Neutral Citation Number: [2023] EWHC 2240 (Comm)

Case No: CL-2021-000065

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 October 2023

Before :

HIS HONOUR JUDGE PELLING KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

VIRGIN ENTERPRISES LIMITED	**Claimant**
- and -	
BRIGHTLINE HOLDINGS LLC	**Defendant**

- -
- -

Daniel Toledano KC, Emma Himsworth KC and Maximilian Schlote (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Nigel Tozzi KC and James Hatt (instructed by **Sidley Austin LLP**) for the **Defendant**

Hearing dates: 3-5, 7, 10-14 and 20-21 July 2023

- -

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.

....

HIS HONOUR JUDGE PELLING KCSITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling KC:

Introduction

1. This is the trial of a claim by the Claimant ("VEL") against the Defendant ("Brightline") for damages for alleged repudiatory breach of a Trademark License Agreement between the parties dated 15 November 2018 ("TMLA"), pursuant to which VEL agreed to license the Virgin Brand (the "Masterbrand") and Marks ("Marks") to Brightline for use in connection with its rail services business on the east coast of the United States of America. Brightline's defence is that it was entitled to terminate the TMLA pursuant to clause 12.2(a). That clause permitted Brightline to terminate the TMLA (after giving written notice to cure) if (i) the Virgin brand had ceased to be a " *brand of international high repute* " or the " *Marks* " (as defined in the TMLA) " *no longer are of high quality status and synonymous with the Purpose and Brand Values* " and if (ii) continued use of the Marks would cause material damage to Brightline's reputation or the value of its business.

2. Brightline served a Notice to Cure on 27 April 2020 and Notice of Termination on 20 July 2020, in each case relying on clause 12.2(a), claiming that as at 27 April 2020 and 29 July 2020 "*… the Defendant's continued use of Marks would have repelled customers, investors and employees from the Defendant's rail business, rather than attracting them to it*." VEL maintains that the conditions set out in clause 12.2(a) were not then or at any time satisfied, that the termination was an illegitimate attempt to save costs at a time when Brightline's business was being severely affected by the Covid pandemic and that by purporting to terminate the TMLA, Brightline renounced the agreement thereby entitling VEL to terminate the TMLA, which it did by notice on 20 August 2020. That said, it is not suggested by VEL that the rights conferred on Brightline by clause 12.2(a) were subject to any implied good faith obligation or that Brightline is otherwise precluded from relying on the provision opportunistically[1]. It follows that the sole question is whether the conditions set out in clause 12.2(a) were satisfied when Brightline purported to serve the Notice to Cure and to terminate the TMLA thereafter. If they were then its motivation for terminating is immaterial.

3. By clause 12.3 of the TMLA, Brightline was permitted to terminate the TMLA for convenience on or after 16 November 2023, but in that event was required to pay an Exit Fee. It is common ground that unless Brightline was entitled to terminate pursuant to clause 12.2(a), VEL is entitled to recover as damages for breach of contract the Royalties to which it would have become entitled down to the first date Brightline could have terminated under clause 12.3 and the Exit Fee that would have become payable on such a termination. Those sums have been agreed subject to liability.

4. There remains a dispute about whether VEL is entitled to an additional amount reflecting the loss of a real and substantial chance of VEL earning a higher Exit Fee because, VEL alleges, there was a Change of Control of Brightline within 12 months of the hypothetical date of termination (i.e., by 16 November 2024). As originally

[1] See (a) Socimer International Bank v. Standard Bank London [2008] EWCA Civ 116; [2008] 1 Lloyds Rep. 558 and Braganza v. BP Shipping Limited [2015] UKSC 17;[2015] 1 WLR 66; and/or (b) Yam Seng Pte v. International Trade Corp [2013] 1 All E.R (Comm) 132, Globe Traders v. TRW Lucas Varity Electric Steering [2017] 1 All E R (Comm) 601 and Al Nehayan v Kent [2018] EWHC 333 (Comm), as considered in Taqa Bratani Ltd v. Rockrose UKCS8 LLC [2020] EWHC 58 (Comm); [2020] 2 Lloyd's Rep. 64.

listed, this trial was to be of all issues concerning both liability and quantum. However, three days before the trial was due to begin, VEL applied to re-amend its amended Particulars of Claim in relation to this part of its claim. On the first day of the trial, I directed (with the agreement of the parties) that the amendment application be adjourned and this element of the claim be tried separately and after determination at this trial of the issues of liability that arise.

5. The trial took place between 3-5, 7, 10-14 and 20-21 July 2023. I heard evidence of fact:

   i) On behalf of VEL from:

      a) Ms Lucinda Howard, VEL's Director of Brand and Consumer Strategy;

      b) Mr Nicholas Fox, who was the Virgin group's Chief Communications Officer between 2015 and 2020; and

   ii) On behalf of Brightline from:

      a) Mr Jeff Swiatek, the Chief Financial Officer of Brightline Trains Florida LLC, a subsidiary of Brightline;

      b) Mr Patrick Goddard, the President of Brightline Trains Florida LLC; and

      c) Mr Kenneth James Nicholson, a Managing Director at Fortress Investment Group LLC.

   I heard expert evidence:

   iii) On behalf of VEL from:

      a) Ms Sara Bennison, an experienced marketing practitioner whose last full time post was as Chief Product & Marketing Officer of the Nationwide Building Society; and

      b) Professor Bobby Calder, Kellstadt Professor Emeritus of Marketing and Director of the Centre for Cultural Marketing at in the Kellogg School of Management at Northwestern University in Evanston, Illinois in the United States of America; and

   iv) On behalf of Brightline from:

      a) Dr Erich Joachimsthaler, who has held various senior academic posts in marketing or marketing related subjects at universities in Europe and the United States and is the founder and CEO of Vivaldi Partners, a marketing consultancy with offices in New York and various cities in Europe; and

      b) Professor Paul Argenti, who is Professor of Corporate Communication at Tuck School of Business at Dartmouth in the United States and is the co-founder of RIG, which "*…applies the mathematics of studying*

biological adaptation to large corporate data sets to understand the attributes of brands that are most important in establishing strong reputations".

6. I have tested the oral evidence of each of the witnesses of fact, wherever possible, against such contemporary documentation as there is, admitted and inconvertible facts and inherent probabilities. This is an entirely conventional approach – see Onassis and Calogeropoulos v. Vergottis [1968] 2 Lloyds Rep 403 at 407 and 413. It is of course necessary to consider all of the evidence – see Kogan v. Martin [2019] EWCA Civ 164 per Floyd LJ at paragraphs 88-89. There is however nothing either in this authority or the requirement to consider all of the evidence that prevents the evaluation of oral evidence using the techniques I have referred to. The evidence of fact relates to events that took place primarily between 2018 and July 2020. Given the passage of time since those events occurred, in my judgment the use of such techniques is all the more appropriate – see Gestmin SGPS SA v. Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm) per Leggatt J (as he then was) at paragraphs 15-22.

Events Down to 15 November 2018

General Background

7. In these proceedings VEL has, and its witnesses have, distinguished between what they characterise as the "*Virgin group of companies*" including VEL ("Virgin group") and what they characterise as the "*VCos*" by which is meant those companies that were licensed to use the Virgin name and Marks ("VCos"). I have tried to maintain this distinction where necessary in this judgment.

8. The Virgin group was founded by Sir Richard Branson. At all times relevant to these proceedings it consisted broadly of two elements. The first is an investment arm, which is concerned with investing in and growing VCos that are usually developed and then sold to third party investors either in whole or part, although the Virgin group has retained a substantial interest in some VCos – Virgin Atlantic (the airline) and Virgin Galactic being examples. The other part of the Virgin group's business is licensing the Virgin Masterbrand to companies in return for royalties. The Masterbrand was and is the Virgin group's most valuable asset.

9. The licensing part of the Virgin group business was at all material times operated by VEL, which held the relevant rights to the Masterbrand and Marks, granted the licences and maintained the Virgin group's contractual relationships with the licensees. The licensees are a major part of the family of VCos. The attraction of the brand to licensees is that it enables new or developing businesses to acquire market recognition that it would otherwise take years and cost substantial sums in advertising expenditure to build, to more easily overcome barriers to entry and expansion relied on by economically more powerful competitors and in some cases at least to cross market goods and services to the customer bases of other VCos, ideally to the benefit of all the VCos concerned.

10. Unsurprisingly, given the importance of the Masterbrand to the Virgin group, VEL carried and carries out extensive market research for the purpose of monitoring the standing and reach of the Masterbrand. The results of this research were used at all

times material to this claim for internal monitoring purposes and also for the purpose of marketing the brand to potential licensees. This market research data is referred to by Virgin and its witnesses as the "*Brand health Data*". VEL's case by reference to this material is there was no material change in the repute of the Masterbrand or the quality of its Marks during the relevant period. This case is supported by Ms Bennison and Professor Calder. This material is also used by Dr Erich Joachimsthaler as the basis for his opinions, although he assesses the data in a different way to that which the Virgin group has always adopted and the way Ms Bennison and Professor Calder approach it. Professor Argenti approaches the evaluation of the brand and Marks in an entirely different way. However, for reasons that I explain later in this judgment his evidence was largely discredited by the end of the trial.

11. Brightline is a Delaware registered company that operates in the eastern United States where, through two indirectly owned subsidiaries, it currently operates a train service between Miami and Orlando, with stops including Fort Lauderdale and West Palm Beach. It is seeking to expand that service within the same region and in other regions of the USA. Its case is that it has and had at all material times "… *a strong reputation amongst consumers, investors and public authorities in the United States as a provider of high speed passenger rail systems*." Subject to this being proved, this is potentially significant, particularly when assessing whether as at 27 April 2020 and 29 July 2020 the continued use of the Marks would cause material damage to Brightline's reputation or the value of its business or, as Brightline put it, would have "… *repelled customers, investors and employees from the Defendant's rail business, rather than attracting them to it*."

12. Brightline's corporate structure is complex. It is largely immaterial to the issues I have decide at this stage, although the issue will become more important in any trial of the loss of chance claim. However, it is necessary to note in summary the nature of the structure since some of Brightline's senior managers worked for Brightline's parent companies at the time material to this dispute and occasionally refer to the parent interchangeably with Brightline. In summary, Brightline's immediate parent company is Florida Investment Holdings LLC. 98% of that entity is owned by funds managed by FIG LLC, whose parent in turn is Fortress Investment Group LLC ("Fortress"). Fortress is a global investment management business based in the United States. Fortress either directly or indirectly owns a substantial majority interest in Brightline through funds managed by FIG LLC.

13. Before turning to the detail, the other general point that I need to mention at this stage concerns Brightline's funding. As will be obvious a new non state funded entrant into the rail transport business requires substantial sums of money to invest in the infrastructure necessary to operate its proposed services. Brightline acquired capital during the period relevant to this dispute using a debt model involving the issue of interest bearing tax exempt bonds regulated by the USA Securities and Exchange Commission ("SEC") and a bond issue to the Florida Development Finance Corporation. Mr Nicholson describes this activity in his witness statement in terms that suggest in 2018 it was a major part of Brightline's activity – he describes Brightline during that year as remaining "… *focused on undertaking the key capital-raising steps required to develop its business*". It was certainly his major pre-occupation. That this was the dominant concern for Brightline is apparent from the

reasons for the initial rejection of the Virgin group's proposals in 2017, to which I refer in more detail below.

14. I turn now to the events leading to the execution of the TMLA. Although there appears to have been some contact between Virgin Trains West Coast (at the time a British train operator) and Brightline, the first meaningful contact between VEL and Brightline commenced in 2015 and was between Mr Fox on behalf of VEL and Mr Nicholson, who was the investment director at Fortress responsible for Brightline's activities.

15. By September 2017, discussions were sufficiently far advanced for the Virgin group by Mr Fox to make a commercial proposal to Mr Nicholson. The proposal was a lengthy document that it is not necessary to reproduce. In summary the document focussed on what Mr Fox maintained would be the benefit of using the Virgin brand and Marks, which were those I summarised earlier as being the basis on which the Virgin group promotes the use of the Masterbrand and Marks. Mr Fox relied on Virgin having an extensive presence in the US "… *with 96% of the population aware of our brand* …". This is an allusion to "Awareness" which in this context is a marketing concept that I explain in more detail below. This proposal culminated with an indication that VEL would expect fees of 2.5% to 3.0% of revenue but *"(w)e will demonstrate that the revenue uplift from our brand covers these fees several times over*." In relation to investment Mr Fox wrote:

> "You asked us to consider whether Virgin might be an investor in Phase 2 of the project. We approached Fortress in the belief that Virgin adds value by leveraging our brand, rail expertise and local/global networks to make Brightline more successful. Having reflected on your ask further, our preference remains to keep our partnership focused on these three core elements."

Mr Nicholson rejected this proposal in the course of a telephone call a few days later. Mr Nicholson maintains that he explained that "… *if there were to be a deal, Virgin would need to have "skin in the game" by making a financial investment in Brightline.*". This is consistent with the focus on capital raising referred to earlier.

16. Discussions continued through the remaining part of 2017 and 2018. These negotiations included a meeting between Mr Edens (of Fortress) and Sir Richard Branson attended by various other senior directors and managers in which those representing Virgin maintained that rebranding Brightline's business would enhance Brightline's reputation and success in Florida and that it could expect to increase revenues by at least 10% as a result. Mr Nicholson's concern was that "… *any financial investment in Brightline by Virgin would be significantly less than the minimum acceptable amount that I and other representatives of Fortress (including Mr Edens) had in mind. They also explained that, due to liquidity considerations within the Virgin Group, a significant financial investment would not be possible*." Mr Nicholson maintains that thereafter, "… *Mr Fox assured me that, based on their experience and the studies Virgin had conducted, re-branding Brightline as Virgin would result in an 8-14% pricing premium on Brightline's ticket fares, and 14% more trips."* These discussions led nowhere however. In November 2017, Brightline succeeded in raising US$600m from an open market bond offering. On 4 January

2018 Mr Nicholson informed Mr Fox that following internal discussions (including concerning the November 2017 bond offering), Brightline did not wish to partner with Virgin and would focus on starting its rail operations under its own name.

17. All this suggests very strongly that from Brightline's point of view its primary or at least one of its primary interests had been in attracting inward investment from Virgin and that it was unpersuaded by Virgin's representations as to why it would benefit from becoming a licensee of the Masterbrand and Marks. This is entirely consistent with what Mr Nicholson had said in his statement concerning Brightline's focus in 2018.

18. During 2018, Brightline completed fund raising from Florida Development Finance Corp of US$1.75b in exchange for bonds and completed the acquisition of XpressWest. This stimulated Sir Richard to email Mr Nicolson and Mr Edens in which he stated:

> "… As we discussed last October in Miami, we remain very keen to work with Fortress on a network of US rail opportunities. I believe our 20 years of rail experience in the UK together with our strong US transport brand in the US will help to elevate your operation and attract more ridership."

The two points being made were those that had been made consistently by Virgin to Brightline – (a) that Virgin had internal expertise in operating a train operator successfully, which could benefit Brightline, particularly as it expanded and (b) Brightline would benefit in all the ways previously identified on behalf of Virgin from familiarity with and recognition of the Virgin brand in the US by reason of Virgin's operations in Florida. This reconnection led in October 2018 to the commencement of the negotiations that led to the TMLA.

19. Ahead of these negotiations, Virgin acting by Mr Fox sent Brightline's representatives some written material that set out what Virgin considered to be the benefit of a relationship with Virgin. This material adopted the now familiar approach of advocating the commercial benefits for Brightline from use of the Masterbrand and the Marks and the offer of Virgin Trains personnel to provide advisory and consultancy services. These points were summarised in Mr Fox's letter of 12 October 2018 in these terms:

> "We will walk you through all of this when we meet, but there are a few points I would call out now:
>
> **Strength and relevance of the Virgin brand**
>
> We have talked extensively about the strength of our brand - globally, in the US, and in Florida in-particular. As Brightline turns its attention to new projects beyond Florida, with the acquisition of XpressWest, building a strong brand will take on increasing importance. We share your ambition to build a leading US-wide passenger rail business. Operating under the Virgin brand, Brightline would benefit from instant nationwide recognition and familiarity - developed over the course of

> almost 50 years - giving the business a critical advantage as it enters new markets. It is fitting that Brightline's first two projects are in Florida and Las Vegas/California. These are core markets, where the Virgin brand performs very well, as you will see in our presentation. We are also expanding in these markets: Virgin Voyages will set sail from Miami in 2020, whilst in Las Vegas we are transforming the 1,500 room Hard Rock Hotel into a Virgin Hotel.
>
> **Commercial benefits of the brand for Brightline**
>
> We firmly believe that the Virgin brand will be accretive to Brightline's business model. In particular, we believe the Virgin brand would improve visibility of the business, speed up trial, create more effective marketing and improve operations and staff hiring and retention. You will find examples and case studies of these attributes and more in our presentation.
>
> **Virgin's rail experience**
>
> With over 20 years of experience operating the leading high-speed rail franchise in the UK, Virgin is uniquely qualified to provide the commercial and operational expertise to maximise Brightline's potential. As part of a Virgin/Brightline brand partnership, we can provide access to Virgin Trains personnel and alumni to consult for Brightline and help optimise your operations."

Inward investment, , remained at the top of the Fortress priority list. In relation to this issue, Mr Fox made two points. First he kept open the possibility of Virgin investing in Brightline as part of a private placement round. Secondly he suggested that Virgin could assist in fundraising:

> "<u>We see Virgin playing an important role in the Brightline fundraising process. In particular, we believe our involvement would be seen as a great advantage by investors, due to the strength of our brand, our reputation for successfully disrupting markets and our exemplary credentials in the travel sector</u>. To help land this to maximum effect with investors, we would provide support from senior Virgin staff at key investor and stakeholder meetings. We have done this previously to great effect on the Virgin Voyages fundraise, with our partner Bain Capital.
>
> Bain is just one of a number of financial investors/partners who have invested behind our businesses previously. Some of these partners have expressed interest in investing in future Virgin branded opportunities and we would be happy to explore their appetite to invest in a Virgin branded Brightline." [Emphasis supplied]

"*Disruption*" has a contextual meaning – it is a word used by the Virgin group to describe the effect of a VCo entering a mature market and undermining market practices that benefit the established participants in the relevant market but are not necessarily in the interests of, or considered beneficial by, consumers. Brightline places particular emphasis on the underlined words because it maintains this demonstrates that the ostensible value of the Masterbrand and Marks were understood by all parties to not merely influence consumers but also investors. This is entirely consistent with what Mr Nicholson says in his statement concerning fund raising and the basis on which earlier negotiations broke down being the Virgin group's unwillingness to invest its cash in Brightline to the extent Mr Nicholson expected. This takes on added importance given that Virgin was or would have been plainly aware that Brightline and its owners were on an almost constant search for more investment both public and private from investors willing to invest in exchange for interest bearing bonds.

20. Accompanying this letter was a deck of presentation slides entitled "*Virgin Group – Virgin and Fortress – Brightline Opportunity*". This document ("October Presentation") consisted of 43 pages or "*slides*". In summary it represented the Masterbrand as "*A GLOBAL BRAND WITH UNIQUE AWARENESS AND REACH*" and supported that proposition by identifying "*awareness*" in 8 regional markets and "*consideration*" in 4.

21. Before setting out the information provided I should summarise what is meant by these concepts. They are concepts used by marketing practitioners including those employed by the Virgin group to measure brand health using extensive opinion testing in the relevant markets and are regarded by Virgin group's marketers as two key performance indicators ("KPIs"). There are four KPIs used by the Virgin group's marketers – awareness, familiarity, openness and preference. Each concept refers back to the questions that are posed of consumers when carrying out opinion testing. As to "*awareness*", Virgin mean by this the percentage of people sampled who are aware of the Masterbrand, "*familiarity*" tests how well those sampled consider they know the Masterbrand, "*openness*" attempts to test how likely or unlikely those tested would be to consider a purchase by reference to the Masterbrand and "*preference*" is an attempt to quantify how likely or unlikely those tested would be to consider a product marketed using the Masterbrand. "*Consideration*" is a collective description used by the Virgin group's marketers for openness and preference.

22. The October Presentation contained summaries of awareness and consideration statistics for (inter alia) three national markets – the UK, the USA and Australia.

Market	**UK**	**USA**	**Australia**
Awareness	99%	96%	99%
Consideration	83%	72%	78%

I have left out of account the other regional markets referred to because the same level of detail was not generally provided. It will be appreciated that the information supplied is provided exclusively by opinion testing of consumers. No similar exercise was carried out in relation to investors. The impact of the brand on the domestic US market was summarised as being:

Market	West USA	Midwest USA	North East USA	Southern USA
Awareness	95%	94%	95%	95%
Familiarity	69%	60%	70%	67%
Consideration	71%	66%	77%	71%

The October Presentation also included information concerning the premium Virgin Trains West Coast (the UK franchise) ticket prices commanded over those of its competitors (between 8-14% for leisure travel and 4-8% for business travel) and the premium of the Virgin America airline over its domestic American carrier competitors.

23. The Virgin group's practice was to carry out brand tracker surveys annually. During 2020, following the start of the pandemic, three surveys were undertaken which are referred to by the witnesses and experts alike as the 2020 first, second and third "*dips*". The October Presentation material came from the 2017 brand health tracker survey.

24. Brightline has not pleaded any case to the effect that the material summarised above is wrong or untrue. As it was put in Brightline's opening submissions:

> "VEL's representations are not relied on as misrepresentations or collateral warranties. Brightline simply contends that when the Court is trying to understand what the parties meant by "*brand of international high repute*" in the TMLA, it should put significant weight on what VEL was saying its brand would do for Brightline's business, what Brightline reasonably understood VEL to be saying and what the commercial purpose of the TMLA was:"

In principle I agree that the material I have so far considered forms part of the factual matrix against which the TMLA is to be construed applying the tests referred to below (not least because Brightline did not seek to test what Virgin was saying in the October Presentation, both parties proceeded on the basis it was correct and Brightline did not seek, and it had no knowledge of, the other health tracker data that was in the Virgin group's possession prior to the date when the parties entered into the TMLA). In construing what the parties meant or intended by the phrase "… *brand of*

international high repute…" the statistical information made available to Brightline by the Virgin group in its October Presentation is likely to be significant because that is the only contextual material against which the question can be considered (because the phrase is not defined contractually and is not a term of art or one with an agreed meaning amongst marketing practitioners), or for any judgment made as to whether the brand had ceased to have such a reputation at the relevant dates.

25. Whilst there were various meetings that took place into October 2018, nothing material turns on them. The TMLA was executed on 15 November 2018 so as to enable Brightline's rail business to be rebranded as "*Virgin Trains USA*". On the same day Brightline entered into a subscription agreement with Corvina Holdings Limited (a company associated with VEL) by which it was agreed that Corvina Holdings Limited would make an equity investment in Brightline of between US$30-50m subject to various conditions being satisfied. Brightline maintains those conditions were satisfied but the investment was never made. Nothing turns on this however, because no claim for breach of the subscription agreement has been made. I say nothing more about that issue hereafter for that reason.

