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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1257/7/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15 July 2016

Before:

THE HON. MR. JUSTICE ROTH
(The President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

DOROTHY GIBSON

Applicant/Proposed Class Representative

- and -

PRIDE MOBILITY PRODUCTS LIMITED

Respondent/Proposed Defendant

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Mr. Tristan Jones (instructed by Leigh Day) appeared on behalf of the Applicant/Proposed Class Representative.

Mr. Alan Bates and Mr. Michael Armitage (instructed by Band Hatton Button, Coventry) appeared on behalf of the Respondent/Proposed Defendant.

CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning. Thank you for your written submissions. If, perhaps, we
2 take the agenda that the Tribunal sent out. First, is the question of the forum. I think both
3 sides have submitted that it should be England and Wales; that seems to me right and I will
4 make that order accordingly.

5 Secondly, a date for the substantive hearing of the application for the CPO. It seems to me
6 two days should be sufficient, but I do not think it is worth hearing argument about that, I
7 am ready to keep a third day in reserve; as Mr. Bates points out this is the first time there
8 will be a substantive application for a CPO, and there will be a cost capping application at
9 the same time as I understand it, so we can proceed on that basis.

10 It will be heard by a full Tribunal, which means we have to align availability of three
11 members. We cannot hear it in the second half of October, we have no availability then.

12 The dates we would propose are 14th/15th November, with 16th in reserve, if that works for
13 the parties.

14 MR. BATES: Sir, those are the only dates that I cannot do because I am in another hearing on
15 14th to 16th.

16 THE CHAIRMAN: Then the only other dates we have in November are 28th/29th with 30th in
17 reserve.

18 MR. JONES: Sir, I am afraid that Mr. de la Mare, who is leading me, cannot do those dates in
19 November.

20 THE PRESIDENT: Then we are going to struggle to get it on this year. Just a moment. (After a
21 pause) Then I think we are in the week of 12th December, we will need to double check
22 that, but that would be 12th/13th and 14th in reserve.

23 MR. BATES: That would be convenient for me, Sir.

24 MR. JONES: I have not, I am afraid, brought Mr. de la Mare's dates in December, and I would
25 need to phone his clerk to double check.

26 THE PRESIDENT: I would like to fix that now.

27 MR. BATES: Sir, if I could just have a moment----

28 THE PRESIDENT: And I should also say that I think it is important that your experts are present
29 for that hearing, not because I envisage they will be cross-examined, but there may be
30 questions concerning common issues, and how quantum is being approached, which you
31 might need to confer with your respective experts.

32 I think we will go forward a little bit, but I will then rise so you can clarify that because all
33 the other dates will fit in obviously working back from the hearing. If that really does not
34 work I think we will revisit the question of whether two days are enough because it is

1 having a third day that has caused some of these problems, and I really think two days
2 should be enough, but it must be heard this year, this application. It would be shocking if it
3 has to go into next year.

4 That will include then the claimant's cost capping application and also argument, Mr. Bates,
5 on the human rights point you wish to raise.

6 MR. BATES: Yes.

7 THE PRESIDENT: Just to be clear, given the terms of the Schedule to the Consumer Rights Act,
8 which introduced s.47B, you are not going to seek a declaration of incompatibility, I
9 presume.

10 MR. BATES: No, Sir. We are going to seek a *Ghaidan v Godin-Mendoza* interpretation of it.

11 THE PRESIDENT: I see – because I do not think this Tribunal has jurisdiction to deal with the
12 function of incompatibility; we will hear what you say about that in due course.

13 The next thing I will mention is the proposed definition of the “class”, Mr. Jones, as set out
14 in the claim form, at para. 11:

15 “Any person who purchased a new Pride mobility scooter in the United Kingdom
16 between 1 February 2010 and 29 February 2012.”

17 as I read that, that would encompass and include purchasers who then leased out scooters.
18 But from the way the witness statements are framed, and Mr. Noble's report, it seems clear
19 that you are not seeking to include scooters that are used for leasing.

20 MR. JONES: Sir, that is right, and to be clear we are not meaning to include the individual
21 consumers who leased the scooters, but we are, which I think, Sir, might be your question,
22 certainly not intending to include any organisation which purchased - Motability is the
23 name of the main organisation - we are certainly not intending to include them. I see the
24 point, Sir, and it may be we should fix that by saying “any natural person”, but I will give
25 that some more thought.

