Neutral citation [2022] CAT 22

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1427/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23 May 2022

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

BELLE LINGERIE LIMITED

Claimant

- v -

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

Defendants

Heard at Salisbury Square House on 14 March 2022

RULING (FAST-TRACK)

APPEARANCES

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

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

A. INTRODUCTION

1. On 17 December 2021, Belle Lingerie ("BL") issued a Claim Form, pursuant to section 47A of the Competition Act 1998 (the "CA 1998") for loss and damage alleged to have been caused to BL as a result of what BL maintains were the Defendants' unlawful agreements and/or concerted practices in relation to the supply of lingerie in the UK. Until 27 September 2021, BL was a long-standing online retailer of the Defendants' lingerie, nightwear and swimwear products ("Wacoal Group Products"). It is alleged that there were a series of resale pricing and online sales policies implemented in a selective and discriminatory fashion by the Defendants which had the object and/or effect of restricting competition pursuant to section 2 of the CA 1998 and, until 31 December 2020, Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

2. On the same date BL applied for an Order under Rule 58 of the Competition Appeal Tribunal Rules 2015 (the "Rules") that its claim be subject to the fast-track procedure ("FTP"), and also sought an asymmetric order capping the costs that are recoverable by the Defendants from BL (the "CCO"). The Tribunal directed that the Defendants provide their response to the FTP application at the same time as their Defence and further directed that the Defendants provide their response to the CCO application by 28 February 2022.

3. The first Case Management Conference ("CMC") took place on 14 March 2022. At the CMC we dismissed BL's application under Rule 58 (the "FTA") and indicated that we would provide a Ruling setting out the reasons for our decision. This is that Ruling. In order to put the FTA in its proper context it is necessary to provide some detail relating to the background and the basis of BL's claim.

4. The First Defendant, Wacoal EMEA Ltd is a wholly-owned subsidiary of the Second Defendant, Wacoal Europe Ltd. The Second Defendant is a holding company within the Wacoal group of companies: a group whose primary business is the manufacture and supply of branded lingerie and swimwear. The Second Defendant and its subsidiaries were previously known as the Eveden Group until they were acquired by the Wacoal group in March 2012.

5. The Second Defendant and another related company, Wacoal America Inc ("Wacoal America"), are wholly-owned subsidiaries of the ultimate parent company, Wacoal Holdings Corp.: an entity incorporated in Japan. Wacoal America is engaged in the design, manufacture and distribution of lingerie and swimwear sold under what are referred to in these proceedings as the "Wacoal Brands".

6. The Second Defendant has a number of subsidiary companies (including in the US and Canada) which are engaged in the design, manufacture, distribution and retail of lingerie and swimwear sold under what are referred to in these proceedings as the "Eveden Brands".

7. The First Defendant's principal activity is the design, manufacture, distribution and retail of lingerie and swimwear products sold under the Eveden Brands in the UK and certain other countries. It also designs and manufactures under licence certain products sold under the Wacoal Brands for sale in the UK, the EU and EEA, and other countries (but not the US and Canada). The First Defendant also distributes in the UK and certain other countries products sold under the Wacoal Brands designed and manufactured by Wacoal America.

8. In the UK the First Defendant supplies, on a wholesale basis, lingerie and swimwear products to approximately 370 retailers. These range from department stores to independent specialist retailers and online lingerie retailers. It also has an online retail presence, and a factory shop at its headquarters in Northamptonshire.

9. BL alleges that the Defendants' infringing conduct consisted of the following:

   (1) A resale price maintenance ("RPM") policy requiring BL (and other resellers) to adhere to its recommended retail prices ("RRP");

   (2) A minimum retail price ("MRP") policy reflected in the terms of two of the Defendants' policies: the Eveden Value Assurance Policy, and the Wacoal Value Assurance Policy (referred to in these Proceedings as the "VAPs");

(3) A minimum advertised price ("MAP") policy (also an express term in the VAPs);

(4) An online platform ban, which required BL to align its advertised and retail prices with the Defendants' RRPs on all eBay sites around the world, failing which BL would be required to de-list the Defendants' products from eBay so that they were no longer visible to customers in the US and Canada;

(5) The monitoring, receipt and relaying of complaints from competing retailers about discounted prices being offered by online retailers, with the latter being requested to increase their resale prices;

(6) Actions or sanctions being applied, being threats to refuse to supply certain ranges and/ or volumes of the Defendants' products. This is said to have resulted in the partial and then complete termination of supplies of the Defendants' products ordered by BL for resale in the UK; and

(7) The discriminatory application of the policies to BL, which it is alleged was targeted and sanctioned whilst many other UK retail competitors were not.

