IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1697/5/7/24(T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 26 June 2025

Before:

Andrew Lenon KC
Rosalind Kellaway
James Wolffe KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Yew Freight Trading Limited

Claimant

- V -

Puro Ventures Limited

Defendant

A P P E A R AN C E S

Julian Gregory on behalf of Yew Freight Trading Limited (Instructed by Nexa Law)

Alan Bates on behalf of Puro Ventures Limited (Instructed by IBB Law)

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:
ukclient@epiqglobal.co.uk

Thursday, 26 June 2025

(10.30 am)

THE CHAIR: I'm going to start with the customary warning. Some of you are joining us via live stream on our website. An official recording is being made and an authorised transcript will be produced but it's strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court.

Thank you. Good morning, Mr Gregory.

Submissions by MR GREGORY

MR GREGORY: Members of the tribunal, good morning. I'm here representing the claimant, Yew Freight; Mr Bates is here representing the defendant, Puro Ventures. Just to check the materials, we should have a hearing bundle and electronic authority bundle and a table that was sent in yesterday summarising areas of agreement and disagreement for disclosure.

THE CHAIR: Okay. I don't have a hard copy of that. We're working ...

MR GREGORY: If we need it, we can get you some hard copies.

THE CHAIR: All right. Mr Wolffe and I are working off the electronic bundles; Ms Kellaway's with the hard copy.

MR GREGORY: You'll have seen the bundle contains standard pleadings, but also documents in which the parties have set out their case management proposals. Yew Freight's application for its response and a document we've referred to as a procedural reply. The agenda is at hearing bundle tab 8, page 3, and I'd be grateful to just turn that up.

Starting with the good news, item 11, which was a minor cost dispute, has been agreed so that's disappeared. Further good news is the first two items on the agenda

are agreed as between the parties, so we're agreed that the proceedings should be treated as proceedings in England and Wales, which is where both parties are based; and we are agreed that there should be a split trial with some issues at least, in particular causation and quantum, left over to trial 2. If the tribunal is content with those two points, I can move on to the other issues which are contested.

THE CHAIR: Yes.

MR GREGORY: As we explained in our skeleton, the central two issues are the precise split of issues as between trial 1 and trial 2, and whether and to what extent expert economic evidence should be permitted in relation to whether the defendant's restrictions on passive sales have the object of preventing competition.

The way in which you determine those two central issues will have knock-on consequences for the other items on the agenda, including hearing date and timetable, the appropriate level of cost caps, and so on. So, I'm obviously in your hands, but my proposal is that we deal with those two central issues first, perhaps over the course of the morning if necessary, and then we sweep up the other issues afterwards once the broad outlines of the proceedings have been identified.

Just before I start on those central issues, I would just like to give you a quick overview of where we are on the other issues, partly just to reassure you on timing because I don't think those other issues will take particularly long.

As I said, on disclosure, there is a substantial amount of agreement in relation to what should be disclosed. The parties have agreed that it's sensible for disclosure to take place in a single tranche, covering all the issues in the proceedings, including in relation to quantum. That's mainly for efficiency reasons, but it's also possible that early disclosure of material in relation to quantum could facilitate settlement discussions. I think that the remaining disclosure issues will only take a few minutes to resolve.

In terms of factual witness evidence, agenda item 5, in relation to issues of liability, Yew Freight anticipates calling one or two factual witnesses, Puro Ventures two.

In relation to agenda items 7 and 8, hearing date and timetable, Puro has proposed a time for trial in May to July next year, essentially a year away. That proposal assumes there will be expert economic evidence that is built into the timetable. If there is not, we think it should be possible to have a hearing before the end of the year, which is what will be necessary if trial 1 is to be allocated to the fast track.

The main challenge is Puro says it needs until mid-September to produce disclosure. We can obviously talk about why that is and whether that amount of time is really necessary, but even if that is the case, we think it should be possible to have a hearing in, say, December, subject to the Tribunal's availability.

Item 9, cost caps. Puro's position is that the parties should be able to recover in full their estimated cost budgets. If trial 1 was to be as broad as Puro is suggesting and expert evidence permitted, that would involve Yew Freight being liable for more than three quarters of a million in costs in circumstances where it only has 135,000 in current assets, which is plainly not workable.

So, as well as proposing a more focused and limited trial 1, Yew Freight is also proposing much lower cost caps, taking into account its ability to pay. In general litigation, the imposition of cost caps which would not allow a successful party to recover all or a substantial proportion of its costs would be unusual, but it is an element of the fast track regime that such cost caps may be imposed in these cases and I will come on to the sort of cost caps that have been imposed in similar cases such as this.

THE CHAIR: Can you just help me as to the nature of the issue on expert evidence. As I understood your client's position, it's that expert evidence is not necessary for the trial 1 you propose?

MR GREGORY: Yes. We are proposing a trial 1 with a primary focus of which is the

object issue and we say expert evidence is not required for that.

THE CHAIR: You say it's not required; if the defendant wishes to adduce expert evidence, presumably you'd have no objection to that except as far as the recoverability of costs is concerned?

MR GREGORY: We would have some objection. Obviously, it would be possible to allow them to adduce expert evidence on the basis it cannot recover any of the costs, that would alleviate the costs points. But that would create the potential for an uneven playing field. As I will come on to, under the test for the admission of expert evidence, you have to ask two questions. First of all, is the evidence necessary to determine an issue? If it's necessary, you should admit it. If it's not necessary, but it could be relevant, then you take into account a broader range of considerations, the governing principles in relation to proportionality and so on. But if you were to permit the defendant to adduce expert evidence which you would have decided is relevant to the object issue, in circumstances where Yew Freight would be unable to adduce equivalent evidence in response, that would create a risk of an uneven playing field.

THE CHAIR: But you say it's not relevant?

MR GREGORY: Yes, and I will take you through the object case law and the nature of the defendant's justification defence to explain that position.

THE CHAIR: Well, if you're right on that, then ...

MR GREGORY: Yes, I'm not sure if there could be any basis for permitting expert evidence, which is not relevant to an issue, particularly given it is estimated to cost several hundred thousand pounds.

On fast track allocation, which is issue 10, it's common ground that you could impose cost caps and order a relatively accelerated timetable under your general case management powers. So, in a sense, the application for the fast track is not critical. However, we have applied to have trial 1 allocated to fast track, and contrary to the

suggestion in Puro's skeleton, we do maintain that application.

We say that if you accept our submissions as to the scope of trial 1, then it satisfies the criteria for fast track allocation and it should be so allocated.

Among other things, claimants - small businesses, individuals - who are considering bringing competition claims look to the fast track cases for guidance as to the way in which their case would be managed. So if the tribunal is satisfied that it does satisfy fast track requirements, we would ask the tribunal should so allocate it so it falls into the class of cases which people look to for guidance.

MR WOLFFE: Am I right that if it's a fast track case, we would be allocating the whole proceedings to the fast track? It really turns on the phrase particular proceedings.

MR GREGORY: No. In fact, the approach, if you wanted to do that, is covered in our skeleton. Turn to page 18 of our skeleton and just read paragraph 61, including the two subparagraphs. This is intended to be a concise summary of what happens in fast track cases.

THE CHAIR: Sorry, paragraph?

MR GREGORY: Sixty-one, it's on page 18. (Pause)

MR WOLFFE: So, in other words, we'd allocate the whole case to the fast track but it would be open to a party or the tribunal to remove it from the fast track subsequently if that seemed sensible?

MR GREGORY: Well, I think it's obviously in the tribunal's hands once you've heard submissions. What we've applied for is to have our trial 1 allocated to the fast track, and you can see from the summary that that was what was done in the Up and Running case. In both cases, some issues were held back and were not determined at the first trial. In Socrates, the former president, Mr Justice Roth, allocated the whole proceedings to the fast track, and in Up and Running, Mr Justice Tidswell only allocated trial 1 to the fast track, so there's a difference in

approach as between the cases.

I think it makes sense, if you accept our submissions on the scope of trial 1, for trial 1 to be allocated to fast track. What would then happen is the issues in trial 1 would be determined and, if necessary, we will come back to the tribunal to discuss how to resolve the remaining issues in the case - and at that point a separate decision could be taken as to whether to allocate a trial to determine the remaining issues for the fast track or not.

With that overview of the other issues out of the way, I propose to return to the central issues on which your case management decisions will turn. That is the precise split of the issues as between trial 1 and trial 2, and the question of whether expert economic evidence should be permitted in relation to the object issue.

Just in terms of a roadmap, I'm going to start with an introduction that sets out our case on those issues in a nutshell without getting into sort of detailed arguments about the authorities. Then I will take you through some of the relevant law, including the authorities on the nature of the object test, which is a little bit involved; the way in which competition law has treated restrictions on passive sales; the test for the granting of permission for expert evidence -- and I'll take you through the essence of Puro's case on justification and what its expert is proposing to adduce by way of expert evidence in relation to the object test.

In terms of the overview, I'm going to assume, if I may, that you are broadly familiar with the background facts and not take too long on them. A few key points. Puro supplies same-day courier services. Some of its competitors are larger companies that have national networks. It competes through a franchise model under which its franchisees, which it refers to as branch operators, supply courier services under Puro's Speedy Freight brand, and franchisees are allocated exclusive territories in which they're supposed to market for Speedy Freight services.

Just for your note, the practicalities of how this works are summarised at paragraph 17 of the defence. To give you the reference, it's the hearing bundle tab C, page 268 in paragraphs 9 to 13. A few key points: In terms of the formal contractual arrangements, the end customer contracts with Puro, rather than with the franchisee. As a matter of contract, franchisees provide their services to Puro as subcontractors.

However, in terms of individual courier jobs, the franchisees are in practice responsible for all of the key steps, including providing or arranging the courier service itself and setting the price. Customers get in touch with the franchisees, and franchisees deal with the customers throughout the job. The franchisees have discretion as to the price that they quote for a job. The price must obviously cover: the cost of providing the courier services; Puro's service fee, which is said to be generally 12 per cent of the total price; and the franchisee's own costs and profits.

The courier service may be provided either by the franchisee itself, using its own vehicles and staff, or it can book a third-party courier, using a courier booking platform. The customer pays the price to Puro, which then pays the money for the courier services to the courier - the franchisee or the third party - and pays the remaining amount, having retained its own service fee, to the franchisee.

For the purpose of the competition law analysis, I submit there are two key points. First, Puro is not attempting to argue that franchisees are simply acting as agents for it, and that as a result there's no vertical relationship between the parties. It's accepted that they are acting as economic undertakings in their own right, and that there is a vertical arrangement between Puro and franchisees. The franchisees make considerable investments in their own premises and staff, and in some cases maintain their own vehicles.

Second, it's common ground the franchisees are responsible for setting the prices which are quoted to customers. I will come on to this, but in principle it would be

possible for customers, subject to Puro's various policies, to shop around and get different quotes from these franchisees.

I'm now going to turn to the respective provisions. It's trite to say that competition law is concerned with how the arrangements operate as a whole, and not simply with the formal written terms. So if we get to trial, part of the case will concern the way in which the written agreements have been interpreted and enforced by Puro. But somewhat unusually, Puro has in fact committed to paper its passive sales restrictions and their rationale. It did that in particular in out-of-area policies which it produced and circulated to franchisees in 2020 and 2023.

The 2020 policy - I'd be grateful if you could turn it up, it's hearing bundle tab C, page 239. At the top of the page, I'd be grateful if you could read the paragraph under "Introduction". FDM is franchise development manager. Halfway down the page, if you could read the paragraphs under, "Why is it important", in particular the first sentence of both of those two paragraphs. So pausing there, on its face that appears to be an explicit admission, or statement, by Puro that its passive sales restrictions are designed to limit price competition between franchisees in order to maintain price, and therefore revenue, levels. The policy explains that each franchisee is allocated certain postcodes as a territory, and that customers could be allocated to franchisees based on the postcode of the person who's making the booking.

I'd be grateful if you could turn over the page to page 240. There's a diagram there that sets out the process to be followed when a franchisee is contacted by a customer. In particular:

"Is the booking for an existing account of yours?"

"No."

"Is the booking being made in your territory?"

"No."

"Is the booking being made in another franchise territory?"

"Yes."

"Pass to that office."

So the franchisee has been told to direct any customers who contact them - passively or actively - to the franchisee in their area.

If you look over the page to page 241, in the middle of the page, there's a section entitled, "Repercussions for anybody caught trading out of area". I'd be grateful if you could read that section. (Pause)

So it had had an out of area trading policy previously. It just hadn't been written down in a document like this before in quite the same way. It seems that Puro identified a number of franchisees who were not complying with its out-of-area policies, and therefore took a number of steps to enforce them more effectively. That involved committing the policy to writing, in this document, and also offering an amnesty under which franchisees could admit to trading with customers outside their allocated territory and have them transferred to the correct franchisee without suffering financial penalties. Although you can see there is now an enforcement regime with financial penalties attached to it going forward.

If you could turn over the page to page 242. This is the 2023 updated policy. Again, if you could just read the first sentence under the heading "Introduction" at the top. So you can see that the fundamental principle has been reworded. It refers to exclusive active marketing within allocation territories. There is a heading just above halfway down, "Change to UK Competition Law - Background", referring to the introduction in the UK of the vertical agreement block exemption order, VABEO.

It is acknowledged that one of the general core principles of VABEO is that businesses must be able to respond to passive sales enquiries, regardless of the customer's location, and that is true. But the VABEO did not change the law in this respect. As

I will show you, the VABEO was simply a post-Brexit enactment in the UK that ported across into UK law the same approach that had been in place for several decades under EU block exemptions which had operated in the UK prior to Brexit. It's possible, I suppose, that the introduction of the VABEO prompted Puro and its legal advisors to review its arrangements.

Then there's a section at the bottom, headed "Record keeping". If you could just read the two short paragraphs above that, starting with, "Each franchisee has purchased ..."

So you can see a slight rewording of the high level policy. Its rationale is stated to be to limit the extent to which customers can shop around between franchisees and get more than one franchisee to quote for the same job.

If you turn over to page 244, the revised process is set out:

"Ask the caller if they already have an account with us."

"No.

"Find out where the customer is based.

"Is this in your area?

"No.

"Inform the caller that we have a SF branch that covers their area.

"Ask the caller if they'd like you to transfer their call to their local branch."

In fact, that's the process even if they are an existing customer as well.

So, in summary, the requirement to pass customers to their local franchisees has been removed and replaced with an obligation to tell them that they have a local franchisee and ask them if they want to be transferred.

One question for trial will be whether that is in fact how Puro has operated policy, or whether it's simply adjusted the written policy, in the light of legal advice, but in practice continued to operate a somewhat stricter regime. But the other point is that it does not really matter. Competition law prohibits restrictions on passive sales, whether they

are achieved directly or indirectly, so there does not have to be an outright prohibition on that. I'd be grateful if you could turn to the authorities bundle tab 11, page 230. This is the CMA guidance on the VABEO.

And if you turn to page 294, I'd be grateful if you could read paragraph 8.36. Note the reference to the fact that the hardcore analysis does not depend on "the market-specific circumstances or the individual characteristics of the parties".

And I'll come back to that when I'm taking you through the case law on object restrictions.

By way of overview, our case on these policies is that on their face they constitute clear restrictions on passive sales of a type that have been long regarded as having the objective restricting competition.

I'm now going to zoom out from the facts of the case and briefly address some broader issues concerning the effective enforcement of competition law.

Competition law can be enforced either through regulatory investigations or private litigation. The CMA has limited resources and has to prioritise which cases it takes. At the moment, for example, there's a lot of focus on digital markets. It is unlikely to initiate an investigation into arrangements between small companies, at least where the relevant law is well established such that there will be no material precedent value. In reality, there is virtually no prospect of the CMA initiating a Competition Act investigation into the arrangements in this case. Just for good order, I should note that I'm one of the CMA's standing counsel, but I'm not making that submission with my CMA hat on, as it were.

So the only way in which competition law could be enforced in relation to arrangements in these proceedings, but also in similar cases involving small parties and restrictions that have long been regarded as being object restrictions, is through private litigation such as this. Unless the effective enforcement of competition rules is to be significantly

undermined, that means that it is critical for small companies to be able to enforce the competition rules, in particular against obvious restrictions of competition, in a way that is efficient and affordable - and that is the policy objective behind the fast track regime. I'm not asking you to turn to it, but paragraph 5.140 of the Guide explicitly states that the objective is to enable less complex claims to be brought by individuals and small businesses with limited risk as to costs, and similar observations were made by the former president, Mr Justice Roth, in the Socrates judgment, which was the first case that was allocated to fast track.

Just for your note, the reference is authorities bundle, tab 14, page 424, paragraph 3. Central to that, of course, is cost-capping.

I'd be grateful if you could just turn to the cover page of our skeleton which summarises each party's cost budget for the narrower and broader versions of trial 1 proposed by the two parties. When we get to cost-capping, I will come on to this in a bit more detail because there are one or two adjustments that we might want to make. But in broad terms, Yew Freight is proposing a procedure under which the central issue in the case, the object issue, would be determined for around £300,000 of costs. That could just about be affordable for Yew Freight with appropriate cost-capping.

