Neutral citation [2024] CAT 9

Case No: 1615/5/7/23

**IN THE COMPETITION APPEAL TRIBUNAL**

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 February 2024

Before:

BEN TIDSWELL
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

**UP AND RUNNING (UK) LIMITED**

Claimant

- v -

**DECKERS UK LIMITED**

Defendant

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**RULING (SPLIT TRIAL AND FAST-TRACK PROCEDURE)**

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## A. INTRODUCTION

1. This Ruling addresses two questions:

   (1) Whether there should be a split trial in these proceedings, with liability dealt with in one trial and damages in another.

   (2) Whether the proceedings are correctly allocated to the Tribunal's fast-track procedure.

2. Up and Running (UK) Limited (the "Claimant") operates a retail business selling specialist running shoes and accessories. Deckers UK Limited (the "Defendant") is the owner of the "Hoka" brand of running shoes, which it supplies to UK retailers for distribution within the UK. Between 2016 and 2021, the Defendant supplied the Claimant with Hoka products for distribution and sale.

3. In late 2020, the Defendant terminated the Claimant's account after the Claimant listed Hoka products for sale on a discount website that had not been approved by the Defendant. In cancelling the account, the Defendant relied on Terms and Conditions ("T&Cs") included on its account set up/credit application form which provide that retailers must have the approval of the Defendant before selling products on a website, and grant the Defendant the discretion to terminate any account for any reason.

4. The Claimant contends that the Defendant's refusal to approve the new website and the consequent cancellation of its account amount to resale price maintenance, and/or an attempt to form a cartel, in contravention of Competition Act 1998 ("the Act") Chapter I, section 2. The Claimant also contends that the measures adopted by the Defendant constitute abuse of a dominant position, in contravention of Chapter II, section 18 of the Act.

5. The Defendant denies these allegations, and states that the agreement between the Defendant and Claimant must be viewed within the context of a selective

distribution system operated by the Defendant, which is exempt from the Chapter I prohibition by virtue of Commission Regulation (EU) 330/2010 and the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 (together, the "Block Exemptions").

6. The Defendant also relies on provisions in the Block Exemptions and the *Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU* (2014/C 291/01) (the "De Minimis Notice") which effectively disapply Chapter I of the Act in circumstances where the market share of the parties is below certain specified levels.

7. It is common ground, however, that the Block Exemptions and the De Minimis Notice can provide no assistance to the Defendant if its conduct amounts to a "hardcore" restriction, being a specified category of abuse which includes the imposition of restrictions on a buyer's ability to determine its onward sale price,[1] otherwise known as "resale price maintenance".

8. The Claimant in these proceedings is not legally represented; Dennis Macfarlane, the Managing Director for the Claimant, is conducting the proceedings on behalf of the Claimant as a litigant in person.

## B. PROCEDURAL HISTORY AND FAST-TRACK APPLICATION

9. The parties attended a case management conference ("CMC") on 1 December 2023.

10. At that CMC, I determined that this case was suitable for allocation to the fast-track procedure available under Rule 58 of the Competition Appeal Tribunal Rules 2015 ("the Rules"). Underpinning that decision was a direction that the case proceed by way of determination of the claim in relation to Chapter I, with the Chapter II claim to be stayed until further order. I also had regard to the fact

[1] See for example Article 4 of Regulation 330/2010 and [8(2)(a)] of the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022.

that the Claimant is a small or medium sized enterprise, and that the core issues in the case seemed to be relatively narrow.

11. I indicated at the December CMC that the Defendant was at liberty to revisit that issue once it had had the opportunity to file its Defence.

12. A further CMC was held on 18 January 2024, at which I heard submissions from the parties on an application by the Defendant to remove the case from the fast-track procedure. I also asked the parties to address the Tribunal, in the context of discussion on that application, on the possibility of:

    (1) trying the question of infringement of Chapter I (including the issue of hardcore restriction and the application of the Block Exemptions) and the question of injunctive relief in one trial; and

    (2) trying the question of causation and quantum of the damages claim in a second trial, at a later date (if required).

