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IN THE COMPETITION

Case No. 1070/4/8/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

7th September 2006

Before:
SIR CHRISTOPHER BELLAMY
(President)
Michael Davey
Richard Prosser OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) STERICYLE INTERNATIONAL LLC
(2) STERICYCLE INTERNATIONAL LIMITED
(3) STERILE TECHNOLOGIES GROUP LIMITED

Applicants

and

COMPETITION COMMISSION

Respondent

Mr. Paul Lasok QC, Mr. George Peretz and Mr. Jorren Knibbe (instructed by DLA Piper Rudnick Gray Carey) appeared for the Applicants.

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

Transcribed from the Shorthand notes of
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

PROCEEDINGS
(Non-confidential version)

Note: Excisions in this judgment (marked "[...][C]") relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

1 THE PRESIDENT: Good morning.

2 MR. LASOK: May it please you, sir; Mr. Peretz, Mr. Knibbe and I appear on behalf of the
3 Applicants, and Mr. Rayment for the Respondents, the Competition Commission.

4 You have got a skeleton argument from us that was sent slightly late due to technical
5 difficulties, and what I am going to do is effectively to take it as read, and also the pleadings as
6 read. I will make some references to certain parts of the skeleton argument, but for the most
7 part my intention is to respond to the case that is made out by the Respondent in its defence.
8 There are a couple of preliminary matters that I need to deal with. The first is that I am not
9 sure that the Tribunal has actually ruled as to whether this is an English case, a Scottish case or
10 something else.

11 The second is that we are grateful for the fact that the Tribunal is holding this in Camera. As
12 you can see from looking at the directions, they are actually littered with confidential material,
13 but there are some people in court and we do not know they are.

14 THE PRESIDENT: We will sort that out straight away, Mr. Lasok, thank you for reminding me.

15 It is the Tribunal's intention to hold this hearing in Private, so we need to ask anyone who is
16 not associated with either of the principal parties to please leave the hearing room. Is there
17 anybody who is not, in the case of the CC, either on the staff of the CC or a representative of
18 the CC; and in the case of the Applicants? I am sorry about that.

19 (All non-interested parties withdrew)

20 THE PRESIDENT: Sorry, Mr. Lasok, the first point was?

21 MR. LASOK: The question of whether this is an English case or a Scottish case.

22 THE PRESIDENT: I do not think it matters particularly, but we will treat ourselves as a Tribunal
23 sitting in England and Wales, which is the normal default position, unless there is some reason
24 not to do so.

25 MR. LASOK: I am much obliged.

26 I just want to make some preliminary points before we get into our submissions on the
27 particular provisions of the directions and the order that are the subject of challenge. As the
28 Tribunal will be aware, there are two notices of application. There is the original notice of
29 application and the supplementary notice.

30 What we have done pragmatically is to try and go as far as we possibly can in the direction of
31 the Competition Commission, irrespective of whether or not we believe that the approach that
32 they are taking is correct in law, or sustainable. There is a point that has been reached at which
33 we believe that actually we believe we simply cannot go any further. It is those points that we
34 have tried to identify in the supplementary notice of application.

1 In the defence and Mrs. Guy's witness statement a number of comments have been made,
2 rather, I think, of a background nature, about what one can loosely describe as the relationship
3 between the CC and the Applicants in the course of the inquiry. Although we think those are
4 not relevant to the legal issues, one always tends to get a bit worried about that kind of thing
5 because one feels that perhaps it is in there in order to colour the views of the Tribunal. I am
6 not saying that this was the intention but one gets a slightly uneasy feeling. In the skeleton
7 argument at paras.4 to 6 we attempt to deal with that and we identify three areas of concern
8 that the Competition Commission appears to have had concerning the Applicants and which
9 seem to be colouring their approach to the present problem.

10 We have identified those areas and in para.6 we have set out some short comments about them.

11 THE PRESIDENT: Just before we go on to that, Mr. Lasok, can I make a general comment. We do
12 get the impression, and I think you have more or less confirmed it, that for whatever reason the
13 relationships, as they have so far developed, have not been quite the best. The CC says that it
14 feels frustrated and your clients say that they do not understand why the CC is feeling
15 frustrated. So there is clearly a certain degree of mismatch between the parties' positions
16 which seems to have arisen in which both sides feel that the other side has not really
17 understood their concerns.

18 When this Tribunal is faced with that sort of situation, which does arise from time to time and
19 when we come to, as it were, have a fresh look where two parties have not quite managed to
20 see eye to eye, it is obviously of concern to us to explore whether, in the context of a fresh
21 look, a sensible arrangement can be made in a way that helps the relationships on and also,
22 after all, helps the further progress of the substantive inquiry, which at the moment is being
23 somewhat sidetracked by this procedural issue as far as we can see.

24 From your clients' point of view I think we can see at first sight, and you will take us through
25 it of course, why the CC is concerned. We can see, to some extent, why your clients are
26 concerned too. There is a very important, I think, interest on your clients' behalf to come as
27 close as they possibly can to what is being asked of them.

28 MR. LASOK: In the greater scheme of things – that is to say in the overall context of the inquiry – it
29 simply is not in our interests to stand on points of principle if there are pragmatic solutions.

30 That is what we have been trying to do. In para.6 – you have got the cross-references ----

31 THE PRESIDENT: This is para.6 of your skeleton argument?

32 MR. LASOK: Yes, of the skeleton argument. If one actually probes into the origins of the CC's
33 concern, one can actually see where they come from. In part they stem from the fact that at an
34 earlier stage in the proceedings the CC came to some assumptions of fact, shall we say, and we

1 have identified them, that were not actually correct. That is not a criticism of the CC, for this
2 reason ----

3 THE PRESIDENT: Mr. Lasok, I am not sure it is going to be useful for us to try to understand why
4 it is that the relationship has not developed in a satisfactory way. It just has not. What we now
5 need to do is to have a very close, fresh look at the situation to see whether it can be sorted out.

6 MR. LASOK: Exactly. We put it there. It is in writing. You can see that there are explanations.
7 This is not a case of the Applicants behaving in a malicious or unhelpful way, as we see it at
8 any rate.

9 THE PRESIDENT: One of the problems is that, for whatever reason, the situation as it was at the
10 end of the OFT's inquiry, the CC seems to have thought that the situation that had by then
11 arisen was rather ambiguous.

12 MR. LASOK: Yes, and I think one can say that the CC, firstly, appears to have been dissatisfied
13 with the approach taken by the OFT.

14 THE PRESIDENT: Yes, and I think one can understand why they may have taken that view.

15 MR. LASOK: Reading between the lines it also looks as though the CC was looking at the OFT
16 undertakings without having a full picture of all the communications that had been passing
17 between the Applicants and the OFT. Therefore, it was coming to the issue from a perspective
18 that was not as fully informed as the OFT.

19 THE PRESIDENT: Up to a point possibly, but unless you persuade us to the contrary I think our
20 present view is that the CC is fully entitled to have a fresh look once it gets here.

21 MR. LASOK: That is absolutely right.

22 THE PRESIDENT: It is only a partial answer to say, "Oh, well, the OFT did not mind, we explained
23 it to them and they thought it was all" ----

24 MR. LASOK: With respect, that is not the point that I am seeking to get across, because we all
25 accept that the CC is entitled to bring a fresh mind, because it has a fresh mind and it has got
26 its own powers to exercise.

27 I think the problem is that the CC appears to have taken the view that the Applicants have not
28 behaved properly in relation to the OFT, but when one looks closely at that, as I have said, that
29 appears to be, if you actually analyse it and look at what happened, based upon the fact that the
30 CC from its perspective was taking a stricter view of the undertakings with the OFT than the
31 OFT itself was taking.

32 THE PRESIDENT: We have a got long witness statement from Mrs. Guy which suggests that that is
33 not the whole story by any means and in the course of the meetings that the CC and its staff
34 had with your clients at various stages they felt very unhappy with what was going on. That is
35 their position. It may be right or wrong, but the position is that we have got a situation to deal

1 with where the CC expresses is frustration and Mr. Reece in his latest witness statement says
2 that he does not understand why they are frustrated, but they are frustrated. Your clients need
3 to appreciate that the CC is frustrated and that we need to find a solution.

4 MR. LASOK: We appreciate that, and I hope now that the CC appreciates that we appreciate it.

5 THE PRESIDENT: Right. On that semi-positive note, let us get on with the case.

6 MR. LASOK: On that basis I would propose to pass on.

7 The next point I wanted to make at this stage concerns the discussion in the skeleton argument
8 at paras.20 to 32 about the meaning of “pre-emptive action”. We think that this interesting
9 question concerning the construction of s.81 of the Enterprise Act is not actually relevant to the
10 present case. That is because the way we read Mrs. Guy’s witness statement is that the CC
11 was intending to prevent future pre-emptive action in the way that we understand the operation
12 of s.81. There is a suggestion – more than a suggestion – the defence contains a number of
13 passages in which it appears that the CC takes a different view from us concerning the
14 construction of s.81. As I said, on the basis of our understanding of the CC’s approach in this
15 case that discussion is not relevant.

16 THE PRESIDENT: Can I just, because it might be useful, articulate a very first thought, and
17 possibly inaccurate thought, as to how this is all supposed to work. Could we just look at s.81
18 and the definition of “pre-emptive action”. This is set out in s.80(10):

19 “Pre-emptive action means action which might prejudice the reference concerned or
20 impede the taking of any action under this part which may be justified by the
21 Commission’s reference ...”

22 I suppose the first observation, which is a purely academic point, is that confusingly the word
23 “action” appears three times but the third time it is used in a quite different sense from the first
24 two. The third reference to “action” refers to action taken under the Act, whereas the first two
25 “actions” refer to actions taken by the undertakings.

26 MR. LASOK: I think one can add this point, the reference to “action” in the phrase “pre-emptive
27 action” and also in the word “action” as it appears after “means” will include defaults, but the
28 third reference to “action” which concerns the action that is taken by the Commission almost
29 certainly refers to positive steps rather than inaction.

30 THE PRESIDENT: It might or it might not.

31 MR. LASOK: We could have an interesting discussion about that.

32 THE PRESIDENT: What is relevant for present purpose is action which might prejudice the
33 reference concerned or impede the taking of further steps.

34 That takes us to the word “prevent”, so we have to ask ourselves whether what is being done is
35 for the purpose of preventing pre-emptive action – i.e. action which might prejudice, et cetera –

1 and in this case it is really action which might impede the taking of the further steps, rather
2 than prejudicing the reference. It would occur to me, at least at first sight, that one would need
3 to identify what action it is that might impede the taking of the other sort of action that you
4 want to prevent. Having identified that, you can then ask yourself whether you need to prevent
5 it and whether it is reasonable to try to do so, et cetera, et cetera.

6 On the academic point as to whether the action that might impede the taking of the subsequent
7 steps that you want to prevent is action that always lies in the future or is action that has
8 already happened, you might on the reading of the section say that it did not necessarily
9 exclude action that had happened in the past.

10 In this particular case, if we go back to the interim order that was actually made, the drift of the
11 interim order of 18th July, para.1 is talking about “further integration”. So that is the context in
12 which this case arises. It is true that sub-para.(d) of para.1 talks about any action which might
13 impede, et cetera, but the essential drift of the first paragraph of the order of 18th July is further
14 integration or further impair – that is (a) and (c). That seems to be the basis on which this
15 order is made in this case. So there is a sense in which it is intended to be looking more at the
16 future than at the past.

17 MR. LASOK: Yes, and that is our understanding.

18 THE PRESIDENT: So it may be that we do not actually need to decide what the exact meaning of
19 the statute is because in this particular case the action that they thought necessary to prevent is
20 future looking rather than past looking.

21 MR. LASOK: That is our understanding of the case as well.

22 THE PRESIDENT: But we can come back to all that in due course.

23 MR. LASOK: What I wanted to do now was to make four general points before passing on to
24 consider the major issue, which is the HSM appointment decision. The four points are these.
25 They are rather trite, I am afraid to say. Firstly, in order to exercise its power to review the
26 order and the directions the Tribunal must first identify the true meaning of the challenged
27 provisions and then, in the light of the true meaning, determine their lawfulness.
28 Secondly, the true meaning is determined objectively from the terms of the relevant provision,
29 and it is not what one or other of the parties thinks that it means, or ought to mean.

30 THE PRESIDENT: Query.

31 MR. LASOK: That brings me to the third point. It is common ground that the order and the
32 directions are an enforcement order for the purposes of the Act, see s.86(6), and as such they
33 are enforceable and give rise to enforceable duties as provided for in s.94.
34 That brings me to my fourth point, which is that it follows that orders and directions of this
35 type must be worded sufficiently clearly and precisely so as to make clear the duties imposed

1 on the persons concerned. That has consequences for the approach taken by courts to the
2 interpretation of such orders and directions. That is why they mean what they actually say.
3 One can go on and make this point: that if a provision is vague or insufficiently clear and
4 precise, that is just as good a reason for striking it out as if it were unworkable, unnecessary,
5 disproportionate or unreasonable for some other reason.

6 THE PRESIDENT: Yes.

7 MR. LASOK: I want to turn now to the HSM appointment aspect of the case. The best way of
8 approaching it, I think, is to start off with the picture – almost literally a picture – of the current
9 position that appearing in the Monitoring Trustee’s report at p.14. The Monitoring Trustee’s
10 report is in the supplementary notice of application bundle at tab B. There you have a table
11 setting out the current senior management team. You will see that Mr. Blyde, the CEO, comes
12 from STG, and you will see, if you look at the various people in the boxes, the companies that
13 they come from, some from WRE and some from STG. You will note that there two boxes
14 which have “Head of finance”, so the current position is that there is existing separation of
15 finance.

16 For the sake of completeness perhaps, if you look on the right hand side you will see two
17 boxes, one “Human resources” and one “Environmental”. There is no objection to integration
18 in relation to those two aspects of the business.

19 Of course, the senior management structure that you see here is subject to the constraints on
20 the passing of confidential information that has been put in place, and to a great extent are not
21 challenged.

22 THE PRESIDENT: Just remind me where I find those, Mr. Lasok, or can somebody remind me in a
23 moment.

24 MR. LASOK: In part it is 2(l) and (m) in the original order. There are rather more complicated
25 provisions in the directions, part of which are the subject of challenge.

26 Trying to put it in a nutshell, the flow of information across the WRE and STG businesses is
27 permitted where it is strictly necessary in the ordinary course of business. The term “ordinary
28 course of business” is a defined term and the definition appears in the order.

29 There can also be a cross-flow where it is for the purposes of enabling the merged entity to
30 defend itself in the course of the CC proceedings and other proceedings, but that is putting
31 matters in a nutshell.

32 There is no particular problem about there being a senior management team in which there are
33 two heads of finance as long as the flows of financial information are strictly necessary in the
34 ordinary course of business.

1 If we compare that as the current structure, which effectively was put in place before the
2 inquiry started and before the OFT asked for undertakings.

3 THE PRESIDENT: The first inquiry from the OFT was the day after the acquisition.

4 MR. LASOK: The CC inquiry and before the OFT asked for undertakings.

5 THE PRESIDENT: Yes, but when you had got a letter from the OFT the day after the acquisition
6 somebody must have been on notice that there was a problem.

7 MR. LASOK: I am simply identifying the facts.

8 THE PRESIDENT: Yes, but it is not wholly irrelevant that, having received a letter from the OFT,
9 your clients just went on as if the merger was going ahead.

10 MR. LASOK: The position actually was that although the inquiry was made by the OFT the OFT
11 did not, itself, trouble itself to advance matters until 24th May.

12 THE PRESIDENT: Would it be fair to say that there was a foreseeable risk, or would have been a
13 foreseeable risk, of some action being taken under the Enterprise Act in regard to this merger
14 from the day after the acquisition at the latest?

