

**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1250/5/7/16

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

7 June 2016

Before:

**THE HON. MR. JUSTICE ROTH**  
(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

- (1) BREASLEY PILLOWS LTD
- (2) COMFORTEX LTD
- (3) DRURY-ADAMS LTD
- (4) FIBRELINE LTD
- (5) G.N.G. FOAM CONVERTERS (LANCS) LTD
- (6) PLATT & HILL LTD

Claimants

- and -

- (1) VITA CELLULAR FOAMS (UK) LTD
- (2) VITA INDUSTRIAL (UK) LTD

Defendants

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Adam Aldred (instructed by Addleshaw Goddard LLP) appeared for the Claimants.

Miss Jennifer MacLeod (instructed by Freshfields Bruckhaus Deringer LLP) appeared for the Defendants.

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1 THE PRESIDENT: Yes, Mr. Aldred?

2 MR. ALDRED: Sir, I appear for the claimants, instructed by Addleshaw Goddard, and Miss  
3 MacLeod appears for the defendants, instructed by Freshfields.

4 This is a hearing to determine the claimants' application for allocation of their claim to the  
5 fast-track procedure.

6 The fast-track procedure was introduced, as you know, in 2015 following changes to the  
7 CAT Rules 2015. Most cases where people have applied for fast-track have resolved in  
8 early settlement, so the regime is yet to be fully tested. Nonetheless, in those cases where  
9 settlement has occurred the fast-track procedure has undoubtedly had the desired effect.  
10 As you know, the fast-track procedure is set out in Rule 58. The claimants made lengthy  
11 written submissions and I do not propose to repeat all those before you now. Even so, the  
12 claimants would like to emphasise a few key points.

13 The twin purposes of the rule changes in the CAT which came into force were described by  
14 the Government in these terms: first, to "increase growth, by empowering small businesses  
15 to tackle anti-competitive behaviour that is stifling their businesses".

16 THE PRESIDENT: Sorry, what are you quoting from?

17 MR. ALDRED: I am quoting from the consultation paper that led to the rule changes. Secondly,  
18 it was to "promote fairness, by enabling consumers and businesses who have suffered loss  
19 due to anti-competitive behaviour to obtain redress".

20 THE PRESIDENT: And this is which paragraph because I do not have a copy of that. Do you  
21 have a copy for me?

22 MR. ALDRED: It is actually the opening statement by the Secretary of State at the time.

23 THE PRESIDENT: This is about all the rule changes?

24 MR. ALDRED: Yes.

25 THE PRESIDENT: It is not specifically about the fast-track procedure?

26 MR. ALDRED: Precisely so. With those two purposes in mind the rule changes implemented  
27 various reforms and the principal reform being "establishing the Competition Appeal  
28 Tribunal as a major venue for competition actions in the UK", and it is as part of that that  
29 the new fast-track procedure was implemented.

30 Those changes were in response to feedback to the Government's consultation that whereas  
31 large companies seemed to be able to get redress for breaches of competition law, smaller  
32 companies and consumers had no realistic way of challenging breaches of competition law  
33 or gaining redress. The issues relating to time and cost both were prohibitive.

1 Today, you have before you six small and medium size enterprises which hope that these  
2 rule changes will fulfil their promise. Six claimants who have come together in the CAT as  
3 they seek to recover losses they have sustained as victims of a cartel.

4 THE PRESIDENT: Yes, could you tell me what do they all do? You say in the claim form, and I  
5 am looking at the claim form at para. 7, they purchase products, and you have explained  
6 “products” cover, under the Decision, both comfort foam applications and technical foam  
7 applications. Am I right in understanding what you go on to say, they are in the comfort  
8 foam category?

9 MR. ALDRED: That is correct.

10 THE PRESIDENT: All of them, yes.

11 MR. ALDRED: It is virtually all comfort foam.

12 THE PRESIDENT: For use in foam conversion manufactured mattresses and pressure care  
13 products. So, essentially, looking at each of them, Breasley Pillows, is that what its name  
14 suggests?

15 MR. ALDRED: Breasley is involved in cutting foam for seats for furnishings and also the  
16 manufacturer of mattresses and pillows.

