Neutral Citation Number: [2023] EWHC 68 (Ch)

Claim No. BL-2021-002179

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 17th January 2023

Before:

HIS HONOUR JUDGE HODGE KC
(sitting as a Judge of the Chancery Division)

- -

Between:

ELI LILLY & CO

Claimant

- and -

TEVA PHARMACEUTICAL INDUSTRIES LIMITED

Defendant

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- -

MR. MICHAEL BLOCH KC, DR. STUART BARAN and **MS. ALICE HART** (instructed by **Hogan Lovells International LLP**) appeared for the **Claimant.**

MR. RICHARD MILLETT KC and **MR. JAMES KNOTT** (instructed by **Bird & Bird LLP**) appeared for the **Defendant.**

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APPROVED JUDGMENT

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HIS HONOUR JUDGE HODGE KC :

1. This is my extemporary judgment on the principal issues arising at the first case management hearing of a claim issued on 1st December 2021 by Eli Lilly & Co, a company incorporated under the laws of the State of Indiana, USA, against Teva Pharmaceutical Industries Limited, a company incorporated under the laws of the State of Israel, which is proceeding in the Business List of the Business and Property Courts of England and Wales under case number BL-2021-002179.

2. The claimant is represented by Mr. Michael Bloch KC, leading Mr. Stuart Baran and Ms. Alice Hart. The defendant is represented by Mr. Richard Millett KC, leading Mr. James Knott (who has attended remotely). All other legal representatives and representatives of the parties have attended this hearing in person.

3. The evidence is contained in three witness statements. The first is from Mr. Daniel Charles Brook, a solicitor and partner in Hogan Lovells International LLP, the claimant's solicitors, dated 28th July 2022. Evidence in answer is provided by Mr. Mark James Hilton, a solicitor and partner in Bird & Bird LLP, the defendant's solicitors, in his witness statement dated 19th December 2022. Mr. Brook has responded to that evidence in his second witness statement dated 9th January 2023.

4. Both sets of counsel have submitted helpful written skeleton arguments dated 11th and 12th January 2023, which I have had the opportunity of pre-reading. Since certain of the material contained within both the skeleton arguments,

and the underlying documentation, is regarded as commercially sensitive and confidential, I will be careful in what I say in this extemporary judgment.

5. These proceedings concern the nature and amount of damages, if any, due to the claimant from the defendant under a settlement agreement dated 16th May 2018 arising out of the marketing and sale by the defendant of a patented drug combination, pemetrexed, in the German market between January 2019 and July 2020. According to the claim form, the claim is said to be valued at more than £10 million.

6. This is the first case management hearing in the matter. The claim is not subject to costs management (because the claim is valued at more than £10 million) and the two principal issues before the court are outstanding issues in relation to the disclosure review document and an application dated 28th July 2022 for the court to direct the trial of a preliminary issue as to the meaning and operation of clause 3.4 of the settlement agreement.

7. It is the claimant that seeks the trial of a preliminary issue and this is opposed by the defendant, primarily on the grounds that it will not be decisive of the case (as is common ground), that it will not save costs, and that it will delay the trial of this matter - a trial, which, absent any settlement, it is common ground is inevitable, whatever the outcome of the proposed preliminary issues.

8. The defendant says that the scope of disclosure and expert evidence will be the same whatever the outcome of the preliminary issue, and its determination will not cut down on the issues in the case, save costs or bring the parties any closer together, and it will only serve to delay the trial of this matter,

particularly if there is an appeal. Mr. Millett described the proposal for a preliminary issue as ‘a treacherous short-cut’.

9. There is, in addition, a subsidiary issue, raised by paragraph 2 of the defendant's application notice dated 19th December 2022, as to whether, should the court be inclined to direct a preliminary issue, interest on any sums due to the claimant should cease to run whilst that preliminary issue is being finally determined.

10. In summary, the background to this application, and case management hearing, is that in July 2012 the claimant had commenced infringement proceedings against the defendant in Germany for breach of the German designation of a European patent relating to the use of the drug pemetrexed disodium. The claimant sells that product under the trade name ‘Alimta’. A number of disputes had arisen in relation to the validity of that patent in a number of jurisdictions, including proceedings between the claimant and the defendant.

11. On 16th May 2018, the claimant and the defendant (alone) entered into the settlement agreement. This settled all outstanding disputes remaining between them across all European jurisdictions (except for the UK), and including proceedings in Germany. That agreement is governed by English law, although it did not extend to the United Kingdom.

12. Clause 3.4 of the settlement agreement gave an option, in the event of the entry into any relevant market by another generic manufacturer of the drug, and a failure by the claimant successfully to injunct that entry, for the defendant to enter the relevant market before the ‘Launch Date’ (as defined)

‘at-risk’ as to damages in the event that the claimant subsequently succeeded in removing the relevant generic drug from the market or succeeded in an infringement action against the generic drug producer.

13. The claimant emphasises that clause 3.4 is not predicated on any breach of the settlement agreement but merely governs what is to happen if a third party enters the relevant market in particular circumstances before the ‘Launch Date’ (as defined).

14. Although the claimant did not purport to enter into the settlement agreement on behalf of anyone but itself, it nevertheless seeks damages by reference to other entities, namely its ‘Affiliates’, a term defined at clause 1.1 of the settlement agreement. The claimant goes on to allege in the particulars of claim that clause 3.4 of the settlement agreement has the legal effect that ‘damages’ means moneys payable to the claimant pursuant to clause 3.4, measured by reference to the losses incurred by ‘Lilly Group’, a defined term, which is said in the particulars of claim to refer compendiously to the claimant and its affiliates as defined by the settlement agreement at clause 1.1.

15. In summary, the claimant's case, as set out in Mr. Bloch's skeleton argument, is that damages under clause 3.4 are to be measured by reference to the losses incurred by Lilly Group, and that those losses are to be in such an amount as to restore the position had the defendant not launched its own product in Germany, calculated on the basis that each sale by the defendant would have been fulfilled by a sale by either the claimant or Lilly Group (as appropriate) by way of a sale of its own product, Alimta.