15 MR. LASOK: There was always a risk. The problem that we have got in the system that has been
16 adopted in the United Kingdom dealing with merger control is that if you wanted to ensure that
17 the mere shot across the bows by an OFT letter should be sufficient to cause people to freeze
18 everything then you simply would not have the legislative provisions that we currently have.
19 Parliament would have provided that when the warning shot comes across then the parties
20 must stop what they are doing.

21 THE PRESIDENT: But if you take a risk, you take a risk, do you not?

22 MR. LASOK: If you take a risk you take the risk.

23 THE PRESIDENT: My question was, would it not be fair for the Tribunal to take the view that in
24 this particular case your clients took a risk?

25 MR. LASOK: They take a risk, yes.

26 THE PRESIDENT: It was always foreseeable that it would come unstuck.

27 MR. LASOK: It was always foreseeable that it would come unstuck. We are not advancing our
28 attack on the provisions in question merely because they will require us to undo what we have
29 already done.

30 THE PRESIDENT: As I understand it, and forgive me, you are basically saying that this is more a
31 question of the reasonableness of what is now proposed?

32 MR. LASOK: Yes, and, as I have said, we have actually agreed to a considerable amount of what is
33 required, and we have not taken the position, "Oh, well, we took a risk and therefore we should
34 be allowed, as it were, to benefit from the fact that we took a risk. We have not said that at all.

1 THE PRESIDENT: The reasonableness of what is now being required might be affected by the
2 antecedent history of how we got to where we are?

3 MR. LASOK: No. In our respectful submission, the reasonableness has to be considered objectively
4 by reference to the state of affairs as it exists and the proper objectives of the power that has
5 been granted to the Competition Commission.

6 I wanted to compare the current structure with a picture of what the CC has decided is
7 appropriate. That is the supplementary notice of application bundle, tab A. Tab A has got the
8 covering letter under which the 25th August directions were sent. It has got a copy of the
9 25th August directions, and it should have also a version that identifies the confidential
10 passages in a sort of highlighting. You should actually have two copies, it may be rather
11 confusing. The other thing to bear in mind is that the copy which has got ----

12 THE PRESIDENT: I am sorry, Mr. Lasok, you are just going a little bit ahead of me. This was
13 appendix 1, was it?

14 MR. LASOK: A, it is the same bundle that we were looking at a moment ago. You should first have
15 a five page letter dated 25th August, and after that you should have a document headed
16 "Directions issued by the Competition Commission on 25th August". In my copy I have got
17 two versions of this document. The second version has got printed highlighting in certain parts
18 of it. If you have the first page of it, it has got things like a box in the top right hand corner
19 that says "Deleted", and another box that says "Formatted font 12 point".

20 THE PRESIDENT: We have got a copy with some highlights in it.

21 MR. LASOK: That is the one I am talking about. The highlights identify passages that are agreed to
22 be confidential by the parties.

23 THE PRESIDENT: I see, yes.

24 MR. LASOK: This highlighted version also has some corrections of typographical errors that had
25 appeared in the other version. I do not know which version you want to look at.

26 THE PRESIDENT: Which is the authentic text?

27 MR. LASOK: The authentic text is the second one, because it is the one with the corrections in it.

28 THE PRESIDENT: You were going to take us to appendix 1 of that.

29 MR. LASOK: Yes, but I have just noticed that I have not got appendix 1 in my copy, which just
30 shows you the tricks that life plays on you. In the first version of this document appendix 1
31 appears on p.19. This has got the senior management structure as the directions will produce.

32 THE PRESIDENT: Yes, I think that version will do because it does not look as if there is any
33 particular change from the other one. Someone can point it out if there is.

34 MR. LASOK: I do not know whether there were any changes to the appendices.

35 THE PRESIDENT: Yes.

1 MR. LASOK: You have got in the top boxes “Stericycle LLC”, which is the parent and on the right
2 you have got Grant Thornton as the Monitoring Trustee. At the next level you have got
3 Bill Blyde, the CEO of Stericycle Europe, responsibility for Stericycle business only. You will
4 recall that he is ex-STG. Opposite him you have got a Hold Separate Manager who is
5 responsible for STG only. Then you have got a series of boxes underneath and a variety of
6 arrows, and there is a commentary at the bottom. [...] [C]

7 MR. LASOK: The problem arises in relation to Hold Separate Manager. [...] [C]

8 THE PRESIDENT: Let us see if I have got the hang of it. The central point at this stage of the
9 argument is the inter-position of a Hold Separate Manager for STG [...] [C]. Is that it?

10 MR. LASOK: Yes, it is the fifth wheel on the cart. The problem about the fifth wheel is that it is not
11 a spare wheel that is just rattling around in the back and can be brought on special occasions.

12 THE PRESIDENT: It is a ----

13 MR. LASOK: It is actually slowing the cart down and it is causing difficulties and it is impractical,
14 unworkable, and so on and so forth.

15 THE PRESIDENT: Whatever those things are that you put on cars that make sure they do not go too
16 fast.

17 MR. LASOK: I think this causes you to go backwards when you would prefer to go forwards.

18 THE PRESIDENT: That is a question of fact and degree.

19 MR. LASOK: [...] [C] this is all actually in the context in which there are permitted flows of
20 confidential information in any event.

21 THE PRESIDENT: Yes, but none of that is seriously in dispute?

22 MR. LASOK: It is the Hold Separate Manager that is the problem.
23 If you turn to the next page, which is appendix 2, we have got the marketing structure
24 explained in slightly greater detail with a bit more commentary. [...] [C]

25 THE PRESIDENT: Yes, but that all is agreed. I think we have understood that. [...] [C]

26 MR. LASOK: Yes. When we get to the next page, “Operations and logistics structure”, we would
27 probably need to add a few arrows.
28 Perhaps I ought to explain why I am doing this. Although we have got a Hold Separate
29 Manager, in reality this is not a hold separate operation. It is not a situation in which there is
30 or there can be a clean split between the businesses so that you can have a genuine Hold
31 Separate Manager. The problem arises because, for reasons which we fully accept, the
32 Competition Commission has put in place a structure that cannot bring about complete
33 separation. There cannot be a complete separation.

34 THE PRESIDENT: They have gone as far as they can to meet some of your objections.

35 MR. LASOK: The problem is, is this achieving anything at all? [...] [C]

1 THE PRESIDENT: That is all agreed?

2 MR. LASOK: That is all agreed, but the reason why I am mentioning this is because, in our
3 submission, the Tribunal needs to understand the context of the role played by the Hold
4 Separate Manager and therefore the reason why we are contesting it. It is very easy to say,
5 “What you want to do is to hold the businesses separate”, and so you have to have somebody
6 running one business and somebody running the other. The problem that we have got here is
7 this is not what I can loosely describe as the ordinary kind of case. This is a highly complex
8 case because of the permitted interlinking between the two businesses. That provides the
9 factual context for an examination of the lawfulness or reasonableness of the Hold Separate
10 Manager decision.

11 THE PRESIDENT: It cuts perhaps both ways. If you had two separate businesses that were plainly
12 separate and separable and just running along as if nothing had happened, you would not need
13 a Hold Separate Manager because they are already separate. If you have businesses that are,
14 on your submission, already integrated to or being run jointly to an extent, and you would say a
15 considerable extent, then maybe that strengthens the argument for having a third party to make
16 sure that the remaining line is not crossed.

17 MR. LASOK: Yes, but you could only come to that conclusion once you have examined the factual
18 context in which the HSM is supposed to be operating.

19 The question that inevitably one has to ask oneself, and this is the question that the
20 Competition Commission should have asked itself, is, and I will put it in simple language,
21 “What are we achieving? Are we achieving the statutory objective in a proportionate and
22 reasonable way?”

23 THE PRESIDENT: That is a relevant question, but when you invite us to examine the factual
24 context, which of course we will do, we are nonetheless sitting as a court of judicial review.

25 MR. LASOK: Yes, quite so.

26 I wanted to move from that picture of the complexity of the underlying arrangement to look at
27 the evidence we have got for the reason behind the decision to appoint the HSM. That is
28 contained in the witness statement of Mrs. Guy, which should be in the file. Mine does not
29 have a number on it but it has got the defence and the exhibits to the defence in it. In that
30 bundle Mrs. Guy’s witness statement appears in the third tab. What I want to do here –
31 I appreciate this looks like cherry-picking, it is not, I am working on the basis that the material
32 has been read and what we need to do is to focus on those parts that are relevant to explain the
33 reasoning of the CC concerning the appointment of the HSM and the considerations that it took
34 into account. We have to look at the evidence for this because, of course, this is the only

1 material that we have got that will explain the basis. I wanted to start off with para.41. I do
2 not propose to read para.41 out loud. It starts off by saying, "The Group explained" ----

3 THE PRESIDENT: They were talking to Grant Thornton?

4 MR. LASOK: They were talking to Grant Thornton but it does disclose what the Group were
5 thinking, where they were coming from.

6 THE PRESIDENT: (After a pause) Yes, we have read that.

7 MR. LASOK: The particularly important passages are the last two sentences where you can see that
8 what they were concerned with were future decisions in the areas of sales and marketing,
9 operations and finance. The last sentence explains why they were of concern, importance of
10 maintaining the customer base, which relates to sales and marketing, importance of
11 maintaining the assets, operations, and then you have got highly sensitive nature of the
12 information held by the finance function.

13 The first sentence of 42 starts off by saying, "Other areas of concern included the situation in
14 relation [...] [C].

15 THE PRESIDENT: [...] [C]

16 MR. LASOK: [...] [C]. If you go next to 43, and I would just ask you to look at the last two lines
17 because there is a reference to the CC's concerns about the need for separation decision
18 making minds in those key risk areas. That again is a rather more precise illustration of what
19 the CC was concerned about, decision making in those key risk areas.

20 If you go to 66 to 71, this is consideration of three operations that the CC was looking at, and if
21 you go to 69 this is the explanation for option 3, which is the one that they eventually went for.
22 Again, I would suggest that you read that. I do not want to read it out loud.

23 THE PRESIDENT: (After a pause) We have got so far, in broad terms, CC's concerns about
24 separate decision making in the key risk areas of sales and marketing, operations and finance,
25 CC's consideration of three options and their choice of option number 3.

26 MR. LASOK: Yes. In the middle of the paragraph, the reference to "key risk areas" is not
27 explained, but it must be an allusion back to the three risk areas that they have identified in 41
28 and 43. You will have noted that the Group was content with [...] [C].

29 THE PRESIDENT: Whether or not they were content, they have accepted it.

30 MR. LASOK: That is exactly the same thing. "Content" is one of those words ----

31 THE PRESIDENT: We do not have to quibble over it.

32 MR. LASOK: We do not have to quibble about it, no. That is what they did. You have also got the
33 bit at the end, the Group took comfort from Blyde's argument that it was not in his interests to
34 damage STG's business.

1 There is a reference in the bottom line to “the statement of principles”. This is a document that
2 is to be found as annex D to the supplementary notice of application. Although that document
3 is headed “Draft”, I am told that it actually reflects the final version, what was agreed. This is
4 a statement of principles put in place to deal with the allocation of new business.

5 THE PRESIDENT: Can we just glance at that?

6 MR. LASOK: The first page is the exchange of emails that relates to this and then second page is
7 the first page of the two page document.

8 THE PRESIDENT: (After a pause) This is agreed, is it, this document?

9 MR. LASOK: Yes, those are my instructions, that they have been agreed. In our submission, that is
10 also necessary part of the fact context because it indicates the existence of constraints
11 concerning sales and marketing decisions that have already been placed upon and accepted by
12 the Applicants.

13 THE PRESIDENT: Yes.

14 MR. LASOK: Financing has effectively disappeared as an issue because we have agreed to the
15 separation of the financing functions. There is only transmission of confidential information
16 between the businesses where that is permitted under the existing order and directions.
17 There are two other parts of the factual background that we need to look at, again to explain
18 the factual context of all this. The first is set out in the transcript of the meeting with
19 Grant Thornton. That is in the CC defence bundle.

20 THE PRESIDENT: Yes, that exhibited to Mrs. Guy’s witness statement.

21 MR. LASOK: It is the last tab. This is a passage that runs from p.4, line 6 all the way through to
22 p.12, last line. I will just explain to the Tribunal why I suggest that you read this, certainly at
23 some stage. I will leave it to the Tribunal’s discretion as to whether you want to read it now or
24 later. This is an extensive passage in which Grant Thornton explained to the Competition
25 Commission the factual context of the businesses in useful and informative terms in order to
26 explain to the Competition Commission the features that rendered the divestment, or a possible
27 divestment, an entirely practicable proposition. It ends on pp.11-12 with, effectively, the
28 Competition Commission putting to Grant Thornton its concerns justifying the appointment of
29 an HSM and Grant Thornton responds by saying that, although it appreciated the theoretical
30 nature of the Competition Commission concerns, in the light of the facts Grant Thornton could
31 not see that the concerns were realistic or possibilities.

32 THE PRESIDENT: Just glancing it, this is rather directed to the personal situation of Mr. Blyde – is
33 that right?

34 MR. LASOK: Are you referring to the passage at 11-12?

35 THE PRESIDENT: Yes.

1 MR. LASOK: I do not think it is, because you can see from the middle of p.11 that Miss Ross says
2 that Bill Blyde retains a substantial amount of decision making power. This is the problem
3 about having independent decision making. That was the root of their concern. This is
4 explained after Mr. Byers' acknowledgment at line 18. Then Mr. Byers at the bottom says:

5 "But because of some of the structural impediments that I have talked about and the
6 recommendations that we have made ..."

7 THE PRESIDENT: Hang on. They say that they have got their concerns and they explain that you
8 have to have something at the end of the day and then Mr. Byers says, yes, he would fully
9 agree with that, and then he says, "Because of some of these structural impediments I have
10 talked about", and then he talks about the incentive for Mr. Blyde, the fatally wounding. That
11 appears to be directed to whether Mr. Blyde would do anything through his management of the
12 combined business that would harm the STG business.

13 MR. LASOK: That ultimately is the CC's concern. The concern is that – we do not have to refer to
14 Mr. Blyde by name – if you have one person in charge of the WRE and the STG businesses
15 then the apprehended risk is that that person will be in a position to run down or other of those
16 businesses in such a way – whether intentionally or otherwise, it does not matter, we are not
17 talking about an intention – as to frustrate any possible remedies.

18 THE PRESIDENT: Is it just the apprehended fear that he might run it down? It is very difficult for
19 one person who is running two businesses to take a decision in the interests of either of them,
20 as it were. The idea is that the decision making function, the decisions taken, should be in the
21 interests of WRE or STG as the case may be. If you are doing both that is more difficult.

22 MR. LASOK: That is a pre-supposition.

23 THE PRESIDENT: Is it not relatively self-evident?

24 MR. LASOK: No, I would not regard it as self-evident.

25 THE PRESIDENT: It depends on the circumstances.

26 MR. LASOK: It depends on the circumstances and you have got to look at the facts, but this is the
27 problem ----

28 THE PRESIDENT: We do not know what problems are going to arise, do we? That is why you
29 have a safeguard for the future.

30 MR. LASOK: Take what Grant Thornton says, that they regarded this scenario as an impossibility.

31 THE PRESIDENT: That is the running down scenario?

32 MR. LASOK: No, it is the scenario that the businesses ----

33 THE PRESIDENT: They are talking about fatally wounding.

34 MR. LASOK: Yes, but it is the scenario that one of the businesses would be run to the advantage of
35 the other.

1 The difficulty here is that Grant Thornton have already explained that there is a factual context
2 to all this, which makes this, in their view, unrealistic. At that point I think it is well worth
3 making this observation: in Mrs. Guy's witness statement you would expect to see her
4 explaining the CC's reaction to this. You would expect her to set out that they have taken
5 these considerations into account, they had considered them, but for some reason or through
6 some exercise of judgment they had concluded that their view was the better view, and the
7 facts referred to by Grant Thornton were not sufficient to put the CC off the decision to require
8 the appointment of an HSM.