The TMLA

26. In so far as is material, the TMLA provided as follows:

> "…
>
> **Recital**
>
> VEL is the legal and beneficial owner of the Marks (as defined below) and has agreed to grant the Licensee a licence to use the Marks (in the form of the Names) for the purpose of operating a higher speed passenger rail network on the Permitted Routes on the terms and conditions of this Agreement (as defined below).
>
> …
>
> **1 DEFINITIONS AND INTERPRETATIONS**
>
> 1.1 In this Agreement, unless otherwise defined herein, the following terms will have the following meanings:
>
> …
>
> **Brand Values** means the following values as generally implemented or followed by the Virgin Group: (i) insatiable curiosity; (ii) heartfelt service; (iii) delightfully surprising; (iv) red hot relevance; (v) smart disruption; and (vi) straight up; as detailed in The Virgin Way, and as the same may be amended or updated by VEL from time to time;
>
> …

Core Activities means the operation of an inter-city private high/higher speed passenger rail service;

…

Expiry Date means twenty (20) years from the Commencement Date;

…

Marks means the Virgin Marks and the Names;

…

Names means the logo and word Marks shown at Schedule 2A and the name Virgin Trains USA, together with the registrations set out in Schedule 2B, the Domain Names, the App Name and the Social Media Names (as the same may be updated from time to time);

…

Purpose means " Changing business for good ", as detailed in The Virgin Way, and as the same may be amended or updated by VEL from time to time;

…

Term means the period commencing on the Commencement Date and terminating on (i) the Expiry Date or on the final day of any renewal or extension in accordance with Clause 2, or (ii) the date of earlier termination of this Agreement in accordance with its terms;

Territory means the US;

…

Virgin Marks means VEL's trade mark applications and/or registrations and unregistered trade mark rights in respect of the Virgin Signature Logo and the word mark VIRGIN(including as the same may be updated from time to time), a list of which is available upon request;

2 **COMMENCEMENT AND DURATION**

This Agreement will come into effect on the Commencement Date, and subject to earlier termination in accordance with its terms, will continue in force until the Expiry Date. Save where this Agreement is terminated before the Expiry Date, and unless the Licensee gives VEL at least six (6) months ' notice in writing that it does not want this Agreement to renew, it will

continue on the same terms (or on such other terms as the parties may agree and record in writing), for two further period(s) of ten (10) years provided that VEL will have a right to decline such renewal by providing written notice at least four (4) months before the Expiry Date if the Licensee has at such time committed an unremedied material breach of this Agreement.

…

3 LICENCE GRANT

…

3.10 The Licensee will not, and will procure that each of its Affiliates will not, within the Territory during the Term and other than in connection with a Licensee ROFR Route Relinquishment, directly or indirectly:

(i) conduct: (a) Core Activities other than under the Marks; or (b) any activities substantially equivalent to the Core Activities conducted under the Marks;

8 CONDITIONS OF USE

Brand

8.2 The Licensee will:

(a) at all times during the Term conduct the Core Activities and Ancillary Activities in relation to the Permitted Routes using only the Names and will use all reasonable endeavours to promote and expand the Licensed Activities for the Permitted Routes throughout the Territory;

…

8.5 The Licensee acknowledges that the value and reputation of the Marks are such that they denote high quality status and are synonymous with the Purpose and the Brand Values. …

12 **TERMINATION AND EFFECTS OF TERMINATION**

12.1 VEL may, by giving notice in writing to the Licensee, terminate this Agreement in whole … immediately if:

(a) the use of the Marks by the Licensee in relation to the Licensed Activities or its conduct of the same has been or is likely to be materially damaging to the goodwill of the Marks or VEL

> (b) the Licensee commits a material breach of this Agreement …
>
> 12.2 The Licensee will have the right, by giving notice in writing to VEL, to terminate this Agreement immediately if:
>
> (a) other than as a result of acts and/or omissions of the Licensee or its Affiliates or Permitted Sub-licensees hereunder, the Virgin brand ceases to constitute a brand of international high repute or the Marks no longer are of high quality status and synonymous with the Purpose and the Brand Values, in each case such that continued use of the Marks by the Licensee would be materially damaging to the reputation of the Licensee or to the value of the Licensee's business, and such event continues unremedied for more than sixty (60) Business Days after the Licensee has served a notice in writing on VEL requiring remedy (including any such detrimental impact arising from the acts or omissions of VEL, its Affiliates or their respective officers, employees or representatives);
>
> …
>
> 12.3 Licensee may terminate this Agreement, for convenience, at any time after the fifth (5th) year anniversary of the Commencement Date, by providing six (6) months ' notice thereof to VEL, provided that in the event Licensee exercises the foregoing termination right, Licensee shall pay VEL the Exit Fee within five (5) Business Days of the date of termination in accordance with this Clause 12.3…
>
> **27 GENERAL**
>
> …
>
> 27.6 In relation to its subject matter, this Agreement sets out the entire agreement between the parties and supersedes all prior agreements, arrangements or understandings between them. The parties acknowledge that they have not entered into this Agreement in reliance upon any statement, representation, assurance or warranty which is not set out in this Agreement. Nothing in this Clause will limit or exclude any liability for fraud or fraudulent misrepresentation…"

27. The key provision for present purposes is clause 12.2, which is the clause that Brightline has relied on for the purpose of claiming to be entitled to terminate the TMLA. The issues that arise are whether at 27 April 2020:

    i) the Virgin brand had ceased to constitute a brand of international high repute (the "High Repute Issue"); or

ii) the Marks no longer were of high quality status and synonymous with the Purpose and the Brand Values (the "Quality of the Marks Issue"); and

iii) continued use of the Marks by Brightline would have been materially damaging to either

a) the reputation of Brightline; or

b) the value of Brightline's business (the "Damage Issue");

and whether such of those conditions as were satisfied at that date (if any) continued to be satisfied on 29 July 2020, when Brightline purported to terminate the TMLA. (i) and (ii) are technical alternatives and it is necessary technically for Brightline to establish only the existence of one or the other. However, I agree with VEL's submission that since the Marks are the physical embodiment of the Masterbrand, in reality high repute and high quality are two sides of the same coin and that it is highly improbable that one would be satisfied but not the other. Most of the evidence is relevant to both and in the result the focus of both parties has been primarily on the High Repute Issue. Synonymity at least potentially raises separate issues as I explain below.

The High Repute and High Quality Issue

28. The High Repute issue necessarily starts with the construction of the phrase "*brand of international high repute*" in clause 12.2(a) of the TMLA. This is so because that phrase is not defined by the terms of the TMLA and is not a term of art whether with a universally understood meaning amongst marketing practitioners or otherwise – see para 7.1 of Professor Calder's report, which is not disputed. I am therefore required to construe the phrase applying conventional English law principles of construction.

Framework Principles Applicable to the Construction of the Policy.

29. The framework principles that apply to the construction of a contract governed by English law are now well established. In summary:

i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15, the earlier cases he refers to in that paragraph and, most recently, Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2; [2023] 1 WLR 575 *per* Lord Hamblen JSC at [29(1)];

ii) In carrying out this exercise it is necessary to consider the contract as a whole since it may be apparent from such a reading that the parties intended either a narrower (or, conceivably, a wider) meaning than the literal meaning of the

words used might suggest when read in isolation – see Barclays Bank Plc v UniCredit Bank AG [2014] EWCA Civ 302; [2014] 2 All ER (Comm) 115 (CA) *per* Longmore LJ at [14] and Apache North Sea Ltd v INEOS FPS Ltd [2020] EWHC 2081 (Comm) *per* Foxton J at [21];

iii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract was made - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 21; that which is known to one party alone is immaterial and what is reasonably available generally means what is readily available to all the parties – see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 *per* Lord Hoffmann at 912–913 and Toth v. Emirates [2012] EWHC 517 (Ch) following Movie Network Channels Pty Ltd v Optus Vision Pty Ltd [2010] NSWCA 111;

iv) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

v) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

vi) Where the language used by the parties is unclear, the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used, but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vii) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

viii) Language used by the parties should not generally be treated as surplus but *"(i)t is well established law that the presumption against surplusage is of little value in the interpretation of commercial contracts…"* – see The Eurus [1998] 1 Lloyds Rep 351 per Staughton LJ (as he then was) at 357, approving Royal Greek Government v. MoT (1949) 83 Ll.L.R 228 per Devlin J (as he then was) at 235 and Chandris v. Isbrandtsen-Moller Co Inc [1951] 1 KB 240 per Devlin J at 245;

ix) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

x) A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.

30. The TMLA is a professionally drawn document in which lawyers acting for both sides of the transaction participated. In principle therefore, it is to be interpreted primarily by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent. The phrase with which I am concerned is one that lacks clarity because it is not a defined term nor a term of art with a meaning that is universally understood by marketing practitioners. It follows that in construing the phrase, rather more emphasis has to be placed on factual and commercial context, assessed in the light of the overall purpose of the provision being construed and the contract in which it is contained, the facts or circumstances known or readily available to both parties that existed at the time that the contract was made and commercial common sense, than usually is necessary when construing a professionally drawn commercial agreement.

31. The first issue that arises is whether the parties are to be treated as having agreed that the brand was one of international high repute at the date when the TMLA was entered into and therefore whether the Masterbrand had ceased to be such a brand is to be assessed by comparing the position at the date when the TMLA was entered into with the position at each of 27 April and 29 July 2020. VEL maintains that this is the correct approach as a matter of construction. Brightline does not accept that is so and that, if it is able to demonstrate that the brand was not a brand of international high repute at the date when the agreement was executed, then it was entitled to take the steps that it did even if there was no material change of position between the date when the TMLA was entered into and the date when the Notice to Cure was served. In my judgment VEL's submission on this point is to be preferred. My reasons for reaching that conclusion are as follows.

32. The TMLA was a long term relational contract. It is improbable that either of the parties intended that it could be terminated by reference to clause 12.2 by reference to the standing of the Masterbrand prior to the agreement being executed. Given that the terms of the TMLA had been negotiated over some weeks it would be absurd for anyone in the position of the parties as at the date that the contract was signed to think that was the intention behind clause 12.2(a).

33. In my judgment that is put beyond doubt by the use of the phrase "… *ceases to*…". The natural meaning of that phrase is that it refers to a change of position occurring after the date when the TMLA was entered into. It cannot naturally mean not being or having ceased being a mark of international high repute prior to the agreement being entered into. If that had been the intention then the parties would have made the contract conditional on the brand being demonstrated to be of a defined standard.

34. In my view that construction receives additional support from the phrase that follows in relation to the Marks – that "… *the Marks no longer are of high quality status and synonymous with the Purpose and the Brand Values* …". The natural and ordinary meaning of the phrase "*no longer*" can only sensibly be treated as referring to an event that occurs after the TMLA had been entered into. If that is the correct construction of this part of the clause, it is difficult to see why a different approach could have been intended in relation to the repute of the Masterbrand, not least because the Marks are the physical embodiment of the Masterbrand.

35. As I explained earlier, when the negotiations started, VEL supplied some statistical information concerning the brand. That is not material that was tested or interrogated by or on behalf of Brightline prior to the parties entering into the TMLA, nor does Brightline challenge this information as anything other than factually correct. In my judgment that was the information known or reasonably available to both parties at the time the TMLA was entered into and, by entering into the agreement in that factual context, both parties were accepting that the Brand was a brand of international high repute by reference to the information that had been supplied by VEL concerning the brand and in particular the statistical information concerning awareness, familiarity and consideration (having the meaning explained earlier) in the UK, USA and Australian markets derived from the 2017 brand health tracker survey. It was by reference to this material that VEL had represented the Masterbrand to be "*A GLOBAL BRAND WITH UNIQUE AWARENESS AND REACH*" and in my judgment the common understanding of the parties down to the date when the TMLA was entered into and what the parties meant by it being of international high repute was that it was a brand with the statistical characteristics supplied by VEL to Brightline. In my judgment it would be wrong in principle to construe the meaning of the phrase "*International High Repute"* other than by reference to the statistical material known to both parties down to the date when the TMLA was signed, applying the principles summarised in paragraph 26(iii) above.

36. The focus of this material and thus the common understanding of the parties was on the effect of use of the brand on consumers. I accept that the parties included in their common understanding that the brand had delivered increased passenger numbers, cross selling opportunities and price premia over prices charged by competitors for comparable services and that such an effect could be the result of use of the brand by Brightline, and that use of the brand could enhance relationships with employees and inward investment. The key point for present purposes is however that Brightline does not allege misrepresentation or breach of a collateral term or contract or that the Masterbrand ceased to be a brand of international high repute by reference to any of this material, which is accepted to be correct down to the date when the TMLA was entered into and not shown to be wrong at any stage thereafter.

37. Although VEL submits that certain other provisions within the TMLA are consistent with the starting point being that the brand was one of international high repute at the date when the TMLA was entered into, in my judgment some caution is required in relation to this submission. The clauses relied on by VEL are included in the TMLA for different purposes and use different language. That said, it is fair to say that there is no provision within the agreement that provides any support for Brightline's position on this issue and none is pointed to.

38. The consequence of these conclusions is that the focus of attention is on any evidence of cessation in the period following 15 November 2018 and not on any alleged deterioration in the reputation of the brand prior to that date. Brightline's claim depends on examining any changes that occurred after 15 November 2018, particularly in the statistical information measuring the same metrics as those supplied by VEL to Brightline prior to that date and then evaluating whether in the light of any such changes the brand had ceased to be one of international high repute. As will be apparent from what is set out later in this judgment, Brightline advances its case by comparing the statistical material available to VEL but not supplied by it to Brightline as a result of VEL's 2018 market survey with the statistical material derived from the 2019 and 2020 surveys. In my judgment this is wrong – the relevant difference is between the 2019 and 2020 statistical information and the information supplied by VEL to Brightline prior to the TMLA being entered into because that is the information known to <u>both</u> parties at the time the TMLA was entered into. It is not suggested that there was any other material readily available to the parties.

39. I agree with VEL that as a matter of construction, the cessation concept requires that Brightline establish a serious adverse change that would appear likely to be permanent to a reasonable party in the position of Brightline at the time when the Notice to Cure was given and remained substantially unaltered when it served its Notice of Termination. It would be inconsistent with the long term relational nature of the contract (and inconsistent with the language ("*Cease*") used by the parties) for the provision to be construed in any other way. I also agree with VEL that it is unlikely to be established by minor statistical changes in consumer sentiment but I do not accept that a decline followed by stabilisation or recovery after 29 July 2020 will negative a cessation if otherwise the statistical evidence suggests that a cessation as I have described it had occurred prior to that date. A party entitled to terminate under clause 12.2(a) is entitled to do so on the basis of the position at the date when notice of termination is served. There is nothing in clause 12.2(a) or the agreement as a whole that suggests otherwise, nor is there any commercial or other reason for approaching the question in this way. Indeed it is difficult to see how a party could ever safely terminate under clause 12.2(a) if that was so because however stark the position might be (hypothetically) on the date when the notice to terminate was served, there is always the chance that things will improve perhaps dramatically after notice has been given.

40. It is true to say that all the material that Brightline now relies on as showing that the brand ceased to be one of international high repute, and which three of the experts rely on, is statistical information generated by VEL's brand health checking activity. It is not suggested that Brightline carried out any such quantitative surveys prior to serving either of the notices on which it relies either by reference to its own market standing or what impact use of the Masterbrand would have on the services it was

then offering. The changes on which Brightline relies were not known to it at the time when either of the notices were served. It is not suggested by VEL that this is relevant to any of the issues that arise and I accept that it is not.

41. The final point I need to address concerning construction of the phrase "*international high repute*" is a submission by Brightline that the question is not informed and should not be resolved by reference to the common understanding of the parties because (as Brightline put it in its opening submissions) a "… *brand is not of high international repute just because people happen to have heard of it. It has to be a brand of global renown commanding respect. Such brands will be the equivalent of what Manchester United, Real Madrid and Barcelona are to football; Einstein and Hawking are to science; Maria Callas, Luciano Pavarotti and Placido Domingo are to opera. It is the Beatles, not the Bay City Rollers.*" In my judgment this is entirely mistaken because it ignores the correct approach to contractual construction summarised above. It is an entirely subjective analysis that is divorced from the common understanding of the parties based on the information available to them prior to the TMLA being entered into. The subjectivity of this approach is apparent from the selection of Manchester United for example whilst apparently ignoring Manchester City and referring to Einstein and Hawking whilst ignoring for example the work of Professors Geim and Novoselov in isolating graphene and who were awarded the Nobel Prize for Physics as a result. For those reasons, I reject Brightline's submission that only "… *a small number of brands will be ones of international high repute. The hurdle to jump over is a high one and none but the creme de la creme - the most notable and highly regarded exemplars in their field - will be able to surmount it*" as clearly mistaken.

42. There is a construction issue concerning what has to be shown if clause 12.2(a) is to be relied on in relation to the Marks. The relevant phrase is " … *the Marks no longer are of high quality status and synonymous with the Purpose and the Brand Values*…". VEL submits that the phrase "*high quality status"* should be read conjunctively with *"… synonymous with the Purpose and the Brand Values*…" with the result that if Brightline is to rely on this element, it must prove both elements – namely a loss of "*high quality status*" and that the Marks are no longer synonymous with both the Purpose and the Brand Values, both of which are defined by the TMLA. Brightline submits that this is wrong and that the two requirements should be construed as being disjunctive with the result that if either the Marks have ceased to be of high quality or have ceased to be synonymous with the Purpose and the Brand Values, then this element of what must be proved has been established.

43. Whilst I agree that the Marks in most cases will probably have ceased to be of "*high quality*", if the Masterbrand has ceased to be of international high repute, that does not lead to the conclusion that the concepts of high quality and synonymity should be treated as alternatives. Had that been intended the word "or" would have been used not the word *"and"*. In my judgment the effect of this choice is that if Brightline is to succeed in its claim to be entitled to terminate by reference to the quality of the Marks it must show <u>both</u> that they are no longer of "*high quality status"* <u>and</u> no longer "… *synonymous with the Purpose and the Brand Values*…".

44. In many cases this will be academic – if the brand is no longer of international high repute, the Marks are unlikely to be either of high quality or synonymous with the

Purpose and the Brand Values as defined in the contract. However, there is nothing in the agreement that suggests a party in Brightline's position could avoid the agreement by reference to synonymity whilst not advancing or failing in relation to the issues concerning the quality of the Marks. The approach I consider should be adopted gives effect to the language used by the parties ("*and"*) and gives meaning to all the different permutations used by the parties. For these reasons, I accept VEL's submission that Brightline must prove both that the Marks are no longer of "*high quality status*" and no longer "… *synonymous with the Purpose and the Brand Values…*". Whilst I accept that in most cases the Marks will cease to be of high quality if the brand has ceased to be of international high repute, the same does not necessarily follow in relation to the synonymity issue, which has to be resolved by reference to the contractually defined "*Purpose*" and "*Brand Values*". It follows from this that Brightline will fail if it is unable to prove that the Marks are no longer of high quality status even if it was able to prove that the Marks were no longer "… *synonymous with the Purpose and the Brand Values…*" and will fail if it is unable to prove that the Marks are no longer synonymous with both "... *the Purpose..."* and the *"… Brand Values*".

45. The final construction issue that arises concerning the effect of the phrase "… *in each case such that continued use of the Marks by the Licensee would be materially damaging to the reputation of the Licensee or to the value of the Licensee's business…*". The reputation and value issues are disjunctive as is apparent from the use of the word "*or*". The issue that arises concerns whether Brightline is right as a matter of construction to contend that overpaying for its licence to use the Masterbrand and Marks constitutes damage to the value of its business. VEL's pleaded case is that Brightline's case on this issue must be rejected as a matter of construction because, if right, the requirement to show damage to the value of its business (or its reputation) would be robbed of any purpose. It contends that the effect of this provision is that it is the use of the Marks which must be materially damaging, not the payment of royalties for them.

46. In support of its contention, Brightline makes two points being (a) that VEL's construction is commercially absurd because the parties were not contemplating a scenario in which the Masterbrand became actively toxic but instead cases in which the brand "*lost its lustre"*; and (b) common sense in this case would dictate that paying hundreds of millions of dollars for nothing of material value is harmful to a business. In my judgment VEL's case on this issue is to be preferred for the following reasons.

47. VEL's contention is entirely consistent with the language used by the parties, which refers expressly to the "… *continued use of the Marks by the Licensee..."* as being the source of either damage to reputation or value of the licensee's business. This is everyday language which does not either lack clarity – as was the case in relation to the phrases "*international high repute*" and "*high quality*" (neither of which had a contractually defined or other agreed meaning) – and is neither illogical nor incoherent. As I have found, the TMLA was an agreement negotiated extensively both commercially and by lawyers instructed on behalf of each of the parties. In those circumstances, this part of the TMLA is to be interpreted principally by textual analysis. Applying that principle leads me to conclude that VEL's construction is to be preferred.

48. I also agree with the point that if the position were otherwise then this part of the clause would be robbed of its purpose. In most if not all cases where hypothetically the Masterbrand had ceased to be a brand of international high repute, it will necessarily follow that the licensees would be paying a sum that was likely to be in excess of fair value at a time when the brand was a brand of international high repute as that phrase is to be understood. In all such cases paying the originally agreed sum would by definition be materially damaging. In any event, issues concerning commercial absurdity and common sense are relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made. The purpose of including the material damage requirement was to limit the circumstances in which an otherwise long term agreement could be brought to an end. It may have been imprudent for Brightline to agree to the qualification (I make no findings either way on that issue) but it did so. A court should not reject the natural meaning of a provision as incorrect simply because it appears to be a very imprudent term for one of the parties to have agreed.

49. Finally, even if Brightline was correct in its construction, it would have to prove the degree to which it was overpaying in the allegedly changed circumstances. The answer is likely to be different depending on whether on the evidence the brand had become "*actively toxic*" at one extreme or had merely "*lost its lustre"* at the other. I accept there may be cases where it can be shown that the cause of the brand allegedly ceasing to be a brand of international high repute was so obviously toxic that it can be assumed that the continued use of the Marks would be materially damaging either to the reputation of Brightline or the value of its business but that is not Brightline's case. Its case is that the brand had "*lost its lustre"*. In such a case (assuming that to be established) I do not accept that the requirement "… *that continued use of the Marks by the Licensee would be materially damaging to the reputation of the Licensee or to the value of the Licensee's business…*" can be found without some evidence concerning the effect of the use of the brand and/or Marks on Brightline's reputation or the value of Brightline's business.

Events After 15 November 2018

50. Aside from some partial re-branding in early April 2019 and an attempt by Brightline to raise capital by an IPO, to which I refer in detail below, the first event of significance was on 10 April 2019, when West Coast Trains Limited (the Virgin Trains UK joint venture) was disqualified from bidding for the renewal of its West Coast franchise.

