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IN THE COMPETITION

1745/5/7/25

APPEAL TRIBUNAL

Case No:

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 9th January 2026

Before:

The Honorable Mrs Kelyn Bacon

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

**Roadget Business Pte. Ltd. and Shein Distribution
UK Limited**

V

Defendant

Whaleco UK Limited

A P P E A R A N C E S

BENET BRANDRETH KC, TOM PASCOE & ALI AL-KARIM (instructed by Freshfields LLP) on behalf of Roadget Business Pte. Ltd. and Shein Distribution UK

JOSH HOLMES KC & CHARLOTTE MCLEAN (instructed by Herbert Smith Freehills Kramer LLP)

and

CHARLOTTE MAY KC, HENRY WARD & HENRY EDWARDS (instructed by Allen Overy Shearman Sterling LLP) on behalf of Whaleco UK Limited

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Friday, 9 January 2026

(10.30 am)

(Proceedings delayed)

(10.38 am)

Housekeeping

THE PRESIDENT: Just give me a moment to sort out my computer. Thank you.

Yes, Mr Brandreth.

MR BRANDRETH: My Lady, I think all of the counsel before you are familiar from the various hearings that you'll have heard. I appear with Mr Pascoe and Mr Al-Karim for Shein today. Ms May and Mr Ward appear for Temu on the IP side; Mr Holmes and Ms McLean on the competition side.

My Lady is aware that there are, as it were, three broad topics: IP competition directions. Those are two. And then the question of mediation and my learned friend has a point about de-designation, but that, I think, will be wrapped up in the discussion about the IP timetable.

I'm told that on the competition side a great deal of agreement has broken out. Indeed, the parties are of one mind as to what the course of action should be and it requires only the approval of the court. If my Lady were of the view that she was content to accept what the parties have proposed --

THE PRESIDENT: Yes.

MR BRANDRETH: -- then we might say no more about it and allow the competition team to depart. If my Lady wants to get into the weeds of it, then our submission is that it's probably better to do that at the end only because by that point, you'll also understand what the shape of the IP timetable is and how the mediation fits into it. But of course, we're ultimately in your hands, my Lady.

THE PRESIDENT: Well, I think allowing the competition team to depart sooner rather

1 | than later, without any disrespect to the competition team, would be an efficient use of
2 | everyone's time. I don't see why we need to keep them here if that can be resolved
3 | quite quickly. So let's just -- I think we should try and deal with that first. Just --

4 | MR BRANDRETH: Perhaps, then, I might hand over to Mr Pascoe, who's handling
5 | that (inaudible).

6 | THE PRESIDENT: Yes, just wait a moment. Just a minute. All right.

7 | MR PASCOE: My Lady, that's our application. It may help to give your Ladyship
8 | (audio distortion) this party (audio distortion).

9 | THE PRESIDENT: Now, I don't know what -- do I have a consolidated draft order?
10 | Should I?

11 | MR PASCOE: You might not have the latest version (overspeaking).

12 | THE PRESIDENT: Yes. I don't think I do, but, yes, if you could hand it up. Are we
13 | just talking about -- well, you can tell me, but are we mainly talking about when the
14 | competition trial should take place?

15 | MR PASCOE: That's right.

16 | THE PRESIDENT: Subject to the availability of the court, which we're just checking.

17 | MR PASCOE: That's right and, of course, directions up until that date.

18 | THE PRESIDENT: All right. Can I just find the relevant paragraph.

19 | MR PASCOE: Yes. So it's paragraphs 22 to 24 of the draft order.

20 | THE PRESIDENT: Yes.

21 | Three weeks from 4 March. Yes. I mean, from my perspective, that works. The only
22 | question is that of Mr Lykiardopoulos -- who's done, I think, at least one of the previous
23 | hearings -- he won't know until next week, what his other professional commitments
24 | are and that's the only reason for the hesitation. Otherwise, we would have been able
25 | to inform you yesterday. It may be that his professional commitments rule out that
26 | entire period, in which case, we'll just have to find other panel members. But

1 otherwise, subject to that, I think that this timetable could be confirmed.

2 I understand that there's some wiggle room that you -- is there agreement that if we
3 can't, for some reason, make that timetable work, we could start a week or so earlier
4 or is that disputed?

5 MR PASCOE: We'd be in difficulty with that, my Lady, because of Ms Demetriou's
6 availability.

7 THE PRESIDENT: I see.

8 MR PASCOE: We've already come forward a little bit. We're starting earlier than is
9 ideal, from her perspective but I think we'd really struggle to go any earlier. The beauty
10 of the 4 March date is we slot the trial very neatly in just before the Good Friday and
11 Easter vacation.

12 THE PRESIDENT: I see. So does that envisage that the trial would continue right
13 through to the 25th or the ...?

14 MR PASCOE: I believe that's right. Yes. Yes.

15 THE PRESIDENT: What's the last day of the trial on that basis?

16 MR HOLMES: My Lady, it's 24 March. At the back of the order at Annex 2 there's an
17 amended timetable for trial.

18 THE PRESIDENT: All right. Now, look, there's one problem with that, which is that
19 this year and last year, there's been a cross-High Court event the last day of this term.
20 If that is replicated next year, which I would expect, that would rule out the last day of
21 the -- is it the Easter term? So, I just wonder, again before the trial is fixed, whether
22 there's any wiggle room for it to start at some point between the 1st and 2nd March?
23 Does that make a real difference?

24 MR PASCOE: We could do the 3rd and so that shaves one day off the end, which
25 would --

26 MR HOLMES: That works for us, my Lady.

1 THE PRESIDENT: It would. Okay. And is Ms Demetriou completely unavailable for
2 the start of the week?

3 MR PASCOE: No. The issue is she's coming out of a long trial at the beginning of
4 February and so it's an issue of making sure she has enough time to properly prepare
5 for this.

6 THE PRESIDENT: Yes. All right. But on both sides then -- I mean, I understand that
7 your position is that we could even start a week earlier but if the problem here is
8 Ms Demetriou's availability, it may need to start on the 3rd, if that means finishing on
9 the 23rd.

10 MR PASCOE: So it pushes the pre-reading back to the previous week.

11 THE PRESIDENT: It would. Yes. All right. Well, I think, at least as I said from my
12 perspective, that should work. I think where we'll have to leave it is that I am content
13 and I don't need to hear further submissions from you on that point. I'm obviously
14 conscious that I don't want to end up in the same situation with the competition trial as
15 we have with the IP trial. I'm aware that the legal teams on both sides are under a lot
16 of pressure. I think that's particularly the case for the Freshfields team who are doing
17 both sides of the case. Is that right?

18 MR PASCOE: Yes, that's right.

19 THE PRESIDENT: And of course, your in-house lawyers are doing both sides of the
20 case. So, I'm anxious to avoid timetables that clash across the two sets of
21 proceedings. So, from my part, that's going to work. I think if you can just leave that
22 with me for us to confirm availability and it may be if that is the only time that works for
23 both of you, that we just have to put it in the diary for then, and we'll liaise with
24 Mr Lykiardopoulos. Yes.

25 Is there any other issue that arises on the competition timetable?

26 MR PASCOE: No. I just draw attention to paragraph 21 of the draft order, which

1 formalises some of the extensions that had been agreed on a pro tem basis until today.
2 It's not contentious but that's another amendment to the competition timetable.
3 THE PRESIDENT: Yes. Sorry. Which paragraphs?
4 MR PASCOE: Paragraph 21. It simply pushes back two existing deadlines until the
5 February recess.
6 THE PRESIDENT: I see. All right. I suppose I should ask at this point, is everyone
7 confident that the trial estimate of three weeks is sufficient?
8 MR PASCOE: Yes. So your Ladyship might recall, I think both parties originally had
9 given a significantly longer estimate. I think we've all got ourselves comfortable with
10 the three-week estimate (inaudible) working towards the IP trial. Yes, but, of course
11 (inaudible).
12 THE PRESIDENT: I can see that the three-week listing involves sitting on Fridays.
13 MR PASCOE: Yes.
14 THE PRESIDENT: I mean, that's not going to be too much of a -- it's not going to be
15 a burden for the first week because we're not going to be sitting for the whole week
16 anyway. There will also be the three days built in for, I can see, writing and reading
17 closing submissions. Is there anywhere a more detailed trial timetable?
18 MR PASCOE: No, we're not yet at the stage of even having had expert
19 permissions(?), so neither party has been showing his hand in terms of the number of
20 witnesses that (inaudible) he was a member of (inaudible).
21 THE PRESIDENT: I see, but the best you've got is at Annex 2 of the draft order? If
22 we're pushing the pre-reading back to start on the Friday of the previous week so that
23 the trial starts on the Wednesday of week one, that means that the oral closings would
24 come straight after the weekend and that we would then have the break for writing
25 closings from Wednesday to Thursday of the previous week with reading the closings
26 on the Friday. That, of course, means that you don't get the weekend to finish the

1 closings. Was it envisaged that you would actually be using the weekend to finish
2 writing the closings?

3 MR PASCOE: I think we're envisaging exchanging the closings on the Friday evening.

4 THE PRESIDENT: On the Friday evening. So you weren't building in the weekend
5 for writing closings?

6 MR PASCOE: (Overspeaking) I think.

7 THE PRESIDENT: No. All right. Because then in that event, the pushing back one
8 day won't make any difference to the timetable. You'll still get the weekend either way
9 to read them. I see. All right. I think then that means that there is no other material
10 difference from pushing the time back a day and then that does mean that the only
11 week in which you have a full five-day sitting week is week two. I think that's
12 manageable. Right, and that's the week for fact evidence. All right. You will be aware,
13 of course, that that doesn't leave any buffer at all. Because if the trial doesn't finish
14 within that time, then it's going to go part heard probably to after the Easter vacation.

15 MR PASCOE: Yes, I mean, at the moment, my Lady, we're working towards
16 a three-week trial. You're absolutely right, there's no buffer. I anticipate in the next
17 month or two when the parties start applying for expert permissions and putting their
18 cards on the table in terms of the number of witnesses they'll call, we will, of course,
19 have to keep that under review and if three weeks looks unmanageable, we'll of course
20 tell the tribunal as soon as that becomes apparent, if it does.

21 THE PRESIDENT: Yes. I mean, just checking at this point, is there availability, on
22 the counsel teams, the other side of Easter if it does go over. Now, and that doesn't
23 necessarily mean waiting until the start of the new court term because the CAT doesn't
24 keep to court terms, but I'm not envisaging that everyone will be coming back the week
25 of 29 March.

26 MR PASCOE: There is availability from our perspective.

1 MR HOLMES: My Lady, I am having difficulty after Easter.

2 THE PRESIDENT: Yes. All right. Are you in difficulty immediately after Easter?

3 MR HOLMES: In increasing difficulty, my Lady. I'm preparing for a possible trial
4 commitment in the course of May and June.

5 THE PRESIDENT: Right. Okay, what I don't want is for there to be a problem which
6 necessitates further adjournment of the competition trial. So, I just wanted to say,
7 now, that if it turns out that the trial estimate needs to be increased, the only realistic
8 option will be to go into the period straight after Easter, because of the Easter vacation,
9 whatever problems that may cause to the other side. So I think you just need to be
10 aware, and just build into your own planning, a possibility that we might have to return
11 straight after Easter, to finish the trial, if it does go over, rather than assuming that the
12 tribunal is then going to just uplift the trial and move it again to March later in the year.
13 All right, so I would perhaps on both sides just pencil in that possibility, given that there
14 seems to be no great wiggle room at the start of the trial period.

15 All right.

16 MR HOLMES: Unless your Ladyship had other questions or concerns on the
17 competition side --

18 THE PRESIDENT: No, and there's nothing else to deal with on the competition side.

19 MR BRANDRETH: Nothing from us.

20 THE PRESIDENT: Okay, all right. Yes, that's fine. So we'll finalise the order, in light
21 of discussions our end, as to the availability of other panel members, but I think we're
22 now agreed on when it's going to be. Thank you very much, both sides.

23 So does that then bring us to the IP timetable?

24
25 IP timetable

26 Submissions by MR BRANDRETH

1 MR BRANDRETH: It does, my Lady. My apologies for my coughing, my Lady.
2 My Lady, you'll be aware that there was a pro tem timetable conveyed to the court on
3 23 December, and the letter and that timetable are actually in your CMC bundle at
4 page 469. (Pause)
5 THE PRESIDENT: Which volume? Because I've got three volumes --
6 MR BRANDRETH: It should be bundle C.
7 THE PRESIDENT: -- or four volumes. I'll just find that. (Pause)
8 Can you give me the page number again?
9 MR BRANDRETH: 469.
10 THE PRESIDENT: Yes, of course, I'm familiar with that.
11 MR BRANDRETH: My Lady probably remembers this.
12 THE PRESIDENT: Yes, I do remember.
13 MR BRANDRETH: I know that myself and Mr Ward certainly do.
14 THE PRESIDENT: Yes.
15 MR BRANDRETH: But, my Lady, if I could just ask you to remind yourself what was
16 said at the bottom of that page, in the paragraph that begins "Neither party" and goes
17 over to the paragraph on the top of that page, the following page.
18 THE PRESIDENT: So you've agreed pro tem changes as necessary.
19 MR BRANDRETH: Correct.
20 THE PRESIDENT: And then you said that these directions would need to be
21 considered further at the hearing.
22 MR BRANDRETH: And the reason I draw your attention to it, my Lady, is that the
23 purpose of the adjournment is reflected in that second paragraph. It was intended to
24 allow for the break over Christmas, and as my Lady knows, the trigger for this was
25 my Lady's concern about the pressure that was on the legal teams, and the idea was
26 that they would be able to alleviate that pressure. And these pro tem directions were

1 | understood to do that.

2 | Now, we say that the idea behind them was that a break might be needed, but they
3 | might need to be varied, not to shorten them, my Lady, because that wouldn't allow
4 | for the break to happen, but rather to adjust them to reflect the IP trial date, whatever
5 | that ultimately was -- expecting it to be May -- and of course, co-ordination with the
6 | competition side, because at that point, adjournment of the competition trial had not
7 | been agreed.