13. The parties also made further written submissions following the CMC, which I have taken into account.

14. At the January CMC, the Claimant made an application for an interim payment, which I declined to grant.

## C. LEGAL FRAMEWORK

### (1) Governing principles

15. The Tribunal is required, in accordance with Rule 4 of the Rules, "to seek to ensure that each case is dealt with justly and at proportionate cost". Rule 4(2) provides that dealing with a case justly and at proportionate cost includes, so far as is practicable, "ensuring that the parties are on an equal footing", "dealing with the case in ways which are proportionate to the complexity of the issues and to the financial position of each party", "ensuring that it is dealt with expeditiously and fairly" and "allotting to it an appropriate share of the

Tribunal's resources, while taking into account the need to allot resources to other cases".

16. The Tribunal is required by Rule 4(4) to actively manage cases. This is stated (in Rule 4(5)) to include "identification of and concentration on the main issues as early as possible", and "planning the structure of the main hearing in advance with a view to avoiding unnecessary oral evidence and argument".

**(2) Fast-track procedure**

17. Rule 58(1) allows the Tribunal, either of its own initiative or on the application of a party, to make an order that particular proceedings be, or cease to be, subject to the fast-track procedure.

18. Where the Tribunal has ordered that proceedings be subject to the fast-track procedure, the substantive hearing must be listed within six months of the order, and the amount of recoverable costs is to be capped at a level to be determined by the Tribunal (Rule 58(2)).

19. Rule 58(3) states:

> "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;
>
> (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;
>
> (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."

**(3) Split trial**

20. Rule 53 gives the Tribunal broad case management powers. Rule 53(1) allows the Tribunal, at any time and on its own initiative or on the request of a party, to give such directions as are provided for in Rule 53(2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.

21. Rule 53(2)(o) provides that the Tribunal may give directions for the hearing of any issues as preliminary issues prior to the main substantive hearing.

22. In considering whether to order a split trial, the Tribunal will apply the factors identified by Hildyard J in *Electrical Waste Recycling Group v Philips Electronics UK Ltd* [2012] EWHC 38 (Ch), which were summarised by Bryan J in *Daimler AG v Walleniusrederierna Aktiebolag and Ors* [2020] EWHC 525 (Comm) at [27]:

> "[Factor 1] 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;
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> [Factor 2] what are likely to be the advantages and disadvantages in terms of trial preparation and management;
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> [Factor 3] whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;
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> [Factor 4] 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;
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> [Factor 5] whether a split trial may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);
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> [Factor 6] whether there are difficulties in defining an appropriate split or whether a clean split is possible;
>
> [Factor 7] what weight is to be given to the risk of duplication, delay, and the disadvantage of bifurcated appellate process;

> [Factor 8] generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
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> Other factors to be derived from the guidance given by CPR Rule 1.4, which reflect a common sense and pragmatic approach, may include:
>
> [Factor 9] whether a split trial would assist or discourage mediation and/ or settlement and [Factor 10] whether an order for a split late in the day after the expenditure of time and cost might actually increase cost."

## D. SPLIT TRIAL

23. It is convenient to deal first with the question of whether the issues of liability should be dealt with prior to the issues relating to assessment of damages.

### (1) The parties' arguments

24. The Claimant supports a split trial. In essence, Mr Macfarlane says that resolution of the issue of liability is an urgent requirement for the Claimant, given its relative lack of financial resources and its continuing losses as a result of the Defendant's actions.

25. Mr Macfarlane has confirmed that his central case under the Chapter I prohibition is an indirect form of price fixing, by the Defendant threatening to withdraw, and then withdrawing, supplies of Hoka shoes in order to prevent the Claimant discounting prices on the alternative website. Mr Macfarlane says that this issue is relatively discrete and can be deal with separately from damages.

26. Mr Macfarlane indicated that the Claimant would likely renew its application for an interim payment if successful on the question of liability, which would then allow it to retain a legal team and forensic accountant in order to progress its claim for damages.

27. The Defendant resists the notion of a split trial. Counsel for the Defendant, Ms Naina Patel, advanced a number of arguments:

    (1) There are complicated questions of causation which should be dealt with alongside liability (contrary to the Tribunal's suggestion that causation be dealt with alongside quantum of damages). Splitting causation from

liability would therefore be inefficient and would cause excessive complexity and diffusion of issues and there may be difficulties in defining a clean split.

(2) There are a number of significant procedural steps required before a trial (unitary or split) can take place. That means there is little benefit from splitting the trial up – it would be more efficient to hear it as a unitary trial, as this would only result in a little extra delay. The prospective advantage of saving costs on a split trial does not therefore outweigh the extra cost of having two trials.

