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4 record.

5 **IN THE COMPETITION**  
6 **APPEAL TRIBUNAL**

Case No: 1427/5/7/21

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9  
10 Salisbury Square House  
11 8 Salisbury Square  
12 London EC4Y 8AP

Monday 14 March 2022

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14  
15 Before:  
16 BRIDGET LUCAS QC  
17 (Chairwoman)  
18 PROFESSOR JOHN CUBBIN  
19 ANNA WALKER CB

20  
21 (Sitting as a Tribunal in England and Wales)

22  
23  
24 **BETWEEN:**

25  
26 **BELLE LINGERIE LIMITED**

Claimant

27  
28  
29 v

30  
31 **WACOAL EMEA LTD AND WACOAL EUROPE LTD**

Defendants

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34  
35 **A P P E A R A N C E S**

36  
37 Anneli Howard QC and Khatija Hafesji (instructed by Sheppard Co appeared on behalf of the  
38 Claimant)

39 Aidan Robertson QC and Matthew O'Regan (instructed by Gateley Plc appeared on behalf of  
40 the Defendants)

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(Monday, 14 March 2022)

1  
2 (10.33)

3 THE CHAIR: Good morning, everyone. These proceedings are being livestreamed.

4 I start, therefore, with the customary warning which I am sure you have all  
5 heard before. These proceedings are in open court as much as if they were  
6 being heard before the Tribunal physically in Salisbury Square House, which  
7 in fact they are, in this instance, except for Mrs Walker who is away. She is  
8 joining us remotely and that is because she has unfortunately tested positive  
9 for covid but she is certainly well enough to be with us and you will see her on  
10 the screen. An official recording is being made and an authorised transcript  
11 will be produced but it is strictly prohibited for anyone else to make an  
12 unauthorised recording, whether audio or visual, of the proceedings and  
13 breach of that provision is punishable as a contempt of court.

14 So, obviously you are familiar that our panel members are Mrs Walker and Professor

15 John Cubbin. I think it is fair that we all have to make a declaration of interest  
16 at this point on the subject matter of the proceedings. It probably will not  
17 come as a surprise that I am a purchaser of lingerie and swimwear. I am not  
18 aware of ever having bought lingerie from the claimant and I am not  
19 particularly brand conscious and therefore would not know whether I had  
20 bought lingerie from the defendants. I think it is only fair to let you know that.

21 Mrs Walker, do you have anything to declare?

22 MRS WALKER: No, nothing to declare except a similar sort of explanation to the  
23 one you have just given.

24 THE CHAIR: Thank you. And Professor Cubbin?

25 PROFESSOR CUBBIN: I have no interest in this case.

26 THE CHAIR: Thank you for that. And so I think there has been quite a bit of

1 movement and we have had some documents coming in thick and fast over  
2 the last few hours. I think if I can start with the agenda and we see where we  
3 get to, Ms Howard, could you perhaps start taking us through that?

4 MS HOWARD: Yes. I do not know whether you wanted me to do some  
5 introductions and just to check that you have got all the documents that came  
6 over the weekend, because I am conscious that Mrs Walker is remote and  
7 therefore she may not have the updated documents.

8 THE CHAIR: That would be really helpful.

9 MS HOWARD: So, just by way of introduction, obviously the claimant is Belle  
10 Lingerie represented by myself, Ms Hafesji and Sheppard Co and for the  
11 defendants, Wacoal UK and Wacoal EMEA, they are represented by Mr Aidan  
12 Robertson, QC, Mr Mathew O'Regan and Gateley Plc. You should have three  
13 bundles before you. The main CMC bundle, which has 42 tabs divided, that  
14 has been updated and the final version was sent, I think, yesterday. I think  
15 there was just one addition that went in, but there's four main tabs to that with  
16 the CMC documents, pleadings, court orders and key correspondence in  
17 addition to the skeleton arguments.

18 There is an authorities bundle and then there is a confidential bundle. As you will be  
19 aware, the claimants submitted two confidential witness statements and we  
20 have managed to progress matters with the defendants to try and limit the  
21 redactions and reduce them, so yesterday again we submitted an updated  
22 non-con – if I may use the shorthand – non-confidential version --

23 THE CHAIR: Yes.

24 MS HOWARD: -- which reduced some of the redactions in those documents and we  
25 have worked together to do that. So, just in terms of the new documents, we  
26 have also liaised over the weekend to finalise and try and agree versions of

1 the draft order. I don't know whether you have copies of the latest version of  
2 that? They should have been put into your bundles but I have soft copies if  
3 that would help.

4 THE CHAIR: We have them. I will just check that Mrs Walker has it.

5 MRS WALKER: I have copies electronically. I have not had a chance to look at  
6 them and read them.

7 THE CHAIR: Okay.

8 MS HOWARD: And then as I said, there are the updated terms of the confidentiality  
9 order and the new non-con version of Mrs Dutton's statement, which has  
10 been added into the new CMC bundle at tab 10A2 and tab 10A3 and there is  
11 also an updated schedule, which just sets out the defendants' objections to  
12 redactions and then explains how the claimants have addressed those, and I  
13 think we have accepted the majority of them but there are a couple where we  
14 have not, and that schedule is also set out in the CMC bundle at tab 10A2.

15 There is another document, which we submitted last night, which records the matrix,  
16 which is in response to the defendants' arguments that we should amend our  
17 pleadings.

18 You may recall at the back of their skeleton argument they attached a highlighted  
19 version of our reply where they said we were raising new arguments and we  
20 needed to amend our claim form. This matrix is quite lengthy because we  
21 have gone through the various pleadings to try and show where actually these  
22 are not new matters; they are all covered in the claim form. It is either new  
23 evidence in support or actually just refers to matters which are referred to  
24 already and I will take the Tribunal through that shortly when we come to that  
25 element.

26 Then I think the last additional document is just one authority which we have, which

1 is an extract of the Penrose Report – it is one page – and also a copy of the  
2 speech given by Sir John Penrose in Parliament last week, which should have  
3 gone into the authorities bundles at tabs 19A and 19B. If you do not have  
4 that, we have some hard copies to hand up for you.

5 THE CHAIR: I only have the authorities electronically, so if they have not gone into  
6 the electronic bundle, we will not have them, which may mean Mrs Walker  
7 does not have them either.

8 MS HOWARD: I think we can send an electronic version.

9 THE CHAIR: Thank you.

10 MS HOWARD: We will forward the documents by – it is just one page reference, the  
11 Penrose Report, page 43.

12 THE CHAIR: Thank you.

13 MS HOWARD: And an extract of the speech which we will send electronically to the  
14 Registry to be forwarded on to Mrs Walker.

15 THE CHAIR: Yes, thank you.

16 MS HOWARD: So, I do not know whether the Panel has had a chance to read any  
17 of these new documents or the witness statements that were submitted last  
18 week? So, I think it would assist if I could have an idea of how much you  
19 have read and then I will know how much to take you to.

20 THE CHAIR: Yes, so I have read pretty much everything that has been filed, all the  
21 skeleton arguments, witness statements, the fast-track application document,  
22 the cost-capping order documents. I have read all of those and the draft order  
23 that was previously in the bundle. I haven't been able to read, in particular  
24 detail, any of the documents that came in last night.

25 MS HOWARD: That is fine, thank you. That is very helpful.

26 PROFESSOR CUBBIN: And similarly.

1 MS HOWARD: Thank you. So, what I was proposing to do – shall I take matters in  
2 the order of the agenda?

3 THE CHAIR: I think that would be helpful, yes.

4 MS HOWARD: I will do that. So, the parties have liaised over the week to try and  
5 agree a lot of the issues on the Tribunal's agenda and where they're not  
6 agreed what we have tried to do in the draft order that you have is to show the  
7 alternative wording in different colours. So, there will be items that are  
8 marked in blue, which is the claimant's proposed wording, and then there is  
9 the defendants' preferred wording in green. I am actually looking at this and  
10 my version does not have – they both seem a shade of blue to me. I do not  
11 know whether --

12 THE CHAIR: I can definitely tell the difference between the blue and green on mine.

13 MS HOWARD: Okay. I have another version with better colouring if that assists.

14 And so dealing with the first item on the agenda, forum, it is not disputed between  
15 the parties that the proceedings should be conducted in England and Wales.  
16 All the parties are domiciled here and that is agreed. I think the next issue is  
17 confidentiality. The claimant has applied for a confidentiality ring order, which  
18 is set out in the CMC bundle at tab 10A3, which starts at B404, and we have  
19 managed to make progress on the terms of that order, so those terms, I think  
20 now are fully agreed between the parties.

21 The defendants' position is they do not object to a CRO being ordered by the  
22 Tribunal and we submit that it is appropriate and proportionate for the CRO to  
23 be put in place now. That is because both the claimant and the defendants  
24 are direct competitors in that they are both active in the retail of lingerie and  
25 swimwear in the UK and the defendant sells directly to consumers both online  
26 and through its physical stores, and so it is therefore important in a case of

1 this nature where there will be disclosure of detailed financial information and  
2 commercial strategy that that should not be made available to direct  
3 competitors in the room, so we do seek a ring of the appropriate mechanism  
4 to ensure that those commercially sensitive confidential information are not  
5 disclosed to the defendants' internal executives, who will be responsible for  
6 formulating their own commercial policy.

7 There are also wider implications because it is probably likely that both parties will be  
8 disclosing confidential information at some stage such as strategy documents,  
9 financials, management accounts and that should not be disclosed widely to  
10 the general public which will include other retail competitors but also suppliers  
11 and customers which could therefore affect the structure of competition in the  
12 market.

13 Actually, the recent disclosure of the two witness statements by the claimants show  
14 that this is a case in point, and that has worked very well. We produced a  
15 confidential or a non-conversion. The defendants pushed back on some of  
16 the redactions. We have accommodated those concerns and narrowed them  
17 and it worked very efficiently. So, we feel there is no good reason to defer the  
18 CRO to a later date. We wish to proceed quickly with these proceedings and  
19 that is a matter I will be coming to shortly but it is important, we think, to have  
20 the ring in place so that we can move to disclosure and witness statements in  
21 an efficient manner.

22 So, we have addressed the confidentiality in the draft PC order at paragraphs five to  
23 nine of the order. I think those are all agreed between the parties and unless  
24 the Panel have any particular concerns or queries, we would ask the Tribunal  
25 to make the CRO in the terms that have been agreed.

26 THE CHAIR: Could you just give me a moment? (Pause) Yes, so as I understand

1 it, you will file a copy of an agreed version, which you tell me this one is and it  
2 is for our approval. I think we will – I have not had a chance to review it in  
3 detail because the terms were not agreed before this morning, so I will take  
4 the opportunity to look at it when we break for a short moment and then  
5 hopefully give you our approval today or our approval either today or shortly  
6 afterwards.

7 MS HOWARD: I think both parties have tried to model it on previous examples given  
8 by the Tribunal.

9 THE CHAIR: Yes.

10 MS HOWARD: So, it is fairly standard terms.

11 THE CHAIR: Yes, thank you.

12 MS HOWARD: I am grateful. I think the next issues on the agenda are preliminary  
13 issues, split trial and I would submit that these are interlinked with the next  
14 issue of whether there is a fast-track application as well, so I was proposing to  
15 deal with them together.

16 THE CHAIR: Can you just clarify for me, is there an issue between you as to how it  
17 should be split?

18 MS HOWARD: I think both parties agreed that a split trial is appropriate but it is the  
19 exact split that is in dispute.

20 THE CHAIR: Right.

21 MS HOWARD: And you will see that from the different colouring that is included in  
22 paragraph 12 of the draft order and also you will see there is different wording  
23 in paragraphs 10 to 11 because it also affects how the fast-track works, but in  
24 summary outline, the claimant's position is there should be a split trial  
25 between what we call phase one liability and phase two, quantum, and both of  
26 those aspects should be dealt with on the fast-track procedure.



1 The defendants' position, and they will correct me if I misrepresent this, is that they  
2 are happy to have a split trial on liability. We have some debate as to what  
3 liability includes within that envelope.

4 THE CHAIR: Yes.

5 MS HOWARD: But they argue[?] that the fast-track application should be refused,  
6 but if the Tribunal is prepared to grant fast-track status, that should only apply  
7 to the liability phase one hearing and not phase two, quantum hearing.

8 I think at this point it might make sense for me just to stand back a little bit and  
9 explain what this case is about and what the issues are because obviously  
10 that feeds into the fast-track analysis and the complexity of the claim and the  
11 issues and likely disclosure, so how I was proposing to approach this was just  
12 to give an overview of what we say this case is about and then to explain how  
13 we would envisage that it is case managed appropriately.

14 THE CHAIR: Thank you.

15 MS HOWARD: So, just starting with the parties, the defendants are the UK and the  
16 European subsidiary of the Wacoal Group, which is a large, international  
17 group, headquartered in Japan but also has offices around the world in  
18 several countries including the US and Canada. They are the global  
19 manufacturer and wholesale supplier of different lingerie and swimwear  
20 brands. We refer to all these brands as the "Wacoal Group products" in the  
21 pleadings but there are different brands within: the Eveden brands, the  
22 Wacoal brand and the B.Tempt'd brand, different categories of brands.

23 The defendants also retail their products directly to consumers in the UK, so in  
24 competition with online and physical retailers, like the claimant, and they do  
25 that through their own website, through their own physical stores and we say,  
26 which is disputed, that the members of the group also sell through Amazon

1 and eBay in the US.

2 The claimant is a small family business and it has been trading online since 2007. It  
3 is a long-established distributor for the defendant. They have been in  
4 business together for over 16 years and it sold the Wacoal Group products  
5 from July 2005 until September 2021 when the defendant terminated all of its  
6 supplies. That is set out in the claim form at paragraph 16.

7 The claimant alleges that there has been an overall infringement contrary to the  
8 Chapter One prohibition and we say that comprises three main elements.  
9 The first is what we, for shorthand, describe as the RPM policies. So, this is  
10 where the defendants made either direct requests to the claimant for retail  
11 price maintenance where they instructed the claimant to increase their prices  
12 back up to stop the discounting, increase the prices back up to their  
13 recommended retail prices, or RRP's for short.

14 Now, sometimes that was done unilaterally, because the defendant was monitoring  
15 prices, we say – and that is disputed by the defendants. Others, there were  
16 complaints from other retailers, from the claimant's competitors and the  
17 defendants took steps to stop the claimant from discounting. Importantly, it is  
18 not just vertical price fixing between a supplier and a distributor but there are  
19 also horizontal elements, partly because the defendant is also a retailer itself,  
20 but also because there have been – what are known as in the trade of  
21 competition law – these hubs and spokes arrangements with complaints to  
22 the manufacturer going up the hub who then take action to stop the  
23 discounting, these sort of arrangements to stop discounting in the UK.

24 That is limb one. Limb two is again direct or indirect RPM through explicit  
25 contractual clauses contained in the defendants' value assurance policies,  
26 which we refer to in shorthand as, "the VAPs". So, there are two VAPs, it now

1 appears. There is the Eveden VAP, which applies to the Eveden brands,  
2 certain covered brands – products within the Eveden brands, and there is the  
3 Wacoal VAP, which applies to the Wacoal brands, and both of those  
4 documents impose minimum resales price requirements, which require the  
5 claimant, to observe the defendants' MRPs when they resell.

6 The VAPs also contain an online platform ban, which prevents retailers selling  
7 through platforms such as eBay. And there are other restrictions, which  
8 would restrict the claimant's ability, we say, to sell passively to consumers  
9 outside of the UK. Now, the defendant has made a number of key admissions  
10 regarding the existence of the MRPs and the platform ban and the refusals to  
11 supply that were applied, but its case is that these VAPs only applied in the  
12 US and Canada and did not apply outside those territories.

13 The claimant's case is that these policies were directly applied to sales of their  
14 products in the UK, so they did not just apply to sales via eBay.com in the US,  
15 but they were directly applied to the claimants via the UK site, ebay.co.uk and  
16 most importantly, were applied even after the claimant had complied with the  
17 VAPs by switching off all sales, all deliveries or international marketing to the  
18 US and Canada. So, a key factual debate will be the geographical extent of  
19 these VAPs. That is the second element of the claim.

20 The third element of the claim is discrimination and refusal to supply. The claimant's  
21 case is that it has been targeted and sanctioned under the VAPs in a manner  
22 that is arbitrary, inconsistent and discriminatory, and this is because the  
23 claimant has been targeted and effectively punished through the refusals to  
24 supply along, I think, with two other UK retailers, but the majority of its rivals in  
25 the UK have been allowed to continue selling first on ebay.com in the US and  
26 ebay.co.uk and they have been allowed to discount without any sanctions

1 being applied against them.

2 So, during the course of 2008, the claimant took measures to comply with the VAPs  
3 in the US but since 2019 has faced a series of partial refusals to supply for  
4 certain brands and certain types of products, continuity and fashion products,  
5 and then ultimately in September 2021 the defendant cut off all supplies,  
6 including the kind of redundant promotion and end-of-line stock.

7 THE CHAIR: Yes.

8 MS HOWARD: So, that is the basis on which this claim has been brought and the  
9 claimant seeks damages on two alternative bases. The first base is damages  
10 for these historic losses, we say, from 2018 to 2021 – well, until judgment  
11 effectively, plus interest and loss, and that is on the basis that this case is  
12 resolved in 2022 and supplies are resumed, whether through settlement or  
13 through the court's determination. On that basis, the past historic losses are  
14 estimated at approximately 1.5 million plus interest, and the future losses,  
15 because of the damage to the growth of the business, are estimated at 1.8  
16 million, and this is set out in the claim form at paragraph 90.

17 The alternative basis is if supplies are not resumed, and in that case the historic  
18 losses remain the same but the amount of quantum for future losses will be  
19 much higher and they are projected on a five-year basis which includes  
20 damage to the claimant's internet rankings, the loss of business growth and  
21 the loss of its competitive market position. That alternative basis for the claim  
22 is valued at over £7 million and that is also on the table at paragraph 95 of the  
23 claim form.

24 So, that is the overview of the claim and in dealing with the case management of this  
25 case, we consider that this case is a paradigm example of the need to ensure  
26 effective case management for these small competition claims and exactly

1 what fast-track procedure was designed for. That was designed, as has been  
2 well recognised in the case law, to enable access to justice for small and  
3 medium enterprises against larger, well-resourced defendants. Now, those  
4 concerns have been highlighted in the Penrose Report. We have just handed  
5 up a section in chapter 6.3 at page 43. This was published in February 2021  
6 where Sir John Penrose explained – I am looking at the second paragraph of  
7 this report.

8 THE CHAIR: Yes, I am just reading through my mountain of paper and trying to find  
9 the copy you handed up earlier. You may have put it in the authorities bundle.

10 MS HOWARD: Ah, yes – it is at 19. It should be 19A, I think, in the authorities  
11 bundle.

12 THE CHAIR: No, I did not have it there.

13 MS HOWARD: Shall I give you another copy?

14 THE CHAIR: It must be here. As soon as you hand it up I will find it up, I am sure of  
15 it, but thank you.

16 MS HOWARD: So, this is the section with the recommendation made in the Penrose  
17 Report that there should be county competition courts, and the author, Sir  
18 John Penrose, referred to the fact that most competition problems are only  
19 ever enforced by the CMA and although they can bring their cases to the CAT  
20 – and then in the second paragraph it says, “Even though the CAT has a fast-  
21 track procedure for some of these cases, it will still look dauntingly slow and  
22 expensive for many small or local firms”. And so it recommends the creation  
23 of regional county competition courts to extend access to justice, particularly  
24 for smaller firms further away from London, and recommends the creation of  
25 new, cheap, efficient fast-track competition courts for local and regional cases  
26 with very tight case management, a low-cost cap for losing firms and a short,

1 one to two-day maximum, hearing length. Then it gives a case example, and  
2 funnily enough, the case example is directly on point. It refers to where a  
3 small independent retailer finds that one of its suppliers wants to impose a  
4 contract that stops them from applying discounts below a certain level, which  
5 stops them from running promotions to stand out from competitors or retract  
6 new customers. And they think this contract could be resale price  
7 maintenance which is a breach of competition law but it is not worth the  
8 money or time of going to the CAT. And so it envisages that they would take  
9 it to the local competition court instead to get the contract changed.

10 Now, last week Sir John Penrose in a debate in Parliament, commented because it  
11 was the anniversary of his report, and he wanted to give an update of the  
12 measures and recommendations and whether they had been implemented  
13 and we handed up a copy of that speech. Halfway down page two of that  
14 speech – I just want to check that you have it, and Mrs Walker, do you have a  
15 copy of it? I think she may be on mute. You may be on mute.

16 MRS WALKER: I am on mute. I have not managed to – I am actually very familiar  
17 with the Penrose Report, so a report of what he said last week would be very  
18 helpful to me.

19 MS HOWARD: I think we sent it to the Registry to be forwarded on to you.

20 MRS WALKER: Okay, then I am sure they will do that and I will make sure I look at  
21 it, but I am actually very familiar with his views and his concerns. So, you can  
22 absolutely rest assured on that point.

23 MS HOWARD: Okay. Well, if you will indulge me, I am quite happy just to quote a  
24 short extract and I can read down exactly what he said in Parliament.