Loss by Virgin Trains of UK West Coast Franchise

51. There is a dispute as to whether Mr Fox informed Mr Nicholson that obtaining renewal would be a "*shoo in*". It is common ground that Mr Fox had informed Mr Nicolson prior to the parties entering into the TMLA that Virgin Trains was required to submit a new bid for the West Coat Main Line franchise. Mr Fox denied saying to Mr Nicholson that getting a new franchise would be a "*shoo in*". Aside from his denial that he would have used language of this sort, he maintains that such a belief would have been unrealistic because:

> "I would not have tried to predict what the government would do in relation to the bid. Virgin Trains had spent many years

> battling with the government on the West Coast Main Line. We had lost the franchise in 2012 (it was restored after court proceedings) and after that we had had to run for many franchise extensions. The East Coast Main Line had also been lost. I therefore would not have said with any confidence anything about our dealings with the government on the franchise."

This issue was the subject of cross examination of Mr Fox. He maintained his denial that he said anything of the sort alleged by Mr Nicholson and that the conversation was confined to him remarking that Virgin Trains was bidding for the franchise, that the result would be announced in 2019, that Virgin had done a good job year by year since 2012 and that it was hopeful of success. His evidence was that the issue was not the subject of detailed discussion beyond that. He added that Mr Nicholson "*… knew the situation we were in and that we were on very short-term renewals which were rolling and that we were now bidding for a very complicated franchise*." Mr Nicholson was cross examined about this issue too. He maintained that Mr Fox had said what he alleged in his statement had been said in the course of a meeting in his office. He maintained that the result of the conversation was that he – that is Mr Nicholson – did not perceive there to be any risk that the West Coast franchise would not be renewed in favour of Virgin Trains.

52. Resolving this issue in the absence of any other evidence depends on my assessment of the oral evidence of Mr Nicholson and Mr Fox. I am prepared to accept as inherently probable that Mr Fox expressed hope that the application would be successful but I reject the notion that he would have suggested that the outcome was certain or near to certain given (a) what had happened to the East Coast franchise, which was public knowledge; (b) the history that had accumulated concerning the West Coast franchise summarised in his witness statement and (c) that Virgin Trains was operating the franchise on an interim basis and had been doing so for a number of years. His oral evidence was that it was wrong to suggest that no one at Virgin thought it would lose the franchise – see T2/169/11-23. I accept that evidence. In those circumstances, I consider it inherently unlikely that Mr Fox would have suggested that renewal was a certainty or close to a certainty and I consider it probable that Mr Nicholson knew full well that there was a real risk that the franchise would not be renewed. In any event the thrust of the Virgin pitch in relation to Virgin Trains was that is senior management could bring a wealth of management expertise to administering a train business that could be of value to Brightline's managers. That being so, whether the franchise was renewed or not was not a source of real concern for Brightline or its owners. It was the past track record of successful train operations that was of potential interest. Indeed, this point was put to Mr Nicholson and he accepted it – see T5/60/8-16.

53. Even if all this is wrong it does not assist on the issues that arise in these proceedings. Brightline submits that it does not have to prove a causative link between any particular event and the brand allegedly ceasing to be of international high repute. I agree. The clause relied on by Brightline does not require it to prove the cause of the brand ceasing to be of international high repute as long as it proves that it ceased to be such a brand. Thus the issue I am now considering, although the subject of extensive investigation at trial, does not assist on the issues that arise. There is a significant

dispute between the parties as to how the data available to VEL concerning the health of the brand should be assessed to which I turn in detail below. I should mention at this stage however that some reliance was placed by Brightline on an internal assessment based on the 2019 Brand Health Tracker data. Its significance is much more limited than Brightline contends because (a) it is an opinion as to potential impact not a report on actual effect and (b) it was limited in its opinion to UK market impact. It does not purport to address actual impact even in the UK and does not mention any opinion concerning any market other than the UK market and thus does not assist on the issue that arises in this case namely whether the brand ceased to be a brand of international high repute.

54. Finally there is no evidence that the loss of the West Coast franchise caused the continued use of the Masterbrand or Marks by the Licensee to be materially damaging to the reputation of the Licensee or to the value of the Licensee's business and I conclude that it did not have that effect. It was not suggested (even internally within either Brightline or Fortress) that the effect of the loss should result in termination of the TMLA when VEL informed Brightline that Virgin Trains had been disqualified from bidding and it is unlikely that such would have been the result given that at least the primary benefit of Virgin Trains to Brightline was the expertise the Virgin Trains management could provide as Brightline expended its routes and capacity – see my findings at paragraph 52 above. The most that is said by Mr Nicholson is that there were internal discussions about the loss of the franchise. The evidence concerning the substance of these discussions is non specific and the issue was not considered sufficiently important to generate any internal notes or emails between relevant officials. Mr Nicholson's evidence was that it was not the practice to keep extensive or any formal internal notes. Even if that is correct – see below – that explanation does not explain the absence of emails, particularly given the geographical separation between Fortress's office in New York and Brightline's in Miami. Mr Nicholson accepted in cross examination that the issue was not the subject of discussions between him and Mr Fox during 2019 – see T5/57/6-11.

55. An event that Mr Nicholson specifically attributed to the loss of the West Coast franchise was a conversation that Mr Nicholson alleged took place with Mr Ryan Rosberg on behalf of an entity that was then Brightline's largest debt investor. No note was kept by Mr Nicholson of this call. Although Mr Nicholson says it was not practice to keep internal notes within Fortress or Brightline (something I am bound to say I am sceptical about, particularly in relation to a regulated investment manager of Fortress's size and sophistication) that does not obviously apply to a conversation with an important external contact, unless the point was regarded as much less significant than it is now portrayed to be.

56. That the conversation was regarded as much less significant than it is now portrayed to be, is supported by the fact that the occurrence and content of the conversation was not reported by Mr Nicholson to anyone internally. Mr Rosberg did not follow up with a letter or email (T5/72/11-15) as in my judgment he would have if he was seeking comfort or assurance about an issue that he considered had a real world impact on the value of the debt investment. The question was not what Fortress or Brightline would have done (although if the issue had been thought to be sufficiently serious I consider it inherently improbable that the issue would not have been

followed up) but what a genuinely concerned investor would have done. In the end the substance of this point reduced to this:

> "Q. Did he call you up and suggest a meeting to discuss the point or anything like that?
>
> A. No, we just had the conversation.
>
> Q. So it was one call, nothing in writing and that was that. Is that right? On this particular occasion?
>
> A. Correct."

In my judgment, Mr Nicholson's written evidence in relation to this issue was substantially exaggerated and the true scope of what occurred and its significance was conceded by him in cross examination. I return to the effect of these conclusions having considered the April 2019 Bond Issue and the Blackstone meeting below. It was not suggested that Mr Rosberg or the entity he represented did anything different in relation to Brightline following this conversation. It is not suggested it sold its bonds or did not invest further as a result of the loss of the West Coast franchise.

57. In paragraph 6.5 of his statement, Mr Nicholson placed quite a lot of emphasis on what he maintains were adverse responses by investors to the use by Brightline of the Virgin brand. It is not suggested on behalf of Brightline that direct evidence could not have been adduced from the investors and bankers concerned. It is unclear therefore why such evidence was not adduced. I return to this issue when considering below what Mr Nicholson says was an adverse effect of the Virgin branding on a bond issue.

58. Although some reliance was placed on the content of a video released by Virgin concerning the loss of the West Coast franchise, in my judgment that takes matters no further because it was self evidently concerned with a UK event not a US one as is apparent from Sir Richard Branson's blog introducing the video in which he said " *I'm proud that Virgin Trains has become one of the best train companies in the UK, if not the world. Drawing on our expertise over the past two decades, we have recently launched Virgin Trains USA and look forward to disrupting the rail industry in the States*."

59. Returning to the issues that matter, I agree with and accept VEL's submission that it "*… is impossible to conclude that this event had any impact on the international reputation of the Virgin brand. There is no support for that in any of the materials before the court*."

The April 2019 Bond Issue

60. Mr Nicholson set out his evidence on this issue in paragraphs 6.6 of his witness statement. Having referred to the email from Mr Fox on 10 April 2019 informing him that Virgin Trains "*... had lost the West Coast franchise ...*", he then refers to the conversations considered above and then turned to the bond issue, of which he states:

> "6.5 … It was obvious to me that our investors drew a connection between the loss of Virgin's franchise in the UK and the safety of their investment in Virgin Trains USA.
>
> 6.6 The concern was also apparent in the context of Brightline's financing efforts around this time (again under the 'Virgin Trains USA' name). In April 2019, Brightline issued USS 1.75 billion of tax-exempt bonds at an interest rate of 6.43%. Although the market conditions in April were better than in November 2017, Brightline's performance was worse; it had to pay a significantly higher interest rate on the bonds (an additional 80 basis points)."

Mr Nicholson then stated at Paragraph 6.7 of his statement that:

> "6.7 Relatedly, I vividly remember meeting on 10 July 2019 with the global investment firm, Blackstone, which was set up as part of Brightline's additional debt offering (then under the Virgin Trains USA name). I attended the meeting with Mr Goddard and Mr Jeff Swiatek (Chief Financial Officer at Brightline) along with representatives of Morgan Stanley (Mr Cody Gunsch and Mr Chance Moreland). We met with, as I recall, 5 to 6 representatives of Blackstone at their offices on Park Avenue in New York. The pivotal moment in the meeting was when a Senior Managing Director at Blackstone stated that, in their assessment, "Virgin is a dying brand". This comment was very embarrassing and very important as well. Mr Goddard, Mr Swiatek and I, together with the Morgan Stanley attendees, discussed the statement in the lift down from the meeting, and after we had left the building. I remember us discussing that, when the largest global investment manager tells you that your affiliation with Virgin is more of a liability than an asset, you need to pay close attention to it."

61. Turning first to the bond issue, Mr Nicholson suggests that the interest rate payable in respect of the bond issue was higher than it would otherwise have been by reason of the loss by Virgin Trains of its UK West Coast franchise. This assertion is problematic for two reasons.

62. The first is that it is factually wrong, as Mr Nicholson was driven to accept in the course of his cross examination. Initially in his evidence he confirmed that what he had intended to say in paragraph 6.6 was that the "… *sole point I was trying to make here was, all in this same general area of time, this April timeframe one important thing that I thought was important to note was that the first transaction issued under the Virgin name was more expensive than a transaction issue previously*" – see T5/79/9-14. He then denied he was attempting to suggest there was a link between the performance of the bond issue in April 2019 and the announcement in the UK, on 10 April 2019, about the West Coast franchise – see T5/80/1-6. He then stated the "… *bond financing was something that was started actually in March 2019 and priced and closed in -- later in April. And so we were in the middle of the financing during*

this." This was a suggestion that the pricing came after not before the loss of the UK franchise became known. He then accepted that the bond issue took place on 2 April 2019 – that is 8 days before Mr Fox informed Mr Nicholson of the situation and 7 days before Virgin Trains had been informed of the outcome by the UK Government's Department of Transport.

63. Mr Nicholson's evidence then became that:

> "… the point that I was just referring to. The bonds had not yet closed. They had priced, they had not yet closed in that period of time. I think they priced on the 2nd or the 3rd. You might -- and then they closed on, I believe, 20th or 22nd from what I recall, some time during the week in the 20s, April 20s. The bonds did not trade well following this announcement …"

On this basis Mr Nicholson disavowed the suggestion that the bonds were "*priced"* differently as a result of the UK West Coast franchise issue (by which he meant the interest rate that was being offers to bond subscribers) but was suggesting that trading in the secondary market was adversely affected by the announcement.

64. The bond issue was in absolute terms a success – it was over-subscribed. As it was described in a local newspaper:

> "Securing crucial funding for its ambitious expansion plans, Virgin Trains USA this week raised $1.75 billion in a bond sale.
>
> Virgin Trains, parent of the Brightline rail service, sold the tax-exempt bonds to pay for its planned expansion to Orlando.
>
> But investors were so keen on owning a piece of the system — and collecting yields of 6 percent in an era of microscopic interest rates — that the company brought in more demand than expected. The Bond Buyer, a trade publication, reported that Virgin Trains ' debt issue received about $4 billion of orders.
>
>> "We received an overwhelming positive response from qualified investors who recognize our early success and the long-term potential for our business, " the company said in a statement. " This financing provides Virgin Trains the necessary funds to start construction into Orlando, creating additional economic benefits for Florida. "
>
> Much of the money will be used for Virgin Trains ' expansion from West Palm Beach to Orlando. The company has said it expects to launch service in 2022.
>
> The new bond issue also was used to refund $600 million in bonds the rail service sold in 2017 to pay for the connection

> between West Palm Beach and Miami. Trains began running between those downtowns in 2018.
>
> The successful bond offering comes after Virgin Trains USA in February pulled the plug on an initial public offering that would have been the biggest IPO of 2019. The stock sale was expected to raise nearly $500 million."

What emerges from this article (the accuracy of which is not in dispute) is that the bond issue closed on 3 April and was over-subscribed because of low interest rates offered elsewhere when compared with an offered yield of over 6%. The offer rate was not, because it could not be, influenced by what happened in the UK in respect of the West Coast franchise. Although Mr Nicholson denied it, in my judgment the clear implication of what he had said in his statement was that the initial offer price (interest of in excess of 6%) had been fixed as a result of the effect of the franchise announcement in the UK. That is the only basis on which Mr Nicholson's statement that "…*(a)lthough the market conditions in April were better than in November 2017, Brightline's performance was worse; it had to pay a significantly higher interest rate on the bonds (an additional 80 basis points)*…" is coherent. For the reasons already explained, this is evidence that is necessarily wrong and must be rejected.

65. In this context I should refer to an email sent by Mr Nicholson to Mr Lovell of VEL dated 26 January 2020. It will be necessary for me to refer to this email in more detail below. For present purposes it is necessary to note only that it was written in the context of an attempt by Brightline to renegotiate the terms of the TMLA. It contains a catalogue of matters relied on as justifying this attempt. It included the following in relation to the bond issue:

> "It's worth noting that almost all of the guys who invested in the bond offering were pre-existing relationships - not folks who came in because of the Virgin brand."

It is nowhere suggested that the issue was a failure or that it only succeeded because the yield offered was at a premium to the market or (the point considered below) that the bonds failed to sell well in the secondary market. Given the date and context of this email, it is inconceivable that Mr Nicholson would not have relied on these points had they had any substance.

66. This then leads to the point Mr Nicholson made in his oral (but not his written) evidence namely that the secondary market proved a disappointment. There are a number of points that can and should be made about this evidence. First Brightline or Fortress or both were advised in relation to the bond offer by Morgan Stanley. Had it been intended to suggest either that the primary market was affected adversely by Brightline's link to Virgin or that the secondary market proved a disappointment for a similar reason, then Brightline could and should have adduced evidence from the bankers that advised in relation to the offer or at least adduced some other evidence that at least supported the proposition that the bonds performed poorly in the secondary market when compared to other bonds with similar characteristics. As things stand there is no evidence to support the suggestion that the bonds traded poorly in the secondary market other than Mr Nicholson's late assertion. There is no

evidence that links this alleged disappointing trading in the bonds' secondary market to the use of the Masterbrand or Marks.

67. I regret to say that Mr Nicholson's evidence on this issue was unsatisfactory. If he had intended to say what he said in his oral evidence then the way the relevant paragraphs of his statement had been prepared was materially misleading and wrong. He did not say in his written evidence what he said orally thereby depriving VEL of the opportunity to investigate what he claims he was wanting to state. There was every opportunity for Brightline to adduce evidence from those most capable of providing support for what Mr Nicholson alleged orally but no such evidence was produced. His statements on this issue in his oral evidence were therefore no more than late assertion and I reject it.

68. My conclusions concerning Mr Nicholson's evidence in relation to his conversation with Mr Rosberg and those I have reached concerning his evidence about the April 2019 bond issue lead me to conclude that I should be cautious before I accept Mr Nicholson's testimony save where it is corroborated or admitted or against the interest of Brightline or Fortress. Whilst I do not conclude that Mr Nicholson set out consciously to mislead me on these issues, I am satisfied that his evidence was materially inaccurate in relation to both of them. That can only be because of a lack of care in his preparation of his witness statement or more likely a lack of accurate objective recollection of events. Either way, that is sufficient to justify the caution to which I have referred.

69. In those circumstances, I reject Brightline's assertion that the April 2019 bond issue or the conversation with Mr Rosberg supports the suggestion that the "*… continued use of the Marks by the Licensee…"* was a source of either damage to its reputation or to the value of the licensee's business. I return to this at the end of this judgment.

The Blackstone Meeting

70. This meeting was attended by Mr Swiatek (Brightline's CFO) as well as Mr Goddard (Brightline's President) and Mr Nicholson. Mr Swiatek's evidence on this issue was set out in paragraph 3.2 of his witness statement in these terms:

> "I understand that Mr Ken Nicholson (Managing Director of Fortress Investment Group LLC) has given a witness statement in these proceedings. I also recall the meeting which he describes in July 2019 during which a representative of the investment management company, Blackstone, described Virgin as a "dying brand"."

He is non-specific as to when this meeting took place and produces no internal notes or other memoranda nor any emails or correspondence that refers to this alleged incident either directly or indirectly. Notably he does not refer in his statement to having discussed this incident with anyone either externally or internally. He does not suggest that the comment was either challenged or responded to in any way. Its alleged occurrence must be read in the context of the bond offer referred to earlier which in my judgment on proper analysis was an unqualified success.

71. Mr Goddard's evidence on this issue was that:

> "I understand that Mr Nicholson has given a witness statement in these proceedings and that he addresses a meeting with representatives of Blackstone on 10 July 2019. I attended that meeting and I also recall a senior representative of Blackstone referring to Virgin as a 'dying brand'."

As with Mr Swiatek, Mr Goddard produces no internal notes or other memoranda nor any emails or correspondence that refers to this alleged incident either directly or indirectly. He was cross examined as to whether and to what extent he challenged the comment he says was made. His response was that it would not have been appropriate to do so in the context of an investment pitch (a point that in principle I accept) and that in any event the comment came at the end of the meeting after Brightline had completed its pitch. He accepted that no one responded to the remark – see T4/98/3-6. He could not recall the name of the person who is said to have made the remark.

72. Mr Nicholson's evidence on this issue was apparently more specific and detailed. At paragraph 6.7 of his statement he stated:

> "Relatedly, I vividly remember a meeting on 10 July 2019 with the global investment firm, Blackstone, which was set up as part of Brightline' s additional debt offering (then under the Virgin Trains USA name). I attended the meeting with Mr Goddard and Mr Jeff Swiatek (Chief Financial Officer at Brightline) along with representatives of Morgan Stanley (Mr Cody Gunsch and Mr Chance Moreland). We met with, as I recall, 5 to 6 representatives of Blackstone at their offices on Park Avenue in New York. The pivotal moment in the meeting was when a Senior Managing Director at Blackstone stated that, in their assessment, "Virgin is a dying brand". This comment was very embarrassing and very important as well. Mr Goddard, Mr Swiatek and I, together with the Morgan Stanley attendees, discussed the statement in the lift down from the meeting, and after we had left the building. I remember us discussing that, when the largest global investment manager tells you that your affiliation with Virgin is more of a liability than an asset, you need to pay close attention to it."

There is no reference within this material to the name of the individual at Blackstone who is alleged to have made this comment. He refers to a discussion with Mr Goddard and Mr Swiatek, that neither of those witnesses refers to and no witness from Morgan Stanley has been produced by Brightline who verifies either the making of the comment or the subsequent conversation which Mr Nicholson alleges they were party to. Mr Nicholson's evidence was that he may have taken handwritten notes which however he did not keep. If the comment was as significant as Mr Nicholson alleges that is surprising since if he really thought that the link with Virgin had become a liability he would have been anxious to maintain a paper trail of material that supported that view in case it was decided to terminate the relationship on that basis. I simply do not accept Mr Nicolson's evidence that as an experienced, astute and very senior investment manager he did not keep notes of what he considered important. The destruction of any notes for this meeting strongly suggests to me that if the

remark was made at all it was not regarded as having any of the significance that Mr Nicholson now seeks to attach to it. A similar conclusion would arise if in fact no notes were kept by Mr Nicholson that recorded the remark.

73. In his oral evidence but not in his written evidence Mr Nicholson maintained that he recalled the first name of the Blackstone representative who had passed the remark as being "*Seth*" but he could not recall his family name. Mr Nicholson said in the course of his oral evidence that Brightline had responded to the comment. This is unsupported by the other witnesses who attended the meeting and contradicted by Mr Goddard. His oral evidence on this issue was:

> "… Blackstone was not an existing investor. We were pitching ourselves as a new thing to these investors. So when -yes, when he told us he thought it was a dying brand, I and Patrick and Jeff, I think, all recognised, wow, we have got an issue here. We have got to try to, you know -- we have got to try to navigate through this. So our response in the meeting was, well, gee, let us tell you about the things we are hoping we can do with this brand, you know, now, and that's -- when you are trying to raise debt, you are a little bit in sell mode, you are in marketing mode and so we were responsive in the meeting. I did not see the need after the meeting to follow up more with this individual."

74. I do not accept that this comment has any of the significance that Brightline and Mr Nicholson in particular now seek to attribute to it. It was not a perception that had affected the bond issue in April for the reasons I have given earlier. Had it been seen at the time as at all significant then I have no doubt that both Mr Goddard and Mr Swiatek would have recalled much more about it than they did and if the post meeting conversation that Mr Nicholson relies on to support his evidence that the point was a significant then each of them would have recalled it but they didn't. Further, I am entitled to weigh in all of this the fact that the meeting was attended by representatives of Brightline's investment bankers (Morgan Stanley) and it is inconceivable that (a) they would not have recalled this event if it had the significance that Mr Nicholson attaches to it, (b) they would not have kept notes of the meeting and recorded within them this discussion if it had the importance now alleged and (c) none of the Morgan Stanley attendees at the meeting have given evidence.

75. I accept at face value the assertion that a Blackstone representative made the remark alleged if for no other reason than it was not challenged in cross examination, but in my judgment no significance was attached to it at the time. On the balance of probability there was no discussion about it after the meeting or internally within Brightline. Had there been all the participants would have recalled it and the substance of what was being said. Had the conversation had the significance that Mr Nicholson now attaches to it, I consider it probable he would have recorded the remark and the post meeting discussion about it in his notebook and would have preserved it in case it had to be relied on to bring an end to the relationship with VEL. In reality neither Brightline or Fortress attached any significance to the remark or thought it was correct.

76. That the remark was of no significance is apparent from Brightline's "*Monthly Revenue and Ridership Report For the Month Ended 07/31/2019*". This was not mere marketing puff. This was a formal report to bond investors, as is apparent from the reference to the bond issues at the head of the document in these terms:

> "Florida Development Finance Corporation Surface Transportation Facility Revenue Bonds (Virgin Trains USA Passenger Rail Project), Series 2019 A
>
> and
>
> Florida Development Finance Corporation Surface Transportation Facility Revenue Bonds (Virgin Trains USA Passenger Rail Project), Series 2019B"

That is also apparent from the statement that appears at the bottom of each page of the document that:

> "The statements contained herein that are not purely historical are forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements are based on the Company's expectations and are necessarily dependent upon assumptions, estimates and data that the Company believes are reasonable as of the date made but that may be incorrect, incomplete or imprecise or not reflective of actual results. Actual events or results may differ materially from the results anticipated in these forward-looking statements as a result of a variety of factors. The Company does not undertake to update or revise any of the forward-looking statements contained herein, even if it becomes clear that the forward-looking statements contained herein will not be realized."