Puro, the defendant, is proposing an approach under which its version of trial 1 would cost £1 million more, around £1.3 million. Given that Yew Freight only has current assets of £135,000 and makes annual profits of £60,000, that is clearly not workable.

We say these sorts of fast track cases may require the tribunal to case manage them in ways which larger cases involving two very well (inaudible) defendants might not be case managed. And that is to make sure that these claims to enforce the competition rules against provisions that prima facie appear to restrict competition can actually be brought by small companies.

Finally, before I take you through some of the substantive law relevant to this issue,

I'm just going to briefly summarise the parties' split trial proposals, and discuss how different approaches could play out. The parties' proposals as to the content of the two trials are made by reference to the agreed list of issues, which I'd be grateful if you could turn up. It's at hearing bundle, page 5. Starting with the issues that Yew Freight think should be addressed in trial 1, "Remaining factual disputes".

Almost all the relevant facts are agreed. There are only four remaining factual issues that are in dispute. The main one concerns how the out-of-area policies were interpreted and enforced by Puro, which will be determined through factual evidence, particularly the disclosure of contemporaneous documents. Just jump ahead to page 6, issue 3. That's the object issue. Both parties agree that should be addressed in the trial.

Issue 6, can Puro's arrangements take the benefit of the block exemption provisions? The main point is whether the out-of-area policies constitute a hardcore restriction on passive sales, which would prevent the arrangements as a whole taking the benefit of the exemption. It is common ground that is a distinct question from whether the arrangements have the object of restricting competition. But those issues are related because, as I will show you, hardcore restrictions generally constitute object restrictions, and similar considerations underlie the approach that has been taken both in the block exemptions and in the object case law. We say those issues should be the primary focus of trial 1.

If you turn over on the agenda to page 7, issues 8 and 9 are two short legal points concerning defences which have been raised by Puro. They are discrete issues. I think they could predominantly be determined on the papers. Therefore they could be incorporated within short trial 1 without significantly extending its length or cost, though they do relate to quantum. But the main benefit of including these further narrow the issues in the hope of facilitating a settlement. Puro says that the following

additional issues should be included in the scope of trial 1. Turn back to page 6 of the list of issues. Issue 2, market definition; issue 4, whether the arrangements restrict competition by effect; issue 5 whether any restriction is appreciable. Just pausing there, the appreciability question does not arise if the arrangements restrict competition by objects, as the case law says that object restrictions are appreciable.

If you turn over to page 7, issue 7, if the arrangements restrict competition and cannot take the benefit of the block exemptions, do they satisfy the criteria for individual exemption? Issues 10 and 11 concern causation and quantum, and it's agreed they should not form part of trial 1.

We propose that those additional issues: 2, 4, 5 and 7, should not be addressed in trial 1 because, unlike the object issue, on our case, they could or at least may require expert economic evidence, which would be very expensive and would very likely render the proceedings unaffordable.

As you've seen from the cost estimates, Puro has estimated the cost of its expert economic evidence would be around £370,000 on the object issue alone, and £490,000 on all of the issues which it would like to be addressed in its broader version of trial 1.

In relation to issues of market definition, effects and appreciability, Yew Freight, as the claimant, would have to lead economic evidence on those issues to prove its case. It plainly cannot afford to do that. The exemption issue is somewhat different. There are specific criteria for an individual exemption, so any economic evidence would need to be focused on those exemption issues. A full market definition and market share analysis would not, we say, be required for the exemption analysis, and it would be the defendant rather than the claimant who bore the burden of proof.

THE CHAIR: Would the exemption analysis be impacted in the event that your client succeeded on object?

MR GREGORY: Well, I think on any objective assessment, your assessment of your prospects of success on an exemption case would significantly be affected. You are not precluded from arguing that an object restriction satisfies the exemption criteria, but it is generally recognised that the circumstances in which that would be the case would be exceptional.

THE CHAIR: Are there other cases where there's been an object infringement but a party has nevertheless satisfied the exemption requirements?

MR GREGORY: Yes. My understanding is there may be a handful, but that's it across decades of case law and the circumstances are rather unusual.

MR WOLFFE: If I understand it, you say in any event the onus would be on the defendant and if there's a by-object restriction, in a sense it would be a more limited set of questions than if one were looking at whether it's a restriction by effect.

MR GREGORY: Yes, certainly. We'd say that for the exemption issue there'd be no need for extensive market definition, market share analysis. Any expert evidence would be much more narrowly focused on the exemption criteria issues.

Just thinking about how Yew Freight's proposals might play out in practice, if the tribunal found at trial 1 that the arrangement had the object of restricting competition and could not benefit from a block exemption, there would be no need to consider the effects case at all.

As a result, any of the costs associated with an effects analysis -- and they are very considerable - market definition, market shares and so on, would not need to be incurred at all. The main outstanding issues would be individual exemption and causation and quantum.

There would then be two possibilities in terms of what would happen.

The first is that the parties might settle. It would obviously be open, as we've just discussed, for Puro to press its case on individual exemption, and I fully expect

Mr Bates, when he stands up, to say that that would be Puro's intention. That obviously raises the spectre of a second expensive trial. But on any objective assessment, prospects of settlement would have been substantially increased. The main issue in the case, the restriction issue, would have been resolved, and while it is open to argue for an individual exemption for an object restriction, as we just discussed, the circumstances where those criteria are satisfied are very limited indeed. To use a biblical metaphor, one might say it's easier for a camel to pass through the eye of a needle than for an object restriction to satisfy the criteria for individual exemption.

In short, in layman's terms, one would hope Puro would see that the writing is on the wall, and not progress to the second trial. But even if that happened, even if they did not settle and Puro insisted on a second trial, a second trial focused on exemption and causation and quantum may well be financially viable if it's done sequentially. We've just discussed how the economic evidence for exemption would be more focused and more limited.

THE CHAIR: I mean, just looking at the cost budget, that's on the footing that your client's costs would be in the region of half a million; is that right?

MR GREGORY: For the second trial?

THE CHAIR: Or is that the whole -- that's the whole --

MR GREGORY: Yes, that's the whole -- the columns in blue, Puro were asking for 6 days for a trial 1 covering all the issues.

THE CHAIR: Is there any estimate of what your client's cost of the second trial would be?

MR GREGORY: We will check over a break or lunch so that we've got that (inaudible) we need to come to costs.

The other key consideration is the scenario where the claimant is successful at trial 1

in establishing the object infringement.

At that stage, it would or may, subject to cost-capping, be entitled to recover all or a substantial proportion of the costs that were incurred in the trial 1 proceedings to date. That would effectively provide it with a fighting fund, which you could use to fight trial 2 if Puro insisted on pressing its exemption case for the second trial. It would not have that benefit if the object and exemption issues were determined in a single initial trial.

I'm proposing now to turn to the nature of the object test. Then, subsequently, whether expert evidence is really necessary for it. I'm going to take you through to leading authorities, one UK, one EU, and I'd be grateful if you could turn to the Court of Appeal judgment in Ping. It's at authorities bundle, tab 16, page 447.

Sir, I'm aware you will be familiar with the facts of this case, having chaired the CAT tribunal. But in brief summary, Ping manufactured golf clubs and operated a selective distribution system. It banned its distributors from selling them online on the basis of its policy that its clubs should only be sold following in-store custom fittings.

The CMA found that amounted to restrictions on passive sales over the internet, which restricted competition by object and did not satisfy the criteria for individual exemption. Ping appealed to the tribunal, which upheld the CMA's conclusions including on object, and Ping then further appealed to the Court of Appeal.

Paragraph 23 in the judgment records the basic point that if the agreement restricts competition by object, it is not necessary to consider the effects.

I'd be grateful if you could turn to page 458 of the bundle. If you look at paragraph 29 and just read the passage from the sixth line up from the end starting, "The CJEU has stated".

MR BATES: Could I ask the tribunal to read from paragraph 26 please, because it will save me taking the tribunal there later. (Pause)

MR GREGORY: So the end of paragraph 29 is obviously the eye of a needle point. Paragraph 30 summarises the facts of the EU Cartes Bancaires case. It concerned a scheme to enable bank customers to withdraw cash not only from ATMs at their own bank, but also from ATMs that have been installed by other banks.

For present purposes, it suffices to note that the relevant provisions were not a well-established form of object restriction, but the Commission nonetheless found that they did restrict competition by object.

I'd be grateful if you could turn to page 459 and read -- I'm sorry, it's a few paragraphs, paragraphs 32 to 37. (Pause)

The context here was therefore whether the category of object agreements should be expanded to include a novel type of object restriction, and which we say is not the case in these proceedings. Nonetheless, you have seen that the advocate general identified the benefits of having object categories, including predictability and legal certainty, as people know what type of agreements are unlawful. The object category allows for procedural economy as it enables the unlawfulness of arrangements to be proved without the "often complex and time-consuming examination of the potential or actual effects on the market."

Like the court, the advocate general noted that the object analysis involved consideration of the economic context of the agreement, but the advocate general also noted that the analysis must be clearly distinguished from examination of the actual or potential effects of the agreement in question. That would collapse the object-effect distinction and undermine the benefits of procedural economy.

I'd be grateful if you could turn ahead to page 465 and please read paragraph 56. (Pause)

If you can turn ahead now to page 467 and read paragraph 66. (Pause)

That is a summary of the Tribunal's analysis of the legal and economic context issue.

What I would highlight is that at both the CMA and tribunal stages, the assessment of the economic context seems to be limited to fairly high-level factual points relating to how the market operated. These are the sorts of points we say - if Puro has similar points that it wishes to adduce - could be made through factual evidence, most obviously, witness evidence from someone in Puro's business who understands how the relevant markets work. They are not the sort of points that could only be made by an external expert who'd obviously not personally be active in the market and would be acting on instructions.

I'd be grateful if you could now turn forward to page 475 and please read paragraph 97. (Pause)

There you see the statement that the object assessment cannot be purely formal; the economic context cannot be totally ignored.

The critical question is what level of detail is required, in particular where what you are considering is a type of agreement which has been previously recognised to have the object of restricting competition.

If you could turn over the page to page 476. I'd be grateful if you could read paragraph 99 and the first three lines of paragraph 100, down to "conventional wisdom". (Pause)

In the next couple of paragraphs, the Court of Appeal notes that it remains to be seen whether the Court of Justice would adopt that aspect of the Advocate General's approach. The answer is that it did not engage with that element of the approach in its Budapest Bank judgment, although, as we'll see it did in a subsequent judgment.

If you turn over the page again to page 477. I'd be grateful if you could read paragraph 103. (Pause)

I showed you paragraphs 6 and 66 a few moments ago; they were the factual considerations taken into account by the CMA and the tribunal in relation to how the

markets worked. The Court of Appeal is therefore saying that sort of consideration of the factual and economic context is adequate, even assuming that the basic reality check test was required in relation, to establish object distinctions.

If you turn a page ahead again to page 478, at 107 Court of Appeal says the tribunal was correct to find that the provisions restricted competition by object, and I'd be grateful if you could read paragraph 109 which starts at the bottom of the page. (Pause)

THE CHAIR: Yes.

MR GREGORY: The Court of Appeal is, there, recognising that courts and competition regulators have carefully drawn a line governing the extent to which those who organise distribution systems can impose restrictions on their distributors and on intra-brand competition, so as to enhance their ability to compete against their competitors, ie so as to increase inter-brand competition.

Some such restrictions are permitted, but not all, and in exclusive distribution systems, such as that in this case, restrictions on passive sales are not permitted; they are a step too far.

Ping is the leading UK authority.

The EU authority that I would like to show you is the Portuguese banks judgment. That's at the authorities bundle, tab 38, page 1486.

Several Portuguese banks engaged in a horizontal information exchange. The Portuguese competition authority found a restriction of competition by object. The banks appealed on the basis that the authority had not properly taken into account the economic, legal and regulatory context in making its object (inaudible).

Please turn ahead to page 1506. We are here in the advocate general opinion. At the bottom of the page under the italicised heading, I'd be grateful if you could read paragraphs AG41 to AG43 over the page. (Pause)

The Advocate General, Rantos, is there endorsing Advocate General Bobek's basic reality test check.

The court expresses itself slightly differently, but in a similar vein, please turn to page 1529. (Pause)

I'd be grateful if you could read paragraphs 46 to 48. (Pause)

THE CHAIR: Can you summarise what those paragraphs are saying?

MR GREGORY: Yes. The court appears to be saying there are some forms of agreement that have the object of restricting competition, irrespective of the nature of the goods and services in the way in which the market operates. But there are other forms of agreement that constitute object restrictions only in certain types of context, and in that situation a consideration of the legal and economic context for the purpose of the object test only requires a consideration of the nature of the relevant goods and services and the structure and functioning of the market to see if it rebuts the presumption that agreements of that type are restrictive of competition.

That analysis -- that limited analysis -- in no way requires a consideration of the actual or potential effects of a particular agreement in question. (Pause)

Standing back and just considering the authorities we've seen, while they express themselves in a slightly different way, there are some common threads to the approach of the two Advocate Generals, the Court of Appeal and the Court of Justice.

One, where you are considering a form of agreement that has previously been recognised to have the object of restricting competition, there is still a need to take into account the legal and economic context. It cannot be entirely ignored, but the nature of the assessment is relatively limited.

Two, it can be expressed as a basic reality check to ensure there is no good reason to displace the standard presumption that agreements of that type have the object of restricting competition. That may involve, in particular, considering the nature of the

goods or services in question and how the relevant markets operate. But what it does not and must not involve is a detailed analysis of the effects of the particular agreement in question.

So that is all I have to say on the nature of the object test. I'm sorry it's taken a little bit of time, but it is central to the case management decisions that you have to take today, I believe.

Against that background, I hope that I can deal with the next few points more briefly.

The next point is that it is well established that restrictions on passive sales and distribution arrangements constitute hardcore restrictions of competition for the purpose of the block exemption regulations and restrict competition by object.

As I have said, hardcore restrictions and object restrictions are conceptually distinct. A hardcore restriction is not necessarily an objective restriction: you still need to apply the object analysis. Nonetheless, both the EU and UK guidelines state that hardcore restrictions are generally restrictions of competition by objects. That is because the reason why they are classified as hardcore restrictions - which, when present in an agreement, prevent the entire agreement from benefiting from the block exemption - is that they are regarded as being some of the most harmful restrictions of competition.

I'd be grateful if you could go back to the CMA's VABEO guidance at authorities bundle, tab 11, page 282. (Pause)

I'd be grateful if you could read from paragraph 8.3 in the middle of the page to the end of paragraph 8.7 over the page. (Pause)

THE CHAIR: Yes.

MR GREGORY: Just for your note, the equivalent passage in the EU guidance is at authorities bundle, tab 9, page 175, paragraphs 177 to 180.

If you just come back to our skeleton argument. Paragraphs 16 to 22 of our skeleton explained that the commission has refused to extend the benefit of block exemptions

to agreements containing restrictions on passive sales since the 1980s, when the commission published its first block exemptions relating to exclusive distribution and franchising systems. I'm not going to repeat those submissions orally.

There are also several cases in which the Commission and the EU courts have found restrictions on passive sales and distribution arrangements restrict competition by object. A few examples of such cases are in the bundles. Again, I'm not proposing to take you through them, but will provide the relevant references. First is the JCB Commission decision, that's authorities bundle tab 29. See in particular recitals 102 to 103 and 151 to 154. Nathan-Bricolux, another Commission decision, authorities bundle tab 30. See recitals 73 to 79 and recital 90. The Court of Justice judgment in Pierre Fabre, which you will be familiar with from the Ping case, that's at authorities bundle tab 31, in particular, paragraphs 37 to 47. And the General Court judgment in Valve, that's authorities bundle tab 37, in particular paragraphs 166 to 184.

Just by way of an aside and referring back to my earlier submissions, at paragraph 171 -- I'll just read it to you -- the General Court states:

"for agreements which constitute particularly serious infringements of competition, the analysis of the economic and legal context of which the practice forms part may thus be limited to what is strictly necessary in order to establish the existence of restriction of competition by object."

That language of analysis, limited to what is strictly necessary, has been used in other cases.

So far as I'm aware, Puro does not dispute that restrictions on passive sales outside of allocated exclusive territories are generally regarded as object restrictions. It just says that even in that context, some sort of assessment of the legal and economic context is required before you can make an object finding. I've already addressed you on the nature of that test.

The next issue is when permission should be granted for expert evidence. As noted at paragraph 38 of our skeleton, a party requires permission to serve expert evidence, and the tribunal's guide explains that, in deciding whether to grant permission, the tribunal will take into account the approach under the CPR.

As to that, I'd be grateful if you could turn to authorities bundle tab 3, page 38. This is an extract from chapter 35 of the White Book on expert evidence. If you look at paragraph 35.4.2.2, it notes the test for permission to adduce expert evidence:

"The burden lies on the party seeking to adduce evidence to persuade the court that it will assist ... The question whether expert evidence is reasonably required to resolve proceedings is inevitably fact-sensitive and should be approached consistently with the overriding objective ..."