16. By contrast, the defendant's case is that damages under clause 3.4 are to be measured by reference to the loss incurred by the claimant alone, and not by any of its affiliates; and that that loss is: (1) in such amount as would restore the position had the defendant not launched its own product in Germany, calculated on the basis that the claimant would have made the sales the defendant made, less the sales which would have been made by other generic companies present on the German market at the time (and taking account of any available price reductions or discounts), and thus by reference to the claimant's own loss of profit, and not that of both the claimant and its affiliates; or (2) the reasonable royalty that the claimant (as patentee) could have obtained from a German court in accordance with German law; or (3) the amount that the claimant (or, if the claimant is right about the entitlement of Lilly Group, the claimant and its affiliates) could have recovered from the defendant in Germany in an action for patent infringement had the settlement agreement never been made, which the defendant says, as a matter of German law, would exclude any loss otherwise recoverable by the claimant's relevant German affiliate.

17. The defendant says that the claimant's basis of claim does not reflect the language or the proper interpretation of the settlement agreement. It says that the concept of a 'Lilly Group' is neither referred to nor contemplated by the settlement agreement and is a confection of the claimant's own devising. It says that the sums owed to the claimant under clause 3.4 relate to losses that may have been suffered by the claimant alone, and not to any losses suffered by other parties, including the claimant's affiliates, as that term is defined in the settlement agreement, or any related companies.

18. Both skeleton arguments address the legal principles governing directions for the trial of preliminary issues. These are not in dispute. The discretion to order the trial of a preliminary issue falls within the court's general powers of case management, and specifically CPR 3.1(2) (i), by which the court can direct a separate trial of any issue.

19. The relevant principles are said by Mr Bloch to have been set out by HHJ Birss QC (as he then was) in *Wagner International AG v Earlex Ltd* [2011] EWHC 3897 (Pat) at paragraph 9 by reference to nine criteria, as follows:

(1) whether the determination of the preliminary issue will dispose of the whole case or at least one aspect of the case;

(2) whether the determination of the preliminary issue will significantly cut down the cost and the time involved in pre-trial preparation and in connection with the trial itself;

(3) if the preliminary issue is an issue of law, the amount of effort involved in identifying the relevant facts for the purposes of the preliminary issue;

(4) if the preliminary issue is an issue of law, whether it can be determined on agreed facts: if there are substantial disputes of fact, it is unlikely to be safe to determine the legal issue until the facts are found;

(5) whether the determination of the preliminary issue will unreasonably fetter either the parties or the court in achieving a just result;

(6) the risk that an order will increase the costs or delay the trial, and the prospects that such an order may assist in settling the dispute;

(7) the more likely it is that the issue will have to be determined by the court, the more appropriate it is to have it determined as a preliminary issue;

(8) the risk that the determination may lose its effect by subsequent amendments to the statements of case; and

(9) whether it is just and right to order the determination of the preliminary issue.

20. Those criteria were derived from the earlier judgment of Neuberger J (as he then was) in the case of ***Steele v Steele*** [2001] CP Rep 106. Mr. Millett was content to accept the way in which Judge Birss had set out the law in ***Wagner***. Comfortingly, he indicated that I would not be asked to make any new law on the factors relevant to the direction of preliminary issues. However, Mr Millett did take me to Neuberger J's judgment in ***Steele***. Mr. Millett submitted that the factors of particular relevance to this case include the following:

(1) Whether the determination of the preliminary issue would dispose of the case, or at least one aspect of the case. Mr. Millett indicated that that factor had been particularly emphasised in recent case law. He referred me to observations of Lord Sumption, noting the unattractiveness of trying preliminary issues which are not decisive; and of Lord Hope's indication in another case that the 'essential criterion' for directing a preliminary issue is whether there is a 'succinct, knock-out point which is capable of being decided after only a relatively short hearing'. He also referred me to the observation of David Steele J, sitting as an additional judge of the Court of Appeal, that 'only issues which are decisive or potentially decisive should be identified' as preliminary issues.

(2) Whether the determination of the preliminary issue will significantly cut down on the court time involved in pre-trial preparation and the trial, and whether it will increase costs or delay the trial, making full allowance for the implications of any possible appeal.

(3) Where the issue is a point of law, whether it can be determined on agreed facts, and how much effort will be involved in identifying the relevant facts for the purpose of the preliminary issue.

(4) Whether the determination of the preliminary issue may unreasonably fetter either or both of the parties or the court in achieving a just result.

(5) Whether there is a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination.

21. Mr Millett pointed out that in ***Steele***, Neuberger J had also noted the need for the court to step back and ask itself whether, taking into account all the various points, it was just to order a preliminary issue.

22. Mr. Millett referred me to observations which were said to speak with one voice as to the caution to be exercised by the court before acceding to the 'siren song' or the 'treacherous short cut' of ordering a preliminary issue. As Lord Hope had noted, there were dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety. That this is so is said by Mr. Millett to be demonstrated by the fact that courts have not infrequently refused to order a preliminary issue, or have even refused to deal with a preliminary issue where

the parties are agreed that one should be directed, or it has been directed by another court. Mr. Millett reminds me that that was the case in *Steele* itself where, having heard the arguments and considered matters thereafter, Neuberger J reached the conclusion that it would not be appropriate to determine the preliminary issue that had been directed by another court.

23. I have had regard to all of those factors. However, one further matter, not addressed by either Neuberger J or by Judge Birss - doubtless because the point did not arise in either of the cases before them - is the need clearly to define the nature and the scope of any preliminary issue ordered by the court. If authority for that is needed, it is to be found in the judgment of Hobhouse LJ in the case of *Allied Maples Group Limited v Simmons & Simmons* [1995] 1 WLR 1602, at page 1621 between letters G and H:

> "Before parting with this matter, I would reiterate that wherever the trial of a preliminary issue or issues is ordered, and this includes orders for issues to be excluded from the trial, it is essential that the issues be clearly defined and that the judgment reflect that definition ... The ability to order the trial of preliminary issues is a most valuable tool which can, when properly used, assist the achievement of justice and save costs. What went wrong in the present case was not the concept of the trial of limited issues ... What went wrong was that the essential disciplines of the proper trial of preliminary issues were not observed."

That authority was not cited to me, but it merely articulates an additional factor which I consider to be of relevance when deciding whether to order the trial of a preliminary issue or issues.

24. Against that background, I turn to the issues which are sought to be ordered as preliminary issues in the present case.

25. In Mr. Bloch's skeleton, the claimant identifies two preliminary issues. The first, referred to as the 'Lilly Group issue', is whether the claimant is correct about the legal effect of clause 3.4 of the settlement agreement as set out at paragraph 18(b) or (c) of the particulars of claim. Paragraph 18(b) refers to the damages in clause 3.4 of the settlement agreement falling to be measured by reference to the losses incurred by Lilly Group, and being in such amount as to restore the position had the defendant not launched the product triggering the action of that clause.

