Neutral citation [2025] CAT 46

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

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11 August 2025

Before:

ANDREW LENON KC
(Chair)
ROSALIND KELLAWAY
JAMES WOLFFE KC

Sitting as a Tribunal in England and Wales

BETWEEN:

YEW FREIGHT TRADING LIMITED

Claimant

- v -

PURO VENTURES LIMITED

Defendant

Heard at Salisbury Square House on 26 June 2025

RULING (SPLIT TRIAL, FAST TRACK PROCEDURE AND COST CAPPING)

APPEARANCES

Julian Gregory (instructed by Nexa Law) appeared on behalf of Yew Freight Trading Limited.

Alan Bates (instructed by Knights PLC) appeared on behalf of Puro Ventures Limited.

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A. INTRODUCTION

1. This ruling follows the second case management conference in these proceedings. The main issues to be determined were as to whether there should be a split trial with certain issues allocated to a first trial, whether the case should be allocated to the fast-track procedure ("FTP"), and whether the Tribunal should make a cost capping order ("CCO").

2. The Claimant ("Yew Freight") is a franchisee of the Defendant ("Puro Ventures"). Puro Ventures operates a national same day freight and courier business under the Speedy Freight brand. Courier services are provided through a network of local branches which enter into franchise agreements with Puro Ventures. Yew Freight is the operator of the branch covering the Romford and Southend-on-Sea postcodes in Essex.

3. In these proceedings, Yew Freight challenges the lawfulness of Puro Ventures' arrangements with its franchisees on the basis that they infringe section 2 of the Competition Act 1998 ("the 1998 Act") ("the Chapter I Prohibition"), and, in respect of the period prior to 31 December 2020, Article 101 of the Treaty on the Functioning of the European Union (the "TFEU") ("Article 101"), in that they prohibit, or significantly restrict, passive sales, i.e. sales to customers located outside of a franchisee's allocated franchise area and who contact the franchisee on an unsolicited basis. Yew Freight claims damages in respect of loss of profits in the region of £240,000, which it claims to have suffered as a result of the restriction, as well as injunctive relief.

4. Puro Ventures denies that the arrangements with its franchisees breach the Chapter I Prohibition or that Yew Freight has suffered any losses by reason of such a breach. Puro Ventures contends that the claim, if upheld, would necessitate a significant change to the operating model of its branch network.

5. Yew Freight is a small company, employing around three people and having a turnover in the region of £300,000. It is concerned that, unless these proceedings are case managed efficiently and costs tightly controlled, there is a real risk that the proceedings will become unaffordable and the costs disproportionate,

undermining access to justice and the effective enforcement of the competition rules.

6. With these concerns in mind, Yew Freight has applied for the following directions:

   (1) A direction for a split trial comprising:

      (i) a first trial which would determine, without the need for expert economic evidence, a number of issues including the issue of whether Puro Ventures' policy of restricting passive sales by its franchisees was and is an object restriction for the purposes of the Chapter I Prohibition/Article 101 ("Trial 1"); and

      (ii) a second trial at which all remaining issues would be determined ("Trial 2").

   (2) A direction that Trial 1 be allocated to the FTP.

   (3) A direction that Puro Ventures' costs be subject to a CCO.

7. These directions are opposed by Puro Ventures on the following grounds, in summary:

   (1) The split proposed by Yew Freight is, says Puro Ventures, unrealistic and impractical. Expert evidence would be needed to determine the issue of the object infringement issue at Trial 1. Moreover, Trial 1 would not resolve the question of whether Puro Ventures' arrangements with its franchisees were lawful and would increase costs overall. If there is to be a split, it should be on a basis which determines all liability issues at a first trial with causation and quantum reserved to a second trial.

   (2) Trial 1, as proposed by Yew Freight, would last six days and would not be suitable to be allocated to the FTP.

(3) Cost capping would be inappropriate, although the proceedings should be subject to strict costs budgeting and management.