You can then skip the next paragraph, but I'd be grateful if you could read the paragraph that starts, "In British Airways". (Pause)

Somewhat unsurprisingly, if you consider that the expert evidence is necessary to determine an issue, you should grant permission.

As I have shown you in this context, the object assessment requires a more limited test, a basic reality check, for example, that the standard presumption relating to passive sales restriction should not apply, taking into account the nature of the relevant services and the way in which the market works. I also showed you that in the Ping case, both the CMA and the tribunal, when considering that issue, was focused predominantly on essentially factual issues about how the market works and the best person to adduce the sort of evidence relating to the practical realities of how the market works is someone from within Puro's business who understands it. We say there's no need for such points to be made at massive costs by external experts who would simply be embellishing matters communicated to them by their client through instructions.

In a moment, I will show you the nature of the economic evidence which Puro is seeking to adduce. In my submission, it is not even relevant to the object assessment, let alone necessary. But even if it were relevant, the tribunal should only grant permission if it were appropriate in the light of the tribunal's governing principles, including the need for costs proportionality and the impact on the parties. We say as soon as you start to consider things through that lens, it's clear that permission should not be granted.

These are points that I touched on at the outset in response to a question. If Puro is granted permission to adduce expert evidence in relation to the object issue in circumstances where the claimant was going to be liable for any material proportion of those costs, it would have the effect of rendering proceedings unaffordable and even if it was not liable for any of the costs, it would create the risk of an uneven playing field, as I discussed earlier. Puro would be allowed to adduce evidence that was relevant and the claimant would not be able to afford to adduce equivalent evidence.

That's been a slightly abstract discussion, so let's have a look at the evidence that Puro is actually intending to adduce. I'd be grateful if you could turn to the hearing bundle, tab B, page 329. That is the witness statement of Mr Ford, Puro's solicitor. If you turn over the page to page 330, you will see at paragraph 5 that the sole purpose of this witness statement is to adduce evidence from Mr Bosley, Puro's expert economist, in the form of a letter exhibited to the witness statement. This is a point of process: Puro should not have done that.

I'd be grateful in the authorities bundle if you could turn to tab 3, page 37. We're back in the White Book. Section 35.4.2, towards the bottom of the page. Under the "court's permission" heading, please read the first seven lines down to the Gulf International reference. (Pause)

That's just a point of process. If you turn back to the hearing bundle and look at what

Mr Bosley says, if you turn to page 337. You'll see the heading numbered 1 and Mr Bosley is here summarising the economic evidence that he proposes to adduce relating to the object issue. Around two thirds of the way down the page, there's a sentence starting "at this stage". I'd be grateful if you could read from there to the end of the object section over the page on page 238. (Pause)

First of all, the fact that previous arrangements differ from classic franchising arrangements insofar as it's Puro rather than the franchisee who contracts with the customer is, in my submission, irrelevant. It's not only in the context of classic franchising arrangements that passive sales restrictions are regarded as object infringement. They are regarded as object restrictions in the context of all types of distribution system. Mr Bosley suggesting that the franchisees are really acting as agents is inconsistent with Puro's pleaded case, except they are not acting as agents and are acting as independent undertakings. As the five numbered points --

MR WOLFFE: Sorry to interject there. Would you say that that question, if it's a question, is one which the tribunal could assess by looking simply at the terms of the contract and the balance of risk and so on, without requiring expert evidence, if the submission, you know, the submission were to be ...

MR GREGORY: Yes, I'm not sure with respect if it's just a question of whether the franchisees are acting as economic undertaking such that there are vertical agreements between Puro and Yew Freight-- that's agreed, as far as I'm aware. And even if it wasn't agreed, yes, you could clearly assess it by reference to a legal analysis, the relevant provisions and factual considerations like the amount of investment.

I think the point that's been made is that this fact that it's Puro rather than the franchisees who contract under the formal contractual arrangements with the customer is a part of the economic context that might somehow be sufficient to rebut

the standard presumption that passive sales restrictions constitute object restrictions. Just on that, it's obviously not enough that other aspects of Puro's arrangements were necessary for it to compete effectively with larger competitors. The fact that Puro may choose to contract directly so that customers just see a Speedy Freight brand nationally, is irrelevant, essentially, to the assessment of whether or not the restrictions on passive sales constitute an object restriction.

Puro has to persuade you that it can only compete in this market if it imposes restrictions on passive sales. There's got to be a nexus between the passive sales restrictions specifically and any benefits which it says may arise in this context. And I think, again, when I say benefit, they shouldn't be the benefit specifically focused on this type of agreement. It would have to be a bit more general. That in this sort of market people cannot operate a franchise network without having absolute total protection, essentially.

I was just about to take you through the five points that Mr Bosley said he was going to include. Points 1 to 3 would entail a detailed market definition and market share analysis. That, we say, is not relevant at all to the object assessment in this context, given that it only requires a consideration of the nature of the services and the practicalities of how the markets operate with a view to assessing whether this context is really so different from all those other contexts in which similar restrictions have been found to the object restrictions that it rebuts the presumption.

I should say, we accept as a factual matter that Puro is competing in a market with larger competitors who have national networks. So it's not necessary to have elaborate market definition of market share analysis just based on factual points.

Points 4 and 5, you can see, both relate to the competition effects of this particular set of arrangements. As you've seen, that is not what the object test is concerned with. The courts have repeatedly stated that a consideration of a legal and economic

context should not extend to the effects of the particular arrangement under consideration, because that would collapse the distinction between object and effect and undermine the legal certainty and procedural economy benefits of having an object category.

Point four also suggests that Mr Bosley might try to argue that there is no scope for potential competition between franchisees. The first point is that that's a factual matter and not something that demands economic evidence. Moreover, we know from the out-of-area policies themselves that there was, in fact, the scope for such potential competition, because Puro said in express terms that restricting the possibility of having franchisees being able to quote for the same job was one of the purposes of the out-of-area policies.

So in summary, our case on these two central issues are that economic evidence is not required to determine the object issue and that permission for such evidence should not be granted. Given the claimant's very limited financial means, including current assets of only £135,000, having a trial 1 with a narrow focus on the object issue combined with appropriate cost caps provides a viable route to allowing competition law to be enforced against what, on its face, appears to be a fairly clear object restriction.

As we discussed earlier, if the tribunal found an object restriction and Puro maintained its case that it could get a camel through the eye of a needle on individual exemption, then I would hope that at that stage, claimant will be able to recover all or a substantial proportion of the costs incurred, and would therefore have a fighting fund to make a more limited trial 2 financially viable.

Those are my submissions on the two central.

THE CHAIR: Okay, we'll have a break there. Just before we do so, I mean, what do you say to allowing some expert evidence at trial 1 but subject to a cost cap? What

would your position be there?

MR GREGORY: Yes. The problem with allowing recovery of any material proportion of the costs associated with the economic evidence is that the economic evidence is so expensive that that in itself may render the proceedings unaffordable. You obviously do have the power, and courts have done it in other cases, to permit expert evidence on the basis that the costs of the evidence are not recoverable at all and the residual problem there is the level playing field problem earlier.

MR WOLFFE: But presumably, you would also say that, I mean, we would have to be clear about what the scope of --

MR GREGORY: Yes.

MR WOLFFE: -- you know, if what was being envisaged was something other than what is proposed at page 338 by way of economic and legal context.

MR GREGORY: Absolutely. Our primary position is that there should be no expert evidence in trial 1. If you were minded to permit such evidence, it would also need to be very tightly controlled and you do not have any application before you to admit expert economic evidence other than the five points which are included in Mr Bosley's letter.

THE CHAIR: Okay, we'll break for five minutes.

(11.51 am)

(A short break)

(12.04 pm)

MR GREGORY: Sorry, do you have a couple of questions on ...

Those are my submissions on what I've described as the two central issues.

THE CHAIR: Yes.

MR GREGORY: Relevant to the nature of the object test, and whether economic evidence should be adduced for it. And our case on the split trial issue is that, given

that we say no economic evidence is required for the object issue, our proposed narrower trial 1 with a focus on the objects issue and the related hardcore block exemption issue is an affordable way given Yew Freight's very limited financial means to enforce the competition rules in this case.

My suggestion was that I now sit down and allow Mr Bates to address you on those two central issues rather than me trying to make submissions on timetable and hearing dates - because obviously all those things will be affected by what you decide is the appropriate scope of trial 1 and whether expert evidence is going to be admitted or not.

THE CHAIR: Very well. Okay. Let's hear from Mr Bates then.

Submissions by MR BATES

MR BATES: Members of the tribunal, the claimant has chosen to bring these proceedings essentially in its own commercial interests. It's telling that really nothing has been said by my learned friend this morning about a public interest motivation for bringing the case or any actual harm that might be being caused to competition or consumers.

In relation to the historical periods, one and two, the claimant says it suffered a loss of £240,000, so it's about money; and in relation to period 3, it says it may also have suffered some unquantifiable loss and my learned friend has talked about his trial 1 facilitating a settlement.

It's against that background that the claimant is now asking the tribunal to structure these proceedings in a way that suits it and to limit its cost exposure to a level that it finds affordable. It says the tribunal has to do this because otherwise, the claimant will have to abandon the claim.

In my submission, there's three important inter-related points that are being lost in all of this which need to be front and centre when the tribunal is considering whether to

acquiesce to these requests. The first is to be clear as to precisely what it is that the claimant is now saying is an infringement by object. It's not just the prohibition on out-of-area sales or the restriction on out-of-area sales that was in place before the policy was changed in 2023. The claimant is saying that it can show at its proposed trial 1, with no economic evidence, that the current policy, the period 3 position, is itself an infringement by object by reason of two aspects which it says constitute restrictions on passive sales.

The first aspect is the requirement for branch operators who receive an inquiry from a customer that's located in another branch's territory to tell the customer that there's a branch that serves its territory and thus give the customer the choice of whether or not to be transferred to that branch. So, the claimant's saying that that is a restriction on passive sales and ergo, on its case, an infringement by object. In my submission, it has no case law at all to support that proposition.

The second aspect is as per issue 6(c), in the list of issues. This is where Yew Freight says -- and the relevant paragraphs of the claim form are 45 to 46 -- that the contractual requirement for branch operators to seek prior approval from Puro Ventures for online marketing is an object infringement. And the source of this restriction, what Yew Freight is referring to is clause 7.67.1 of the franchise agreement, which prohibits branch operators from:

"... promoting the Business or selling, marketing, or making available the Services on the Internet or other electronic means without the prior written approval of Puro Ventures."

So, that too is being alleged to be an infringement by object, and it's those things that my learned friend says in his words are a "fairly clear object restriction"; in other words, the type of agreements that by their nature harm competition so they can be condemned without any economic analysis.

Puro Ventures accepts that the policies in place pre-2023 did involve restricting to a degree branch operators from dealing with out-of-area customers. That was changed in 2023 in response to the issue being raised as to whether it was compatible with competition law. So Puro Ventures made a pragmatic choice in its part, which is to take the benefit, it wanted the benefit of the vertical block exemption, which is why the tribunal has seen that the reference to the VABEO in the 2023 policy.

We say it wasn't necessary to make that change, but that's what Puro Ventures did. That history shouldn't obscure the fact that Yew Freight's case today is that it's clear that the tribunal can decide that the post-2023 arrangement itself constitutes an infringement by object. So that's the first point.

The second point is that the purpose of the competition tribunal is to uphold competition law. And competition law is a field of law that has as its purpose the protection of consumers. Recall, for example, Mr Justice Roth's words in StreetMap. It's not in the authorities bundle, but I'll read it out.

"It must always be borne in mind that the purpose of competition law is to prevent arrangements or practices which distort competition and to safeguard the interests of consumers. In the jurisprudence under article 101, it is well established that an agreement or arrangement will not be prohibited unless it may have an appreciable effect." [as read]

Nothing has been said by Mr Gregory today about how the alleged arrangements are harming the process of competition in a way that might be appreciably affecting competition or causing any ultimate harm to consumers. That's not surprising, given the facts: first of all, the market for courier services is characterised by low barriers to entry and many suppliers; secondly, that Puro Ventures is a relatively small supplier in that market; and thirdly, and most importantly, that there's little evidence that the customers are even aware that Puro Ventures call centres are being operated by

independent sales agents, let alone that there's any meaningful competition whereby, absent these out-of-area agreements, the consumers would ring around different branches to get quotations. The reality is this is a market where if you're a customer and you want a package picked up from your law firm and taken to another law firm, you know, you may ring around a number of different brands if you're price-sensitive, but you wouldn't ring, you know, the London branch and the Essex branch and the North of Scotland branch of Puro Ventures in order to get different quotations.

And so we say that this lack of any indication of any harm to consumers, it's relevant to how the proceedings should be structured; it's relevant to fast track; it's relevant to cost caps. Because one can imagine a case coming before the tribunal where, let's say, it's a small company against a huge company like Google or Amazon or whatever, where there do appear to be reasonable grounds for thinking that there is consumer harm being caused. And it won't be possible for the tribunal to deal with that issue, to look at that issue, unless there's cost caps and the procedures are hammered into a shape that enables the claimant to bring the claim. One can see why in that sort of context, where what's being sought is an injunction to stop that practice, there might be a justification for sort of getting the hammer out and taking that approach to it. But in my submission, that simply is not this case. There's no public interest justification for bending the proceedings to suit the claimant.

Thirdly, this is my third point, if there were any reason to believe that there was significant consumer harm being caused, that would militate in favour of a degree of expedition towards a trial where the tribunal could decide whether or not the arrangements were or were not lawful, and potentially to grant injunctive relief.

But that's not what the claimants are proposing here. They're proposing a trial 1 where all that would be established at trial 1 is if the claimant can show without economic evidence that there's an infringement by object, including apparently in relation to

period 3, and the question of the other matters that would need to be established, including the defendant's section 9 defence, would all still not have been determined so the tribunal wouldn't be able to grant any relief at the end of trial 1.

Mr Gregory says that the Competition and Markets Authority wouldn't investigate this because it wouldn't be a priority and that's clearly right against the background of the facts that I've set out. But why then should Puro Ventures' irrecoverable resources be spent on carrying out this exercise?

So, those are my preliminary points. I'm now going to come on to the question of whether or not economic evidence is relevant to showing whether the out-of-area agreement's an infringement by object. My learned friend has already referred to what's set out in the defence at paragraph 17 about the way these arrangements work. This is a market for courier services characterised by strong interbrand competition. Really, anyone can provide courier services if they've got a phone and a computer and an ability to place jobs with freelance couriers.

It's true, we accept that there is a degree of risk that is carried by the branch operators in that they, for example, will have to invest in their own premises or telephones in order to provide the service. So we're not saying they're an agent within the meaning of the block exemptions. Under competition law, of course, if you've got a true agent, they're not considered as being an undertaking for the purposes of the competition law analysis. We're not saying that.

But the extent of any risk that's being carried by these branch operators is low because of the fact that it's Puro Ventures that's contracting with the customer; it's Puro Ventures that's contracting with the freelance courier or indeed contracting with the branch operator if the branch operator is effectively doing that role itself by providing the vehicle that that does the pickup. On a true analysis, we say the practical position and the economic reality of the position is that the branch operators are

essentially sales agents. So, they might not be agents as a matter of law or for all purposes; they are separate undertakings, but they are acting as sales agents providing an administration service to Puro Ventures, whereby they answer the calls, they arrange the pickups, they book the freelance couriers or they provide pickup services, as a subcontractor service to Puro Ventures.

It's within that context of Puro Ventures creating that single-brand network that serves customers as one coherent whole and without customers having any awareness that there are independent franchisees who are providing the branch operator function that Puro Ventures attaches importance to consistency in the presentation to customers that there's a single brand, customers aren't aware of who's actually answering their calls, that it's all part of Speedy Freight, and that we don't have a situation where different offices are quoting different prices or where there's any incentive to customers to ring around different branches. Instead, customers are served by the branch that covers their area and has the local knowledge to be able to provide a service that, by its nature, involves going out to the customer's premises and picking up the package. So, that's the background.

MR WOLFFE: Can I just check one thing. You made a point about risk. I think I may have picked up from the papers that the franchisee bears the risk of the customer not paying; is that correct?

MR BATES: Yes. The franchisee contractually bears the risk of the customer not paying in order that the franchisee has an incentive to ensure that the customer's creditworthy and to carry out those checks. But the contract is still between the customer and Puro Ventures, so the debt's owed to Puro Ventures.

So turning then to how this fits in with the law on infringement by object. It's common ground that the fact that a restriction is or may arguably be a hardcore restriction within the meaning of the block exemption doesn't mean that it's an infringement by object.