25 MRS WALKER: That would be very helpful for me.

26 MS HOWARD: So halfway down page two Sir John Penrose refers to the noticeable

1 gap in redress and the need to improve competition or regress and he says:

2 “Although that gap is starting to close and there have been reforms at the small  
3 claims court, for example, there has been no reform in other areas that need  
4 it, such as the creation of county competition courts. Such reform is  
5 necessary to create opportunity for small, local companies that are being  
6 ganged up on by larger local incumbents and prevented from prosecuting  
7 their competition rights because taking someone to the competition appeal  
8 Tribunal in London for a breach of competition law is never going to be  
9 affordable. Even under the current fast track approval process redress is still  
10 out of reach for most small regional firms. A restaurant in Bristol, an estate  
11 agent in Hull or a hotelier in Liverpool will not be able to afford to do anything  
12 if they are being ganged up upon by a local competitor until we get what I am  
13 calling county competition courts, and I am afraid there has been little  
14 progress towards that at the moment.”

15 And then further down the page at the last paragraph he says:

16 “That matters because at the moment it is too easy for large, well lawyered  
17 incumbents to walk backwards slowly in the face of a challenge from a small,  
18 plucky entrepreneurial insurgent firm that is trying to transform and disrupt  
19 a particular market. If they construe legal obstacles in the challenger’s path  
20 they can basically make it much harder for Britain’s economy to be nimble.”

21 We submit that this case, and you will see from the evidence that it has been  
22 submitted by the director of the claimant, that this is a case that needs to be  
23 case managed in a robust and rigorous manner, in an expeditious manner,  
24 that does not allow the trial timetable to exhaust the claimant’s finances. And  
25 we have set out in some detail the predicament that the claimant has been  
26 under since the refusal to supply and how effectively they have been battling

1 to survive. And what they are trying to do is to manage this process so that it  
2 can run the business at the same time, generate the cash flow to pay for the  
3 litigation, but they do need relief quickly. And you will see from the evidence  
4 of Mrs Dutton that before this conduct of the defendant it was a very profitable  
5 business. In 2017 it was ordering over £1 million worth of supplies from the  
6 defendants and it had significant year on year growth.

7 But when the VAPs were introduced in 2018 its growth nosedived and because of  
8 the cessation of supplies it has suffered loss of customers that were loyal to  
9 the Wacoal brands. And it has had to restructure its whole business in order  
10 to diversify its portfolio away from the defendants' brands, which at that point  
11 were over 60 per cent of its turnover, and to bring on new brands and attract  
12 new customers. And so Mrs Dutton's evidence is that its competitive market  
13 position has been affected because its direct competitors in the UK have not  
14 been subject to these restrictions and they have not been subject to the same  
15 sanctions. So there is an imperative to this litigation and there is an urgency  
16 because at the time in 2019 the impact was so devastating that the claimant  
17 could not afford open injunction. It had to concentrate on building the  
18 business and surviving. Mrs Dutton explains that it cannot afford long-term  
19 litigation. So the loss and damage from the defendants' actions is ongoing  
20 and is causing significant harm that is affecting its ability to compete in the  
21 market, to grow its business.

22 So it is for those reasons that we have put in the application for the fast track and the  
23 application for the costs cap order. And at this point it probably makes sense  
24 for me to just explain the split between phase 1 and phase 2.

25 THE CHAIR: Yes.

26 MS HOWARD: I think both parties are agreed that a split trial is sensible and it is



1 also consistent with the principles that are set out in the lead case, Electrical  
2 Waste. We have set those principles out at paragraph 16 of our skeleton and  
3 that is in the authorities bundle. And here the issues of liability and quantum  
4 can be separated quite easily and avoid duplication. And it is unlikely that the  
5 same witnesses will be needed for both parts of the trial. I think Mrs Dutton  
6 will because obviously she has got the financial acumen of her business for  
7 the quantum assessment, but so far as the defendants' witnesses are  
8 concerned, I think it is agreed that they will not be needed for quantum issues.

9 The claimant anticipates that expert evidence actually for phase 1 liability should be  
10 relatively limited and minimal and that is because these infringements are  
11 object restrictions. RPM is an object restriction. So we do not need to prove  
12 anticompetitive effects. Similarly the online platform ban is a hardcore  
13 restriction on passive sales, which again cannot be, you do not have to show  
14 an effect. You do not need to raise issues of objective justification. It is very  
15 difficult to objectively justify. So we submit that the actual economic input is  
16 fairly limited for phase 1. Obviously at phase 2 the expert analysis on  
17 quantum will be more extensive. However, it makes sense to split the two  
18 because the phase 1 liability trial will then set the framework for the quantum  
19 assessment and the Tribunal's findings on the infringement will be fed in by  
20 the experts into their counterfactual analysis of the quantum and should help  
21 to scope and narrow at the extent of that hearing, saving on disclosure and  
22 saving on expensive expert analysis. And actually it may be that the liability  
23 trial can dispense with the phase 2 quantum trial altogether. What we have  
24 proposed is that if liability is established that the parties then have some time  
25 out for ADR and they can hopefully manage to settle any quantum issues  
26 without the need for a full trial on quantum at all.

1 There are two aspects of where the split, what the envelope of liability contains, and  
2 you will see this in the draft order at paragraph 12. It may be that for the first  
3 one there is a distinction between what we call causation or the theory of  
4 harm and causation of loss. And the claimants advocate that the first aspect,  
5 the causation of harm or the theory of harm, should be included as part of  
6 phase 1. And that is very much because they consider RPM to be an object  
7 infringement and as part of that analysis we need to show that the conduct is  
8 capable of causing harm to consumers or the structure of competition in the  
9 market. So it is an inherent part of establishing liability for an object case or  
10 a hardcore ban on passive sales. And we think it makes sense for those two  
11 aspects to be determined together at phase 1. And if it is included at phase 1  
12 then that will actually maximise the chances of settlement because the parties  
13 will know, firstly, whether there has been an infringement at all and, secondly,  
14 whether it has caused harm and then they can try and find a commercial  
15 settlement to the quantum issue.

16 We regard that, the causal theory of harm, as different to the causation of loss.

17 The causation of loss is obviously an inherent part of quantification and we  
18 accept that if there is a split between those two aspects causation of loss  
19 should be part of phase 2. So that explains the different colours in  
20 paragraphs 12A and 12B.

21 The second issue about what is included in the liability trial, and I am going to  
22 summarise my understanding of the defendants' position, but they may want  
23 to step in and explain it more clearly, is the defendant wishes to include the  
24 claimant's entitlement to a permanent injunction as part of the phase 1 trial.  
25 And we do not agree with that inclusion as we think it raises an academic  
26 point of law which will not be determinative of the dispute. As I explained

1 previously, the claimant has claimed relief on two alternative bases. The first  
2 one is a damages only basis on the assumption that supplies will not be  
3 restored in 2022 and then there is also the second basis of damages on  
4 a lower level if supplies are resumed.

5 If liability is determined in the claimant's favour and then the parties engage in ADR,  
6 it may be that supplies are restored as part of those commercial negotiations,  
7 part of the mediation, without the need to engage the Tribunal's resources at  
8 all on this topic. If liability is not established at all, then there is no need to go  
9 on to determine this topic. So it really makes sense to consider issues  
10 relating to relief at a later stage once the prior question of liability has been  
11 resolved. Because the main difference between the parties is just going to be  
12 the level of damages that is payable. The level of past historic losses will be  
13 the same. It is really the future growth to the business that is the difference  
14 between the two measures of damages.

15 THE CHAIR: But if the issue of permanent injunction is left over to the second  
16 phase, does that not make the evidence that is filed for the purposes of the  
17 second phase somewhat uncertain? So that if, for example, the Tribunal  
18 determines that you were not entitled to a permanent injunction, at least  
19 everyone would then know what evidence they need to file for phase 2 and if  
20 we determined that it was likely to be or even granted a permanent injunction  
21 for a shorter period of time, when you got to phase 2 you would know which  
22 was the balance of the loss that you would otherwise be claiming. So is there  
23 not something to be said for having the permanent injunction as part of phase  
24 1?

25 MS HOWARD: I can see that trying to narrow down the scope for the experts and  
26 make it as more straightforward for them to deliver their quantum input. It

1 may be that this question of whether they are entitled to a permanent  
2 injunction should be a preliminary question for phase 2, which could be done  
3 at the same time as ADR is being conducted as a very short preliminary,  
4 narrow question of law as part of the phase 2 trial, before you get to  
5 disclosure and expert evidence and quantum, if that would assist. But I do not  
6 think there is a point of bolting it into phase 1 and, most importantly, the  
7 inclusion to phase 1 is not going to save costs or save court time. It is just  
8 going to burn up the claimant's limited financial means on what is an abstract  
9 theoretical legal question which is divorced from the evidence on that point  
10 and it will also add days to the hearing length, which then risks taking the  
11 case out of the fast track procedure.

12 THE CHAIR: Is that right? Would it add days to the (inaudible)?

13 MS HOWARD: On the defendants' analysis, they are estimating seven days for the  
14 totality of phase 1 and I think they are saying it is going to be five days of  
15 argument and evidence and then an extra two days to deal with it, which I  
16 presume is the difference for this legal issue.

17 THE CHAIR: Two days for the permanent injunction argument?

18 MR ROBERTSON: No. Our time estimate is seven days. Five days to deal with the  
19 evidence. As my learned friend has explained, there are a raft of factual  
20 allegations made against my clients and it is going to be necessary to resolve  
21 those. And with the best will in the world we are not going to get that done in  
22 two days under the fast track, to allow for a day for submissions. It is going to  
23 take, there is also going to be some expert evidence as to in way in which  
24 eBay works and the ability which you can segment.

25 THE CHAIR: Yes, I will hear you on these aspects in a moment.

26 MR ROBERTSON: Yes.

1 THE CHAIR: Just the permanent injunction issue.

2 MR ROBERTSON: The permanent injunction is essentially an issue of law. We say  
3 we are under no obligation to supply the claimant and if we are under no  
4 obligation to supply the claimant they have no entitlement to a permanent  
5 injunction. There is some case law on that. And in terms of standing on my  
6 feet and arguing about it, I expect that will take about an hour of submission.  
7 The rest of my closing submissions, for which I have estimated a day, a day  
8 for Ms Howard, will be spent reviewing the evidence and making submissions  
9 on whether there has been infringement or not. So that is the basis of my  
10 time estimate.

11 THE CHAIR: So in essence you are saying a permanent injunction would not be  
12 a time consuming part of the trial.

13 MR ROBERTSON: It is an hour of oral submission. You will have had written  
14 submissions in advance.

15 THE CHAIR: Ms Howard, what do you say to that?

16 MS HOWARD: I think this is probably overlapping with the arguments on fast track  
17 because we are getting into the number of witnesses and how much time it is  
18 going to take. I would anticipate there will be case law on this. I think an hour  
19 may be quite short and obviously we need time to respond. So I think it is  
20 going to be at least half a day of argument between the parties, but then I  
21 cannot see the difference between our estimate of three to four days for the  
22 trial, their estimate of five days and suddenly going to seven days. I cannot  
23 see that seven days is going to be necessary for that entire phase 1 hearing.

24 THE CHAIR: Yes, I am sure it will come to that, thank you.

25 MS HOWARD: So if I may move on, and I do not know whether you want to hear  
26 from my learned friend on the split or whether you want to hear from me

1 totally on the fast track and then hear from my learned friend. Because I just  
2 make --

3 THE CHAIR: Mr Robertson, have you anything further you want to say on the  
4 permanent injunction and whether that should form part of phase 1?

5 MR ROBERTSON: It should form part of phase 1 because that will then dictate the  
6 scope of the second trial. They obviously want to keep the possibility of  
7 a mandatory injunction in play for the purposes of negotiation. But if it is  
8 something that can be ruled out in the first trial, then in our submission it  
9 should be ruled out at that stage. It is not a remedy we say they are entitled  
10 to. And that then would inform the scope of a second trial on causation and  
11 quantum.

12 On the issue of causation, my learned friend has explained that we would not have  
13 that as part of phase 1, the first trial, and the reason for that is we think that  
14 naturally sits within, looking at quantum, on this assumption you have  
15 established there were infringements. Now, what did those infringements  
16 actually, what loss did they actually cause? And how much loss did they  
17 cause? That seems to us to sit naturally together and also has the advantage  
18 of keeping the first trial a bit shorter because you do not need to go into  
19 causation. We too would like to deal with this in a proportionate and  
20 expeditious way. My client has no desire to spend longer in court than is  
21 necessary. But we do not think that putting causation into phase 1 is  
22 necessary. Phase 1 is about establishing whether there have been  
23 infringements and whether there is a continuing duty to supply, and that is it.

24 I should also explain, I think I said there is half a dozen witnesses. I was referring to  
25 our witnesses. I had forgotten of course that the claimant has a couple of  
26 witnesses as well.

1 THE CHAIR: Yes.

2 MR ROBERTSON: So we are talking about eight witnesses of fact in phase 1. I do  
3 not think I can assist you any further on split trial.

4 THE CHAIR: Thank you. Ms Howard, can you help me a little bit about the  
5 causation point and how you say that that sits more comfortably in phase 1? I  
6 know you have explained it to me once again, but I would ask you to.

7 MS HOWARD: Sorry. We see that as a distinction between causation of harm, or  
8 maybe theory of harm is the better descriptor, and legal causation as in how  
9 much loss has been caused and the quantification of that loss. We say that  
10 the theory of harm is an inherent part of establishing the infringement,  
11 particularly here because we say this is an object infringement. You have to  
12 show that it is under the case law of Cartes Bancaires and the Hungarian  
13 banks that it is capable of causing sufficient harm to consumers or the  
14 structure of competition in the market and we say that RPM is a paradigm  
15 example of an object infringement, also hardcore restrictions on passive  
16 sales, also object infringements from the Court of Appeal in Ping. So and  
17 there will be limited expert analysis on that, but we think it really goes into the  
18 establishment of the infringement.

19 And the theory of harm is separate from the quantification and causation of loss, of  
20 how much money is payable, I am sure you are more familiar than I am. So  
21 we feel it is sensible to have the theory of harm included as part of the  
22 infringement because, and I have seen this in other cases where you find out  
23 there is an infringement, you then go to settlement and the defendants say,  
24 "Well, you know, there is no harm here. You have not demonstrated that this  
25 infringement has created harm in any way." And then you are back to square  
26 one again. So it really makes sense to set up phase 1 in a position that the

1 claimants know everything they need, or can demonstrate what they need to  
2 go to then settle if they can with the defendants.

3 On the permanent injunction, we can see that if it is just going to add half a day and  
4 that wants to be included in phase 1, that is up to the Tribunal how you  
5 manage that. We are not just keeping this on as a leverage. We are actually  
6 just trying to manage this litigation so that we do not burn up much needed  
7 litigation cost on abstract legal arguments. That is why we are resisting it  
8 because, as we have explained in the witness evidence of Mrs Dutton, we  
9 have got a very carefully structured legal budget and even just for the  
10 claimant's own legal costs we are managing on the CFA basis with deferred  
11 and contingency fees. We have agreed a very set monthly payment schedule  
12 to manage this litigation and we do not want to burn up the oxygen of the  
13 litigation on issues that are really academic and do not have practical utility,  
14 being divorced from the evidence on quantum. And that is why we felt it sat  
15 more properly with phase 2 than phase 1.

16 THE CHAIR: Thank you. (Pause).

17 MS HOWARD: Sorry, I have just received instructions from my instructing solicitor,  
18 just to make the point about the permanent injunction. Obviously we see the  
19 refusal to supply here as an inherent part of the RPM in that it was a sanction  
20 for the claimant's refusal to comply with the MRPs in the VAPs and also for its  
21 ... it actually complied with the VAPs in the US but it refused to comply with  
22 them in the UK and the EU because it said that would be a breach of UK and  
23 EU competition law. So really that refusal to supply, we say, is as much  
24 a part of the infringement and so, although the defendant may present  
25 arguments to say, "We are not dominant, we are not under any obligation to  
26 supply," we say the Tribunal is duty bound to correct the refusal to supply and



1 that is where the remedy for a permanent injunction comes in. Because it has  
2 to make sure that there is effective relief. So there will be arguments on this  
3 and it is up to you whether you include that as phase 1 or phase 2, but it is  
4 very much part and parcel of the refusals to supply.

5 THE CHAIR: Yes, I understand. Now, unless we have got anything else on where  
6 the split will lie, I am conscious we have been going for 55 minutes. We could  
7 take a ten-minute break now and we could consider that and come back and  
8 let you have our view on that point before we move on to the next issue.

9 MR ROBERTSON: I think from our point of view that would work well and also the  
10 next issue is fast track procedure and on that it is Mr O'Regan who is going to  
11 be addressing the Tribunal, not me. He is a veteran of one FTP case and I  
12 am a complete novice.

13 THE CHAIR: I am sure you would do it admirably, Mr Robertson, but I look forward  
14 to hearing from him. So I think we will rise for ten minutes until 25 to.

15 (11.26)

16 (A short adjournment)

17 (11.37)

### 18 **Ruling on split trial application**

19 THE CHAIR: We have before us an issue as to whether or not we should make an  
20 order for a split trial in this case, with liability being determined in phase 1 and  
21 quantum being determined in phase 2. The parties are agreed that some  
22 form of split trial is appropriate along those lines, phase 1 to deal with issues  
23 of liability: phase 2 dealing with quantum. The issue is as to what exactly is to  
24 be included in phase 1. The Claimant says that the phase 1 trial should  
25 include issues of causation, in the sense of theory of harm as opposed to  
26 causation of loss, and the Defendant says it should not include those issues.

1 The Defendant on the other hand says that phase 1 should include issues  
2 arising in relation to whether or not a permanent injunction can be granted  
3 and the Claimant is opposed to that. On those two points we think it is  
4 appropriate for causation, in the sense of the theory of harm, to be included in  
5 phase 1. We consider that whether or not the infringement is capable of  
6 causing sufficient harm to the market is an integral part of our decision-  
7 making which will be required at the hearing of phase 1 on the question of  
8 liability, so we will order that causation and theory of harm form part of phase  
9 1.

10 As regards the permanent injunction, we also think that this should be  
11 included. We think this issue requires determination at an early stage and it  
12 will determine to some degree the evidence and certainly the expert evidence  
13 required for the phase 2 hearing and frame the issues to be determined at  
14 that hearing on quantum. We would also order that phase 1 include the issue  
15 of whether or not a permanent injunction is a form of relief that the tribunal  
16 should award. That should be included in phase 1 also. We don't think that  
17 would add significantly to the time that would be required for the hearing of  
18 phase 1. That is our decision on that point. So, Ms Howard, where do we go  
19 from here?

20 MS HOWARD: I think we now move into the fast-track, our application for the fast-  
21 track procedure. You will see we made the application for the fast-track on 17  
22 December at the same time as our issue of the claim form. That is included at  
23 tab 6 of the CMC bundle, and the defendant replied on 4 February. Their  
24 reply is at tab 7 of the bundle, and in support of that application, the cost  
25 capping order, we have also submitted the evidence of Ms Sheppard and Mrs  
26 Dutton. The issues between the parties are the claimant considers that both

1 phase 1 and phase 2 should separately be subject to the fast-track procedure  
2 whereas the defendant opposes the fast-track procedure, but in the  
3 alternative the claimant says that if the Tribunal is not minded to allow this  
4 claim on a fast-track it should in any event exercise its case management  
5 powers in a robust manner under Rule 53 and Rule 4 of the rules to ensure  
6 that the case is pursued expeditiously.

7 What I wanted to do was to take you through the criteria that had been set out in  
8 Rule 58 and the relevant case law in support of our position that this case is a  
9 case for the fast-track procedure. We have presented evidence in Mrs  
10 Dutton's statement that shows there is extreme public interest in this case  
11 because the CMA has already issued a warning letter, firstly a general one to  
12 the retail sector in 2016, that is set out at paragraph 5 of Ms Sheppard's  
13 witness statement at paragraph 5, but also a specific warning letter in 2018 in  
14 the Women's Underwear Sector about RPM practices, and yet those RPM  
15 practices are continuing. You will note paragraph 18 of Mrs Dutton's  
16 statement, in the confidential version of that statement, you might just want to  
17 have a look at that if you have not had a chance to read that statement. Her  
18 statement is in the confidential bundle, it is at tab 1 of the bundle, and it is  
19 paragraph 18. I am not going to read it out for obvious reasons.

20 THE CHAIR: We have it. It is tab 2.

21 MS HOWARD: It is page A24 of that bundle, tab 2. You will see from paragraph 18  
22 the references that we have had to other suppliers attempting to enforce RPM  
23 – that bit is not confidential. We submit that this is an important issue not just  
24 for the parties to this dispute but also the wider interest in the industry as a  
25 whole. That is also picked up in Ms Sheppard's witness statement. That  
26 point is not confidential.

