "Poole Interests") own certain properties located on the quayside of Poole Harbour, Dorset.

2. The appeal is concerned primarily with the question as to whether the Panel should grant a waiver, subject to a vote of the independent shareholders of Alexanders, of the obligation for Orb Estates to make a general offer to the remaining shareholders in Alexanders under Rule 9 of the Code which would otherwise arise as a result of the proposed issue of shares to Orb Estates.

3. Alexanders announced on 30 January 2002 that it had signed a conditional agreement for the purchase of certain properties in the course of development at the quayside of Poole Harbour, Dorset. As the transaction was to involve a reverse takeover under the AiM rules, Alexanders' shares were suspended from trading on AiM on that date.

4. On 4 July, Alexanders issued a circular to its shareholders seeking, among other matters, approval for the acquisition of the Poole Interests from Orb Estates, approval for the issue of shares to Orb Estates as consideration for that acquisition and approval of the waiver given by the Executive of the obligation under Rule 9 that would otherwise arise for Orb Estates to make a general offer for Alexanders. The suspension of Alexanders shares from trading on AiM was lifted on 8 July.

5. Following the issue of the Alexanders circular, the Executive was contacted by Mr Guy Thomas, a shareholder in Alexanders, who raised a number of issues in connection with the transaction. As a result, the Executive contacted Alexanders and its financial adviser, Corporate Synergy PLC ("Corporate Synergy"), in order to investigate the issues raised.

6. As a result of its investigation into the issues raised by Mr Thomas, the Executive became aware of certain connections between Corporate Synergy and Orb Estates (being, principally, that Corporate Synergy had recently acted as adviser to Orb Estates in connection with another transaction). The Executive therefore concluded that Corporate Synergy was not sufficiently independent from Orb Estates (for the purposes of Rule 3.3 and paragraph 4(a) of Appendix 1 to the Code) to provide independent advice to the Alexanders board.

7. The Executive therefore ruled that Corporate Synergy must step down as the Rule 3 adviser to Alexanders for the purposes of the transaction and that, if the transaction was to proceed, an independent adviser must be appointed and a further circular sent to Alexanders shareholders. Daniel Stewart & Company Plc ("Daniel Stewart") was then appointed as Rule 3 adviser in place of Corporate Synergy.

8. As a consequence of this development, the annual general meeting of Alexanders shareholders convened for 30 July to consider, among other matters, the Orb Estates transaction was duly adjourned.

9. On 1 August, Alexanders issued a supplemental circular to its shareholders in connection with the Orb Estates transaction. This circular included the advice of Daniel Stewart, as the new Rule 3 adviser, that the transaction and the waiver of Rule 9 are in the best interests of Alexanders and its shareholders as a whole.

10. In addition, the supplemental circular also informed shareholders that:

- due to his appointment to the board of Newport Holdings PLC on 4 July as a representative of Orb Estates, Mr Sinclair (one of the directors of Alexanders) was not considered by the Executive to be independent for the purposes of this transaction and would therefore no longer form part of the Alexanders board's recommendation of the transaction to shareholders;

- Sunneynook Limited ("Sunneynook"), a significant shareholder in Alexanders, would be disenfranchised from voting on the Alexanders shareholder resolution to approve the waiver of Rule 9 as a result of certain connections between Sunneynook and Lynch Talbot Limited ("Lynch Talbot"), the ultimate controller of Orb Estates; and

- an agreement entered into between Mr Roger Humm, one of the directors of Alexanders, and Gateside Holdings Limited ("Gateside"), under which Mr Humm had agreed to sell his Alexanders shares to Gateside, had been cancelled.

11. The supplemental circular otherwise confirmed that the Executive had agreed to waive the requirement which would otherwise arise under Rule 9 of the Code for Orb Estates to make a general offer to Alexanders shareholders as a result of the issue to it of shares under the transaction, subject to a vote of independent Alexanders shareholders.

12. The annual general meeting which would consider the resolutions to approve the whitewash transaction was reconvened for 16 August, 15 days after the supplemental circular was issued. In the meantime, Mr Thomas lodged an appeal with the Panel which was heard on 15 August. In order for the position to be clarified before the reconvened annual general meeting, the Panel announced its decision shortly after the hearing on 15 August and now gives its detailed reasons.

Appeal by Guy Thomas

13. Mr Thomas initiated the appeal but has since been joined as an appellant by Mr Nicholas Greenwood and Mr David Barton, both of whom are shareholders in Alexanders. Mr Greenwood and Mr Barton associate themselves with the arguments described below as those of Mr Thomas. In addition, another shareholder (Mr Michael Griffiths) wrote a letter of support and Mr Thomas explained that he had spoken to numerous shareholders "none of whom had a good word to say about the transaction" .