(3) By way of example of the required procedural steps:

(i) The pleadings in the case are still in flux and require further work to properly identify the issues.

(ii) The Defendant needs to review between one and two hundred contracts it has with retailers in order to determine the overall practice of contracting of the Defendant, which is relevant to the liability issues and in particular the application of the selective distribution provisions in the Block Exemptions.

(iii) There is a need for expert evidence to determine whether the percentages which apply to the De Minimis Notice and in the Block Exemptions are relevant in this case. This is complicated by the Claimant's (stayed) Chapter II case, which asserts a 100% market share for the Defendant's sales of Hoka shoes.

(iv) The issues relating to selective distribution in the case will require considerable factual evidence.

(v) The causation issue is complex, factually and legally, not least because the Claimant alleges that the T&Cs are void. There is therefore no basis put forward for the counterfactual in which the Defendant is required to supply the shoes.

(4) There would also be an additional burden on witnesses who might have to give evidence in both trials, especially if causation is dealt with in the second trial (the same witnesses would deal with that as would give evidence in the liability trial).

(5) This is a complex case, with a significant claim for damages. It would be fairer, more efficient and quicker overall to deal with it in a unitary trial.

(6) Any mediation is likely to be more effective if the trial is unitary, as the parties will be able to focus on the likely outcomes in terms of injunctive relief and damages.

**(2) Analysis**

28. In my judgment, the Defendant overstates the complexity and extent of the key issue in these proceedings. The Claimant asserts that the Defendant has "disciplined" the Claimant, to prevent it from discounting, by asserting the termination provisions in the T&Cs. That behaviour, if established, is capable of being a form of resale price maintenance, as an indirect prevention, restriction or distortion of competition under the Chapter I prohibition and as a hardcore restriction in the nature of resale price maintenance. As the CMA's Guidance relating to the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 usefully summarises at [8.12]:

> "8.12 RPM can also be achieved through indirect means, including incentives to observe a minimum price or disincentives to deviate from a minimum price. The following examples provide a non-exhaustive list of such indirect means:
>
> …
>
> (f) threats, intimidations, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to the observance of a given price level."

29. It follows that the main issue for consideration, in relation to the question of liability, is not just an assessment of the terms of the T&Cs, but the way in which those provisions have been deployed by the Defendant and for what purpose.

That is also part of the context in which the terms of the T&Cs need to be assessed in order to determine whether there is a "by object" infringement of the Chapter I prohibition, which is a similar but analytically distinct exercise from determining whether the restriction is a hardcore one.

30. In short, the central question is: did the executives of the Defendant terminate supply to the Claimant because they were genuinely concerned about the qualitative aspects of distribution by the Claimant through its alternative website (as the Defendant alleges), or because they wanted to stop the Claimant from selling Hoka shoes at discounted prices on the alternative website?

31. I expect that issue will largely be determined by the evidence of the executives concerned, in the context that appears from documents which are relevant to the Defendant's pricing policies and practices, as applied in this particular case. It is not a complex issue at all, but a question of fact which should be determined with relative ease at trial.

32. The Defendant pleads in some detail a defence based on the application of the selective distribution provisions of the Block Exemptions, and the market share thresholds on the Block Exemptions and the De Minimis Notice. In my judgment, these are of marginal relevance to the question of split trial:

    (1) As the Defendant accepts, none of this matters if the Claimant establishes a hardcore restriction – that would "trump" the Block Exemptions and the De Minimis Notice entirely.

    (2) If it is necessary to consider the market share thresholds set out in the Block Exemptions or the De Minimis Notice, there is unlikely to be significant effort required in order to determine the market shares, given the availability of data on sales, the limited alternatives for the relevant market and the expertise of the Tribunal in determining markets and market shares. The question is likely to be straightforward and may indeed be a suitable case for a single joint expert to assist the Tribunal.

(3) It is only if there is no hardcore restriction and the market share percentages in the Block Exemptions and the De Minimis Notice are exceeded that the application of provisions in the Block Exemptions relating to selective distribution come into play. That seems to be a relatively unlikely outcome, but in any event, to the extent that the Defendant's motivation for enforcing the termination provision in the T&Cs was in order to maintain a selective distribution system, that can and will no doubt be dealt with in the evidence of the executives responding to the allegations about the existence of a hardcore restriction.

