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IN THE COMPETITION

Case No. 1070/4/8/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

19th September 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)

MICHAEL DAVEY
RICHARD PROSSER OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

**STERICYCLE INTERNATIONAL LLC
STERICYCLE INTERNATIONAL LIMITED
STERILE TECHNOLOGIES GROUP LIMITED**

Applicants

and

COMPETITION COMMISSION

Respondent

Mr. George Peretz (instructed by DLA Piper) appeared for the Applicants.

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

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PROCEEDINGS AFTER JUDGMENT HANDED DOWN

1 THE PRESIDENT: For the reasons given in the Judgment that the Tribunal has handed down
2 today, the application for review of the order made by the Competition Commission on 18th
3 July, and directions made under that order on 25th August is dismissed. The text of the
4 Judgment is for the time being embargoed until we have sorted out questions of confidentiality
5 which we hope can be done in early course.

6 MR. PERETZ: Yes, as far as today is concerned I think I am content just to proceed on the basis that
7 we are going to be careful in what we say and there will not be any need to say anything ----

8 THE PRESIDENT: Yes, we are in open court at the moment, I think, Mr. Peretz.

9 MR. PERETZ: Indeed, and there is no need to say anything confidential. May I just flag up in
10 relation to confidentiality that we will obviously get back to the Tribunal some time tomorrow
11 with the redactions that we think necessary and obviously the CC will have an input into that
12 as well.

13 THE PRESIDENT: Yes, thank you.

14 MR. PERETZ: It may be – and I just take this under advisement but I just flag it up now – that we
15 will need to propose fairly substantial redactions simply because, to put it as shortly as I can,
16 we are very conscious we have competitors looking at us at the moment, and the more they
17 know about the various difficulties that we are under the more difficulty we have. A lot of
18 those sensitivities are, however, very temporary. They will go away once – as we hope – the
19 merger is cleared, which will be at the latest by December, and even if the merger is not
20 cleared these matters will become rapidly less sensitive.

21 One thing that has occurred to me that maybe the right approach is to take this in two stages.
22 First, to publish a fairly redacted version of the Judgment with a view to coming back to it in
23 three or four months' time and publishing a much fuller version when a lot of these
24 sensitivities will have gone away.

25 THE PRESIDENT: Well, Mr. Peretz, as at present advised I do not know that we feel that we have a
26 great deal of room for manoeuvre in this matter. We cannot indefinitely keep secret either the
27 fact of the proceedings or the points at issue, so I hope you will bear that in mind when you
28 make your representations, to which of course we will give very careful attention.

29 MR. PERETZ: I am conscious of the need the Tribunal has to explain as soon as possible the
30 reasons why it has come to the conclusions that it has and in broad terms what the case was
31 about.

32 THE PRESIDENT: Yes.

33 MR. PERETZ: But there plainly are sensitivities here ----

34 THE PRESIDENT: I understand that.

1 MR. PERETZ: -- and a lot of them are very short term. One of the points we may make is that
2 certain redactions may simply perhaps be for a matter of months and then it will be a question
3 of publishing a fuller version later.

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

5 MR. RAYMENT: Sir, on behalf of the Competition Commission I make an application for my
6 costs, first, of the application that was made and came on for hearing on 19th July. On that
7 occasion the Tribunal reserved the costs of that application. I am very sorry, I have actually
8 brought the wrong order along with me, but the Tribunal did reserve the costs of that
9 application. I also make an application for the costs of the application in respect of which you
10 have just delivered Judgment. The Commission's proposal would be to try and agree the level
11 of any costs the Tribunal was minded to order within a period of, say, 28 days and in default of
12 agreement the costs be summarily assessed – the costs in this case should be a relatively
13 straightforward matter to summarily assess if that became necessary, but it may not. Of
14 course, all of this is on the basis that you are minded to make such an order for costs. I
15 understand Mr. Peretz has some submissions that he wants to address to you on costs.
16 Sir, I think that is all I need to say at the moment from the Commission's side, other than I
17 have had a very quick chat with legal representatives on the other side and just to update the
18 Tribunal, both sides are making progress with the appointment of a hold separate manager, so
19 we are hopeful that with a good wind a hold separate manager can be appointed very shortly.