8 | Now, that sets the context for the remaining disputes between the parties over what
9 | the timetable up to that May trial date should be, because what has now happened is
10 | that Temu having agreed these dates, with the idea they would provide a break, has
11 | sought to bring many of them forward, in some cases to Monday, and we do say that
12 | completely undermines the purpose of the adjournment. Reinstates multiple burdens
13 | on the claimant in January, which was supposed to be the chance to decompress,
14 | that, as I say, being the entire point of the adjournment. And for that reason, it's no
15 | answer to say that there were previously tighter deadlines being worked to, because
16 | the point of the adjournment was a recognition that those deadlines were imposing an
17 | intolerable burden, not just for us, but on the other side as well.

18 | THE PRESIDENT: Well, can we start by looking at the dates for the IP trial. Now, has
19 | that now been --

20 | MR BRANDRETH: My Lady will find it probably quite helpful to look at my learned
21 | friend's annex to her skeleton.

22 | THE PRESIDENT: Yes.

23 | MR BRANDRETH: And if you turn there, you can see that various steps have been
24 | set out on the left-hand side.

25 | THE PRESIDENT: Yes. Can I just start with the date for the hearing?

26 | MR BRANDRETH: Yes, absolutely.

1 THE PRESIDENT: So has that now been definitively listed, do you know?

2 MR BRANDRETH: I think -- sorry.

3 MS MAY: I can answer the question, my Lady. Our understanding is that listings have
4 been informed of the proposed new date, but it hasn't yet formally been relisted. The
5 proposed new date is the week of 11 May and the week of 18 May. So it's the
6 two weeks running up to the Whitsun court break.

7 MR BRANDRETH: I think the position is that my Lady checked, at the time that we
8 wrote, to see if it was even possible --

9 THE PRESIDENT: And it was possible.

10 MR BRANDRETH: -- but formally, obviously, this is the hearing at which an order to
11 that effect has to be made.

12 THE PRESIDENT: Yes, alright. Just work backwards --

13 MR PASCOE: Yes.

14 THE PRESIDENT: -- as in start by just confirming that this is going to be a suitable
15 time for the trial, and then look at the dates running up to it. Now, before we go further,
16 can I just ask: are you all now, given where you are at, content with the two-week
17 listing? Because when we were considering at the PTR, the detailed shape of that,
18 there were various concerns raised as to whether that built in enough time. Before
19 this is formally listed, I would like your confirmation on both sides that this is going to
20 be enough, given what is now known about the number of witnesses and the shape of
21 the evidence, and we're now considerably further ahead than we were when we were
22 originally looking at a two-week listing. So, can I have both of your submissions on
23 that?

24 MR BRANDRETH: For our part, my Lady, the trial remains as it was intended to be in
25 January, but it has been moved to the available new slot. The expectation on our side
26 is that the evidence that we will advance can be addressed in that time frame, and

1 nobody has suggested to the contrary to date. There is considerable difficulty trying
2 to fit it in any longer, in any event, because longer slots are not available. And so,
3 my Lady, we say not only because it can be done, but because it is practical for it to
4 be done in the same timetable that was envisaged, that is where we are in May.

5 THE PRESIDENT: Yes. In terms of the length of the slot, my move here means that
6 there is more flexibility in that regard.

7 MR BRANDRETH: Not on the side of the bar, my Lady.

8 THE PRESIDENT: Yes, okay. So the issue is your availability, rather than the court's
9 availability.

10 MR BRANDRETH: Well, I haven't checked fully the court's availability, but I hear what
11 my Lady says. But certainly from our perspective, there are two constraints: the first
12 is that we obviously want resolution of our claim and sooner rather than later; but the
13 second is that it is already quite difficult to fit in the May hearing. It's always slightly
14 embarrassing when a barrister tells you how busy they are, but both myself and
15 Ms May are very busy in and around that area. One of the points that my learned
16 friend makes, which is a fair one, is that in order to accommodate even that May date,
17 both myself and Ms May will have to bring some of the preparation into
18 March -- certainly I will have to bring it into March -- but then I'm immediately
19 committed to another trial after May.

20 So that is why May is where it is. As it happens, even that, as my learned friend's
21 instructing solicitor knows, because he's against me on another case, is going to make
22 my life difficult, because I have hearings in the run up to May, but we're trying to make
23 it work, my Lady, but we're very constrained. And those are the two weeks that can
24 be done.

25 THE PRESIDENT: I understand. Can you just remind me -- because I haven't got the
26 original detailed timetable in front of me, and I only have what's been put in my

1 | diary -- 11th to the 22nd. Is that the hearing dates?

2 | MR BRANDRETH: Sorry, of May?

3 | THE PRESIDENT: Of May. Is that the hearing dates or does it include pre-reading?

4 | MR BRANDRETH: No, pre-reading is before that. So the idea is that you will receive
5 | the skeletons, I think, on 6th of May.

6 | THE PRESIDENT: Yes.

7 | MR BRANDRETH: Then there's pre-reading on the 7th and 8th, the weekend of the
8 | 9th and 10th, we're into court on the 11th, we have those two weeks, the buffer at the
9 | far end is also -- it's not just the barristers, but also court vacation. So one can only
10 | run up until -- yes, indeed.

11 | THE PRESIDENT: Can I just ask: is there any room for movement, say, by one day
12 | if necessary? If it were to turn out closer to the trial, to need more time, as in, because
13 | of your commitment? The answer to that may be: "No, there isn't any room at all". But
14 | if, for example, we get closer to the date and you both think, even one extra day would
15 | make a big difference, is that impossible, in terms of your existing commitments?
16 | We could we start, if necessary, on the 8th? You're looking puzzled.

17 | MR BRANDRETH: Oh, sorry. You mean come earlier?

18 | THE PRESIDENT: Yes. I mean, I'm definitely not asking to go into the vacation,
19 | because apart from anything --

20 | MR BRANDRETH: My Lady, I'd have to check. I think probably Mr Cordell is in
21 | a better place to answer, because I've got a hearing in another case that week.

22 | THE PRESIDENT: That week?

23 | MR BRANDRETH: That's the thing I'm having to juggle. It's against Mr Cordell. I can't
24 | remember whether it's the 6th or the 7th. (Pause)

25 | The 5th?

26 | So, in other words, my Lady, I'd be starting the trial only a few days after having had

1 another hearing. I'm not saying it can't be done, and I would try and make it work.

2 Something will have to give; it will either be this case or it will be the other case.

3 THE PRESIDENT: I see. So there really isn't that much wiggle room on your side?

4 MR BRANDRETH: No.

5 THE PRESIDENT: All right, thank you.

6 Ms May, the same for you?

7 Submissions by MS MAY

8 MS MAY: Yes. I think my diary is slightly more flexible than my learned friend's.

9 I could start a day earlier, and it wouldn't be difficult for me. But my learned friend is

10 correct, that it was hard enough to find a two-week period that everyone could do.

11 THE PRESIDENT: I'm just trying to ascertain how much flexibility there is. If we did

12 get close to it, and then someone says, "Well, actually, we're really struggling to make

13 this work".

14 MS MAY: I mean, certainly on our side, as things currently stand, the two-week period

15 remains very tight. But obviously one of the potential advantages of having a little bit

16 more time to prepare in a slightly more civilised manner is that it gives both parties the

17 opportunity to think and to consider whether any issues can be dropped. Although

18 certainly on our side, my Lady will understand, and we'll get into the weeds in a minute,

19 one of the reasons why we are keen not to lose momentum, in relation to the

20 outstanding deadlines, is precisely so that we can get the remaining information to

21 which we are entitled, as soon as possible, to facilitate the exercise of trying to narrow

22 the issues.

23 THE PRESIDENT: All right, okay.

24 So that's the parameters. Can we then perhaps just work through the disputed

25 deadlines?

26

1 Disputed deadlines

2 Submissions by MR BRANDRETH

3 MR BRANDRETH: Yes, my Lady.

4 THE PRESIDENT: Rather than having one person address me on everything all at
5 once, I think probably we should just go through each of the disputed deadlines and
6 deal with them. Is that sensible?

7 MR BRANDRETH: That is sensible subject to this submission, my Lady, which is that
8 one of the objections is that by bringing them forward, lots of things are being required
9 to be done at the same time. So my Lady appreciates that an overarching submission
10 is what might be acceptable if it was the only instance isn't going to be acceptable
11 when it's several of them.

12 THE PRESIDENT: Yes.

13 MR BRANDRETH: So if my Lady has that annex.

14 THE PRESIDENT: I've got the annex.

15 MR BRANDRETH: The first one that's identified by my learned friend at 3 is not, in
16 fact, a point of dispute, and as we indicated in our skeleton argument, we can do the
17 list of issues by the 13th.

18 THE PRESIDENT: All right. So let's just agree then it's the 13th.

19 MR BRANDRETH: Yes.

20 THE PRESIDENT: Good. All right, so then the next point is number 7.

21 MR BRANDRETH: That's right. So number 7 is about the supplemental expert report
22 in reply. Now, my Lady may recall that there was an issue over translations and Temu
23 sought to put in a further report on some aspects of the other parts of the contract, the
24 relevance of which we didn't understand. Now, there is an opportunity for us to put in
25 a reply report. What they say is, "Well, look, it can be done. If it can be done, why not
26 by the 19th rather than by the 30th?". Now, the answer to that --

1 THE PRESIDENT: The 30th being the pro tem deadline?

2 MR BRANDRETH: Being the pro tem deadline. Now, the answer to that, my Lady, is
3 that bringing it forward 11 days does increase the burden on my client, particularly
4 because it is being done in circumstances where we understood we had until the 30th.
5 Now, my learned friend gives two points in justification. First, she says the evidence
6 which it replies is short, so they assume it's not going to require much work. My Lady,
7 that falsely equates length with complexity, and it takes no consideration of the
8 question of the availability of either the expert or the legal team to progress the matter.
9 Nor does it consider that overarching submission that the task would have to be
10 undertaken alongside others. Now, the second point that's made, my Lady --

11 THE PRESIDENT: Your starting point was that you could do it on the 30th.

12 MR BRANDRETH: Yes, and we're happy to stick with that, my Lady. My learned
13 friend has an important point to make which bites on me as well, my Lady, which is
14 that we can't lose momentum and we must keep progressing the case so that we can
15 be preparing in March. I fully understand that. But the difference is not significant in
16 terms of that question, because from 30 January onwards, we still have the whole of
17 February, March, April and that part of May.

18 THE PRESIDENT: The deadline was originally 2 January in the context of a trial that
19 was going to start later in January. So we've moved the date by -- not quite a month,
20 but we've got another three and a half months in the overall timetable.

21 MR BRANDRETH: Absolutely, and that submission is going to crop up again and
22 again. I agree we need to get things ready, but the pro tem deadlines do envisage
23 completion of the actions in February. There's no need to bring them forward to get
24 what my learned friend wants. At the same time, it imposes a considerable burden.

25 THE PRESIDENT: All right. Can I hear from Ms May on this, then? Are you going to
26 be making all the submissions, Ms May?

1 MS MAY: Yes, I am.

2 THE PRESIDENT: Yes. Is there a pressing need to have this earlier than the pro tem
3 agreed deadline?

4 Submissions by MS MAY

5 MS MAY: In my submission, the answer is yes. There are a number of reasons why,
6 and these reasons actually are relevant to quite a lot of the submissions I'm going to
7 be making this morning. So if I just make them once upfront, my Lady will understand
8 our position.

9 There are four points which apply across the board in relation to all of the dates. The
10 first is Chinese New Year. That starts the week of 12 February, and it runs to the end
11 of February. It takes the Chinese-speaking members of both teams as well as the
12 clients out of the picture for potentially up to three weeks.

13 THE PRESIDENT: Really?

14 MS MAY: Yes, because the official dates -- they're in my learned friend's
15 skeleton -- are the 15th to the 23rd. But what happens, as I understand it, is that
16 people will often take time off either before or afterwards, and so --

17 THE PRESIDENT: Are they really taking three weeks off?

18 MS MAY: I don't think everyone is taking three weeks off.

19 THE PRESIDENT: A three-week period of general disruption, during which not
20 everyone will be there. But it doesn't mean that everyone's going to be away for
21 three weeks.

22 MS MAY: No, but it does mean that everyone's going to be away between the 15th
23 and the 23rd.

24 THE PRESIDENT: But that's in the case of both sides.

25 MS MAY: It is, yes. So there is a hiatus in the second half of February, and so we
26 say that's important context for having a position where generally everything gets done

1 before that hiatus. The second point --

2 THE PRESIDENT: But I can see all of the dates that are running through are around
3 the end of January or start of February, before the Chinese New Year hiatus.

4 MS MAY: Yes, indeed. Indeed.

5 THE PRESIDENT: So when I say proposed, including proposed by Shein. So it's not
6 just.

7 MS MAY: No, indeed, but some of the dates are closer to 9 February than others, and
8 I'm going to need to make some specific submissions in relation to one disputed date
9 which is 9 February, and I can come back to that in due course, but just making these
10 general points first.

11 So the first is, as I say, is my Lady needs to be aware of the existence of the Chinese
12 New Year and the impact that's going to have on the progress of the case.

13 The second general point is counsel availability. Of course, it doesn't come as any
14 surprise to my Lady to know that -- certainly on our side, and I'm sure it must be true
15 on Shein's side -- we all have really good availability right now, running through to
16 10 February when the trial was going to end. Thereafter, things get increasingly more
17 difficult. My learned junior, Mr Edwards, my Lady will recall, is on brief on another
18 matter from 9 February, which was why we couldn't run over 10 February in the first
19 place. Certainly on our side, we want to maximise the time that we have now to get
20 ahead in relation to our preparation to avoid the same difficulties that we had last time
21 around.

22 Since all of the dates that we are looking at are dates which were otherwise feasible
23 for Shein to complete within the context of the January trial, in our respectful
24 submission, we have to be really careful not to fall into the trap of allowing things to
25 expand into the time available.

26 THE PRESIDENT: Yes, but the pro tem dates were set in order to take off the

1 pressure over Christmas. Effectively, that's spent now, because people have
2 therefore not been killing themselves over Christmas and New year.

3 MS MAY: Well, with respect, my Lady, it was the adjournment itself that allowed the
4 break over Christmas. Everybody agreed the pro tem dates on --

5 THE PRESIDENT: Well, the adjournment and the pro tem extensions, because it
6 meant that there weren't work streams that were, for example, being completed by
7 2 January.

