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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1075/4/8/07

Victoria House
Bloomsbury Place
London WC1A.2EB

17 January 2007

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

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 IN PRIVATE
APPLICATION FOR STAY

IN PRIVATE

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1 MR. PERETZ: We are now in camera?

2 THE PRESIDENT: We are.

3 MR. PERETZ: I just wanted to say something very brief about what is happening now and it is
4 much easier if one does not have to watch one's words.

5 THE PRESIDENT: Yes, thank you.

6 MR. PERETZ: The position at present is that we have three firm purchasers, two of which are
7 subject to clearance from the Competition Commission (which we hope and expect will be
8 given very shortly) and one has clearance from the Competition Commission. We have a
9 fourth who has expressed keen interest and is almost certainly going to come in as well, who
10 again we would anticipate would be accepted. That is essentially the basis upon which we and
11 the Competition Commission currently both hope and expect – fairly strongly expect – that the
12 sale will be completed.

13 THE PRESIDENT: Does that mean that you are expecting to sign the Heads of Agreement by the
14 first of those dates.

15 MR. PERETZ: That is, of course, the difficulty of any transaction of this kind. One can say,
16 certainly as matters stand now, that there is every prospect that the sale will proceed to
17 somebody but, as you know, Sir, difficulties in selling a business can arise at the last moment,
18 and they can affect the timetable without necessarily affecting one's overall confidence in
19 being able to sell the business. One can imagine all sorts of events taking place; there is
20 gamesmanship of various sorts – it is not dissimilar from selling a house, you can be absolutely
21 that you are going to sell it, but you can have a slip just before exchange of contracts which
22 means things are delayed for a week. As a result it becomes very difficult to formulate a
23 trigger event – speaking from today's perspective – that would mean that one could say at that
24 point if something had not happened then we should be restarting these proceedings. One
25 simply cannot assume, for example, that just because – now we are in private I can say this –
26 the 14th February date has not quite been met that does not automatically mean that it is
27 appropriate to restart these proceedings. One may at that point still be able to ----

28 THE PRESIDENT: It might mean it or it might not, we do not know.

29 MR. PERETZ: It might, one simply does not know. It might be a slight problem to do with
30 something fairly minor having cropped up with due diligence, or a last minute haggle over the
31 price; on the other hand, it might be something pretty fundamental which would be disturbing
32 one's confidence that the package would be disposed of successfully – one simply does not
33 know. So our fairly strong preference would be simply to leave the Competition
34 Commission's Defence (which is the next procedural step) at the moment to further

1 application. We certainly do not want to get into a position where there is a risk that the
 2 trigger is pulled and the Competition Commission starts having to spend time, energy and
 3 money on preparing a Defence – that is not entirely altruistic on our part of course because
 4 there may be (particularly if we do end up withdrawing the proceedings) an argument that we
 5 are liable for those costs.

6 THE PRESIDENT: You have brought the proceedings, Mr. Peretz, and that is one of the
 7 consequences of bringing the proceedings, that it triggers a timetable.

8 MR. PERETZ: Yes, well it is our hope, particularly in this Tribunal with the ability to be flexible
 9 where necessary, that we can try and manage the proceedings in these circumstances in such a
 10 way as to minimise costs, against the background – certainly as matters currently stand – that
 11 both us and the Competition Commission are able to say with some degree of confidence that
 12 the disposal package will be successfully sold we hope by the time set out in the draft
 13 undertaking with obviously potentially some possibility for slippage there. We all hope and
 14 expect that that is what will happen, and therefore that these proceedings will be withdrawn
 15 and no further step need be taken. Obviously in those circumstances we are slightly concerned
 16 not to have costs and effort unnecessarily incurred. Part of the reason for our concern about
 17 the Competition Commission having to prepare a defence is not just that the costs will build up
 18 but it also inevitably diverts their attention from sorting out whatever problem might have
 19 arisen, so that is our position. For our part we are content, at least for the moment, for the date
 20 of 21st March to be pencilled in and we think there is something to be said for that in that it
 21 creates a date in everybody's diaries – both the Tribunal and ours – and gives us a focus for
 22 thinking about at various stages whether we ought to be applying to the Tribunal for further
 23 directions, so it enabled us to know roughly where we are going, so that is helpful. I think Mr.
 24 Rayment does have some difficulties with that date, but he can speak for himself, but for our
 25 part we are content with that. Our concern is simply at this point that we would want to avoid
 26 being prescriptive about the point at which these proceedings should go live.