26. The second is referred to as the 'German law issue'. That is whether the question of damages under clause 3.4 of the settlement agreement is to be assessed by reference to the damages that would have been awarded in an action for patent infringement by a German court under German law.

27. Mr. Bloch recognises that only the Lilly Group issue originally formed the subject of the claimant's application for a preliminary issue. The German law issue had been raised by the defendant in correspondence, and has since become the subject of an amendment to the defence. Mr. Bloch proposes that given: (a) that the German law issue is another purely legal issue concerning the construction of damages in clause 3.4 of the settlement agreement, and (b) that the way it has been pleaded by the defendant, it also bites on the issue of what the Lilly Group entities might be able to recover for their losses, it would be suitable for inclusion alongside the Lilly Group issue at any preliminary issue trial. Mr. Bloch emphasises that that preliminary issue would not extend to the content of the substantive German law to be applied, but only to whether German law is relevant in the first place.

28. In broad terms, the claimant's position on that is that German law is not relevant to the question of damages under the settlement agreement, which extends beyond sales in Germany, even though the agreement is itself governed by English law.

29. The claimant's time estimate for hearing both of the preliminary issues is one day, with an additional half day for pre-reading. The issues are said to be issues of law on which no substantive evidence is required, and the hearing will take the form of legal argument only. Mr. Bloch contrasts that with the claimant's time estimate for the full trial of 7-9 days, excluding pre-reading and time off for preparing closing submissions. He points out that that time estimate may, however, require revision upwards given that the defendant has since pleaded out its case on German law, particularly when account is taken of the defendant's approach to the claimant's disclosure obligations.

30. That said, however, Mr. Bloch estimates that if the claimant were to succeed on both preliminary issues, that would take at least 3 or 4 days off the 7-9 day trial estimate, reducing it to between 4 and 5 days, which is the estimated time required for: (1) legal argument on the correct interpretation of clause 3.4, (2) the cross-examination of German law experts, and (3) further cross-examination of the accountancy experts on the alternative damages bases. Even if the claimant were not to succeed on the preliminary issues which it seeks, Mr. Bloch envisages that it is possible that a time saving of one day or more could still be made to the estimate, though in light of the extent of the disclosure that will be required in such a scenario, it is possible that the original time estimate will remain.

31. I take the view that if any preliminary issue is to be ordered, then the preliminary issues would have to be reformulated. I do not consider that it is helpful to be formulating a preliminary issue simply by reference to paragraphs in a statement of case. It is rather better to set out the preliminary issue in a self-contained form, which is therefore much more readily susceptible to a clear answer. I would therefore prefer the Lilly Group issue, referred to by Mr. Bloch, to be reformulated to ask whether the legal effect of clause 3.4 of the settlement agreement is that damages thereunder are to be measured by reference to: (1) the losses incurred by the claimant and its affiliates, as defined in clause 1.1 of the settlement agreement, or (2) by reference to the losses incurred by the claimant only, and not by any of its affiliates.

32. The Lilly Group issue would then have to go on to make it clear that the court is also being asked to determine whether those losses are to be calculated on the basis: (a) that each sale by the defendant would have been fulfilled by a sale by the claimant (or, if appropriate, one of its affiliates) of its own product, Alimta, or (b) on the basis that either would have made the sales the defendant made, less the sales which would have been made by other generic companies present on the German market at that time (after taking account of any available price reductions or discounts).

33. The German law issue would, I think, have to be expanded so as to ask the question whether damages under clause 3.4 of the settlement agreement were to be assessed by reference not only to the amount that the claimant (or, if the claimant is right about Lilly Group, the claimant and its affiliates) could have

recovered from the defendant in Germany in an action for patent infringement had the agreement never been made, but also on the alternative basis of the reasonable royalty that the claimant (as patentee) could have obtained from a German court under German law.

34. However, those are essentially matters of detail. I am satisfied that the court could properly reformulate the preliminary issues with the assistance of the parties. Nevertheless, the fact that the preliminary issues do require reformulation is a relevant consideration which I have borne in mind.

35. I move then to the submissions of the parties. For the claimant, Mr. Bloch invites me carefully to read the evidence of Mr. Brook and Mr. Hilton on each of the ***Wagner*** factors in their three witness statements. Mr. Bloch begins by discounting the need for evidence of the applicable German substantive law. He says that there is no need for expert evidence of that. The German law issue is to be phrased as a pure question of contractual interpretation, with what Mr. Bloch describes as a binary, ‘yes’ or ‘no’ answer. He says that there is no reason why answering that binary question should require the determination of any issues of fact, or would require the court to engage in the substance of German law. Those are said to be issues to be addressed further down the line if, contrary to the claimant's contention, the defendant is right that German law is relevant to the operation of the settlement agreement, that is to say, if the court were to answer the German law issue in the sense for which the defendant contends. Evidence of the content of that law is not needed to resolve the German law issue, as the claimant has expressed it.

36. I am satisfied that the preliminary issue could be approached on the footing of a statement of assumed facts as to the content of German law; but I note: (1) that no such statement of assumed facts has been proffered to the court, and (2) that if the matter were to proceed on the basis of a statement of assumed facts as to the substance of German law, then there is the potential for actual evidence of German law at trial to differ from that statement of assumed facts; and, if it did, and the court were to find that the operation and effect of German law is different from that on which the determination of the preliminary issue had proceeded, then the value of that determination might well be reduced.

37. Having disposed of that preliminary point, Mr. Bloch emphasises that the main thrust of the defendant's evidence in opposition to the preliminary issue application is founded upon its disagreement as to what will be achieved by any decision on the preliminary issues. In response to this, the claimant principally relies upon two points, namely the potential for such determination: (1) to reduce substantially the time and costs in the parties' preparations for, and at, the final trial, and (2) to increase the prospects of the entire dispute settling, such that a final trial would not be necessary.

