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**IN THE COMPETITION**

Case No. 1070/4/8/06

**APPEAL TRIBUNAL**

Victoria House  
Bloomsbury Place  
London WC1A.2EB

7<sup>th</sup> 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.

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**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 18<sup>th</sup> 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 18<sup>th</sup> 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 24<sup>th</sup> 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 25<sup>th</sup> August directions were sent. It has got a copy of the  
9 25<sup>th</sup> 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 25<sup>th</sup> August, and after that you should have a document headed  
16 "Directions issued by the Competition Commission on 25<sup>th</sup> 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. What you actually see, if you take the first  
7 three boxes, is separate management for sales and marketing, finance, operations and logistics.  
8 Finance currently exists and there is no difficulty with that.

9 In the next two boxes you have got human resources and environment, mental health and  
10 safety. There is a bow-shaped thing printed there, and it says, “Shared services, provide on  
11 arm’s length basis”. This is because Helen Inch and Stuart Budd are envisaged as reporting  
12 both to the Stericycle and the management and the HSM, and also because their functions are  
13 not separated. They perform their functions for both businesses. As a cross-reference to that,  
14 you get that from schedule 1 to the directions at paras.1, 4-5, 25 and 28, where you see the  
15 explanation of the position of Miss Inch and Mr. Budd and those two aspects of the business.  
16 So those two aspects remain integrated.

17 It is envisaged, when it says, “Provide on arm’s length basis”, that there should be arm’s length  
18 charges made. I suspect that is not actually particularly relevant in the present context. If you  
19 want the source for that, the arm’s length charges, it is schedule 1, para.16.

20 If you go to the three boxes on the right hand side – and these relate to what is underneath, as it  
21 were, the Hold Separate Manager – you see “Finance, operations and logistics”, then you see  
22 “Sales and marketing” with Mr. Blyde appearing. This is the same Bill Blyde who is the CEO  
23 responsible for the Stericycle business. So he has two hats here. You will also notice that  
24 there is a dotted line connecting the Hold Separate Manager box with Bill Blyde in his capacity  
25 as CEO, Stericycle Europe. This dotted line appears to represent a reporting function, not a  
26 control function.

27 THE PRESIDENT: The arrow goes, slightly confusingly, in the wrong direction.

28 MR. LASOK: A lot of the arrows I think go confusingly in the wrong direction.

29 THE PRESIDENT: Yes, but we think we know what it is getting at. I hope I am not taking up too  
30 much time, Mr. Lasok, but broadly speaking the bottom of line of this diagram is not in  
31 dispute, except perhaps on one or two points of detail – is that right?

32 MR. LASOK: The problem arises in relation to Hold Separate Manager. We have accepted, for  
33 example, Mr. Blyde’s double function.

34 THE PRESIDENT: Let us see if I have got the hang of it. The central point at this stage of the  
35 argument is the inter-position of a Hold Separate Manager for STG to whom Bill Blyde reports

1 in his capacity as sales and marketing director for STG, and as regards STG business in his  
2 capacity as CEO of Stericycle Europe. Is that it?

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

5 THE PRESIDENT: It is a ----

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

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

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

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

12 MR. LASOK: Under the three right hand boxes it says:

13 "STG only, see only STG related information, do not see WRE confidential  
14 information, Paul Simpson is permitted to provide certain services to Stericycle."

15 So again there is yet another layer of overlapping, and this is all actually in the context in  
16 which there are permitted flows of confidential information in any event.

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

18 MR. LASOK: It is the Hold Separate Manager that is the problem.

19 If you turn to the next page, which is appendix 2, we have got the marketing structure  
20 explained in slightly greater detail with a bit more commentary. For example, if you look  
21 under the third bottom box, which is Mike Chappell, you have got a note, "N.B. Mike Chappell  
22 reports to Bill Blyde in respect of the [...] [C] contract". This is a contract with STG. In the  
23 middle box you have got "David Storey, general manager, SQ", and he is sitting in the middle  
24 of all this, so there is another area of integration, as it were. "SQ" is "small quantities".

25 I believe they are such things as requests when doctors or dentists ring up and ask for stuff to  
26 be disposed of.

27 Then if you look to the right, again looking at the notes at the bottom, "N.B. Eric Lomas is  
28 permitted to service certain Stericycle customers". The cross-reference to that is to schedule 1,  
29 para.10.

30 THE PRESIDENT: Yes, but that all is agreed. I think we have understood that. There are one or  
31 two exceptions, but at that level there are two teams with a few cross-flows with Mr. Storey,  
32 Mr. Chappell and Mr. Lomas.

33 MR. LASOK: Yes. When we get to the next page, "Operations and logistics structure", we would  
34 probably need to add a few arrows.

1 Perhaps I ought to explain why I am doing this. Although we have got a Hold Separate  
2 Manager, in reality this is not a hold separate operation. It is not a situation in which there is  
3 or there can be a clean split between the businesses so that you can have a genuine Hold  
4 Separate Manager. The problem arises because, for reasons which we fully accept, the  
5 Competition Commission has put in place a structure that cannot bring about complete  
6 separation. There cannot be a complete separation.

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

8 MR. LASOK: The problem is, is this achieving anything at all? If you look, for example, at  
9 logistics here, it is essentially concerned with reviewing the businesses' sites, reviewing site  
10 managers' capital expenditure proposals and monitoring site performance.

11 THE PRESIDENT: Just say that again?

12 MR. LASOK: It is essentially concerned with reviewing the businesses' sites, reviewing site  
13 managers' capital expenditure proposal and monitoring site performance. When you look at it  
14 you have got Mr. Blyde and a Hold Separate Manager at the top and under them you have got  
15 Mr. Hughes and Mr. Simpson respectively. There is this dotted arrow between the two. The  
16 explanation for that really is to be found in schedule 1 of the directions, para.19. I think it is  
17 sufficient if I just give you the cross-reference.

18 THE PRESIDENT: It is explained in the notes at the bottom.

19 MR. LASOK: For new business the operations and logistics are managed actually by Mr. Simpson,  
20 assisted by Mr. Hughes.

21 THE PRESIDENT: New business for STG, you mean?

22 MR. LASOK: No, it is new business for both.

23 THE PRESIDENT: This says that they respectively permitted to provide certain services on an  
24 arm's length basis.

25 MR. LASOK: I do not think that is a reflection of para.19, that refers to something else. If you go  
26 back to para.19 ----

27 THE PRESIDENT: This is in the directions?

28 MR. LASOK: In the directions itself. Although this is confidential, it is not something that has been  
29 amended. We have got here:

30 "New supplier relationships and contract terms shall be managed by Paul Simpson  
31 assisted to the extent strictly necessary by David Hughes for STG or David Hughes  
32 for Stericycle in accordance with para.2 of the order."

33 THE PRESIDENT: They are not, as it were, doing it jointly.

34 MR. LASOK: They are not doing it separately.

1 THE PRESIDENT: Is this the arm's length services that are referred to in the footnotes to appendix  
2 3 or is this something different?

3 MR. LASOK: I think this is something different. The reason is that the arm's length services  
4 referred to in the note are dealt with in schedule 1, para.12.

5 THE PRESIDENT: I see, yes.

6 MR. LASOK: The note refers to para.12. You have really got to add in ----

7 THE PRESIDENT: Where do we get David Hughes' arm's length services?

8 MR. LASOK: That is schedule 1, para.11. If you look at the note in the middle of the page which  
9 starts, "Stericycle business transport team supplies logistic services" – do you have that? I will  
10 read it all:

11 "... supplies services to the STG business on an arm's length basis to STG reporting  
12 to Paul Simpson and HSM in relation to this."

13 That is schedule 1 of the directions, paras.14 and 18. Then the next bit which says:

14 "Operations function is separate. David Hughes is permitted to provide certain  
15 services to the STG business on an arm's length basis."

16 That is para.11. I have mentioned para.12, the N.B. under the right hand column of boxes.

17 Paragraph 12 also affects Mr. Gaynor because it refers to him as well. He also is providing  
18 services to the other business. The upshot is that if you wanted to have this particular diagram  
19 representing what is actually envisaged in the directions you would have to add, for example, a  
20 line connecting Tom Gaynor with David Hughes. The dotted line between Hughes and  
21 Simpson should become an unbroken line reflecting what they are doing under para.19. You  
22 would also need solid lines running from the three right hand boxes under the Stericycle  
23 Europe heading into Paul Simpson.

24 You have got in relation to both the sales and marketing and the operations structure a lack of  
25 true separation because there are these cross-flows.