8 MS MAY: Yes, but as my Lady understands, firstly, those deadlines were pro tem and
9 secondly, as my learned friend pointed out to my Lady, it was an express position that
10 they were pro tem, subject to coming back to the court and having a discussion with
11 the court as to what the appropriate deadline actually is.

12 In that context, my next point to make by way of a general observation is that -- I'm
13 sorry to say, but history tells us that Shein misses deadlines. In the run up to the PTR,
14 every deadline was missed and that was putting unbearable pressure on my side in
15 terms of the ability to prepare properly for trial. The difficulty is, the later you make
16 these deadlines to 9 February and the Chinese New Year, the greater the risk that
17 they are not met before the Chinese New Year. We then have a two to three-week
18 hiatus, and we find ourselves in March, with deadlines still not being met. The risk is
19 we are then back in the same situation that we were in in December, where we are
20 rushing to get material in a constrained period of time with limited counsel availability,
21 and that's going to undermine our ability to prepare properly for trial.

22 So our position is we need to be using the time that we have in January and February
23 in a considered and measured way to facilitate fair and proportionate and effective
24 preparation in this time period. So the benefit of 19 January is twofold. Firstly, it allows
25 for a little bit of slippage if slippage is required before the Chinese New Year, and
26 experience tells us that slippage will be required. Secondly, it also allows for

1 a staggered approach, which in my understanding, is one of the things that Shein
2 wants. They don't want to have all of the deadlines on the same dates.

3 My learned friend made a general observation about expert availability, but it's fair to
4 say there isn't a concrete submission from him that his expert isn't available to do this
5 by the 19th. I don't think he went so far as to say that the 19th isn't feasible. It's two
6 working weeks away from now, so there's no reason why it can't be done by way of
7 a reply report to a five-page report.

8 THE PRESIDENT: Can you just give further information about your expert's
9 availability?

10 Reply submissions by MR BRANDRETH

11 MR BRANDRETH: As to the specifics, my Lady, I can't off the top of my head, but
12 I will seek instructions. My Lady knows that we were working on the basis that we
13 would have to meet these deadlines beforehand. But what has happened, my Lady,
14 is that understandably, the parties have done what we understood we were supposed
15 to do and taken the space that was available to us so that we weren't on the verge of
16 collapse.

17 In a world in which what we were asking for was genuinely butting up against a May
18 trial date, my learned friend's submissions would have force. In circumstances where
19 what we're asking for is to be able to do this in the measured way that doesn't result
20 in people collapsing in the courtroom, 30 January versus 19 January doesn't seem too
21 much to ask, and has to be fitted in around all the other activity we will also be taking
22 place in the same time period.

23 My learned friend gave the impression somehow we're going to be twiddling our
24 thumbs in the course of January. We've got several deadlines to meet before
25 9 February, all of which are running in parallel, all of which are being done by the same
26 team. My Lady, to take one in isolation, and say, "Well, you could definitely do that",

1 is not an answer to the overarching problem here, which is that the idea was that we
2 wouldn't -- not stop working, but that we wouldn't be doing it in a way that was so
3 rushed and forced that errors were arising, deadlines were being missed. My learned
4 friend really is advancing a submission that somehow we were the only ones at fault,
5 when she herself had to make multiple applications for extensions of time, precisely
6 because that this was the problem that the constrained run up to the trial was creating.
7 All of those pro tem deadlines result in the output of the work before the Chinese New
8 Year, in many cases well before it. In circumstances which then leaves the counsel
9 on both sides February, March, April to use as they think appropriate before even the
10 May preparation for a trial, it cannot be said that these are unacceptable dates. On
11 the other hand, the burden on us if they are brought forward is very significant.

12 THE PRESIDENT: All right. I've heard both of you. I don't think there's much more
13 than can be said on either side. I'm minded to stick with the pro tem deadlines for all
14 of the points for which pro tem deadlines have been agreed, given that the parties
15 have, on the basis of the pro tem deadlines, arranged their work streams around those
16 dates. Even then, it's not as if everything is being shifted back by three months. It's
17 not. The pro tem deadlines, as far as I can see, have been shifted back by around
18 a month, which, even with the Chinese New Year, that should leave a considerable
19 buffer in the timetable.

20 I think I will emphasise that the deadlines are not optional and have to be complied
21 with in the circumstances that they have been pushed back considerably. Where
22 everyone knows that the deadlines are butting up on Chinese New Year, I think it will
23 just not be acceptable for the parties just to put in documents late and then ask the
24 court, belatedly, for an extension of time.

25 So I think when I say that I would be inclined to maintain the pro tem deadlines, it will
26 be on that basis. I think that the parties on both sides should be aware that if

1 documents are put in late or if disclosure is provided later, if timetables are otherwise
2 not adhered to, I will be willing to consider sanctions for that, and that may be in the
3 form of costs, or it may be in the form of simple non-admissibility of documents if
4 they're being filed.

5 That is not an invitation to put in something late and say, "We'll just pay for it". I will
6 consider sanctions at the request of the objecting party if deadlines are not adhered
7 to going forward, given that -- at considerable inconvenience to both sides,
8 I know -- the trial's been adjourned, which frees up time in a timetable but means that
9 both of you are juggling other commitments in that time. So, obviously, on the whole,
10 the decision was taken it was best to adjourn the trial, but we are then working within
11 a constrained timetable. So my view is that for this in particular, I'm going to stick with
12 the pro tem deadline. Is there any other of the pro tem deadlines, which for whatever
13 reason, simply is not going to work from your side, Ms May?

14 Further submissions by MS MAY

15 MS MAY: Yes, that's why I'm on my feet, my Lady, because there's one which is the
16 disclosure, which is item 8.

17 THE PRESIDENT: Right.

18 MS MAY: Can I explain the concern on this side of the court with the 9 February date?
19 It's as follows. The first is, when we get the disclosure, if it arrives on 9 February,
20 experience tells us that it's going to be documents in Chinese. And so that's too late
21 for us to be able to engage with the disclosure meaningfully before the Chinese New
22 Year. So if my Lady is going to stick to 9 February, it has to be on the understanding
23 that what's been provided are translations.

24 The alternative is to put that date forward, whether it's 16 January or 23 January, for
25 the Chinese documents, and then make a date for the translations.

26 THE PRESIDENT: On the CPR, in general, am I right in thinking that one would

1 normally have to provide translations?

2 MS MAY: Yes.

3 THE PRESIDENT: So the default would be that they would have to be translated
4 documents.

5 MS MAY: Yes, but again, I'm sorry to say this, but history tells us that Shein don't
6 think that CPR applies to them because we haven't got any translations for any other
7 documents yet, although my Lady ordered them at the last hearing, and for each of
8 those documents to be provided 24 hours after they had been received, despite the
9 order that my Lady made to that effect nearly a month ago, we have still not received
10 a single translation.

11 THE PRESIDENT: All right but just thinking about -- I mean, we'll come on to
12 translations in a minute -- but in terms of what the default position would be under the
13 CPR, it would be that the deadline would need to refer to translated documents.

14 MS MAY: Yes, indeed.

15 THE PRESIDENT: Yes.

16 MS MAY: But I'm giving the opportunity for Shein to do it in two stages, which is to
17 provide the Chinese documents a little bit earlier.

18 THE PRESIDENT: Yes.

19 MS MAY: So that we at least have the opportunity for the Chinese speaking members
20 of the team to read them, such that if they have the same difficulties in relation to
21 translations that they evidently are having, with respect, to literally everything else, we
22 are not prejudiced to the same extent as not having anything readable on 9 February
23 with our Chinese team going off for Chinese New Year.

24 THE PRESIDENT: So at the moment, the date would be -- so the options that you're
25 proposing is either 9 February, as it stands, but those would have to include translated
26 documents or what date are you proposing for the Chinese versions?

1 MS MAY: We're proposing 16 January, my Lady.

2 THE PRESIDENT: And then translations to be provided by that by when?

3 MS MAY: On the 9th. Can I explain why we say 16 January is an appropriate date?

4 THE PRESIDENT: Yes.

5 MS MAY: The first is the disclosure exercise that my Lady ordered is a discrete and
6 confined exercise. It relates to two custodians only: Mr Wei and Ms Shang, and it's
7 over a specific date period.

8 The second is my Lady ordered that disclosure exercise on 16 December, and at the
9 time my Lady made the order, the documents were to be provided by 2 January 2026.

10 Take it from me, my Lady, that's ten working days. And my Lady made it clear, in
11 my Lady's order, those documents were to be provided without fail. There was no
12 suggestion from Shein at the time that they couldn't undertake the exercise within
13 ten working days. By the date of the adjournment, which was 24 December, seven of
14 those ten working days had passed. So it is reasonable to assume that Shein must
15 have already undertaken the bulk of the disclosure exercise. They must already have
16 garnered all of the documents and started the process of going through them to check
17 what is disclosable and what is not. They have -- so the adjournment came with
18 three working days remaining to complete the exercise; an exercise my Lady had
19 ordered them to do without fail.

20 In those circumstances, suggesting a 16 January date gives them an additional
21 ten working days on top of the deadline to which they were previously working to and
22 which, as I say, they must have virtually already completed. And so it is, in our
23 respectful submission, unreal to suggest that they can't provide the documents by
24 16 January.

25 THE PRESIDENT: From today --

26 MS MAY: Yes.

1 THE PRESIDENT: -- that would be --

2 MS MAY: It's next Friday. Yes.

3 THE PRESIDENT: Yes. Five working days from today.

4 MS MAY: Yes, but, I mean, obviously the 16 January date isn't a new date today. It's
5 been our proposal in our skeleton and in correspondence. And as my learned friend
6 has already submitted to my Lady, on his side, they are busy getting on with the
7 process of trial and so no doubt, since they've all been back at work from 2 January,
8 or 5 January at the latest, they've been getting on with this. And so the sensible course
9 is to order the 16th for the Chinese documents, and the benefit of that is that it gives
10 with it a little bit of slippage and, you know, God forbid that they are late again, there's
11 still enough time to get the Chinese documents before everybody leaves for Chinese
12 New Year, and then we can get the translations on the 9th.

13 These are important documents for our side of the case. They feed into the question
14 of knowledge. They feed into our cross-examination prep. They feed into what the
15 issues are and, remember, we've agreed -- and my Lady has already indicated in
16 today's hearing -- that the list of issues is going to be finalised on 13 February. We
17 can't do that exercise without the disclosure. So it is quite important.

18 THE PRESIDENT: Yes. All right. Let me hear from Mr Brandreth on that particular
19 point, bearing in mind, Ms May's points, that by the time of the adjournment, seven out
20 of the ten working days had already elapsed.

21 Further submissions by MR BRANDRETH

22 MR BRANDRETH: Yes, my Lady. I think the answer there is the same one that I've
23 already given you, which is that once the adjournment kicked in, the space opened up
24 in order to allow people, first of all, to enjoy their Christmas holiday, but secondly, to
25 restructure when they would be doing things with the aim of providing the disclosure
26 by 9 February, my Lady. And that was the basis on which we'd been proceeding and

1 on which therefore processes like review for relevance and so on and so forth are
2 being taken forward.

3 Now, my Lady suggested that the obligation is to provide translations under disclosure.
4 I don't think that's right, my Lady. We think it doesn't require it. I think my Lady is
5 thinking of the requirement to provide translations of documents that you rely upon in
6 the case. But in any event, the point is that 9 February is a date which can be met in
7 the context of all of the other things that are being done, and is --

8 THE PRESIDENT: For all the translated versions?

9 MR BRANDRETH: For the disclosure exercise. I don't know the distinction between
10 translation and --

11 THE PRESIDENT: That's a material distinction, because if you're going to be giving
12 Chinese documents, they won't be legible by the English speaking part of the team at
13 that point and then their Chinese counterparts will be then disappearing for Chinese
14 New year. So that is a relevant distinction.

15 MR BRANDRETH: My Lady, notwithstanding that whether it is or isn't an obligation,
16 I'm told that we can provide whatever disclosure there is with translations by the 9th,
17 but we certainly can't get the disclosure done by the 16th and then translations to
18 follow, because the 16th --

19 THE PRESIDENT: If you're providing the disclosure with the translations by the 9th,
20 you must have identified the relevant disclosure before the 9th in order to get
21 (inaudible).

22 MR BRANDRETH: Yes, absolutely, in order to do the translation.

23 THE PRESIDENT: In which case you can hand over the Chinese documents before.

24 MR BRANDRETH: My Lady, but I don't know when that will be completed before the
25 9th.

26 THE PRESIDENT: Right. But there must be a date quite significantly before the 9th

1 for you to have identified which documents you're going to get translated and carry out
2 that exercise so you could provide the documents for the 9th in Chinese form.

3 MR BRANDRETH: But, my Lady, plainly there is going to be a gap between
4 identifying the Chinese language document.

5 THE PRESIDENT: How many documents are we thinking about?

6 MR BRANDRETH: I don't know the answer to that, my Lady, off the top of my head.

7 THE PRESIDENT: Approximately, any idea of the (inaudible)?

8 MR BRANDRETH: Sorry, for actually being disclosed or for being reviewed?

9 THE PRESIDENT: Well, being disclosed(?).

10 MR BRANDRETH: We anticipate there won't be very many documents at all for
11 disclosure.

12 THE PRESIDENT: (Inaudible).

13 MR BRANDRETH: Well, my Lady, the last time that we looked at the knowledge issue,
14 you'll recall that we went through 30,000 documents.

15 THE PRESIDENT: It's not going to be 30,000 documents from two custodians
16 between --

17 MR BRANDRETH: No, it was the same two custodians that we looked at on the
18 previous occasion.

19 THE PRESIDENT: Yes, between a confined time period. So bearing in mind that,
20 effectively, seven out of ten of the working days had elapsed before the adjournment,
21 so we're working on an assumption that you only had three working days left to
22 complete the disclosure exercise, even assuming that everyone completely down
23 tools, at the point of the adjournment, but assuming that people can now pick up tools
24 again, is there any reason why you can't provide at least the Chinese documents by,
25 say, the week beginning 19 January? Because that would give you more than
26 five working days from today, in circumstances when the original exercise was only

1 going to take three working days more, from the point of the adjournment, and on the
2 assumption that you will have done therefore the bulk of the exercise already.