38. The way it is put in the claimant's application notice of 28th July 2022 is that a preliminary issue "will dispose of a substantial part of the case and substantially increase the prospects of the parties reaching a settlement". Mr. Bloch submits that the preliminary issues are two ‘big points’ in the case which the court will be required to resolve. A decision on those points at an earlier stage than the final trial will leave fewer issues to be determined, and,

in doing so, will narrow the range of possible outcomes at that final trial. Mr. Bloch acknowledges that the claimant cannot say with certainty that a decision on the preliminary issues will lead to a settlement; but there is good reason to believe that it will, as he puts it, ‘shift the goal-posts for at least one of the parties, which ought to facilitate the parties in reaching a compromise’. The claimant for one accepts that if it loses the preliminary issues, it will have to reconsider its position and the amount it seeks to recover by its claim. If it does not lead to settlement, at least a decision on the preliminary issues will substantially reduce the time, and cost, in the parties' preparations for and at the final trial.

39. The preliminary issue will dispose of and decide part of the case, such that it will no longer need to be decided at any final trial. That is said to have a number of consequences for the case.

40. First, based on the parties' pleaded cases, at present the parties will need to prepare for trial and present their positions on the recoverable damages under clause 3.4 of the settlement agreement on a number of alternative bases, which Mr. Bloch sets out at paragraph 24 of his skeleton argument. Disclosure will have to be given, witness and expert evidence will have to be prepared, and the case will have to be prepared and presented on those alternative bases.

41. It is common ground that that would be highly undesirable. Where the parties differ is as to whether that result is unavoidable. The judge hearing all the evidence at a final and entire trial, with all of those alternative bases remaining live on the pleadings, would have to hear extensive evidence and argument in

respect of each of them, and would then need to come to a decision on each of them.

42. Mr. Bloch submits that a decision on the preliminary issues, whichever party succeeds, will narrow the list of live bases for the assessment of damages considerably. No matter what the outcome therefore, the scope of the final trial will be reduced. That will enable the parties' preparations for trial to be streamlined, saving the accountancy experts from having to prepare evidence, and the parties from having to prepare argument, on alternative damages bases that will turn out not to matter. Moreover, if the claimant succeeds on the German law issue, that should dispense with the need for the parties to engage experts on German law, and to prepare expert evidence on those issues, and thus save the expense of doing so, reducing the experts from six to four.

43. Second, Mr. Bloch relies upon Mr. Brook's explanation of the difference in the magnitude of the disclosure exercise that he anticipates will be required from the claimant if the Lilly Group issue should be determined in advance of trial in the claimant's favour. That is said to be relevant to some of the debate over disclosure.

44. Mr. Bloch elaborates upon this at paragraphs 29 to 32 of his skeleton argument. In summary, he says that a decision in the claimant's favour on the Lilly Group issue would have a significant impact on the magnitude of the disclosure exercise, and the consequential detailed analysis of the documents that will need to be undertaken by the parties, their solicitors and the experts in order to prepare their respective cases, accompanied by the inevitably significant costs of doing all of this. A decision on the issue in advance of the

disclosure and evidence stages of the case will therefore offer obvious benefits to the conduct of the case as a whole, and its efficient case management, and thus in terms of costs, in accordance with the overriding objective.

45. Third, and related to these points, the trial estimate can be shortened if the preliminary issues are to be decided in advance. The parties will not have to prepare argument on certain damages bases, and the accountancy experts will not need to address, nor be cross-examined upon, those bases either.

46. Mr. Bloch notes the defendant's complaint about the delay a preliminary issue trial would cause to the progress of the action. However, he invites the court to note that both parties accept that the claimant is owed a sum of money as damages under the settlement agreement, and the question between them is how much that is. Mr. Bloch says that there is no incentive for the claimant to wish to delay the resolution of the case, thereby keeping it out of receiving payment of the money owed to it.

47. Mr. Bloch says that the claimant's understanding from the Chancery Listing office is that a one-day hearing could come on in April to July of this year, and thus in only a few months' time, much earlier than any final trial. Given the commercial importance of this dispute to both parties, and the amount at stake, the claimant cannot dismiss the possibility that the losing party would seek to appeal the preliminary issue judgment, such that if permission to appeal were to be given, a final decision on the issues would need to factor in the time for an appeal. The claimant therefore accepts that any final trial may well be listed at a later date than it otherwise would have been. However, he says that this delay is no reason to refuse to order the preliminary issues. The delay is

but one factor that needs to be balanced against a number of other factors that are said strongly to point in favour of the preliminary issue. These are: (1) the obvious benefits of the preliminary issue, in particular the very significant savings in the parties' - and the court's - time and resources that will result if the preliminary issue is ordered; (2) the increased prospects of settlement following the determination of the preliminary issue, which would mean that the proceedings would be brought to a close earlier in time than they otherwise would have rather than later; and (3) the fact that the reduced scope of any resulting trial may also mean that the final trial may be fixed in the court's diary sooner than the longer trial would have.

48. Mr. Bloch submits that it is notable that the defendant's complaints about delay are made at a relatively high level. It cannot, and does not, point to anything specific in the market, or relevant to its commercial circumstances, that would require this dispute to be resolved before a certain date. Mr. Bloch acknowledges that the defendant raises a point on interest, seeking an order that if a preliminary issue is ordered, the court should direct that any interest that may accrue to the claimant is suspended from the grant of the preliminary issue to the final judgment on it. The claimant makes it clear that it does not agree to such an order. Its proposal is that the issue of the appropriate interest payment should simply be reserved to the judge who hears the final trial, and who will be in a position to make an assessment in the light of the preliminary issue having been heard and decided, and having seen how it has impacted on the case as a whole.

49. For all of those reasons, therefore, the claimant submits that the *Wagner* factors point in favour of the court ordering a preliminary issue on the terms sought by the claimant.

50. During the course of his oral submissions, Mr. Bloch made the following points. First, that the determination of the preliminary issues which he seeks would dispose of one, and possibly the most contentious, aspect of the case, namely what counts as damages for the purposes of clause 3.4. He reminded the court that issues of liability are frequently determined in advance of issues of quantum, and he said that it was similar here. There is a fundamental dispute as to the operation of clause 3.4, and this was a very substantial aspect of the case.

51. Second, he submitted that the advantages of the preliminary issue did not stop with disclosure. It also had the potential to avoid the need for any expert evidence of German law.

52. Third, there were no difficulties about determining the relevant facts because these were clearly set out in the recitals to the settlement agreement. There was no reason to think that that agreement meant anything different in relation to the German market than to any other country to which it might extend. Damages should fall to be assessed by reference to the law of the country governing the settlement agreement, and not by reference to the law of the particular jurisdiction - one of only many to which the settlement agreement extended - in which the relevant sales had been made. What the laws of that jurisdiction actually happened to be was an entirely separate matter.