26 THE PRESIDENT: Or excluding purchases for use in a business?

27 MR. JONES: Sir, yes, that may also fix it. Could I, with your permission, give that a little more
28 thought?

29 THE PRESIDENT: Give it some more thought. It is important to get that clear quickly because
30 it affects the publicity, the people to whom you publicise the CPO application. The
31 proposals for publication are on the basis that the class is, as it were, end consumers,
32 individuals, who purchase for themselves or their parents, or whatever, and not people who
33 are purchasing for a business.

34 MR. JONES: That is correct.

1 THE PRESIDENT: You have clarified that orally. I think the definition needs a bit of tidying up.
2 We will proceed, therefore, when looking at how to publicise it, on that basis. Equally, if,
3 say, a nursing home purchased scooters for the use of residents, that is not included.

4 MR. JONES: Sir, I think that is right. I am hesitating because I must confess that particular point
5 is perhaps not one to which we have given the consideration it deserves, and we will do that
6 very quickly.

7 THE PRESIDENT: It is rather important, because, if it were included, you will get into the pass-
8 through, which you are understandably seeking to avoid. It would complicate this.

9 MR. JONES: We are certainly are.

10 THE PRESIDENT: Clearly the defendant needs to know that, but equally the Tribunal must
11 know, because of the way we approach it. I take it from your answers that the class is as
12 discussed in Mr. Noble's report.

13 MR. JONES: Yes, Sir. With the nursing home example, if the nursing home which, itself, buys
14 scooters not to sell on or to lease on, but for the use of its residents, Sir, could I just give
15 that a little bit more thought?

16 THE PRESIDENT: I do not know if that arises. It may be that a private nursing home charges
17 for the use of scooters.

18 MR. JONES: It might, and we need to iron that out.

19 THE PRESIDENT: There are complications. I doubt it is significant from what I have seen, but
20 you seem rather more concerned that that is a significant factor. Motability certainly is on
21 the numbers.

22 MR. JONES: Yes.

23 THE PRESIDENT: I think then, because we have got to consider the timetable, it is probably
24 best if I rise and you take instructions about those dates in December, which I hope can be
25 done in ten minutes.

26 MR. JONES: Certainly, Sir.

27 THE PRESIDENT: I will come back at ten to, and then we will go through the steps and
28 publicity and confidentiality, and so on.

29 MR. JONES: I am grateful.

30 (Short break)

31 THE PRESIDENT: Yes, Mr. Jones?

32 MR. JONES: Sir, those dates, 12th to 14th December, would work well for all parties, as I
33 understand it.

34 THE PRESIDENT: 12th to 13th with 14th in reserve.

1 MR. JONES: Sir, could I briefly return to the question about the class, because I have also taken
2 instructions on that?

3 THE PRESIDENT: Yes.

4 MR. JONES: I can confirm, as I think I already have is that the class is not intended to include
5 any organisation which purchased scooters in order then to rent them on or sell them on.

6 THE PRESIDENT: Yes.

7 MR. JONES: The category which you touched on, a residential home is a slightly different
8 category because there one can see there might be organisations, residential homes is
9 perhaps the most obvious example, which buy scooters for use of other people, but not
10 necessarily renting them on. I think I have already indicated, but I say straightforwardly we
11 have not given that consideration and I would, therefore, need to ask for a bit more time to
12 consider that with, in particular, our economist, who has looked in to these issues. What I
13 propose, although there may be other ways of doing this----

14 THE PRESIDENT: And your client.

15 MR. JONES: Of course, and my client of course. My client is sitting behind me, and she is
16 particularly interested in what our economist has to say, so I am not leaving her out of the
17 loop on this. What I propose as one possible solution is that we are given a short time,
18 maybe just a week or so, to confirm our position on this and, in the event that that category
19 is included in the class we could also come forward with concrete proposals about how to
20 reach that category of person.

21 THE PRESIDENT: Yes. We have given the date of the hearing, I do not think giving you a week
22 presents any problems. If we say by the end of 22nd July?

23 MR. JONES: Yes, Sir.

24 THE PRESIDENT: What I think you should do by that date is revise the definition of the “class”.

25 MR. JONES: Yes.

26 THE PRESIDENT: We have agreed that is necessary to exclude purchasers for leasing and then
27 in revising it you will make clear whether it includes those who are purchasing for use in
28 potentially a business like a private nursing home.