Mr Swiatek accepted the formal importance of these documents. As he said in answer to a question from me, "…*we have a number of bonds that are outstanding with investors. We have an obligation to those investors to give them regular updates. The requirement is for us to give them a monthly revenue and ridership report* ….". He also accepted that he "… *would expect holders of the bonds to be making, in part at least, decisions concerning whether to further buy bonds or to dispose of bonds or to hold bonds on the basis of the information that was supplied …*" by those reports. He accepted that as the Chief Financial Officer of Brightline he was concerned to ensure that what was contained in the reports was truthful and accurate.

77. The document set out information concerning passenger numbers and revenue growth which showed revenues of passenger number to be sharply up on the previous year. In relation to "*Other Activity for the Month*" it reported on "*rebranding"* in these terms:

> "Rebranding. We are currently rebranding our business as Virgin Trains USA, with the transition planned for the fourth quarter of this year. Our rebranding will include a new online presence, as well as a new look for our trainsets and a revised

> customer environment in our stations. We expect to obtain strong marketing and pricing benefits from the rebranding due to the high customer awareness commanded by the Virgin name, especially with respect to the approximately 125 million domestic and international annual visitors to Florida. We also expect significant cross-marketing opportunities with other Virgin companies. Virgin Atlantic and Virgin Holidays both bring a large number of customers to Florida each year and the launch of the Virgin Voyages cruise line out of Port Miami in early 2020 will further expand the market for our train- to-port product."

78. Whilst I accept the point that as a matter of contract Brightline was required by clause 8.2 of the TMLA to "*… at all times during the Term conduct the Core Activities and Ancillary Activities in relation to the Permitted Routes using only the Names and will use all reasonable endeavours to promote and expand the Licensed Activities for the Permitted Routes throughout the Territory…*", that did not require Brightline to include within its formal monthly report to bond holders a statement of its belief that "*… (w)e expect to obtain strong marketing and pricing benefits from the rebranding due to the high customer awareness commanded by the Virgin name …*" or that it expected " *… significant cross-marketing opportunities with other Virgin companies…*" if it had no such belief. Given the formal nature of the document and the express qualification contained in its footer, Brightline's directors would have been much more circumspect on what they said, had they believed that the Virgin brand had been compromised by the removal of Virgin Trains UK from the UK franchise bidding process or was a dying brand or that by using the brand there was any risk of damaging either its reputation or to the value of its business. It would have been particularly circumspect if in truth it considered that the Virgin brand had compromised either the success of the bond issue or had affected the value of bonds on the secondary market. In my judgment no significance of any sort attaches to the Blackstone remark, which in my judgment is immaterial to any issue that arises in this claim. It follows that I reject Brightline's submission that "*Blackstone's comment cannot be over-stated*."

Events in the Period August - December 2019

79. Some reliance was placed by Brightline on the fact that the statement concerning rebranding disappeared from the "*Monthly Revenue and Ridership Report For the Month Ended 10/31/2019*". That again must be viewed in context. Brightline maintains that the removal of this statement reflected its "*… disillusionment with the Virgin brand…*" I do not accept that is a correct characterisation of this omission for the following reasons.

80. First, the report contained on the front page a "photoshopped" picture of a train in Virgin livery. It is difficult to see how the inclusion of that picture is consistent with the supposed disillusionment with the Virgin brand and I reject the notion that it was. There was no other difficulty in illustrating reports with trains in Brightline livery – see the focus group findings report referred to below.

81. Secondly, the Virgin mark is prominently displayed at the bottom of the front page and each subsequent page and the first page starts with the title "*Virgin Trains USA Passenger Rail Project*". Although there was some suggestion in the course of the trial to the effect that this was adopted because of the contractual obligation imposed by clause 8.2 of the TMLA, I reject that as being the probable explanation given that prior to the publication of this document, Brightline had made clear to VEL that it would not be re-branding before October 2020 and VEL had not challenged that decision. At the time when the July report had been sent to investors the intention had been that the rebranding exercise would be completed during September and early October 2019.

82. Thirdly, Brightline did not change (and did not assert that it had changed) its plans because of any alleged disillusionment with the brand. Mr Goddard explained what was being done in an email to Mr Fox of 11 October 2019 in these terms:

> "Our initial desire was to rebrand Brightline as Virgin Trains during the slower period of September and early October. For a number of reasons, this timeline became impossible primarily due to the coordination required to deliver the physical aspects of the rebrand such as trains and station interiors and signage. The biggest concern being that we would have taken trains out of service in a period that we expect to be our busiest. We have also been without a CMO and CPO for several months.
>
> As agreed, taking more time for the rebrand allows us to get our new CMO in place, new CPO up to speed, avoid any interim processes and generally take more time and care to develop a rebrand effort. This also avoids the risk of having trains out of commission when we need them most.
>
> Our new timeline (draft schedule attached) has us delivering the rebrand over the course of next summer and "flipping the switch" in early October 2020.
>
> During this time period, as we focus on the various elements of the rebrand, we will look to elevate the Virgin Brands involvement as well as look for ways for the brand to elevate Brightline.
>
> Please let us know if there are any questions or concerns, and we look forward to continue our collaboration together."

83. Nothing in this email speaks of or implies an alleged disillusionment with the brand. To the contrary it explains the delay as operational in nature whist remaining focussed on elevating the brand and using the brand to elevate Brightline and on continuing "*… our collaboration together…*". There was no suggestion made that it did not want to re-brand at all or that Brightline's board believed that the Virgin brand was a dying brand or that by using the brand there was a risk of damaging either its reputation or to the value of its business. To the contrary, as Mr Goddard accepted in the course of his oral evidence, "*... I was looking for more involvement and I was looking for them to help us in the way that they had described that they could*." Mr Fox understood

that was Brightline's position as is apparent from his email in response also dated 11 October 2019, in which he stated:

> "During the next year - to drive greater awareness, familiarity, excitement and ridership. We have a Richard speaking event in Miami in late February next year and I hope we can use this, Voyages ramp up to launch and a renewed campaign from Atlantic to support your business - as well as encouraging Delta to look more closely at partnerships."

Mr Goddard was cross examined about this response which culminated with this exchange:

> "Q. I assume that all of those points that he made, those matters that he referred to, would have been music to your ears at the time because those were the kind of cross-selling and marketing and other opportunities that you'd wanted from the partnership with Virgin?
>
> A. Certainly all that we had hoped for, yes."

The reality is that if Brightline was disillusioned as alleged, its email notifying the delay would have been in significantly different terms and there would have been a response to Mr Fox's email that made the position clear. It is not suggested that Brightline was seeking to disguise the true position.

84. Fourthly, what is now characterised as disillusionment with the brand is inconsistent with the information being supplied to Brightline from its own market research efforts. Brightline was presented with a report prepared on its instructions by Integrated Insight Inc entitled "*Brightline ON TRACK TO BECOME Virgin Trains USA*" and described as being "*Branding Focus Group Findings*". The report was based on responses from *"(t)wo groups (Leisure Travel and Commuter/Business Travel) … held in each of three cities (Miami, Fort Lauderdale and West Palm Beach) on November 5, 6 and 7, 2019, respectively*." The report makes clear that its content was not appropriate for statistical projections but was qualitative in nature. It was made clear that *"(f)indings are reported when they appear to represent a consensus or clear tendency among study participants. In cases where disagreements or varied opinions arise, the study's conclusions reflect that fact*." In relation to the Virgin brand, the findings reported were that:

> "The Virgin Brand was positively associated with innovation, customer service, quality, sophistication, style, and Richard Branson.
>
> Most participants expected there would be some changes to the Brightline product/service as the Virgin rebranding rolls out. While there was no consensus on how exactly the brand would change (more luxury, more technology, red color throughout, an international flair, an array of different amenities, etc.), there was the expectation that Virgin would introduce innovations heretofore not imagined.

> Some also had an expectation that pricing would increase so Virgin could recoup its investment."

Later in the report, it was reported that the "… *Virgin Brand Carries Many Positive Associations…*", that *"(m)ost felt that Virgin would add to the Brightline brand image - perhaps providing a bit more sophistication…*" and that "*(p)articipants hoped for better communications, marketing, and flair*." Mr Goddard accepted in cross examination that the report presented "… *a very positive picture of people's impressions of the Virgin brand….*" – see T4/114/2-6 which was followed by this exchange:

> "Q. You must have felt very content with that at the time?
>
> A. I was reassured that there was positive feedback on the brand, yes."

He added, when pressed as to why this report had not been mentioned in his witness statement, that "… *it's a focus group and it's confirming what we believed about the potential of the brand*." I do not accept that explanation as either a full or frank explanation for the omission of any reference to this report, particularly as it is the only piece of market research of which I am aware that was carried out by or on behalf of Brightline. It is inconsistent with the Brightline board having become what is now characterised as disillusioned with the brand or at least with it having any reason to be disillusioned, whether by reference to any of the events on which Brightline rely that occurred earlier in 2019 considered earlier or otherwise.

85. To similar effect was the insistence of Broward College that Brightline emphasise its link with Virgin in relation to a speaker series it was organising in collaboration with Brightline. Broward was a college located in the same location as Brightline's operating hub. Broward advertised extensively on Brightline's trains and stations. The point made by the college in its email of 10 December 2019 was:

> "Remember to make sure that we are on the Virgin Teams Radar as far as the BC marketing team's expectation that the we are counting on this being the Broward College Virgin Trains Speaker Series.
>
> This is huge element and speaks to the most essential reason for our partnership...The Association with Virgin Trains brand is paramount."

The college's position was reported in an email internal to Brightline in these terms:

> "They very much want this to be Virgin Trains presenting the Speaker Series as opposed to Brightline. I've told them that our rebrand will be taking place in stages over 2020 starting Q2/Q3 and I don't know when we'll be approved to go live with VT assets. This speaker series is set to run starting in March/April I believe.

> Wanted to put this on your radar so that we can maximize what we're getting from them for the speaker series as well as to address any issues with integrating our new brand on their program."

This internal email is significant because it shows that Brightline was operating precisely as identified in the 11 October email to Mr Fox from Mr Goddard and because it reflects the repute of the mark in the eyes of at least one of Brightline's customers in December 2019 – a view which as Mr Goddard accepted in the course of his cross examination was one that Brightline needed to pay attention to – see T4/117/7-11. Again, this exchange of emails is inconsistent with Brightline having any reason to be disillusioned with the Virgin brand, or with it having any objectively justifiable reasons for thinking that the Virgin brand was a dying brand or that by using the brand there was any risk of damaging either its reputation or to the value of its business.

86. Similar points can be made by reference to some emails with local business organisations in February 2020. It is not necessary that I set out the detail because it does not add materially to what I have said already beyond providing more material to support the conclusions I have reached on this issue. The same points can be made by reference to various public presentations made by Mr Goddard in early 2020. His comment in his oral evidence was that it was his job and that he did it despite having reservations but that is to miss the point – if Brightline or its owners were disillusioned as alleged or thought that the Virgin brand was a dying brand or that by using the brand there was any risk of damaging either its reputation or the value of its business it would have taken the first opportunity to end the relationship on that basis or would have been discussing such a move internally by this stage. There is no evidence of any such discussions and I conclude that is so because that was not Brightline's view at the time. It was for that reason that Mr Goddard accepted as correct the proposition that "… *saying that Virgin was a great brand was something that would be received well by the people that you were speaking to or you wouldn't have wanted to say it*?".

Attempts to Renegotiate the TMLA

87. In December 2019, Brightline (or Fortress on its behalf) sought to renegotiate the TMLA. Mr Nicholson describes it in his statement at paragraph 6.9 in 6 lines in which he says that he reminded Mr Lovell of VEL that the TMLA was something that Brightline could terminate and that ostensibly the reason for this was "… *our disappointment and alarm at both the loss of the West Coast franchise, the video and the decline in reputation and power of the Virgin brand."* Mr Nicholson accepted that this was a threat to terminate – see T5/98/16-19. The next step in this discussion came with an email from Mr Lovell dated 13 January 2020 making the following points:

> "Just a couple of important bullets I think you should know:
>
> -Virgin Atlantic will fly over 1mm passengers into South FL in 2020.
>
> -Virgin and Delta partnership very strong

> -Virgin Voyages will start operations out of Miami in March and will have over 145,000 cruise passengers alone in 2020
>
> -Virgin Hotels will open high profile hotel in Miami in 2022 (contract is signed).
>
> -Virgin companies will spend over $40mm in direct marketing in the US in 2020 and over $80mm by 2023
>
> -Virgin brand currently has 96% awareness in South FL and a 72% "openness to try new Virgin products"
>
> Everything we are doing across the group will benefit trains. Talk soon."

Ten days later, Sir Richard Branson sent an email to Mr Edens of Fortress which was written on the basis that Sir Richard "… *wanted to understand why your team at Fortress has suddenly indicated its desire to break our agreement of November 2018*…". In his email in reply of 26 January 2020, Mr Nicholson asserted that "… *Fortress does not want to "break" the contract. As you know, what we have discussed is all of the reasons why the relationship isn't working and a desire to work it out. If we can't do that without lawyers, then we will simply exercise our contractual remedies.*"

88. The difficulty about the points relied on by Mr Nicholson is that (a) the West Coast franchise was lost some 8 months earlier in April 2019; and (b) although the video was released on 21 November 2019, it received limited or no publicity in the United States and had no objectively discernible impact on the standing of the brand, at any rate to the knowledge of Brightline and its directors and owners at the time these exchanges were taking place and as I have explained the information that was available to Brightline at this time suggested there had been no "… *decline in reputation and power of the Virgin brand…*" so far as Brightline was concerned.

89. This correspondence culminated on 21 February 2020, with an email forwarded to Mr Nicholson by Mr Lovell on behalf of Ms Lisa Thomas, VEL's Global Chief Brand Officer. In her email, Ms Thomas commented at the outset that "… *Fortress' rationale for this change of direction remains unclear to us* …". She then reminded Mr Nicholson of the contractual position namely that there was no right to terminate before 16 November 2023, that termination then was subject to a 6 month notice period and the payment of an Exit Fee and that unlawful termination prior to the 16 November 2023 would entitle VEL to claim substantial damages. She then stated:

> "Today, the Virgin brand is stable and strong in America, and Florida is the strongest region with 96% awareness. We expect the brand to strengthen even further between now and 2023: with the launch of Virgin Voyages this year we will soon see 140k passengers depart the port of Miami annually; we have announced plans for our hotel in Brickell; and we continue to fly over 1m Virgin Atlantic passengers and 300k Virgin Holidays customers into Miami and Orlando, alongside our partner Delta."

She concluded her email by stating:

> "The strength and relevance of the Virgin brand has only grown since the TMLA was signed in November 2018, and the brand is set to strengthen and grow further over the coming years, particularly in the transport sector and in Florida."

In summary, Mr Nicholson's position had been that he would cause Brightline to terminate the TMLA unless VEL agreed to re-negotiate its terms and VEL had declined to negotiate, which left Brightline only with the option to terminate the TMLA. Given the way this correspondence developed, I accept VEL's submission that from 21 February 2020, Fortress's only option was to terminate and that is what it intended should happen from at least that day forward given its position as set out in Mr Nicholson's email of 26 January 2020, the relevant part of which is set out above.

90. VEL's case is that from at least that date Brightline was looking for a pretext to terminate the TMLA. The circumstances set out above suggest that this is probably so but as I said at the start of this judgment, if Brightline is able to establish a contractual entitlement to terminate then it was fully entitled to take advantage of that right, regardless of its motivation or reasons for wanting to do so.

91. Whilst it is possible that a particular event or events could of itself support an inference that the reputation of the Masterbrand had become sufficiently diminished when compared to its reputation at the start date, in my judgment the effect of such an event (or series of events) would have to be proved objectively capable of inflicting very serious, obvious and direct reputational damage before such an inference could be drawn.

92. In my judgment none of the events I have so far considered either individually or collectively come close to justifying such an inference and Brightline does not invite me to draw such an inference. The limited market research undertaken by Brightline did not indicate any diminution in the reputation of the brand. So far as VEL's Brand Health Tracker research is concerned, the research for (a) the 2018 Brand Health Tracker survey was undertaken between mid-August to mid-September 2018; (b) the 2019 Brand Health Tracker survey was undertaken between mid-July and the end of September 2019; and (c) the first 2020 Brand Health Tracker survey (which is referred to in these proceedings as Dip 1) was undertaken during May 2020. It will be necessary to consider this material in more detail when I consider the expert evidence below, but for present purposes it is necessary to note that there was no material downward change between the 2017 information supplied pre contract by VEL to Brightline[2] (identified in the table below as respectively UK, USA and AUS 2017) and 2019 results, which in summary were as follows:

METRIC	UK 2017	UK 2018	UK 2019	USA 2017	USA 2018	USA 2019	AUS 2017	AUS 2018	AUS 2019
Awareness	99%	99%	99%	99%	95%	96%	99%	99%	100%

[2] See above – consideration is a combined figure for openness and preference

Familiarity	-	89%	89%	-	61%	64%	-	81%	85%
Openness	-	87%	83%	-	77%	72%	-	88%	88%
Preference	-	33%	32%	-	21%	19%	-	28%	29%
Consideration	83%	-	-	72%	-	-	78%	-	-

There was a marginal reduction in openness when comparing 2018 and 2019. There is a dispute between the experts as to how the relevant statistics should have been extracted from the raw data obtained during the data tracking process and what answers should be considered. However for present purposes I need not consider that further. The methodology adopted by Virgin for all relevant periods prior to 2020 was the same. Comparing like with like therefore involves looking at the presentation made by VEL. In my judgment this material does not support a conclusion that the brand had ceased to be a brand of international high repute at the end of September 2019 when compared with the position in either September 2018 or by reference to the information supplied pre-contractually by VEL to Brightline, in each case subject to the expert evidence to which I turn below.

93. Some reliance was placed by Brightline on some VEL internal material that suggests a developing concern about brand reputation. Brightline did not have access to this material until after the commencement of these proceedings. However none of this material demonstrates that even internally VEL acknowledged the brand had ceased to be of international high repute, in particular as that phrase is to be understood in the context of this case. Many of the documents relied on were not created until after the purported termination. So far example Brightline places reliance on some comments in a document concerned with an analysis of the Dip 3 data. Leaving to one side the point that this material post-dates the purported termination of the TMLA, particular reliance is placed on the comment in the second bullet point in that document that "*(i)t should also be noted that the 2019 numbers showed some early signs of brand decline…*" In my judgment this does not assist on the issue I have to decide because it does not show that VEL internally thought the brand had ceased to be a brand of international high repute in 2019, much less that it thought such was the case at any point in 2019. Unless it is accepted that <u>any</u> brand decline is synonymous with the brand ceasing to be one of international high repute, this internal report does not assist at all.

94. Similar considerations apply to an email from Ms Howard to Sir Richard dated 6 December 2020. Brightline rely on her comment that "*... we were seeing some early signs of brand erosion in 2019 ...*" but that takes matters no further for exactly the same reasons set out above concerning the Dip 3 document. It is also quoted out of context – the document was concerned with an analysis of the Dip 1 and Dip 2 testing for 2020, the effect of which is summarised in detail. The sentence from which the quote relied on by Brightline comes was in full in these terms: "*Whilst this demonstrates the resilience of the Virgin brand, it's worth noting that we were seeing some early signs of brand erosion in 2019 (for example, drops in admiration and a*

softening in our brand image) which we were building strategies to address." None of this comes close to establishing what Brightline has to prove if it is to make good its claim. It reflects the internal concerns of VEL employees for whom modest movements in data were issues to be addressed in order to maintain brand standing and reputation. It does not begin to show that the brand had ceased to be a brand of international high repute at any stage in 2019.

Events between 21 February 2020 – 29 July 2020

95. In considering the events that took place during this period it is necessary to remember that this was when the global COVID pandemic began to severely affect the leisure, hospitality and travel industries.

96. The Pandemic was declared to be such by the World Health Organisation on 11 March 2020. In order to provide some context, Mr Nicholson accepted that Brightline had laid off 250 out of 300 (or about 80%) of its operational employees as a result of not being able to operate due to the pandemic – see T5/114/6-115/4. That it continued to pay for building work using contractors was not to the point and was an attempt to divert attention from the fact that many entities in the leisure and passenger transportation sectors were faced with hard choices during the pandemic. Although Brightline criticised Virgin Atlantic for asking 8500 operational employees to take 8 weeks unpaid leave, as something that inflicted harm on the brand, Mr Nicholson accepted (and accepted that he knew at the time) that was something supported by both employees and the unions – see T5/113/25-114/5. More generally, Mr Nicholson accepted that the pandemic "… *was an unprecedented event that had a major impact on all airlines globally* …". He accepted too that Virgin Atlantic was not the only airline to seek government aid – see T5/113/20-24. This is particularly relevant to an assessment of the reliance placed by Brightline on the conduct of Virgin Australia and Virgin Atlantic as they attempted to address the effect of the Pandemic on their operations and businesses.

97. Before turning to those events, it is necessary to ask why they are material. The information that matters is the statistical information which VEL obtained from its Brand Health Tracker activity. Being able to attribute any particular statistical dip to a particular event or events does not assist – either the dip demonstrates the cessation that Brightline must prove or it does not. Linking it to a particular event or events does not take matters any further. It is entirely possible that criticism by newspapers simply does not carry over to affect brand reputation. If that is so then the fact that Sir Richard has been criticised for not immediately himself providing support for Virgin Atlantic or for asking the UK Government for support takes no one anywhere. It is for that reason that Brightline submits that (a) I should conclude from the statistical information available as interpreted primarily by Dr Joachimsthaler that the Masterbrand had ceased to be a brand of international high repute by the time when Brightline served its Notice to Cure and that things did not improve by the time when it served its Notice of Termination; and (b) that conclusion is not surprising having regard to how events were being reported and understood contemporaneously by those responsible for the brand's reputation. Thus the factual narrative on Brightline's case is in reality nothing more than a sense check for the conclusions that it maintains should be drawn from the correct analysis of the available statistical information.

98. In those circumstances, attempting to resolve the differences between the parties concerning the factual narrative between 21 February 2020 – 29 July 2020 will ultimately only be of limited assistance. In those circumstances, notwithstanding the vast amount of detail set out in the submissions of the parties, I do not propose to address the points in anywhere near the same level of detail.