27 THE PRESIDENT: Well it is very difficult. You have raised points on the merits in this case ----

28 MR. PERETZ: Indeed.

29 THE PRESIDENT: -- and it is very difficult for the Tribunal to contemplate a situation where more
 30 than three months after the report points on the merits have not yet been addressed in the
 31 Appeal proceedings. So the 21st, or around that date, is really the last date upon which it is
 32 really sensible to be dealing with the merits.

33 MR. PERETZ: Our position is, as matters stand at the moment, given the timetable that we have, it
 34 is sensible – perfectly sensible – to pencil that date in bearing in mind those points. But in

1 terms of trying to formulate at what point now further steps should be taken in these
2 proceedings we think it ----

3 THE PRESIDENT: We could have a timetable that gave various points and just left it to the parties
4 to apply if they wanted to alter that, depending on how things went.

5 MR. PERETZ: Yes, one can always do it that way, but then one has to get round to applying, which
6 generates further costs.

7 THE PRESIDENT: Well it is all the consequence of having brought the Appeal in the first place.

8 MR. PERETZ: Yes, well one option that had occurred to us was the option of applying to extend the
9 time to appeal, but we thought about that and discussed it with the Competition Commission
10 who expressed the view that it was not the right thing to do and we came to the conclusion it
11 was not either, but there is a difficulty in this sort of situation.

12 THE PRESIDENT: Yes.

13 MR. PERETZ: You understand our position.

14 THE PRESIDENT: We do understand and we are trying to accommodate the various interests that
15 are around.

16 MR. PERETZ: We do have very substantial criticisms of the Competition Commission Report on
17 the merits, but we also want to avoid bringing a challenge to the report in circumstances where
18 it is not commercially necessary for us to do so.

19 THE PRESIDENT: Yes, thank you. Yes, Mr. Rayment?

20 MR. RAYMENT: Sir, I am very grateful. If I could deal first of all with the issue of whether a
21 general stay – if I can call it that – will be appropriate, and then move on to some comments
22 about your proposal ----

23 THE PRESIDENT: Yes.

24 MR. RAYMENT: -- that is the way I propose to deal with things. Just before I deal with those two
25 practical procedural points, could I just put on the record the Commission's position in general
26 as to the situation which has arisen in this case, which is that the normal presumption is that
27 where a challenge has been made to a Commission decision like this, the Commission
28 presumes that the proceedings should proceed expeditiously, and even where a party agrees to
29 implement its preferred remedy on a "without prejudice" basis, i.e. without prejudice to any
30 application they have lodged, generally speaking uncertainty and questions about the viability
31 of the remedy again would normally, we think, militate in favour of the proceedings going
32 ahead and being disposed of as expeditiously as possible.

1 THE PRESIDENT: Well we are obviously extremely alive to that particular point and, in particular,
 2 the uncertainty that has been hanging over this business now dates back to the middle of last
 3 year, or even earlier.

4 MR. RAYMENT: Yes, I just wanted to emphasise that very strongly, but then at the same time,
 5 having made clear just how alive the Commission is to these issues, we nevertheless think that
 6 in the particular circumstances of this case, and of course this case creates no precedent
 7 whatsoever as far as the Commission is concerned, that there is an unusual degree of progress
 8 in this particular case. The report in this case was published on 12th December and by that
 9 stage Stericycle had already been out in the market marketing this particular package, so we
 10 really are at an unusually advanced stage in this case by comparison with what one would
 11 usually expect.