26 THE PRESIDENT: That is all agreed?

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

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

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

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

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

15 MR. LASOK: Yes, quite so.

16 I wanted to move from that picture of the complexity of the underlying arrangement to look at  
17 the evidence we have got for the reason behind the decision to appoint the HSM. That is  
18 contained in the witness statement of Mrs. Guy, which should be in the file. Mine does not  
19 have a number on it but it has got the defence and the exhibits to the defence in it. In that  
20 bundle Mrs. Guy’s witness statement appears in the third tab. What I want to do here –  
21 I appreciate this looks like cherry-picking, it is not, I am working on the basis that the material  
22 has been read and what we need to do is to focus on those parts that are relevant to explain the  
23 reasoning of the CC concerning the appointment of the HSM and the considerations that it took  
24 into account. We have to look at the evidence for this because, of course, this is the only  
25 material that we have got that will explain the basis. I wanted to start off with para.41. I do  
26 not propose to read para.41 out loud. It starts off by saying, “The Group explained” ----

27 THE PRESIDENT: They were talking to Grant Thornton?

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

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

31 MR. LASOK: The particularly important passages are the last two sentences where you can see that  
32 what they were concerned with were future decisions in the areas of sales and marketing,  
33 operations and finance. The last sentence explains why they were of concern, importance of  
34 maintaining the customer base, which relates to sales and marketing, importance of

1 maintaining the assets, operations, and then you have got highly sensitive nature of the  
2 information held by the finance function.

3 The first sentence of 42 starts off by saying, "Other areas of concern included the situation in  
4 relation to [...] [C]". This was based on a misunderstanding on the CC's part that was only  
5 cleared up after this meeting. What had happened in relation to [...] [C] was that a decision  
6 had been taken by the merged entity but having regard not only to the interests of the merged  
7 entity but also of the business that was actually running the [...] [C]. The explanation for this  
8 is set out in Mr. Blyde's second witness statement at paras.40-42. What one can say is that the  
9 CC appears to have relied upon the decision concerning the [...] [C] as an illustration of the  
10 kind of decision regarding assets, a type of decision regarding assets, namely closure because  
11 of a decision not to acquire a part that it feared might be made in the future in the interests  
12 either of the merged entity as a whole or, to put it another way, contrary to the separate  
13 interests of the STG business or the WRE business, whichever was the relevant one.

14 THE PRESIDENT: That was an STG site, was it?

15 MR. LASOK: It was a WRE site. So it is an illustration of the issue that had arisen in connection  
16 with operations.

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

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

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

27 MR. LASOK: Yes. In the middle of the paragraph, the reference to "key risk areas" is not  
28 explained, but it must be an allusion back to the three risk areas that they have identified in 41  
29 and 43. You will have noted that the Group was content with Mr. Blyde having this double  
30 function because of the fact that no other person was available.

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

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

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

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

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

8 THE PRESIDENT: Can we just glance at that?

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

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

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

16 THE PRESIDENT: Yes.

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

23 THE PRESIDENT: Yes, that exhibited to Mrs. Guy's witness statement.

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

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

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

4 THE PRESIDENT: Yes.

5 MR. LASOK: I do not think it is, because you can see from the middle of p.11 that Miss Ross says  
6 that Bill Blyde retains a substantial amount of decision making power. This is the problem  
7 about having independent decision making. That was the root of their concern. This is  
8 explained after Mr. Byers' acknowledgment at line 18. Then Mr. Byers at the bottom says:  
9 "But because of some of the structural impediments that I have talked about and the  
10 recommendations that we have made ..."

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

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

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

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

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

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

29 THE PRESIDENT: It depends on the circumstances.

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

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

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

35 THE PRESIDENT: That is the running down scenario?

1 MR. LASOK: No, it is the scenario that the businesses ----  
2 THE PRESIDENT: They are talking about fatally wounding.  
3 MR. LASOK: Yes, but it is the scenario that one of the businesses would be run to the advantage of  
4 the other.  
5 The difficulty here is that Grant Thornton have already explained that there is a factual context  
6 to all this, which makes this, in their view, unrealistic. At that point I think it is well worth  
7 making this observation: in Mrs. Guy's witness statement you would expect to see her  
8 explaining the CC's reaction to this. You would expect her to set out that they have taken  
9 these considerations into account, they had considered them, but for some reason or through  
10 some exercise of judgment they had concluded that their view was the better view, and the  
11 facts referred to by Grant Thornton were not sufficient to put the CC off the decision to require  
12 the appointment of an HSM.  
13 I fear that this is labouring the obvious, but decisions of this nature – and I am here talking  
14 about decisions to be made under s.81 – should not be taken in a factual vacuum or on the  
15 basis of some kind of doctrinaire approach or on the basis of pre-suppositions, they should be  
16 taken by reference to the factual context of the case. In our respectful submission, the decision  
17 maker – here it is the CC – has got to address its mind to the particular facts of the case and, in  
18 the context of review proceedings of this nature, you expect the decision maker in its evidence  
19 to explain that it has looked at the factual context and that it has arrived at a decision that did  
20 take into account the relevant features.  
21 THE PRESIDENT: Can we just identify the particular facts or relevant considerations that you say  
22 they did not take into account?  
23 MR. LASOK: Well, they did not take anything of this into account so far as we can see from  
24 Mrs. Guy's witness statement.  
25 THE PRESIDENT: When you say "this", what do you mean?  
26 MR. LASOK: Pages 4-12.  
27 THE PRESIDENT: Did not take into account pp.4-12.  
28 MR. LASOK: We do not see in Mrs. Guy's witness statement any explanation of what view, if any,  
29 the CC took of the facts drawn to the CC's attention by Grant Thornton. One needs, in our  
30 respectful submission, to again go back.  
31 THE PRESIDENT: It is 41, is it not?  
32 MR. LASOK: 41 what?  
33 THE PRESIDENT: Of Mrs. Guy's witness statement.

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

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

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

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

9 MR. LASOK: Line 8, he says that the business is fundamentally made up of a series of processing  
10 sites. The processing or production side is cellular fixed, geographically specific, high  
11 transport costs if you have to shuttle waste, the identity of the business by reference to where  
12 its sites are located is a key determinant. Then he says that it is not easy for other types of  
13 industry to suddenly close down lots of processing sites and centralise them on a really big  
14 processing site where there might be enormous economies of scale. There are not necessarily  
15 economies of scale in this type of business ----

16 THE PRESIDENT: Just take it a bit more slowly, Mr. Lasok. He saying, “We have got structural  
17 impediments to integration in the near term”. Then we have got, first of all, these sites are  
18 operating separately, et cetera, et cetera.

19 MR. LASOK: You have got the problem that they simply cannot close down suddenly processing  
20 sites.

21 THE PRESIDENT: [...] [C].

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

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

29 In the middle of p.5, I fear the Tribunal has gone ahead of me on this, we have got the brands  
30 [...] [C]. There is a reference to the adoption of each other’s models that apparently is not a  
31 problem so far as the CC is concerned; and of decentralisation which he regarded as  
32 something that was helpful. We get that at p.6, lines 21-23. He says at the bottom of p.6 that it  
33 was important to go through some of those structural issues because they are important in  
34 painting the backdrop.

35 THE PRESIDENT: Yes.

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

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

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

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

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

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

23 MR. LASOK: Precisely.

24 THE PRESIDENT: That cannot be the point.

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

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

27 MR. LASOK: With respect, no. The concern expressed by the CC is all about the running down of  
28 assets. You will remember the reference in para.41 of Mrs. Guy to the “maintenance of  
29 assets”; and the reference in the next paragraph of her witness statement, para.42, where she  
30 refers to the problem about the [...] [C]. As I said when I was dealing with para.42, that  
31 appears to be the type of decision that was their concern, namely a decision that effectively  
32 brought about the closure of an operation or asset, and the fear was that that decision would be  
33 made not in the interests of the business – that is to say the separate business, STG or WRE –  
34 but it would be made for some other reason.

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

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

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

6 MR. LASOK: This is set out in Mr. Blyde's second witness statement. At one of the meetings we  
7 simply said, "Look, the position currently is that decisions concerning expenditure of below  
8 [...] [C] are made locally" – that is to say it is made by the person who deals with operations  
9 for each business. Above [...] [C] it has to be approved by Stericycle LLC for obvious reasons.  
10 Between [...] [C] and [...] [C] the current position was that the decision was made by  
11 Mr. Blyde. So the proposal was that Mr. Blyde would drop out of the picture and instead up to  
12 [...] [C], the decision would be made by the person in charge of operations for the relevant  
13 company. Above [...] [C] naturally the proposal would come from the person who was in  
14 charge of the operations – that is to say the management of the assets of the relevant business –  
15 but it would actually have to be approved by Stericycle LLC. Expenditure above [...] [C] has  
16 never caused any difficulty so far as we are aware, save for this, that in the directions provision  
17 is made that such expenditure must be approved not only by Stericycle LLC but also by the  
18 CC. That is not something that we have objected to. Our solution to this particular problem  
19 has been to say, "Okay, get rid of the single decision maker for [...] [C] to [...] [C]".