10. BL alleges that the object and/or effect of the Defendants' policies, individually and/or in combination, was to maintain or stabilise retail prices for the Wacoal Group Products at or above the Defendants' RRPs which:

(1) eliminated or limited intra-brand price competition amongst online UK distributors of Wacoal Group Products (including the Defendants' own direct retail websites in the UK);

(2) facilitated tacit or explicit horizontal collusion amongst independent retailers to adhere to minimum or fixed prices and minimise discounting and/or erosion of retailers' margins;

(3) reduced price transparency over the internet so as to limit downward pressure on retail prices of Wacoal Group Products by removing products from eBay.co.uk;

(4) reduced the visibility and footfall of BL's online business to buyers in the UK, EU, the US and Canada so as to prevent the fulfilment of passive sales to customers outside the UK and damage BL's online search and platform rankings; and

(5) treated bricks and mortar stores preferentially over online retailers.

11. On 27 September 2021, the Defendants ceased supplying stock to BL. BL seeks a permanent injunction requiring the Defendants to restore supplies and claims damages on two alternative bases. First, BL claims historic losses, from 2018 to 2021, on the assumption that the case is resolved in 2022 and supplies are resumed. On this basis the past losses are estimated at approximately £1.5 million plus interest, and future losses (being damage to the future growth of the business) are estimated at £1.8 million. Alternatively, if supplies are not resumed, BL estimates its loss over a five-year period to be over £7 million, including damage to its internet rankings, loss of business growth and the loss of its competitive market position.

12. The Defendants deny that they have been a party to, implemented or enforced in the UK (or in the EU or EEA) any agreement or concerted practice that infringed or infringes either the Chapter I prohibition of the CA 1998, or Article 101(1) TFEU (whether by object or effect). In short, the Defendants' position is as follows:

(1) The First Defendant publishes RRPs in its catalogues and price lists, and these are set separately for each country. The First Defendant does not operate a selective distribution system in the UK, EU or EEA save that it will only supply retailers that trade under their own brand name (fascia) whether a bricks and mortar store and/or an online website. The First Defendant has not operated and does not operate a policy or system of RPM, or a platform ban policy that prohibits or restricts retailers from

selling on third party platforms. It does not use price monitoring software.

(2) The Defendants say that the Eveden VAP only applies to retailers' sales of Eveden Brands in the US and Canada. It does not apply to sales of such products in the UK, EU or EEA, and does not apply to Wacoal Brands.

(i) The Eveden VAP contains an MRP policy which applies to some (but not all) Eveden Brands, and an 'advertising and marketing policy' ("AM policy"), which prohibits the advertising, promotion or sale online of all Eveden Brands on any internet site or platform, including eBay, without prior approval. The Defendants allege that BL has not been authorised to advertise, promote or sell Eveden Brands to consumers in the US and Canada.

(ii) At various times the Defendants had requested BL not to advertise, promote or sell Eveden Brands to consumers in the US, or alternatively only to do so at the applicable manufacturer's suggested retail price ("MSRP").

(iii) At no time did the First Defendant request or require BL to advertise and sell products in the UK, EU or EEA at either the applicable RRP for that territory, or at the MSRP in the US or Canada.

(iv) The First Defendant did not take measures to enforce the Eveden VAP against BL in respect of its online sales of Eveden Brands to consumers in the UK, EU or the EEA or any country other than the US and Canada.

(3) The Defendants say that the Wacoal VAP only applies to retailers' sales of Wacoal Brands in the US and Canada. It does not apply to sales of such products in the UK, EU or EEA, and does not apply to Eveden

Brands. At all material times, Wacoal America has supplied Wacoal Brands only to authorised resellers, who are permitted to refer to themselves as such, and use its intellectual property in their advertising and marketing.

(i) The Wacoal VAP contains an MRP policy which applies to some (but not all) Wacoal Brands, and an AM policy which prohibits the advertising, promotion or sale online of all Wacoal Brands on any internet site or platform, including eBay, without prior approval. The Defendants maintain that Wacoal America has not authorised BL (or any other retailer) to use eBay to advertise, promote or sell Wacoal Brands to consumers located in either the US or Canada.

(ii) BL was not an authorised reseller of Wacoal America, and as such was not authorised to sell products to consumers in the US and Canada. Wacoal Brands purchased by BL from the First Defendant were not licensed for sale to or in the US or Canada.

(iii) Wacoal America uses monitoring software to identify unauthorised resellers, including violations of its AM policy. It identified BL as an unauthorised reseller, and sent warning emails to BL.

(iv) Despite BL claiming it had configured its eBay.co.uk account so as not to advertise Wacoal Brands to customers in the US on eBay.com, BL's offers for sale of Wacoal Brands remained accessible and visible to US consumers through eBay.com. This resulted in the First Defendant giving notice to BL in March 2019 that it would cease to supply Wacoal Brands to BL.

(v) No steps were taken against BL to enforce the Wacoal VAP in respect of BL's sales to consumers in the UK, EU or EEA: or any country other than the US and Canada.

(4) The decision taken in June 2019 to stop supplies of certain lines to BL, and limit other supplies to 'redundant lines' of Eveden Brands, followed a strategic review.

(5) The decision subsequently taken not to supply any products to BL in September 2021 followed an irretrievable breakdown of the commercial relationship between BL and the First Defendant.