The tribunal seen that from the Ping case at paragraphs 26 to 29 that you've already been taken to, that the block exemption is simply a safe harbour. The fact that a restriction is a hardcore restriction for the purpose of the block exemption simply means that it doesn't get the benefit of the block exemption. The same is true, of course, of retail price maintenance and other aspects of vertical agreements that would take them outside the scope of the safe harbour.

The concept of an infringement by object: the tribunal's already seen other paragraphs of the Ping case you were taken to by my learned friend: paragraphs 30 to 37. He didn't show you paragraph 38, which states that the concept of object infringements need to be interpreted restrictively.

I also wanted to show the tribunal paragraphs 74 to 76 of that case. It's at page 470 of the authorities bundle.

THE CHAIR: Sorry, which page?

MR BATES: 470. If I could just ask the tribunal to read paragraphs 74 to 76. (Pause) So that's obviously to answer the point that my learned friend made, so this hermetically-sealed approach where you don't look at effects at all, he says, when you're considering whether something's an infringement by object. It's not actually as simple as that, as those paragraphs show.

So what I'm now going to do --

MR WOLFFE: Sorry, Mr Bates, would you take from the proposition that we find in that paragraph that there is no bright line between the second step of an object analysis and an effects analysis that effectively you would always potentially require expert evidence in order to assess a restriction by object?

MR BATES: Absolutely not, sir.

We've seen from the authorities that the tribunal has already been taken to that for assessing whether something is infringement by object, it may be relevant to look at,

in particular, the economic and legal context.

Now, the extent to which you need to look at the economic context will vary from case to case. So if, for example, you have a secret price-fixing arrangement between horizontal competitors, you're not going to need to look at the economic context at all to see that that's an object infringement. The further you get away from that, the more you might need to look at other factors in order to assess whether it's an object infringement or not.

So that's essentially my point, that this is a nuanced exercise in seeing whether something's an infringement by object. There is a world of difference between a horizontal price-fixing agreement on the one hand, and a requirement that a branch operator has to tell an out-of-area customer that there is another branch that serves its area and give that customer a choice. Or a requirement that internet marketing has to be pre-approved in order, we would say, to protect the brand.

There's just a huge difference between those two things. We say that the further you get away from something that's obviously harmful for competition, the more you do have to look at what the economic context is, and also other factors which I'm going to come onto.

It may be helpful if I simply set out our stall on how we say the law works on infringement by objects and then go through some of the cases because a lot of the extracts from the cases go to multiple of these points.

So I've got seven points on this that I'll go through as quickly as I can.

The first is that the categorisation of agreements as object infringements is for identifying agreements that are so obviously harmful to competition that there's no need to assess the economic effects. Essentially, it's the cases where economic analysis would be pointless in terms of looking at the detail of how there was actually an effect on the market, because you don't need to get that far.

The second point is that the extent to which consideration of the economic context is necessary in order to decide whether something is an object infringement will depend on the nature of the agreement and the circumstances, and that's the point that I've made in answer to the tribunal's question a moment ago.

Thirdly, that in non-obvious cases what will need to be looked at includes, three things: the provisions of the agreement; secondly, its objectives, ascertained objectively; and thirdly, as I've said, the economic and legal context. The economic context will include considering the nature of the goods and services in the relevant markets and also the actual conditions of competition and the actual structure of the market, which are, of course, economic questions, ultimately; the questions to which economic analysis is likely to be relevant.

So that brings me to my fourth point, which is that the matters -- examples of the matters to which economic evidence might be relevant. Looking at it in the context of this case that would include, for example, evidence about how competition is operating in the market for courier services and also the market in which the branch operators are providing the services that they supply to Puro Ventures.

Secondly, the position of Puro Ventures in the market, its size, the competition dynamics, including the strength of interbrand competition and also the degree of concentration or otherwise in the market. Then also --

THE CHAIR: Why does that really matter? I mean, in Ping, there was very strong intrabrand competition. Why does it help us to know where Puro sits in relation to other providers of courier services?

MR BATES: Well, this goes to the point that I was making earlier about the nature of the restriction that's being examined. In Ping, what you had was essentially a restriction on internet selling that the tribunal concluded and then the Court of Appeal concluded that that was clearly harmful to competition and it wasn't considered

necessary, in relation to that particular restriction, to consider concentration in the market.

In other cases -- so I'm going to take the tribunal a moment to the Super Bock judgment, which is about resale price maintenance. So that's an example of a restriction that is a hardcore restriction for the purposes of the vertical block exemption. But in that circumstance, the Court of Justice didn't consider that you could see just from the nature of that restriction that it was an object restriction and therefore you did have to consider the market context, which can include looking at the degree of concentration in the market.

To put it in practical terms for the present case, if you had a situation where, for example, Puro Ventures had half the market share in courier services, which obviously it doesn't, one can see there that competition or potential competition between branch operators might be important. If that was being strangled off, it would be more likely perhaps to have some negative impact on competition overall and harm to consumers; that in a market where Puro Ventures might have, say, 2 per cent of the market for courier services where interbrand competition is very strong.

That is, we say, an example of the economic context that has to be considered when you're then looking at the restriction to see if it's an object restriction or not.

MR WOLFFE: Why do you say that one would need an expert economist to speak to the position of Puro Ventures in the market? Let's assume the relevant market is courier services. It's presumably, I don't know, but essentially a matter of fact, what Puro's share of that market is and who the major competitors are, and it doesn't seem to be a matter of dispute. There are larger competitors.

MR BATES: It's always difficult to draw a distinction between a matter of fact and a matter of assessment. It's essentially a matter of economic assessment, in my submission, what the parameters are of the market in which competition is taking place

and what the market shares are. Puro Ventures as a small player in the market it's like, you know, a fish in a pond to be honest. It can't see the pond: it has a sense that it is a small player in a much bigger market, and it knows it's competing against bigger people. It's not in a position, as my learned friend suggests, to provide an overview of competition in the market. That is a task for an economist, and it's not the only thing that an economist would be doing, because economists would be looking at the way competition dynamics are working in relation to courier services, and whether there's any potential, actually, for any harm to competition to arise from this restriction, which we say there isn't.

THE CHAIR: What do you say is the point of the out-of-area arrangement, whereby customers have to be told that there's a franchisee in their own area. What's the point of it? What's the purpose of it?

MR BATES: The purpose of it is that Puro Ventures wants to provide the highest quality of service it can under a single brand, and it considers that the best way of doing that will normally be for customers to deal with the branch that covers their own area, because of the importance of local knowledge to the provision of the service.

So if, for example, you're in London and you want a package picked up and you speak to someone who is running the call centre for London, they're going to be more aware of, you know, where your law firm is in London, for example. They're going to be able to make decisions about whether to use their own vehicle because they've got a vehicle that can do the pickup on behalf of Puro Ventures or whether to use a freelance courier. That local branch can cultivate the relationships with customers in the area, rather than a situation where the customers are phoning a number that they might have got from some online source where they've searched couriers which might be far away.

So that's the essential reason; it's a quality reason and it's part of presenting a single

provider brand that has these local branches that look after customers in that area.

MS KELLAWAY: Can I just ask: why do you think the VABEO and the VBR call out the kind of restriction that your clients had in their agreements and say that de minimis issues are not relevant? In other words, the de minimis notice doesn't come to their rescue if they have those kinds of hardcore restrictions in their agreements.

MR BATES: Well, the first point I would make is that we wouldn't necessarily accept that what the VABEO has in mind is the situation that we have in this case, where the franchisees are not themselves supplying any services to customers. That itself is a point of distinction. But even if one gets beyond that, the VABEO is simply representing a competition authority position, ultimately, on the parameters of who can benefit from the block exemption. It's not suggesting that anything that's outside of the block exemption is an infringement by object.

MS KELLAWAY: I agree that it doesn't equate hardcore restrictions with object infringements necessarily, but it does say generally that they probably will be, and this is a very common form of old-style restriction. It's not novel, is it? And is it really right that the claimants don't actually provide any services themselves in relation to the courier services? I thought I'd read that they do sometimes provide transport services themselves and commission them, and therefore they're not just an answering machine.

MR BATES: Well, some of them are just an answering machine. Not all of them are answering machine, but none of them are providing courier services to customers. Insofar as they're involved in the actual picking up of packages, they are doing that as a supply to Puro Ventures.

MS KELLAWAY: Yes, well, contractually I understand that. But in practice they also set the price, don't they?

MR BATES: Well, they don't set the majority of the price. They can choose to take

a lower commission and that can affect the ultimate price that is being quoted to the customer. But that price, whatever it is, is the price that's payable by the customer to Puro Ventures and out of which Puro Ventures then remunerates the branch operator.

MS KELLAWAY: So are you saying that Puro Ventures actually set the prices themselves?

MR BATES: The majority of the price elements are set --

MS KELLAWAY: Do they have a price list?

MR BATES: Well, the prices are determined a little bit like Uber by predominantly by what the freelance operator is willing to accept.

MS KELLAWAY: So it's actually the freelance operator that sets the price, it's not Puro Ventures.

MR BATES: Well, the freelance operator is the main contributor to the components of the price. Another component is the commission that the branch operator wishes to charge Puro Ventures. So those elements together, plus the Puro Ventures 12 per cent, it's all three elements that go towards the overall price.

MS KELLAWAY: So -- yes. Okay, but why is the way competition works in relation to these services then a matter for an expert economist? Why isn't it a matter for factual evidence from the parties here?

MR BATES: Well, the way that these services are being provided, that is a matter for factual evidence. But the question of how competition operates in the market for courier services as a whole, and the question of whether and how the arrangements operated by Puro Ventures might be harming competition in that market as a whole, those are economic questions and not questions for factual evidence, in my submission.

MS KELLAWAY: I see.

MR WOLFFE: Mr Bates, sorry to debate, but we'll let you get on with your --

MR BATES: Can I just --

MR WOLFFE: Yes, of course.

MR BATES: I just wanted to make one further response to Judge Kellaway's question, which is that of course it is generally right that where you have, say, a selective distribution system, a sort of Ping-type selective distribution system, and you had restrictions on passive sales in that sort of context, that that would be an object restriction. But this is why it's important to look at the actual services -- the goods and services that are being supplied and the context as the case law says we have to.

If, for example, one had a situation where if you go into a sports shop, the sports shop have to tell you, "Well, this is a sport shop in London and you live in Essex, so are you aware that there's a shop you go to in Essex?" One can see why that would be problematic.

But in this situation, this is where there are good reasons, we say, why Puro Ventures has established matters as they are where branch operators are using local knowledge to serve local customers. That's why Puro Ventures wants customers to know that there is a branch that's serving the locality.

MS KELLAWAY: Are you saying that those restrictions are indispensable then?

MR BATES: I'm not saying they're indispensable because that's not the test. But the question here is whether or not this is an infringement by object, and there's nothing in the case law that says that a restriction has to be indispensable in order to get out of the object box.

MS KELLAWAY: Well, if it's in the object box it has to be indispensable for it to get out of it on the basis of an individual exemption. We're not saying that's not possible.

MR BATES: Well, with respect, that is the epitome of a bootstraps argument, isn't it? In the sense that, of course, if you're in the object box you then need a justification to get out of it, but the question we're talking about here is whether Puro Ventures can

show at the proposed trial 1 that it's in the object box.

MS KELLAWAY: Okay.

MR BATES: Sorry.

MR WOLFFE: Yes. The chair asked you a question about the purpose of the restriction and I've noted that. I just wanted to understand what you say about the part of the policy where it's said:

"It is also possible that the customer could ask multiple offices to quote on the same job which would see us competing against ourselves which could damage revenue levels, profit margins and reputation."

I'm just interested in whether you ever submit what your submission is about that particular part of the policy which seems, on the face of it at least, to suggest that one of the reasons is to maintain revenue levels, profit margins and so on.

MR BATES: Yes. Well, an explanation of that test would obviously be in a matter for factual evidence in due course.

MR WOLFFE: Yes.

MR BATES: I note that the primary justification here is the benefit to customer service of being served by the local partner, so that comes first. In relation to what follows, without trying to give evidence myself --

MR WOLFFE: Of course.

MR BATES: (Overspeaking) what's been said.

First of all, clearly what was put in this paragraph was to help explain or persuade the branch operators that they should co-operate with the policy, so that was a factor that was in mind in how it was presented. But also, there is a concern on the part of Puro Ventures about customers being incentivised to phone different branch offices in order to find different prices, because if that was the approach, that would undermine the single-facing structure and the benefits of the single-face structure as I've outlined.

If, for example, you're in the position of a customer and you regularly have a certain courier job done and you know that getting your package from Freshfields to Linklaters costs £12 or whatever it is, and then you happen to look at the website quickly, you're in a hurry and you ring a number that's actually for a different branch, and then you're being quoted a significantly different price, that undermines in Puro Ventures' view, the confidence that customers can have in the brand and what Puro Ventures is trying to present to customers.

So that was on my fourth point. My fifth point is that it may be relevant to consider the counterfactual: is there any competition that would otherwise be existing that's being restricted? And so one of the matters that needs to be considered is whether or not there would be competition between the different Puro Ventures branches in relation to price, even though, as I've said, customers are not aware that the independent operators are operating the different phone numbers.

The sixth point is that we say that --

MS KELLAWAY: Could you repeat that point to make sure I've got it?

MR BATES: Yes. In the counterfactual where these restrictions didn't exist, what would be the difference for the competition? This is a situation where the customers by and large have no idea that the phone numbers are being operated by different independent operators. So why would they then be phoning around different Puro Ventures branches, different Speedy Freight branches, in order to get different prices so that there would then be price competition between the different branch operators?

MS KELLAWAY: So you're saying that because the customers are in the dark, it doesn't matter that there's no price competition?

MR BATES: Well, it's not quite that. It's that in the counterfactual world, there wouldn't be any more competition. It's simply that.

MS KELLAWAY: Well, why did your client then write a memo saying, "We don't want price competition and we don't want people giving competing quotes" if it wasn't realistically possible?

MR BATES: Well, I've already given an answer to that question that's come from another member of the tribunal. But I am concerned about, as I say, trying to give evidence --

MS KELLAWAY: It's a factual matter.

MR BATES: -- factual matter (overspeaking) --

MS KELLAWAY: It's a factual matter.

MR BATES: -- trial, yes.

MS KELLAWAY: Thank you.

MR BATES: The sixth point -- and I will show the tribunal case law to support all of these points as we go on, but just to finish outlining the sixth point -- is that it's appropriate to take account of pro-competitive effects of the arrangements as being elements of the economic context.

The seventh is whether or not there's any non-anti-competitive rationale for the agreement, that that's also a part of the economic context.

If I can begin by taking the tribunal to the Super Bock case, which starts at page 1362 of the authorities bundle. Taking it from the head note that, the facts were that:

"S had allegedly imposed minimum resale prices on beverages ... Minimum resale prices were updated monthly and communicated to distributors, who generally applied these prices in accordance with S's terms of business, and under monitoring and threat of 'retaliatory measures' by S."

A bit further on:

"The Court [of Justice] ruled that (i) a vertical agreement fixing minimum resale prices was only a 'restriction of competition by object' where it presented a sufficient degree

of harm to competition."

I note that this is a context of resale price maintenance where again, it's a hardcore restriction. In general, resale price maintenance is considered to be something that can be harmful to competition. But in the circumstances of this case, it was held that one couldn't simply take it to be a restriction of competition by object. One had to see whether or not it presented a sufficient degree of harm to competition.

Then going on to page 1376, if I can just ask the tribunal -- there's quite a lot of paragraphs -- to read from starting from 1375, paragraphs 32 to 43, and then I'll make the points I wanted to make about it.

THE CHAIR: Sorry, I've lost the paragraph number.

MR BATES: Sorry, 32 through to 43. (Pause)

So those paragraphs, they're supporting, I think, they address all but one of my seven points showing that restriction of object has to be interpreted restrictively; there's the sufficient degree of harm to competition point; there's the having regard to the economic context of which the provisions form part; there's taking account of the nature of the goods and services affected; there's taking account of the actual conditions of the functioning and structure of the market or markets in question; there's also ... (Pause)

Yes, and I make the point about paragraph 36 also about pro-competitive effects, that where they're demonstrated, those effects may give rise to reasonable doubt as to whether the agreement concerned causes a sufficient degree of harm to competition.

The one point that I made of my seven points that I don't think (inaudible) that is (inaudible). A positive effect on competition is also to be taken into account; as I've just shown from paragraph 36, that is in there. It's also, for the tribunal's note, in the Budapest bank case, tab 33 of the authorities bundle at paragraphs 81 to 82, which are at page 1254 of the authorities bundle that also confirm the positive effects on

competition can be taken into account.

I can also show the tribunal the Generics case, which we've already seen, but just (inaudible) also at paragraph 87. You've been taken to some of this; I don't want to take you over paragraphs you've already been to. Specifically paragraph 87, it's on page 1347 of the authorities bundle, and this is in the context of talking about generic medicines and agreements that arose out of litigation about generic medicines.

At paragraph 87, the court says:

"However, such a characterisation as a 'restriction by object' must be adopted when it is plain from the analysis of the settlement agreement concerned that the transfers of value provided for by it cannot have any explanation other than the commercial interests of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits."

