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**IN THE COMPETITION**

Case No. 1069/4/8/06(IR)

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

19<sup>th</sup> July 2006

Before:  
SIR CHRISTOPHER BELLAMY  
(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

STERICYCLE INTERNATIONAL LLC

Applicant

and

COMPETITION COMMISSION

Respondent

Mr. Paul Lasok QC and 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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**APPLICATION FOR INTERIM MEASURES**

1 THE PRESIDENT: Good morning, Mr. Lasok.

2 MR. LASOK: Good morning, Sir. Mr. Peretz and I appear on behalf of the Applicant, and  
3 Mr. Rayment appears on behalf of the Respondent. I think, Sir, you have had an opportunity  
4 to look at the papers.

5 THE PRESIDENT: Yes, I have had a quick opportunity to look at the papers. As far as I can see at  
6 the moment the Tribunal would be in a position to hear this matter more fully in the course of  
7 next week, possibly on Tuesday or Thursday, and I am assuming therefore that the only matter  
8 before us today is whether I need to make any kind of order in the interim until then?

9 MR. LASOK: There has been contact between the parties this morning. My understanding of the  
10 CC's position is that pending the substantive determination of the application they would not  
11 take steps and require us to take steps to activate what we have described as the 'separate  
12 team's provision' which is specifically the second part of para.2(j) of the order – nothing else  
13 is in contention.

14 The discussions between the parties have produced this as a sort of proposed timetable, which  
15 is that we will finalise our notice of application and the witness statement of Mr. Blyde, which  
16 of course is the substantive statement, as opposed to the one he has done for the purpose of  
17 seeking interim relief, and we will do that by close of business tomorrow. As I understand it,  
18 the CC envisages putting in something by way of defence in writing and a short witness  
19 statement in reply on Monday so that the parties would be geared up for a substantive hearing  
20 on the Tuesday.

21 That means, first, on the basis of our understanding of the position of the CC there is no need  
22 for the Tribunal to make an interim order; and secondly, the parties do appear to be in a  
23 position to have the matter come before the Tribunal for a substantive hearing on Tuesday.

24 THE PRESIDENT: Yes, could I just ask in relation to that, the present order requires – according to  
25 its terms at least – that your clients will liaise with the CC in order to establish various things.

26 MR. LASOK: There is no problem with liaising.

27 THE PRESIDENT: That is the only thing that the order is requiring – whether it is enforceable or  
28 not is another matter.

29 MR. LASOK: As you will have seen from the correspondence that was exactly the point that we  
30 raised with the CC because at one point it was not clear to us what exactly that part of 2(j)  
31 meant, and the letter that came to us I think on the 17<sup>th</sup> with the draft form of the order attached  
32 to it contained passages that did not appear to be entirely consistent. So that generated the  
33 request from us for further clarification as to what exactly this meant, and it produced the  
34 exchange on 18<sup>th</sup> July, which we have quoted in the skeleton argument, in which it was made  
35 clear to us that the understanding of the CC was that this part of the order does indeed

1 encapsulate a non-negotiable requirement to separate existing integrated teams, and the  
2 reference to liaising and so forth is concerned only with establishing the suitable arrangements  
3 for giving effect, its modalities, but it is not the end result. The end result is separation of the  
4 existing teams.

5 THE PRESIDENT: I think when we reach the hearing next week, and again obviously this is very  
6 much a matter of first impression, so that anything I say at the moment – and I am sitting alone  
7 and not with the Tribunal – is absolutely no more than that, but what as a matter of first  
8 impression one would hope was that serious thought would be given within reasonable bounds  
9 to what could in practice be done, in practical terms, to meet the CC's concerns.

10 MR. LASOK: That is what we have done, and that explains why the debate concerns only this part  
11 of the order. The order is goes on and covers a whole load of other things.

