



Neutral Citation Number: [2022] EWHC 1244 (Ch)

Case No: IL-2018-000115

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**  
**INTELLECTUAL PROPERTY**

Rolls Building  
Fetter Lane  
London, EC4A 1NL

25<sup>th</sup> May 2022

**Before :**

**THE HONOURABLE MR JUSTICE MELLOR**

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**Between :**

- (1) **LIFESTYLE EQUITIES C.V.**  
(2) **LIFESTYLE LICENSING B.V.**  
(both companies incorporated under the laws of the Netherlands)

**Claimants**

**- and -**

- (1) **ROYAL COUNTY OF BERKSHIRE POLO CLUB LTD**  
(2) **MR DAVID BAXTER GENTLE AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF GRETA MAE MORRISON**  
(3) **JAMES TARA MORRISON**  
(4) **THE PARTNERSHIP (LICENSING) LIMITED**  
(5) **JONATHAN ERIC BOWER TOWNSEND**  
(6) **MAYS ZONA LIBRE S.A.**  
(a company incorporated in Panama)  
(7) **EMPRESAS POLAR S.A.**  
(a company incorporated in Chile)  
(8) **EMPRESAS HITES S.A.**  
(a company incorporated in Chile)  
(9) **TIENDAS PERUANAS S.A.**  
(a company incorporated in Peru)  
(10) **SEARS OPERADORA MEXICO, SA DE CV**  
(a company incorporated in Mexico)  
(11) **ABDUL GHANI MAMOUN TR LLC**  
(a company incorporated in the UAE)

**Defendants**

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**Michael Edenborough QC and Thomas St Quintin** (instructed by **Brandsmiths**) for the  
**Claimant**

**Michael Silverleaf QC** (instructed by **Maitland Walker LLP**) for the **Defendants**

Hearing date: 5<sup>th</sup> May 2022

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on the National Archives and BAILII websites. The date and time for hand-down is deemed to be Wednesday 25<sup>th</sup> May 2022 at 10.30am.

**Mr Justice Mellor:**

**Introduction**

1. At the pre-trial review in this case the claimants (LECV or LE) applied to strike out substantial portions from two witness statements served on behalf of the first to fifth defendants (the defendants) for alleged failure to comply with Practice Direction 57AC. Having considered the objections during my pre-reading and the oral submissions at the hearing, I was able to reach a clear view and announced that I dismissed LECV's application for reasons to be given later. This was in part because the PTR was heard in a busy interim applications week and in part due to the arguments raised on LECV's application on the principles applicable to trade evidence in trade mark matters. This judgment contains my reasons.
2. The context for this application was as follows. LECV own and manage rights in a fashion brand 'BEVERLY HILLS POLO CLUB' (BHPC) which features a logo comprising those words arranged around an image of a galloping polo pony and rider with polo mallet raised. LECV allege infringement of trade marks registered in the UK/EU but also in Chile, Mexico, Panama, Peru and the UAE (which I will refer to as the Overseas Territories) and conspiracy to injure by unlawful means. LECV also alleges that certain UK trade marks of which the first defendant is the registered proprietor are either invalid or should be revoked for lack of genuine use.
3. The action is now concerned only with the first to fifth defendants, who are sued in connection with the use of various signs which feature the words 'ROYAL COUNTY OF BERKSHIRE POLO CLUB' (in various fonts). The Royal County of Berkshire Polo Club (RCBPC – the first defendant) was founded by the manager of Pink Floyd, the late Bryan Morrison and his business partner, Norman Lobel, in 1985. His widow (now deceased) was the second defendant. The third defendant is his son and the current chairman of the club. The fourth and fifth defendants were, until recently, the first defendant's licensing agent and its director.
4. The application concerns two unusual features of this action. The first is apparent from the list of countries in the Overseas Territories. To simplify matters and avoid the need for extensive evidence of foreign law, the parties have agreed that (1) the issue of infringement in each of the Overseas Territories will be tried on the basis that the UK/EU test for infringement applies and (2) infringement will be assessed at the date of the claim form namely 25<sup>th</sup> June 2018. Any residual matters of foreign law (e.g. the Defendants have pleaded some specific defences under Mexican law) are to be dealt with following the trial, as may be necessary. However, it is axiomatic that when applying the UK/EU test for infringement, the Court will need to be informed about the context of all alleged infringements and in particular the relevant characteristics of the average consumer in each territory.
5. The second unusual feature is a central part of the Defendants' case. They say the parties are but two of many polo club-themed clothing and accessory brands. They say that some (like the Defendants and Greenwich Polo Club) are merchandising offshoots of real polo clubs, whereas others (such as LECV and

Polo Ralph Lauren) are not but seek to leverage the up-market aspirational image of the sport of polo. The Defendants say the relevant market for these products is crowded in each of the territories in issue such that the relevant public must be able to distinguish between the various competing brands.

6. To those familiar with trade mark disputes, it will already be evident that the Defendants require substantial trade evidence to be able to sustain this type of case. A central issue on this application is whether the way in which the Defendants seek to put various pieces of evidence before the Court is compatible with PD57AC: in essence, is ‘trade evidence’ (of the type previously accepted in trade mark cases) compatible with PD57AC?
7. Since there is clear authority that PD57AC does not change the rules of admissibility of evidence, the answer to that question appeared to be ‘Yes’. However, in his oral submissions, Mr Michael Edenborough QC appearing with Mr Thomas St Quintin for LECV submitted that the decision of Birss J. (as he then was) at the PTR in *Fenty v Arcadia* [2013] EWHC 1945 (Ch) (*Fenty*) was wrong because s.3(2) of the Civil Evidence Act 1972 had been overlooked. Since I was aware that *Fenty* had been applied many times and not, so far as I am aware, ever doubted, this argument required some scrutiny. I also observe that this type of argument ought to have been clearly developed in a skeleton argument.
8. In addition, LECV’s application also raised an important more general proportionality issue about PD57AC applications.

#### **PD57AC – applicable principles**

9. These were not really in dispute, even though LECV accused the Defendants of adopting a position that PD57AC either doesn’t mean what it says or that it doesn’t apply to trade mark cases.
10. Naturally, I was referred to the helpful summary of the principles in the judgment of O’Farrell J. in *Mansion Place Ltd v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) at [22]-[38]. I will not lengthen this judgment by setting out those paragraphs or restating any parts of PD57AC (PD) or the Statement of Best Practice (SBP), all of which I have had fully in mind. O’Farrell J. referred to the important point established in the judgment of Sir Michael Burton CBE (sitting as a Judge of the High Court) in *MAD Atelier International BV v Axel Manes* [2021] EWHC 1899 (Comm) (on which more below) that PD57AC does not change the law as to the admissibility of evidence or overrule previous authority as to what may be given in evidence, albeit that it was ‘*obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it.*’
11. I should also mention some helpful observations made by HHJ Stephen Davies in *Blue Manchester Ltd v Bug-Alu Technic GmbH* [2021] EWHC 3095 (TCC). Having cited from *Mansion Place* and *MAD Atelier*, he drew attention to and endorsed two particular points made by O’Farrell J.:

- i) First, that ‘*serious consideration should be given to finding a more efficient and cost-effective way forward*’, because the application before her had taken a full day to argue. HHJ Stephen Davies added this ‘*Parties in the Business and Property Courts who indulge in unnecessary trench warfare in such cases can expect to be criticised and penalised in costs.*’
  - ii) Second, that whilst the court will be astute to strike out offending parts of a trial witness statement it will not do so where that is not reasonably necessary.
12. I was also referred to the recent judgment of Fancourt J. in *Greencastle MM LLP v Alexander Payne & Ors* [2022] EWHC 438 (IPEC), but that was a very different case where the breaches of PD57AC were extensive and significant.

