



Neutral citation [2022] CAT 23

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1427/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 May 2022

Before:

BRIDGET LUCAS QC
(Chairwoman)
PROFESSOR JOHN CUBBIN
ANNA WALKER CB

Sitting as a Tribunal in England and Wales

BETWEEN:

BELLE LINGERIE LIMITED

Claimant

- v -

(1) **WACOAL EMEA LTD**
(2) **WACOAL EUROPE LTD**

Defendants

Heard at Salisbury Square House on 14 March 2022

RULING (PLEADINGS)

APPEARANCES

Ms Anneli Howard QC and Ms Khatija Hafesji (instructed by Sheppard Co) appeared on behalf of the Claimant.

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

A. INTRODUCTION

1. The background to this matter is set out in our Ruling dated 23 May 2022 ([2022] CAT 22) (the “Fast-Track Ruling”) which we do not set out and repeat here, save to add that BL filed its Reply in these proceedings on 25 February 2022. This Ruling adopts the definitions used in the Fast-Track Ruling. This Ruling arises from the first Case Management Conference (“CMC”) which took place on 14 March 2022 and relates to objections taken by the Defendants in their skeleton argument to BL’s Reply. It is said that BL’s Reply:
 - (1) Contains a considerable number of allegations that are either entirely new or have been expanded from the allegations (including but not limited to allegations that were either unparticularised or inadequately particularised) set out in the Claim Form, including by annexing additional documentation to the Reply. This was said to affect Reply paragraphs 5, 8(c)-(e), (g) and (i), 10, 12, 14, 16, 17(b), 18, 19, 20, 21, 22(b), 24(b) and (c), 25(a)(i)-(vi), 29(a) and (b), and 31 (a) and (b), and Annex 1.
 - (2) Pleads additional facts in a chronology of key events which are not agreed and which is annexed to the Reply as Annex 2.
2. The Defendants contend that this is an impermissible use of a Reply, and that the Claimant has not explained why such allegations could not have been made in, and documents annexed to, the Claim Form. The Defendants say that they have not had an opportunity to plead to these matters.
3. The Defendants invite the Tribunal (i) to strike out various paragraphs of the Reply in whole or in part, (ii) to order that the Claimant amend its Claim Form to plead these matters and file and serve an amended Claim Form, and (iii) to give permission to the Defendants to amend their Defence. The Defendants provided a copy of the Reply with their skeleton argument which highlighted the alleged offending passages.

B. THE RELEVANT LEGAL BACKGROUND

4. Rule 30 of the Competition Appeal Tribunal Rules 2015 (the “Rules”) provides, so far as is relevant for present purposes:

“(3) The claim form shall contain—

...

(c) a concise statement of the relevant facts ...;

(d) a concise statement of any contentions of law which are relied on;

(e) the relief sought in the proceedings, including (where applicable) —

(i) an estimate of the amount claimed in damages, supported by an explanation of how that amount has been calculated;

(ii) details of any other claim for a sum of money;

(iii) in proceedings in England and Wales ... a statement that the claimant is making a claim for an injunction;

...

(5) There shall be annexed to the claim form—

...

(b) copies of any documents referred to in the claim form ...”

5. Rule 35 provides for the defendant to file a defence, so far as is relevant for present purposes:

“(1) ... within 28 days of service of the copy of the claim form the defendant shall file a defence—

(a) setting out in sufficient detail which of the facts and contentions of law in the claim form the defendant admits or denies, on what grounds and on what other facts or contentions of law the defendant relies;

...

(3) As far as practicable, there shall be annexed to the defence a copy of every document referred to in the defence (except where such documents have been annexed to the claim form). ...”

6. Rule 36 provides, so far as is relevant for present purposes, that:

“(1) Within 21 days of receipt of the copy of the defence, the claimant may file a reply to the defence.

...

(3) If the claimant files a reply to the defence, it shall send a copy of the reply and any accompanying documents to each other party at the same time as it files the reply. ...”

7. Rule 37 provides that no further pleadings may be filed without the permission of the Tribunal.

8. Paragraph 3.2 of the Competition Appeal Tribunal Guide to Proceedings 2015 (the “Guide”) explains that:

“The Rules pursue the same philosophy as the CPR of the High Court and many of the rules are modelled on the CPR. Where, in particular as regards private actions, a rule mirrors the CPR, the Tribunal would generally expect to interpret that rule in the same way as the High Court or Court of Appeal. However, the Tribunal’s Rules are different in various respects and parties should not assume that the approach of the CPR applies to a particular procedural issue. ...”

9. The Guide addresses the substantive requirements of the Claim Form at paragraphs 5.2; the structure of the Claim Form at paragraphs 5.22 to 5.27; and the documents to be annexed to the Claim Form at paragraphs 5.28 to 5.31. In particular:

- (1) Paragraph 5.22 acknowledges that the Rules do not prescribe a structure for the presentation of the claim, but that: “it is vital that the Tribunal is able fully to understand the claim from the moment of its receipt. Clarity, concision and common sense should underpin the drafting and presentation of the claim form”.
- (2) Paragraph 5.24 suggests that it would be helpful to have a brief summary of the factual and legal nature of the claim.
- (3) Paragraph 5.25 suggests that it will then normally be appropriate to set out fully the factual background to the claim, how it has arisen and how those facts are alleged to have caused loss to the claimant.
- (4) Paragraph 5.26 provides that having identified the facts on which the claim is based, the Claim Form should identify the grounds which entitle

the claimant to recover the sums claimed. The arguments supporting those grounds should then be developed in a concise manner.

(5) Paragraph 5.27 provides that when setting out the arguments in support of each ground, it is unnecessary to set out lengthy extracts from decided cases: short citations, accompanied by the case reference and paragraph number, will normally suffice.

(6) As regards documentation, paragraph 5.28 provides that the claimant should annex copies of any documents referred to in the Claim Form. Paragraph 5.29 makes clear that:

“At this stage it is not necessary to produce every document on which the claimant will rely; it suffices to include ... any document to which reference is made in the claim form. In this regard, the claim form should only refer to documents of central importance and should not include material of a peripheral nature”.

10. Paragraphs 5.66 to 5.71 provide guidance as to what should be provided by way of a defence. In particular, paragraph 5.69 states that “[t]he defence should contain the same level of detail as required in respect of the claim form and, as far as practicable, annex a copy of every document referred to in the defence”, and paragraph 5.70 provides that “[u]nless the context requires otherwise, the guidance given above in respect of the claim form applies equally to the preparation and presentation of the defence”.