So, the point I draw from this is that a further factor to be considered would be whether there's an alternative non-anti-competitive rationale for the agreement in question. That's also a factor that's relevant to the analysis.

MR WOLFFE: Sorry, can I ask, when we're thinking about pro-competitive effects and an alternative non-anti-competitive rationale, are we focusing on the pro-competitive effects of the particular clause or practice that's at issue?

MR BATES: Yes.

MR WOLFFE: Because the word agreement is used in the case law you've shown us.

MR BATES: That's the way the case law usually talks about anti-competitive agreements, but the focus is actually on the particular restriction in question. And so in this case, we say that the requirement that customers be told that the local branch that serves them has a pro-competitive reason for it, as I've already outlined.

Likewise, the requirement that internet marketing be pre-approved by Puro Ventures, it's not some sort of evil restrictive thing. It's something that ensures that the individual

branch operators are not putting stuff out there on the internet that's accessible to anyone that isn't consistent with Puro brand's central branding policy. So again, we say there's a pro-competitive justification for it. So it's not possible against that background for my learned friend to say, well, actually the only explanation for all of this, the object of this restriction is to harm competition.

I've included in the authorities bundle an academic article which provides a review of the European case law on infringement by object and tries to draw all the strands together. I'm not going to take up time, although I could do, going through it and drawing out what it says that are relevant to the seven points I've already made. I say it does support the seven points that I've already made. I invite the tribunal perhaps to read it if the tribunal would find it helpful to have an academic digest and analysis of the relevant case law.

I'm conscious that it's 12.56 pm. I was going to go on to make submissions about split trial and permission for economic evidence. I don't know if now is convenient?

THE CHAIR: Yes, it is. I mean, I put to you the sort of converse of the question I put to Mr Gregory. If you say that expert evidence is needed to determine the object infringement issue, the burden of proof would be on the claimant. Would it not follow that that the claimant would be prejudiced by directions that there was to be no expert evidence on that issue? I mean, if you're right, then presumably they would fail because they couldn't show the necessary context and the other features of the anti-competitive effects of the restrictions which are under consideration.

MR BATES: Well, in the context in which the tribunal is trying to determine matters on the balance of probabilities rather than some higher standard, there is clearly some importance in the defendant being able to properly put a defence case. And we would be concerned about any situation where the defendant was precluded from bringing forward evidence that we consider to be important to rebut the case that's being made

against us that these restrictions are, by their nature, ones that are harmful to competition in this economic context. There's a risk of the tribunal reaching wrong conclusions about the relevant economic context without the benefit of the evidence that we would like to adduce. Now, of course, if they want to proceed on the basis that they don't wish to bring any economic evidence, then that is a matter for them, but it's not a reason why the defendant should be precluded from bringing forward economic evidence that it considers important for its case.

THE CHAIR: If we're talking about a basic reality check, I mean, what do you say is going to be the cost of producing that evidence from the defendant's point of view, limited to that?

MR BATES: Two points on that. First of all, the extent to which the basic reality check is basic depends on facts that are alive about the nature of the agreement and how obvious it is that it's harmful to competition. Now, against the background of the claimant saying, "This is something that's obvious, it's obviously harmful competition", for us to answer that, that's why we need to bring in the economic evidence. That economic evidence will by its nature involve looking at the conditions of competition in the market and how they might be potentially affected by the restrictions, rules, whatever you want to call them, of this kind. So actually, it ends up being quite a broad analysis that very substantially overlaps with the analysis that would need to be done for dealing with, for example, exemption under section 9 and indeed an effects analysis, if the claimant didn't succeed on its object case in circumstances where it has actually pleaded an effect case as well, so it has also put its case on that basis.

My second point related to that is that, in my submission, the right approach for the tribunal to take is not to look at what's convenient or affordable for the claimant; it's to look at what's the right and efficient way of enabling the tribunal to try the pleaded issues. In circumstances where there is this overlap in the economic evidence that

would be relevant to all these issues, and there would be great inefficiency in having the same evidence having to be brought two separate trials, that is the key consideration. So the cost of it would be substantially duplicated, actually, if you had to have the evidence at two different trials.

So yes, I make no bones about the fact that it would be quite expensive to have the economic evidence provided for dealing with the infringement of objects issue alone because of the way that the analysis is also relevant to the other issues. But in my submission, that's the reason why you should try issues 1 to 7 together. It's the most efficient way of doing it.

THE CHAIR: Efficient, except that it's unaffordable.

MR BATES: Well, it's said by the claimant to be unaffordable, but I would resist any notion that there's a right for a claimant to say whatever amount of money they have or they consider is affordable to it, that must mean that the proceedings have to cost less than that. One can understand from the claimant's perspective, these proceedings are worth £240,000. From my client's point of view, this is about whether they can maintain the business model that's relevant to themselves and all their other operators. Against that background, the defendant quite understandably wants to fully exercise its rights of defence and to bring forward economic evidence. In my submission, it would be wrong in principle to say that because the claimant happens to be small, that somehow constrains the evidence that the defendants should be able to adduce in support of its defence case.

THE CHAIR: Well, that's inherent in the fast track procedure, isn't it? That --

MR BATES: It isn't. What's inherent in the fast track procedure is that there will be cost-capping, which affects the amount of cost recovery. What's also inherent in the fast track procedure is that the trial would take place within six months of the case management conference, but that is in a context where the tribunal is looking to

identify cases where you could have a trial of perhaps the whole case, or at least enough of the case to decide whether there's an infringement and issue an injunction within two or three days. If this isn't that sort of case that we can actually get to a decision on whether there's been infringement within two or three days -- and it's actually common ground that we can't because it won't include issue 7 for example -- that means the case isn't suitable for the fast track. It doesn't mean that somehow we allocate it to the fast track first and then shoehorn it in by preventing the defendant from properly advancing its defence case.

THE CHAIR: Thank you. 2.00.

(1.03 pm)

(The short adjournment)

(2.05 pm)

THE CHAIR: Yes, Mr Bates.

MR BATES: Thank you, sir.

Before I begin addressing the topic of split trial, I'd just like to give the tribunal a couple of references to the authorities bundle that are relevant to questions that I was asked by the tribunal.

First of all, in relation to Judge Kellaway's question about potential competition, what would happen in the counterfactual and the relevance otherwise of that, in the Energias de Portugal case, which the tribunal has already seen, at paragraph 60 to 64, which is at page 1437 of the bundle. That sets out the principle that one of the matters to be looked at is whether there's a real and concrete possibility of competition between the undertakings, who are said to be being restricted from competing with each other. It can't simply be a mere hypothetical.

And the other references in relation to the question that Judge Lenon asked me about the relevance of concentration, that question is addressed in the article at the end of

the authorities bundle at pages 1562 to 1563. There's a section there entitled:

"THE ROLE OF EXTERNAL FACTORS IN THE ASSESSMENT.

"A. Conditions of competition"

It's just sections there on 1562 and then carrying on to the next page.

So on the topic then of split trial, it's common ground that this is a pragmatic assessment by the tribunal in deciding how issues should be separated between different trials, and that the whole list of factors in the Daimler case at paragraph 27 that my learned friend cites in his skeleton are relevant.

I'd like, if I may, to show you, what the tribunal said in the Boyle case when it was deciding on which issues should be put into two different trials. It's at page 930 of the authorities bundle. Picking up at paragraph 12, it says:

"Case management, including the splitting of trials and framing of preliminary issues, is quite fundamentally an exercise in pragmatism. The Tribunal must bear in mind how far it can proceed in hiving off certain issues, and in doing so it must consider two things. First of all, the cost-benefit in hiving off; and secondly, the viability of any trial where those issues have been hived off.

"13. These are questions which cannot, obviously, be finally determined at this, early procedural stage. We are in the early foothills of this litigation and it would be wrong to reach a finally concluded view on anything substantive. Hence the pragmatic view. This Tribunal is concerned with risk management and the risks that we must ensure are avoided are (i) unnecessary escalation of costs, but (ii) also the need to have an effective trial that is not derailed by a risk of certain points not being before the court at the relevant and appropriate time.

"14. So that's broadly the pragmatic exercise that we are seeking to resolve~..."

So, the principle that I draw from that is that there are, of course, various known unknowns, but the tribunal has to be cautious about inappropriately prejudging any

issues that would be for subsequent determination on the basis of evidence, and also ensuring that the structure of the proceedings doesn't prejudice either party's ability to put its case properly or prevent the tribunal from having before it the material that it needs in order to fairly and properly adjudicate on the issues at the trial.

In my submission, this has to be looked at on a cautious basis at this stage, and not by simply buying into arguments that my learned friend's made about how it would be difficult for the defendant to show a certain thing, or prejudging in any way how the picture might look to the tribunal once it has before it the evidence: factual and, if permitted, economic.

Against that background, we say that it's not appropriate to seek to hive off issues 1, 3 and 6 from the other issues which are relevant to whether the current arrangement is lawful or not. Instead issues 1 to 7 should be dealt with together. We have essentially five points in support of this.

The first one I already made before the lunch adjournment in answer to a question from Judge Lenon, which is that we say that the economic evidence that's relevant for determining issue 3 would overlap with issues 2, 4, 5 and 7. So --

THE CHAIR: It would overlap but it would be more limited, wouldn't it?

MR BATES: It would be more limited. But we suggest that the extent to which it would be more limited might actually be quite modest because the experts are still going to have to essentially engage with the way that competition is working in the market, and what could be the impact of these particular restrictions on potential competition in the market. So it might be difficult to draw some clear parameters that enabled that material to be completely separated out.

It is noteworthy, I suggest, that first of all both parties recognise that there's going to be a need for economic evidence in order to determine whether there's been an infringement or not. Secondly, that the costs of that economic evidence as between

the two parties are not that different. Looking at the front page of my learned friend's skeleton argument, one can see in the right-hand side, which is the cost for defendants, proposed trial 1, which is essentially the cost of resolving issues 1 to 7, that the claimants propose to spend £318,000 on their economic evidence, and we propose to spend £391,000. So really there's not a great order of difference between.

MR GREGORY: Just to say that's not quite right, but I can clarify that later.

MR BATES: I'm not sure why it's not quite right, but my learned friend will --

THE CHAIR: Which figures are you looking at there?

MR BATES: On my learned friend's table at the first page of his skeleton.

THE CHAIR: Yes.

MR BATES: There's costs set out there for C, trial 1, which, as I understand it, is the claimant's proposed trial 1. Then the right-hand is defendant's trial 1, which is a six-day trial, which is for issues 1 to 7. Looking at the line for expert reports --

THE CHAIR: Yes, I see.

MR BATES: They propose to spend £318,000. Now they're going to have to spend it if they want to pursue these proceedings because issue 7 needs to be determined in order to work out whether there's an infringement or not, and whether the tribunal should grant them any relief. So, the cost is not something that can be avoided. The question is, does it make sense to incur these costs for a single trial? Both of these columns envisage what would be the costs of trial 1, but the right-hand one is to deal with all of issues 1 to 7. That's all going to have to be dealt with anyway. So we say that it makes sense to incur it in this way rather than have potentially economic evidence at two separate trials, which would increase those costs for both parties; or at least for Puro Ventures, if the claimants chose not to bring the economic evidence forward at their proposed trial 1.

MR WOLFFE: Can I just clarify the point on what you say would be required on

issue~7.

MR BATES: Yes.

MR WOLFFE: Because I think in discussion with Mr Gregory, part of Mr Gregory's point was if at trial 1 there was a finding of a restriction by object, then trial 2 would have to go on to deal with issue 7 but that the economic evidence would be within the framework of that existing finding, and that it would be more limited, if I understood the point correctly, than if we were considering a restriction by fairness and --

MR BATES: It may be that in his reply, he's going to unpack that submission for you. In my submission, of course we only get on to issue 7 if there's been either an infringement by object or an infringement by effect found, but the fact that there's been infringement by object found doesn't in any way mean that less economic evidence is going to be relevant in relation to exemption. Indeed, if he were right that it would be more difficult in those circumstances for the defendant to show that its arrangements were justified on efficiency grounds, arguably you'd need even more economic analysis, I suppose, in order to do it.

But it simply doesn't follow that the economic evidence is somehow going to be less for issue 7 if an infringement by object has been established. The question of exemption is an entirely separate question, in my submission.

MR WOLFFE: But on that hypothesis, you wouldn't be requiring to consider restriction by effect.

MR BATES: Yes. You wouldn't be required to consider infringement by effect but for the purposes of issue 7 you have to consider the proportionality of the restriction having regard to the effect on competition. So there's no way of avoiding looking at what the effect on competition would be for the purpose of issue 7.

MR WOLFFE: Thank you.

MR BATES: So that's on the overlap of the economic evidence.

Our second point is on the overlap of the factual evidence because the factual evidence that's relevant to issues 1, 3 and 6 would also substantially overlap with the factual evidence for issues 2, 4, 5 and 7 because it's going to be essentially the same evidence about the reasons why Puro Ventures has adopted the arrangements that it has; the way that branch operators are dealing with customers; the extent, if any, to which customers were aware that the branch operators are independent undertakings, et cetera.

Now, the questions that those witnesses are asked in cross-examination might be different perhaps between the two trials and have a slightly different focus, but you would still have essentially the same factual witnesses giving factual evidence at both trials, which again would be duplicative and undesirable.

Our third point is that a first trial dealing with only issues 1, 3 and 6 wouldn't enable the tribunal to grant any relief, even if the claimants succeeded on those issues because, of course, issue 7 would still not have been resolved. So what would have happened is the tribunal would have committed a lot of resources, and the parties would have committed a lot of resources, to getting to a trial on my learned friend's case on an expedited basis so we could get within the six months, but actually the outcome of it would be absolutely nothing in terms of the tribunal determining the lawfulness of the arrangements that are currently in operation.

Whereas, of course, in contrast, the defendant's proposal would enable the tribunal to determine the lawfulness of the current arrangements and potentially to grant an injunction if those arrangements were unlawful.

The fourth point is that there's simply no basis for the claimant's supposition that if they succeeded on their proposed first trial, that the proceedings would be likely to settle. I made the point before the lunch adjournment that the way that Puro Ventures structures its arrangements -- because this is important to its business model -- it does

advance a case that these arrangements would be qualifying for exemption under section 9, if it's necessary to do so. Therefore, it's simply wishful thinking on the part of the claimant that they could succeed on the first trial and that would be the end of the case.

THE CHAIR: Well, there'll be room for negotiation in relation to financial losses, wouldn't there?

MR BATES: There would be room for negotiation in relation to financial losses, as indeed there is at the moment. If all these proceedings were about was £240,000, perhaps I wouldn't be standing here because they might have been resolved. But the importance that the defendant attaches to its business model and the way that it's able to compete with much bigger people through this single-facing operating model with non-disclosed sales agents -- and we don't accept any suggestion that there is somehow something wrong with, to use a phrase used to me by the tribunal earlier, "keeping customers in the dark", that there's somehow some obligation to use only disclosed agents -- that's something that's very important to it and its ability to compete effectively. That's why I'm here; that's why we're defending these proceedings.

MR WOLFFE: Should we really be speculating about the prospects of settlement on different hypotheses, in any event?

MR BATES: I would suggest not. If this was a case in commercial proceedings where it could be seen that the proceedings were really just about money, and if the court or tribunal was able to resolve a certain amount of issues, then basically the rest wouldn't be worth arguing over – sometimes that does happen in commercial proceedings – ne can see how that might be a factor for a court in thinking, okay, let's try these issues first. It's very unlikely we're going to get to a trial 2, because trial 2 is only about quantum or whatever it is.

That is actually the model that would apply on the defendant's trial proposal because

we'd have a trial of infringement on issues 1 to 7. The quantum issues, so issues 8 to 11, would all be left over. It is very likely that those issues would settle after the outcome of our trial 1, because they're just about money.

That brings me to my fifth point which is a related point, which has only become apparent from the claimant's skeleton for this case management conference. It revealed that their thinking is that if they succeed on the issues in their proposed trial 1, then even though all that's determined is some preliminary issues, that no breach of competition law has been shown, they would be awarded their full costs of that trial, and then they would use that money -- to use my learned friend's words earlier today -- as a fighting fund to then be able to fight trial 2, including on issue 7.

I make two points about that. First of all, it's an entirely unjustified assumption that the tribunal would in fact award them all of their costs on trial 1 in the scenario they have in mind. Given that no infringement would yet have been proven by the end of the proposed trial 1, my submission at the end of that trial would be that costs should be in the case. If what the tribunal is being asked is to prejudge that question now in their favour, then I would strongly resist that.

But there's also a second point to this which is that their approach doesn't make sense. If they were awarded their costs of trial 1, let's say they get, what, three quarters of their costs back of what it costs them to participate in trial 1, how is that going to provide them with a fighting fund to fund the £318,000 that they would then be spending on economic evidence for the purposes of their proposed trial 2. It just doesn't make sense.