### Trade evidence in trade mark and passing off cases

13. The central issue raised before Birss J. in *Fenty v Arcadia* [2013] EWHC 1945 (Ch) on 5<sup>th</sup> July 2013 was whether trade evidence (where suitably experienced people in the trade give opinion evidence about the circumstances in the trade concerned) is expert evidence within CPR Part 35. As he said in [13], Birss J. did not find this question an easy one to address. He referred to s.2(3) of the Civil Evidence Act 1972 and CPR 35.4(1) and (2), noting that there is no definition of what expert evidence is and referring to [9]-[11] from the judgment of Lewison J (as he then was) in *O2 Holdings Ltd v Hutchinson 3G Ltd* [2006] EWHC 601 (Ch), where Lewison J. said:

‘The identification of what is or is not expert evidence is difficult to formulate. I think that in most cases one knows expert evidence when one sees it but to try and formulate an overall test would I think be an impossibility.’

14. From [19]-[39], Birss J. conducted a thorough review of the various trade mark cases in which trade evidence (of various types) has been received by the courts. Following that review, he identified the following points (the reference to the category identified by Maurice Kay LJ is to his judgment in *esure* where he referred to ‘a recognised expertise governed by recognised standards and rules of conduct’):

31. First, the category identified by Maurice Kay LJ is not the only kind of expert witness evidence covered by CPR Part 35. For example, in patent cases expert evidence is routinely called from persons who are not professional experts and do not necessarily belong to bodies with recognised standards and rules of conduct.

32. Second, independence is not what takes such evidence into the relevant category. There are numerous examples of evidence from experts who are not in fact independent at all. That may be fine, as long as the nature of any link with either side is identified and taken into account.

33. Third, it seems to me that the nature of the proceedings and the role the evidence is to play in those proceedings is an important element in characterising the evidence in question.
34. Fourth, sometimes parties do call an expert report identified as such in trademark and passing off cases. An example was the report of Mr. Blackett in the two cases I have referred to already. It is important to note that there was no issue in *esure* or *Samuel Smith* that Mr. Blackett's evidence was expert evidence. As I say, it was identified as such. So the difficulty before me did not arise in those cases. I should say that in this judgment I am not expressing a word of disagreement with the decisions I have referred to above, which emphasises the lack of utility of anyone trade witness or a self-identified expert in "branding" -giving an opinion on the likelihood of confusion in a case about a market that the court is likely to be familiar with.
35. Fifth, for years trademark and passing off cases have routinely included evidence from persons in the relevant trade describing the circumstances of the trade, the nature of customers and so on. Such evidence will always have explained the experience of the witness in order to justify their evidence and add credibility to it. That evidence will always consist of factual statements about the trade. Although it is primarily factual, it will sometimes include statements which are, properly analysed, expressions of opinion. These are not necessarily opinions simply on the likelihood of confusion but are expressions of opinion about how customers behave. However, it is clear, and I refer, for example, to *Hasbro*, that such evidence has not always been treated as expert evidence as such and has not hitherto been regarded necessarily as subject to the regime in CPR Rule 35. *Hasbro* is also an example showing that as long as it is kept in its proper place, not characterising it as expert evidence within CPR Part 35 does not matter.
36. Moreover, to impose the further burden of the duties and responsibilities of expert witnesses on such witnesses is capable of having a chilling effect in trademark and passing off cases. The sort of trade evidence I am talking about is not given by persons who identify themselves as "expert witnesses", and they are different from the self-identified experts such as the individual referred to in *esure* and *Samuel Smith*. Mr. Hobbs referred to the recent *Interflora* cases in the Court of Appeal. Their aim is to seek to ensure that costly survey evidence of little probative value is eliminated from trademark and passing off cases. Of course one of the alternative sources of relevant evidence in trademark and passing off cases is cogent evidence from persons in the trade describing the circumstances of that trade to the court. When properly done, that evidence is much less costly overall than a badly-conducted survey.

15. Birss J. concluded:

39. In conclusion on the principles, just as Lewison J (as he then was) in *O2* found, it seems to me that to provide a definition of expert

evidence is impossible. Plainly trade evidence can be presented as an expert's report, such as the branding expert evidence of Mr. Blackett. The cases show that that evidence can have little value. But, in my judgment, in a trademark and passing off case, evidence of the factual circumstances of a trade by a person in that trade, even when they deploy their experience in that trade to bolster what they are saying, is not necessarily "expert evidence" within CPR Part 35. Apart from anything else, there is no reason to treat it as such. However, the fact that evidence is not labelled as an expert's report does not mean it is not in truth expert evidence. The evidence which was the subject of the criticisms in *esure* was obviously expert evidence, whether it had been labelled as such or not. A witness who expresses an opinion on the ultimate question before the court -for example, will the relevant public think due to the presence of the photograph of Rihanna on a T-shirt that the Rihanna T-shirt is in fact licensed by or authorised by Rihanna? -is expressing an expert opinion. A witness called to say that would need to comply with CPR Part 35.

16. It is also instructive to highlight certain of the decisions which Birss J. made on the facts in that case. He started by making three general points:
  - i) First, the case was concerned with T-shirts aimed at young teenage girls. He was of the view that he would be assisted by proper evidence focusing on the nature and circumstances of that market.
  - ii) Second, the central issue in that case was not whether a particular sign was or was not too similar to another sign. The issue was the significance of a picture of Rihanna on a t-shirt: what do customers think about it?
  - iii) Third, the witnesses in question explained their experience in the trade. Each was seeking to rely on that experience to justify their evidence.
17. Further general points which emerged (a) foreshadowed parts of PD57AC, where Birss J. questioned the point of duplicative evidence and commentary on documents and (b) gave rise to case management questions which the Judge was going to consider in the light of his ruling.
18. I draw attention to the following particular rulings made by Birss J.:
  - i) In [41]-[45], Birss J. drew a pertinent contrast between, on the one hand, the witness statements from Messrs Coyle, Daffner & Dapron, all of whom addressed the trade in general, not the particular t-shirt in issue, and hence were giving trade and not expert evidence, and that from Mr Robinson. Mr Robinson was a music industry consultant whose job was to study fans. He said that fans expect High Street retailers with the stature of TopShop to sell official merchandise. He also referred to some research he had done but could not find, and cross-referred to a colleague who was also involved in research and said his colleague shared the same view. Birss J. said this was expert evidence, the determinants being the

reference to and reliance on research and the nature of his role as a researcher generally.