11. Paragraph 5.72 deals with the reply as follows:

“Rule 36(1) allows the claimant, within 21 days of receipt of the defence, to file a reply. However, this is not a requirement. If the claimant does not wish to file a reply, it should inform the Registrar and the other parties of that fact as soon as possible rather than let the 21 day period expire. Similar considerations to those mentioned above in respect of the claim form and defence apply to the preparation and presentation of the reply.”

12. Paragraph 5.73 refers to Rule 37, which provides that no further pleadings may be filed by any party without the permission of the Tribunal.

13. The provisions relating to the contents and structure of the Claim Form in proceedings in the Tribunal do not therefore mirror those that apply to a Claim

Form, Particulars of Claim, Defence and Reply under Part 16 of the Civil Procedure Rules (“CPR”) and Practice Direction 16. In particular, we note that:

- (1) Whereas the CPR provides for Particulars of Claim to be included either in or with the Claim Form, or served separately within 14 days of service of the Claim Form, the Rules require a claimant to set out its case in the Claim Form.
- (2) CPR r. 16.4 provides that the Particulars of Claim must include “a concise statement of the facts on which the claimant relies” (CPR r. 16.4(1)(a)) and, if the claimant is seeking interest, aggravated, exemplary or provisional damages, a statement to that effect, (CPR r.16.4(1)(b) to (d)) and such other matters as are set out in any relevant practice direction (CPR r. 16.4(1)(e)). The Tribunal Rules and Guide similarly require the claimant to provide a concise statement of the relevant facts but, as we have said, also require the Claim Form to include a concise statement of any contentions of law which are relied on. Having identified the facts on which a claim is based, the Claim Form is expected to identify the grounds which entitle the claimant to recover the sums claimed and to develop in a concise manner the arguments supporting those grounds, which may include citations from relevant case law. In addition, the Claim Form is expected to refer to documents of central importance to the claim and copies of those documents are to be attached, but it is not necessary to produce every document on which the claimant relies.
- (3) CPR r. 16.5 provides that the defendant must state which of the allegations in the Particulars of Claim are denied, not admitted, or admitted (CPR r. 16.5(1)). Where a defendant denies an allegation, he must state his reasons for doing so; and if he intends to put forward a different version of events from that given by the claimant, he must state his own version. The Tribunal Rules and Guide are in slightly different terms and require that a Defence should set out in sufficient detail which of the facts and contentions of law are admitted or denied, and on what grounds. It should provide a concise statement of other facts or

contentions of law on which the defendant relies providing the same level of detail as the Claim Form, and attach documents in so far as they have not already been attached to the Claim Form. The Guide in relation to the Claim Form is equally applicable to the Defence.

- (4) CPR r. 16.7 does not provide any guidance as to the contents of a Reply, but there is no requirement to serve one (CPR r. 15.8). CPR r. 16.7 makes clear what should happen if the claimant does not file a Reply to the Defence, or does so but fails to deal with a matter raised in the Defence. The Tribunal Rules and Guide also make clear that the service of a Reply is optional. In the event that one is served, similar considerations to those that apply in relation to the Claim Form and Defence apply to the Reply. In other words, a claimant who serves a Reply may therefore identify the contentions of fact and law in the Defence that the claimant admits or denies, explain on what grounds, and develop in a concise manner, the arguments supporting those grounds. Again, documents referred to in the Reply which have not already been attached to the Claim Form or Defence must be attached.

14. Counsel for BL and the Defendants both referred us to *Martlet Homes Ltd v Mulalley & Co Ltd* [2021] EWHC 296 (TCC) (“*Marlet*”) on the subject of what is and what is not permissible by way of Reply. In that case, the claimant owned five high rise towers. The previous owner had entered into a design and build contract with the defendants which included the design and installation of external cladding. Practical completion was achieved in respect of the works to the various tower blocks between 2006 and 2008. The claimant issued proceedings against the defendant on 11 December 2019 seeking damages for alleged negligence and breach of contract. As the contract was entered into by way of deed, the claim was brought a matter of days before the expiry of the twelve-year limitation period in respect of works at two properties, and less than four months before the expiry of the limitation period in respect of works at two others. Any claim in respect of the works at the fifth tower block was already statute barred. The Claim Form was served with Particulars of Claim on 9 April 2020, which was the very last working day on which proceedings could be served within the four months permitted by CPR r. 7.5.

15. The defendant served a Defence on 4 June 2020 in which it admitted various breaches of contract, and put the claimant to proof on other allegations. It denied that the alleged breaches had caused any loss arguing that, following the tragic fire at Grenfell Tower in June 2017, the claimant was in any event required to replace the cladding. The claimant served a Reply on 9 July 2020. It joined issue with the causation defence, and pleaded in paragraphs 80 to 83 of its Reply that, even if the defendant was right as to causation, it would remain liable because the defendant was in breach of contract in using the cladding that it had. The defendant sought to strike out those paragraphs of the Reply on the basis that the claimant could not raise a new claim by way of a Reply. The claimant resisted such an order, but sought in the alternative permission to amend its Particulars of Claim so as to plead its case as set out in paragraphs 80 to 83 of the Reply. The Defendant argued that permission should be refused as it was an attempt to plead a new claim based on new facts after the expiry of the limitation period.

16. At [17] to [24], Pepperall J considered the requirements as to what must be contained in the Particulars of Claim and Defence under the CPR. He referred to the fact that service of a Reply is optional, and to the fact that a claimant who does not file a Reply is not taken to admit the matters raised in the defence (CPR r. 15.8 and 16.7). He noted that the CPR give little guidance to what can be pleaded in a Reply, but referred to paragraph 9.2 of Practice Direction 16 which provides that “A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example, a reply to a defence must not bring in a new claim. Where new matters have come to light the appropriate course may be to seek the court’s permission to amend the statement of case”. He also referred to the rule that no party may serve a statement of case after a Reply without the permission of the court (CPR r. 15.9).

17. At [20] to [21], Pepperall J stated that:

“20. In my judgment, the terms of r. 16.4(1)(a), the optional nature of the Reply, the rule restricting subsequent statements of case and the terms of the Practice Direction all point to the clear conclusion that any ground of claim must be pleaded in the Particulars of Claim. New claims must be added by amending the Particulars of Claim and cannot simply be pleaded by way of Reply. I reject Mr Selby’s submission that such view would deprive the Reply

of all purpose. A Reply can be particularly useful in order to refute a ground of defence. For example, a Reply can properly plead:

20.1 a later date of knowledge pursuant to ss. 14 or 14A of the Limitation Act 1980, or that the court should disapply the primary limitation period pursuant to ss. 32A or 33 of the Act, in answer to a plea in the Defence that the claim is statute barred;

20.2 that an exemption or limitation clause was not incorporated into the parties' contract or that it was of no effect in excluding or limiting liability because the clause did not satisfy the condition of reasonableness within the meaning of the Unfair Contract Terms Act 1977; or

20.3 that the defendant is estopped by some earlier judgment or representation from relying upon a particular defence.