99. In summary I am satisfied that during the period I am concerned with a number of prominent VCos including in particular Virgin Atlantic and Virgin Australia were subjected to commercial shocks that in the case of Virgin Australia caused it to enter administration, and in relation to Virgin Atlantic, a financial restructuring. I accept too that there was extensive adverse press criticism primarily in the UK of Sir Richard Branson's personal response to the crisis. I accept too that this led to increasingly intemperately expressed concern within Virgin (that was not known or available to Brightline at the time) as to the impact that the developing crisis was or would have on the standing or value of the brand and on the apparent inability of the Virgin group to alter the narrative or persuade Sir Richard to take steps that would have that effect. I accept too that much of the hyperbole to be found in the internal communications within the Virgin group was the result of working in unprecedented circumstances in the face of unprecedented challenges. Further I accept that at least some of the internal communications concerned fears as to what might happen rather than being a summary of what in fact had occurred.

100. Turning first to Virgin Atlantic, the narrative starts with a letter written by Mr Weiss, the CEO of Virgin Atlantic, and Mr Norris, the chairman the Virgin group, to the UK Government stating that the UK airline industry was going to need government financial support. It was not a request for support on behalf of Virgin Atlantic specifically. The letter was leaked on 14 March 2020 and was misrepresented by various newspapers as (a) being from Sir Richard, when it wasn't and (b) on behalf of Virgin Atlantic, when it wasn't. This was described in a Virgin group internal media summary as having "… *generated a negative backlash on social media targeted at Richard.*" The 8 week leave scheme was said to have "… *heightened the negative backlash targeted at Richard*." However this was not confined exclusively to Virgin Atlantic – for example within the same internal press analysis, there is a quote from one newspaper to the effect that "*British Airways admits job cuts will happen as it axes flights along with Virgin Atlantic, Ryanair, EasyJet and Tui while ministers hint they could give airlines multi-billion pound bailout amid coronavirus shutdown*" but nonetheless the focus on Sir Richard became rather more stark with the same newspaper stating that "*Roman Abramovich and Gary Neville have shown it's good to be kind during this unprecedented crisis... But Richard Branson's motto as he counts his cash? Screw everyone*" and later "*Flog your private island and pay your staff': Richard Branson among billionaire business owners and shareholders facing furious demands to open their OWN wallets to help staff survive as the coronavirus epidemic batters the economy*". Much of the evidence suggests this was unfair reporting – not least because Virgin Atlantic was a joint venture controlled by an autonomous board with a unionised work force that had agreed the unpaid leave proposal.

101. Internally, there was some analysis of in particular social media coverage down to 19 March 2020 by Mr Greg Rose, the Virgin group's Content and Communications Director, who commented:

> "Summary:
>
> Unprecedented negative sentiment towards Richard and the brand – 10x what we have seen at any previous point. It's important to note that the risk is not a short-term personal reputational impact for Richard, it is a long-term catastrophic

> brand risk for Virgin. As many pieces of coverage highlight, we don't want this to be what Virgin is judged for once the crisis is over. We need to take substantial, tangible, immediate action to help people, especially Virgin employees, so that when we do get to the other side with companies intact, there are people who are proud not ashamed to be our customers."

The press coverage that led to this was:

> "The Sun: Branson told to flog his private island as Virgin Atlantic staff get told to take unpaid leave
>
> Morning Star: Tory MP hits out at Richard Branson
>
> Metro: Billionaire Branson must pay staff or be judged after the crisis is over
>
> The New European: Government shouldn't bail out Branson until he has used his reserves, says shadow minister"

Brightline's forensic focus is on the phrase "*... long-term catastrophic brand risk for Virgin...*" but this ignores or underplays the fact that this was one person's assessment of a risk based on a micro analysis of a limited amount of media coverage over a short period. Mr Fox described this statement as "*… probably more alarmist than is Greg's usual tone but I think it was reflecting the fear of the unknown at the time, the nature of the criticism and the desire to prompt some action*." I accept this evidence as a fair analysis. Although Brightline does not assert otherwise, I make clear that I do not accept that this material shows that the Masterbrand had ceased to be a brand of worldwide high repute when compared to its standing at the date the parties entered into the TMLA. Whether that had occurred depends on the statistical review with which the expert evidence is concerned and to which I turn below.

102. I record too that Mr Fox maintained (and Brightline did not dispute) that the reporting of the agreement with Virgin Atlantic's staff that they take 8 weeks unpaid leave in a period of 6 months was materially misreported and as it was put in VEL's closing submissions "*… the airline's conduct was perfectly responsible and humane.*" There is a real difficulty in a trial of this sort where Brightline make copious references to material of this sort whilst at the same time saying, as did Mr Tozzi when cross examining Mr Fox on these issues, that "*… I am not going to explore with you whether what was being said in the press was fair or whether it was correct, okay? Because that's not of any relevance, it seems to me, to what we have to look at, because what I'm interested in, what I want to explore with you, is the fact of such negativity …*". I make no criticism of Mr Tozzi in saying what he did (not least because I agree with it) but what it does mean is what VEL alleges to be material misreporting was repeated and went unanswered. I should make it clear therefore that VEL maintains that this material is unfair and inaccurate reporting. Equally unfair was the suggestion of some critics that Sir Richard was able to meet the Virgin Atlantic salary bill for 8 weeks from interest, which presupposes that Sir Richard's assets were all cash or interest earning assets. When this was put to Mr Fox by Mr Tozzi, Mr Fox made that point which resulted in Mr Tozzi saying "*I'm not saying it to provoke you, Mr Fox*." In my judgment that was an unfair response to an entirely

predictable attempt by Mr Fox to correct what he considered to be indefensible. These exchanges reflect the point made already – these events do not establish and are not relied on as establishing what Brightline has to prove.

103. In fact on 20 March 2020, the UK Government announced its Job Retention Scheme which was as available to Virgin Atlantic as to everyone else. Whilst it is speculation, if that announcement had been made earlier or Virgin Atlantic had delayed its announcements, then the publicity storm referred to above either would probably not have happened or have been much more restrained.

104. Overall, I consider this reaction to be part of the history of the extraordinary events following the onset of the Pandemic. It impacted the VCos because of the business sectors they operated in. As Mr Fox put it in his oral evidence:

> "… it was a global pandemic, so there were business problems all over the world. We had a cruise ship moored off Florida, we had hotels closed in America, we had Virgin Limited Edition resorts in Morocco, the Caribbean. We had gyms in many countries also closed. So the business issues were around the world. …"

Other businesses in those sectors suffered similar experiences. The real point is that this dispute is concerned with whether it can be said that as a result of this and the UK press coverage the Virgin Masterbrand ceased to be one of international high repute or merely suffered the transitory changes in perception to which all businesses are subject. Mr Tozzi maintained that there had been a brand catastrophe and whatever its cause it would have had a global effect. Mr Fox's evidence on this point when it was put to him was that "*… I didn't feel we were having a brand catastrophe at the moment. ... if Virgin Atlantic had gone bust, we would be facing a brand catastrophe. We were in a very challenging position and our efforts had to be around those two things. One was to save Virgin Atlantic ... and then, once we had saved Virgin Atlantic, as I had been agitating to try and build Richard's reputation …*"

105. The difficulty about all this is that attempting to argue that there was or was not a *"brand catastrophe*" by reference to isolated events, particularly in the extraordinary circumstances caused by a global pandemic, goes nowhere. That point is all the more apparent because it was based on media commentary. That can be fickle and proved to be so in this case as some articles published later in 2020 demonstrate. It is not necessary to set out the contents of these articles in full. It is necessary to note only a headline in one UK paper: "*Virgin Atlantic is an airline that deserves to be saved*"; and in another that "*Virgin Atlantic's survival will benefit British Airways*". The fickle nature of this reporting over a relatively short time span emphasises the point that the only question that matters is whether the brand had ceased to be one of international high repute and the only way that can be proved or tested is by reference to the statistical information that is available read in the correct contractual context.

106. I have commented already about internal communications concerned with the risk of brand damage occurring. Some of the internal communications suggested that some brand damage had already occurred. A number of the documents relied on by Brightline fall into this category. These include an internal email dated 31 March

2020 from Ms Thomas to Mr Fox. The part of the material relevant for present purposes was to this effect:

> "The brand and RB's reputation have been significantly impaired by the consumer reaction to our response on COVID-19 and we have to work together to devise a strategy and deliver a plan over the long term. Richard's voice both within Virgin and externally has to be part of that as does Josh's.
>
> I recognise that no real harm will come from this note and people across the Group will love getting a personal note from him. That however is not really the point - we need to be doing the most we possibly can to reinvigorate our brand and deliver as a unified team."

The context of this email was a complaint by Ms Thomas about how the terms of Sir Richard's note had been considered internally. The fact is however that she was the Global Chief Brand Officer and she was apparently accepting that the brand had been significantly impaired at the date of her email. Mr Fox explained the email in his witness statement as being a comment that:

> "…was very much looking at the last couple of weeks of coverage through a UK lens. This was a snapshot in time. Later, as I will describe, we started to see more stories about what Virgin Group was trying to achieve, more calm coverage and more isolated criticism. I understood Lisa was writing in this emotive way because she was reacting to the press coverage at this time and because she wanted to make sure that she would be involved when we were discussing the approach on communications. She wanted to humanise the efforts of the brand, the Virgin Group and Richard in contrast to the more corporate approach that others were taking."

Whilst Ms Thomas did not give evidence, I accept this explanation because there had not been any market testing of the health of the brand by the end of March 2020. The work for the 2019 Brand Health Tracker exercise had been completed at the end of September 2019 and the work for the first 2020 Brand Health Tracker exercise ("Dip 1") did not start until 2 May 2020 so this judgment could not have been based on anything else. I do not consider the email to be "*emotive*". It was a subjective judgement arrived at in the particular context of a global pandemic and its effect on a brand that was heavily invested in the travel and leisure sectors, arrived at by reference to limited press coverage over a limited period.

107. Some reliance was placed by Brightline on a Q & A document prepared within VEL. The document is of limited value to any issue I have to decide because the document was described on its face as being "*a draft*" and the evidence is that it was never used – see Mr Fox's evidence on this issue at T3/61/11-21 and T3/63/10 – 54/6. That evidence was entirely clear, was not ultimately challenged and I accept it. To the extent that its contents reflect internal concern, that does not assist for the reasons already given in particular in relation to Ms Thomas's email referred to in the previous paragraph. Subjective opinions by senior employees will not assist because

the health or otherwise of the brand will be determined by the brand health monitoring exercises carried out by the Virgin group as analysed by the expert witnesses.

108. The next event that Brightline refers to is what happened concerning Virgin Australia. As I have explained already Virgin Australia ultimately collapsed into administration before resuming trading with the support of a major bond holder. Brightline relies on an internal email dated 27 March 2020 from a Ms Reja to Mr Fox and Ms Thomas amongst others, headed "*Media Coverage Australia and NZ*". It is a lengthy email. It contained significant reported information relating to Virgin Australia including the reduction of its credit rating by Standard & Poor's to CCC, wide ranging redundancies, that it was seeking further Australian government support and which referred to a headline concerning Sir Richard that "*Pandemic ends public love affair with Richard Branson et al. Opinion: The larger-than-life corporate mavericks who rose to prominence in the 80s and 90s suddenly seem unsure of themselves*." It was this that no doubt caused Ms Thomas to respond to Mr Fox: "*Profound brand questions being raised here - both on Virgin Australia and Richard. Nick can we get access to that Management Today article?*" Before taking that further it is also worth noting that Ms Reja's email reported on extensive coverage of the commercial and business difficulties being suffered by other Australasian based businesses as a result of the pandemic including other airlines operating in the region. Relevant headlines included "*Coronavirus: Regional airlines have 8 days left before they collapse. The owners of several regional Australian Airlines have begged the government for a payout before they are likely to collapse in the coming days*."; "*Smaller Australian airlines issue mayday on government aid*" and a report that "*As the coronavirus crisis continues to worsen, a survey of corporate Australia has found 90 per cent of companies expect to suffer a significant blow from the pandemic and the emergency measures taken to control its spread*." None of this detracts from what is said concerning Virgin Australia but it provides the necessary context in which those headlines and articles are to be read and may explain why this reporting did not translate into the statistical material considered below or did not do so materially.

109. By 25 June 2020, it had been announced that Bain Capital was buying Virgin Australia following a competitive process in which the two main contenders (one of which was Bain) had expressed support for the Virgin brand. Brightline's case is that this is driven by Bain's vested interests. How if at all this impacted on public perception is unexplained.

110. By 14 July 2020, Virgin Atlantic had announced its rescue package which involved US$170m investment by Davidson Kempner and US$200m by Sir Richard. Further substantial support (estimated in some press reports as being about £400m) was provided by Virgin group waiving or deferring fees. Although Mr Nicholson suggested that the Bain acquisition of Virgin Australia was a disaster for the investor community because the bond holders in Virgin Australia lost most of the value of their bonds, I reject that suggestion. It is bare assertion, it is not something that he had referred to in his witness statement so was not something that VEL could have investigated prior to trial, there is no evidence of any cross over between bond investors in Brightline and those who had invested in Virgin Australia, and it is not reflected by what Mr Goddard said on the same topic. There was this telling exchange in cross examination of Mr Goddard on this topic:

> "Q. … You didn't see this at the time, but would you agree with me that the fact that Bain Capital and Cyrus Capital are stepping in in this way, to try to acquire Virgin Australia, and publicly supporting the Virgin brand in this way would have been positively received by the same sort of investors that you say were concerned by the earlier administration of Virgin Australia?
>
> A. Look, I think that it's entirely possible that that's true, you know, I think it's entirely possible that it's true.
>
> Q. Do you remember any of the investors who had earlier raised concerns with you, or you say had raised concerns with you about Virgin Australia's administration? Do you remember any of them saying to you, "Great news about Bain Capital buying it out of administration, great news about that"? You don't recall that?
>
> A. No, that wouldn't have -- no."

Mr Goddard's evidence is speculative on its face and was fairly presented by him as such. I think he is also correct in his assessment that a worried investor might make contact if they thought their investment was at risk but would not if the available information suggested it was not. Had Brightline wanted to prove that the brand had ceased to be one of international high repute by reference to investor sentiment for Brightline bonds, there are a number of ways this could have been done. It could have adduced evidence from those at Morgan Stanley on the issue, it could have sought permission to adduce expert evidence on the point or possibly attempt to prove the point by reference to open source market movement information. It has done none of these things. Mr Nicholson's non-corroborated evidence must be treated with caution for the reasons I gave earlier and particularly so in relation to assertions such as those I am considering which are not only self-serving and not corroborated but are in part contrary to what Mr Goddard has said.

111. In truth this debate takes nobody anywhere in relation to this claim. Undoubtedly what was being reported in the period between March and May 2020 was capable of damaging the brand, and what had been reported in the UK press in relation to Virgin Atlantic in particular had probably inflicted some damage – Mr Fox accepted as much in his oral evidence – but there is no evidence of investor sentiment as I have said, and whether in fact the events referred to above or any of them had done any permanent damage to consumer perception, and if so to the extent that enables me to conclude that the brand had ceased to be a brand of international high repute as that phrase is to be understood in the context of this claim, is something that can be determined (if at all) only by an examination of the Brand Health Tracker evidence that became available later in 2020. As Professor Calder observes in his report, "… *it cannot be assumed that any adverse news coverage of Virgin Trains, Virgin Australia, Virgin Atlantic, and Sir Richard Branson must equate to a change in the consumer reputation of the Virgin brand. These issues should be viewed as hypotheses that require evaluation.*"

The Statistical Assessment of the Reputation of the Brand

Introduction

112. As I said earlier, the enquiry as to whether the Masterbrand ceased to be a brand of international high repute requires a statistical comparison by reference to the status of the brand based on the KPI information supplied by VEL to Brightline prior to the parties entering into the TMLA and the position at the date when the Notices to Cure and to terminate were served. Alternatively, it involves comparing the statistical information available to VEL down to the date when the agreement was entered into and the position when the notices were served. It involves considering whether any statistical change justifies the conclusion that the brand had ceased to be a brand of international high repute by the date of the Notice to Cure and, if so, whether that continued at the date when notice to terminate was given.

113. Brightline's case is that based on the brand tracker surveys alone, as at 27 April 2020 the Virgin brand had ceased to be one of international high repute, and that it had not recovered from that position as at 29 July 2020. It further submits that was not surprising having regard to how events (being principally those to which I have referred above) were being reported and understood contemporaneously by those responsible for the brand's reputation during 2019-2020, as set out in the VEL internal material to which I have referred in summary above.

114. Brightline submits that the concept of reputation is wider than reputation with consumers. I agree in principle that is so but I do not accept that there is any evidence from which I could safely infer that the Masterbrand had ceased to be a brand of international high repute in the minds of any of the other stakeholders that Brightline relies on – investors, lenders or contractual counterparties. Professor Argenti's evidence is very severely criticised by VEL and I turn to that below. However the point that matters for present purposes is that in his evidence he accepted that the material on which he relied did not provide any insight into the investor perspective – see T9/94/1-14. In my judgment it follows that if Brightline is to make good its case it must do so by reference to the statistical material to which I have referred, even though that focusses exclusively on the views of consumers.

115. It is helpful to consider the material (a) in the manner that VEL considered it; and then (b) to consider what adjustments should be made to the assessment of the material if any as a result of the expert evidence available to me.

The Brand Health Tracker Evidence As Interpreted by VEL

116. This is an appropriate starting point essentially because it allows a comparison to be made between the brand tracker information available to Brightline (who it will be remembered did not seek or obtain any information on the issue other than what VEL supplied in its October 2018 presentation) when it entered into the TMLA and the position as it was at the date when the Notice to Cure and the Notice of Termination were served using the same statistical techniques.

117. Although Dr Joachimsthaler characterised the slides by which the information was supplied to Brightline by Virgin as being "… *actually a marketing deck. You know, where Virgin sells, to Brightline in this case, how great of a brand they are* …" – see T8/15/10 – that is not what matters for present purposes. That was the material known to both the parties down to the date when the TMLA was entered into and it can only

have been by reference to that material that Brightline was satisfied that the Masterbrand was at the time it entered into the TMLA a brand of international high repute. That was the context against which that phrase "*international high repute*" is to be construed as I have held already and no other material has been identified by Brightline as material it relied on when entering into the agreement. As I have said the brand of international high repute phrase is not defined contractually, nor is it a phrase with an agreed meaning within the marketing or advertising industries. It can only be given meaning therefore from the context in which it was used. If this is correct, then it would be wrong to conclude that the brand had ceased to be a brand of international high repute otherwise than by comparing as best it can be the pre-contractual material supplied with that which is available from the subsequent market surveys down to the 2020 Dip 2 survey. The same approach would apply if the correct starting point is the data that was available to VEL (but not shared with or requested by Brightline) prior to the parties entering the TMLA.

118. Dr Joachimsthaler maintains that it is necessary to consider raw data not considered even by VEL because all VEL was ever presented with was an analysis prepared by its external service provider. This point arises because VEL's external service provider (an entity called "Incite") received (and kept) the survey responses in ".QPack" format and that data was not provided to VEL. Incite reported the results to VEL via Excel spreadsheets and, in 2018-2019, in presentations. Dr Joachimsthaler requested and was given access to the .QPack data not seen by VEL and has carried out his analysis by reference to this material. He has assessed that data by taking account of various metrics other than the KPIs that are at the heart of VEL's assessments, by taking account of material not considered by VEL or its external service provider in arriving at his conclusions and in some cases at least applying weightings to some of the material that were not applied by VEL when assessing the data for its own commercial purposes. In my judgment the more remote the material used for comparison purposes becomes from what was available to Brightline prior to entering into the TMLA, the more cautious it is necessary to be in reaching conclusions about brand reputational health, with particular care being taken to ensure that like is being compared with like at all stages.

119. There is no suggestion that in principle the material obtained as a result of the Brand Health Tracker surveys does not provide a proper evidential base for testing the issues that arise. The questionnaire used to obtain the material was kept consistent year on year. There were approximately 13,000 respondents for the 2018 survey, 13,700 for the 2019 survey and 15,400 respondents split over the three dip surveys undertaken in 2020. It is common ground that the sample size used for the Brand Health Tracker exercises was large enough to draw statistical conclusions of significance and that "… *it was a robust, well-executed survey, and fit for purpose for our brand analysis*…" – see paragraph 2 and Footnote 4 within Appendix 3A to Dr Joachimsthaler's report and his oral confirmation in the course of his cross examination at T8/23/2-15. This is hardly surprising given that VEL use the material not merely for the purpose of marketing the brand but as its primary tool for monitoring its health internally. It is not something that has been created for the purposes of this litigation. As Dr Joachimsthaler accepted in the course of his oral evidence, the data used was collected in the ordinary course of business - see T8/25/10 – and "… *was a real world exercise carried out for commercial purposes* …" – see T8/26/14.

120. In carrying out this work, Incite was assisted by another service provider called Dynata, which carried out most of the field work. There is no criticism of VEL using an external service provider to carry out the surveys. It was common ground that VEL had worked collaboratively with its external service provider to devise the survey questions and that it was appropriate for them to have done so because, as Dr Joachimsthaler accepted, "… *the business will know best what data will be useful to them to measure and assess the brand…*". This is an important consideration when determining what data will be useful in determining whether the brand had ceased to be a brand of international high repute by the relevant dates and how best it should be analysed for the purpose of answering those questions.

121. It was also common ground that the brand information provided by VEL to Fortress and Brightline in October 2018 for the US market was the following:

Year	Awareness	Familiarity	Openness	Preference
2015	97%	64%	67%	13%
2017	96%	68%	72%	17%

In addition, as I noted earlier, the October Presentation contained summaries of awareness and consideration statistics for (inter alia) three markets – the UK, the USA and Australia:

Market	UK	USA	Australia
Awareness	99%	96%	99%
Consideration	83%	72%	78%

As noted already "Consideration" in this context is a term that combines openness and preference.

122. The comparable results for the US market for 2019 and 2020 Dips 1 and 2 are as follows:

Year	Awareness	Familiarity	Openness	Preference
2015	97%	64%	67%	13%
2017	96%	68%	72%	17%

2018	95%	61%	75.5%	21%
2019	96%	64%	72%	19%
2020 Dip 1	94%	63%	71%	22%
2020 Dip 2	93%	61%	70%	22%

Thus if simply comparing the information provided by VEL to Brightline in October 2018 relating to the US market with that analysed in the same way for 2020, it is difficult to see how any of the changes from 2017 to Dip 2 in 2020 either individually or collectively could be fairly described as evidencing that the Virgin brand had ceased to constitute a brand of international high repute. 2015 is not material because the last year for which figures had been supplied was 2017 and, other than awareness, all the metrics for 2017 were higher than in 2015. In 2018, although familiarity in particular had dropped, both openness and preference had increased. In 2020 Dip 1, preference had increased to a level maintained in 2020. In 2020, Dip 2, although openness had dropped that was only by a maximum of 2 percentage points when compared with the 2017 result. Overall, marginal movement between years was to be expected in my judgment and the movements across the metrics on which VEL relied using the methodology for considering each metric that VEL used consistently does not justify concluding that the Masterbrand had ceased to be a brand of international high repute as that phase is to be understood in its contractual context. No doubt the movements shown were significant or potentially so for those concerned to maintain or augment the standing of the brand but that is an entirely different issue. In my judgment if cessation is to be proved much more radical movements would be required.