12 THE PRESIDENT: Yes, quite, I see that.

13 MR. LASOK: And we have spent a great deal of effort reaching accommodation with the CC  
14 whether we agreed with them or not – if we could do it we would do it. But our problem is,  
15 and this is stated in Mr Blyde's witness statement, that the operation of this particular  
16 requirement as far as we can see is impractical quite without regard to any of the other points  
17 that we make in the draft notice of application.

18 THE PRESIDENT: Well the monitoring trustee presumably has a role to play here, or may have a  
19 role to play. But if, for example – and I do not want an answer now, but this is the sort of  
20 question that might crop up next week – a new tender is announced in a fortnight's time, which  
21 would require the preparation of some new tender documents and so forth, how is that sort of  
22 thing to be handled? Do not answer me now but just think about whether that is a future  
23 development that has not already happened but is something that is still in the future, as to  
24 which one might think about whether there are any precautionary steps that could or could not  
25 be put in place, I have no idea.

26 MR. LASOK: There is material in Mr. Blyde's witness statement.

27 THE PRESIDENT: Yes, I have seen there is something about that.

28 MR. LASOK: It is one of the things that is going to be canvassed.

29 THE PRESIDENT: But obviously at this stage there is sort of continuing business going on that  
30 may not necessarily be in the same business as it was when the merger first took place so  
31 those are just things to think about – no more than that.

32 MR. LASOK: Yes.

33 THE PRESIDENT: Thank you, Mr. Lasok, I will come to Mr. Rayment to see what the position is.  
34 What is the envisaged timetable for the completion of the reference, Mr. Rayment, do you  
35 know?

1 MR. RAYMENT: I think it is December, Sir. That would be the six months, assuming of course  
2 that there is no extension. I have the administrative timetable which is currently published on  
3 the Commission's website here, and I think 12<sup>th</sup> December is the statutory deadline, although  
4 the Commission is hoping in this particular case to do as streamlined a job as possible, and late  
5 November is the target date at the moment for publishing the report.

6 THE PRESIDENT: Yes, I see. What is your general position on what Mr. Lasok has said so far

7 MR. RAYMENT: He has accurately represented matters, and the Commission is prepared not to  
8 enforce the terms of the second part of para.2(j) of the order as far as imposing separate teams  
9 is concerned, until the Tribunal has had an opportunity to dispose of the substantive matter.  
10 We are grateful to you for raising the question of liaison because as the independent Trustee  
11 begins his work there are issues on this matter that we will want to clarify with the applicants  
12 with a view to putting mechanisms in place to achieve some separation of the businesses,  
13 which the Commission has come to the view is necessary. We have tried, as you will see, in  
14 the order to make it as flexible a process as possible with as much input by the applicants as is  
15 possible but, as you know, at the moment we have reached an impasse on that, but it is possible  
16 that we may be able to make progress – who knows?

17 THE PRESIDENT: You mention enforcing the order – I am on p.2 of the draft application which  
18 sets out the contested paragraph – as I read the order at the moment it is an obligation to liaise.  
19 Is that right? One wonders how you would go about enforcing an obligation to liaise?

20 MR. RAYMENT: I agree, if people do not want to liaise with you.

21 THE PRESIDENT: What seems to be the general drift is that what you want to achieve is a more  
22 detailed discussion than has so far taken place including the monitoring Trustee in order to  
23 establish the practicality of some kind of separation of the existing arrangements, to preserve  
24 as much as possible pending the outcome of the reference. Am I reading it right? Is that what  
25 the aim is, broadly speaking?

26 MR. RAYMENT: Yes, it is.

27 THE PRESIDENT: It depends to some extent on the willingness, the ability of the trustees and the  
28 willingness of the applicants to co-operate in that exercise, I imagine.

29 MR. RAYMENT: Yes.

30 THE PRESIDENT: At the moment.

31 MR. RAYMENT: At the moment.

32 THE PRESIDENT: Very well, what do we do now about the practicalities? I think both parties  
33 have said they will be ready by Tuesday, is that right? Is that going to give enough time for the  
34 Trustee to be in place and for more detailed information to be available, to see whether some  
35 practical solution can be arrived at?

