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Case No: HP-2020-000016

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday 4th March 2021

Before :

THE HON MR JUSTICE MELLOR

Between :

CABO CONCEPTS LIMITED
- and -
(1) MGA ENTERTAINMENT (UK) LIMITED
(2) MGA ENTERTAINMENT, INC.
(a company incorporated under the laws of the state
of California, USA)

Claimant

Defendants

Ms Ronit Kreisberger QC, James St Ville and Stefan Kuppen (instructed by **Spector, Constant & Williams**) for the **Claimant**
Ms Victoria Wakefield QC, Tom Moody-Stuart QC and Jennifer MacLeod (instructed by **Fieldfisher LLP**) for the **Defendants**

Hearing date: 25th February 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 2pm on Thursday 4th March 2021.

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MR JUSTICE MELLOR

Mr Justice Mellor:

1. This is my judgment following the first CMC in this claim by the Claimant for damages allegedly suffered due to certain alleged conduct of the Defendants. The conduct in question is alleged to give rise to infringements of competition law but also unjustified threats of patent infringement. The inclusion of the latter resulted in the claim being issued in the Patents Court, as required by CPR 63.2(2).
2. The parties have largely agreed a directions order and its accompanying list of issues. However, these remain subject to three major and three minor issues which I have to determine.
3. I was assisted by detailed Skeleton Arguments from each side. At the fully remote hearing, Ms Kreisberger QC for the Claimant unfortunately encountered some difficulties with her internet connection (a problem with which I can only sympathise) eventually joining the hearing by telephone. Although there were points at which it was difficult to hear what she was submitting, some pauses and repetition enabled her to get her points across very effectively. I am grateful to her and to Ms Wakefield QC for the Defendants for their succinct and helpful submissions.
4. Of the three major issues, the first and most significant is whether there should be a split trial of liability and quantum as the Claimant proposes or a single trial, as the Defendants propose. In the second, the Defendants apply for this case to be transferred from the Patents Court to the Competition List, whereas the Claimant invites me to allocate this case to a nominated Judge of the Patents Court who has competition law expertise. The third issue is a dispute between the parties as to the approach to be taken to disclosure. I propose to deal with the second and third issues before addressing the major issue of whether a split trial should be ordered in this case.
5. I will identify and deal with the three minor issues at the end.

Background

6. The claim involves two products. First in time was the Defendants' LOL Surprise! Product ("the LOL product line") which is described in their skeleton argument in the following way:

The LOL Surprise! product line comprises a range of dolls characterised by proportionately oversized and cartoon-like head and eyes, with a range of collectible and interchangeable accessories; contained in a surprise format requiring unwrapping of a spherical ball container wrapped with layers of tight plastic material, in a blue "cyan" colour with a pastel palette, and a prominent speech bubble.

7. The LOL product line was first presented to retailers in the US from June 2016, and made available for sale in the US from October 2016. It was launched in the UK from February 2017. It does not seem to be in dispute that it was an extremely successful product line.

8. Second in time was the Claimant's product branded Worldeez. It comprised a series of small plastic collectible character toys and cards, yet the flagship product in the Worldeez range (as the Claimant puts it in the Particulars of Claim) was a globe, opened with a collectible key to reveal two Worldeez characters and collectors' cards hidden inside.
9. The Claimant's attempts to launch its Worldeez product line began in around April and May 2017. It arranged for a review on a popular YouTube channel presented by a 'child influencer'. It says it arranged for 3 major UK specialist toy retailers to launch the Worldeez product line, that discussions took place for certain in-store launch events and it is said that certain orders were placed.
10. The Defendants wrote a letter of complaint to the Claimant dated 23 May 2017, claiming that the Worldeez products were marketed in packaging which was confusingly similar to that of the LOL products. The Claimant alleges that, at around the same time, the Defendants embarked on a campaign to put pressure on UK toy traders not to buy, stock or supply Worldeez toys. This course of conduct is alleged to include unjustified threats of patent infringement.
11. In about June 2017, the Claimant changed the wrapping of the Globe from blue to white, as the Claimant puts it "to further differentiate the Globe from LOL products" and the Claimant alleges that no Globes in blue wrapping were shipped to retailers. I note that when one puts the respective products side by side, the Worldeez globe is somewhat smaller than the LOL globe.
12. The Defendants allege that the get-up of the Worldeez globe product was closely similar to that of the LOL surprise product line, so much so that in addition to the allegations of passing off made back in 2017, those allegations have been fully developed and pleaded as part of its defence to this claim.
13. In the Particulars of Claim the Claimant has pleaded various communications passing between the Defendants and various toy retailers and adds some further communications in its Amended Particulars of Claim.
14. As to the alleged effect of those communications, the Claimant alleges that the planned UK launch events in July 2017 were cancelled and that by September 2017, orders for the Worldeez product from UK retailers were cancelled, leading to the ultimate demise of the Worldeez product in early 2018.
15. After pre-action correspondence between July and December 2019, this claim was issued on 15 May 2020. By his Order dated 21 July 2020, Master Teverson gave permission to serve out on the Second Defendant. To date pleadings have been exchanged (Particulars of Claim dated 23.7.20, Defence 23.10.20 and Reply 07.12.20) and Disclosure Reports have recently been served.