29 MR. JONES: Yes, Sir.

30 THE PRESIDENT: Good. In the light of that we can look at the timetable, the time by which the
31 defendant shall respond to the CPO, but also, Mr. Jones, before that you are also going to be
32 making an application for a costs cap, are you not?

33 MR. JONES: Yes, Sir.

1 THE PRESIDENT: So I think we also need to put that in as to when that should be done, which
2 can be done by a separate application.

3 MR. JONES: I think there is an agreement on our proposal of 12th September for the application
4 for a cost capping.

5 THE PRESIDENT: Yes, as a response to the CPO and costs budget, I know the date proposed
6 was 15th August, but it is not necessary to be done in August, as the hearing is going to be in
7 December it can be done a bit later if that is more convenient, Mr. Bates?

8 MR. BATES: It certainly would be, Sir. We did not want to ask for more than was reasonable in
9 the circumstances.

10 THE PRESIDENT: If we had been hearing this in mid-October, that timetable would be----

11 MR. BATES: We would be really grateful for more time.

12 THE PRESIDENT: Is it you who is away in September, I think you said, is that right?

13 MR. BATES: I am away for much of September and Mr. Armitage is away for all of September.

14 THE PRESIDENT: It probably better be, then, in August. Would you like 26th August, or the
15 end of August, would that be more helpful? That is including any evidence and a cost
16 budget. Let us deal with reply. Response by 26th August, reply, Mr. Jones----

17 MR. JONES: Reply we would ask for----

18 THE PRESIDENT: By the end of September?

19 MR. JONES: Yes, Sir, end of September.

20 THE PRESIDENT: 30th September?

21 MR. JONES: Yes.

22 THE PRESIDENT: Publicising and then time for objections. I would have thought publicising
23 should be by mid-October. It does mean that it is all done then, but that would be when all
24 steps have to be completed. If we say by 14th October, I do not think we need say 4 pm for
25 that – the other dates will have 4 pm but for service of the pleadings, but not the publicity
26 steps.

27 Can we then think about the various steps that have been taken. I have seen the very helpful
28 and full report from Signal. That is also, of course, dealing with publicising the order and
29 later management. What is proposed at this stage, and I think that is in your skeleton
30 argument at para.20, is the website. There is a Signal website. Then summary of the
31 application and a copy of the claim form. We will come on in a moment to look at the
32 annex to the claim form as to whether or not that is confidential. That does seem to me
33 sufficient for the website.

1 The only point that did occur to me, on looking at the notices for the case website, that is on
2 p.13 of your skeleton argument, is there a bigger copy of that in the Signal report, the
3 illustration? I think it is in Signal's report, is it not?

4 MR. JONES: Sir, yes, it is in the Signal report, but could I have a moment just to find that page,
5 which is at tab 9. I am told it is p.27. As you have pointed out, this was designed for the
6 later stage.

7 THE PRESIDENT: This will go - is this right - from your para.20, you say that what is proposed
8 now, with regard to publicising the hearing in December, is that the website will be set up,
9 the case website?

10 MR. JONES: The website will be set up but it is not proposed that it would have this front page
11 until and unless the CPO is made, because what would be important at this stage would be
12 to give notice of the application. So the front page would not look like this from the outset,
13 and we have not mocked up yet what that front page would look like. It would contain the
14 information at para.19, and of course a summary of the claim.

15 THE PRESIDENT: Leigh Day's website and the NPC website deal with that. Leigh Day and
16 NPC will issue a joint press release. **Which?** to publish a story.

17 MR. JONES: Sir, just on that, Leigh Day will ask **Which?** to publish a story.

18 THE PRESIDENT: We cannot order it.

19 MR. JONES: No, and we have been in touch with **Which?** and they are keen to help. They have
20 also emphasised that they, of course, have their own editorial timing considerations, so
21 cannot make any promises. We will certainly ask them.

22 THE PRESIDENT: You have now got, as it were, the September issue which will be much
23 easier, given that you are starting now. Doing it by mid-August would, I expect, have been
24 difficult.

25 Other potential publicity: the NPC, as I understand it, has a quarterly newspaper called **The**
26 **Message**, which is printed with a large number of copies.