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

25 MR. LASOK: No, that is not an issue.

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

29 MR. LASOK: That is not the problem.

30 THE PRESIDENT: Why not?

31 MR. LASOK: Because the decisions would be made by the operations and finance people of the  
32 relevant companies. You also need to bear this in mind: part of the factual context of all this  
33 is that we are talking about ----

34 THE PRESIDENT: In the interests of that company.

1 MR. LASOK: In the interests of that company, and we are talking also about a highly regulated  
2 industry where there are environmental and health and safety regulators who will require  
3 expenditure to be carried out.

4 The problem is that we have got a situation in which there is a whole series of constraints that  
5 prevent the kind of decision that appears to have been anticipated.

6 I suspect that the reason why the concern is articulated by the CC in relation to a very narrow  
7 scope is because the CC is well aware that each of the businesses is stocked with spares. They  
8 were already told of the capital expenditure programmes that had already budgeted for before  
9 all this blew up. There is not anything in terms of serious decision making of a relatively high  
10 level that needs to be made, but if it is going to be made it will be the subject of approval by  
11 the CC because that is provided for in the directions.

12 THE PRESIDENT: That is the above [...] [C]?

13 MR. LASOK: That is the above [...] [C]. So far as the below [...] [C] is concerned, our proposal, in  
14 our submission, is eminently sensible because it simply devolves to the separate managers of  
15 the operations or the two businesses the decision, and it takes the unique decision maker  
16 actually out of the picture and, in our submission, that resolves the problem.

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

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

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

23 THE PRESIDENT: The problem being?

24 MR. LASOK: Our solution.

25 THE PRESIDENT: Your solution, this second suggestion.

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

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

31 MR. LASOK: Yes. I think it is also relevant to point out that the fact that the CC were comforted by  
32 Mr. Blyde's position in relation to sales and marketing, which you will recall from para.70 of  
33 the witness statement, the bit at the bottom, that surely, as a matter of logic, must also go to his  
34 position in relation to assets. How could they believe that Mr. Blyde had no interest in running  
35 STG down in relation to sales and marketing, but would have had an interest in running STG

1 down in terms of the maintenance of its assets, which would have obviously have adversely  
2 affected its ability to perform the contracts that he was negotiating for?

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

6 MR. LASOK: What for?

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

9 MR. LASOK: You have got two concerns, sales and marketing and operations. Our proposal for  
10 operations is that there be two minds, and these are for the below [...] decisions.  
11 Obviously for the above [...] decisions the proposal has to come from the separate mind,  
12 the person in charge of operations in the relevant company. The proposal was that the separate  
13 mind would simply make the decision and do it in the interests of the company. Above  
14 [...], because it had to be approved by Stericycle LLC, it would have to move upwards, but  
15 there is no difficulty because the CC requires its consent as well to the decision, so there is no  
16 problem. Where is the difficulty?

17 You then get to sales and marketing and here the position is that there is no separation, there  
18 are no two minds, because Mr. Blyde is in charge of sales and marketing in STG.

19 THE PRESIDENT: In order to mitigate that, because you want to try to have separate minds but you  
20 have not actually got a separate mind, instead of throwing up your hands and saying, "I cannot  
21 do anything about it, I am not going to bother", you say, "I think it is actually wise I do put  
22 some safeguard in there just to see that in all good faith things do run as far as they could".

23 MR. LASOK: We are now focusing on the function of the HSM as giving some kind overview of  
24 the decisions of Mr. Blyde in relation to sales and marketing, because apart from that there is  
25 nothing else.

26 THE PRESIDENT: So you say.

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

28 THE PRESIDENT: Hang on, let me just follow it, oversight of Mr. Blyde in relation to sales and  
29 marketing. The [...] suggestion and all the rest of it, when was that made and where does  
30 that figure? It is probably the second witness statement of Mr. Blyde, I think you said.

31 MR. LASOK: Paragraphs 34 to 42. I am just looking at my notes on the cross-referencing of all  
32 this. Perhaps I ought to do this for the sake of completeness: I have asserted that decisions  
33 concerning expenditure above the level of [...] would have to be approved by the CC as  
34 well as Stericycle. That is in the directions, schedule 1, para.13.

35 THE PRESIDENT: 61 in Mrs. Guy's witness statement.

1 MR. LASOK: She records an agreement on how capital expenditure decisions could be taken, and  
2 then the subject disappears completely from the witness statement. What she does not do is  
3 seek to answer the points made by Mr. Blyde in paras.34-42 of his second witness statement.

4 THE PRESIDENT: Which I find where?

5 MR. LASOK: That ought to be in a bundle which contains the second witness statement of  
6 Mr. Blyde.

7 THE PRESIDENT: It does indeed. I think you said paras.34-42.

8 MR. LASOK: The point at which this proposal was put to the CC was at the meeting of 17<sup>th</sup> August.

9 THE PRESIDENT: That is all the capital expenditure stuff plus the separation at the management  
10 level lower down.

11 MR. LASOK: There is a bundle of transcripts and that is divided into 3. The first tab deals with the  
12 16<sup>th</sup> August meeting. I just take extracts. Would you look at p.28, lines 17-25. It is the  
13 problem about the decision regarding assets being made solely in the interests of the separated  
14 companies.

15 THE PRESIDENT: Yes.

16 MR. LASOK: Then 30 and following deals with capital expenditure, but on the following day there  
17 was a meeting that is at tab 2.

18 THE PRESIDENT: So it is the single decision making mind point rather than the running down  
19 point that they are thinking point there?

20 MR. LASOK: Yes, and if you look at p.31 in the second tab ----

21 THE PRESIDENT: The meeting with the staff.

22 MR. LASOK: Yes, this is the staff meeting. The suggestion that comes from Miss Ross is to  
23 separate out the teams and take Mr. Blyde out of the loop, and she says, "Would they be able  
24 to take decisions up to [...] [C] or not?" Mr. Blyde says, yes, in theory they could make the  
25 decision together. Miss Ross, "It would not be somehow beyond their capacity?" Mr. Blyde,  
26 "No". So there was actually a proposal at that stage on 17<sup>th</sup> August. I say a "proposal", there  
27 was an exchange at that stage concerning separation so that you would have two decision  
28 makers dealing with below [...] [C], and Mr. Blyde is comfortable with that. He does not see  
29 that there is a practical problem.

30 What you have is a situation that in relation to assets there was a solution that was put to the  
31 applicants which was the devolution of the decision making, and this was [...] [C] to [...] [C]  
32 band, devolving that so that all below [...] [C] decisions concerning assets were made by two  
33 separate decision makers, one in each of the businesses. That was not a problem. Therefore,  
34 we need to see in Mrs. Guy's witness statement where it is that the Competition Commission

1 says, “We looked at all this, we came to the conclusion for the following reasons that it was  
2 not appropriate”.

3 THE PRESIDENT: They are just uncomfortable with this dual function that Mr. Blyde still has.

4 MR. LASOK: He has not got it on assets if you follow this proposal. When a decision maker is  
5 charged with making a judgmental decision the decision maker has got to look at the relevant  
6 facts and matters and come to an informed decision. There will be areas in which the decision  
7 maker is clearly wrong – for example, because it is based on an error of fact – but there will be  
8 other areas where the decision maker is faced with a bit of a quandary. It has to exercise its  
9 judgment and the job of the Tribunal is not, as it were, override that exercise of judgment. The  
10 job of the Tribunal in a review process is to ensure that the decision maker acted reasonably,  
11 that it looked. That is why it is particularly important that the Tribunal is given the evidence  
12 that shows that the decision maker properly informed itself about the relevant facts, looked at  
13 them, considered them, thought about it and made its decision.

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

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

20 On sales and marketing we have got a very strange situation in which there is not separation.  
21 You have Mr. Blyde as the CEO of what I will call the WRE end, and he is also in charge of  
22 sales for the STG end. This was a decision that, in our submission, the CC was driven to by  
23 the facts. As Mrs. Guy pointed out in para.70 of her witness statement there was nobody who  
24 could do the job apart from Mr. Blyde.

25 I am told that an earlier stage there was a proposal that in the directions it should state that  
26 Mr. Blyde would not have authority to block capital expenditure decisions by Mr. Graver, who  
27 was then proposed as the HSM, and the STG interim team, which would have been another  
28 way round the problem. A simpler way round it, which achieves exactly the same right, is this  
29 idea of devolving the decision making process and removing Mr. Blyde from it. I am told that  
30 this exchange is recorded in paras.60-61 of Mrs. Guy’s witness statement.

31 Reverting to sales and marketing, I have made the submission that effectively the CC was  
32 driven to leaving Mr. Blyde responsible for that part of the activities of the STG business. In  
33 case the Tribunal is interested in knowing what that kind of function entails, there is a  
34 description of it that was given by Mr. Blyde at the 17<sup>th</sup> August meeting. It is in the transcript  
35 bundle at tab 2, p.7. If you start at line 23, this is where Miss Ross raises the question about

1 bidding for new contracts and asks for an explanation of how it goes. Then in the next  
2 following pages running through to the bottom of p.10, you have got a description by  
3 Mr. Blyde about what this entails and how long he has been doing it for STG.

