

**COMPLETED ACQUISITION BY RAILWAY INVESTMENTS LIMITED AND
ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS LIMITED OF MARCROFT
HOLDINGS LIMITED**

**NOTICE OF DIRECTIONS ISSUED PURSUANT TO PARAGRAPH 8 OF THE INTERIM
UNDERTAKINGS ACCEPTED BY THE COMPETITION COMMISSION ON 13 MARCH 2006**

On 6 February 2006, the Office of Fair Trading made a reference to the Competition Commission (the *CC*) under section 22 of the Enterprise Act 2002 (the *Act*) concerning the completed acquisition by Railway Investments Limited (a wholly owned subsidiary of English Welsh & Scottish Railway Holdings Limited (*EWS*)) of Marcroft Holdings Limited (*Marcroft*).

And, on 13 March 2006, the *CC* accepted Interim Undertakings from *EWS*, pursuant to section 80 of the *Act*, for the purpose of ensuring that no action is taken pending the determination of the reference, which might prejudice that reference or impede the taking of any action by the *CC* under Part 3 of the *Act* (the *Undertakings*).

And the Undertakings are still in force.

The Competition Commission now makes Directions for the appointment of a Monitoring Trustee pursuant to paragraph 8 of the Undertakings.

A copy of the Directions is set out below.



Jeremy Peat
Group Chair

15 November 2006

**COMPLETED ACQUISITION BY RAILWAY INVESTMENTS LIMITED AND
ENGLISH WELSH & SCOTTISH RAILWAY HOLDINGS LIMITED OF MARCROFT
HOLDINGS LIMITED**

**Directions issued pursuant to paragraph 8 of the Interim Undertakings
accepted by the Competition Commission on 13 March 2006**

To preserve for divestment a package suitable to remedy the SLC identified in the report titled *Completed acquisition by Railway Investments Limited of Marcroft Holdings Limited*, published 12 September 2006 (the report), ensuring that the purchaser can operate this package as a viable and competitive undertaking;

to facilitate the negotiation of the sale of a suitable package to the Proposed Purchaser;

to facilitate continued separate and independent management of Marcroft in accordance with the Undertakings and the Final Undertakings during the divestment process;

to ensure that within the specified period EWS or Marcroft take no action that might adversely affect the ability of the purchaser of the suitable divestment package to operate the package as an independent, viable and competitive undertaking;

to ensure that within the specified period EWS or Marcroft take no action that might adversely affect the service arrangements, terms of service or otherwise prejudice the interests of Marcroft's customers;

and to assist the CC in responding to any request that may be made by EWS or Marcroft for a variation of or consent under the Undertakings or the Final Undertakings;

and recognizing that during the course of the CC investigation into the merger, the CC has not had cause to issue directions for non-compliance with the Undertakings;

the CC now directs under paragraph 8 of the Undertakings that the following actions shall be taken:

1. EWS shall on or before 6 December 2006 appoint a Monitoring Trustee acceptable to the CC with the primary function described in paragraphs 2 to 11 below;
 - (a) that appointment shall be made in accordance with the provisions of paragraphs 16 to 18 below;
 - (b) EWS shall ensure that the terms of appointment of the Monitoring Trustee shall give effect to the provisions of these directions, and that the terms of appointment will be approved by the CC in accordance with the provisions of paragraphs 25 to 27 below; and
 - (c) EWS shall, and will ensure that its subsidiaries and Marcroft shall, cooperate fully with the Monitoring Trustee in accordance with the provisions of paragraphs 17 and 18 below.

Primary functions of the Monitoring Trustee

2. The Monitoring Trustee will (without undue interference in commercial negotiations) monitor the progress of discussions with the Proposed Purchaser and the wagon

maintenance customers identified in the Initial Divestiture Package (detailed in Annex 1), and negotiations for the sale of the Initial Divestiture Package to the Proposed Purchaser.