- ii) In [46], Birss J considered the evidence from Mr Joseph, also in the music merchandising business, who discussed the control of the image of artists. His company had taken a licence from the claimant to promote her then current world tour. As Birss J. said: *'He explains in general terms the value of that licence and discusses the impact of unauthorised goods. I think this is relevant evidence. I do not think it is expert evidence within Part 35 at all. It is basically factual trade evidence.'*
- iii) At [47] Ms Perez was identified as the main witness for the claimant. The high point of the objection related to [81]-[83] where *'effectively Ms. Perez articulates the claimant's case why the T-shirt in this case is said to create a misrepresentation that it is authorised and why the claimant is concerned about it. I think this is natural evidence for the claimant to give. It is not expert evidence. It is difficult to see how this case could be articulated otherwise.'*
- iv) Amongst the defendants' evidence was a statement of 46 paragraphs from Ms Sauvaire, the head of marketing at TopShop. She explained her experience in the trade and described the marketing at TopShop. Attention was focussed on this sentence in her paragraph 44:

"It is my experience that consumers expect a more overt level of marketing communication before they will assume a connection between a celebrity and a brand."

- v) Birss J. took the view:

'In saying that, she is referring to what she says is the marketing communication given by the T-shirt in question in this case. I think this is natural evidence for someone in her position to give in a trademark case. The court, as I say, is not necessarily familiar with the shopping habits of teenage girls. The defendants did not seek permission under Rule 35. I think they were right not to do so. To say that this sentence turns the entire evidence given by Ms. Sauvaire, which runs to some 46 paragraphs, into expert evidence seems to me to be wrong, and to impose the expert evidence regime as a result would be a sledgehammer to crack a nut. In my judgment, it is outside CPR 35.'
- vi) Finally, there was the evidence of Mr Chatalos, who was the source of the t-shirt at issue:

'He describes his business and the application of images to T-shirts. In my judgment, this is useful evidence too, just like the trade evidence from the



claimants. It is not expert evidence either, and I will admit it.’

19. At the trial [2013] EWHC 2310 (Ch), Birss J. found for the claimant. The defendants appealed against the main trial judgment and the ruling on 5 July 2013. In the event, the main appeal was dismissed and permission to appeal against the ruling on 5 July 2013 was refused, see [2015] EWCA Civ 3 (*Fenty CA*) at [62]-[64]. Parts of the appeal judgment reveal more information about what was in issue before the Judge.
20. Part of the final ground of appeal (discussed in [53]-[61]) concerned the treatment of Ms Perez’s evidence and her [83] & the material parts of [94] in particular. These passages are set out in the judgment of Kitchin LJ at [55] (in which the parts to which objection had been taken are shown in italics) and [57]:

“83. *In my experience, the fact that the image that was used on the unauthorised t-shirt was taken on the occasion of a video shoot, and a well known one too, rather than when [Rihanna] was not working or at an event, means that fans are particularly likely to think that the image came from promotional material for that album, single or video.* In this case the official booklet for the Talk That Talk album contains professional images of Rihanna. Included in those images are shots from the We Found Love video shoot. They show Rihanna with the same hairstyle and headscarf that she was wearing in the shot used for the Topshop t-shirt ... *[Topshop’s] actions were therefore likely to lead fans to think the t-shirt was authorised, particularly as it was sold under the mark RIHANNA TANK ...*”

“94. ... Arcadia’s unauthorised t-shirts bear an image of Ms Fenty in the distinctive clothing, hair and makeup of the authorised music video I have described above, thereby implying that this t-shirt is authorised and indeed part of that official authorised and approved promotion. Thus the sale of these shirts infringes her rights and is likely to deceive the fan and customer base. The typical potential shopper is likely to come from the younger age groups who listen to her music and perhaps follow her through social media. They may or may not be able to go to her concerts but they rely on the reputation of the place where they shop.”

21. On the first day of trial, Birss J. had given another ruling in which he explained he would attach no weight to evidence on what he described as the ultimate issue which he had to decide, but that the ‘substance’ of [83] was relevant. In relation to [94], Birss J. ruled that the ‘first part’ of the paragraph (i.e. the first two sentences) was argument and did not need to be cross-examined to, but the second part was relevant because it went to the circumstances of the trade. Accordingly,

no cross-examination was directed to the argument/passages on the ultimate issue.

22. The final ground of appeal focussed on the last two sentences of [67] of the trial judgment of Birss J. in particular in which he appeared to rely upon Ms Perez's opinions from the italicised portions of [83] and the first part of [94]. Kitchin LJ considered the submissions on this point to be 'powerful', having particular force in relation to [67] of the judgment. Nonetheless, and 'despite the legitimacy of this particular complaint' he considered that [67]-[69] of the trial judgment had to be considered as whole. Overall, he concluded that the Judge was entitled to conclude as he did and added:

'In these circumstances it is not necessary and I do not believe it would be appropriate to embark upon a consideration of whether and to what extent evidence of trade practice, trade usage, consumer behaviour and consumer perception constitute expert evidence to which the provisions of s.2(3) of the Civil Evidence Act 1972 and CPR Part 35.4 apply.'

23. Accordingly, since the CPR came into effect, and certainly since PD57AC came into force, as far as I am aware, the Court of Appeal has not had an opportunity to consider these issues. However, the ruling in *Fenty v Arcadia* has been applied numerous times to my knowledge, including by Birss J. himself at the PTR in *Hearst v AVELA*. It is referred to in the textbooks as authoritative, including *Kerly* (16<sup>th</sup> Edition) at 23-013.

24. I also note three other points made in that section of *Kerly*, which is entitled 'The Role of Expert and Trade Evidence':

- i) First, 23-009 sets out the general position:

'..evidence of the circumstances of the trade, the manner in which goods are sold and so on is always admissible [fn10], (although if the trade is one with which the judge may be expected to have experience of their own, it may be of limited value). Thus, evidence may be given, by retailers [fn11], as to the phrases used by customers in asking for goods [fn12], and as to the proper inference to be drawn from the wording of the requests [fn13]. Similarly, a wholesaler may give evidence as to the likely effect on their system of handling orders of concurrent use of the two marks [fn14].

Footnote 10 starts '*This kind of evidence has long been regarded as being of informative value for the court...*' and then refers to case law dating from 1905 through to 1997 at all levels.