B. THE RELEVANT LEGAL BACKGROUND

13. Rule 58 of the Rules makes provision for a FTP as follows:

> "(1) The Tribunal may, at any time, either of its own initiative or on the application of a party, make an order that particular proceedings be, or cease to be, subject to the fast-track procedure.
>
> (2) Where the Tribunal has ordered that particular proceedings be subject to the fast-track procedure—
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> (a) the main substantive hearing is to be fixed to commence as soon as practicable and in any event within six months of an order of the Tribunal stating that the particular proceedings are to be subject to the fast-track procedure; and
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> (b) the amount of recoverable costs is to be capped at a level to be determined by the Tribunal.
>
> (3) In deciding whether to make particular proceedings subject to the fast-track procedure the Tribunal shall take into account all matters it thinks fit, including—
>
> (a) whether one or more of the parties is an individual or a micro, small or medium-sized enterprise within the meaning of Commission Recommendation No. 361 (EC) of 2003 concerning the definition of micro, small and medium-sized enterprises;
>
> (b) whether the time estimate for the main substantive hearing is three days or less;
>
> (c) the complexity and novelty of the issues involved;
>
> (d) whether any additional claims have been or will be made in accordance with rule 39;
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> (e) the number of witnesses involved (including expert witnesses, if any);
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> (f) the scale and nature of the documentary evidence involved;
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> (g) whether any disclosure is required and, if so, the likely extent of such disclosure; and

> (h) the nature of the remedy being sought and, in respect of any claim for damages, the amount of any damages claimed."

14. The Competition Appeal Tribunal's Guide to Proceedings 2015 (the "Guide") deals with the FTP at paragraph 5.146:

> "Given that competition cases generally tend to be heavy, complex and often involve consideration of novel issues, it is unlikely that the Tribunal will designate a case as suitable for the FTP unless it is a clear-cut candidate for such an approach. Generally, such a case is likely to arise or be linked to a scenario where injunctive relief is being sought, or, in the case of a claim for damages, where all the parties are clearly committed to a tightly constrained and exceptionally focused approach to the litigation. …"

15. We were referred to a number of previous rulings of the Tribunal in relation to the FTP. The first case to be allocated to the FTP was *Socrates Training Limited v The Law Society of England and Wales* (Case No. 1249/5/7/16) ("*Socrates*"). That case was an abuse of dominance claim where there was to be a split trial with liability being determined first. In the Tribunal's subsequent ruling on cost-capping ([2016] CAT 10), at [2] to [3] Roth J explained that:

> "2. The FTP was introduced pursuant to an amendment to the Enterprise Act 2002 made by the Consumer Rights Act 2015, which came into force on 1 October 2015. This is the first case to proceed this far under that new regime.
>
> 3. The policy behind the FTP was explained in the Government White Paper of January 2013, *Private Actions in Competition Law* (see paragraph 4.22 and following). It is a procedure particularly designed to help small and medium sized enterprises ("SMEs") to obtain access to justice in an appropriate case. That reflects a view widely expressed in the prior consultation that the cost and complexity of competition actions deter smaller companies from pursuing their rights, particularly as regards injunctive relief. …"

16. We were also referred to *Breasley Pillows Limited v Vita Cellular Foams (UK) Limited* [2016] CAT 8 ("*Breasley*"). That case was a follow-on claim for damages, following a finding of a cartel in violation of Article 101 TFEU by the European Commission. The nature of the losses claimed involved consideration of issues relating to overcharge, run-off periods, umbrella effects, volume effect, and additional finance costs. In that case, the claimants submitted that the trial would take seven to eight days, but that the reference in Rule 58(3)(b) to whether the time estimate was three days or less applied per claimant such that, given there were six claimants, the relevant time period permitted for the FTP was 18 days. Roth J found this approach to be "fundamentally

misconceived" (at [19]): "Although three days is not an absolute limit it should be stated emphatically that a case of such longer duration is not the kind of case that is suitable for the FTP." On this ground alone, the FTA failed. However, Roth J went on to consider the approach that should be taken to FTAs.

17. He stated that paragraph 5.146 of the Guide sets out the correct approach. He referred to *Socrates,* being the one case that had (at that time) been directed to be subject to the FTP, and noted (at [30]) that: (i) the issue of quantification of damages had been split off to be heard later, (ii) the relief sought had been purely injunctive relief, (iii) the economic expert evidence was limited to the questions of market definition and dominance and was (on the facts of the case) very confined, (iv) there were only two parties, and (v) the case could be heard in three to four days.

18. He acknowledged (at [31]) that damages cases could be subject to the FTP (and the Guide envisages that), but considered an action concerned with a claim for damages arising from a cartel was unlikely to come within the criteria for the FTP, notwithstanding that it was a follow-on claim.

19. He referred (at [33]) to urgency:

> "The fact that a claim is not urgent is not the most relevant factor, but it is not irrelevant when one bears in mind that one of the distinctive features of the FTP is that it is designed to be, as its name indicates, much faster than ordinary litigation. A substantive trial takes place within six months, and the case therefore effectively jumps the queue."

