Neutral citation [2025] CAT 31

Case No: 1702/5/7/25 (T)

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

12 May 2025

Before:

HODGE MALEK KC
(Chair)

Sitting as a Tribunal in England and Wales

BETWEEN:

LENZING AG & OTHERS

Claimants

- v -

WESTLAKE VINNOLIT GMBH & CO. KG & OTHERS

Defendants

Part 20 Claimants/Defendants

Heard at Salisbury Square House on 12 May 2025

RULING (DISCLOSURE)

APPEARANCES

Michael Armitage and Hugh Whelan (instructed by Stewarts Law LLP) appeared on behalf of the Claimants.

Josh Holmes KC and Conor McCarthy (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the 1st to 3rd and 5th and 6th Defendants.

Anneli Howard KC and Nikolaus Grubeck (instructed by Slaughter and May) appeared on behalf of the 7th to 13th Defendants.

A. INTRODUCTION AND BACKGROUND

1. This is the first case management conference ("CMC") in this matter in relation to a case that was initially filed in the High Court on 11 July 2023. The case was subsequently transferred to this Tribunal by the High Court.

2. This ruling concerns various applications made by the parties on 3 April 2025 and considered at the CMC held on 12 May 2025. The primary issue for determination at the CMC is the disclosure process to be undertaken by the parties. Other matters for determination include the list of issues filed by the parties.

3. The Claimants are all entities within the Lenzing corporate group, which are global producers and sellers of wood based and other fibres in the textile industry.

4. The first to third and fifth and sixth Defendants are entities within the Westlake/Vinnolit corporate group (the "Westlake Defendants"). The seventh to the thirteenth Defendants are entities within the Ineos/Inovyn corporate group (the "Ineos Defendants"). The Defendants are manufacturers of caustic soda, which is an important input for the Claimants' business. The Claimants are direct purchasers of caustic soda from the Defendants.

5. The Claimants' case is that the Defendants were party to anti-competitive agreements and concerted practices in relation to the supply of caustic soda (the "Cartel") contrary to Article 101(1) TFEU, and the Chapter 1 prohibition in section 2 of the Competition Act 1998, during a period covering at least July 2017 to February 2021 (the "Cartel Period"), and in particular in relation to the manipulation of caustic soda price indices produced by IHS Markit Limited (the "IHS Index") which was relevant to caustic soda pricing.

6. The Claimants contend that they have suffered loss and damage as a result of the Cartel, including through the payment of overcharges on their purchases of caustic soda from the Defendants and others.

7. The claim is based on inference. The essential basis for the Claimants' case is set out in the Amended Particulars of Claim dated 24 June 2024, at paragraphs 36 to 37:

> "36. Before the second half of 2017, caustic soda pricing as reported in the IHS Index was relatively consistent, with prices in the IHS Index ranging from €445 to €490 per dmt between quarter 1 in 2016 and quarter 1 in 2017, representing an average price increase of 2.45% at each quarterly adjustment over that period. By April 2017, the reported price per dmt had reached €520 per dmt.
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> 37. In July 2017, prices in the IHS Index were €550 per dmt but began to rise sharply from there to €740 per dmt by January 2018 (approximately 35% higher than prices in the IHS Index had been in July 2017, and approximately 51% higher than prices in the IHS Index had been in January 2017 (i.e., one year earlier)). While there were fluctuations during the remainder of the Cartel Period, the price remained at over €700 per dmt throughout 2018, falling slightly in 2019 but remaining over €600 per dmt throughout that year. In 2020, the pricing ranged between €578 and €650 per dmt, and was at €523 per dmt in February 2021."

8. The Claimants infer that the only plausible explanation for these price developments is IHS Index price manipulation. The central allegation is set out at paragraph 40 of the Amended Particulars of Claim:

> "40. The Claimants infer that the explanation for the price trends observed in the IHS Index in the Cartel Period (and the corresponding trends in the prices actually paid by the Claimants during the Cartel Period) is that the Westlake/Vinnolit Undertaking, the Ineos/Inovyn Undertaking (together the 'Defendant Cartelists') and entities within the Dow, Covestro and Nobian corporate groups (together the 'Non Defendant Cartelists') colluded with one another in order to manipulate the IHS Index, through the co-ordinated submission of artificially high pricing information and/or a failure to disclose accurate price information. Such collusion had the result that the prices reported in the IHS Index were artificially high during the Cartel Period thereby also resulting in the prices charged by the Defendant Cartelists and the Non-Defendant Cartelists (together the 'Cartelists') being inflated to artificially high levels that would not have arisen in the absence of the Cartel."