20 THE PRESIDENT: Thank you. Yes, Mr. Peretz?

21 MR. PERETZ: If I can make two points? First, in relation to the application on 19th July, as you
22 may recollect, Sir, the reason why we felt it necessary to make that application was that the
23 Competition in Correspondence had indicated that the paragraph of the order with which we
24 were concerned (para.2(j)) was going to be immediately enforced by them. As you pointed out
25 to my learned leader at the hearing it was not apparent that para.2(j) was capable of being
26 enforced, a proposition with which my learned leader agreed. The problem that we face and
27 the reason why we were there was that had not been the Competition Commission's position,
28 but at the hearing they indicated that in fact they were prepared to accept that it was not
29 immediately enforceable, but that was not something that we were aware of until we got to the
30 hearing.

31 In relation to that application we say the proper order would be no order as to costs.

32 THE PRESIDENT: Yes, is that for me or for the Tribunal – I think it is possibly for me, is it not?

33 MR. PERETZ: I think it may well be for you, Sir, as the only member of the Tribunal who was
34 there.

35 THE PRESIDENT: Yes.

1 MR. PERETZ: In relation to the matter on which the Tribunal has delivered Judgment today, we
2 simply say this: the difficulty that we faced at the time of making the application was that the
3 reasons that had been put to us in the various meetings that we had had with the Competition
4 Commission (that is to say the meetings of 16th August and 17th August in particular) when the
5 Competition Commission announced its intention at that stage of appointing an HSM, were
6 that they had concerns as to what Miss Guy calls the “Key Factors” – that is to say concerns
7 about operations, concerns about sales and marketing, concerns about finance with the latter
8 very much assuming a subsidiary role. That was how the case was put to us. Indeed, in para.
9 71 of your Judgment you make the point, quoting Mrs. Guy, that the purpose of 17th August
10 meeting (the staff meeting) was “... to discuss in detail how best to achieve a workable solution
11 to effect the separation of the sales and marketing operations and finance functions in line with
12 our objectives.”

13 THE PRESIDENT: Yes.

14 MR. PERETZ: That is indeed how it had been put to us. We were then told in a fairly short email,
15 which I am afraid I do not have in front of me, that simply the group had decided to impose an
16 HSM. We were not confronted with what I call “the full reasoning” of Mrs. Guy set out in
17 your para.72, Sir, that is to say option 1, 2 and 3, that all emerged in the witness statement of
18 Mrs. Guy. There is no trace of that analysis in the previous correspondence. What one does
19 have, and I accept that – I think one finds it most conveniently in the Decision Letter – is a
20 slightly vague occasional reference to wider concerns. In the Decision Letter at the bottom of
21 the first page the CC does say that ----

22 THE PRESIDENT: Yes, we quote that in 152.

23 MR. PERETZ: Yes, I am looking at the original letter. The CC refers to its concerns relating to
24 these issues, that is to say the ones I have just flagged up, and then it refers in general terms to
25 a wider concern. But again, it is put in pretty general terms here, and this paragraph, as far as
26 we were concerned, had to be seen against the background of the specific concerns raised at
27 the meetings which we had spent really quite a lot of time discussing – there are pages and
28 pages of transcript of those meetings – devoted to sales and marketing and then to operations.
29 We read the somewhat general paragraph against that background. So we say we were entitled
30 at that stage to bring an application to point out the CC did not really appear to have grappled
31 with the detailed points that we had made.