9 I fear that this is labouring the obvious, but decisions of this nature – and I am here talking
10 about decisions to be made under s.81 – should not be taken in a factual vacuum or on the
11 basis of some kind of doctrinaire approach or on the basis of pre-suppositions, they should be
12 taken by reference to the factual context of the case. In our respectful submission, the decision
13 maker – here it is the CC – has got to address its mind to the particular facts of the case and, in
14 the context of review proceedings of this nature, you expect the decision maker in its evidence
15 to explain that it has looked at the factual context and that it has arrived at a decision that did
16 take into account the relevant features.

17 THE PRESIDENT: Can we just identify the particular facts or relevant considerations that you say
18 they did not take into account?

19 MR. LASOK: Well, they did not take anything of this into account so far as we can see from
20 Mrs. Guy's witness statement.

21 THE PRESIDENT: When you say "this", what do you mean?

22 MR. LASOK: Pages 4-12.

23 THE PRESIDENT: Did not take into account pp.4-12.

24 MR. LASOK: We do not see in Mrs. Guy's witness statement any explanation of what view, if any,
25 the CC took of the facts drawn to the CC's attention by Grant Thornton. One needs, in our
26 respectful submission, to again go back.

27 THE PRESIDENT: It is 41, is it not?

28 MR. LASOK: 41 what?

29 THE PRESIDENT: Of Mrs. Guy's witness statement.

30 MR. LASOK: With respect, if 41 is the evidence on this point then it is deficient. It is deficient in
31 the sense that 41 simply does not say that the CC had addressed its mind to the particular
32 points of fact raised by Grant Thornton ----

33 THE PRESIDENT: I think we need to identify what these points of fact, even if it does mean us
34 looking at pp.4-12 in a bit more detail. They are expressing a view as to what they think
35 Mr. Blyde might or might not do. Is that a fact or it is just a view?

1 MR. LASOK: If you start at p.4 ----

2 THE PRESIDENT: Just tell us what facts we are talking about?

3 MR. LASOK: Line 8, he says that [...] [C].

4 THE PRESIDENT: Just take it a bit more slowly, Mr. Lasok. He saying, “We have got structural
5 impediments to integration in the near term”. [...] [C]

6 MR. LASOK: [...] [C]. We have got a reference on the next page, 2 to 5, to financial accounting,
7 but I do not think that is relevant. The concern that we are looking at here relates to sales and
8 marketing on the one hand, and operations – that is to say the maintenance of assets – on the
9 other.

10 I use the phrase “maintenance of assets” because that is the phrase used in the penultimate
11 sentence of para.41 of Mrs. Guy’s witness statement, and there she also uses the phrase
12 “maintaining of the customer base” in relation to sales and marketing.

13 In the middle of p.5, I fear the Tribunal has gone ahead of me on this, we have got the brands.
14 [...] [C] He says at the bottom of p.6 that it was important to go through some of those
15 structural issues because they are important in painting the backdrop.

16 THE PRESIDENT: Yes.

17 MR. LASOK: On p.8 there is a long bit about logistics, but as far as I can see logistics disappeared
18 as an issue.

19 Then you get to p.9, line 2, the CC says that the areas were sales and marketing and operations,
20 and here we have the “all roads lead to Bill Blyde”. At 14-20 you have got the concern that
21 Bill Blyde would be knowledgeable about both the Stericycle and STG businesses. The point
22 is made by Mr. Byers from Grant Thornton that the STG business was actually built up by
23 Mr. Blyde. Then there is a comment at the bottom that that was unusual. Then he says – this
24 is Mr. Byers on the next page, lines 1-10 – that the particular features concerning Bill Blyde
25 are that he actually has an intimate knowledge of the STG business in any event, and that was
26 something that could not be changed.

27 When you get to p.11, in the middle of that page we have got the bit that I think I referred to a
28 moment ago about Blyde retaining a substantial amount of the decision making power. The
29 comment at 19 to 24 from the CC is again about decisions that could:

30 “... impact on the viability of a separate STG business as a divestiture package, and
31 this is particularly where our concerns go to, operations and commercial marketing,
32 because if you do not have a viable functional set of assets to sell and if you do not
33 have some customers you do not really have a business.”

1 Grant Thornton then addressed that because they have already made the point that due to the
2 particular nature of the businesses this is not a situation in which you can actually run down the
3 assets or get rid of them as you might be able to do in another area of business.

4 THE PRESIDENT: He would not be wanting to run the assets down anyway because he has only
5 just bought them.

6 MR. LASOK: Precisely.

7 THE PRESIDENT: That cannot be the point.

8 MR. LASOK: That is the point that is made, “a viable functional set of assets” ----

9 THE PRESIDENT: It is not that they are being run down, it is that they are being put together.

10 MR. LASOK: With respect, no. The concern expressed by the CC is all about the running down of
11 assets. You will remember the reference in para.41 of Mrs. Guy to the “maintenance of
12 assets”; and the reference in the next paragraph of her witness statement, para.42, where she
13 refers to [...] [C], and the fear was that that decision would be made not in the interests of the
14 business – that is to say the separate business, STG or WRE – but it would be made for some
15 other reason.

16 THE PRESIDENT: In the interests of the merged concern.

17 MR. LASOK: That was it. At the end of the day, it is a decision concerning the running down of an
18 assets that belongs to one of the businesses. Obviously, if, for example, a decision is made to
19 enhance capacity for one of the businesses in the interests of the merged entity, that is not
20 something that the CC has expressed any concern about at any stage.

21 THE PRESIDENT: What suggestion have your clients made on this particular point?

22 MR. LASOK: This is set out in Mr. Blyde’s second witness statement. [...] [C]

23 THE PRESIDENT: I can see that you could put in a structure for decisions to spend capital, make
24 capital expenditure, I can see that provisions can be put into place to deal with actual disposal
25 of the assets, but there is a sort of interim position where one says – I am not talking about the
26 particular facts of this case – “We have got 15 plants, ten of them need some money spending
27 on them for maintenance, how are we going to decide which to spend where?”

28 MR. LASOK: [...] [C]

29 THE PRESIDENT: It might be, in that kind of example, that it is actually quite difficult for someone
30 who is looking at the business as a whole to decide whether it should be spent in the STG bit or
31 the WRE bit.

32 [...] [C]

33 MR. LASOK: [...] [C] we are talking also about a highly regulated industry where there are
34 environmental and health and safety regulators who will require expenditure to be carried out.

1 The problem is that we have got a situation in which there is a whole series of constraints that
2 prevent the kind of decision that appears to have been anticipated. [...] [C]

3 THE PRESIDENT: Is all this being reported to the Monitoring Trustee as well?

4 MR. LASOK: And this will be reported to the Monitoring Trustee.

5 What you would have expected was that Mrs. Guy in her witness statement would have shown
6 that the CC had addressed to this solution to the perceived problem. In the witness statement
7 we do not see this. We do not see her saying, "We looked at this particular problem, we
8 thought about it" ----

9 THE PRESIDENT: The problem being?

10 MR. LASOK: Our solution.

11 THE PRESIDENT: Your solution, this second suggestion.

12 MR. LASOK: "We looked at this, we thought about it and we came to the conclusion for the
13 following reasons that it was inappropriate". I put it in that way because in an ordinary judicial
14 review case this is what you would expect to see in the witness statement from an officer in the
15 decision maker.

16 THE PRESIDENT: So it does not set out why Stericycle's proposals would not do the trick?

17 MR. LASOK: Yes. [...] [C]

18 THE PRESIDENT: I still have difficulty with this running down idea. I think there the drift of the
19 CC's approach is, "We want, as far as we can achieve it, and we may not be able to achieve it
20 very far, two directing minds for these two businesses".

21 MR. LASOK: What for?

22 THE PRESIDENT: "To keep them operating as far as we can separately for the rest of the course of
23 the inquiry".

24 MR. LASOK: You have got two concerns, sales and marketing and operations. Our proposal for
25 [...] [C]

26 THE PRESIDENT: In order to mitigate that, because you want to try to have separate minds [...] [C],
27 you say, "I think it is actually wise I do put some safeguard in there just to see that in all
28 good faith things do run as far as they could".

29 MR. LASOK: We are now focusing on the function of the HSM as giving some kind overview [...] [C]
30 because apart from that there is nothing else.

31 THE PRESIDENT: So you say.

32 MR. LASOK: That is our submission. Everything is narrowed down to that question.

33 THE PRESIDENT: Hang on, let me just follow it, oversight of [...] [C]. The [...] [C] suggestion
34 and all the rest of it, when was that made and where does that figure? It is probably the second
35 witness statement of Mr. Blyde, I think you said.

1 MR. LASOK: Paragraphs 34 to 42. [...] [C]
2 THE PRESIDENT: 61 in Mrs. Guy's witness statement.
3 MR. LASOK: She records an agreement on how capital expenditure decisions could be taken, and
4 then the subject disappears completely from the witness statement. What she does not do is
5 seek to answer the points made by Mr. Blyde in paras.34-42 of his second witness statement.
6 THE PRESIDENT: Which I find where?
7 MR. LASOK: That ought to be in a bundle which contains the second witness statement of
8 Mr. Blyde.
9 THE PRESIDENT: It does indeed. I think you said paras.34-42.
10 MR. LASOK: The point at which this proposal was put to the CC was at the meeting of 17th August.
11 THE PRESIDENT: [...] [C]
12 MR. LASOK: There is a bundle of transcripts and that is divided into 3. The first tab deals with the
13 16th August meeting. I just take extracts. Would you look at p.28, lines 17-25. It is the
14 problem about the decision regarding assets being made solely in the interests of the separated
15 companies.
16 THE PRESIDENT: Yes.
17 MR. LASOK: Then 30 and following deals with capital expenditure, but on the following day there
18 was a meeting that is at tab 2.
19 THE PRESIDENT: So it is the single decision making mind point rather than the running down
20 point that they are thinking point there?
21 MR. LASOK: Yes, and if you look at p.31 in the second tab ----
22 THE PRESIDENT: The meeting with the staff.
23 MR. LASOK: Yes, this is the staff meeting. The suggestion that comes from Miss Ross [...] [C].
24 Therefore, we need to see in Mrs. Guy's witness statement where it is that the Competition
25 Commission says, "We looked at all this, we came to the conclusion for the following reasons
26 that it was not appropriate".
27 THE PRESIDENT: [...] [C]
28 MR. LASOK: [...] [C]. When a decision maker is charged with making a judgmental decision the
29 decision maker has got to look at the relevant facts and matters and come to an informed
30 decision. There will be areas in which the decision maker is clearly wrong – for example,
31 because it is based on an error of fact – but there will be other areas where the decision maker
32 is faced with a bit of a quandary. It has to exercise its judgment and the job of the Tribunal is
33 not, as it were, override that exercise of judgment. The job of the Tribunal in a review process
34 is to ensure that the decision maker acted reasonably, that it looked. That is why it is
35 particularly important that the Tribunal is given the evidence that shows that the decision

1 maker properly informed itself about the relevant facts, looked at them, considered them,
2 thought about it and made its decision.

3 The problem that we have got here is that we have got a simple enough proposal. It is, in fact,
4 something that emanates from the CC itself. Yet there is no explanation in Mrs. Guy's witness
5 statement as to why this solution to the problem was abandoned.

6 There are, as it were, two pillars to support the decision to appoint the HSM. One is the assets
7 problem and the other one is sales and marketing. I have made my submission on the assets
8 problem.

9 On sales and marketing [...] [C].

10 So far as the entry into new contracts is concerned, the brands are distinct but the statement of
11 principles is in place in order to ensure that there is an allocation of new contracts as between
12 the WRE and STG businesses. [...] [C]

13 The question that then arises is what is the function that is being performed by the HSM? We
14 have got a situation in which the HSM is being imposed on us at our expense and the
15 assumption must be that he is not a flower pot, a piece of decoration. But what is he supposed
16 to be doing? We have already submitted that in relation to one of the two areas of concern,
17 which is assets, there was an alternative solution that, in our submission, was completely
18 workable and which is not discussed in Mrs. Guy's witness statement. So we are left with the
19 sales and market aspect.

20 Given the fact that sales and marketing, as you can see from what Mr. Blyde told the
21 Competition Commission, involves the kind of thing that he is talking about, what does the
22 HSM bring to the picture? What is the decision that the HSM is going to make, bearing in
23 mind that, *ex hypothesi*, the HSM is going to be coming from outside the business because the
24 proposals that have been made for internal candidates have been rejected by the CC? So we
25 are going to have somebody from outside the business and what is he going to [...] [C]. What
26 does the HSM bring? We do not find in Mrs. Guy's witness statement an explanation of what,
27 given the factual context, the CC thought the HSM would bring to the party.

28 I ought to add at this juncture before I forget it that the applicants undertook in correspondence
29 with the CC to embark upon the exercise of finding an HSM, that exercise hopefully to be
30 completed by today's hearing. Unfortunately, although two candidates were identified, both of
31 them through the agency that the applicants were using, informed the applicants – they
32 informed the agency – that they had reservations because of the structure that had been put in
33 place in the directions. We were telephoned this morning separately by both of these
34 candidates withdrawing their interest on the grounds that the proposals are unworkable. That

1 is not to say that it is impossible to find somebody somewhere who might be willing to do this,
2 but the vibes are not good.

3 THE PRESIDENT: Mr. Lasok, if we went back to appendix 1 to the directions, the chart with all the
4 arrows that you were telling us about, the HSM at the moment, although the arrows are slightly
5 round the wrong way, but never mind, is there to be the person whom it is envisaged the STG
6 finance and operations and logistics will report to in respect of those matters [...] [C]. If you
7 did not have an HSM to whom STG finance, STG operations and logistics, et cetera, or, for
8 that matter, STG sales and marketing report to?

9 MR. LASOK: There is no difficulty about reporting to Mr. Blyde, but then of course ----

10 THE PRESIDENT: They would all report to Mr. Blyde?

11 MR. LASOK: Yes, and as you can see, in fact, the HSM, himself, reports to Mr. Blyde.

12 THE PRESIDENT: I thought Mr. Blyde reported to the HSM?

13 MR. LASOK: No, the Hold Separate Manager reports to Mr. Blyde. You can see that at the bottom
14 left hand corner. There is an issue about that because it says, "HSM reports to Bill Blyde to
15 extent necessary to enable Bill Blyde to fulfil regulatory reporting responsibilities".

16 THE PRESIDENT: Yes, that is only to give him the information that he may or may not need for
17 the Irish Companies Act and US requirements. That is not reporting in the normal
18 management sense.

19 MR. LASOK: Not in that sense, no.

20 THE PRESIDENT: It is not at all the case that the HSM is reporting to Mr. Blyde in a management
21 sense?

22 MR. LASOK: Precisely.

23 THE PRESIDENT: Who is going to review whether the finance operations and the logistics and
24 operations, and all the rest of it, are being run efficiently and properly?

25 MR. LASOK: That would be Mr. Blyde. The problem is that, on the evidence, Mr. Blyde has no
26 interest in making decisions that are adverse to STG or WRE.

27 THE PRESIDENT: You can see the difficulty, that he can no longer in terms of those separate
28 companies if he is CEO of the whole lot.

29 MR. LASOK: He can, there is no problem about that. Anybody can do that.

30 THE PRESIDENT: What safeguard do we have that he is going to do it? I am not suggesting that
31 he would not in good faith do his best.

32 MR. LASOK: The Monitoring Trustee. You have got mechanisms that are either already in place or
33 that could be put in place. Already in place are things like the statement of principles which
34 determines how new contracts are to be allocated. That ensure preservation of the customer

1 base. We would submit that that solves the problem so far as sales and marketing are
2 concerned.