9. The effect of the alleged price manipulation is said to have been to increase prices of the IHS Index, which resulted in the prices charged by the Defendants and other alleged cartelists being artificially high. The Amended Particulars of Claim then pleads, at paragraph 41, a series of bases for the inferences in price manipulation of the IHS Index, including assertions such as there being adequate capacity to meet demand during the relevant period; an allegation that there were no cost-based explanations for the price trends; the consistent profitability and market shares of the Defendants; and the differences between

the IHS Index and the equivalent export prices. The sustainability or otherwise of these inferences will need to be tested by factual and economic evidence at trial.

10. The value of commerce in respect of which the Claimants allege they have suffered overcharge losses is €310.4 million, in respect of which they claim an overcharge of 26 percent: see Amended Particulars of Claim at paragraph 62.

11. The Defendants deny any wrongful or collusive conduct. On damages they put in issue pass on of the alleged losses by the Claimants.

B. DISCLOSURE AND EVIDENTIARY ISSUES

12. The Defendants suggest that this is a weak case because it is based on inferences. However, merely because a case is based on inferences or circumstantial evidence does not necessarily mean that it will fail. As set out in *Phipson on Evidence* (20th edition, 2022), paragraph 45-09:

> "… The correct approach is not to start with some form of hierarchy of evidence, but to consider all the evidence, in whatever admissible form, and to test and consider each item of evidence against the rest of the evidence. That one should consider different threads of evidence in order to reach a finding of fact on an issue is illustrated by the directions given by Pollock CB to a jury on a burglary charge in Kingston Crown Court in 1866, which still holds good today (*R v Exall* [1866] 4 F&F 922 to 929):
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> > "Thus it is that all the circumstances must be considered together. It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be of quite sufficient strength."

13. As has been observed, the nature of the evidence that the fact-finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. Criminal cases, civil disputes involving conspiracies, and fraud are often inferential cases where circumstantial evidence needs to be drawn together and considered. In such cases, a fact-finding process involves the assessment of various strands of evidence. As reflected in Pollock CB's direction, the nature of circumstantial evidence is that the effect is cumulative, and the existence of

a successful case based on circumstantial evidence is that the whole is stronger than the individual parts.

14. Having looked at the inferences sought to be drawn by the Claimants, it is impossible at this stage to form a view as to whether or not the inferences, if in fact found, would be sufficient to sustain the allegation of a cartel which led to increased prices.

15. On the other hand, as I have noted, the mere fact that it is a circumstantial case does not mean it is necessarily weak.

16. In a case like the present, disclosure is clearly going to be very important, because it may reveal direct evidence of collusion to fix or influence prices. Therefore, an inferential case may, after disclosure, become a mixture of an inferential and direct evidence case.

17. The proceedings, as I have noted, were initially commenced in the High Court in July 2023. Progress has been slow, largely due to the need to serve parties out of the jurisdiction. The Amended Particulars of Claim were filed on 24 June 2024, and the Defences of both groups of Defendants were filed on 18 October 2024. Pursuant to an Order by consent dated 10 January 2025 in the Competition List in the High Court, the claim has been transferred to this Tribunal.

18. On 21 March 2025 I issued directions for the purposes of this first CMC. Pursuant to those directions, the parties have issued applications for disclosure on 3 April 2025. The applications have been refined somewhat by sensible discussion between the parties with an element of give and take, and the positions of the parties has moved somewhat since the commencement of this CMC.

19. The parties do not disagree with the order that I am making that disclosure should be by way of: (1) preparation and exchange of disclosure reports and electronic document questionnaires ("EDQs"); followed by (2) the making of requests and responses to requests for documents or categories of documents, including proposals for specific search methodologies via the exchange of

Redfern Schedules. The parties are in disagreement as to the timetable for this disclosure process. Timing of disclosure deadlines will not be dealt with in this ruling but in the Order of the Chair drawn 19 May 2025.

20. Each of the parties have their own position for early disclosure in advance of the Redfern Schedule process. In summary, the Claimants have sought an order that the parties shall each give disclosure by 30 June 2025 of known adverse documents ("KADs"), as defined in Practice Direction 57AD of the Civil Procedure Rules 1998 ("PD57AD") at paragraph 2.8, in relation the Claimants' contention that the Defendants and/or the undertakings of which they form part participated in/implemented infringements of competition law. This is reflected in a draft order provided by the Claimants (paras. 2-3).