In each example, the claimant would be pleading new facts in order to refute a defence, but it would not be pleading a new claim. Equally, while there is no obligation to respond upon the facts, a Reply can usefully admit a fact alleged in the Defence (thereby avoiding the cost and trouble of needing to prove the fact and allowing the court and parties to focus on the real issues) while explaining why such admitted fact does not provide a defence to the claim. Or a Reply can deny an allegation of fact and usefully explain why such allegation must be wrong.

21. Not only is the proposition that one can advance a new claim in a Reply contrary to the clear terms of the Practice Direction, but it is also inherently undesirable and contrary to the overriding objective of dealing with cases justly and at proportionate cost. If such practice were to be condoned, claimants would not need to be precise in their formulation of the Particulars of Claim since they could always have a second bite of the cherry when pleading the Reply. Defendants would have to seek permission from the court in order to answer by way of Rejoinder any new claims pleaded in the Reply, which might in turn call for a Surrejoinder from the claimant. Further, a claimant seeking to bring a new claim after the expiry of the limitation period could sidestep r. 17.4 altogether although possibly not s. 35 of the Limitation Act 1980) by avoiding the need to make any amendment.”

18. Pepperall J went on to consider the claimant's arguments that the amendments pleaded no new duties, no new losses and concerned the same element of the building as was already in issue in the case. At [30] he said:

“The classic definitions of a cause of action are “every fact which is material to be proved to entitle the plaintiff to succeed” (per Brett J in *Cooke v. Gill* (1873) L.R. 8 C.P. 107, at 116) and “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person” (per Diplock LJ, as he then was, in *Letang v. Cooper* [1965] 1 Q.B. 232 , at 242-3). In determining whether an amendment raises a new cause of action, Millett LJ (as he then was) in *Paragon Finance plc v. DB Thakerar & Co.* [1999] 1 All E.R. 400, at 405, stressed Brett J's focus on materiality:

“... only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action.

The selection of the material facts to define the cause of action must be made at the highest level of abstraction”.”

19. At [32], Pepperall J referred to the decision in *Co-operative Group Ltd v Birse Developments Ltd* [2013] EWCA Civ 474 at [22] in which Tomlinson LJ stated that:

“Where an amendment pleads a duty which differs from that pleaded in the original action, it will usually assert a new cause of action – see per Sir Iain Glidewell in *Darlington Building Society v. O'Rourke* [1999] P.N.L.R 365 at 370. However, as Sir Iain went on to observe, where different facts are alleged to constitute a breach of an already pleaded duty, the courts have had more difficulty in deciding whether a new cause of action is pleaded. Particularly has this been so in construction cases. ... The question to be resolved is therefore one of fact and degree. For my part I am not convinced that one needs to look further than for a change in the essential features of the factual basis relied upon, bearing in mind that the factual basis will include the facts out of which the duty is to be spelled as well as those which allegedly give rise to breach and damage. ...”

20. Pepperall J concluded that the claimant’s alternative case based on a breach of duty (in using the material that the defendant did) was not properly raised by way of Reply and struck out paragraphs 80 to 83. He also decided that it was a proper case for allowing a post-limitation amendment, and granted the claimant permission to amend its Particulars of Claim.

C. THE DISPUTED PARAGRAPHS

21. The parties in this matter agree that the grounds of claim are to be pleaded in the Claim Form and not by way of a Reply. However, the issue that arises in relation to BL’s Reply is whether or not it raises new grounds of claim or whether, as BL contends, the Reply pleads new facts in order to refute the Defence, or denies an allegation of fact and provides an explanation as to why the allegation or legal contention made in the Defence must be wrong, both of which are permissible (*Martlet* at [20]). BL also submits that providing further information or new evidence in respect of a claim which has already been advanced in the Claim Form cannot, in and of itself, require an amendment to the Claim Form.
22. Mr Robertson QC for the Defendants submitted that the Reply contained new facts, new allegations of infringement and annexed new documents; that the

Defendants would wish to respond to these, but that in the absence of a rejoinder, the appropriate course was for BL to amend the Claim Form.

23. Ms Howard QC for BL submitted that the Reply does not plead a new claim: it responds either to denials put forward by the Defendants or to their complaints that the claim had not been properly particularised. There has been no prejudice to the Defendants, and it would be no different to the Defendants having issued a request for further information. There would be no right of reply to the response to such a request. Any response would be dealt with in witness statements or skeleton arguments, or at trial. As regards documents that the Defendants suggest should have been annexed to the Claim Form but were not, and which have been annexed to the Reply, there has been no prejudice to the Defendants. We were told that the documents emanate from the Defendants, being emails sent by the Defendants' employees to BL.
24. We were provided shortly prior to the hearing with a schedule that junior counsel for BL had helpfully prepared which sets out all of the paragraphs and documents with which the Defendants took issue: a document which ultimately extended to 49 pages and was colour-coded to show in relation to each disputed paragraph which (i) were new issues that it was accepted would require amendment to the Claim Form in due course; (ii) refute denials made in the Defence by reference to legal or factual submissions already contained in the Claim Form; (iii) refute denials made in the Defence by pleading new facts which do not amount to a new claim; (iv) deny allegations of fact made by the Defendants and provide an explanation as to why the Defendants' position must be wrong; and (v) refer to and annex documents that the Defendants contend ought to have been annexed to the Claim Form.
25. Mr Robertson confirmed in the course of argument that the Defendants maintained their objections to BL's Reply only to the following: Paragraphs 8(c), (e) and (i); 14; 16, 17(b); 19; 24(b), (c); 25 (in particular 25(iv)) and 31 of the Reply. This is significantly less extensive than originally indicated by the Defendants in their skeleton argument. We now turn to consider each of these paragraphs in turn.

(1) Reply paragraphs 8(c), (e) and (i)

26. Paragraph 8 of the Reply is a summary of the Claimant's case: paragraphs 9 onwards plead in further detail to specific paragraphs of the Defence.