3 MR BRANDRETH: My Lady, the difficulty is that it's got to be integrated with all of the
4 other work. If my Lady is saying that 9 February is too late, I would at least ask we
5 have longer than to 19 January in order that it might be done in an orderly way. If we
6 are to bring it forward so that there can be then a provision of the translation
7 subsequently because I understand my learned friend's point is about the availability
8 of Chinese speakers, then it seems to me that a week before 2 February for the
9 Chinese documents would, as it were, split the difference between not putting the
10 burden back onto my clients in circumstances where they thought it had been lifted,
11 and allowing my learned friend time to look at the Chinese language documents with
12 Chinese speakers before it began.

13 THE PRESIDENT: I think I probably heard enough on both sides. What I'm going to
14 say is that the Chinese documents should be provided on 26 January. That is a bit
15 more than a week later than proposed by Ms May, but is two weeks earlier than
16 proposed by Mr Brandreth. The Chinese documents are to be provided by then
17 because on any view a decision is going to have to be made by around then about
18 which documents are going to be translated. I cannot imagine that the decision as to
19 which documents to provide will be made later than that, because they will need to be
20 translated. So I will order that the Chinese versions of the documents -- or the original
21 versions of the documents, whether they're in Chinese or English -- if they are in
22 English, then they can be provided by the same point -- the original versions of the
23 documents be provided by the 26th, and I'll say close of business on the 26th, and
24 then insofar as there are Chinese documents in the original, translations of those to
25 be provided by 4.00 pm on 9 February. That will give another two weeks for
26 translations to be procured. That should not be onerous, especially if Mr Brandreth's

1 right in saying that there won't be very many documents, by that point.

2 MR BRANDRETH: Very good, my Lady.

3 THE PRESIDENT: Let me just make a note of that. (Pause)

4 MR BRANDRETH: My Lady might find it helpful to look at paragraph 9 of the
5 consolidated order.

6 THE PRESIDENT: (Inaudible).

7 MR PASCOE: I think what my Lady has ordered is the adoption of the green language
8 but with the figure of 26 January 2026 in the first brackets. It's at paragraph 9.

9 THE PRESIDENT: Yes, absolutely.

10 MR PASCOE: Yes.

11 MR BRANDRETH: That's right. Yes. Whilst my Lady has the order open, perhaps
12 I could ask my Lady to turn to paragraph 18. (Pause)

13 This is one point where the parties have agreed some modification, but the detail is
14 important. It's concerned with the identification of the witnesses for trial.

15 THE PRESIDENT: Well, are we now -- I mean, what I was doing was I was working
16 through the annex to Ms May's skeleton in chronological order. Are we skipping to
17 another part of that annex? Or is this the next point that's going to arise for dispute?

18 MS MAY: No, certainly on my side I would like to make submissions on item 9.

19 THE PRESIDENT: All right. Can we just go through the annex in order then, rather
20 than skipping forward.

21
22 Translations

23 Submissions by MS MAY

24 MS MAY: So just picking up my Lady's invitation, for which we are very grateful, to
25 make submissions, in relation to my Lady's general approach, to stick to the pro tem
26 dates. We understand that's my Lady's position, and this is the only other -- we

1 understand that, obviously, that position doesn't relate to the dates that have been
2 agreed. So to the extent the parties have agreed different dates, there's no dispute.
3 But the other one where we do have some concerns is the translations, which is the
4 pro tem date is 2 February. My Lady will recall that in my Lady's order before
5 Christmas at the PTR, my Lady ordered for translations to be provided as soon as
6 reasonably practicable, but in any event, 24 hours after they've been prepared and
7 received.

8 Does my Lady recall that?

9 THE PRESIDENT: Yes, and you said you haven't had anything.

10 MS MAY: We haven't had a single one. And that was on 16 December, my Lady,
11 which is nearly a month ago, and we are really concerned about it, because either it
12 means that Shein just hasn't started the process, or it means that they are disobeying
13 my Lady's order, and we don't know which it is. But there are lots of documents in the
14 case, there are 32 witnesses, they all exhibit and refer to disclosure documents, none
15 of which have been translated. I'm simply not able to progress my trial preparation, in
16 relation to each of the specific works, until I understand what the evidence is, that is
17 being put forward in relation to those works. I can't read the documents, let alone
18 assess if I need to cross-examine the witness, or what the cross-examination looks
19 like.

20 And so I'm being hamstrung in my preparation, and it's simply not fair or appropriate.
21 We have raised it in correspondence, we have chased, we have had no explanation
22 at all.

23 THE PRESIDENT: Yes, all right, let me speak to Mr Brandreth. What is going on
24 here? Because you said that translations were being done.

25 Submissions by MR BRANDRETH

26 MR BRANDRETH: I'm told, my Lady, that we haven't been provided by the translators

1 with the certified translations. I think that is an important distinction, my Lady. What
2 we understand is an issue is the certified versions of translations of documents. My
3 learned friend says she can't understand any of these documents. That suggests
4 somehow she has nobody who's capable of producing a machine translation of these
5 documents. That can be done at the click of a button. It is the certifications that are
6 the sticking point, and I'm told that, and I admit to my surprise, that the translators have
7 not provided anything to us.

8 THE PRESIDENT: I mean, they're your contractors --

9 MR BRANDRETH: Yes.

10 THE PRESIDENT: -- and there was a period between the PTR and the adjournment
11 in which I understood, from what your submissions were at the PTR, translations were
12 ongoing --

13 MR BRANDRETH: Yes.

14 THE PRESIDENT: -- and where the order was for those to be provided to the other
15 side, each document within 24 hours. How is it even possible that nothing has been
16 provided in that time?

17 MR BRANDRETH: The answer is that we haven't received them ourselves, my Lady.

18 THE PRESIDENT: Right. Can you just instruct other translators then? I mean, it's
19 just not --

20 MR BRANDRETH: My Lady, I completely understand that it has to be progressed --

21 THE PRESIDENT: Yes.

22 MR BRANDRETH: -- and the only question is: by when? And the answer is, my Lady,
23 I understand --

24 THE PRESIDENT: If your contractors simply aren't doing the job, then sack them and
25 get others.

26 MR BRANDRETH: Completely, my Lady, and the position is that my Lady has already

1 made an order, that it be provided as soon as it becomes available and within
2 24 hours. The urgency, the whip hand, is there, as my Lady says, it may be it needs
3 to be applied directly to the translators. The only question is -- and those behind me
4 will have heard that -- whether or not the long stop date should be next Friday, or
5 whether it should be 2 February, in circumstances where it's only a long stop date, as
6 my Lady has already made clear, they've got to come as they arrive to us.

7 My Lady, 2 February is, we say, a suitable long stop date, precisely because it
8 appears that we haven't been receiving the translations before now.

9 THE PRESIDENT: All right, well, I think the long stop idea is clearly not working. The
10 translators either have to start producing the certified translations, or they have to be
11 replaced. I think what I'm going to do is to direct that the translations are produced in
12 tranches, and that will have to be complied with, and if your translators are not, for
13 whatever reason, providing you with the documents that you have commissioned from
14 them, and for which you are paying them, then you will have to get other translators to
15 do it.

16 MR BRANDRETH: I'm not quite clear what my Lady means by "in tranches".

17 THE PRESIDENT: So what I want to explore is where we can say half of the
18 documents to be provided by a certain date, and then the other half to be provided by
19 the long stop date, so that at least there is a possibility of Ms May's team getting on
20 with some of this in the interim. Now, if the long stop date is 2 February, there is no
21 reason -- it is unfathomable that nothing will be available before then.

22 MR BRANDRETH: That must be right.

23 THE PRESIDENT: So it must be, and assuming that everyone is just getting on with
24 doing things at pace, which is what you said at the PTR, half of them must be available,
25 at some point, before then, and logic would suggest at the halfway point. So, I wonder
26 if I could simply say that no less than half of the document should be provided by

1 16 January, with the remainder to follow on 2 February, and given that the original
2 date was the 5th.

3 MR BRANDRETH: I'm not resisting.

4 THE PRESIDENT: All right, so we'll do that.

5 Reply submissions by MS MAY

6 MS MAY: Can I just seek one point of clarification? I think on our side we're content
7 with that order, but subject to the fact that it doesn't vary the existing order, which
8 my Lady sees set out in the table at point 9. So from 16 January to 2 February, as
9 further certified translations become available, they should be provided.

10 THE PRESIDENT: Yes.

11 MS MAY: And so that order is undisturbed.

12 THE PRESIDENT: Yes.

13 MS MAY: And I just want that to be clear for the record, we're not getting two tranches,
14 one on the 16th and one on the --

15 THE PRESIDENT: The long stop is divided into tranches.

16 MS MAY: Yes.

17 THE PRESIDENT: So if and when any are available, they are provided within
18 24 hours, but as a long stop, at least half of it must be provided on the 16th, with the
19 remainder by the 2nd. What I am concerned about: this resulting in effectively
20 two tranches, rather than compliance with the original order. I think I need, also, some
21 kind of explanation as to why the translators are not providing things on an ongoing
22 basis, and confirmation that they will be providing the certified translations on an
23 ongoing basis, as and when the translations are done, rather than withholding any,
24 and dealing with them in stages, as they clearly have been doing so far. There is no
25 reason, if a translation has been done, for the certified translation not to be provided
26 forthwith, rather than waiting. Can an explanation be provided?

1 Further submissions by MR BRANDRETH

2 MR BRANDRETH: A letter can be provided that explains what the position is.

3 THE PRESIDENT: Yes, and confirmation that going forward, without delay, as soon
4 as a translation is done, the certified translation will be provided.

5 MR BRANDRETH: In accordance with the order --

6 THE PRESIDENT: In accordance with the order, yes.

7 MR BRANDRETH: -- my Lady has already made. As I say, I'm slightly surprised to
8 discover there's been this hold up, but I'm told there is.

9 THE PRESIDENT: And it's obviously not of your making, but it's not even of the
10 making of those behind you.

11 MR BRANDRETH: My Lady was very clear on the last occasion, hence the order that
12 they come as they arrived, and it is underlined on today's date.

13 THE PRESIDENT: Yes, all right.

14 MR BRANDRETH: I don't know if my learned friend had any point prior to, in her
15 annex, coming to our 16 and 17.

16
17 Pro tem dates

18 THE PRESIDENT: So, I can see in the new order there are a number of highlighted
19 points between 9 and 16. Is there anything that I need to now then deal with between
20 9 and 16, or can we revert to the pro tem dates?

21 MR BRANDRETH: I think (inaudible) ask my learned friend.

22 Submissions by MS MAY

23 MS MAY: So, my Lady, I think paragraph 10, my Lady, is just varied. This is the one
24 that deals with the translations -- I don't propose that we draft by committee, we're
25 going to have to go away and put in the tranche long stop direction that my Lady's --

26 MR BRANDRETH: It's not 10, it's 9.

1 MS MAY: Sorry.

2 MR BRANDRETH: I'm sorry --

3 MS MAY: I'm looking at the draft -- we're looking at the draft order, aren't we?

4 MR BRANDRETH: Yes.

5 MS MAY: Yes. 9, we've already amended. 10 is the paragraph of the draft order

6 we've just dealt with. 11 we've already addressed on my Lady's order, 30 January.

7 THE PRESIDENT: Is there any dispute as to 10? Because 9 and 10 are slightly

8 different, aren't they?

9 MS MAY: Yes. 9 is the Model C disclosure, which my Lady is directed, and the green

10 date of 16 January has been changed to 26 January.

11 THE PRESIDENT: No, not in the annex -- oh, yes.

12 MS MAY: For the original documents.

13 THE PRESIDENT: Were we effectively dealing with both 9 and 10 in the discussion

14 that I've just had? Does that sweep up both of them?

15 MS MAY: Yes, exactly. In the two discussions we've just had, one about disclosure

16 and then about translations, that's paragraphs 9 and 10.

17 THE PRESIDENT: I don't want there to be any doubt.

18 MS MAY: My Lady is looking at the draft order. Correct?

19 THE PRESIDENT: I'm looking at the annex.

20 MS MAY: Oh, I'm so sorry. We're talking at cross purposes.

21 THE PRESIDENT: I'm sorry. I'm looking at the points in the annex.

22 MS MAY: If my Lady -- so the points in the annex. Yes, the disclosure was item 8.

23 THE PRESIDENT: Yes.

24 MS MAY: And then, the translation was item 9.

25 THE PRESIDENT: And then 10 is also --

26 MS MAY: Item 10 is agreed. That's been agreed in correspondence.

1 THE PRESIDENT: I see. So that falls away.

2 MS MAY: That falls away.

3 Item 11 is agreed, so that also falls away.

4 Items 12, 13 and 14. These are --

5 THE PRESIDENT: As you say, mechanical.

6 MS MAY: Totally mechanical exercises. And in light of the claimant's position that

7 they don't want to do it until 2 February, we've actually undertaken the exercise

8 ourselves. We did it in about an hour yesterday, and we've got documents up and

9 running, with the appropriate paragraphs crossed out. We're just waiting for

10 instructions from our client before we can send them in correspondence to the other

11 party.

12 THE PRESIDENT: The claimants then confirm that --

13 MS MAY: And then they can confirm that they're correct.

14 THE PRESIDENT: Mr Brandreth, is there going to be any problem with you confirming

15 that they're correct within, say, two working days of getting them?

16 MR BRANDRETH: I wouldn't have thought so, my Lady. Could we say 16 January?

17 That's Friday next week.

18 THE PRESIDENT: Yes, all right. I'll say 16 January. (Pause)

19 MS MAY: So that's 12, 13 and 14.

20 THE PRESIDENT: You will need to send those to the claimants, in order for that

21 time --

22 MS MAY: By all means. So we'll do it as quickly as we can, if possible today, if not,

23 it'll be Monday.

24 Okay, then item 15 is agreed, my Lady.

25 And then item 16 is us indicating when, is this the date by which we will indicate which

26 witnesses we're going to cross-examine.

1 THE PRESIDENT: And we're now then up to the point which Mr Brandreth was going
2 to address me on.

3 MS MAY: Yes.

4 THE PRESIDENT: So that's 18 in the draft order, 16 in the annex.

5 MS MAY: So I think the first question for my Lady is whether my Lady wants there to
6 be another PTR. This is a proposal from Shein. We're neutral. We consider it as
7 really a matter for my Lady.