3. The Monitoring Trustee shall ensure that no arrangements are put into place or completed that affect the ability of the Stoke workshop business to provide workshop services to such part of the Marcroft outstation business as is divested pursuant to paragraphs 8.59 and 8.61 of the report.
4. The Monitoring Trustee shall ensure that EWS and Marcroft take no action or make no omission that might adversely affect the service arrangements, terms of service or otherwise prejudice the interests of Marcroft's customers.
5. The Monitoring Trustee shall be entitled to have access to any data room established for the purposes of conducting due diligence on either the Initial Divestiture Package or the Secondary Divestiture Package, as appropriate.
6. The Monitoring Trustee shall facilitate the exchange of confidential information between EWS, Marcroft, and the Proposed Purchaser insofar as the exchange of such information is necessary for the negotiation and conclusion of the sale of the Initial Divestiture Package. Where necessary the Monitoring Trustee may instruct that documents containing confidential information, sensitive to the customers identified in the Initial Divestiture Package, EWS's retention of which is required by any applicable law or judicial body, or necessary for liability purposes, be deposited with EWS's legal advisers and accessed only in the event of a breach of warranty claim.
7. The Monitoring Trustee may consider any application for consent under the terms of the Undertakings or Final Undertakings, and grant consent where the Monitoring Trustee considers this consent is necessary for the purposes of negotiation or sale of the Initial Divestiture Package or, if necessary, the Secondary Divestiture Package.
8. Where the Monitoring Trustee is satisfied that the consent is necessary for the purposes detailed in paragraph 7, and subject to the purposes of the Monitoring Trustee's function, and provided always that the Monitoring Trustee has been provided with all the information necessary to enable it to reach an informed decision, it will issue the consent and advise EWS and the CC in writing.
9. If the Monitoring Trustee reaches a preliminary view either that the consent is not necessary for the purposes detailed in paragraph 7, or is inconsistent with the purposes of the Monitoring Trustee's function, the Monitoring Trustee will so advise the applicant and will stipulate a reasonable period of time in which the applicant may provide the Monitoring Trustee with further information.
10. Where the Monitoring Trustee is not satisfied that the consent is necessary for the purposes detailed in paragraph 7, or is inconsistent with the purposes of the Monitoring Trustee's function, the Monitoring Trustee will provide the applicant with a short statement explaining why the Monitoring Trustee is not satisfied and supply a copy to the CC. A further application for consent may then be made by the applicant to the CC and the CC shall, if it is satisfied that the consent is necessary for the purposes detailed in paragraph 7, issue the consent as soon as reasonably possible.
11. On a fortnightly basis, the Monitoring Trustee shall report to the CC on:
 - (a) the progress of discussions with the wagon maintenance customers identified in the Initial Divestiture Package;

- (b) the progress of discussions with the Proposed Purchaser;
- (c) any matters affecting the separate and independent management of Marcroft or the competitiveness or viability of divestment packages;
- (d) any matters that the Monitoring Trustee is aware of that may lead to an application under paragraph 7;
- (e) as necessary:
 - (i) the marketing of the Secondary Divestiture Package; and
 - (ii) the process of identifying a suitable purchaser for the Secondary Divestiture Package.

In addition to the above, the Monitoring Trustee's first report to the CC shall detail the history of discussions with the Proposed Purchaser.

Additional functions of the Monitoring Trustee

12. In addition to the Primary Functions, the Monitoring Trustee will also:

- (a) assist the CC in monitoring the extent of compliance by EWS and Marcroft with the Undertakings and the Final Undertakings and shall in particular provide the CC with any information in the possession of the Monitoring Trustee that may suggest that a breach of the Undertakings or the Final Undertakings may have taken place as soon as is practicable after receipt of the information;
- (b) assist the CC (at the request of the CC) to respond to any request that may be made by EWS or Marcroft to the CC for a variation of or consent under the Undertakings; and
- (c) otherwise assist the CC to prevent EWS or Marcroft taking any action that might adversely affect the divestment of a package suitable to remedy the SLC identified in the report;

and the 'Monitoring Trustee's Functions' shall include the performance of the Primary Functions, the performance of the additional functions in this paragraph 12, and the performance of any other act or task necessary for the performance of those functions of the Monitoring Trustee including the performance of the reporting obligations in paragraph 11.