- ii) Second, 23-016 which reads: '*In some cases it may not be entirely easy to distinguish between direct evidence that there is a likelihood of confusion, and evidence about the circumstances of the trade or whether there has been confusion. In Neutrogena v Golden [fn [1996] RPC 473 at 501-502] shopkeepers gave evidence that they were content to stock both parties*'

*products, and had not themselves experienced any signs of confusion. This was held relevant and admissible, although the judge declined to rely on it for other reasons [fn Similar evidence was led in *Lever Bros. v Sunnwhite* (1949) 66 RPC 84 at 92....]*

- iii) Third, the observation made at the start of 23-017: ‘*Evidence as to other related marks or names in use in the trade is of value, ....*’
25. Thus, although *Fenty* is the most up to date analysis, it follows a very long line of authority approving of trade evidence being received from suitably qualified witnesses of fact.
26. The final ground of appeal in *Fenty CA* shows that care is required when argument or submissions are set out in a witness statement (or, for that matter, in an expert’s report). I have considered whether this suggests a fully rigorous application of PD57AC 3.1(1)&(2) and the SBP [3.6(2)]. In certain cases, it might. In the circumstances of this particular case, I do not consider it is necessary. The amount of argument is very limited, it is readily identifiable, it can be (and in this case I consider it is) helpful to have a clear articulation of the case and the trial judge is also forewarned by what occurred in *Fenty*.

### LECV’s argument

27. As a matter of legal principle, LECV’s basic submission was that *Fenty v Arcadia* was wrong because s.3(2) of the Civil Evidence Act 1972 (the Act) had been overlooked. In particular, Mr Edenborough QC submitted that [39] (set out above) was ‘if you read it in a certain way,...clearly wrong’. He submitted that s.3(2) provided only a narrow exception, into which ‘trade evidence’ did not fit. He said it ought to be given within the safeguards of CPR Part 35.
28. Whilst Birss J. cited s.2(3) of the Act, it is true that he did not refer to s.3(2). In his *ex tempore* judgment he said he would try and address all the material cited to him, from which it may be inferred that s.3(2) was not cited. However, the notion that the advocate seeking to establish the objections which had been taken – Mr Geoffrey Hobbs QC – overlooked a supposedly critical provision is somewhat surprising, as is the notion that no-one, in the 50 years since the Act, has previously identified this point.
29. Section 3 of the Civil Evidence Act 1972 provides as follows:

‘3 Admissibility of expert opinion and certain expressions of non-expert opinion.

(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts

personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section “relevant matter” includes an issue in the proceedings in question.’

30. It became apparent that Mr Edenborough’s submission that the exception in s.3(2) was narrow was founded on the notion that it was restricted to ‘conveying relevant facts personally perceived by him’. He also submitted it should be narrowly construed because it was an exception. He appeared to me to submit that trade evidence concerned facts which were not ‘personally perceived’ by the witness.
31. In his oral submissions, Mr Edenborough also made a bold attempt to define ‘expert evidence’. He seemed to draw a distinction between evidence of fact (e.g. the car was red, being a fact which is amenable to cross-examination) and expert evidence because the latter was ‘based upon numerous unspecified pieces of information’ which might be ‘unidentified hearsay information or unidentified pieces of factual information’. Somewhat later he said ‘It is, in essence, a complicated matrix of information, the individual parts of which are not always readily amenable to scrutiny under cross-examination’ and that ‘it is commonly characterised by the fact that it follows a statement, an introductory statement, like “in my opinion, in my view, in my experience.’
32. Although I found certain parts of this argument difficult to follow, I remain entirely unpersuaded either that any part of *Fenty* is wrong or that trade evidence, if it is to be given, must be given by way of an expert report complying with CPR Part 35, or that trade evidence does not fall within s.3(2) of the Act.
33. The point relating to s.3(2) can be illustrated by one of the statements objected to by LECV in this case, in respect of which the Defendants say it is trade evidence. Señor Garcia in [20] of his witness statement expresses his opinion that ‘*This is a crowded market...in the LatAm Territories and these brands co-exist with each other well without consumer confusion.*’ I can assume, for the purposes of argument, that these are relevant matters. The question is whether these opinions are a way of him conveying relevant facts personally perceived by him. The experience he relates in his witness statement (set out below) would appear to provide an affirmative answer. At the very least, there is no basis on which I can exclude this evidence because Señor Garcia has insufficient experience in the trade.
34. There may be a number of relevant facts being conveyed but they include at least that (a) there are numerous other polo brands in these markets, (b) these brands appear to co-exist without problems, (c) he has not encountered any consumer confusion between these polo brands and (d) he has had sufficient contact with the market to be in a position to perceive these facts. That these facts are more complex than simply ‘the car is red’ does not matter. It is part of Señor Garcia’s job to perceive facts like these, giving him the relevant knowledge and experience. Essentially the same point applies to all properly admissible trade evidence.

35. Albeit in a different context, section 3(2) of the Act was considered by Sir Michael Burton in *MAD Atelier*. At the PTR in that case, he had to rule on a similar application based on PD57AC to strike out passages in the claimant's witness statements and reliant passages in the expert's report. The impugned passages went to quantum of two potentially intertwined heads of damage, both of which required an assessment of the 'but for' question i.e. a conclusion as to the hypothetical profits that would have been made but for the allegedly fraudulent inducement to enter into a joint venture agreement to develop an international franchise of restaurants.
36. The witnesses of fact had worked for the claimant at the time, had some involvement in the joint venture and appeared to have relevant experience as to the setting up of restaurants both in London and Dubai. Their evidence went to what could or would have happened.
37. Counsel for the claimant drew the Judge's attention to s.3(2) and to a range of authority which exemplified that witnesses of fact may be able to give opinion evidence which relates to the factual evidence they give, particularly if they have relevant experience or knowledge, that this was particularly so where the evidence given is as to a hypothetical situation as to what would or could have happened (referring to *Kirkman v Euro Exide Corporation (CMP Batteries Ltd)* [2007] EWCA Civ 66, in which Smith LJ at [19] considered such hypothetical evidence as evidence of fact).
38. The Judge clearly approved these points. Furthermore, he pointed out that having this material set out in witness statements created much greater transparency, enabling the defendant's counsel to challenge the witnesses directly, rather than indirectly through the expert. If not set out in the witness statements, the same material would inevitably have to have been given to the experts on instructions.
39. Finally, the Judge pointed out that the impugned material might turn out to be self-serving and unreliable but those were matters for trial. He held that all the impugned passages were admissible and should not be struck out.
40. The ruling in *MAD Atelier* appears eminently sensible and, in my view, provides strong support for not adopting a narrow reading of s.3(2). It is also a helpful illustration of the desirability of the Court being able to receive opinion evidence from witnesses of fact based on their relevant knowledge and experience, in a different context to trade evidence in trade mark and passing off cases. It seems to me to be entirely consistent with *Fenty* and confirms that reference to s.3(2) in *Fenty* would not have made any difference.
41. Accordingly, I propose to apply *Fenty*. Having rejected LECV's argument on the applicable principles, I turn to consider the substance of the Claimants' application.