The claims and responses set out in the pleadings

16. The Particulars of Claim commence with a short introduction, followed by a long section entitled Factual Background in which the Claimant pleads the circumstances which existed in early 2017, and the various communications identified and relied upon so far between the Defendants and various UK retailers.

17. Against that factual backdrop, the claim for unjustified threats under s.70 of the Patents Act is pleaded succinctly over just one page.
18. The competition claims occupy the next 10 pages of the Particulars of Claim. They involve claims under Arts 101 and 102 of the TFEU and their national equivalents in Chapters I and II of the Competition Act 1998. As is to be expected, the pleading addresses the relevant affected markets before moving on to set out the Claimant's allegations as to dominance and abuse. Then the alleged anti-competitive agreements and/or concerted practices relied upon under Chapter I/Art 101 and their anti-competitive effects are pleaded out in some detail. There is then a short section of two paragraphs by way of conclusion on the issues of liability.
19. In view of the arguments which I have to deal with I will cite how the Claimant puts its case under the heading of Causation and Loss, to which I have added my own emphasis:

76. In the premises, the actionable threats of patent infringement proceedings and/or breaches of statutory duty (individually or together) caused the exclusion of the Worldeez product line from the relevant markets and its eventual demise. But for the aforesaid threats / breaches by MGA, the Worldeez product line would have enjoyed a successful launch, initially in the UK and Ireland, and would have gone on to generate significant sales in the UK and globally, including in the United States and other English speaking territories, such as Canada and Australia, not least given the generally close links between toy trends experienced in those markets and the international appeal inherent in the Worldeez design theme.

77. Accordingly, as an intended and/or foreseeable consequence of the conduct on the part of MGA pleaded above, Cabo has suffered loss and damage including in the form of lost profits in respect of:

(a) Lost sales to toy traders, including but not limited to the UK Launch Retailers and other toy traders identified at paragraph 53(e) above, which cancelled existing orders and/or declined to take supplies of Worldeez as a result of the infringements and/or threats which form the subject-matter of the Competition Law and Threats Claims, or any of them.

(b) Lost sales and licensing revenues resulting more generally from the foreclosure of Worldeez and its ultimate demise. For the avoidance of doubt, this head of claim is not confined to losses in the UK and Ireland but also extends to lost profits in other jurisdictions which were consequent on the foreclosure/ demise of Worldeez.

78. Whilst the quantum of losses suffered by Cabo will be the subject of expert evidence, Cabo will say at trial that it would have captured a significant share of sales made by MGA around the world which, according to an article by The Atlantic Magazine of 29 November 2018, amounted to more than 800 million units of LOL products by November 2018 since their launch in late 2016. Cabo currently estimates its losses from lost direct sales alone (excluding licensing

revenues) to be in excess of £170 million. Cabo will therefore seek disclosure from MGA as to its sales of LOL products to inform its assessment of the market opportunity that would have been available to Worldeez products but for the infringements pleaded herein.

20. I need only identify a few points from the Defence:

20.1. First, a major plank of the Defence is the allegation that the Worldeez product would have resulted in passing off and these allegations are pleaded out fairly fully.

20.2. Second, at the risk of oversimplification, it appears that the Defendants largely admit the communications relied upon in the Particulars of Claim, but they deny that their actions had any, alternatively any significant impact on the Worldeez product line, for a number of reasons:

20.2.1. First, the Defendants allege that the Worldeez product line failed not because of action taken by them, but because of other factors i.e (i) many new products do not succeed; (ii) copycat products do not succeed, because, it is alleged, consumers overwhelmingly prefer the original; (iii) Worldeez had other routes to market, such that, if the product was going to succeed, it would have succeeded in any event.