Mr Thomas contends as follows:

- Sunneynook's acquisition of shares in Alexanders should be considered to be a disqualifying transaction in relation to the Poole Interests transaction and, as a result, the Panel should not be prepared to grant a waiver of Rule 9 in connection with the issue of Alexanders shares to Orb Estates;

- the agreement between Mr Humm and Gateside under which Gateside agreed to acquire Mr Humm's Alexanders shares should also be considered to be a disqualifying transaction and that this should continue to be the case notwithstanding that the agreement had since been cancelled; and

- the Panel should not be prepared to grant a waiver of Rule 9 in connection with the issue of Alexanders shares to Orb Estates without knowledge of the ultimate beneficial ownership of Orb Estates.

14. The decision for the Panel is whether, on the basis of the evidence presented to it in relation to the three grounds of Mr Thomas' appeal, this is a case in which a waiver of the Rule 9 obligation should be refused. The Panel will also deal with Mr Thomas' alternative suggestions that Craigen Estates Overseas Limited ("Craigen") and Mr Humm should be prevented from voting on the transaction. The facts are somewhat complex and, exceptionally, are therefore set out in some detail, mindful that Mr Thomas invited the Panel to see the picture as a whole.

Terminology

15. A waiver by the Panel of the obligation to make a general offer under Rule 9 which would otherwise arise where, as a result of the issue of new securities as consideration for an acquisition, a person or group of persons acting in concert acquires shares that would normally give rise to such an obligation is known as a "whitewash" or a "Rule 9 whitewash", and the transaction itself is commonly referred to as a "whitewash transaction".

16. In applying the Code to a whitewash transaction, references to the "offeror" in a particular Rule should be taken to be references to the potential controlling shareholder or shareholders (in this case, Orb Estates). References to the "offeree company" should be taken to be references to the company issuing the new securities and in which the potential controlling position may arise (in this case, Alexanders).

Factual background

(a) Alexanders

17. In 1998, Alexanders began disposing of its business and assets and has effectively been a cash shell since May 2000.

18. The principal shareholder in Alexanders at this time was Mrs Aleksandra Clayton who held shares representing approximately 68% of the Alexanders voting share capital.

19. In October 2000, Mrs Clayton sold shares representing approximately 41% of the voting share capital of Alexanders to Craigen at a price of 30 pence per share. Craigen immediately placed approximately 11% of the shares with independent placees, leaving it with a holding of 11,863,409 shares, representing approximately 29.9% of the voting share capital of Alexanders at the time. The Executive was consulted in relation to this transaction at the time and confirmed that it would not trigger a Rule 9 obligation on Craigen.

20. A new management team was also appointed to the Alexanders board at this time alongside the continuing directors, Mrs Clayton and Mr Humm (who both became non-executive directors). The additional directors appointed were Mr Charles Helvert, Mr Stephen Sinclair and Mr Jacques Delacave.

21. Since October 2000, Alexanders has been looking for opportunities to use its cash to acquire investments and the new management team was appointed to assist in this repositioning of the company.

22. On 31 May 2001, Mrs Clayton resigned as a director of Alexanders and, having been listed on the London Stock Exchange until 5 June 2001, the ordinary shares of Alexanders were admitted to AiM on 6 June 2001.

23. Prior to that, on 21 May 2001, Mrs Clayton had entered into put option agreements with Sunneynook under which Mrs Clayton acquired the option to put an aggregate of 10,720,446 ordinary shares in Alexanders on Sunneynook at a price of 30 pence per share at any time between the date falling six months after the admission of Alexanders to AiM (i.e. 7 December 2001) and the date falling 12 months after admission (i.e. 6 June 2002). Under the terms of the put option agreements, whenever the options were exercised the shares and purchase consideration would both be transferred into an escrow arrangement to be released after the end of the option period. Sunneynook's payment obligations under the put options were guaranteed by Lynch Talbot.

24. On 7 December 2001, Mrs Clayton exercised her rights to put shares on Sunneynook under the terms of the put options and those shares were accordingly sold to Sunneynook on 27 June 2002 (following the end of the escrow period).

(b) Alexanders directors

25. The current directors of Alexanders are: Mr Helvert who is Chairman, Mr Humm, Mr Delacave and Mr Sinclair. Of these, only Mr Humm owns any shares in Alexanders.

26. Mr Helvert, Mr Delacave and Mr Sinclair were all appointed to the board of Alexanders on 2 October 2000 in the circumstances described in paragraph 20 above and the announcement made at the time stated that all three were nominees of Craigen.