53. Fourth, there was little or no dispute as to the facts. The issue was one of construction. There was no suggestion that any of the recitals to the settlement agreement were in any way controversial.

54. Fifth, Mr. Bloch emphasised the advantages of a preliminary issue in achieving a just result. He pointed out that this was a claim in debt and that the timing of the trial would not affect the relief that was ultimately granted. He contrasted the case of a claim for injunctive or declaratory relief. There was no reason why a determination of the preliminary issues proposed should in any way fetter the trial judge's discretion; the issue of interest was the only discretionary issue to which the defendant had drawn attention, and that was properly a matter for determination by the trial judge.

55. Sixth, Mr. Bloch acknowledged that there was a risk that the preliminary issues would delay the trial, and he acknowledged that one of the factors to which the court should have regard was the risk of any appeal. But the advantages of a preliminary trial were that the determination of the preliminary issues would shorten the time to be taken at trial, and also the time that would be spent in preparation for trial; and that, in itself, would enable the trial to be listed earlier. Indeed, the determination of the preliminary issues might well dispose of any need for a trial. This was, after all, just a money claim.

56. Seventh, there was no doubt that these issues would need to be determined by the court at some stage.

57. Eighth, Mr. Bloch did not see how the risk of any subsequent amendment might cause the preliminary issues to be deprived of their relevance or effect.

The advantages of determining the two proposed preliminary issues went way beyond anything that might be lost if there were to be an amendment.

58. Ninth, Mr. Bloch drew attention to two other particular considerations. The first was the asymmetry of the burden to be borne by the parties to this litigation if there were to be no preliminary issues. If, as a result of an order for the trial of preliminary issues, the trial of the claim was delayed, the only consequence for the defendant would be that it would have to pay any damages to the claimant later than might otherwise have been the case. That would be a source of no injustice to the defendant. If costs were to be increased by the trial of preliminary issues, that could be reflected in an adjustment to any appropriate order as to costs at the end of the trial.

59. By contrast, the injustice to the claimant would be far more difficult to mitigate or address. The extensive disclosure sought by the defendant was said to expose the nature of the burden on the claimant. Mr. Bloch acknowledged that those who pursue litigation must expect consequent disruption to their businesses and the public exploration of their private commercial matters and affairs. Any claimant who pursues litigation has to accept the face of publicity, and appropriate probing into its private commercial business; but, he said, such trouble and expense should be avoided if at all possible provided this causes no disproportionate prejudice to the counterparty to the litigation. Ordering the trial of preliminary issues would achieve that end.

60. The second was that this case would be difficult to case manage without some kind of preliminary issues. He reminded me of the alternative bases of

calculation of damages, to which I have already referred; and he emphasised that the determination of a preliminary issue would reduce the need for the trial judge to address those alternative bases. The opposing factors were, he submitted, ultimately, relatively few.

61. In the course of his reply, Mr. Bloch submitted that the parties were a long way apart on the correct analysis of the approach to damages. He likened them to ‘ships passing in the night’. Determination of the preliminary issues would resolve a principal issue or issues in the case, and would enable the court to focus on the significance of the real issues that remained once the preliminary issues had been resolved.

62. The defendant addressed the reasons why the trial of a preliminary issue should not be directed at paragraphs 31 to 54 of Mr. Millett's skeleton argument. He submitted as follows:

63. First, the proposed preliminary issue would not be decisive. It was common ground that determination of the issue in either party's favour would not be determinative of the case. It would not be ‘decisive’ or the sort of ‘succinct, knock-out point’ referred to by Lord Hope. The highest that the claimant was able to put it was that the preliminary issue might be dispositive of the claim as a whole, but then only because it might assist in the prospect of the parties reaching a settlement, and not because the court would itself, by its own decision, dispose of the claim. That was simply not a safe, let alone any valid, basis for ordering a preliminary issue, which, as was common ground, would add delay into the timetable to trial. The mere possibility, or even the

likelihood, of settlement could not stand in for a ‘decisive’ or ‘knock-out’ outcome when considering this first, and most important, factor.

64. It was not at all surprising that the claimant was unable to assert that the preliminary issue would be decisive. That is because, even if it were to be decided in the claimant's favour, and damages were to be measured by reference to losses suffered by the Lilly Group, the court was still going to have to assess: (1) which entity or entities within the Lilly Group was said to have suffered the loss claimed; (2) the basis on which that entity, or those entities, were said to be able to recover those losses from the defendant; and (3) the actual amount of such losses. The parties would therefore still have to give disclosure and evidence, including multiple fields of expert evidence, in relation to those issues.

65. Mr. Millett emphasised that the claimant had, to date, steadfastly refused to provide the defendant with the sort of information that might aid settlement discussions, namely any breakdown of the entities which the claimant claimed to have suffered the loss, the basis for claiming such loss, and the amounts claimed in respect of each entity. There was no reason to think that a generic interpretation of clause 3.4 would aid the parties in settlement discussions. Mr. Millett submitted that these preliminary issues were in no way the key that would unlock the door to the disposal of this case.

66. Second, the proposed preliminary issues would not cut down the time or cost, and would delay the progress, of the proceedings. The sole basis for the claimant asserting that the proposed preliminary issue would reduce the time and cost of trial preparation was a reduction in disclosure, on the basis that, if

the claimant were to succeed, it would not be required to give disclosure in relation to its intra-group structure and profit flow because all that would matter would be the group's loss as a whole, and it would not have to be divided up company by company. Reference was made to paragraphs 30 to 43 of Mr. Brook's second witness statement.

67. Mr. Millett submitted that that point was obviously wrong. Whether or not the claimant's interpretation of clause 3.4 were to be favoured by the court, that would not materially cut down disclosure because the claimant would still have to disclose its intra-group structure and profit flow, and its losses divided up company by company. It was that disclosure which would be far more valuable to the parties in seeking to narrow the issues on quantum, and in assisting them with a view to settlement.

68. Mr. Millett submitted that the claimant was going to have to give disclosure of the group arrangements whichever way the preliminary issue was decided because it would either have to show how it itself had suffered loss of revenues (on the defendant's case) or how it and its affiliates had done so (on the claimant's own case). Paragraphs 30 to 43 of Mr. Brook's second witness statement were said to afford no answer to that point.