33. Against that background, I now turn to consider the *Electrical Waste* factors:

(1) Factor 1: In light of the above observations about the key issue in the case, it seems to me that there is a strong case that a relatively short hearing focused on limited factual matters is likely to be the most efficient way to try this case. A liability hearing in the region of three (or possibly four) days will result either in the Defendant succeeding (in which case no further hearing will be required) or the Claimant being entitled to move on to a damages assessment. In the latter case, I doubt that there will be any material cost resulting from separation. There seems little risk of duplication between the two trials. On the contrary, it seems likely that any damages hearing would be more focused as a result of a clear finding on liability.

The Defendant points to causation as an area where there might be inefficiency. In my view, this concern is overstated, as the arguments about causation are not as complex (legally or factually) as the Defendant suggests and can be dealt with as a discrete issue regardless of in which part of the trial they appear. However, I agree with Ms Patel that causation may be better dealt with in the first trial. This ought to add little extra time or effort to the shape of the first trial.

(2) Factor 2: I am not persuaded by the Defendant's arguments that a long list of procedural steps means a unitary trial is desirable. It seems that the contrary is actually the case:

(i) There is likely to be a relatively small amount of documentary evidence required to deal with the key issue.

(ii) The factual witness evidence is limited.

(iii) There is no need for any significant expert evidence, if indeed it is needed at all.

On the other hand, the Claimant's case on damages is at a relatively early stage of development and is likely to involve a lengthy process of disclosure from the Claimant and the engagement of forensic accountants, as well as several days of trial time. That will require considerable effort and expense, which may well be avoided once the outcome of the first trial is known. Accordingly, it seems clear that there are considerably more advantages to a split trial, in terms of trial preparation and management.

(3) Factor 3: It may be that there is a need for the Defendant's witnesses to give evidence in two trials, rather than just giving evidence once in a unitary trial. However, I expect the extent of this to be limited, if it arises at all. This is particularly so given that I agree with the Defendant that causation should be dealt with in the first trial.

(4) Factor 4: For the reasons set out above, I consider that the key issue in this case (whether there is a hardcore restriction) is in fact a relatively simple one which can be tried sensibly and effectively in isolation from the quantum issues. On the other hand, a unitary trial is likely to introduce extra complexity and create a significant case management burden for the Tribunal, given the need to case manage the damages aspects of the case.

(5) Factor 5: I do not consider that asking the Defendant to prepare for a trial of liability and causation, as a separate exercise from assessing the quantum of damages, is unfair or unreasonably constrains the defence which can be put forward to the claim. The Claimant asserts an indirect breach of the Chapter I prohibition, in the form of a hardcore restriction. I do not accept the Defendant's suggestions that extensive disclosure, factual evidence or expert evidence is required to determine this issue. It is a relatively short factual point which can be determined without delay. That should be in all parties' interests.

(6) Factor 6: Taking account of the Defendant's observations about separating causation from liability, which I agree with, there is a clean split between the liability (and causation) issues and the assessment of damages.

(7) Factor 7: As noted above, I consider the risk of material duplication to be low. There is obviously a risk that an appeal of the outcome of the first trial (assuming for these purposes that the Claimant succeeds) might delay the outcome of the second trial. That will be the position in most split trials. However, in this case there is the more unusual feature that an unrepresented claimant would, in the situation posited, be able to apply for an interim payment and Mr Macfarlane has indicated that this could be used to finance external assistance for his damages claim. That would be likely to make the damages segment of the case more efficient. There is therefore an associated potential benefit to a split trial.

(8) Factor 8: It should be noted that this factor must also be viewed in the context of the Tribunal's Rules and approach, and in particular Rule 4, which requires the Tribunal to ensure that cases are dealt with justly and at proportionate cost. Rule 4 includes in particular:

(i) A requirement to ensure that the parties are on an equal footing (Rule 4(2)(a)).

(ii) A requirement to deal with the case in ways which are proportionate to the financial position of each party (Rule 4(2)(c)(iv)).

(iii) A requirement to ensure that the case is dealt with expeditiously and fairly (Rule 4(2)(d)).

(iv) A requirement that cases be case managed actively, including an early concentration on the main issues, the fixing of an early hearing date, and adopting appropriate fact-finding procedures (Rule 4(5)).