1 THE CHAIR: Page 41 in our bundle.

2 MS HOWARD: Thank you. I just want to check this point is not confidential.

3 MR ROBERTSON: Nothing in that witness statement is confidential.

4 MS HOWARD: She refers to it in paragraph 30 of her witness statement, at F10 she  
5 says, "RPM requests from suppliers have been getting more and more  
6 frequent and it is more difficult for a small business retailer such as the  
7 claimant to manage its business operations without losing significant  
8 suppliers. Unless and until a major public enforcement of the consequences  
9 of engaging in such illegal RPM is made in this market, such as a court finding  
10 a breach with financial consequences, there is no reason that this situation  
11 will change since there are no consequences for such illegal behaviour other  
12 than damage to the retailer who has refused to breach competition law and  
13 has therefore lost suppliers as a result". We say at the outset there is a very  
14 important issue, firstly in terms of urgency for the claimant to be able to get its  
15 business back on track, and retain its suppliers and customers, but also a  
16 very strong public interest to ensure that effective enforcement is resolved  
17 quickly.

18 According to the criteria in Rule 58 we have provided evidence that the claimant is a  
19 small enterprise. It has 24 employees and a turnover of approximately £3  
20 million. You will see that in Mrs Dutton's witness statement at paragraph 2.  
21 There is considerable disparity between the parties in terms of size and  
22 resource. The defendants are a large multinational corporation whereas the  
23 claimant is a family run business.

24 There is a paramount element of urgency here. This is a situation where there is  
25 ongoing damage to the claimant's business, its internet rankings and its  
26 competitive market position and that is a direct result of the refusals to supply

1 but also the discrimination which we say the claimant has suffered when its  
2 direct retail rivals in the UK have not. We have explained, and it is set out in  
3 the witness statement of Mrs Dutton, that the claimant was unable to apply for  
4 injunctive relief in 2019 because it had to concentrate on its survival, and now  
5 there have been further refusals to supply since then, culminating in  
6 September 2021, which have presented an iterative situation of attrition where  
7 the claimant is battling to rebuild its business, expand its brands and maintain  
8 its cash flow to pursue this litigation. Put simply, the longer this litigation takes  
9 and the more its cash flow is exhausted on legal arguments the greater the  
10 chance that it will not actually get any result at the end.

11 Turning to the complexity of the issues: the defendants have made a lot of  
12 arguments about the complexity of the issues, the number of allegations that  
13 have been raised, but the facts are not complex, they raise object  
14 infringements which have been well rehearsed in competition law, certainly in  
15 the UK, for over 20 years and within the EU for over 40 years. You will see  
16 the witness statement of Ms Sheppard where she explains that in her 25  
17 years of legal practice you can recognise RPM when you see it and this is  
18 what she calls the A, B, C of competition law, so where there are direct RPM  
19 instructions in emails from a supplier to a retailer that is an RPM established  
20 early in this Tribunal's jurisprudence in replica kits and Argos, Littlewoods,  
21 back in 2003. The evidence will be required to establish that will be largely  
22 focused on the emails between the parties, the communications between the  
23 witnesses.

24 Then we have the indirect RPMs about complaints from other retailers, from other  
25 retailers who are complaining about the claimant's discounting and the action  
26 taken by the defendant to get the claimant to stop the claimant pricing and

1 discounting below their RRPs and MRPs. Again, we say that this will be a  
2 matter for largely email documents, and we would admit there are examples  
3 where the claimant has also explained, pointed out other retailers who were  
4 discounting and asked the defendant to do something about this, so there was  
5 a horizontal element to this.

6 The third aspect of the MRPs and the online platform ban: again those are written  
7 explicitly into the terms of the VAPs which have already been disclosed, the  
8 balances(?) to the defence, and so largely this will be a matter of legal  
9 construction of those terms but also an analysis of the way in which they have  
10 been applied and enforced by the defendants and we say have been applied  
11 directly in the UK in relation to sales of the defendants' products on  
12 eBay.co.uk.

13 There will then be issues about whether those restrictive sales to customers outside  
14 the UK, but that case law has been recently examined by the Tribunal and the  
15 Court of Appeal in the Ping litigation, so the principles there are well  
16 established. There is also relevant EU jurisprudence in Pierre Fabre and Coty  
17 that deal with those issues as well.

18 The last issue is the treatment of a refusal to supply under competition law where  
19 that is being used as a penalty or sanction to penalise the claimant in this  
20 case because it did not observe RPM and it refused to extend the VAP  
21 provisions to the sales in the UK.

22 Lastly, there will be the issue of discrimination of charted application of the VAPs  
23 against the claimants and we have disclosed already screenshots of the  
24 claimant's rivals that were selling on eBay during the relevant period, both in  
25 the US and in the UK, and were discounting and selling at prices below the  
26 MRPs during that period yet the defendant did not take action against them.

1 We say, yes, there are a number of elements of this overall infringement that we  
2 have identified but most of the legal analysis is well established in both the  
3 vertical block exemption, the commission's guidance and the case law. It  
4 really comes down to an issue of practicality of how this case should be  
5 managed for the Tribunal and to make maximum and effective use of the  
6 Tribunal's resources, as well as the legal costs of this litigation.

7 My learned friend relies on Breasley case which was a follow on cartel damages  
8 case against one of the PU Foam cartelists brought by ten different retailers,  
9 and we say that that case where the fast-track procedure was refused is not  
10 on point. That is a very different case, firstly because there were multiple  
11 parties that could not be packaged into a mini series of claims under the fast-  
12 track procedure, but also the issues were very, very complex, including joint  
13 and several liability, over-charge, run-off periods, umbrella damages and pass  
14 on, and those issues do not arise in this case. We are not dealing with a large  
15 international cartel. We are just dealing with conduct between two parties in a  
16 vertical relationship and the horizontal elements within the distribution  
17 network.

18 In practical terms we consider that this hearing can be run in a period of three to four  
19 days for the phase 1 liability trial, and that would be on the basis that there are  
20 openings of one day. We have one day of fact or witnesses, and I think we  
21 have two witnesses for the claimant, who are sitting behind me, but it is  
22 probably going to be Mrs Dutton who is the principal witness, she is a director  
23 of the business. The defendants have said they will have four witnesses of  
24 fact, or is it six?

25 MR ROBERTSON: It is up to six.

26 MS HOWARD: Up to six, but I don't anticipate that all of those will be called for

1 cross-examination. Certainly at the moment there are two names there that  
2 we don't recognise from the documents at least, although the claimant may  
3 have ... So it may be that not all of them are called for cross-examination.

4 We have made provision for an industry expert but only if that is considered  
5 necessary and appropriate. There is one factual element that is in dispute  
6 between the parties, which is how eBay worked because the claimants' case  
7 is that when you make a listing of a product on eBay.co.uk it is then relayed  
8 through to the US and it is not possible to change the price of the listing for  
9 different jurisdictions, for different territories, so the price that you put a  
10 product on and list it at in the UK is then shown in the US or in any other  
11 territories around the world. We have called it an industry expert, which is a  
12 rather glorified term. It may just be a statement from eBay explaining how the  
13 listing process works and we may not need an involved process for reply  
14 evidence or meetings of experts or anything like that. We want to try and  
15 keep that process as proportionate as we can. We would envisage that that  
16 aspect is probably going to be dealt with on the papers rather than having an  
17 industry expert being called.

18 Again, Ms Sheppard has made clear in her witness statement that we regard that  
19 there will be limited economic expert evidence at phase 1 and that is because  
20 we are dealing with object infringements both in terms of RPM and in terms of  
21 online sales restrictions that restrict passive sales and so the economic  
22 evidence that we foresee will just be limited to the theory of harm which is an  
23 abstract concept of whether it is capable of producing harm rather than a full  
24 effect analysis.

25 The issue of "market definition" I think will be relatively straightforward and made  
26 basically on common sense. We don't see that there is going to be a whole



1 day of expert analysis.

2 Whether the defendants intend to load up with expert – that is a matter for them but  
3 obviously that is a question of proportionality and necessity.

4 We anticipate that it is possible to do this hearing in three to four days and that is on  
5 the basis of openings of one day shared half a day for each party, one day of  
6 factual witnesses, half a day maximum for experts, possibly using a hot-tub if  
7 necessary, and then one day of closing arguments with some time for  
8 questions for the Tribunal. Even now we are adding on the issue of the  
9 permanent injunction we don't see that that will materially extend that  
10 timetable and should not be used to deprive this case of the fast-track  
11 procedure.

12 THE CHAIR: As I understand it, the factual witnesses, I think it has always been  
13 accepted that it is going to be two from you and four from the defendants.  
14 They now say it may be up to six but I think you have acknowledged it is  
15 probably four?

16 MS HOWARD: I think it is just because there are different names on the email  
17 communications but it may be that there are overlaps between them and you  
18 don't need to call all of them, but we haven't seen the witness statements at  
19 this point, but certainly I think it is Ms Lythgoe and Ms Beech – and they  
20 feature heavily in the documents, as does the sales director Mr Cooper.

21 THE CHAIR: Six factual witnesses in one day is quite a tall order.

22 MS HOWARD: I think on the assessment we have there is still half a day run-over  
23 we've allowed for either questions or cross-examination. At the moment we  
24 don't anticipate that there is any need for expert evidence, or not much at all,  
25 on dealing with the theory of harm. That is probably more a written process.

26 THE CHAIR: You mention your case is principally an object case. Did I misread it,

1 that you also put it on an effects basis?

2 MS HOWARD: I will just take instructions. (PAUSE)

3 THE CHAIR: It is paragraph 71 of your claim form so B22.

4 MS HOWARD: I think our primary position is this is an object case, whether you are  
5 looking at the RPM, whether you are looking at the MRPs, the platform ban or  
6 the sales restrictions, but I think we put an alternative back-up – we obviously  
7 don't know what the defendants are going to argue as well and we may have  
8 to respond if they want to come in with a detailed effects case but, yes, we  
9 have presented it as an alternative but our primary case is that this is object  
10 infringement and that should be enough to establish liability.

11 THE CHAIR: If we do have to go on and consider the effects analysis, wouldn't that  
12 add to the timetable you have just outlined?

13 MS HOWARD: I think that probably would because the experts would then need to  
14 opine on the case factual of what would the situation be in the absence of the  
15 infringement to show what the effects would be.

16 THE CHAIR: If you go to B24, paragraph 78, the heading there is "Anti competitive  
17 object or effects" and I confess I did read that you were running a case on  
18 both aspects.

19 MR O'REGAN: Madam, where are you looking?

20 THE CHAIR: Paragraph 78, B24.

21 MS HOWARD: I think we are putting it on an alternative aspect but our primary  
22 focus is going to be on the object infringement. The Tribunal has recognised  
23 that the limits of the fast-track procedure are not hard and fast and it is  
24 possible to award the fast track procedure even if the hearing is going to  
25 exceed the number of days in the Tribunal's rules. I think you come down to a  
26 philosophical question almost of "is the fast-track procedure open to this type

1 of case?" We submit that it has to be because otherwise these cases simply  
2 aren't capable of being prosecuted through the FTP model and I refer that to  
3 the Penrose Report I took the panel to earlier. Now, if the Tribunal is saying  
4 the fast-track procedure is meant for a very short hearing of two to three days  
5 and it is primarily aimed at injunctions, that's all well and good but as we know  
6 there are very, very few cases for injunctions in this country compared to  
7 other jurisdictions where they are the primary redress and you have to  
8 question why that is the case. How is the Tribunal going to make the fast-  
9 track procedure effective in terms of delivering effective access to relief and  
10 fast and appropriate remedies?

11 THE CHAIR: Yes.

12 MS HOWARD: Otherwise it will just become a fig leaf.

13 THE CHAIR: Yes, I have your point on that, why you think this is an absolute  
14 paradigm case for it. I am just trying to get a handle on the time estimates for  
15 the hearing itself.

16 MS HOWARD: Whether it is four days or five days, six days, I don't understand that  
17 there is a formal guillotine point at which it is incapable of being managed  
18 through the fast-track procedure.

19 If I may move on to disclosure.

20 THE CHAIR: Yes.

21 MS HOWARD: The claimant has already provided the majority of its disclosure, as  
22 Ms Sheppard has explained at paragraph 16 of her witness statement. We  
23 have disclosed examples of emails where the defendant is clearly making  
24 RPM requests as well as, as I said, screenshots of discriminatory treatment of  
25 other retailers.

26 The defendant will need to provide their disclosure and the timetable will obviously

1 need to cater for that, but the defendant has been on notice of these issues  
2 and the allegations of it being an infringement of competition law since 2018.  
3 This was raised by the claimant through its solicitors in correspondence in  
4 2018, although they didn't make a formal threat of litigation in the sense of a  
5 Pre-Action Protocol letter, they made it very clear that they were reserving  
6 their rights to contest the application of enforcement of the VAPs, and so the  
7 defendant should have preserved that documentation and had that ready.  
8 What is more, they were put on intended notice of this claim in the Letter  
9 Before Action in July 2021, so nearly eight months ago, and again at the  
10 beginning of December just shortly before issue, so they have had a relatively  
11 long period of time of notice of this claim and should not have any difficulty in  
12 gathering that information, which actually relates to a very short relevant  
13 period, because we have got the historic dealings of retail price maintenance  
14 but we are only claiming about RPM from 2016 onwards to be within the  
15 limitation period. The crux of the claim is really about the application of the  
16 VAPs from 2018 to 2021, so it is a relatively short period for disclosure. They  
17 have already identified their relevant witnesses and custodians so they should  
18 be able to locate that information.

19 We have, in Ms Sheppard's witness statement, identified the categories of disclosure  
20 that she considers will be necessary from the defendants - she has set that  
21 out at paragraphs 8 to 17 - and she has also suggested pragmatic  
22 approaches to limit disclosure by categories and to limit the extent of expert  
23 analysis that is necessary. And I do not know whether you would like to-

24 THE CHAIR: Yes, turn that up.

25 MS HOWARD: So that is at tab 41. (Pause) I should add of course that the  
26 defendants have made a number of important admissions in their defence

1 which we set out at the beginning of our reply, so they have admitted that the  
2 VAPs were applied and contain the MRP provisions and the platform ban, but  
3 their main contention is that that application was confined to the US and  
4 Canada. So the real issue is whether in practice the defendant extended the  
5 application of those practices extraterritorially and applied them to sales of the  
6 defendants' products in the UK and the EU.

7 THE CHAIR: Yes.

8 MS HOWARD: So we submit that there are ways in which the disclosure in this case  
9 can be contained and can be pursued in an effective and efficient manner  
10 which would enable the trial to be brought on either at the end of July, as you  
11 will see through our suggested directions, or shortly thereafter so that it can  
12 be resolved by the end of 2022, certainly on phase one liability.

13 But if the Tribunal is not with me on the application of the fast track procedure,  
14 regardless of the precise badge that these proceedings are labelled with we  
15 submit that, as happened in the Rest & Play case in which I appeared on  
16 behalf of the defendants, it is possible for the parties to construct a timetable  
17 to trial that achieves a very similar outcome in terms of timing and cost simply  
18 by using the Tribunal's case management powers under Rule 53 and Rule 4  
19 to ensure that these proceedings are dealt with expeditiously and in a  
20 proportionate manner.

21 THE CHAIR: Yes.

22 MS HOWARD: I think the main difference for us is that obviously under the fast  
23 track procedure there is a right to a cost capping order and cost management  
24 as a right.

25 THE CHAIR: Yes.

26 MS HOWARD: We would not want to have an expedited timetable without some

1 protection for the claimant on costs, on adverse costs.

2 THE CHAIR: Yes, I understand that.

3 MS HOWARD: For us that is the main advantage of the fast track procedure. I was  
4 going to deal with costs separately; I do not know whether you want to hear  
5 from my learned friend first on fast track before we deal with the issue of  
6 costs?

7 THE CHAIR: Yes. Can we just go to the draft order and can you just give me an  
8 idea of the dates you had in mind for the various steps?

9 MS HOWARD: Yes. We have left asterisks primarily because we did not know what  
10 the Tribunal's resources are and exactly how that work, but obviously we were  
11 thinking that the parties would be able to file disclosure reports at the  
12 beginning of April and a list of categories of documents probably 14 days  
13 thereafter, and then for disclosure to be given at the end of April so that most  
14 of the disclosure could be underway, an inspection could be underway  
15 through April ...

16 THE CHAIR: Yes.

17 MS HOWARD: ... and then the parties would probably have a period towards the  
18 end of May to file their witness statements, with reply witness statements in  
19 June. But there is no reason why the factual evidence could not be run in  
20 conjunction with any statements from the industry experts and certainly with  
21 preparation of any expert evidence. So we were considering that if the main  
22 factual witness statements are provided at the end of May that would give the  
23 experts sufficient input to be able to put their reports on economics in June,  
24 shortly after the reply statements from the witnesses so that they can be taken  
25 into account. The industry expert reports probably can be dealt with  
26 separately from the factual witness evidence; I do not think the two are

1 interlinked, so that can be done in parallel. That is why we put a date for May  
2 for that process.

3 THE CHAIR: Yes.

4 MS HOWARD: So it can be done in tandem with the factual evidence.

5 THE CHAIR: Yes.

6 MS HOWARD: Because we are just dealing with issues of liability and not quantum,  
7 we envisage that the expert's reports should be fairly constrained, being  
8 mainly on, as you will have seen, the provision that we set out in paragraph  
9 28. They are largely confined to market definition, the theory of harm and  
10 then the defendants have asked for an assessment of the effects on  
11 competition in the United Kingdom.

12 THE CHAIR: Do you object to that, or ...?

13 MS HOWARD: We objected to it because we saw the case as being an object case  
14 and we did not want the whole claim to be bogged down with expert analysis,  
15 but with your questioning earlier, Madam, I think we had to concede that we  
16 have put the case on the alternative effects and there will be - there are two  
17 questions on effects and I think it is important to segregate them. Firstly is  
18 what I would call what seems to be a qualified effects analysis here, in little 3 -  
19 and the defendants will correct me. Their claim is that all this conduct took  
20 place in the US and so what they are saying is: was there a qualified effect of  
21 this conduct in the US that then overflowed and applied in the UK market, and  
22 the kind of intel qualified effects doctrine. That is my understanding of it and I  
23 will be corrected if I am wrong on that.

24 We say that is irrelevant because this conduct applied directly in the UK, it applied to  
25 the claimant's sales of the defendants' products here on the ebay.co.uk site.  
26 Most importantly, it applied after the claimant had deactivated all of the relay

1 to the ebay.com site, so it was not marketing, it was not advertising, it was not  
2 shipping its products to the US at all. The policies were biting on the sales of  
3 the defendants' products here in the UK and the EU. So we say there was a  
4 direct implementation of the policies here in the UK.

5 THE CHAIR: Yes.

6 MS HOWARD: So you have got the qualified effects doctrine on one side. The  
7 other side is what were the anticompetitive effects of this conduct in the UK?

8 THE CHAIR: Yes.

9 MS HOWARD: You have had my submissions on that, that this is primarily an object  
10 case that we concede in the alternative we have said that if you are not with  
11 us that this is an object case - we cannot possibly see how that can be the  
12 case - we would want to reserve position to explain the effects of it. But we  
13 think that could be done in a fairly limited manner.

14 THE CHAIR: I think the problem I have with that, if you reserve your position on the  
15 effects case it is quite difficult for the defendants to know what evidence they  
16 are going to need to adduce on it.

17 MS HOWARD: We can probably set that out through the series of the expert  
18 reports, because at the moment we are planning to have simultaneous expert  
19 reports. Now, if the defendants are worried about this we could go for  
20 sequential expert reports so they can see our case and respond to it, but in  
21 terms of effects analysis obviously the counterfactual will be: what was the  
22 situation in the absence of these measures?

23 THE CHAIR: Yes.

24 MS HOWARD: We know what the position was in 2017 before the introduction of  
25 the VAP where the defendant commended the claimant for being one of its  
26 top sellers and was extremely successful, and then its position rapidly



1 deteriorated thereafter. So there is no magic in the effects analysis, we  
2 submit; it can be dealt with in a straightforward pragmatic sense by the  
3 experts.

4 THE CHAIR: Then if we look at the economic experts, I hear what you say about, I  
5 think you say no meeting and no joint report is necessary on the industry  
6 expert - that is paragraph 27 of the draft order.

7 MS HOWARD: We just think that is gold plating it a little because probably this is  
8 going to be a statement from eBay, we are not going to have somebody that  
9 is opining on this in the same way as an economist.

10 THE CHAIR: Then have the parties given any thought to having a single expert?

11 MS HOWARD: I do not think that will work on the expert analysis. I have not  
12 discussed that with my learned friend.

13 THE CHAIR: On the industry experts.

14 MR O'REGAN: We have not given any thought. I agree that it is not something,  
15 Madam, that is suitable in this case.

16 THE CHAIR: Right.

17 MR O'REGAN: The claimant needs to prove its case; it is as simple as that.

18 THE CHAIR: Then on the economic experts, I think there is going to need to be a  
19 meeting there and a joint report. Is that right?

20 MS HOWARD: Yes.

21 THE CHAIR: So for your dates at paragraph 31 ...

22 MS HOWARD: Again we were envisaging that would take place towards the end of  
23 June into July but before the hearing.

24 THE CHAIR: Looking at the dates you have got, and I do not want to put you on the  
25 spot but we are trying to get a handle on how both the timetable at trial and  
26 the timetable to trial take shape to see whether or not the fast track

1 application is useful.