4 THE PRESIDENT: How is this going to work, Mr. Lasok? We have got, if I have understood it and  
5 I may not have understood it, Mr. Croskery, who is the sales and marketing director of the  
6 WRE side, and we have also got the division of the statement of principles that you referred to  
7 earlier. Is Mr. Croskery going to be preparing the tenders or is that Mr. Blyde, or how is going  
8 to work?

9 MR. LASOK: As I understand it, and somebody will correct me if I am wrong, Mr. Croskery will be  
10 preparing the tenders because Mr. Blyde will not have the same kind of direct contact with the  
11 WRE customers as he will be having with the STG customers. As you can see from the  
12 passage that you have got there, he has got a very, very intimate knowledge of the STG  
13 customers and of the industry generally. Of course, we are here talking not simply about  
14 maintaining the existing contracts, but also the search of new business and the entering into  
15 new contracts.

16 So far as the entry into new contracts is concerned, the brands are distinct but the statement of  
17 principles is in place in order to ensure that there is an allocation of new contracts as between  
18 the WRE and STG businesses. So there is bound to be some degree of, as it were, co-operation  
19 between Mr. Blyde in his capacity as the person in charge of sales and marketing for STG and  
20 Mr. Croskery for WRE. So the reality is that it is simply impossible to have complete  
21 separation. This is something that the Competition Commission rightly recognises.

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

29 Given the fact that sales and marketing, as you can see from what Mr. Blyde told the  
30 Competition Commission, involves the kind of thing that he is talking about, what does the  
31 HSM bring to the picture? What is the decision that the HSM is going to make, bearing in  
32 mind that, *ex hypothesi*, the HSM is going to be coming from outside the business because the  
33 proposals that have been made for internal candidates have been rejected by the CC? So we  
34 are going to have somebody from outside the business and what is he going to do in relation to  
35 Mr. Blyde, who is carrying on this very, very – I was going to say technical, it is technical –

1 technical exercise in relation to getting in new contracts. What does the HSM bring to the  
2 party, as it were, bearing in mind that all this activity by Mr. Blyde and by Mr. Croskery in  
3 terms of sales and marketing must take place within the context of the statement of principles?  
4 What does the HSM bring? We do not find in Mrs. Guy's witness statement an explanation of  
5 what, given the factual context, the CC thought the HSM would bring to the party.

6 I ought to add at this juncture before I forget it that the applicants undertook in correspondence  
7 with the CC to embark upon the exercise of finding an HSM, that exercise hopefully to be  
8 completed by today's hearing. Unfortunately, although two candidates were identified, both of  
9 them through the agency that the applicants were using, informed the applicants – they  
10 informed the agency – that they had reservations because of the structure that had been put in  
11 place in the directions. We were telephoned this morning separately by both of these  
12 candidates withdrawing their interest on the grounds that the proposals are unworkable. That  
13 is not to say that it is impossible to find somebody somewhere who might be willing to do this,  
14 but the vibes are not good.

15 THE PRESIDENT: Mr. Lasok, if we went back to appendix 1 to the directions, the chart with all the  
16 arrows that you were telling us about, the HSM at the moment, although the arrows are slightly  
17 round the wrong way, but never mind, is there to be the person whom it is envisaged the STG  
18 finance and operations and logistics will report to in respect of those matters and Mr. Blyde  
19 will report to in respect of STG sales and marketing and ditto for human resources and  
20 environmental, et cetera, who have a cross-role. If you did not have an HSM to whom STG  
21 finance, STG operations and logistics, et cetera, or, for that matter, STG sales and marketing  
22 report to?

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

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

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

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

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

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

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

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

1 MR. LASOK: Precisely.

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

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

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

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

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

11 MR. LASOK: The Monitoring Trustee. You have got mechanisms that are either already in place or  
12 that could be put in place. Already in place are things like the statement of principles which  
13 determines how new contracts are to be allocated. That ensure preservation of the customer  
14 base. We would submit that that solves the problem so far as sales and marketing are  
15 concerned.

16 If you look at assets, the proposal, as I have said, originating in the CC itself that was regarded  
17 by us as a perfectly workable one, was the devolution of the decisions down to the operations  
18 managers for each of the businesses so that it would only be decisions that required  
19 expenditure of more than [...] [C] that would go up. As far as I am aware the CC did not object  
20 to the upwards of [...] [C] proposal, as it were, and we simply do not understand and we do not  
21 know why they had an issue with the devolution of decisions relating to proposals concerning  
22 expenditure of less than [...] [C]. There is no explanation for this. One would have thought  
23 that if you have got devolution of that nature there is not really a problem. It is described as  
24 “workable”, what is the difficulty?

25 The finance issue was concerned, so far as one can tell from Mrs. Guy’s witness statement –  
26 that is para.41 – with the dissemination of confidential information. There are other provisions  
27 in existence that deal with the dissemination of confidential information, and those provisions  
28 permit dissemination where it is strictly necessary in the ordinary course of business. I ask this  
29 as a rhetorical question bearing in mind the time, what is the problem with Mr. Blyde being  
30 there bearing in mind the underlying facts and these alternative ways that are either in  
31 existence or could easily be put in place that we would submit solve the problem? After all,  
32 the problem at the end of the day identified by the CC is future decision making of a particular  
33 sort. So we need to focus on what those decisions are and what are the proportionate solutions  
34 to the difficulty that has been identified. At the terrible risk of repetition it seems to us to be  
35 perfectly clear what the proportionate solution in relation to assets is; and so far as sales and

1 marketing is concerned, you have this situation in which Mr. Blyde cannot be kept out of the  
2 picture at all, but you have got the statement of principles. So what is the HSM bringing to the  
3 party?

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

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

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

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

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

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

19 MR. LASOK: Yes.

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

21 MR. LASOK: I have finished them.

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

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

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

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

31 THE PRESIDENT: Very well, five past two.

32 (Adjourned for a short time)

33 MR. LASOK: Before the break you were asking about what appendix 1 would look like. Over  
34 lunchtime we had a go but our technical facilities extend only to biros. We did it in  
35 manuscript. What we would propose to do is to get it typed up and send it to the Tribunal

1 rather than get the grubby bit of paper and start handing it round now. What it boils down to is  
2 this, if you look at appendix 1 – I can just describe it in a couple of seconds, the thrust of it – it  
3 is in the supplementary notice of application bundle, tab A, p.19: if you look at the Hold  
4 Separate Manager box you would simply put Bill Blyde in there. To explain that  
5 Paul Simpson would have a devolved decision making function regarding assets, when you  
6 explained it in a diagrammatic form you could simply move him to the very edge on the right  
7 hand side and then put a dotted line from his box to what used to be the Hold Separate  
8 Manager box. You would also have a dotted line connecting the Paul Simpson box with  
9 Grant Thornton. The dotted line would then reflect the fact that Paul Simpson has a devolved  
10 decision making role and reports to Mr. Blyde, but he also will be monitored by the  
11 Monitoring Trustee.

12 That, as I have explained, would be sufficient to ensure the separate decision making on the  
13 operations side which was the concern of the CC.

14 Of course, it does not make an alteration on sales and marketing, but that results from the fact,  
15 as we see it, due to the particular nature of the sales and market function there is nothing that  
16 the HSM can add to that.

17 For the sake of completeness, you will note that I have not mentioned doing anything to the  
18 Stericycle side at the left hand of the page. When we were drawing this out we thought, for the  
19 sake of symmetry, that you could take David Hughes, the operations man, and also put his box  
20 to the far left, connecting it with dotted lines to Mr. Blyde and the Monitoring Trustee. In his  
21 second witness statement Mr. Blyde was suggesting that he and Mr. Hughes would make asset  
22 decisions. That satisfies the concern in relation to separation, because the separation is  
23 achieved when you take Paul Simpson out of Mr. Blyde's control on decisions relating to  
24 assets.

25 For the sake of symmetry you could also do in relation to Mr. Hughes a dotted line taking him  
26 all the way through to the Monitoring Trustee. Our understanding is that there would be  
27 monitoring of these things by Grant Thornton.

28 You have not got it in front of you but that is the gist of it. We will send it to you when we  
29 have typed it out. Of course, underlying all this are all the other arrows, and so forth, that  
30 would be left in place under the unchallenged parts of the directions.

31 I wanted to turn now to the other points, the first one being what is described as the "Fiduciary  
32 responsibilities issue". We can keep this bundle open and turn to an earlier part of the  
33 directions. It is still in schedule 1, but it is para.3. If you look at para.3, you have got the Hold  
34 Separate Manager should be appointed and the Hold Separate Manager shall report to

1 Bill Blyde. So obviously the fiduciary responsibilities issue would fall away if there were no  
2 HSM. Then you have got:

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

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

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

11 MR. LASOK: The last sentence says:

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

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

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

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

20 MR. LASOK: Can I just take you to where this originated, and that is in the transcript, the  
21 17<sup>th</sup> August transcript, transcript volume, volume 5, tab 2, and it should be p.46. Could you  
22 read lines 3-16?