B. THE CLAIM

8. Yew Freight's case as to Puro Ventures' infringement of the Chapter I Prohibition distinguishes between three different periods:

(1) the period from 27 September 2016 until about 27 February 2020 ("Period 1");

(2) the period from about 27 February 2020 until about 10 October 2023 ("Period 2"); and

(3) the period from about 10 October 2023 to the present date ("Period 3").

9. The Claim Form alleges as follows:

(1) During Period 1 and Period 2, Yew Freight (in common with Puro Ventures' other franchisees) was prohibited from making passive sales to customers located outside of its allocated territory, as it was required to pass passive sales inquiries from customers located outside of its territory on to the franchisee in whose territory the customer was located (the difference between Period 1 and Period 2 being that it was only in Period 2 that the prohibition was specifically documented); and

(2) During Period 3, Yew Freight (in common with the other franchisees) was (and is) restricted from making passive sales to customers located outside of its allocated territory in that, if Yew Freight receives a passive sales inquiry from a customer located outside its allocated territory, it is required to tell the customer that Speedy Freight has a franchisee in its area and to ask the customer if they want to be transferred to the branch of that other franchisee.

10. The Claim Form alleges that Puro Ventures' restrictions on passive sales referred to above:

(1) constitute a "hardcore" restriction for the purpose of the Block Exemption Provisions[1] so that they could not benefit from the Block Exemption Provisions;

(2) had and have the object and the effect of restricting competition, and accordingly infringed (and continue to infringe) Article 101(1) TFEU/the Chapter I Prohibition;

(3) had and have an appreciable effect on trade;

(4) are not capable of benefitting from an individual exemption under section 9 of the 1998 Act or Article 101(3) TFEU;

(5) have caused loss to Yew Freight; and

(6) entitle Yew Freight to injunctive relief, damages and interest.

11. In its Defence, Puro Ventures denies that its policies in any of Periods 1, 2 or 3 had the object or effect of restricting competition. It points out that under those arrangements, the supply of courier services under the Speedy Freight brand is made by Puro Ventures to customers and not by the franchisee; the customer's contract is with Puro Ventures and not with the franchisee. Puro Ventures contends that, in these circumstances, there is no meaningful competition between franchisees in relation to the supply of courier services to customers and therefore the arrangements cannot give rise to any restriction on competition in the market for courier services.

[1] i.e. Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices until 31 May 2022 (the "VABER"), and the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 from 1 June 2022 ("VABEO"), collectively the "Block Exemption Provisions".

12. Puro Ventures further contends that its policies on out of area trading were reasonably necessary and proportionate for pursuing its legitimate pro-competitive objectives of:

(1) supplying its courier services through a UK-wide network of local branches presented to customers as a single operator under the Speedy Freight brand; and thereby

(2) seeking to compete effectively in the courier services market, including against larger operators that operate through branch office networks, a market characterised by vigorous competition and low barriers to entry and in which Puro Ventures has only a small market share.

13. Puro Ventures further denies Yew Freight's contentions:

(1) that its policies constitute "hardcore" restrictions within the meaning of the Block Exemption Provisions;

(2) that its policies have had any appreciable effect on competition; and

(3) that its polices have caused any loss to Yew Freight or give rise to any entitlement to relief.

C. THE ISSUES

14. There is an agreed list of disputed issues, which is as follows:

(1) Factual disputes concerning the operation of the parties' business.

(2) What are the economic markets in which: (a) Puro Ventures supplies its services; and (b) Yew Freight and other franchisees supply their services.

(3) Do the terms of the Out of Area Agreements[2] constitute a restriction of competition *by object* (in each of the three Periods)?

(4) Do the Out of Area Agreements constitute a restriction of competition *by effect* (in each of the three Periods)?

(5) Is any restriction of competition and/or trade appreciable?

(6) Can the Out of Area Agreements claim the benefit of the Block Exemption Provisions?

(7) In respect of each of the three periods, if the Out of Area Agreements did not qualify for claiming the benefit of the Block Exemption Provisions, did they satisfy the requirements for individual exemption?

