Neutral citation [2022] CAT 24

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1427/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

24 May 2022

Before:

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

Sitting as a Tribunal in England and Wales

BETWEEN:

BELLE LINGERIE LIMITED

Claimant

- v -

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

Defendants

Heard at Salisbury Square House on 5 April 2022

RULING (COSTS MANAGEMENT AND COSTS CAPPING ORDER)

APPEARANCES

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

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

A. INTRODUCTION

1. On 17 December 2021, Belle Lingerie ("BL") issued a Claim Form, pursuant to section 47A of the Competition Act 1998 ("CA 1998") for loss and damage alleged to have been caused to BL as a result of what BL maintains were the Defendants' unlawful agreements and/or concerted practices in relation to the supply of lingerie in the UK (the "Claim"). BL operates an online business selling lingerie and swimwear products. It had a long-standing trading relationship with the First Defendant (which is a subsidiary of the Second Defendant) and purchased its lingerie products for resale until the First Defendant ceased all supplies in September 2021. BL alleges that there were a series of resale pricing and online sales policies implemented in a selective and discriminatory fashion by the Defendants which had the object and/or effect of restricting competition pursuant to section 2 of the CA 1998 and, until 31 December 2020, Article 101 of the Treaty on the Functioning of the European Union ("TFEU").

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

3. The first Case Management Conference took place on 14 March 2022 (the "First CMC"). At the First CMC we dismissed BL's application for the FTP under Rule 58, and we provided the reasons for our decision in our Ruling dated [**TBC**] [2022] CAT [•] (the "FTP Ruling"). The FTP Ruling sets out the background and grounds for the parties' respective claims and defences, and this Ruling should be read in conjunction with the FTP Ruling. Had we granted the application for the FTP, pursuant to Rule 58(2)(b) costs capping would automatically have applied. However, BL's application for a CCO was also made in the alternative pursuant to the Tribunal's case management powers, and in particular Rule 53(2)(m), in the event that its FTP application failed.

4. Notwithstanding our decision as to the FTP, we considered that this case should proceed on an urgent basis. At the First CMC we made an order for a split trial with Phase 1 comprising issues of liability, theory of harm and injunctive relief. If required, Phase 2 will deal with issues of causation, quantum and mitigation of loss. We gave directions leading to a trial of Phase 1, which has been listed with a time estimate of five days commencing 15 September 2022. We also made an order that the Claim shall be subject to costs management pursuant to Rule 53(2)(m).

5. In light of the fact that BL's estimated costs budget had been prepared and filed before an order for a split trial had been made, on the basis of BL's initial assumption that the trial would deal with both liability and quantum with a three-day estimate, and the fact that the Defendants had not filed a costs budget at all (on the basis that the CCO application was premature), we ordered that there be a costs and case management conference ("CCMC") which was listed for 5 April 2022 at which we would determine how the costs of the proceedings are to be managed, including BL's CCO application. We gave directions for the parties to agree the format of their respective costs estimates for Phase 1, which were not required to be in the Precedent H form prescribed by Practice Direction 3E to the Civil Procedure Rules ("CPR").

6. By its CCO application, BL originally sought a "phased asymmetric order". Its proposal was that the first stage would be a "judicially supervised" mediation focusing on establishing the parties' respective "without prejudice" positions on quantum, and ADR. If that mediation process was unsuccessful, then BL proposed that there be a second stage which would be a trial on liability and quantum subject to the FTP. BL proposed that the Defendants' recoverable costs for the First CMC and ADR be capped at £80,000, and that the Defendants' recoverable costs of defending the Claim to trial be capped at £140,000. BL proposed that its own costs for both phases, estimated to be £695,000, would be recoverable in full, subject to detailed assessment in due course. It was suggested by BL that the Defendants' costs should be much lower at approximately £400,000 on the basis that the burden of substantiating liability and quantum would predominantly fall on it and the Defendants' work would be largely responsive.

7. As a result of the directions we gave at the First CMC, the parties filed their costs estimates for Phase 1. The position is that BL now estimates that it will incur total costs, without contingencies, of £783,670. With contingencies, this figure rises to £908,170. The Defendants estimate that they will incur costs of £944,239.50 without contingencies, and £1,084,439.50 if contingencies are included.

8. BL filed two witness statements from its solicitor, Susannah Sheppard, dated 7 March and 31 March 2022 (respectively, "Sheppard 1" and "Sheppard 2") in support of its CCO application. According to Sheppard 2, there is "a real risk that the Claimant could not afford to proceed with the litigation unless the Tribunal ensured the litigation was run on a cost effective and proportionate manner and the Claimant, a small family business, secured protection from adverse costs". Sheppard 1 explains that, in December 2021, BL obtained the benefit of ATE insurance provided on a fully deferred and contingent basis in the sum of £250,000, which includes £30,000 to cover its own disbursements and £220,000 to cover adverse costs. Sheppard 2 explains that, on receiving the Defendants' estimated Phase 1 costs budget, BL sought an increase in the level of ATE insurance and has received agreement from Temple Legal Protection Limited ("Temple Legal"), the managing general agents of the insurer, Royal & Sun Alliance, that should the Tribunal cap the Defendants' costs at up to £500,000 they would provide cover to match such costs cap. In their letter dated 31 March 2022, Temple Legal confirmed that should the Tribunal determine the Defendants' costs to be capped at a level of £500,001 or more they would consider an increase in the level of indemnity, but it would involve some delay. Against that background, the costs cap contended for by BL in respect of the Defendants' recoverable costs for Phase 1 is now £450,000 "as that represents the upper end of what the Claimant will be able to afford based on the current facility that has been agreed with the ATE insurer".[1]

9. BL submits that a costs cap is necessary over and above any costs budgeting and management procedures because it has no real visibility or control over the Defendants' costs and, in particular, because if a large multi-national, such as

[1] Claimant's skeleton argument for the CCMC, paragraph 33.

the Defendants, is not cost-sensitive or wishes to obtain a tactical advantage against a cost- and time-sensitive claimant, it can increase costs by drawing out timetables, making formal applications, preparing extensive expert evidence, and arguing complex and novel issues where the legal principles are well-established. BL maintains that is what the Defendants have done here, and it fears the Defendants will continue to do so. BL says that the essential point is that it should not be shut out of bringing its Claim on the basis that it does not have the means to meet its potential costs liabilities (however limited, reasonable and proportionate those liabilities may be).

10. BL submits that:

(1) The Claim could not continue in the absence of a CCO. BL relies on the evidence of Ms Dutton, its director. Her witness statement dated 7 March 2022 ("Dutton 1") provides information relating to BL's financial position. She says that "[h]igh adverse legal fees could risk the future of our business, and if the future of our business were at risk, we would need to seriously reconsider whether we could continue with this litigation." BL alleges that there is a danger in this case that the parties' combined legal costs could almost reach the value of the Claim.

(2) The "one way" nature of the costs cap BL seeks is appropriate where its lawyers are working at reduced rates on a deferred and conditional basis and have entered into structured payments in order to enable it to bring this Claim. If its Claim is successful, BL ought to be entitled to recover its costs in full, subject to detailed assessment.

(3) The Tribunal is entitled to make a CCO even if the Defendants' proposed costs are reasonable and proportionate; and

(4) There are strong public interest concerns raised by this case: if it is successful, it will serve the wider consumer interest.

11. The Defendants submit that the first step is to consider and approve the respective parties' costs budgets. Having done so, the Tribunal can proceed to

consider BL's CCO application which the Defendants submit should be refused. The Defendants submit that: (i) the Tribunal does not have the power to make a CCO under Rule 53(2)(m); (ii) if it does have the power to make a CCO, it should apply by analogy CPR r. 3.19 and a CCO should only be made in truly extraordinary and exceptional circumstances and not to remedy problems of access to finance for litigation, or to counteract or minimise any imbalance between the financial position of the parties; (iii) BL's assertion that the Claim is brought in the wider consumer interest is inapt as the Claim is brought in the private interest of BL who seeks damages and an injunction; and (iv) the Tribunal should in any event refuse the CCO application because BL has not advanced a good reason to justify making it and the cap applied for is manifestly too low, unreasonable and unjust.

B. THE RELEVANT LEGAL BACKGROUND: COSTS MANAGEMENT

12. The Tribunal has a broad discretion when it comes to issues of costs management. Rule 53 provides, so far as is relevant for present purposes, that:

> "(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost.
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> (2) The Tribunal may give directions—
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> …
>
> (m) for the costs management of proceedings, including for the provision of such schedules of incurred and estimated costs as the Tribunal thinks fit; …"

13. When considering the costs budgets that have been filed, it is necessary to consider what level of costs is reasonable and proportionate. As to reasonableness, in *Kazakhstan Kagazy PLC & Ors v Zhunus* [2015] EWHC 404 (Comm) ("*Kazakhstan Kagazy*") at [13], a case concerned with an interim payment on account of costs, Leggatt J (as he then was) put it this way:

> "In a case such as this where very large amounts of money are at stake, it may be entirely reasonable from the point of view of a party incurring costs to spare no expense that might possibly help to influence the result of the proceedings. It does not follow, however, that such expense should be regarded as

> reasonably or proportionately incurred or reasonable and proportionate in amount when it comes to determining what costs are recoverable from the other party. What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party. This approach is first of all fair. It is fair to distinguish between, on the one hand, costs which are reasonably attributable to the other party's conduct in bringing or contesting the proceeding[s] or otherwise causing costs to be incurred and, on the other hand, costs which are attributable to a party's own choice about how best to advance its interests. There are also good policy reasons for drawing this distinction, which include discouraging waste and seeking to deter the escalation of costs for the overall benefit for litigants."