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

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

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

30 He says:

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

32 In other words, “I am making that judgment”. The way it was put to Mr. Blyde was, “If we  
33 provide in the directions that you get what is needed for regulatory reporting requirements, is  
34 that sufficient to enable you to make a judgment on what go up or not?” and he says, “Yes”.

1 If that was what the directions provided for then we would have no difficulty with it. There is  
2 a problem because of the fact that the verb “discussed” is construed by the CC as meaning  
3 “agreed”, “agreed with the Monitoring Trustee”. So it is not what was put to Mr. Blyde.  
4 There is a simple way out of all this, and that is that one construes the directions in accordance  
5 with their language, and one construes them in this way: the HSM is obliged to report to  
6 Mr. Blyde to the extent necessary to enable Mr. Blyde to fulfil his regulatory responsibilities,  
7 and the HSM must therefore respond to Mr. Blyde’s requests for relevant information. The  
8 discussions with the Monitoring Trustee envisaged in para.3 of schedule 1 of the directions  
9 simply entail Mr. Blyde informing the Monitoring Trustee of the nature and frequency of the  
10 reporting and discussing matters such as the extent to which the burden on the HSM might be  
11 reduced or managed in some other way.

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

24 THE PRESIDENT: What are we talking about in terms of the legal framework under discussion?

25 Which statutes of which jurisdiction are we talking about?

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

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

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

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

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

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

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

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

12 MR. LASOK: Pardon?

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

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

16 THE PRESIDENT: Sorry?

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

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

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

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

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

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

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

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

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

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

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

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

21 THE PRESIDENT: What is the problem?

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

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

35 THE PRESIDENT: Yes.

1 MR. LASOK: The evidence in Mrs. Guy's witness statement does not indicate that any  
2 consideration at all has been given to this particular problem. We have no explanation as to  
3 why it is that the CC believes that the word "discusses" does not mean that at all but means  
4 something else.

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

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

13 "Bill Blyde, Helen Inch and Stuart Budd shall be permitted to attend those  
14 management meetings or parts of those management meetings of the STG business  
15 that are strictly necessary having regard to the functions they carry on for the STG  
16 business, and they shall be permitted, if appropriate, to take part in decisions  
17 concerning their areas of expertise."

18 Whether or not the HSM appointment decision is upheld, such a restriction would be damaging  
19 to the STG business. The reasons for that are set out in Mr. Blyde's second witness statement  
20 at paras.50-60. I am not going to read them out. I am going to make comments along the  
21 following lines: the background to all this is that, historically, as we know, Mr. Blyde ran the  
22 STG business on the basis of collective decision making by the senior management team,  
23 [...][C].

24 What the STG business is now facing under the directions in their current form is, firstly, a  
25 new CEO, the HSM, who will in all probability have no experience at all of the business. The  
26 STG business will also be faced with a partial fragmentation of the management of the  
27 business with complex interweaving chains of command and of reporting and overlapping  
28 responsibilities. These are all to be found in the appendices to the directions that I went  
29 through this morning. Thirdly, the STG business will also be faced with the necessity for  
30 personnel to devote time to dealing with what is a demanding Competition Commission  
31 investigation.

32 On top of all that, you have got the imposition of a form of management that is alien to the  
33 management culture of the STG business.

34 Part of the problem here is caused by the fact that there is no ban on participating in meetings,  
35 it is a ban or a restriction on participating for certain purposes. The borderline between what is

1 and is not permitted participation is not clear, and one can well see that considerable  
2 management time could be spent discussing whether or not, and if so to what extent, a  
3 particular person could attend a particular meeting.

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

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

7 THE PRESIDENT: The Hold Separate Manager is managing it. If he invites somebody to leave the  
8 meeting because it is outside his area of expertise that is his management decision.

9 MR. LASOK: That may well be so, but the problem is posed by the fact that he will need the people  
10 there participating in the decision making process. An illustration of this is given by  
11 Mr. Blyde in his second witness statement at paras.54-56. This is a real illustration that he  
12 gives of what can happen when you need to have a discussion with all persons present. You  
13 cannot simply have, as it were, one to one discussions with individual members of the senior  
14 management team and then pool together their collective wisdom without them having heard  
15 what the other people have been saying.

16 The question that arises here is, does the Hold Separate Manager have to have separate  
17 meetings with each of the members of the STG team, or can the whole thing be dealt with in a  
18 single meeting? If the whole thing can be dealt with in a single meeting what is the point of  
19 the last sentence of para.4 that we have been looking at?

20 The extent to which the CC seems to be prepared to take this can be seen from an email in  
21 bundle 6, tab 14. Like all these emails, the first one starts at the bottom, and you can see that it  
22 was an email actually sent on 5<sup>th</sup> September by those instructing me raising the fact that  
23 Mr. Budd, the head of compliance, wanted to run a meeting training session and DLA wanted  
24 to consult the Competition Commission to see whether it was okay. You just need to look at  
25 number 1, which is "Joint health and safety meeting attended by managers from both WRE and  
26 STG". This provoked the response as follows:

27 "Dear Elizabeth,

28 "Thank you for alerting us to these planned meetings. Proposal 2 is perfectly  
29 acceptable. I am afraid proposal 1 raises some concerns since it might contain risk of  
30 pre-emptive action. Before giving a final view on this could you please tell us which  
31 managers will be attending, send us copies of the agendas and explain why it is  
32 necessary for the meetings to be conducted jointly."

33 This of course is in an area that is integrated permissibly under the directions.

34 What are the concerns that necessitate this fragmentation of the STG management team?

35 Fragmentation of the management team is not going to be remedied by the appointment of an

1 HSM, because an HSM will need to consent the management team, and he is there presented  
2 with a fragmented team – in other words, it detracts from his ability to make decisions  
3 effectively and efficiently. What is this for?

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

12 I pass on now to the next point which is the restriction on the communication of necessary  
13 information. This is to be found in para.35 of schedule 1 of the directions. Paragraph 35  
14 prohibits the sharing of information across the management teams, save where that is strictly  
15 necessary in the ordinary course of business. That, in turn, is the subject of a definition in the  
16 order, on which there is a distinct lack of clarity. The lack of clarity can be illustrated by  
17 reference to an exchange of emails in bundle 2. This is the supplementary correspondence  
18 bundle. Can we start at p.448, tab 63. This is in the context of the compliance statements and  
19 this is an email from those instructing me to the Competition Commission. If you look just  
20 above the second hole punch there is a paragraph that begins, "Paragraph 2(1) allows for".

21 Could you read the second sentence to the end of the paragraph.

22 THE PRESIDENT: (After a pause) Yes.

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

26 THE PRESIDENT: (After a pause) Yes.

27 MR. LASOK: You can see that at the end of the second paragraph I have asked you to read it was  
28 suggested that what was strictly necessary in the ordinary course of business was something  
29 that had to be communicated if the businesses were genuinely unable to function.

30 If you move then to 490, this is carrying on the exchange, and go to the first hole punch there  
31 is a paragraph beginning "Furthermore". Would you just read that. (After a pause) The  
32 interpretation given by the CC is queried. Then if you go to p.528, just above the first hole  
33 punch you have got a paragraph, "The Group will consider". If you look at the third line in her  
34 email of 7<sup>th</sup> August and just read from there to the end.

35 THE PRESIDENT: (After a pause) Yes.

1 MR. LASOK: So things have come round full circle. The Competition Commission puts forward a  
2 restricted interpretation of “strictly necessary in the ordinary course of business” referring to  
3 what appears to be an exceptional situation not in the ordinary course of business, and then  
4 resiles from that and says it is simply an example of the kind of exchange that may be strictly  
5 necessary.

6 At the end of the day, one is left completely unclear as to what the CC’s take on “strictly  
7 necessary in the ordinary course of business” means. On the face of it, “Strictly necessary in  
8 the ordinary course of business” can be taken literally. In ordinary language the word  
9 “strictly” is necessary to emphasise the importance of, here, the word “necessary”, but  
10 “necessary” typically is a more or less absolute term and things are either “necessary” or they  
11 are not “necessary”. On the face of it, “strictly necessary in the ordinary course of business”  
12 means just that.

13 If we revert now to the directions, 35 refers to the communications, “sharing of confidential  
14 information if strictly necessary in the ordinary course of business”. It is followed by 36 which  
15 is there, as it says, for the avoidance of doubt to illustrate certain transfers that are “strictly  
16 necessary in the ordinary course of business”. Paragraph 36 looks like an illustrative but not a  
17 determinative list, or conclusive list, of situations in which information can be shared.

18 It is obvious that, given the complex interwoven relationship between STG and WRE  
19 businesses provided for in the directions, a considerable amount of information about each  
20 business is going to pass to the other business. Another example of this is para.38. Apart from  
21 causing harassment and disruption, it is difficult to see what purpose is served by 35, that is to  
22 say 35, which starts off with a general prohibition that is followed by an exception where the  
23 sharing of information is necessary in the ordinary course of business.