32 As I read your Judgment, Sir, and you have read Mrs. Guy’s witness statement, we all saw the
33 option 1, 2 and 3 analysis and you accepted that there were these were wider concerns that fill
34 in rather more than the background, but we regard as the foreground of the CC’s reasoning, I
35 think all I can say is that was not how it struck us back at the end of August, and it was really

1 only when we saw Mrs. Guy's witness statement that we saw that the case was capable of
2 being put on that basis, although even then, as you will remember, we still felt a lot of what she
3 was saying was still concentrated on what she called the "key factors".

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

5 MR. RAYMENT: Sir, members of the Tribunal, if I can just deal with those two points. First, in
6 relation to the hearing on 19th July, and the application that led to that hearing, it is said that the
7 CC's position was not clear on para. 2(j) of the order, but in my submission para. 2(j) was
8 perfectly clear in the sense that it did not require the applicants to do anything at that stage as
9 regards separating teams that had already been merged.

10 THE PRESIDENT: Can you just remind me ----

11 MR. RAYMENT: And then we wrote a letter, it is in the second correspondence bundle – not the
12 supplementary – the first files, it is at the back at tab 29.

13 THE PRESIDENT: I seem to remember – and I am just casting my mind back – that there came a
14 point in which you had more or less said that you would not be taking any steps to enforce 2(j)
15 until you had had further clarification by way of the monitoring trustees' report, but I am not
16 clear at what point that was said? Was it before the application was made, or when the
17 application was made?

18 MR. RAYMENT: The liaison to which we were referring as part of that process was actually
19 mentioned on the face of para. 2(j) you will recall, so although we had decided in principle,
20 and I think para. 2(j) of the order made that clear, the modalities were very much up in the air,
21 and I made a submission to that effect at the hearing.

22 THE PRESIDENT: Is this the 18th July?

23 MR. RAYMENT: The hearing was on 19th July.

24 THE PRESIDENT: Yes, but the letter to which you were just about to refer?

25 MR. RAYMENT: It is actually undated.

26 THE PRESIDENT: But it is under cover of an email of 18th July – is that right – just immediately in
27 front of it?

28 MR. RAYMENT: Yes.

29 THE PRESIDENT: Sent on behalf of Kate Vernon – is that right? Or who is that to?

30 MR. RAYMENT: The Commission's letter was to Mr. Rees.

31 THE PRESIDENT: It is behind a different email in our file – no matter.

32 MR. PERETZ: This is the letter that begins: "Thank you for your email of 13.24 ..."

33 MR. RAYMENT: That is correct. It came under cover of an email, I think, with the order. It was a
34 covering letter to the order, I think.

35 THE PRESIDENT: What is the point you ----

1 MR. RAYMENT: -- to draw your attention to, it is simply the fourth paragraph where the author of
2 the letter, which is Miss Ross, says that she notes that the mere fact of an appeal to the
3 Tribunal in this context does not have automatic suspensory effect, and she says but it is not
4 certain that no steps will be required to separate existing teams before the conclusion of
5 proceedings in the Tribunal.

6 THE PRESIDENT: Yes.

7 MR. RAYMENT: Well, the fact you have been told that it is not certain that no steps will be
8 required is not, in my submission, a sufficient basis on which to rush off immediately to the
9 Tribunal in the way that happened on the 19th July when the terms of para.2(j) of the order
10 itself and the letter that had been received both made it clear that nothing immediate was
11 required in terms of separating existing teams, because on the face of ----

12 THE PRESIDENT: We need to go back to 2(j) I think, if we may.

13 MR. RAYMENT: Yes, of course.

14 THE PRESIDENT: (After a pause) Yes, then this point came up at the hearing and I am just turning
15 up the transcript of that hearing. On p.1 of that transcript Mr. Lasok told me that there had
16 been "contact between the parties this morning" and that the CC's position was that "pending
17 the substantive determination of the application they would not take steps and require
18 [Stericycle] to take steps ..." etc. He then says that on the basis of that there is no need for the
19 Tribunal to make an interim order.

