IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1427/5/7/21

BETWEEN:

BELLE LINGERIE LIMITED

Claimant

- v -

(1) WACOAL EMEA LTD
(2) WACOAL EUROPE LTD

Defendants

ORDER

UPON the Tribunal's Order made on 14 March 2022, as amended by the Tribunal's Reasoned Order made on 21 June 2022, the Tribunal's Order made by consent on 28 June 2022 and the Tribunal's Reasoned Order made on 28 July 2022

AND UPON reading the application, by letter from the solicitors for the Defendants dated 15 August 2022, for permission for the Defendants' economic expert to adduce a rejoinder report to respond to new matters raised in the reply report of the Claimant's economic expert filed and served on 8 August 2022 (the "Application")

AND UPON the Defendants filing their proposed economic expert's rejoinder report on 16 August 2022 prior to the Tribunal's determination of the Application

AND UPON considering the Claimant's reasons for opposing the Application made by letter from its solicitor on 16 August 2022

IT IS ORDERED THAT:

1. The Defendants' application is dismissed.

2. Costs reserved.

3. Liberty to apply.

REASONS

1. On 14 March 2022, although declining to make an order that these proceedings be subject to the fast-track procedure, the Tribunal gave directions for a trial to take place starting on 15 September 2022. The Tribunal gave permission for expert economic evidence on four specific points, the first two of which were issues of (1) market definition; and (2) the theory of harm in relation to retail price maintenance and horizontal price coordination (including via the minimum retail prices ("MRPs")) and hardcore online restrictions on passive sales in respect of sales of the Defendants' products in the UK/EU/EEA.

2. The directions provided for (1) the filing and service of economic expert reports; (2) the filing and service of reply economic expert reports; (3) a meeting of the economic experts; and (4) the filing of a joint statement of matters agreed and not agreed. Notwithstanding the fact that the issues for economic expert evidence were clearly delineated, there remained a significant difference of opinion between the parties as to the relevant scope and extent of the economic expert evidence. Following a costs and case management hearing, and as part of its ruling on the parties' respective costs budgets ([2022] CAT 24), the Tribunal therefore also directed that a preliminary meeting take place between the experts in order for them to seek to agree a list of the relevant issues that their reports needed to cover under each of the four areas on which permission was granted. The parties' experts met, and agreed the scope of the expert economic evidence ("the Methodology"), and a copy of their note recording this was provided to the Tribunal on 16 June 2022.

3. The directions were varied at the joint request of the parties, so as to provide for sequential reports. The Tribunal ordered on 28 June 2022 that by 4pm on 15 July 2022, the Claimant was to file and serve its expert report; the Defendants would file and serve their report by 4pm on 25 July 2022 (subsequently varied to 26 July 2022) addressing the four points for expert evidence in accordance with the Methodology, and any reply to the Claimant's economic expert report; and the Claimant was to file and serve any reply to the Defendants' economic expert report by 4pm on 5 August 2022

(subsequently varied to 8 August 2022). The economic experts were still to meet by 12 August 2022, and the joint statement was due to be filed by 4pm on 18 August 2022.

4. The Claimant filed Dr Veljanovski's expert report on 15 July 2022; the Defendants filed Mr Noble's expert report and reply to Dr Veljanovski's report on 26 July 2022; and Dr Veljanovski filed his second expert report ("the Reply Report") on 8 August 2022. The experts met by 12 August 2002, and a draft joint statement has been prepared.

5. By letter dated 15 August 2022, the Defendants applied to vary the directions so as to permit them to file and serve a rejoinder expert report which was to address the Claimant's expert's Reply Report, and to extend the time for the experts to meet to discuss their reports to 17 August 2022. The Claimant objects to the order sought. Given the tight timeframe, the fact that both experts had imminent holiday commitments, and the resulting impracticability of the parties being in a position to meet either the date sought by the Defendants for the joint meeting or the date for filing of the joint statement, the Tribunal exercised its case management powers (of its own motion) to extend the date for filing the joint statement until 1 September 2022. However, the issue of whether or not the Defendants ought to be entitled to serve an expert report in rejoinder, or there ought to be another meeting between the experts still needs to be resolved. Nothing in this Reasoned Order regarding the Application prejudges the issues that the Tribunal will determine at the trial in these proceedings.

6. As to this, the Defendants' position is that Dr Veljanovski (the Claimant's expert) has not confined his Reply Report to points of reply to Mr Noble (the Defendants' expert), but has introduced new matters and analysis. The Defendants maintain that Mr Noble must be entitled to respond to Dr Veljanovski's criticisms of his analysis, and to his further new analysis, failing which the experts will be "like ships passing in the night" – a state of affairs that the preliminary meeting and agreed Methodology was intended to avoid. The Defendants have filed with the Tribunal a 20-page second report of Mr Noble ("the Rejoinder") which I have considered in reaching my decision.