### **This application**

42. The passages objected to are contained in the First Witness Statements of Federico Garcia Campos and Michael Amooore, each dated 8 April 2022. By letter dated 26 April 2022 LECV's solicitors identified the paragraphs/passages

objected to and brief reasons in support of each objection. I mention in passing that the letter also raised some points about the translation of Señor Garcia's statement and requests for disclosure and information, which I need not address further.

43. In broad outline, the Defendants say that Señor Garcia and Mr Amooore are their two key trade witnesses. Mr Amooore is the general manager of the first defendant. Señor Garcia is the first defendant's Latin American agent responsible for licensees in the central and south American territories. The Defendants submit that:
  - i) both have long and extensive knowledge of the market for polo-themed branded clothing and accessories;
  - ii) both give evidence about the market and consumer reaction which is within their respective personal knowledge and experience;
  - iii) their evidence is of a kind which is routinely adduced in trade mark and passing off actions.
44. In broad terms, the content of each witness statement reflects the witness' knowledge and experience relevant to the issues in dispute. I deal with each witness statement in turn.
45. I propose to approach each of the witness statements and the passages objected to at face value, but I do so without prejudice to what may transpire at the trial, especially during cross-examination. To be very clear, I am not deciding anything about whether any of this evidence is correct or the weight which should be given to it – those are matters for trial.

### **The first witness statement of Federico Garcia Campos**

46. Señor Garcia's evidence goes to the position in the market in various South American territories. In his witness statement, he explains he is the Vice-President of the Latin American branch of CAA-GBG Global Brand Management Group. His company has been the first defendant's licensing agent since January 2018. His job is focussed on business development and brand management. He says he has spent the whole of his career in the retail market for leisurewear in Latin America, mentioning several brands and roles at different organisations. He has been involved with the first defendant's brand in Latin America since 2015, since CAA-GBG was the sub-agent appointed by the fourth defendant.
47. He says he has over 7 years of experience with the RCBPC brand and has developed a close relationship with its licensees in Latin America and 'an in depth understanding of what draws them to the brand'. He says he is frequently involved in communication with existing licensees on a day to day basis. He sees all new product designs which are passed to RCBPC for approval. He sets out a history of the RCBPC brand licensing in Latin America, highlighting Mexico as the territory from which RCBPC currently earns the most revenue.

48. Although he does not state this in terms, it is clear from his evidence that in order to do his job, he needs to know the markets in question and, in particular, the markets in which RCBPC goods are sold in Latin America, how to position that brand in relation to other similar brands in those markets and the attitudes of licensees (actual and potential) for RCBPC branded goods.
49. Señor Garcia describes the structure of his witness statement as follows:
- ‘(a) In Section A below, I explain a bit more about my role within CAA-GBG and what I do for RCBPC’s accounts in various Latin American territories.
- (b) In Section B below, I set out what the markets within each of the Latin American territories, that I am told are the subject of these proceedings (namely Panama, Chile, Peru and Mexico (“the LatAm Territories”)), look like in relation to polo themed brands, i.e. approximately how many polo themed brands there are, how they generally present in the market and my perception of who are the largest players. This is not intended to be an exhaustive market wide report of the polo brands that exist in these territories but is rather based on my knowledge of the market.
- (c) In Section C below, I confirm that I am not aware of any issues with the public in any of the LatAm Territories not being able to distinguish the products of the various polo themed brands.
- (d) In Section D below, I make some concluding comments drawing what I consider to be the key points arising from Sections A to C of this witness statement.’
50. LECV’s objections regarding Señor Garcia’s witness statement can be grouped as follows:
- i) Passages containing opinion, matters of belief, commentary on other evidence or repetition, contrary to PD [3] and SBP [3.3]: [15], [16 second sentence], [17], [18], [19], [20], [22, first part], [60]
  - ii) Commentary on Exhibit FGC2, not on matters from within the witness’ own knowledge plus some speculation – [24]-[53].
  - iii) Commentary on documents –[56]-[59] – contrary to PD3 and SBP 3.6.
51. It is not necessary for me to review every passage to which objection was taken. Indeed, in his oral submissions, Mr Edenborough QC concentrated on a few examples. However, my reasoning and approach will appear from the following.
- [15], [16 second sentence], [17], [18],
52. [15] and [16] appear at the end of his section A and as part of his account of the history of RCBPC brand licensing in Latin America, with particular emphasis on

Mexico. [17] & [18] are at the start of his section B under the sub-heading ‘The general appeal of polo brands in Latin America’. The relevant passages are as follows:

‘15. I believe that a large part of the attraction of the RCBPC brand to licensees in Mexico is that they know that it is authentic, i.e. that it is a real English polo club, and they know that the brand will be popular with consumers for the reasons set out at paragraph 17 below.

16 ... Within DD Document 105 are some photographs of how RCBPC’s products might typically appear in the Tenth Defendant’s stores in Mexico. ...

17. Generally, in my experience polo brands and other brands with similar looks (like nautical brands and tennis brands) together with American and British brands are very popular with consumers in the LatAm Territories because they relate to activities of the wealthy. Taking polo, for example, the public is aware that it is a sport played by the rich, famous and royalty. The looks projected by brands linked to polo and some nautical and tennis brands generally have a preppy look that has appeal to a wide range of consumers because clothing associated with these activities has an aspirational image in consumers’ minds which makes it popular.

18. I do not consider that there is any difficulty with Latin American consumers, even those that are purely Spanish speaking, identifying the difference between polo brands that contain English words. I would estimate that at least 80% of the Latin American fashion market is in brands that contain English words. Even the private labels in the main retailers are in English.’

53. In my view, this is all relevant trade evidence, based on his knowledge of and experience in these markets. It is appropriate for him to refer to the disclosure document to convey concisely how RCBPC’s products appear in the licensee’s stores in Mexico.

[19], [20]

54. These paragraphs appear in section B under the sub-heading ‘Other polo brands on the market internationally and generally’. In [19] he introduces Exhibit FGC3 which he has been told was compiled by the Fifth Defendant ‘and a small team of researchers’ in or around May 2019. I was not supplied with any of the exhibits but Señor Garcia, in one of four observations on the document, says it ‘*contains examples of various authentic and fictional polo clubs, used in connection with polo, as brand logos which appear to be in use, or have been used, in several territories including many if not all of the territories which are the subject of this action.*’

55. In [20] he says this:



‘The key point arising from the document referred to above at Exhibit FGC3 in relation to these proceedings, which is entirely consistent with my own knowledge of the market, is that there are very many polo logos internationally and many of these are used in relation to clothing either globally or in specific territories. This is a crowded market both globally and in the LatAm Territories and these brands co-exist with each other well without consumer confusion.’