8 THE PRESIDENT: I think we should just pencil one in so that it's in everyone's diaries
9 and if, nearer to the event, peace has broken out and everyone has agreed on
10 everything, then it can be vacated; if not, it's there in the diary.

11 MR BRANDRETH: Yes, I think that was our thought, my Lady. There seems to be
12 a date that works for everyone which is 24 March.

13 MS MAY: Let me just check that. Yes. Subject, obviously, to my Lady, yes, I can do
14 that.

15 Submissions by MR BRANDRETH

16 MR BRANDRETH: So my Lady, but the actual debate here on the paragraph that
17 my Lady has identified in the draft order, paragraph 18, is about the identification of
18 the witnesses that the defendants require for cross-examination. The importance of
19 that is to that question of proper progression of the case.

20 My Lady, here, in some respects, I'm mirroring my learned friend's submissions that
21 she made to you about the effect of the Chinese New Year. We need to know by
22 4 February who it is that my learned friend wants to call, because our witnesses are in
23 the vast majority based in China, and my Lady's already indicated that they will be
24 coming to give evidence remotely. So a lot of logistical effort is required.

25 My Lady, I don't know if you absorbed from my skeleton argument that in China,
26 perhaps unlike in the UK, there are quite a few hoops you have to jump through in

1 order to be able to move around the country and certainly to move out of the country.
2 It's not a small task. We need to be told as soon as possible who it is that we need to
3 make those efforts for and incur the costs for. My learned friend was going to have
4 done that at the beginning of January. We're now asking for her to do it by 4 February.
5 That will allow us to make the proper preparations. Thereafter, I'm sure that we will
6 be able to agree things like the cross-examination timetable for the PTR.
7 But my Lady can see it's important that we know that in advance, because if some
8 witnesses need to go to Singapore versus Hong Kong, well, it might make sense to
9 batch all of the Singapore witnesses on one day so that's we -- and so on and so forth.
10 I don't know if --

11 THE PRESIDENT: The pro-tem date was 4 February.

12 MR BRANDRETH: That's what we asked for, my Lady.

13 THE PRESIDENT: You just asked for the pro tem date.

14 MR BRANDRETH: Exactly.

15 THE PRESIDENT: All right. Ms May, is there any reason why you can't do that by
16 the pro tem date?

17 Reply submissions by MS MAY

18 MS MAY: Yes, my Lady. By 4 February, I won't even have received translations of
19 the disclosure, let alone the list of issues. So if my Lady forces me to give a position
20 on 4 February, then it will be simply that I'm cross-examining all of the witnesses.
21 Because I'm not going to be able to work out which witnesses I can drop that early.
22 I'm going to need time to consider the position properly, once I have received all of the
23 relevant material.

24 In the normal course, my Lady, this is the kind of thing that would be discussed at the
25 PTR, and we have suggested that we indicate our position two weeks before the PTR.
26 It's a matter for my learned friend and his clients as to which witnesses they are

1 proffering. They have chosen to put forward 32 witnesses. They must proceed on the
2 basis that all of them are going to be cross-examined and make the appropriate travel
3 arrangements. These are not difficult travel arrangements; it's a function of getting on
4 a train from Guangzhou to Hong Kong, which is no more than a couple of hours away.
5 In terms of the context of the size of this litigation and the costs already incurred, it is
6 a drop in the ocean. So we are just not going to be in a position to progress things by
7 4 February.

8 THE PRESIDENT: You're going to be getting disclosure by --

9 MS MAY: The 9th.

10 THE PRESIDENT: The 9th is at the latest, but I've just ordered that some of this will
11 be provided earlier.

12 MS MAY: Yes.

13 THE PRESIDENT: So at least half of the translations will be coming to you by
14 16 January.

15 MS MAY: That's for some of the translations of the existing documents in the case.
16 That's not the translations of the knowledge disclosure, which I'm not getting in this
17 disclosure (overspeaking).

18 THE PRESIDENT: All right, so (overspeaking) on disclosure that will be coming in
19 original version on the 26th.

20 MS MAY: Yes.

21 THE PRESIDENT: So you can start to look at it by then.

22 MS MAY: Yes, and we're not agreeing the list of issues until 13 February. So on any
23 view, I can't be forced to start making decisions about which witnesses I might drop
24 until after that.

25 THE PRESIDENT: So once you've got the list of issues, is there -- and I know that
26 you are not going to be available for some period immediately after the original trial

1 date.

2 MS MAY: Yes, so I have absolutely no availability for most of the rest of February and
3 the first week of March.

4 THE PRESIDENT: So is that the problem?

5 MS MAY: That is part of the problem. But there's also the fact that in the normal run
6 of things, one considers the question of which witnesses one is going to cross-examine
7 alongside drafting the skeleton and working out what issues remain live and what
8 issues necessitate cross-examination. I don't think I've ever had a trial before where
9 I would have been forced to indicate my position on cross-examination of witnesses
10 four months before the trial.

11 So in my respectful submission, the norm is that you do it in the context of the PTR
12 and agreeing the timetable for trial. That is the norm, and there's no reason to do any
13 different. What my learned friend is saying is that he's going to have to make some
14 practical arrangements in relation to his witnesses. Well, that's true in every trial and
15 this is no different.

16 THE PRESIDENT: So can I just go back to your availability?

17 MS MAY: Yes.

18 THE PRESIDENT: So when does your period of unavailability end?

19 MS MAY: So I'm out of the country from 11 February through to 20 February, and
20 then again from 1 March through to 8 March. Then I'm also unavailable again,
21 13 March through to 20 March. The difficulty is in the bit when I'm in the country
22 between 20 February and 1 March, that will be Chinese New year.

23 THE PRESIDENT: But by that point, this will be a matter which is in your hands. So
24 just working back, if you were to indicate two weeks prior to the PTR, on any basis,
25 you would have had to have effectively formed your decision.

26 MS MAY: So two weeks before the PTR is 12 March. So I can do that.

1 THE PRESIDENT: No, 24 March is the PTR. Two weeks prior to that --

2 MS MAY: Is the 10th.

3 THE PRESIDENT: -- is 10 March. If you're going to be out until the 8th, you would

4 have had to have effectively made up your mind before then.

5 MS MAY: Well, not ...

6 THE PRESIDENT: You're going to have done the bulk of the work in the period before

7 that.

8 MS MAY: Yes, that may or may not be right, my Lady.

9 THE PRESIDENT: Is there any reason why, for example, you --

10 MS MAY: Yes. The answer is yes.

11 THE PRESIDENT: What I'm going to do -- we need to have a break now, anyway.

12 Can you just have a think about whether you would be able to inform the other side of

13 the relevant witnesses by, say, the point at which you go out of the country for the

14 second time. So I'm thinking by 27 February.

15 MS MAY: I can take instructions, but I envisage that that's going to be difficult because

16 of the Chinese New Year period.

17 THE PRESIDENT: Or if not then, at the end of the following week.

18 MS MAY: Week of this -- 6 March?

19 THE PRESIDENT: Yes, so by 6 March, because that would still -- yes, at some point

20 during that week. Because you say the Chinese New Year period runs to the end of

21 February. But most of the work being done is going to be done at this end because

22 by that point we will have the translations. So it's not as if you're going to need the

23 Chinese speakers to assist you with your decision. You will have had the translations

24 by then. It will be a matter of you working through the evidence and the legal team

25 here.

26 So I'm thinking of either the 27th or, based on the fact that you will then be going out

1 of the country, during the following week, but not leaving it quite as late as the 6th
2 because then there's not much air space between then and the 10th anyway.

3 MS MAY: Just looking at my own diary, that is going to be extremely difficult for me,
4 my Lady, because whilst I can work on the case the week of 23 February, I'm then
5 away again the week of 2 March. It's not just me. I obviously need to take instructions
6 and get access to my team.

7 THE PRESIDENT: Yes, but then in that case -- I mean, can I just leave you to think
8 about it?

9 MS MAY: Yes.

10 THE PRESIDENT: But if in fact you are out of the country and not really doing any
11 work on this case between 1 March and 8 March, then it seems to me that it would be
12 much preferable for the decision to be made earlier. But I'm just going to have
13 a five-minute break and I'll let you discuss that with your team then and come back
14 with an answer on that. All right, thank you.

15 (11.57 am)

16 (A short break)

17 (12.06 pm)

18 THE PRESIDENT: All right. Yes, Ms May, where have you got to?

19 MS MAY: My Lady, thank you for that time. I've looked at my diary and I've discussed
20 it with my team, and I'm afraid I'm simply not in a position to be able to bring the date
21 forward. We're not going to be able to indicate a constructive view in relation to which
22 witnesses we want to cross-examine before 10 March.

23 I do emphasise that word, "constructive". I want it to be clear on our side that that's
24 what we are intending to do. We want to be able to be in a position where we can
25 indicate that we are dropping witnesses, but the trial prep needs to be sufficiently far
26 ahead to facilitate us being in that position. We do not think we are going to be able

1 to do that before 10 March, bearing in mind the existing deadlines, the difficulty of
2 periods where I'm unavailable and when my client is unavailable.

3 10 March is still two months before trial and in my respectful submission, that is weeks
4 ahead of what is normally required. We are told by our Chinese colleagues that it is
5 actually very straightforward to get permission to travel to Hong Kong, and it doesn't
6 take very long at all.

7 THE PRESIDENT: All right. Well, I've heard both of you on that point. I'm going to
8 say 10 March. That is still several months before the trial date, two weeks before the
9 PTR, and is certainly a lot earlier in terms of the distance between that and the trial
10 than it would have been under the previous trial timetable.

11 So I'll say 10 March, and I appreciate the problem here is Ms May's pre-existing
12 commitments before that date.

13 MS MAY: I'm very grateful, and I do emphasise that we will endeavour to be as
14 constructive as we can be in relation to the position we take on that date.

15
16 Witness availability

17 Submissions by MS MAY

18 MS MAY: Then, my Lady, looking at paragraph 18, you'll see there are some
19 additional words in --

20 THE PRESIDENT: There are 17 in between them; the timetable for
21 cross-examination.

22 MS MAY: I'm sorry, my Lady, I'm in paragraph 18 of the order.

23 THE PRESIDENT: Oh, I see. Paragraph 18 of the order; paragraph 16 of the annex.
24 So what do you --

25 MS MAY: So we are asking in return from the claimants that they let us know
26 seven days later, which is seven days before the PTR, whether or not each of the

1 witnesses we have asked to be available for cross-examination are actually going to
2 be attending the trial and that the necessary travel arrangements have been made for
3 those witnesses.

4 THE PRESIDENT: Well, no, I think that -- I mean, what's sauce for the goose is sauce
5 for the gander. You can't say that you can't give your list until 10 March and then
6 expect the claimants, within a week, to have made all the travel arrangements. That's
7 just not going to happen.

8 MS MAY: Right, so just three points to say in response to that. In my respectful
9 submission, the first point is we need to separate out the question of principle, whether
10 my Lady agrees with me in principle that we're entitled to get this information, from the
11 question of when we get it.

12 So in terms of the principle that we are entitled to get this information, our position is
13 we should be told by the claimants when they know, in relation to any particular
14 witness, that the travel arrangements are in place for that witness, or that they cannot
15 be made for that witness if that is the case. Because my Lady understands that our
16 cross-examination prep is dependent on knowing, in fact, which witnesses are turning
17 up. Because the nature of the cross-examination may change if I know that
18 a particular witness I want to cross-examine isn't, in fact, turning up, because that's
19 going to necessitate me putting different questions to different witnesses.

20 THE PRESIDENT: Okay. So there's two points. One, I think the question of, in
21 principle, whether the witnesses are going to then be attending the trial.

22 MS MAY: Yes.

23 THE PRESIDENT: And secondly, confirmation that the travel arrangements have
24 been made for those witnesses.

25 MS MAY: Yes, as I understand it, my Lady --

26 THE PRESIDENT: Yes.

1 MS MAY: -- it's always been Shein's position that they intend for all of the witnesses
2 to attend to trial. That's what my learned friend said expressly at the last hearing. The
3 only reason why they wouldn't attend trial is if the travel arrangements cannot be made
4 for them. And so that's why this point about the travel arrangements is important.
5 I completely understand if seven days isn't enough, that they can have more time but
6 our position, as one of principle, is that we should be told that travel arrangements
7 have been made when in fact they have been made. Indeed, we don't actually
8 understand this point of principle to be disputed, because if you look at my learned
9 friend's skeleton, at paragraph 16 --

10 THE PRESIDENT: Rather than having your submission on what I think you're
11 saying --

12 MS MAY: Yes.

13 THE PRESIDENT: -- I think I would just like to hear from Mr Brandreth. I understand
14 your point. You needed to know for your cross-examination prep.

15 Submissions by MR BRANDRETH

16 THE PRESIDENT: Mr Brandreth, how long do you need to be able to confirm travel
17 arrangements?

18 MR BRANDRETH: As my learned friend herself submitted, the reason why we could
19 leave it until 10 March is because we would then have two months up until trial to make
20 the necessary arrangements. It will be different for each person. For some of them,
21 there'll be no difficulty at all because they are either UK-based, like Mr Democratis, or
22 they are expert witnesses who we have to make the arrangements for in the normal
23 way as part of their business activities.

24 The difficulty, though, is the third parties, my Lady. Now, my learned friend said it was
25 just a matter of taking a train from Guangzhou to Hong Kong. That's not right.
26 My Lady, these people have to go to their home town to obtain permission to move.

1 Then if they do obtain that permission, we have to obtain a visa to get them from
2 Guangzhou to Hong Kong. It's a big business.

3 Now, that was being done in anticipation of a trial in February. We now have to go
4 back to these third parties and say, "Actually, you were going to free yourself from your
5 job in February, we need you to free yourself up in a completely different time period
6 and make all the necessary arrangements." I need as much time as I possibly can to
7 do that. And my learned friend is effectively saying, "Well, unless you do it within
8 seven days, somehow you're not allowed to bring the witness."

9 My Lady, if I manage to get the arrangements done to bring that witness, and she says
10 she needs to cross-examine them, then I ought to be allowed to tender that witness.
11 Now, it seems to me that process ought to be given as much possible time as it can
12 be and that's --

13 THE PRESIDENT: Can we do something like this: that for each witness --

14 MR BRANDRETH: Yes.

15 THE PRESIDENT: -- once you have confirmation that the travel arrangements are
16 made, you will then let the other side know. So they have a rolling list of when for
17 each witness you know that they're definitely going to be going.