Mr Humm

27. Mr Humm owns 1,342,656 ordinary shares in Alexanders, representing approximately 3.2% of the issued voting share capital and has given an irrevocable undertaking to vote in favour of the resolution to approve the Orb Estates transaction at the relevant shareholders' meeting.

Mr Helvert

28. Mr Helvert is also a director of Orb Estates and of several of the subsidiaries being acquired by Alexanders. As a result of his connection with Orb Estates, Mr Helvert is not considered independent for the purposes of recommending the acquisition of the Poole Interests to Alexanders shareholders and abstained from voting at the Alexanders board meetings which approved the transaction.

Mr Delacave

29. Mr Delacave was, between October 1998 and October 2000, a director of Orb Estates. Mr Delacave resigned from the Orb Estates board on 31 October 2000.

Mr Sinclair

30. Following the current transaction, Mr Sinclair will remain responsible for the financial reporting of the Alexanders group. As mentioned above, Mr Sinclair also represents Orb Estates on the board of Newport Holdings PLC. Consequently, he is not considered independent for the purposes of the transaction.

(c) Principal Alexanders shareholders

31. The relevant principal shareholders of Alexanders and their current respective interests in the company's voting share capital are as follows:

- Craigen – 28.6%
- Sunneynook – 25.8%
- Mr Humm – 3.2%

32. If the proposed transaction with Orb Estates is completed, the relevant principal shareholders of Alexanders and their respective interests in the company's voting share capital will be as follows:

- Orb Estates – 75.1%
- Craigen – 7.2%
- Sunneynook – 6.4%
- Mr Humm – 0.8%

(d) Lynch Talbot, Euro & UK Property Limited, Mr Sam Nolan and Mr Salai Ozturk

33. The ultimate parent company of Orb Estates is Euro & UK Property Limited ("Euro & UK"), a company registered in the British Virgin Islands. Euro & UK has two classes of share capital: ordinary shares which only carry voting rights, but no rights to income or capital; and preference shares which carry the right to income and, on a winding up, capital from Euro & UK, but no voting rights.

34. The ordinary shares in Euro & UK are wholly-owned by Lynch Talbot. Lynch Talbot is a company registered in Jersey. Lynch Talbot administers a number of properties and general investment companies, including Euro & UK. Lynch Talbot receives a management fee for its services.

35. The preference shares in Euro & UK are held by a number of high net worth individuals who are investment clients of Lynch Talbot. Investment clients of Lynch Talbot provide capital which is invested by Lynch Talbot as it sees fit. Such investment clients receive a return according to any increase in value in the investment, but do not control that investment. In the case of Euro & UK, such investment clients have invested through the preference shares issued in that company.

36. Lynch Talbot is owned and managed by two individuals, Mr Sam Nolan and Mr Salai Ozturk. Mr Nolan set up a corporate trust business that was ultimately acquired by the Cater Allen Group in 1994 and he was a director of Cater Allen Trust Company Limited, part of the Abbey National group, until he joined Lynch Talbot in June 1999. Mr Ozturk left British Government service in 1962 to go into business on his own account. He is a British and Turkish national who has had a wide range of business interests.

Provisions of the Takeover Code relevant to whitewash transactions

37. Rule 9 of the Code, the whitewash procedure and the reasons for their inclusion in the Code are relevant in order to understand fully the first two of Mr Thomas' grounds for appeal.

(a) Rule 9 – the mandatory offer

38. Rule 9 of the Code, which derives from General Principle 10, provides that where control of a company is acquired, or consolidated, by a person or group of persons acting in concert, a general offer to all shareholders is normally required. "Control" for Code purposes means a holding of 30% or more of the voting rights of the company.

39. Rule 9.1 provides that:

"Except with the consent of the Panel, when:-

(a) any person acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company; or

(b) any person who, together with persons acting in concert with him, holds not less than 30% but not more than 50% of the voting rights and such person, or any person acting in concert with him, acquires additional shares

which increase his percentage of the voting rights,

such person shall extend offers, on the basis set out in Rules 9.3, 9.4 and 9.5, to the holders of any class of equity share capital whether voting or non-voting and also to the holders of any class of voting non-equity share capital in which such person or persons acting in concert with him hold shares. Offers for different classes of equity share capital must be comparable; the Panel should be consulted in advance in such cases."

(b) Whitewashes

40. The Code recognises, however, that, in circumstances where a person acquires control of a company as a result (among other matters) of a transaction involving the issue to him of new shares, it may not always be appropriate to require that person to make a general offer to the remaining shareholders, notwithstanding the provisions of Rule 9.