17 THE PRESIDENT: For furnishings, mattresses and pillows. And does it make the mattresses  
18 and pillows itself?

19 MR. ALDRED: If I could describe it, Sir, essentially they buy in large blocks of foam, which are  
20 taller than you and I, and are about 5 ft wide, so massive things, and they have special  
21 machines that cut it down into the shape that is required for purpose. So they take the foam,  
22 and that ends up inside your cushion covers on your sofas, and might end up being cut down  
23 for---

24 THE PRESIDENT: Do they make the cushions or the mattresses?

25 MR. ALDRED: They cut them to size. So they buy the foam---

26 THE PRESIDENT: They buy the foam, they cut it down to size. Do they sell it on to somebody  
27 else?

28 MR. ALDRED: They sell it on.

29 THE PRESIDENT: To the people who make the mattress?

30 MR. ALDRED: The people who may sell the mattresses, which may be retailers.

31 THE PRESIDENT: Someone has got to make the mattress.

32 MR. ALDRED: They take the foam, they cut it to size, they cover it in the relevant fabric, they  
33 put in the zips. It is then being converted from being a big block of foam to potentially five

1 or six mattresses. The foam comes in one door, and mattresses, packaged in their plastic,  
2 are available to move out of the door ready for purchase by you.

3 THE PRESIDENT: So they sell to retailers?

4 MR. ALDRED: They sell to retailers, or they could sell it directly, but most of our converters sell  
5 on to retailers.

6 THE PRESIDENT: So that is Breasley.

7 MR. ALDRED: That applies very similarly for all of them. Breasley just happens to have a  
8 greater proportion of its business that relates to the manufacture of mattresses, but all of  
9 them, to a greater or lesser extent, are involved in the process of taking the foam and  
10 converting it. It either turns it into pillows, mattresses or cushions, for example, on behalf  
11 of a furniture manufacturer, such as, for example, DFS, or it could be any number.

12 THE PRESIDENT: So some of what they do is sold to retailers, where they make mattresses, and  
13 some of it is sold to furniture manufacturers?

14 MR. ALDRED: Yes.

15 THE PRESIDENT: That is true of all of them?

16 MR. ALDRED: Yes. Comfortex has a particular speciality in dealing with markets which supply  
17 hospitals and the like, so it just goes through an additional manufacturing process, and has  
18 additional specifications for that purpose. Nonetheless, the principle applies, they buy  
19 blocks of foam from the defendants, and others who you will have seen. They then, using  
20 their own processes, cut it down to size. Part of the art is trying to do it without wastage.  
21 They can say, we already know that block has to go to a number of people, there is a certain  
22 way of cutting it to ensure there is little wastage.

23 THE PRESIDENT: It is who their customers are at the other end that I was trying to understand.  
24 If I have got this right, part of their sales are to retailers, so they are selling finished  
25 products, part of it is to other manufacturers, who may make furniture.

26 MR. ALDRED: Yes.

27 THE PRESIDENT: But the second claimant, Comfortex, sells particularly to health authorities?

28 MR. ALDRED: It also has a particular niche in that market.

29 THE PRESIDENT: But does other things as well?

30 MR. ALDRED: Yes. They are all in the business of converting the foam.

31 THE PRESIDENT: Yes, I have got that. You say, again in the claim form, this is para. 39, “. . .  
32 each of the Claimants purchased directly and/or indirectly from the Defendants and/or other  
33 Cartelists.” What is the indirectly?

1 MR. ALDRED: Sir, I have had instructions on this point and will be making it clear in the reply,  
2 they are all direct purchases.

3 THE PRESIDENT: They are all direct, so we do not have to worry about indirectly. Fine, thank  
4 you, I am sorry, I interrupted you, but I just wanted to get that clear.

5 MR. ALDRED: Sir, we are just talking about the six claimants who have brought their claims to  
6 recover losses sustained as victims of the cartel. That cartel was the cartel found by the  
7 European Commission in respect of polyurethane foam, which operated 2005 to 2010, so  
8 almost five years.

9 The defendants were part of the undertaking which was the whistle blower, and it received  
10 immunity from fines. The other cartelists were fined €114 million. The Commission found  
11 at Article 1 of the Decision, that the undertakings have infringed Article 101 of the Treaty  
12 by participating during the cartel period in a European agreement and/or concerted practice  
13 covering a total of 10 Member States consisting in the co-ordination of their pricing  
14 behaviour in the flexible polyurethane foam sector. Thus, the defendants, who are before  
15 you today, participated in the co-ordination of their pricing behaviour with other cartelists.  
16 If that were to be summed-up in two words it would be ‘price fixing’.