3 If you look at assets, the proposal, as I have said, originating in the CC itself that was regarded
4 by us as a perfectly workable one, was [...] [C]. As far as I am aware the CC did not object to
5 the [...] [C] proposal, as it were, and we simply do not understand and we do not know why
6 they had an issue [...] [C]. There is no explanation for this. [...] [C]

7 The finance issue was concerned, so far as one can tell from Mrs. Guy's witness statement –
8 that is para.41 – with the dissemination of confidential information. There are other provisions
9 in existence that deal with the dissemination of confidential information, and those provisions
10 permit dissemination where it is strictly necessary in the ordinary course of business. I ask this
11 as a rhetorical question bearing in mind the time, what is the problem with Mr. Blyde being
12 there bearing in mind the underlying facts and these alternative ways that are either in
13 existence or could easily be put in place that we would submit solve the problem? After all,
14 the problem at the end of the day identified by the CC is future decision making of a particular
15 sort. So we need to focus on what those decisions are and what are the proportionate solutions
16 to the difficulty that has been identified. At the terrible risk of repetition it seems to us to be
17 perfectly clear what the proportionate solution in relation to assets is; and so far as sales and
18 marketing is concerned, [...] [C] you have got the statement of principles. So what is the HSM
19 bringing to the party?

20 THE PRESIDENT: I think we will probably need to rise now if that is convenient to you. Would it
21 be possible for someone to prepare for us a little replacement chart for building on appendix 1
22 to the order as to what the management structure would look like if you took the HSM out of
23 the picture altogether in terms of who is reporting to who, that incorporates, as far as we can,
24 diagrammatically what your proposals are? That would be very helpful.

25 MR. LASOK: I am reminded that we, ourselves, have put a yet further alternative proposal and that
26 was that there should be an internal candidate for the position of HSM.

27 THE PRESIDENT: There is not one that is acceptable.

28 MR. LASOK: There is not one that is acceptable.

29 THE PRESIDENT: I think, Mr. Rayment, if I may say so, it would be helpful when we come to the
30 CC to have either a piece of paper of a description of what you see the duties of the HSM
31 actually being so that we are clear that is.

32 I do not know how we all see the time because we do need to get through the hearing tonight.
33 Mr. Davey also has to get back to Northern Ireland so we are not going to be able to sit much
34 after five at the latest. I have the impression, Mr. Lasok, that the main point is the HSM.

35 MR. LASOK: Yes.

1 THE PRESIDENT: You may be fairly advanced in your submissions on the HSM now.

2 MR. LASOK: I have finished them.

3 THE PRESIDENT: Do we need to go into the supplementary points, or is that going to be the main
4 point?

5 MR. LASOK: The HSM is the main point but I think we do need to go into the supplementary
6 points. I know everybody's heart sinks when that is said, but I am afraid that we will have to
7 do it. What I will do is I will go through it as quickly as I can. I think that it really boils down
8 to making the points as shortly as possible. There is not the kind of reference to documents
9 that I have been doing hitherto.

10 THE PRESIDENT: So about half an hour after lunch?

11 MR. LASOK: I will try and keep it to half an hour.

12 THE PRESIDENT: Very well, five past two.

13 (Adjourned for a short time)

14 MR. LASOK: Before the break you were asking about what appendix 1 would look like. Over
15 lunchtime we had a go but our technical facilities extend only to biros. We did it in
16 manuscript. What we would propose to do is to get it typed up and send it to the Tribunal
17 rather than get the grubby bit of paper and start handing it round now. What it boils down to is
18 this, if you look at appendix 1 – I can just describe it in a couple of seconds, the thrust of it – it
19 is in the supplementary notice of application bundle, tab A, p.19: if you look at the Hold
20 Separate Manager box you would simply put Bill Blyde in there. [...] [C].
21 That, as I have explained, would be sufficient to ensure the separate decision making on the
22 operations side which was the concern of the CC.
23 [...] [C]
24 For the sake of completeness, you will note that I have not mentioned doing anything to the
25 Stericycle side at the left hand of the page. [...] [C]
26 You have not got it in front of you but that is the gist of it. We will send it to you when we
27 have typed it out. Of course, underlying all this are all the other arrows, and so forth, that
28 would be left in place under the unchallenged parts of the directions.
29 I wanted to turn now to the other points, the first one being what is described as the "Fiduciary
30 responsibilities issue". We can keep this bundle open and turn to an earlier part of the
31 directions. It is still in schedule 1, but it is para.3. If you look at para.3, you have got the Hold
32 Separate Manager should be appointed and the Hold Separate Manager shall report to
33 Bill Blyde. So obviously the fiduciary responsibilities issue would fall away if there were no
34 HSM. Then you have got:

1 “(i) to the extent necessary to enable Bill Blyde to fulfil his regulatory reporting
2 responsibilities in Ireland and the USA, the nature and frequency of such reporting to
3 be discussed with the Monitoring Trustee immediately after appointment of the
4 HSM.”

5 If you turn to the covering letter and go to the third page, at the top of the third page you have
6 got, “Bill Blyde’s ability to fulfil reporting obligations”, and this is the commentary on the
7 direction that we have just looked at.

8 THE PRESIDENT: We have read it, thank you.

9 MR. LASOK: The last sentence says:

10 “We have directed that Mr. Blyde should liaise with the Monitoring Trustee to agree
11 what needs to be supplied and at what intervals.”

12 So that is the interpretation that the CC places on the word “discuss”, it does not mean
13 “discussed” at all, it means “agreed”.

14 When this proposal effectively was put to Mr. Blyde originally it was put in a slightly different
15 way.

16 THE PRESIDENT: Where are we leading to, Mr. Lasok? Is this just a point on the drafting of the
17 order?

18 MR. LASOK: Can I just take you to where this originated, and that is in the transcript, the
19 17th August transcript, transcript volume, volume 5, tab 2, and it should be p.46. Could you
20 read lines 3-16?

21 THE PRESIDENT: “I think I am making that up on a daily basis as to what I pass up to them”?

22 MR. LASOK: It is the preceding sentences. Before that, the end of Miss Ross, what she does is she
23 puts a proposal that Stericycle should see only what it totally needs to see in order to comply
24 with its reporting requirements. That is lines 3-5. Then she says at lines 11-14:

25 “Do you think that gives you sufficient clarity in terms of sort of information you
26 would be able to take a reasonable judgment on what should go up versus what should
27 not?”

28 He says:

29 “Yes, I think I am making that anyway.”

30 In other words, “I am making that judgment”. The way it was put to Mr. Blyde was, “If we
31 provide in the directions that you get what is needed for regulatory reporting requirements, is
32 that sufficient to enable you to make a judgment on what go up or not?” and he says, “Yes”.
33 If that was what the directions provided for then we would have no difficulty with it. There is
34 a problem because of the fact that the verb “discussed” is construed by the CC as meaning
35 “agreed”, “agreed with the Monitoring Trustee”. So it is not what was put to Mr. Blyde.

1 There is a simple way out of all this, and that is that one construes the directions in accordance
2 with their language, and one construes them in this way: the HSM is obliged to report to
3 Mr. Blyde to the extent necessary to enable Mr. Blyde to fulfil his regulatory responsibilities,
4 and the HSM must therefore respond to Mr. Blyde's requests for relevant information. The
5 discussions with the Monitoring Trustee envisaged in para.3 of schedule 1 of the directions
6 simply entail Mr. Blyde informing the Monitoring Trustee of the nature and frequency of the
7 reporting and discussing matters such as the extent to which the burden on the HSM might be
8 reduced or managed in some other way.

9 That, in our submission, is what, on a true construction, para.3 of the directions actually means.
10 If it is construed in that way then it gives rise to no problem. But, if it is construed differently
11 – in other words, as involving the Monitoring Trustee in some sort of decision making function
12 or more generally as has been suggested by the CC in para.86 of the defence (and I think it is
13 sufficient just to give you the reference) – then that would involve not only a departure from
14 the terms of the directions, but it would also be unreasonable, because at the end of the day
15 there is no problem about the Monitoring Trustee knowing the nature of the information
16 passing from the HSM to Mr. Blyde and, if appropriate, raising a query about something, but
17 neither the Monitoring Trustee nor, with respect, the Competition Commission, is really in a
18 position to judge the scope of Mr. Blyde regulatory responsibilities and what is needed for him
19 to discharge them. This kind of thing is typically a matter that turns on the judgment of the
20 executive in question because he is the one who lies under the obligations.

21 THE PRESIDENT: What are we talking about in terms of the legal framework under discussion?
22 Which statutes of which jurisdiction are we talking about?

23 MR. LASOK: It is both the Irish and the United States.

24 THE PRESIDENT: In terms of what, the Companies Acts or is it ----

25 MR. LASOK: It is Mr. Blyde's second witness statement, paras.65-73. In 65 he tells the Tribunal
26 what directorships he holds; and then in 66 he refers to the problem about performing his
27 fiduciary duties as a director of STG; and explains in 67 why he needs various types of
28 information. It is in 68 that he refers to the position under US law. As I understand it, the
29 position in Ireland is governed by the Irish Companies Act. You will have seen from the top of
30 p.15, end of para.66, that he is a director of Stericycle Ireland Limited, so he has got duties
31 under Irish law as well as US law.

32 THE PRESIDENT: He is a director of Stericycle Ireland Limited. Presumably Stericycle Ireland
33 Limited has other directors?

34 MR. LASOK: Yes, but he has still got fiduciary responsibilities as a director.

1 THE PRESIDENT: Yes, but if a competent court says he is not to have certain information that is a
2 position well recognised that relieves him of his responsibility to that extent.

3 MR. LASOK: The intention of the Competition Commission was not to do that. If you look at the
4 passage in the 25th August letter that I referred you to – it is the first sentence, I believe ----

5 THE PRESIDENT: His para.67 – one can quite see, Mr. Lasok, why the CC are concerned about
6 this – asserts that by virtue of Irish Companies law he needs to have full access to trading and
7 financial information about STG, to see the monthly financial statements, senior management
8 reports and senior management team minutes, just to comply with the Irish Companies Act.

9 MR. LASOK: Pardon?

10 THE PRESIDENT: To comply with the Irish Companies Act in relation to an English subsidiary. It
11 is a bit far-fetched, is it not?

12 MR. LASOK: Why should it be far-fetched? There is no evidence that says it is far-fetched.

13 THE PRESIDENT: Sorry?

14 MR. LASOK: There is no evidence before the Tribunal to say it is far-fetched.

15 THE PRESIDENT: There is no evidence, but it is a very wide view of what are the directors’ duties
16 under Irish legislation, if that is equivalent to English legislation in this respect.

17 MR. LASOK: You cannot jump to the conclusion that what he says is not correct in the absence of
18 evidence that ----

19 THE PRESIDENT: No, but we can jump to the conclusion that this would drive a coach and horses
20 through the hold separate arrangements that are being considered.

21 MR. LASOK: There is a problem here, is there not, because the intention of the CC is not to prevent
22 Mr. Blyde from fulfilling his reporting obligations. The difference of views really concerns
23 the question whether the directions which use the verb “discuss” are to be construed as
24 meaning “agreed” – in other words, that the Monitoring Trustee is capable of exercising some
25 form of veto. This pre-supposes that the Monitoring Trustee is in a position to rule upon the
26 regulatory position in Ireland and the United States. This, in my respectful submission, is
27 somewhat unrealistic.

28 THE PRESIDENT: At the moment it is not at all clear to me what these obligations are that we are
29 talking about, whether Mr. Blyde is the only person who can discharge them and what the
30 position would be if he was prevented by United Kingdom law from having access to the
31 information.

32 MR. LASOK: The problem here is the purpose of this particular provision is not, we are told, to
33 prevent Mr. Blyde from fulfilling his reporting obligations. So that particular issue does not
34 arise.

1 THE PRESIDENT: That is said and it is a reasonable position for the CC to take, notwithstanding
2 the obscurity of what the obligations are, on the condition that it passes, as it were, through the
3 Hold Separate Manager. If you take that away you just open a door to him getting everything
4 because of these allegedly legal obligations, and that is a completely different situation. It
5 begins to suggest – 67 is very widely worded – that there would not, in fact, be any restriction
6 on anything passing to Mr. Blyde on the basis of these so-called reporting obligations.

7 MR. LASOK: I am afraid I do not follow that, because the way we are putting it is this: I can
8 understand it if, in the course of these discussions, the Monitoring Trustee says something like,
9 “Please provide us with a letter from a lawyer that explains why you need this information”.
10 Where the difficulty comes in is where you say that the Monitoring Trustee has got some kind
11 of decision making role which is, as it were, encapsulated in the substitution of the verb
12 “agree” for the verb “discuss”. If you make the Monitoring Trustee a decision maker,
13 somebody who exercises a veto, then you have produced a situation in which it may well be
14 impossible for Mr. Blyde to fulfil his reporting obligations.

15 The position I think needs to be made perfectly clear. We do not have a problem ----

16 THE PRESIDENT: The word we have got at the moment is “discussed”.

17 MR. LASOK: Exactly, and so we submit ----

18 THE PRESIDENT: What is the problem?

19 MR. LASOK: We submit that the word “discuss” means “discussed”, and it means that in the course
20 of those discussions the Monitoring Trustee, in the exercise of its functions, can perfectly
21 legitimately ask Mr. Blyde to produce some “authority” for the proposition that information
22 queried by the Monitoring Trustee is required in order for him to discharge his reporting
23 responsibilities, regulatory responsibilities.

24 That does not pose a problem. If that is what it means and that is how it is construed then there
25 is no difficulty. If the Tribunal considers that that is what it means then I can pass – well, you
26 have not heard the arguments from the other side, but if the Tribunal were to conclude that that
27 was the true construction of the direction then our difficulty with this disappears. Our
28 difficulty does where you have a situation in which there is potentially a conflict between
29 Mr. Blyde’s reporting responsibilities and a decision maker, the Monitoring Trustee. The
30 problem here is that, with all due respect, the Monitoring Trustee is not in a position to make
31 judgments of this nature.

32 THE PRESIDENT: Yes.

33 MR. LASOK: The evidence in Mrs. Guy’s witness statement does not indicate that any
34 consideration at all has been given to this particular problem. We have no explanation as to

1 why it is that the CC believes that the word “discusses” does not mean that at all but means
2 something else.

3 By way of final remark on this point, the defence, para.87, and I think I just need to give you
4 the reference, simply refers to there being, or having been, similar arrangements in other cases.
5 The problem there is that the word “similar” means, “well, it is a bit like it but it is not the
6 same”. There is no evidence before the Tribunal as to whether or not any of those other cases
7 was comparable to the present case. From the evidential point of view there is actually no
8 basis for accepting the arguments set out in para.87 of the defence.

9 That brings me on to the next restriction that I wanted to make submissions on, which is the
10 one in para.4 of schedule 1 of the directions. It is the last sentence of para.4:

11 [...] [C]

12 What the STG business is now facing under the directions in their current form is, firstly, a
13 new CEO, the HSM, who will in all probability have no experience at all of the business. [...] [C].
14 [C]. Thirdly, the STG business will also be faced with the necessity for personnel to devote
15 time to dealing with what is a demanding Competition Commission investigation.

16 [...] [C]

17 Part of the problem here is caused by the fact that there is no ban on participating in meetings,
18 [...] [C] restriction on [...] [C].

19 THE PRESIDENT: This is one of the reasons why you need a Hold Separate Manager to see the
20 rules are followed.

21 MR. LASOK: No, because the Hold Separate Manager would simply participate in the discussion.

22 THE PRESIDENT: The Hold Separate Manager is managing it. If he invites somebody to leave the
23 meeting [...] [C] that is his management decision.

24 MR. LASOK: [...] [C]

25 It is significant that the CC’s evidence on this point does not attempt to answer the points
26 raised by Mr. Blyde in his second witness statement. There is no indication from Mrs. Guy’s
27 witness statement that the CC took any, or any proper, account of relevant considerations
28 before reaching its decision on this point. It is completely unclear from Mrs. Guy’s witness
29 statement where exactly the meeting’s restriction fits into the aims and objectives that the CC
30 sought to obtain in the directions. What is the problem? Is it independent decision making? Is
31 that the difficulty? Is it problems with communication of confidential information? What? It
32 just seems to be a doctrinaire stance that is not related to the facts of the case.