20. At [34] to [36] he referred to the mandatory costs cap inherent in Rule 58(2)(b):

> "34. The FTP also brings claimants the benefit of a mandatory cost cap on their potential liability for the defendants' costs: Rule 58(2)(b). In their submissions, the claimants ask rhetorically how a small business that is the victim of a cartel can hope to bring a claim economically if it cannot have the benefit of the FTP. I have some sympathy with the claimants' concern about costs running to several millions of pounds when they quantify their claim at less than £9.5 million. For this reason, if for no other, issues such as disclosure will require the careful case management to which I have referred, irrespective of the fact that the claim is not dealt with under the FTP. …
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> 35. Mr Aldred referred in his oral submissions to the statement of policy from the Government, which presaged the introduction of the new regime for private actions in the Tribunal. He referred to the statement by the Secretary of State that the reforms have the twin aims of: "increased growth by empowering small

> businesses to tackle anti-competitive behaviour that is stifling their business" and "promote fairness by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress."[1] Mr Aldred made the fair point that for small businesses there is a cost, quite apart from legal fees, in its directors or managers having to spend time on prolonged legal proceedings.
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> 36. I, of course, recognise the importance of that policy underlying the new regime introduced by the Consumer Rights Act 2015. But that statement applies to the regime generally, including, for example, the new forms of collective action and what is there described as a "radically enhanced system of ADR". The FTP is not designed to be the remedy for all concerns about costs. Follow-on cartel damages claims may be described as "only about causation and quantum" but they are of considerable complexity in terms of evidence and proof. Accordingly, such claims may have to be advanced by resort to various funding mechanisms such as conditional fees or damages-based agreements. I believe there is now an active market in ATE insurance and a growing market for third party funding for soundly based follow-on claims. It is through such means and not recourse to the FTP that costs problems of bringing these claims have to be addressed."

21. We were also referred to the Tribunal's ruling in *Rest & Play Footwear Ltd v George Rye & Sons Ltd* [2021] CAT 18 ("*Rest & Play*"). In that case the claimant contended that the FTP should be ordered. The Defendant was generally neutral, but in any event, both parties agreed that it was desirable for the case to be progressed quickly and efficiently, and subject to a timetable which had been largely agreed between them. On the facts of that case, Bacon J noted that various factors might potentially indicate the suitability of the case for allocation to the FTP, whilst others counted against it. She noted (at [4]) that none of the factors referred to in Rule 58(3) was likely to be decisive in itself. We respectfully agree. It is a matter of considering whether or not, taking all of the factors together, the case is suitable for designation under the FTP.

22. Bacon J declined to order that the case proceed by way of the FTP, but stated at [13]: "That does not, however, prevent the Tribunal from robustly case managing these proceedings to ensure an efficient procedure and the minimisation of costs", and she went on to do just that. The Tribunal has the ability to exercise its powers in an appropriate case to ensure that proceedings are robustly case managed and to manage costs.

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[1] Private Actions in Competition Law: A consultation on options for reform – government response (January 2013), p.3.

C. THE CLAIMANT'S APPLICATION

23. BL supported its FTA with two witness statements: a statement of Janine Dutton ("Dutton 1"), a director of BL, and a statement from Susannah Sheppard of Sheppard Co ("Sheppard 1"), the solicitors firm acting for BL. Sheppard 1 addressed the factors set out in Rule 58(3). Dutton 1 referred to various matters, including the detrimental effects on the business of the cessation of supply, and BL's financial position.

24. BL submitted that this case is a "paradigm example" of the need to ensure effective case management and is exactly what the FTP was designed for: to enable access to justice for small and medium enterprises against large, well-resourced defendants. In this regard we were referred to paragraph 6.3 of the Penrose Report,[2] which stated "… even though the CAT has a [FTP] … it will still look dauntingly slow and expensive for many small or local firms", and recommended the creation of regional County Competition Courts as a tier below the existing Competition Appeal Tribunal fast-track cases for low-cost cases of a one to two day maximum hearing length. We were also referred to observations of Mr Penrose MP made on 8 March 2022 in Parliament to the effect that his proposal had not been implemented, but was necessary and mattered because "it is too easy for large, well lawyered incumbents to walk backwards, slowly, in the face of a challenge from a small, plucky entrepreneurial, insurgent firm that is trying to transform and disrupt a particular market". However, we note that this Report and Mr Penrose's observations relate to his proposal to create a tribunal tier below the Competition Appeal Tribunal and its FTP, rather than the FTP itself.

25. BL relied on these passages in the context of its submissions as to the need for robust case management, and to ensure that the trial timetable does not exhaust BL's finances. Ms Howard QC for BL referred us to Dutton 1, to the effect that BL cannot afford long-term litigation. As Ms Howard fairly acknowledged, the main advantage of the FTP is that there is a right to a costs-capping order, and

[2] Power to the People: Stronger Consumer Choice And Competition So Markets Work for People, Not the Other Way Around (February 2021), p.43.

costs management. However, as to that, the Tribunal's comments in *Breasley* at [36] which we have referred to above are apposite. The fact that a costs-capping order might be available, or even appropriate in any particular case, is not a sufficient reason to make a FTP order. The Tribunal has extensive case management and cost management powers, including in relation to listing a matter to be heard in short order, which are not confined to the FTP. We turn then to consider the factors under Rule 58 to which we are required to have regard.

