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 considering the Claimant's Request for Information dated 13 August 2022 (the "RFI") and the Defendants' holding response by letter from their solicitors dated 16 August 2022

AND UPON considering the Claimant's application filed on 19 August 2022 seeking an order in relation to items on an enclosed colour-coded schedule which indicated the priority of the Claimant's requests (the "RFI Schedule") and for an order summoning two individuals to give witness evidence and provide relevant documents at trial (the "Application")

AND UPON considering the Defendants' response to the Application filed on 23 August 2022 and the Claimant's reply and an updated RFI Schedule (the "Updated RFI Schedule") filed on 25 August 2022

IT IS ORDERED THAT:

1. The Claimant's application for an order requiring the Defendants to notify and make arrangements for Mr Nicholls and Ms Chandler to attend and give evidence at trial is refused.

2. By 4pm on 7 September 2022 the Defendants shall search (by the keywords agreed by the parties) and provide disclosure of all documents of which Mr Nicholls (including to and/or from "policy.admin@eveden.us" and "policy admin UK") and Ms Chandler are custodians (insofar as these have not previously been provided to the Claimant).

3. The Defendants shall by 4pm on 5 September 2022: (a) provide to the Claimant the further information and/ or clarification, and (b) conduct further searches by keyword and provide further disclosure in respect of all points identified in the RFI Schedule provided to the parties by the Tribunal.

4. The Defendants shall provide a signed witness statement by 4pm on 7 September 2022 confirming that the searches required by paragraphs 2 and 3 of this order have been carried out, and that disclosure of all disclosable documents identified by those searches has been made.

5. Costs Reserved.

6. Liberty to apply.

REASONS

1. In very brief summary, in these proceedings the Claimant seeks loss and damage alleged to have been caused to it as a result of what the Claimant maintains were the Defendants' unlawful agreements and/or concerted practices in relation to the supply of lingerie in the UK. Until 27 September 2021, the Claimant was a long-standing online retailer of the Defendants' lingerie, nightwear and swimwear products ("Wacoal Group Products"). It is alleged that there were a series of resale pricing and online sales policies implemented in a selective and discriminatory fashion by the Defendants which had the object and/or effect of restricting competition pursuant to section 2 of the Competition Act 1998 and, until 31 December 2020, Article 101 of the Treaty on the Functioning of the European Union.

2. By letter dated 19 August 2022 the Claimant applied for an order (i) pursuant to Rule 53(2)(d) and Rule 53(2)(l) of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") for clarification and additional information of matters in dispute in

these proceedings, and for further disclosure;[1] and (ii) pursuant to Rule 22 of the Tribunal Rules for an order summoning two former employees of the First Defendant, Mr Simon Nicholls and Ms Caroline Chandler, to give evidence and provide relevant documents at trial.[2]

3. The Phase 1 trial is listed to commence on 15 September 2022 with a time estimate of five days. Whilst the Tribunal declined to make an order that these proceedings be subject to the fast-track procedure the hearing is nevertheless taking place just over six months after the first case management conference took place. The Tribunal also made a costs management order and has approved costs budgets for both sides. It is important, as both sides acknowledge that this case proceeds on a basis that is proportionate both as to the issues in dispute and costs.

The Application for Clarification and Additional Information/Disclosure

4. On 13 August 2022, the Claimant sent a request for further information and clarification ("RFI") to the Defendants. The requests fall into two categories: (i) requests arising from the Defendants' witness statements; and (ii) requests arising from the Defendants' disclosure. The requests themselves (under both categories) are hybrid in nature, comprising numerous requests for information, and for documents, which have not been disclosed, to be provided.

5. The Defendants responded on 16 August 2022, objecting to the timing and scope of the RFI, and refusing to conduct any further document searches or to disclose any further documents. The Defendants considered the Claimant's RFI to be a fishing expedition. As regards the requests for clarification or further information, the Defendants indicated that they would "endeavour to obtain further information in order to respond to the questions asking for information and/or explanations. … However, whether further information and, if so, what further information, can be provided and the time period in which this can be achieved is uncertain at present."

6. The RFI made 61 "headline" requests - many of which were made up of numerous parts and requests for documentation - and extended to 20 pages. The Claimant has since

[1] Claimant Submissions, paragraph 1.
[2] Claimant Submissions, paragraph 5.

produced a RFI Schedule containing summaries of each request, colour-coded to denote those of "high priority", "medium priority", "lower priority – Claimant reserves the right to seek adverse inferences if not provided", and "deprioritised – right to seek adverse inferences". The Claimant seeks a response to high and medium priority requests by 2 September 2022 on a rolling basis, prioritising those categorised as "high". The Claimant seeks answers to the remaining requests by 6 September 2022. The Claimant submits that it urgently requires the responses because it needs them to prepare for trial.