20.2.2. At least some existing retailers of the LOL product, including Toys R Us considered the get up of the Worldeez product to be 'too close'.

20.3. Third, if the Defendants actions had any impact, it was the result of the Defendants legitimate assertion of its right by way of the law of passing off and the steps taken by them to mitigate the harm caused by side by side sales of the Worldeez globe product and the LOL product line.

21. In relation to the patent threats, the Defendants also say the only alleged patent threat identified by the Claimant formed part of the communications with The Entertainer in which the Defendants asserted their rights in passing off. On this basis it is denied that the threat had any causative effect on the commercial conduct of the Entertainer.

22. The Defendants' pleading to the competition claims identifies a considerable range of disputes, which I need not go into in this Judgment.

23. As to causation and loss, the Defendants plead that their conduct did not cause the exclusion of the Worldeez product line, and claim that it is speculative to assert the Worldeez product line would have gone on to generate considerable sales etc.

24. In the fairly extensive Reply (which runs to 25 pages), the allegation of passing off is denied in considerable detail, plus there are responses made to a number of points regarding both the threats claim and the competition claims.

25. In respect of the threats claim, the Claimant contends that the patent threats extended beyond that made to the Entertainer. The Claimant's argument is that references to 'knock-offs' would have been understood by the recipients as

including an allegation of patent infringement. This is a short point which the trial judge will have to decide.

26. After that overlong introduction, I turn to address the three main issues, dealing first with the transfer application.

Transfer

27. On the transfer issue, there is actually very little between the parties. Although in their respective skeleton arguments there is much debate, the end point for each side is very similar. Both seem to agree that ideally this claim should be tried by a judge with, as it is put, dual expertise but with a greater emphasis on expertise in competition law.
28. The point underlying the Defendants' application is its submission that the centre of gravity of this claim lies in the competition claims, a submission with which I entirely agree. The alleged unjustified threats are just some of the communications relied upon.
29. The Defendants do not seek to justify any threats of patent infringement which were made, so this case does not include any claim for infringement nor any challenge to validity of any patent. In terms of patent technical complexity, this case is at the very lowest end of the scale. The Defendants also say that the Intellectual Property elements of this claim, namely the patent threats and passing off, are well capable of being handled by any of the judges in the Chancery Division, another point with which I agree.
30. Furthermore, it is clear that the time which will be taken up at trial with the Intellectual Property aspects of this claim will be much less than the time needed to resolve all other issues.
31. The Defendants apply under CPR 30.5(2). This provides that '*a judge dealing with claims in a specialist list may order proceedings to be transferred to and from that list*'.
32. It is certainly true that the Patents Court is a specialist list. However, despite all appearances, the Competition List does not qualify as a 'specialist list' within the meaning of that term in the CPR. The 'Competition List' exists for listing purposes, but has no status beyond that, as I understand the position.
33. Furthermore, as the Claimant pointed out, of the 10 full High Court Judges able to sit in the Patents Court, 6 of them are experienced competition law specialists.
34. In these circumstances, as I indicated to the parties in the course of the hearing, although it is not appropriate for me to allocate this case to any particular judge or a sub-group of those Judges able to sit in the Patents Court, in the usual way I am sure that the Listing Office will endeavour, so far as is possible, to list the trial of this action before a Judge with competition law expertise.
35. Despite that indication, which seemed to me to achieve (to the extent possible) what each side wanted, Ms Wakefield QC did try to press her application for a transfer

of this case out of the Patents Court specialist list into the general Chancery Division list, but she realistically recognised that since such a transfer made no or very little difference, there was no or very little reason so to order. For these reasons I decline to transfer this case.

36. As for the Claimant's request for this case to be docketed to a named Judge, I do not consider it is appropriate for me to accede to this request at the moment. I do not rule out the fact that it may, at some later stage, become apparent that this case requires active case management from an allocated Judge, and in that regard the parties will have to keep the situation under review.