18 MR BRANDRETH: I can try and do that, my Lady. I mean, part of the problem is that
19 there are moving parts so that it might be that we're expecting them to come to
20 Hong Kong, we're making arrangements on that basis, visa doesn't come through so
21 we switch to Singapore.

22 THE PRESIDENT: Yes. No, I'm trying to find a practical way that, at least on a rolling
23 basis, as and when you have, in principle, travel arrangements set up for witnesses,
24 you let Ms May know. I don't think it needs a solicitor's letter, I think it just means you
25 can just communicate with Ms May that you've now got travel arrangements for the
26 following witnesses, so that she can then prioritise her cross-examination for those

1 witnesses who are confirmed to be able to travel.

2 MR BRANDRETH: Well, I can certainly try to do that and part of the aim of this is to
3 set us up into a position where we can discuss a timetable for the cross-examination
4 at trial. I have to liaise with my learned friend over that and where it would be and
5 what days it would be on. My only real question is when that can practically be done
6 and, in my submission, it ought to be at the beginning of May. Not because, it might
7 necessarily take that time to get all of those travel arrangements sorted out but
8 actually, because it is the flip of my learned friend's position. She's going to tell us at
9 the beginning of March but I'm then away in March and April, and so I need to be in
10 a position to liaise with my solicitors about the arrangements in order to come back to
11 them.

12 THE PRESIDENT: Can I just ask this. What can be done at the PTR? Because at
13 the PTR, we're going to have a general idea of how many days we've got for the
14 third-party witnesses, so that can be done at the PTR, and the assumption then will
15 be that they're all turning up, at least those that Ms May has asked to cross-examine.

16 MR BRANDRETH: We don't need to revisit that.

17 THE PRESIDENT: No.

18 MR BRANDRETH: You've already made a ruling about that.

19 THE PRESIDENT: Well, she's going to then confirm which ones she wants to
20 cross-examine. That may have moved on.

21 MR BRANDRETH: But it doesn't change the amount of time that's available to
22 cross-examine. That's going to be there for her to allocate as she wants.

23 THE PRESIDENT: I see. Yes.

24 MR BRANDRETH: The only real question will be whether we try to, for example, batch
25 people to Singapore.

26 THE PRESIDENT: I see.

1 MR BRANDRETH: So on and so forth.

2 THE PRESIDENT: And you say that that detail of it can't be done until May?

3 MR BRANDRETH: Or we run the risk of having to revisit it. I think what my Lady was
4 suggesting is, well, as we go along, can we try and let people know and I'm saying
5 that we were going to do that anyway because we want to try and liaise over it.

6 THE PRESIDENT: Yes.

7 MR BRANDRETH: I just don't think there needs to be a formal deadline. If, however,
8 my Lady does want to put in a formal deadline, I ask for it to be closer to the trial and
9 that would be at the beginning of May.

10 THE PRESIDENT: Ms May, do you want to say anything about that? I can see
11 Mr Brandreth's point. In principle, he's going to try and get all of them there who you
12 want to cross-examine.

13 Reply submissions by MS MAY

14 MS MAY: By all means. Can I be frank, my Lady? What we want to avoid is
15 a situation where the rug is pulled from under my feet, when I'm told the day before
16 the trial starts, or two days before the trial starts, when I've done all of my
17 cross-examination prep, and that prep is on the understanding that witness A, B, and
18 C are all attending for trial and the questions I'm putting to each of them is dependent
19 on the questions I'm putting to the others, and then I suddenly get told that, "Oh gosh,
20 sorry we haven't been able to get a visa for witness A" or that they're refusing to attend
21 or whatever it is. Now, I totally understand that things can happen in the last minute
22 in a trial, but to the extent that Shein know that they cannot get a visa for a witness or,
23 more importantly, that they have got the visa for a witness, there's absolutely no skin
24 off their nose simply to tell me.

25 THE PRESIDENT: That was what I was essentially asking Mr Brandreth for, if he's
26 willing to do.

1 MS MAY: Yes. And with respect to my learned friend, I totally understand his diary is
2 complicated, I really do, and I'm not trying to make life difficult for him personally, but
3 I do not understand why he has any involvement in the question of these witnesses
4 getting visas. His solicitors will be doing that, and once Freshfields know the answer
5 for any particular witness, particularly if it's a positive answer, they can just, as a matter
6 of courtesy, please, let us know and it will make a genuine practical difference to our
7 trial prep and --

8 THE PRESIDENT: I don't think there's any objection to them just letting you know, as
9 and when. Can you then put in, in words to the effect that, that the claimants will let
10 the defendants know on a rolling basis, once they have confirmed travel arrangements
11 for each of the witnesses. I'm content for that to be done as informally as you like. It
12 doesn't need to be formally, but as long as that information is communicated.

13 MS MAY: I'm very grateful, my Lady.

14 THE PRESIDENT: And I would emphasise rather than somebody sitting down and
15 doing some formal letter which is going to take ages, an email ought to suffice. But
16 as long as it's communicated.

17 MS MAY: Well, or just a phone call. Mr Robinson to Mr Cordell.

18 THE PRESIDENT: Yes.

19 MS MAY: That's absolutely fine.

20 THE PRESIDENT: All right, so that deals with paragraph 18 of the order.
21 Paragraph 16 of the annex --

22 MR BRANDRETH: My Lady, just to pause there. I hoped I've made it clear that that
23 was what we were intending to do.

24 THE PRESIDENT: Yes.

25 Further submissions by MR BRANDRETH

26 MR BRANDRETH: I'm slightly concerned that it's been put in as an order given what

1 are the parameters of what we're going to do, when will we be in breach. Can we not
2 just make it clear that that's what we were intending to do? I thought what we were
3 discussing was whether there needed to be a long stop. If my Lady is saying there
4 doesn't need to be a long stop because she understands we're going to do what we
5 were going to offer to do anyway then I don't see why it needs to be part of the order.
6 I'm concerned that if it is, then we're going to end up with what has been the leitmotif
7 of this case, which is an endless series of satellite disputes over whether or not we've
8 strictly complied with how quickly we told them. It does seem to me that that's a recipe
9 for disaster.

10 THE PRESIDENT: Well, given the nature of these proceedings and the unhappiness
11 on both sides, I think I need to put something in an order. If that means that the
12 communication must at least be in writing in some way in order that no one takes
13 a point as to whether it's being communicated or not maybe that's what needs to be
14 said.

15 Perhaps, for the avoidance of doubt, I ought to put in a long stop to avoid a situation
16 where Ms May says that she's only been told a few days before trial. 1 May,
17 Mr Brandreth, you said you were content with the start of May. That gives a clear
18 week before the trial. So long stop of 1 May, to confirm. The assumption will be then
19 if for particular witnesses, you haven't confirmed travel arrangements by 1 May, then
20 those witnesses will not be attending and will not be cross-examined and you will just
21 have to rely on hearsay notice in relation to those witnesses.

22 MR BRANDRETH: My Lady, in the event that I manage to get the visa on 2 May, I will
23 come back to court and say it wasn't in my power, because it was a matter of the
24 Chinese authorities; I shouldn't be shut out bringing that evidence around.
25 I understand what my learned friend is saying.

26 THE PRESIDENT: Yes, and what I don't want is a situation where suddenly, on

1 2 May, we've got another ten witnesses produced.

2 MR BRANDRETH: I understand, but my Lady, the whole premise of my submission
3 to you is, I want to get started. I'd like to have got started on 4 February (inaudible)
4 I need to (inaudible). But I'm going to be trying to do it a lot earlier than 1 May.

5 THE PRESIDENT: Yes, all right.

6 Discussion

7 MS MAY: Sorry, just one point of clarification on my side of the court, my Lady.
8 My Lady, I've made a note of wording to the effect that the claimant will inform the
9 defendant on a rolling basis.

10 THE PRESIDENT: In writing?

11 MS MAY: In writing, once they know they have travel arrangements for each such
12 witness. And I'd be grateful if my Lady could confirm that it should also include
13 a statement to the effect that the claimants will also inform the defendant once they
14 know that a witness will not attend, because --

15 THE PRESIDENT: Well, no, I think Mr Brandreth's point is that he's going to be trying
16 to make arrangements for all of the witnesses to attend.

17 MS MAY: By all means.

18 THE PRESIDENT: There won't be a point at which that he knows that they won't be
19 attending, because if --

20 MR BRANDRETH: What does it mean to know that?

21 THE PRESIDENT: Because it will be simply that he's still trying to make
22 arrangements. I suppose your point is that if it is definitively known that for some
23 reason a witness cannot attend, they've -- I don't know, a family member has passed
24 away or something, and they've simply said, that you should be informed immediately.

25 MS MAY: That's all I've got in mind.

26 THE PRESIDENT: Okay.

1 MS MAY: It's not to shut out visa applications.

2 THE PRESIDENT: Yes, I understand.

3 MR BRANDRETH: My Lady, I'm very happy to indicate in a recital to the order that

4 we will do that, but my Lady already has the feel.

5 THE PRESIDENT: No, no --

6 MR BRANDRETH: If this is made an order that I must know -- we're going to be back

7 here with my learned friend, for the record --

8 THE PRESIDENT: Put it in a recital. Say that you undertake to inform the other side

9 immediately, if it is known that a witness cannot -- definitively -- attend.

10 MR BRANDRETH: Well, my Lady, an undertaking to the court that is effectively --

11 THE PRESIDENT: Yes.

12 MR BRANDRETH: That's what I'm caveating.

13 THE PRESIDENT: All right. For the avoidance of doubt, you've confirmed that you

14 will be --

15 MR BRANDRETH: Using our best endeavours.

16 THE PRESIDENT: Well, it's not a best endeavours -- if you are told that a witness'

17 father has passed away and the witness will not -- categorically -- on any basis, be

18 attending the trial, then it's not a best endeavours. You just inform the other side

19 immediately, right?

20 MR BRANDRETH: Sure.

21 THE PRESIDENT: Are you agreeing that you will do so?

22 MR BRANDRETH: The reason I'm caveating this, my Lady, what does immediately

23 mean? Am I brought back in front of the court because I did it while we were

24 investigating? We were told that we wanted to check what the position was, so we

25 went back --

26 THE PRESIDENT: No, obviously not. But as soon as you know that the witness

1 absolutely, 100 per cent, is not coming, for whatever reason, then you should let them
2 know.

3 MR BRANDRETH: I'm happy to do that.

4 THE PRESIDENT: Yes, all right. So that should be on any basis. If you don't want it
5 in the order, it needs to be in a recital that you've confirmed that you will do that. Right.

6 MS MAY: Thank you, my Lady. So I think where we've got to, that's item 16 of the
7 annex, and paragraph 18 of the draft order.

8 THE PRESIDENT: Yes.

9
10 Timetable for cross-examination

11 Submissions by MS MAY

12 MS MAY: Then the next one, item 17 of the annex, is the timetable for
13 cross-examination, and the dispute here, on our side, we're proposing that we try to
14 agree it in advance of the PTR, otherwise it's agreed at the PTR, or determined at the
15 PTR. I think my learned friend's position is that it should -- Temu's position is that we
16 try and agree in advance, or else it's determined at the PTR, and Shein's position is
17 that it's resolved after the remaining post PTR deadlines have been complied with,
18 and if not agreed, 1.4 weeks before the PTR.

19 THE PRESIDENT: But what do you mean by the timetable for cross-examination?
20 Because, if that means when particular witnesses are going to be cross-examined --

21 MS MAY: Yes.

22 THE PRESIDENT: -- for the reasons that we've just discussed, you're not going to be
23 able to do this until May. So what is it that is outstanding beyond what was already
24 set down at the previous PTR?

25 MS MAY: Yes. Well, that rather suggests that there may not be a need for a second
26 PTR in March, because it won't be very constructive at that point.

1 THE PRESIDENT: No, but I mean, I'm just putting it in, in case other disputes arise.

2 (Pause)

3 MS MAY: Sorry, can I just have a moment?

4 THE PRESIDENT: Yes, of course. (Pause)

5 MS MAY: So, my learned friend is suggesting that one way or the other, we've got to
6 amend paragraph 40 of the current PTR order, and his proposal is that we simply
7 amend paragraph 40, as set out in paragraph 19 of the draft before my Lady, so that
8 it provides that the parties shall seek to agree a timetable for cross-examination in
9 advance of PTR2. But the difficulty, I think, on our side, is that that's going to be very
10 difficult to do, because we can't progress the timetable beyond the general state that
11 it's already in, until we know the list of witnesses and the order in which they actually
12 come in. I mean, that's normally what a judge wants and expects by the PTR; it isn't
13 just C's witnesses, D's witnesses, it's Joe Bloggs, followed by John Smith, followed by
14 Lucy Smart, and so forth, with an actual time estimate for each witness. And that's
15 what we were envisaging on this side of the court, and I guess the difficulty is that that
16 is obviously going to have to be prepared before the trial. The only question is when
17 in advance of the trial it can be prepared.

18 THE PRESIDENT: What date are you proposing?

19 MS MAY: Well, we were proposing it was resolved at the PTR.

20 THE PRESIDENT: If you're saying that you won't be able to make much progress by
21 then --

22 MS MAY: Well, we're rather in the hands of my learned friend, I think, and he'll be in
23 the hands of the Chinese visa authorities. And, you know, I don't know if he's got
24 a particular order in which he's proposing to call his witnesses, for example.

25 Submissions by MR BRANDRETH

26 MR BRANDRETH: My Lady, just to cut through it for today, the trigger here is the

1 PTR date, and that is highly constrained by the availability of all. So my proposal is
2 simply that we endeavour to resolve the position. Hopefully, we will know what the
3 position is, in relation to visas and travel arrangements, and if so, at the PTR or in
4 advance, we can say to the court, we've managed to work it all out and here it is.

5 If that isn't the case, and hopefully it will only be in respectful proportion of the
6 witnesses that are called for in any event, then in my submission, that can be dealt
7 with on the very first day of trial, if it's necessary. I would have thought, of all the issues
8 in dispute, the logistical question of when the witnesses will be cross-examined will be
9 relatively easy to resolve, because the only really contentious dispute has already
10 been resolved, namely, the proportion of time at trial that each side has.

