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IN THE COMPETITION

Case No. 1075/4/8/07

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

17 January 2007

Before:
SIR CHRISTOPHER BELLAMY
(President)
LORD CARLILE QC
PROFESSOR ANDREW BAIN OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) STERICYCLE INTERNATIONAL LLC
(2) STERICYCLE INTERNATIONAL LIMITED

Applicants

and

COMPETITION COMMISSION

Respondent

Mr. George Peretz (instructed by DLA Piper Rudnick Gray Carey) appeared for the Applicant.

Mr. Ben Rayment (instructed by the Treasury Solicitor) appeared for the Respondent.

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HEARING

APPLICATION FOR STAY

1 THE PRESIDENT: Good morning ladies and gentlemen. Could I say first of all that although I am
2 chairing this case management conference today, as you know the President is shortly retiring
3 and Lord Carlile will take over the chairmanship of this Appeal hereafter. We thought,
4 however, it would be useful to convene this case management conference because a number of
5 procedural issues arise that have wider implications going beyond this case for the way the
6 merger regime under the Enterprise Act works in the circumstances before us today.

7 We have, I think, formally speaking in front of us what is *de facto* an application by Stericycle
8 for a stay and *de facto* not without hesitation a letter from the CC saying that they do not object
9 to that.

10 The Tribunal for its part is somewhat uncomfortable about the situation that thereby arises and
11 would like to explore with the parties how we deal with the matter. Our general starting point
12 is that although we have no reason to believe that things are not proceeding according to plan
13 or that parties are not proceeding in good faith, experience suggests that things can go wrong
14 and that if the various proposals that are under discussion at the moment did not proceed and
15 the Appeal was later effective we are concerned if a great deal of time had then been lost.

16 When I have finished my opening remarks we probably need the parties to write down for us
17 two pieces of information – two dates – that we need. There is a process for divestiture which
18 assumes two periods, one is called the “initial period” and another is a “final date” by which
19 completion is supposed to take place; I think we need to know what those dates are but we will
20 obviously not mention them as long as we are in open court.

21 However, if we had not covered the preliminary ground in this Appeal before the date by
22 which this matter was supposed to be completed by way of a voluntary divestiture, and we
23 were then to restart the clock for the Defence and for interventions, there could be a very
24 considerable slippage in the timetable, bearing in mind that this report was signed-off on
25 8th December. One could imagine the situation in which it would be perhaps the late Spring
26 before the Appeal was effectively being heard in a certain combination of circumstances which
27 we feel one should guard against. On the other hand, there is obviously the consideration that
28 one should not necessarily run up costs to no effect; one should try to manage these kinds of
29 proceedings in a proportionate and sensible way.

30 Against that background what we are minded to do is to set today a provisional date for this
31 appeal, and this is on the basis that there is an appeal to be heard and that, as I say, is a rather
32 pessimistic basis – it may never need to be heard. The provisional date we have in mind would
33 be 21st March. That would enable this Appeal to be dealt with broadly speaking within the
34 Tribunal’s original timetable and slightly three months from the date of the report. I am just
35 expressing at the moment a provisional view which is, of course, open to discussion. That

1 would allow us to work back from that and in the event that the matter was effective that
2 would mean – provisionally at least – that the Applicants would need to put in a skeleton
3 argument by Wednesday 14th March, to which the Competition Commission would probably
4 need to reply by Monday, 19th March, shortly before the hearing.

5 The two other aspects to the procedure that are relevant here are: first, (and principally) the
6 time for the Defence; and secondly, the time for interventions. In terms of the latter – taking
7 the latter first because it is the easier one – the relevant Notice under Rule 15 has already been
8 published on the Tribunal website, so the time for interventions is running and will expire on
9 1st February. Our present view is that we should simply allow that time to continue to run and
10 see whether we get any interventions or not by 1st February.