26. As regards Rule 58(3)(a), at least by the time of the CMC it was accepted that BL is a small enterprise within the meaning of the Commission Recommendation No. 361 (EC) of 2003. At all material times, BL had less than 30 employees and its annual turnover in the financial year to 2020 was £3,284,222.

27. Rule 58(3)(b) – whether the time estimate for the main substantive hearing is three days or less - proved more controversial. By way of background, BL in its FTA (received by the Tribunal before the Defendants had served their Defence) asserted that the trial on liability and quantum would last, at most, three days. It was asserted that the claim was legally straightforward, few factual witnesses were likely to be required to give evidence, and limited expert evidence on quantum would be required. No split trial was proposed: three days was BL's time estimate for the matter to be determined in its entirety.

28. The Defendants in their Response to the FTA asserted that this was misconceived and unrealistic. Their time estimate for trial (including quantum) was ten days.

29. By the time of the CMC both parties proposed that there be a trial split between liability and quantum. We agreed that a split trial was appropriate. However, there was a dispute between the parties as to precisely which issues should be included in Phase 1 and which should be deferred to Phase 2. First, BL contended that Phase 1 should include causation (in the sense of theory of harm as opposed to causation of loss). The Defendants opposed this. Secondly, the Defendants contended that Phase 1 should include the issue of whether or not

the Tribunal has jurisdiction to order the permanent injunction sought, and if so whether it should make such an order. BL opposed this. Establishing the scope of Phase 1 is a logical precursor to determining whether or not the Phase 1 trial was appropriate for the FTP. The Tribunal ruled at the CMC that Phase 1 should deal with issues of liability, theory of harm and injunctive relief.

30. By the time of the CMC, although Ms Howard submitted that BL considered that both Phase 1 and Phase 2 should separately be subject to the FTP, it was not entirely clear what was meant by that in particular (given that there is to be a split trial). In reality, the thrust of her submissions related to Phase 1 being fast-tracked with Phase 2 to follow, after a short period of delay to facilitate settlement discussions.

31. As to the parties' respective time estimates for Phase 1, BL suggested that the time estimate was three to four days. BL's position was that determination of issues of quantum in Phase 2 would take two to three days. The Defendants, on the other hand, suggested that the time estimate for Phase 1 alone would be a minimum of seven days.

32. We accept that a time estimate of three days in Rule 58(3)(b) is not an absolute limit, and there is some degree of latitude. Ms Howard submitted that a trial with a time estimate of even six days might nevertheless be appropriate for the FTP. However, in our view, it is difficult to envisage circumstances in which proceedings with a time-estimate double that provided for in the Rules would be appropriate for the FTP.

33. The time-estimate for Phase 1 in these proceedings will turn on factors such as those identified in Rules 58(3)(c), (e) and (f), and it is to those that we now turn. (As regards, Rule 58(3)(d), the parties are agreed that no additional claims will be made.)

34. Rule 58(3)(c) – the complexity and novelty of the issues involved – again proved controversial. BL accepts that the claim raises a "wide range of factual and legal issues". However, BL's position is that the issues are not complex or novel. BL accepts that there are factual matters in dispute between the parties,

some of which require expert evidence, but suggests that the facts themselves are not complicated. Ms Howard submitted that as regards direct instructions in emails between the parties and the like, you "recognise RPM when you see it", and it is part of the "A, B, C of competition law".[3] As regards indirect RPMs, arising in relation to complaints made by other retailers, this will also turn largely on emails between the parties. As regards the MRPs and online platform ban, those are reflected in the VAPs and the issue will be the way in which they have been applied and enforced in the UK in relation to sales on eBay.co.uk. BL says that the key factual issue is whether or not it was possible for it to comply with the online platform ban in a way which only affected sales in the US and Canada. The Tribunal will also need to consider the allegations of discrimination in the application of the VAPs against BL. BL maintains that some of its rivals were permitted to sell on eBay and were discounting during the relevant period, both in the US and the UK, but that the Defendants did not take action against them. We were referred to examples of the emails on which BL relies.

35. BL suggests that the law is also not complex or novel. BL submits that the relevant principles have been well-rehearsed and delineated in previous case law: *Argos Limited v Office of Fair Trading*,[4] and *Ping Europe Ltd v Competition and Markets Authority.*[5] Once the Court has determined whether the Defendants' conduct had the object and/or effect of enforcing RPM in the UK, BL maintains that the conduct falls within the Chapter I prohibition as a hardcore object infringement.

36. The Defendants' position is that the issue of whether there has been an infringement at all is legally complex, and that it is not a case of simply applying existing case law. The Defendants submit that the present case is distinguishable. At its heart, the Defendants contend that this case is about the application of the VAPs by two American companies in relation to the advertising and sale of products to consumers in the US.

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[3] Transcript, page 29 line 17ff.
[4] [2006] EWCA Civ 1318.
[5] [2020] EWCA Civ 13.