Note 1 on the Dispensations from Rule 9 provides that:

> "*When the issue of new securities as consideration for an acquisition would otherwise result in an obligation to make a general offer under this Rule, the Panel will normally waive the obligation if there is an independent vote at a shareholders' meeting.*
>
> …
>
> *The appropriate provisions of the Code apply to whitewash proposals. Full details of the potential shareholding must be disclosed in the document sent to shareholders relating to the issue of the new securities, which must also include competent independent advice on the proposals the shareholders are being asked to approve, together with a statement that the Panel has agreed to waive any consequent obligation under this Rule to make a general offer. The resolution must be made the subject of a poll. The Panel must be consulted and a proof document submitted at an early stage*."

41. The Code therefore provides, through the whitewash procedure, a mechanism whereby, subject to certain safeguards, shareholders of the company that are independent of the party acquiring control may weigh in the balance the commercial merits of a transaction being proposed, on the one hand, and the ceding of control (in Code terms) of the company to the new controller, on the other. In these cases, the Panel will normally grant a waiver of the requirements of Rule 9 subject to the safeguards set out in Appendix 1 to the Code, including (among other matters):

"…

(d) approval of the proposals by an independent vote, on a poll, at a meeting of the holders of any relevant class of securities, whether or not any such meeting needs to be convened to approve the issue of the securities in question; and

(e) disenfranchisement of the person or group seeking the waiver and of any other non-independent party at any such meeting."

(c) Disqualifying transactions

42. A further safeguard in a proposed whitewash transaction is that there must have been no "disqualifying transactions" in the previous 12 months. This requirement is set out in detail in paragraph 3 of Appendix 1 to the Code which provides that:

"Notwithstanding the fact that the issue of new securities is made conditional upon the prior approval of a majority of the shareholders independent of the transaction at a general meeting of the company:-

(a) the Panel will not normally waive an obligation under Rule 9 if the person to whom the new securities are to be issued or any person acting in concert with him has purchased shares in the company in the 12 months prior to the posting to shareholders of the circular relating to the proposals but subsequent to negotiations, discussions or the

reaching of understandings or agreements with the directors of the company in relation to the proposed issue of new securities;

(b) a waiver will be invalidated if any purchases are made in the period between the posting of the circular to shareholders and the shareholders' meeting."

43. The rationale behind the introduction of this provision is General Principle 1 of the Code which states that:

"All shareholders of the same class of an offeree company must be treated similarly by an offeror."

44. It is an important constituent element of a disqualifying transaction, however, that an offeror should not be penalised for having made an acquisition of shares at a time when the proposed transaction which will give him control was not in contemplation. It is only where the whitewash transaction and the purchase of offeree company shares can be regarded in some way as part of the same overall transaction that there can be General Principle 1 concerns.

Application of the disqualifying transaction provisions to Mr Thomas' grounds for appeal

45. We now turn to the issues raised by Mr Thomas.

(a) The Sunneynook acquisition

Background

46. Sunneynook is a company registered in the British Virgin Islands. It is owned by a Turkish national named Mr Osman Akatte.

47. Sunneynook owns 10,720,446 ordinary shares in Alexanders. It acquired those shares on 27 June 2002 pursuant to the terms of put option agreements

entered into with Mrs Clayton on 21 May 2001 in the circumstances described in paragraphs 23 and 24 above.

48. Sunneynook's payment obligations under the put option agreements were guaranteed by Lynch Talbot, which ultimately controls Orb Estates. The Executive therefore concluded that Sunneynook could not be considered to be independent for the purposes of the shareholder vote to approve the waiver of the Rule 9 obligation.

49. The guarantee by Lynch Talbot also raised the issue of whether Sunneynook and Orb Estates should be deemed to be acting in concert. If Sunneynook was deemed to be acting in concert with Orb Estates, an acquisition of shares by Sunneynook would potentially be a disqualifying transaction in relation to the whitewash. The Panel concluded that the acquisition of shares by Sunneynook pursuant to the terms of the put option agreements should not be regarded as a disqualifying transaction. The reasons for the Panel's conclusion are set out below, but concern the nature and timing of the arrangements which led to Sunneynook's acquisition of shares, rather than the relationship of the acquirer with Orb Estates.

50. Mr Thomas referred to the first paragraph of Note 10 (now re-numbered as Note 11 following the issue on 4 July by the Code Committee of Response Statement 9 which inserted a new Note 5) on Rule 9.1 in support of his argument that the relevant time to test whether a disqualifying transaction occurs when shares are acquired as a result of a put option is the date of the actual acquisition of those shares.