So for all those reasons, we just say that stepping back and thinking about what's the fair way and what's the logical way to try the issues in the proceedings, it is to have all the infringement issues and all the economic evidence, the factual evidence, in one trial.

The next topic I need to deal with, the last one before I sit down, is on permission for economic evidence. I can deal with this quite briefly because to a large extent it's covered by things I've already said on the earlier matters.

The starting point in my submission is that everybody is agreed that there's going to have to be some economic evidence in these proceedings because, as we've said, it's relevant to issue 7; we say it's also relevant to issues 2, 4 and 5.

Any suggestion that issue 7 is somehow going to be straightforward if an infringement by object is found is simply wrong for the reasons I've already explained in answer to a question from the tribunal. As the Supreme Court explained in the Sainsbury's case at paragraph 116, which I cited in my written submissions, exemption is by its nature a complex assessment. It doesn't say it's a complex assessment unless there's been an infringement by object found. The reality is that there will be substantial economic evidence required for that and so permission should plainly be granted so far as that's concerned.

As for infringement by object, the tribunal already has my submissions on this in terms of the relevance of economic evidence. In my submission, the tribunal could only properly refuse permission for such evidence if it were satisfied that economic evidence could not arguably be properly relevant to the defendant's case under issue 3. Because otherwise what the tribunal would be doing is effectively depriving the defendant of its rights of defence in relation to that issue. As I submitted before the lunch adjournment, it must be wrong in principle that the tribunal to take the approach that just because the claimant who's raising these issues happens to be small, that somehow cuts the legs off the defence in terms of what they can advance by way of evidence at issue 3, provided that that material is relevant, as we say it plainly is, to the case that we wish to advance on infringement by object for all the reasons that I set out this morning.

Now, if there were any doubt as to whether economic evidence was relevant, then one approach the tribunal could potentially take for dealing with it is to reserve its decision on the recoverability of the defendant's costs of that evidence until it's given its judgment on issue 3. Because if the tribunal decides in its judgment on issue 3, we've looked at this economic evidence, it wasn't of any assistance to us, the tribunal could say, "Well, no one can get their costs of putting forward irrelevant evidence". But if the tribunal found that evidence helpful and relevant and relied on it in deciding the case in favour of the defendant, it would, in my submission, be quite wrong for us to be refused our costs for it. But more importantly, it would be wrong if we'd actually been precluded from all of that because we'd been prevented from putting in that economic evidence in the first place.

There is a clear lack of logic, in my submission, in the claimant's argument about this which was picked up on by the tribunal at the beginning of the day, which is that my learned friend says that we should be prevented from putting in economic evidence for his proposed trial 1 because it would create an uneven playing field, and yet, at the same time, he says the evidence is irrelevant. Those two things cannot both be right. In my submission, the reason he's concerned about the uneven playing field is because he knows that economic evidence would be of substantial assistance to the defendant in putting forward our case on issue 3.

Those are my submissions unless there any questions for me.

THE CHAIR: Thank you. Sorry, this is a point that hasn't been raised before. What -- and I appreciate you probably want to take instructions -- would your client's position be if the tribunal were to order some sort of compulsory mediation in this case?

MR BATES: We're entirely amenable to any mediation. That's -- I don't think there's any -- we were talking about a situation where there's a relationship between Puro Ventures and one of its own branch operators and we need to be able to work

together collaboratively to benefit the common network. So, it's not as though these are parties that are alienated from each other; they're parties that are dealing with each other very regularly.

THE CHAIR: That's good. So, you're not opposed to that?

MR BATES: I'm not seeking to resist that.

THE CHAIR: Okay. All right. Thank you. Yes.

MR GREGORY: Thank you. Yes. I just have a few points by way of reply.

THE CHAIR: Can I just say that I think it's unlikely -- I'll have to confer with my co-tribunal members -- that we will be able to make up our minds on the question of the split trial today. So in terms of future planning, in terms of timetabling, perhaps we can work on two alternative bases: either there is a split trial or there is not. Does that seem ...?

MR GREGORY: Yes, we can.

MR WOLFFE: Split is one party (inaudible) the other. I think there will be a split trial.

MR GREGORY: I think on the timetable that should be practical. I'm just trying to think about whether that's practical in terms of the cost-capping issues given they will be potentially affected by the extent to which economic evidence is going to be allowed in to the different trials.

THE CHAIR: Well, again, I don't think there's much alternative, but for you to deal with it on different hypotheses depending on what decision we come to.

MR GREGORY: All right. Well, I guess let's see how we go.

THE CHAIR: Yes.

MR GREGORY: If we get to a point where actually it just becomes a bit artificial or too difficult, I suppose we can try and deal with that on the papers if possible.

THE CHAIR: Yes. Okay.

Reply submissions by MR GREGORY

MR GREGORY: Mr Bates made some points about the motives for the litigation. There's almost always a financial motive on the part of claimants to bring claims, because otherwise the claims wouldn't be brought. That is the case here. The out-of-area policies have resulted in Yew Freight losing very valuable repeat customers which it's been required to transfer to other franchisees. The policies limit Yew Freight's ability to grow its business through providing good services to customers who contact Yew Freight passively from outside its allocated territory.

The existence of a public interest is obviously not a precondition to the bringing of proceedings, but in any event, the fact that Yew Freight has a private interest does not mean there is no public interest in the claim.

First, the claimant is seeking to enforce the competition rules against what appears on its face to be an object restriction. The reason why certain provisions are regarded as object restrictions is that they're generally regarded as harmful to competition, and thereby customers. It is not necessary to prove specific consumer harm as a prerequisite to bringing a claim.

Second, and in any event, the potential for customer harm on the facts here is obvious. As you've seen, the out-of-area policy states on their face that their purpose is to restrict the ability of customers to shop around to get competing quotes from different franchisees for the same job. As Ms Kellaway asked, if it were really correct that there were no possibility of customers doing that, there would have been no need for the out-of-area policies in the first place.

Mr Bates also submitted that the proceedings were hugely important to Puro Ventures because it calls into question the viability of its entire distribution system. It doesn't. We are not challenging the lawfulness of their entire distribution arrangements in general. We are only challenging the lawfulness of the restrictions on passive sales. All that is required for them -- they've obviously made some changes to the policy in

2023 -- now is to make a small adjustment to the flowchart in the 2023 policy, such that if a franchisee is contacted by a customer who's located outside their allocated territory passively, they can deal with them and provide them the service without having to tell them that there's a local franchisee in their area and would they like to be transferred to them.

THE CHAIR: They can still deal with them, can't they? They can still --

MR GREGORY: There's no prohibition now, post-2023 on them dealing with them. They are required to tell the customer that there is another franchisee in their area and ask them if they want to be transferred. So I think it's fair to say it's designed to limit the extent to which franchisees end up serving customers who are located outside their allocated territory. That's stated on its face of the policy.

THE CHAIR: But presumably you would accept that, to the extent there is an infringement, the infringement is much less significant now than it was before?

MR GREGORY: Yes. That depends on the effects and that depends in part on how the written policy is actually enforced in practice. But in terms of going by the written terms, which is obviously not the end of the competition or analysis, the written terms on their face appear to be less restrictive.

MR WOLFFE: I can see that, if there's factual evidence, in practice it operates as before, then, you know, that's one scenario. But if it's operated as it's stated on its face, you still say it's a restriction by object?

MR GREGORY: Yes, I'm sorry, I'll come on to that. Just first on pricing, there was an exchange about who sets the prices. I'd be grateful if you could turn to the hearing bundle, tab C, page 269. We are here in the defence, so this is Puro's own case. I'd be grateful if you read subparagraphs 17.5 to 17.5.3, which just goes over the page.

(Pause)

So it's the franchisee that sets the prices.

Indirect effects -- this is the point that Mr Wolffe just asked me a moment ago -- it's said that the 2023 policy -- we are saying the 2023 policy -- is an object infringement. Mr Bates queried whether that was the case because it's not an express prohibition anymore; it's the consequences of the policy.

In general terms, can a provision restrict competition by object through indirect effects rather than simply express prohibitions? Well, the answer to that is yes. It's trite law that competition law focuses on the substance and not the form, and that arrangements can restrict competition through indirect as well as direct means. There have been lots of cases in which territorial restrictions in particular have been implemented indirectly, such as through a refusal to extend warranty protections to customers located outside an allocated territory, or by a manufacturer reducing volumes to distributors who are being found to be selling outside their allocated territories.

There's only one case, I think, in the bundle, which touches on that aspect. It's the JCB case, which is in the authorities bundle at page 1067. JCB had a policy designed to reduce the extent to which distributors were selling construction equipment outside of its allocated territories. I'd be grateful if you could read recitals 102 and 103. (Pause)

So, there's no express prohibition there, but it was simply that support was being denied if a product was sold outside the territory. Just for your notes, recital 150, the Commission found that it constituted an object restriction. There are other cases; they're just not in the bundle. If it's a critical issue for the tribunal, I can send in some authorities with paragraph references after the hearing.

That's the general position. But just in terms of grounding this in the practical realities, the object assessment is concerned, as the label suggests, with the object of the arrangements. The subjective intention of the parties is obviously highly relevant. This

is not a case where it is being argued that arrangements which on their face appear to have a pro-competitive objective in fact restrict competition by object because of their indirect effects. The expressly stated purpose of the out-of-area policies is to restrict passive sales. So yes, the written terms have been tempered a little bit, but on their face, the policies say what their object is.

There were some exchanges about interbrand as against intrabrand competition. Mr Bates was suggesting, oh, it's all fine because there's lots of interbrand competition. Some economists obviously take the view that that's right and they don't feel the need for any restrictions on constraints on what distributors do in terms of intrabrand competition, but that's not the approach that competition law has taken.

As long ago as 1966, shortly after England won the World Cup, the Court of Justice handed down its judgment in Consten and Grundig, where that line of argument was rejected. Ever since then, competition law has taken the view that some restrictions on intrabrand competition are not allowed, even if it is said they enhance the manufacturer's ability to compete with its rivals in terms of interbrand competition. You saw a passage in the Court of Appeal judgment in Ping, where the court noted that courts and regulators had drawn a careful line in terms of what restrictions on intrabrand competition were permitted for that purpose, and restrictions on passive sales are not. They are a step too far.

Are effects entirely irrelevant to the object assessment? There are two issues here. The first question is the relevance of the effects. Sorry, I should say: are the effects of the arrangements in question relevant to the object assessment? There's two issues: the relevance of those effects and then the nature of the evidence which is required in relation to those effects.

In terms of the relevance of the effects, the ultimate purpose in the context of an object analysis can't be to identify and weigh up the pro and anti-competitive effects of the

agreement in question, because that is the effect analysis and it would collapse the distinction. The effects of the individual agreement may be indirectly relevant insofar as they shed light on the assessment of the legal and economic context.

Here, for example, Puro could argue in principle, although it hasn't in fact done this, that nobody would have been willing to be a franchisee absent a promise of absolute territorial protection for their areas. That evidence obviously relates to this particular set of arrangements, but it might be indirectly relevant to an argument that in this market, it would be impossible for anyone to operate a franchisee network without promising absolute territorial protection to the franchisees.

But the more pragmatic issue concerns the nature of the evidence which is necessary to make these points. I've said before, the evidence which is required is evidence from someone within Puro who understands how the market operates and why Puro does the things that it does. That is factual evidence that can be provided in the form of witness statements and presumably those considerations would also be reflected in disclosure of internal documents.

There is no need for those sorts of points to be embellished at great expense by an external expert who knows far less about the operation of the market. Mr Bates referred to his academic article, which is at tab 39 of the authorities bundle. He didn't actually take you to it, he just gave you a little bit of reading to do and I think I will do the same. I'd be grateful, if you are going to dip into it, if you have a look at the passages on pages 1561 and 1565.

In relation to expert evidence, it is not the case, as Mr Bates suggested, that we accept we will need to adduce expert economic evidence to prove our case. I should set out that that would obviously be true in relation to an effects case. The first point to note on that, obviously, is if we succeed on object, we will not need to run an effects case. If we lost on object, in reality, it would be very difficult for us to run a sort of standard

case on effects because of the amount of expert economic evidence that would be required. I suspect the possibility of running an effects case would be limited to if the tribunal rejected the object argument for some narrow reason and it was possible for us to build an effects case by essentially piggybacking on some of the findings that you already made. But could we run it from scratch? In reality, no. And we are perfectly content for our case on effects to be stayed. Obviously, if we then applied for it to be unstayed then Mr Bates would be able to make whatever points he wants to make about the risk of duplicated costs and so on.

If we prove object, what will be left is the exemption arguments. Those, as I said earlier, will be much more focused. Mr Bates suggested that wasn't the case and I think the tribunal questioned him about that, but the exemption evidence would be much more limited. It must be limited to whether the exemption criteria are satisfied or not. There would be no need for full market definition and market share analyses. We would not be saying, if it's helpful to clarify this, that the arrangements have eliminated all competition in the market, an argument that might require a market definition analysis.

But also, in the case of the exemption, the burden of proof would be on Puro to prove that it satisfied the exemption criteria which are demanding. It would therefore be open to Yew Freight to sit back and not adduce its own economic evidence, but simply to contend that Puro had not discharged the burden of proof.

There was some confusion about the exact cost estimates in relation to expert evidence. I'd be grateful if you could turn up -- well, if you go to the cover page of our skeleton first, which is where Mr Bates took you. So, if you look here, we're looking in the blue columns which relate to Puro's proposed wider trial 1. It is correct, as he said, that if you look across the expert report columns, the figure for Puro is £391,000, and the figure for Yew Freight is £318,000. It may be this is a consequence of an error on

our part, but if you look down to pretrial preparation and trial, Puro's costs are a lot greater than ours. The reason for that is we put all of our expert economic costs into the expert reports section. Puro, as well as having to pay for the expert reports, has got significant sums being paid to its expert for the purpose of trial preparation and trial, and the details of that are set out in footnote 2 on page 3 of the skeleton. So, in addition to the £391,000 costs of the expert reports, if you go through Puro's detailed cost estimates, they also pay £75,000 to their expert for trial preparation and £25,000 for trial attendance so it bumps it up by another £100,000.

On permission, Mr Bates essentially said that if the defendant wants to adduce certain expert evidence then it should be allowed to and it would be unfair of the tribunal to not allow them to. It is simply not the case that parties have a right to adduce expert evidence. Permission is required to adduce expert evidence, both under the CPR and in the tribunal, and the reason why a different approach is taken to expert evidence is no doubt because it has recognised that it can be hugely expensive, as you'll have seen in the cost estimates here.

That is why the courts control it and insist not only that expert evidence is relevant, but it is proportionate, given that proportionality is part of the overriding objective and part of the tribunal's governing principles.

Mr Bates also was inviting you to not decide now whether Yew Freight was potentially liable for Puro's economic evidence costs. That, I'm afraid, would render the proceedings not viable for Yew Freight. As recognised under the fast track regime, it is not only costs that can render proceedings unviable, but cost risks. If Puro had hanging over it the possibility that it might be ordered to pay hundreds of thousands of pounds to Puro for expert evidence costs at some point down the line, then it could not proceed with the proceedings. It must have certainty now as to what its liabilities are.

Finally, so you asked about compulsory mediation to Mr Bates. We are very happy to sit down and mediate. We suspect that mediation and settlement may be easier once the tribunal has expressed some sort of preliminary views, but we are happy to sit down.

THE CHAIR: That's helpful. Thank you.

Discussion re effect

MR BATES: Sir, with apologies, there is one matter I need to raise arising from that, because my learned friend raised for the first time in his reply submissions a proposal by the claimant that their effects case could be stayed. So just to briefly set out what my position is on that, but if that's --

THE CHAIR: Sorry to interrupt, I wasn't clear as to whether that -- at what point the stay would come into effect.

MR GREGORY: Well, our proposal is that we do not pursue an effects case for the purpose of trial 1. So if you accepted that we would have a trial 1, we would find out your conclusions on object.

Obviously, if you find an object restriction, there's no need for us to consider effects. If you didn't find an object restriction, it would then fall for us to consider whether we wanted to pursue an effects case, and as I've said, there is basically no realistic possibility of pursuing a sort of standard effects case. The question will be whether there is something in the judgment that allowed it to be run more efficiently. So that is how I think things would play out in the normal event.

Given that we are not proposing to run an effects case at trial 1, we have no objection to our effects case being stayed now for the time being; it makes no difference to us.

MR BATES: So the tribunal knows my position on that: my position is that if the proposal is that the effects case be stayed now, that actually what should happen is

that all the other issues, apart from the effects case, should be put into trial 1. Because the claimant's position, as I understand it, is that they wouldn't be adducing economic evidence on any of the issues at that trial. They wouldn't have the cost of economic evidence because they've said they don't want to present any, and we would simply present our evidence in relation to all of issues 1 to 7.

THE CHAIR: I'm not sure that's right, is it? I mean, there would still be -- you'd still need to adduce economic evidence on the question of the exemption.