(8) Is the claim barred by reason of Yew Freight being a voluntary participant in the agreement which it alleges was unlawful?

(9) Is the claim barred by reason of waiver or estoppel?

(10) In respect of Periods 1, 2 and 3, did any breach of competition law cause Yew Freight to suffer losses and, if so, what was the extent of those losses?

(11) If the Out of Area Agreements constituted a breach of competition law, is Yew Freight entitled to an injunction or declaration?

D. APPLICATION FOR A SPLIT TRIAL

(1) The parties' submissions

15. In support of its application for a split trial on a confined list of issues, Yew Freight submitted, in summary, as follows:

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[2] i.e. the restrictions imposed over the course of Periods 1, 2 and 3 on passive sales outside Yew Freight's allocated territory.

(1) An agreement restricts competition *by object* if it reveals a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess its effects.

(2) Restrictions on passive sales, i.e. provisions which have as their object the restriction of the geographical area into which buyers may sell the contract goods or services, have repeatedly been found by competition authorities and courts to have the object of restricting competition. Relevant Decisions include Case COMP.F.1/35.918 – *JCB* and Case COMP.F.1/36.516 – *Nathan-Bricolux*, and relevant judgments include Case C-439/09, *Pierre Fabre Dermo-Cosmétique*, EU:C:2011:649, and Case T-172/21, *Valve Corporation v European Commission*, EU:T:2023:587. As "hardcore" restrictions, they cannot take the benefit of the Block Exemption Provisions.

(3) A full-blown assessment of the economic effects of an object restriction is not necessary. As noted by AG Wahl in his Opinion in Case C-67/13, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204 ("*Cartes Bancaires*") cited with approval by Rose LJ (as she then was) in *Ping Europe Limited v Competition and Markets Authority* [2020] EWCA Civ 13 ("*Ping*") at [32], procedural economy is promoted through the ability to identify and condemn as object restrictions arrangements of a type that are generally considered to have harmful effects on competition "without conducting the often complex and time-consuming examination of the potential or actual effects on the market concerned". AG Bobek's Opinion in Case C-228/18, *Gazdasagi Versenyhivatal v Budapest Bank Nyrt. and Others*, EU:C:2020:265, also cited by Rose LJ in *Ping* at [97] to [99], described the legal and economic context aspect of the object restriction as being "a basic reality check".

(4) Trial 1 should be limited to determination of whether Puro Ventures' Out of Area Agreements were an object restriction (Issue 3) together with Issue 1 (a small number of disputed factual issues) and Issue 6 (whether the arrangements can claim the benefit of the Block Exemption

Provisions). Issues 8 and 9 are short points of law that could also easily be accommodated within a two- to three-day trial. All the other Issues could be determined, if necessary, at a second trial.

(5) The Tribunal should only permit the introduction of expert evidence that is necessary. No, or no significant, expert economic evidence, would be needed to determine the issues in Trial 1. Without expert evidence, Trial 1 would last no more than two to three days. The costs of Trial 1 would be far lower than the costs of a full trial with expert economic evidence.

(6) If Yew Freight succeeds at Trial 1 in showing that Puro Ventures' Out of Area Agreements are an object restriction and not within the Block Exemption Provisions, there would be a good chance of settling the case, in which case the costs of Trial 2 (including the costs of expert evidence for that Trial) would be avoided altogether. Alternatively, Yew Freight could use any costs awarded at the conclusion of Trial 1 as a "fighting fund" to proceed to Trial 2 which would be focused on the issue of individual exemption (Issue 7) and quantum (Issue 11). Yew Freight would be content for its case on restriction by effect (Issue 4) to be stayed.

(7) A split trial would facilitate the allocation of Trial 1 to the FTP. This would allow the central issue in the claim to be adjudicated as fairly, quickly and efficiently as possible given that Trial 1 would come on within six months, with a mandatory CCO in respect of Puro Ventures' costs.