7. The Defendants commented on the RFI Schedule, and the Claimant has provided an Updated RFI Schedule: now extending to 60 pages. The result of this exercise is that 23 requests are now categorised as high priority; 6 as medium; 8 as low and 24 as "deprioritised". In relation to the latter category, it is not clear what order is now being sought. Some are described as "no longer pursued". Others are said to duplicate or overlap with requests made elsewhere but suggest some form of information or disclosure is still required. The document is now a complex document, containing numerous internal cross-references, and in some respects has departed somewhat from the original RFI.

8. It is impossible in this Reasoned Order to refer to each and every request. The Tribunal will provide to the parties its version of the RFI Schedule, with the Tribunal's decision against each request (the "Tribunal's RFI Schedule"). This Reasoned Order will address the approach that has been applied.

The Law

9. Pursuant to Rule 53 of the Tribunal Rules, the Tribunal may at any time at the request of a party or of its own motion give such directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost. These include giving directions requiring clarification or additional information in relation to any matter in dispute, or for disclosure of documents.

10. CPR 18 is in similar terms and makes clear that the Court may make such an order even though the matter in dispute is not contained in a statement of case. Note 18.1.2 of the 2022 White Book states that "Nonetheless, a request for further information or

clarification should be concise and strictly confined "to matters which are reasonably necessary and proportionate" to enable the party seeking clarification or information "to prepare his own case or to understand the case he has to meet" … It should not be treated as an opportunity to attempt pre-emptive cross-examination on paper."

Timing

11. As regards the timing of the RFI, the Defendants submit that it is simply too late and for that reason alone I should decline to make the order sought. In short, the Defendants say that the RFI was served one month before the commencement of the Phase 1 trial, during the summer vacation, and there is no good reason for the delay given that the Defendants provided disclosure by 31 May 2022 and served their witness statements on 14 and 30 June 2022; it would be extraordinarily burdensome and unreasonable to be expected to comply with such a request in the limited time proposed by the Claimant, even if the trial were not imminent. The making of the order would cause the Defendants considerable prejudice, by diverting its legal team, senior management and employees from preparations from trial (now three weeks away) and involve considerable and disproportionate costs above those included in its approved costs budget.

12. The Defendants maintain that they have complied with their disclosure obligations, and that if the Claimant had any complaint, it should have raised it promptly.

13. As regards the requests for further information, the Defendants submit that the requests are extensive and not concise; will require them to contact numerous current and former employees and await responses from them. Former employees are under no obligation to assist, and the difficulties are compounded by the holiday period. The Defendants also do not accept that the requests are reasonable or proportionate to enable the Claimant to prepare its own case or understand the case it has to meet. The Defendants submit that the RFI is a pre-emptive attempt to undertake extensive cross-examination on paper in advance of trial.

14. The Claimant, on the other hand, submits that the Defendants' complaints about delay are without merit. The Claimant made its requests once it had had the opportunity to consider the entirety of the disclosure provided by the Defendants (which was three

weeks late); the Claimant has limited financial resources, and does not have a large legal team; there have been knock-on delays caused by the Defendants' late disclosure, which has had implications for the Claimant's ability to meet other sequential trial deadlines deferred as a consequence, and to prepare for trial; the Claimant has had to divert its resources to preparing its industry expert evidence, its economic evidence, and its reply witness statements in the time since disclosure was provided.

15. The Defendants do not accept that the Claimant's resources are as limited as it suggests and submit that the Claimant could and should have undertaken a full and timely review of both the Defendants' disclosure and their witness evidence. Neither the disclosure (amounting to 478 documents: approximately 1,908 pages) or witness statements were extensive.

16. The timing of the application is a relevant, but not determinative factor. The tight timetable in these proceedings inevitably presents challenges. Whatever the reason for that may be, I am not prepared to refuse to make any order solely on the basis that this application is made late in the day, and only shortly before trial. I must consider whether it is necessary to make an order to ensure that the proceedings are dealt with justly and at proportionate cost. In considering what is just and proportionate a relevant factor will be the imminent trial date and the issues (for example in terms of resources) that may give rise to.

Further Information and Clarification in relation to Witness Statements

17. The Claimant seeks further information in relation to various statements made in Mr Cooper's first witness statement and the first witness statement of Ms Garside. It has not been suggested that the Claimant is unable to understand the Defence, or to pursue its claim on the basis of the statements of case. Whilst further information and clarification may be sought (and ordered) of any matter in dispute in the proceedings - not just in relation issues raised in statements of case but including witness statements – I do not think it reasonable or proportionate in this case to make an order requiring that the Defendants answer in writing before the trial, questions arising from the witness statements.