13. In furtherance of the Monitoring Trustee's Functions, the Monitoring Trustee shall take such steps as it reasonably considers necessary including:

- (a) giving such directions to the officers and staff of EWS or Marcroft, including any person holding such position on a temporary basis, or on secondment, as are reasonably necessary for the fulfilment of the Monitoring Trustee's functions;
- (b) the monitoring of such communications between any of EWS, Marcroft, the Proposed Purchaser and with the wagon maintenance customers identified in the Initial Divestiture Package, including written and electronic communications, telephone conversations and attending such meetings of employees and officers (including board meetings, and meetings of any committee of the board) of EWS or Marcroft as the Monitoring Trustee considers reasonably necessary for the fulfilment of the Monitoring Trustee's functions; and

- (c) complying with such requests as the CC may reasonably make for the purpose of ensuring compliance by EWS and Marcroft with their obligations under or in relation to these directions.
14. If the Monitoring Trustee advises the CC that the Initial Divestiture Package is unlikely to be sold within the Initial Divestiture Period, or if the Initial Divestiture Period expires without agreement by the Proposed Purchaser to acquire the Initial Divestiture Package, then the CC will consult the Monitoring Trustee about the progress of negotiations and, unless satisfied that negotiations will conclude successfully within a further reasonable period, will formally notify EWS of the commencement of the Secondary Divestiture Period.
15. If the Monitoring Trustee advises the CC that EWS cannot procure divestiture of the Secondary Divestiture Package within the Secondary Divestiture Period, either the period may be extended by the CC or the CC may issue a direction to mandate the appointment of an independent divestiture trustee as required by paragraph 8.62 of the report (and in accordance with the procedure provided for in the Final Undertakings).

EWS obligations

16. EWS shall remunerate the Monitoring Trustee, and shall reimburse the Monitoring Trustee in full for all reasonable costs and expenses properly incurred, in accordance with the terms and conditions of the Monitoring Trustee's appointment, provided that such remuneration and reimbursement shall not give rise to any conflict of interest or otherwise impair the ability of the Monitoring Trustee to discharge its functions.
- (a) For the avoidance of doubt such reimbursement shall include the fees and disbursements of such legal or other professional advisers, consultants and assistants as the Monitoring Trustee reasonably considers necessary for the discharge of its functions; and
- (b) any appointment of advisers, consultants or assistants and any individual item of costs or expenses in excess of £1,000.00 shall not be reasonably incurred without the prior written consent (which may be general) of the CC. Where the CC grants the Monitoring Trustee consent to incur any such liability the Monitoring Trustee shall promptly inform EWS.
17. EWS and Marcroft shall comply with the directions of and cooperate fully with, and shall ensure that their employees, officers, advisers and consultants shall comply with the directions of, and cooperate fully with, the Monitoring Trustee in the performance by the Monitoring Trustee of the Monitoring Trustee's functions.
18. Without prejudice to the generality of paragraph 17, that cooperation shall include:
- (a) the grant to the Monitoring Trustee on the date of appointment of all such rights, powers and authorities as are necessary for the performance of the Monitoring Trustee's functions;
- (b) the provision of such facilities as are necessary for the discharge by the Monitoring Trustee of the Monitoring Trustee's functions, including the provision of an office with a workstation, telephone, fax machine and a computer at such premises of the Marcroft business as the Monitoring Trustee may reasonably require; and

- (c) the provision of full and complete access, including access to electronic files, to all personnel, books, records, documents, facilities and information of EWS and Marcroft as the Monitoring Trustee may reasonably require.
- 19. Nothing in the functions of the Monitoring Trustee shall require or entail the disclosure to either the Monitoring Trustee or the CC of information or documents that EWS or Marcroft would be entitled to withhold from the CC on the grounds of legal privilege.
- 20. The Monitoring Trustee should notify the CC immediately on the formation by the Monitoring Trustee of a reasonable suspicion that the Undertakings have been breached, or if the Monitoring Trustee is unable effectively to carry out the Monitoring Trustee's functions. In either situation, the Monitoring Trustee should give reasons and attach any supporting evidence (so far as the Monitoring Trustee is permitted to do so by paragraph 19).
- 21. All communications between the Monitoring Trustee and the CC (including the statements and reports of the Monitoring Trustee) shall be confidential and shall not be disclosed to EWS or Marcroft by the Monitoring Trustee without the express written permission of the CC. In relation to the possibility of disclosure of such communications to persons other than EWS or Marcroft, the CC shall act in accordance with the provisions of Part 9 of the Act. The Monitoring Trustee shall not disclose such communications to third parties.