27 MR. JONES: Yes, that is right, Sir, it has about 25,000 copies, and is disseminated more widely,
28 and it will - and I apologise this was not in my skeleton argument - the next one of those is
29 due to be at the start of September. It is a bit of a movable feast, but it will be some time at
30 the start of September.

31 THE PRESIDENT: That will fit in nicely with the timing.

32 MR. JONES: Yes, Sir.

33 THE PRESIDENT: That is something that we can specify, the September issue will have this
34 publicising.

1 Have your clients or solicitors been in touch with Age UK, either the biggest or one of the
2 biggest charities for the elderly?

3 MR. JONES: Can I just take instructions, Sir? (After a pause) Yes, Sir, Ms Gibson has been in
4 touch with Age UK and in fact has a meeting with them in the next couple of weeks. She
5 intends to ask them about publicity. They could get, I am told, a lot of publicity. So there
6 are potentially a lot of opportunities to publicise it, and she is happy to ask them to do so.

7 THE PRESIDENT: I think send a request to **Which?** or the Consumer Association to publicise
8 and to request Age UK to publicise it. The source that appeared from some of the papers is
9 the Research Institute for Consumer Affairs, which has done some studies of motor scooters
10 and mobility scooters. They are referred to by Mr. Noble. I think that is a consumer
11 website giving advice to consumers who want to buy one, so I think also to request the
12 RICA, so those three.

13 I think that should be sufficient for this stage, the fact that this application is being made,
14 the date that it is being heard and if anyone wants to object they must do so by notice in a
15 manner explained by 14th October.

16 MR. JONES: Sir, would it make sense for that 14th October date to be slightly later? If the
17 publicity will be potentially done by 14th October, it might be----

18 THE PRESIDENT: You are quite right, the publicity is the 14th. I think the objection should give
19 a month, so I think it should be 11th November, the date for objection.

20 MR. JONES: Sir, would that be in writing to this Tribunal, or alternatively to Leigh Day, which
21 could then pass it on.

22 THE PRESIDENT: Just a moment. (After a pause) I think it is better to the Tribunal, so put in
23 the Tribunal's address. As I understand it, it is not proposed that you will be using social
24 media just to publicise the hearing of the application? That comes afterwards.

25 MR. JONES: That comes afterwards.

26 THE PRESIDENT: I think that is reasonable. Of course, it is on the Tribunal's website, and no
27 doubt various specialists in competition law will be aware of it in any event.

28 Is there anything else on publicity that you can think of at this stage?

29 MR. JONES: No, Sir.

30 THE PRESIDENT: Can we turn to confidentiality. What you have done is respect requests from
31 Pride, as I understand it. Mr. Bates, first of all, we do not generally allow extensive claims
32 for confidentiality unless matters, as you know, are really commercially sensitive.
33 Secondly, there has to be a rather greater transparency in collective proceedings anyway
34 than in other proceedings because of the large class who are bound, but are not involved in

1 instructing lawyers. Looking at the annex to the collective proceedings claim form, which
2 is two pages, the first page is the number of scooters - that is to say the models - that is
3 estimated. That is those models sold over these two years, 2010 to 2012, and then the
4 number of other Pride models sold in that period. Why is that said to be confidential?

5 MR. BATES: It is not said to be confidential, it never has been, Sir. I think it is important to
6 emphasise that Pride has never made any request for confidential treatment of any
7 information. The position is that we were asked at a pre-action stage whether we would
8 give certain information going right up until 2015. So some of it was very recent
9 information. We handed over a lot of spreadsheets and sought confidentiality in terms of
10 leaving the issue of confidentiality to be dealt with at the first CMC, which is clearly today.
11 In relation to the data that is purely historical, so it just relates to the 2010 to 2012 period,
12 we are not seeking to claim confidentiality in relation to those figures. I think our concern
13 is more with respect to the more recent figures, and also whether it is possible from an
14 aggregated figure to back-calculate the figures that lie behind it by looking at the
15 methodology in Mr. Noble's report. That is why it seemed to us that the appropriate way
16 forward would be for us to do an exercise we have not yet done with Leigh Day, which is to
17 have a discussion about what figures can be released. One approach may be to redact all the
18 figures, another approach may be to redact some of the figures and perhaps a little bit of the
19 methodology.

20 THE PRESIDENT: Yes, I understand. Do I then understand you to say that what is called the
21 confidential annex need not be treated as confidential?