16. Puro Ventures opposed Yew Freight's application for a split trial on the following grounds, in summary:

(1) The application for a split trial is premised on the false assumption that Issue 3 (the object restriction) can be determined without any economic evidence. Economic evidence will, says Puro Ventures, be essential for enabling the Tribunal to properly assess whether Puro Ventures' restrictions on passive sales were not only "hardcore" restrictions under

the terms of the respective Block Exemptions, but also object infringements. The assessment would necessarily entail consideration of the nature of the services affected and the "real conditions of the functioning and structure of the market or markets in question" (*Cartes Bancaires*, at [53]; see also *Ping*, at [30] and [37]). The pro-competitive effects of the Out of Area Agreements contended for by Puro Ventures would also have to be taken into account as part of that assessment since they may justify reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object (Case C-307/18, *Generics UK Ltd v Competition and Markets Authority*, EU:C:2020:52, at [103]-[107]).

(2) The factual and economic evidence that would be required at Trial 1 would substantially overlap with the factual and economic evidence required for Trial 2 including Issue 7 (regarding individual exemption under section 9 of the 1998 Act and/or Article 101(3) TFEU). The decision whether a restriction qualifies for individual exemption was described by the Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC, at [116], as requiring the court to:

> "carry out a balancing exercise – a 'complex assessment' … involving weighing the pro-competitive effect against the anti-competitive effect of the conduct in question. Cogent empirical evidence is necessary in order to carry out the required evaluation of the claimed efficiencies and benefits."

It would be inefficient for the same witnesses and experts to have to give evidence about substantially the same matters at two separate trials.

(3) Trial 1 dealing only with Issues 1, 3 and 6 would not enable the Tribunal to grant any relief, even if Yew Freight succeeded on those Issues. In particular, Issue 7 (regarding individual exemption) would not have been resolved, and the lawfulness or otherwise of the Out of Area Agreements would still be unknown. If there is to be a split trial arrangement, it should be one which enables the parties to know, from the judgment given at the end of the first trial, whether or not the Out of

Area Agreements (including the one currently being operated between Puro Ventures and its franchisees) is, or is not, lawful.

(2) The Tribunal's assessment

17. Rule 53(2)(o) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the "Rules") provides that the Tribunal may give directions for the hearing of preliminary issues before the main substantive hearing. In deciding whether to give such a direction, the Tribunal must seek to ensure that the case is dealt with justly and at proportionate cost in accordance with Rule 4(1).

18. Factors to be taken into account include those identified by Hildyard J in *Electrical Waste Recycling Group v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch):

> "5. Where the issue of case management that arises is whether to split trials the approach called for is an essentially pragmatic one, and there are various (some competing) considerations. These considerations seem to me to include whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary; what are likely to be the advantages and disadvantages in terms of trial preparation and management; whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials; whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case; whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages); whether there are difficulties of defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of duplication, delay and the disadvantage of bifurcated appellate process; generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
>
> 6. Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and a pragmatic approach, may include whether a split would assist or discourage mediation and/or settlement; and whether an order for a split late in the day after the expenditure of time and costs might actually increase costs."

19. Given that Yew Freight is a company with limited financial resources and given the modest level of damages claimed, it is clearly important to explore the potential for keeping costs to a minimum through a split trial direction which might avoid the need to try all the issues in the case.

20. If, as Yew Freight submits, a two- to three-day Trial 1 could satisfactorily determine the issue of whether the Out of Area Agreements were object restrictions without the need for economic expert evidence, thereby facilitating the prospects of settlement, enabling Trial 1 to be allocated to the FTP, and potentially providing Yew Freight with a cost award to enable it to proceed to Trial 2, the case for a split trial would be hard to resist.