1 MR. RAYMENT: Sorry, I probably should have mentioned that. At the moment our expected time  
2 frame is that we probably will not have had a report back from the Trustee before 10 days. So  
3 in any event the question of specifying separate teams and so on does not arise until then in  
4 any event.

5 THE PRESIDENT: What is the utility of having a hearing on para.2(j) as it is at the moment without  
6 the benefit of the Trustee's report which would presumably inform the CC as to what could be  
7 done, or what can be done? As I read the order there is no obligation at present, actually now  
8 that is an enforceable obligation to create an existing separate team, although it is the intention  
9 behind this stage of the order that that is an objective to which one is perhaps moving. The  
10 order at the moment is to liaise with an order to establish suitable arrangements. If the  
11 Applicants will not co-operate (or do not co-operate) which, I must say, would be extremely  
12 unfortunate, the CC has to fall back on the Trustee presumably and take advice from him as to  
13 what arrangements could suitably be imposed. There would then be a legal question as to  
14 whether those fell within the powers of the Act, and the discretionary question as to whether it  
15 was appropriate to impose them. Am I reading it correctly? I am not sure if I am missing  
16 something?

17 MR. RAYMENT: No, I think broadly that is correct. You have identified one legal issue that would  
18 presumably be an issue next week if the hearing took place then, but in a sense it is my learned  
19 friends who are ----

20 THE PRESIDENT: -- pressing for a hearing, yes.

21 MR. RAYMENT: As I say, we are unlikely to take action until we have had a chance to discuss  
22 matters with the independent trustee, but in principle – and I think this is the point where my  
23 friends are concerned, and it is that that has provoked this application – the Commission has  
24 decided there needs to be greater separation of these two businesses pending the outcome of its  
25 investigation. But, as I say, the mechanism for achieving that is still very much up in the air,  
26 and I think that is what you have identified.

27 THE PRESIDENT: I may need to go back to Mr. Lasok for a moment, but it may be difficult to  
28 decide the question of *vires* without knowing what concrete requirement was going to be  
29 imposed, i.e. to say that an obligation to liaise is not at this stage a particularly onerous  
30 obligation in itself, and not one that Mr. Lasok in itself objects to; he is worried about the final  
31 stage or the possible final stage of some kind of separation, but in order to decide whether  
32 whatever it is that is finally to be “imposed” is either within the CC's powers under the Act, or  
33 a proper exercise of those powers, we would need to know more precisely what it was. For  
34 example, if it said “No one at site so-and-so should have any contact with anyone at site

1 somewhere else, as from this date”, then one would have something to grip on in order to  
2 decide whether or not it was within the powers of the Act.

3 MR. RAYMENT: On this side we do see the force of that, but on the other hand we are dealing with  
4 the application that has been put in front of us and, as I understand it, that application is  
5 essentially saying that once the horse has bolted the CC does not have *vires* to put the horse  
6 back in the box, as it were, even if we were not on duty in the stable yard at the time the horse  
7 originally bolted – I can put it no higher than that. So yes, I do see the force of what you say,  
8 and it is true at the Tribunal hearing the application would have a better picture of the  
9 Competition Commission’s stance on the specifics of how this greater separation would  
10 operate at that hearing. But, as I say, we are dealing with the application in front of me and  
11 that is how I understand it is put at the moment.

12 THE PRESIDENT: Yes, thank you. Yes Mr. Lasok, did you follow the drift of that discussion?  
13 You see the point I am grappling with is, is it useful to go into all this until we have something  
14 more concrete to grip on?

15 MR. LASOK: Well if you turn to bundle 2, which is the correspondence between the applicants and  
16 the Competition Commission.

17 THE PRESIDENT: Bundle 2 – I have not read all this yet.

18 MR. LASOK: If you turn to tab 25. This is a letter from those instructing me dated 18<sup>th</sup> July,  
19 addressed to the Competition Commission.