37. According to the Defendants, the questions of law are:

(1) First, whether or not a brand owner, such as the Defendants, can lawfully prevent a UK-based internet retailer, such as BL, from advertising and selling to customers in the US and Canada (where the same rules on resale price maintenance do not apply) at a price below the manufacturer's retail price in the US and Canada, and whether it can restrict such activity on an internet platform: is this within the scope of a Chapter I prohibition at all?

(2) Secondly, if so, does it constitute a restriction of competition by object? The Defendants submit that there is no case law at all on whether restricting export sales from the UK in this way can affect trade within the UK or trade between member states.

(3) Thirdly, if it does not do so by object, can it nevertheless have appreciable effects? If so, in what circumstances, and does the block exemption apply?

(4) Fourthly, whether a restriction on passive sales to customers not in the UK, EU or EEA is a hardcore restriction of competition, in circumstances where the rules are concerned with removing internal barriers to trade. The Defendants maintain that these are essentially jurisdictional questions which go to whether or not UK or EU competition law applies in the first place.

38. The Defendants submit that there is a further unresolved legal question as to exactly what constitutes unlawful discrimination under the Chapter I prohibition as opposed to under the Chapter II prohibition, and whether or not differential treatment by the brand owner as against different retailers can constitute a restriction of competition whether by object or effect. We were told that this has not been resolved in the existing case law.

39. In response, BL submits that the Defendants are seeking to overcomplicate matters both in terms of the legal analysis and the expert evidence that will be

needed in order to determine those questions. Ms Howard referred us to emails which she submitted revealed the Defendants' strategy regarding protection of the European and UK business, with only incidental benefit to the US.

40. The FTA is concerned with whether or not the FTP is appropriate. There is no application for summary judgment on, or to strike-out any part of the Defendants' case. It may be that in due course BL is proved right, and the issues are more straightforward than the Defendants have suggested. However, we do not think that at this early stage in the proceedings it is appropriate for us to proceed on the assumption that this will necessarily be the case. The fact is that the Defendants have identified a number of issues they will be raising at the Phase 1 trial, including issues on which we were told there is no existing case law. We have yet to hear full submissions and argument from the parties on these points or the applicable case law. Absent any application for summary judgment or to strike out any part of the Defendants' case, that will take place at the Phase 1 trial. Time for these issues to be argued must be factored into the time estimate for the trial.

41. As regards Rule 58(3)(e) – the number of witnesses (including expert witnesses) – BL intends to call two factual witnesses in Phase 1, and the Defendants intend to call up to six. Ms Howard flagged the possibility that not all factual witnesses will necessarily be called for cross-examination. That may be the case but we do not think that, for the purposes of determining the case's present suitability for FTP, that is an assumption we should make.

42. BL, in its FTA originally suggested that only one expert witness on quantum, and possibly an industry expert on eBay and internet rankings, would be required. That would suggest that for the purpose of a split trial, only an industry expert would be required.

43. However, by the time of the CMC the parties agreed that four expert witnesses will be required: one economic expert and one industry expert for each side. We have granted permission for the parties to adduce the evidence of:

(1) an industry expert to explain how listings, rankings, prices and international advertising and/ or shipping work on the eBay platform in the UK, and how it relays those listings to the eBay platform in the US; and

(2) an economic expert to address issues of:

(i) market definition;

(ii) the theory of harm in relation to RPM and horizontal price coordination (including via MRPs) and hardcore online restrictions on passive sales in respect of sales of the Defendants' products in the UK/EU/ EEA;

(iii) whether the alleged imposition of MRPs pertaining to the advertising of the Defendants' products for sale to consumers in the US and Canada was capable of having negative effects on competition in the UK, EU and EEA; and

(iv) alleged anticompetitive effects relating to the alleged imposition of the platform ban and its alleged discriminatory application.

44. Even so, it is apparent to us that there is a gulf between the parties as regards their respective expectations as to the scope and extent of the expert evidence that will be required. BL's position is that whilst it has been agreed that the parties can call an industry expert, that may be a rather "glorified term": it might consist of a statement from eBay explaining how the listing process works, and there may not need to be a meeting of experts, joint report or any reply evidence. Similarly, BL maintains that there will be limited economic expert evidence because this is in essence an "object" case in terms of RPM and online sales restrictions: the evidence will - according to BL - be limited to the theory of harm and need not address a full effects analysis.

45. BL has, however, also pleaded an "effects" case. BL suggests that this is very much "a fall-back position" on which it wishes to "reserve its position", and that

it expects to succeed on its claim that the alleged conduct is an infringement by object. Ms Howard accepted that if the Tribunal was required to consider the effects analysis that would add to the time required, but suggested that any expert evidence addressing the counterfactual would be limited.

46. We understand BL's concerns as to the possibility that extensive and expensive expert evidence will be adduced by the Defendants, which exceeds what might reasonably be required by the Tribunal in order to reach its decision. Any expert evidence – whether economic or industry – ought to be proportionate and focused on what will assist the Tribunal rather than provide extensive background or commentary, or deal with extraneous matters. We will exercise our case management powers with this firmly in mind, and ultimately the Tribunal has the ability to apply costs sanctions should the expert evidence extend beyond its reasonable and proper scope.