22 MR. BATES: I think that is right, Sir.

23 THE PRESIDENT: These are figures for 2010 to 2012. The first page you say is clearly not. On
24 the second page it has the price but that was the price at that time, and I think this is the
25 recommended price on an average - is that right? No, this is the average charged, I think.
26 Then there are what are Mr. Noble's estimates, obviously not agreed by Pride, of the
27 overcharge, and therefore how the damages were calculated. Is there anything confidential
28 in the second page of the annex?

29 MR. BATES: I think the answer to that is no, but I would like to have an opportunity to consider
30 it as part of the package of information, because I think from that material you could
31 perhaps back-calculate the margin between the wholesale price at which Pride is selling to
32 its retailers and a retail price, or at least a recommended retail price.

33 THE PRESIDENT: That is 2010-12, not today?

1 MR. BATES: Yes, in 2010-12. Sir, as I said, I do not think that we would maintain
2 confidentiality in relation to it, but I would like the opportunity to discuss it with Pride as
3 part of looking at the overall interchange.

4 THE PRESIDENT: I am not very happy that it is delayed to looking at it with lots of other
5 material, because this is the claim. If it is going to be publicised, the first thing that any
6 interested party wants to know is “how much might be in it for me?” That is the obvious
7 thing that people are interested in, “How much is being claimed on my behalf? Should I
8 object because I think it is too little?” It is part of the claim form which, as you see from the
9 proposal for the publicity now, is going to be included as a PDF copy on Signal’s website.

10 MR. BATES: I see the force in what you say, Sir, and I think the appropriate approach then is to
11 not maintain confidentiality in relation to those two pages, and if there is an issue about
12 back-calculation from those figures we will discuss that with Leigh Day as part of looking
13 at redactions to Mr. Noble’s report.

14 THE PRESIDENT: Yes, I think that is an appropriate approach. So we will say that the annex is
15 no longer confidential and can be referred to. I think it is right, given that there is some
16 interest in this case, to say that the claimant’s estimate is that the size of the class is between
17 27,200 and 32,400, and the initial estimate of damages, pre-interest is just over £4 million.

18 MR. BATES: Yes, Sir.

19 THE PRESIDENT: On other matters of confidentiality, because what a member of the class
20 might do is approach Leigh Day and say: “I hear you have made this application, and I
21 gather there was a hearing, and so I can understand what is going on better . . .” – and they
22 may even have legal advisers – “. . . can I see the material that was before the Tribunal?”
23 The witness statement of Ms Gibson is not confidential. The exhibit, I think there is no
24 confidentiality in the exhibit to that witness statement? No, there is nothing there. Then
25 there is the witness statement of Mr. Haan and I think it is the exhibit to Mr. Haan’s witness
26 statement, CJH1 which is said to have something confidential. I looked through that and I
27 could not see anything there, Mr. Bates, that might be sensitive. There are some figures on
28 p.41 to do with warranty cards, and again for that period, those two years, the number of
29 warranty cards your client holds, and then again the total number of products sold.
30 I think you have confirmed the total number of products sold is not confidential. Is it
31 suggested that the number of warranty cards held by Pride for those two years is
32 confidential?

33 MR. BATES: No, it is not.

1 THE PRESIDENT: It could not be, could it? Perhaps you can have a quick look through with
2 your clients after this hearing but, as I say, I do not at the moment see that there should be
3 anything in that exhibit, which is an exhibit of correspondence, and therefore the only letters
4 that could be confidential are letters from your solicitors not from Leigh Day, I believe, as
5 to why any confidentiality need be maintained in that exhibit?

6 MR. BATES: Sir, this is why I have said in my skeleton and suggested in my draft directions that
7 the Tribunal should refer the parties to Rule 101 in the 2015 Rules, which makes clear that
8 if the document is being submitted and marked as confidential the particular information
9 which is said to be confidential, which has caused it to have that classification should be
10 marked up, which would obviously then provide a focus to the parties' solicitors in dealing
11 with redaction. Perhaps that can be done----

12 THE PRESIDENT: That can be done from now on, but we are where we are with these
13 documents.

14 MR. BATES: Indeed.

15 THE PRESIDENT: The only other one that I think has given rise to concern is Mr. Noble's
16 report, and it may be, for reasons you have explained, that there are matters concerning
17 current margins, or current information, or from which current information could be
18 deduced, which might give rise, which could be dealt with by redactions or (inaudible).