In my judgment, these provisions all point strongly towards a split trial as the best course to ensure fair, quick and efficient adjudication. The key issue in this case is a relatively short one which can be dealt with in a short hearing and in isolation from the assessment of damages.

(9) Factor 9: Contrary to the Defendant's suggestion, it seems to me that a mediation is most likely to be effective once there is a clear focus on the liability issues, which a split trial will engender at an early stage.

(10) Factor 10: The issue of a split trial arises early in these proceedings and on the initiative of the Tribunal.

34. These factors all point strongly towards a split trial in which liability, causation and the Claimant's application for an injunction are dealt with in the first trial and the assessment of damages is dealt with in a second trial. I have no doubt that is the right approach to the trial of this matter and I therefore order a split trial in that format.

## E. FAST TRACK PROCEDURE

### (1) The parties' arguments

35. The Defendant advances the following points in support of its application to remove the case from the fast-track procedure:

(1) The time estimate for the trial should properly be more than three days, given the complexity of the issues, the likely number of witnesses, the need for expert evidence and the fact that the Claimant is unrepresented.

(2) There are complex issues involved, including questions about pre and post Brexit law and the transitional provisions between the two, issues of market share arising from the De Minimis Notice and the Block Exemptions, the selective distribution provisions in the Block Exemptions, issues of relief and the complexity of the Claimant's damages claim.

(3) The need for 6 to 8 witnesses of fact and at least three experts to deal with market share and accounting issues.

(4) Likely issues of contention relating to disclosure.

(5) The size of the claim for damages (in excess of £3 million) and the entitlement of the Defendant to defend itself properly.

(6) The approach being taken to the litigation by the unrepresented Claimant, which increases the costs and time necessary to progress the case.

36. The Defendant relied on the decision of the Tribunal in *Belle Lingerie v Wacoal EMEA Ltd* [2022] CAT 22, which also involved allegations of resale price maintenance and where the Tribunal declined to place the case in the fast-track procedure.

37. The Claimant resists the application to remove the case from the fast-track procedure. The Claimant's argument is essentially that it can only pursue the claim if it is dealt with expeditiously, within the tight control the fast-track delivers and with the cost capping consequences of being within the fast-track procedure.

**(2) Analysis**

38. My decision to order a split trial in these proceedings is of material significance to the question of suitability of the fast track. For all the reasons I have set out above, it is my view that the questions of liability, injunctive relief and causation can be dealt with in a relatively short hearing, in the region of three days. It may be that the hearing will not fit within three days, but Rule 58 does not require exact adherence to that target and my expectation is that a fourth day in reserve would be prudent and also consistent with the fast-track procedure.

39. In reaching this view I have taken the following into account:

(1) There are likely to be two main witnesses from the Defendant in relation to liability (Mr Hagger and Mr Henderson). Ms Patel suggested that the Claimant might compel one of the Defendant's witnesses to give evidence, but that seems unlikely to happen. Ms Patel also suggested that a witness about strategy might be required, but it is not clear what issues that evidence would go to. There has also been a suggestion of a witness to speak to the financial position of the Claimant (which is said to be relevant to causation). I am not convinced that evidence from the Defendant about the Claimant's financial position will be very helpful, but in any event it is unlikely to occupy material trial time.

There will probably only be one witness for the Claimant. So there will be three, or possibly four, factual witnesses in total.

(2) There is, for the reasons set out in relation to the split trial issue, not likely to be any need for significant expert evidence in the first trial.

(3) Contrary to the Defendant's submissions, I expect the issues relating to the market share provisions in the De Minimis Notice and the Block Exemptions to be secondary (to the hardcore restriction issue) and in any event to be relatively straightforward. As noted above in relation to the split trial issue, I anticipate that the selective distribution issues will be dealt with as part of the Defendant's answer to the hardcore restriction allegations. I doubt that the pre and post Brexit and transitional issues (with which the Tribunal is already familiar) will add materially to the time required at trial.

(4) I am also sceptical of the argument advanced by the Defendant that causation is a complex and difficult issue. The Claimant asserts that the T&Cs, under which the Claimant was historically supplied, are void, so it is unclear on what basis supply would continue in the counterfactual. It also asserts that an examination of the Claimant's credit history with the Defendant is required, in order to assess whether concerns in relation to future payment of invoices by the Claimant might be a valid reason why the Defendant would not have supplied the Claimant in the counterfactual. The former point seems largely to be a short point of law, while the latter is a discrete factual enquiry and is unlikely to involve in depth examination or to require serious time at trial.