2 MS HOWARD: We were thinking that --

3 THE CHAIR: Or desirable.

4 MS HOWARD: ... obviously the witnesses of fact would be served and exchanged  
5 at the end of May. We would then have a short period for reply statement of  
6 fact at the beginning of June, which should be 10 to 14 days thereafter, so  
7 those reply statements can then be taken into account by the experts, but  
8 most of the bulk of the work in preparing the expert reports should have been  
9 done already while the factual witness statements are being prepared. We  
10 are already well advanced in our expert analysis and so we would be able to  
11 turn that evidence around quite quickly after the reply statements of fact, into  
12 sort of mid-June is what we were thinking.

13 THE CHAIR: So mid-June is paragraph 29.

14 MS HOWARD: Yes.

15 THE CHAIR: Then a little bit later, end of June, do you say, for paragraph 30, for  
16 ...?

17 MS HOWARD: I was thinking again about 10 days probably, because it is not going  
18 to be detailed quantum analysis, this is just ...

19 THE CHAIR: Then does that mean that in paragraph 31, the meeting - I am just  
20 trying to get a handle on it.

21 MS HOWARD: So that would be the end of June for the meeting.

22 THE CHAIR: Then July for the joint report, is it?

23 MS HOWARD: We were thinking that probably the meeting, they could turn that  
24 around - and I have certainly done this in the Rest & Play litigation, they had  
25 the joint meeting on the Monday and the joint report on the Friday, they had  
26 done it during the same week. Because again we are not dealing with loads

1 of quantum analysis.

2 THE CHAIR: Right, thank you. Just to see how you see that stage panning out.

3 Thank you.

4 MS HOWARD: Obviously most of the preparation of the trial bundles will be created  
5 leaving slots as necessary for the joint statement of the experts, so that could  
6 be done during the course of June, not necessarily after. You do not need to  
7 delay, we could just fill the experts' replies, statements and joint statement  
8 into the bundles. We do not consider that a pretrial review is going to be that  
9 necessary, so that is why in 35 - but we have left it in as if required, just in  
10 case there is something that crops up, but we do not think that is going to be  
11 necessary. Then we envisage that the phase one hearing would take place at  
12 the end of July.

13 THE CHAIR: You say the end of July, and I am not putting you on the spot on this,  
14 at the moment it says on or after 18th. Do you think realistically it --

15 MS HOWARD: I do not know what the Tribunal's availability, but I was thinking the  
16 last week of July.

17 THE CHAIR: Before the vacation?

18 MS HOWARD: Before the vacation.

19 THE CHAIR: Thank you.

20 MS HOWARD: I think that is the week commencing 25 July.

21 THE CHAIR: Yes. Yes, thank you. Is there anything else you want to address us  
22 on on the fast track application?

23 MS HOWARD: No, I think I can sit down and ...

24 THE CHAIR: Let Mr O'Regan have his say.

25 MS HOWARD: ... Mr O'Regan have his say. Thank you.

26 MR O'REGAN: I am grateful, Madam. Looking at the time, I will endeavour to be

1 completed by one o'clock but if it runs a few minutes on then I think it might be  
2 appropriate to continue and then you can consider your ruling over lunch.

3 THE CHAIR: Thank you.

4 MR O'REGAN: I think the first point has simply been discussed with my learned  
5 friend at some depth, timetables to trial, the first point is first of all to consider  
6 whether or not this case is suitable for allocation to the fast track. If it is, then  
7 we have to be heard within six months and we will obviously - both parties will  
8 need to comply with whatever timetable the Tribunal considers is appropriate.  
9 But the defendants' clear position, Madam, is that this case is simply not  
10 suitable for the fast track at all. If one takes a step back the only factor in  
11 Rule 58(3) that is satisfied is that the claimant is an SME. Our case is very  
12 clearly when you look carefully that none of the other factors at all are  
13 considered and are satisfied.

14 I propose to break my submissions into three parts, Madam: first of all some general  
15 observations on the applicability of the fast track as my learned friend has  
16 addressed you on, inter alia the Penrose Report; secondly, to explain why  
17 none of the factors for the application of the fast track are met; and then to  
18 focus particularly on a few of what we think the key points are that take this  
19 case outside of the fast track, that is the complexity, particularly of the legal  
20 issues that this case raises, but also obviously there are a lot of factual issues  
21 in dispute which take time to be resolved, and secondly the lack of urgency in  
22 this case - it is not a factor that is set out in Rule 58(3) but it is something that  
23 the Tribunal needs to take into account and we accept that.

24 In terms of the general observations on the applicability and use of the fast track,  
25 Madam, my learned friend refers in her skeleton at paragraph 26 to what she  
26 calls the policy behind the FTP and we agree that the policy objectives behind

1           it are to assist SMEs in resolving competition disputes. But the key factor is  
2           that it must be an appropriate case. Roth J has made that clear, both in his  
3           judgments in Socrates - I do not know if I need to take you to that, Madam ...

4 THE CHAIR: No.

5 MR O'REGAN: ... at paragraph 3, and again in Breasley the President, Roth J,  
6           made clear that it needs to be a clear-cut candidate for the application of the  
7           FTP. In our submission this case is clearly not a clear-cut candidate and it is  
8           certainly not, as my learned friend has put it this morning and in her skeleton,  
9           a paradigm case. A paradigm case most simply is one that meets all the  
10          criteria for allocation, and this case clearly does not, it is a long way from  
11          being a paradigm.

12 Even if the claimant is, and it is accepted that it is a small business, it is clearly an  
13          SME, and even if on its case that it has limited resources, that does not bring  
14          the case within the FTP. There are clear limits to its suitability. In Breasley at  
15          paragraph 14 Roth J held that simply because the claimant is a small or  
16          medium sized enterprise it does not follow that means that the fast track is  
17          applicable. Indeed, my learned friend has made some reference to the Rest  
18          & Play litigation in which she appeared for the defendant; that case was  
19          brought by a micro-enterprise, it may even have been a one man band, and  
20          the defendant was a small enterprise - that is at paragraph 3 of the judgment -  
21          but the fast track application was refused, albeit that tight case management  
22          was then applied. In the Churchill Gowns case the claimant was a start-up or  
23          at least a new entrant, and there was no application at all for the fast track  
24          because it was clearly not going to be a case that could be dealt with within  
25          three to four days, and indeed it was listed for seven with two more in reserve.  
26          So we consider that whilst the cases are different, the timing involved in this

1 case is likely to be similar to that in Churchill.

2 Addressing briefly my learned friend's references to the Penrose Report, the  
3 Penrose Report first of all was written by Sir John in his personal capacity, an  
4 individual capacity albeit at the invitation of the government. Mrs Walker  
5 earlier this morning, in confirming that she was very familiar with it, said that  
6 she was well aware of his views and his concerns, so the Report very much is  
7 a matter of Sir John Penrose's views and is not government policy.

8 Secondly, my learned friend took you to page 43 of the Report. I do not think we  
9 need to turn it up because my learned friend has taken you through the key  
10 points that Sir John makes in that paragraph about County Competition  
11 Courts. Now, in his view they were to resolve local and regional cases that  
12 were of a tier below existing capped fast track cases, with a hearing of one to  
13 two days maximum, so more equivalent, a sort of competition equivalent to  
14 the IPEC in small value IP disputes. He gives the example which my learned  
15 friend took you to of a small independent retailer. This case does not involve  
16 such a small independent retailer. Indeed, the Parliamentary debate which  
17 my learned friend also took you to, Sir John made very clear that what he was  
18 talking about was small regional claimants such as the restaurant in Bristol,  
19 involving local markets and local disputes. This case is a very long way from  
20 what Sir John Penrose had in mind in both his report and his speech in the  
21 Parliamentary debate. It is not on point at all.

22 This is not a local or regional case, it involves a UK wide market by an online retailer,  
23 which I think has described itself as one of Britain's leading independent  
24 lingerie retailers, online retailers; it has an international element; certainly not  
25 one that would ever be suitable for the County Competition Court. The  
26 claimant on its own case has turnover of at least getting on for three and a

1 half million odd, 25 or so staff. Mrs Dutton's evidence says that they have two  
2 warehouses and they are clearly trading nationally and indeed internationally.  
3 So it is far removed from what Sir John Penrose had in mind, and clearly that  
4 does not add anything in my submission to whether or not this case is suitable  
5 for the fast track.

6 My learned friend also made considerable point that the claimant sees this case as  
7 some kind of test case on behalf of the industry to deal with what is said to be  
8 widespread retail price maintenance in the lingerie sector. Be that as it may,  
9 but this case is not a test case, it is clearly brought by the claimant for its own  
10 interest. It may or may not be of wider interest to the lingerie sector or indeed  
11 the community at large, but that is not a factor that is relevant to whether or  
12 not a case is on the fast track.

13 She referred you to Ms Sheppard's evidence at paragraphs 5 to 7 and again at 29,  
14 30 and 36 of her witness statement. She refers in paragraph 29 to Mrs  
15 Dutton, a director and shareholder of the claimant, as wanting to tackle wider  
16 practices of RPM in the industry, and at 36 she describes the case as an  
17 important one, which is a point that my learned friend made as well. My  
18 learned friend's skeleton, at paragraph 49, refers to this claim serving the  
19 wider public interest by ending endemic RPM practices and artificially high  
20 prices in this industry. The defendants' clear position is that it does not  
21 engage in RPM, but be that as it may, as to what the claimant's motivation is  
22 for bringing this case, it is quite clear that a case which is being brought as  
23 some kind of test case would not be suitable for the fast track, which needs to  
24 be very tightly controlled.

25 So that is my observations, Madam, submissions more generally on the application  
26 of the fast track.

1 Turning now to the specific factors that the Tribunal needs to take into account in  
2 Rule 58(3), clearly the claimant is an SME but that is not in our submission  
3 determinative.

4 Ms Sheppard in her witness statement said this case could be dealt with in three to  
5 four days. My learned friend seemed to suggest it could well be longer than  
6 that, but clearly three days is not the absolute maximum, but it is unlikely that  
7 a case in our submission that goes beyond four days is going to be suitable  
8 for the fast track, and that is a consistent approach the Tribunal has taken in  
9 earlier cases. I can take you to those if that would be of assistance but I think  
10 the point is fairly clear. There needs to be a cut-off point at some point. My  
11 learned friend said you have five days, six days, but where does one stop? It  
12 is quite clear in our submission that a case needs to be one that can be tightly  
13 managed in three to four days. This is not such a case. It is complex, it is  
14 standalone. It raises numerous legal issues, which I will come to in a  
15 moment.

16 There was some discussion with my learned friend as to witnesses. There are going  
17 to be eight witnesses of fact. Obviously they will probably - the duration of  
18 each of their evidence will be different but at the present time one needs to  
19 assume that each of those witnesses will be cross-examined. It may well be  
20 that some of the evidence may be brief or simply goes unchallenged, but that  
21 is not something that the Tribunal can determine at the moment. In  
22 determining the likely trial length one needs to assume that each of the  
23 witnesses will be subject to at least some cross-examination. As with the  
24 experts, it is clearly not --

25 THE CHAIR: Just stop you there.

26 MR O'REGAN: Yes, Madam.



1 THE CHAIR: You said up to six witnesses. I think you just indicated, I think, your  
2 view it will now be six witnesses. I am not asking you to nail your colours to  
3 the mast completely but I think that was the thrust of what you were saying.  
4 To what extent is the evidence of those six witnesses going to overlap in  
5 some way?

6 MR O'REGAN: There will be some overlap. Perhaps I will deal with the witness  
7 point now, Madam, in terms of going through who they are and what we  
8 expect they will say. I will say, Madam, the reason we say up to six is that  
9 some of them are no longer employed by the defendants; some of those who  
10 are not employees any more have indicated a willingness to give evidence,  
11 others my instructions are that that process is still ongoing, hence that is why  
12 it is up to six.

13 THE CHAIR: No, I understand.

14 MR O'REGAN: In terms of who the witnesses are, Madam, this is in our skeleton at  
15 paragraph 9(b). Some will give evidence as to what is alleged to have taken  
16 place between 2012 and 2017 in relation to what my learned friend called  
17 direct or indirect attempts to influence prices in relation to UK sales. So it is  
18 probably up to five witnesses will have been alleged by the claimant to be  
19 involved in that process at one time or another.

20 Then the key thrust of the claimant's case as put to us this morning by my learned  
21 friend is in relation to the VAPs, the value added policies, and how they were  
22 applied by the defendants from 2018 onwards, and probably between three  
23 and four of those six will address that issue. So that is five of the witnesses  
24 will be involved in either what might be called domestic RPM or the VAPs.

25 There is also the issue of cessation of supply. So two of those five witnesses were  
26 involved in some detail in that issue. Then the sixth witness, who is Mr

1 Waylett, who is the Finance Director of the First Defendant, it is the  
2 defendants' case that the cessations of supply were not taken as matters to  
3 punish the claimant or to retaliate against it but were taken for legitimate  
4 business reasons. Each of those decisions was taken by the board of the  
5 First Defendant. Mr Waylett was a director of the First Defendant at the  
6 relevant times for all three decisions to cease supplying to the claimant,  
7 whether in March or October of 2019 or in September of 2021. So his  
8 evidence will be directed at that point. He is not involved in a day to day  
9 operational sense in dealing with the defendants' customers, so the retailers.  
10 His evidence will be fairly limited to that point, but I think the claimant has put  
11 that particular point in issue so therefore it will need to be addressed, but  
12 evidence from someone who has knowledge of that is Mr Waylett.

13 That is why we end up potentially with up to six factual witnesses, some of whom are  
14 personally accused of engaging in, if it is established, illegal activity, RPM, so  
15 clearly on the documents they will be put to them and they will have to explain  
16 what those documents are. That is why we say it is implausible - the claimant  
17 will have two witnesses. Again, we accept it is likely that Mrs Dutton will be  
18 the principal witness for the claimant and that she has day to day  
19 management of the business.

20 THE CHAIR: So does that - because I asked the same question to Miss Howard -  
21 how long do you think the cross-examination of the witnesses will take then,  
22 the factual witnesses?

23 MR O'REGAN: Somewhere between three and three and a half days, a day and  
24 a half therefore for experts. That is why we come to the five days that we do.  
25 I think it is just implausible that the Tribunal could hear from eight witnesses in  
26 a single day, which is what my learned friend suggested to you earlier. So we

1 must assume at this stage that each will be subject to at least some  
2 cross-examination and that eight witnesses, with an average of, say, two  
3 hours each, that is 16 hours. That is going on for three to three and a half  
4 days of Tribunal time.

5 This case is important and therefore it is clearly a matter for both parties that all  
6 these issues are properly ventilated, that shortcuts are not taken, whether in  
7 factual witness or in expert evidence. And it is simply not appropriate, in our  
8 submission, as my learned friend seeks to suggest, that evidence from eBay  
9 or from a single expert can be taken on the nod or just taken note of by the  
10 Tribunal. Clearly if there is a factual dispute as to what eBay does,  
11 functionality is an issue, that is something the Tribunal needs to determine on  
12 the basis of evidence. It is not something that can be resolved, unless it is  
13 accepted of course, by what eBay says or by what either expert says. That is  
14 a matter that is a live issue for the Tribunal to determine. And at this stage  
15 one must assume that that will require live expert evidence and  
16 cross-examination of those experts, industry experts. That is no way around  
17 that at this stage. And there will be --

18 THE CHAIR: Your clients dispute how eBay works in that sense then, that they  
19 could disable the shipping and various other things that meant that they were  
20 not going to be supplying the US, but nevertheless the advertising is still  
21 visible from the US. Do your clients dispute that?

22 MR O'REGAN: The claimant's case, as I understand it, is that she had no choice but  
23 to set the same price and to show that price to every person using eBay  
24 anywhere in the world, including the United States and Canada. That is not,  
25 our clients, the defendants, do not, the first and second defendants, do not  
26 trade on eBay. So it may or may not be the case that other members of the

1 wider Wacoal group do so, which is what the claimant suggests. That point is  
2 also disputed. It was only raised in the Reply. It was not something we have  
3 been able to plead to yet. But the defendants do not at this stage, it is not  
4 within their direct knowledge because they do not use eBay, as to what the  
5 functionality of eBay was in terms of disabling listings outside of the UK that  
6 are on the ebay.co.uk platform, whether they get relayed in some way onto  
7 ebay.com as international sales visible in the US. That is a point that at this  
8 stage is not accepted by the defendants and is very much one for live  
9 evidence. Indeed the defendants' position is that other parties trading on  
10 eBay had no difficulty in disabling access of their sales to consumers in the  
11 US.

12 THE CHAIR: Yes.

13 MR O'REGAN: So that is an issue that is in dispute between the parties at this  
14 stage.

15 THE CHAIR: Thank you.

16 MR O'REGAN: In terms of experts on economic matters, our case is that economic  
17 expert evidence will be required as to whether or not there is an infringement  
18 at all in this case that falls within the scope of either the Chapter 1 prohibition  
19 or Article 101. It is not clear at this stage whether the claimant's claim  
20 includes breaches of EU or EEA competition law up until the end of 2020, but  
21 clearly the principles involved will be similar as to whether or not the conduct  
22 in question was capable of having an appreciable effect on trade within the  
23 UK or between Member States, whether or not it was capable of having  
24 an appreciable restriction on competition so as to fall within the scope of the  
25 relevant prohibition and, if so, whether that constituted a restriction of  
26 competition, an infringement by object, because we do not accept that the

1 imposition of the VAPs which were not applied by either of the defendants.  
2 They were not the policies of either of the defendants. They were the policies  
3 of US affiliates within the Wacoal group. It is not accepted that those were  
4 applied at all to the claimant's business in the UK.

5 It may be appropriate at that point, Madam, if I was to move on to the complexity.

6 THE CHAIR: Yes.

7 MR O'REGAN: It is linked with why we say expert evidence is required. As  
8 a general observation on complexity, something can be complex because it is  
9 difficult to understand or it is something new or which one is still grappling with  
10 an answer to, which is often the case in competition law, or it is complex  
11 because it consists of many different and connected parts, factual and/or  
12 legal, that need to be resolved. We say that is why this case is complex.

13 The case on liability, as to whether there is infringement at all, is legally complex. I  
14 will submit in a moment there are several new unresolved issues on the  
15 application of the Chapter 1 prohibition to vertical restraints. It is not a case of  
16 simply applying existing case law. This is going to involve, in our submission,  
17 the Tribunal dealing with issues that have not yet been addressed by either  
18 the UK or the EU courts and resolving those will involve expert evidence. As  
19 to factual disputes, there are just lots of points of dispute that will need to be  
20 gone through and that will take time.

21 There are a number of points relating to when RPM or Internet sales bans are  
22 a restriction of competition by object. We do not dispute those. So it is not  
23 disputed that RPM if established on the facts is a restriction of competition by  
24 object; the Tribunal recently has determined that in the Roland judgment. It is  
25 also not disputed that an absolute prohibition on sales on the Internet is  
26 a restriction of competition by object if it has the necessary effect on either

1 trade within the UK or inter-state trade under Article 101. That is clear from  
2 the Court of Justice's judgment in Pierre Fabre and the Court of Appeal  
3 judgment in Ping that my learned friend took you to earlier. Now, those cases  
4 are not on point, in our submission, with the factual circumstances in this  
5 case. Ping in particular concerned an entirely domestic case. It did not  
6 concern sales outside of the UK by a UK based Internet resaler. Golf club  
7 retailers in question who are being restricted, were all based within the UK  
8 looking to sell to golfers who were also in the UK.

9 In relation to platform bans, so prohibitions on selling say on eBay, in our  
10 submission, it is clear that those do not necessarily restrict competition by  
11 effect but may do by object but may do by effect. It is not correct, in our  
12 submission, that a platform ban is either an object restriction of competition in  
13 itself or a hardcore restriction.

14 This case also is not about the circumstances in which a restriction of competition  
15 may constitute an infringement by object. They are well established now in  
16 both the EU case law Budapest Bank, Lundbeck, Generics UK, et cetera, and  
17 indeed by the Tribunal's subsequent application of those in the paroxetine  
18 case, Generics UK, earlier this year. But this case is not about that. It is  
19 about a different set of principles. At its heart this case concerns the  
20 application of the value added policies, the VAPs, by two American  
21 companies in relation to the advertising and sale of products to consumers in  
22 the United States.

23 So the question ultimately for the Tribunal here, which we say does raise a new point  
24 of law, is whether or not a requirement on a UK based retailer, Internet  
25 retailer, such as the claimant, in relation to its sales to consumers in the US,  
26 whether that can infringe the Chapter 1, fall within the scope of the Chapter 1

1 prohibition at all and, if so, whether it is a restriction of competition by object.  
2 The claimant very clearly says this it is. We disagree, but the point for present  
3 purposes is that that is not a point that has been determined in the case law  
4 so far. It is certainly not a restriction on passive sales, as the claimant puts it,  
5 from the UK to the US. It is certainly not something that, in our submission, is  
6 within the scope of the Vertical Restraints Block Exemption Regulation, which  
7 is to do with removing territorial restrictions on trade within the EU, and  
8 obviously under the retained exemption within the UK. Those policies do not  
9 apply to sales to customers within the UK or within the EU.