20 THE PRESIDENT: This is yesterday?

21 MR. LASOK: Yes. In the second paragraph it says:

22 “As far as my clients are concerned, the key question to be answered by the CC is  
23 whether it has now decided that separate teams must be established in order to carry  
24 out the relevant functions.”

25 This dealt with the draft revised order that contained the para.2(j) in the form that it currently  
26 takes. You will see that various quotes are made from earlier versions and, if you go down to  
27 the bottom of the page, there is a quote of the re-drafted version, which is the form that it  
28 currently takes, and then the last two lines the letter says this:

29 “The emphasised words suggest that no decision has actually been taken by the CC  
30 that all or any relevant functions must be carried out by separate teams and that the  
31 door remains open, during the consultation, for my clients to persuade you that  
32 separation of the teams would not in fact prevent any further pre-emptive action  
33 and/or would be disproportionate.

1 We plainly need to know as a matter of urgency what the true position is and look  
2 forward to your immediate response. I should make it clear that if the CC has now  
3 decided that there must be a separation of the teams then ....”

4 and then there is a reference to the challenge. Now, we did this because we ourselves, when  
5 we read 2(j) in the form which it then took (which is the same as the current form) were of  
6 exactly the same view that you have, and we needed to clarify that because if we had failed to  
7 take action that we should have taken, and we subsequently discovered that our understanding  
8 of 2(j) was not what it meant, then we might have been in some difficulty. So we asked them,  
9 we put the question to them. You then get the response in tab 26. This is the reply by email,  
10 18<sup>th</sup> July, 12.09.

11 “Dear Mr. Rees,

12 Thank you for your letter. In your letter you seek clarification on whether it is the  
13 CC’s view that separate teams must be established. I can confirm that.”

14 Then in the next paragraph:

15 “... the revised wording does not leave open the question ...”

16 THE PRESIDENT: Just a minute. I need to read it quietly.

17 MR. LASOK: I think you just need to read those two paragraphs.

18 THE PRESIDENT: Yes, give me a moment. (After a pause) Yes.

19 MR. LASOK: The way we understand this, as a response to the precise question that we put, is that  
20 it is not a matter for discussion. It has been decided, we can discuss modality – the way we do  
21 the separation – but there is no discussion about separation.

22 There is also the reference to discussion about aspects of relevant functions, but the point we  
23 have made in our skeleton argument is that if at some future point in time the CC decides that  
24 some particular aspect or aspects of a relevant function is going to have to be dealt with by  
25 separated teams, then we are faced with the difficulty either of separating the teams dealing  
26 with the entire function or of running, as it were, two teams within a given function - a  
27 separated team covering the aspects identified by the CC, and an integrated team covering  
28 other aspects. Now, on the face of it that is not an easy situation to organise, and on the face of  
29 it if one has to separate aspects of functions one may have, in practical terms, to separate the  
30 entire function. So negotiation – or at least discussions about these aspects of relevant  
31 functions is not, as it were, a way out of saying that we are faced with a very serious problem.  
32 But what we are faced with is an order that we separate.

33 THE PRESIDENT: Well I am not sure that you are at the moment because an order to separate  
34 would, at least at first sight, require some rather specific direction as to what it was that was  
35 going to be separated.

1 MR. LASOK: Well to some extent what you are saying, Sir, is a joy to my heart because if it were  
2 to be ruled that the true construction of this particular part of 2(j) is that it does not impose an  
3 obligation to separate but initiates a discussion then that is something completely different  
4 from the impression that we have been given, but it is something that would obviously affect  
5 the position that we would take at the substantive hearing.

6 THE PRESIDENT: The difficulty is at the moment that if you are talking about an obligation to  
7 separate, it is quite difficult to talk about such an obligation in any useful way without knowing  
8 precisely what it is that one is talking about. For example, if it were said that no further steps  
9 from here on in should be taken to integrate the computer operations of these two firms that  
10 might be one situation.