(5) In fact, the real issue for the first trial is easily defined and relatively straightforward, being largely a factual question, as described above.

(6) For that reason, the disclosure required to deal with the issues in the first trial is likely to be relatively limited. I do not accept that the Defendant's desire to review between one and two hundred retailer contracts is necessary for resolving the hardcore issue and is therefore a central requirement of the case. If the Defendant wishes to carry out the exercise, it is of course free to do so, but that should not affect the allocation of the case.

(7) There is no reason why the Defendant cannot properly prepare and put forward its case on the hardcore restriction (and if necessary the

application of the De Minimis Notice and the Block Exemptions) in a trial under the fast track procedure. There is ample time for the Defendant to do that within a six month period between allocation to the fast track and the trial.

(8) In any event, Rule 4 requires me to ensure the parties are on an equal footing, to consider the financial positions of both parties, to ensure that the case is dealt with expeditiously and fairly and to case manage the case actively. All these factors point towards allocating the case to the fast-track procedure.

(9) Although *Belle Lingerie* sets out and applies in very clear terms the requirements of Rule 58, the facts in that case were very different and the outcome there is of limited assistance by way of guidance about the outcome here. As Mr Macfarlane pointed out, for example, the circumstances surrounding the resale price maintenance allegations in *Belle Lingerie* involved international pricing arrangements and policies. The factual position in this case (as described above) is considerably simpler.

40. I therefore reject the application by the Defendant and order that the case should remain in the fast-track procedure for the purposes of the first trial, as defined in my decision in relation to split trial above.

## F. DISPOSITION

41. I order that there be a split trial in these proceedings, in the following format:

(1) Trial 1 to deal with questions of liability under the Chapter I prohibition, injunctive relief and causation.

(2) Trial 2 to deal with questions of the assessment of loss or damage suffered by the Claimant, if it is successful in Trial 1.

42. The Claimant has indicated that it wishes to seek to amend its claim to include a claim based on Article 101 of the Treaty on the Functioning of the European Union. If that amendment is permitted then the Article 101 issues will be determined in Trial 1 as well.

43. The Defendant's application to remove the proceedings from the fast-track procedure is refused. As a consequence, the Tribunal will now determine the appropriate level of cost cap to apply under Rule 58(2)(b). The parties should provide any further written submissions on this subject by 4pm on Thursday, 15 February and I will deal with the issue on the papers.

44. Rule 58(2)(a) requires the Tribunal to fix the main substantive hearing (that is, Trial 1) for a date as soon as practicable and in any event within six months of the order allocating the case to the fast-track procedure. Given that I made an order allocating the case to the fast track on 1 December 2023, that six month period might in principle expire on 1 June 2024. However, I am mindful that the original allocation to the fast-track was for a unitary trial, and that I have now ordered a split trial, and the Defendant's application to reverse the allocation will have created some uncertainty.

45. In those circumstances, I will treat the date of handing down of this judgment as the starting point for the six month period, and the six months will therefore expire on 6 August 2024. I note, however, that this is the outside limit of the period in which the trial can be fixed and other factors, such as the Tribunal's availability, will mean that the trial may be fixed at any time in July and possibly in June 2024. The Tribunal Registry will contact the parties to identify a suitable trial window of three days, with an extra day in reserve.

46. In the meantime, the parties should seek to agree a timetable to trial, covering:

    (1) The date for the mutual disclosure of documents.

    (2) Dates for the mutual exchange of witness evidence and any reply witness evidence.

(3) A date for a Pre Trial Review hearing.

47. If the parties are unable to agree a timetable by Thursday, 15 February 2024 then they should submit a draft timetable to the Tribunal showing the areas of disagreement.

48. In the meantime, the parties should progress the activities which the timetable contemplates with all due expedition. The parties are reminded of their duty under Rule 4(7) to co-operate to assist the Tribunal in the case management of these proceedings.

49. If either party wishes to seek permission to adduce expert evidence for the purposes of Trial 1, then they should make that application by 4pm on Wednesday, 28 February 2024. If any such applications are received then the Tribunal will set a timetable for responsive observations from the other party.

Ben Tidswell
Chair

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

Date: 6 February 2024