17 THE PRESIDENT: Yes, you say “in the cartel period” and, indeed, you use the expression ‘cartel  
18 period’ in the claim, but these defendants were found to have participated not for the cartel  
19 period as you have defined it in para. 6 of the claim, but only until 30<sup>th</sup> April which is when  
20 they ‘blew the whistle’, as you put it.

21 MR. ALDRED: Precisely.

22 THE PRESIDENT: So I am not quite clear, because in para. 29 you say, again in the claim form,  
23 there is a breach by the defendants for the duration of the cartel period, but that is not quite  
24 right, is it?

25 MR. ALDRED: The cartel period is defined in the decision----

26 THE PRESIDENT: You have defined it in para. 6.

27 MR. ALDRED: I take your point, Sir. It is common ground that these defendants terminated  
28 their participation in the cartel a couple of months before the end of the cartel period insofar  
29 as it related to the other cartelists. So, it is accepted by the claimants that so far as their  
30 ability to bring a claim under s.47A is in respect of their liability for the period in which  
31 they were participating in the cartel. The decision to just proceed against these defendants  
32 was not a decision that was taken lightly by the claimants, because as we have seen already  
33 in the defence, there is already a suggestion that they would resist the claims relating to the  
34 period in which they were not involved in the cartel.

1 THE PRESIDENT: What is puzzling me is when you look at the way you have quantified the  
2 claim, you have taken the claim against them, you have said there is the cartel period and  
3 there is the run-off period. You have taken the cartel period to 27<sup>th</sup> July in your annex 3.

4 MR. ALDRED: Sir, and in the hope that the point might not be taken against the claimants, you  
5 will see on the next paragraph there is a reference again in annex 3, what the value of  
6 commerce is in the period after these defendants ceased to be participating in the cartel.

7 THE PRESIDENT: This is in the paragraph?

8 MR. ALDRED: If you are looking at annex 3, the first heading: “Value of Commerce Cartel  
9 Period 26<sup>th</sup> October to 27<sup>th</sup> July”, then the next paragraph: “Value of Commerce 1<sup>st</sup> May  
10 2010 to 27<sup>th</sup> July 2010”, and then again it quantifies that.

11 So, not knowing if the point was going to be taken against us----

12 THE PRESIDENT: Just so I understand it, in that period do the cartelists exclude Vita, the  
13 figures you have given?

14 MR. ALDRED: In the first part of the table, all cartelists that we purchased from are included. If  
15 you were to exclude the value of commerce for the period when Vita was not participating,  
16 you would then deduct. So you deduct the 4.7 million figure.

17 THE PRESIDENT: That is purchases from everyone in that period?

18 MR. ALDRED: Yes.

19 THE PRESIDENT: Yes, I see. You are claiming for the cartel their joint and several liability for  
20 the cartel up until what date?

21 MR. ALDRED: We would be advancing it for the cartel period. There will be an argument as to  
22 whether that works with regard to these defendants, given that their period ended two  
23 months earlier than that, but then we will also be making the point in our reply, which is due  
24 on Thursday, that we would be seeking to recover loss and damage until the normal  
25 competitive price re-emerged in the market place. That, we would say, would cover the  
26 period when the other cartelists are participating in the cartel because there is still not yet a  
27 competitive price, and the run-off period, which as my friend has noted, is currently  
28 assessed at one year from the end of the cartel period.

29 THE PRESIDENT: Yes, that is what your allegation is.

30 MR. ALDRED: Yes.

31 THE PRESIDENT: Thank you.

32 MR. ALDRED: So the value of the claimants’ follow-on damages claim has been subject to  
33 considerable analysis and it is currently assessed at less than £9.5 million. On any footing,  
34 therefore, the claims that these small and medium-size enterprises have are modest, the

1 claimants submit that their claims scream out for cost control, and tight case management  
2 and, therefore are ideally suited for the fast-track procedure.

3 THE PRESIDENT: The fast-track procedure, of course, is something, as the name suggests, that  
4 you get a quick trial in six months, and a mandatory cost cap, and it is a short case. It does  
5 not mean that you do not get effective costs management outside the fast-track.

6 MR. ALDRED: Sir, this Tribunal has a very good reputation for managing its cases effectively  
7 and efficiently, but what I would like to go on and explore is the question with regard to  
8 cost control and case management.