Disclosure

37. As I understand the position, in discussions the parties agreed that the Disclosure Pilot in PD51U did not apply. As a result, the Claimant submitted that I should order "*request-led, search-based disclosure by reference to issues and/or categories of documents, and disclosure of known adverse documents*". By contrast, the Defendants contended for issue-based disclosure under CPR r31.5(7).
38. Each side filed a Disclosure Report, but I found they addressed matters at a high level of generality by reference to 7 and 6 categories of documents respectively, with each category being expressed in fairly general terms. I give three examples to illustrate the point: 'Documents relating to the Claimant's Worldeez product'; 'Documents relevant to the market for the toy industry'; 'Documents relating to the ultimate demise of the Wordeez product and brand both in the UK and internationally, including the steps taken to mitigate that demise'.
39. The Disclosure Reports provided me with little or no assistance in assessing the merits or demerits of the two disclosure regimes which the parties were putting forward. Furthermore, the proposed List of Issues for determination at trial did not take the matter forward either. As I pointed out to the parties during the hearing, each side had yet to develop what their chosen disclosure regime would really entail.
40. It is true that PD51U, §1.4 provides, in so far as is relevant '*The pilot shall not, unless otherwise ordered, apply to proceedings which are - (1) a Competition claim as defined in Practice Direction 31C;*' However, I was curious as to the reasons behind the exclusion of competition claims from the Disclosure Pilot. It may be my lack of experience of competition claims, but I could not immediately see why competition claims would not benefit from the new culture embodied in the Pilot. I speculate that the exclusion may have something to do with the explicit references in Practice Direction 31C at §1.6 and §2.7 to specific provisions in the Damages Directive (i.e. Directive 2014/104/EU ... on certain rules governing actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union). Although PD31C has been amended as of 1.1.2021, the previous version of PD31C continues to apply in respect of the events said to give rise to the competition law claims in this action which occurred prior to 31.12.2020.
41. Bearing in mind I had reached the preliminary conclusion that I did not have sufficient information to enable me to make a properly informed decision between

the two alternatives which the parties presented, Ms Kreisberger QC indicated that the Claimant would be content to adopt the regime of the Disclosure Pilot. On taking instructions, Ms Wakefield QC agreed. Accordingly, I will order that disclosure in this action takes place pursuant to the Disclosure Pilot in PD 51U.

42. That leaves the question as to how we should deal with the steps which PD51U assumes have already occurred by this point, and how various time limits set out in PD51U should apply.
43. Unless, on receipt of this Judgment, either party suggests that going through the exercise of Initial Disclosure would be helpful, I will not order the parties to go through the Initial Disclosure phase, not least because the Defendants have already produced certain documents requested by the Claimant and which feature in the amendments made to the Particulars of Claim. To the extent necessary, I abrogate the obligation on each side to provide Initial Disclosure, under PD51U, §5.10. It seems inevitable that any documents which would have been produced in Initial Disclosure have already been produced or are covered by Known Adverse Documents or will be covered by the (inevitable) order for Extended Disclosure which will be made in due course.
44. As for setting the timetable running which is contemplated in PD51U, §7 and bearing in mind the parties have already started to consider disclosure, I will direct that the parties take the step in §7.1 within 14 days of the date of this Judgment and that the Claimant must prepare and serve on the other parties a draft List of Issues for disclosure by 8th April 2021.
45. If the parties are able to agree a proposal for Extended Disclosure, so much the better. If not, they will have to come back for a second CMC.

Split trial

46. The applicable principles are now clear. The overall test to be applied is to ensure that proceedings are dealt with justly and at proportionate cost. This test requires a pragmatic balancing exercise, taking into account numerous factors, including those helpfully summarised by Hildyard J in *Electrical Waste Recycling Group Limited v Philips Electronics UK Limited and Others* [2012] EWHC 38 (Ch) at [5] - [8]:

“5. Where the issue of case management that arises is whether to split trials the approach called for is an essentially pragmatic one, and there are various (some competing) considerations. These considerations seem to me to include whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased aggregate costs if liability is established and a further trial is necessary; what are likely to be the advantages and disadvantages in terms of trial preparation and management; whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials; whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case; whether a split may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages); whether there are difficulties of defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of

duplication, delay and the disadvantage of bifurcated appellate process; generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.

6. Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and a pragmatic approach, may include whether a split would assist or discourage mediation and/or settlement; and whether an order for a split late in the day after the expenditure of time and costs might actually increase costs.

7. All these sorts of factors seem to me to be potentially relevant and need to be taken into account in what is essentially a pragmatic balancing exercise in assessing how the case is likely to unfold according to whether there is or is not a split.

8. It follows that each case falls to be assessed by reference to its own facts, features and peculiarities. Further, the assessment has to be made before the Court can responsibly take any reliable view as to the prospects of success, and thus as to whether quantum will be a live issue or not.”