10 So the questions of law, in our submission, that are novel and complex in this case,  
11 are the following. The first is whether or not a brand owner such as the  
12 defendants can lawfully prevent a UK based Internet retailer, such as the  
13 claimant, from advertising and selling to customers in the US and Canada,  
14 where the same rules on retail price maintenance do not apply, which is why  
15 the VAPs have been implemented by the US subsidiaries within the Wacoal  
16 group and indeed by a broad range of US retailers and brand owners.

17 So, first of all, can a UK retailer be restrained from advertising to such customers at  
18 a price below the manufacturer's retail price for the US and Canada, not the  
19 UK RRP but the Canadian or US one. Secondly, can they be restricted on  
20 an Internet platform? So is this within the scope of a Chapter 1 prohibition at  
21 all? And secondly, if so, does it constitute a restriction of competition by  
22 object? There is no case law at all, in our submission, on whether restricting  
23 export sales from the UK in this way can affect trade within the UK or trade  
24 between Member States or have an appreciable effect on competition. Those  
25 are matters the Tribunal will, in our submission, need to consider in this case.  
26 So, is there an appreciable effect on trade within the UK? By its very nature

1 does the imposition of the VAPs show a sufficient degree of harm to  
2 competition within the UK or the EU? Thirdly, if it does not do so by object  
3 can it nevertheless have appreciable effect? And if so, in what  
4 circumstances? And if so, whether or not the block exemption applies.  
5 Fourthly, whether restrictions on passive sales outside of the UK, for  
6 customers not in the UK or the EU or the EEA, whether or not that can be  
7 a hardcore restriction of competition in circumstances where the rules on  
8 market partitioning under UK and EU law are to do with removing internal  
9 barriers to trade.

10 All of those are likely to require both extensive legal submission and expert  
11 evidence, not evidence as to the actual effects but whether as a matter of  
12 principle such a restriction is capable of restricting competition within the UK  
13 to an appreciable extent. That is a sort of jurisdictional point, that is a gating  
14 point, as to the application of UK competition law or EU competition law in the  
15 first place.

16 There is also another unresolved legal question as to exactly what constitutes  
17 unlawful discrimination under the Chapter 1 prohibition as opposed to under  
18 the Chapter 2 prohibition, whether or not differential treatment by the brand  
19 owner as against different retailers can constitute a restriction of competition  
20 whether by object or effect. That, in our submission is an open question. So  
21 those are the complicated legal issues that this case will raise. They are not  
22 ones that can be resolved, we would submit, in a few hours of legal  
23 submission by counsel. They are points that are going to take some time for  
24 counsel and the Tribunal to go through, which is another reason why this case  
25 simply isn't suitable for the fast-track.

26 I am very mindful of the time, Madam. Those are the key points I make on that.



1 Given the number of witnesses and experts that will be required, and the need for  
2 disclosure which we don't accept will be entirely straightforward in the way my  
3 learned friend has described it to you, it seems extremely unlikely that this  
4 case could be got ready for trial between now and six months hence, which  
5 would be early September, which is another factor as to why in our  
6 submission the FTP simply isn't realistic.

7 My learned friend has put it to the Tribunal both in writing and in submissions this  
8 morning that this is all some kind of stalling tactic or delaying tactic on the part  
9 of the defendants. It is clearly, in our view, a fair and realistic assessment of  
10 the work, the evidence that is going to be required to fairly determine the  
11 issue on the first trial, liability and causation by which I understand the theory  
12 of harm to be, the first having sufficient effect on competition to show that  
13 there has actually been a breach of statutory duty, so it is a realistic estimate  
14 of the time that is going to be taken to bring this case to trial and to hear it.  
15 We are not taking a Rolls Royce approach to litigation here above and beyond  
16 what is reasonable and proportionate.

17 We intend to conduct this litigation in accordance with the governing principle, at fair  
18 and proportionate cost in accordance with the Tribunal's directions and  
19 procedures that apply to cases such as this which can't simply be short-  
20 circuited. We have no objection at all to what my learned friend describes as  
21 "robust case management" provided that it is realistic and fair.

22 Turning to the question of urgency ---

23 THE CHAIR: I am going to take you slightly out of your order. You skated over  
24 documentary evidence and disclosure. The claimant's position is that that  
25 should be fairly limited and targeted and a relatively straightforward exercise.  
26 Why is it that you say that is not right?

1 MR O'REGAN: Neither party has yet made a formal request for disclosure and the  
2 Tribunal hasn't ordered it, but it is clear from both the Letter Before Claim,  
3 which is in the bundle at tab 13, and from Ms Sheppard's witness statement at  
4 tab 41, that the claimant is seeking to make wide requests for disclosure, and  
5 the Letter of Claim identifies six categories of internal documents, and Ms  
6 Sheppard's witness statement identifies seven. If it assists I can take you to  
7 those but clearly six or seven categories of documents is not the very limited  
8 amount of disclosure that is likely to be appropriate for fast-track.

9 THE CHAIR: It rather depends what their request is, doesn't it?

10 MR O'REGAN: Yes, Madam.

11 THE CHAIR: Let's have a look at the requests that have been made.

12 MR O'REGAN: I will bring up my bundle.

13 THE CHAIR: Where do we find that?

14 MR O'REGAN: D41. The Letter Before Claim is at tab 13, in the electronic bundle  
15 that starts at page 463, internal page D41. There is a request for pre-action  
16 disclosure at internal paragraph 133, and on that page there are six  
17 categories there of (a) to (f). I don't know if I need to take you through those,  
18 Madam.

19 THE CHAIR: Am I right in thinking those documents haven't been forthcoming yet?

20 MR O'REGAN: No disclosure has been made by either party beyond what is  
21 annexed to the various pleadings, and I think to a limited extent in witness  
22 statements.

23 THE CHAIR: Have your clients taken steps to get this information together?

24 MR O'REGAN: My instructions are they have complied fully with their disclosure  
25 obligations but obviously at the time in terms of maintaining and preserving  
26 documents, in terms of actually undertaking the physical or electronic process

1 of collecting it, I understand – and I will take instructions – that has not yet  
2 been commenced. May I turn my back? No. The defendants’ position on  
3 that very clearly is that certainly in terms of the Letter Before Claim they were  
4 under no obligation to actually incur the costs of undertaking this exercise,  
5 particularly as proceedings had been threatened for a fairly considerable time  
6 before then without anything materialising so clearly the defendants took the  
7 view, not unreasonably in my submission, that focusing on their business  
8 rather than devoting resources to searching out documents was not an  
9 appropriate or a proportionate use of their resources at that time. Clearly,  
10 they can be got together and that can be done probably in relatively short  
11 order, but not as short as my learned friend was suggesting, that it could be  
12 done almost at the flick of a switch. Out of the six categories, some of them  
13 go right back to January 2012. I will take paragraph (a) “All internal  
14 documents or policies setting out Wacoal’s (the defendants’) approach to  
15 retail pricing of the Wacoal Group products by online retailers during the  
16 period from January 2012 to October 2019”, so that is over five years: it is  
17 seven years.

18 Then (b) “all internal documents, emails etc., on the monitoring of retail pricing and  
19 compliance to pricing policies and online sales practices from January 2012 to  
20 August 2021”, that is over nine years. Clearly, it is difficult to know at this  
21 stage how much material that will be but the actual exercise beyond  
22 preserving all relevant custodian’s, documents of whatever kind has not yet  
23 been undertaken by the defendants.

24 In terms of what is in Ms Sheppard’s witness statement, that is at tab 41, at  
25 paragraph 17, which is on page F6, page 632 in the electronic bundle, again  
26 there is a further (a) to (g), so that is seven categories, but I think (g) – which

1 relates to the alleged infringement, so, again, a fairly long list of documents.  
2 Of course, if this case is on the fast track we only have specific disclosure, it is  
3 not general disclosure, but, nevertheless, that disclosure cannot be more than  
4 a relatively small amount both in terms of evidence that will be before the  
5 Tribunal but also the time that will be taken to identify, collect and inspect that  
6 documentary evidence and then for the parties to make use of it as they will in  
7 their respective witness statements and expert reports. The precedent in  
8 Breasley was very clear at paragraphs 22 and 27, that is in the authorities  
9 bundle at page 146, it was very clear that the FTP will only be suitable as a  
10 matter of principle where there is no or little disclosure, perhaps little beyond  
11 what is annexed to the parties' witness statements and Statements of Case.  
12 We are a long way from that case here given what Ms Sheppard has said  
13 twice in correspondence and in her witness statement about what the  
14 claimant will be seeking.

15 My learned friend suggested the claimant has no disclosure to give. The defendants  
16 don't accept that. We have set out in our response to the fast-track  
17 application seven categories of documents that are likely to be required to be  
18 disclosed by the claimant. The response is in tab 7 of the bundle, the  
19 paragraph in question is paragraph 38.

20 THE CHAIR: Yes, thank you.

21 MR O'REGAN: It is bundle 7, page B348 in the electronic bundle. Page 342  
22 summarises the categories of documents at that point in time the defendants  
23 considered were likely (sic), so that is (a) to (g), (h) isn't relevant because of  
24 your ruling on the split trial as to quantum. Again, there is likely to be a not  
25 inconsiderable amount of disclosure required by the claimant we would say,  
26 certainly more than the de minimis level that is appropriate for a fast-track.

1 One of the matters that needs to be taken into account is the importance of this  
2 case. The claim against the defendants is they are being accused of fairly  
3 hardcore infringements of competition law, which they deny and must be  
4 afforded the opportunity to defend in a reasonable and proportionate manner,  
5 which they intend to do.

6 My learned friend took you to the quantum of this claim, it is presently pleaded up to  
7 £7.7 million or thereabouts with interest, and the claim is for ongoing losses,  
8 that may well amount to £8 million both in terms of quantum and interest by  
9 the time we get to trial. That is a very significant amount which in our  
10 submission is well above the sums that might be justified on what one might  
11 call a relatively rough and ready approach to the fast-track as compared to a  
12 more normal procedure. Clearly, in Socrates the damages claim was no more  
13 than half a million at most. I was involved in the Meigh v Prinknash case  
14 where damages I think were not above about £600,000. Clearly we are a  
15 magnitude of times away from that here. That is another factor that needs to  
16 be taken into account; as is the claim for a mandatory injunction which will  
17 have a significant effect on the defendants, and the wider effects of a finding  
18 of infringements on the defendants and the employees or directors who are  
19 claimed to have been involved, so they are clearly all matters that go to the  
20 Tribunal's discretion on whether to allocate this case to the fast-track.

21 In relation to costs which my learned friend took you to: it is right that the fast-track  
22 has mandatory cost-capping but that is not a reason why a case should be  
23 allocated to the fast-track, is the next order of point. It is not one of the factors  
24 that needs to be taken into account under Rule 58(3). That is clear, in our  
25 submission, from paragraph 33 of the Breasley judgment. My learned friend  
26 Mr Robertson will address the Tribunal later more generally on costs,

1 including cost-capping and whether or not the claim is on the fast-track. As  
2 the President held in Breasley at 36, the fast-track is not the remedy for all  
3 concerns about costs. It may well be that the claimant has some difficulties in  
4 that respect, although it is notable that it is considered the claimant has  
5 sufficient of its own resources plus counsel and solicitors acting on partial  
6 CFA, to incur costs of nearly £700,000 in bring this claim to trial. Obviously  
7 that will be lower now because you don't have to address quantum, but,  
8 clearly, the availability of cost-capping is not a relevant factor in determining  
9 whether the case is suitable for the FTP.

10 Finally and briefly, Madam, in relation to urgency, that position is set out in our  
11 written submissions at paragraphs 44 to 50 and in our skeleton at paragraph  
12 12.

13 This claim, or threatened claim, has been rumbling on for some time, certainly since  
14 the middle of 2018. The claimant had at that point in time engaged solicitors,  
15 Sheppard Co., who were already by that point in time well involved in the  
16 commercial discussions between the parties. Nevertheless, at no time has  
17 the claimant sought to apply for an interim injunction. That was the case even  
18 back in 2018 before it was said that the claimant was suffering from losses as  
19 a result of the cessation of supplies. In June of that 2018 the claimant was  
20 informed, given over three months notice that the defendants would cease  
21 supply of certain lines, the continuity and seasonal lines, by October of that  
22 year. Mrs Dutton's witness statement at paragraphs 3 to 6, which I don't think  
23 are confidential but I will not read them out in court but in summary they  
24 indicate that the claimant nevertheless threatened with this cessation of  
25 supply put in place an extensive plan, including raising additional finance to  
26 purchase additional stock, but at no point in time, despite having the

1 assistance of skilled legal advice at that point did the claimant seek an interim  
2 injunction.

3 No admission is being made as to whether or not an interim injunction would be  
4 appropriate in this case, and clearly the defendants' case it is not, but the  
5 claimant never even sought one nor even threatened one, so, clearly, in our  
6 submission the case does not have the level of urgency that is required for it  
7 to be placed on to the fast-track. In her witness statement at paragraphs 3 to  
8 11 Mrs Dutton merely confirms the reasons for the delay in making an  
9 application, bringing proceedings, not issuing the claim form until late  
10 December of 2021, that is over three years after the first and second  
11 cessations of supply, doesn't justify why this claim is now urgent and  
12 deserves to be fast-tracked and therefore jump the queue over other claims  
13 before the Tribunal. There is no evidence that suggests that the claimant is at  
14 risk of insolvency, indeed the evidence that Mrs Dutton does give is that in the  
15 year to November 30, 2020 the claimant's turnover was about £3.4 million,  
16 and although the turnover figures for the last financial year have not yet been  
17 finalised and certainly aren't given in the witness statement she does give  
18 evidence at paragraph 15 that turnover has increased by about 5 per cent, so  
19 it will probably now be around £3.6 million. So, there is no evidence at all that  
20 notwithstanding the claimant has a level of indebtedness, which is clear from  
21 its published accounts, that the claimant is at risk of irreparable harm, or even  
22 insolvency, if this case is not dealt with with a greater than usual degree of  
23 expedition.

24 Indeed, at paragraph 97 of the claim form, and this is my final point, the claimant  
25 avers that it is successfully selling other lingerie brands. So in our submission  
26 the need for urgency is also not met out. So unless I can assist you further,

1 Madam, the defendants' submissions are that this application should be  
2 dismissed because, other than the fact that the claimant is a small or a  
3 medium sized enterprise, none of the criteria listed in Rule 58(3) are satisfied,  
4 and nor is the requirement for urgency.

5 THE CHAIR: Thank you. I am quite conscious of the time. Miss Howard, would you  
6 like to have submissions in reply, and if so, how long do you think you might  
7 be? I do not want to rush you.

8 MS HOWARD: I do want to make submissions in reply. I have been taking some  
9 notes but I wanted to - and I would like to enable you to be able to make a  
10 decision over the recess, so while I am conscious of the time and the  
11 transcribers, but if we can stay on a little bit later I think that would be effective  
12 so that you can take it away and come with a ruling after lunch, if that will  
13 help.

14 THE CHAIR: That is very sensible, if that is - if you are ready to make your  
15 submissions in reply.

16 MS HOWARD: Yes, I may be leaping around a bit, if that is acceptable.

17 THE CHAIR: Actually I should have asked - I have not asked my co-panel members  
18 whether they had any questions for Mr O'Regan. No?

19 PROFESSOR CUBBIN: That is a no --

20 MS WALKER: No, thank you very much.

21 THE CHAIR: That is a no. Thank you. Sorry, Ms Howard.

22 MS HOWARD: I think there are probably three main issues here about the allocation  
23 of this case to the fast track procedure, and we have approached it from a big  
24 picture principle of there has to be a way to prosecute these type of claims by  
25 small businesses and there has to be effective access to justice.

26 My learned friend has developed a lengthy list of issues of law that need to be



1 resolved, and we submit is trying to over-complicate this claim considerably,  
2 both in terms of the legal analysis and the expert evidence that will be  
3 needed. To prove this I would like to take the Tribunal to some of the emails  
4 that were developed and attached to their defence, just to make the point.  
5 The key email that I would like to take you to, in the hard copy bundle was at  
6 B185, and it is Annex 12 to the defence.

7 THE CHAIR: Yes.

8 MS HOWARD: It is an email from Margaret --

9 MR O'REGAN: Can I ask my learned friend where this is in the bundle? I am  
10 struggling to --

11 MS HOWARD: I am sorry, I am just trying to find it in the ...

12 MR O'REGAN: Which tab are we in?

13 MS HOWARD: I am in your defence, which I think is at B4.

14 MR O'REGAN: Yes.

15 MS HOWARD: It was at B185 of the hard copy bundle.

16 MR O'REGAN: Thank you.

17 MS HOWARD: I think it is the same number in the ...

18 MR O'REGAN: I am grateful.

19 MS HOWARD: So this is an email, I will not reveal names because of the  
20 defendants' (inaudible), but it is an email from the Second Defendant - note  
21 that it is the European entity, not the US entity - sent to the claimant and  
22 copying in other members of the Second Defendant as well as the First  
23 Defendant. There is no mention of any US or Canadian enterprise there. It is  
24 headed: "US pricing," and it says:

25 "Hi Janine. We are still seeing our product is not at the correct retail price and this is  
26 not only impacting Wacoal Europe's business but this is also contributing to

1 Wacoal US problems too. It is a matter of urgency that you either pull the  
2 product from the US market or align the price which would need to be  
3 actioned and completed within 24 hours, if not sooner. If you need the US  
4 dollar prices confirmed, I can help you with this. If we do not see the above  
5 request actioned this will leave me with no option but to suspend your account  
6 with Wacoal Europe for 30 calendar days, and during this time I would also  
7 expect that the prices will be amended to reflect the correct retail price. This  
8 is something I am reluctant to do but we had the policy in place to protect our  
9 brands and business in the US and those that trade with us in this region,  
10 regardless of where their business is located, have to comply.”

11 So we say that that email is very revealing of the defendants’ strategy: firstly, it is  
12 framed in terms to protect the European Wacoal business with an incidental  
13 contribution to the US market; and they present an option of either pulling the  
14 product from the market or aligning the prices. So if they were so worried  
15 about the product appearing on the eBay online platform, why are they happy  
16 for it to remain on the eBay platform provided the price is aligned to the  
17 defendants’ MRPs? The tone that they give them 24 hours to comply with  
18 pulling all the products, again we say is indicative of the relationship and the  
19 power between the parties.

20 If we look at the reply, just on the page before, B184, the claimant replies saying:

21 “I did email last month about your request to remove the items from dotcom, asking  
22 for some clear guidelines as to what you were wanting us to do and to  
23 reassure us that Wacoal will accept responsibility should this be in breach of  
24 any competition law.”

25 Then she goes on to explain that she is confused:

26 “We are told to remove the listings from dotcom but now we are advised that the

1 RRP should be the US RRP, so again we have asked for clear guidelines of  
2 what Wacoal is requesting but I have not received any clear instruction at all.”

3 Then she goes on to explain that she is shocked about the 24 hour guideline  
4 because she still has not received a reply to her email, and that she is now on  
5 holiday but she is going to start amending the listings because this is under  
6 duress because of the threat. This email is then relayed up the team to the  
7 sales director - this is again at the top of B184 - where he says that he has not  
8 replied:

9 “The reply sits with me. I am going to despatch clear guidelines and I will reissue the  
10 back policy with this,”

11 and then they refer to them being in breach of competition law. But there is actually  
12 no guidance. If we turn over the page again, these are in the beginning of  
13 July, B188:

14 “There will be a response but not until we have had guidance from our lawyers too. I  
15 am pretty confident we are not in breach but let’s just be doubly sure.”

16 So it is quite clear that this policy had been implemented by the commercial team  
17 without checking out the legal position and what the impact is on markets  
18 outside the US. If you can look at page B187:

19 “We have been advised it is fully compliant in the US,”

20 this is the third paragraph down,

21 “it does not break any US competition laws. The VAP and these policies only affect  
22 the US market.”

23 Further down:

24 “Other competition regimes outside the EU and the US are not relevant and the VAP  
25 measures have no impact on other jurisdictions outside the US, and Belle  
26 Lingerie is only based in the UK.”

1 So they are clearly pursuing a policy without regard to the impact that it is having in  
2 the UK, and that is the whole point of this case: we say that this policy, which  
3 may have originated within the US, was applied directly to sales in the UK  
4 market, and that the defendants are trying to layer this case with complexity  
5 that is unwarranted. We are dealing here with a case that if you do the sniff  
6 test it is immediately obvious that there is RPM, that is an object infringement  
7 and that the online platform ban is just another element of an indirect means  
8 of ensuring RPM.

9 Now, in terms of the management of this case, we say that this case can be brought  
10 on quickly. Yes, we will have a number of witnesses. We do not think that all  
11 of those witnesses will need to be called and there will be overlaps between  
12 them, and we can manage that process efficiently.

13 Similarly, if we have a statement from eBay explaining how eBay listings works,  
14 surely we could use an agreed statement that eBay is its own authority on  
15 how its system works, if that was a way of cutting through that issue to reduce  
16 the time for trial.

17 On expert evidence, again we say there should be limited evidence for phase one.

18 The items of disclosure that we have listed in the LBA and in Ms Sheppard's  
19 statement overlap those categories, so we are not talking about six or seven  
20 categories, then a further seven categories. We have tried to focus those  
21 very, very carefully. The defendants say they go back to 2012 but actually we  
22 have refined those to relate to the claim period, which is from 2016 onwards.