47. However, on the information available to us for the purposes of this FTA, we are unable to proceed on the basis of what BL believes or hopes may prove to be the limited extent of the input of the experts ultimately required at the trial. We cannot, for example, proceed on the assumption that there will only be a statement from someone at eBay, and that no substantive cross-examination will be required. Both parties have sought permission to adduce evidence on this issue, and we have granted it. On this FTA we have to consider the issues that arise on the parties' respective pleaded cases. We also have in mind the fact that the parties are in agreement that (at least at this stage) they anticipate that two experts on each side will be required to address them.

48. This then brings us back to the time estimate for the main substantive hearing (Rule 58(3)(b)). We consider that BL's time estimate of three to four days is too short, and also that the Defendants' time estimate of seven days is too long.

49. Ms Howard submitted that it ought to be possible to complete a Phase 1 trial in three to four days, on the basis of openings of one day (shared half a day for each party), one day of factual witnesses, half a day maximum for experts and then one day of closing arguments. Leaving aside the fact that this totals three and a half days and that even on BL's case three days is impossible, we think

that this timetable is unrealistic. This is particularly so given that there will be up to eight factual witnesses, and considering the scope of the issues on which the parties have permission to adduce expert evidence.

50. Mr O'Regan for the Defendants submitted that there would need to be one day of openings, somewhere between three and three and a half days for factual witnesses, between one and one and a half days for experts, and a day for closings: a total of seven days.

51. We consider the appropriate time estimate to be five days. We have indicated that it is unrealistic to assume that the evidence of eight factual witnesses and four experts can be dealt with in a day and a half. On the other hand, we do not see how that evidence could extend to five days. In particular, whilst we consider that the expert economic evidence is likely to be more extensive than BL suggests, we are not convinced that it is necessary for it to be as extensive or as lengthy as the Defendants appear to anticipate; or that we would be materially assisted if it was. Bearing in mind the number and nature of the issues in dispute, we expect all of the evidence to be completed in three days. We have also factored in a day for oral openings, and a day for oral closings.

52. We are also required to consider the scale and nature of the documentary evidence involved (Rule 58(3)(f)), and whether any disclosure is required, and if so the likely extent of it (Rule 58(3)(g)). BL suggests that limited documentation is likely to be required, and that targeted disclosure will be sufficient and relatively modest. Sheppard 1 suggested that BL had already disclosed the vast majority of its contemporaneous documentary materials, and to the extent that additional disclosure is necessary in relation to liability, that could be provided in short order. As regards the categories of documents that would be required from the Defendants, Sheppard 1 identified documents relating to the VAPs (their strategy, implementation and enforcement); the (alleged) selective application and enforcement action against BL; the Defendants' retail price policy in the UK; discussions regarding the prices retailers should set including complaints made relating to price discounting; information relating to meetings with BL or other UK retailers about resale

pricing or discounting; price monitoring; and meetings between the Defendants and trade bodies.

53. The Defendants say that BL has significantly understated the position, and that the documentation is likely to be extensive. The Defendants also say that they will be making a number of requests for documents to BL. The Defendants rely upon *Breasley* at [22] and [27] in support of the proposition that where significant disclosure will be required, particularly where each party will require disclosure of documents from the other that are not readily available, a case will not be suitable for the FTP. We accept that such a case may be unlikely to be appropriate for the FTP, but not that it will never be.

54. It became apparent during the course of the hearing that, notwithstanding the fact that these proceedings were issued on 17 December 2021 and that they had been on notice of the claim significantly prior to that, the Defendants had not made any real attempt to assess the extent of the documentation likely to be disclosable, apparently on the basis that they were not yet obliged to do so. This was unhelpful. As a result, the Defendants were not in a position to provide much information to substantiate their submissions in relation to Rule 58(3)(f) and 58(3)(g) or on *Breasley*. We are unable to accept the Defendants' bald assertion that the claim is likely to require significant documentary evidence and disclosure, still less that that assertion requires us to conclude that the FTA fails on these grounds. Mr O'Regan drew our attention to the fact that some of BL's pre-action requests related to documents going as far back as January 2012. However, in the course of his submissions Mr O'Regan accepted that the relevant documentation could be compiled "probably in relatively short order". In any event, by the time of the CMC the parties had agreed a procedure for disclosure, including as regards the swift resolution of any dispute as to whether particular categories of document or data should be disclosed. As such, we do not consider that in this case the scale and nature of the documentary evidence or disclosure are factors that count against an order for the FTP.

55. Rule 58(3)(h) requires us also to have regard to the nature of the remedy sought and the amount of any damages claimed. BL, in its FTA, suggested that its losses will be "relatively small by the standards of the Tribunal". Mr O'Regan

submitted that the claim against the Defendants is a serious one, and that they must be afforded the opportunity to defend it in a reasonable and proportionate manner. A claim for £7 million is a not insubstantial one, and a mandatory injunction requiring the Defendants to supply BL will also have significant effects on them.