19 MR. BATES: Indeed, Sir, yes.

20 THE PRESIDENT: But, I would ask you, therefore, to consider that with your clients. Can that
21 be done by the end of next week, please?

22 MR. BATES: Yes, Sir, I think that is the date we have suggested.

23 THE PRESIDENT: By 22nd July, regarding both the exhibit and the expert's report, and I think
24 there is nothing else in the material before this court today that attracts any question of
25 confidentiality.

26 The question of clarification of any matters, I think there are two things that arise, one
27 dealing with your client, and that is that you had a dealer network, as I understand it.

28 MR. BATES: We have what we refer to as a dealer network but, in fact, that includes, as I
29 understand it, all of our retailers, only, I think, one of whom sells only Pride products, so
30 effectively they are just retailers.

31 THE PRESIDENT: I appreciate that, but it is a selective distribution network as I understand the
32 OFT Decision. In other words, you appoint them as dealers and you choose them and you
33 have some relationship with them on that basis.

1 MR. BATES: I am not sure that that is right, Sir. I do not think that at the time there was a
2 selective distribution agreement setting out standards to be maintained. Indeed, that was the
3 problem, if you like, because Pride tried to go about achieving that in the wrong way.

4 THE PRESIDENT: They would not supply, I think, any dealer who wanted them, they had
5 regard to a number of other dealers, or quality of the dealer. It is not a criticism; it is just a
6 comment.

7 MR. BATES: Yes, I am not sure that is right, Sir.

8 THE PRESIDENT: That is what the OFT seemed to say, and they even give a figure for the total
9 number of about, I think, 700 to 800 across the UK. I think it would be helpful for you to
10 disclose a list of those dealers in the years 2010 to 2012 who stocked Pride scooters,
11 whether they are online dealers or bricks and mortar dealers, so that between now and the
12 hearing the solicitors to Ms Gibson can contact some of the dealers at least – some, I think,
13 have gone out of business – and see if they have any records of purchases including
14 particularly names and addresses of people who have bought them, because if they do then
15 that will obviously be an avenue to be pursued when it comes to publicising an order, if an
16 order is made, so they can decide whether to opt out or not.

17 MR. BATES: Yes, Sir.

18 THE PRESIDENT: Because, clearly, if you want the actual identity of the purchasers that is the
19 best means of communicating if you have their address. Now, you can disclose that such
20 that it is for the moment to be made available only to the legal representatives of Ms
21 Gibson, but that they use it to contact those dealers to request information.

22 MR. BATES: Yes, Sir, but can I ask that the order be phrased a little differently, so that it refers
23 to all customers supplied by Pride during the period covered by the infringement because,
24 as I say, whatever is stated in the OFT's decision, my understanding is that we did not
25 operate a selected distribution system in the way that has been described.

26 THE PRESIDENT: Yes. All customers supplied with mobility scooters by Pride over that
27 period, names and addresses to be supplied – what would be a sensible date, because you
28 might have to go into your records. Is your client here in the Tribunal?

29 MR. BATES: No, they are not, Sir.

30 THE PRESIDENT: If we say by 5th August, there will be liberty to apply.

31 MR. BATES: Yes, we will certainly do our best to do it by then.

32 THE PRESIDENT: If they cannot get all of them by 5th August for the full period, at least, they
33 will get quite a number of them. Obviously we have, I think, seven or eight names from the

1 OFT Decision already, but there are many more. That will enable your solicitors, Mr.
2 Jones, to contact those dealers and say: “What records do you have of that period?”

3 MR. JONES: Yes, sir.

4 THE PRESIDENT: You might even get pricing information, but as far as the hearing in
5 December is concerned, what we are interested in is what sort of information you have
6 about individual identities of customers.