27. As regards disputed paragraph 8(c) of the Reply, the relevant background is as follows:

(1) Paragraph 21 of the Claim Form states:

"The Defendants are in the business of selling lingerie on a wholesale basis to retailers in the UK as well as other countries including the US and Europe. In addition, the First Defendant retails its lingerie products direct to consumers in the UK through its own websites (such as <https://www.wacoallingerie.com/uk/en/lingerie/c/10/>, for the Wacoal brand and others for their other main brands). It also has a "Freya store within a store" on certain online platforms such as Amazon.com".

(2) The response, at paragraph 20(d) of the Defence is as follows:

"It is denied that the First Defendant has 'a store within a store' site for the sale of any Eveden Branded Products on either Amazon.com or any other platform. Neither the First Defendant nor any other subsidiary of the Second Defendant sells Eveden Branded Products on Amazon or on any other third-party platform"

(3) The Reply pleads at paragraph 8(c) that "... [t]he Wacoal Group also sells on Amazon and Ebay" and includes the relevant webpage links in the footnotes.

28. BL submits that paragraph 8(c) responds to paragraph 20(d) of the Defence; that 20(d) makes carefully worded denials about the extent of the Defendants' online retail operations, whilst remaining silent as to the specific allegations made at paragraph 21 of the Claim Form. BL referred to the paragraph 1(c) of the Defence which makes clear that unless otherwise stated, each and every allegation made in the Claim Form is denied.

29. We agree with BL: there is a degree of opacity to the plea in paragraph 20(d) in the Defence. The first sentence of paragraph 20(d) does not deny that there is a Freya store within a store through which Eveden Brands are sold. The denial is that it is not the First Defendant that does so: whilst strictly speaking responsive

to the claim as put (Freya being one of the Eveden Brands) it leaves open the issue of whether or not any other subsidiary of the Second Defendant does so (the Defendants specifically referring, by contrast, to such other subsidiaries for the purposes of the second sentence of paragraph 20(d)). The second sentence denies that either the First Defendant or any other subsidiary of the Second Defendant sells Eveden Brands on Amazon or any other third-party platform but is silent, for example, on whether they sell Wacoal Brands in this way.

30. Having already identified one such “store within a store” selling Eveden Brands via online platforms such as Amazon in paragraph 21 of its Claim Form, BL in paragraph 8(c) of its Reply responds to the Defendants’ denial by pleading that the Wacoal Group sells on Amazon and eBay and provides two relevant links. The Defendants’ objection to this is that they have not had the opportunity to respond to this, and they would wish to do so. However, we consider that BL’s plea is properly responsive to the Defendants’ denial of the use of online platforms. We do not think that an amendment to the Claim Form is required. The Defendants will be able to explain their position in evidence in due course.
31. As regards paragraph 8(e) of the Reply, this pleading is said by BL to be responsive to paragraph 2(h)(iii)-(iv) of the Defence. Those paragraphs of the Defence refer, in summary, to the Wacoal VAP which prohibits the advertising, promotion or sale online of Wacoal Brands in the US and Canada without Wacoal America’s prior approval, and plead that BL has not been authorised to do so, and that BL has, at no relevant time been an authorised reseller of Wacoal America.
32. The Reply pleads at paragraph 8(e) that the assertion that BL was not authorised to use eBay to advertise, promote or sell Wacoal Brands in the US and Canada is “fanciful”, and goes on to plead that BL:

“... had been a long-standing retail distributor for the First Defendant for over 14 years since 2007 and even before that since 2005 when the owner and controller of the Claimant was a retail distributor operating as sole trader. So, for over 10 years before the VAPs were enforced on the Claimant and with the Defendants’ knowledge, the Claimant had sold its products in the United States and Canada using eBay”.

It also pleads when BL was first informed of the VAPs.

33. In our view, in paragraph 8(e) BL has pleaded facts to refute the allegation made by the Defendants that BL was not an authorised reseller of Wacoal Brands. That is something that it is entitled to do by way of reply. The Defendants submit that this is something to which they would wish to respond to. That may well be so, but they can do so in their evidence in due course.

34. Paragraph 8(i) of the Reply addresses the issue of the Defendants' alleged discriminatory treatment of BL. To put this in context:

(1) Paragraph 60 of the Claim Form pleads:

“On 7 March 2019, the First Defendant, through its legal representatives, responded to the Claimant stating that it would no longer supply the Claimant with its Wacoal or B'Tmpt'd Brands. No reason was given for that refusal to supply. The Claimant is aware that such sanctions were not imposed on all other UK retailers; many of the Claimant's key online competitors continued to sell Wacoal Group Products via online platforms (including eBay) below the Defendants' RRP's”.

(2) Paragraph 58(c) of the Defence pleads to paragraph 60 as follows:

“As to the third sentence, it is admitted that sanctions were not imposed on other UK online retailers as such retailers, when requested to do so by the First Defendant, complied with the Wacoal America VAP by ensuring that their listings of Wacoal Branded Products on third party platforms, including ebay.co.uk, were not visible to consumers in the United States, including on ebay.com. As pleaded above, the Claimant failed to so comply leading to the First Defendant ceasing supplies of such products to the Claimant”.

(3) As part of the summary of BL's case, paragraph 8(i) of the Reply addresses the termination of supply in 2019, and pleads that:

“Further, the Defendant has failed to evidence its claims that its application and enforcement of its VAP Policies was not discriminatory. The Defendants did not follow the escalation procedures in the VAP Policies but proceeded immediately to impose a cessation of supplies despite the Claimant's actions to deactivate marketing and sales in the US. The inconsistent, ad hoc and arbitrary selection, at the Defendants' whim, of which retailers should (and should not) be subject to the MRP requirements and Online Platform Bans (and at which precise point in time) undermines any objectivity, necessity and/or proportionality of the requirements imposed.”

35. BL maintains that paragraph 8(i) restates claims already made relating to discriminatory treatment at paragraphs 2(b); 16(i), 58 and 79(c) of the Claim Form, and responds to the Defendants' denials of such treatment. Paragraphs

2(b)(iii) and (iv) plead an unlawful and discriminatory online platform ban and sales requirements. Paragraph 16(i) summarises the factual background and context for BL's claim and specifically pleads that BL was the subject of targeted and discriminatory enforcement whilst its competitors were not subject to the same requirements and were allowed to continue to sell all Wacoal Group Products at a discount and on online platforms (including in the UK, US and Canada). Paragraph 58 alleges that BL's online, UK-based competitors continued to sell Eveden and Wacoal Brands in the US via eBay.co.uk and Amazon.co.uk without adhering to the MRP or MAP policies, and paragraph 79(c) refers to how it is alleged that the online platform ban was intended to take effect and operated.