51. Note 11 provides:

> *"In general, the acquisition of convertible securities, warrants or options does not give rise to an obligation under this Rule to make a general offer but the exercise of any conversion or subscription rights or options will be considered to be an acquisition of shares for the purpose of the Rule."*

52. The Executive did not accept Mr Thomas' argument. It suggested that Note 11 is concerned with determining where, in fact, actual control of offeree company shares lies and who controls those shares for the purposes of triggering an obligation to make a general offer under Rule 9. Where shares are under option, the option-holder normally does not control those shares and, therefore, should not be considered to do so until such time as he in fact acquires them when the option is exercised. This is made clear by the next paragraph of Note 11 which provides that:

> *"The taking of an option will, however, normally be regarded as constituting the acquisition of shares giving rise to such an obligation where the relationship and arrangements between the two parties concerned are such that effective control over those shares has passed to the taker of the option."*

53. The purpose of Note 11 is therefore, according to the Executive, very different from the rationale behind disqualifying transactions, where the key issue to determine in Code terms is whether the offeror took steps to acquire shares in the offeree company (and therefore to treat shareholders unequally) at a time when it had commenced negotiations with the offeree company board in relation to the whitewash transaction, such that there was a reasonable likelihood that the transaction would proceed. The Executive therefore considers that Note 11 is not relevant to the issue of whether the Sunneynook acquisition was a disqualifying transaction.

54. The Executive has considered the exercise of put options in this context before and has concluded that, since the timing of the exercise of the put is in the control of the shareholder putting the shares and not in the control of the recipient of the shares, the date on which the put is exercised is not relevant for the purposes of determining whether the acquisition is a disqualifying transaction. Instead, the relevant date for determining whether the constituent elements of a disqualifying transaction are met is the date on which the put option agreement is entered into - i.e. 21 May 2001 in this case. It is when the

put option is entered into that the acquirer incurs the potential obligation to acquire the shares, and therefore at that time that equal treatment of the shareholders as a whole under General Principle 1 should be considered.

55. The Panel agrees with the Executive on this point.

Application of the Executive's interpretation to the Sunneynook acquisition

56. The current transaction between Orb Estates and Alexanders was first considered by Orb Estates in November or December of 2001, and was first discussed with the Alexanders board in December 2001. An initial agreement in relation to the transaction was entered into on 30 January 2002. That agreement was replaced by an agreement dated 31 March and subsequently by the final agreement dated 4 July.

57. Given that the put option agreements were entered into on 21 May 2001 and the original Alexanders circular to shareholders was posted on 4 July 2002, the Panel considers that the Sunneynook acquisition should not be regarded as a disqualifying transaction for Code purposes for two reasons:

- first, the put option agreements were entered into more than 12 months before the date of the original Alexanders shareholder circular; and

- secondly, entering into the put option agreements pre-dated by some months the negotiations, discussions or the reaching of understandings or agreements with the directors of Alexanders in relation to the proposed issue of new securities to Orb Estates.

(b) The Humm/Gateside transaction

Background

58. Mr Humm has been a director of Alexanders since 1992, being vice chairman and chief executive between 1992 and 2000 and becoming a non-executive director in October 2000. After the company had restructured itself and became a cash shell, Mr Humm remained a director in order to see through the development of the company.

59. As mentioned above, Mr Humm owns 1,342,656 ordinary shares in Alexanders, representing approximately 3.2% of the issued voting share capital and has given an irrevocable undertaking to vote in favour of the resolution to approve the Orb Estates transaction at the relevant shareholders' meeting.

60. The Panel was informed that, shortly before the first Alexanders circular was posted to shareholders, Mr Humm made the board aware of his desire to sell his stake, though he wished to remain a director of this company after the transaction. As a result, Gateside was introduced to Mr Humm as a purchaser via Mr Helvert and Mr Ozturk (one of the co-owners of Lynch Talbot) and an agreement was entered into on 3 July, the day before the date of the circular, under which Gateside agreed to acquire Mr Humm's shares conditionally upon the approval of the Orb Estates transaction by Alexanders' shareholders for 30 pence per share.

61. Gateside is a company registered in the British Virgin Islands and is owned by an individual named Sven Olav Bracks, who is a Scandinavian resident and businessman.

62. The Panel was informed that Mr Humm did not consider the proposed purchase price of 30 pence per share to be unreasonable, even though the last trading price of an Alexanders share before trading of the shares on AiM was

suspended following announcement of the current transaction was 15.5 pence, because he was convinced of the attractiveness of the Orb Estates transaction. Mr Humm also did not consider that the identity of the purchaser of the shares should raise any issues as regards the proposed Orb Estates transaction.