123. In relation to the other markets that were always sampled (the UK and Australia) similar conclusions follow. The information provided in October 2018 had combined openness and preference as consideration. The subsequent VEL internal reports addressed all four metrics for each market. In summary:

METRIC	**UK 2017**	**UK 2018**	**UK 2019**	**UK 2020 Dip 1**	**UK 2020 Dip 2**	**Aus 2017**	**Aus 2018**	**Aus 2019**	**Aus 2020 Dip 1**	**Aus 2020 Dip 2**
Awareness	96%	99%	99%	99%	99%	99%	99%	100%	99%	99%
Familiarity	90%	89%	89%	90%	90%	85%	81%	85%	87%	85%
Openness	83%	87%	83%	78%	80%	78%	88%	88%	85%	87%

Preference	26%	33%	32%	27%	27%	18%	28%	29%	26%	25%

Awareness in the UK market (Virgin's core market) was unaltered from the figure supplied to Brightline, familiarity was up by 1 percentage point, openness was down in 2020 Dip 2 by 7 percentage points when compared with the 2018 result but by only 3 percentage points when compared with the 2017 result and preference was 1 percentage point higher in 2020 Dip 2 when compared with 2017 but 6 percentage points down on the 2018 result. In Australia, openness was up 10 percentage points when compared with 2017 but otherwise stable and preference was down 4 percentage points at 2020 Dip 2 when compared with 2018. Although the changes were numerically larger than those for the US market across the same period, in my judgment those changes do not demonstrate that the Masterbrand had ceased to be one of international high repute. The movements were not large enough to support such a conclusion of themselves. In order to arrive at such a conclusion it would be necessary to compare the same metrics with other companies trading internationally where it could be shown that those companies had collected the same data using at least substantially the same methodology and then interrogated the data in the same way that VEL had. However no such information was provided in the October 2018 presentation and none was sought.

124. In summary simply comparing the statistical information supplied to Brightline before it entered the TMLA with similar information prepared in a similar way afterwards does not support the conclusion that the brand had ceased to be one of international high repute. It is next necessary to consider whether the expert evidence concerning how the available statistical information should be analysed undermines that conclusion.

Expert Evidence from Professor Argenti

125. As will be apparent from what I say below, I have not had regard to Professor Argenti's evidence in arriving at the conclusions I set out below. In light of the concession made concerning that evidence in Brightline's closing submissions it would unnecessarily lengthen this already long judgment if I was to set out in detail why I agree with that concession.[3] This concession was rightly made for the reasons identified in paragraph 262 of Brightline's closing submissions.

126. In very brief summary, Professor Argenti and his team carried out what he calls a "*Meta-Rep*" exercise using rankings for a brand over time obtained from different sources and averaged for the purpose of identifying trends. This exercise was flawed in a number of respects. I accept VEL's submissions that errors were demonstrated in the manner in which Professor Argenti's calculations have been carried out, which meant that checks would be necessary before any of that evidence could safely be

[3] In para 262, Brightline said that "*it does not shy away from accepting the obvious: namely that the cross-examination of Professor Argenti … highlighted flaws in some of the data used in his reports and in his understanding of some of the work that his team had carried out for the purposes of his reports*". In para 263, Brightline said that: "*As a result, Brightline accepts that the Court will only place limited reliance on the details of Professor Argenti's numerical results…*". In para 286, Brightline said that "*In light of his cross-examination, Brightline accepts that it is unrealistic for it to seek to rely on the reputation signature analysis and Prof Argenti's principal component analysis relating to brand values*".

relied on but it is impossible to check the accuracy of much of the underlying work that Professor Argenti has done. Professor Argenti acknowledged there were what in my judgment were fundamental weaknesses in his approach. Thus at one point it was put to him that his ranking did not include BMW when though, it was suggested, "… *it's beyond any reasonable argument that BMW is a brand of great international repute*…" to which he responded:

> "A. I accept that in a layperson's terminology, but in terms of the way you look at the way things are ranked in the world, it was not in those particular years a brand of high repute.
>
> Q. I'll put it to you again, even if a brand has a meta-rep score of less than 1, such as BMW in this year, it could still be a brand of international high repute. Do you accept that?
>
> A. In the minds of some consumers it could be seen as a brand of high repute."

This was followed by a similar exchange in relation to Rolls Royce:

> "Q: … I've just shown you Rolls Royce, the car brand, isn't on the list either. We are not seriously going to have an argument, are we, about whether Rolls Royce is a brand of international high repute? You must surely accept that Rolls Royce, the car brand, is a brand of international high repute. Do you accept that?
>
> A. In the minds of consumers, some consumers, it would have a brand of high repute but in terms of the way we do our analysis …it would not be.
>
> MR TOLEDANO: The way you do your analysis it would not be?
>
> A. It would not be."

This exchange culminated with:

> "Q: … My suggestion to you is it's a serious limitation of your analysis because your approach, based on the rankings, excludes a large number of brands, in any given year, of obvious international high repute. It's therefore a serious limitation of your analysis?
>
> A. I do not think it is a limitation of the analysis but it's a limitation of the way rankings are done in this world. I would agree with that."

127. In my judgment these short exchanges show substantively the shortcomings of the approach that Professor Argenti espouses. It is flawed for the reasons identified in the cross examination, it is flawed because it fails to ground the question the professor is

attempting to answer by reference to the contractual context in which the question arises and proceeds by reference to a concept of international high repute (in so far as the concept was defined at all by Professor Argenti) that was different from that which as a matter of construction had been adopted by the parties when entering into the TMLA and in any event it is flawed for all the technical reasons identified elsewhere in the cross examination on which the Brightline concession is founded.

128. Although it was submitted by Brightline in closing that there were some parts of Professor Argenti's evidence that could safely be adopted, in my judgment that would be a wrong approach having regard to the wide-ranging nature of the criticisms advanced against his evidence because his approach to the issues that arise was so markedly different from that adopted by the other three experts.

129. For those reasons, I much prefer to approach the question by reference to the data available as a result of VEL's data tracking surveys because the starting point is the material supplied to Brightline by VEL. The surveys provide a reasonably solid statistical basis for arriving at conclusions. There are of course disputes between Ms Bennison and Professor Calder (the experts giving evidence on behalf of VEL) and Dr Joachimsthaler (giving evidence on behalf of Brightline) concerning the proper interpretation of that data.

Expert Extrapolation From the Health Tracker Evidence

130. The dispute between Ms Bennison and Professor Calder on the one hand and Dr Joachimsthaler on the other concerned the proper interpretation of the data resulting from the brand health tracker testing carried out on behalf of Virgin. It is to those issues I turn now. It is necessary to remember however that the issue I am concerned with is not an academic exercise but one that involves deciding whether Brightline has proved that the Masterbrand had ceased to be a brand of international high repute (as that phrase is to be construed) on 27 April 2020 (when the Notice to Cure was served) and had not regained such a reputation by 29 July 2020 when it served its termination notice.

Role of the KPIs

131. As I have explained already, VEL's October 2018 presentation to Brightline and most of its internal evaluation was carried out by reference to the four Key Performance Indicators or KPIs of awareness, familiarity, openness and preference. Professor Calder and Ms Bennison consider this approach to be appropriate.

132. Having defined as the "Relevant Period" the period between 15 November 2018 and (a) 27 April 2020 and (b) 29 July 2020, Dr Joachimsthaler concludes that VEL and Incite have incorrectly interpreted their own data before setting out what he describes as his "*... rival findings relating to the performance and reputation of the Virgin brand during the Relevant Period …*" before concluding that the "*… international reputation of the Virgin brand significantly declined during the Relevant Period …*", that the Virgin Marks were no longer synonymous with the Purpose and Brand Values and that the continued use of the Marks by Brightline would have been disadvantageous to the value of Brightline's business. For present purposes I proceed on the assumption that 15 November 2018 is the correct start point although for the reasons I have given I do not accept that to be so. I am content to proceed on that

basis because although the statistical differences that emerge using this start date are greater than those that would appear using the 2017 data that was the basis of what was supplied to Brightline pre-contractually, in my judgment it makes no material difference to the ultimate outcome.

133. Broadly Dr Joachimsthaler arrives at his conclusions by taking account of metrics other than the KPIs, assessing the raw data relevant to the KPIs in a way that is different from that adopted by VEL or Incite and assessing the statistical information obtained in relation to the metrics not considered by VEL and Incite in arriving at conclusions concerning brand health using his own preferred statistical analysis, which involves considering a wider range of answers than either VEL or Incite would have considered and applying weighting factors not adopted by Virgin or Incite even in relation to the answers that they considered relevant to brand health.

134. Ms Howard's evidence as to why the KPIs (together with spontaneous admiration[4]) were regarded by VEL as the most important measures of brand health was in essence because they said most about brand recognition and consumers' intention to purchase products marketed using the Masterbrand. Numerous other metrics were tested as well. These other metrics are concerned with what VEL and the experts describe as measuring the Virgin brand DNA. They or at least some of them are described in VEL's September 2019 Masterbrand briefing document in the following terms:

Measuring the Virgin brand DNA

Virgin

We asked each respondent to rate each brand on these statements:

DNA Component	DNA Expression	Statement in the survey
Proposition	Feel good experiences you'll want to be part of	Feels good to be a part of
Ambition	A more meaningful role in people's lives	Is for people like me
Genes	We empower our people	Has employees that go out of their way to help
	We invest in healthy societies	Takes its social responsibilities seriously
	We are entrepreneurial in all that we do	Is bold enough to try new things
	For us, play is serious business	Is fun
Values	Insatiable curiosity	Innovates to raise standards
	Smart disruption	Challenges the status quo
	Straight up	Is open and transparent
	Heartfelt service	Cares about its customers
	Delightfully surprising	Exceeds my expectations
	Red hot – stylish	Is stylish
	Red hot – magnetism	Is enticing
	Inclusivity	Is welcoming to everyone
	Employees	Has a reputation for treating its employees well
	Quality	Delivers great quality products and experiences
	Environment	Takes its environmental responsibilities seriously
	Value	Gives me more for my money
	Trust	I trust

incite

Under the heading "*Values*" are included a list of brand values that include the Brand Values identified in the TMLA. These metrics were described by Ms Howard as being "*… the most volatile metrics that we measure, as they are not as deep-seated as other measures such as brand openness, and they move around depending on what is going on in the world…*" and as "*… considered by the business to be of lesser importance*

[4] A metric I refer to below but which in summary involves asking respondents to list their 10 favourite brands and then assessing where the brand stands when all the responses are considered, which can be presented either as a percentage of those who placed the brand either first or a defined top of the range or as a position in a list of brands identified by respondents.

than the KPIs. That is because they are less concrete and more abstract. Also, when looking at brand health, the business tend to be less interested in the Brand DNA metrics than the KPIs because they are more superficial. They are about how people perceive the Masterbrand as compared to the KPIs which are about intent to shop with the Masterbrand. More commercially minded colleagues, particularly, tend to be much more interested in people's purchase propensity."

135. I conclude on this evidence that within VEL primary consideration was given to the KPIs together with spontaneous admiration because they together provided the most useful information about the commercial potency of the brand, that attention was paid to the other metrics that were measured as well but they were accorded less significance internally for the reasons identified by Ms Howard in her evidence. I return below to the degree to which the diagnostic metrics assist in resolving the issues that I have to determine.

136. Professor Calder's evidence was that the KPIs were the most important metrics for the purpose of determining brand reputation. He describes the KPIs as ones that measure the overall outcomes of branding, and allow a determination of how consumers regard a brand at a particular point in time during which the relevant surveys were carried out, and that they are commonly accepted by marketing practitioners for the purpose of evaluating the current status of a brand. These performance metrics are to be distinguished in Professor Calder's view from diagnostic metrics such as those referred to earlier as used for the purpose of testing or measuring Virgin's brand DNA, which are relevant for the purpose of "… *developing strategies to influence consumers in order to improve brand performance*."

137. Professor Calder's view reflects accurately the purpose of the brand health research undertaken by VEL – first to test the current status of the Masterbrand and secondly to work up strategies for controlling erosion of its status or enhancing it. The first of these purposes was tested by reference to the KPIs as is reflected in the approach of the parties prior to the execution of the TMLA, with VEL supplying KPI information which Brightline accepted without seeking further or additional information and which it used thereafter for its own marketing purposes.

138. I agree with Professor Calder that the focus of attention should be on the KPIs essentially for the reasons that he gives and to the extent that Dr Joachimsthaler suggests the primary use of metrics other than the KPIs and spontaneous admiration then I reject that evidence. The task that arises in this case is to measure the status of the brand at particular points in time. That is best achieved by comparing movements over time of the KPI metrics because together they show the current status of the brand at the date the relevant marketing sampling took place and comparing the scores achieved over time shows quantitively the degree to which the status of the brand has altered between relevant dates – in this case being the date when the TMLA was entered into and the dates when the relevant notices were served. I also find that spontaneous admiration is likely to provide an insight into brand reputation because it will show the movement of the brand relative to others. However some care needs to be taken as to the weight to be given to this metric because the responses are more subjective than the answers to the questions that provide the statistical information relevant to the KPIs.

139. On the assumption that the reputation issue is to be determined not by comparing the performance metric information supplied to Brightline by VEL prior to the making of the TMLA (which it will be recalled was limited and derived from the 2017 survey) but requires consideration to be given to the KPI information that was available to VEL (but not Brightline) prior to the date when the parties entered into the TMLA, then the starting point is the KPI information available following completion of the 2018 study based on material gathered between 13 August-16 September 2018. Assuming that is the correct starting point, it is necessary to consider the KPI information derived from the 2018 study (however that is to be derived, which depends on the expert evidence to which I turn below) and comparing it with information derived using the same methodology from information gathered for 2019 (which was gathered between mid-July and the end of September 2019), 2020 Dip 1 (the material for which was gathered in May 2020, between 2 and 4 weeks after the Notice to Cure was served) and 2020 Dip 2 (the information for which was gathered in a period between 2 days prior and about a month after the Notice of Termination was served). If the correct approach is to start with all the KPI information that could have been made available for 2017, then the same exercise has to be carried out but necessarily treating consideration as a proxy primarily for openness.

140. There is an issue between the parties concerning the answers used. In relation to awareness, for example, respondents were asked to respond with a range of offered answers from "*I am not aware of this brand*" at one end of the spectrum to "*I know a great deal about this brand*" at the other. There is a significant difference of approach between Professor Calder and Dr Joachimsthaler. VEL or rather Incite on its behalf worked on what is known in this area as a "top box" basis – that is it calculated its percentage figures on the basis of those answering in boxes 2 – 5 thereby discarding those who said they had not heard of or were not aware of the brand. Professor Calder's view is that this cannot be criticised since it "*… reflects the quantity of consumers that have reached some minimal or higher level of awareness (i.e., those not saying they have never heard of/are not aware of the brand).*" I agree with this so far as this metric is concerned for the purposes of answering the question that arises in this case, which is concerned with whether the brand has ceased to be one of high repute. In so far as this metric assists at all for present purposes, it depends upon analysing statistical movement. As long as the same technique is maintained throughout, whether the bottom box is included or not can have no material impact other than one within the range of statistical error. Similar considerations apply to familiarity in my view because the same information is used to arrive at an answer, but using only the top three answers.

141. There is an issue between the parties concerning the value for present purposes of awareness and familiarity to the question whether a brand has ceased to be a brand of international high repute. In a strictly marketing sense the information is important because awareness and familiarity are a function of openness and preference. Professor Calder describes this in terms of a funnel:

For marketing purposes a relatively low awareness or familiarity score will mean that the number of people in absolute terms who would satisfy the openness and preference tests would be fewer than would be the case if the number of persons sampled who satisfied the awareness and familiarity tests were higher. As Ms Bennison said in her oral evidence awareness (and familiarity) is the "… *fundamental starting point of brands*…" and why "… *people spend a lot of money on advertising and promotion is to build that base level of awareness*."

142. Whilst as I accept that awareness and familiarity of themselves may say relatively little about the quality or alleged erosion of a brand's reputation it is difficult to see how they can be ignored as irrelevant to that issue. I accept that something or someone can be familiar to others for all sorts of unsatisfactory or unsavoury reasons so that awareness and familiarity of themselves say little or nothing about the quality of the reputation enjoyed, but that is then qualified by the openness and preference criteria. A high familiarity percentage that is maintained over the period when comparative returns are being considered coupled with a major adverse change in openness and/or preference may indicate a deterioration in the reputation of a brand, whereas no or no significant changes may indicate that there has been no material change in the reputation of the brand concerned.

143. In my judgment therefore, it is not possible simply to ignore two of the KPIs and focus exclusively or even mainly on the other two. I think that was what Professor Calder was alluding to when he said in his oral evidence:

> "Q. We also don't know whether the awareness itself was positive or negative, do we?
>
> A. Well, we have a consideration measure, which you would expect to be quite negative if the awareness was negative.
>
> Q. Right. That's when we come on to openness and preference. I understand that, but in terms of the awareness/familiarity question, you know, we may all be aware of someone or something that is completely notorious, simply

> saying, "I know a lot about that thing" doesn't tell you one way or the other, does it, whether that awareness is based on a positive or a negative association with the name?
>
> A. No, but it should be reflected in the consideration. If I have -- as we do in this case, extremely high awareness and consideration is high, you can presume that the awareness is positive."

(consideration as I have said earlier meaning in this context the combination of openness and preference).

144. I have set out the information relevant for 2018, 2019, and 2020 Dips 1 and 2 above and do not need to repeat it. Awareness and familiarity remained stable. Familiarity was lower in absolute terms in the US when compared with the UK and Australia but that is not relevant. What matters is comparative material movement. I do not consider the movements that this material reveals are sufficiently material to demonstrate that the Masterbrand had ceased to be of international high repute. At best it shows a modest drop in familiarity in one market.

145. Turning next to openness and preference, these KPIs are important to an assessment of whether the Masterbrand has ceased to be a brand of international high repute for reasons already given – if familiarity and awareness are in effect unaltered then degradation of reputation is likely to be reflected in a decline in these metrics. As Professor Calder put it in his oral evidence:

> "Q. Do you share Virgin's view, as we have seen recorded in the documents, that at a Masterbrand level a decline in openness was a cause for concern? Let me explain why they said that: because openness was at the heart of the value proposition to the VCos?
>
> A: I recall that's in the record. I'm not sure I would accord it more weight than preference but again, assessing change in the brand, I think you would want to look at openness and preference to see if there is a decline that merits that judgment.
>
> Q. Isn't the point -- I think this was Virgin's point and I just want to explore it with you -- that for the Masterbrand openness is more relevant because preference is actually going to be influenced by more practical and functional factors, such as price, availability and other features, which are more in the gift of the VCo than they are of the Masterbrand?
>
> A. And I accept that point but, again, if you can detect preference, that's a very good thing. Remember, preference is defined by this question, it's not at the level of the service, it's saying, "This is one I would definitely have a preference for." That definitely would be a very valuable thing for the brand to have."

146. It was suggested that openness has a particular significance because Virgin is a "*branded house*" – that is an operation that franchises a brand to multiple different businesses operating across numerous different sectors – so that preference is less significant than it would be where the brand is associated with a particular product (e.g. "Hoover" in relation to vacuum cleaners for example). It was this issue that was being alluded to in the last question and answer set out above. I reject that approach for the reasons identified by Professor Calder in his answer. The brand is marketed on the basis that it will cause consumers to purchase goods and services using the brand, the brand is used for the purpose of selling goods and services and the focus of the questions asked is on the purchase of goods and services using that brand. In my judgment therefore both openness and preference are likely to be significant metrics for the purpose of considering any downturn in the reputation of the brand.

147. There is an issue between the parties concerning which answers to the relevant questions should be counted in relation to the openness and preference metrics. Each metric is tested by answers to the same question by which respondents are asked "*how likely, or unlikely, are you to consider this brand*?" Responses were on a 6-point scale ranging from "*Not one I would even consider*" to "*It's the only one I'd consider*." The Openness score is arrived at by Incite on behalf of the Virgin group by reference to the top four boxes of the consideration question ("*I would consider but after most others*" or "*I would consider equally with others*" or "*It's one I would consider above most others*" or "*It's the only one I'd consider*"). The preference score is arrived at taking the top two responses only.

148. Brightline's case is that the fourth box should be disregarded when assessing openness and that if it is discarded then the figures for openness would be even more stark than it was submitted they were even looked at as VEL looked at them. Ms Howard said VEL included the fourth box ("*It's one I would consider but after most others*") because the objective was to identify the proportion of respondents who were open to the brand. Professor Calder considered that was an appropriate position to adopt:

> "Q. Would you agree, Professor Calder, that to describe those people as open to the brand is fairly borderline?
>
> A. It's at the low end of the consideration range but people are still considering the brand. It's on their "shopping list", as people often put it, and that's what you are trying to assess, is it on their consideration list or not.
>
> Q. Right. But "It's one I consider but after most others, "isn't a great start, is it?
>
> A. It's notably lower than, "One I would consider equally with others."

149. I accept Professor Calder's evidence on this issue. There is a clear distinction of principle between openness on the one hand and preference on the other. Openness is not measured properly by excluding a group of respondents who are open to the brand albeit less so than others responding more positively. Excluding them will narrow the gap between openness and preference and risk degrading the difference and therefore

the validity of the conclusions that can be reached from distinguishing between the two metrics.

150. As is apparent from the figures quoted earlier (and ignoring for present purposes the 2017 results) there was a drop of 9 percentage points in the UK on openness between 2018 and 2020 Dip 1 which narrowed to 8 percentage points by Dip 2. The point made by Ms Howard is that this still meant that 78% of people in the UK would consider the Virgin brand. This is a fair analysis by a responsible senior VEL employee about something which it was her everyday responsibility to consider and help manage. In the US there was a drop of 5.5 percentage points between 2018 and 2020 Dip 2 and in Australia a dip of 3 percentage points from 2018 to Dip 1 which had narrowed to 1 percentage points by Dip 2. The drop in the UK market was 8% and in the US about 7.28%.

151. It was put to Professor Calder that these changes were "*pretty horrific*" or "*very serious*". Professor Calder's response was only that it would be noticeable and that whether it "*… reduced the level of consideration to a level where the brand would cease to be a brand of high repute is a different matter …*". I agree. That is an issue that requires amongst other things a comparable or comparables to compare the magnitude of decline against other comparable brands in the same period in order to come to a conclusion. I return to that issue below.

152. Turning finally to preference, as is apparent from the tables set out earlier there was a drop in the UK market of 6 percentage points, in the US an increase from 21% to 22% and in Australia a drop of 3 percentage points. Preference is the strongest of the KPIs because it focuses on the proportion of respondents who would consider a Virgin branded product or service above most others or as the only one the respondent would consider. That is reflected is the substantial absolute difference in numbers between the openness and preference figures.