MR BATES: If the claimant's intending to adduce economic evidence on exemption. But as I understood Mr Gregory's submission, their point on the exemption is that the burden of proof is on Puro Ventures, and therefore they wouldn't need to adduce economic evidence on that either. I'm saying if their position is that they don't wish to adduce economic evidence, and their effects case can be stayed, then actually that militates in favour of having issues 1 to 7 tried together. The defendant can put forward its economic evidence. If the claimant's electing not to put forward any economic evidence, then that's a matter for it.

MR GREGORY: If I just -- to help me just to clarify my position on that. So just focus on the exemption issue alone. Yes, I wasn't definitively saying that we would not want to put any economic evidence in. It is obviously a different position because it's more focused and the burden would be on Puro.

I suspect if we got to the point of talking about directions for expert evidence on exemption, what I might ask for is sequential expert evidence so that Puro would put in expert evidence on exemption first, and then we would have an opportunity to put in reply expert evidence. We might then take the view, actually, we're just going to run the "You haven't met the burden" point and not put in any, or if there was one or two areas where we felt it would be helpful to put in economic evidence, we could put in expert evidence that was much more limited. That is just a pragmatic way of trying

to keep the costs down and the amount of expert evidence proportionate.

On the effects evidence, if our effects case has stayed, there's no need for any economic evidence relating to effects at trial 1, including evidence on market definition, market shares and so on.

THE CHAIR: So where does that take us in terms of the agenda?

MR GREGORY: Sorry, are you saying in terms of the agenda items?

THE CHAIR: Yes.

MR GREGORY: Well, we can make -- shall we just try and work through them and we'll see if --

THE CHAIR: Yes.

MR GREGORY: -- we can deal with some of them?

Submissions by MR GREGORY

MR GREGORY: Disclosure is fairly easy, I think. Do you have in electronic or hard-copy form the agreed disclosure table? I do have copies if you want me to hand them out.

THE CHAIR: No, I've got copies of that.

MR GREGORY: So, as I've said at the outset, nearly all of the factual issues are agreed just in terms of the pleadings. There's a limited number of disputed points. The parties have agreed that it would be efficient for all the disclosure to be divided in a single tranche, including in relation to quantum. That may also have the benefit of facilitating settlement.

One point to note is that there's no -- well, we'll go through it -- material disclosure that relates exclusively to the effects analysis. If you have a look at page 6 of this document, you will see a row that's got a number 2 in the left-hand column. That's the second issue which is market definition.

So what's referred to there are documents relating to -- high level documents where

the parties identify their main competitors. I think that sort of disclosure would be relevant to an assessment of the legal and economic context, even if there's going to be --

THE CHAIR: I haven't got the right page, sorry. Which --

MR GREGORY: Page 6 of the document.

THE CHAIR: This is the joint disclosure table.

MR GREGORY: Yes.

THE CHAIR: Yes. Oh, I'm sorry, I'm looking at something that says "proposals". Is that not the same thing?

MR GREGORY: Joint disclosure proposals.

THE CHAIR: Yes. Page 6?

MR GREGORY: Yes.

THE CHAIR: Any high-level business planning, that --

MR BATES: It's all agreed, isn't it?

MR GREGORY: Yes, it's all agreed. I'm just making the point that technically this relates to market definition, but irrespective of whether you're going to formally determine market definition at trial 1, I think these are still helpful documents to have.

THE CHAIR: Okay. Yes.

MR GREGORY: If you go back to page 2 at the bottom, you'll see the contested elements are highlighted in yellow. You may have seen from the pleadings that Puro is placing considerable weight on the fact that it refers to its franchisees as branch operators rather than franchisees. Its initial proposal was therefore to disclose all the screenshots from its website where it refers to branch operators. We've said, "Well, you can you disclose the screenshots where it refers to franchisees as well?" and it said, "Well, there aren't any of those".

Our understanding is that the way in which Puro refers to its franchisees as branch

operators changed over time, so previously, they tended to be referred to as franchisees, more recently as branch operators. So we've just proposed if they aren't going to have any current screenshots, that they just provide some disclosure as to the extent to which that is the case.

Perhaps related to that is you can see there's another highlighted section at row 1(b). So actually that is -- I'm happy to hear say that's agreed. We discussed this issue about whether franchisees carried out the courier services themselves or by booking a third-party courier.

Mr Bates explained it: well, some franchisees do it one way and some do it another. Again, our understanding is that that has changed slightly over time. So whereas previously more franchisees would do the courier bit themselves, more recently there's been more booking.

Puro, in principle, should have all of that information on its system, mainly because it receives the money and it then has to make payments to whoever carried out the courier service, whether that is a third-party courier or the franchisee, and I'm told there are different codes that are used to determine that in the system. What I understand from Mr Bates is actually because of issues with their systems, they may not have been able to get all of that data going very far back in time.

This bit here, the first highlighted bit, relates to disclosure by Yew Freight. We don't mind, being subject to that disclosure requirement, our ability to access these data in a sort of comprehensive way is much more limited than Puro, but we are happy just to do what we can in terms of getting that information.

If you turn over the page at the top of page 4. This is the issue that, if, as I am told, Puro can only access recent data relating to this, that may well not be representative of the position over the entire claim period, because it won't pick up the earlier period when, as I understand it, franchisees were doing more of the couriering themselves.

So what we have asked for are just documents that shed light on the extent to which that has changed over the course of the claim period, given they may not be able to access all of the data.

But that is that, and I think that is it. There was a final highlighted bit --

MR WOLFFE: Sorry, can I just clarify. So I think you introduced this by saying that both of these were now agreed.

MR GREGORY: Everything that's not highlighted is agreed.

MR WOLFFE: Okay.

MR GREGORY: Sorry.

MR WOLFFE: In relation to 1(b).

MR GREGORY: Yes, sorry. 1(b) on page 3, that's the claimant's disclosure.

MR WOLFFE: Yes.

MR GREGORY: We are happy to provide what we have. It will not be as comprehensive as the information that Puro provides, so it may be duplicative to some extent, but anyway.

MR WOLFFE: So, what you're telling us is you've no objection to disclosure in the terms sought, but you're putting down a marker that there may be limits on what that will actually produce.

MR GREGORY: Yes.

MR WOLFFE: In relation to point 3 of the defendant's disclosure, what's the position?

MR GREGORY: Yes, that position is -- I had anticipated that they would just be able to pull off the data that showed you the balance throughout the entire claim period. I gather from Mr Bates that that might not be the case; they might only be able to pull off the data from the more recent years, which wouldn't be representative if what we believe is true, which is the balance has shifted over the course of the period.

So this is simply asking for disclosure of documents for evidence if there has been

a shift in the extent to which franchisees are actually carrying out the courier servicing themselves.

THE CHAIR: That's disputed, is it?

MR GREGORY: And that's --

THE CHAIR: That one is disputed, is it?

MR GREGORY: I gather, yes.

THE CHAIR: Okay. Thank you.

MR GREGORY: I think that's it. There's one final highlighted bit on page 10. That's actually a hangover from an earlier draft. We're happy to deal with that point.

MR BATES: So that's it on disclosure. [WAS THIS THE CHAIR?]

MR GREGORY: Oh, well, I should say, there's an issue about the timing of disclosure, but I think that probably falls within the timetable rather than at this point.

Submissions by MR BATES

MR BATES: So I know that the claimant's skeleton for this case management conference said at paragraph 63 that most factual issues are agreed and disclosure should not be particularly extensive.

That rather contrasts with what's actually in this table. It's true that there isn't very much disclosure that's to be provided by Yew Freight, but there is an awful lot that's going to have to come from the defendant.

Now, we don't object to that, given that we're the ones who are trying to bring in economic evidence, et cetera, that obviously the economists are going to need the material to do their analysis. But I make that point because it's relevant when one comes to look at the detail of some of these requests and what they're actually asking for.

There is also another difficulty I should mention, which is the one that my learned friend alluded to. Puro Ventures changed its systems in March 2022, so it's not able to do

a search using its own staff immediately looking at records before that. It's investigating to what extent it can dig out the previous data from previous systems and access it and that's something that's being worked on.

In terms of the individual areas of disagreement. On the one at the bottom of page 2, we don't object to providing screenshots or copies of web pages at any point over the claim period, which started in September 2018 if you count back six years from the High Court claim form. But we do object to the second highlighted bit, which is:

"Any documents evidencing the extent to which and why terminology used by Puro Ventures to describe its franchisees/branches has changed over the claim period." [as read]

It's very difficult to see how that material could proportionately be searched for. What's already going to be found by the earlier part of the request is the actual screenshots, insofar as they can be found, what was actually on the website at the relevant time. So why should we also search for documents explaining the reasons for the words that were then used on the website? It's obviously disproportionate.

1(b), as I understand it, that's all now agreed, or at least the claimant has agreed.

The (iii) at the top of page 4, that has to be seen against the background of the other parts of the defendant's disclosure under 1(b). So what will be giving under 1(b) is first of all on page 3 for the defendant, we're going to give the data evidencing the proportion of jobs which were jobs placed by Yew Freight, which were fulfilled using Yew Freight's vehicles and staff, et cetera. So we'll give the data on that.

We're then being asked to give equivalent data for all franchisees, so insofar as we can we'll do that.

So why then is it proportionate to ask us to give documents relating to the proportions that have changed over time or why they've changed over time? If we've got the data that shows that, we'll give it and they'll get the data; if we haven't got the data, we

haven't got the data.

Then on the last page, I'm not sure if my learned friend was saying that that's no longer in dispute, 10(1)?

MR GREGORY: Yes. That's correct.

MR BATES: That's helpful. Thank you.

Submissions by MR GREGORY

MR GREGORY: So I'll hopefully knock off some more points.

I think we can agree the 1(a), the point on page 2, is they're going to get all the screenshots from over the entire period. That's fine. There's no need to get the other documents.

The only point about (iii) at the top of page 4 is that was put in based on an understanding that actually Puro would not be able to get the data over the duration of the claim period, and the point was: well, if you can't get the data, just provide some documents that summarise how it's changed. If what Mr Bates is saying is that it can get the data, there's no need for the documents, I accept that.

THE CHAIR: Right. So that deals with disclosure.

MR GREGORY: Yes. Shall we ...

Timetable or cost controls?

THE CHAIR: There's nothing much to say about factual witness evidence, is there?

MR GREGORY: No.

THE CHAIR: Expert evidence, we're going to reserve our position on that.

Hearing date for trial 1, if there is to be a split trial.

MR GREGORY: Yes. So, the only actual timetable that's been proposed, Mr Bates had a proposed timetable in his skeleton which assumed expert evidence. If you look at Puro's skeleton at page 5. (Pause)

So I think on the assumption that there was going to be some expert evidence, what

I would ask, as I suggested a few moments ago, is that it's ordered to be sequential rather than simultaneous. That is to give Yew Freight's the possibility of being extremely selective in terms of the points on which it responds in relation to economic expert evidence, or indeed to take a judgment about whether it wants to respond at all.

If the evidence is exchanged simultaneously, I mean, it just, you know, it has to go out and start incurring costs potentially of a wide range of issues because it doesn't know what the other side is going to say. So I think it would be much more proportionate from a cost perspective to have sequential exchange. Obviously, if there's then going to be a joint expert statement, Puro's expert, if they want to respond to our expert report, will have an opportunity to do that in the joint expert statement.

THE CHAIR: That would seem to be sensible. Mr Bates, on that basis that there was a right to reply in a joint expert statement.

MR BATES: Yes, there's no objection to that.

THE CHAIR: Okay. And what about the timetable itself?

MR GREGORY: Well, I think if there's experts -- so under the fast track allocation which is related issue --

THE CHAIR: Yes.

MR GREGORY: -- the hearing would have to come on within six months of the order allocating it to the fast track.

THE CHAIR: Yes.

MR GREGORY: So in reality the hearing would have to take place before Christmas.

THE CHAIR: Yes.

MR GREGORY: If there's expert evidence and given that Puro is saying it needs until September to produce the disclosure, that is not going to be possible. So a decision to admit expert evidence is a decision not to allocate any of the proceedings to the fast

track, essentially, at least at this stage.

THE CHAIR: Does that -- and I think it was you said that ultimately that doesn't matter particularly, because we have our general case management powers which can do everything that could be done under the --

MR GREGORY: Yes.

THE CHAIR: -- fast track process.

MR GREGORY: I think what we would want to -- the critical issue for us is the cost caps.

THE CHAIR: Yes.

MR GREGORY: So I think even if the proceedings can't be formally allocated to the costs to the fast track, we would be invoking the spirit of the fast track procedure when we start talking about the cost cap issues.

THE CHAIR: Yes. Okay. But otherwise that timetable is not disputed then.

MR GREGORY: Yes. I think if you substitute the reply expert reports for Yew Freight's -- any expert evidence that Yew Freight wishes to serve.

MR WOLFFE: Could that be argued to say something about a timetable on the hypothesis that we take a different view on the question of expert evidence?

MR GREGORY: Yes. If there's no expert evidence, our submission is it should be possible to have a hearing before Christmas so that we could allow the case to be allocated to the fast track.

Puro has suggested it needs until 15 September to provide disclosure. It seems like a long time. I will let Mr Bates explain to you why he thinks so long is really required. But if you then look at the dates after that, he's allowed almost two months for factual witness statements after disclosure, and then around five weeks from the initial factual witness statements to reply factual witness statements. We think it should be possible to squeeze those very generous deadlines. So, for example, if you had

disclosure -- and I'm not trying to give precise dates -- in mid-September, you could have factual witness evidence by mid-October and reply factual witness evidence by early to mid-November, which would allow skeleton arguments in time for a hearing, for example, at some point in December.

So if there's no expert evidence and subject to the details we think it should be possible to bring it on this year.

THE CHAIR: That would seem, again, perfectly sensible. Mr Bates.

Submissions by MR BATES

MR BATES: Sir, broadly, we're content to leave it to the tribunal's good sense and experience to set the timetable depending on how the tribunal comes out on the other issues. I'd only make a couple of just high-level points.

The first being, of course, that, absent this discussion about the potential fast track allocation and the timetable that would naturally go along with that, there's no particular reason for urgency in these proceedings as to why these proceedings should be prioritised over other proceedings in the tribunal and given some sort of expedition, albeit that in general, especially if all of issues 1 to seven can be tried together, we're keen ourselves to have that determined as soon as possible so we know the lawfulness or otherwise of the arrangements that we're operating.

The second high-level point that goes with that is that we wouldn't want the timetable to be so compressed so that it actually leads to inefficiencies. I mean, as far as the disclosure timing is concerned, our thinking was that because of the extensiveness of the disclosure -- and I realise the tribunal may not have a good sense of that now, because the extent to which disclosure has been agreed means we haven't had to go through the table.

But if I can invite the tribunal before finalising the timetable to actually look through all the categories, it is a very extensive exercise that we will have to do, and our thinking

was that it might take perhaps eight weeks to try to find the data and then allowing four weeks, which is not a very generous amount of time, for that material then to be reviewed by the solicitor. So that's how we've got 12 weeks, also taking account that that will of course cut across the summer holiday period.

So I don't think we've been particularly greedy, if I can put it that way, in the timetable we've asked for for the disclosure process.

MR GREGORY: I would suggest if you decide that there is to be no expert evidence, and you would be minded to allocate the proceedings to the fast track in the event that the trial could take place before December. I mean, the practical thing to do may be to look for hearing dates in December, and then to work backwards from that, and then there'll be obviously no need for the times for witness evidence and so on to be more truncated than they need to be in order to hit the December hearing date.

THE CHAIR: Okay.

Submissions by MR GREGORY

MR GREGORY: Should I -- there's the question of cost caps. Shall I make some submissions on that?

THE CHAIR: Yes.

MR GREGORY: Obviously, the total amount of cost is a bit up in the air at the moment because we don't know, whether until --

THE CHAIR: A particular interest would be the possibility of cost caps on expert evidence at trial 1.

MR GREGORY: Yes. So as you've heard, given Yew Freight's limited financial means and the size of the cost budgets that have been put forward, it's obvious that a cost cap would need to be imposed on the defendant, and setting a maximum amount that we'll be able to recover in the event that it's successful. That's the reason that I made a few moments ago; that actually the cost risks alone if they were open-ended would

be enough to deter the proceedings from going forward.

I'd be grateful if you could turn to our skeleton, at page 16 and if you could read paragraph 55. (Pause)

So this identifies some of the key considerations and at a high level what has been done on cost caps in the Socrates and Up and Running cases. (Pause)

Just some points to highlight from those paragraphs. One, cost-capping is not about the reasonableness of the costs incurred; it's about making the litigation affordable. In Up and Running and Socrates, cost caps were imposed on the defendants in the order of one quarter and one half of their estimated costs. The parties' ability to pay is a critical consideration. In the light of that, there's no reason why cost caps should be symmetrical, whether in absolute or relative terms. In Socrates, for example, the defendant's costs were capped at about half of its budget, whereas the claimant was permitted to recover almost all of its budgeted costs in excess of 90 per cent.