12 Again, further to that, Mr. Peretz has also explained to you the number of potential purchasers
 13 for this package and the likely timeframe for that, so albeit there may be some very small
 14 slippage on the timescale which is not possible to predict at the moment, the Commission
 15 cannot guarantee that those dates will be met, nevertheless it is confident that a suitable
 16 purchaser will be found and that a sale will be possible within a period that is on those dates
 17 which you have been given, or very close to those dates. In those circumstances – and I am
 18 turning now to the specific points – my submission would be that the general stay is still the
 19 most flexible and appropriate procedural device to put in place. The Commission’s submission
 20 is that it can be trusted to bring the matter back with all due expedition at the first sign of any
 21 unjustified slippage. In the history of this case the Commission has certainly shown itself to be
 22 in no way complacent about the possibility of any slippage or anything that would threaten the
 23 effective implementation of remedies. So that is my primary position which is effectively to
 24 support Mr. Peretz in relation to a general stay.

25 However, moving on to your proposal, Sir, the Competition Commission is by no means
 26 averse to the identification at this stage of a proposed date for a hearing of the application. But
 27 what concerns us on this side at the moment is the preparatory steps that you were envisaging
 28 and the timescale for those preparatory steps. Obviously the balance between the risks and the
 29 need to incur unnecessary costs and, indeed, to behave proportionately in deployment of the
 30 Commission’s resources, in the particular circumstances of this case the Competition
 31 Commission has come to the view that it would be appropriate to try and save those costs.

32 THE PRESIDENT: Well they would pay the costs, or you apply for them to pay the costs ----

33 MR. RAYMENT: Well that is true, but we have to incur those costs before we can get them back
 34 and it does not just boil down to a question of money; the Commission has heavy public

1 interest responsibilities as the Tribunal is well aware and there are lots of better things that its
2 staff could be doing than dealing with an application that in all likelihood is not going to be
3 effective.

4 THE PRESIDENT: Well if it is not going to be effective you do not have to deal with it, I mean you
5 take a view on it.

6 MR. RAYMENT: Well maybe that neatly brings me on to my points, and please do not think that
7 the Commission is not trying to help the Tribunal to get to a reasonable procedural settlement.
8 It is simply the fact that if we proceed as the Tribunal proposes with a requirement on the
9 Commission to put its defence in seven days after either the mid-February date, or the end of
10 February date, our view is that we would still need to incur costs because we cannot go from a
11 standing start to a defence in seven days. So if the Tribunal is not prepared to go with the
12 general stay my application is to request an extended period in which to put in our Defence. In
13 my submission it would be appropriate to allow the Competition Commission three weeks to
14 put in a Defence from the end of February date, aiming for a hearing of the substantive
15 application by, for example, 2nd April.

16 THE PRESIDENT: Three weeks from the end of February is 21st March.

17 MR. RAYMENT: I should say, although we think it is unlikely, if we got into a situation in mid-
18 February where the Commission came to the view that there was no possibility of
19 implementing the divestment package we are discussing it would wish liberty to apply to the
20 Tribunal to get things moving before that date.

21 THE PRESIDENT: So your bid is – did you say 2nd April?

22 MR. RAYMENT: My bid would be for 2nd April. I have discussed that with Mr. Peretz and we
23 think that if the Tribunal was minded to give us that time for the preparation of our Defence
24 that would be the soonest one could reasonably get a hearing on. But, as the Tribunal has
25 already pointed out, the Notice of Application and the Defence should effectively set out the
26 pleaded cases on either side, and there is unlikely to be a need for much by way of further
27 pleading at that point, so one could go fairly rapidly into a substantive hearing.

28 PROFESSOR BAIN: Mr. Rayment, could I just be clear on this, the Competition Commission and
29 Stericycle are basically agreeing on these undertakings – putting in the date of the initial period
30 and the final completion date?