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

25 MR. LASOK: Strictly necessary in the ordinary course of business. In this type of situation the  
26 obvious question for the decision maker to ask is, given the flow of information that is already  
27 taking place anyway and the particular nature of the information being shared, such as sales  
28 and marketing information, that is going to be inevitably possessed by Mr. Blyde, what is it  
29 about the confidential information that might be shared, the additional confidential information  
30 that might be shared, that makes it necessary and proportionate or reasonable to impose this  
31 particular restriction?

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

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

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

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

10 The question that I am raising is this, and I put it in a rhetorical form: when you have got this  
11 very, very wide exchange of information that is inevitable in any event, what is it about this  
12 other confidential information that is likely to threaten pre-emptive action with the context of  
13 s.81 that requires a restriction of this sort? On the face of it, there is an awful lot of important  
14 information of which the classic example is information relating to sales and marketing that the  
15 Competition Commission accepts must be, and will be, shared across the two businesses. So  
16 what is it about all this other stuff?

17 The thing is that you would expect to see in Mrs. Guy's witness statement an explanation about  
18 this. Unfortunately, we have not got an explanation. If Mrs. Guy had said, "Look, our concern  
19 is X, Y and Z, we have permitted certain exchanges, this is as far as we are able to go, but there  
20 are types of exchanges, this is an example of a type of exchange that is not strictly necessary in  
21 the ordinary course of business, it would not be the kind of thing that Mr. Blyde get in the  
22 ordinary event and this actually is important because this kind of exchange would give rise to  
23 the risk of pre-emptive action and that is what we want to stop." If she had said that I could  
24 not possibly have an argument unless I was able to demonstrate that the Group's evaluation  
25 was unreasonable. My difficulty is that I do not even have that. I have no explanation  
26 whatsoever as to what is the underlying concern.

27 It is also known that should there be a divestment of the STG business the management team is  
28 going to stay with Stericycle.

29 THE PRESIDENT: It is difficult always to say that a thing like that is known, because that all lies in  
30 the future and who knows what the future brings.

31 MR. LASOK: I think one can put it in this way: the evidence is that the current intention is that the  
32 senior management team will go to Stericycle. I can understand it if Mrs. Guy had said in her  
33 witness statement, "Well, we took this into account, we looked at this, we looked at that, we  
34 came to the conclusion that balancing one thing against another, judgmentally the conclusion  
35 was that", and then she came to some conclusion, but she does not even do that. This is a

1 major problem because, with all due respect, you cannot, in this kind of judicial review  
2 exercise, uphold a decision that does not provide you with the evidence, or where the decision  
3 maker does not provide you with the evidence, that the relevant factors were take into account.

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

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

19 THE PRESIDENT: It make divestiture more difficult.

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

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

23 MR. LASOK: They did not say that in Mrs. Guy’s witness statement.

24 THE PRESIDENT: They said it in the order.

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

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

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

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

8 THE PRESIDENT: To only have to get as far as “might” is not a very high hurdle.

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

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

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

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

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

26 MR. LASOK: We entirely agree with that.

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

30 MR. LASOK: With respect, no. What we are faced with is a highly complex order that introduces  
31 difficulties, and my clients cannot understand the reason why these difficulties have been  
32 introduced, because all that they appear to be are gratuitous restrictions. They do not appear to  
33 have a justification. As I have said, if Mrs. Guy in her witness statement had explained what  
34 the problem was, the factors that had been taken into account, the balancing exercise, then we

1 would not have a case on this point unless we could demonstrate that she was acting  
2 unreasonably.

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

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

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

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

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

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

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

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

18 Also, looking at someone's preparatory material cannot possibly fall within any one of the  
19 powers listed in s.81 of the Act. There is no necessity for even the Monitoring Trustee to see  
20 such material, as, in fact, appears to be acknowledged by Mrs. Guy in para.84 of her witness  
21 statement. Any such provision would be disproportionate because, for the reasons given by  
22 Mr. Blyde in para.78 of his second witness statement, it is likely to have a damaging effect and  
23 there is no apparent benefit arising from it.

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

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

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

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

3 THE PRESIDENT: It is meant as an illustration.

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

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

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

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

13 MR. LASOK: Quite properly.

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

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

19 THE PRESIDENT: No.

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

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

22 MR. LASOK: No, not at all.

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

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

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

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

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

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

19 THE PRESIDENT: Yes.

20 MR. RAYMENT: I think, broadly speaking, I will be able to take a fairly short run-up and then go  
21 straight into the Hold Separate Manager points and hopefully just give you an outline of what  
22 we envisage the Hold Separate Manager's role would be and what he or she would be doing.  
23 I do not think I need to go into the debate so far about pre-emptive action. Generally speaking,  
24 I think, for the purposes of the subject matter of this application, in principle we do have the  
25 powers here to appoint the Hold Separate Manager and to deal with the consequences of the  
26 integration so far

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

28 MR. RAYMENT: Exactly, I think that has to be the focus. I think the only point on pre-emptive  
29 action is that it has not been entirely clear, going right back to as far as the OFT stage, whether  
30 the current view that the Applicants take about pre-emptive action is the one that they have  
31 always held or whether that has undergone some development. It certainly seemed to us that  
32 there might have been some development. I will not take you to it, but we slightly adverted to  
33 this difficulty in the defence in the sense that in the original supplementary notice of  
34 application they simply referred to the paragraphs of the original notice of application which  
35 had made some of these arguments, but are more developed in the skeleton argument and it

1 certainly seemed to the Commission that in the original notice of application it was a slightly  
2 less sophisticated view, shall we say, of pre-emptive action.

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

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

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

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

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

18 Here we have a situation with a single chief executive officer with an integrated senior  
19 management team around him with plans, originally at least, for ever increasing integration.  
20 Mr. Blyde's position, as we have already explained, is a dual one and is particularly difficult in  
21 terms of managing both businesses in the best interests of each of those businesses. There is  
22 no suggestion of a dark plan to destroy one of the companies or to fatally wound it, and we say  
23 that emerges quite clearly from the Commission's meetings and Grant Thornton meetings. We  
24 are not saying that he would deliberately run down one business at the expense of the other.  
25 The point is simply that managing on a group basis is not the same as running a business on an  
26 individual basis. It is just difficult for the Commission in this situation to accept assertions to  
27 the contrary in view of the balance of the risk in these situations. That is what the Commission  
28 guidelines are doing, they are providing a starting point for identifying risk. Simple assertions  
29 that somebody would not act in a particular way are not sufficient.

30 By way of illustration, the Commission was obviously pleased when Mr. Blyde says he will  
31 not act against STG's interests in performing sales and marketing functions. As has already  
32 been mentioned, we took comfort from his argument that is quoted in para.46 of the skeleton.  
33 We accept that this ensured that there is no risk from Mr. Blyde's dual capacity. There is  
34 always the risk that his decisions will be influenced by the Group perspective. This is a real  
35 risk. This is not "speculation or a hunch", as the supplementary notice of application describes

1 it, it is not “fanciful”. It is difficult, as I have said, for a chief executive officer and a  
2 management team to run two companies independently in the best interests of each. That  
3 independent management, or at least the separation of key functions, including the introduction  
4 of a Hold Separate Manager is what the Competition Commission considered in this case was  
5 necessary to manage this risk over what is necessarily an uncertain period. In this case the  
6 level of senior management integration was unusually advanced.

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

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

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

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

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

21 MR. RAYMENT: The Applicants would pay that.

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

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

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

26 MR. LASOK: It would be a full-time position, and you will recall that that was one of the reasons  
27 why the Commission was somewhat cautious about the appointment of Mr. Graver. I think the  
28 key point about Mr. Graver was that he lacked the necessary independence in the view of the  
29 Commission, but there was also the point that he was only spending two days a week in the  
30 United Kingdom [...] [C].

31 The key point about an interim manager is that they are there to manage. I cannot give you an  
32 overview of what somebody who manages a company has to do. The roles are many and  
33 varied. It is an executive role, it is preventing problems, it is dynamic. It is difficult to define,  
34 but it is certainly not the sort of role that the Commission can play by just responding to  
35 particular that are raised and it is then said, “Would you mind giving your consent to this?”

1 “Do you consent to that?” or indeed to the role played by the Monitoring Trustee. It is an  
2 altogether more dynamic position.

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

8 On a more detailed level, the Hold Separate Manager would be establishing what the relevant  
9 key performance indicators were for the STG business, the numbers of contracts involved,  
10 contracts won and lost, the revenues both from what I think we are call “on contract” and  
11 “non-contract” business, because so far we have only been talking tender business. The  
12 statement of principles only covers tenders, it does not cover so-called non-contract business.  
13 He would be looking at staff turnover, including staff retention, which could be important  
14 going forward.