21. The Tribunal is, however, for the following reasons, not persuaded that Yew Freight's proposal is realistic.

22. First, in the Tribunal's view, the issue of whether the Out of Area Agreements amounted to an object restriction could not be satisfactorily determined without any expert economic evidence. Although the authorities relied on by Yew Freight indicate that certain types of restrictions are sufficiently well established as being sufficiently harmful to competition that no detailed examination of their economic effects is necessary in order for them to be characterised as object restrictions, the case law also makes clear that a restriction of competition, whether by object or effect, must be established in the light of the relevant economic and legal context. As AG Wahl observed in his Opinion in *Cartes Bancaires* quoted by Rose LJ in *Ping* at [34]:

> "56. Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition."

23. At [79] of *Cartes Bancaires*,[3] AG Wahl described "experience" in this context as meaning:

> "what can traditionally be seen to follow from economic analysis, as confirmed by the competition authorities and supported, if necessary, by case-law".

24. We recognise that it does not follow that a detailed, technical market definition exercise or detailed effects analysis is called for as part of "the basic reality check" needed to determine whether the Out of Area Agreements are an object

[3] Cited by Rose LJ at [35] of *Ping*.

infringement (Issue 3). However, the Tribunal considers that some limited expert economic evidence consistent with the basic reality check referred to in *Ping* is nevertheless likely to be necessary (not just helpful) in order for the Tribunal to understand the relevant market in which competition is alleged to have been restricted and the way in which the Out of Area Agreements, in the different periods referred to in the Claim Form, have impacted on that market including any pro-competitive effects. As Puro Ventures submits, the relevant agreements in the present case are not typical franchise arrangements in that the franchisee does not contract with the customer.

25. In particular, Yew Freight's case includes the claim that Puro Ventures' requirement in Period 3 that franchisees who receive an inquiry from a customer located in another franchisee's area must tell the customer that there is a different branch that serves its territory, and thus give the customer the choice of whether or not to be transferred to that branch, amounts to an object restriction (the "Period 3 Requirement"). Yew Freight submitted that the Tribunal was not concerned with a novel form of agreement in respect of which economic evidence could be relevant. The Tribunal was not, however, shown any authority in which a restriction analogous to the Period 3 Requirement has been treated as a restriction on passive sales, or so harmful to competition as to be treated as an object restriction. That suggests that expert economic evidence, as well as factual evidence, is likely to be necessary in order to inform the Tribunal's conclusion on that question.

26. As was noted in *Boyle v Govia Thameslink Railway Limited and others* [2022] CAT 46 at [13]:

> "13. … This Tribunal is concerned with risk management and the risks that we must ensure are avoided are (i) the 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."

27. Since the Tribunal considers that at least some expert economic evidence is likely to be necessary to determine Issue 3 (object restriction) at Trial 1, the Tribunal would give permission to Puro Ventures and to Yew Freight to adduce such evidence.

28. Given the Tribunal's conclusion that at least some expert evidence is required at Trial 1, the rationale for Yew Freight's split trial proposal is largely undermined.

29. An additional reason for rejecting Yew Freight's split trial proposal is that, whatever the outcome of Trial 1, it would leave central questions both as to liability and quantum unresolved. Those questions would only be resolved after Trial 2 at which, as Yew Freight accepted, expert economic evidence would be needed to determine the question of whether Yew Freight is entitled to an individual exemption.

30. The only scenario in which these costs would be avoided, under Yew Freight's split trial proposal, would be if the case settled after Trial 1. The Tribunal cannot, however, usefully speculate as to whether there would be a settlement at that stage. Puro Ventures' current position is that these proceedings challenge the structure of its arrangements with its franchisees, that it would, if necessary, seek an individual exemption and that a settlement in the event that Yew Freight was successful at Trial 1 is wishful thinking.

31. In the absence of a settlement, there would need to be two rounds of economic and factual evidence at Trials 1 and 2 which would potentially increase costs overall as compared with a single trial of all issues. Yew Freight's suggestion that, if successful at Trial 1, it would be awarded its costs of Trial 1 which would enable it to acquire a "fighting fund" to proceed to Trial 2 is also speculative. Yew Freight would not have established any entitlement to relief at the conclusion of Trial 1 and would not necessarily be awarded all its costs.