20 MR. RAYMENT: In my submission we had made clear that nothing immediate was required and
21 certainly nothing so immediate as to justify ----

22 THE PRESIDENT: So what was the nature of the contact between the parties that had taken place
23 on the morning of the 19th ----

24 MR. RAYMENT: Well I do not want to give evidence, but I think it was a quick word that he had
25 with me just before we came into the Tribunal.

26 THE PRESIDENT: Yes, and you tell us (on p.3) that your clients were prepared not to enforce the
27 terms of the second part of 2(j) "... until the Tribunal has had an opportunity to dispose of the
28 substantive matter".

29 MR. RAYMENT: There that was specifically in the context of the fact that by that stage, of course,
30 the application had been made. But the point that I am making is that there was nothing that
31 justified ----

32 THE PRESIDENT: They had no need to make the application.

33 MR. RAYMENT: No, not at that stage in the way that it came about, it was slightly over the ----

34 THE PRESIDENT: Yes.

1 MR. RAYMENT: Then moving on to the application for costs in relation to this matter. Mr. Peretz
2 has referred you to the discussions at the 16th and 17th August meetings between the
3 Commission and the Applicants. In my submission, as I read your Judgment, it was clear from
4 those meetings that the separate minds' point was very much in the mind of the Commission as
5 well as the more specific narrower points that Mr. Peretz has sought to persuade you were the
6 only issues that were really in play as far as they were concerned.

7 THE PRESIDENT: Where do we find that being put in terms to the Applicants? Clearly Mrs. Guy
8 made that point when discussing the matter with Grant Thornton on the 16th, but where do we
9 find it being explained to the Applicants?

10 MR. RAYMENT: I apologise, I do not actually have the transcript.

11 THE PRESIDENT: You have pointed out at 64 the meeting on 7th July.

12 MR. RAYMENT: As I say, I am sorry, I do not have the transcript in front of me at this moment,
13 but it was certainly put to Mr. Blyde, for example, as I recall that the Commission was
14 concerned about his dual position.

15 THE PRESIDENT: On 16th August ----

16 MR. RAYMENT: Yes.

17 THE PRESIDENT: -- if on no other date.

18 MR. RAYMENT: If on no other date.

19 THE PRESIDENT: His dual role, yes. Are we able to put our fingers on that?

20 MR. RAYMENT: I am sorry, what I meant was I physically do not have the relevant file in the
21 room, it is outside the door in fact.

22 THE PRESIDENT: Why do we not rise for a couple of minutes while we see if we can just nail that
23 point?

24 MR. RAYMENT: I am grateful.

25 (The hearing adjourned at 2.45 p.m. and resumed at 2.55 p.m.)

26 THE PRESIDENT: Yes, Mr. Rayment?

27 MR. RAYMENT: I am grateful for that short adjournment, Sir. I think this is quite an important
28 issue because it really goes to the heart of what is discussed in the Judgment which is that we
29 had a process here where the applicants were consistently coming into the Commission saying
30 "You have raised this issue, this addresses it. You have raised this issue we address it by
31 saying **this**", and the Commission's response to that is to say that there are individual issues.
32 "We are concerned actually that some of the specific proposals that you have made do not
33 actually address these issues", but there is the overall consideration in the context of interim
34 remedies, and the slightly difficult position the Commission is in in being able to prescribe and
35 identify precisely everything that is likely to happen. That is why you put in a hold separate

1 manager. In our submission that is a point that has somewhat been lost on the Applicants in all
2 of this, and the position of the Commission does come out quite clearly in the hearing on 16th
3 that was held with the Applicants at p.32 of the transcript, in file 5.