18. That is particularly so where the questions asked may (and no doubt will) be asked of witnesses who are scheduled to appear before the Tribunal. I do not accept the Claimant's proposition that it will save time if the matters are dealt with in writing, as this may avoid the need for some cross-examination. Responding to requests will take the Defendants time, during a critical time of preparation for the hearing which is imminent. In any event, pre-empting cross-examination is not a reason for making an order for further information and clarification.

19. I also do not consider that it is right to order the Defendants to provide information which (for example, in relation to RFI request 1) is acknowledged by the Claimant to be duplicative of information sought elsewhere in the RFI, or to require the Defendants to attempt to ascertain from the RFI (which is undoubtedly a "dense" document), precisely what is and what is not duplicative.

20. In a number of respects, the Claimant's requests go significantly further than is appropriate, given the terms of the witness statement. So, for example, in his statement, Mr Cooper stated "Wacoal Europe received complaints about other retailers discounting against RRPs all the time. This included complaints from Belle Lingerie about other retailers' prices as well as complaints from other retailers about Belle Lingerie". The Claimant asks the Defendants, amongst other things, to "identify and provide copies of the emails to which Mr Cooper here refers …" yet Mr Cooper does not refer to any email. The Claimant also asks the Defendants to "explain what Wacoal did in response to such complaints". Yet Mr Cooper's statement, at least in this sentence, is not referring to anything done in response. As I have indicated, this request has been "deprioritised" as being duplicative of others. That simply underlines the general and broad scope of the request, which is not warranted by the words used by Mr Cooper in his witness statement.

21. The real nub of the Claimant's complaint is that the Defendants' disclosure suggests that documentation is missing which the Claimant believes must have existed. I address the issue of further disclosure below. My approach to the RFI in relation to the issues arising from the witness statements is as follows:

    (a) As regards Mr Cooper (RFI requests 1 to 3) therefore, I will order the Defendants to search for and provide disclosure of the documents sought in

request 2 (guidance given to teams in relation to retailers deviating from the RRP), and any automated emails to UK retailers that were forwarded to the Defendants as sought in RFI request 3 and as set out in further detail in the Tribunal's RFI Schedule. Otherwise, it seems to me that the requests do not arise out of Mr Cooper's statement at all, are duplicative of other requests made, or should be raised with him in cross-examination.

(b) As regards Ms Garside (RFI requests 4 to 9), I will order that the Defendants search for and provide further disclosure in relation to contemporaneous documentation relating to the decision to stop supplying the Claimant with Wacoal and B'Tempt'd brands in March 2019, and the subsequent decisions to stop supplying the Claimant with full price ranges in September 2019 and redundant stock in September 2021 (RFI request 4). I will also order that the Defendants do the same in relation to the Defendants' consideration and communications relating to the Claimant's "out-of-date imagery, … product descriptions, and …. general presentation of brands and products" (RFI request 5(a)).

22. If the searches I have directed should be undertaken have (as the Defendants maintain) already been done in a way that is likely to disclose such documents, and there no further documents have been identified, then that can be confirmed in a witness statement to be provided by the Defendants, which I will come to below.

Requests for Further Disclosure

23. The Claimant's complaints about disclosure relate in particular to the fact that neither Mr Nicholls nor Ms Chandler were specified as relevant custodians by the Defendants in their electronic disclosure questionnaire, and that their documents and emails have not been searched.

24. As regards Mr Nicholls, he was a main board director of the First Defendant. When he resigned he held the role of Customer Services and Logistics Director. There has been a misunderstanding as to when he resigned: whether it was 31 May 2022, or 31 May 2019 but it has been confirmed that it was the latter.

25. The Claimant maintains that he was a "key decision maker", with responsibility for key policies and plans. The Claimants say that he will be able to provide insight into how the relevant policies and plans worked, which other witnesses have said that "they do not recall". The Claimant points out that he appears to have been the internal coordinator (also known as "Policy Admin") in charge of the application and enforcement of the relevant plans and policies. The Claimant has identified various emails in disclosure that refer either to him or to "PolicyAdmin@eveden.com". It maintains that Mr Nicholls is a highly significant witness.