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

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

21 Mr. Lasok says that really his role is only in relation to sales and marketing and operations as  
22 far as he understands what we have been saying, but the Competition Commission’s position is  
23 that that is not, in fact, the case. Certainly the intention is that the interim manager would have  
24 a much wider remit. Yes, it is true that sales and marketing and operations are particularly  
25 important, but those other functions are important too. For example, he, the interim manager,  
26 would be involved in deciding how much human resource is needed to be brought in on the  
27 arm’s length basis that we have already set up; and ditto in relation to how much was needed  
28 in terms of environmental services. So even in relation to those functions, although they are  
29 not functions that he would be taking major decisions on every day, he would nevertheless  
30 have some involvement in assessing what was required, and so on.

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

32 MR. RAYMENT: That is the intention.

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

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

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

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

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

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

14 THE PRESIDENT: Yes.

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

22 THE PRESIDENT: Yes.

23 MR. RAYMENT: It reads:

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

27 Those of course are risks at this stage. That does not mean that we do not think that there may  
28 be other risk areas, but so far as we are able to tell at the moment these are some of the key  
29 areas, but they are by no means necessarily all the areas that there are. That position has also  
30 been confirmed to the Applicants at an earlier stage, if you look at the covering letter to the  
31 directions. I do not think you necessarily need to go to it now. I can just read it out to you.  
32 Under "Decision making structure", the covering letter of 25<sup>th</sup> August says:

33 "As we have previously explained, the CC believes it is necessary to establish a  
34 separate decision making structure for the Stericycle and STG businesses through the

1 Inquiry. This is in relation to both capital expenditure decisions and more generally  
2 to other decisions which relate to the operation of the business.”

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

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

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

16 THE PRESIDENT: You cannot foresee.

17 MR. RAYMENT: That is an important point. We have tried to sketch out where we see the risks,  
18 but it is impossible to be too prescriptive. For example, in relation to sales and marketing,  
19 Mr. Lasok has made quite a lot about the fact that Mr. Blyde, if he acts in relation to the sales  
20 and marketing function in relation to STG, will perform that function within the statement of  
21 principles for the allocation of new business, and so on. In fact, part of the business is  
22 accounted for by the tenders that are covered by that statement of principles. Then at the  
23 bottom you have the so-called small quantity business. In between there is still a chunk of  
24 business that is taken on at plant level, and so on, and it is being managed on a day to day  
25 basis. In relation to, for example, just the general operation of that sort of business, that is the  
26 sort of area in which a Hold Separate Manager could have a role.

27 THE PRESIDENT: Do we know the order of magnitude of this contract business?

28 MR. RAYMENT: I will endeavour to provide you with specific figures, [...] [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. In fact, the thought did occur to us over the short adjournment  
14 that we must be approaching the time when certain budgets for certain operational issues are  
15 probably being drawn up, and that is something obviously that an interim manager would be  
16 involved in.

17 Turning to operations, which is the other specific area that has been mentioned, yes, of course  
18 the order deals with the preservation and maintenance of assets. The risk here is not that there  
19 might be nothing to sell if the Competition Commission has to make a divestment, the object is  
20 to try and preserve the best possible outcome, if it needs to act. That means that, in relation to  
21 operations, it is not simply a question of preserving some plants or some assets, it is to make  
22 sure they are run to the best of their potential in the interests of that particular firm. Although  
23 it is true that many operational decisions, as you have heard – and you have been referred to  
24 the Grant Thornton transcript, and of course this is in the Grant Thornton report as well – are  
25 taken at plant level. Inevitably important issues do rise up for consideration at senior  
26 management level and, where they do, we submit that it is important that there are guarantees  
27 in place that decisions involving those issues are taken in the best interests of STG than the  
28 group as a whole. That is the Competition Commission thinks that the Hold Separate Manager  
29 has a role to play. The orders by themselves are themselves are not adequate without that  
30 additional safeguard. That is the judgment of the Competition Commission, having considered  
31 matters in the round. Again, we are comforted by the fact that the Monitoring Trustee says that  
32 no site has suffered any adverse change at the moment. That is excellent but the Hold Separate  
33 Manager would be further comfort in the light of the risk going forward.

34 I think there was some discussion about the question of capital expenditure decisions, and one  
35 of the points made was that it was possible in relation to decisions in the bracket [...] [C] to

1 [...] [C] of expenditure, on the Applicants' proposal, could have been taken away from  
2 Bill Blyde and given to an operational manager such as Paul Simpson. On that basis I think  
3 they were submitting that there was no need for a Hold Separate Manager. The Competition  
4 Commission disagrees with that approach, the Hold Separate Manager does have a role to play  
5 in the Applicants' world. Although Mr. Simpson, for example, would have responsibility for  
6 those decisions, he would still be reporting to Mr. Blyde in connection with those decisions, as  
7 I understand it. That is not the situation, we think, necessary to guarantee the sort of  
8 independent decision making that we are trying to achieve.

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

10 THE PRESIDENT: Just on that last point, what are you saying – this is para.61, I think, of  
11 Mrs. Guy's statement – is that although these gentlemen would be capable of taking decisions  
12 they would still have to explain themselves to Mr. Blyde who might or might not agree with  
13 the decision taken?

14 MR. RAYMENT: And might or might not influence the eventual decision.

15 THE PRESIDENT: You might want to discuss it with him beforehand, even you were, yourself,  
16 capable of taking it?

17 MR. RAYMENT: Yes. I do not mean this in any nefarious way, it is just that Mr. Blyde is a figure  
18 who commands a great deal of influence and respect ----

19 THE PRESIDENT: The normal interplay of human relations, basically.

20 MR. RAYMENT: ---- in just the general hierarchy.

21 The directions, and so on, do not cover entirely decisions not to spend money. I think that was  
22 one of the points that you raised with Mr. Lasok in argument. We again say that is another  
23 area where a Hold Separate Manager may have a role to play. I do not mean this as a question  
24 of evidence, these are questions of what is possible in the future, factors that might have the  
25 effect that we are trying to prevent, decisions about what is a priority.

26 We have been told that capital expenditure decisions have all been finalised for this year. We  
27 have already discussed that we may be going into next year under these arrangements. It is  
28 just difficult to foresee.

29 The other point is that, of course, although one can have a scheduled budget including the  
30 major expenditure decisions that need to be taken, we have already seen in relation to the  
31 [...] [C] the fact that plant goes wrong and works need to be done and decisions taken in  
32 connection with those failures. Those are not necessarily situations that are completely  
33 covered by the directions. The point is that the Commission's view is that the best outcomes  
34 for managing those sorts of situations are going to come with somebody who is managing on  
35 this independent basis that we are trying to establish.

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

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

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

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

18 THE PRESIDENT: Yes.

19 MR. RAYMENT: It is also true to say that, of course, Grant Thornton were dealing with the matter  
20 on the basis that Mr. Blyde was the Chief Executive Officer of the two companies. That was  
21 pretty much a given at the stage they embarked upon preparing their report.

22 Then we come to the position which was that the Commission had the meeting that we know  
23 about on 16<sup>th</sup> August and the matter was raised with them. It is true that in relation to the  
24 notion of fatally wounding, deliberately doing one of the companies, the relevance or  
25 otherwise of Mr. Blyde's share options, it is true that Grant Thornton said that in their view it  
26 was a bit theoretical. When they are discussing the Commission's concern in the transcript,  
27 namely not the doing down of one particular company or the other, but rather the real  
28 Commission concern which is the difficult position that a dual capacity chief executive has, at  
29 that point Grant Thornton, not having obviously thought about it in any great detail, at least  
30 acknowledged that it was a legitimate concern and was something that could be thought about  
31 further. I think we could look at p.19 of the transcript of the meeting with Grant Thornton.

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

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

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

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

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

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

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

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

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

32 I do not think it is right that the Commission has to expressly disagree in this context with  
33 everything that is put to them as a possible problem. They have a duty to consider it and then  
34 to reach a decision on that material that is reasonable. If that decision is reasonable having

1 regard to the particular statutory objectives, then that decision is not susceptible to challenge  
2 on judicial review.

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

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

10 (Adjourned for a short time)

11 THE PRESIDENT: Yes?

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

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

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

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

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

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

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

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

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

32 THE PRESIDENT: It is basically the last two sentences of 67 and the middle sentence of 69, "This  
33 was the Group's preferred option", is that where we find the heart of it?

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

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

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

7 THE PRESIDENT: Because of the directing mind.

8 MR. RAYMENT: Essentially because of the directing mind point applied to various areas of the  
9 business which are not necessarily covered by the directions.

10 Then much of the disproportionality comes from the fact that we have imposed these  
11 additional obligations in relation to collective deliberations, for example, and the flow of  
12 information.

