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**IN THE COMPETITION
APPEAL TRIBUNAL**

Case No. 1190/4//8/12

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 April 2012

Before:
VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

SRCL LIMITED

Applicant

-v-

COMPETITION COMMISSION

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Paul Lasok QC and Mr. Josh Holmes (instructed by DLA Piper UK LLP) appeared on behalf of the Applicant.

Mr. Daniel Beard QC and Mr. Robert Palmer (instructed by the Treasury Solicitor) appeared on behalf of the Respondent

1 THE CHAIRMAN: First of all, many apologies for the mix up with the timing this morning. I
2 was convinced for some reason that we were starting at 2 o'clock, so many apologies for
3 that glitch. So let us crack on then with working out what we need to do to bring this matter
4 to trial. Who is going to kick off. Mr. Lasok?

5 MR. LASOK: I and Mr. Holmes appear on behalf of the applicant, SRCL, and my learned friends
6 Mr. Beard and Mr. Palmer appear on behalf of the Competition Commission.

7 As we understand it, the Tribunal has indicated two possible dates or groups of dates in
8 June for a hearing, but from our perspective we are content with either of them. There is
9 obviously a preference for the earlier rather than the later. We would propose to work on
10 that basis and work backwards from those dates, so our starting suggestion would be that we
11 would put in our skeleton argument two weeks from the date of the hearing, which ever one
12 it is, with the Commission putting in its skeleton argument seven days before, that is to say
13 seven days before the hearing.

14 Between now and the 14 days before the hearing obviously we would have to sort out the
15 remaining part of the timetable. The crucial point for that is the date for the service of the
16 defence, and since that is really a matter for the Commission I do not propose to make any
17 contribution on that part of the timetable.

18 The other aspect of the discussion this morning is this. SRCL has already embarked on and
19 largely finished most of the steps that it needs to take in order to initiate the divestment
20 process, so this is not a case in which SRCL is simply using these proceedings for delay or
21 anything like that. However, there is an obvious difficulty with SRCL now pressing the
22 button on the divestment process because we do not want to get into the point of no return
23 before we even know what the outcome of these proceedings is.

24 The second problem that we face is that there is a very real concern on our part that for
25 commercial reasons the potential purchasers, whom we have identified, and include persons
26 other than those who have previously indicated an interest to the Competition Commission,
27 so a wider pool of potential purchasers, our real concern is that none of these people
28 realistically is going to devote their time and their resources to embarking on the
29 negotiations and due diligence processes that would be normal until they know whether or
30 not the deal on the table is the deal that they are going to be faced with further down the
31 line, and that is not a problem, we would say, of our own causing, it is simply a fact which
32 arises where third parties have to make a commercial decision as to whether or not they are
33 prepared to devote time and resources to this kind of exercise and we cannot control them.

1 So there will be, at some point, an issue about the practical reality of the timing originally
2 laid down in the report. I think the target date is a confidential date so I am not going to
3 mention it. At the moment there are, as I understand it, discussions between the parties
4 regarding that timetable. What we would propose is that those discussions should be
5 allowed to continue. If the parties can reach an agreement then we will not need to trouble
6 the Tribunal. If no agreement can be reached it may well be necessary to come back to the
7 Tribunal but we do not think we have reached that point at this stage.

8 THE CHAIRMAN: Yes, as far as postponing the divestment is concerned, the relief that you are
9 seeking is remission to the Competition Commission for the Competition Commission to
10 reconsider and make a new decision, so one cannot guarantee that which ever way the
11 Tribunal decision goes the Tribunal's Judgment will be the date after which it will become
12 clear what package is going to be divested.

13 MR. LASOK: It may be that the Tribunal's decision will be such as to make it pretty clear what
14 ought to be in the package but that may not be the case, it is an imponderable. In my
15 respectful submission one cannot at this stage seek to therefore pre-judge what the eventual
16 outcome of this might be, but we would submit that the parties acting in good faith would,
17 we hope, at any rate reach a sensible agreement as to keep things on track so far as is
18 possible, and it will no doubt be necessary to adjust to future events because, for example,
19 one of the Competition Commission's concerns arises out of the re-tendering of a
20 substantial contract later this year, but at this stage we do not know when that re-tendering
21 exercise is actually going to take place.

22 Further down the line we ----

23 THE CHAIRMAN: Is there anything to stop that customer themselves deciding to delay the re-
24 tender until the outcome of this is known, or are they bound for some reason to re-tender at
25 a particular date?