7. The Claimant's position is that the Rejoinder is not necessary in the interests of fairness and justice and will only add complication and unnecessary expense; that there is substantively no new matter in Dr Veljanovski's Reply Report, and that granting the Application is inconsistent with the overriding objective.

8. The Defendants have identified the following five areas of "new material and analysis":

   (a) Product market definition;

   (b) Geographic market definition;

   (c) Calculation of market shares;

   (d) The importance of intra-brand competition;

   (e) The alleged "must have" status of Wacoal products.

9. As regards the first point, product market definition, the Defendants submit that in his first report, Dr Veljanovski in essence made a cursory assessment of the extent of the product market and adopted the Claimant's view that it is the market for "luxury branded lingerie and swimwear." In his report, Mr Noble analysed the positioning of Wacoal Group products versus other branded products, so as to assess whether Wacoal products are characterised by a distinguishable luxury positioning. In doing so he conducted an analysis of the average prices of Wacoal bras sold by the Claimant compared to its sales of other brands and concluded that the average selling price was £18; compared prices of Wacoal products on websites generally to those of other brands; analysed evidence from Mintel surveys as to the types of retailers from which consumers have purchased nightwear, loungewear and underwear, and concluded that "Wacoal Group products compete against a large variety of other branded and own-label products that are characterised by a multiplicity of value propositions".

   (a) In his Reply Report, Dr Veljanovski takes issue with the price comparison analysis undertaken by Mr Noble and explains why he considers it to be inappropriate, and in particular asserts that Wacoal brands are sold at prices near or above £30, and some are sold at £50 or above, which he contrasts with brands sold at well below £20 by, for example, supermarkets. He has collected prices posted on Wacoal's own websites and concludes that "contrary to Mr Nobel's price comparison analysis Wacoal brands are not sold at an 'average of £18' but at retail prices of £30 upwards". He refers to a price point of £30 to distinguish between luxury and non-luxury products (a figure derived from a witness

statement of Mrs Dutton, a director of the Claimant, which was filed after Mr Noble's report).

(b) Mr Noble's proposed Rejoinder seeks to explain the purpose behind the analysis of the Claimant's own pricing as being suggestive of "how the Claimant itself considered the price positioning of different products …". As part of this exercise, he has produced a table comparing the average sale price of the Claimant's Wacoal Group products over two periods.

(c) I do not consider that the points Mr Noble seeks to make require evidence in rejoinder. His observations (at paragraphs 2.4 to 2.9 of the proposed Rejoinder) are, strictly speaking, not expert evidence. In so far as he seeks to take issue with Dr Veljanovski on the average selling prices over two periods (paragraphs 2.10 to 2.11), the point can be made (shortly, and not at length) in the experts' joint statement and, if considered necessary, I direct that Table 2.1 may be attached to it. Similarly, the observations Mr Noble makes at paragraphs 2.12 to 2.16 do not require evidence in rejoinder. In particular, in so far as Mr Noble disagrees with the £30 threshold and considers it to be "arbitrary", he does so on the basis of the analysis he has already set out in his first report. There is no need to reproduce the self-same figure taken from his first report (confusingly renumbered) again.

10. Secondly, as regards geographic market definition, in his first report, Dr Veljanovski found that the relevant geographic market was the UK. His view is that the fact that UK based retailers sold focal products outside the UK is not evidence that the relevant geographical market is wider than the UK; that in order for the market to be wider than the UK, the sales of the focal products outside the UK would need to exert a competitive constraint on the retail prices of the products sold in the UK; that there is no evidence that they did so, and that "sales to customers in the US and other countries outside the UK from a UK based retailer which lists on eBay.co.uk took place in the UK for products shipped to these other geographical areas". The Defendants say that this assertion is central to the Claimant's case that the pricing restrictions contained in the relevant policies (which the Defendants maintain only applied to sales in the US and Canada) constituted RPM in the UK, and that the platform bans supported this. This is relevant to the Claimant's "effects" case.

(a) On this issue, Mr Noble, in his first report, conducted an analysis of the retail and wholesale market separately. As to the retail market, he agreed that the UK and US markets are separate markets, but not that sales made from the UK to the USA should be considered as constituting part of the UK market. He considered that they should be regarded as taking place in the US market, and explained why.

(b) In his Reply Report, Dr Veljanovski strongly disagrees with Mr Noble and considers how a geographical market ought to be defined, and explains why he considers Mr Noble's conclusion to be wrong.

(c) The Defendants submit that Dr Veljanovski's analysis in his Reply Report is new, and that Mr Noble must be given the opportunity to respond. In the proposed Rejoinder, Mr Noble explains why he considers Dr Veljanovski's criticisms of his approach are wrong, and why his own approach, as set out in his first report, is the correct one. Again, I do not consider that the points Mr Noble seeks to make require evidence in rejoinder. To the extent that Mr Noble disagrees with Dr Veljanovski, that can be recorded in the joint statement and brief reasons given.