11 So it's not that I'm trying to avoid a fight, but if we could just leave it at the first line of
12 paragraph 40, then probably we're all right, and if we're not all right, the PTR2 on
13 24 March will be a moment to raise it.

14 THE PRESIDENT: Yes, and I think we'll just say that the timetable will be addressed
15 by the court at PTR2, and it may not be that I can fully determine it, if there is still, as
16 may well be the case, questions about availability of the Chinese witnesses. All right.

17 (Pause)

18
19 Mediation

20 Submissions by MR BRANDRETH

21 MR BRANDRETH: I think, my Lady, that brings us to the question of mediation.

22 THE PRESIDENT: All right.

23 MR BRANDRETH: And if my Lady has the consolidated order, you're looking at
24 page 7 in that draft. My Lady will see that there are, in some respects, significant
25 points of agreement. So paragraph 25, my Lady sees that it's agreed that the party
26 shall engage in mediation. We're going to take the opportunity that the adjournment

1 has provided, and also that to make sure it has its potential benefits in good time, that
2 it will commence no later than 4 February.

3 Thereafter, the issue that arises is the degree to which to make sure it does happen
4 in that time frame, the court now should make specific provisions. And I think one
5 thing that is common ground between the parties is that whatever the court does, they
6 are effectively just a default option, and that the parties can agree their way out of it.

7 THE PRESIDENT: Yes.

8 MR BRANDRETH: Now, the proposal from my clients is set out in red from 27 to 32.

9 THE PRESIDENT: There's no dispute that I have the power to make the orders that
10 you have proposed at paragraphs 28 to 37.

11 MR BRANDRETH: Not at all, my Lady, and I've addressed that in my skeleton
12 argument. There was a revision made to the CPR in the light of a Court of Appeal
13 judgment, the master of the rolls being very keen to move things forward. The case
14 is Churchill v Merthyr Tydfil.

15 THE PRESIDENT: All right, then I'm not sure I need you to say anything more on this
16 point because, provisionally, I'm very much in favour of making as precise orders as
17 possible, to avoid the possibility of further dispute.

18 MR BRANDRETH: Indeed. Can I then just take you through our proposal?

19 THE PRESIDENT: Well, I understand that you propose that you should each propose
20 five mediators, or rather you should propose five mediators; the defendant shall
21 confirm whether there are any suitable ones, with justifications, and the parties will
22 then seek to appoint a mediator afterwards. What happens then if you don't -- that
23 takes us up to 32.

24 MR BRANDRETH: Can I just take you very quickly through -- so paragraph 28,
25 my Lady.

26 THE PRESIDENT: Yes.

1 MR BRANDRETH: Can I put a marker down? I need to come back to paragraph 26.
2 But paragraph 28 says the WIPO rules of mediation apply. The WIPO rules include
3 a procedure for identifying a mediator if the parties can't agree, and ultimately allows
4 for WIPO to impose its own choice. Now, what our 28 does is remove that final stage,
5 where WIPO imposes its own choice, and replaces it with a provision that my Lady
6 does so, and that's paragraph 29. So in our scenario, the WIPO procedure is followed,
7 which involves various stages of trying to browbeat the parties into coming up with
8 a good idea. Ultimately, it comes back to my Lady.

9 My learned friend's proposal points to CEDR, which is an alternative set of rules; that
10 also has a provision for browbeating the parties, and then for CEDR to decide. And
11 again, if CEDR was preferred over WIPO, we would still want the decision ultimately
12 to be my Lady's. What we're concerned about with CEDR is that we shouldn't be
13 confined to only CEDR approved mediators. I understand that's not a point of
14 contention for my learned friend.

15 So really, it's more about the detail of the steps that are taken between 30, 31, 32 and
16 the use of my Lady as the final arbiter, that stands between me and my learned friend
17 on that.

18 Can I just highlight what the point on 26 is? We do consider it's very important that
19 somebody with the power to settle is present in the room. In our experience, that's the
20 way mediation is taken seriously. Now, I think what my learned friend has done is
21 include this wording because we've said the location should be London. In
22 correspondence we've been very clear we're happy to have that mediation in
23 Singapore, Hong Kong, anywhere in Asia, if that makes it easier. Our view is that the
24 location is less important than having the people with the power to make the decisions
25 in the room.

26 THE PRESIDENT: That can be reworded to say, with the relevant decision-makers

1 present in person, without prejudice to the right of other members of the team to attend
2 remotely. Would that cause you problems?

3 MR BRANDRETH: Not at all. With the relevant decision-makers present in the room
4 is the crucial point.

5 THE PRESIDENT: Yes. And so the sticking point as between you on the red section
6 is mainly that you want this to come back to the court if not agreed, whereas the
7 counter-proposal is that the CEDR should appoint the mediator.

8 MR BRANDRETH: I think that's the dispute.

9 THE PRESIDENT: I mean, obviously, that you put in more details as to how it's going
10 to work, but essentially, ultimately, you want it to come back to me, and they say they
11 don't want CEDR.

12 MR BRANDRETH: On the question of who the mediator is, that's right.

13 THE PRESIDENT: Right. Why would I know better than CEDR?

14 MR BRANDRETH: I think, my Lady, the answer is your knowledge of the case and of
15 the nature of the dispute and of the relationship between the parties. CEDR, in our
16 experience, occasionally will thrust somebody who doesn't know anything about any
17 of the areas of law in front of you and we would want to avoid that. My anticipation, of
18 course, is that my learned friend will want to avoid that as well.

19 This is definitely, I think what might be called the premeditation of evils, rather than the
20 expectation that we will come back before you; I doubt that you would want to see us.
21 We just want to know what happens. The answer, we say, should be somebody who
22 really knows the parties, the dispute. They should be the person who says, "Okay, it's
23 this mediator".

24 THE PRESIDENT: All right, and are you content for that decision if it did come back
25 to me to be decided on the papers --

26 MR BRANDRETH: That is our submission to you.

1 THE PRESIDENT: Yes.

2 All right, Ms May.

3 Submissions by MS MAY

4 MS MAY: My Lady, can I start with paragraph 28 and the rules? My Lady, I have quite
5 a lot of experience of mediation because I'm a trained mediator myself. I've done
6 many of them. I can tell my Lady from my own experience that most mediators, myself
7 included, have their own mediation agreement. My mediation agreement isn't subject
8 to WIPO rules or CEDR rules; it's my agreement with my rules. In my experience,
9 that's true for most mediators.

10 I'm very concerned that paragraph 28 is firstly, completely unnecessary, but secondly,
11 more importantly, potentially actually constraining. Because if the parties land on
12 a mediator who isn't a WIPO mediator or doesn't conduct their mediations in
13 accordance with WIPO rules, then we rule them out. So I simply don't think we need
14 paragraph 28. It's positively unhelpful and potentially constraining.

15 In that context, I should say that we have already been making progress behind the
16 scenes, and I'm grateful to the claimants. They sent us a letter yesterday, proposing
17 their list. That was off the back of a constructive conversation that I had with my
18 learned friend, trying to get on with it. We're going to engage with that list and see if
19 we can progress things as quickly as possible.

20 So paragraph 28, I would positively ask my Lady not to make that order. It's not going
21 to help and it's not necessary.

22 The next thing to say is, again, in my experience, it is always a requirement of the
23 mediation agreement that there will be somebody available who has the authority to
24 settle. However, whether that person is available in person or on the end of
25 a telephone, it is always a matter for the parties. It's quite an important point to thrash
26 out. We have no problem with Temu personnel being in London, but I cannot

1 | guarantee that the ultimate decision-maker from within my client has the capacity to
2 | be in London. I do not think it is appropriate for the court to order it; to require it. So
3 | long as the parties both have the appropriate channels of communication to finalise
4 | an agreement, which is what is always required in a mediation agreement, that's all
5 | that is necessary.

6 | Again, speaking from experience, both as counsel, representing parties at mediations
7 | and as a mediator, it is very common for the person in the room to need to make
8 | a phone call or to check with someone who isn't physically in the room to finalise or
9 | authorise a settlement. It doesn't in any way prevent the settlement. But I think it
10 | would be highly constraining to suggest that the relevant decision-maker has to be
11 | present in person.

12 | THE PRESIDENT: I think that without prejudice to the parties' right to attend the
13 | mediation remotely, it allows too a wider scope. On its face, it could mean that the
14 | entirety of your team would attend remotely.

15 | MS MAY: Okay, that wasn't the intention. There will be people there in person, but
16 | there may also be people on screen.

17 | THE PRESIDENT: Well, I think that what's needed is that there is, at the very least,
18 | a senior decision-maker there in person, because saying there will be people
19 | there -- again, having regard to the intensity of the dispute between the parties, I don't
20 | want to leave anything open to disagreement if it can be settled now.

21 | MS MAY: I completely understand that sentiment.

22 | THE PRESIDENT: I think people cannot be, you know, a trainee. I think that what
23 | would be necessary is that at the very least there should be senior decision-makers
24 | on either side physically present.

25 | Now, I think that that, of course, does not exclude the possibility of somebody having
26 | to make a call for final authorisation. I think probably what needs to also be provided

1 is that if final authorisation is going to need to be required from someone not there,
2 that they should be available, one way or the other on the day of the mediation.

3 MS MAY: Yes, I mean, that's a given and as I say, that is, in my experience, always
4 an express requirement of the mediation agreement to which all of the parties sign up
5 to.

6 THE PRESIDENT: So you think it will be in the mediation agreement (overspeaking)?

7 MS MAY: It will be if --

8 THE PRESIDENT: All right. On that basis, I think probably what we can just simply
9 say is with senior decision-makers on both sides attending in person. Then I don't
10 think that there is any need to specify anything else about who may attend remotely,
11 because other members of the team should be able to attend remotely, I think. But
12 you were going to go on to say -- so that that, I think, would -- Mr Brandreth, is there
13 any objection to that being a provision? Does that deal with your concern?

14 MR BRANDRETH: No, it deals with my concern and also with the worry of the time
15 difference issue which remoteness would (overspeaking).

16 THE PRESIDENT: All right.

17 Then we then move on to the question about 28 you've addressed me on. Ms May,
18 you say you just don't want it there?

19 MS MAY: No, I'm genuinely really concerned to have it there. I think it would be
20 completely unhelpful and restraining.

21 THE PRESIDENT: All right, and then 29 to 32.

22 MS MAY: So 29 to 32, I've got two observations to make. The first is I'm nervous
23 about the court micromanaging the process. Because in my experience, what often
24 happens is the parties land on a mediator, but then it turns out that the mediator
25 doesn't have availability at a point in time where both parties can attend a mediation,
26 and so they then have to go through the process a second time, sometimes a third

1 time. So there's just a degree of dialogue that has to take place behind the scenes
2 between the parties, as they are trying to co-ordinate effectively three moving parts:
3 identifying a common mediator; checking the availability of the mediator; and assuring
4 that availability is consistent with availability of the parties.

5 THE PRESIDENT: Yes, but I think that wasn't Mr Brandreth's concern. His concern
6 was that if, having done all of that, you're unable to land on any mediator that is agreed
7 by both sides, who makes the decision on that? Is it CEDR or some other body who
8 may not know very much about the nature of the dispute, or is it the court?

9 From my part, I have no wish to micromanage the mediation, but I can see the force if
10 the central issue in dispute is the identity of the mediator; you can't agree on one.
11 Short and probably less than five pages, submissions to the court may deal with this
12 more effectively than asking somebody with no knowledge of the dispute to pick
13 a name.

14 MS MAY: Can I just take instructions?

15 THE PRESIDENT: Yes. (Pause)

16 MS MAY: My Lady, we're content for it to be my Lady who makes the decision. Just
17 to be clear, we're completely ad idem with my learned friend and the court that there
18 needs to be a backstop. We had simply made the proposal at paragraph 33 because
19 that's a standard proposal. It wasn't intended to be limited to a CEDR mediator.

20 THE PRESIDENT: No, so I think why don't we suggest instead of that that there's
21 a backstop of a date. I think from my part, sooner rather than later is desirable.

22 MS MAY: I agree.

23 THE PRESIDENT: So it could be that -- and I understand that you've already been
24 given a list.

25 MS MAY: Yes.

26 THE PRESIDENT: So could we simply say that failing the identification of a suitable

1 mediator by close of business on Monday.

2 MS MAY: As in 12th? That might be a little bit early, my Lady, because of the time
3 difference.

4 THE PRESIDENT: Oh, I'm sorry. I was looking at the wrong bit. End of next week?

5 MS MAY: 16 January?

6 THE PRESIDENT: Then the parties shall refer the matter to me with brief submissions
7 of no more than two pages on that point. So for me to be sent the dispute and the
8 submissions by close of business on the 16th. (Pause)

9 Oh, I'm sorry. No, that's no good because I'm on comp(?) leave on the 16th and the
10 19th, so it will either have to be before the 16th or after the 19th.

11 MR BRANDRETH: My Lady, might we revert to the 21st? I think the parties will know
12 by the 16th if there is a problem that can't be resolved, and that'll give us time to prep
13 our submissions, put them in to you on the 21st.

14 THE PRESIDENT: So if by close of business on the 16th the parties have been unable
15 to agree, then you shall refer the matter to me with submissions of no more than
16 two pages by, let's say, 10.00 am on the 21st?

17 MR BRANDRETH: 10.00 am on the 21st. (Pause)

18 THE PRESIDENT: Then I presume that you're not then going to ask me to select
19 someone out of the ether, but you're going to say I'm going to have to choose one of
20 the mediators proposed by the parties.

21 MS MAY: I envisage it being a situation where we can't agree, we've both got our
22 preferred --

23 THE PRESIDENT: And I just select one of those.

24 MS MAY: Both of them are available within a period of time, and it's a dispute as to
25 which one we pick.

26 THE PRESIDENT: I see. All right. Okay.

1 MS MAY: Yes. So just to be clear, then, the order my Lady is making is paragraph 26
2 with the amendment we've made about a senior decision-maker on both sides being
3 present. Then, 27 through 33 are being replaced with one paragraph, which says --

4 THE PRESIDENT: Well, I haven't decided the point about the terms of the mediation.
5 I was just dealing with the question about --

6 MS MAY: Oh, I'm sorry.

7 MR BRANDRETH: I think I understood -- sorry, I cut across my Lady.

8 THE PRESIDENT: No, no, you should obviously reply. I was just proposing a way of
9 cutting through the question about the decision on the mediator.