69. Mr. Millett took me to observations of Hobhouse LJ in the case of *Gerber Garment Technology Inc. v Lectra Systems Ltd* [1997] RPC at 443, at page 479:

> "Where, as here, the relevant companies are carrying on business in different countries, the starting point must be that an income loss suffered by one company will normally not translate directly into an equal monetary loss to the other company ... The root principle which must be adhered to is that

> each company is a separate legal entity. The property of one is not the property of another. The plaintiff must prove its own financial loss in its own pocket and quantify it. Any other approach is contrary to the decided authorities and the principle in *Saloman v A. Saloman & Co. Ltd*."

70. In his reply, Mr. Bloch emphasised that the focus of the preliminary issues was upon what the claimant was entitled to claim under a particular contract. The *Gerber* case was different. It was concerned with what a company was entitled to claim in respect of damage suffered by its associates. Here, the question was one of the true construction of clause 3.4 of the settlement agreement. On the claimant's case, it was entitled to recover the loss suffered by its affiliates, whether or not such loss had been suffered by the claimant itself.

71. Mr. Millett emphasised, in relation to costs generally, that determining the proposed preliminary issue would be a costly exercise in and of itself; and it was obviously the case that having two trials was costlier to the parties than having only one (it being common ground that, absent any settlement, there would need to be a full trial in any event).

72. As regards delay, the claimant did not, and could not, seriously contend that the trial of a preliminary issue would not delay the proceedings. Furthermore, the delay in disclosure of the material that would actually help to narrow the issues on quantum, namely disclosure as to the entities which the claimant claimed actually to have suffered loss, how they had suffered it, and the amounts which they were said to have lost, would obviously hamper settlement efforts in the meantime.

73. Third, Mr. Millett submitted that the proposed preliminary issue could not meaningfully be determined on agreed facts, and that the process of determining those facts would require a full trial. There was no schedule of agreed or assumed facts in relation to the preliminary issues, and the claimant had not proposed one. That should make the court wary of ordering a preliminary issue on the basis that, as David Steele J had said, preliminary issues should be decided on the basis of a schedule of agreed or assumed facts.

74. In any event, absent particulars from the claimant as to all of the entities or figures which were being claimed within the composite Lilly Group, or the basis upon which it was said that any and/or all such entities could have recovered from the defendant, the defendant was simply in no position to know, let alone agree, the factual basis for the application. Such relevant facts as are now known have had to be dragged out of the claimant over a period of months (and continue to be drip-fed in the form of new material even as late as Mr. Brook's second witness statement). But other key facts remained unknown: What was the claimant's own loss? If none, which entity in the Lilly Group had suffered it? How, and on what basis? Without those facts, the utility of the preliminary issue about whose damage was contemplated was said to be doubtful.

75. Furthermore, there was a danger in the court undertaking the isolated construction of a contractual clause in the absence of the full evidence at trial which was likely to be relevant, to at least some extent, as part of the factual matrix relevant to the construction of the settlement agreement. In that regard, it was said to be notable that the claimant had an expressly pleaded case (in

paragraph 17 of the particulars of claim) as to what purposes the settlement agreement, taken as a whole, had served for the parties, which had been put in issue by the defendant by way of non-admission. I note, in that regard, that this was merely by way of non-admission, and that no positive counter-case was advanced by the defendant, even in its amended defence.

76. Fourth, it is said that determination of the preliminary issue would unreasonably fetter the parties, or the court, in achieving a just result. In circumstances where the claimant's expressly stated wish in making the application for preliminary issues is to avoid giving disclosure on its intra-group structure, and on a company-by-company basis, Mr. Millett says that there is a real risk that determination of the preliminary issue, at this stage, would fetter both the defendant and the court in testing the claimant's case that the Lilly Group has suffered whatever loss the claimant will, in due course, say that it has suffered. That is no satisfactory way to go about a damages inquiry. Nor is it a proper basis for any preliminary issues, particularly in this case where the group loss needs must be identified by loss to **someone** in the group. Mr. Millett points out that the Lilly Group is not a legal entity trading as such.

77. Fifth, the preliminary issue could lead to an application for the pleadings to be amended, so as to avoid the consequences of the determination. Mr. Brook confirms that Lilly is not willing to undertake not to amend so as to claim anything other than its own direct losses. As a result, the defendant has no comfort that the claimant will not seek to amend in some way if it loses the

preliminary issue, such as, for example, to seek the same or similar forms of loss in any event.

78. Sixth, it is not just to order a preliminary issue. Standing back and taking the *Steele* factors into account, this is not a case where it would be just to order a preliminary issue. In circumstances where it is common ground that the preliminary issue would not be decisive of the case whatever way it was decided, and where the highest it can be put, even by Lilly, is that it **might** push the parties closer on settlement, a preliminary issue could only conceivably be justified if it was certain to reduce the time and cost of the proceedings, which will inevitably go to trial absent a settlement. That simply cannot be said in this case. A preliminary issue would do little to narrow the issues in dispute, and would reap minimal savings in court time and therefore costs. Indeed, it would be more likely to add to both, it being common ground that the insertion of the preliminary issue trial will delay the final trial, and it being obvious that two trials are more costly than one.

79. Further, Mr. Millett submits that the proposal to expand the preliminary issue application to include the question whether or not German law applies to the settlement agreement, or the assessment of damages thereunder, is not something that the court should countenance.

80. First, it is said to misstate the issue between the parties. The defendant does not say, and has never said, that German law 'applies to' the settlement agreement. It is common ground that this is governed by English law. Rather, the relevance of German law goes to the question of how 'damage' within clause 3.4 is to be identified, and measured, on the facts of this case. It is a

matter of evidence whichever party's case on clause 3.4 is correct. The claimant's positive case is that the settlement agreement was intended to put the defendant in as good a position as any other generic pharmaceutical company would be entitled to be. For the defendant, to be in as good a position as any other generic pharmaceutical company, it follows that the claimant cannot recover damages over and above what any other generic company would have had to pay the claimant for launching 'at-risk' in Germany. To make that assessment, the court will need to understand the ability of the claimant, or Lilly Group, to recover damages in Germany for patent infringement. It cannot be seriously arguable that German law is irrelevant to the question of what loss was suffered by either the claimant, or the Lilly Group, in circumstances where the primary entity whose sales were damaged by the defendant's entry into the German market was the German entity within the Lilly Group.