33 I pass on now to the next point which is the restriction on the communication of necessary
34 information. This is to be found in para.35 of schedule 1 of the directions. Paragraph 35
35 prohibits the sharing of information across the management teams, save where that is strictly

1 necessary in the ordinary course of business. That, in turn, is the subject of a definition in the
2 order, on which there is a distinct lack of clarity. The lack of clarity can be illustrated by
3 reference to an exchange of emails in bundle 2. This is the supplementary correspondence
4 bundle. Can we start at p.448, tab 63. This is in the context of the compliance statements and
5 this is an email from those instructing me to the Competition Commission. If you look just
6 above the second hole punch there is a paragraph that begins, "Paragraph 2(1) allows for".
7 Could you read the second sentence to the end of the paragraph.

8 THE PRESIDENT: (After a pause) Yes.

9 MR. LASOK: If you go to p.455, and again if you look just below the first hole punch there is a
10 paragraph, "We can confirm", and could you read that paragraph and the next following
11 paragraph.

12 THE PRESIDENT: (After a pause) Yes.

13 MR. LASOK: You can see that at the end of the second paragraph I have asked you to read it was
14 suggested that what was strictly necessary in the ordinary course of business was something
15 that had to be communicated if the businesses were genuinely unable to function.
16 If you move then to 490, this is carrying on the exchange, and go to the first hole punch there
17 is a paragraph beginning "Furthermore". Would you just read that. (After a pause) The
18 interpretation given by the CC is queried. Then if you go to p.528, just above the first hole
19 punch you have got a paragraph, "The Group will consider". If you look at the third line in her
20 email of 7th August and just read from there to the end.

21 THE PRESIDENT: (After a pause) Yes.

22 MR. LASOK: So things have come round full circle. The Competition Commission puts forward a
23 restricted interpretation of "strictly necessary in the ordinary course of business" referring to
24 what appears to be an exceptional situation not in the ordinary course of business, and then
25 resiles from that and says it is simply an example of the kind of exchange that may be strictly
26 necessary.

27 At the end of the day, one is left completely unclear as to what the CC's take on "strictly
28 necessary in the ordinary course of business" means. On the face of it, "Strictly necessary in
29 the ordinary course of business" can be taken literally. In ordinary language the word
30 "strictly" is necessary to emphasise the importance of, here, the word "necessary", but
31 "necessary" typically is a more or less absolute term and things are either "necessary" or they
32 are not "necessary". On the face of it, "strictly necessary in the ordinary course of business"
33 means just that.

34 If we revert now to the directions, 35 refers to the communications, "sharing of confidential
35 information if strictly necessary in the ordinary course of business". It is followed by 36 which

1 is there, as it says, for the avoidance of doubt to illustrate certain transfers that are “strictly
2 necessary in the ordinary course of business”. Paragraph 36 looks like an illustrative but not a
3 determinative list, or conclusive list, of situations in which information can be shared.
4 It is obvious that, given the complex interwoven relationship between STG and WRE
5 businesses provided for in the directions, a considerable amount of information about each
6 business is going to pass to the other business. Another example of this is para.38. Apart from
7 causing harassment and disruption, it is difficult to see what purpose is served by 35, that is to
8 say 35, which starts off with a general prohibition that is followed by an exception where the
9 sharing of information is necessary in the ordinary course of business.

10 THE PRESIDENT: Strictly necessary in the ordinary course of business.

11 MR. LASOK: Strictly necessary in the ordinary course of business. In this type of situation the
12 obvious question for the decision maker to ask is, given the flow of information that is already
13 taking place anyway and the particular nature of the information being shared, [...] [C] what is
14 it about the confidential information that might be shared, the additional confidential
15 information that might be shared, that makes it necessary and proportionate or reasonable to
16 impose this particular restriction?

17 THE PRESIDENT: I am not following this at all, Mr. Lasok. You have got a whole list in 36 quite
18 widely drawn of the things you can do. Paragraph 35 presumably is intended to mean,
19 whatever the strict drafting, that outside those definitions no confidential information is to flow
20 unless, for some reason, it is strictly necessary for it to flow.

21 MR. LASOK: I think one needs to bear this in mind: that para.36 looks like an illustrative list and
22 not a conclusive list. The reason for that is ----

23 THE PRESIDENT: Yes, I agree. You cannot always foresee in the future what is going to happen,
24 that is the point.

25 MR. LASOK: My point is this: what you have is a situation in which you have this complex inter-
26 relationship between the WRE and STG businesses. You have got permitted flows of
27 information. Then you have this restriction that is subject to what are potentially extremely
28 wide exceptions permitting flows of information that are strictly necessary in the ordinary
29 course of business.

30 The question that I am raising is this, and I put it in a rhetorical form: when you have got this
31 very, very wide exchange of information that is inevitable in any event, what is it about this
32 other confidential information that is likely to threaten pre-emptive action with the context of
33 s.81 that requires a restriction of this sort? On the face of it, there is an awful lot of important
34 information [...] [C] that the Competition Commission accepts must be, and will be, shared
35 across the two businesses. So what is it about all this other stuff?

1 The thing is that you would expect to see in Mrs. Guy’s witness statement an explanation about
2 this. Unfortunately, we have not got an explanation. If Mrs. Guy had said, “Look, our concern
3 is X, Y and Z, we have permitted certain exchanges, this is as far as we are able to go, but there
4 are types of exchanges, this is an example of a type of exchange that is not strictly necessary in
5 the ordinary course of business, it would not be the kind of thing that Mr. Blyde get in the
6 ordinary event and this actually is important because this kind of exchange would give rise to
7 the risk of pre-emptive action and that is what we want to stop.” If she had said that I could
8 not possibly have an argument unless I was able to demonstrate that the Group’s evaluation
9 was unreasonable. My difficulty is that I do not even have that. I have no explanation
10 whatsoever as to what is the underlying concern.

11 [...] [C]

12 THE PRESIDENT: [...] [C]

13 MR. LASOK: [...] [C] I can understand it if Mrs. Guy had said in her witness statement, “Well, we
14 took this into account, we looked at this, we looked at that, we came to the conclusion that
15 balancing one thing against another, judgmentally the conclusion was that”, and then she came
16 to some conclusion, but she does not even do that. This is a major problem because, with all
17 due respect, you cannot, in this kind of judicial review exercise, uphold a decision that does not
18 provide you with the evidence, or where the decision maker does not provide you with the
19 evidence, that the relevant factors were take into account.

20 THE PRESIDENT: Mr. Lasok, it is fairly clear – though at times, since we began after lunch, I am
21 beginning to doubt whether your clients have grasped it – that the CC’s intention is, so far as
22 possible, to keep these two businesses apart. It is a fairly self-evident provision to think about
23 in that context about the flow of information between them. So we have a provision dealing
24 with confidential information. The CC has been relatively generous in allowing a lot of
25 confidential information to flow. One cannot deduce from that that, therefore, there should be
26 a free-for-all on the confidential information. They have effectively said, “Beyond what we
27 have specified, nothing else except if it is ‘strictly necessary’.” That may leave some doubt in
28 marginal cases as to whether something is “strictly necessary” or not – that I accept – but the
29 general intention, I would not have thought, needed to be spelt out with reasons beyond that
30 fairly self-evident point.

31 MR. LASOK: In our submission, one cannot unfortunately leave it like that. The reason for it is
32 this: s.81 gives power to take action to prevent pre-emptive action. “Pre-emptive action” in
33 the present context means action that will frustrate the outcome of the inquiry. I put it as
34 broadly as that. It is not the precise statutory language.

35 THE PRESIDENT: It make divestiture more difficult.

1 MR. LASOK: That is the point, is it not. Pre-emptive action ----

2 THE PRESIDENT: We do not know. The safe course is to say nothing shall pass unless it can be
3 shown to be strictly necessary.

4 MR. LASOK: They did not say that in Mrs. Guy's witness statement.

5 THE PRESIDENT: They said it in the order.

6 MR. LASOK: Again, let us be precise about this. The power is to take action to prevent pre-
7 emptive action. Pre-emptive action in the present context means "action that would frustrate
8 the outcome of the inquiry". Pre-emptive action is not something that is, as it were, up in the
9 air somewhere. It has to have, by statutory definition, a consequence. I am not saying
10 anything about causality – in other words, what the quality of risk is. It simply has to risk a
11 certain consequence, but it has got to have that consequence or that risk. If it does not have
12 that risk then it is not pre-emptive action and there is no statutory power to prevent it. That is
13 the problem, because it means that when you are faced with a situation in which you have got a
14 merged entity, a completed merger, you cannot simply stand up and say, "Thou shalt separate
15 the businesses". You can only do that if the separation of the businesses is necessary in order
16 to ensure the effectiveness of any remedies that are adopted at the end of the inquiry.

17 The question that always has to be asked is, "What is the pre-emptive action that is anticipated,
18 and is the step, the remedy that is adopted to prevent it, something that is effective, necessary
19 and proportionate – in general terms reasonable?" That is the difficulty.

20 THE PRESIDENT: The action here in terms of the pre-emptive action is the passing of confidential
21 information.

22 MR. LASOK: The passage of confidential information *per se* is not something that in all cases will
23 amount to pre-emptive action.

24 THE PRESIDENT: To only have to get as far as "might" is not a very high hurdle.

25 MR. LASOK: Let us take an example. Let us take the example of confidential information, whose
26 confidentiality lasts one week because it is simply evanescent information. It cannot be
27 rationally be supposed that the communication of confidential information with a practical
28 lifetime of one week is something that would prejudice the remedies that might be imposed at
29 the end of an inquiry. That is not rational.

30 That is one example, but it is an example, in our submission, that demonstrates the need to
31 focus on the specific problem. If we take the example of financial information, there is no
32 issue about that, because everybody can understand the concern that arises there. What we are
33 here talking about is a situation in which it is accepted that there may be, and that there must
34 be, exchanges of a wide range of confidential information. That cannot be avoided, but what is
35 this other stuff that apparently causes the concern?

1 THE PRESIDENT: If there is no other stuff it does not matter, does it not?

2 MR. LASOK: The difficulty is that people have to question at all times whether there is or there is
3 not. They have to apply this test that, as I have shown, is a test that even the Competition
4 Commission is not able to explain in clear language.

5 THE PRESIDENT: Mr. Lasok, one could perhaps suggest that it is not that difficult to make all this
6 work if people are prepared to acknowledge the spirit in which it is supposed to be happening.

7 MR. LASOK: We entirely agree with that.

8 THE PRESIDENT: We do not detect any sign from your clients that they have any willingness to
9 make this kind of structure operate. They are spending their time quibbling about the terms of
10 the order.

11 MR. LASOK: With respect, no. What we are faced with is a highly complex order that introduces
12 difficulties, and my clients cannot understand the reason why these difficulties have been
13 introduced, because all that they appear to be are gratuitous restrictions. They do not appear to
14 have a justification. As I have said, if Mrs. Guy in her witness statement had explained what
15 the problem was, the factors that had been taken into account, the balancing exercise, then we
16 would not have a case on this point unless we could demonstrate that she was acting
17 unreasonably.

18 Perhaps I have not quite been getting this through. Mr. Blyde's witness statement is concerned
19 with practicability, workability, he is not interested in quibbles. What he sees in the
20 restrictions that have been identified are real and genuine difficulties. If those real and genuine
21 difficulties are founded upon a proper exercise of judgment then we just have to put up with
22 them, and we will. The problem is that one cannot identify the proper exercise of judgment
23 that might have been the foundation for the imposition of these restrictions.

24 That brings me to the last point, and that concerns para.38 of schedule 1. This permits the
25 sharing of information that is necessary for the defence of the merged entity in these and other
26 proceedings. The second sentence of para.38 provides that the Monitoring Trustee shall
27 monitor the flows. The concern expressed by Mr. Blyde in paras.77-79 of his second witness
28 statement was that this provision would enable the Monitoring Trustee effectively to see and
29 pass on to the Competition Commission preparatory exchanges.

30 You may say, "That is a rather unfounded, a rather exaggerated interpretation of para.38", but
31 the problem is that in the defence the Competition Commission does not say that. The
32 Competition Commission says in the defence – and I will just give the references, it is 99-102
33 – that the provision, para.38, is intended to preserve legally privileged exchanges. By
34 implication that means that exchanges that are not legally privileged are not protected and may
35 be disclosed by the Monitoring Trustee to the Competition Commission.

1 If that is a misunderstanding of the defence then we would be very grateful to be corrected, but
2 we can only take the defence for what it says. Our primary submission on this point is that
3 para.38 does not prevent a non-privileged exchange or flow of confidential information that is
4 necessary for and limited to the co-ordination of Stericycle and STG's proceedings. Indeed,
5 para.84 of Mrs. Guy's witness statement does not contain the suggestion to be found in the
6 Competition Commission's defence. If the Tribunal comes to the conclusion that the true
7 meaning of para.38 is that flows of confidential information are permitted to the extent necessary for the
8 defence of the Applicants' interests in all the proceedings referred to, whether or not the flow
9 is of legally privileged material, that gets rid of that aspect of the problem.

10 The next point is this: in our submission, the second sentence of 38, which deals with the role
11 of the Monitoring Trustee, simply means that the Monitoring Trustee can employ reasonable
12 measures to verify that flows of confidential information fall within the scope of the first
13 sentence, and such measures do not necessarily require the Monitoring Trustee even actually to
14 see the material that is being communicated. That interpretation of 38 is supported by a
15 passage in para.84 of Mrs. Guy's witness statement.

16 If para.38 is not to be construed along the lines that we have suggested then, in our submission,
17 it is unlawful. Why is it unlawful? We will begin with the problem posed by legal
18 professional privilege. Large companies find it much easier than small companies to use legal
19 professional privilege because they have got the resources to employ the lawyers who can, as it
20 were, put their *imprimatur* on preparatory material and convert it into legal professional
21 privilege. Small companies are not in that position. Narrowing the provision of the sort that
22 we have got in para.38 to legally privileged material would constitute unlawful discrimination
23 against small companies. In any event, no legitimate purpose would be served by limiting the
24 permitted flows to legally privileged material, because if a flow of confidential information is
25 necessary in order to enable someone to defend himself, that necessity exists whether or not
26 the route chosen to transmit the information is the route covered by legal professional
27 privilege, because legal professional privilege is merely a route.

28 For the same reason, if the defence of one's interests justifies the communication of
29 confidential material it justifies it whether or not the material is covered by legal professional
30 privilege.

31 If para.38 is to be construed as empowering the Monitoring Trustee to lift preparatory material
32 and communicate it to the Competition Commission it is unlawful for that reason.

33 Also, looking at someone's preparatory material cannot possibly fall within any one of the
34 powers listed in s.81 of the Act. There is no necessity for even the Monitoring Trustee to see
35 such material, as, in fact, appears to be acknowledged by Mrs. Guy in para.84 of her witness

1 statement. Any such provision would be disproportionate because, for the reasons given by
2 Mr. Blyde in para.78 of his second witness statement, it is likely to have a damaging effect and
3 there is no apparent benefit arising from it.

4 As I have submitted, these problems arise only if you take a view of the meaning of para.38
5 that departs from what we submit to be its true construction by reference to the terms that are
6 actually used in it. If the Tribunal were to construe in the way that we suggest is appropriate
7 then these difficulties seem to disappear.

8 That is the end of my submissions ----

9 THE PRESIDENT: Could it be said just on this last point that para.38 from your point of view is
10 already pretty generous, because in the normal circumstances if these two businesses had been
11 kept separate from the beginning and the process of integration had not proceeded then the two
12 companies would be separate and they would each put in their own information and you could
13 not draw on information from one to meet the case of the other? This is the sort of advantage
14 you get by jumping the gun, as it were.

15 MR. LASOK: In our respectful submission, it is nice colourful language to say “jumping the gun”,
16 but ----

17 THE PRESIDENT: It is meant as an illustration.

18 MR. LASOK: I can see the Tribunal’s concern. It is right to say this: when you say, “jumping the
19 gun”, it was really the combination of the senior management teams, because below that there
20 was no integration.