56. The Tribunal hears many claims for damages significantly greater than those claimed in this case (£3.5m to £7m) and in that sense the damages sought could be described as relatively small. However, we agree with Mr O'Regan that they are not insubstantial. In addition to the claim for damages, BL seeks a permanent injunction requiring the Defendants to resume supplies. Whether or not the Tribunal has jurisdiction to make such an order is challenged by the Defendants. So is the question of whether or not, if it does, the Tribunal should exercise its discretion to make such an order. These issues will require detailed legal submissions.

57. Although not specified in Rule 58, lack of urgency is not an irrelevant factor (see *Breasley* [32]), in so far as the FTP enables a claimant to "jump the queue". BL submits that the claim is urgent: the alleged infringement is having an ongoing detrimental impact on BL's business despite steps taken by it to mitigate its loss. BL claims that it has taken on significant amounts of debt in order to re-model its business, and its growth has slowed significantly. These matters are addressed in Dutton 1. The Defendants, on the other hand suggest that the Claimant has not demonstrated any particular urgency. The Defendants question why the claim was not brought sooner, given that the conduct in respect of which damages are sought commenced in July 2018 (being the date of the application of the VAPs).

58. As to this, Dutton 1 explains that BL was not able to commence legal proceedings immediately because:

    (1) Ms Dutton knew that it was highly likely that as soon as BL did so, the Defendants would cease all supplies, and she did not believe BL could survive the immediate cessation of supplies in 2019: instead BL

concentrated on re-building its business with new brands, ranges and customers;

(2) that transition came at a significant financial cost to BL which meant that it was not in a financial position to commence legal proceedings at that time, and has struggled subsequently;

(3) BL hoped to be able to work towards the Defendants reinstating supplies; and

(4) BL has also had to cope with the Covid-19 pandemic. Since the cessation in 2019 of all supplies except redundant stock, BL has had to take steps to stabilise its business and mitigate its effects. Since the cessation of all supplies, BL maintains it has been unable to compete as effectively with other leading online lingerie retailers and has been adversely affected financially (as further particularised in a section treated as confidential in Dutton 1).

59. BL also submitted that there is another element to the issue of urgency. It maintains that the issues in this claim are important not just to the parties to this dispute but also the wider industry as a whole. Dutton 1 suggests that RPM requests from other suppliers are more frequent, and that unless and until a major public enforcement of the consequences of engaging in such illegal RPM is made in the lingerie and swimwear market, there is no reason to believe the situation will change. In that regard, we were referred to the fact that the CMA issued a specific warning letter to the Women's Underwear Sector about RPM practices and yet, BL alleges, such practices are continuing.

60. The Defendants make the point that this claim is a personal one in which BL seeks damages: it is brought in BL's own interests. They submit that it may or may not be of wider interest to the lingerie sector or community at large, but that factor is irrelevant to the issue of whether or not this case should be subject to the FTP.

61. We consider the fact that there may be an element of public interest in a claim may be relevant to the issue of urgency. However, the fact that a case has an element of public interest, or indeed is urgent, is not a reason in and of itself to make an order for the FTP. The Tribunal has the ability to exercise its case and costs management powers robustly to ensure that proceedings are dealt with expeditiously outside the FTP regime, as the Tribunal's decision in *Rest & Play* demonstrates.

62. We have been referred to other cases (*Meigh v Prinknash Abbey Trustees Registered* (Case No. 1303/5/7/19); *Socrates*; *Breasley*; *Rest & Play*) in which the FTP was either ordered or refused. The parties have sought to draw comparisons with, or to distinguish (as the case may be) particular aspects of those cases: the legal and factual issues involved, the number of witnesses and experts, the amount of damages claimed, time estimates and other factors. However, each case will turn on the application of Rule 58 to its own particular facts and circumstances and such comparisons are therefore of limited assistance.

63. As we indicated at the outset of this Ruling, taking into account the matters in Rule 58, and for the reasons we have explained, we do not consider that this case is a suitable one for the FTP. It is a balancing exercise. Some factors were consistent with the FTP, or at least would not have suggested that the FTP would be inappropriate. However, we consider the time estimate for Phase 1, the complexity and novelty of the issues involved, the number of witnesses, and the fact that a permanent injunction is sought militate against it.

64. The Tribunal was not unsympathetic to BL's position as a small business, its evidence as to the effects on its business of the Defendants' decision to stop the supply of their products, and its submissions as to the need to ensure that this case is dealt with expeditiously with robust case management. Notwithstanding our unanimous decision against ordering that these proceedings be subject to the FTP, therefore, we considered that this case should proceed on an urgent basis and gave directions at the CMC to this effect. The Tribunal has been in a position to accommodate a trial from 15 September 2022. It will therefore start

only a matter of days later than it would have been required to start had BL's FTA succeeded (see Rule 58(2)(a)).

65. Given our decision on the FTP, costs capping does not automatically apply. However, we have also ordered that the proceedings should be subject to cost management. BL's CCO application was therefore adjourned to a second CMC and will be subject to a separate ruling.

Bridget Lucas QC
Chairwoman

Professor John Cubbin

Anna Walker CB

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

Date: 23 May 2022