4 MR. DAVEY: This is the transcript of 16th August?

5 MR. RAYMENT: That is correct.

6 THE PRESIDENT: Page 32.

7 MR. PERETZ: Can I just make an apology at this stage which is that not having offices just down
8 the corridor as certain parties before this Tribunal ----

9 THE PRESIDENT: You do not have it.

10 MR. RAYMENT: I do not have an office down the corridor either, I had just got my papers outside
11 the door.

12 THE PRESIDENT: Well perhaps we can lend Mr. Peretz a file.

13 MR. PERETZ: That would be very kind, thank you. (File handed to Mr. Peretz)

14 MR. RAYMENT: I am not able to take the Tribunal to every passage in the transcript but I think the
15 passage I want to take you to does sum up in essence this issue that I have just referred to. In
16 particular Miss Ross, who is quoted at the bottom of the page, that quote **there**, and maybe I
17 would invite the Tribunal to read it to yourselves.

18 THE PRESIDENT: Yes, "... difficult to prescribe ..."

19 MR. RAYMENT: Yes, and the issue for the interim remedies as a whole, and this for us
20 encapsulates essentially part of the problem of this whole iterative process that we went
21 through.

22 THE PRESIDENT: Yes. In this same transcript, while we are on it, among the passages that I had
23 underlined, there is a passage on p.12, towards the bottom. It begins "You talk about the
24 senior management team ..." and this is the Chairman saying that all roads effectively lead to
25 Mr. Blyde.

26 MR. RAYMENT: Yes.

27 THE PRESIDENT: And that there is a single directing mind, and I think that may be reflected again
28 on p.28.

29 MR. RAYMENT: Could you perhaps look at p.25 if you are going in that direction, because the
30 second speaker there is the Chairman, and what she says half way through the paragraph of her
31 speech: "What we are suggesting is that the separation needs to happen however we end up in
32 relation to you. At that level we need to have more separation."

33 THE PRESIDENT: Yes.

1 MR. RAYMENT: So Mr. Blyde was very centrally identified as the issue. I do not deny for a
2 moment that the Commission did have these principal concerns in its mind, but it was always
3 wider than that.

4 THE PRESIDENT: On p.28, again Miss Ross, at the bottom of the page:

5 “If they are to remain capable of competing with each other and that STG remain a
6 viable business in its own right, if throughout the inquiry there is a single decision
7 making mind that makes decisions straddling both those businesses because it seems
8 very difficult for us for that one person to divide himself and make decisions”

9 in relation to the two businesses effectively. That is the point, is it not?

10 MR. RAYMENT: That is the point, and it appears in a number of places in the transcript in my
11 submission.

12 THE PRESIDENT: Yes.

13 MR. RAYMENT: I think that is the key point and, as I said, there is the overarching point about the
14 whole issue raised by these submissions which is about the whole nature of the process that we
15 went through.

16 THE PRESIDENT: Yes. Do you want to come back on the transcript, Mr. Peretz?

17 MR. PERETZ: Very quickly, yes. Dealing first with the point about the current application. If you
18 stay in the transcript bundle and go to the transcript of the staff meeting on the 17th, the
19 purpose of which was really to take forward the discussion that had started on the 16th. It is
20 interesting, we say, to see how Miss Ross opens that meeting on behalf of the CC. If you turn
21 to p.3 of the transcript and quickly skim down to the bottom of the page to get the context, and
22 then turn over to the top of p.4 there she is explaining how useful they found the Grant
23 Thornton report. She says “It has allowed us to focus in on certain key areas of the business
24 where we think there are real risks to the separable viable STG.” Then she goes on: “One is in
25 relation not commercial marketing because that relates to the customer base, one is in relation
26 to operations because that relates to the assets”, and she mentions finance. Then she goes on to
27 say at lines 14 and 15: “... less concerns about other things.” Then she says: “Does that make
28 sense to you as a sort of map for the meeting?” That is the CC’s own map for the meeting
29 setting out the reasons why they were thinking of appointing a hold separate manager. As far
30 as we were concerned, we understood that to be the articulated basis upon which we were
31 being asked to explore the final decision, that stage had not yet been taken, but to explore the
32 reasoning behind appointing an HSM. Yes, there is the odd reference to there being wider
33 concerns, but we focused on the matters on which we had been asked specifically to
34 comment ----

35 THE PRESIDENT: But is all this about an HSM, or is this about details?

1 MR. PERETZ: Yes, well at this stage we are still discussing, because the CC is very careful to say at
2 this stage that it had not yet taken a decision on whether or not to appoint an HSM. We are
3 discussing as well, of course, a whole lot of other things.