7 MR. JONES: Yes, Sir.

8 THE PRESIDENT: That is the first point of clarification. The second point of clarification, Mr.
9 Jones, is on your side, the third party funder, Burford Capital, I think we would like to know
10 at the hearing of the application whether they are members of the Association of Litigation
11 Funders and, in particular, whether they subscribe to the Code of Conduct for litigation
12 funders of that Association. If they do not, if they are not members, and it is a voluntary
13 Association, then I think we would want to be told a bit about their rights under the funding
14 agreement, what rights they have regarding the conduct of the litigation. For example, if at
15 some point, assuming a CPO is made and, obviously, it may not be, that will be determined
16 by the Tribunal in December, but if it is made the collective action goes ahead. If an offer
17 of settlement is put forward, what role, if any does Burford Capital have in considering that
18 offer? Can they say: “If it is not accepted we withdraw funding” for example, now the
19 Code of Conduct deals with that, because there can be an obvious tension between the
20 interests of ‘class’ and the interests of the funder? So, if they subscribe to the Code that
21 probably deals with that. If they do not, you might want to consider disclosing the funding
22 agreement with any redactions if necessary.

23 MR. JONES: Yes, we have, in fact, disclosed it in full. The only thing we have redacted is the
24 premium, and I do not think there is any----

25 THE PRESIDENT: I thought that was ATE insurance?

26 MR. JONES: Sir, I apologise, that is the only policy we have in place.

27 THE PRESIDENT: I thought you would get funding from Burford Capital – is that not right?

28 MR. JONES: No, Sir, the solicitors’ costs and counsel’s costs are on conditional fee agreements.
29 There are then some disbursements, which are underwritten by Leigh Day as I recall – yes,
30 my solicitor is nodding, so yes.

31 THE PRESIDENT: What role is Burford Capital----

32 MR. JONES: Burford insures the risk of adverse costs, so in the event that Ms Gibson----

33 THE PRESIDENT: I thought they work with – let me just understand. So the costs of the expert
34 are funded by whom?

1 MR. BATES: By Leigh Day, Sir.

2 THE PRESIDENT: I see. So Burford are really just providing the premium for the insurance,
3 which is underwritten by Munich Re?

4 MR. BATES: Yes, Sir.

5 THE PRESIDENT: There is no funding agreement, other than the ATE policy?

6 MR. JONES: That is right, unless one included the CFAs and so on, as a funding agreement.

7 THE PRESIDENT: Sometimes there is, as you understand.

8 MR. JONES: Yes, but that said, Sir, the ATE policy does have terms which touch on things like
9 settlement and so forth. The issues which you have touched on do arise, and we have
10 disclosed the policy and we will address those issues at the hearing.

11 THE PRESIDENT: Yes, and you will obviously provide a copy to the Tribunal?

12 MR. JONES: Yes, Sir.

13 THE PRESIDENT: Thank you. Are there any other matters that either side thinks should be
14 clarified for the hearing in December?

15 MR. JONES: Sir, there are a few very short points. One, and this is really just for the record, we
16 had raised the point about the warranty cards held by Pride, and in the event that the CPO is
17 made would we be able to access that information? Mr. Bates has confirmed that we will.
18 He explains it is not necessarily a list of cards, the information might be incomplete, it
19 might be on spreadsheets, and so forth, but whatever they have got he emphasises, rightly,
20 that they may need an order for this for data protection reasons, but that will not be resisted.
21 Then there is a question of skeleton arguments, which we had agreed seven days before the
22 hearing if you are content with that.

23 THE PRESIDENT: I had not got to that. I was thinking of any matters by way of factual
24 information or disclosure.

25 MR. JONES: In which case, none from me.

26 THE PRESIDENT: No, not from either side. Then we come on to the run up to the hearing. So
27 skeleton arguments seven days before. As we have said, the hearing is on the 12th, so it is
28 by 5th December. The 5th is a Monday, so I shall say Friday, 2nd December, so slightly
29 longer, but that means you will not ruin your weekend.

30 Then bundles to be lodged with the Tribunal, and we need I think five copies. I will say
31 5th December for that.

32 MR. JONES: Could I ask a couple of clarificatory questions about bundles? You have the claim
33 form and the associated bundle, and there will then be the defendant's bundle.

1 THE PRESIDENT: There will be a defence, there may be a reply, there will be an application for
2 costs capping. There may be a response to objections, if there are any objections. I do not
3 know what might come in.

4 MR. JONES: No, quite, so what I was going to propose was, could we produce then a further
5 bundle including anything which has not already been lodged, or would you prefer us to
6 produce a full set, which would include replicating those things which have in other formats
7 already been lodged with the Tribunal?

