

TAKEOVERS AND MERGERS PANEL

PANEL DECISION

RE: CLP HOLDINGS LIMITED (“CLP”)

In relation to an application for review of a ruling by the Executive concerning the application of Rule 32.1 of the Takeovers Code to on-market share repurchases

1. The Panel met on Thursday 11 December 2003 to consider an application under Section 9.1 of the Introduction to the Takeovers Code (“**Code**”) by CLP for a review of a ruling by the Executive in relation to the application of Rule 32.1 of the Code to the share repurchase programme operated by CLP.

Salient facts

2. The Kadoorie family and its concert parties (the “**Kadoorie family**”) held a shareholding interest in CLP of between 30% and 35% on 19 October 2001. Under the transitional provisions of Rule 26.6 of the Code, a mandatory bid threshold of 35% applies to it. The Kadoorie family currently holds a 34.84% interest in CLP.
3. Since May 1998, CLP has operated an on-market share repurchase programme. Share repurchases by CLP pursuant to this programme cause the Kadoorie family’s proportionate interest in the voting rights of CLP to increase, and such increase is treated as an acquisition of voting rights for purposes of the Code, pursuant to Rule 32.1 of the Code. At this stage, a share repurchase of 11 million shares would cause the Kadoorie family to cross the 35% threshold and hence incur an obligation to make a mandatory general offer under Rules 26.1 and 26.6 of the Code.
4. On 28 October 2003, Somerley Limited (“**Somerley**”), financial adviser to CLP, applied to the Executive for a ruling that the present wording of Rule 32.1 of the Code does not preclude a whitewash waiver application covering *on-market* share repurchases. Rule 32.1 of the Code provides that:

“If as a result of a share repurchase a shareholder’s proportionate interest in the voting rights of the repurchasing company increases, such increase will be treated as an acquisition of voting rights for purposes of the Takeovers Code. As a result, a shareholder, or group of shareholders acting in concert, could obtain or consolidate control of a repurchasing company and thereby become obliged to make a mandatory offer in accordance with Rule 26. If so, the Executive should

*be consulted at the earliest opportunity. In the case of a **share repurchase by general offer or an off-market share repurchase**, as such terms are defined in the Codes, the Executive will treat an application for a waiver from the requirement to make a mandatory offer in accordance with Rule 26 as if it were an application for a whitewash waiver in accordance with Note 1 on dispensations from Rule 26...” (emphasis added)*

Ruling by the Executive

5. In a letter dated 6 November 2003 to Somerley, the Executive ruled that it was satisfied that Rule 32.1 did not enable a whitewash mechanism to be used to waive general offer obligations triggered by on-market share repurchases.
6. On 17 November 2003, Somerley/CLP applied to the Panel under Section 9 of the Introduction to the Code for a review of the Executive’s ruling. The review was requested on two bases:
 - (a) Rule 32 of the Code should be interpreted to permit whitewash applications triggered by on-market repurchases; and further
 - (b) alternatively, the Panel should consider that, in accordance with Section 2.1 of the Introduction to the Code concerning the spirit of the Code, a strict application of Rule 32, if it is construed to disallow whitewash applications following on-market repurchases, would be inappropriate having regard to the merits of this particular case and the legitimate interests of CLP and all its shareholders.

Section 2.1 provides that:

“...the spirit of the Rules [of the Code] must be observed as well as their letter and the Executive and the Panel may each modify or relax the application of a Rule if it considers that, in the particular circumstances of the case, strict application of a Rule would operate in an unnecessarily restrictive or unduly burdensome, or otherwise inappropriate, manner.”

Panel Decision

7. The Panel carefully considered the written and oral representations before it.
8. The first issue for the Panel to decide was the interpretation of Rule 32.1. In that regard, the Panel concluded that Rule 32.1 should not be interpreted so as to permit whitewash applications in respect of mandatory bid obligations triggered by on-market share repurchases. The Panel believes that this is clear from the wording of the Rule itself in that only two specific dispensations from Rule 26, involving two specific types of share repurchases, namely share repurchases by general offer and off-market share repurchases, are explicitly referred to in the Rule; and the Panel is satisfied that this was deliberate. The Panel is clear that on-market share repurchases

are a third type of share repurchase, specifically defined in the Code, which are sufficiently distinct from share repurchases by general offer and off-market share repurchases that they cannot be regarded as falling within either of these dispensations.

9. The second issue which the Panel was asked to decide was whether, having concluded as it did in relation to the precise interpretation of Rule 32.1, it should exercise its discretion under Section 2.1 of the Introduction to the Code in the particular circumstances of this case so as to allow a whitewash application to proceed (and with what conditions attached). In that regard, the Panel concluded that the particular circumstances in this case did not justify the exercise of any discretion which the Panel may have to modify or relax the application of Rule 32.1. In reaching that conclusion, the Panel was mindful of the fact that its discretion under Section 2.1 to modify or relax the application of a particular Rule was to be exercised by reference to particular circumstances in specific cases and was not intended to be used to bring about more generally applicable changes to the Code; such changes should only be effected through the normal review and consultation process.
10. The Panel therefore affirmed the ruling of the Executive with regard to this matter.

Dated 17 December 2003