Neutral citation: [2007] CAT 9

**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1075/4/8/07

Victoria House
Bloomsbury Place
London WC1A 2EB

17 January 2007

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

Sitting as a Tribunal in England and Wales

BETWEEN:

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

-v-

COMPETITION COMMISSION — Respondent

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

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

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# HEARING IN PRIVATE
# RULING ON APPLICATION FOR STAY

**IN PRIVATE**

THE PRESIDENT:

1 We are dealing today with case management issues that arise in relation to an application under section 120 of the Enterprise Act 2002, lodged with the Tribunal on 8th January 2007 in which the Applicants ("Stericycle") challenge a report by the Competition Commission published on 12th December 2006 which found that there was a substantial lessening of competition in relation to a merger between Stericycle and a company known as STG. The background to the matter is fully set out in the report and also referred to to some extent in the Tribunal's Judgment of 19th September 2006 at an earlier stage of these proceedings: see [2006] CAT 23.

2 The application having been received on 8th January, the Tribunal published a summary of the application in the normal way on 11th January inviting interventions which would normally be received by 1st February. In the normal way the Competition Commission would file its Defence four weeks after the lodging of the application i.e. at the end of the first week of February. The main challenge in the application is to the definition of the geographical market used by the Competition Commission, but there are other challenges.

3 The complicating factor in the present case is that the Applicants have voluntarily put forward a divestiture proposal and the Competition Commission has accepted that the Applicants should have an opportunity to "market test" that proposal, and that if a satisfactory buyer is found for the part of the business that is envisaged to be divested, then the Competition Commission would accept that as an appropriate remedy in this case. If, however, that proposal does not proceed for one reason or another then the Competition Commission's position is that a wider divestiture would be appropriate in relation to STG's UK business.

4 There are various undertakings (at present in draft) that Stericycle is prepared to give regarding the proposed voluntary divestiture. Those undertakings effectively envisage that there will be an initial period at the end of which Heads of Agreement with any prospective purchaser will be agreed, and then a further period before there is a completion date. Both sides tell us that that process is quite advanced, and although nothing can be guaranteed, both Stericycle and the Competition Commission are optimistic that a satisfactory solution will be arrived at. In those circumstances Stericycle effectively applies for a general stay of these proceedings to enable that divestiture proposal to go ahead, and the Competition Commission does not, in general

terms oppose that. Both sides emphasise the desirability of allowing these kinds of procedures to develop flexibly and the need for saving costs and resources as regards these proceedings that may otherwise be wasted if, in fact, the application is withdrawn and the divestiture proceeds successfully. Secondly, there is the suggestion by the Applicants that their application to the Tribunal is a protective application in the sense that it is simply made to protect their position in the event that the divestiture procedure does not go ahead.

5 To take that latter point first, in the Tribunal's view an application under section 120 should in all circumstances be made in the normal way, and there is, in effect, no such thing as a "protective application" in the sense that the Tribunal might be minded to allow parties to add to or develop later an application that is put in in short form purely for protective purposes. The Tribunal's general approach is that an application under section 120 of the Act needs to be as full as is reasonably necessary and it is for the applicant to judge what that entails. The Tribunal will not normally be minded to allow new or further material to be added at a later stage. The application put in in the present case is commendably brief and seems to us to be capable of being a perfectly acceptable basis upon which this application should proceed.

6 That takes us to the procedural issue, which is whether or not there should be some kind of stay of these proceedings, whether the original timetable should proceed as if nothing had happened, or whether there is some intermediate position that can be arrived at. The Tribunal's general position is, as I think the Competition Commission in particular would accept, that in cases of this kind the normal presumption is that the Tribunal's timetable continues to run in the normal way.

7 However optimistic parties may be, and however favourable circumstances may appear at any given moment, there is always the risk that for one reason or another proposals do not proceed, and the Tribunal is in general terms not prepared to run the risk of postponing a decision on the merits to a later stage. In particular, on one scenario that if these various proposals in this case did not proceed, and the timetable for this application was then restarted, the matter could slip beyond the Spring of this year to the general detriment of the process, also leading to the prolongation of uncertainty in the market place, and uncertainty for this business as to what the situation was. Therefore, in general terms the Tribunal is not likely to look with favour on applications for a general stay in such circumstances, and only in exceptional cases should the Tribunal divert from its normal timetable. We adopt that approach with a view to protecting

the system generally. As a broad rule of thumb, we are of the view that unless there are exceptional circumstances a hearing on the merits should normally be brought on at the latest within three months from the date of the original report which, in this case, would be the second week of March. That being the case, should the Tribunal simply continue with the statutory timetable, or is there some other mechanism that will, at least to some extent, meet the concerns that the parties have expressed?

8 The Tribunal's initial approach was to propose to the parties that in any event a hearing date should be fixed for the hearing of this application and that in effect the procedural timetable should be geared to that hearing date. The Tribunal suggested that this case could conveniently be heard on 21st March, which is a date acceptable to the Applicants. The Applicants point out that if, by that date, the divestiture proposal presently under consideration had not proceeded then they are facing the much wider divestiture prospect set out in the report and that, at least by that date, the Applicants would need to have the merits adjudicated upon and the resulting uncertainty resolved.

9 The Competition Commission suggests that the hearing date should be put back to 2nd April. The reason for that suggestion is that the Commission would like a period for filing the Defence of 21 days from the date at which it is presently envisaged that completion should take place under the divestiture proposal. Again, the Tribunal's view is that while it is important that costs should not be unnecessarily expended, there has already been a great deal of resource invested in this case. Every effort should be made to bring these proceedings on as early and effectively as possible. We are extremely reluctant to allow this matter to slip beyond the three month period that we indicated earlier. The Competition Commission's difficulty – insofar as there is a difficulty – relates essentially to the preparation of the Defence.

10 In all the circumstances we think the best and most effective procedure is to maintain the suggested hearing date of 21st March as we initially indicated. In terms of the Competition Commission's defence we are minded to give the Commission an extension of time beyond 6th February (which is the date the Defence would otherwise be due) to 21 days after the expiry of the initial period, which would in effect give a date in early March. On that assumption, that means the date for the Defence is 7th March. If by that stage it is plain that things are going wrong, then no doubt it will be sensible to adhere to that date. If by that stage it is plain that things are going extremely well, and there remain only minor matters outstanding it is, of

course, always open to the parties to make a further application to the Tribunal for more time, bearing in mind, however, that the Tribunal is extremely reluctant to vacate the date of 21st March unless very strong reasons are given.

11 On that timetable the Applicants would then need to put in any skeleton argument they wish to put in by 14th March, and the Competition Commission would need to put in any skeleton in reply by the 19th. We emphasise in general terms that the issues as raised in the Notice of Application should, in our provisional view at least, be capable of being dealt with in a reasonably succinct way by way of response, and we would not necessarily expect the Competition Commission to find it necessary to produce a disproportionately long or complicated defence, having regard to the way the matter is put in the Notice of Application. So the Tribunal will give directions to that effect.

(For discussion after Ruling see main In Private transcript)