23 It is very interesting that the defendant concedes that, having received that letter at  
24 the beginning of August last year they took no steps even to engage with the  
25 claimant to try and scope out those issues. This was a very detailed letter  
26 before action, it was 44 pages long, with detailed quantum analysis. It was

1 quite clear from the analysis of competition law, the detailed case on  
2 infringements and the quantum that the claimants were at the point of issuing  
3 proceedings and it should have been taken seriously, and the defendants did  
4 nothing about that. They did not even give the courtesy of a proper response.  
5 They came back asking for clarifications, which we again responded to at the  
6 end of August but then their response was immediately to cut off supplies in  
7 September 2021.

8 So they could have engaged and they could have taken steps to deal with that  
9 disclosure, but they have not. The reason --

10 MR O'REGAN: I hesitate to rise. That simply is not right, that we have not engaged.

11 There was a response to the letter of claim, which said that the claim was  
12 defective. There was a response from those instructing me, it is not the case  
13 there was no engagement at all. Obviously engagement took some time  
14 because it was taken over the summer, but there was a full response which  
15 denied the claims. It is not right to say we have not engaged at all.

16 THE CHAIR: Just let us have the page reference --

17 MS HOWARD: So D101 in the hard copy bundle. There is a one page response  
18 from Gateley claiming that they have the right to cut off supplies and asking  
19 how we propose to address the point that there was any continuing obligation  
20 to supply and the legislation that prevents a supplier from unilaterally  
21 discriminating against a particular customer. We then gave a detailed  
22 response on the case from pages D103 to D111, also during the summer  
23 vacation period, setting out our case on the legal basis for the claims and the  
24 refusal to supply and RPM, as well as the online sales restrictions and  
25 platform bans and discrimination, attaching recent decisions as well on RPM  
26 to educate them.

1 Then the next response was the letter of 27 September, that is at D113 to D116,  
2 where again they complain about the inordinate length of the letter before  
3 action, that it was sent through the holiday period. They do have some  
4 response there on the RPM and practice, but they just then say they will  
5 rigorously defend the claim, they cut off all supplies and they threaten that the  
6 client will seek an order for security for costs. That is at D116.

7 That is the sole reason why we could not issue before, because the claimant, having  
8 been threatened with security for costs, then had to engage to get ATE  
9 insurance. It took, as Ms Sheppard has explained in her evidence, it took the  
10 whole period from September to December to obtain that ATE insurance to  
11 protect them against adverse costs. But that ATE insurance is limited at this  
12 stage, and we have had no engagement from the defendants on what they  
13 anticipate their likely costs to be.

14 THE CHAIR: Yes, and I am sure we will come to that.

15 MS HOWARD: Yes.

16 THE CHAIR: Thank you for taking me to the correspondence.

17 MS HOWARD: The last point I would make on the disclosure that they are  
18 requesting from us and the categories they set out is that most of those  
19 categories seem to relate to quantum. They deal with their strategy  
20 documents and - sorry, I have not got the letter in front of me at the moment,  
21 but a lot of it is dealing with financial information that is relevant for phase two,  
22 but I think only one of those items is really relevant to phase one liability. I  
23 think it is at page B342. We say that it is paragraph 38F:

24 "The measures it took to remove the products from the eBay platform to comply with  
25 the VAP and the effect, if any, on its sales,"

26 that is relevant to liability issues, but all the others relate more to quantum and the

1 growth of the business.

2 THE CHAIR: Yes, thank you.

3 MS HOWARD: You will see from the evidence both of Mrs Dutton and Ms Sheppard  
4 that the impact of these refusals to supply has been devastating for the  
5 claimant, that it has lost 60 per cent of its brands and therefore its customers  
6 and it has had to rebuild that from scratch, including by taking out finance. It  
7 simply was not in a position to seek or threaten an injunction when it was  
8 battling for its survival. I am afraid the defendants' submissions are just  
9 divorced from all reality of the impact of these measures and what it had on  
10 the reality of trying to bring litigation against a company such as the defendant  
11 and the risks of trying to bring an injunction against them. So it is not that  
12 they have failed to act expeditiously or seek injunction, it is just they simply  
13 were not able, and they have tried to proceed as quickly as they can in issuing  
14 this claim but making sure it was done with some quantum analysis and some  
15 estimate of the loss, rather than rushing straight into it.

16 THE CHAIR: Yes. Thank you. (Pause)

17 MS HOWARD: My instructing solicitor tells me that the defendant says this claim  
18 has been rumbling on for some time since 2018, but that only goes to the  
19 point why are they not then in a position to make their disclosure? But in any  
20 event, the claimant was not threatening litigation in 2018, they were trying to  
21 find some commercial settlement with the defendant, they were trying to get  
22 clarity and guidance on what exactly these policies meant, because they were  
23 given no help or support as to how to remove or align prices, and they were  
24 trying to explain the impact and try and resolve it commercially. But obviously  
25 those attempts failed and it was only once they were in a financial position to  
26 be able to bring litigation that they have been able to act on that.

1 THE CHAIR: Yes, thank you.

2 MS HOWARD: So, yes, this may not form into the micro claim of an injunction or a  
3 small local claim, but we say that the comments of Sir John Penrose are still  
4 apt, that there has to be an effective mechanism; especially when none of the  
5 recommendations about creating County Competition courts have been  
6 implemented, there has to be an effective way through for these sorts of  
7 claims to be brought and heard effectively, and at the moment the system is  
8 not working. The FTP was designed to enable access to justice and unless it  
9 is utilised for these types of claims, which are endemic in many industry  
10 sectors, then it is just a fig leaf and it has no meaning whatsoever. That was  
11 not the policy intentions of the reasons why this procedure was set up, and it  
12 needs to be given some substance and some effectiveness. So that is the  
13 end of my submissions on that and I will deal with costs after the recess.  
14 Thank you.

15 THE CHAIR: Thank you. So I think if we say we will come back for 2.30.

16 (13.27)

17 (The short adjournment)

18 (14.36)

19 **Ruling on fast track procedure application**

20 THE CHAIR: We are very grateful to the parties for their very detailed submissions  
21 on whether or not this case is appropriate for the fast track procedure. We  
22 have considered them and have reached our decision and we will provide our  
23 detailed reasoning in due course. To give proper justice to the points that  
24 have been raised with us we will need more time to deliver a fully reasoned  
25 decision.

26 However, we have decided that this is not an appropriate case for the fast



1 track procedure. We are of course satisfied that rule 58(3)(a) is satisfied, but  
2 we have come to the view that this hearing is likely to take longer than three  
3 or even three to four days. We accept that that factor in and of itself is not  
4 determinative, but we also consider that this case will raise complex and  
5 potentially novel issues in terms of both law and fact.

6 We have also taken note of the number of factual witnesses, which is likely to  
7 be between six and eight, for both parties: as in six to eight in total. There will  
8 also need to be expert evidence - an industry expert for both sides and  
9 an economic expert for both sides.

10 We consider that the likely length of hearing for phase 1 will probably be  
11 between the two time estimates put forward by the Claimant on the one part  
12 and the Defendants on the other. The Claimant says three days and the  
13 Defendants say seven days. We consider on the basis of what we have  
14 heard that a five-day estimate is more likely. The parties have also expressed  
15 a radically different view to us of how much disclosure is required and how  
16 much documentary evidence there will be. In our view it is likely to be more  
17 extensive than Claimant suggests and is unlikely to be as limited as the fast  
18 track procedure probably envisages.

19 Having said all of that, we are satisfied that the case should be heard  
20 urgently. We have made inquiries and the Competition Appeal Tribunal would  
21 be available to hear this matter for five days between 22 and 26 August. As I  
22 have indicated, we will give our reasons in more detail as to why we have  
23 reached the decision that we have, but in our view the application does not  
24 succeed.

25 So would it be helpful if we also gave an indication as to our thinking on costs  
26 and costs capping? We think that in light of the fact that the costs budget put

1 forward by the Claimant was put forward on the basis of a three to four-day  
2 trial of both quantum and liability and was in summary form and that we have  
3 now given an indication that there should be a phase 1 trial on liability which  
4 will take five days, we have reached the view that the costs information that  
5 we have is probably out of date. We think that the appropriate course would  
6 be to adjourn the costs issues to a separate hearing in relation to which costs  
7 budgets would need to be filed and we would obviously need to receive any  
8 further submissions, I know that the parties have already lodged certain  
9 written submissions, but any further submissions should be lodged before the  
10 date of the hearing. And any submissions made should cover costs capping,  
11 which is an issue we will want to consider at that hearing. So that you know  
12 how the tribunal is placed, we have also made inquiries as to the availability  
13 for that hearing and we have capacity on 11 April.

14 So that is an indication of our thinking on the costs capping application. I  
15 appreciate that we have not heard submissions on that aspect. If someone  
16 wants to with dissuade me from that course I am not meaning to shut you out  
17 from making your submissions.

18 MS HOWARD: May I just have a couple of minutes to take instructions?

19 THE CHAIR: Certainly.

20 MS HOWARD: Thank you.

21 MR ROBERTSON: The only question I have is in relation to the date of the costs  
22 case management conference. Is there any possibility of it being earlier than  
23 11 April?

24 THE CHAIR: I think we reviewed this.

25 MR ROBERTSON: The reason I say so is my junior is away on holiday on that date.  
26 I do not think you need leading counsel for a costs CMC. So if there were

1 an earlier date.

2 MS HOWARD: I also have difficulties on 11 April. But my junior is available on that  
3 date.

4 THE CHAIR: I am trying to recall why we agreed that 11 April was convenient to the  
5 panel. I am just going to ask Mrs Walker if she is available on an earlier date.  
6 Which date did you have in mind, Mr Robertson? (Pause).

7 MR ROBERTSON: A date earlier than 6 April, I think it was.

8 MR O'REGAN: Yes.

9 MRS WALKER: Would you like my availability?

10 THE CHAIR: Professor Cubbin is available on 5 April.

11 MRS WALKER: I could make 5 April too.

12 THE CHAIR: So the panel would be available on 5 April.

13 MR ROBERTSON: Mr O'Regan is available on 5 April. (Pause).

14 MS HOWARD: 5 April works as well for the claimant's counsel.

15 MR ROBERTSON: Thank you very much.

16 THE CHAIR: So on the assumption no one is dissuading me from that course, 5  
17 April, we will list that hearing.

18 MS HOWARD: There was one point that we wanted to make. Obviously we are  
19 trying to minimise costs in this case and we have resisted there being another  
20 CMC basically because that will add another £25,000 minimum to the costs  
21 budget.

22 THE CHAIR: Yes.

23 MS HOWARD: Which obviously our client is acutely conscious of.

24 THE CHAIR: Yes.

25 MS HOWARD: So what we were hoping is, I mean, we can see the panel's point  
26 that obviously the dimension of the litigation is changing, with more witnesses,

1 more disclosure, and that makes it even more imperative that the claimant  
2 has costs protection.

3 THE CHAIR: Yes.

4 MS HOWARD: So we were wondering, and I can make submissions on this,  
5 whether provisionally there is a ruling that the costs management should  
6 apply to this claim as a matter of principle, the parties are allowed to put  
7 submissions in and then it is determined on the papers. That approach has  
8 been followed in other litigation before the Tribunal that I have done in the  
9 Vattenfall and in the SSE litigation. Those were very vast follow-on  
10 competition claims, the cartel claims, where both parties were very resourced.  
11 But if that approach can be adopted as a precaution to approach in those  
12 types of cases, we submit that could easily apply in this case where the  
13 parties submit we give directions of our updated budgets for submissions on  
14 both the costs management and the level of any costs cap and whether it  
15 should be asymmetric or otherwise, and then the Tribunal can simply decide  
16 that on the papers without the need for a hearing. (Pause).

17 THE CHAIR: Mr Robertson.

18 MR ROBERTSON: My learned friend referred to the Vattenfall case.

19 THE CHAIR: Yes.

20 MR ROBERTSON: There was a case management conference that dealt with costs  
21 budgeting. We fully agree to the principle of costs management by the  
22 Tribunal.

23 THE CHAIR: Yes.

24 MR ROBERTSON: I do not seek to dissuade you from that, it is the modern way.  
25 But in Vattenfall there was definitely a case management conference. They  
26 discussed costs budgeting. I was not at it. My junior for Vattenfall, and I am

1 for Vattenfall, my junior, Ms Abram was at it, so it was a live case  
2 management conference.

3 MS HOWARD: Yes, in Vattenfall there was a CMC, but in SSE v Prysmian, which is  
4 the other claim that I do not think you are instructed in, there was SSE, it was  
5 determined on the papers.

6 MR ROBERTSON: Right.

7 MS HOWARD: I am probably eliding the two cases.

8 MR ROBERTSON: Yes, so Vattenfall there was. I remember something being  
9 made about the level of my brief fee and how reasonable it was.

10 MS HOWARD: My instructing solicitor just had one point in as well. Obviously the  
11 predicament the claimant is in at the moment is it has no transparency  
12 whatsoever on the defendants' costs budget and it has provisionally got ATE  
13 insurance up to a certain level, but this litigation can only continue if it knows  
14 that it can cover this with the ATE insurance and in particular has to get  
15 an increase. So if the defendant has submitted a costs budget, and the  
16 claimant may well need some time before it can make detailed submissions  
17 on whether it is actually possible to increase the ATE insurance to the levels  
18 demanded.

19 THE CHAIR: And how long do you think that might take? (Pause).

20 MS HOWARD: I am instructed it may take a week or two. We have tried to progress  
21 the ATE insurance as efficiently and quickly as we can. But just getting it was  
22 quite protracted between September and December of last year. And  
23 obviously we will deal with it as a matter of urgency. But we will need some  
24 time before we can --

25 THE CHAIR: So you will need to know what your costs budget, the costs budget is  
26 that you are considering. You will need to know by the end of this week

1 realistically, 18 March.

2 MS HOWARD: Is that for both parties?

3 THE CHAIR: Yes.

4 MS HOWARD: Because obviously we can prepare our own budget. We have  
5 already prepared an outline one.

6 THE CHAIR: Yes.

7 MS HOWARD: We would submit it does not have to be done to a full precedent H  
8 budget and Melanie Meigh, it is authority that it is not a detailed costs  
9 assessment. We do not need a full precedent H budget, which is exorbitantly  
10 expensive in and of itself. But just a summary with milestones, like was  
11 accepted in the Cables litigation, to give an indicative view of costs should be  
12 sufficient. So we would be able to prepare our costs budget, but obviously we  
13 need to be able to react to the defendants' and I am not sure whether they  
14 have taken any steps at all with their costs budget, even though they have  
15 been on notice since December.

16 THE CHAIR: Yes, exactly.

17 MR ROBERTSON: If it was just costs of those of us here, we could do that by the  
18 end of the week, but we are going to have to have permission for experts as  
19 well in the costs budget and we do not think that is going to be possible by the  
20 end of this week.

21 THE CHAIR: Would you be able to get an estimate of what you think it would be?

22 MR ROBERTSON: We can use our reasonable endeavours to do that. It may be  
23 a broad range of quotes, that is the practical difficulty.

24 THE CHAIR: It would at least give everybody something to work with though.

25 MR ROBERTSON: Yes.

26 THE CHAIR: And presumably, although a summary is perhaps all that is necessary,

1 we will need to understand something of the assumptions on which the figures  
2 have been put forward. Because I anticipate, and I may anticipate wrongly,  
3 that the figures may differ quite dramatically.

4 MS HOWARD: I think it would make sense perhaps if counsel could liaise to agree  
5 what the milestones are for the various stages of the litigation and what is  
6 going to be included within them. Maybe we can come up with an agreed  
7 format which we can submit to you for approval, to make sure you think we  
8 have covered the outline headings and then we can populate them and file  
9 the costs budgets. Would that work?

10 MR ROBERTSON: That sounds like a very workable proposition. Thanks for the  
11 suggestion.

12 THE CHAIR: I think it is important that the claimant gets some idea of where they  
13 are going with costs management as soon as possible, hence the fixing of the  
14 date in April. So I think if we can do everything we can to make sure that  
15 hearing is effective.

16 MR ROBERTSON: It is important for us as well.

17 THE CHAIR: Yes.

18 MR ROBERTSON: I just also bear in mind there is, as we have already mentioned,  
19 a possible application for security for costs to be coming from our side and  
20 that will be dealt with at the case management conference as well.

21 THE CHAIR: In relation to on 5 April?

22 MR ROBERTSON: Yes. I just float it as a possibility, just to flag it up.

23 THE CHAIR: Yes. Let us see if you do apply and what the application looks like, but  
24 it may be that that has to go to another date. So 5 April and I think half a day  
25 ought to be sufficient.

26 MR ROBERTSON: Yes.

1 THE CHAIR: So can I leave you to ... I am sorry, instructing solicitor was  
2 remonstrating.

3 MS HOWARD: Sorry. (Pause). I was going to make submissions on costs, but I  
4 think they are now redundant in the light of that. I am not clear for the terms  
5 of the order obviously, because we want to try and finalise the CMC order for  
6 you, whether there is a kind of ruling that costs management should apply to  
7 this claim.

8 THE CHAIR: Yes, there is.

9 MS HOWARD: So we will add that to the order and then set out the directions  
10 agreed.

11 I think probably the next area to deal with is really the timetable to trial, to try and  
12 work through those deadlines, which will be the most efficient use of time  
13 before we deal with other business.

14 THE CHAIR: Yes.

15 MS HOWARD: My instructing solicitor --

16 MR ROBERTSON: Sorry to interrupt, I just wonder if it is worth dealing with  
17 amendment of your pleadings first? Because that will then affect the  
18 timetable to trial.

19 MS HOWARD: It should not affect it, that is our point, but also it can be done in  
20 parallel so it does not defer or delay anything in terms of the lay timetable.  
21 Because the next phase is disclosure which can be done jointly with any  
22 amendments to pleadings anyway if it was necessary and we do not consider  
23 it is necessary.

24 THE CHAIR: I think we can return to the issue of the amendments to the pleadings.  
25 I think Ms Howard is correct when she says that the issues are now  
26 ventilated, whether you think they are in the right document or not, and



1           therefore we can move on and think about how the stages are going to  
2           happen.

3 MS HOWARD: So in dealing with the directions, we have only at the moment in the  
4           draft order dealt with the phase 1 directions. We are just leaving phase 2 until  
5           the ruling has been given. My instructing solicitor has difficulties with the date  
6           the Tribunal has set in August and obviously that is going to be the starting  
7           point that we work backwards from. She has real difficulties in attending that  
8           week. And I am not very comfortable doing a hearing without instructing.

9 THE CHAIR: That is fine. We asked about 22 August because there all sorts of  
10          availability issues over that time anyway. And that was the date that the panel  
11          members can do, 22nd to the 26th. Is it the whole that of that week that your  
12          instructing solicitor has issues with? (Pause).

13 MS HOWARD: I think the difficulty obviously, my instructing solicitor is a sole  
14          practitioner, so she has no one to delegate to, and in the lead-up to that  
15          hearing date she is away, which is something that cannot be changed, so that  
16          she would not be around for the kind of bulk of the preparation for trial.  
17          Obviously counsel will try and shoulder as much as we can, but there will be  
18          things where we need instructions and, you know, help with witness  
19          statements and analysing.

20 THE CHAIR: The difficulty we have is that if it is not then we go round to 17  
21          October.

22 MR ROBERTSON: 17 October does not work for me because I am in preparation  
23          for the Vattenfall trial in this Tribunal, which starts on, from memory, 9  
24          November.

25 MS HOWARD: And we are on opposing sides.

26 MR ROBERTSON: We are indeed, yes. So 17 October would not be terribly

1 convenient for either Ms Howard or myself.

2 THE CHAIR: It is always very difficult trying to liaise diaries from the bench, is it not?

3 (Pause). I wonder if you can just ask when your instructing solicitor is  
4 available? (Pause).

5 MS HOWARD: I think my instructing solicitor is back in the office on the 22nd, but  
6 obviously would not be able to have any input on the skeletons and kind of  
7 bundles ahead of that, so would need some time, but would be available for  
8 early September.

9 THE CHAIR: It does create a difficulty. I may be able to accommodate something  
10 else with moving something around. If we rise, I think it is important to get the  
11 date written in stone because otherwise I think the timetable is all  
12 hypothetical. So, if we can rise for just five minutes and I will just check with  
13 the panel as to availability.

14 MS HOWARD: I am grateful.

15 (14.57)

16 (A short adjournment)

17 (15.02)

18 THE CHAIR: Right, so we have discussed it between us – let me just get this  
19 straight – we can do 15<sup>th</sup>, 16<sup>th</sup> and then the 19<sup>th</sup>, which is a Monday, 20 and  
20 21 September. Is that convenient?

21 MR ROBERTSON: Yes, fine for us.

22 THE CHAIR: Thank you.

23 MS HOWARD: I have something in my diary but I will try to move it.

24 THE CHAIR: I do think that is the best we can do. I will have to deploy your  
25 professional advocacy skills with my husband because that puts me late on  
26 my holiday. So, 15<sup>th</sup>, 16<sup>th</sup> and 19<sup>th</sup>, and then the 19<sup>th</sup> until the 21<sup>st</sup>.