General

- 22. The Monitoring Trustee shall possess appropriate qualifications and experience to carry out the Monitoring Trustee's functions.
- 23. The Monitoring Trustee shall be independent of EWS and Marcroft and shall have no conflict of interest in relation to the performance of the Monitoring Trustee's functions.
- 24. The remuneration and reimbursement of the Monitoring Trustee shall not impede the independence or effectiveness of the Monitoring Trustee.
- 25. The appointment by EWS of the Monitoring Trustee shall be subject to the approval of the CC as to the identity of the Monitoring Trustee and as to the terms and conditions of the Monitoring Trustee's appointment. The terms of the Monitoring Trustee's appointment shall include:
 - (a) all the provisions necessary to give effect to these directions (including any necessary conditions as to confidentiality and restrictions on future employment);
 - (b) an indemnity by EWS, and Marcroft, by which the Monitoring Trustee and any assistant appointed by the Monitoring Trustee is held harmless against any losses, claims, damages, liabilities or expenses arising out of or in connection with the performance of the Monitoring Trustee's Functions except to the extent that such losses, claims, damages, liabilities or expenses shall be caused by the bad faith or gross negligence of the Monitoring Trustee; and
 - (c) shall provide that the only method of termination of the appointment of the Monitoring Trustee is by EWS acting on the direction, or with the prior written approval, of the CC.
- 26. EWS shall inform the CC as soon as is reasonably practicable and in any event by 29 November 2006 of the identity of the Monitoring Trustee proposed by EWS and

shall provide the CC with draft terms and conditions of appointment at least seven working days prior to the date on which the Monitoring Trustee is proposed to be appointed. On the appointment of the Monitoring Trustee EWS shall provide the CC with a copy of the agreed terms and conditions of appointment.

27. EWS shall not appoint the Monitoring Trustee without the prior written consent of the CC in relation to the identity of the Monitoring Trustee and the terms of appointment.
28. The CC may issue such further directions as it considers necessary to ensure compliance with the Undertakings and the Final Undertakings, including, where the appointment of the Monitoring Trustee pursuant to these directions has been terminated, or where EWS fails to nominate a suitable Monitoring Trustee in accordance with paragraph 26, nomination of a Monitoring Trustee or directions for the appointment of a further Monitoring Trustee, or a hold separate manager.

Interpretation

29. In these directions references to 'the Undertakings' are references to the Interim Undertakings accepted by the CC from EWS on 13 March 2006 or the Final Undertakings that, upon being accepted by the CC, supersede the Interim Undertakings. Terms and expressions defined in the Undertakings shall have the same meaning in these directions, save as the context otherwise requires.
30. For the purposes of these directions the following terms shall mean:

The Act	The Enterprise Act 2002.
Final Undertakings	The final undertakings accepted under section 82 of the Act or, as necessary, Order under section 84 of the Act, put in place to remedy the SLC identified in the Report.
Initial Divestiture Package	The customer contracts, maintenance bases, employees, assets, and sites identified in paragraph 8.59 of the report and detailed in Annex 1 to these Undertakings, or a package similarly composed and approved in writing by the CC.
Initial divestiture period	[✂] from the conclusion of the final Undertakings or, as necessary, Order put in place to remedy the SLC identified in the report.
Monitoring Trustee	A monitoring trustee to be appointed in accordance with the terms of these directions.
Primary Functions	The functions of the Monitoring Trustee set out in paragraphs 2 to 11 of these directions.
Proposed purchaser	[✂]
Secondary Divestiture Package	The package described in paragraph 8.61 of the report.
Secondary divestiture period	[✂] from the cessation of the Initial Divestiture Period.

Details of the Initial Divestiture Package