11 MR. LASOK: That is not the situation.

12 THE PRESIDENT: If it were to be said that at a level below senior management separate sales  
13 teams shall be preserved, that might be another situation. But until we know exactly what it is,  
14 it is rather difficult to come to grips with any detailed consideration of whether whatever it is  
15 (as specified) is within the powers under the Act, and whether it is a proper exercise of those  
16 powers. It is rather difficult to address the legal issues raised in the application on the basis of  
17 a rather general indication that a separation is necessary until we have got the report of the  
18 trustee and/or any sensible suggestions that your clients might be prepared to make to solve  
19 this particular problem.

20 MR. LASOK: Of course, that tends to suggest – to borrow a phrase from elsewhere in the law – this  
21 part of 2(j) is void for uncertainty.

22 THE PRESIDENT: It is not exactly void for uncertainty because in practical terms if the CC went to  
23 the High Court on the existing wording of 2(j), the Judge may be asking them questions as to  
24 exactly what order they were asking him to make – that is so. But nonetheless, the intention  
25 that your client should, in good faith, seek to meet the CC's concerns and in default of which  
26 the CC will take advice from the Trustee and make whatever order in the light of that advice  
27 seems to be appropriate, appears to be the present position.

28 MR. LASOK: Well you say that, Sir, but that is exactly what we sought to ascertain from the CC in  
29 the correspondence that you have seen.

30 THE PRESIDENT: The CC has not resiled from their present view (and it would be very difficult to  
31 expect them to say that at this stage) – that some kind of separation is necessary. That is their  
32 view, but to implement that view they need the Trustee's report and they would need, I would  
33 have thought, a detailed order.

34 MR. LASOK: In which case I simply do not understand why they write or send emails such as the  
35 one on p.330, but I fear that this is a rather arid ----

1 THE PRESIDENT: We have a bit of a mis-match at the moment, I think.

2 MR. LASOK: We have a mis-match in the sense that I think our initial impression of 2(j) is the one  
3 that you, Sir, have formed, but we have been told that that is wrong, and that is the basis on  
4 which we have had to make this application.

5 THE PRESIDENT: My principal concern, and I will come back to Mr. Rayment in a moment, is  
6 that neither the parties, nor the Tribunal, should spend a day arguing interesting points that are  
7 actually difficult to come to grips with because nothing yet is sufficiently certain to have a grip  
8 on.

9 MR. LASOK: The indication from the CC in the correspondence is that there is something certain,  
10 but if the position is that in the light of your remarks the CC makes its position clearer, or  
11 shifts away from the position as stated in the 18<sup>th</sup> July email, then obviously we will take  
12 account of that.

13 THE PRESIDENT: They have indicated that they will not take any specific steps to order any  
14 specific separation until the report of the trustee is available in ten days' time – absent  
15 agreement in the meantime presumably. So I was just wondering whether we could usefully  
16 take it any further than that.

17 MR. LASOK: Probably the best thing is for me to take instructions on that point, but the difficulty  
18 that we are in is that the CC indicated originally that the operation of 2(j), that is to say its  
19 enforcement, could not be excluded prior to the hearing of the substantive application. Now, if  
20 the CC has modified its position, and it modified it this morning, in the form of not taking  
21 steps or requiring the implementation of 2(j) – and we are here talking about the separation of  
22 the teams, we are not talking about liaison, we are talking about separation of the teams. Now  
23 that in itself was an indication to the Tribunal that the CC's understanding of 2(j) is exactly as  
24 set out in the 18<sup>th</sup> July email and, as I have explained it to the Tribunal, in other words that  
25 there is a decision requiring separation.