63. Due to the fact that the Alexanders circular was due to be posted the following day, Alexanders and its financial adviser at the time, Corporate Synergy, concluded that the proposed Humm/Gateside transaction could be disclosed simply by the following statement in the circular:

> *"A third party has entered into an agreement with Mr Humm to purchase his entire ordinary share holding in the Company immediately following the Class Meetings."*

64. The Executive was not consulted about the Humm/Gateside agreement or this disclosure before the circular was posted, as it should have been.

Potential disqualifying transaction

65. The Executive has not to date been required to rule definitively on whether or not it considers Gateside to be acting in concert with Orb Estates as a result of the possible connection between Gateside and Lynch Talbot/Orb Estates. The position is not clear cut. However, the Executive adopted a cautious approach to the issue and informed Alexanders that, in its view, it was likely that Gateside was acting in concert with Lynch Talbot and, accordingly, Orb Estates. In the interests of progressing with the transaction and because of a desire to resolve the original issues raised speedily, the relevant parties to the transaction have accepted this decision.

66. Since Gateside has been treated as acting in concert with Orb Estates, an acquisition of Alexanders shares by Gateside would amount to a disqualifying transaction in the same way as if it had been made by Orb Estates itself.

67. Although Mr Humm has now agreed to the cancellation of the agreement with Gateside, and although the Panel understands that he would prefer to remain as a director of the company after the Orb Estates transaction, he has agreed that he will now resign as a director of Alexanders immediately prior to completion of the transaction so as not to be prevented from selling his shares for 12 months after the company's re-admission to AiM.

68. The Executive considered whether simply entering into the Humm/Gateside agreement should be considered to be a disqualifying transaction or whether, alternatively, the position could be remedied by terminating the agreement before the acquisition of the shares by Gateside.

69. The purpose of the provisions concerning disqualifying transactions is to ensure equality of treatment as between the shareholders of the company concerned so as not to allow some shareholders a cash exit from the company at the hands of the offeror while the remaining body of shareholders are not afforded such an option.

70. The Executive therefore considered that if the agreement to sell the shares was terminated, no shareholder would in fact be treated in any preferable way compared with the others and that accordingly it would not be offensive under General Principle 1. The Executive therefore ruled that if the agreement was terminated it would not be considered to be a disqualifying transaction. On the back of this ruling, the agreement was terminated and the Panel agrees that this is sufficient to remedy this point.

Continued independence of Mr Humm

71. It is suggested by Mr Thomas that, notwithstanding termination of the Humm/Gateside agreement, Mr Humm should no longer be considered as independent of Orb Estates either for the purposes of being entitled to vote his shares on the proposed transaction at the shareholders' meeting or of recommending the transaction to shareholders.

72. Given the unsatisfactory background (see above), it is not surprising that this point is made. However, the effect of termination of the Humm/Gateside agreement should be, for all purposes of the Code, to put the parties into the position they would have been in had the agreement not been entered into in the first place. Further, the Panel has seen written confirmations from the relevant parties (including Mr Humm himself) that Mr Humm is not connected with Orb Estates. Accordingly, the Panel does not consider that Mr Humm should be prevented from voting on the proposals or recommending the transaction to shareholders.

Effect of non-disclosure

73. Had the Executive been consulted in advance about the proposed Humm/Gateside transaction (as it should have been) and concluded that Gateside was in fact acting in concert with Orb Estates, it would not have permitted the Humm sale to be entered into. The result of the ruling on this issue is therefore the same as if the Executive had been properly consulted in advance.

No side agreements

74. In approving the termination of the Humm/Gateside agreement, the Executive was concerned to ensure that there were no other agreements or arrangements that existed as a result of which Mr Humm would subsequently be able to transfer his shares to Orb Estates (or any associate of Orb Estates) or would otherwise be compensated for being unable to sell his shares at this time or at the proposed price of 30 pence each. The Executive was also concerned that, even in the absence of such an agreement today, Mr Humm should not be able to sell his shares to Orb Estates (or any of its associates) in the 12 month period following the proposed transaction.

75. As a result, the supplemental circular contains the following statements:

> *"Following termination, there are no agreements, arrangements or understandings whereby any of the Ordinary Shares owned by Mr Humm will be transferred to any person, or otherwise existing between Mr Humm and any member of the Orb Group or associate of any such member (including Gateside Holdings Limited).*
>
> *Subject to shareholder approval of the Proposals and so that he can sell his Ordinary Shares, Mr Humm will resign as a director immediately prior to Admission. Mr Humm has agreed that he will inform the Panel, and obtain its prior approval, of any disposal of his shareholding within the twelve months immediately following Admission."*

76. The Executive has also received a letter from Mr Humm to the same effect.

77. Mr Thomas contends that in the event that Mr Humm does not comply with his undertakings to the Panel, the Panel will have no effective sanction against either Mr Humm or Orb Estates. In fact, the Panel, in such a case, will have the same sanctions as it always has when any party breaches the Code.