11 In terms of the Competition Commission’s Defence, I think the formal position under the
12 Rules is that it should be served by 6th February, which would be following the Rules to the
13 letter. We have given to consideration to what are basically the two possibilities, namely: (i)
14 that we simply extend the time generally for the Defence and see what happens; or (ii) we put
15 in place some kind of timetable that has regard to the timetable for the proposed voluntary
16 solution but guards against the possibility of undue slippage, if I can put it like that. What we
17 are considering at the moment is that the timing for the Defence could be geared to the two
18 stages, which we understand to be the case, in the proposed procedure, i.e. there comes a
19 moment when the initial period (by which time a certain thing has to happen) comes to an end
20 and it should be pretty clear whether or not that has actually happened by that date, in which
21 case we could say that the Defence is due seven days after that date, and/or if that first stage is
22 satisfactorily completed and the initial period is completed there is then a period which is
23 envisaged for completion. If something were then to go wrong at that stage one could then say
24 the Defence was due seven days in the alternative – seven days after the date for completion.
25 That timetable, and our provisional assessment, would then give time for an exchange of
26 skeleton arguments and a hearing to take place in the third week of March. In that event, the
27 Defence having arrived fairly recently, the Competition Commission would not really need to
28 add very much by way of a skeleton argument to the Defence because the Defence would
29 really form the dual role of being both the skeleton argument and a Defence. What we are
30 feeling our way towards is a compromise between the need for proceedings under s.120 of the
31 Enterprise Act in general terms to be managed fairly tightly and, on the other hand, the desire
32 of the parties to have at least some room for manoeuvre in terms of timing in this kind of
33 situation. So that is, broadly speaking, what we are envisaging at the moment in terms of
34 timing. If I could also express provisionally our views on two other points that arise, which
35 can no doubt be discussed if necessary, the first of those points is that this application is

1 expressed as a protective application and in our view it is commendably brief and to the point;
2 and we thoroughly welcome that.

3 The concept of a protective application, however, in these circumstances is one that the
4 Tribunal has some difficulty with. Our view at the moment is that if there is to be a review
5 under s.120 it is for the Applicant to put in what they consider to be their grounds of appeal
6 and we do not envisage a further stage in which there is a second bite of that particular cherry,
7 and that is a view we take in the interests of the procedure as a whole, looking much wider
8 than this particular case, so we would view favourably matters being opened out beyond where
9 they are at the moment. It seems to us in terms of a Judicial Review application at least the
10 grounds are fairly clear from the existing Notice of Application and do not really require much
11 elaboration.

12 Related to that matter, and this is now looking ahead a little, it is true that formally speaking
13 the present application does not have a witness statement and it may be, formally speaking, one
14 would need a one line statement of truth that what is said in the various submissions is true, but
15 we would not at this stage normally envisage further facts beyond what is already set out in the
16 material before the Competition Commission being adduced at this stage, and therefore by the
17 same token when (and if) the Competition Commission comes to put in a Defence we do not
18 necessarily see the need for that defence to be supported by a witness statement. That is to say
19 we are now, as a Tribunal, fairly fully aware of the procedures that the Competition
20 Commission follows. The review is the review of the decision that was reached on the
21 evidence; one can produce the evidence and read the report and assess whether there is any
22 identifiable error or not, but we would not necessarily be sympathetic – both in the interest of
23 economy and procedure, and as a matter of general principle – to further witness evidence
24 coming in in a case such as this.

25 Our present view is that we are minded to indicate that the Tribunal would really like to hear
26 argument (if anybody wants to put in a witness statement), and that we would not really allow
27 a witness statement in without the Tribunal's permission and a reasoned case for putting a
28 witness statement in. That, I think, more or less sums-up where we have got to; now the
29 parties may wish to have a little time to reflect on how they see it and whether that is or is not a
30 workable solution, or whether they would like to argue us in or out of any particular alternative
31 solution. What we do need (if someone would be kind enough to write them down) are those
32 two dates that I mentioned, namely the end of the initial period and the end of the period of
33 completion – we think we know the second, but I am not sure we quite know the first.

34 Would you like a few minutes just to react – Mr. Peretz, Mr. Rayment?

1 MR. PERETZ: It may be helpful for myself and Mr. Rayment to have a quick word before we take
2 matters any further. I can hand the date up there. (Document handed to the Tribunal)

3 THE PRESIDENT: Thank you. (After a pause) Yes, that is rather what we had worked out for
4 ourselves, I think. Shall we rise for a few minutes, Mr. Rayment, and you can take a moment
5 with your client?

6 MR. RAYMENT: I would be grateful for that, Sir, for me to have a quick word with Mr. Peretz and
7 also to take some instructions from those sitting behind me.

8 THE PRESIDENT: Yes, well take your time, we will come back in at 11.30 if you have not
9 summoned us before then; let us know as soon as you can.

10 (The hearing adjourned at 11.15 a.m. and resumed at 11.35 a.m.)

11 THE PRESIDENT: Yes, Mr. Peretz?

12 MR. PERETZ: Sir, can I start by requesting – it will certainly make life easier – if we now go into
13 camera?

14 THE PRESIDENT: Yes.

15 (For hearing In Private see separate transcript)