32. For these reasons, the Tribunal refuses Yew Freight's application for a split trial confined to the particular issues which it identified. The Tribunal recognises that the consequence of this refusal is that, given the costs of a single trial, Yew Freight may be unable to pursue its claim. That consequence is not, however, a sufficient reason for directing a split trial on a basis which would not enable the issues to be properly determined and might well lead to increased costs overall.

E. APPLICATION FOR ALLOCATION TO THE FTP

33. Rule 58(1) of the Rules allows the Tribunal, either of its own initiative or on the application of a party, to make an order that particular proceedings be, or cease to be, subject to the FTP. Where the Tribunal has ordered that proceedings be subject to the FTP, the substantive hearing must be listed within six months of that order, and the amount of recoverable costs is to be capped at a level to be determined by the Tribunal (Rule 58(2)).

34. In *Up and Running v Deckers* [2024] CAT 9 ("*Up and Running*"), the Tribunal gave directions for a trial of the claimant's case under the Chapter I Prohibition to be allocated to the FTP with the claim under the Chapter II Prohibition of the 1998 Act being adjourned generally. In *Socrates Training Limited v The Law Society of England and Wales* (Case No. 1249/5/7/16) ("*Socrates*"), the Tribunal allocated the whole case to the FTP but directed a split trial of liability and quantum.[4] Yew Freight submitted by analogy with *Up and Running* and *Socrates* that Trial 1 should be subject to the FTP pursuant to Rule 58(3). Yew Freight accepted, however, if expert evidence were to be permitted at Trial 1, it would not be possible to produce that evidence, for which Yew Freight required prior disclosure from Puro Ventures, in time for a hearing within six months of the Tribunal ordering the matter to the FTP; therefore there could be no allocation to the FTP.

35. Since the Tribunal has concluded that expert evidence should be permitted at Trial 1, the question of allocation to the FTP falls away.

F. APPLICATION FOR A CCO

36. Rule 53 of the Rules provides, so far as is relevant for present purposes, as follows:

> "53(1). The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other

[4] See [2] and [3] of the Tribunal's Order made on 16 May 2016 in *Socrates*.

directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.

(2) The Tribunal may give directions— …

(m) for the costs management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal thinks fit; …"

37. In *Belle Lingerie Limited v Wacoal EMEA Ltd and Wacoal Europe Ltd* [2022] CAT 24 ("*Belle Lingerie*"), the Tribunal held that it has the power under this Rule to make a CCO, i.e. an order limiting the amount of future costs which a party can recover pursuant to an order for costs subsequently made in cases which are not allocated to the FTP. Cases allocated to the FTP are subject to mandatory cost capping under Rule 58(2)(b).

38. With regard to the discretion to be exercised in deciding whether to make a CCO, the Tribunal in *Belle Lingerie* considered that Rule 3.19 of the Civil Procedure Rules ("CPR"), reflects the factors that the Tribunal should have regard to when considering whether to make a CCO, and that the applicant for a CCO is required to establish each of these factors before the Tribunal may exercise its discretion in favour of a CCO. CPR Rule 3.19, so far as is relevant for present purposes, is in the following terms:

"(5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –

(a) it is in the interests of justice to do so;

(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and

(c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –

(i) case management directions or orders made under this Part; and

(ii) detailed assessment of costs.

(6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –

(a) whether there is a substantial imbalance between the financial position of the parties;

(b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;

(c) the stage which the proceedings have reached; and

(d) the costs which have been incurred to date and the future costs."