14. Costs management, and in particular the issue of proportionality, was considered in the context of a competition law claim in *Red and White Services Limited v Phil Anslow Limited* [2018] EWHC 1699 (Ch) ("*Red and White Services*"), a decision of Birss J in proceedings brought in the Competition List of the Business and Property Courts in Wales. The case concerned bus services in Cwmbran, Wales, the allocation of bus slots in the bus station and leases granted by a third party to the claimant. A competition law claim was brought, by the Defendant by way of counterclaim, and Part 20 claim against the third party, on both Chapter I and II grounds. The issues involved market definition, issues of dominance, effect issues, questions of abuse and quantum. The case was fixed for a ten-day trial, with two economist experts and seven factual witnesses. The defendant's budget for trial was £288,000 including £103,000 of incurred costs. The claimant's and third party's budgets were each £1.5 million of which the claimant's incurred costs were around £100,000, and the third party's incurred costs were around £348,000. The defendant submitted that the budgeted costs were disproportionate given that the value of the claim was in the region of £80,000 to £120,000. The claimant and third party argued that the defendant's costs were unrealistically low.

15. Birss J referred to two judgments in relation to costs management orders: the judgment of Coulson J (as he then was) in *Willis v MRJ Rundell & Associates Ltd and Grovecourt Ltd* [2013] EWHC 2923 (TCC) ("*Willis*"), and the judgment of Flaux J (as he then was) in *Wright v Rowland* [2016] 5 Costs LO 713 ("*Wright*"). In *Willis*, Coulson J found that the budgets, which had in fact

been agreed between the parties, were nevertheless disproportionate having regard to the sums at stake in the action. He found that it would cost significantly more to fight the case than the claimant would ever recover. He declined to make a costs management order, with the result that the costs would go to detailed assessment. In *Wright* the court was also faced with a dispute about costs budgets and, in particular, how complex the litigation really was. In that case, Flaux J decided not to take the course taken in *Willis* (to make no costs management order). He decided to manage the items in the costs budget that could be managed and leave some other parts of the budget to be considered at a later stage when the complexity of the claim became clearer.

16. Birss J adopted the following approach in *Red and White Services*: first, he considered proportionality at [19]: "it is relevant to compare the financial level of the claim against the costs in the budgets". On the facts of that case, he found that "[t]he claim has a higher value and greater significance than can be seen simply by focussing on the likely quantum of damages". He then turned to consider at [20] the claimant's and third party's characterisation of the case as including issues that were potentially legally novel, noting that modest value cases often raise legally novel issues which may have far-reaching implications. However, he did not consider that this was a good explanation for the very substantial differences between the budgets for the parties: "legal novelty is not a good explanation for high costs". He accepted at [21] that the case may have wider significance for the parties' bus services and the bus industry more widely, although he considered that factor to be "a little overdone". He also accepted at [22] that the claim relating to the third party had significance from the view of business investors in land and property.

17. He continued:

> "23. Also, of course I accept that infringements of competition law have a public aspect. That is a very serious matter. However, the seriousness of competition law infringements, which they undoubtedly are, cannot be used in and of itself as a form of trump card justification for a very high budget. The significance of approving a budget is that the costs are more likely to be recoverable from the losing party. Thus, a very significant aspect of budgeting is concerned with the other party's cost risk. …
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> 24. Costs budgeting is not directly concerned with how much a party can actually spend to protect their reputation either. Wealthy litigants can spend

> what they like but whether they can recover what they spend from the other party is a different matter. The budget is concerned with recoverable costs. In other words it addresses how much a party can spend whereby the other party then has to bear the costs risk that they might have to pay a figure of that order if they lose the action. …"

18. The judge concluded that the claimant's and third party's costs budgets were not just on the high side but disproportionate and at [26] that "[c]osts proportionate to the issues in a claim like this ought to be lower. The question which needs to be grappled with is what to do about that". He continued at [28]:

> "Simply to send this case away on the footing that the costs budgets are disproportionate helps nobody. Also, simply to decline to make a costs management order also helps neither side and, indeed, in some ways could just make the situation worse by prolonging uncertainty. I have considered whether the course I should take is to budget some figures but not others. That would be appropriate if the situation was like the one before Flaux J. The problem there was that the court did not have the information necessary to be able to budget all the detailed figures in the proposed budgets. That is not the problem that the court is faced with here. The problem in this case is about the overall figures, not the detail."

19. He concluded at [29] that

> "[i]t seems to me that if the court can come up with an overall figure which is appropriate, then that is the course that the court should take. In doing that I must bear in mind what is at stake, both in terms of the quantum but also, and very importantly, the other wider issues that particularly the claimant and the third party have emphasised".

Having then considered various items in the budgets, he noted at [31] that "[i]nevitably … the court cannot do anything other than take quite an approximate approach to estimating a proper overall level for the future costs of one party". He concluded that the appropriate overall figure for the claimant's or the third party's costs should be £800,000.

20. We were also referred to the decision of Roth J in *Socrates Training Limited v The Law Society of England and Wales* [2016] CAT 10 ("*Socrates*"). That case was allocated to the FTP and cost capping was therefore compulsory: the issue was what the level of cap would be. However, the starting point was to consider the costs budgets, which had been filed, and assess whether they were reasonable and proportionate. As to that, Roth J noted that he would expect the defendant's budget in that case to be significantly higher than the claimant's and

the reasons why that was the case (at [6]). He referred at [9] to CPR rule 44.3, and in particular r. 44.3(2)(a) which provides that the High Court will only allow costs that are proportionate to the matters in issue, and may disallow or reduce costs even if they were reasonably incurred. At [10] he stated: "It is important to ensure that costs are at a level that is not disproportionate to what is involved in the case, which includes not only the monetary value of the claim but also has regard to the significance for the parties of the issues raised". At [11], he observed that the decision of the defendant to instruct London solicitors could not be criticised as unreasonable, but that did not mean it was entitled to place the resulting costs burden on the claimant. He referred at [12] to the judgment of Leggatt J in *Kazakhstan Kagazy* and concluded that he was satisfied that, considered on a standard basis of assessment, the defendant's costs would be reduced to well below £0.5m (from the £637,000 appearing in their costs budget). He considered the appropriate costs cap to be £350,000.

C. THE RELEVANT LEGAL BACKGROUND: CCO

(1) Jurisdiction

21. The Defendants submit that the Tribunal simply does not have the power to make a CCO under Rule 53(2)(m). That is not a point that was made in their original response to the CCO. The Defendants originally expressly accepted that, pursuant to Rule 53(2)(m), the Tribunal had the power to set the maximum costs that a party would be entitled to recover at a level below its reasonable and necessarily incurred proportionate costs: the issue was whether or not the Tribunal should do so in this case.

22. The Defendants now suggest that the Tribunal has no such power because Rule 58(2)(b) contains a mandatory costs-capping provision for cases allocated to the FTP, and no other Rule contains any provision for costs-capping – as opposed to costs management. The Defendants suggest that costs capping is an exception to the general principle that a successful party is entitled to recover its reasonable and proportionate costs, on the standard basis of assessment. Accordingly, it is said, specific provision has been made for CCOs in CPR r. 3.19, s. 88 of the Criminal Justice and Courts Act 2015 ("CJCA") (in the context

of certain judicial review claims) and Rule 58(2)(b) in respect of proceedings allocated to the FTP by the Tribunal. The Defendants argue that these are all exceptions to the general principle and that, had Parliament intended to give the Tribunal a costs-capping power (as distinct from general powers of costs management under Rule 53(2)(m)), it would have done so.

23. The CPR provide for cost-capping at r. 3.19, so far as is relevant for present purposes:

> "(1) For the purposes of this Section—
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> (a) 'costs capping order' means an order limiting the amount of future costs (including disbursements) which a party may recover pursuant to an order for costs subsequently made;
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> …
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> (4) A costs capping order may be in respect of –
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> (a) the whole litigation; or
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> (b) any issues which are ordered to be tried separately.
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> (5) The court may at any stage of proceedings make a costs capping order against all or any of the parties, if –
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> (a) it is in the interests of justice to do so;
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> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
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> (c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by –
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> (i) case management directions or orders made under this Part; and
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> (ii) detailed assessment of costs.
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> (6) In considering whether to exercise its discretion under this rule, the court will consider all the circumstances of the case, including –
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> (a) whether there is a substantial imbalance between the financial position of the parties;
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> (b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;
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> (c) the stage which the proceedings have reached; and
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> (d) the costs which have been incurred to date and the future costs.