78. The Executive describes the cancellation of the Humm/Gateside agreement as a pragmatic solution which is in accordance with the principles and Rules of the Code. Mr Thomas contended that, as a result of this solution, no penalty attaches to a serious failure of disclosure. However, the Panel considers that to withhold its waiver of the requirements of Rule 9 (and therefore effectively deny independent shareholders the opportunity of considering the transaction at the shareholders' meeting) would be an inappropriate response in the circumstances.

Application of the Code to Mr Thomas' other grounds for appeal

79. Mr Thomas also appealed on the ground that the Panel should not grant a Rule 9 waiver as the identities of the ultimate beneficial owners of Orb Estates are not disclosed in the Alexanders circular and because of what he describes as a pattern of material non-disclosure and misstatement.

80. Mr Thomas suggests that the "proponents" of the current transaction must benefit in some way from the Orb Estates group and, as such, are not independent of Orb Estates for the purposes of the transaction. In particular, Mr Thomas has cited Craigen and Mr Delacave as parties who should be required to prove they have no interest in the Orb Estates group, although even then he would still question their independence of Orb Estates and their eligibility to vote on the acquisition of the Poole Interests.

Disclosure in the Alexanders circular

81. The original Alexanders circular discloses that the ultimate parent of Orb Estates is Euro & UK, which is registered in the British Virgin Islands and whose directors are Mr Sam Nolan and Mr Salai Ozturk. Only the ordinary shares in Euro & UK carry voting rights and these are owned by Lynch Talbot, a Jersey based company whose directors and shareholders are Mr Nolan and Mr Ozturk and their family trusts.

82. According to the Alexanders circular, a group of high net worth individuals have the right to income and, on a winding up, capital from Euro & UK through their ownership of the non-voting preference shares in that company.

Code issues relevant to this ground of appeal

83. A shareholder circular issued in connection with a whitewash transaction is required by the Code to contain certain information in relation to the identity of the offeror, so as to enable the offeree company's shareholders to reach a

properly informed decision as to the merits of the proposed transaction and the passing of control in the offeree company.

84. Specifically, in the present case where the offeror (Orb Estates) is not a company whose shares are admitted to the Official List or dealt in on AiM, Rule 24.2 provides as follows:

> *"Except with the consent of the Panel:-*
>
> …
>
> *(c)* … *the offer document* [i.e. in this context, the whitewash circular] *must contain:*
>
> …
>
> *(iii)* *in respect of any person … whose pre-existing interest in the offeror is such that he has a potential direct or indirect interest of 5% or more in any part of the capital of the offeree company which the Panel regards as equity capital, details of his identity and of his interest in the offeror and such further information as the Panel may require in the particular circumstances of the case (see Note 2);"*

Note 2(a) to Rule 24.2 goes on to provide that:

> *"(a) For the purpose of Rule 24.2(c), the expression "person" will normally include the ultimate owner(s), and persons having control (as defined), of the offeror … Whilst the precise nature of the further information which may be required to be disclosed … in any particular case will depend on the circumstances of that case, the Panel would normally expect it to include a general description of the business interests of the offeror and/or other person(s) concerned and details of those assets which the Panel considers may be relevant to the business of the offeree company."*

85. The question from a Code perspective is, therefore, whether there has been appropriate disclosure of the indirect interests in Orb Estates in the Alexanders circular and what consequences should flow if there has not been.

Application of Rule 24.2

86. The Panel's application of Rule 24.2(c) has developed over the years, in particular in recent years with the increase in the number of offers being made by venture capital businesses where control of the investments made by the venture capital business will rest with the fund manager, although the ultimate economic interest will be held for a number of (often passive) investors.

87. For the purposes of Rule 24.2, the key issue is what level of influence the underlying investors have, or would have, over decision-making processes in relation to the offer for, and the ongoing business of, the offeree company. In other words, whether a person has an indirect interest in the offeree for Rule 24.2(c)(iii) purposes will generally be judged by reference to levels of control. If an underlying investor does not have any degree of voting control over the corporate vehicle which acquires offeree shares pursuant to the offer, his interest will not generally be regarded as being relevant for disclosure.

88. In relation to capital that does not confer control, no more is generally required for the purposes of the additional information referred to in Note 2(a) to Rule 24.2, than a description in broad terms of the nature of the investors, for example "pension funds" or "insurance companies", and the identities of the investors do not need to be disclosed.