8 MR. BATES: Sir, if I can intervene at this point? For the reasons I raised about confidentiality, I
9 suggest it would be helpful to have bundles prepared with the confidential data, etc, marked
10 up so that people do not read it out accidentally.

11 THE PRESIDENT: Yes. At the moment, that will only be bits of the expert report, by the sound
12 of things. We can get a substitute into this bundle. I think, as far as I am concerned, if you
13 liaise with the Tribunal and with the Référéndaire as to what is most sensible, I do not want
14 to put you to the cost of re-copying everything unnecessarily, as these costs mount up, and
15 if it can be done just by continuing from this bundle we can take this bundle with a
16 substitute expert's report.

17 It is important, if there are redacted documents, particularly for the December hearing,
18 which may attract some general interest because it is the first time we have done this, that
19 you should have available non-confidential versions of skeletons, and things like that, so
20 that they can be made available to those who might be interested.

21 As far as the bundles are concerned, I am content to say that this can be bundle 1, as it were,
22 and the other bundles can follow on.

23 MR. JONES: The one final point, Sir, which I wanted to mention was this: it would be very
24 helpful for the purposes of focusing the argument on the legal points, especially the
25 retrospectivity and human rights points, and so on, which have been floated, if the key
26 authorities could be mentioned in Mr. Bates' response document rather than in the skeleton.
27 If it is only in the skeleton that we see the key authorities that they are relying on we will
28 not then have responded to them in our skeleton on the same date. That would be helpful,
29 so that we know not just the points but the authorities which we need to respond to.

30 THE PRESIDENT: I will not make an order about that. Mr. Bates, you have heard what is being
31 said. Equally, we do not want a response with extensive quotes from authorities. If there
32 are some key authorities and principles, you can mention them, but I will leave it to your
33 discretion, you will be sensible about it.

1 MR. BATES: Thank you, Sir. We are aware of the usual approach in this Tribunal, where
2 defences, etc, tend to be fuller.

3 THE PRESIDENT: Tend to be fuller, they are not bare pleadings. It is in your interests as well,
4 because otherwise you get a skeleton argument and you then get a supplementary skeleton
5 argument, and so it goes on. I think you can put in the usual kind of pleading that we get,
6 which does explain fully, and that will clearly assist the efficient conduct of the hearing.

7 THE PRESIDENT: Is there anything else that you wish to raise, Mr. Bates?

8 MR. BATES: There are just two minor points. First of all, in relation to the costs capping
9 application, is it desired that Pride should file any response to it?

10 THE PRESIDENT: Yes. As I said, it is 12th September for the costs capping application. I have
11 not got a date for reply to it, have I?

12 MR. BATES: No, Sir.

13 THE PRESIDENT: You are away in September, so if we say 21st October for the response?

14 MR. BATES: Yes, Sir, thank you very much. The other matter was really to remedy my own
15 ignorance, which is that where a document is filed in the Tribunal which is said to be
16 confidential, is there any need to seek any order from the Tribunal to ensure that third
17 parties are not able to access a copy of it? I know this is dealt with in the CPR, but I could
18 not find anything specific in the Tribunal Rules?

19 THE PRESIDENT: I cannot remember either. The answer is no, because we have so much
20 confidential material in some cases, merger cases, and so on, we do not allow general
21 access. In case there is any doubt about it, so that it is clear, for the moment the expert's
22 report before the Tribunal today is confidential.

23 MR. JONES: Sir, I have been asked to raise one final point, which is backtracking slightly, I am
24 sorry to say, which is this: the costs budget is to be provided on 26th August, and my
25 solicitor reminds me that our costs capping application really should be directed at that, and
26 there may need to be a bit of a dialogue between the parties after we have seen the budget. I
27 am asked, therefore, to enquire whether we could have a little longer than 12th September?
28 It may be that a week longer would be helpful to make sure there can be a bit of dialogue
29 before that application is put in. The reply is then 21st October, so----

30 THE PRESIDENT: Your costs capping application is by 12th September, and Pride's costs
31 budget is 26th August. Yes, I understand, so rather than 12th September, I think you can
32 have two more weeks, so 26th September, and then I will say 24th October, so it gives a full
33 four weeks for the response. So that 26th September for the claimant's costs capping

1 application, and 24th October for a response to that by the defendant. Thank you, that is
2 sensible.

3 Is there anything else? No. Thank you all very much for your constructive approach.
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