> (7) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order. No such variation will be made unless –
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> (a) there has been a material and substantial change of circumstances since the date when the order was made; or
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> (b) there is some other compelling reason why a variation should be made."

24. We do not accept the Defendants' submission. We consider that the Tribunal is entitled to manage the costs of the proceedings before it and, if it considers it is necessary, to impose a CCO in order to do so. Nothing in Rule 53(2) or anywhere else in the Rules suggests it is not entitled to do so. Further, and in any event, the Tribunal has a wide discretion under Rule 53(1) to give such directions as it thinks fit to secure that the proceedings before it are dealt with justly and at proportionate cost. If it thinks fit to make a CCO in order to secure that result, then the Tribunal is entitled to do so. Mr O'Regan for the Defendants suggests that the court's ability to make a CCO under CPR r. 3.19 is an exception, but that rule makes clear it applies to all civil litigation to which the CPR apply except for judicial review proceedings where s. 88 CJCA or protective costs order apply. The fact that there is a separate costs capping regime addressing the particular issues and requirements that arise in relation to judicial review cases does not mean that costs capping does not apply in other forms of proceedings, including in this Tribunal. On its proper construction, what Rule 58(2)(b) makes clear is that, where the FTP is ordered, the Tribunal must determine the level at which the amount of recoverable costs is to be capped: whether or not to do so is no longer a matter of discretion. It does not provide that the FTP is the only situation in which a CCO may be made, nor does it limit the Tribunal's otherwise broad discretion under Rule 53.

(2) Discretion

25. As regards whether we should make a CCO, the parties have tailored their submissions to the requirements of CPR r. 3.19. We consider that CPR r. 3.19 reflects the factors that the Tribunal should have regard to when considering whether or not to make a CCO. The Tribunal may, therefore, make a CCO against all or any of the parties if three factors are satisfied: (a) it is in the interests of justice to do so; (b) there is a substantial risk that without such an

order costs will be disproportionately incurred; and (c) the Tribunal is not satisfied that that risk can be adequately controlled by (i) case management directions or orders; and (ii) detailed assessment of costs. These requirements are cumulative, and an applicant for a CCO is required to establish each of them before the Tribunal may exercise its discretion.

26. When considering whether to exercise its discretion to make a CCO, the Tribunal will consider all the circumstances of the case, including those set out in CPR r. 3.19(6), of which (a) whether there is a substantial imbalance between the financial position of the parties; and (d) the costs which have been incurred to date and the future costs are the most relevant in the present case.

27. We also note that paragraph 1.1 of Practice Direction 3F provides that: "[t]he Court will make a costs capping order only in exceptional circumstances."

28. We were referred to two cases in which a costs cap had been ordered by the Tribunal: both being cases which were allocated to the FTP and therefore a costs cap was mandatory. In *Socrates*, Roth J referred to the FTP and the policy behind it at [3]: "[i]t is a procedure particularly designed to help small and medium sized enterprises … to obtain access to justice in an appropriate case". In *Meigh v Prinknash Abbey Trustees Registered* [2019] CAT 14 ("*Meigh*") at [2], Roth J said that:

> "[t]he reason there is cost capping is that this procedure was introduced to enable competition claims, which can notoriously become extremely expensive, to be accessible to smaller businesses and traders, who would be deterred either from bringing claims that may be reasonable, or from effectively contesting a claim, if faced with potentially very high fees."

29. Ms Howard QC for BL submitted that these statements reflected the policy behind the costs capping regime. That is not right. Roth J's statements concern the policy behind why, in the context of the FTP, costs capping is mandatory. They are not intended to read more broadly as a policy reason why the Tribunal should exercise its discretion in favour of a costs cap. As regards the level of costs cap, in *Socrates*, Roth J stated at [14] that even having considered what the likely reduction would be on a standard assessment of the defendant's costs to reflect what would be reasonable and proportionate:

> "… that is still an enormous potential liability to face a small company if it is to bring a case which cannot be dismissed as fanciful. In my view, the measure of cost capping under the FTP is not to be approached as a form of *ex ante* standard assessment. In particular, where parties are of very disparate means, it is important that those costs strike a fair balance between enabling access to justice for the claimant and providing a measure of protection to the defendant not only from unmeritorious claims but also from the burden of having to defend a claim which it is assumed for this purpose proves to be unfounded. That may mean that in some cases the amount is not the sum required to achieve justice only for the receiving party, but a limited contribution to that party's costs."

Roth J imposed a costs cap of £350,000. His decision in *Meigh* was to similar effect (see [3] to [7]).

30. In *Black v Arriva North East Limited* [2014] EWCA Civ 1115 ("*Black*"), Christopher Clarke LJ considered an application for a CCO pursuant to CPR r. 3.19 in the context of an appeal in relation to the Appellant's discrimination claim which was brought as one of two test cases. The appeal raised questions of some importance to disabled people and to public transport providers. The Appellant had taken out ATE insurance for £50,000. The Appellant submitted that this was an exceptional case in which a CCO should be made capping the Respondent's costs at £50,000 (and given that this level of costs had already been incurred, there would be no recovery for any future costs of the appeal). The Respondent estimated that it would incur further costs in the appeal of around £95,000 plus VAT.

31. Christopher Clarke LJ considered the requirements of CPR r. 3.19(5). He accepted that the Appellant was of limited financial resources, whereas the Respondent was a major public transport provider with extensive financial resources; and the Appellant would not be able to pursue the appeal if there was a risk that she would have inadequate ATE insurance in place. It was submitted that the exceptional nature of the case arose because of two factors: (i) the need for an order if the case was to continue, and (ii) the importance of the case to a wider group.

32. As to the submission that, in the absence of a CCO the appeal would founder, Christopher Clarke LJ accepted that this was relevant when considering the interests of justice. He stated at [11] that:

> "The fact that, in the absence of a costs capping order, the appeal will founder is relevant when considering the interests of justice, although there are considerations which point the other way. First, it does not seem to me to be the function of costs capping orders to remedy the problems of access to finance for litigation. If, for instance, the Respondent's anticipated costs were agreed to be proportionate, it would not be possible to exercise any jurisdiction to make a costs capping order simply because without it the appeal would not continue to be financially viable".

33. Considering the requirements of CPR r. 3.19(5), he concluded (at [14] and [16]) that he was not satisfied on the evidence before him that there was a substantial risk that without a CCO, costs would be disproportionately incurred, or that (if he was wrong) any risk of disproportionate costs could not be adequately controlled by either case management directions or a detailed assessment of costs (at [18]).

34. As regards whether it was in the interests of justice to make a CCO, Christopher Clarke LJ stated at [21]:

> "… Of course, it is desirable from the Appellant's point of view that her case should be heard. There are public interest considerations as well, but it does not follow that it is in the interests of justice that it should be heard on terms that the Respondent can recover no more than £50,000 even though it may have reasonably incurred more in successfully resisting what may be something of a test claim."

35. He acknowledged the fact that there was a substantial imbalance between the financial position of the parties but, taking all the factors together, he was not persuaded that the interests of justice required a CCO to be made. In any event, he was not satisfied that the conditions provided for by CPR r.3.19(5)(b) and (c) were met.

36. Public interest considerations are not, therefore, to be taken as being necessarily the same as the interests of justice. The interests of justice must take into account whether or not it is appropriate that the receiving party will recover less than he may reasonably (and we would add, proportionately) have incurred.

37. In *Tidal Energy Ltd v Bank of Scotland PLC* [2014] EWCA Civ 847 ("*Tidal Energy*"), Arden LJ (as she then was) considered an application for a costs capping order under CPR r. 3.19 in relation to an appeal brought by the Appellant (a start-up company in the wave energy industry) against the

Respondent (a very substantial bank) over a payment of £217,781 which was paid into the wrong account, and which could not be returned. The principal objection in that case was that the bank proposed to be represented by both leading and junior Counsel. As regards the interpretation of CPR r. 3.19:

> "7. My starting point is that this provision is a precondition to the exercise of the discretion which is conferred on the court under that rule, because a discretion is only triggered if (a), (b) and (c) are satisfied. I am not concerned with (a) and (b) at this point, only with (c). What is necessary is that if the court is not satisfied that the risk in subparagraph (b) can be adequately controlled by (then this the material part) "detailed assessment of costs".
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> 8. That is the material element of the provision because there is nothing to suggest that if the services of leading counsel turn out to be a luxury, which is unnecessary for the proper hearing of the appeal and which ought not to be laid at the door of the appellant, if the appellant loses the appeal, then it is not disputed but that the court would be able to strip that element of the costs out of the recoverable costs assuming an order for payment of costs is made against the unsuccessful party. …
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> 9. Mr Guy Adams, who appears on this application for Tidal Energy, submits that the true interpretation of subparagraph (5) is that the risk referred to in 5(c) is the substantial risk that without a costs cap costs will be disproportionately incurred and that therefore the only type of exercise within (c)(i) or (c)(ii) that can constitute adequate control is a mechanism for preventing the costs being incurred in the first place. That would lead to the proposition that a costs cap would prevent leading counsel being instructed, if taken literally, but as I understand it Mr Adam simply means that the cost cap would make it certain at the outset that Tidal Energy would not have to bear the costs referable owing to the instruction of leading counsel.
>
> 10. In my judgment that interpretation of the rule, however desirable for the reasons Mr Adams pressed on me, is simply not tenable as a matter of interpretation. Paragraph (c) uses advertise words "the risk in subparagraph (b) can be adequately controlled". In my judgment, it is clear that a mechanism may constitute adequate control if it neutralises or satisfactorily manages the risk. It may not be possible to eliminate a risk but only to manage it. But, to my mind, that must be the interpretation of the rule because otherwise a detailed assessment of costs could never or scarcely ever be a mechanism of control within 5(c). Moreover, as I see it that would reflect a policy decision which the drafter of 3.19 may reasonably have taken, namely that the court should not be troubled by satellite litigation, constituted by cost cap litigation if the long-standing system of assessing costs would provide an adequate mechanism. That is the view that I came to without studying a *Eweida v British Airways Plc* [2009] EWCA Civ 1025. That was a decision about a protective costs order under CPR 44. The critical wording of CPR 44.18 paragraph 5(c)(ii) set out at in paragraph 31 of the judgment of Lloyd LJ is precisely the same as that in CPR 3.19(5). I note that Lloyd LJ, with whom Moses LJ and the Vice-President, Maurice Kay LJ, also agreed considered that the appellant in that case could not satisfy CPR 44.18(5)(c)(ii) because the costs judge would provide the protection to which the appellant is entitled in respect of excessive costs. In that case the question of rates arose. As I say I have reached that conclusion entirely independently of *Eweida*. That is because risk can be managed either in advance or after the event or, as I put it in argument,

> apologising for using Latin the mechanism in 5(c)(i) is an *ex-ante* mechanism and that in 5(c)(ii) *a posteriori* mechanism after the event to limit costs.
>
> 11. In those circumstances, while accepting that the courts must interpret the provisions of the CPR with a view to giving effect to the obvious policy of trying to control costs and to ensure, in accordance with the amended overriding objective, that cases are dealt with justly and at proportionate cost. Even accepting that, I am not satisfied that this is a case in which this court can make a costs cap order under CPR 3.19.
>
> …
>
> 13. I would add this. The decision that I have made does not mean that in another case a party may not be able to lead evidence from, let us say, a costs drafter that the cost judge could not adequately distinguish between costs reasonably incurred and costs unreasonably incurred, for instance, of very extensive and detailed litigation on a technical matter. In those situations then of course, looking at the case on its specific facts, the court may reach the view that 5(c)(ii) is not a bar to making a costs cap order. However, I am clear that on the way this application has been presented that is not this case. Therefore I dismiss the application."

38. For the purposes of CPR r. 3.19(5)(c), therefore, the issue is not whether case management directions or orders and detailed assessment of costs eliminate the risk of disproportionate costs being incurred, but whether or not the Court is satisfied that such mechanisms neutralise or satisfactorily manage the risk.

39. Both of these cases pre-dated costs budgeting. In *PGI Group Limited v Thomas and others* [2022] EWCA Civ 233 (*"PGI"*), Coulson LJ considered an application for permission to appeal the refusal of Cavanagh J to grant a CCO. The claimants were 31 Malawian women employed by a Malawian company, Lujeri to work in tea or nut plantations in Malawi. They alleged that they were raped, sexually assaulted, harassed and discriminated against by male employees of Lujeri. The defendant (and applicant for a CCO) was the parent company of Lujeri. Cavanagh J dismissed the application for a CCO which would limit the claimants' future costs to £150,000, and at a subsequent hearing fixed the claimants' costs budget in the sum of £848,140 (as against the figure of £1.5m originally suggested in their costs budget). The defendant's justification for the figure of £150,000 was that this was the figure it suggested would be the likely costs of pursuing the claim in Malawi.

40. At the time of the application, the claimants' incurred costs were £1.6m. Taken together with the budgeted future costs of £848,140, this gave a total of

approximately £2.5m up to trial. The defendants' incurred costs were £750,000, and its future costs budgeted at £1.75m: a total of around £2.5m.

41. Coulson LJ considered the CCO regime and stated at [6]:

> "CCOs are very rare. CPR PD 3F at 1.1 makes plain that they will only be made "in exceptional circumstances". The costs budgeting regime, introduced after costs capping as part of the Jackson reforms, is widely regarded as a more scientific way of achieving the same goal. However it is not right to say that the CCO regime is moribund. It was retained in the CPR, following the introduction of costs budgeting, at the express request of certain regular litigants, including Pension and Trust Funds, who said in their response to the CPRC that they liked the certainty that CCOs can bring, saying that they proved a useful tool in cases with a finite amount of money. The available evidence appears to demonstrate that, despite that, CCOs are rarely sought or made (and that is certainly my experience) but the available statistics are not entirely reliable. Consistent with this, the response to the CPRC concerning Pension and Trust Funds explained that the majority of cases were agreed without the need for a cost capping order, but with the knowledge that the court had the power to make one."

42. Having referred to the fact that there are very few authorities on CPR r. 3.19, he stated at [8]:

> "The White Book suggests that *Tidal Energy Limited v Bank of Scotland PLC* [2014] EWCA Civ 847 is authority for the proposition that cost capping orders may only arise where there was evidence that the costs judge could not adequately distinguish between costs reasonably incurred and costs unreasonably incurred in a complex case. However, that was simply an example taken by Arden LJ (sitting alone) to explain how r.3.19(5)(c) might work. *Tidal* was actually a case in which it was argued that costs could not be controlled by the detailed assessment of costs at the end of the case, so that the costs of leading counsel should be prohibited before they were ever incurred. Arden LJ rejected that proposition. In *Black v Arriva North East Limited* [2014] EWCA Civ 1115 the underlying issue concerned the funding of the litigation, and the application for a CCO was dismissed. Both cases pre-dated costs budgeting."

43. He went on to consider at [10] the various provisions that deal with proportionality of costs in the CPR, and in particular CPR r. 44.3(2) and the importance of proportionality in the assessment of costs: "[t]he rule means that, even if an element of costs is both reasonable and necessary, it may still be reduced or even disallowed altogether on assessment if it is found to be disproportionate in amount". He highlighted various findings in the Judge's judgment on the CCO application, including that the defendant estimated that the likely maximum damages would be around £10,000 per claimant; that the

claims were about more than money; that the claims were arguable, and that if a CCO were made in the sum of £150,000 that would be likely to stifle the claim.

44. He noted that:

> "27. In the ordinary case, of course, it would be unusual if the future costs, to be capped by way of a CCO, were fixed at far less than the reasonable minimum amount necessary to pursue a valid claim through to trial. Translating that to the facts of this case, if £850,000 is the right figure for future costs identified by the judge, a reduction of that sum by more than four fifths to arrive at a CCO of £150,000 would be an extraordinary result.
>
> 28. However, just as the judge did, I accept that there may be cases in which the reasonable and necessary costs required to enable the claimant to fight the case through to trial were disproportionate, and would therefore justify a CCO in a lesser amount. Indeed, that is more than just a theoretical possibility (which is how the judge wrongly described it): that principle is enshrined in r.44.3(2)(a), which provides for such a result in terms (even though it is concerned primarily with assessment after the event, not limiting the incurring of such costs in the first place by way of a CCO). So in principle, a costs budget or a CCO could be set at a sum that was less than the reasonable and necessary costs to be incurred, because that sum might still be disproportionate. What matters is that the judge concluded that, on the facts, this was not such a case. For the reasons that I have already given, I agree."

45. As regards costs already incurred, which must be taken into account pursuant to CPR r. 3.19(6)(d) when the Court is deciding whether to exercise its discretion, he noted at [38] that:

> "… the problem in principle with costs incurred to date is that, whilst a court is required to take them into account when making a CCO, there is nothing that the court can really do about them at the time of the application. They have been incurred so, in general terms, they cannot be retrospectively reduced, save on assessment at the end of the case. It is the same for cost budgeting: the court has to take into account the amount of the incurred costs, but the practical difficulties that this can pose for the budgeting exercise are stark."

D. THE PARTIES' RESPECTIVE COSTS BUDGETS

(1) The Costs Budgets

46. The starting point is to consider the parties' respective costs budgets and whether or not the costs reflected in them were reasonable and proportionate prior to considering whether or not to impose a CCO. The parties filed their respective costs budgets on 25 March 2022 (followed by updated versions filed

on 28 March 2022). These budgets were not in the form of Precedent H, but are stated to be estimates and were in a summary form.