10 MR BRANDRETH: I do understand that effectively 29 through to 32 has become
11 a version of 33. I do understand that, although presumably my learned friend doesn't
12 object to the requirement for the parties to seek to agree to appoint a mediation in
13 good faith (overspeaking).

14 MS MAY: No, of course not.

15 MR BRANDRETH: So subject to that, that my learned friend and I (inaudible), I think
16 the only remaining dispute there is -- and presumably also my learned friend doesn't
17 object to 27, and I didn't understand her to -- is about the effect of 28, and whether
18 there should be a default position. Sorry, I don't want to cut my learned friend off if it's
19 not my turn, but I was just going to say --

20 MS MAY: Well, I just want to be clear, I didn't address my Lady on 27. I don't think
21 we need 27, and it's part and parcel of the same problem I've got. The mediator will
22 have their own mediation agreement. That sets out the rules to the extent there need
23 to be any. Thereafter, the way in which the mediation is conducted is actually a matter
24 for the mediator through the course of the mediation. So I actually don't think my Lady
25 can make the order at paragraph 27.

26 THE PRESIDENT: So your point is that you think 27 and 28 should go.

1 MS MAY: Yes.

2 THE PRESIDENT: 29 through to 33, we've effectively dealt with and we've come up
3 with something that is acceptable to everybody.

4 MS MAY: Yes.

5 THE PRESIDENT: All right. So the remaining dispute is 27 and 28 and I have your
6 submissions on those.

7 Mr Brandreth, what do you have to say about 27 and 28?

8 MR BRANDRETH: My Lady, let me park 27. We are trying to agree the contact, the
9 mediation.

10 THE PRESIDENT: Yes.

11 MR BRANDRETH: I'm against making orders you don't need to make so I won't push
12 that.

13 THE PRESIDENT: Yes, all right.

14 Reply submissions by MR BRANDRETH

15 MR BRANDRETH: 28 is just a backstop. What my learned friend didn't draw your
16 attention to is that the WIPO rules of mediation are the default position, but can be
17 varied by mutual agreement. That's (ii). So the idea here is how do we keep things
18 moving forward? Well, the parties know what the starting point is. If they appoint
19 a mediator, for example, Mr Silverleaf or whoever it was that, as my learned
20 friend -- I'm not suggesting it could be Mr Silverleaf -- but has an agreement, then the
21 parties would simply say, "Great, we're going to use those and the WIPO thing has
22 gone to one side".

23 But it's if they can't reach that agreement, then the ball keeps rolling forward because
24 we know, okay, well, it'll be the WIPO rules and that, it seems to me, is very helpful
25 because it does help frame the discussion and it ensures that the parties are moving
26 forward until such time as they've reached an agreement.

1 Further submissions by MS MAY

2 MS MAY: Yes, I'm really not trying to be difficult. I'm really not. But rule number 1 of
3 the WIPO rules is that you've got to tell WIPO that you want a mediation and
4 everything has to be done through WIPO and so it just actually makes more work and
5 is more constraining, and we just don't need it. It's not a function of -- if my Lady
6 makes this order, then there are immediate things we have to do with WIPO before
7 we've even appointed a mediator.

8 THE PRESIDENT: Yes.

9 MS MAY: And we just don't need it and it's a level of micromanagement that is
10 counterproductive.

11 THE PRESIDENT: All right. I've heard enough. I'm not going to make a provision in
12 27 and 28. We've got a provision for a mediator to be appointed. Selection of the
13 mediator will obviously involve consideration of the terms of that mediator's own rules.
14 That will be something to be taken into account in determining which mediator to go
15 for. We have a procedure for me to determine the mediator, if that's not agreed by the
16 parties. That will then effectively bring us to paragraph 34.

17 There's a provision at paragraph 36 for the parties to apply for further directions, along
18 the way, if necessary. I'm not encouraging that but I think the idea will be that it will
19 be used sparingly. So I think that no further management by the court, unless
20 specifically asked, is required at this stage. I'm hoping that the process over the next
21 couple of weeks will enable a suitable mediator to be appointed, and they will then set
22 the rules of the mediation.

23 I think the next point in dispute is, well, that provision, parties being at liberty to apply
24 for further directions, Ms May, I think it's sensible as a backstop.

25 MS MAY: I mean, I don't think we need it --

26 THE PRESIDENT: No, I'm not encouraging it.

1 MS MAY: -- (inaudible) to apply, but if my Lady wants to make that order expressed,
2 that's not a problem.

3 THE PRESIDENT: Then that 37, costs.

4 MS MAY: Yes. So can I just make our position clear on this. Clearly costs need to
5 be addressed. And it may simply be that the red language has just not been drafted
6 appropriately but there's a difference between the cost of the mediator and the cost of
7 the mediation. The concern is that, as the red text says, the cost of the mediation is
8 borne equally by the parties. The effect of that order would be if my client spend
9 100,000 on their mediation but my learned friend spends 3 million, we have to pay half
10 of his 3 million.

11 THE PRESIDENT: Oh, I see.

12 MS MAY: Yes, and I don't think that's what he intended. In fact, what happens is it is
13 nearly always, in my experience, a term of the mediation agreement that the parties
14 will pay the mediators' costs 50 per cent each. So that's why our green language says,
15 "save as provided in the mediation agreement", because it will be the mediation
16 agreement that dictates that the parties are responsible for 50 per cent of the costs
17 each, "there shall be no order as to the cost of mediation", because the costs that each
18 party chooses to incur in terms of how long they take to draft the statement, how many
19 meetings they have in prep and so forth, shouldn't fall on the other party.

20 THE PRESIDENT: All right.

21 Mr Brandreth.

22 Further submissions by MR BRANDRETH

23 MR BRANDRETH: As explained by my learned friend, it makes total sense. The
24 green wording is fine.

25 THE PRESIDENT: So the green wording here -- thank you -- so we've got red wording
26 at paragraph 36; green wording at 37. Does that deal with the issues?

1 MR BRANDRETH: There's one very small issue, my Lady, on the paragraph that
2 comes after this, paragraph 38.

3 THE PRESIDENT: Sorry, does that deal with the mediation issues?

4 MR BRANDRETH: It absolutely does, as far as I'm concerned.

5 THE PRESIDENT: Are we then into de-designation and how long do you think that
6 will take?

7 MR BRANDRETH: Two minutes.

8 THE PRESIDENT: So we will be finished before lunch?

9 MR BRANDRETH: Oh yes.

10 THE PRESIDENT: Excellent. All right. De-designation then.

11 MR BRANDRETH: There is an enormous amount of agreement here, which is that
12 we are to provide the defendant with the versions of the transcripts by 16 January,
13 with the specific OCRI designations of any to be reflected in the translations and that
14 we will limit them to the confidentiality markings in the documents and the manner
15 consistent with the confidentiality order and the court's prior decisions. There is also
16 agreement that there should be explanations provided in line with the confidentiality
17 order.

18 THE PRESIDENT: Yes.

19 MR BRANDRETH: And we say that's right, because there was a long debate about
20 what was needed under confidentiality order and the provisions were discussed and
21 argued and settled upon, and that's what should be done. But my learned friend is
22 going to seek to argue that there should be some additional work piece done, in
23 relation to it, which we say falls either exactly the same as the confidentiality
24 agreement, in which case it adds nothing, or is supposed to be some additional burden
25 that we say is inappropriate. And so if the green wording in that final square brackets
26 can be removed, the rest is agreed but that is the point of dispute.

1 THE PRESIDENT: Yes.

2 All right, Ms May.

3 Further submissions by MS MAY

4 MS MAY: My Lady, the green wording is not meant to be adding to the existing
5 obligations of the confidentiality order, but it's just reinforcing those obligations and
6 unfortunately, on our side of the court, our position is that those obligations do need
7 to be reinforced. This is the third time in a row that we are before the court in relation
8 to OCRI designations. It is the third hearing. We had two in December and here we
9 are again in January. All three cases, what has happened is we've had a blanket
10 OCRI designation from Shein in relation to a document, and we have had to push back
11 and ask for proper discrete designations of the parts of the document that are actually
12 confidential. My Lady will be, unfortunately, exquisitely familiar with this because
13 my Lady has already had to deal with two Scott schedules where we've had to go
14 through in a minute detail explaining why designations are not, in fact, confidential.
15 So, in our submission, it's simply not good enough, because every time we have
16 a situation where Shein ignores the structure of the two-tier order, over-designates
17 without proper explanation or justification, and it costs -- we then have to object, and
18 we then have to incur the time and the money preparing our submissions as to why
19 that over-designation is inappropriate. Every time Shein then backs down. But all of
20 that is the wrong way around. The burden is on Shein to undertake the exercise
21 properly and to do so from the outset.

22 I don't know if I need to hand it up, but there's a very useful decision from
23 Mr Justice Roth in the Infederation case where he makes expressly clear that the
24 question of confidentiality is one not just for the client, but for the solicitor and for the
25 solicitor not to unquestioningly accept the client's view as to confidentiality but to
26 consider, just like they would with disclosure, whether or not the position is

1 | appropriately taken. And so the burden is not just on Shein but on Shein's solicitor to
2 | do the job and to do the job properly. I can hand up the decision to my Lady,
3 | because --

4 | THE PRESIDENT: No, it's all right. I mean, that should be taken as a given anyway.

5 | MS MAY: I think it should be taken as a given.

6 | THE PRESIDENT: I don't think Mr Brandreth would say it was not his solicitor's job to
7 | do that.

8 | MS MAY: No. And so on our side, the very fact that Shein is objecting to this wording
9 | in green causes us concern.

10 | THE PRESIDENT: Well, I think the point, Mr Brandreth's point is, are you asking them
11 | to do something that's beyond the requirements of the confidentiality order? And
12 | I think your point is you're not. You simply want it to be explained why the relevant
13 | information does fall within the confidentiality order.

14 | MS MAY: Yes.

15 | THE PRESIDENT: But you're not suggesting that is something going beyond the
16 | confidentiality order.

17 | MS MAY: No.

18 | THE PRESIDENT: Is there a dispute about this paragraphs 3.2 and 4.1.1? Because
19 | obviously, paragraph 3.2 is green, but 4.1.1 is not.

20 | MS MAY: So I think 3.2 has to be there because that cross refers back to
21 | paragraph 2.2, and that's the paragraph that lists out the various different reasons
22 | upon which you can assert that a piece of information should be designated as
23 | confidential.

24 | THE PRESIDENT: (Inaudible) in the bundle?

25 | MS MAY: Yes, it is, my Lady. It's in bundle B.

26 | THE PRESIDENT: Yes.

1 MS MAY: Sorry, my Lady, I need to give my Lady a page. I've got it marked. Just
2 give me a moment. It's bundle B, page 125.

3 THE PRESIDENT: (Overspeaking) OCRI if it's within paragraphs 2.2.1 to 2.2.5.

4 MS MAY: Yes. So if you flick back, paragraph 2.2 is on page 124.

5 MR BRANDRETH: Sorry, my Lady, just to cut across this, I hope I made it clear in my
6 submissions it's the green wording in the square brackets we're objecting to. Our
7 whole point is that we're going to do it in line with the provisions of the confidentiality
8 order. It's otiose to spell out which paragraphs those are because they're part of it.
9 So I don't take any point on the fact that it's paragraph 3.2. I mean, I'm already under
10 that obligation.

11 THE PRESIDENT: No. Thank you, Ms May.

12 Mr Brandreth, do you have anything more to say about the green bits in the square
13 brackets?

14 MR BRANDRETH: Only, my Lady, that my learned friend's confirmation, it's supposed
15 to be what we're supposed to do already.

16 THE PRESIDENT: Yes.

17 MR BRANDRETH: Why introduce complexity and potential satellite dispute in
18 circumstances where we're going to do that? Our wording does that in line with
19 paragraphs 3.2 and 4.1.1 of the confidentiality order.

20 THE PRESIDENT: All right. What I'm going to say is, with explanations provided as
21 to why each OCRI designation meets the requirements under. I don't think that that
22 should be anything beyond the requirements of the order, but it just underscores that
23 that, if it is needed, is for each designation and not a sort of blanket explanation for
24 the entire document. I'm sure that that wouldn't be given anyway but just for the
25 avoidance of doubt, that should deal with it. Now --

26 MS MAY: I'm very grateful. Sorry, just to be clear, there's one other bit in square

1 brackets, which is at the start of the sentence, "The limit --"

2 THE PRESIDENT: Mr Brandreth, I understood him not to object to that. The
3 claimants will limit any confidentiality markings to the documents in a manner --

4 MS MAY: Sorry, just one last thing to say, on our side, I'm afraid I do have to put down
5 a marker which is that we do indicate that we expect the claimants to comply with the
6 confidentiality order this time around. And if they don't, and we find ourselves having
7 to make a further application in relation to de-designation, we will be seeking a wasted
8 costs order in due course.

9 THE PRESIDENT: Right. Noted. Now, paragraph 39, is it simply now costs in the IP
10 claim and counter-claim? Or is it "save as provided in paragraph 37 above"?

11 MR BRANDRETH: I think it's 37 only.

12 THE PRESIDENT: 37. All right. Is there anything more for me to order now?

13 MR BRANDRETH: Not on our side, my Lady.

14 MS MAY: Nor on our side.

15 THE PRESIDENT: All right.

16 MS MAY: Other than just to say a word of thanks, and I think I'm speaking on behalf
17 of the whole court when I say this. We are enormously grateful to my Lady, firstly, for
18 facilitating the adjournment. Secondly, for being available repeatedly through the
19 course of the Christmas vacation, in the run up to Christmas, on email. And thirdly,
20 for fitting in this hearing today before term starts. Like I say, I'm sure I speak on behalf
21 of everyone in the courtroom, we really do appreciate my Lady's efforts in facilitating
22 what I think has been a really positive outcome in terms of the adjournment.

23 THE PRESIDENT: Thank you to everybody.

24 MR BRANDRETH: May I extend our thanks also to those behind the scenes who have
25 made that possible. I'd appreciate that as well.

26 THE PRESIDENT: Thank you very much. Noted, that will get passed on. Thank you

1	very much.
2	(1.03 pm)
3	(The court adjourned)
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