56. This paragraph mixes argument with commentary on a document and opinion. However, Señor Garcia is endorsing what is shown by the document in order to convey his view of the situation in the trade in question. In theory, he could have compiled a similar document himself, but that would have wasted his time and costs. What he says about the document is not, in my view, the sort of pointless running commentary on disclosure documents which speak for themselves in the chronology of relevant events. Presumably some of what he says in his four sub-paragraphs in [19] will be apparent to the trial judge, but he has added opinions of his own. His opinion set out in [19] and [20] is properly trade evidence. Once again, the weight to be given to his evidence and to the document is a matter for trial. On analysis, if the exhibit turns out to contain a lot of ‘state of the register’ evidence, that will be worthless, but that type of point (and other challenges to the material) are matters to be explored in cross-examination at trial.

*[22, first part], [24]-[53] – commentary on FGC2, not on matters from within the witness’ own knowledge, plus some speculation.*

57. I will deal first with the accusations of speculation. One concerns Amazon Mexico. Señor Garcia’s evidence is that ‘*It is a large online marketplace within Mexico but probably not the biggest.*’ His use of ‘probably’ is said to demonstrate this is speculation but that does not follow at all. This is evidence from his own trade knowledge. The word ‘probably’ is entirely appropriate qualification. The witness is indicating he does not know for certain one way or the other. The second alleged instance concerns [52], where Señor Garcia gives 10 specific examples of polo brands co-existing in shopping malls but he ‘would estimate that there many many more’. This is not speculation, but his view based on his knowledge and experience in the trade.
58. The much bigger point concerns exhibit FGC2 and the numerous paragraphs relating to it in [22]-[53]. To put the objections in context I need to explain the structure of this part of section B of the witness statement.
59. All these paragraphs appear under the heading ‘Other polo brands on the market in the LatAm Territories’ which starts with [22] (which I set out below). The first sub-heading is ‘Physical stores’ under which there is [23] and a table. The [23] table contains some 16 entries of polo brands and identifies retailers in Mexico, Chile, Panama and Peru where each brand is said to be on sale. Under the second sub-heading ‘Online Marketplaces’ in [24]-[39], after some general introductory points, Señor Garcia then runs through a series of online marketplaces: Mercado Libre, Claro-shop.com, Amazon, Dafiti & Linio.

60. There are three further sub-headings in this section. First, ‘Co-existence of brands within physical retailers’ - [40]-[51], second, ‘Co-existence of brands within malls’ – [52] and third, ‘Co-existence of brands in online marketplaces’
61. Señor Garcia describes FGC2 in [4] as simply a paginated bundle of true copy documents. I have not seen FGC2, but there are several references to various pages in it in the table under [23] and in [24]-[52]. From these references it appears FGC2 contains a series of print-outs from websites. Brandsmiths’ letter says the defendants are not entitled to rely on FGC2 without the court’s permission, apparently because some or all of the documents in FGC2 were not produced before the deadline for disclosure, but this point was dropped in the Application Notice. The Application Notice also concedes that the evidence in [22] that the contents of exhibit FGC2 ‘accords entirely with [Mr Garcia’s] understanding of the market in the LatAm Territories’ may remain (see the underlined passage below).
62. In [22], Señor Garcia introduces the [23] table as follows:
- ‘Like the position internationally and generally set out at paragraphs 19 to 21 above, there are many polo themed brands on the markets in the LatAm Territories, the largest of which is Ralph Lauren. Of the LatAm Territories, Mexico has the largest number of polo themed brands as can be seen from the table at paragraph 23 below and the remainder of this Section C [sc. B] which is a combination of my own research and that of the First to Fourth Defendants’ solicitors and which accords entirely with my understanding of the markets in the LatAm Territories.’
63. The [23] table includes various references to pages in FGC2. I infer the pages show how the brand in question appears in store. Likewise, the references in the online marketplace paragraphs presumably show how the brand appears on line. I note that searches were also conducted on various websites to find how many and what types of RCBPC product appear on the site in question, but these searches provide evidence of some relevance to the issue of co-existence.
64. Not unnaturally, Mr Edenborough fastened on the reference to ‘research’ in [22] and, invoking [45] of *Fenty*, submitted this whole section was inadmissible evidence unless presented in a CPR Part 35 Expert’s Report, for which permission was required. The objection taken in Brandsmiths letter to [24]-[53] was that he has merely commented on the content of FGC2 and it is not evidence given from his own knowledge.
65. I disagree on both points. If a solicitor locates a person experienced in a particular trade, where one issue might be ‘what are the main brands which operate in this sector of the market’, it is to be expected that the potential witness would be able to reel off a whole series of brands immediately. Once faced with preparing a witness statement and the prospect of being cross-examined on its contents, the potential witness would want to check his or her recollection, ensure s/he had given a fair and accurate picture of the market and seek to support and illustrate what they were saying by reference to documents. Today this is very easy to do,

via some internet searches. Of course, the very question may also involve the witness forming an opinion as to what are the ‘main’ brands or even ‘brands of any significance’, but this is fairly standard fare for trade witnesses. The tendency to want to carry out this type of ‘research’ would be enhanced if the question ranged across several territories, as in this case.

66. This type of ‘research’ is, in my view, different in kind from the type of research which Mr Robinson referred to in *Fenty*. It is not materially different from an ordinary fact witness looking out and reviewing documents from his or her records to refresh their memory as to the sequence of particular events. An experienced trade witness would be expected to have encountered and ‘perceived’ many brands during their work but would need to refresh their memory before being ready to give evidence about them. If, on the other hand, the ‘research’ identified a whole series of brands which the witness had not previously encountered at all, that might be different. However, it seems to me that type of point can be brought out in cross-examination. The mere possibility that it might have occurred does not, in my view, convert this evidence into expert evidence, nor is there any other reason to require this evidence to be given by an expert. As I have said, I consider this ‘research’ to be different in kind from that in issue in *Fenty*. Furthermore, Mr Robinson had a role as a researcher: that was part of his job. That cannot be said of Señor Garcia, even though it is and has been part of his job to know and understand the markets in which he operates. The overriding point is that Señor Garcia is giving evidence as to the trade in the various countries, but naturally seeking to support his recollections using documents. In my view, this is all admissible trade evidence, but the weight to be attached to it is a matter for trial. Certainly on the material before me it is not possible to conclude that the evidence in [24]-[53] is not evidence given from Señor Garcia’s own knowledge. It seems much more likely that he does have knowledge of other polo brands in the various Latin American markets, and needs that knowledge to be able to do his job, to attract and support licensees and discuss issues that they raise with him.
67. Equally, the opinions he expresses in these paragraphs (e.g. in [40] ‘*..there are many incidences of polo brands co-existing within the same retailer ..*’ and in [53] ‘*...These polo themed brands seem to be able to co-exist with each other within online marketplaces without any confusion from consumers.*’) I view as trade evidence. To the extent they impinge on the ultimate question for the Court the trial judge will be well aware that Señor Garcia did not have in mind either the legal tests which the judge will have to apply or the circumstances which the judge will have to take into account when applying those tests, as well as other points which may be brought out in cross-examination which devalue his opinions, and s/he will give such weight to these pieces of evidence as is warranted in all the circumstances.
68. Finally, LECV made a general point about particular details in these paragraphs, pointing to two by way of non-exhaustive example. The first was that Mercado Libre had 139m active users in 2021 and the second that Walmart had over 2,200 stores in Mexico. In their letter, Brandsmiths said these were ‘*highly unlikely to be matters of which he has personal knowledge*’, the more general objection being that Señor Garcia had not expressed these facts to be from his own knowledge.