47. To recap, BL's total costs budget (including incurred costs) is £783,670 without contingencies, and £908,170 with contingencies. The Defendants' total figure is £944,239.50 without contingencies, and £1,084,439.50 with contingencies. The contingencies relate to a threatened security for costs application (which has not eventuated), a possible request for further information and/or specific disclosure (neither of which has been made), ADR (which we have informed by the Defendants is unlikely before liability has been established) and the pre-trial review ("PTR").

48. The areas of the Defendants' costs budget specifically disputed by BL are as follows:

    (1) The Defendants' economic expert. The Defendants estimate that the expert's fee for the preparation of their expert report will be £175,000 (not including attendance at trial). BL's estimate is £27,500 (including the portion of the expert's fee already incurred). The Defendants also estimate that the fee for their expert's attendance at trial will be £45,000, whereas BL's estimate for its expert to attend is £2,500;

    (2) The Defendants' industry expert. The Defendants estimate that the expert's fee for the preparation of the expert report will be £25,000. BL's estimate is £5,000. In addition, the Defendants estimate that the fee for the expert's attendance at trial will be £10,000, whereas BL's estimate for its expert to attend is £1,000.

    (3) The costs of attendance at trial. The Defendants' solicitors' costs for attendance at trial are estimated to be £50,000. This contrasts with BL's figure of £25,000. The Defendants' estimate for the five day trial is £165,000 (including the experts' fees and solicitors' costs) as opposed to BL's which is £81,000.

49. Before turning to these items, it is first relevant to consider proportionality, and to compare the financial level of the claim against the costs in the budgets. In the event that it is successful, BL seeks damages of around £1.5m in respect of its past losses. It also claims in addition future losses, the amount of which will depend on whether or not the Tribunal orders a mandatory injunction requiring the Defendants to restore the supplies of their products to BL (and if so, on what terms). If the Tribunal grants an injunction, then the future losses are said by BL to be in the region of £1.8m, giving a total claim of £3.5m. If the Tribunal does not order an injunction then the total damages claim increases to £7.7m exclusive of interest and costs. As we have indicated in the FTP Ruling, whilst the Tribunal is used to determining claims significantly greater in value than this, it cannot be described as an insignificant claim. On any analysis, neither side is proposing to incur costs that exceed the financial value of the claim which is, at its lowest, £3.5m.

50. Both sides suggest that there is more to this dispute than it simply being a money claim. BL maintains that there is a wider public interest aspect to these proceedings, but does not seek to suggest that that necessarily affects the costs budgets *per se*. BL maintains it is a relevant factor to be taken into account as to whether or not a CCO should be granted. From the Defendants' perspective, the alleged infringements are very serious and they are entitled to seek to defend them, but again, they do not suggest that affects the costs budgets. Neither side relies on these factors to justify a material difference in estimated expenditure: save for the limited items in dispute, both sides' costs estimates are very similar.

(2) Economic Evidence

51. BL wrote to the Defendants on 28 March 2022 seeking an explanation for the basis of the Defendants' estimates for their expert economist, querying what the fee estimate covers in the following terms:

> "…please would you clarify what that fee estimate covers including:
>
> - how many economists will be working on the report and the level of seniority of each;

- whether they are being granted access to all of the documents and data disclosed in the claim or whether you are identifying the relevant documents for them;

- whether they will have oversight of factual witness evidence;

- whether any part of their fee involves an opinion on whether there has been a breach of competition law (as opposed to the economic effects of the conduct concerned); and

- a breakdown of estimated costs between the initial report, reply, joint meeting and joint statement.

We also note that the estimate for economic experts is £45,000 for attendance at the trial. We cannot understand the basis of this fee for what should be a fairly limited role of experts in this case. We consider that it is unlikely that more than 4 hours of time in total will be dedicated to examination of the evidence of both parties' economic experts (a maximum of 2 hours each). There is no need for the experts to sit in or attend the remainder of the trial. Therefore, we would be grateful if you would provide us with some further information about the basis for the estimated fee of £45,000 for the expert's time at the trial. Please would you explain how long it is proposed that the economic experts attend the trial, how many experts are planning to attend, and the level of seniority of each."

52. The Defendants responded on 29 March 2022:

"The expert's fees are estimated at this stage and the related figures included in our clients' estimated costs budget are those at the top end of the expert's estimate which has been given, at this stage, for each phase of the work which will need to be undertaken. These are (exclusive of VAT):

Expert Report	£115,000.00
Reply Expert Report	£30,000.00
Joint Statements	£30,000.00
Trial	£45,000.00
Total	**£220,000.00**

We do not at this stage know how many economists will be working on the Expert Report or any Reply Expert Report although our clients' intended expert (who is a partner at a well-known consultancy) will, as is usual in cases of this nature, be assisted by one or more junior colleagues, which will assist in minimising costs.

> The expert will, as is usual, be granted access to documents and data disclosed in the claim including such documents and data which the expert may specifically request sight of. It will be for the expert to determine the use of such documents and data.
>
> The expert will be provided with copies of the written evidence of witnesses of fact following service of the same to the extent that the expert requests sight of such evidence and/or we should deem it appropriate for the expert to consider the same. (Obviously the expert will not be involved in the process of taking such evidence.)
>
> The expert will not be giving an opinion as to whether there has been a breach of competition law (such being a matter for the Tribunal to determine and not one for the expert to opine upon).
>
> Your suggestion, that each economic expert will give evidence for a maximum of two hours and that they will not be required to attend the remainder of the trial, is misconceived. We anticipate that the experts will give evidence for, in total, at least a day, which is likely to be spread over two sitting days, so that – for budgeting purposes – it must be assumed that they will, for the purposes of giving evidence, need to attend for two days of the trial. We anticipate that they will give concurrent evidence and also there will be a need for them to be questioned separately by counsel. Either the expert or a junior colleague also will attend the remainder of the trial, as would be usual in cases of this nature, to assist counsel. The expert will also need to prepare for giving evidence. Our estimate for trial takes account of these matters.
>
> We consider that our estimated costs for the economic expert are realistic and both reasonable and proportionate. Your estimate, by contrast, seems to be unrealistically low."

53. As is immediately apparent, the difference between the Defendants' estimate of £175,000 for preparation of the reports (including the joint statement), and BL's estimate of £27,500 (including costs already incurred) is, to put no finer point on it, enormous. As we have indicated in the FTP Ruling, BL regards this claim as a relatively straightforward case of resale price maintenance ("RPM"), which it maintains is an object infringement, subject to established case law, in relation to which the scope for expert evidence is limited. However, the Defendants maintain that it is not, and that there are a number of points that arise in this case that have yet to be decided. The Defendants say that these are "complex matters that will require extensive evidence from expert economists, although not (other than in relation to market definition and the analysis of any effects on competition as a result of the alleged platform ban) any, or any significant, empirical analysis".

54. Ms Howard submitted that the Defendants are entitled to their world view of the case, and to bring their complex economic effects arguments and theories, but there is no good reason why BL should have to pay for that if the arguments are not actually necessary, relevant or likely to assist the Tribunal.

55. Mr O'Regan, on the other hand, submitted that BL has either underestimated the legal economic issues involved in this case or have simply chosen not to engage with them. He does, however, accept that this case is not about undertaking a detailed review of vast databases to conduct empirical analysis. In the course of his submissions, he informed us that the expert(s) would need to see relatively limited documentation, and that the report will be on market definition and the conceptual analysis of the potential harms that might flow from the complained of behaviours.

56. BL proposes that the economic expert costs for the reports be reduced by taking £50,000 off the estimate for preparing the report, and £45,000 off the cost of the reply and joint report. As regards the costs of the expert attending trial, BL proposes that the Defendants' estimate be reduced by £30,000, to £15,000.

57. Mr O'Regan in his submissions informed us that there had been a range of estimates provided by the expert they had approached, and the Defendants had put forward the estimate that was at the very top of the range proposed by their intended expert. The lower range was an estimate for £65,000 for the expert report; £25,000 for each of the reply report and joint statement, and £25,000 for trial: a total of £140,000, and reduction of £80,000 against the estimate put forward in the costs budget. Mr O'Regan also submitted that BL's costs were extremely low for an expert, even if the expert only attended for one day of the trial.

58. We are concerned that the parties seemingly remain at odds as to what the expert economic evidence should entail. We have given permission for four issues in relation to economic expert evidence: (i) market definition; (ii) the theory of harm in relation to retail price maintenance and horizontal price coordination and hardcore online restrictions on passive sales in respect of sales of the Defendants' products in the UK/EU and EEA; (iii) whether the alleged

imposition of minimum retail prices pertaining to the advertising of the Defendants' products for sale to consumers in the US and Canada was capable of having negative effects on competition in the UK, EU Member States and EEA States, and (iv) alleged anticompetitive effects relating to the alleged imposition of the platform ban and its alleged discriminatory application.

59. Notwithstanding these clearly delineated issues, there remains a significant difference of opinion between the parties as to the relevant scope and extent of the economic expert evidence. We are extremely concerned to ensure that this disconnect does not continue. The evidence must be limited to only what is necessary for us to decide the issues in the case, and it is imperative that the experts agree what those issues are, and that their reports address them. We must avoid ships passing in the night.