39. We were referred to two cases in which CCOs have been made by the Tribunal: *Socrates* and *Up and Running*. In *Socrates*, the Tribunal, having reviewed the parties' costs budgets, imposed cost caps of £200,000 on the claimant (91% of its estimated costs) and £350,000 on the defendant (55% of its estimated costs). In *Up and Running*, the Tribunal imposed a cost cap on the defendant of £150,000 (27% of its estimated costs). However, as these cases were allocated to the FTP and therefore subject to mandatory cost capping, they are of limited assistance in providing guidance as to how the Tribunal's discretion to make a CCO should be exercised in non-FTP cases. As the Tribunal in *Belle Lingerie* noted, the need to ensure access to justice for claimants with limited means (which was fundamental to the Tribunal's determination of the level of the CCO in those two cases) reflects the policy underlying the FTP regime. In contrast, in *Black v Arriva North East Limited* [2014] EWCA Civ 1115 ("*Black*"), which was an appeal from a County Court decision, in which a CCO was sought by an appellant with limited means against a well-funded respondent, and there was a risk that, without a CCO, the appeal might founder, Christopher Clarke LJ held as follows:

> "11. The fact that, in the absence of a costs capping order, the appeal will founder is relevant when considering the interests of justice, although there are considerations which point the other way. First, it does not seem to me to be the function of costs capping orders to remedy the problems of access to finance for litigation. If, for instance, the Respondent's anticipated costs were agreed to be proportionate, it would not be possible to exercise any jurisdiction to make a costs capping order simply because without it the appeal would not continue to be financially viable. …
>
> 21. I am also unpersuaded that the interests of justice require the making of the order sought. Of course, it is desirable from the Appellant's point of view that her case should be heard. There are public interest considerations as well, but it does not follow that it is in the interests of justice that it should be heard on terms that the Respondent can recover no more than £50,000 even though it may have reasonably incurred more in successfully resisting what may be something of a test claim."

40. In *Belle Lingerie* itself, the claimant, a small enterprise with less than 30 employees, was seeking damages of between £3.5m and £7.7m and a permanent injunction to compel the defendants, part of a large global corporation, to

resume supplies of lingerie products. The claimant sought a CCO on the basis that, in the absence of a CCO, the claim could not continue because of the legal costs involved. The claimant's estimate of its total costs was £908,170. The defendants' estimate of its total costs was £1,084,439.50. After making certain deductions to the defendants' budgeted costs, the Tribunal provisionally approved the parties' costs estimates.

41. The Tribunal went on to consider the claimant's application for a CCO. Applying the requirements of CPR Rule 3.19(5)(b) and (c), the Tribunal considered that the defendants' costs, which were broadly consistent with the claimant's, were not disproportionate, given what was at stake in the proceedings, and that the Tribunal was able to adequately control the costs through costs management and detailed assessments. The Tribunal held that the application for a CCO must therefore fail as the requirements in CPR Rule 3.19(5)(b) and (c) were not satisfied. The Tribunal went on to hold that the public interest requirement in CPR Rule 3.19(5)(a) was not satisfied either, since the claim was being brought for private reasons rather than in the public interest.

42. In the present case, Yew Freight submitted that it would be appropriate to make a CCO in respect of Puro Ventures' costs on the following grounds:

    (1) Unless the effective enforcement of competition rules is to be significantly undermined, it is critical for small companies to be able to enforce competition rules, in a way that is efficient and affordable.

    (2) Puro Ventures is significantly larger and has considerably more financial resources available to it than Yew Freight. Yew Freight only has current assets of £135,000, annual turnover of about £300,000 and annual profits of about £60,000. According to Puro Ventures' most recent accounts, it has net assets of £6.4 million and made profits of £4.5 million in 2022 and £873,000 in 2023.

    (3) Puro Ventures' estimates of its costs are £719,629 for Trial 1 and £554,395 for Trial 2. Without a cap on Puro Ventures' costs, the risk of

liability in respect of Puro Ventures' costs coupled with its own costs, would mean that the proceedings are unaffordable for Yew Freight.

43. Puro Ventures resisted the application for cost capping on the following grounds:

(1) The starting point is that a defendant should be entitled to recover its costs of successfully defending proceedings.