81. Second, it is said that it would be unfair to the defendant for the court to determine now, and once and for all, the relevance of German law as a matter of what 'damages' are ultimately recoverable by the claimant in circumstances where there remain unanswered, and relevant, questions as to the nature of the Lilly Group, not least within Germany. It is said that the court is being asked to decide the relevance or otherwise of German law without having the full picture before it. Mr Millett contends that nothing that is said in Mr. Brook's second witness statement really grapples with the relevance of German law as a matter of **evidence** in identifying how 'damages' are to be identified and measured.

82. Those are the parties' submissions on the preliminary issue.

83. Against the background of those submissions, I turn to consider, and apply, the ***Wagner*** criteria. First, it is common ground that the determination of the preliminary issue will not dispose of the whole case. It may dispose of two important aspects of the case; although the court should not be blind to the fact that, on occasions, where a preliminary issue has been directed, the court has ultimately declined to decide that issue (as was the position in ***Steele*** itself).

84. One of the two principal reasons advanced by Mr. Bloch in support of the application for preliminary issues is that they will increase the prospects of the entire dispute settling, such that a final trial will not be necessary. I do not accept that that is the case, unless 'by settlement' is meant the claimant backing down if the preliminary issues are decided against it. I can see no real prospect of settlement on the part of the defendant until it has received disclosure of documents from the claimant relevant to issues of the quantification of the claimant's claim. Ordering the trial of preliminary issues may well delay settlement, rather than accelerating its prospects.

85. Second, on the issue of whether determining preliminary issues will significantly cut down the costs, and the time, involved in pre-trial preparation, and in connection with the trial itself, on this aspect of the case I prefer the submissions of Mr. Millett to those of Mr. Bloch. It does seem to me that whether it is the claimant itself, or the claimant and its affiliates, which is, or are, entitled to be treated as the relevant body for the assessment of damages under clause 3.4, there will still need to be detailed disclosure of the kind identified by Mr. Millett. I accept Mr. Millett's submission that the

court is still going to have to assess: (1) which entity, or entities, within the Lilly Group are said to have suffered the loss claimed; (2) the basis on which they are said to be able to recover those losses from the defendant; and (3) the amount of such losses. The parties will therefore still have to address those matters on disclosure, and in their expert evidence, whatever the outcome of the preliminary issues.

86. The third and fourth factors are the amount of effort involved in identifying the relevant facts for the purposes of the preliminary issue, and whether any issues of law can be determined on agreed facts.

87. So far as the Lilly Group issue is concerned, I accept Mr. Bloch's submission that this may be capable of being determined without any factual evidence whatsoever beyond the uncontroversial recitals to the settlement agreement. Even then, however, the judge determining the preliminary issue may want some, albeit limited, additional factual evidence as to the factual matrix underlying the settlement agreement. But so far as the German law issue is concerned, it does seem to me that there would need to be, at the very least, an assumed statement of facts, if none can be agreed, as to the relevant principles of German law.

88. It would, as I have indicated, be possible to require the defendant to prepare an assumed statement of facts. However, the court can have no real confidence that that would be the factual position for which the claimant would ultimately be contending at trial. The trial directions assume that if the German law issue remains live at trial, there will be a need for experts on German law on each side. The court is entitled to infer from this that there may be a dispute as to

the content of the relevant substantive German law. If that is so, the basis upon which the judge determining the preliminary issue has approached the German law issue may prove to be incorrect, whether in part or in whole, at the trial itself. If so, then that may create difficulties for the parties and the court at trial. Even if that does not unreasonably fetter either the parties or the court in achieving a just result – the fifth factor - it does mean that the determination may lose some, or all, of its utility, and effect, by subsequent facts emerging at trial concerning substantive German law.

89. In so far as the risk that an order will increase the costs, or delay, the trial is concerned – the sixth factor - clearly there will be some delay to the trial of the ultimate claim. What is really concerning is the prospect that there might be an appeal. Whilst a trial of the preliminary issue on its own may only set matters back a matter of some six months or so, if there were then to be an appeal, that might well have the effect of a further year's delay. Given the vigour with which competing arguments have been advanced before this court, I cannot discount the possibility of there being an appeal from any determination of the preliminary issues (or, at least, an application for permission to appeal).

90. I have already indicated that I am sceptical as to the prospects that the determination of the preliminary issues may have in assisting the parties to settle this dispute in advance of disclosure of the kind sought by the defendant.

91. I accept that these are issues that will have to be determined by the court at some point; but that, of itself, does not mean that it is appropriate to have them determined as preliminary issues.

92. So far as the risk that the determination may lose its effect by subsequent amendments to the statements of case – the eighth factor – is concerned, I do consider that this is a real possibility, and therefore that is a factor that I have to weigh in the equation.

93. Finally, and overall, I must step back and consider whether it is just and right to order the determination of these preliminary issues. I am not satisfied that it is either just or right to do so. I am not satisfied that they represent the key that may unlock the door to the resolution of this bitter dispute between the parties. Rather, I incline to the view of Mr. Millett that ordering preliminary issues may well be a 'treacherous short-cut'. I have concerns as to whether, even if the preliminary issues are re-crafted in the way I have suggested, any judge hearing them will necessarily take the view that it is appropriate to determine them at a preliminary stage, and without the benefit of evidence of fact or German law.

94. So, for all of those reasons, in the exercise of the court's case management powers, I dismiss the application for preliminary issues. Had I acceded to the application, then I would not have made a direction, at this stage, that any interest that might accrue on any sum found to be due to the claimant at trial should be suspended while the preliminary issue was being determined. I am satisfied that the court has the discretion to make such an order; but in my judgment, that discretion should be exercised either by the judge determining any preliminary issue or, at his or her direction, by the judge actually conducting the full trial. It is not a discretion that should be exercised in advance, or as a condition, of an order for the trial of preliminary issues.

Interest, after all, is not intended to operate by way of penalty for late payment (unlike interest pursuant to the interest on commercial debts regulations). Interest awarded by the court under section 35A of the Senior Courts Act 1981 is primarily intended simply to compensate the receiving party for being kept out of their money. Therefore, in my judgment, it would not be appropriate to pre-empt any decision by any judge hearing either the preliminary issue, or the trial, as to the effect on interest running of a direction for preliminary issues.

95. I turn then to consider two minor matters: the costs of the defendant's disclosure application of 26th July 2022 and the costs of paragraph 1 of the defendant's application notice dated 19th December 2022 (what has been termed ‘the designation application’).