60. In our view, the economic experts should meet on a preliminary basis to consider and seek to agree a list of the relevant issues that their reports need to cover under each of the four areas on which they are permitted to provide expert evidence. We have some sympathy with BL's submission that an agreement at a general level as to the issues in dispute may be insufficient to ensure that the parties and the experts have a mutual understanding of their respective positions on each issue and what is required in order to address them. The experts should therefore also discuss and agree, in so far as they are able to do so, what each of them understands to be the parameters of the economic issues in dispute, highlighting any differences between them as to what it is necessary to cover.

61. The parties should then provide the Tribunal with an agreed document setting out the parameters for each of the four issues for which they have permission to adduce expert economic evidence, highlighting the areas of disagreement (if any). If either party considers at that stage that sequential expert reports would assist in narrowing any issues in dispute, they must notify the Tribunal. Once the parties are in agreement, or any areas of disagreement have been resolved by the Tribunal, we propose that the parties provide a revised costs estimate for the economic expert report, joint statement, reply evidence and attendance at trial. Whilst we accept that this extra step may necessitate further expenditure by the parties, we consider that this is preferable to the apparent stalemate

between BL and the Defendants continuing. It is likely to allow the case to proceed more efficiently and cost-effectively in future.

62. This preliminary meeting between the economic experts has been directed so that the parties' experts can identify and concentrate on the main issues as early as possible. Pursuant to Rule 4(7), we require the parties to co-operate to ensure that there is clarity as to what the expert economic evidence will cover.

63. For the purposes of the CCO and this CCMC we have considered, on a preliminary basis and doing the best we can on the limited information available to us, what a reasonable and proportionate estimate for expert evidence should be. Mr O'Regan sought to persuade us that his upper end estimate was "reasonable and proportionate", and that it was appropriate that this be included in the Defendants' costs budget. We do not agree, in particular given that the expert has provided a significantly lower estimate which we can only assume is also put forward to the Defendants as "reasonable and proportionate". However, we do not think that a comparison with BL's own costs should be determinative: we are concerned that BL has underestimated its own expert's costs. We do not, for example, consider the figure of £2,500 for preparation for, and attendance at trial to be realistic.

64. In our view, doing the best we can and pending the economic experts' preliminary meeting we have referred to, a fee of £85,000 in total for the Defendants' expert report, reply report and joint statement would, subject to what we say below, be appropriate, and £20,000 for attendance at trial.

(3) The Industry Expert

65. The Defendants' estimate for the industry expert report is £25,000 as opposed to BL's estimate of £5,000 for its own. The Defendants also say that the industry expert's fee for attending trial is estimated to be £10,000, as opposed to BL's estimate of £1,000. The basis for the Defendants' estimate of £35,000 in total is that the industry expert will need to devote seven days' work up to and including attendance at trial calculated at £5,000 per day.

66. BL, in their letter of 28 March 2022 queried this estimate on the basis that the evidence is aimed at obtaining a factual description about the functional operations of the eBay platform; the report should be relatively short; and the experts may not be required to attend trial, but if they did it would probably only be for cross-examination for two hours (one hour for each industry expert).

67. The Defendants' reply of 29 March 2022 made clear that the fees had been estimated by their solicitors because they had yet to obtain an estimate from an industry expert. They consider that the suggestion that the experts will not be required to attend trial is unrealistic: the Defendants consider that the industry experts will be required for one day of the trial, and that one day's preparation will be required.

68. BL submitted that the term "expert" was probably a misnomer as the evidence that the industry expert will provide will be factual and relate to eBay functionality and how listings work. In the course of the First CMC, BL had suggested that the evidence may simply consist of a statement from eBay explaining how it works, and that it was possible that no cross-examination would be required.

69. In the course of his submissions, Mr O'Regan explained that the Defendants had difficulty identifying an appropriate industry expert, although they accepted that the industry expert would only need to consider the pleadings, witness statements and documents that go to the use of eBay, but nothing further. This is because the evidence will relate to how eBay works, how online retailers adjust settings on eBay to effectively blank out the US and Canada, and, if so, how that can be done and what impact it has upon sales to the rest of the world, including within the UK. This is relatively tightly constrained, and Mr O'Regan suggested that, although the figure put forward in the Defendants' costs budget was the best estimate, he thought that "in reality the number will be significantly lower".

70. BL submitted that the total figure for the Defendants' industry expert reports and attendance at trial should be reduced by £20,000 to £15,000: a figure that would still be more than double that which BL has estimated for its own industry

expert. Given the acceptance by Mr O'Regan that the fee would be significantly lower than his clients' estimate, and doing the best we can in particular bearing in mind the limited issues in dispute, we consider a fee of £5,000 in total would be appropriate for the industry expert's fees for the reports, and £10,000 for preparation and attendance at trial.

(4) Costs of Attendance at Trial

71. The final main area of dispute is the Defendants' solicitors' costs of attendance at trial. BL complains that the Defendants' costs of solicitors' attendance is £50,000. BL's own estimate is £25,000. The Defendants' estimate equates to £10,000 per day. Ms Howard submitted that (by reference to the hourly rates provided by the Defendants) this is equivalent to the entire team of four lawyers attending every day for 8 to 10 hours a day. She submitted this was not proportionate, that there is no need for the partner and legal director to attend every day, particularly when they can watch it on livestream back in the office. However, that ignores the fact that if the partner and legal director attended via livestream, an hourly charge would still be incurred. In reality, the thrust of Ms Howard's submission is that to have four members of the legal team in attendance, in person or remotely, is unnecessary. BL is only intending to have one solicitor present. That said, her hourly charge out rate at £500 per hour is significantly higher than that charged even by the partner of the Defendants' solicitors. BL's estimate of £25,000 relates entirely to her.

72. Mr O'Regan noted that his clients do not have in-house counsel but are instructing solicitors in Manchester, working at considerably lower hourly rates than BL's solicitor who is based in London. We were informed that Mr Lye, the legal director, is an experienced litigator, but not a competition litigator. Another partner in the firm deals with competition issues and will also attend the trial. As the solicitors are not based in London, there are costs such as travel and hotel accommodation and the like that have been factored in.

73. We do not think it is appropriate to limit the Defendants to only one member of the legal team in attendance just because that is the model that BL has chosen to adopt. Subject to what we say below, we consider that a figure of £35,000 is

appropriate. It equates to £7,000 per day, in particular in circumstances where the combined charge out rate for the partner and legal director is £656 per hour. We will also reduce the disbursements to £2,500.

(5) Incurred Costs

74. The Claimant's incurred costs to date total over £350,000. The Defendants' incurred costs to date are said to be over £210,000. BL submits that the Defendants' figure is "hefty". BL submits that it has had to frontload its work in order to establish its claim, including dealing with pre-action correspondence, organising its disclosure, and engaging its economic expert. Ms Howard says that given that, as became apparent at the First CMC, the Defendants had not properly engaged on the issue of disclosure or responded to any of BL's document requests dating back to 2019, it is difficult to see what the Defendants' incurred costs relate to. She submits that BL's incurred costs could reasonably be expected to be higher than the Defendants'. Once this is taken into account, she says, the Defendants' incurred costs are - relatively speaking - significantly higher than BL's.

75. Mr O'Regan submitted that the Defendants had to respond to the Claim Form, and deal with the FTP application, this CCO application, and various disputes as to the confidentiality regime. He informed us that there was not a significant overlap or duplication in the work undertaken by the members of the legal team, and that the case is primarily being run by Mr Lye, who has conduct of the proceedings, with other solicitors having input in issues in which they have relevant experience. Mr O'Regan also submitted that BL's own incurred costs were very high and cited, by way of example, BL's production of a 49-page schedule responding to issues that the Defendants had raised in relation to BL's Reply, and the subject of our Ruling dated [**TBC**] [2022] CAT [•].The clear implication was that the preparation of the schedule was unnecessary, and disproportionate. We disagree. It was an invaluable document that resulted in the Defendants dropping many of their objections and it assisted the Tribunal.

76. We bear in mind the observations of Coulson LJ in *PGI* at [38]: the trouble is that the costs have been incurred, and there is nothing we can sensibly do about

them on this application. They will be subject to assessment at the end of the case. We cannot say on the information currently available to us whether, and if so the extent to which such costs may be described as unreasonably or disproportionately incurred. We make two observations: (1) we would expect BL's costs in a case such as this to be higher in the early stages of the proceedings than the Defendants', and (2) there is a sense that the Defendants are, on some procedural issues, perhaps taking every issue that could possibly be taken: their response on the Reply is an example of that, and we anticipate that will be reflected on assessment in due course. Whilst we have had regard to the incurred costs in reaching our decision, this Ruling is only concerned with the parties' respective estimates of future costs.