31 MR. RAYMENT: That is correct.

32 PROFESSOR BAIN: Those dates are presumably reasonable in the view of the Competition
33 Commission?

34 MR. RAYMENT: Yes.

1 PROFESSOR BAIN: You would expect vendors of the businesses to be able to meet those as
2 targets?

3 MR. RAYMENT: Yes, we think they are challenging, but they are reasonable.

4 PROFESSOR BAIN: I see, but you would not regard it as unreasonable for them not to meet the
5 dates in the undertakings?

6 MR. RAYMENT: It all rather depends on the particular difficulty that has arisen, and it is difficult
7 to foresee, so we do understand that difficulties can arise but without knowing precisely what
8 the particular difficulty is it is difficult to assess whether it be reasonable, for example, to allow
9 a few more days in order for the thing to be sorted out.

10 THE PRESIDENT: Has any work been done so far?

11 MR. RAYMENT: By the Competition Commission?

12 THE PRESIDENT: On the Defence?

13 MR. RAYMENT: No.

14 THE PRESIDENT: Yes?

15 MR. RAYMENT: So I think that summarises our position. Unless there is anything else I can assist
16 you with.

17 THE PRESIDENT: No, thank you, Mr. Rayment. Did I gather from Mr. Peretz that there was some
18 difficulty about the Tribunal's hearing date?

19 MR. RAYMENT: Can I let him address you on that? The other point is, of course, you have already
20 indicated I think that the Applicant should more or less be confined to the Notice of
21 Application as they have put it in ----

22 THE PRESIDENT: Yes.

23 MR. RAYMENT: -- and in making these submissions that is the basis upon which I am proceeding
24 as well, that that is what we are going to be pleading to and we are going to assume that the
25 facts in the report are the correct facts and so on.

26 MR. PERETZ: If I can clear that point up, it is certainly not our intention to start producing further
27 facts if I can reassure everybody on that front. There is a slight note of reservation about the
28 possible need to say something else in the Notice of Application but we are conscious that we
29 had done it. We had erred on the side of concision in the circumstances, perhaps even more
30 than usual; and secondly, though it is slightly difficult actually to conceive of a practical
31 example, it is because time has passed it might be possible that some other point had come up
32 which we might need to draw attention to, although given the nature of these proceedings that
33 is inherently unlikely but cannot, I suppose, be completely ruled out, so probably we need to
34 put that reservation down, but it is a reservation that is not a statement of intent.

1 THE PRESIDENT: You would need to make an application, I think.

2 MR. PERETZ: Indeed, we accept that. You asked me about the date, as far as we are concerned the
3 21st March is fine and, as I said, it seemed to us to be sensible to have a date for everybody to
4 work to and I can live with that. We do not see why it would take the Competition
5 Commission three weeks to prepare a Defence, even from a standing start, given that the
6 criticisms made in the Notice of Application are, as the Tribunal may have gathered, not news
7 to the Competition Commission, they were put in response to preliminary findings and
8 presumably have already been the subject of consideration and thought by the Competition
9 Commission – maybe the Competition Commission wish to make further points in addition to
10 what is in the Report, but we think there is nothing new in them, or very little new in them.
11 But if I can just put that marker down, we do not see that three weeks is necessary. I have at
12 the moment a difficulty with 2nd April, but nothing, I am sure, that cannot be sorted out, but we
13 see 21st March as perfectly achievable.

14 THE PRESIDENT: Would that be preferable from your point of view – on a worst case scenario?

15 MR. PERETZ: On a worst case scenario where we are now only now in the world where
16 Stericycle's package 1 has fallen for whatever reason. At that point we would – as I am sure
17 the Competition Commission and the Tribunal would – want to have the matter sorted out as
18 soon as possible because of the uncertainty that would then overhang our business, because we
19 would then be faced with the possibility of the Competition Commission's reserved position of
20 being required to divest the whole of the acquired business, it is not something we would want
21 to last for any length if it could possibly be avoided. So that is one of our reasons for
22 preferring the 21st, to try and get it dealt with as quickly as possible, but the date is slightly
23 abstract at the moment, given that we simply do not know what will happen.