21. The Westlake Defendants have proposed an exercise comprising initial disclosure. Their position, as set out in the skeleton argument for this hearing, was that if the Tribunal were minded to order some form of early disclosure, the proceedings would be better advanced by initial disclosure of: (1) key documents on which each party has relied expressly or otherwise in support of the claims or defences advanced in its Statement of Case, and including the documents referred to in the Statement of Case; and (2) the key documents that are necessary to enable the other parties to understand the claim or defence that they have to meet.

22. The Ineos Defendants' disclosure proposal is for another variation of KADs disclosure. In their skeleton argument, they state that they agree to a preliminary disclosure process involving KADs, as long as this is a meaningful exercise that is managed appropriately so that it has a realistic prospect of efficiently advancing the case, rather than duplicating the main disclosure exercise and the attendant costs. Such a preliminary disclosure process would entail: (a) an obligation to disclose KADs in relation to the parties' pleaded cases; (b) preliminary disclosure of documents considered or relied upon expressly or otherwise in the preparation of the pleadings; and (c) a timetable that allows for any pleading amendments in light of the preliminary disclosure, before proceeding with the general disclosure process.

23. Turning to the first major item for determination, the disclosure process. Disclosure in the Tribunal is governed by Rule 60 of the Competition Appeal Tribunal Rules 2015 (the "Tribunal Rules") which provides as follows:

> "60. (1) In this rule, and in rules 61 to 65 —
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> (a) a party discloses a document by stating that the document exists or has existed;
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> (b) a "disclosure report" means a report verified by a statement of truth, which —
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> (i) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;
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> (ii) describes where and with whom those documents are or may be located;
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> (iii) in the case of electronic documents, describes how those documents are stored;
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> (iv) estimates the broad range of costs that could be involved in giving disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and
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> (v) states which directions are to be sought regarding disclosure;
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> (c) an "Electronic Documents Questionnaire" means a questionnaire in the form of the questionnaire in the Schedule to Practice Direction 31B of the CPR.
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> (2) Subject to paragraph (3) and unless the Tribunal otherwise thinks fit —
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> (a) at the first case management conference, the Tribunal shall decide whether and when the disclosure report and a completed Electronic Documents Questionnaire should be filed; and
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> (b) at a subsequent case management conference, the Tribunal shall decide, having regard to the governing principles and the need to limit disclosure to that which is necessary to deal with the case justly, what orders to make in relation to disclosure.
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> (3) The Tribunal may at any point give directions as to how disclosure is to be given, and in particular —
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> (a) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents;
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> (b) whether lists of documents are required;
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> (c) in what format documents are to be disclosed (and whether any identification is required);

(d) what is required in relation to documents that once existed but no longer exist; and

(e) whether disclosure is to take place in stages.

(4) A party's duty to disclose documents is limited to documents which are or have been in its control; and for this purpose, a party has or has had a document in its control if —

(a) the document is or was in its physical possession;

(b) it has or has had a right to possession of the document; or

(c) it has or has had a right to inspect or take copies of the document.

(5) A party need not disclose more than one copy of a document, and for that purpose a copy of a document that contains a modification, obliteration or other marking or feature is to be treated as a separate document.

(6) Any duty of disclosure continues until the proceedings are concluded.

(7) If documents to which such a duty extends come to a party's notice at any time during the proceedings, it shall immediately notify every other party."

24. The general approach to disclosure has been set out in some detail in *Ryder Limited and Another v MAN SE & Others* [2020] CAT 3 at [23]-[38]. It is not necessary for the purposes of this ruling to replicate that.

25. The approach that I take as Chair is that the applicable disclosure regime for any particular case depends on the very facts and the type of case in issue. As regards dealing with the process and working out any disclosure, a flexible approach is taken to dealing with these applications.

26. The flexible approach to the disclosure process is explained in *Dawsongroup plc and Others v DAF Trucks N.V. and Others* [2021] CAT 13 at [5]-[11]:

"5. Given the complexity of disclosure in this case and the number of parties involved and the issues involved, and the paucity of data going back so far in many cases, the Tribunal considers that close case management is necessary, as set out in the Disclosure Ruling. In practice, that means that the Tribunal gets involved in one of three ways.

6. The first is where there is a very short point of principle, which can be dealt with easily. These are being dealt with on paper, and the Tribunal has been dealing with a lot of applications in that way.