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

14 MR. RAYMENT: Yes, that is right. That is connected with their objection which is that the Hold  
15 Separate Manager is put in an impossible position because of the way that we have set up these  
16 provisions on collective deliberation. We say, as we have said all along, that, properly looked  
17 at, those restrictions are not particularly onerous. Going back to the explanation of the role of  
18 the interim manager, we just do not accept that an appropriately qualified individual would not  
19 be able to make the necessarily inquiries and to have the right people at the right meetings,  
20 which is, in crude terms, what the Applicants are saying. They are saying that these provisions  
21 are so restrictive that the Hold Separate Manager would not be able to manage. We do not see  
22 how that is possible, the Hold Separate Manager is the person who would be responsible for  
23 who ultimately attends meetings. If thinks that only X and Y should be at the meeting, but he  
24 needs A and B as well, he is entirely free to have them attend. That is certainly the intention of  
25 the Commission. If that has not been achieved then we would seek to try and reach a solution,  
26 but we think it has in the relevant provisions.

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

28 MR. RAYMENT: I was going to take one other point as to why this is said to be unworkable, that it  
29 would lead to staff departures. As we say, once we have considered these measures are  
30 reasonable, it is a bit difficult for us to then accept that their reasonableness might be affected  
31 by people who take a different view and want to move on. However genuinely those people  
32 may feel that they cannot work in this situation it is a bit of a difficult situation for the  
33 Commission. It is really an employment issue for the companies concerned. I do not want to  
34 get into the whys and wherefores of whether it would be constructive dismissal or not. If these  
35 are reasonable objectives then those situations have to be managed, in my submission.

1 THE PRESIDENT: Yes.

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

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

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

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

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

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

12 THE PRESIDENT: The point that was being put, I think, was that they might be preparatory  
13 material that might not be strictly covered by privilege, because perhaps a lawyer had not been  
14 involved, or something, which in some way might be passed to the Monitoring Trustee and  
15 thus to the Commission which inhibit the preparation of a defence. That was the argument.

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

20 THE PRESIDENT: Yes.

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

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

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

33 THE PRESIDENT: Is that a publicly available report?

34 MR. RAYMENT: No, but it is one we could certainly make available subject to an undertaking.  
35 The version on the website apparently has a lot of excisions, but I think we could probably

1 show the Tribunal and the Applicants the sorts of provisions that have been in place on this  
2 sort of issue in previous inquiries.

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

5 MR. RAYMENT: I think that covers in a fairly quick run-through all the points. Overall, my  
6 submission is that the objectives were legitimate and reasonable and the measures employed to  
7 achieve them are workable for the reasons I have given. To the extent that there are any  
8 problems of practicality – I would put into that category Mr. Lasok’s problem with the word  
9 “discuss” in relation to quite what the obligations were in relation to the reporting provision. It  
10 was never intended to go beyond what I have described to the Tribunal just now.

11 Although the provisions of the Order are somewhat complex they reflect the attempt that the  
12 Commission has made to move in the direction of the Applicants. I appreciate they say that  
13 they have moved in our direction, but we have also tried to move in their direction with these  
14 provisions. It is possible that more intrusive measures could have been adopted at an earlier  
15 stage, but the Commission took the decision that they would try to accommodate the  
16 Applicants as far as possible. You, yourself, have already identified a couple provisions which  
17 perhaps are quite wide in relation to, for example, the reporting obligations.

18 THE PRESIDENT: Yes.

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

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

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

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

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

32 MR. LASOK: I think we are beginning to get there. I am a little bit concerned still about the flow of  
33 confidential information necessary for the defence of the Applicants, because it really seems to  
34 be confirmed that the restriction on the CC seeing this stuff is conceived as applying only to  
35 material covered by legal professional privilege. I have made the point that one of the

1 problems is that if you are a big company with an in-house lawyer and all the resources that is  
2 no difficulty, but we are not talking about big companies here, we are talking about small  
3 companies with limited resources and they do not actually have the resources to buy in a  
4 lawyer, stick him in an office so that you can concoct the legal professional privilege umbrella.  
5 I have made the point about that.

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

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

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

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

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

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

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

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

1 We can see that the Monitoring Trustee will obviously want to be in a position to monitor this  
2 kind of thing. You would expect the Monitoring Trustee to have got some kind of idea about  
3 how best to do it, because that is the kind of thing that a Monitoring Trustee would do.  
4 We, at the moment, do not see why information of that sort should get anywhere near the CC.  
5 Of course, we are not talking here about preparatory material in the sense of a draft document,  
6 we are talking about the raw information that has been suddenly realised or found by  
7 somebody who wants to transmit it to somebody else for the preparation of the defence, but  
8 that information, that piece of information or evidence, may need to be combined with some  
9 other evidence from somebody else or re-checked in order to produce the finished version.  
10 From my experience, I well know the consequences of decision makers getting hold of  
11 material, the original raw material that has not been properly processed and, without checking  
12 to see whether the final version has been tampered with or has simply been corrected. You can  
13 bet your bottom dollar that, generally speaking decision makers will consider that the material  
14 has been deprived of part of its evidential force if the final product differs from the original,  
15 because it is very often the case that what will happen is that somebody will say, "This is the  
16 position", it will then have to be checked with something else before it can be verified, you  
17 will go through a process of verification and you will end up with something that may be the  
18 same as the original thought but may be slightly different. The difficulty is with people  
19 beginning to look at the earlier material because they will jump to the conclusion that it is only  
20 the early material that is the unvarnished truth. That is one of the difficulties about all this.  
21 That is a very, very real concern and one can see it in all kinds of cases in which this kind of  
22 problem arises.

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

25 MR. LASOK: That is correct.

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

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

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

30 MR. LASOK: That is not the issue.

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

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

1 THE PRESIDENT: Yes.

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

11 At an earlier stage the position was very different because at an earlier stage back in July the  
12 concerns were articulated around confidential information and the running down of the brands.  
13 That was early on. At the time we are talking about here, which was when we are moving into  
14 the making of the decision, the concerns are focused on the lack of independent decision  
15 making concerning sales and marketing and operations and nothing else.

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

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

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

28 THE PRESIDENT: There is a fairly general statement at the end of 67 as to what the concern was –  
29 it is 67, p.23, “I was concerned this option”, et cetera, et cetera. That is rather broadly  
30 expressed.

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

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

1 MR. LASOK: Exactly, but she draws a distinction between the Group and herself, “I was  
2 concerned”, and then she has got, “The Group considered”. If you look at the last sentence of  
3 68, “In some respects I thought this option went further”, but then in 69 you have got  
4 references to what the Group thought.

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

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

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

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

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

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

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

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

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

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

28 One has to remember, as I think I submitted earlier, if you are looking at pre-emptive action  
29 mere combining of the management of two businesses is not necessarily pre-emptive action.  
30 In many cases it will be, but it is not necessarily in all cases. We know that in this particular  
31 case, from what Grant Thornton told the CC, there was a considerable degree of non-  
32 integration and a great ability due to the particular nature of the businesses of separation.

33 That is why focusing on what the perceived pre-emptive action is is of some importance, but  
34 we know that the only focus, the only articulated concern – and I am submitting that the only  
35 concern on a fair reading of Mrs. Guy’s statement – concerned these key risk areas and the risk

1 that there would not be independent decision making, but it boils down to those areas, because  
2 financing was different, of sales and marketing and operations.

3 On sales and marketing it has been submitted that there is a category of contracts that is not  
4 covered by the statement of principles. I understand the position to be this: about 75 per cent  
5 of the business will fall within the scope of the statement of principles, 25 per cent is small  
6 quantities – about 25 per cent is small quantities – and you will remember from the diagram  
7 that I showed you this morning that small quantities is integrated because there is only one  
8 person who deals with small quantities and he deals with it for both businesses.

9 THE PRESIDENT: Yes. You are saying that the statement of principles is comprehensive, there is  
10 no middle category?

11 MR. LASOK: There is no middle category and therefore there is no problem as perceived by the  
12 CC.

13 THE PRESIDENT: I wonder if we could see whether we can get some form of either agreement or  
14 factual basis for that, because it would be unfortunate if it turned on a question of fact that had  
15 been ----

16 MR. LASOK: Precisely. I am sure that both parties will use their best endeavours as quickly as  
17 possible to provide an agreed position on that.

18 THE PRESIDENT: Yes, that would be good.

19 MR. LASOK: That really leaves the asset problem. The situation here is that the proposal  
20 originating with the CC itself was devolved decision making and that was regarded by us as  
21 workable. The devolved decision making would have been exactly that ----

22 THE PRESIDENT: This is the capital expenditure rule?

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

24 THE PRESIDENT: Yes, the up to [...] [C] rule, if I can put it that way.

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

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

1 THE PRESIDENT: Yes.

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

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

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

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

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

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

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

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

30 "... information that may effect competition should divestiture be ordered needs to be  
31 ring fenced."

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

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

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

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

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

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

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

26 THE PRESIDENT: We will go and talk about it for a moment, if you do not mind waiting for ten  
27 minutes or so while we reflect on what we have heard so far. We have given an indication of  
28 what our target is and if any of you want to come back and say, "That is frankly going to create  
29 a lot of difficulties for us, can you do something about it", then of course we will consider it  
30 very carefully. We will just rise for a few minutes and we may send a message to say  
31 everyone can go home, or we may come back, we will see.

32 (The court adjourned)