In relation to estimated costs, you'll have seen I just handed up a document with some additional tables of the same sort that were included on the cover page. The first page has the same table that was included in the skeleton. These are estimated forward-looking costs from now on for our trial 1. Some of the numbers were highlighted because actually these figures were taken from the two parties' cost budgets, which weren't done on an equivalent basis. So, the highlighted figures for Puro, for the claimant's proposed trial 1, for trial preparation and trial attendance, you'll see £88,000 and £44,000. They actually assumed a five-day trial, so they would be expected to come down a bit, whereas our proposals were for a two-day trial.

If you turn over the page to the top, what I've done is the same table, but I've adjusted those figures on the assumption that we would be dealing with a three-day trial. So, Puro's figures have been multiplied by 3/5 and our figures have been multiplied by 3/2 and you see that they come out as quite similar.

Then, if you look down towards the bottom of the page, that table is an enlarged table because it also includes cost to date, pre-action statements of case and the CMC, including the short remote hearing that we had. Both parties have incurred around £100,000 of costs in the proceedings to date. If you compare the figures in the bottom row at the table at the top, so that's £289,000, that's the forward-looking costs of our proposed trial 1 with no expert evidence. The equivalent figure in the table in the middle of £490,000, that would be the total costs incurred to date and also estimated that would have been incurred by the end of our proposed trial 1. The estimates for Puro's proposed trial, given that it includes extensive economic evidence, are obviously a lot higher.

In terms of the parties' ability to pay, there was a table at paragraph 56 of our skeleton that contained one error and had two missing figures. The table at the bottom of the second page that I've handed up is a corrected and completed version of the table. It just illustrates that, well, I think in their response, Puro is keen to emphasise that it too was a small company and was concerned to keep costs to a minimum. You can form your own view on whether they've done that in their costs proposals, but these basic figures relating to number of employees, turnover, profit after tax and the current assets which are taken from financial reports which are in the hearing bundle just illustrate that Puro is obviously a much larger company and its current assets are almost £4 million compared to Yew Freight's current assets of £135,000.

I'll also just ask you to look at hearing bundle tab D, page 397. If you go first to page 393, you've got the cover page, this is Puro's annual report and financial statements for the year ending November 2024. If you then turn to page 397, in their response, Puro highlighted that it had only had profits of £158,000 in 2024. You can see the three-column table with 2024, 2023 and 2022 figures. Mr Yew, in his witness statement, pointed out that that ignored the fact that it had had quite a generous tax

rebate so actually its profits in that year were significantly higher.

But the point that I want to make here is it seems to have had unusually low profits in 2024 so its 2024 profits are not representative of its profits in other years. It's had almost £900,000 profits in 2023 and almost £4.5 million in 2022. The commentary on the previous page 396 suggests that the reason for the lower profitability figure in 2024 is that Puro has made significant investments, including in systems and so on.

As to the level of the cost caps that we asked for, we would ask that Yew Freight, if it's successful at trial 1, be permitted to recover all or almost all, the overwhelming majority, of its costs incurred up to that date. You will have seen that is consistent with the approach that the tribunal took in Socrates where a cost cap of around £200,000 was imposed on a claimant, which allowed it to recover more than 90 per cent of its costs. As I've explained, one of the reasons for that is to make sure that Yew Freight has enough money to participate in a second trial if Puro insisted on pressing the remaining issues to that second trial.

In terms of the cost caps for Puro -- you can see from the tables that have been handed up the level of costs that it would incur in a sort of focused trial 1 of the sort that we proposed -- we would ask for a cost cap on Puro, taking into account all of its costs incurred up to the end of trial 1 of 75,000. That would amount to 28 per cent of its costs incurred and estimated up to that point, which is actually fractionally higher in percentage terms than the cost cap that was imposed on the defendants in Up and Running. The main reason for that is that it's necessary for a cost cap of around that level to be imposed in order for the proceedings to be financially viable for Yew Freight. It has already incurred costs to date of £100,000. Its estimated forward-looking costs for a three-day trial are around £125,000. So, if it lost and had to pay Puro's costs, even if they were capped at £75,000 as I've suggested, that would be an outlay of £300,000. That is in circumstances where it has current assets of

£135,000 and annual profits of around £60,000. The directors would therefore be needing to draw on their personal reserves in order to make even that level of contribution to Puro's costs.

I would also ask you to take into account, when setting the level of the cost cap, that in our submission Yew Freight has a strong prima facie case. I'm obviously not asking you to make a finding on this stage on the merits, but (1) the terms and rationale for the out-of-area policies were committed to writing; (2) it's well established that passive sale restrictions of that sort restrict competition by object; and (3) it's also well established that object restrictions will only very rarely satisfy the exemption criteria. This is far from being a speculative claim and my submission is that it's in the interests of justice that cost caps be imposed at a level that allows the claim to be brought.

Those are my submissions on cost caps.

THE CHAIR: Should we have a break now for five minutes for the transcript? How long are we going to be? Presumably not long.

MR BATES: Not long, maybe ten minutes.

MR GREGORY: And then fast track is the only remaining issue.

THE CHAIR: Okay, well, let's still have a break.

(3.27 pm)

(A short break)

(3.35 pm)

Submissions by MR BATES

MR BATES: On cost-capping, we say that it's important to bear in mind that the usual position, the starting position, is that a defendant should be able to recover its reasonable and proportionate costs for defending the proceedings. That's especially true, of course, in a case which hasn't been allocated to the fast track. But even if the case is allocated in the fast track, we say that should still be the starting position and

justification is needed for departure from it. In a case such as this where both parties have quite limited resources, we say that the appropriate way of controlling costs is for costs to be actively and carefully managed to a proportionate level rather than preventing one party from recovering its reasonably incurred and proportionate costs of the proceedings.

This isn't analogous to the cases like Socrates and the Deckers case that my learned friend referred to. Of course, it's always possible to go through the list of tribunal cases and pick out a couple where cost caps have been imposed in a way that's favourable to you and set them as the example. I could come up with some others where that hasn't been the approach followed, but the reality is all these cases are fact-specific.

Socrates was against the Law Society. That was a situation where the Law Society were basically trying to use their monopoly position, because they're the Law Society, to control who was able to provide certain training courses. So the issues in that case were quite narrow and confined and the consumers who benefited as the outcome of that case were ultimately solicitors who, of course, were members of the Law Society. So it was a very small training company against a regulatory body and one can see why in that particular context, it might be appropriate to set cost caps in a way that are favourable to the claimant to enable those proceedings to be brought to clarify the lawfulness of a regulator or professional body which has regulatory powers. Deckers is an international group of brands. It includes, for example, UGG shoes, et cetera. They are huge, you know, turning over billions of dollars a year.

The situation of the defendant, yes, we accept that we are larger than the claimant, but even just relying on the figures that my learned friend gave, if we take his figures, our total assets of £4 million. Yes, of course, the operating profit varies from year to year because of tax reasons, et cetera, but we're not a huge company and the reality

is that if we are left out of pocket, even if we're successful in the proceedings, by, you know, £100,000, £200,000, whatever it is, that is going to have a very real financial impact on the defendant and so that has to be borne in mind as part of the overall fairness.

I particularly urge the tribunal against any suggestion from my learned friend that the cap shouldn't even be reciprocal. Because he seems to be suggesting they should recover all of their reasonable costs, but we shouldn't even get the same amount; we should be given some lower amount. Perhaps that would make sense in a case if we were Apple or Google or even Deckers. But the reality is this is a claim where the claimant is trying to get £240,000 of damages, and the tribunal should be very wary of creating a situation where the defendant is put in a position where it's sort of heads you lose, tails you lose, where whatever the scenario, we're going to lose a six-figure sum because of the cost cap that's been imposed. That simply wouldn't be fair.

I go back to the point that I made at the beginning of my submissions today about the public interest. That is an important consideration because in the High Court, for example, cost caps are sometimes imposed which result in one party not being able to recover its reasonable costs, but that's nearly always where there's a public interest justification for the proceedings. For example, if you've got an environmental pressure group that wants to raise an issue about pollution or something like that. One can see why in that kind of context, the public interest may lead the tribunal to departing from the usual position.

In this case, although my learned friend makes some suggestions of some relevance to the public interest, the reality here is that the defendant is a relative minnow, as the figures about assets et cetera show, within the market for courier services. So, the notion that the public interest somehow requires protection by enabling my learned friend to bring his case in a way that his clients consider affordable is much less

strong -- it is really quite weak in my submission -- compared to some of the cases which this tribunal has to deal where there is some disagreement that --

THE CHAIR: I didn't really pick up that public interest was at the forefront of the argument about cost-capping. It's more to do with access to justice, isn't it?

MR BATES: It's more to do with access to justice, and in my submission, the points that I made at the beginning of my submissions earlier today are highly important as the framework through which they should be seen. This is access to justice to advance a claim for £240,000. That's the reality of it.

THE CHAIR: So, you don't want to say anything more about the specific figures? I'm not suggesting you have to; you can obviously leave it to the tribunal.

MR BATES: What I say about it is that in contrast to what the claimant have done, we have put in a very detailed Precedent H cost budget, setting out all our costs. No specific points have been taken on any of that by the claimant to say any of those costs are unreasonable; they've just said that a cost cap should be imposed. I made my submissions earlier that certainly for the economic evidence, it seems to me that there isn't actually a great disparity between the parties' costs anyway. One area where clearly the defendant will be justified in incurring significantly greater costs than the claimant is disclosure and that's just obvious from the disclosure table, where they are hardly going to search for anything and we're going to provide very extensive disclosure. Well, that's got to be reflected in the cost cap. So, if one is going to set a cost cap, my submission would be that it should at the very least be reciprocal but in fact, the defendant's costs cap should be higher to take account of the higher cost of disclosure that it would need to incur.

Submissions by MR GREGORY

MR GREGORY: Just on disclosure costs, I'm not sure actually there was a dramatic difference in disclosure cost. Obviously Puro is familiar with all of its own documents,

whereas we will have to spend time reviewing them to understand what they say.

I think I might have misspoke. I think I said Puro had net assets of 4.6 million; I've been passed a note saying it's actually 6.4 million, if it matters. The reference for that is the hearing bundle page 405.

I didn't have anything more on cost caps. I think the only remaining agenda item is the fast track allocation.

THE CHAIR: Yes.

MR GREGORY: I think it's common ground that if you allow expert evidence, it will not be possible to hold the trial within six months so therefore fast track allocation will not be possible. If there is no expert evidence at trial 1, we have an application that trial 1 be allocated to the fast track. I'd be grateful if you could turn to the fast track provisions as summarised in the hearing bundle at page 312. This is our application. You'll see that rule 58(1) allows the tribunal to make an order that particular proceedings be subject to the fast track regime. Particular proceedings is the wording used in the provision. Rule 58(3) sets out eight non-exhaustive factors that the tribunal should take into account. I think I already discussed this earlier, but certainly in the tribunal's previous practice, it has allocated proceedings, to the fast track notwithstanding that some of the issues in the proceedings were not going to be dealt with at the trial which was ordered.

In Socrates, you can see -- I might have shown it to you earlier -- it's dealt with at paragraph 61 of our skeleton on page 18. In Socrates, the claimant sought an injunction and issues of damages were split off to be heard later. In the directions that were made following the CMC, the claim as a whole was allocated to the fast track.

In Up and Running, claims were made under both chapter 1 and chapter 2. The chapter 2 case was put off until later and it was the chapter 1 issue which was the subject of the first hearing which was allocated to the fast track. As I said, we've

applied for our trial 1 to be allocated to the fast track and I think that seems like the right approach. But anyway, that's been the tribunal's practice in the past.

THE CHAIR: Yes.

MR GREGORY: In terms of the criteria, going back to the hearing bundle at page 312, these are eight non-exhaustive factors. So the requirement to have a trial within six months is a fixed requirement. These are a number of factors to be considered in the round in deciding whether to allocate to the fast track.

Yew Freight is a micro enterprise within the meaning of this regulation. Puro is a medium-sized enterprise.

"Whether the time estimate for the main substantive hearing is three days or less."

I think we could determine our trial 1 within three days, as I've suggested, and it could potentially include those points of law as well, relating to Puro's defences.

"The complexity and novelty of the issues involved."

Well, I said our basic case is that this is a classic restriction on passive sales which is of the type that's long been regarded as an object restriction. So we say that's not a particularly complicated legal issue for you to determine.

"Whether any additional claims have been or will be made --"

We're not proposing to bring any new claims. There obviously are different elements to the claim but, as I've said, that's not stopped allocations to the fast track in the past.

The number of witnesses are relatively limited, the factual witnesses.

"The scale and nature of the documentary evidence involved."

You've seen what the agreed disclosure proposals are and when Puro says it could provide that material by.

"The nature of the remedy being sought."

Well, in relation to our proposed trial 1, all we will be asking for is a judgment that the provisions in question restrict competition by object.

On that basis, given in particular the nature of the issue and the size of the parties, we say it satisfies the criteria for fast-track allocation and it should be so allocated as I mentioned earlier: small companies who are considering bringing claims do look specifically to fast track cases for guidance as to how their claim would be treated.

Those are my submissions on fast track. (Pause)

THE CHAIR: Three days strikes me as pretty tight. I mean, one of the problems would be, though, is we're not just talking about one restriction; we're talking about different restrictions over different time periods. That's right, isn't it?

MR GREGORY: Yes. I think my understanding is the way that the -- there was a very similar out-of-area policy operated during periods 1 and 2. During period 1, it hadn't yet been set down in a single document in the way that it was in the 2020 out-of-area policy. But I understand the nature of the policy was the same. There is then obviously a slightly different written policy for 2023 onwards.

MR BATES: So just as a single source, a convenient source, of the tribunal's case law on fast track, can I draw the tribunal's attention to the Belle Lingerie judgment, which is tab 22 of the authorities bundle. It's starting at page 709 of that bundle. There's paragraph 16 where it traces through the tribunal's decision-making since the Breasley Pillows decision of Mr Justice Roth.

Looking down to paragraph 19, it quotes there what Mr Justice Roth observed in Breasley, which is that:

"'The fact that a claim is not urgent is not the most relevant factor [in relation to whether the case should be allocated to the fast track], but it is not irrelevant when one bears in mind that one of the distinctive features of the FTP is that it is designed to be, as its name indicates, much faster than ordinary litigation. A substantive trial takes place within six months~...'"

It then quotes what he said about the benefits of the claimant of a cost cap.

Then at 36, Mr Justice Roth talks about other options for funding proceedings that are available, such as after the event, insurance and conditional fees, et cetera.

Then at paragraph 21, it sets out the approach taken by Mrs Justice Bacon, of course now the President of the tribunal, in the Rest & Play case where she said, quoted there at paragraph 22, of the fact that the case wasn't allocated there to the fast track:

"That does not, however, prevent the Tribunal from robustly case managing these proceedings to ensure an efficient procedure and the minimisation of costs.

"The Tribunal has the ability to exercise its powers in an appropriate case to ensure that proceedings are robustly case managed and to manage costs."

That's then the approach that was taken in the Belle Lingerie case.

So with those principles in mind and looking at this case, clearly we're in the tribunal's hands as to what's going to be decided about which issues are for which trials and expert evidence, et cetera.

In my submission, whichever of those models is taken, it's unlikely that we can have a trial of within three days. I think that's really too tight. In any event, it's not clear what would be the benefit of the tribunal imposing on itself a straitjacket whereby it had to get to a trial within six months, when actually, since the fast track procedure was designed, practice in all the courts has moved on in terms of the way that the courts manage costs and manage cases in a proportionate way.

So in my submission, looking at that overall, there's really no advantage to allocating this case to the fast track and no good could come of it and it would just impose an unhelpful straitjacket that's not necessary.

MR GREGORY: I just have one small point on urgency. I'm instructed that next October it will be possible for Puro to terminate Yew Freight's franchise arrangements. Yew Freight is obviously concerned that Puro might not be best pleased with it for having brought these proceedings and it would like the proceedings, if possible, to be

resolved before that termination date. I suppose that risk is something that could potentially be addressed by Puro giving an undertaking that it will not seek to end the arrangements until these proceedings have been completed. But I would just -- thought I would note that as a concern on the part of the claimant.

Otherwise, I think that is -- we've got to the end of the --

THE CHAIR: Very good.

MR GREGORY: -- agenda items. I mean, we're obviously in your hands. Just from a cost management perspective, I appreciate there may well -- once you've decided the principle issues -- need to be some further exchanges, more details provided in relation to costs, given your determination of the precise scope of the trial and so on. It will be our preference, if possible, for those issues to be determined on the papers in order to keep costs down as far as possible.

THE CHAIR: Yes. And in terms of a possible mediation, presumably the parties would be in favour of that happening sooner rather than later. I mean, I'll appreciate after the tribunal has given its ruling on today's matters, but before a lot of costs have been incurred on disclosure and so on.

Okay. Very good.

Well, thank you very much for your submissions. The tribunal will now reserve its ruling.

(3.54 pm)

(The court adjourned)