36. Mr Robertson submitted that the allegation that the Defendants did not follow the escalation procedures in the VAPs but proceeded immediately to impose a cessation of supplies should have been pleaded in the Claim Form. However, the allegation does not amount in our view to a change in the essential features of the factual basis relied upon as regards the allegation of discriminatory treatment and does not amount to a new claim. We do not think that there can be an objection to this being pleaded in the Reply.

(2) Reply paragraph 14

37. Paragraph 14 of the Reply refers to an incident alleged to have taken place at an exhibition, Moda 2016:

(1) Paragraph 36 of the Claim Form claims that BL was informed on 7 August 2016 at an Italian Fashion Show "by the Wacoal Sales Manager for the UK and Ireland that by discounting Wacoal Group Products below their RRP, the Claimant was 'spoiling it for everyone'", and refers to an email sent by BL to the First Defendant later that evening referring to this. Paragraph 37 refers to an email sent the next day on the subject. Paragraph 38 pleads the First Defendant's response on 8 August 2016, and alleges that the First Defendant did not deny that it had asked BL to fix the resale price of Wacoal Group Products at the RRP.

- (2) The Defendants plead to paragraph 38 of the Claim Form at paragraph 36 of the Defence, and in particular:

“(b) As to the second sentence, whilst it is admitted that Ms Beech (who was still attending the Moda 2015¹ event at this time) did not address Mrs Dutton’s assertion (contained in her email of 7 August 2016) that Ms Lythgoe [the Sales Manager for the UK and Ireland] had asked her to fix the Claimant’s prices to RRP, it cannot be inferred that this was an acceptance or admission by Ms Beech [the Retail Sales Executive] (who is not alleged to have spoken with Mrs Dutton at Moda 2015) that Ms Lythgoe had done so.”

- (3) Paragraph 14 of the Reply pleads regarding the Defence that:

“As to paragraph 36(b), it is alleged that Ms. Beech was in the presence of Ms. Lythgoe and Mr. and Mrs. Dutton, when Ms. Lythgoe instructed the Claimant to reinstate its RRP prices. Mr. and Mrs. Dutton left the meeting, followed by Ms. Beech who did then speak to the [sic] Mr. and Mrs. Dutton on the point and informed them that the Defendants were in the process of relaunching their own retail websites in the United Kingdom. ...”

38. In our view, paragraph 14 is plainly a response to what is pleaded in the Defence, and in particular as to the allegation that no inference can be drawn as to Ms Beech’s failure to deny the request, and as to whether or not (the Defendants having raised the point in paragraph 38 themselves) Ms Beech was present when Ms Lythgoe spoke to BL’s Mr and Mrs Dutton. It is not a new claim, and there can be no objection to paragraph 14 of the Reply.

(3) Reply paragraph 16

39. Paragraph 16 of the Reply provides a further example of what BL alleges is the Defendants’ ad hoc monitoring of BL’s discounting and pricing requests. It sets out an email exchange dated Sunday 11 April 2017 from Ms Beech and annexes a copy. In summary, the paragraph refers to: (i) an email from Ms Beech to Ms Dutton informing her that it had been noticed that BL was selling a bikini at a discount, asking, “Is there any chance you can bring this in line with our pricing please”; (ii) Mrs Dutton’s objection on the basis that BL was price-matching a competitor; (iii) Ms Beech’s response informing her that the sales director had picked up on it and that she had checked and that particular competitor “don’t have this range, Sorry to be a pain”; (iv) Ms Dutton then responding asking them

¹ The Defendants’ skeleton argument informed the Tribunal that this should be a reference to 2016.

to check because she would not discount unless someone else was selling at that price; (v) Ms Beech's response that she would do that, and a subsequent email from Ms Beech in which she stated that BL was not being victimised, but that she could not explain the price matching as she could not find anyone else in the same price region.

40. The Defendants object to this paragraph being in the Reply. To put it in context:

(1) Paragraph 34(c)(i) of the Claim Form pleads the Defendants' enforcement mechanism of the alleged RPM, and asserts that if the Defendants discovered through monitoring or complaints from other resellers that BL was discounting prices below their RRP's, the First Defendant's employees would contact BL and ask it to increase prices.

(2) The Defence, at paragraph 32 alleges that this is embarrassing for want of particulars. The Defendants do not admit the allegation, asserting that the First Defendant's employees have no recollection of this.

41. Paragraph 16 of the Reply provides an example of an employee contacting BL and asking it to increase prices, the Defendants having complained of a lack of particulars. It pleads facts to refute the Defendants' claim that the Defendants' employees have no recollection of having acted as alleged by BL. The matters pleaded in the Reply do not plead a new claim. We can see no objection to it.

(4) Reply paragraph 17(b)

42. The Defendants also object to paragraph 17(b) of the Reply, which pleads to paragraph 42(d) of the Defence, which in turn addressed paragraph 44 of BL's Claim Form. The relevant passages are as follows:

(1) At paragraph 44 of the Claim Form, BL refers to when it received the VAP from the Defendants and sets out some of its terms relating to the MRP Policy.

(2) In response, at paragraph 42 of the Defence, the Defendants aver that:

“(c) It is averred that, as is clear from the full wording of the document, the Eveden VAP applied to the retail sale in the United States and Canada of specified ‘Eveden Products’ , i.e. those Eveden Branded Products that had been specified by Eveden Inc. as ‘Covered Products’ and which were listed as such on the website maintained by Eveden Inc.

(d) In the premises, it is averred that, at all material times, the Eveden VAP (including the Eveden MRP Policy) did not apply to either (i) other products including Wacoal Branded Products) in any country or (ii) retail sales of any product (including Eveden Branded Products and Wacoal Branded Products) outside of the United States and Canada. Accordingly, the Eveden MRP Policy did not apply to the retail sale of any Eveden Branded Products or any Wacoal Branded Products in territories other than the United States and Canada, including the United Kingdom, the EU and the EEA.”

(3) The disputed part of paragraph 17(b) of the Reply reads as follows:

“... Whilst ‘Eveden Products’ are defined in the Eveden VAP, the policy is clear that it applies only to ‘Covered Products’. These products are not defined in the policy itself, rather they are defined by reference to a list to be made available to a retailer. There is no reference in the Eveden VAP to Covered Products being those specified by Eveden Inc and being listed as such on Eveden Inc’s website. Despite the Claimant’s repeated requests for clarification regarding the scope of the Policy, the Defendants did not provide the list of Covered Products to the Claimant until 25 January 2019 (some nine months later). ...”