153. In principle deciding whether the Masterbrand has ceased to be a brand of international high repute will be assisted by comparing movements across the same metrics for similar brands. If the brand has suffered a degradation in openness for example that is not experienced by other comparable brands over the same period then that may suggest a more serious degradation than if similar degradations have been suffered by comparable brands or may focus attention on the difference in magnitude of change between the master mark and other comparable marks and the significance that such a difference represents.

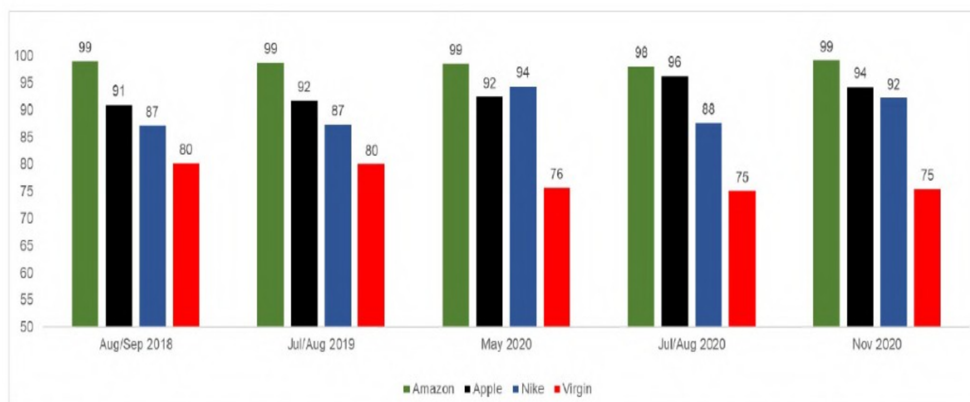
154. There are a number of difficulties in the way of such an approach statistically in this case. First, finding an appropriate comparator is difficult because VEL is not a trading company and the Masterbrand is used by a multitude of different businesses operating in different sectors. Whilst it would be possible to compare for example Virgin Atlantic against a comparable UK or US based airline with a substantial transatlantic passenger business, it is much more difficult to derive conclusions as to the reputation of the Masterbrand by comparing it with trading entities particularly ones not operating in the same sectors as utilise the master mark.

155. Next, if such a comparison is to be carried out it would be necessary to be sure that each brand was being tested in the same manner. Whilst VEL and Incite refer to Apple, Amazon and Nike as comparators for internal purposes, some caution is

required before relying on those for present purposes because, as Ms Howard accepted, VEL looks at what information is available for these brands "… *to give us something of a yardstick, although I take the point that they are, by their nature, very different brands to our own.*" Given that these comparators are trading entities, are larger operations than the equivalent VCo (if there is one) with much larger advertising spends, no useful information for present purposes can be obtained from looking at the percentages each achieved for example for openness and preference as absolute numbers. If any information of value is to be obtained from this exercise it must be by reference to comparative movement over time. Even then some care is required for the reasons already noted.

156. Dr Joachimsthaler focussed on this issue in his report. He expressed some caution about the comparators that VEL relied on internally because, he said "(*i)t is not clear to me from the materials I have reviewed why Virgin has chosen these brands specifically, although it would make sense that Virgin views them as aspirational benchmark, rather like a gold standard*." I agree with this assessment, which accords with what Ms Howard accepted, at least implicitly.

157. That said, Dr Joachimsthaler has attempted to draw conclusions from the comparative information that is available. This attempt has been conducted by taking composite scores from "*several KPIs*" (which are not as far as I can see defined further) then dividing each brand's percentage score by the highest scoring brand and multiplying by 100, meaning a score of 100 is best-in-class and any score below 100 shows the gap to best-in-class. Using this methodology, Dr Joachimsthaler summarises the outcome graphically as:

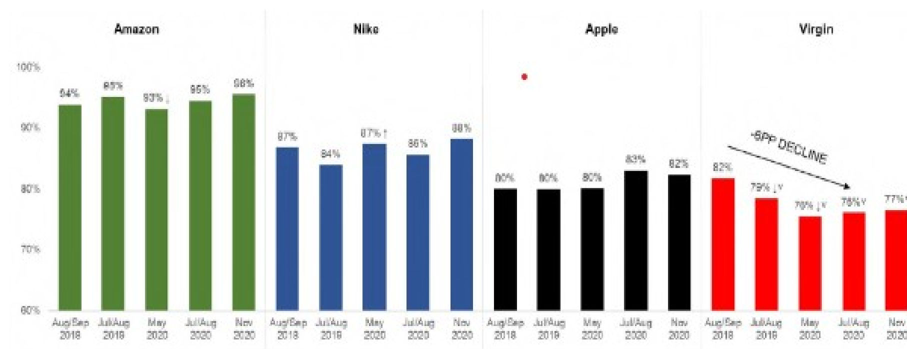


As I have said the absolute difference between Virgin on the one hand and the comparators on the other is not material but the magnitude of comparative variation over time may be. This shows a difference between Amazon and Virgin in September 2018 of 19 percentage points, which had become a difference in May 2020 of 24 percentage points and in July-August 2020 of 23 percentage points. What happened thereafter is immaterial. This suggests a net drop in comparative terms between Amazon and Virgin of 5 percentage points but in the context of a pandemic where Amazon was able to trade but the leisure and travel industries had in effect ceased to operate at any meaningful level.

158. A similar exercise was carried out by Professor Calder but focussing on what Ms Howard had described as the "key" KPI of openness. She regarded this as the key KPI for present purposes because it was not as adversely affected as preference by the Masterbrand being a brand used across multiple different trading companies whereas the comparators were trading brands. Professor Calder carried out a comparative exercise for openness in the Dip 1 and Dip 2 windows. In summary his evidence on this was:

Entity	UK Dip 1	UK Dip 2	USA Dip 1	USA Dip 2	Australia Dip 1	Australia Dip 2
Virgin	78%	80%	71%	70%	85%	87%
Nike	88%	87%	88%	84%	84%	86%
Amazon	95%	97%	95%	96%	79%	79%
Apple	77%	78%	83%	88%	79%	83%

These figures do not focus on the 2018 and 2019 results. However the following bar chart taken from Dr Joachimsthaler's first report provides the necessary information:



159. Virgin openness reduced by 6 percentage points between 2018 and Dip 2 in 2020. Nike openness reduced over the same period by 1 percentage point whereas Amazon openness increased by about 1 percentage point and Apple by 3 percentage points over the same period (which coincided with the onset of the pandemic when Amazon was likely to increase openness). Comparing openness in Dip 1 with that in Dip 2, shows that in the UK, Virgin's openness improved by 2 percentage points (as did that of Amazon and Apple) whereas Nike's dropped by 1 percentage point; in the US, Nike dropped by 4 percentage points , Virgin by 1 percentage point whereas Amazon

increased by 1 percentage point and Apple by 5 percentage points and in Australia, both Virgin and Nike increased by 2 percentage points , Amazon remained the same and Apple increased by 4 percentage points . In the period 2018-9, Nike dropped by 3 percentage points, Apple stayed the same and Amazon increased by 1 percentage point. Unsurprisingly given the occurrence of the Pandemic, Amazon's openness statistics increased during 2020 having dropped during 2019-20 and Apple increased too in 2020. Virgin dropped by a similar rate to Nike between 2018 and 2019 (3 percentage points) but dropped a further 3 percentage points during 2020, when both Amazon and Apple increased their respective scores. It is noteworthy that in July 2019, Virgin was only 1 percentage point lower than Apple.

160. Aside from the comparator companies being gold standard or aspirational comparators, as Dr Joachimsthaler accepted in the course of his cross examination, there was a pandemic in 2020, the comparators could all move their businesses online and did so, whereas it was next to impossible for most of the Virgin businesses to do so. To that extent, the comparison of the Masterbrand with comparators was not like for like and in my judgment could not be said to support the proposition that the Masterbrand had ceased to be a brand of international high repute by the date when the Notice to Cure was served.

161. The conclusions to be derived from the KPI material or KPI derived material referred to respectively by Dr Joachimsthaler and by Professor Calder are not dissimilar in my judgment. When approached as material from which to form a judgment based on trends to be derived from snapshots in time, neither justifies the conclusion that the Masterbrand had ceased to be a brand of international high repute as that term is to be understood (that is judged either on the basis of the KPI information supplied to Brightline by VEL prior to the parties entering the TMLA or alternatively from the KPI information that was available to VEL prior to that date). This is so simply taking the KPI changes to which I referred above or by comparing the movement of openness (the key KPI metric for that purpose) for the Masterbrand with that of the "*gold standard*" or "*aspirational*" comparators referred to above. If the starting point is the 2017 data supplied to Brightline before the TMLA was entered into then the adverse changes are less.

162. It is necessary to say something about the spontaneous admiration metric now. Dr Joachimsthaler places reliance on this metric whereas Professor Calder does not. It stands at the border between the KPIs on the one hand and the diagnostic metrics on the other. It occupies that position because it is regarded as of importance by VEL in assessing the health of the Masterbrand but shares at least some of the characteristics that leads Professor Calder to treat it as diagnostic and thus as shining no greater light on the reputation issue than that provided by the KPIs.

163. Spontaneous admiration was tested during the brand health tracking exercises carried out by VEL by asking respondents the open question "*Are there any brands in any sector which you admire?*" and respondents were allowed to name up to 10 brands in their answers. Anyone who mentioned either a VCo or just Virgin were coded as Virgin collectively. This is addressed at length by Ms Howard in her witness statement and is not in dispute. I accept Professor Calder's evidence that this metric is more subjective in approach than the questions that are used to provide the KPI statistics. That is so because what stimulates a particular person's admiration will vary

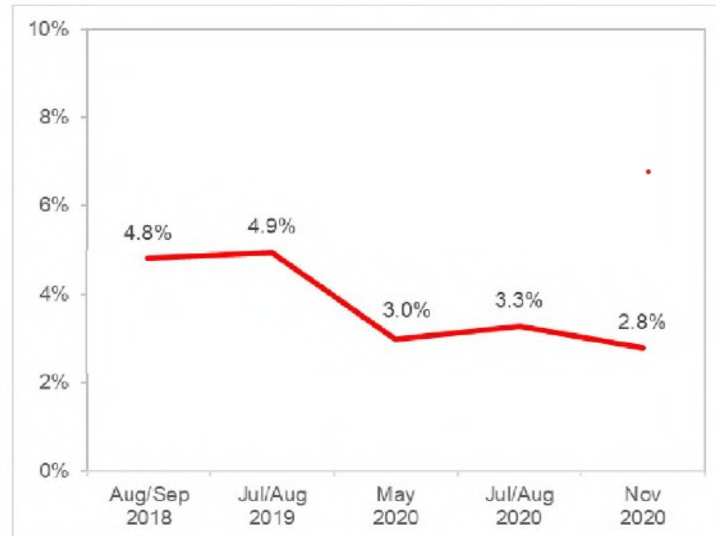
from person to person and will depend on different considerations, whereas that quality does not apply to the questions used to obtain the KPI statistics.

164. Ms Howard's evidence is that VEL regards the metric as important. However it is relevant to note why and how VEL measures comparative movement of spontaneous admiration. Ms Howard characterises it as important because "… *it measures our salience and it is also a measure of decency i.e. is this a "good brand?"*". This suggests that VEL consider the metric helpful in assessing reputation, which VEL considers relevant to assessing performance. Ms Howard adds that "*Secondly, spontaneous admiration is something of a kind of early warning signal in that if it changes that suggests that there are other things to look out for and be aware of.*" It is therefore also regarded as being diagnostic in nature. This reinforces the view expressed earlier that this metric stands at the border between the metrics relevant to performance (the KPIs) and those that are purely diagnostic (that is assisting to diagnose why the brand is performing in a particular way at a particular time when compared to earlier samples and what might be done to address any adverse changes). As to the "How" issue, Virgin assess the responses to this question by noting where Virgin is placed in the list of companies identified. In 2018, the effect of the responses was to place Virgin 3rd in the list. Ms Howard states that "(*o)ver the course of 2020 we saw our spontaneous admiration ranking move from 7th place to 6th place and then to 9th in Dips 1, 2 and 3 respectively…*".

165. Dr Joachimsthaler makes essentially two points about this metric. First he focusses on the percentage response rather than where that placed Virgin in the running order of brands mentioned and states that the percentages resulting were "*…very low"*. In my judgment however, simply looking at the percentages as numbers does not assist. As I have said on a number of occasions, assessing whether the Masterbrand ceased to be a brand of international high repute by reference to statistical information involves looking at the material available down to the date when the parties entered into the TMLA (assuming for present purposes that is the correct start point) and comparing it with the same material obtained on the dates most proximate to those when the Notices to Cure and of Termination were served. Thus the absolute figures are not what matters – it is the movement from the 2018 dip to 2020 Dip 2 that is at least potentially important to the issues that arise in this case.

166. Similarly, stating, as does Dr Joachimsthaler, that "… *other global brands [Virgin] had benchmarked itself against, such as Apple and Amazon, had spontaneous admiration scores of between 15-19% in the same time period*" does not assist either because of the "*gold standard*" or "*aspirational*" nature of those comparators. No one suggests that Virgin has the same prominence as Apple or Amazon. What those numbers do provide however is some context in which to evaluate whether the numbers provided for the Masterbrand are "*very low*" to the extent that is at all relevant.

167. There is no dispute as to the relevant spontaneous admiration raw data, which Dr Joachimsthaler has chosen to present in his report in the following format:



This shows a drop of 1.7 percentage points from a plateau that applied from the start of TMLA of 4.85% to a plateau of 3.15% in the period beginning in May and ending in August 2020.

168. Although Dr Joachimsthaler characterises these as "… *low and declining scores*…" that "… *suggest that overall top-of-mind brand awareness of Virgin is very low*…" in my judgment this misses the point. Assuming that this material was in principle capable of assisting in evaluating reputation, looking at these numbers (as opposed to the level of change between them) in isolation does not assist. Context is given to the significance of the figure being low by (a) the figures attributed to the much larger Amazon and Apple brands referred to earlier; (b) by the standing in the list of the companies mentioned by respondents, where the drift was from 3rd (2018) to 7th (Dip 1 2020) and 6th (Dip 2 2020) and (c) the period between May and August (and for that matter November) being heavily influenced by the effect of the pandemic. In this regard although the graph apparently shows a gradual decline between August 2019 and May 2020, that is not what the available information demonstrates in fact. The material constitutes a snapshot in time as I have said repeatedly and therefore it would have been fairer and more accurate for these figures to be presented in bar chart or tabular form.

169. The statistics do not enable any conclusion to be made as to when between August 2019 and May 2020 sentiment altered. I consider it inherently more likely that the changes were the result of the onset of the pandemic and the relative effect that had on the standing of companies that were able to trade remotely and could offer services remotely or to supply goods direct to people's addresses when compared to companies like most using the Virgin Masterbrand trading in the travel and leisure industries that to all intents and purposes ceased trading and in any event ceased to be relevant to most people.

170. Mr Tozzi put Brightline's argument based on spontaneous admiration to Professor Calder in cross examination in this way:

> "Q. In the context of reputation, Professor Calder, can I suggest that, if you have very high awareness, coupled with very low spontaneous admiration, that would not support an argument that a brand is of high international repute, would it?
>
> A. I don't think that follows. Remember, this is a very stringent question. Name ten brands you admire most. Of all the brands in the world, you name ten. That cannot be a very good indicator of all the brands that you have in high repute. It's a very specialised list, and we don't quite know what defines it anyway in terms of how to interpret it. We have much more interpretable and -- much more interpretable data available that clearly reflect the brand's performance."

The premise is much more nuanced than Mr Tozzi suggested in any event because in making that point it is necessary to consider how that fits in with Apple and Amazon's spontaneous admiration scores when viewed in the context of their awareness scores, which Dr Joachimsthaler characterised in his first report as top of class. If what Mr Tozzi suggested was correct it is difficult to see how the position would be different for example for Apple or Amazon, each of which had high familiarity scores but relatively low spontaneous admiration scores. It is necessary to define what is meant by very low and in what context for this to have any meaning.

171. In my judgment this metric does not add anything new to what is to be derived from the KPIs. As Professor Calder put it in cross examination when he was taken to Dr Joachimsthaler's report where he addresses this point and to the graph reproduced above, "… *(i)t's a piece of diagnostic information that you would have to interpret* …". I have no reason to think that Ms Howard is wrong when she attributes the decline in spontaneous admiration as anything more than "… *what was going on during the pandemic was that "comfort" brands and household names became much more relevant and important to people naturally. So if you look at the ratings, we dropped down and Tesco, Marks & Spencer and John Lewis moved up*." As I have said this is the inherently probable explanation. The relatively small numerical movements combined with the context in which they took place and the impact the Pandemic would inevitably have on a brand heavily linked to the travel and leisure industries lead me to conclude that this material does not demonstrate that the Masterbrand ceased to be a brand of international high repute, as that phrase is to be understood, in May – August 2020 either or itself or when read together with the relevant KPI scores.

172. It is necessary that I now address the degree to which the Brand DNA or diagnostic metrics alter this analysis. In my judgment some caution is required in relation to these metrics.

173. Firstly, it was not material by reference to which the parties could reasonably be taken to have understood the phrase "*international high repute*" when entering into the TMLA.

174. Secondly, fundamentally the KPIs on the one hand and diagnostic metrics on the other are looking at different things. In this regard, I accept the evidence of Professor Calder. He was cross examined extensively on the basis that he did not consider the

love, distinctiveness and momentum metrics or what he described as "*…any of the more diagnostic metrics*". He accepted that he had not and maintained that was so for the reasons set out in his report. His oral evidence, which I accept, was encapsulated in this question and answer in the course of his cross examination:

> "Q: If you want to know and the court wants to know about brand reputation, you don't just look at performance, you have to look at all of these other metrics because they are going to give you true insight on whether the reputation of the brand, people's attitudes towards the brand, have in fact changed. They are not simply diagnostic, they are actually telling you what people think about the brand and that's why you can't just discard 7/10ths of the information, perhaps more, that is contained in these tracker surveys, isn't it?
>
> A. … If you had the information about performance that's what you want to look at to see if there has been a change. If you are interested in the future and diagnosing the future, as a company, Virgin, of course, wanted the diagnostics but … here it's perfectly appropriate to focus on the consequence."

In my judgment this is evidence I should accept as correct when considering the question that has to be answered in this case. This case is concerned with whether the Masterbrand ceased to be a brand of international high repute as that phrase is to be construed during the relevant period. That is a question that depends almost exclusively on performance outcomes at various points in time during the relevant period. So for example asking a respondent whether he or she trusted Virgin branded companies tells you nothing more than the information supplied in particular by the openness and preference KPIs. It may tell you why the respondent is or is not open to the brand or prefers goods and services marketed using the brand but that is immaterial for present purposes. Professor Calder was very clear in his answers – any decline will be shown by the KPI data. In his opinion, looking at the diagnostic metric results is not going to alter that because the end result will be the same. As Professor Calder put it, when asked again about this point, if "… *these diagnostics measures are truly predictive, causally related to the outcome measures, they already will be reflected in the outcome measures*."

175. I accept that evidence largely because I consider it close to obvious. Equally I accept that if you want to know <u>why</u> the openness or preference performance metric scores have dropped, it will be necessary to look at metrics such as trust, love, momentum and so on because they are by their nature diagnostic. I accept too that will be something that a market practitioner such as Ms Howard will be concerned to examine. That is because her concern will not merely to be informed of any adverse changes in performance metric scores but to ascertain why the changes have occurred and what needs to be done to address the problem. None of that is relevant to the issues that arise in this case. This case is concerned exclusively with whether the Masterbrand has ceased to be a brand of international high repute not why it has, if it has, or what corrective steps can or should be taken.

176. Whilst I have read and re-read Dr Joachimsthaler's written and oral evidence in relation to these issues, I do not regard the material to which he refers as taking matters any further from the conclusions that arise from looking at the KPI information. Focussing on Points of Difference and Points of Parity for example (see paragraph 148 and following of Dr Joachimsthaler's first report) may well be of great importance in ensuring that marketing efforts are effective but in my judgment it does not tell me anything about whether the brand ceased to be one of international high repute by either of the relevant dates. So knowing that there was a decline during the relevant period for example in Points of Differences scores in relation to questions such as "*Is for people like me*", "*I trust*", "*Feels good to be part of*" "*Exceeds my expectations*", "*Delivers great quality products and experiences*", "*Is enticing*" and "*Gives me more for my money*" takes me no further than the results of the KPI assessments and runs the risk of treating the brand as having declined by more than in fact is the case. So far example noting a decline in the metric "*is for people like me*" from 60% to the low 50%s during the relevant period is not providing more relevant information than the openness and preference results will tell you. What it tells you is why there might have been a decline in openness or preference results over the same period.

177. Averaging the performance of these metrics is likely to be even more unhelpful in providing information relative to the reputation of the brand because it degrades focus on particular diagnostic metrics (which ostensibly is the benefit of looking at them in the first place) without providing any of the benefits of focussing on the KPIs. The picture was further complicated by Dr Joachimsthaler's adoption of frameworks not used by VEL and which were devised by him and his team. No explanation of the reasoning leading to this appears in the reports and when cross examined about it, no coherent explanation was offered. I do not intend to set this out in detail – it is all addressed in Dr Joachimsthaler's cross examination at T8/70-92. All this undermined my confidence in the approach adopted by Dr Joachimsthaler. That was further undermined by his inability to give coherent or on occasion any explanation of his underlying methodology. Thus when he was asked to explain how he had calculated what he described as the netting off of the association scores that he had used in order to measure average performance, there was the following exchange:

> "Q. Could you explain to me what you mean in this context by "netting the available association scores" ?
>
> A. I don't remember.
>
> Q. So you can't tell me what "net" is referring to in this and so you won't be able to tell me what "net" means when you have used it in other places in this document?
>
> A. Yes, I used it a number of times. I don't remember specifically how we did the netting out of the association scores. I just don't remember exactly."

Giving evidence is not generally a memory test in relation to things like dates and times; nor will experts generally be expected to keep in their heads reference data that they would normally expect to access using hard or soft copy databases but this is more fundamental than that. It is difficult for a court to have confidence in an expert

who has embarked on an analysis of data that is different from that used by the recipients of it for the purpose of arriving at conclusions that are different from those arrived at by the recipients if that expert is unable to explain or even recall the techniques that have been used to arrive at the conclusions contended for.

178. Similar problems arose elsewhere, as for example where he had referred to weighting scores for various statements used as being weighted based on their relative performance in driving consideration. This led to him being asked where the weightings used were to be found and resulted in the following exchanges:

> "Q. So where are the weightings for that calculation?
>
> A. They are provided by Virgin. Yes.
>
> Q. Where were they provided by Virgin?
>
> A. Yes - -
>
> Q. You haven't explained, have you
>
> A. No, I can't really - - I don't recall this specific calculation.
>
> Q. Dr Joachimsthaler, that is wholly unsatisfactory on behalf of my clients because we need to understand - - and my Lord needs to understand - - exactly what your evidence is and the basis upon which you gave it.
>
> A. I totally agree, I totally agree."