47. Although each side puts forward a range of arguments invoking a number of the factors mentioned by Hildyard J, it seems to me that the real dispute between the parties is centred on two main points. I propose to outline the positions on these two main points before setting out my analysis which will include other points raised by one side or the other.
48. The first main point is whether it is possible to define a split with clarity – or ‘a clear demarcation’ – so as to avoid duplication and attendant difficulties. The second is whether bifurcation is desirable because of the number of potential permutations of findings at stage 1, each of which, it is said, could or would lead to a different enquiry at stage 2 such that, if you had a split trial, the necessary framework would be identified before embarking on stage 2. As will appear, in this case these are not separate points, but closely related.
49. I should record where the split envisaged by the Claimant lies, a point clarified in oral argument. Stage 1 will involve the issues of liability and what the Claimant called ‘basic causation’. Stage 2 will involve the remaining causation issues (in fact the bulk of them) and quantification of damages. The Claimant points out that to establish the breaches of statutory duty in the competition claims, it will need to show ‘some harm’ – this is what it means by ‘basic causation’.
50. Split trials of liability and quantum are, of course, very common in intellectual property cases, but not universal. However, to my mind, the split is usually between liability being determined in the first trial and all issues of causation and quantum being considered (if at all) at the second stage. My reference to ‘if at all’ is a recognition of the fact that very few IP cases proceed to a trial of quantum. This, however, reflects two frequent features of IP litigation. The first is that the primary remedy for the claimant is often an injunction. The second is that once liability has been determined, it often proves much easier to reach a settlement on issues of quantum.
51. The split proposed by the Claimant in this case lies at the same point as in the typical IP case. In most such cases, that the claimant has suffered some damage by the

events giving rise to liability is usually self-evident, so the successful claimant then proceeds to the quantum stage and often has an election between an inquiry as to damages or an account of profits. Again, in most such cases, the quantum enquiry is heavily dependent on the scale of the acts found to infringe. There are rare cases where the Court is not prepared to order an inquiry as to damages without the Claimant producing evidence of ‘some harm’. This can occur in threats claims, where, although to establish liability a claimant must show it is aggrieved by the threat that is not an onerous hurdle. A requirement to show ‘some damage’ arises in a threats claim where in order to progress to the next stage of an inquiry as to damages (or an account of profits), the claimant needs to show at least some damage has occurred which would justify an inquiry (see *Prince plc v Prince Sports Group Inc* [1998] FSR 21 at p36). This, it seems to me, is equivalent to the Claimant’s concept of ‘some harm’ in this case.

52. The similarities between a typical IP case and this case end there. The mere fact that a split can be identified and that it lies at the same point as in IP cases, does not mean that in this particular case, it results in a clear demarcation between issues and evidence.
53. Turning back to the rival contentions in this case, the Claimant submits that a clean split can easily be achieved. This is based on its submission that in stage 1 the Claimant only need to establish that it has suffered ‘some harm’ so that the causation issue it includes in stage 1 is a low hurdle. As I mentioned above, on this view of the world, the real issues on causation are being left over to stage 2. Then, according to the Claimant, in stage 2, the court will assess the degree of commercial success the Worldeez product would have had if the infringements had not occurred.
54. On the second main point, the Claimant submits that there are a large number of possible permutations of loss (i.e. in stage 2), depending on which of the various infringements are or are not made out in stage 1.
55. For its part, the Defendants submit that no clean split is possible in the circumstances of this case. They point out that the Claimant’s case on damage is not of ‘some harm’ but a total exclusion from the market. In any event, they submit that the extent of the harm suffered is intimately tied up with the alleged infringements.
56. The emphasis placed by the Defendants on the Claimant’s pleaded case – of exclusion from the market – led to Ms Kreisberger QC stressing, in effect, that the Claimant might not succeed in its pleaded claim of exclusion from the market and might only establish a very limited extent of liability giving rise only to damage caused by, for example, the lost sales to one particular retailer, such as The Entertainer.
57. Ms Kreisberger QC also submitted that a split trial was the ‘normal’ order in competition law cases by reference to the following sentence in the decision of the CAT (Roth J as President) in *Sportradar AG v Football Dataco Ltd* [2020] CAT 25 at [58], where the CAT had to decide an application by the Defendants to transfer the proceedings from the CAT to the High Court:

“Thus in the CAT proceedings, as is not uncommon in stand-alone competition cases, issues of the quantum of damages can be split off to be determined at a separate trial after determination of liability.”