Application to the Alexanders circular

89. In the present case, ultimate control of Orb Estates is held by Lynch Talbot (through the voting, ordinary shares in Euro & UK) and its shareholders, Mr Nolan and Mr Ozturk. The identity of these persons is adequately disclosed in the circular.

90. We understand that (except for a holding by Mr Mitchell Higgins, a director of Orb Estates, of 211,368 Orb Estates shares, representing less than 1% of its capital) the only company in the Orb Estates ownership chain where any person may have an interest in capital which gives it an indirect interest in Orb Estates and accordingly in more than 5% of the equity capital of Alexanders, is Euro & UK. As stated in the circular:

> *"A group of high net worth individuals have the right to income and, on a winding up, capital from Euro & UK Property Limited through their ownership of preference shares in that company."*

91. Given that the preference shares in Euro & UK only carry economic rights and do not have any voting (and therefore any potential control) entitlement, it is consistent with its usual application of Rule 24.2(c) that the identities of the holders of those shares are not disclosed and that they are described in that way. The disclosure of the ownership of Orb Estates in the Alexanders circular is consistent with its usual practice in similar circumstances and that, since the holders of preference shares will not be entitled to exercise control over Alexanders, it is not necessary for Alexanders' shareholders to be informed of the identity of those shareholders.

Position of certain parties connected with Alexanders

92. The Executive was conscious however that failure to disclose the identity of the holders of the Euro & UK preference shares might lead to suggestions in the context of the present transaction that either Craigen or the directors of Alexanders are interested in those shares and therefore the Orb Estates group and, as such, should not be regarded as independent of Orb Estates and therefore should be unable to vote on the transaction.

93. The Executive therefore asked to be provided privately with details of the identities of the preference shareholders, but has been informed that because of confidentiality agreements between Lynch Talbot and those investors, their identities could not be revealed.

94. However, the Executive obtained and the Panel had before it written confirmation from Lynch Talbot that, to the best of Mr Nolan's knowledge and belief, no interest in any of the share capital of Euro & UK, Lynch Talbot or any member of the Orb Estates group is held by any of, among others:

- Craigen, its directors or Mr Robert Newman (the beneficial owner of Craigen) ;
- any of the directors of Alexanders;
- Sunneynook;
- Gateside; and
- Mrs Clayton.

95. The Panel also had before it written confirmations from Craigen, Mr Newman and each of the directors of Alexanders to the effect that they do not have, inter alia, any interest in Euro & UK, Lynch Talbot or any member of the Orb Estates group.

96. On the basis of the above confirmations, the Panel is satisfied that its consent to the waiver of the requirements of Rule 9 should still be given, notwithstanding that the identities of the preference shareholders in Euro & UK have not been disclosed. On the same basis, both Craigen and Mr Delacave have satisfied the Panel, on the evidence before it, that they can fairly be regarded as independent of Orb Estates for the purposes of the transaction.

97. On the general issue of non-disclosure and misstatement, there may well be questions which the Executive should address about the responsibility for these shortcomings but, having regard to the steps which have been taken to render the transaction Code compliant, including the issuance of the supplemental circular and the other steps recorded in it, the Panel believes it would be wrong to deprive Alexanders shareholders of an opportunity to consider the transaction on its merits.

Conclusion

98. The original Alexanders circular was deficient in Code terms in a number of respects.

99. However, the Executive has taken steps to investigate the issues raised with it and to ensure that these deficiencies have been remedied. The Panel is satisfied, on the basis of the information and arrangements set out in the supplemental circular and of the facts as it understands them, that the transaction now complies with the Code.

100. It should be emphasised that the Code is not concerned with the financial or commercial advantages or disadvantages of a transaction, which are matters for the company concerned and its shareholders. Provided that a transaction is in compliance with the Code, the Panel should not seek to prohibit (or otherwise impose constraints upon) the transaction merely because certain elements of the transaction were previously deficient in Code terms. To do so would operate to deprive the shareholders of the company of the opportunity to consider the transaction on its commercial merits.

101. In relation to the specific grounds of appeal in this case:

- the acquisition of shares in Alexanders by Sunneynook is not a disqualifying transaction for the purposes of the Code;

- the agreement entered into between Mr Humm and Gateside is not a disqualifying transaction for the purposes of the Code as it has since been cancelled;

- the absence of full information as to the beneficial ownership of the non-voting preference shares in Euro & UK does not prevent a waiver of the requirements of Rule 9 in this case; and

- neither Craigen nor Mr Humm should be prevented from voting on the transaction.

102. Accordingly, the appeal should be dismissed.

19 August 2002