26 Now, if the CC's position modifies again and their position becomes that of saying that no  
27 action of that nature shall be taken unless and until the information provided by the monitoring  
28 trustee justifies it, then we are into a different position entirely, because now we are into the  
29 literal reading of the second part of 2(j) and the literal reading of the second part of 2(j) would  
30 envisage a process along these lines that there would be liaison, you would have the  
31 monitoring Trustee operating and at a later stage there would then be an order under s.81  
32 dealing with the question of separation. It would be at that stage that if we believed that it was  
33 attackable, we would attack that order and that decision. I can fully understand that way of  
34 looking at the order in its current form, because that was what we did feel it envisaged, but that  
35 was not what we were told. But, as I have said, if the position ----

1 THE PRESIDENT: I am not completely sure that there is that much difference between the parties,  
2 but let us see what ----

3 MR. LASOK: In our respectful submission it is necessary to be quite clear what the structure and  
4 the legal consequences of this order actually are and there are two possibilities. The first is the  
5 literal construction which is that there is an obligation to liaise with a view to the possibility  
6 that, at some point in the future, should the CC think it appropriate an order within the meaning  
7 of s.81 will be made concerning separation – that is one possible permutation.

8 The other one is the one that we believe is the position taken by the CC in the correspondence  
9 that was exchanged between the parties, and that is that the order requiring separation has been  
10 made and is to be found in the second part of para.2(j). What 2(j) envisages when it refers to  
11 “liaison” is discussion about the modalities for implementing the order, achieving the order’s  
12 objective, but the order has been made.

13 THE PRESIDENT: The Tribunal’s difficulty at the moment is that if it is the latter it is fairly trite  
14 law that an order of that kind, in order to be enforceable, would have to be precise, and if the  
15 precise details have not yet been settled because we are waiting for the Trustee’s report, or any  
16 suggestions your clients might make, there is not yet any means of enforcing the alleged  
17 decision in principle that is said to have been taken.

18 MR. LASOK: But that of course does not preclude a challenge.

19 THE PRESIDENT: It does not preclude a challenge but the question before the Tribunal at the  
20 moment is whether there is any need for interim relief and if there is nothing for this order to  
21 bite on at the moment because the precision is not yet there, there is no need for interim relief  
22 because there is nothing precise that you are being asked to do at this stage.

23 MR. LASOK: But for the moment the interim relief issue has fallen away because at the outset of  
24 the hearing ----

25 THE PRESIDENT: Well it has fallen away until Tuesday, but what I am on at the moment is  
26 whether or not it is useful to go ahead on Tuesday or whether it is not better to wait until we  
27 have the Trustee’s report or more precise details of precisely what it is by way of separation  
28 that is envisaged before we go into these interesting legal arguments, otherwise there is some  
29 risk that we shall just discuss things in the abstract without actually knowing what precise it is  
30 that it proposed.

31 MR. LASOK: Yes, but our difficulty is that to a great extent all this is outside of our control. We  
32 can all have a useful discussion about the true meaning of this part of 2(j) and that discussion  
33 could be productive in the sense that if the Tribunal were to decide that it means “A” rather  
34 than “B”, then everybody knows where they are. If the Tribunal’s conclusion is that the “A” is  
35 my first permutation which, on the face of it, is what it means then that puts both parties in the

1 position in which they know exactly where they are. If it is “B” then we have this ongoing  
2 problem.

3 THE PRESIDENT: I do not see that it is an immediate problem because you do not have any precise  
4 direction yet.

5 MR. LASOK: Yes but the problem about it is ----

6 THE PRESIDENT: What is the problem?

7 MR. LASOK: -- that we are vulnerable to a direction – well not quite a direction – to the  
8 enforcement of this.

9 THE PRESIDENT: No you are not, because the precise details have not been settled.

10 MR. LASOK: Then I simply do not understand why the CC is telling us that we are exposed.

11 THE PRESIDENT: No, they are saying that at this stage they have not resiled from the principle  
12 that separation of some sort, to some extent and in some respects is likely to be necessary but  
13 they have left open exactly how to do it, and as long as that is open it is rather difficult to see  
14 how an order expressed in the abstract to separate could be an enforceable order?

15 MR. LASOK: Well it could be if, in the circumstances of the case, there was no situation in which  
16 whatever modality you selected would be workable.