4 THE PRESIDENT: Yes, excuse me. (After a pause) Yes.

5 MR. PERETZ: As I say that is the position as we saw it.

6 THE PRESIDENT: Yes, thank you, Mr. Peretz.

7 MR. PERETZ: Then if I could deal with the 19th July application. By this stage there were several
8 letters each day, but the previous few letters preceding the Decision Letter, are helpfully set out
9 in para.51 and so on of the original Notice of Application. Paragraph 51 on p.28 there is a
10 letter from those instructing me asking whether or not it has now decided that separate teams
11 must be established, and it quotes from the previous letter of the CC, which said that the CC
12 “... now requires Stericycle and STG in liaison with the CC to establish suitable
13 arrangements for ensuring that certain key functions or specified aspects of key
14 functions are carried on by separate teams”.

15 Then further down the page we flagged up that that was not quite what we understood para.
16 2(j) to mean on its wording, and we emphasise the passage underlined there. At para.52 we
17 get an email back from the CC just over an hour later. That says:

18 “It is the CC’s view that the separate operation of certain key Stericycle and STG
19 teams is necessary from this point onward in order to preserve the viability and
20 separability of the Stericycle and STG businesses and to ensure the effectiveness of
21 the CC’s inquiry.”

22 Then those instructing me write back, again just over an hour later, at para.53:

23 “In the meantime we say we take it that no steps are required to separate existing
24 teams before (a) the conclusion of the CAT proceedings; and (b) the consultation with
25 Stericycle and STG required under clause 2(j) of the Commission’s order.”

26 and it is that question which the later letter of that day of the CC, which we have already been
27 through, is seeking to address. Put shortly, the CC was on notice by this stage, somewhat late
28 in the day on Tuesday, that we were very much thinking of an interim application because we
29 were very concerned we were going to be asked to do something immediately. What the CC
30 could certainly have done at any stage is simply to say “Look, all of us who are active in this
31 field know that the CAT will deal very quickly and promptly with an application of this sort; it
32 will not take very long. Let us co-operate to get it on quickly. In the meantime we can assure
33 you that you are not going to be required to do something to your prejudice and about which
34 you are protesting.” They could have simply said that and there would have been no need for
35 us to go to the Tribunal the next day. It never said so.

1 THE PRESIDENT: Right, thank you.

2 MR. PERETZ: And, as a result, it is only on the morning of the day that Mr. Rayment phoned me,
3 and I can confirm that, that we became clear what the CC's actual position was.

4 THE PRESIDENT: Thank you.

5 [For the Tribunal's ruling, see separate transcript]

6 THE PRESIDENT: Anything else? Mr. Peretz, do we take it from what Mr. Rayment said that
7 there is now progress towards the appointment of a hold separate manager?

8 MR. PERETZ: Yes, that is my understanding. Candidates, I understand it, are being interviewed.

9 THE PRESIDENT: The reason that I ask is that if there were any prospect of any further Appeal, as
10 to which we would be extremely unenthusiastic, we would be minded to abridge the time for
11 making any such application because, in our view, we have now reached the point where
12 decisions have to be taken and implemented.

13 MR. PERETZ: I have no instructions to take the matter any further.

14 THE PRESIDENT: Yes.

15 MR. RAYMENT: No observations.

16 THE PRESIDENT: Unless there are any other applications, thank you very much indeed.

17 (The hearing concluded at 3.15 p.m.)