However, in [3], he said ‘*The facts and matters contained in this witness statement are within my own knowledge unless otherwise stated...*’ Although this may be characterised as a fairly ritual statement to include, I am not prepared to rule that Señor Garcia does not know the two facts mentioned above from his own knowledge. Furthermore, this point is not binary. Following cross-examination, it may turn out that Señor Garcia knew for example that Mercado Libre had active users of over 100m, or even ‘a very substantial number’ but he checked and gave a more accurate figure. But none of this requires these figures to be excised from his witness statement. Their relevance can be explored, if it is thought really necessary, in cross-examination.

69. Brandsmiths letter also made a complaint that the first phrase in [22] should be excised as being repetition. It is doing more than that, drawing an arguably relevant comparison as part of Señor Garcia’s trade evidence.

*[56]-[59] Commentary on documents*

70. These paragraphs appear under the heading ‘Issues arising from the Claimant’s disclosure list on confusion’ and in [57] and [59], Señor Garcia considers certain documents from LE’s disclosure. As he says in [56], he has not been asked to comment on what these documents are alleged to show, but has been asked to comment on them because of his knowledge of the market from which they come.
71. The document he addresses in [57] is an email about Albrook Mall in Panama City, which I assume dates from 2015. He gives evidence about Albrook Mall as being one of the largest in the world containing over 700 stores. He was provided with a list of the stores in Albrook Mall in 2015 and currently and identifies where certain polo-related brand stores were or are situate.
72. In [59] he relates he was shown a series of related documents all titled ‘Screen shots of webpage – Dafiti’ from LE’s disclosure. He draws attention to his earlier explanation as to Dafiti – an online retailer for Latin America, similar to ASOS in the UK. He indicates the screenshots appear to have been taken from a fraudulent or scam site.
73. In my view, all of this is relevant evidence because it puts the disclosure documents into context. No doubt LE will be submitting these documents evidence a likelihood of confusion but it is well-established that context is very important (cf *Specsavers*). He gives this evidence from his experience in the trade.

*[60]*

74. [60] starts with Señor Garcia’s evidence that he is not aware of any incidences of confusion between the RCBPC and BHPC brand, or between any polo brands at a consumer, retailer, buyer or licensee level. That this evidence is packaged as a submission (‘I consider the key point for the court to note is...’) does not affect the evidence he gives. Furthermore, it is not reasonably necessary to excise those initial words.
75. In the remainder of [60], Señor Garcia expresses two largely conclusory opinions which are based on the material he has presented in the earlier sections of his

witness statement. Both concern his view of the ability of consumers to distinguish between polo brands in the market(s). For what his opinions are worth, in my view, this is trade evidence (cf *Neutrogena*) but whether it is accepted by the trial judge is another matter.

### **The first witness statement of Michael Amore**

76. Mr Amore is the General Manager of RCBPC and has been since 2006. He has been at RCBPC since it was established, initially as Polo Manager. In his role as General Manager, he is responsible (inter alia) for managing the Club's merchandising activities. He says this includes liaising with RCBPC's licensing agents, making decisions on the selection of licensees, negotiating terms and managing the relationships, overseen by the statutory directors of RCBPC.
77. Mr Amore's evidence describes the history of the first defendant and his role in it, the history of its use of the marks complained of, both in the UK and overseas, the history of the trade mark disputes between the parties in relevant territories.
78. The structure of his witness statement is explained by him in an introductory paragraph as follows:

'5 (a) In Section A below, I set out some background information about RCBPC, my role within RCBPC and its merchandising activities overseas including its instruction of licensing agents, formerly the Fourth Defendant and currently a leading brand management agency, CAA-GBG. I also describe RCBPC's use of its trade marks to date in the UK.

(b) In Section B below, I set out the background of the LE's dispute with RCBPC both generally and then, in particular, in relation to each of the territories that are the subject of these proceedings together with an explanation of my understanding of the trade mark position with regards RCBPC's trade marks in each of those territories.

(c) In Section C below, I explain in detail how I have managed the overseas merchandising activity of RCBPC and how and when I report to the directors of RCBPC on those issues in response to LE's allegations of joint liability of the First to Third Defendants set out at paragraphs 42 to 46 of the Amended Particulars of Claim and the First to Third Defendants' response to those allegations at paragraphs 17 to 20 of the Amended Defence and Counterclaim of the First, Second and Third Defendants.

(d) In Section D below, I confirm that there has never been any intention on the part of RCBPC or its directors to harm LE's business or brand. This is a normal situation where each party's brands are, to some degree, in competition with each other – there is not a more sinister intention on the part of RCBPC or its directors, as LE appear to suggest at paragraphs 106 to 110 of the Amended Particulars of Claim under the heading

“Conspiracy to Injure by Unlawful Means”, to develop its brand in a way that causes financial loss or damage to LE.

(e) In Section E below, I set out that I have not received any reports of confusion on the part of any consumers, retailers, buyers or licensees between the LE’s brand and RCBPC’s brand, either directly or via its licensing agents. I set out my limited knowledge of the other brands in the markets of the various territories and coexistence agreements that exist between RCBPC and third parties and between LE and third parties.

(f) In Section F below, I make some concluding comments drawing what I consider to be the key points arising from Sections A to E of this witness statement.’

79. Against that background, I have grouped paragraphs objected to by LE along with a summary of the objection.

*[6]-[14] & [17] – irrelevant commentary and/or opinion, contrary to PD 3.2 and SBP 3.6(4).*

80. It is not necessary to set out all these paragraphs. They all appear in section A as background. In them Mr Amoores first gives a very brief history of the first defendant and then his background and his role in the first defendant since 1985. These paragraphs form part of the material by which he seeks to establish his credentials for being in a position to give relevant trade evidence. Some of it may be of marginal relevance (e.g. his experience in the administration of polo in the UK in [17]), but relevance is for assessment at trial.

81. None of this is irrelevant and the limited opinion evidence is either trade evidence or goes to establishing his ability to give the further trade evidence later in his statement.