21 THE PRESIDENT: You would not normally defend a merger on the basis of information being
22 supplied by the acquired company to the acquirer. Normally the acquirer would have to
23 defend it on the basis of the information that he got.

24 MR. LASOK: That, in our submission, does not affect the point, because the point does not concern
25 the first sentence of para.38.

26 THE PRESIDENT: They have given it away to you.

27 MR. LASOK: Quite properly.

28 THE PRESIDENT: Question as to whether that has already gone further than would be strictly
29 appropriate?

30 MR. LASOK: They must have in this respect, of course, considered what was appropriate in the
31 light of the facts. We do not dispute the first sentence of para.38, and I do not the Competition
32 Commission to be saying that it is inappropriate.

33 THE PRESIDENT: No.

34 MR. LASOK: I wanted to end with two apologies. The first is time.

35 THE PRESIDENT: It is probably the Tribunal’s fault for having interrupted you, Mr. Lasok.

1 MR. LASOK: No, not at all.

2 The second is to go back to the point that the Tribunal made a little while ago about my clients
3 being obstructive. I wish to make it absolutely clear, if I have not already done so, that that
4 simply is not the case. We have tried to be as co-operative as possible, but our difficulty is that
5 at certain points we hit what we considered to be very, very real issues concerning the
6 practicability of all this and what we considered to be the damaging consequences. The
7 Tribunal may well criticise us for picking on points, but that is because we have conceded a
8 whole range of other points just leaving, as it were, these particular peaks of the mountains or
9 the icebergs. So the exposure, if you like, of certain of these points that the Tribunal might
10 find quibbling points, that derives from the fact that we have been trying to co-operate and
11 have been bending over backwards to go as far as we possibly can in the direction that the CC
12 wishes to go, but there comes a point at which we hit what we consider to be an impasse, and
13 that gives rise to these issues.

14 Unless there is something else that I can assist the Tribunal on those are our submissions.

15 THE PRESIDENT: Thank you. Yes, Mr. Rayment?

16 MR. RAYMENT: Thank you very much, sir. I think Mr. Lasok ended the morning or started the
17 afternoon by bringing you up to date on getting the identity of potential people for this Hold
18 Separate Manager role. As he indicated, unfortunately his clients have run into problems in
19 that regard. Just to bring you up to date from our point of view, we have been making
20 enquiries outlining the sort of role that would be involved and so far we have had some pretty
21 positive responses and we are actively pursuing that at the moment, so we will hopefully be
22 able to assist should the need arise.

23 THE PRESIDENT: Would that mean that if the Applicants are unable to appoint someone, in the
24 last resort you would appoint someone?

25 MR. RAYMENT: In the last resort we would, and that is our position on most of these issues, which
26 is that, in the last resort, if necessary, we will intervene. Our aim, as we have set out in general
27 terms in the defence, is to try and identify what our general objectives are and then receive
28 hopefully input and assistance from the parties in trying to create mechanisms which will
29 enable those objectives to be created. It is extremely difficult and time-consuming for the
30 Commission to try and work out in advance every last detail, so we are absolutely dependent
31 upon people helping us. As I say, in the last resort, if we have to appoint somebody or decide
32 then that is what we have to do.

33 THE PRESIDENT: Yes.

34 MR. RAYMENT: I think, broadly speaking, I will be able to take a fairly short run-up and then go
35 straight into the Hold Separate Manager points and hopefully just give you an outline of what

1 we envisage the Hold Separate Manager's role would be and what he or she would be doing.
2 I do not think I need to go into the debate so far about pre-emptive action. Generally speaking,
3 I think, for the purposes of the subject matter of this application, in principle we do have the
4 powers here to appoint the Hold Separate Manager and to deal with the consequences of the
5 integration so far

6 THE PRESIDENT: It is more the reasonableness of what is proposed?

7 MR. RAYMENT: Exactly, I think that has to be the focus. I think the only point on pre-emptive
8 action is that it has not been entirely clear, going right back to as far as the OFT stage, whether
9 the current view that the Applicants take about pre-emptive action is the one that they have
10 always held or whether that has undergone some development. It certainly seemed to us that
11 there might have been some development. I will not take you to it, but we slightly adverted to
12 this difficulty in the defence in the sense that in the original supplementary notice of
13 application they simply referred to the paragraphs of the original notice of application which
14 had made some of these arguments, but are more developed in the skeleton argument and it
15 certainly seemed to the Commission that in the original notice of application it was a slightly
16 less sophisticated view, shall we say, of pre-emptive action.

17 THE PRESIDENT: Our concern, I think, is the reasonableness point.

18 MR. RAYMENT: Yes, I think we need to move on to reasonableness.

19 We have made some points in the defence about the statutory context. We say that the key
20 issue is management is risk. The balance of risk that the Commission has to consider is the
21 effective functioning of markets, and it is the CC's role to take action where they think that
22 action might prejudice this, and you have already identified that that is a low threshold.

23 "Might prejudice" really means there might be an effect that would mean that action that the
24 CC might want to take would not be as effective as it might otherwise have been – in other
25 words, the test is precautionary to protect the Competition Commission's ability to act in
26 accordance with what we submit is a heavy public interest duty.

27 We say that the burden in this situation is very much on the Applicants to show that the
28 Competition Commission is unreasonable in its objectives and its proposals for achieving those
29 objectives. Our submission is principally that the situation here plainly fell within our
30 guidance. That is annexed to the witness statement of Mrs. Guy and the relevant passages are
31 cited in the defence – I do not think I need to take you to it specifically now.

32 Here we have a situation with a single chief executive officer with an integrated senior
33 management team around him with plans, originally at least, for ever increasing integration.
34 Mr. Blyde's position, as we have already explained, is a dual one and is particularly difficult in
35 terms of managing both businesses in the best interests of each of those businesses. There is

1 no suggestion of a dark plan to destroy one of the companies or to fatally wound it, and we say
2 that emerges quite clearly from the Commission's meetings and Grant Thornton meetings. We
3 are not saying that he would deliberately run down one business at the expense of the other.
4 The point is simply that managing on a group basis is not the same as running a business on an
5 individual basis. It is just difficult for the Commission in this situation to accept assertions to
6 the contrary in view of the balance of the risk in these situations. That is what the Commission
7 guidelines are doing, they are providing a starting point for identifying risk. Simple assertions
8 that somebody would not act in a particular way are not sufficient.

9 By way of illustration, the Commission was obviously pleased when Mr. Blyde says he will
10 not act against STG's interests in performing sales and marketing functions. As has already
11 been mentioned, we took comfort from his argument that is quoted in para.46 of the skeleton.
12 We accept that this ensured that there is no risk from Mr. Blyde's dual capacity. There is
13 always the risk that his decisions will be influenced by the Group perspective. This is a real
14 risk. This is not "speculation or a hunch", as the supplementary notice of application describes
15 it, it is not "fanciful". It is difficult, as I have said, for a chief executive officer and a
16 management team to run two companies independently in the best interests of each. That
17 independent management, or at least the separation of key functions, including the introduction
18 of a Hold Separate Manager is what the Competition Commission considered in this case was
19 necessary to manage this risk over what is necessarily an uncertain period. In this case the
20 level of senior management integration was unusually advanced.

21 THE PRESIDENT: If we come to the specific points that Mr. Lasok has been making, which on the
22 Hold Separate Manager point essentially boiled down to, if he will forgive me for summarising
23 an extended and powerful submission, what is the added value that the Hold Separate Manager
24 brings to the party?

25 MR. RAYMENT: The Hold Separate Manager is an interim manager, sir, and it has been mentioned
26 on a number of occasions the difficulties that an interim manager would face coming into this
27 particular organisation. In the Commission's experience there is a wide range of people with
28 expertise who perform these sorts of functions. This is one particular example of where
29 interim managers are called for, but one can think of others in the insolvency field.

30 THE PRESIDENT: The appointment of a receiver or an administrator is an obvious example.

31 MR. RAYMENT: These are highly qualified people and obviously the advertisement for the job
32 would be at the going rate which, in this particular case I am sure is an adequately remunerated
33 sum which would attract somebody of the right sort of calibre.

34 THE PRESIDENT: The Applicants pay that, do they?

35 MR. RAYMENT: The Applicants would pay that.

1 THE PRESIDENT: It is a full-time position?

2 MR. RAYMENT: That would be one synergy that would be foregone from the current situation, as
3 it were.

4 THE PRESIDENT: Right, but it is a full-time position.

5 MR. RAYMENT: It would be a full-time position, and you will recall that that was one of the
6 reasons why the Commission was somewhat cautious about the appointment of [...] [C].
7 The key point about an interim manager is that they are there to manage. I cannot give you an
8 overview of what somebody who manages a company has to do. The roles are many and
9 varied. It is an executive role, it is preventing problems, it is dynamic. It is difficult to define,
10 but it is certainly not the sort of role that the Commission can play by just responding to
11 particular that are raised and it is then said, "Would you mind giving your consent to this?"
12 "Do you consent to that?" or indeed to the role played by the Monitoring Trustee. It is an
13 altogether more dynamic position.

14 I am afraid that is a slightly wishy-washy general summary but, as I say, their job as an interim
15 manager is to come in and manage on an interim basis. They will obviously bring themselves
16 to up to speed as quickly as possible. That can be done, we think, pretty quickly. No doubt the
17 Monitoring Trustee's report will be useful in that regard, but they will be able to dig down into
18 much greater detail than even the Monitoring Trustee, they are in charge.

19 On a more detailed level, the Hold Separate Manager would be establishing what the relevant
20 key performance indicators were for the STG business, the numbers of contracts involved,
21 contracts won and lost, the revenues [...] [C].

22 THE PRESIDENT: Who has the hiring and firing responsibility?

23 MR. RAYMENT: He would have the hiring and firing responsibility. I could go on at some length,
24 but obviously he can call for reporting on key aspects of the business. He can look for
25 significant changes. Of course, he can be involved in the functions that Mr. Lasok spent quite
26 some time on this morning, sales and marketing and operations, as well as human resources
27 and environmental.

28 Mr. Lasok says that really his role is only in relation to sales and marketing and operations as
29 far as he understands what we have been saying, but the Competition Commission's position is
30 that that is not, in fact, the case. Certainly the intention is that the interim manager would have
31 a much wider remit. Yes, it is true that sales and marketing and operations are particularly
32 important, but those other functions are important too. For example, he, the interim manager,
33 would be involved in deciding how much human resource is needed [...] [C]. So even in
34 relation to those functions, although they are not functions that he would be taking major

1 decisions on every day, he would nevertheless have some involvement in assessing what was
2 required, and so on.

3 THE PRESIDENT: So he is going to be the principal directing mind, as it were?

4 MR. RAYMENT: That is the intention.

5 THE PRESIDENT: What is the envisaged timescale? What sort of period of time are we talking
6 about in practice?

7 MR. RAYMENT: For the determination of the reference?

8 THE PRESIDENT: What is the minimum and maximum period of time for which this chap or lady
9 might have to be in post?

10 MR. RAYMENT: They might be in post only until about the beginning of December, but it is
11 feasible that they might be in charge for anything up to a year. The basis for saying that is
12 again this whole situation that the risk management has to apply to all eventualities. It is
13 possible, for example, if the Commission decided, and of course no decision has been taken on
14 that at this stage, that a divestment remedy was appropriate then it would hope that the
15 divestment would be able to take place within six months, but if not it is not impossible that
16 that situation of seeking an appropriate purchaser, and so on, could take considerably longer
17 than six months. It is just difficult to foresee at this stage.

18 THE PRESIDENT: I suppose there might be appeals of some sort.

19 MR. RAYMENT: The possibility of litigation, and so on, could hold matters up further, so it is just
20 uncertain.

21 THE PRESIDENT: Yes.

22 MR. RAYMENT: Perhaps I could just make good the point that I was making, which is that as far
23 as the Commission is concerned, although there may have been greater focus on sales and
24 marketing and operations, it has never been the case that the Commission has solely restricted
25 itself in considering the issue of a Hold Separate Manager to those areas. It is always much
26 wider. We can go, for example, to Mrs. Guy's witness statement, para.41, about half-way
27 down, the sentence beginning "In particular". I do not want to take too long over this, but
28 I should just take you to it.

29 THE PRESIDENT: Yes.

30 MR. RAYMENT: It reads:

31 "In particular, the Group considered it important to establish a separate decision
32 making structure for the two businesses during the course of the inquiry, especially in
33 relation to areas where key risks had been identified."

34 Those of course are risks at this stage. That does not mean that we do not think that there may
35 be other risk areas, but so far as we are able to tell at the moment these are some of the key

1 areas, but they are by no means necessarily all the areas that there are. That position has also
2 been confirmed to the Applicants at an earlier stage, if you look at the covering letter to the
3 directions. I do not think you necessarily need to go to it now. I can just read it out to you.
4 Under “Decision making structure”, the covering letter of 25th August says:

5 “As we have previously explained, the CC believes it is necessary to establish a
6 separate decision making structure for the Stericycle and STG businesses through the
7 Inquiry. This is in relation to both capital expenditure decisions and more generally
8 to other decisions which relate to the operation of the business.”

9 “Operation of the business” there is not operations, it is the whole going concern.

10 THE PRESIDENT: What Mr. Lasok says that, essentially, it is quite difficult to actually separate
11 these two businesses because quite a lot has happened already and the particular position of
12 Mr. Blyde is rather unusual as the former principal actor in the hire business now being in
13 charge of the whole business, and that on various specific points the Applicants have gone as
14 far as they can reasonably be expected to go. Going any further than that is, frankly, not a
15 reasonable exercise of the Commission’s discretion. That is essentially how Mr. Lasok puts it.
16 So one question is, what are the remaining risks that this Hold Separate Manager will guard
17 against that are not already in one way or another adequately guarded against in what has been
18 done?

19 MR. RAYMENT: One cannot give a definitive answer at this stage. One can only point to certain
20 examples, some of them hypothetical, some of them more concrete, as to where the risks might
21 come from in the future.

22 THE PRESIDENT: You cannot foresee.

23 MR. RAYMENT: That is an important point. We have tried to sketch out where we see the risks,
24 but it is impossible to be too prescriptive. For example, [...] [C]. In relation to, for example,
25 just the general operation of that sort of business, that is the sort of area in which a Hold
26 Separate Manager could have a role.

27 THE PRESIDENT: [...] [C]

28 MR. RAYMENT: [...] [C]

29 The other point is that, of course, operating the sales and marketing function does not cover
30 questions of inaction, of prioritisation. There are limits to which you can provide for those
31 sorts of issues in the framework that we have envisaged. You can only go so far with the
32 framework of rules, and this is the problem with a dynamic commercial situation, trying to
33 impose definite rules to try and cover every eventuality is very difficult and we think the
34 answer is to appoint a Hold Separate Manager.

35 We also have some difficulty ----

1 THE PRESIDENT: Just help me with how it is going to work. The STG business, does that,
2 technically speaking, still exist as a legal entity?

3 MR. RAYMENT: Yes, it does.

4 THE PRESIDENT: It has report and accounts, and that sort of thing?

5 MR. RAYMENT: Yes, it does.

6 THE PRESIDENT: So if the finance department prepares the annual budget, how would that
7 normally be done? It would normally go up to a board presumably?

8 MR. RAYMENT: Yes, it would.

9 THE PRESIDENT: What is envisaged, in effect, in this case is that the Hold Separate Manager
10 would be the equivalent of the chairman of the board – is that right?