96. Mr. Millett, for the defendant, submits that it is the successful party on both of those applications. It has secured disclosure which it would not otherwise have secured, absent the application; and it has succeeded in achieving the purpose of the designation application. Costs should follow those events in the usual way.

97. Mr. Bloch resists that, essentially on the basis that the claimant has conceded those issues, and that the court should not, by an award of costs, discourage parties to litigation from making appropriate concessions. I reject that submission. That would simply operate to encourage parties to litigation to dig their heels in unnecessarily unless and until forced to do so by the issuing and pursuit of a court application. In my judgment, there is no reason why costs should not follow the event in relation to those two very minor matters in the usual way.

98. So far as the costs of the amendment application (in paragraph 3 of the defendant's application notice dated 19th December 2022) are concerned, the application for permission to amend has now been conceded by the claimant. However, there is no reason why the usual order for costs attendant upon an amendment application, and an amendment, should not apply. The defendant should pay the costs of its amendment application, and also the costs thrown away by the amendment itself, in the usual way.

99. That then, finally -- about two hours into this judgment -- brings me to the issue of the disclosure review document. This would not have needed to be decided had I determined the preliminary issue in the claimant's favour; but since I have not ordered preliminary issues, it is appropriate for me to address the issues raised on the disclosure review document. That is most conveniently addressed by reference to the table at paragraph 68 of Mr. Brook's second witness statement, when read in conjunction with the letter from the defendant's solicitors, Bird & Bird, dated 13th January 2023, which came into existence at such a late stage that it has had to be added to the bundles for this hearing.

100. I begin by acknowledging some general considerations. For the claimant, Mr. Bloch emphasises the following points surrounding extended disclosure under Practice Direction 57AD. First, that practice direction (replacing the former PD51U) was intended to effect a culture change, and it is driven by the concepts of reasonableness and proportionality, with disclosure being directed specifically to defined issues for disclosure arising in the proceedings, and distinguishing between issues for trial and issues for disclosure.

101. Second, it is for the party requesting extended disclosure - in this case the defendant - to show that what is sought is appropriate, reasonable and proportionate, taking into account the overriding objective and the various factors set out in the practice direction.

102. Third, model C is for disclosure of particular documents, or narrow classes of documents. It is request-led. It is likely to be appropriate where vast amounts of documentation are likely to exist, most of which are irrelevant to the actual dispute. It is implicit in this that model C requests need to be tightly focused, otherwise the benefits of avoiding a general trawl through the documents will be diminished or lost altogether. I therefore accept that model C requests should be limited in number, focused in scope, and concise.

103. Fourth, and finally, the parties should seek to avoid any unduly granular or complex approach to disclosure, even in the context of a high-value dispute.

104. I also acknowledge the two points made by Mr. Millett at the beginning of his submissions, which he described as ‘overarching points’. First, it is desirable for disclosure to be done properly and cost-effectively in one go, rather than in dribs and drabs, or by instalments. Second, in approaching issues of disclosure, the court is not involved in making any ruling on what the claimant is required to prove at trial, but merely what it is required to disclose in the course of the litigation.

105. As should be apparent from what I have already said in relation to the preliminary issue, the claimant's disclosure should extend to loss allegedly suffered by all relevant entities within the Lilly Group as a whole. I accept Mr. Millett's submission that it would be contrary to the overriding objective,

and to basic concepts of fairness, for a party which claims to recover losses within an entire group of companies not to give disclosure of the parts which go to make up the total sum claimed, so that the claimant's case on quantum is capable of being tested on the evidence at trial in the usual way.

106. I turn, therefore, from the general to the particular. I recognise that the parties have been liaising over the disclosure review document in correspondence for a number of months and, as a result, they have co-operated so as to narrow the matters that remain in issue between them.

107. I deal first with disclosure issue 2. There are a number of requests in dispute. Requests 1 and 2 can properly be taken together. In my judgment, it is both reasonable and proportionate to adopt the reformulation of requests 1 and 2 in the composite form proposed at paragraph 1(d) of Bird & Bird's letter of 13th January 2023. I am not satisfied that it is sufficient simply for average figures to be provided for the period 1st January 2017 to 1st January 2019, being the period before the 'at-risk' launch. I am satisfied that it is reasonable and proportionate for disclosure to be given in the way indicated in the Bird & Bird letter.

108. So far as request 3 is concerned, again I accept Mr. Millett's submissions. In my judgment, this request is reasonable and proportionate as going to issues of both mitigation, and also causation, of damage. One has to bear in mind that the assessment of damages is on a counter-factual basis, and it is appropriate to investigate that by way of disclosure.

109. Request 4 has received a pragmatic response in the Bird & Bird letter. I consider that that response is both reasonable and proportionate.

110. Request 5 has been addressed by a suggestion in the Bird & Bird letter which I consider both reasonable and proportionate, subject to the extension of the time for the responsive letter to 12 weeks from the 28 days originally proposed, which will fit in with the revised timetable for disclosure which Mr. Millett has agreed at paragraph 58 of his skeleton argument.

111. Again, I consider that request 6 is appropriately addressed by the proposals suggested in the Bird & Bird letter. I accept that requiring information for 2016 would be disproportionate; but the information should be provided during the timeframe of 1st January 2017 to June 2021; and I see no reason why it is not reasonable and proportionate to require the same information to be provided throughout that time period.

112. For the reasons given in the Bird & Bird letter, I consider their proposal in request 7 to be both reasonable and proportionate.

113. Again, I consider requests 8 and 9 to be reasonable and proportionate. I do not accept that they are a fishing exercise. They go to mitigation and, potentially, to causation.

114. Request 10, limited in the way indicated in the Bird & Bird letter, is in my view appropriate.

115. However, I do not consider that the same applies to request 14. I do not consider that that request is relevant to the current proceedings. Moreover, it is so widely drawn as to be disproportionate. I would not allow request 14 to remain.

116. As I understand it, requests 15 and 16 are not opposed, provided the court makes an order requiring the claimant to disclose the documents requested. I consider it appropriate to make such an order.

117. In relation to issue 3, I agree with the defendant that there is no justification for restricting the requests in the way suggested by the claimant. I suspect that that suggestion had assumed that there would be a preliminary issue as to whether only the claimant was entitled to damages. It seems to me that all of those requests are amply justified.

118. That, I hope, deals with the disclosure review document, and I hope also deals with most outstanding issues, other than the actual directions that the court should order; but if there are any matters that I have not covered, perhaps counsel could raise them now.