58. This is saying nothing more than quantum *can* be split off and does not in any way establish that a split is the *normal* order. Even if it is, I still have to consider the circumstances which exist in this case.
59. Ms Kreisberger QC also sought to make a point that there is significant efficiency in the court having determined the restrictive effects counterfactual before it proceeds to hear argument/evidence on quantum, relying on this quote from *Competition Litigation, UK Practice and Procedure, 2nd edn, 2019*, by Mark Brealey QC and Kyla George:

“The [damages] counterfactual is closely related and involves a similar exercise to the counterfactual undertaken to determine whether a restriction constitutes a restriction of competition ... The counterfactual in the damages exercise involves assessing the harm that the claimant has sustained measured against what would have happened had the wrong to the claimant never occurred.”

60. As Ms Kreisberger QC pointed out, a similar point was also made by Zacaroli J in *Churchill Gowns v Ede & Ravenscroft* [2020] CAT 15 at [24]. However, it is important to note that Zacaroli J made his point in the context of a split between liability and causation on the one hand, leaving over only the quantification of damages to stage 2.
61. Leaving aside the two main points, the Claimant relies on three further factors in favour of a split trial. It submits that delaying the award of damages to the Claimant will not cause it undue prejudice; that a split trial would assist mediation and/or settlement and that any duplication involved in a split trial, in terms of witness evidence or otherwise, does not outweigh the efficiencies embodied in its previous points.
62. It is not necessary for me to set out the Defendants’ arguments in detail, partly because some have been overtaken by refinements in the Claimant’s position in the course of argument, and the remainder largely coincide with my views reflected in the analysis which follows.

Analysis

63. As I indicated above, I see the two main points as closely related. I will start however with the Claimant’s contention that there are a large number of possible permutations of loss. In the somewhat unusual circumstances of this claim, I consider the Claimant significantly exaggerates this point.
64. As the Defendants point out, the whole tenet of the Claimant’s case is that it was wrongfully excluded from the market by the acts of the Defendants which are complained of. It seems to me that whatever combination of infringing acts are actually established, the Claimant will still run its exclusion from the market argument until perhaps a tipping point is reached where it becomes plain the total

exclusion from the market argument is untenable. To take an example used in argument, if the only infringing acts established relate to the Claimant's dealings with The Entertainer, Ms Kreisberger QC accepted for the purposes of argument that the Claimant would not be able to sustain a damages claim based on total exclusion from the market and would have to fall back to claiming e.g. the loss of sales which would have been made through The Entertainer and possibly some other consequential losses.

65. I accept entirely that passing what I have called the tipping point may involve the Claimant pursuing these alternative damages claims in respect of their damaged relationships with potentially a number of retailers. However, it seems to me to be inevitable that to decide the case on liability, the Court will receive evidence about at least the initial sales the Claimant had secured from The Entertainer (and other retailers) and it seems a matter of common sense that the Claimant would have prepared forecasts of likely sales to each retailer, whether actually discussed with the retailer or not, which will also be part of the evidence on liability. I accept that a damages claim specific to that retailer may well go somewhat further, but the point is that much of the foundation for all the possible alternative damages claims will be covered in the evidence on liability in any event. This points to a degree of overlap between liability and quantum and hence a degree of duplication if a split trial was ordered. (cf *Electrical Waste* at [13]).
66. I point out that those putative claims for damages involving individual retailers are not found in any pleading yet, probably for two reasons. First, because the Claimant wishes to maintain focus on its larger claim for as long as possible. Second, because until the arguments on split trial were developed, the Claimant had not really contemplated what would be much smaller claims involving individual retailers.
67. Leaving aside the putative claims for damages involving individual retailers, there is no doubt that the Claimant's primary focus is on its much larger claim for damages caused by its claimed total exclusion from the market. Although in theory there are a large number of possible permutations of which infringing acts are found proved, as I indicated above, provided the Claimant has proved sufficient infringing acts to be able to make the argument credible, perhaps a majority of these permutations will result in the single, much larger, damages claim being pursued. This points against a split, in my view.
68. Although I am not making any findings in this regard, it seems to me that the ultimate reason for the "demise of the Worldeez product" was a decision on the part of the Claimant to cease its marketing of the product line. It is tolerably clear that the Claimant's plan was for its Worldeez product to be a major competitor to, and to take market share from the LOL product. When its launch faltered, it appears the Claimant was not interested in making sales of the product which were significantly below its expectations and so the product line was withdrawn.
69. On one view, the Claimant's decision does represent a demarcation, but it does not, it seems to me, create a clean split in the issues in this case, for the following reason. Provided the tipping point has not been reached, the Claimant's case must be that whatever the extent of the infringements of competition law and/or unjustified threats of patent infringement for which the Defendants might be found liable in stage 1, the Claimant had no choice but to withdraw from the market, alternatively