9 With regard to cost control, as you will have seen from Freshfields' letter of 2<sup>nd</sup> June, the  
10 defendants assess their costs to trial in excess of £3 million. If similar sums are added to  
11 each proposed Rule 39 Defendant, we are potentially looking at costs on the cartelists' side  
12 likely to exceed the amount of the claim, unless the Tribunal intervenes and helps ensure  
13 costs are proportionate to the amount of the claim.

14 With regard to case management, the Tribunal will also have noted that Freshfields estimate  
15 that it will take 12 to 15 months from today to get to trial. That is seeking to introduce  
16 levels of delay that the reforms in this CAT were designed to erase once and for all, the  
17 claimants submit.

18 THE PRESIDENT: Is there any great urgency about this case?

19 MR. ALDRED: Save that the more time that you would give to people to have the opportunity of  
20 developing the case, and the costs that are associated with that, I think that the approach of  
21 trying to ensure that small businesses have the opportunity to get to trial swiftly and contain  
22 costs effectively without prolonged distraction with regard to management time - these are  
23 small businesses, the principals are hands-on in the business - as much as they might enjoy  
24 speaking with those instructing me, this is a distraction from their business and they have  
25 got other things that they need to do.

26 THE PRESIDENT: It does not answer the question about urgency, because I noticed that, in fact,  
27 the proceedings were only issued right at the end of the two year limitation period, so it  
28 does not suggest that it was seen as terribly urgent to bring this case.

29 MR. ALDRED: Sir, the defendants would have the Tribunal believe that little has been done----

30 THE PRESIDENT: It may be that a lot has been done, but the fact remains that if people are keen  
31 to get their case on quickly they issue quickly. When a case is brought at the end of  
32 limitation period, it suggests that - they obviously want to recover their money - they are not  
33 desperately urgent about it.



1 MR. ALDRED: You will appreciate, Sir, that there are two potential forums for cases like this.  
2 The point has been made that it has been taken at the end of the liability period under s.47A,  
3 which brings us before this Tribunal and the opportunity for fast-track. The alternative, and  
4 others out there may well be thinking in these terms, is to just simply issue in Chancery and  
5 rely on the provision that cartels are kept secret and proceed on that footing. One of the  
6 attractions of----

7 THE PRESIDENT: On that basis, the limitation period might run from the decision, so you have  
8 got quite a bit longer, but you could have issued much earlier. I get your point about cost  
9 effective and small businesses. I was just trying to ascertain whether it makes a great  
10 difference now to your clients whether this case is heard within six months or a year,  
11 because they are going to get interest. They have not rushed it along. What is the urgency?

12 MR. ALDRED: I would term it another way and say that the purpose of the fast-track procedure,  
13 having regard to the twin aims of giving people the opportunity to press on without stifling  
14 their businesses, and to promote fairness by enabling consumers and businesses to obtain  
15 redress. It is not that they would not get redress, but I would say that, with the prospect of  
16 simply having to engage with this litigation for a prolonged period of time when we are in a  
17 position, and we have put in a draft timetable that maps out why we think we can get to trial  
18 in six months, then I turn it on its head and say, "Why not?" We can get to trial within six  
19 months, we can do it in an efficient and cost effective manner.

20 This is not a standing start. The letter before action was sent on 12<sup>th</sup> December 2014, so 18  
21 months ago. As a matter of fact, it was an open letter, it offered mediation. Freshfields  
22 responded on an open basis on 18<sup>th</sup> December, and their letter states that Vita may be  
23 prepared to engage in constructive dialogue. I could pass a copy of that letter to you if it  
24 would help. In fact, it probably would be appropriate. (Same handed)

25 Since then the claimants have instructed Oxera and the forensic accountant. The claim form  
26 and particulars demonstrate a level of particularity not usually seen in follow-on damages  
27 claims, but this is because the time has been used productively. The value of commerce has  
28 been calculated with a degree of precision, as you have just seen in annex 3. Oxera have  
29 calculated the value of the overcharge, which they have assessed at about 10 per cent.

30 THE PRESIDENT: Is that calculated? They say it is only on the basis of the material, of course,  
31 the claimants have got. They have not had any disclosure from any of the cartelists?

32 MR. ALDRED: Correct.

33 THE PRESIDENT: They can look at the prices charged to the claimants during and after  
34 presumably. We do not know how they went about it. There are no details of that. You

1 refer to their general report showing averages, but an average, of course, can mean there is  
2 quite a big range. Indeed that is what the report shows. It is not clear how they got to the  
3 10 per cent at the moment.