1 MS HOWARD: Thank you.

2 THE CHAIR: So, we now have an end date to work to.

3 MR ROBERTSON: Yes.

4 THE CHAIR: So, what are the proposals for disclosure? Ms Howard, do you have a  
5 starting date for paragraph 18 of your draft order?

6 MS HOWARD: I still think we should try and go for a date in April, given that we are  
7 only in mid-March at the moment and both parties have scoped out the  
8 disclosures that they think is necessary, and so I would submit that the first  
9 disclosure reports and EDQs should be in mid-April. I am just trying to –  
10 obviously, we have Easter in the intervening period, have we not?

11 THE CHAIR: So, if we said --

12 MR ROBERTSON: Mr O'Regan has our indicative timetable to trial, our internal  
13 working document. Do you want to –

14 MR O'REGAN: Yes, Madam. Assuming I have my dates right – I have to work back  
15 from where we thought it might be – sometime towards the end of April or  
16 early May for filing and serving reports and then inspections should follow  
17 thereafter, I think. If we stick with a timetable for trial in mid-September, but  
18 obviously if the Tribunal is minded to bring that forward, that would be --

19 MS HOWARD: Madam, I am conscious that I am sure all of the parties will have had  
20 problems during the August month.

21 THE CHAIR: Yes.

22 MS HOWARD: And also availability of witnesses, so I would like to bring the factual  
23 witness evidence up early so that we are not trying to do that over the  
24 vacation. I mean, obviously experts may fall during August, but that is  
25 manageable, I think, but I really think it is imperative to get on with disclosure  
26 so that we can have witness statements happening before the summer, given

1           that there are replies as well.

2 THE CHAIR: I was going to propose 18 April.

3 MR O'REGAN: Yes, Madam, and if disclosure is then, and inspection is at the end  
4           of April or early May, witness statements would then be sometime in June  
5           with experts before the summer break at the end of July, I think, then prep for  
6           trial would be in August.

7 THE CHAIR: Yes, yes, and it would give people time to work around their respective  
8           holiday commitments.

9 MR O'REGAN: Yes, so we would exchange on factual witnesses – I mean, those  
10          dates are fine.

11 THE CHAIR: So, if we said 18 April for paragraph 18, so for the filing and service of  
12          disclosure reports, and then –

13 MR O'REGAN: The 18<sup>th</sup>, Madam?

14 THE CHAIR: The 18<sup>th</sup> April, and then 3 May --

15 MS HOWARD: 18 April may be Easter Monday.

16 THE CHAIR: Ah, it might be. So, 19 April then. Let us say the 19<sup>th</sup> then. 3 May,  
17          which is the day after another bank holiday, I think, for paragraph 19, agreeing  
18          the list of further categories. And then if we said – how long do you need  
19          before giving inspection electronically, once you have agreed your further  
20          categories of documents?

21 MS HOWARD: Not long.

22 THE CHAIR: So, 10 May?

23 MS HOWARD: We think it could be done in a week, but we have most of our  
24          disclosure together and the defendants may --

25 THE CHAIR: 10 May, Mr Robertson?

26 MR ROBERTSON: I think we can live with 10 May.

1 THE CHAIR: Thank you, and then factual evidence, filing and serving witness  
2 statements of fact by – is 10 June achievable?

3 MR ROBERTSON: Yes.

4 MS HOWARD: Yes. My clients are away that week but we will work around that, 10  
5 June.

6 THE CHAIR: 10 June, thank you. And then 24 June, does that work for revised  
7 statements?

8 MR ROBERTSON: Yes.

9 THE CHAIR: Now, the industry experts. Ms Howard, you said that you did not think  
10 this depended on the date of the service of factual evidence?

11 MS HOWARD: No, I think this is discrete to the factual ...

12 THE CHAIR: Yes.

13 MS HOWARD: -- in that Mrs Dutton will give her understanding of the events at the  
14 time but I think it can be done in tandem with the factual evidence.

15 THE CHAIR: Shall we do that for 17 June, which gives a week after the witness  
16 statements have been served, and then reply reports, that would be taking  
17 two weeks, 1 July.

18 Following the draft order, we then have paragraph 27, which is whether or not the  
19 industry experts should meet.

20 MR ROBERTSON: It is normal practice for experts to meet to produce a note where  
21 they are in agreement and where they are not, so it narrows the issues for the  
22 Tribunal.

23 THE CHAIR: I think, Ms Howard, you don't consider this to be necessary or  
24 proportionate in this case?

25 MS HOWARD: I think we envisage there will probably be a statement from eBay  
26 who would know how their listings work. Maybe if we keep the wording but

1 just say “if necessary” or “necessary and appropriate”, so when we get the  
2 parties reports we may not need to go for a meeting, and we have that option  
3 to remove it if we don’t think it is necessary at that stage.

4 MR ROBERTSON: I think if both parties agree it is not necessary.

5 THE CHAIR: then you would simply notify the Tribunal.

6 MS HOWARD: Yes.

7 MR ROBERTSON: Yes.

8 THE CHAIR: I think we won’t include wording “if it is necessary” but we will keep the  
9 provision for the meeting in there and then if the parties decide it is not  
10 necessary then just notify the Tribunal. That meeting should be by, shall we  
11 say, 15 July, and to produce a joint statement of matters agreed two weeks  
12 later, the 29<sup>th</sup> or perhaps the 27<sup>th</sup> which is ten days later?

13 MS HOWARD: 27 July.

14 THE CHAIR: Economic experts: to a degree this may depend on the factual  
15 evidence, I think, so factual evidence is due to be filed on 10 June, with reply  
16 on 24 June. The economic expert report, shall we say 15 July for that?

17 MS HOWARD: I think that is sensible and it also happens after the industry expert  
18 report so if it is appropriate they can feed that in to their assessment as well.

19 THE CHAIR: Yes. Mr Robertson, do you agree with 15 July?

20 MR ROBERTSON: Yes.

21 MS HOWARD: Could we try and narrow the issues in paragraph 28 because there  
22 is a phase in blue where we wanted the theory of harm to be included as part  
23 of phase 1, and then there is the effect on the defendant that I wanted to  
24 include.

25 THE CHAIR: Yes, I thought we would resolve the first part by the scope of the  
26 issues in phase 1, and the second part – Ms Howard, do you have an

1 objection to that?

2 MS HOWARD: I will take instructions. (Pause) No, we don't have objections.

3 THE CHAIR: Thank you, so both the blue the green text in some form go into the  
4 order. Paragraph 29 we have decided is 15 July for the first round of  
5 economic expert evidence and then reply shall we say the 29<sup>th</sup>? Then the  
6 meeting of experts should be on that basis by 12 August.

7 MS HOWARD: We will need to check, and I am sure the defendants will need to  
8 check it with their expert's availability.

9 THE CHAIR: Yes.

10 MS HOWARD: We will come back if there is a problem.

11 THE CHAIR: Yes, and it does, of course, as you mentioned earlier, give us a little bit  
12 of flexibility around the August dates given that the hearing is now in  
13 September, not a lot but some.

14 MS HOWARD: The trial hearings bundles. Could I check, is the meeting and the  
15 joint statement going to be on the same day or do you want to have an  
16 interval between them?

17 THE CHAIR: Sorry, I wrote it down on my draft and I didn't tell you what date I had  
18 put down, 12 August for the joint meeting.

19 MR ROBERTSON: And then the joint report.

20 THE CHAIR: I meant the joint statement.

21 MS HOWARD: Oh sorry, you are quite right.

22 MR ROBERTSON: That is 26 August which is the Friday before the August Bank  
23 Holiday.

24 THE CHAIR: You are quite correct.

25 MS HOWARD: Could we shorten that a little bit because ...

26 THE CHAIR: Yes.

1 MS HOWARD: Obviously these issues are not to be like a quantum report, so if we  
2 have the meeting on the 12<sup>th</sup> then we may be able to get the joint statements  
3 by the 19<sup>th</sup> rather than having a full 14 days.

4 THE CHAIR: Are we happy with that? 24 August.

5 MR ROBERTSON: Yes.

6 PROFESSOR CUBBIN: Sorry, what date did you say that was?

7 MS HOWARD: In paragraph 31, the first date is 12 August and the second date for  
8 the production of a joint report is 24 August.

9 THE CHAIR: Hearing bundles, shall we say ten days before the hearing, so that  
10 would be by 5 September; authorities bundles five days before the start of the  
11 hearing on the 15<sup>th</sup>, so by the 9<sup>th</sup>. Skeletons, can we do those by 7  
12 September?

13 MS HOWARD: Would it be possible to ask for some flexibility or cooperation with  
14 the bundle creation because it took my instructing solicitor three days to try  
15 and get the bundles sorted for this hearing, and obviously the burden normally  
16 falls on the claimant but we do have significantly less resource than the  
17 defendants' solicitors, and it would help to have some cooperation, even if it is  
18 just with printing and creating them because we are having to outsource that  
19 to independent copiers, which is not very cost effective either.

20 THE CHAIR: Let's say there has to be an attempt to agree an index for the trial  
21 bundle by 31 August, does that work?

22 MS HOWARD: Could they just be prepared in electronic bundle format? Is it  
23 important for the Tribunal to have them in hard copy?

24 THE CHAIR: I think we have got at paragraph 34, "Parties are to liaise with the  
25 Tribunal regarding appropriate format of the bundles." If when the index is  
26 agreed you can forward that to the Tribunal the panel members can then



1 indicate which bundles they want in which form.

2 MS HOWARD: We could produce a hard copy core bundle, if that would help, and  
3 then have the rest electronic, if that would help.

4 THE CHAIR: Exactly, that makes it much easier to carry stuff around, so it may be  
5 that when you let us have the index we can revert to saying who wants what  
6 and in what format.

7 MS HOWARD: I am grateful.

8 THE CHAIR: Pre-trial review. Do we think a pre-trial review will be necessary in this  
9 case?

10 MR ROBERTSON: It could be covered by “liberty to apply”. We don’t know what is  
11 going to crop up.

12 THE CHAIR: No, I think it would be covered by – I think you are right, Mr Robertson,  
13 let’s say that that is covered by “liberty to apply” if there is any issue that is  
14 outstanding.

15 MS HOWARD: I agree. If the parties can liaise and perhaps agree a timetable for  
16 the hearing between themselves and submit that to the Tribunal we may be  
17 able to get round some of the logistics.

18 THE CHAIR: Yes. Perfect. Thank you. The phase 1 hearing is to be listed, as we  
19 have indicated, on 15 September, with an estimate of five days. We have  
20 already given a date for skeleton arguments. Chronology, dramatis personae,  
21 list of issues.

22 MS HOWARD: We have already got that that we can work on. I think if we submit  
23 that at the same time.

24 THE CHAIR: As skeletons.

25 MS HOWARD: That would be helpful.

26 THE CHAIR: I think we now have a timetable up to trial. Ms Howard, where do we

1 go now?

2 MS HOWARD: I think that leaves the amendments to the claimant's pleadings. As it  
3 has been raised by my learned friend, it is probably one for him to make and  
4 have the claimant's response.

5 MR ROBERTSON: Madam, you have already raised the issue that appears due.  
6 The issues are out there, in that they have got their pleaded case. We have  
7 got a pleaded defence, and I am going to reply which unusually, in our  
8 submission, has a lot more material in it than you would expect in a reply, in  
9 particular it has got new facts, allegations of infringement and it has got new  
10 documents. When I say they are new documents, they were pre-existing  
11 documents at the time the claim was originally issued to the Tribunal, so they  
12 are not new in that sense but they are further documents that my learned  
13 friend wishes to refer to in her pleaded reply. The problem we have got is  
14 how do we respond to these new allegations because we don't have  
15 permission for a rejoinder, and I am not asking for permission for a rejoinder,  
16 at this stage anyway, and it seems to us that in fact what has happened is that  
17 the reply has gone rather further than the permissible extent of a reply. As to  
18 that, has the Tribunal looked at the Martlet Homes case?

19 MS WALKER: I haven't, no.

20 MR ROBERTSON: In that case I think it is worthwhile having a look at it. It is in the  
21 authorities bundle, tab 11, it is the judgment of Pepperall J, one of the editors  
22 of the White Book, and the passage begins at paragraph – well, page 6,  
23 paragraph 15, and essentially the issue is that a reply was advancing a case  
24 that was alternative to the case pleaded in the Statement of Case. Mr Justice  
25 Pepperall sets out the principles applicable to a reply, starting at paragraph  
26 17. Can I ask your Ladyship and members of the Tribunal to read paragraphs

1 17 to 21 rather than having me read them out to you.

2 THE CHAIR: Yes. (PAUSE) Yes, Mr Robertson.

3 MR ROBERTSON: Obviously those are the principles applicable under the Civil  
4 Procedure Rules but they are equivalent under the Tribunal's rules, that is to  
5 say reply is optional; you can't serve a Statement of Case after reply without  
6 the permission of the Tribunal – that is Rule 37 – the fact it is optional is Rule  
7 36(1).

8 At paragraph 20, "There is a clear conclusion that any ground of claim must be  
9 pleaded in the Particulars of Claim. New claims must be added by amending  
10 the Particulars of Claim, they cannot simply be pleaded by way of reply."

11 That, in essence, is the principle that we rely upon. My learned friend's ---

12 THE CHAIR: What was the new claim in Martlet?

13 MR ROBERTSON: Paragraph 12, as you see, it sets out an alternative case.

14 THE CHAIR: Yes.

15 MR ROBERTSON: Actually what they had done is they had also served draft  
16 amended particulars so they were nailing their colours to the reply.

17 So, we drew attention to this, as the Tribunal is aware, in our defence by highlighting,  
18 annexing the reply and then highlighting the provisions, the parts of the reply  
19 that contain new factual allegations and referred to new documents. Sorry, it  
20 was attached to our skeleton, not our defence.

21 THE CHAIR: Yes, I have that.

22 MR ROBERTSON: What my learned friends have done, and they served this  
23 yesterday evening, they have drawn together a matrix. Does the Tribunal  
24 have this? It is a 49 page document that is colour coded.

25 THE CHAIR: Yes.

26 MR ROBERTSON: What is set out there is their response essentially to what we

1 said in the reply. What they are saying in this document is that essentially  
2 they are just further particularising their Statement of Case in the reply, that is  
3 what it comes down to. They say at Point 7 of their note that, “We’ll sweep all  
4 of this up after disclosure and then we’ll apply to put it in our Statement of  
5 Case”. The problem is, prior to disclosure – we haven’t been able to respond  
6 to these factual allegations. That is really the basic problem, and these  
7 factual allegations go quite a way further than what was in the original  
8 Statement of Case.

9 Can I take you to the colour coded table that forms part of my learned friend’s matrix  
10 and pick out some examples of this? Page 6, row 5, I don’t think you need in  
11 close detail the Particulars of Claim and Defence columns but you then get to  
12 the reply pleading, “The Wacoal Group also sells on Amazon and eBay”. That  
13 is an allegation about us selling through platforms that didn’t form part of the  
14 Statement of Case and is a new point that we have not yet responded to. We  
15 don’t have the ability to respond to it as matters currently stand.

16 If we move down to row 7, again in the Reply Pleading column, if you turn the page,  
17 so page 9, there is a pleading there that the claimant had sold its products in  
18 the United States and Canada using eBay for over ten years before the VAPs  
19 were enforced. Again, that is something to which we would wish to respond.

20 Row 9 on page 13, again in the Reply Pleading column, “The defendants’ did not  
21 follow escalation procedures in the VAP policies but proceeded immediately  
22 to impose a cessation of supplies”. You have heard my learned friend on that  
23 this morning. Again, that is not a pleading in the Statement of Case.

24 Row 12 on page 16: again allegations relating to the Moda 2016 encounter including  
25 who was alleged to be present and who said what.

26 Row 13 ---

1 THE CHAIR: Sorry, I have got a little bit lost. Page 16 you said.

2 MR ROBERTSON: Page 16, in the column on row 12, "As to paragraph 36(b) ..."

3 THE CHAIR: Yes, I have that.

4 MR ROBERTSON: There is about another seven or eight examples, but I think I  
5 have taken you through enough to give you the flavour of why we say this is  
6 just more than particularisation, and that these raise factual allegations to  
7 which we should be given the opportunity to respond.

8 The obvious way for that we say is for the claimant to amend its Statement of Case  
9 and for us to be given a short period in which to serve an amended defence  
10 otherwise, and this is my primary submission, my fallback submission and it is  
11 very much a fallback, is that – sorry, I have missed one stage of that out. Of  
12 course, amended defence and then amended reply if so advanced. That is  
13 the way to get the pleadings properly on foot.

14 As a fallback submission, but it is very much a fallback submission, we should be  
15 given permission to serve a rejoinder – the only problem there is I think my  
16 learned friend will then be applying for permission to serve a surrejoinder, and  
17 that is a process that is deprecated by Pepperall, J, in the Martlet Homes case  
18 to which I took the Tribunal.

19 I tried to deal with that in as much as a nutshell as possible.

20 THE CHAIR: Can I understand: do you have an issue with each of the rows  
21 identified in the schedule produced by the claimant?

22 MR ROBERTSON: Not each of them. We have got an issue with about two-thirds  
23 of them.

24 MS HOWARD: All of these rows pick up the items that have been highlighted in the  
25 reply that was annexed to my learned friend's skeleton.

26 MR ROBERTSON: Yes, and we have considered them and some of the responses

1           yes we understand where they are coming from but we are still not satisfied  
2           as to the remainder.

3 THE CHAIR: But at the moment, so this identifies two-thirds of the issues that are  
4           still in dispute between you-

5 MS HOWARD: No. This is the comprehensive of all the issues that they raised in  
6           their skeleton. All of the highlighted items.

7 THE CHAIR: I'm being a bit slow here. I thought Mr Robertson was saying that he  
8           does not mind some of the bits that were previously highlighted or have I  
9           misunderstood?

10 MR ROBERTSON: That is correct. To be precise, the rows where we do not think  
11           the response is adequate and we still maintain our objection are, in addition to  
12           the ones which I took the Tribunal, also lines or rows 15, 18, 24-

13 THE CHAIR: Just bear with me. 15, 18-

14 MR ROBERTSON: 24, 26, in particular 26(iv). Then finally row 31: the allegation  
15           that the defendants are running a hub and spoke arrangement which is said to  
16           infringe, and we also object--

17 THE CHAIR: Where do I find that, the hub and spoke?

18 MR ROBERTSON: That is on 31, which is on-

19 THE CHAIR: Page 45.

20 MR ROBERTSON: Yes. It is actually on page 46.

21 THE CHAIR: Thank you.

22 MR ROBERTSON: In the alternative – it is an alternative case – there has been a  
23           hub and spoke concerted practice between the defendants.

24 THE CHAIR: Yes.

25 MR ROBERTSON: And the other point I make, it is a fairly technical point, but I will  
26           make it for the sake of completeness is that documents have been annexed to

1 the reply, which should have been annexed to the Statement of Case  
2 because, as I say, they are further documents they are not new documents  
3 and the obligation is to set out all the documents on which you rely in your  
4 Statement of Case if you have referred to them in your Statement of Case.

5 MR LLOYD-DAVIES: Excuse me, I am very sorry to interrupt. I am working on the  
6 transcript today and I had a connection issue and so lost the previous about  
7 two minutes. The last thing I had a note of was a question from Ms Lucas  
8 asking, "Do you have a problem?", to which Mr Robertson's reply began "Not  
9 with each of them". I am afraid I wasn't on the call subsequent to that, so that  
10 will be missing from the transcript. My apologies.

11 MR ROBERTSON: Shall I run through the numbers again?

12 THE CHAIR: Yes, please.

13 MR ROBERTSON: The numbers of the rows to which we still object are: in addition  
14 to the ones to which I had already taken the Tribunal, rows 15, 18, 24, 26, in  
15 particular 26(iv) and line 31, the allegation that the defendants are running a  
16 hub and spoke arrangement.

17 I also made what I described as a technical objection to documents being annexed  
18 to the reply when under the Tribunal's rules documents relied upon should be  
19 annexed to the Statement of Case. These are now new observations from  
20 me. I described that as technical because as, Madam, you said the  
21 documents are now out there, but we have not had the chance to plead to  
22 them, as we were able to plead to the documents annexed to the original  
23 Statement of Case. So we have currently got open ended pleadings. How do  
24 we draw all these to a conclusion and close the pleadings? We say that  
25 should be by way of an amended statement of case, followed by an amended  
26 defence and then for my learned friends to serve an amended reply, if so

1 advised.