43. BL already pleads in paragraph 49 of the Claim Form that it sought clarification in an email of 25 May 2018 of exactly which products were covered by the VAP and its territorial scope, and at paragraph 55 that the Defendants responded with a list of products to which the VAP applied on 25 January 2019.
44. It is not entirely clear what the Defendants’ objection to paragraph 17(b) of the Reply is. In our view, paragraph 17(b) responds to the implication in paragraph 42(d) of the Defence, and the express plea in paragraph 53 of the Defence that “[i]t was therefore clear to the Claimant what products were and were not subject to different provisions of the Eveden VAP”. BL refutes the allegation in the Defence that it was clear to it - a point which is already part of its pleaded case - and explains why it was not clear by reference to the provisions of the Eveden VAP. Such a plea usefully explains why BL alleges that the Defendants’ case in this regard is wrong, and is permissible in a Reply.

(5) **Reply paragraph 19**

45. To put paragraph 19 of the Reply in context, paragraph 47 of the Claim Form pleads that in early May 2018 there was an exchange of phone calls and emails with the First Defendant about the sudden imposition of the VAP and its targeted and discriminatory application to BL; that other competitors in the UK were selling products at prices below RRP on platforms in the US; and that the First Defendant instructed BL to stop products listed on eBay.co.uk from appearing on customers' searches via eBay.com.

46. The Defence deals with this at paragraph 45. The Defendants allege that paragraph 47 of the Claim Form is:

“embarrassing for want of particularisation and is not admitted. If it is the Claimant’s case that it exchanged telephone calls and emails with the First Defendant about the Wacoal America VAP and/or the Eveden VAP, these are matters within the Claimant’s knowledge and (if the same exist in documentary form) possession and control”,

and that any emails should have been annexed to the Claim Form pursuant to Rule 30(5)(b). Paragraph 45 goes on to plead that:

“Without prejudice to the generality of the foregoing;

(a) Between April and July 2018 the First Defendant required other retailers based in the United Kingdom that were, on ebay.com, advertising for sale and selling Eveden Branded Products and/or Wacoal Branded Products to consumers in the United States, to cease doing so as this was in violation of the Eveden VAP or the Wacoal America VAP, respectively. In each case, the retailer was requested to remove listings that were visible on ebay.com to consumers located in the United States. Those retailers complied with these requests. Accordingly, the allegation that the First Defendant applied these policies to the Claimant in a “*targeted and discriminatory*” manner is denied”.

47. Paragraph 19 of the Reply refers to the fact that various emails relied upon are annexed to the Reply, and pleads:

“As to paragraph 45(a), the Defendant is required to prove the averments made therein and, in particular, prove its denial of the averment that the Eveden VAP was applied to the Claimant in a “*targeted and discriminatory*” manner in circumstances where the Claimant wrote to the Defendant identifying numerous other UK retailers who were advertising, marketing, promoting and selling the Defendants’ products via eBay.com and eBay.co.uk in the United States and were not complying with the Eveden MRP. Yet, the Defendant did

not take steps to stop those retailers from displaying products on those platforms or to stop them discounting or to cease their supplies.”

48. It is only the words we have underlined that the Defendants object to. In our view, paragraph 19 is unobjectionable. It responds to the Defendants’ allegation of lack of particulars, their denial of targeted and discriminatory treatment, and explains why BL maintains that the denial must be wrong. BL makes clear that it expects the Defendants to prove that what they say is true, and highlights that it considers that will require an explanation as to how it is that BL was able to identify other retailers who were advertising and selling the Defendants’ products via eBay.com and eBay.co.uk in the US and not complying with the Eveden MRP, and that BL wrote to the First Defendant about it. We do not consider that to be inadmissible in a Reply: we do not see how it can be said to raise any new claim.

(6) Reply paragraphs 24(b) and (c)

49. Paragraphs 24(b) and (c) of the Reply plead to paragraph 56(a)(i) of the Defence, which in turn is a plea to paragraph 58 of the Claim Form. The relevant paragraphs are as follows:

- (1) Paragraph 58 of the Claim Form alleges that:

“The discriminatory application of the Policies has undermined, and continues to prejudice, the Claimant’s ability to compete in the UK lingerie market. From 15 July 2018 until at least the date of this Claim Form, the Claimant noted that its online, UK-based competitors continued to sell Wacoal Eveden Brands and the Wacoal Brands in the US via eBay.co.uk and Amazon.co.uk, without adhering to the MRP or MAP Policies. ...”

- (2) Paragraph 56(a)(i) of the Defence denies these sentences in the following terms:

“[i]t is denied that the Defendants discriminated against the Claimant in the application of the Eveden VAP and the Wacoal America VAP. These policies applied to all retailers, irrespective of location, selling Eveden Branded Products and Wacoal Branded Products, respectively, in and to consumers in the United States and Canada, whether using their own website or a third-party platform such as eBay or Amazon. ... The First Defendant has, when requested by Eveden Inc. and Wacoal America, applied these policies to other online sellers of Eveden Branded Products and/or Wacoal Branded Products located in the United Kingdom. This was confirmed by Mr Cooper [the Commercial

Director] in an email sent to Mrs Dutton on 14 December 2018, in which he stated that *“We are constantly monitoring activity of our brands on reselling sites in the US to enforce our policy, more and more we are closing off those that offend and I can assure you that no client receives preferential treatment”.*”

50. Paragraphs 24(b) and (c) of the Reply plead:

“(b) During 2018, 2019 and 2020, the Claimant sent numerous emails to the Second Defendant identifying its direct competitors in the UK that were advertising, marketing and selling Eveden and Wacoal Products via eBay.com and eBay.co.uk in the United States at discounted prices ... The discriminatory application of the VAPs was also pointed out by the Claimant’s Solicitors, Sheppard Co in its letter dated 11 February 2019.

(c) Even as at the date of this Reply, in February 2022, there are over 51,000 listings of Wacoal Branded Products being marketed and sold on eBay.com which are not compliant with the Wacoal VAP yet they have not been sanctioned in the same way as the Claimant with whole or partial refusals to supply. ...”

51. In our view, paragraphs 24(b) and (c) plead facts in response to the Defendants’ claim that they required other UK online retailers to comply with the VAPs, and their denial that their practices were discriminatory as regards BL. BL annexes to the Reply the specific emails referred to in these sub-paragraphs, and on which it relies by way of example. We do not see how these paragraphs are inadmissible by way of reply. They are not raising a new claim. The claim that the Defendants’ practices were discriminatory is already made in the Claim Form, as is the allegation that BL’s direct competitors continue to sell in the US via eBay.co.uk and Amazon.co.uk, and do not comply with the VAPs.