26. The Defendants deny that he was involved in the "design" or formulation of the relevant policies, but accept he was responsible for the "administration" of one of the key policies in dispute, the Eveden VAP, in the UK. The Defendants say that he was not responsible for the development of the VAPs or for decisions taken regarding their application to or enforcement against specific retailers. Mr Nicholls' role was "a functional one" not a commercial one. The Defendants say that his evidence would be irrelevant to the Tribunal.

27. As regards Ms Chandler, she was an external para-legal support consultant in the period January to July 2019.

28. The Claimant maintains that she was overseeing the Defendants' "Brand Management Plan", and that she "appears to have had a key role in its roll-out". It submits that she "was clearly involved in discussions which must have taken place" relating to correspondence received from the Claimant's solicitor and was involved in the development of the Brand Management Plan.

29. The Defendants say that Ms Chandler was only employed for a short period to assist with a number of matters including the reorganisation of distribution arrangements and development of a "brand management plan. This included liaising with external lawyers. She had no involvement at all in the application or enforcement of the VAPs. She was employed in an administrative role and had no management responsibilities or involvement in the taking of decisions on commercial matters.

30. I will return to the issue of whether Mr Nicholls or Ms Chandler should be summoned to appear as witnesses below. There is a separate point as to whether or not their

documents ought to be searched as relevant custodians for the purposes of disclosure. The Defendants suggest that their proposed custodians were agreed by the Claimant.[3] However, the Claimant says that there was an information asymmetry, and that the potential significance of these individuals was not appreciated by the Claimant at that time. I accept that submission.

31. I also accept that Mr Nicholls appears to be a custodian of documents that may be relevant to this dispute. The Defendants' distinction between being responsible for the administration of the Eveden VAP in a functional and not a commercial capacity is somewhat opaque. Further, the Claimant has identified a number of examples of emails in which Mr Nicholls was provided with relevant policy documents and he appears to have been involved with their implementation. The position as regards Ms Chandler is less clear. The Claimant has referred to only two emails: in the first, Ms Lythgoe forwards her (without comment) a copy of the Eveden VAP, and in the second, she is forwarded (again without comment) an email from the Claimant relating to trading on Ebay.com regarding sales in the US.

32. The Defendants object to providing further disclosure or running further keyword searches. They refer to the decision in *Sportradar AG and another v Football DataCo Limited and others* [2022] CAT 37 ("*Sportradar*") at [7]-[9], [11] and [13], and in particular, to the President's statements that there are inherent difficulties in any process of electronic disclosure and it will never be "perfect"; that "it will take a great deal to persuade this Tribunal to conduct a re-run of [an electronic disclosure] exercise" which would be both "expensive and time consuming"; and that:

> "The fact is that when a process, in this case done under the close supervision of the Tribunal and the Court, has been completed, it may well be, and almost certainly will be, that there are gaps because the search process, with hindsight, could have been differently done. In such circumstances, absent the exceptional case, this Tribunal and Court must make do with what has been produced".

However, that case was one in which disclosure had a "long history", in which a number of issues had arisen in relation to disclosure, and in relation to which the Tribunal had

[3] Defendants' Submissions, paragraph 50.

taken considerable time and effort to set out a series of issues which were debated between the parties, and any dispute determined by the Tribunal. This is not such a case.

33. In this case, the parties reached agreement as to the scope of disclosure between themselves. The Claimant now suggests that they were unaware of potentially relevant custodians. It may be late in the day, but this is just the sort of issue that the Tribunal might have had to decide in the process of disclosure taking place. Further, the President noted at [8] that: "Self-evidently, it is important that the process of review – in particular the electronic sift – is done appropriately from the beginning". If a potentially relevant custodian is excluded from the search there is nothing in *Sportradar* that suggests a further search, specifically to address that problem, would be inappropriate. It is not the same as ordering a re-run of the process.

34. The Defendants submit that they have undertaken, at considerable expense, a large, time-consuming and cumbersome electronic disclosure exercise, which involved collecting 3.5 million documents from their servers, and 385,000 electronic files were subjected to keyword searches. The incurred costs of the third-party e-disclosure platform provider, Rational Enterprise, alone are over £113,000, and that does not include legal costs or the costs of management time. The Defendants maintain that they have complied with their obligations on disclosure, and that if some documents appear to be missing that is because despite extensive searches, they have not been identified. That may be right, as regards the documents of the custodians that they searched, but takes us no further forward as regards Mr Nicholls and Ms Chandler. If they have, in fact, searched Mr Nicholls and Ms Chandler's relevant documents, then they can simply say so in the witness statement I will direct should be provided.