that it had sufficient justification to take that decision. This will be a key point on causation, but I would expect the evidence from the Claimant's side going to that will come from those witnesses who are centrally involved in giving evidence on liability. This, again, points against a split.

70. So, in stage 2, whilst there may be many permutations of loss which will have to be considered (i.e. how successful would the Worldeez product have been on the basis that the infringements had not occurred), those permutations will exist whatever the findings on liability, unless most of the Claimant's case on liability has collapsed. In other words, the possible permutations of loss which will have to be examined in stage 2 are largely independent of the extent of liability found, assuming of course that some liability is established in stage 1.
71. In terms of other points, Ms Kreisberger QC's point on the counterfactuals would, it seems to me, have some force if her split was between liability and causation on the one hand and quantification of damage on the other, but it isn't. The counterpoint from the Defendants stems from the other reasons they put forward for the failure of the Worldeez product, as summarised in paragraph 20.2.1 above. It seems to me that those points will be deployed both on liability (did the representations actually have an anti-competitive effect?) and causation.
72. As the Defendants submit, the Court is going to have to consider the extent of the harm caused by any of the conduct complained of, and this is the same question which will have to be considered on causation, feeding into the assessment of loss. Accordingly, I foresee that the evidence required to determine quantum is likely to overlap with the factual evidence in relation to liability (cf *Electrical Waste* at [13]).
73. There are a few final points which I have taken some account of.
74. First, in my view, the three further factors which the Claimant prayed in aid told against a split.
75. Second, I find it more than a little odd that the Claimant seeks a split trial rather than the Defendants. One would have thought the Claimant would want to secure its damages as quickly as possible, particularly if the loss is as large as it contends.
76. Third, although the Claimant suggests that the prospects of settlement will be improved once liability has been determined, I do not agree. Assuming that the Claimant's case on liability has not collapsed and it has established at least some of the alleged infringements, the parties will be more or less none the wiser as to the realism in the Claimant's very large claim for damages. Hence there is at least a suspicion that the Claimant sees a split trial as desirable because it can hold the threat of the large damages claim over the head of the Defendants for longer. Conversely, a single trial will get the parties to a resolution of that large damages claim sooner.
77. In view of the analysis I have set out above, a split will involve duplication of witnesses and some of the evidence. Furthermore, two trials will inevitably cost more than a single trial and it will take much longer to resolve the dispute. Contrary to the Claimant's submission, considerations of efficiencies, cost savings and time to achieve resolution all point towards a single trial.

78. For all these reasons, I have reached the firm conclusion that this case should go forward to a single trial at which liability, causation and quantum will all be decided.

Final issues

79. The final three points concern trial length, service of skeleton arguments before trial and technical complexity rating.

80. Both parties stressed that it was difficult to make a reliable trial estimate at this stage. The Claimant estimated 4 weeks for stage 1 and 5 weeks for a single trial. The Defendants' estimates were somewhat shorter. In view of the significant uncertainty, I will direct a listing for the single trial with an initial trial estimate of 4 weeks. I reminded the parties of their duty to keep the trial estimate under review as the action progresses and to inform the listing office if or when the trial estimate changes.

81. The Defendants ask for sequential exchange of skeleton arguments before trial. The Claimant resists this on the basis that the issues will be clear from the pleadings and evidence served. However, I strongly suspect that the Claimant's case will be significantly refined in its skeleton argument for trial. To avoid the opening trial skeletons passing like ships in the night, I consider that sequential skeletons are desirable. There was also a mini-point about timing. In advance of a 4 week trial, I will direct the Claimant serves its opening Skeleton Argument 21 days in advance of the start of trial, with the Defendants' opening Skeleton Argument served 14 days in advance.

82. In terms of technical complexity, the appropriate rating for this case is 1. As indicated, if at all possible, the trial should be listed before a Judge with expertise in competition law.