(2) Puro Ventures, though larger than Yew Freight, is not a particularly large company. A CCO which left Puro Ventures out of pocket for £100,000 or more in respect of costs which it could not recover would have real financial impact on the company.

(3) There is no particular public interest in the pursuit of Yew Freight's claim.

(4) The proceedings are of considerable importance to Puro Ventures in that that they challenge the lawfulness of the arrangements with its franchisees for the effective conduct of a single branded courier service operation.

(5) Puro Ventures would support the application of cost budgeting and other exceptional cost control measures as alternatives to a CCO, such as (a) a bar on either party recovering costs of instructing Leading Counsel; (b) pre-budgeting of recoverable costs of expert evidence; and (c) a bar on either party recovering costs of solicitors at above the guideline hourly rates for solicitors based outside of central London.

44. To judge from the parties' costs estimates, the costs that would be incurred in these proceedings by both parties, if not reduced by the Tribunal, may well be disproportionate and unreasonable. Yew Freight's estimate of its own future costs for a six-day trial on issues of liability, on the basis proposed by Puro Ventures, is £510,000 including £318,000 in respect of expert evidence. Puro Ventures' estimate of its total costs was in excess of £900,000 with costs of

expert evidence in excess of £400,000. There is clearly a substantial risk of costs being disproportionately incurred for the purposes of CPR Rule 3.19(5)(b).

45. It does not, however, follow that the Tribunal should make a CCO. Yew Freight did not suggest that the Tribunal would be unable to adequately control the risk of disproportionate costs through costs management. Following the approach adopted in *Belle Lingerie*, as endorsed by the Court of Appeal in *Durham CCC v Durham Company Limited* [2023] EWCA Civ 729, the application for a CCO must therefore fail because the condition in CPR Rule 3.19 (5)(c) is not satisfied. Furthermore, following *Black*, the Tribunal is not persuaded that the discrepancy between the financial positions of the parties and the risk of the proceedings being stymied without a CCO are enough to satisfy the requirement in CPR Rule 3.19 (5)(a) that it would be in the interests of justice to make a CCO, limiting Puro Ventures' ability to recover its reasonable and proportionate costs from Yew Freight.

46. We recognise that the stringency of the requirements under CPR Rule 3.19(5) means that a discretionary CCO may well be unavailable to a claimant with limited financial resources irrespective of: the strength of its claim; the imbalance between its financial position and the defendant's; and the risk that, without cost capping, the proceedings will not be viable for the claimant to pursue. In practice, allocation to the FTP, with its provision for a mandatory CCO, may well be the only route by which a CCO can be obtained.

47. Although the Tribunal, exercising its discretion consistently with the approach in *Belle Lingerie*¸ will not make a CCO in this case, it can robustly manage the costs of the parties, including the costs of their expert evidence, through cost budgeting and assessment under Rule 53 to ensure that the parties' recoverable costs are no more than is reasonable and proportionate. In order to do so, the Tribunal will need updated costs estimates and, in relation to the experts, more information as to the issues which they propose to address in their reports.

G. ALTERNATIVE DISPUTE RESOLUTION

48. The parties did not oppose the Tribunal's proposed direction that the proceedings be stayed to enable the parties to engage in a mediation with a view to settling their dispute. The parties may apply to the Tribunal if any further directions are needed to facilitate that mediation. The parties should promptly inform the Tribunal of the outcome of the mediation. If the case does not settle at mediation, there will require to be a further CMC – on the footing that there will be a trial on liability issues – at which the Tribunal will expect to give directions in relation to the scope of the expert evidence and to scrutinise the parties' costs budgets.

H. DISPOSITION

49. For the reasons set out above:

(1) Yew Freight's applications for a split trial, allocation to the FTP and a CCO are refused.

(2) The proceedings are stayed for a period of two months to enable the parties to engage in a mediation.

50. This decision is unanimous.

Andrew Lenon KC
Chair

Rosalind Kellaway

James Wolffe KC

Charles Dhanowa CBE KC (Hon)
Registrar

Date: 11 August 2025