4 MR. ALDRED: I can assist, Sir. They have assessed documents from the cartelists again with  
5 the analysis that they do----

6 THE PRESIDENT: Documents from the cartelists?

7 MR. ALDRED: Forgive me, from the claimants, with a view to assessing the level of overcharge.  
8 Clearly that needs to be supplemented by what the cartelists have.

9 THE PRESIDENT: Yes.

10 MR. ALDRED: The figure that they have alighted upon is at the lower end of the range, which is  
11 often propounded in cases like this, of anywhere up to 40 per cent based on an earlier Oxera  
12 Report.

13 This is based on the claimants' data, so it is closer to an assessment of this case.

14 THE PRESIDENT: I understand.

15 MR. ALDRED: Furthermore, they have also had an assessment of the level of run-off which you  
16 will have seen in the papers they have assessed at 55 per cent. So you have much of the  
17 work done. Typically in these cases, work remains to be done when people set off with  
18 their claim forms at the outset and issue and then they give themselves all the work to do.  
19 These claimants have done much of the work and then issued before this Tribunal, which  
20 has the opportunity of dealing with cases on a fast-track procedure.

21 THE PRESIDENT: But you want, despite that – sorry to interrupt you – you are looking for a lot  
22 of documents from the defendants, para. 15 of your observations.

23 MR. ALDRED: I would say that the defendants have already pulled this together.

24 THE PRESIDENT: Yes, but never mind whether they have got it together or not, you said that  
25 Oxera have been able to come up with a figure but, despite that, you are asking for a lot of  
26 documents from the defendants, presumably so they can rework or verify, or re-analyse the  
27 question of the overcharge and the run-off, otherwise it is not necessary.

28 MR. ALDRED: Or make more robust, or at least understand the case which they will be asked to  
29 answer when Vita has put forward their position.

30 THE PRESIDENT: Yes, but you say it is proper that they should get all that information?

31 MR. ALDRED: Yes. We have set out a timetable, which we consider is completely achievable.  
32 As far as the defendants are concerned, we would say that they are, and must be more  
33 advanced than their submissions would suggest. First, as the whistle blowers in 2010----

1 THE PRESIDENT: Before we go to the defence, can I ask you something else, because you have  
2 another expert, I think, an accountant.

3 MR. ALDRED: Independent Forensic Accounting Limited.

4 THE PRESIDENT: I am sure it is my fault, but in the annex 5, I think it is, to the claim, the very  
5 last page, 60, you have the footnote – I think I have understood it, but I just want to make  
6 sure – footnote 7:

7 “Independent Forensic Accounting Limited has calculated the loss of margin for  
8 each of the Claimants and it considers it is reasonable to assume that 50% of the  
9 lost profit due to lost sales volume is as a result of the overcharge.”

10 Can you just explain what that means?

11 MR. ALDRED: Yes, Sir. Having assessed what is happening within the businesses of the  
12 claimants, having regard to their ability to continue to sell products, Mr. Prior has sought to  
13 determine what sales were lost over the relevant periods, and applying his own expert  
14 opinion, but in time I think it will be the case that we will be inviting the Tribunal to form  
15 its own view based on the facts, that a proportion of that, related to the overcharge.

16 THE PRESIDENT: So this is the volume effect.

17 MR. ALDRED: This is a specific volume effect, so what Mr. Prior has done is sought to  
18 ascertain with regard to the actual sales that the claimants were engaged in and the  
19 reduction in those sales, he has actually looked at the figures and come up with what is the  
20 reduction over that period.

21 THE PRESIDENT: The reduction in what?

22 MR. ALDRED: Lost sales volume, and extrapolated that to pounds and pence, and then that  
23 figure, which you have seen there, is his assessment as to how much of that ought to be  
24 attributable to the overcharge, and he said 50 per cent.

25 THE PRESIDENT: But that is, then, your claim for the volume effect?

26 MR. ALDRED: Yes.

27 THE PRESIDENT: But, of course, the claim on the volume effect is not for lost sales, it is for  
28 lost profit?

29 MR. ALDRED: Yes.

30 THE PRESIDENT: There is the decline in sales over that period. He is saying 50 per cent of the  
31 profit lost is attributable to a volume effect from the cartel, is that right?