26 MR. LASOK: We are not aware of anything that would prevent them from postponing the date,
27 however, that is the kind of thing that it would be useful to have discussions with that
28 particular customer to see what could be done. It is the kind of thing that, in our
29 submission, the parties can – on the basis that they are acting in good faith, and I do not
30 think there is any dispute about that – would try and sort something out. If they cannot and
31 we have reached an impasse, or the need to have an order from the Tribunal we could come
32 back at a later stage. But apart from flagging these issues up before the Tribunal now I do
33 not think there is any order that the Tribunal could usefully make at this stage.

1 THE CHAIRMAN: Thank you. You mentioned skeleton argument and the defence, and we will
2 hear from Mr. Beard whether there is likely to be more evidence filed, or some evidence
3 filed.

4 MR. LASOK: Yes, but it is conceivable that one might want to have provision for a reply if need
5 be. At the moment ----

6 THE CHAIRMAN: That could be wrapped up in the skeleton.

7 MR. LASOK: It is more likely that it would be efficient to wrap it up in the skeleton and
8 obviously there would be the usual liberty to apply in the direction that the Tribunal made to
9 cater for anything unforeseen at this point.

10 THE CHAIRMAN: Yes, now there are some elements, as you have already referred to, which are
11 confidential, but given that there are only two parties it does not seem that there is going to
12 need to be a ring established.

13 MR. LASOK: Not as far as I am aware.

14 THE CHAIRMAN: It may just be a matter of having to sit in camera occasionally or just people
15 being careful about what they say.

16 MR. LASOK: At this stage that is how we see it. Unless there is anything further on which I can
17 assist the Tribunal those are my submissions at this stage.

18 THE CHAIRMAN: Yes, thank you, Mr. Beard?

19 MR. BEARD: Dealing with the last point first, confidentiality, we tend to think the same thing,
20 that unless and until it becomes obvious that some other provision needs to be made, given
21 that there are only two parties. We understand, and we are grateful to the Tribunal for
22 having already abridged time in relation to intervention and really this is a question for the
23 Tribunal whether or not there has been any indication that they would be interested in
24 intervention because, if so, then we may need to have to consider that but I see Mr. Lusty
25 shaking his head.

26 THE CHAIRMAN: But when is the date?

27 MR. BEARD: It has passed already. Then it sounds like confidentiality is unlikely to be a
28 problem in the circumstances.

29 That does then take us to the time tabling issues, and here we do have some concerns, and
30 some of the concerns we have are probably matters we are going to have to refer to
31 confidential issues. I believe there may be one person in court who is not from either of the
32 parties unfortunately. But if I could start down the line before getting into anything
33 confidential.

1 We consider that there is a real urgency about dealing with this matter and the reason for
2 that urgency is to ensure that the relevant date for divestment, which is confidential, is
3 maintained, and that gives us this difficulty in discussing matters in any detail further.
4 What we can say is, as the Tribunal will have seen, we have written to the Tribunal and to
5 SRCL indicating that we think this should be a very accelerated timetable with a hearing
6 commencing in the week beginning 21st May at the latest. We are conscious of the fact that
7 in dealing with s.120 appeals this Tribunal has readily recognised the need for speed. The
8 original s.120 appeal, *IBA*, was dealt within seven days from application to hearing. The
9 same was true of *Lloyds HBOS*, there have been some that have gone longer – *Unichem* was
10 a whole 26 days, and *Celesio* was 19. The point is that this Tribunal has shown itself well
11 able to recognise the concerns that, for good reason, litigation should not undermine the
12 very purpose of merger control, and the merger control regime has a purpose in appropriate
13 cases to take action to remedy adverse impacts on competition, the SLC, which result from
14 mergers as soon as is effectively possible, and that consideration is crucial here, because as
15 indicated in the letter there is a real concern on the part of the Competition Commission that
16 SRCL could achieve by litigation what it did not achieve through the Competition
17 Commission investigation process. In other words, a material advantage in key contract
18 renewal exercises, which could give it an unfair advantage vis-à-vis Ecowaste and thereby
19 undermine competition.