This became worse in re-examination where the following exchange took place:

> "Q … Those figures there reflect those figures that we were just looking at a moment ago in that appendix?
>
> A. Yes.
>
> Q. Percentages. So can you just explain, please, what they are?
>
> A. Yes, they are the -- they are showing the degree to which these 19 -- these statements, like "I trust" or "It's for people like me", how they contribute to differentiation.
>
> Q. Right. How do you arrive at a figure for that?
>
> A. I don't remember.
>
> Q. Okay.
>
> A. Sorry, I don't remember how I did the analysis."

179. Furthermore all these metrics must be viewed in context. Some may well show an adverse reaction as a result of the response of companies such as Virgin Atlantic to the pandemic for example ("*Takes its social responsibilities seriously*") whereas others will be much more difficult to assess and are likely to be primarily attributable to the reputation of the VCos rather than the Masterbrand (as for example "*Has employees that go out of their way to help*" or "*Innovates to raise standards*"). In my judgment none of this level of abstraction or complexity is necessary or helpful. As Professor Calder said at one point in his cross examination "… *there is no reason to look at the mindset or diagnostics when you have performance measures that are agreed by both experts as the consequence of the diagnostics, any change in the diagnostics should be reflected in these performance measures and, therefore, they should be the criteria for judging the question …*".

180. In my judgment therefore, Brightline has failed to prove that the brand had ceased to be a brand of international high repute on the date when it served its Notice to Cure or on the date when it served its Notice of Termination.

The Quality of the Marks Issue

181. All the experts are agreed that the status of the Marks as one of "*high quality*" is derived from and therefore follows the conclusions reached concerning the status of the brand. This is unsurprising since the Marks are no more or less than the physical embodiment of the brand. If the Masterbrand has not been proved to have ceased to be a brand of international high repute, then it is difficult to see how the Marks could be by either the date of the Notice to Cure or the Notice of Termination "… *no longer are of high quality status…*".

182. Different questions arise in relation to whether the Marks ceased to be "… *synonymous with the Purpose and Brand Values…*". On this question, Ms Bennison considered the issue by reference to the Brand tracking data relevant to that issue. Professor Calder considered that the questions depended on the answer to the question concerning reputation. It was accepted both by Ms Bennison in her evidence and by VEL in its closing submissions that the diagnostic metrics can be used to assess whether the Marks remained synonymous with Purpose and Values. In those circumstances, I do not accept that Professor Calder's view is correct.

183. Brand Values were defined contractually as meaning (i) insatiable curiosity; (ii) heartfelt service; (iii) delightfully surprising; (iv) red hot relevance; (v) smart disruption; and (vi) straight up. As is apparent from the October 2018 and the 2019 brand performance presentations by VEL, VEL measured brand values by reference to the following brand tracking data questions:

i) "*Insatiable curiosity*" was tested by reference to the statement "*Innovates to raise standards*";

ii) "*Heartfelt service*" was tested by reference to the statement "*Cares about its customers*";

iii) "*Delightfully surprising*" was tested by reference to the statement "*Exceeds my expectations*";

iv) "*Red hot - stylish and magnetism*" was tested by reference to the statements "*Is stylish and enticing*";

v) "*Smart disruption*" was tested by reference to the statement "*Challenges the status quo*"; and

vi) "*Straight up*" was tested by reference to the statement "*Is open and transparent*".

Notwithstanding this, Ms Bennison's evidence in her supplemental report was that:

> "Whilst I could spend time reviewing each of those individual questions relating to the 12 brand values in detail, from my experience a clear picture of the impact of these values can be achieved by reviewing those three key measures up to which the more detailed questions ladder i.e. the outputs rather than the inputs. In terms of relative importance, a tracking debrief in 2018 puts this at 50% for Love, 28% for Distinctiveness and 22% for Momentum. Also, to reduce the risk of these individual DNA measure sample sizes in 2020 being too small to be meaningful, I have focussed my attention on the primary target market for Brightline's passengers of the USA and used the UK as a point of comparison given this was the market at the heart of the negative news stories at the beginning of the COVID-19 pandemic."

184. It would have been more accurate for Ms Bennison to have said that she could have spent time reviewing only the questions identified as relevant for the brand values referred to in the contractual definition of Brand Values. This exercise would of course have taken much less time. The brand performance presentation dated September 2019 (the document that Ms Bennison referred to in her supplemental report at footnote 34 when discussing the issues I am now considering) identifies the KPIs in the section of the presentation entitled "*How we assess each brand*" under the heading "*Benchmarked Performance*" with commercial potential being tested by reference to the openness and preference KPIs. This reflects my conclusions set out earlier that it is those benchmarks (and the openness metric in particular) that are most material for the purpose of assessing any reputational changes against a stable familiarity score. The love, distinctiveness and momentum metrics are described as being relevant to an understanding of the strength of the brand and appear under the heading "*Brand Equity*". The Brand Values appear on the following slide under the heading "Measuring the Virgin Brand DNA" and are listed as being a "*DNA Component*" and the particular values including those that appear in the contractual definition of Brand Values are listed under the sub heading "*DNA Expression*". In answer to the approach adopted by Brightline (which is to test change in Brand Values by reference to the question specifically attributed to each value in the 2019 presentation) Ms Bennison maintains that is wrong and that it is necessary to concentrate on the brand equity metrics and by reference to those there is no reason to conclude that the Marks had ceased to be synonymous with the Purpose and Values.

185. Ms Bennison rejected the suggestion that synonymity depended on a consumer associating the brand with any one of the particular values identified in the contract or

by Virgin. Her response was to say that this is to be assessed by reference to the percentage who agree "… *to the closest statement proxy that you could have in consumer language to what the value is*…" and in order to measure change requires examination of how that changes over time. I accept that is so but it does not assist in reaching a conclusion on the issue I am now considering because the difference between the parties is whether the closest proxy is to be derived from love, distinctiveness and momentum metrics or from the responses to the questions Virgin identify as relevant to each of the relevant values. Ms Bennison's explanation on this issue was that she accepted that love, distinctiveness and momentum were not defined Brand Values but considered that the values "… *laddered up, if you like… into [those] three measures*." She accepted however what is obvious from what I have said so far namely that VEL linked the Brand Values specifically to their DNA questions.

186. I consider that synonymity should be approached by reference at any rate initially to the questions that VEL had identified as relevant to assessment of those values. However I also accept that the answers are likely to contribute to and therefore to be reflected in part in the love, distinctiveness and momentum measures. I accept that the responses are not material to the international high repute for the reasons identified at length earlier. However the synonymity question is a different question. That question is concerned with whether the Marks are as closely associated with the values identified in the contract as they were at the time the contract was entered into. That is a much more micro focussed question than the more macro reputation or high repute and high quality issues.

187. There is however another issue that has to be resolved before turning to the available material. There is a dispute between Professor Calder and Ms Bennison on the one hand and Dr Joachimsthaler on the other concerning how the data available in relation to each of the questions VEL identified as relevant to each of the brand values was to be assessed. The VEL approach (adopted by Professor Calder and Ms Bennison) was at all material times to look at what are referred to in this case as the top three boxes – that is the three most positive responses available. Dr Joachimsthaler's approach was to look at the top 5 answers because, he maintained, this was the only basis for testing what he described as the "*movable middle*" – that is the portion of respondents that are neither strongly positive nor strongly negative in their responses. It is necessary that I resolve this issue before proceeding further.

188. In my judgment widening the responses considered does not assist. Firstly, Dr Joachimsthaler had accepted in his second report that the methodology adopted by VEL and Professor Calder and Ms Bennison was appropriate and conventional for the purpose of monitoring the brand and by necessary extension measuring the responses to the brand value questions. He maintained however that it was necessary to look at the "*moveable middle*" "… *in order properly to evaluate and assess the status of a brand* …". The distinction between monitoring the brand on the one hand and evaluating or assessing on the other is one that is obscure even on Dr Joachimsthaler's evidence. In the course of his cross examination he explained the distinction as being:

> "… to monitor a brand, just to know are we doing fine. Fine, that's one option to monitor, rather than assess the valuation, and number 2, to manage a brand, that could be very well the

> case. If I were Virgin, I would look at all scores, especially when they want to extend licences to other third parties."

189. Dr Joachimsthaler's underlying reasoning looking at the "*moveable middle*" was that "*… those who are already highly engaged with a brand are more difficult to "move" to a higher score*." In my judgment this reasoning may well be relevant to a marketing practitioner attempting to assess the effect of advertising or other steps being taken to enhance and augment the brand. Dr Joachimsthaler acknowledges this point at least implicitly in paragraph 62 of his second report, where he states:

> "The need for brands to focus on many more consumers — more than its already-strongest advocates — is proven through various empirical studies showing that this audience can return up to five times the return on advertising spend compared to the more inert high- and low-scoring consumers. More importantly, the moveable middles are a substantially larger group than heavy buyers, proving the point that marketers interested in multiple outcomes should be working with (or toward) a much larger target."

He describes the approach adopted by VEL (and by Professor Calder and Ms Bennison) as being:

> "… in line with a conventional wisdom that mature brands must rely on defection management (i.e., customer retention) for brand maintenance and growth. However, my view is that by doing that, Virgin has sacrificed something much greater, namely the value that the potential acquisition of new customers could bring as proof of marketing programme investment effectiveness, and hence, the rest of the brand value chain."

This approach (which is consistent with the oral evidence quoted above) is unsurprising since the research paper referred to by Dr Joachimsthaler in his written evidence in connection with the issue I am now considering was expressly described in its title as being concerned with and about "*Profitable Growth by Targeting Consumers in the Movable Middle*" and in its executive summary as being " *… as this report's title notes—to help brands target a new group of consumers: the 'movable middles*." It identified the basis of the paper as having been:

> "We've developed a new methodology to identify and target these most valuable consumers and put it to the test for a brand of frozen pizza in the U.S. market. We found that the movable middles for that brand were 5X more responsive to the brand's advertising. We developed an outcome-based marketing plan to target that group, and it outperformed a traditional reach plan by more than 50% on ROAS. It even improved reach across the board."

The key point that emerges from this paragraph and the reliance placed on this approach by Dr Joachimsthaler is that it confuses what VEL might have done in order

to "… *prove marketing programme investment effectiveness*…" with the issue that arises in this case, which is to assess whether the Marks as defined in the TMLA had ceased to be "… *synonymous with the … Brand Values…"* on either of the relevant dates when compared to the position as it was on the date when the parties entered into the TMLA. In my judgment that question is to be answered by reference to movements in the scores relevant to monitoring in the sense that Dr Joachimsthaler appears to use that word – that is identifying movements or trends – as opposed to evaluating or assessing in the sense Dr Joachimsthaler appears to use those words – that is by identifying how potentially new customers could be acquired. Dr Joachimsthaler appears to accept in paragraph 61 of his report that the top three box approach is appropriate for the purpose of monitoring brand or value movements and trends. In the course of his cross examination he accepted in the end that "… *the top is important to see a decline* …". I agree.

190. In his oral evidence Dr Joachimsthaler said that "*(t)he top will move only over a long time, you will see over years sometimes* …". To my mind this is an important consideration in answering the question that actually arises in this case. It my judgment it would be entirely wrong to conclude that either the Masterbrand had ceased to be a brand of international high repute or the Marks had ceased to be synonymous with the Brand Values by reference to a change in attitude of those who are "… *not people who purchase the brand's products at every turn, but they don't have anything against the brand either*." The questions that arise in this case arise in the context of a long term relational contract and for that reason focus on changes that are profound and likely to be permanent or long term in effect. Testing change by reference to responses from those who can be described as the movable middle and whose sentiments will easily alter over short spaces of time are unlikely to provide an indication of those sorts of changes.

191. For these reasons I prefer the approach adopted by VEL and by Professor Calder and Ms Bennison. I now turn to the statistical material that is relevant for present purposes.

192. Turning to analysis of the brand tracking data for each of statements attributable to the Values referred to in the TMLA, I have reproduced the tables below from the evidential material available at trial as ultimately it was presented. As I have indicated already what occurred in November 2020 is immaterial. With those points in mind:

A8. DNA T3B _ Virgin by Country	Innovates to raise standards	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020	T
	UK	32.46%	31.24%	23.47%	24.76%	25.46%	-7.70%	
	US	29.59%	29.10%	27.23%	26.45%	30.14%	-3.13%	
	Australia	31.48%	31.94%	26.77%	27.22%	31.20%	-4.25%	
	Canada	27.87%	24.06%	17.79%	16.01%	19.68%	-11.86%	
	All	31.00%	30.23%	25.37%	25.60%	28.04%	-5.40%	

A8. DNA T3B _ Virgin by Country	Cares about its customers	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020
	UK	28.82%	30.39%	22.10%	23.65%	25.83%	-5.17%
	US	30.38%	30.31%	26.74%	27.19%	32.85%	-3.18%
	Australia	33.98%	33.01%	32.09%	26.29%	34.15%	-7.69%
	Canada	30.79%	24.60%	18.53%	17.50%	22.60%	-13.29%
	All	30.11%	30.52%	25.17%	25.38%	29.77%	-4.74%

A8. DNA T3B _ Virgin by Country	Exceeds my expectations	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020
	UK	25.61%	24.80%	19.34%	20.08%	23.05%	-5.53%
	US	24.88%	24.81%	24.32%	21.92%	25.85%	-2.95%
	Australia	25.55%	25.68%	23.24%	23.54%	30.01%	-2.01%
	Canada	23.57%	17.28%	13.52%	13.54%	18.98%	-10.04%
	All	25.24%	24.75%	21.84%	21.14%	24.97%	-4.10%

A8. DNA T3B _ Virgin by Country	Is stylish	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020
	UK	33.06%	31.66%	24.74%	25.93%	27.19%	-7.13%
	US	32.85%	30.85%	28.35%	28.04%	32.84%	-4.81%
	Australia	33.41%	30.68%	27.58%	28.02%	32.19%	-5.39%
	Canada	32.07%	26.20%	20.37%	17.41%	22.58%	-14.66%
	All	32.99%	31.09%	26.55%	26.92%	30.13%	-6.07%

A8. DNA T3B _ Virgin by Country	Is enticing	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020
	UK	27.35%	28.47%	20.62%	23.18%	23.31%	-4.17%
	US	27.86%	26.47%	24.11%	24.33%	29.02%	-3.53%
	Australia	27.21%	28.10%	24.11%	22.74%	29.43%	-4.47%
	Canada	26.34%	21.89%	17.50%	13.91%	18.51%	-12.43%
	All	27.54%	27.42%	22.47%	23.45%	26.40%	-4.09%

A8. DNA T3B _ Virgin by Country	Challenges the status quo	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020
	UK	29.19%	29.00%	21.60%	21.52%	23.80%	-7.67%
	US	29.29%	28.47%	28.56%	26.64%	30.59%	-2.65%
	Australia	32.59%	30.75%	25.88%	26.31%	30.77%	-6.27%
	Canada	27.66%	23.54%	17.99%	15.29%	23.05%	-12.37%
	All	29.58%	28.85%	25.07%	24.17%	27.54%	-5.40%

A8. DNA T3B _ Virgin by Country	Is open and transparent	Aug/Sep 2018	Jul/Aug 2019	May 2020	Jul/Aug 2020	Nov 2020	Absolute decline: Aug 2018 - Aug 2020
	UK	26.22%	26.43%	19.89%	19.46%	23.86%	-6.76%
	US	26.51%	25.65%	26.51%	26.07%	28.68%	-0.44%
	Australia	28.09%	27.26%	27.56%	24.34%	30.68%	-3.76%
	Canada	23.84%	20.45%	16.46%	15.85%	16.81%	-7.99%
	All	26.51%	26.06%	23.58%	22.83%	26.59%	-3.67%

193. Brightline submits that on this material and on any view, there were significant declines in the Brand Values between November 2018 and May or July/August 2020 that were sufficiently dramatic that the Marks had ceased to be synonymous with the Brand Values or the Brand Purpose by each of the relevant dates, when compared

with the position as it was at the date the TMLA was entered into. I do not agree. Variations as set out in the "*All*" line summarise the relevant movements at between about 4 percentage points and about 6 percentage points . I do not consider movements of that magnitude to be massive enough or as taking place over a sufficiently long period to prove (as Brightline must prove) that the Marks ceased to be to be synonymous with the Brand Values when compared with the position as it was when the TMLA was entered into.

Material Damage To Brightline's Reputation Or The Value Of Its Business.

194. Even if my conclusions that Brightline has not proved that (a) the Masterbrand had ceased to be a brand of international high repute by the date when Notice to Cure was served or was not such a brand when it served its Notice of Termination or (b) the Marks were no longer of high quality or (c) the Marks were no longer synonymous with the Brand Values as set out in the TMLA, are wrong, it would be necessary for Brightline to prove that, at the relevant dates, continued use of the Marks would cause material damage to Brightline's reputation or the value of its business. In my judgment it has plainly failed to do so.

195. Strictly, the point is not one that arises given the findings I have made so far. I set out my conclusions on the issues that were relied on by Brightline at the end of the trial but all those issues have to be viewed against my conclusions concerning the reputation of the brand and status of the Marks set out above. Given those conclusions the claim that continued use of the Masterbrand or Marks would cause material damage to either Brightline's reputation or the value of its business is bound to fail. The findings that follow are material only if and to the extent that I was wrong in the conclusions I have so far reached.

196. First it is submitted by Brightline that its reputation declined in the eyes of investors. That is an argument that I reject for the reason already given earlier when considering Mr Nicholson's evidence on this topic. In any event, even if I was wrong to reject Mr Nicholson's evidence on these topics, the point remains that there is no evidence that debt investment decreased or could only be secured by offering a higher yield to bond holders on issue, much less is there any evidence that any such changes were caused by the Masterbrand ceasing to be a brand of international high repute or that the Marks that are its physical embodiment ceased to be synonymous with the values identified in the TMLA.

197. Some reliance was placed by Brightline on a requirement in 2020 by two real estate valuers seeking payment by Brightline of fees in advance. Although understandably Brightline place significant reliance on evidence from Mr Swiatek on this issue, no evidence was given by the valuers concerned. In my judgment Brightline's reliance on this incident as demonstrating that Brightline's reputation had been materially damaged by reason of Brightline's association with Virgin without adducing such evidence deprives VEL of the opportunity to explore with the valuers concerned whether their concern was as they apparently articulated it or whether it was a concern about the financial stability of Brightline, given that in August 2020 it could not trade as a result of the pandemic and had not been since March 2020. As Mr Swiatek accepted in the course of his cross examination, Brightline had no significant income at this time and that was widely known including by the valuers, as was the fact that

Brightline had ceased operations in March 2020. Although perhaps of lesser importance in this context, I am satisfied that the fact that 80% of Brightline's operational staff had been laid off had been the subject of press articles and was something that was probably known to the valuers at the time given they were locally based. In my judgment in these circumstances, the weight that can safely be attributed to evidence from Mr Swiatek on this issue is limited.

198. I conclude that this conversation was one that was not considered relevant at the time to what by then was a dispute between Brightline and VEL. Had it been it would have been the subject of email comment and possibly a note. By the time of this conversation, the termination had taken place and Brightline was aware that its purported termination was under challenge. Herbert Smith Freehills had written to Brightline's solicitors on 31 July 2020 on behalf of VEL stating that "*… our client does not accept that the Notice is valid. Indeed, your client's attempt to serve such a notice is plainly a repudiatory breach of contract giving our client a right to terminate the TMLA and claim substantial damages*." The letter then explains over 5½ pages why in their view that was so. That letter referred specifically to what was characterised as a failure to particularise what "*detrimental impact*" was alleged to Brightline' s reputation (see paragraph 3(e)) and a failure to "*… particularise any damage that you say has been caused or will be caused to your client as a result of the use of the Virgin brand. We have now pointed this out to you on numerous occasions*." Given the contents of this letter, in my judgment it is inherently improbable that the conversation to which I am now referring to would not have been the subject of an email or other internal note. It is not suggested such a note or email exists but is privileged, but that there is no such material. In my judgment that suggests the conversation was significantly less specific or significant than is now suggested. It is not suggested that the valuers were not available to give evidence. I conclude that whatever might have been said by the valuers, the likely real concern for them was that their proposed contractual counterparty was not trading, had not traded for several months and had been forced to discharge about 80% of its employees as a result of the impact of the pandemic.

199. Although it was suggested by Brightline that its standing with consumers was damaged by its continued association with Virgin, there is no evidence that is so. Placing reliance on Ms Bennison's evidence that a decline in brand equity equates to a decline in the financial value of the enterprise, in my judgment that goes nowhere unless it can be shown that Brightline's brand equity had been damaged. There is no evidence that demonstrates that is so. The limited evidence that VEL obtained about Virgin Trains USA was addressed by Ms Bennison in paragraph 11.21 of her report. She summarises the evidence available in tabular form as:

Virgin Trains USA	2019	May 2020	July-August 2020	November 2020
Awareness	26%	35%	32%	38%
Familiarity	18%	28%	25%	30%
Openness	89%	87%	92%	90%
Preference	42%	44%	47%	49%

Ms Bennison said the material was limited because Brightline was "… *a secondary VCo* …" and without a point of comparison for 2018 for obvious reasons, but nonetheless:

> "Bearing in mind the limited physical re-branding from Brightline to Virgin by May 2020 from a consumer perspective and the subsequent dropping of the Virgin name from even the trading company by November, the pure power of the Virgin brand to drive awareness amongst USA consumers is startling and grows rather than falls over this period. The sample sizes will be small but in my view sufficient to draw reassurance that the effect of the continued use of the Virgin Mark would have continued to be a positive one in line with the findings more broadly around the perceptions of the Virgin brand in the USA."

I agree. Both openness and preference increased during May to August 2020, and awareness and familiarity also increased between the 2019 dip and 2020 Dip 2. This is consistent with the KPI information available for Virgin in the USA. As Professor Calder put it in his report:

> "The Virgin brand in the US was strong during the period in question. Awareness ranged from 92 to 96 percent. Familiarity ranged from 61 to 64 percent. Openness ranged from 70 to 75 percent. Preference ranged from 19 to 25 percent. … It is difficult to believe that Brightline's US business would have been better off without the brand. Nor is it credible to think that Brightline could have invested enough in a short amount of time to even come close to these numbers, much less to better them. Without the brand, Brightline would clearly have been disadvantaged in attracting customers. As long as Brightline operated the business as planned, the Virgin brand would have contributed to the business, not harmed it."

Although it was suggested to Professor Calder that this was flawed because he had failed to consider the counterfactual, I consider this to be misplaced. Had I concluded that the Masterbrand had ceased to be a brand of international high repute or the Marks had ceased to be synonymous with the brand values identified in the TMLA, the KPI numbers referred to respectively by Ms Bennison and Professor Calder would have been the same and the conclusions they reached by reference to them the same and so are independent of any conclusion reached concerning the reputation of the brand and the synonymity of the Marks with the values identified in the TMLA.

Conclusions

200. For the reasons set out above, I conclude that Brightline has failed to prove any of the three issues it had to prove if it was to succeed in its defence and for that reason the claim succeeds.