32 MR. ALDRED: Yes.

33 THE PRESIDENT: The volume effect will be different as between each claimant, presumably?

34 MR. ALDRED: Yes.

1 THE PRESIDENT: Yes, I understand now, I think, thank you. Then you were coming on to the  
2 defendants.

3 MR. ALDRED: And their state of preparedness, having regard to background factors. They were  
4 the whistle-blowers in 2010 and they have had more time than anyone else to prepare for  
5 and consider follow-on damages claims. They had notice of this claim 18 months ago.  
6 They have already instructed a competition economist and, Sir, in February of this year, it is  
7 reported that three foam suppliers in the UK, which by default must include the defendants,  
8 settled a similar claim to that of the claimants and agreed to pay £2.1 million in damages,  
9 and over £1 million in costs. My learned friend already has a copy of the relevant article.  
10 That settlement, if it included the defendants, and it is hard to believe that it did not, means  
11 that the defendants are well advanced with regard to all the usual issues that arise in follow-  
12 on damages claims including the overcharge, the run-off period, the volume effects, interest,  
13 and, importantly, the relative contribution of the other cartelists. These cartelists have  
14 already agreed, one must assume – but frankly I do not know, and I cannot assist the  
15 Tribunal further – must have already agreed the relative contributions once and the  
16 claimants would submit it should not be too time consuming to do so again.

17 THE PRESIDENT: You could say that the relative contributions can be dealt with separately.

18 MR. ALDRED: Precisely.

19 THE PRESIDENT: You are concerned with the liability to your clients, and then contributions as  
20 between defendants and other parties, that does not have to be finalised at the same time.

21 MR. ALDRED: Precisely.

22 THE PRESIDENT: But can I ask you this: one of the criteria, as you know, and you address it, is  
23 the length of the trial. You first said your initial application you thought could be done in  
24 three days. I detected in your further observations some reconsideration of that because you  
25 say in less than eight days.

26 MR. ALDRED: Sir, when I made the initial application with very robust case management  
27 perhaps three days, but you will recall I immediately went on to give the Tribunal reasons  
28 as to why the guideline of three days ought to be treated as three days per claimant.

29 THE PRESIDENT: I understand that. I appreciate that point on the guideline, but is it right that  
30 having now seen the defence, which you had not seen then, of course, you now think that  
31 more realistically it is seven to eight days – is that fair?

32 MR. ALDRED: Yes, Sir, as matters stand with the proposal that there be six witnesses on behalf  
33 of the claimants, I think the defendants have indicated three.

34 THE PRESIDENT: That is right.

1 MR. ALDRED: Concurrent evidence for experts, which is our proposal, with written openings  
2 and closings, we could even knock it over in less than seven days, but I think that seven to  
3 eight days is not an unreasonable estimate.

4 THE PRESIDENT: Yes. So your point about three days per claimant is rather important,  
5 because seven to eight days is rather more than is envisaged for a fast-track case.

6 MR. ALDRED: Seven to eight days is more than three days.

7 THE PRESIDENT: It is significantly more than three days. I mean you are into a two-week  
8 hearing which is not what fast-track on perhaps many people's reading of it, subject to your  
9 three day per claimant point, is all about.

10 MR. ALDRED: Nonetheless, under rule 4 of your rules, dealing with cases swiftly and  
11 proportionately, if there is the opportunity, because these claimants have availed themselves  
12 the opportunity of joining together to share costs, avoid duplication and to proceed in an  
13 expeditious way, I would suggest that the fast-track procedure should be still available to  
14 them such that there is the real opportunity to not deal with just one claimant, but to deal  
15 with six, on any footing, in a shorter space of time. I think that is really an opportunity  
16 which the claimants would invite the Tribunal to seize.

17 The other way of looking at it is if they could not adopt the fast-track procedure by dint of  
18 having approached it on this footing, but they could have individually then the Tribunal  
19 could have faced potentially six separate fast track trials of three to four days. Clearly, what  
20 is being proposed here avoids duplication, avoids costs, is proportionate and aids to  
21 swiftness.

22 THE PRESIDENT: You are rather assuming that if only Breasley Pillows had brought a claim it  
23 would then have been dealt with in three days and that the only reason it runs to seven to  
24 eight days is because there are six claimants.

25 MR. ALDRED: And, essentially, I suspect that rather holds true, because the prolongation of the  
26 trial is essentially to deal with the witnesses of fact.

27 THE PRESIDENT: Yes.

28 MR. ALDRED: There was a point that my learned friend foreshadowed in her submissions that  
29 we intended to issue further applications and she refers specifically to the confidential  
30 version of the Commission's Decision.