35. The Defendants say that it would be disproportionate to be required to undertake further searches, and it would cause prejudice. Compliance would require "extensive additional searches to be undertaken at considerable and disproportionate expense", and that it is "unlikely that the Defendants could complete any such further searches in the limited time proposed by the Claimant's draft order or even before trial".[4] The Defendants have yet to obtain an estimate from their e-disclosure provider of the likely costs, but suggest that the existing total provide an indication of likely future costs. I do not see how that

[4] Defendants' Submissions paragraph [50].

is necessarily the case. The Defendants also say that they would need to re-engage Rational Enterprise because the database has now been archived (to save "up to £17,000 per month" storage costs). If searches were to be undertaken against existing identified custodians, that will take 48 to 72 hours. If searches were required against new custodians, it would take 48 to 72 hours for data to be collected from the Defendants' servers and a further 48 hours for it to be processed by Rational Enterprise. It would take at least one week to complete these steps. Only then can keyword searching be undertaken, before documents could be identified for review, and subsequent disclosure to the Claimant.

36. Balancing the interests of justice and proportionality, I consider that a search of Mr Nicholls and Ms Chandler's documents should be undertaken. As I have indicated, the position as regards Ms Chandler is not as clear as Mr Nicholls. However, she was only involved for a period of less than six months, and a search ought not to be onerous. The search should be by reference to the keywords the parties have already agreed. As regards the points made by the Defendants on the time and potential cost involved, it was the Defendants' decision to archive documentation in the run up to this trial and run the risk that any further request for disclosure would have the consequences they suggest arise. Proportionality is one factor, but I must also have regard to what is required for this case to be determined justly. I consider that the interests of justice require these searches to be undertaken.

37. Turning then to the Claimant's requests for further searches for specific documents referred to in the RFI, I will direct that the Defendants conduct some limited further searches, and provide limited further information. These are set out in the Tribunal's RFI Schedule. If the Defendants have already conducted searches for the documents identified by me on the Tribunal's RFI Schedule as being documents that ought to be disclosed and no further documents have been identified, that can be confirmed in a witness statement. That witness statement should also address the searches conducted as regards the documents sought in RFI requests 48; 49 and 50. If convenient, the confirmation sought can be provided by adding a column to the Tribunal's RFI Schedule, verified by a witness statement.

38. This seems to me to balance the interests of justice as between the two parties, and is proportionate in terms of cost, and given the limited time before the Phase 1 trial.

Witness Summons

39. The Claimant's witness summons applications are made "provisionally".[5] It is unclear what the Claimant means by this, or what relief it really seeks. The order sought by the Claimant is not that the Tribunal issue a summons. The Claimant's application does not clearly address the requirements of Rule 22, and (for example) makes no proposals for the payment of either Mr Nicholls or Ms Chandler (as required by Rule 22(3)(b)). The Claimant's application is for an order that the Defendants notify and make all arrangements for Mr Nicholls and Ms Chandler to attend trial to give evidence, and confirm that they have included them as custodians in their disclosure searches, or if not, provide all documents relating to them. Despite the suggestion in written submissions that the Claimant requires Mr Nicholls and Ms Chandler to produce documents at trial, that is not sought in the draft order. Nor would it be sensible to make such an order in light of the fact that they both left the Defendants over three years ago, and it would be unlikely that they hold documents relating to the Defendants' affairs. In any event, I have now made an order for disclosure against the Defendants in this regard.

40. In its written submissions, the Claimant requests that the Defendants "confirm whether Mr Nicholls … [and] Ms Chandler [were] invited to provide evidence in these proceedings". The Defendants have now confirmed that they do not intend to call either of them as witnesses. I cannot force the Defendants to do so, which appears to be what is envisaged in the Claimant's draft order.

41. In any event, I am not prepared to accede to an application that the Tribunal issues a witness summons (if that is what is intended by the Claimant) on a provisional basis. The provisional nature of the application is underlined from the fact that the Claimant "reserves the right to request the Tribunal to draw adverse inferences" should the Defendants refuse to call Mr Nicholls and Ms Chandler as witnesses.[6]

42. I have made an order for disclosure in relation to documents of which Mr Nicholls and Ms Chandler were custodians. If, having reviewed the documents produced and the

[5] Claimant Submissions, paragraph 23.
[6] Claimant Submissions, paragraph 26.

witness statement from the Defendants relating to the searches conducted and the results, the Claimant wishes to apply for a witness summons it may do so, and it will be dealt with expeditiously. The trial is listed to conclude on 21 September 2022, and if necessary and proportionate (and I emphasise that this must be shown to be the case) such evidence could be accommodated.

Bridget Lucas QC Made: 26 August 2022
Chair of the Competition Appeal Tribunal Drawn: 26 August 2022