11 MR. RAYMENT: That is correct.

12 THE PRESIDENT: The company would then approve that budget?

13 MR. RAYMENT: Yes, that is right. [...] [C]

14 Turning to operations, which is the other specific area that has been mentioned, yes, of course
15 the order deals with the preservation and maintenance of assets. The risk here is not that there
16 might be nothing to sell if the Competition Commission has to make a divestment, the object is
17 to try and preserve the best possible outcome, if it needs to act. That means that, in relation to
18 operations, it is not simply a question of preserving some plants or some assets, it is to make
19 sure they are run to the best of their potential in the interests of that particular firm. [...] [C]
20 we submit that it is important that there are guarantees in place that decisions involving those
21 issues are taken in the best interests of STG than the group as a whole. That is the Competition
22 Commission thinks that the Hold Separate Manager has a role to play. The orders by
23 themselves are themselves are not adequate without that additional safeguard. That is the
24 judgment of the Competition Commission, having considered matters in the round. [...] [C]
25 the Hold Separate Manager would be further comfort in the light of the risk going forward.
26 I think there was some discussion about the question of capital expenditure decisions, [...] [C]
27 I think they were submitting that there was no need for a Hold Separate Manager. The
28 Competition Commission disagrees with that approach, the Hold Separate Manager does have
29 a role to play in the Applicants' world. [...] [C] necessary to guarantee the sort of independent
30 decision making that we are trying to achieve.

31 You have already covered in argument some of the points that I was intending to raise.

32 THE PRESIDENT: [...] [C]

33 MR. RAYMENT: [...] [C]

34 The directions, and so on, do not cover entirely decisions not to spend money. I think that was
35 one of the points that you raised with Mr. Lasok in argument. We again say that is another

1 area where a Hold Separate Manager may have a role to play. I do not mean this as a question
2 of evidence, these are questions of what is possible in the future, factors that might have the
3 effect that we are trying to prevent, decisions about what is a priority.

4 [...] [C] The point is that the Commission's view is that the best outcomes for managing those
5 sorts of situations are going to come with somebody who is managing on this independent
6 basis that we are trying to establish.

7 THE PRESIDENT: What is your position as regards the Grant Thornton transcript?

8 MR. RAYMENT: The Applicants rely on the fact that Grant Thornton did not expressly recommend
9 the Hold Separate Manager as a factor that we should take into account. The first point to
10 make is that the question of whether or not a Hold Separate Manager is the responsibility of the
11 Commission having regard to the risk that it has to manage under s.81. That is not a
12 Grant Thornton question directly. It was not within the instructions of Grant Thornton to
13 consider whether or not to impose a Hold Separate Manager. The order that Grant Thornton
14 was essentially looking at from a compliance perspective did not provide for a Hold Separate
15 Manager. So it was not directly within their remit. Having said that, of course, it was
16 discussed at the meeting between the Commission and Grant Thornton.

17 THE PRESIDENT: Where do we find what their remit was?

18 MR. RAYMENT: The letter of instruction is with the report. I am afraid I have not been using the
19 copy in the Applicants' bundle, but if you look in bundle 2, supplementary correspondence,
20 tab 86, and in my copy it is p.543. You can see the terms of the engagement there. You can
21 see at the bottom our instructions. These instructions cover, at least at this stage, the
22 appointment of the Monitoring Trustee, the initial work to ascertain the position and then what
23 is envisaged in their role going forward.

24 THE PRESIDENT: Yes.

25 MR. RAYMENT: It is also true to say that, of course, Grant Thornton were dealing with the matter
26 on the basis that Mr. Blyde was the Chief Executive Officer of the two companies. That was
27 pretty much a given at the stage they embarked upon preparing their report.
28 Then we come to the position which was that the Commission had the meeting that we know
29 about on 16th August and the matter was raised with them. It is true that in relation to the
30 notion of fatally wounding, deliberately doing one of the companies, [...] [C] it is true that
31 Grant Thornton said that in their view it was a bit theoretical. When they are discussing the
32 Commission's concern in the transcript, namely not the doing down of one particular company
33 or the other, but rather the real Commission concern which is the difficult position that a dual
34 capacity chief executive has, at that point Grant Thornton, not having obviously thought about
35 it in any great detail, at least acknowledged that it was a legitimate concern and was something

1 that could be thought about further. I think we could look at p.19 of the transcript of the
2 meeting with Grant Thornton.

3 THE PRESIDENT: We need to rise for about five minutes at a quarter to four, Mr. Rayment.

4 MR. RAYMENT: Yes, sir. The question is being put at the bottom of p.19 about Mr. Blyde's
5 position, and you will see the last sentence, "I think he is in a very difficult position". We see
6 Grant Thornton's response over the page.

7 It is true to say, of course, and Mr. Lasok can fairly say this, that Grant Thornton did say that
8 there were a number of controls that could be put in place. If you keep reading down,
9 Grant Thornton say, "We certainly would not rule out have a Hold Separate Manager", this
10 having just been put to them. He makes the very pertinent comment that in doing that you
11 would have to choose somebody for that role very carefully, but that is fully what the
12 Commission intends to do. They do not intend to appoint somebody who does not have the
13 capability of doing this job.

14 The Commission cannot accept, bearing in mind the general comments that I made about the
15 role about interim managers, and so on, that there is something so inherently complicated
16 about this particular business that means that you cannot put somebody in to effectively deal
17 with the situation. We just do not consider that that is the case.

18 In my submission, a Hold Separate Manager would need further consideration, but the
19 Commission gave it that consideration but decided, in the light of their specific statutory aims,
20 that they had to have a Hold Separate Manager in place.

21 THE PRESIDENT: That is essentially because, you say, of the unsatisfactory situation in which
22 Mr. Blyde is called upon to play a dual role, however conscientiously he might seek to do so.

23 MR. RAYMENT: That is right, and with the view, as we say, not just to, for example, preserving
24 assets, but preserving the possibility of restoring effective competition on the markets affected
25 by the merger as viable marketable and competitive business and I would just like to make the
26 point ----

27 MR. DAVEY: Mr. Rayment, where can we find – presumably in Mrs. Guy's affidavit – what the
28 considerations were that drove the Group to decide that a Hold Separate Manager was the only
29 answer? We have already directed us this position where you are saying it has to be chosen
30 carefully because the last thing we want is for the business is a temporary loss of control,
31 losing customers, et cetera, et cetera. Where, in her affidavit, do we see what thinking drove
32 them to conclude that the Hold Separate Manager was required, despite the risks which had
33 been drawn to their attention? There is a discussion around about para.60 or so of the affidavit
34 of the three options which they considered.

1 MR. RAYMENT: As you say, it seemed to the Group that the appointment of the Hold Separate
2 Manager struck the right balance, having taken into account – this is in para.69 – all the
3 matters that had been put to them.

4 I do not think it is right that the Commission has to expressly disagree in this context with
5 everything that is put to them as a possible problem. They have a duty to consider it and then
6 to reach a decision on that material that is reasonable. If that decision is reasonable having
7 regard to the particular statutory objectives, then that decision is not susceptible to challenge
8 on judicial review.

9 Many of these points – for example, in relation to Grant Thornton – Grant Thornton raise the
10 issues you need to consider in appointing a Hold Separate Manager, you need to consider it
11 carefully. It is clear that the Group did go away and do that. They then discussed the
12 Grant Thornton report in the meeting with the Applicants and they were still making the point
13 at the meeting with the Applicants on the Grant Thornton report that they were still concerned
14 about the position of Mr. Blyde, notwithstanding all these other issues.

15 THE PRESIDENT: Very well, we will just rise for five minutes, if you will bear with us.

16 (Adjourned for a short time)

17 THE PRESIDENT: Yes?

18 MR. RAYMENT: Sir, I am grateful. I do not think I need to take you to it, but I was just referring
19 you before you rose to the fact that the overarching purpose in terms of restoring competition
20 and going beyond just, as I said, preserving assets but actually keeping a dynamic management
21 function in place so as to create viable, marketable and competitive businesses, that is actually
22 referred to in the recital to the order.

23 THE PRESIDENT: I think the point that Mr. Davey was making just before adjourned is that, if you
24 go to para.67 and onwards of Mrs. Guy's witness statement, it is true that you set out the three
25 options. What we are searching for is the reasoning for going for option number three and
26 where exactly we find that. It is the last sentence of 67, is it?

27 MR. RAYMENT: That is part of it, sir, yes, "I was concerned", at the bottom, do you see, six lines
28 up.

29 THE PRESIDENT: "I was concerned", yes. That is the split personality problem.

30 MR. RAYMENT: Yes, and that is our main point.

31 THE PRESIDENT: That is the main point, I see.

32 MR. RAYMENT: There are sufficient issues or situations in which that could be important, and we
33 have been discussing some of those.

34 THE PRESIDENT: Then you get to 69, a separate set of decision makers in respect of the two
35 businesses.

1 MR. RAYMENT: That is right, and that is just mentioning two key risk areas, but, as I said, it is not
2 confined to that, as has been made clear, partly because it is not possible to do that.

3 THE PRESIDENT: It is basically the last two sentences of 67 and the middle sentence of 69, “This
4 was the Group’s preferred option”, is that where we find the heart of it?

5 MR. RAYMENT: Yes. The question is, why this proposal is objected to? It is said that it does not
6 work. I think, if it is helpful, that may be where we should go next just to see some of the
7 problems that are said to arise.

8 THE PRESIDENT: It is said that it is disproportionate because all the other arrangements
9 effectively solve the problem in one way or another.

10 MR. RAYMENT: We have tried to outline why that is not the case.

11 THE PRESIDENT: Because of the directing mind.

12 MR. RAYMENT: Essentially because of the directing mind point applied to various areas of the
13 business which are not necessarily covered by the directions.
14 Then much of the disproportionality comes from the fact that we have imposed these
15 additional obligations in relation to collective deliberations, for example, and the flow of
16 information.

17 THE PRESIDENT: These are the specific that we came to this afternoon?

18 MR. RAYMENT: Yes, that is right. That is connected with their objection which is that the Hold
19 Separate Manager is put in an impossible position because of the way that we have set up these
20 provisions on collective deliberation. We say, as we have said all along, that, properly looked
21 at, those restrictions are not particularly onerous. Going back to the explanation of the role of
22 the interim manager, we just do not accept that an appropriately qualified individual would not
23 be able to make the necessarily inquiries [...] [C].

24 THE PRESIDENT: Yes. What about the fiduciary responsibilities point?

25 MR. RAYMENT: [...] [C] As far as regulatory reporting to Mr. Blyde is concerned, you, yourself,
26 have observed that it might be considered on one view relatively generous, and the
27 Commission would wish to emphasise that nothing is intended that would put Mr. Blyde at any
28 risk of breaching his director’s duties. We have been prepared to take the approach that he
29 tells us what he needs and a system is put in place for him to get that information. What we
30 had envisaged is some kind of protocol which would have a list of the sorts of information that
31 he needs that could be drawn in conjunction with the relevant people in the jurisdictions which
32 he has to report into, and in that way one can see what information and in what categories is
33 passing through, and if there is information that is not in a particular category that he needs
34 then he asks for it, and there is no reason why he should not obtain that.

1 THE PRESIDENT: On that point the distinction is made between the word “discussed” and the
2 word “agreed” – i.e. the schedule refers to the information he needs being discussed with
3 Grant Thornton – and the defence envisages that something should have some sort of veto over
4 what it is so that it has to be, as it were, agreed, as I understood the point.

5 MR. RAYMENT: The purpose of discussing it with the Monitoring Trustee is effectively so that the
6 categories that are needed can be identified. This is one of the problems in this situation and it
7 is a problem that was identified in the Grant Thornton report, which is that as far as
8 compliance goes there is a paucity of systems in place for working out how the various bits of
9 reporting that are required are going to take place. You cannot have a monitoring system when
10 Mr. Blyde just says, “Oh, I want this bit of information or that information”. The thing is to
11 agree. This is what happens in the vast majority of cases that the Commission deals with, there
12 is a list drawn up of the sorts of information that is needed and then boxes are ticked as that
13 information is handed over, and the Monitoring Trustee can then keep tabs on what is passing
14 backwards and forwards. As I say, if there is anything outside those categories of information
15 that is necessary then Mr. Blyde can ask for it. It does not seem unreasonable for him to
16 explain why he needs it. That is the Commission’s position on it. I do not see anything
17 inconsistent with what I have said with the drafting of the provision. “Discuss” is “discuss”. If
18 the Monitoring Trustee did then consider that there was information that was nothing to do
19 with his reporting requirements that was passing via this mechanism then he would report to
20 the Commission accordingly. That is how the provision works at the moment. I can see that
21 reasonable people might disagree about whether that was sufficient or not, but that is the
22 provision that has been put in place.

23 THE PRESIDENT: At the moment there is a general prohibition subject to this possible exception,
24 so presumably you bring yourself within the exception by discussing it with the Trustee – that
25 is the idea, is it?

26 MR. RAYMENT: That is the idea, under this particular head. Provided it is to do with his reporting
27 restrictions there is no problem. That provision ought to be capable of being managed with
28 goodwill on all sides.

29 Not dissimilar issues arise in relation to the provision dealing with the ability of the Applicants
30 to present their case to the Commission. Again, it is very much to establish a protocol so that
31 the transfer of this information can be monitored. There is no intention that privileged material
32 should end up in the hands of the Competition Commission. We, for our part, find it difficult
33 to see that any issue is actually going to arise in practice.

34 THE PRESIDENT: The point that was being put, I think, was that they might be preparatory
35 material that might not be strictly covered by privilege, because perhaps a lawyer had not been

1 involved, or something, which in some way might be passed to the Monitoring Trustee and
2 thus to the Commission which inhibit the preparation of a defence. That was the argument.

3 MR. RAYMENT: I understand that argument, but I think the response is, is it privileged or not? If
4 it is privileged information it is for them to make that clear and to make sure that it does not –
5 provided it is made clear that it is privileged information I do not see how the Monitoring
6 Trustee is going to end up sending that to the Commission.

7 THE PRESIDENT: Yes.

8 MR. RAYMENT: These are practical issues. I accept that it would be a serious matter if, for some
9 reason, privileged material inadvertently found its way to the Commission, but that is nothing
10 to do with the actual provision in the direction. It is all to do with working out good system for
11 governing these exchanges. It is true, of course, that every case is different, but this situation
12 does come up and it has always been capable of being managed appropriately before and the
13 Commission has not ended up with privileged information or things that are protected by the
14 rights of the parties.

15 THE PRESIDENT: Forgive me for not knowing this, Mr. Rayment, has the Commission done this
16 on previous occasions?

17 MR. RAYMENT: Yes, it has. It has not been the subject of an order so far because it has always
18 been capable of agreement, but we have had a similar provision in place in – the *Heinz* case
19 was a recent example.

20 THE PRESIDENT: Is that a publicly available report?

21 MR. RAYMENT: No, but it is one we could certainly make available subject to an undertaking.
22 The version on the website apparently has a lot of excisions, but I think we could probably
23 show the Tribunal and the Applicants the sorts of provisions that have been in place on this
24 sort of issue in previous inquiries.

25 THE PRESIDENT: Yes. We are not interested in specific issues, just in the template of this sort of
26 thing. If you could us an example it would be helpful. Yes?

27 MR. RAYMENT: I think that covers in a fairly quick run-through all the points. Overall, my
28 submission is that the objectives were legitimate and reasonable and the measures employed to
29 achieve them are workable for the reasons I have given. To the extent that there are any
30 problems of practicality – I would put into that category Mr. Lasok’s problem with the word
31 “discuss” in relation to quite what the obligations were in relation to the reporting provision. It
32 was never intended to go beyond what I have described to the Tribunal just now.
33 Although the provisions of the Order are somewhat complex they reflect the attempt that the
34 Commission has made to move in the direction of the Applicants. I appreciate they say that
35 they have moved in our direction, but we have also tried to move in their direction with these

1 provisions. It is possible that more intrusive measures could have been adopted at an earlier
2 stage, but the Commission took the decision that they would try to accommodate the
3 Applicants as far as possible. You, yourself, have already identified a couple provisions which
4 perhaps are quite wide in relation to, for example, the reporting obligations.