20 Mr. Lasok rather casually is saying that divestment date that is laid down in the report we
21 will have to deal with it at some point in the future. We are not quite sure why he is saying
22 that, that is what has been decided in the report and there has been no application to suspend
23 it. There is an indication that such an application would be made at the back end of the
24 notice of application, but no such application has been made and, as is absolutely clear,
25 bringing an appeal, whether it is under s.120 or any other appeal is not suspensive of the
26 decision in question, indeed, under the Competition Act, there are of course specific
27 provisions in the form of sections 37(1) and 46(4) which mean that when you bring an
28 appeal against an infringement decision there is actually a suspension of the penalty
29 payments requirement but not of the finding itself and, of course, the same is true in judicial
30 review, that is made clear in CPR 54.3, the same is, of course, clear in relation to Court of
31 Appeal applications ----

32 THE CHAIRMAN: Does the Competition Commission have power itself to agree a
33 postponement of the date that is set in the report?

1 MR. BEARD: For the Competition Commission what needs to be identified would be a material
2 change of circumstance under 2.138 in order to be able to deal with these matters.
3 Otherwise you do not have a good basis for the Competition Commission just flexing its
4 conclusions in relation to these matters. It cannot just go back and revisit the report. After
5 all, there is a deadline by which that report has to be completed and published. That is a
6 clear and defined limit.
7 What is very important here is there has been no interim relief application pursuant to Rule
8 61.

9 THE CHAIRMAN: What Mr. Lasok seems to be saying is that there would need to be an interim
10 relief application which would otherwise be contested or not contested. What I understand
11 Mr. Lasok to be saying is they will discuss with you whether it is possible to put before the
12 Tribunal an uncontested one, or whether there is going to be a fight about this.

13 MR. BEARD: With respect, it is not satisfactory for this process to be followed in that way.
14 After all, if one goes back to cases like *Genzyme*, which is where the Tribunal set out its
15 approach to interim relief, the Tribunal made very clear in those circumstances that you
16 could make such an application before you even dealt with the appeal, and it is incumbent
17 upon you to fulfil the requirements of Rule 61 in relation to these matters. It has not been
18 done here.

19 The concern arises because of the date which is referred to in the notice of application as
20 being the date to which there is a desire to postpone divestment. The Competition
21 Commission says that is quite wrong, and it is not sufficient for Mr. Lasok to turn up today
22 and say, "We might make further enquiries".

23 What has been done by the Competition Commission overnight, however, is to look at
24 whether or not there is any basis for a material change of circumstance finding in relation to
25 these matters. However, in order for me to make comment about these issues, I will need to
26 refer to particular dates, and in doing so I will refer to dates pertaining to the divestment
27 indicated confidentially.

28 THE CHAIRMAN: I am not sure why we are going down this path. Why are we not just setting
29 the trial date and setting the timetable and then your clients and Mr. Lasok's clients will
30 have to decide whether anything needs to be done, bearing in mind that timetable, to the
31 date that is set in the report.

32 Let us start with, how long do you think the substantive hearing is going to take?

33 MR. BEARD: We think a day.

34 THE CHAIRMAN: You think a day. Do you agree with that?

1 MR. LASOK: We agree with that. We felt that it would be better to timetable it provisionally for
2 two days because if there was a run-over, which we would anticipate would be for, let us
3 say, half a day, it is better to have the timetabled for two days.

4 THE CHAIRMAN: So it is one to one and a half days?

5 MR. LASOK: Yes.

6 THE CHAIRMAN: And you are saying you want this in the week beginning 21st May?

7 MR. LASOK: Yes.

8 THE CHAIRMAN: I am not sure whether the Registrar has the availability of the other
9 Members. (After a pause) Mr. Beard, the difficulty may be with constituting a Panel for a
10 day and a half in that period. Are you saying that 6th and 7th June is not soon enough as far
11 as you are concerned?

12 MR. BEARD: Yes. As I say, I can explain in more detail why, but I would need to refer to those
13 parts of the report where dates are referred to, and reasoning is referred to. I am concerned,
14 by making submissions, not to disclose anything confidential.

15 THE CHAIRMAN: Just wait a moment.

16 MR. BEARD: (After a pause) The only possibility on the timetable we have given would be to
17 bring it forward to, say, Friday the 18th.

18 THE CHAIRMAN: (After a pause) Perhaps we could move into Camera then for you to make
19 your submissions. If there is anybody in the court who is not linked with either of the
20 parties, perhaps they could leave as we need to hear some confidential matters now.

21 (For proceedings in Camera, see separate transcript)