2 THE CHAIR: Thank you.

3 MS HOWARD: Thank you. We have produced this matrix in an attempt to try and  
4 cut the back of these allegations, to find a workable way to take the panel  
5 through the allegations. We contend that the process of amendment is not  
6 warranted and this will only cause additional delay and expense. If the  
7 Tribunal opens up the authority of Martlet, on which my learned friend has  
8 relied, at tab 11 of the authorities bundle. He took your Lordships to this. At  
9 paragraph 20, at the bottom of page 7 on the internal numbering, it makes a  
10 distinction where a reply may be pleaded and can be particularly useful. It  
11 makes a distinction with provisions that are not inconsistent with the  
12 particulars that are already set out in the particulars of claim, and an important  
13 distinction between a new ground of claim or a new cause of action which is  
14 not permissible, and a mere reference to new facts or new allegations which  
15 refute the defence. So if you look at page 8 of the authority the judgment  
16 gives some examples there, under 20.1, 20.2 and 20.3:

17 “In each example, the claimant would be pleading new facts in order to refute a  
18 defence, but it would not be pleading a new claim. Equally, while there is no  
19 obligation to respond, a reply can usefully admit a fact and therefore avoid the  
20 cost and trouble of needing to prove that fact. Or a reply can deny an  
21 allegation of fact and usefully explain why the allegation must be wrong.”

22 Again, over the page, if we turn to paragraph 30 on page 11, the judgment makes  
23 the important distinction between defining a new cause of action and simply  
24 new facts or allegations. So it is important:

25 “The amendments plead no new duties, no new losses and concern the same  
26 element that was already in issue on the original case.”



1 That is the opening of paragraph 29. Paragraph 30 continues:

2 “The classic definitions of a cause of action are every fact which is material to enable  
3 the plaintiff to succeed.”

4 At the bottom of the page:

5 “The pleading of unnecessary allegations or the addition of further instances or  
6 better particulars do not amount to a distinct cause of action. The selection of  
7 the facts to define the cause of action must be made at the highest level of  
8 abstraction.”

9 Over the page it refers to the authority of *Co-operative Group v Birse*  
10 *Developments*, and again it directs the court to see if there is a change in the  
11 essential features of the factual basis, say giving further particulars of existing  
12 allegations - sorry, rather than just giving further particulars of existing  
13 allegations, when it goes further than that and introduces a new cause of  
14 action.

15 “So where an amendment pleads a duty which differs from that pleaded in the  
16 original action, that will normally assert a new cause of action. However, as  
17 Sir Iain Glidewell in the *Darlington Building Society* went on to observe, where  
18 different facts are alleged to constitute a breach of an already pleaded duty,  
19 the courts have had more difficulty in deciding whether a new cause of action  
20 is pleaded. The question to be resolved is therefore one of fact and degree.  
21 For my part I am not convinced that one needs to further than for a change in  
22 the essential features of the factual basis, bearing in mind that the factual  
23 basis will include the facts out of which the duty is to be spelled as well as  
24 those giving rise to damage.”

25 In this case we say we have not pleaded a new breach; all that we are doing in  
26 response to either the denials that have been put forward by the defendants

1 or their complaints that we have not particularised the claim properly and that  
2 it is embarrassing for want of detail, is we have just tried to supplement it with  
3 further particulars. So that does not cause any prejudice to the defendants, it  
4 is a very early stage of the proceedings. It would be no different to if they  
5 were to issue an RFI or ask for further and better particulars. They would not  
6 have a right of reply to those FBPs or the RFI under Part 18 of the CPR, but  
7 they would be able to address those points either in their evidence or in their  
8 skeleton arguments or indeed at trial. So what we tried to do in this matrix is  
9 to categorise these various allegations into different categories where we say  
10 they are actually just responding either to refute points that are made in the  
11 defence, to provide better particulars that the defendant has asked for or, yes,  
12 we have annexed documents. But those documents do emanate from the  
13 defendants, they are not new documents that should come as any surprise to  
14 them and do not cause any prejudice to them; they are emails that the  
15 defendants' own employees have sent the claimant.

16 So what I wanted to do is to work through some key examples to show the  
17 categories that we divided these into, and I do think it is telling that of the 32  
18 original objections that the defendants raised I think we are now looking at  
19 about 6 or 7 or 8, I think. I did not catch all of the initial ones they objected to.  
20 Then there is a group of ones that depend on these new documents that are  
21 being submitted.

22 So let us take some of these. Let us deal with the green categories first, and you will  
23 see in the opening explanation we say that the paragraphs that are marked  
24 green, which are rows 8 to 9, 14 to 17, 20, 27, 29 and 30 to 32, do not raise a  
25 new duty or a new allegation, they are simply refuting denials that the  
26 defendant has made in their defence. What we have sought to do is to make

1 legal or factual submissions, some of which are already contained in the  
2 particulars of claim.

3 So let us take you to some of the ones. One of them is row 8.

4 THE CHAIR: Which I think is no longer complained about.

5 MS HOWARD: I thought this one was the eBay listing, but I may be ...

6 THE CHAIR: I appreciate it is all quite - they are all relatively new submissions and  
7 your documents are quite new but I do not think, Mr Robertson, you rely on  
8 row 8, do you?

9 MR ROBERTSON: I did not rely upon row 8.

10 MS HOWARD: Okay. I will try and confine this to ones that --

11 MR ROBERTSON: Bear in mind I have only had this document this morning  
12 actually.

13 MS HOWARD: Yes.

14 THE CHAIR: Yes, I know, yes. Row 9, I think.

15 MS HOWARD: Row 9 I think is objected to. So this is the complaint, we say in the  
16 reply, that the defendants did not follow the escalation procedures in the VAP,  
17 which I do not think the panel has been taken to the VAP document itself, but  
18 there is a series of notices that the defendants can make and ask the  
19 claimants to rectify the prices or to remove products from the listing, and if  
20 they do not do it then there can be a refusal to supply for 30 days and then 60  
21 days, and it escalates. So we say the defendants did not follow their  
22 escalation procedures, they proceeded immediately to impose a cessation of  
23 supplies.

24 That point responds to an add further particulars of why we say the sanctions  
25 imposed on the claimant were discriminatory and have been applied in an ad  
26 hoc and selective fashion. This ties back into the submissions that we made

1 at paragraph 2 of the particulars of claim and also paragraph 16.i and  
2 paragraph 58 and 79C. So if you can look at the column head of particulars  
3 of claim, I am going to focus on 16.i:

4 “We do say they were applied in force against the claimant in a targeted and  
5 discriminatory manner with the claimant’s direct retailers who were not subject  
6 to the same requirements and they were allowed to continue.”

7 Again, we say that the discriminatory application of the policies has undermined the  
8 claimant’s ability to compete in the market because its UK based competitors  
9 continue to sell the Wacoal brands and the Eveden brands via ebay.co.uk and  
10 amazon.co.uk without adhering to the policies. So we are simply saying that  
11 this actually forms part of the central allegation relating to discrimination and it  
12 is just simply providing further particulars of why we say this was not a  
13 systematic or consistent treatment but was ad hoc, selective and  
14 discriminatory, and it forms part of the main central allegations that have been  
15 made in the particulars of claim and responds to the denials that are made at  
16 paragraph 58C of the defence.

17 THE CHAIR: Yes.

18 MS HOWARD: If I may move, I think the next - I am trying to do it by category so  
19 that you can see. I think the next point that my learned friend made was  
20 paragraph 18, which I think is a grey category, which you will see from the key  
21 at the top, this is where the defendant has denied facts and the reply is  
22 pleading facts to show why the defendants’ denials are wrong. So we say this  
23 clearly falls within the permissible extent of a reply under the Martlet case.

24 The denial, the defendant has denied that they - sorry, at 45a of the defence they  
25 deny that they were discriminating against the claimant and did not treat it  
26 consistently with other UK retailers, because they say that the defendants

1 required other retailers based in the UK to comply with the VAP policies and  
2 to stop advertising or selling the products to consumers in the US, and  
3 required them to remove their listings in the same way, and they say that the  
4 retailers complied with those requests and therefore they deny that there was  
5 any targeting or discriminatory treatment.

6 We said in the reply at paragraph 19 we put the defendant to proof of that, and we  
7 do maintain our pleading that it was applied in a targeted and discriminatory  
8 manner because the claimant specifically wrote to the defendant to identify  
9 other UK retailers who were continuing to advertise, market and sell via  
10 ebay.com and ebay.co.uk and were not complying with the MRP. We have  
11 attached documents to the reply to make that point good. So we have annex,  
12 I think it is B - I will not take you to them, but annex B300 to 322, we have  
13 annexed screen shots that show that UK rivals were selling the Wacoal  
14 products on eBay and on Amazon in the US and they were also discounting  
15 below the MRPs. So we say that is perfectly within the scope of a pleading of  
16 a reply because it is refuting the denials that the defendants have made.

17 Let us turn to row 24, which I think is another one the defendants have objected to. I  
18 am just going to check my notes. Now, this is a blue one, which again we say  
19 these are new facts that we have put forward in order to refute the position in  
20 the defence. These facts at 24, we say that during 2018, 2019 and 2020 the  
21 claimant sent numerous emails to the Second Defendant identifying its direct  
22 competitors. So this again is a similar point to the previous one and it refers  
23 to the emails and the screenshots of UK rivals who were selling on eBay in  
24 the US and on ebay.co.uk. Again, we say that even at the date of this reply in  
25 February 2022 there are still over 51,000 listings of Wacoal products being  
26 marketed and sold on the ebay.com which are not compliant with the VAP

1 and yet those retailers have not been sanctioned in any way, yet the claimant  
2 has faced the refusals to supply.

3 So we are saying that is not a new breach of duty, it falls completely within the  
4 previous allegations of discrimination and refusals to supply to show why  
5 those sanctions are discriminatory and targeted against the claimant.

6 The next point that the defendants have objected to is paragraph 26. Again, this is  
7 blue so this is new facts, and we say that paragraph 58 of the - sorry, it is 25A  
8 of the reply responds to paragraph 58 of the defence. We say that we are  
9 pleading facts to refute the position in the defence, which is admissible by way  
10 of reply because this is not a new claim, it is just simply new evidence, which  
11 was that the refusal to supply was a sanction for the claimant's refusal to  
12 comply with the VAP.

13 We go on to not plead a new cause of action, we are simply pleading new facts to  
14 support the fact that the claimant was being sanctioned with the violation  
15 notices and the refusals to supply in circumstances where it had blocked all  
16 advertising and sales of the products in the US by ebay.com and ebay.co.uk.  
17 Those actions had been taken in July 2018, yet in March 2019 the defendant  
18 sent the violation notices complaining that they were in breach. Because  
19 there were no sales in the US at that time, they could only be applicable to  
20 sales that were happening in the UK on the ebay.co.uk site. So even though  
21 the claimant had taken the measures to deactivate the ebay.com listings in  
22 the US, it still received those violation notices and was still sanctioned through  
23 the refusals to supply. So again that is not a new cause of action, it is simply  
24 new facts that go to support the same breaches that we say the defendant  
25 has committed.

26 I think the last one that the defendants objected to was paragraph 31. Now, this is

1 the one which they contend relates to hub and spokes. By hub and spokes  
2 infringements - this is page 46 of the table - they object to the fact that we  
3 pleaded in the reply:

4 “In the alternative there has been a hubs and spokes concerted practice between the  
5 defendants and retail entities consisting of retailers, monitoring and referring  
6 complaints to the defendants about the claimant’s online discounting, and  
7 then the defendants pursuing those complaints with follow up actions to limit  
8 the claimant and other retailers offering discounts and getting them to  
9 increase their prices up to the defendants’ RRP’s and MRPs.”

10 Now, hubs and spokes is shorthand in competition law speak for these concerted  
11 practices where you have the manufacturer at the centre of the hub and you  
12 have the retailers referring complaints or pricing information into the  
13 manufacturer, who then relays it to other members of the retail network,  
14 distribution network, or it receives a complaint and acts on it by taking action  
15 against another retailer. So this is just shorthand for a situation where you  
16 have got A and B with the manufacturer acting as a conduit in between to  
17 carry out what is in effect indirect retail price maintenance.

18 So this is well established case law from Replica Kits, which I think I appeared in,  
19 nearly twenty years ago, and we have made that point very clearly in  
20 paragraph 79 of the particulars of claim, which is set out in the column on the  
21 left on page 46. So we say that this, the RPM policy, constitutes a horizontal  
22 concerted practice between competing retailers, including Wacoal’s own retail  
23 operation, and the defendants as manufacturer or wholesale distributor. Then  
24 it goes on:

25 “The defendants received specific complaints about competing retailers, about below  
26 RRP pricing offered by the claimants and other online retailers. The

1 defendants also invited complaints and market intelligence from the claimant  
2 about other retailers' pricing as well as carrying out its own monitoring of retail  
3 prices. The defendants then acted upon the complaints by asking the  
4 offending retailers to increase their prices or face the sanction of reduced  
5 supplies or no supplies, and this constitutes RPM, contrary to section 2(2)(a)  
6 of the Act or Article 101(1)."

7 So, yes, we have labelled it as a hubs and spokes, as a form of shorthand, but there  
8 was no material difference to the allegation that has been made, it is just  
9 repeating what we have actually claimed in the particulars of claim.

10 So for all of the ones that the defendants now identify, we say that there has been no  
11 introduction of a new cause of action, these are just simply further facts,  
12 further evidence in support of the main allegations.

13 We have highlighted one area where we think there is something new, and that is  
14 the yellow, which I think is rows 20 to 21. I am just going to check with my  
15 learned junior. I must say, this work of art is the work of my junior, Miss  
16 Hafesji and she has worked through the night, over the weekend, to get this  
17 done, which I think is helpful. It is rows 21 to 23 and 25. We have made this  
18 very clear in the opening section of this table at paragraph 5. These are the  
19 ones that are highlighted in yellow. I am sorry, I have not got the page  
20 reference but I will give that. Page 28.

21 THE CHAIR: Yes.

22 MS HOWARD: In the particulars of claim at paragraphs 53 and 56 onwards we refer  
23 to the Eveden VAP, which applied to certain covered products of their defined  
24 - of the Eveden brands. What the claimant understood was that the  
25 defendants were then extending that policy to the Wacoal brands and so in  
26 meetings they refer to the same MRPs and the platform ban, but the claimant



1 understood that this was some kind of extension of the Eveden VAP. For the  
2 first time in the defence the defendants disclosed the existence of a separate  
3 VAP, the Wacoal VAP, which the claimant had never heard of, and it was the  
4 first time she had seen a copy of the Wacoal VAP, which one was attached to  
5 the defence. So in the reply we have therefore tried to address the new  
6 Wacoal VAP and therefore, yes, we are referring to new facts there but they  
7 were facts that were not in the claimant's knowledge at the time of the  
8 particulars of claim. We say this is a legitimate submission in response to  
9 new facts advanced by the defence, and which we were aware of for the very  
10 first time.

11 So that applies to rows 21, which is 22B of the reply, row 22 and row 23, which is  
12 24A of the reply, and I think it also applies to row 25 at page 34 to 35, which is  
13 paragraph 24D of the reply. We say, okay, this is a separate policy but to all  
14 intents and purposes it was the same policy as the Eveden VAP; it applied  
15 MRPs to the Wacoal brands, it applied the same platform ban and the same  
16 sanctions were applied. So if there is a shift in that we have redirected the  
17 claim towards the Wacoal VAP, the defendants have not suffered any  
18 prejudice as a result of that - it is their policy anyway - it is just that we wanted  
19 to clarify our position.

20 Now, if the panel wants us to amend the claim form to reflect that new fact that we  
21 have only just been made aware of, we are quite happy to do that, but we  
22 consider it is a bit disproportionate to amend the whole proceedings and delay  
23 the timetable to trial when in any event, if we are going to be having  
24 disclosure in short order, we will probably have to amend anyway in the light  
25 of evidence that is disclosed as part of disclosure, and it would make sense to  
26 wrap up those small amendments to paragraph 24 of the reply as part of

1           those admissions after disclosure.

2 THE CHAIR: Those paragraphs you have just referred to, I do not think Mr  
3           Robertson has an issue with, because they were not ones identified when we  
4           went through the table.

5 MR ROBERTSON: Because my learned friend accepts that she needs to amend in  
6           due course --

7 THE CHAIR: To reflect those.

8 MR ROBERTSON: ... it is just a question about when it is done.

9 THE CHAIR: So when we went through the table - I just want to be clear about this -  
10          when we went through the table we looked at the yellow - we looked at all the  
11          ones you disputed. There are these yellow ones.

12 MR ROBERTSON: Yes, these yellow ones, they have explained in the key ...

13 THE CHAIR: Right.

14 MR ROBERTSON: ... that these are new issues raised requiring amendments in  
15          due course.

16 THE CHAIR: Requiring amendment, right. Thank you, Mr Robertson.

17 MS HOWARD: I think paragraph 24 was included in my learned friend's --

18 MR ROBERTSON: It was.

19 MS HOWARD: ... list of objections.

20 MR ROBERTSON: It was. As I say, I have been working on this document only this  
21          morning.

22 THE CHAIR: Yes. That is fine. Can you just - there is one other one, which is 12, I  
23          think. Mr Robertson referred to row 12.

24 MS HOWARD: If it would help ...

25 MR ROBERTSON: It is Moda.

26 MS HOWARD: Thank you.

1 MR ROBERTSON: The conversation is on page 16.

2 MS HOWARD: Okay. So I think there is some confusion here because the  
3 defendant referred to Moda 2015, which is a typo in the defence and we do  
4 not object to that. But the defendant in the defence denied that there had  
5 been any discussions at the Moda 2016 event. I am not going to name the  
6 employees but there were two employees there and they denied that there  
7 was any RPM request to increase prices. So what we have sought to do in  
8 paragraph 14 of the reply is respond to those denials and to add further  
9 particulars of the conversation that Mr and Mrs Dutton had with the  
10 defendants' employees and to clarify which employee said what and when.  
11 So all we are saying: this is not a new cause of action or a new allegation of  
12 breach, this is part of the main allegation on direct RPM requests that were  
13 made by the defendant and we are just adding new facts and new particulars  
14 in an attempt to see whether this jogs the defendants' witnesses' memory.  
15 We say that is a legitimate part of the reply.

16 Those facts would in their natural course probably have been referred to in the  
17 witness statements of the witnesses when they are handed down later in the  
18 summer, so there is no prejudice to the defendant. There are always new  
19 facts, new documents that are being disclosed in the course of disclosure,  
20 and there is ample opportunity to address those, both in reply witness  
21 statements or skeleton arguments or indeed submissions at trial, and the  
22 defence can put them to our witnesses. So there is no unfairness here or  
23 prejudice caused to the defendant at all. If anything, it is helpful that they  
24 have got this up front now so they can address it.

25 THE CHAIR: Yes, thank you. Mrs Walker, do you have any questions?

26 MS WALKER: No, thank you, I do not.

1 THE CHAIR: I will take that as a no.

2 MS WALKER: Yes, thank you.

3 THE CHAIR: Mr Robertson, do you have anything you want to add on that?

4 MR ROBERTSON: Simply to observe that my learned friend took you to Martlet  
5 Homes but the bulk of the passages she referred to were concerned with the  
6 test for when an amendment to a statement of case is to be permitted or not.  
7 We do not object to them amending the statement of case, we are inviting  
8 them to do it so that we can respond to the plethora of new facts, new  
9 evidence, that my learned friend has just taken the Tribunal. Either that is  
10 done at this stage so we have proper closed pleadings or this waits until after  
11 disclosure, and that seems a somewhat tardy approach.

12 MS HOWARD: Sorry, I do not want to keep popping but the reason I took the panel  
13 to those sections in paragraph 30 onwards is precisely to make the point that  
14 we do not need to amend our statement of case, those principles do not apply  
15 here, because we have not pleaded a new breach or a new cause of action,  
16 and that is precisely why we say these amendments are not needed at this  
17 stage. We are happy, if the Tribunal considers that we need to make an  
18 amendment now to tidy up disclosure in relation to those rows 21 to 25, the  
19 yellow bits, we are happy to do that but we just think it is a bit disproportionate  
20 because actually there is no difference to whether it is the Eveden VAP or the  
21 Wacoal VAP. I think our case is clear of what the main central allegations are  
22 anyway and what the facts are that we are relying on, so we do not think there  
23 is a problem.

24 THE CHAIR: Thank you. I am quite conscious of the time and I have only just  
25 recently seen this document and been referred to the Martlet case, so I think  
26 we have actually agreed that it will not affect the timetable and so when we

1 give our detailed ruling on the fast track application I will also feed in whatever  
2 we want to say about this.

3 I am conscious, I think there is one more issue, is there not, which is confidential  
4 treatment of documents filed before this hearing. Is there still an outstanding  
5 dispute between you on that?

6 MR ROBERTSON: Now that we have established a confidentiality ring, that allows  
7 the parties to refer any dispute, outstanding dispute, as to confidentiality, if  
8 they cannot resolve it between themselves, to the Tribunal for a ruling, and in  
9 that light there is not an outstanding issue today, we have a process for  
10 dealing with the issue now.

11 THE CHAIR: So is there anything else we need to deal with today?

12 MS HOWARD: No, we will amend the orders, both the draft CMC and the CRO  
13 order, agree them with the other side and we will submit them to you as soon  
14 as we can so that you can finalise those, but I do not think there is anything  
15 else.

16 MR ROBERTSON: It remains for us to express our gratitude to the Tribunal for  
17 sitting in person. It is good to be back - it has been over two years.

18 THE CHAIR: It does make a difference. Except Mrs Walker.

19 MS WALKER: And I have apologised for my Covid.

20 THE CHAIR: Thank you.

21 (16.12)

22 (The Tribunal adjourned)

23