(7) Reply paragraph 25

52. As to paragraph 25 of the Reply:

(1) At paragraph 60 of the Claim Form, BL pleads that on 7 March 2019, it was informed that the First Defendant would no longer supply certain brands, that no reason was given for this, that BL is aware that such sanctions were not imposed on all other UK retailers, and that many of BL’s key online competitors continued to sell Wacoal Group Products on online platforms including eBay below the Defendants’ RRP.

- (2) The Defendants respond to this at paragraph 58 of the Defence. They admit that no reason was given for the decision, but plead that it was because of BL's alleged continuing breaches of the Wacoal VAP. At paragraph 58(c), they also admit that sanctions were not imposed on other UK online retailers but say that this is because those other retailers complied with the Wacoal VAP by ensuring that their listings on third-party platforms including eBay.co.uk were not visible to consumers in the US.
- (3) Paragraph 25 of the Reply sets out BL's case in response to paragraph 58 of the Defence. In particular, paragraph 25(a) pleads to paragraph 58(b) of the Defence. The Defendants object to almost every sentence of paragraph 25 of the Reply, as illustrated by the underlining we have included below:

“a. As to 58(b), it is denied that the Defendant's refusal to supply was due to the Claimant's continuing sales of Wacoal Branded Products to consumers in the United States through ebay.com. In particular:

i. The Claimant effectively blocked all advertising and sales of the Covered Products to the United States, via Ebay.com and Ebay.co.uk, with effect from July 2018.

ii. Despite the Claimant taking those measures, the Defendants issued the Claimant with two MAP violation notices on 1 and 4 March 2019 respectively. That was over eight months after the Claimant had deactivated all advertising and sales of the Defendants' products in the US. The MAP violation notices stated that the Claimant's retail prices on the UK domain Ebay.co.uk were not in alignment with the Defendants' minimum retail prices: see copies of the MAP Violation notices of 1 and 4 March 2019 at Annex 1 (11) and (12).

iii. The timing and content of the notices (on which the Claimant will rely at trial) show that, as a matter of fact, the Defendants' application and enforcement of the MAP did not object to marketing or sales via Ebay in the US but were actually aimed at ensuring retail price maintenance in the UK, EU and EEA. The Defendants punished the Claimant by the permanent withdrawal of supplies because it had not aligned its advertised or retail prices in the UK (EU or EEA) with the MAP and/or MRP.

iv. When the Claimant, through its lawyers, informed the Defendants on 5 March 2019 that it refused to comply with those pricing instructions because they were illegal and objected to the extra-territorial application of the MRP Policy to sales in the United Kingdom, the Defendants responded on 7 March 2019 by ceasing supplies of all Wacoal Branded and B'Tempt'd Products. Moreover, on the very same day, it effectively sought to cease supplies of all new season Eveden Full Priced Stock by cancelling the

planned meeting for the Claimant to place advance orders for the next season of Eveden Autumn/Winter Full Priced Stock. The new season ordering meeting and normal availability of such new Eveden Full Priced Stock (other than the current season stock) was therefore cancelled by email that same day and never reinstated.

v. Those refusals did not follow the escalation procedures in the VAP Policies and extended the refusals to Wacoal Group products (such as Eveden and B'Tempt'd brands) that were not the subject of the MAP violation notice.

vi. It is averred that the Defendant's refusal to supply on 7 March 2019 was a sanction for the Claimant's non-compliance with the MAP/MRP/RPM in the UK and EU/EEA. Moreover, the sanction was arbitrary and selective in that similar sanctions have not been applied to the Claimant's direct competitors who have continued to sell the Defendants' products on online platforms in the US, UK and EU/EEA at prices below the RRP."

53. As the opening words of paragraph 25(a) make clear, BL takes issue with the Defendants' case that the refusal to supply was because of BL's alleged continuing sales to consumers in the US. Sub-paragraphs 25(a)(i) to (v) particularise the facts and matters relied upon by BL in support of its argument that this was not the reason, and avers in sub-paragraph (vi) what it says the reason was. In our view, paragraph 25(a) pleads facts to refute the Defendants' positive case that the refusal to supply was due to BL's sales to consumers in the US, and explains why BL maintains that the allegation must be wrong. It is permissible in the Reply. This is not a new claim. BL's case that the refusal to supply was a sanction for the Claimant's refusal to comply with the Defendants' allegedly unlawful MAP, MRP and RPM policies was already clear from its Claim Form.

(8) Reply paragraph 31

54. To put paragraph 31 of the Reply in context:

- (1) Paragraph 80 of the Claim Form sets out what BL claims the overall infringement had as its object and/or effect, and in particular at paragraph 80(b) that its object and/or effect was as follows:

“The facilitation of tacit or explicit horizontal collusion amongst independent retailers (including Wacoal's own retail operation) to adhere to minimum or fixed prices and minimise discounting and/or erosion of retailers' margins.”

- (2) The Defendants plead to this at paragraph 78(b) of the Defence in the following terms:

“Paragraph 80(b) is embarrassing for want of particularity. The Claimant has advanced no particulars that the Defendants are or were party to any horizontal agreement or concerted practice with another retailer concerning retail pricing, discounts or margins. Without prejudice thereto, this is denied. To the extent that it is alleged that the Defendants have entered into agreements with other companies in the Wacoal group concerning their retail operations, this plainly cannot infringe either the Chapter I prohibition or Article 101(1) TFEU, as all such group companies constitute a single economic entity and undertaking.”

- (3) BL then deals with this at paragraph 31 of the Reply. The Defendants object to this paragraph almost in its entirety as is clear from the underlining we have included:

“a. As to paragraph 78(b), it is not alleged that the Defendants have entered into agreements with other companies in the Wacoal Group. Rather, it is alleged that the First Defendant (acting both as a wholesale supplier and as a retailer selling direct to consumers) has entered into agreements with certain of the Claimant’s direct competitors to engage in RPM and exclude or limit the Claimant’s ability to compete in the relevant market. In the alternative, there has been a “hubs and spokes” concerted practice between the Defendants and those retail entities consisting of retailers monitoring and referring specific complaints to the Defendants about (amongst others) the Claimant’s online discounting of Wacoal and Eveden brands with the Defendants pursuing follow-up actions to limit the Claimant (and others) offering discounts and to get them to increase their retail prices up to the Defendants’ RRP/MRPs. Both arrangements had the object and/or effect of limiting or distorting price competition between retailers in the United Kingdom (including between the Claimant and the Defendant’s own retail operations) and protecting physical stores from competitive pressure from online retailers. See paragraphs 36-38, 40, 42 of the [Claim Form], which are not addressed at paragraph 78(b) of the Defence.”