(6) Conclusion

77. As regards in particular the economic experts' fees, we do not think that it would assist either side to send the case away without providing our views on what the appropriate figure ought to be, based on the limited information we have received. That would simply prolong the uncertainty. Taking all of the above issues into account, for the purposes of the CCO application and this CCMC, we proceed on the basis that the Defendants' figures in their costs budget for future costs ought to be in the region of £395,800. In reaching this figure, we have also taken into account the fact that not all future costs to be incurred by the parties would (if subject to detailed assessment) be recoverable in full. Indeed, BL accepts that in relation to the figures it has put forward it is only likely to receive between 60% and 70%. We consider that the figures put forward by both parties should reflect this and that the appropriate figure to assume would be reasonable and proportionate so as to be recoverable is 65%.

78. BL submitted that we ought only to manage the costs of the Defendants, and not its own. That is said to be because BL's legal team are all working on reduced fees, on a deferred and conditional basis, and the Defendants have never taken issue with BL's costs. Whilst it has always been clear that BL sought an asymmetric cost capping order, it does not follow that asymmetric cost management is also appropriate. We have ordered that these proceedings will be subject to cost management, and we will manage the costs of both sides. We

can see no justification in imposing costs management (whether or not we make a CCO) only on the Defendants. That said, no objection is taken by the Defendants to BL's estimated future costs. Their complaint relates to the costs already incurred by BL (which the Defendants allege are excessive) and, as we have said, they will be subject to assessment in due course.

79. Subject to the CCO application, we would approve the Defendants' and BL's costs budgets with the amendments we have mentioned, and reflecting a PTR as the only contingency, in the form attached to this Ruling as Annex 1. These figures represent a reduction of around 35% of the sums estimated to be incurred by the parties in the future, save in respect of BL's costs of its economic expert's report. As we have indicated, we are concerned that BL has underestimated its costs in relation to this item and we have therefore not applied a discount but have included them in full. This also affects BL's estimated costs of the trial, which in our view are similarly underestimated as regards the economic expert, and we have therefore also included these without applying a discount. If and in the event that any further application other than the PTR is required the parties could either seek summary assessment of costs, or a variation to the costs budget in the usual way. We will also order that both parties have permission to apply to vary their respective costs budget and/or make submissions in relation to the costs budget of the other party in relation to the following matters:

(1) economic experts' fees once the preliminary meeting has taken place, and the scope of economic evidence on the list of issues has been resolved;

(2) industry expert reports; and

(3) any consequential variation to the costs estimate for trial.

E. THE APPLICATION FOR A COSTS CAPPING ORDER: DISCUSSION

80. We turn to consider BL's application for a CCO. BL's position at the CCMC is that even taking into account any reductions to the Defendants' costs budget that we may be prepared to make, a cost cap of £450,000 should apply to the

Defendants' costs (including its incurred costs). According to Sheppard 2 at paragraph 13, this cap is sought to be imposed for both Phases 1 and 2. However, neither side has submitted a budget for Phase 2, and we cannot say at this stage of the proceedings what either side's costs might be. In these circumstances, any consideration of a cost cap for Phase 2 is in our view premature.

81. As we have said at [26], we consider that CPR r. 3.19 reflects the factors that the Tribunal should have regard to when considering whether or not to make a CCO. Under CPR r. 3.19(5), we are only able to make a CCO if three conditions are satisfied: (a) it is in the interests of justice to do so; (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and (c) we are not satisfied that that risk can be adequately controlled by (i) case management directions; and (ii) detailed assessment of costs. Only then does the Tribunal have the power to exercise its discretion. If the threshold conditions are satisfied, we may in the exercise of our discretion, make a CCO. When deciding whether or not to exercise our discretion we are required to have regard to the factors set out in CPR r. 3.19(6).

82. Given that we have made a costs management order, and considered the costs budgets of both sides, we first consider the requirements of CPR r. 3.19(5)(b) and (c).

83. As regards whether the Defendants' costs can be described as disproportionate, we note that, save in the respects we have identified, they are broadly consistent with BL's. We are mindful of the fact that BL seeks between £3.5m and £7.7m in damages, and seeks a permanent injunction to compel the Defendants to resume supplies. Given what is potentially at stake, we do not consider the costs of either side (subject to the adjustments that we have identified) to be obviously disproportionate to the issues in the case.

84. BL submits that there is nevertheless a substantial risk that without such an order, costs will be disproportionately incurred. BL claims that there is a risk of oppressive behaviour on the part of the Defendants in this litigation that makes BL's position more vulnerable. Ms Howard submitted that it is a consistent theme in this litigation that BL has had to do "all of the running". She referred,

by way of example, to BL's 44-page letter before action which elicited two very short letters in response, and to what she described as the Defendants' failure to engage on the timetable. We have already referred to the Defendants' objections to BL's Reply, many of which were not pursued.

85. BL is right to observe that these skirmishes add, bit by bit, to the costs incurred not only by BL, but also by the Defendants (for whose costs BL may, if the proceedings do not go BL's way, ultimately be liable). BL also submits that the figures put forward by the Defendants in their costs budget show that they are taking a taking a 'gold-plated', Rolls-Royce approach to this litigation. Whilst that is something the Defendants are entitled to do, the costs risk of the Defendants taking that approach should not be visited on BL.

86. We also bear in mind that as matters stand there is a serious disagreement between the parties as to whether, as BL maintains, this is a straightforward case which the Defendants are over-engineering in terms of law and complexity, or whether, as the Defendants maintain BL has underestimated what is involved. That feeds into the dispute as to the scope and extent of the economic expert evidence required, which we have considered above. If BL is ultimately right, then the approach of the Defendants may be said to have been "disproportionate". However, unless and until that point is reached, we cannot say that it is.

87. Mr O'Regan submitted that the Defendants are not running a Rolls-Royce, gold-plated defence, with the intention of running up wholly unnecessary costs purely for the purpose of intimidating BL. He relied on Birss J's decision in *Red and White Services*, which stressed the seriousness of competition law allegations.

88. We move on, then, to consider whether any risk of disproportionate costs being incurred can be adequately controlled by both case management directions (including cost budgeting) and detailed assessment of costs. The Tribunal has a wide discretion under Rule 53(2)(m) to give directions for the costs management of proceedings, and in addition, under Rule 53(1), to make any direction it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost. Subject to the application for a CCO, we have already

indicated the directions we would intend to make as regards costs management, and in relation to expert evidence, in order to ensure that the case may be dealt with justly and at proportionate cost.

89. BL submits that there nevertheless remains a substantial risk that disproportionate costs will be incurred. Ms Howard submits that costs management will not be sufficient to provide certainty and protection to BL because the Defendants can apply to vary and therefore increase the budget in response, for example, to applications that they might make. CPR r. 3.15A provides that a party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions, and the court may approve, vary or disallow the proposed variations. Whilst CPR r. 3.15A does not directly apply in the Tribunal, it would be open to a party in proceedings before it to seek to revise its budgeted costs upwards (or downwards). However, there is a level of protection in that it would ultimately be a matter for the Tribunal to decide whether or not to approve the revision, taking into account all of the circumstances: it is not obliged to do so.

90. As regards detailed assessment, Rule 104 provides that the Tribunal may at any stage of the proceedings make any order it thinks fit in relation to the payment of costs, in respect of the whole or part of the proceedings (Rule 104(2)). So far as is relevant for present purposes, Rule 104(4) provides that in making such an order and determining the amount of costs:

> "(4) …the Tribunal may take account of—
>
> (a) the conduct of all parties in relation to the proceedings;
>
> (b) any schedule of incurred or estimated costs filed by the parties;
>
> (c) whether a party has succeeded on part of its case, even if that party has not been wholly successful;
>
> …
>
> (e) whether costs were proportionately and reasonably incurred; and
>
> (f) whether costs are proportionate and reasonable in amount."

91. Further, the Tribunal itself may assess the sum to be paid in respect of costs (and we note BL has already suggested that it will seek immediate summary

assessment of the costs if it succeeds in Phase 1) or may direct that the costs be assessed either by the President, a chairman or the Registrar, or by detailed assessment of a costs officer of the Senior Courts of England (Rule 104(5)).

92. The Tribunal therefore has a number of means available to it to ensure that the risk of disproportionate costs being incurred is adequately controlled both *ex ante*, and *a posteriori* (per Arden LJ in *Tidal Energy*). As regards the latter, its powers in the assessment of costs are not limited to detailed assessment by a costs officer. That is a relevant further factor the Tribunal should take into account when considering whether or not the requirements reflected in CPR r. 3.19(5) are met. We are satisfied (1) that the risk of disproportionate costs being incurred is not substantial, and (2) that in any event, any risk can be adequately controlled by case management directions and by the exercise of our powers under Rule 104.

93. Miss Howard submitted that if the only considerations are whether or not costs can adequately be managed by *ex ante* cost budgeting, and by *ex post* detailed assessment after the conclusion of the trial, then CCOs have no function at all in the Tribunal, even where unlimited costs risks would otherwise stifle claims brought in the public interest. We do not think that that is right. As Coulson LJ made clear in *PGI* at [6], CCOs are very rare and only made in exceptional circumstances: "[t]he costs budgeting regime … is widely regarded as a more scientific way of achieving the same goal". It would be an unusual case where the future costs were capped at far less than the reasonable minimum amount necessary to pursue or defend a claim. There may be cases where the reasonable and necessary costs required to fight or defend a claim are disproportionate to the issues in the case (see *PGI* at [27] to [28]). But as we have indicated, this is not such a case.