*[21] – argument, plus a lengthy extract from a document, contrary to SBP3.6(1).*

82. In this paragraph, Mr Amoores refers to one of LECV’s allegations of non-use in this action and sets out the key passage from a prior decision at the EUIPO when a previous allegation of non-use made by LECV was rejected. This might be of marginal relevance, but the citation from the decision helpfully identifies the key passage.

*[28] – opinion, matters of belief, commentary on other evidence.*

83. In [28] Mr Amoores gives his opinion as to the reason for the strength of the RCBPC brand in the Overseas Territories. He refers to the ‘Englishness’ of the RCBPC brand, which he says consumers in Latin American countries love, and says it is something ‘we have worked hard to promote in promotional materials like our Style Charters..’ This is trade evidence. Whether the trial judge accepts it is a different matter.

[39]-[58] – recitation and commentary on a trade mark schedule prepared by the defendant’s trade mark agents.

84. In [39], Mr Amooore explains:

‘In relation to each of the territories that are the subject of these proceedings I set out at paragraphs 40 to 58 below an explanation of the disputes we have encountered with LE including in relation to trade mark registrations which is informed by RCBPC’s trade mark attorney Bailey Walsh. At pages 121 to 135 of Exhibit MA1 is a Trade Mark Schedule prepared by Bailey Walsh and updated on 22 March 2022 which contains details of the trade mark applications since it was first established and their current status in alphabetical order by country. Where there has been an opposition a brief note of the opposition is given. I shall refer to this document herein as “the Trade Mark Schedule”.

85. In an action for trade mark infringement which is limited to the UK, one would normally expect the Court to receive evidence about prior disputes between the parties involving either the same or similar marks. Even if those prior disputes give rise to no estoppel or abuse arguments, one side or the other usually relies on them as indicating something about the likelihood of confusion, the taking of unfair advantage or the cause of detriment or the general behaviour of the other party etc.. For example, in paragraphs 40-43 Mr Amooore relates that the first defendant has, between 1989 and 2016, made some 8 applications to register signs which are now alleged to infringe, despite the fact that none were the subject of opposition from LECV. The relevance of this sort of information can vary very widely, but assessment of relevance is a matter for trial.
86. I entirely accept that, unaided by reference to documentary records provided by the first defendant’s trade mark attorneys, Mr Amooore’s evidence would have been likely to have been something along the lines of: ‘Over the years, we have made a series of applications for registration of trade marks in the UK, and, as far as I can recall, none were opposed by LECV’.
87. However, in my view, the Court is likely to be assisted by the more precise evidence which he can give by reference to the schedule of information prepared by the trade mark attorneys. His evidence indicates that he was involved, at least to some degree, in decisions to apply to register trade marks and when responding to any developments regarding those applications. Any errors in the schedule can be challenged, but the presentation of the information in the schedule is, in my view, an efficient way of conveying information which one party contends is relevant and one which, ultimately, saves costs and court time.
88. Mr Amooore explains the more complicated situation regarding EUTMs in [44]-[47], but he sets out the relevant information (and he could have been the subject of criticism if he had not presented the full picture).
89. In [48]-[58], Mr Amooore sets out the history of applications and any oppositions thereto regarding the Overseas Territories. If the Court receives this type of

information regarding the UK, there is perhaps a greater reason to receive it for a foreign territory where the Judge has less or no experience of the market conditions.

90. Overall, I saw no reason to exclude this material or to interfere in the way it is presented.

*[59], [60], [73]-[74] – commentary on disclosure documents*

*[75] -opinion and/or submission.*

91. All these paragraphs are in Section C, where Mr Amoores responds to the allegation of joint and several liability against the second and third defendants. In [59]-[60], he sets the context with a summary of the allegations made in [42]-[43] & [45] of the Particulars of Claim. In [61]-[72] (to which no objection is taken), he refers to a number of disclosure documents to explain his role in the licensing activity which is said to give rise to joint and several liability of the second and third defendants. In effect, he is saying he undertook all the substantive activity in the licensing of the first defendant's marks, with the second and third defendants merely reviewing and approving his activities. [73]-[74] is more of the same, albeit [73] contains a list of 13 emails. Although I have not seen these emails, it is apparent from the witness statement that the purpose of this list is to show the first defendant's licensing agent, the fourth defendant, reporting directly to him (and presumably not to the second and third defendants).
92. All of this appears to be relevant evidence. Again, assessment of it and its relevance is for trial but I am satisfied none of it should be excluded.
93. [75] contains the conclusion which Mr Amoores seeks to draw from the previous paragraphs in this section. Although some of it is argument or submission, this is a minor infraction. In addition, this paragraph does contain some evidence from him. The weight to be attached to this is a matter for trial.

*[76]-[77] – argument and/or opinion*

94. These paragraphs are at the start of Section D, which is headed 'No intention to harm LE'. In [76], Mr Amoores starts by setting the context with a brief reference to the section of the Amended Particulars of Claim titled 'Conspiracy to Injure by Unlawful Means' and what he has been told those allegations entail. Then he identifies some of his earlier evidence as relevant to this.
95. In [77] he refers to the disclosure process and confirms there 'are no documents what were relevant to or discloseable against this issue'. His next sentence is opinion and conclusory. However the final three sentences are evidence. Once again, the weight to be attached to each will be a matter for trial and, no doubt, cross-examination.

*[79]-[80], [82], [83, save for the last sentence]-[84] – opinion, matters of belief, commentary on other evidence.*



96. These paragraphs are in Mr Amoores section E entitled 'Confusion & co-existence'. The general thrust of this section of his evidence is that there are many polo brands in relevant markets and they co-exist, a point confirmed by his knowledge of various co-existence agreements between Ralph Lauren and three entities, including the first defendant.

### **Conclusion**

97. Having reviewed the various objections in detail in this judgment, I adhere to the view I expressed at the hearing that, whilst there are some minor infractions, it is not reasonably necessary to excise any of the paragraphs or passages to which LECV objected, because very largely they comprise admissible trade evidence.
98. Some of the points taken in Brandsmiths' letter were trivial. Whilst I accept that certain points were not maintained in the Application Notice and Mr Edenborough QC did not press minor points in oral submissions, in my view PD57AC should not be taken as a weapon with which to fillet from a witness statement either two or three words at various points or essentially insignificant failures to comply with PD57AC in a witness statement. Furthermore, in my view, before an application is brought seeking to strike out passages in a witness statement based on PD57AC, careful consideration should be given as to proportionality and whether such an application is really necessary. Indeed, in my view, an application is warranted only where there is a substantial breach of PD57AC (as, for example, in *Greencastle*). If there really is a substantial breach of PD57AC, it should be readily apparent and capable of being dealt with on the papers. That might provide a mechanism for dealing with objections in an efficient and cost-effective manner.
99. It is for all these reasons I dismissed LECV's application with costs. I summarily assessed the Defendants' costs in the sum of £14,000. LECV's costs were considerably greater.