5 THE PRESIDENT: Yes.

6 MR. RAYMENT: It was an issue – the Commission has not taken the stance, but it could well have
7 taken the stance that if the Applicants were subject to statutory or *quasi* statutory obligations
8 under the Order that would provide them with a defence to any issues raised in a foreign
9 jurisdiction, but the Commission decided not to take that sort of approach and to be prepared to
10 accept Mr. Blyde’s word, if necessary on advice, as to what exactly he needed. That provision
11 ought to be able to work.

12 Unless I can assist you further on any particular issue that is broadly the Commission’s
13 position.

14 THE PRESIDENT: Thank you. Yes, Mr. Lasok?

15 MR. LASOK: I am grateful to my learned friend for his position or the clarification regarding the
16 word “discuss”. We have got both parties gliding towards each other and probably passing
17 each other in the night, but anyway ----

18 THE PRESIDENT: Can they not somehow attack the ----

19 MR. LASOK: I think we are beginning to get there. I am a little bit concerned still about the flow of
20 confidential information necessary for the defence of the Applicants, because it really seems to
21 be confirmed that the restriction on the CC seeing this stuff is conceived as applying only to
22 material covered by legal professional privilege. I have made the point that one of the
23 problems is that if you are a big company with an in-house lawyer and all the resources that is
24 no difficulty, but we are not talking about big companies here, we are talking about small
25 companies with limited resources and they do not actually have the resources to buy in a
26 lawyer, stick him in an office so that you can concoct the legal professional privilege umbrella.
27 I have made the point about that.

28 THE PRESIDENT: Is there a practical solution to this problem, Mr. Lasok, because I think the CC
29 is not trying to get hold of some preliminary draft of some submission that might or might not
30 be going to be made, they just want to be sure that under the guise of preparing the “defence”
31 there is not some leakage of information across that should not really be happening under the
32 envisaged scheme.

33 MR. LASOK: If that is all it is ----

34 THE PRESIDENT: I think that is what it is.

1 MR. RAYMENT: Could I come in, I might be able to assist. On that category of information, if that
2 category is agreed, as it were, with the Monitoring Trustee then the Monitoring Trustee can
3 consider information that passes through his office, as it were, and if it falls into that category
4 it can be specified that that category is a category that is not to be disclosed to the Commission.
5 The Commission would be prepared to accept that, I think.

6 THE PRESIDENT: When you say “that category”, you mean the category of?

7 MR. RAYMENT: Of these preparatory documents that Mr. Lasok is talking about. We do not have
8 any need to see those documents. What we want to prevent is, as you said, the leakage of
9 information that cannot be reasonably said to fall into that category.

10 THE PRESIDENT: If we take a concrete example – I do not know whether this is a concrete
11 example – if we take the example of next year’s budget for STG, for example, it may be that
12 there is an argument that says, “Mr. Blyde really need to see that because of his regulatory
13 responsibilities”, et cetera, et cetera, in which case that would need to be verified in some way
14 or other to see whether it was actually the case that he needed to see it. Then there would be
15 the question as to whether separately a document of that sort really was essential to the defence
16 of the proceedings, I suppose. I just do not know.

17 MR. LASOK: I think it is more likely to be this: you will have somebody – let us take it as a
18 member of the management team in the STG business – who has seen some communication
19 from the CC and is sitting in his office and he suddenly says, “The answer to this is”. Let us
20 assume that this confidential information relating to STG. He cannot transmit that information
21 because it is not a transmission that is strictly necessary in the ordinary course of business. He
22 can only do it if he can get it within para.38. It is not legally professional privilege. We
23 construe para.38 as enabling him to do that.

24 We can see that the Monitoring Trustee will obviously want to be in a position to monitor this
25 kind of thing. You would expect the Monitoring Trustee to have got some kind of idea about
26 how best to do it, because that is the kind of thing that a Monitoring Trustee would do.

27 We, at the moment, do not see why information of that sort should get anywhere near the CC.

28 Of course, we are not talking here about preparatory material in the sense of a draft document,
29 we are talking about the raw information that has been suddenly realised or found by
30 somebody who wants to transmit it to somebody else for the preparation of the defence, but
31 that information, that piece of information or evidence, may need to be combined with some
32 other evidence from somebody else or re-checked in order to produce the finished version.

33 From my experience, I well know the consequences of decision makers getting hold of
34 material, the original raw material that has not been properly processed and, without checking
35 to see whether the final version has been tampered with or has simply been corrected. You can

1 bet your bottom dollar that, generally speaking decision makers will consider that the material
2 has been deprived of part of its evidential force if the final product differs from the original,
3 because it is very often the case that what will happen is that somebody will say, "This is the
4 position", it will then have to be checked with something else before it can be verified, you
5 will go through a process of verification and you will end up with something that may be the
6 same as the original thought but may be slightly different. The difficulty is with people
7 beginning to look at the earlier material because they will jump to the conclusion that it is only
8 the early material that is the unvarnished truth. That is one of the difficulties about all this.
9 That is a very, very real concern and one can see it in all kinds of cases in which this kind of
10 problem arises.

11 THE PRESIDENT: We are still here talking about confidential information about the STG business
12 that Stericycle would not normally have.

13 MR. LASOK: That is correct.

14 THE PRESIDENT: I cannot see why they should have it at the moment even if it is ----

15 MR. LASOK: It is permitted under the first sentence of 38. The argy-bargy that we are talking
16 about here is the question of whether or not the CC would be ----

17 THE PRESIDENT: You would not want to be holding back information from the CC anyway.

18 MR. LASOK: That is not the issue.

19 THE PRESIDENT: The information itself would not be privileged anyway. What might be
20 privileged would be the lawyers' work product ----

21 MR. LASOK: The first sentence of 38 does not, as we construe it, limit itself to legally privileged
22 information. Time is getting on. What I would prefer to do is actually to make some final
23 submissions in reply on the HSM appointment problem.

24 THE PRESIDENT: Yes.

25 MR. LASOK: I think that it is fair enough to say that the HSM appointment idea originated in
26 concerns about the absence of independent decision making in WRE and STG. But it is
27 important to bear in mind that all the evidence indicates that that concern arose in connection
28 with decision making concerning sales and marketing and operations, more particularly the
29 treatment of assets. The phrase used by Mrs. Guy is "maintenance" or "maintaining" assets.
30 I am not going to go through the transcripts in order to make that. I will just simply make this
31 observation: the transcripts are littered with references to concerns focused on the lack of
32 independent decision making in the two areas of sales and marketing and operations. They do
33 not go into such things as the hiring and firing of staff.

34 At an earlier stage the position was very different because at an earlier stage back in July the
35 concerns were articulated around confidential information and the running down of the brands.

1 That was early on. At the time we are talking about here, which was when we are moving into
2 the making of the decision, the concerns are focused on the lack of independent decision
3 making concerning sales and marketing and operations and nothing else.

4 Indeed, there are bits in the transcript where a particular issue is raised. I am thinking now of
5 the IT problem that was discussed with Grant Thornton, and that disappears. It is not an area
6 of concern. There are other parts of what was the original concern of the CC that were
7 discussed and disappeared.

8 So, in our respectful submission, it is not actually correct to say that there was an articulated
9 concern about pre-emptive action taking place otherwise than in the areas of sales and
10 marketing and operations with the sole exception of the problem of confidential information
11 concerning finances slipping out.

12 It is right to look at Mrs. Guy's evidence and the emphasis that she places on those two
13 particular areas and actually limit it to that. There is no articulated concern, no identification
14 of pre-emptive action in relation to any other decision making outside those areas, nothing in
15 the evidence.

16 THE PRESIDENT: There is a fairly general statement at the end of 67 as to what the concern was –
17 it is 67, p.23, "I was concerned this option", et cetera, et cetera. That is rather broadly
18 expressed.

19 MR. LASOK: Save that this is Mrs. Guy, it is not the Group.

20 THE PRESIDENT: Yes, but she then goes on, "The Group considered option one was too similar to
21 the current position and offered little additional protection". It is true that we have not got a
22 witness statement from each member of the Group, but she is the Chairman of the Group.

23 MR. LASOK: Exactly, but she draws a distinction between the Group and herself, "I was
24 concerned", and then she has got, "The Group considered". If you look at the last sentence of
25 68, "In some respects I thought this option went further", but then in 69 you have got
26 references to what the Group thought.

27 THE PRESIDENT: So what you are saying is that we should not assume that this is a reflection of
28 what the Group thought?

29 MR. LASOK: I think you can only take this witness statement for what it says. In our submission, it
30 would not be wise to read the word "I" as meaning "the Group".

31 THE PRESIDENT: So should we get supplementary statements from other members of the Group?

32 MR. LASOK: That is a matter for the Tribunal, but all I can do is look at and make submissions on
33 the basis of what this evidence is. In para.41, for example, it is, "The Group explained that, the
34 Group considered it important".

35 THE PRESIDENT: That is what it says in the last sentence of 67.

1 MR. LASOK: Yes, I know, but it does not say it in the penultimate sentence. That cannot be a
2 drafting error.

3 THE PRESIDENT: It could have said, I agree, “The Group shared this view and considered that
4 option one was too similar to the current position”.

5 MR. LASOK: The other thing you have got to do is read the penultimate sentence of 67 in isolation
6 from the rest of the witness statement. The rest of the witness statement is all about the focus
7 on specific areas, of which the classic example is 43, the last two lines, “The CC’s concerns
8 about the need for separate decision making minds in those key risk areas of sales and
9 marketing, operations and finance”.

10 THE PRESIDENT: Yes, but at 41 it is put more broadly.

11 MR. LASOK: If you look at the title on p.23, above 66, “CC’s consideration of three options for
12 separation of key functions”. If one gives a fair reading to this and reads the thing as a whole,
13 in our submission, it is absolutely clear what the CC’s concerns were. They are encapsulated
14 in the last two lines of para.43 by way of example.

15 One has to remember, as I think I submitted earlier, if you are looking at pre-emptive action
16 mere combining of the management of two businesses is not necessarily pre-emptive action.
17 In many cases it will be, but it is not necessarily in all cases. We know that in this particular
18 case, from what Grant Thornton told the CC, there was a considerable degree of non-
19 integration and a great ability due to the particular nature of the businesses of separation.
20 That is why focusing on what the perceived pre-emptive action is is of some importance, but
21 we know that the only focus, the only articulated concern – and I am submitting that the only
22 concern on a fair reading of Mrs. Guy’s statement – concerned these key risk areas and the risk
23 that there would not be independent decision making, but it boils down to those areas, because
24 financing was different, of sales and marketing and operations.

25 [...] [C]

26 MR. LASOK: That really leaves the asset problem. The situation here is that the proposal
27 originating with the CC itself was [...] [C] and that was regarded by us as workable. [...] [C].

28 THE PRESIDENT: This is the capital expenditure rule?

29 MR. LASOK: It is expenditure. [...] [C]

30 THE PRESIDENT: [...] [C]

31 MR. LASOK: It is the maintaining of assets, the expenditure required to maintain assets. At the
32 moment I simply fail to understand how a suggestion originating in the CC itself that is
33 regarded by us as workable can simply be dismissed out of hand in the absence of any stated
34 reason found in Mrs. Guy’s witness statement.

1 I think I will end on one point, and this is it: there has been some discussion about what
2 Grant Thornton were up to. They certainly thought that they were gathering material in order
3 to advise the CC of separability because they said that in their report. The report in the
4 supplementary notice of application bundle, tab B. If you go to p.6 and look at the left hand
5 side there is a heading, "Content and recommendations", and if you just read that sentence you
6 will see that they thought that what they were doing was assisting the CC to determine what
7 steps were required for the purpose of preventing pre-emptive action.

8 THE PRESIDENT: Yes.

9 MR. LASOK: We all accept that the CC is the decision maker, not Grant Thornton, but I think one
10 has to accept the fact that the CC had sent out Grant Thornton to provide it with facts and
11 evidence and this was all in the context, as the Tribunal Chairman will remember from the first
12 hearing in this case ----

13 THE PRESIDENT: I seem to remember some discussion about it on a previous occasion.

14 MR. LASOK: Exactly. That explains why, among other things, about the first thing that
15 Grant Thornton embarked upon when they had the meeting with the CC was an explanation in
16 those pages, 4-8 of the transcript of the hearing, of the reasons why they felt that separability
17 was possible. It was not their job to argue with their employer, but it was their job to put fairly
18 to the CC the facts that they had dug up. That is what they did but, in our respectful
19 submission, it was not really for the CC with a kind of Olympian detachment to ignore all this.
20 At the very least they should have set out, if this is what actually happened, in Mrs. Guy's
21 statement a proper explanation of why it was they took the view that the facts identified by
22 Grant Thornton were not sufficient to put them off the idea of having the HSM. After all,
23 Grant Thornton was looking at continuing separability. On the page following the one I have
24 just drawn your attention in the left hand column there are other bits where they refer to what
25 they were looking at when they were preparing the report.

26 I will just ask my junior whether there is anything else that I need to deal with, and he says no.
27 Unless there is anything further on which I can assist the Tribunal those are our submissions.

28 THE PRESIDENT: I am sorry, Mr. Lasok, forgive me for appearing discourteous. I was just
29 running my eye quickly through the Executive Summary of the Grant Thornton report to see
30 exactly what it was that they did think they were doing and what it was that they said. Yes, it
31 is 2.31, that is what I was searching for.

32 MR. LASOK: You will notice, sir, in 2.32:

33 "We believe that Bill Blyde's position is key to the business and information that is
34 made available to him in his position as Managing Director is strictly necessary in the
35 course of business."

1 THE PRESIDENT: Yes, but they also say in 2.33:

2 “... information that may effect competition should divestiture be ordered needs to be
3 ring fenced.”

4 Yes, I think we have got a feel for it.

5 Very well. I think we would just like to rise for a minute or two just to see where we are, but
6 before we do I think I would like some indication from the parties as to when you would like
7 us to give judgment effectively.

8 MR. LASOK: The problem is that all parties will answer as soon as possible, if not earlier, and I do
9 not think it is helpful to give a response that is limited in that way. One has to give reasons to
10 explain why. The reasons are fairly evident, which is that we are dealing with an ongoing
11 inquiry by the CC. From the CC’s perspective you can see that it is as a matter of concern for
12 them to get this sorted out as soon as possible. We have exactly the same desirability to get
13 this thing sorted out because that provides us with some degree of certainty and understanding
14 as to the next steps forward. The interval of time since the first hearing, which of course has
15 been a necessary incident in these proceedings because proceedings can never be terminated
16 with a final decision in the very nanosecond that they commence, has itself been fraught with
17 difficulty due to the uncertainties and the difficulties. That is all that I can say.

18 THE PRESIDENT: We will just have a little discussion about it in a moment, but the stage that our
19 earlier discussion had reached was that were aiming for the early part of next week. I suppose
20 what I was really wondering is whether you wanted it quicker than that, or whether that will in
21 some unsatisfactory sense do. Tomorrow is a little difficult because, as you appreciate, we all
22 come from different parts of the United Kingdom and I have other commitments tomorrow.
23 There are various train strikes and things predicted for Monday that affect some of us, but no
24 doubt we could do something now if Mr. Davey, who has to get back to Northern Ireland,
25 could stay over.

26 MR. LASOK: Apparently there is a hearing on Tuesday in the main part of the inquiry and it would
27 not be needed before then. The reality of the position is that it cannot be done sooner than it
28 can be done, and it would be inappropriate to hasten too much.

29 THE PRESIDENT: One does not want to cut corners and one has to do justice to the arguments that
30 have been very fairly presented this afternoon.

31 MR. LASOK: I cannot really say anything more than I have already said and just leave it in the
32 hands of the Tribunal.

33 THE PRESIDENT: We will go and talk about it for a moment, if you do not mind waiting for ten
34 minutes or so while we reflect on what we have heard so far. We have given an indication of
35 what our target is and if any of you want to come back and say, “That is frankly going to create

1 a lot of difficulties for us, can you do something about it”, then of course we will consider it
2 very carefully. We will just rise for a few minutes and we may send a message to say
3 everyone can go home, or we may come back, we will see.

4 (The court adjourned)