55. We were referred by BL to other sections of its Claim Form. The Claim Form makes clear at paragraph 1 that BL’s claim is for loss and damage caused to the Claimant as a result of the Defendants’ alleged unlawful agreements and/or concerted practices. Paragraph 71 specifically alleges that the Defendants adopted and/or implemented various anti-competitive and discriminatory measures, which had the object and effect of restricting and distorting competition, and that those measures included the RPM policy, the MRP policy, the online platform ban, and the MAP policy together with the monitoring, receipt and referral of complaints from competing retailers about discounted prices being offered by online retailers and enforcement actions. It also alleges that these measures implicated other retailers (including the Defendants’ retail

arm) as a horizontal price coordination arrangement, and that the retailers' compliance with and acquiescence in or implementation of the arrangement constituted a concerted practice between undertakings for the purposes of section 2 of the CA 1998. In paragraph 79(a) BL alleges that the RPM Policy constitutes "a horizontal concerted practice between competition retailers (including Wacoal's own retail operation) and the Defendants as manufacturer/wholesale distributor"; that the Defendants received complaints from competing retailers about below RRP pricing, monitored retail prices, and then acted upon this by asking the offending retailers to increase their prices or face the sanction of reduced or no supplies.

56. In our view, BL's plea in paragraph 31 of the Reply seeks to clarify what is not being alleged, and summarises what is the alleged facilitation or explicit horizontal collusion to adhere to minimum or fixed prices. As to that, BL makes clear that it is alleged that the First Defendant has entered into agreements with certain of BL's direct competitors to engage in RPM and exclude or limit BL's ability to compete in the relevant market. Alternatively, there has been a "hubs and spokes" concerted practice between the Defendants and those retail entities consisting of retailers monitoring and referring complaints to the Defendants about BL's online discounting, and the Defendants' follow up actions. In our view this is admissible in a Reply. It is a response to the issues raised by the Defendant and is not a new claim. BL identifies the paragraphs of its Claim Form where the facts relied upon are set out in further detail.

D. ANNEX 1 TO THE REPLY

57. The Defendants also object to the inclusion in Annex 1 to the Reply of various documents that they maintain ought to have been annexed to the Claim Form. Mr Robertson fairly accepted that this point was a "technical one". We note that the Defendants take the point that where BL refer in its Claim Form to having written to the First Defendant "in December 2013" or "in October 2014", those documents ought to have been annexed to the Claim Form. The Defendants now object to those emails being identified specifically in and annexed to the Reply.

58. The Defendants also complain that BL referred to documents generically in the Claim Form but did not attach copies. By way of example, at paragraph 34(c) of the Claim Form, BL pleads that the Defendants' enforcement mechanism of the RPM involved monitoring, and the First Defendant's employees then telephoning and/or emailing BL asking BL to increase the price of the product. The Defendants, at paragraph 32(d) of the Defence, allege that each such email was required to be annexed to the Claim Form. Paragraph 12 of the Reply states that the evidence to which BL refers is in Annex 1 to the Reply.
59. In so far as the Defendants complain that they have not had a chance to plead specifically to these documents in their Defence, we note firstly that they could have asked for copies from BL before pleading their Defence; secondly, that the documents are predominantly communications passing between the Defendants and BL, and therefore ought to be within the Defendants' own possession; and thirdly the Defendants are in any event able to address these documents in their witness evidence as appropriate. We also note that the Rules do not envisage that each and every document that might be relied upon as evidence must be annexed to the Claim Form: paragraph 5.29 of the Guide states that "At this stage it is not necessary to produce every document on which the claimant will rely", and that the Claim Form should refer only to documents of central importance. We do not think that there is anything in the Defendants' complaint. In any event, in our view, it would be entirely disproportionate to require BL to amend the Reply to remove these documents as attachments, and attach them instead to the Claim Form.

E. AMENDMENTS TO CLAIM FORM

60. BL accepts that the paragraphs of its Reply which address the existence and application of the Wacoal VAP ought to be brought by way of an amendment to its Claim Form. BL says that the Defendants disclosed the Wacoal VAP for the first time in its Defence and BL was not previously aware of its existence before then. As a result, it could not have brought its claims any earlier. This affects paragraphs 22(b) and (c); 24(a) and 24(d) of the Reply.

61. The question then arises as to when this should be done. The paragraphs of the Reply which are in issue:
- (1) explain BL's position as regards notifications received pursuant to the Wacoal VAP (paragraph 22(b));
 - (2) allege that the terms of the Eveden VAP and Wacoal VAP are so similar that the effect of notification of a Wacoal VAP violation was to extend the application of the Eveden VAP to the Wacoal Brands (paragraph 22(c));
 - (3) put the Defendants to proof of their Defence that they did not apply the Wacoal VAP in a discriminatory manner (paragraph 24(a)); and
 - (4) aver that the Wacoal VAP prejudiced BL's ability to compete in the UK lingerie market and placed it at a competitive disadvantage, and that it undermined the Claimant's online presence in all geographical markets vis-a-vis its direct retail competitors and adversely affected the volume of its sales, internet rankings, market share and business growth in the UK and EU (paragraph 24(d)).
62. In light of the fact that the Defendants have pleaded the Wacoal VAP, and BL has pleaded its response in its Reply, we do not think that the fact that the Claim Form will need to be amended in due course should affect the other directions we have given to trial. As regards disclosure, the Defendants know the case they have to meet, and are in a position to identify any documents on which they intend to rely. It would import entirely unnecessary delay into the timetable to insist that BL amends its Claim Form to repeat what it has already set out in its Reply, and provide time for preparing and serving an Amended Defence and Amended Reply before disclosure takes place (in particular given that we have already expressed the view that this case is urgent, and it has been listed to commence on 15 September 2022).

F. CONCLUSION

63. The Defendants' objections to paragraphs of the Reply and Annex 1 to BL's Reply are dismissed.
64. We will direct that BL has permission to serve and file an Amended Claim Form limited to amendments in order to reflect the facts and matters pleaded at paragraphs 22(b) and (c); 24(a) and 24(d) of the Reply and direct a timetable for BL's amended Claim Form, the Defendants' Amended Defence and BL's Amended Reply (if any). If and in so far as BL wishes to make any other amendments to its Amended Claim Form following disclosure, it will need permission to do so.
65. This decision is unanimous.

Bridget Lucas QC
Chairwoman

Professor John Cubbin

Anna Walker CB

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 23 May 2022