17 THE PRESIDENT: It is a bit obscure at the moment.

18 MR. LASOK: Well it is not obscure – if you cannot do it you cannot do it. So, for example, let us  
19 imagine for the sake of argument – although it is actually drawn from Mr. Blyde’s witness  
20 statement – that for the teams that are being targeted by the CC one of the difficulties is that  
21 there is no more than one person who is actually capable of carrying out the relevant functions.  
22 Now, one of the problems that I think even lawyers have to recognise is that it is remarkably  
23 difficult to chop a person into two and expect them then to carry on with the same degree of  
24 efficiency that they were able to carry on their functions prior to being dismembered. Now, if  
25 you only have one person then there is simply no way in which you can ----

26 THE PRESIDENT: That may well be so, Mr. Lasok, that is a bridge to be crossed in the future, is it  
27 not? We are not there yet. No doubt the Trustee will so report, and he will say “You cannot  
28 chop this man up and therefore that is that”.

29 MR. LASOK: Ah, but the analogy is this, you have a river that you have to cross, you have not got  
30 there yet ---- (Laughter)

31 THE PRESIDENT: No, I think I need to hear Mr. Rayment now and see what his views are.

32 MR. LASOK: Well can I just pursue this for a minute? The problem is this, if somebody says  
33 “Cross the bridge when you get to it and not before” that is an interesting point to make, but if  
34 you can see that there no bridge then it is an idle point.

1 THE PRESIDENT: We cannot see that there is not a bridge until we have the report of the Trustee.  
2 The CC has your client's submissions on this point but they are awaiting the Trustee's  
3 independent review. He may see that there is bridge, or a passerelle of some sort. Yes, Mr.  
4 Rayment, do you want a little time to think about it, or do you want to react now to the  
5 situation? The point I am still grappling with is whether it is useful to have a hearing next  
6 week, or whether we should not wait until the Trustees' report is available on the basis that no  
7 precise steps have yet been identified as to exactly what separation is envisaged?

8 MR. RAYMENT: Well we think that would be a helpful course of action to take. As I say, we  
9 never intended to impose any degree of separation on the applicant until we had had time to  
10 consider the matter, both with the independent Trustee and with them. In those circumstances  
11 I can see the sense of the Tribunal's approach. I am sorry if things have not been clear. We  
12 thought we were clear about the position that we were taking which is that in principle the  
13 Commission has reached a decision, there needs to be a greater degree of separation until it  
14 reaches the end of the ----

15 THE PRESIDENT: Well my understanding is that they have reached that position in principle, but  
16 they have not ----

17 MR. RAYMENT: There is quite a lot of detail to fill in.

18 THE PRESIDENT: -- put down the detail.

19 MR. RAYMENT: I can understand Mr. Lasok's concerns because his position is that all of this is  
20 just impossible, limbs will go flying and that is just not feasible.

21 THE PRESIDENT: But that may or may not be right – the devil is in the detail.

22 MR. RAYMENT: Well we hope that is true and we can have some further fruitful discussion.

23 THE PRESIDENT: Well should we fix at least a provisional date when we can see what next step  
24 should be taken? Over what sort of timetable is this going to unfold now?

25 MR. RAYMENT: (After a pause) One of the issues to take into account in relation to timetable,  
26 and I think this is a matter that both parties probably need to discuss, is just how quickly the  
27 monitoring Trustee could be appointed and come back with a report, and that does not depend  
28 entirely on us, as it were. But in principle if a monitoring Trustee could be in place by the end  
29 of the week then with a good wind we would have thought that they would be able to come  
30 back within 10 days of the date of appointment.

31 THE PRESIDENT: Yes. That would take us to the week beginning 14<sup>th</sup> August. What I am  
32 inclined to say – just to be completely clear – the CC has said that in default of agreement it  
33 will not make any order requiring any precise steps to be taken by way of separation until the  
34 report of the Trustee is available. That, I would have thought, implies, some further order  
35 beyond the one that we already have that would specify more precise steps.