31 Sir, once a confidentiality ring is established, the claimants would expect the defendants  
32 voluntarily to disclose the confidential version of the Decision into the confidentiality ring  
33 without the need for any application, and if they are suggesting otherwise I would simply  
34 invite them to make their intentions clear in that regard.

1 THE PRESIDENT: I do not think you need worry about that.

2 MR. ALDRED: The Rule 39 defendants: I have since had word that the first, third and fourth of  
3 the would-be Part 39 defendants have been served, or they were served by post on Thursday  
4 night. That still leaves the parent company of Carpenter which is based in the US. I simply  
5 say that some of the submissions that the claimants have made would hold true.  
6 Nonetheless, we just do not know if and when they would ever be brought before this  
7 Tribunal.  
8 Sir, for the reasons more fully----

9 THE PRESIDENT: What about the separate issue regarding - I think they are called Duflex, the  
10 umbrella pricing? You have included a claim for umbrella pricing. This is not a simple  
11 claim for just overcharge paid to these defendants for purchases by your clients from them,  
12 it goes much wider. There is the Duflex claim and you have seen what is said in the  
13 defence about that, that Duflex are not, as it were, an ordinary purchaser from your clients  
14 all five of your clients. They purchased - let me just look at the claims.

15 MR. ALDRED: There is £16 million volume of commerce attributable to Duflex. That is again  
16 in annex 3.

17 THE PRESIDENT: It is the nature of umbrella pricing point as regards Duflex. It is said that  
18 most of your clients' purchases from Duflex were for on-sale to particular customers who  
19 are under the same ownership, and so the prices were not set by reference to market prices.

20 MR. ALDRED: That is what the defendants say.

21 THE PRESIDENT: That is what is said, so there is a particular issue about how negotiations with  
22 Duflex took place, and how that reflected the market or not.

23 MR. ALDRED: Precisely, Sir.

24 THE PRESIDENT: Is that right? I appreciate your reply is not in yet, but I need to have some  
25 idea of what is involved. You will know what your instructions are and what the issues will  
26 be. Is that accepted, that there is a special price regime?

27 MR. ALDRED: No, Sir. The customer to whom the claimants supplied the cut foam would  
28 specify that they would buy directly from Duflex. They are still direct sales. Duflex, if I  
29 might just check this point, I understand, has now been acquired by Carpenter.

30 THE PRESIDENT: We are dealing with the position up to 2011?

31 MR. ALDRED: Precisely, Sir.

32 THE PRESIDENT: What has happened since then does not matter. At that time I imagine the  
33 ownership is not obscured from the customers who brought the foam products that were  
34 sold to your clients by Duflex. It was a sort of----

1 MR. ALDRED: We can see the point that is coming at us, which is that they dispute whether or  
2 not this was a price which was inflated. We say that it is a price that is inflated because the  
3 cartelised price is higher than it otherwise would be. They say no, because of the particular  
4 circumstances. We say, as the claimants, we know what we are paying for the foam from  
5 the cartelists, we know what we are paying Duflex for the foam, and we have a view as to  
6 whether or not there was any appreciable difference between those prices. It is ultimately  
7 quite a simple matter of fact when it comes down to it.

8 THE PRESIDENT: Yes.

9 MR. ALDRED: For the reasons more fully set out in the written application and the observations,  
10 we would simply say there is nothing particularly special or novel about this claim. It is  
11 typical of a cartel follow-on damages claim, and we would say it is ideally suited for the  
12 fast-track procedure. If anything is able to case manage and costs manage a case like this,  
13 then it is this Tribunal. All the claimants are SMEs. It ought not to be regarded as complex  
14 when viewed through this Tribunal's eyes. As I said, additional claims can and should be  
15 dealt with separately. We have already discussed the number of witnesses and the experts  
16 and the timeframe.

17 With regard to unintended consequences, you will perhaps recall what happened when there  
18 were, all of a sudden, 22 construction appeals and trying to case manage that. There is an  
19 opportunity to encourage claimants like these to come together with a streamlined, well  
20 developed case.

21 Faced with the potential costs of these cartelists, costs capping is clearly an appropriate  
22 approach, and we would submit that this case can and should be dealt with expeditiously  
23 and warrants allocation to the fast-track.

24 THE PRESIDENT: Yes, thank you very much. I shall give judgment at 3.30.

25  
26 Judgment (sent for approval)

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