24 I also want to add and support the point that Mr. Rayment made about the Competition
25 Commission's position, that it would get back to the Tribunal as soon there was real concern
26 that package 1 was not going to proceed, and that would be our position as well for good
27 commercial reasons. If it began to look commercially realistic that the future of the whole of
28 the of the STG business was in play because it looked reasonably likely that the Competition
29 Commission would be forced back to its reserve position at that point we would be wanting to
30 get that possibility resolved as soon as possible, so we would be with the Competition
31 Commission in coming to the Tribunal in saying "Look, this is where we are, we need to try
32 and get on with this."

33 The Competition Commission is intimately familiar with how the transaction is proceeding
34 because they have a weekly, or fortnightly report from the monitoring trustee who is looking

1 into that; of course, we are intimately familiar with it. The Tribunal can be assured that as
2 soon as it looks as if it is about to go wrong in some fundamental way one or other of us – or
3 probably both – will be back at the Tribunal saying “Look, we need to get these proceedings
4 off and running as quickly as possible”, that is what will happen.

5 LORD CARLILE: Mr. Peretz, my experience of due diligence procedures is that they can be slower
6 than one thinks. Has due diligence started in respect of any of the proposed solutions?

7 MR. PERETZ: My understanding – and I will be corrected – is that it is starting at the moment ----

8 LORD CARLILE: Yes, I can see your instructing solicitor nodding.

9 MR. PERETZ: -- the first round is taking place at the moment. As Mr. Rayment very fairly pointed
10 out there was not a standing start on the 12th December, because we had done a lot of work
11 before that in anticipation of the Competition Commission as it were buying our package. So
12 we are rather further on than one might expect if one had assumed that ----

13 LORD CARLILE: Yes, I asked because you mentioned due diligence earlier, and I had assumed that
14 it had started, so it does not look as though due diligence would be a cause of any real delay?

15 MR. PERETZ: At the moment it does not, but of course due diligence is a process and things come
16 out and there is always a possibility at the last minute that somebody either genuinely – or
17 perhaps not quite genuinely – to “discover” something in the due diligence that generates
18 a pricing discussion, so one cannot rule these things out.

19 LORD CARLILE: Yes, thank you.

20 (The Tribunal confer)

21 THE PRESIDENT: The Tribunal will rise for a moment or two.

22 (The hearing adjourned at 12 p.m. and resumed at 12.15 p.m.)

23 (For Judgment see separate transcript)

24 THE PRESIDENT: Now we need to raise with the parties what we are going to do about that
25 Judgment in terms of keeping the timetable confidential.

26 MR. PERETZ: My first reaction is that the only problematic item is going to be the dates, and
27 probably unfortunately all of the dates because the dates all hinge on the initial period and the
28 completion period dates.

29 THE PRESIDENT: Yes, including the hearing date.

30 MR. PERETZ: Including the hearing date, but that is an initial reaction and I think out of a sense of
31 caution it might be sensible for us to see the Judgment in print ----

32 THE PRESIDENT: We will circulate the transcript and invite comments on the transcript and we
33 can always publish the full transcript at a later date – in terms of at least the general approach it
34 is obviously a transcript the Tribunal would wish to publish.

1 | MR. PERETZ: Yes.

2 | THE PRESIDENT: So, Mr. Registrar, we will direct that this Judgment is given in private and the
3 | Judgment will not be published until the parties have had an opportunity to comment on the
4 | confidentiality issues.

5 | MR. PERETZ: I am grateful.

6 | THE PRESIDENT: Very well, thank you very much.

7 | (The hearing concluded at 12.30 p.m.)