1 MR. RAYMENT: Yes, and the order provides for that.

2 THE PRESIDENT: As the order provides, and that the right time for a detailed challenge in this  
3 matter would be when that further detailed order is available and, until such time as that  
4 occurs, the present clause 2(j) – as I read it extremely provisionally – does not impose on the  
5 Applicants any precise obligation other than to liaise. Whether that is an obligation in itself,  
6 or how far that obligation in itself is capable of enforcement is another matter, but that is what  
7 it says. So in terms of legal enforceability the obligation to separate arises at a stage when, in  
8 default of agreement, precisely what separation is required is imposed.

9 MR. RAYMENT: Yes, I think that must be right. I do not know that it needs to be the subject of  
10 any order by you, but it seems then it would be sensible if – obviously we very much hope that  
11 interaction between the Commission and the Applicant can resolve this matter without having  
12 to come back to the Tribunal. But if, having seen such detailed directions as may be made by  
13 the Commission, the Applicants still wish to challenge the order that is made at that stage then  
14 we could probably agree here that we should approach the Registry with an agreed set of  
15 directions – or at least some outline of how the matter should be decided at that point ----

16 THE PRESIDENT: Yes.

17 MR. RAYMENT: -- rather than having a CMC being convened quite like this today.

18 THE PRESIDENT: Yes. My inclination is to say that as far as today's application we make no  
19 order, we just leave the present order as it is, and allow events to unfold and, if at any stage  
20 either party wishes to apply to the Tribunal for further relief then make an application and we  
21 will see what can be done, but I am not sure, Mr. Lasok, at the moment there is much point, in  
22 the light of that clarification, in staging some rather grand hearing next week.

23 MR. LASOK: Well save for this, that I was taking instructions and I am told that all that needs to be  
24 done from the perspective of the appointment of the monitoring Trustee is to sort out the terms  
25 of reference. In principle that could actually be done today and he could be appointed today.

26 THE PRESIDENT: Yes, good.

27 MR. LASOK: Our belief is that for the purposes of this exercise he would require only two days in  
28 order to produce a report because our understanding is that basically he will be going around  
29 looking, verifying effectively, the degree of integration that has already taken place, and also  
30 looking at the matters that are effectively covered in Mr. Blyde's first witness statement.

31 THE PRESIDENT: Yes.

32 MR. LASOK: Now that means that it would be possible in principle, for a report from the  
33 monitoring Trustee to be available at the beginning of next week, and if the CC considered that  
34 that provided them with a proper basis for taking matters further forward then it would be  
35 theoretically possible at any rate for there to be a hearing in the course of next week, either on

1 the Tuesday or the Thursday. That, of course, does depend on what the report says and what  
2 the CC would propose to do on the basis of it.

3 THE PRESIDENT: Yes, well my present view is that even if everything went according to that  
4 timetable, the end result of that process would presumably be some more precise order from  
5 the CC as to exactly what it was that was envisaged, and it would be appropriate at that stage  
6 then to have the hearing so that we know exactly what we are talking about and you can argue  
7 about *vires* and discretions.

8 MR. LASOK: Quite so.

9 THE PRESIDENT: And that may go very fast in which case the Tribunal will do its best, despite the  
10 holiday period, to accommodate the parties and there is no reason why we should not be able  
11 to do so pretty quickly. But I think unless and until that situation arises it is not particularly  
12 useful for me today to make any further directions.

13 MR. LASOK: Yes.

14 THE PRESIDENT: So shall we leave matters on that basis?

15 MR. LASOK: Yes, I do not think in the light of the views that you have expressed that we can do  
16 otherwise.

17 THE PRESIDENT: No, I do not think you can. (Laughter) There will be no order today. The  
18 application will be adjourned generally with liberty to apply and we will await any further  
19 developments. Thank you all very much.

20 (The hearing concluded at 11.40 a.m.)