11. Thirdly, as regards the calculation of market shares, the Claimant pleads that the Defendants were "able to leverage market power as the sole UK wholesale distributor of Wacoal Group products". The Defendants complain that Dr Veljanovski "barely considered the question of the parties' market shares on (sic) his first report", and made no calculations for them.

(a) Mr Noble in his first report made an assessment of the parties' market shares for the retail and wholesale market.

(b) The Defendants say that in his Reply Report, Dr Veljanovski commented on Mr Noble's calculations (suggesting that it was not clear to him why he adopted the approach he had), and undertook his own calculations. They complain that he could and should have conducted his own analysis in his first report.

(c) Dr Veljanovski states in his Reply Report that he did not discuss the parties' respective market share analysis because it was not part of the agreed Methodology, and because he formed the view that the data was inadequate to calculate market shares. However, in light of Mr Noble's analysis, he provides comments on Mr Noble's estimates and offers his own, using the same data and method as Mr Noble. In particular, Mr Noble used annual sales data from Mintel and Statista. In making his estimates, Dr Veljanovski applied different assumptions as to the relevant product market in the UK, and drew on an additional piece of data from Statista. He concludes that the market shares are likely to be many orders of magnitude greater than those calculated by Mr Noble.

(d) In the proposed Rejoinder, Mr Noble asserts that he had explained the rationale behind his calculations in his first report – and proceeds to repeat the "key point" from his first report. That does not require evidence in rejoinder. In substance, Mr Noble wishes to make two points in relation to Dr Veljanovski's calculations for the "Retail luxury market": first, in relation to the interpretation of the Statista data, and secondly as to the validity of the "re-scaling factor" applied by Dr Veljanovski. As to the first, Mr Noble expresses his concern as to the use of the Statista data. That seems to me to be a point that can be addressed in the experts' joint statement. As to the second, Mr Noble considers that Dr Veljanovski's analysis is based on an incorrect assumption. Again, that can appropriately be addressed in their joint statement. Mr Noble has prepared a table (Table 4.1) which applies a different "re-scaling factor". If considered necessary, I direct that that table can be attached to the experts' joint statement. Mr Noble also disagrees with Dr Veljanovski's market share calculations in relation to the retail branded luxury sales because he considers the assumptions made to be misleading. Again, the disagreement can be recorded in the experts' joint statement.

12. The fourth issue on which the Defendants wish to adduce evidence in rejoinder relates to the importance of intra-brand competition. In short, the Defendants suggest that Dr Veljanovski's assessment of what he considers to be negative effects on intra-brand competition was more extensive in his Reply Report, and ought to have been in his first report. In the proposed Rejoinder, Mr Noble refers back to what he says in relation to

inter-brand competition in his first report, and his conclusion that the limited market position of Wacoal's products on the UK lingerie and swimwear market excludes the possibility of the alleged anti-competitive conduct having had material negative effects on competition in the relevant market. This is not new evidence. Any area of disagreement with what Dr Veljanovski has said can be referred to in the experts' joint statement.

13. Finally, as regards the alleged "must have" status of Wacoal products, Mr Noble has explained what he understands by the term "must have" and already concluded in his first report that they are not "must have" products. In the proposed Rejoinder, he comments on Mrs Dutton's factual evidence, but reiterates the views expressed in his first report. The assessment of Mrs Dutton's evidence is a matter for the Tribunal. In so far as he repeats what was said in his first report, proposed Rejoinder evidence is unnecessary.

14. In the ordinary course, each party would set out their own case, and the expert reports would be cross-served or exchanged simultaneously. Each party would review the other's position, and then file a reply. Generally, neither party would be able to comment on what the other had said in reply by way of rejoinder evidence. Points of disagreement would be discussed between the experts, and reflected in their joint statement. That is the effect of my decision. Mr Noble had the opportunity to consider what Dr Veljanovski has said, and to reply to it in his first report. Dr Veljanovski has considered Mr Noble's analysis, and replied to it. If there are areas of disagreement, that is what the joint statement is there to identify.

15. Where the areas of disagreement are referred to in the experts' joint statement, those points should be briefly summarised, with the emphasis on brevity. Those points will no doubt be explored in cross-examination in due course. I have indicated that Mr Noble's Tables 2.1 and 4.1 may be appended to the experts' joint statement if considered necessary to explain the disagreement, and because this may assist in the cross-examination process. Otherwise the Defendants' application is dismissed. I make no order in relation to a whether a further meeting must take place. It may be that it is unnecessary. However, if either expert considers it would be useful to meet before finalising their joint statement, I expect the parties to cooperate and arrange for it to take place in good time before the joint statement is finalised.

Bridget Lucas QC Made: 25 August 2022

Chair of the Competition Appeal Tribunal Drawn: 25 August 2022