94. As regards whether or not it is in the interests of justice to make a CCO, BL's submissions fall broadly in to two categories: first, that if a CCO is not made it will stifle the Claim; and second, that the Claim is not simply a private claim, but a claim brought in the broader public interest.

95. BL submitted that it would be unfair to expose it to disproportionate costs risk in light of the disparity between the parties in terms of size and resources: BL is a small enterprise within the meaning of Commission Recommendation No. 361 (EC) of 2003, and at all material times had less than 30 employees. According to the CCO application, BL's annual turnover in the financial year to 2020 was £3,284,222. On the other hand, the First Defendant is a subsidiary of the Second Defendant which is the UK subsidiary of a large global corporation, Wacoal Holdings Corp., incorporated and headquartered in Japan. The CCO application states that the Wacoal Group global turnover for the financial year 2020 amounted to approximately £1.2bn. We are told that the First Defendant's turnover in the year to March 2020 was £59.4m, and that whilst the Second Defendant's turnover in the same period was only £600,000, it had net profits after dividends of over £4m and net assets of over £22.6m. BL submitted that without a costs cap in place, it would be deterred from pursuing its claim since it cannot risk being exposed to costs above the level of its ATE insurance and is struggling to recover from the financial impact of the Defendants' allegedly unlawful acts. BL argues that although the Defendants might realistically expect only to recover 65% of their costs on the standard basis of assessment, in the absence of a costs cap the uncertainty associated with litigation risk would act as a "considerable disincentive for would-be claimants and would most likely stifle the Claim." BL maintains that the combined legal costs are likely to represent a substantial amount not far short of the Claim itself, and that if it is forced to seek increased ATE insurance, then the amount of damages available to BL, should it succeed, diminish further. Ms Howard also submitted that in the absence of the CCO, there is a risk that BL will be unfairly exposed to the risk of insolvency.

96. The fact that, absent a CCO, a case may founder is a relevant factor when considering the interests of justice. But, as Christopher Clarke LJ put it in *Black* at [11], the function of a CCO is not to remedy the problems of access to finance for litigation. If, as in this case, the Defendants' costs are (subject to the points we have made) to be regarded as proportionate (and not that dissimilar to BL's), it is not possible to make a CCO simply because without it the case is not

financially viable. The "interests of justice" means more than just BL's interest in obtaining justice (see also *Black* at [21]).

97. Ms Howard seeks to distinguish *Black* on the basis that it was a discrimination claim for damages brought under the Equality Act 2010, whereas the present claim is brought under an entirely different legislative scheme which was established not simply to protect the rights of individuals, but to protect consumers from anti-competitive practices. Ms Howard submitted that this case is not being brought solely in BL's private commercial interests; it has a wider important public interest, not just for BL and other resellers in the market but for the process of competition in these markets (and, most importantly, for consumers who are entitled to have the benefits of choice and lower prices). If BL succeeds, it will serve the wider consumer interest by ending RPM practices in the industry. In support of her argument as to the general public interest, Ms Howard relied upon three warning letters from the Competition and Markets Authority ("CMA") regarding RPM. The first, dated 20 June 2017, was a general industry-wide warning letter sent by the CMA to suppliers and resellers regarding RPM, which was followed up in 2018 with a specific warning letter to the lingerie sector, and a further warning letter in the same sector sent in 2021.

98. Ms Howard sought to rely upon the Court of Appeal decision in *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600 ("*Corner House*"), a judicial review case in which the court set out the principles governing (1) the making of Protective Costs Orders ("PCO") in public law cases raising issues of general public importance to allow claimants of limited means access to the court without the fear of substantial orders for costs being made against them; and (2) the making of reciprocal CCOs by which the liability of the defendant for the applicant's costs are also restricted to a reasonably modest amount.

99. Ms Howard also referred us to *R (Plantagenet Alliance Limited) v Secretary of State for Justice* [2013] EWHC 3164 (Admin), which again relates to judicial review proceedings. Haddon-Cave J (as he then was) had granted a PCO, applying the "Corner House" principles. At [7] he stated: "PCOs are about ensuring access to justice. They are granted in respect of judicial review claims

which raise issues of "*general public importance*" which it is in the "*public interest*" should be determined, but would otherwise be stifled by lack of financial means." Having granted a full PCO in favour of the claimant which provided full protection against the defendants' costs, he directed that there should be a further hearing to set an appropriate 'cap' on the claimant's own recoverable costs. The Secretary of State sought permission to challenge the granting of the PCO, and whilst he decided that there were no compelling reasons to set aside the grant of the PCO, the Judge went on to reconsider the grant of the PCO afresh. Having done so, he decided at [55] that it was appropriate to grant a full PCO in favour of the claimant, protecting it in terms of its liability to meet the defendants' costs, and dismissed the applications to discharge, vary or set aside the PCO. He then went on at [58] to [62] to consider the quantum of the costs cap which should apply in the other direction. That is to say, the costs that ought to be recoverable from the defendants in the event that the claimant succeeded - something he described as being the *quid pro quo* for granting a full or partial PCO.

100. These decisions do not assist us. The CPR costs capping regime under CPR r. 3.19 expressly does not apply to such claims (CPR r. 3.19(2)). The costs capping regime in judicial review proceedings is subject to its own statutory regime and requirements as set out in the CJCA which applies only where the proceedings are public interest proceedings (although the scope for PCOs in certain other public law cases remains). In those proceedings, the matters to which the court is required to have regard when considering whether to make a CCO are set out in s. 89 CJCA and include factors such as whether or not the applicant for the order is likely to benefit if relief is granted, whether the legal representatives are acting free of charge, and whether the applicant is an appropriate person to represent the interests of other persons or the public interest generally. Consideration must also be given to what the respondent is entitled to by way of costs protection as a *quid pro quo*: something that we note BL does not propose should apply in this case.

101. In our view, the distinction that Ms Howard sought to draw between the present case and *Black* is also not valid. We accept that a decision in this case may well have wider effects and may benefit the public at large, but that may be said of

many other cases - in particular where questions of law fall to be decided - and is only one factor. It does not mean that the case has been brought in the interests of the public generally, or in the interests of consumers. This Claim has a significant personal element: it is brought by BL for around £3.5m in damages at a minimum, together with an injunction ensuring BL's future supplies, or alternatively for damages of up to £7.7m. This is not akin to the claims brought in the public interest by way of judicial review.

102. Given that all of the requirements of CPR r. 3.19(5) must be satisfied, our conclusion in relation to the factors set out in CPR r. 3.19(5)(b) and (c) means that the CCO application must fail. However, for the reasons we have explained, we also do not consider that CPR r. 3.19(5)(a) is satisfied. Even if the interests of justice were to be regarded as a form of "trump card", the issue is whether or not it is in the interests of justice for the case to be heard on terms that the Defendants can recover no more than £450,000 of their costs if successful: even though such costs may have been reasonably incurred and are proportionate to the litigation. We are not satisfied that it is, in particular in circumstances where, save for the costs of the expert evidence, the amounts claimed or which we are minded to approve are not dramatically different to those claimed by BL, and in some instances, less.

F. CONCLUSION

103. We unanimously dismiss BL's application for a CCO and approve the costs budgets in the form scheduled to this Ruling. Both parties have permission to apply to vary their respective costs budgets and/or make submissions in relation to the costs budget of the other party in relation to the following matters:

(1) economic experts' fees once the preliminary meeting has taken place, and the scope of economic evidence on the list of issues has been resolved;

(2) industry expert reports; and

(3) any variation relating to the estimate of costs for the trial consequential on (1) and (2).

104. Both parties are entitled to apply to vary their costs budgets in the event of a significant development in the litigation.

Bridget Lucas QC
Chairwoman

Professor John Cubbin

Anna Walker CB

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

Date: 24 May 2022

ANNEX 1 (ALLOWED FUTURE COSTS)

Item	Claimant's Costs Allowed	Defendants' Costs Allowed
Issues / Statements of Case	£4500	£7,600
CCO Application and Responses	£750	
Costs Budgeting and Costs CMC	£9,500	£9,000
Disclosure	£31,000	£38,000
Witness Statements	£43,000	£38,000
Reply Witness Statements	£13,000	£13,000
Industry Expert Reports	£17,000	£18,200
Economists Expert Reports	£44,500	£82,000
Trial preparation	£75,000	£85,000
5 Day Phase 1 Hearing	£81,000	£81,000
Contingency (PTR)	£21,500	£24,000
Total	**£340,750.00**[2]	**£395,800.00**[3]

[2] This does not include the incurred costs of the Claimant at the time of the CCMC (£360,970)
[3] This does not include the incurred costs of the Defendant at the time of the CCMC (£214,289.50)