7. The practice varies. Sometimes the parties ask the Tribunal for an informal view as to what the Tribunal thinks, and that informal view is given. If the parties are content to follow that informal view, the Tribunal does not get

> involved any further, apart from approving a consent order. If the parties are not agreed, the practice has been to have more elaborate argument with the parties being able to explain their positions more fully in writing. The Tribunal then makes a short ruling.
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> 8. The second way is where there is a more substantial point which will take up to half a day: that is going to be dealt with and has been dealt with by way of Friday applications. The Tribunal has been available one Friday a month since February 2020 to hear such applications. Most applications threatened or taken out, have been resolved by the parties without needing a formal ruling from the Tribunal. The Tribunal has made a significant number of consent orders for disclosure. A consistent approach has been adopted, in part by having Hodge Malek QC being available to deal with all matters in relation to disclosure.
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> 9. The third route is where there is a general point which cuts across all the cases and involves multiple parties or one that needs extensive argument. This can either be heard by the full Tribunal at a CMC or it can be dealt with at a separate hearing with the full Tribunal, or sometimes with one member of the Tribunal.
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> 10. As regards today's exercise, the Tribunal directed Redfern Schedules to be given, and they were served on 26 March 2021 and have been very helpful. But looking at those schedules, it was evident that there was more room for discussion between the parties, and there has been a gap between the 26 March 2021 schedules and the actual hearing of the CMC on 5-6 May 2021. This is why, on the first day of the two-day CMC, the Tribunal directed that further updated Redfern Schedules be served.
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> 11. It is most important that it is only once a dispute or an issue has crystallised between the parties as one not being capable of resolution between them that it comes before the Tribunal for a resolution."

27. I do envisage that there may well be issues between the parties which will arise as they work out the disclosure exercise. So they can be dealt with relatively quickly, if there is an issue on which the parties think the Tribunal may assist, then the party seeking disclosure can write in to the Tribunal, set out what that issue is, the other party can explain what their position is and the Tribunal can be asked to give an informal ruling, or the Tribunal can decide, if the Tribunal is not prepared to give an informal ruling, whether or not a formal application needs to be taken out. If the Tribunal takes the view that there does not need to be a formal application, then it will be dealt with by way of an indication in writing by letter from the Tribunal. If either party is not happy with the indication, then a formal application will need to be taken out and the matter be heard before the Tribunal.

28. I am very conscious that every hearing in this Tribunal entails significant costs and preparation which could be a diversion from the parties getting on with the disclosure exercise and the preparation of the case.

29. I would like to make clear that I will take the same approach that I took in the Trucks cases. If there is any disclosure application and any party has, in my view, acted unreasonably, or failed to be cooperative or the like, there will be an adverse costs order. But, otherwise, if there are bona fides issues that need to be worked out where the Tribunal can assist the parties, then there will be no adverse costs order in principle. I do not want to deter the parties from coming to the Tribunal to try to resolve any deadlock between the parties.

30. As regards the disclosure reports, I would invite the parties to do those sensibly and they should avoid the high level of generality as was found in *Cabo Concepts Limited v MGA Entertainment (UK) Limited* [2021] EWHC 491 (Pat) at [38]. It does not assist the Tribunal or the parties if the categories are put in such general terms that make them unworkable. Therefore, I would hope that the disclosure reports can be dealt with in a useful way.

31. The parties need to work together constructively on the disclosure exercise in this case, which is not going to be, let's say, straightforward. I appreciate this is a cartel case, but there have been no findings by any regulator, so there are many aspects of the case that need to be looked at, possibly for the first time.

32. As regards how the disclosure process is going to operate, I would expect – and I have directed already – that it is going to be done on a rolling process. So as and when categories have been agreed, I would expect the parties to start getting those categories together and disclosing their documents category by category on a rolling basis. As and when any category has been disclosed, there should be a disclosure statement. If there are documents which are subsequently found in relation to a category, they can be added to the next list that is provided in relation to the next category of documents. Once the whole process has concluded the parties are to produce one global disclosure statement by an appropriate person dealing with all the disclosure to date.

33. The advantage of having disclosure on a rolling basis is it enables the parties to get on with preparing the substantive case. It may assist the parties to formulate their case in more detail, therefore it may enable either party to give further particulars of matters which are already pleaded or it may assist the parties to actually amend their pleadings. If there is an amendment application, again that amendment application, if the parties can't agree with it, can be submitted to the Tribunal. If there is going to be an actual amendment, I would expect an application to amend to be taken out in the normal way, and whether it's dealt with on paper or at a hearing can be determined once the Tribunal has considered it.

34. I would like to point out that disclosure can take a number of forms. It can take the form of disclosing actual documents, but it also can be in the form of providing information. Sometimes by providing information, it reduces the necessity of producing reams of data.

35. I can see in a case like this, there is probably going to be a fair amount of data on pricing, both in relation to the Claimants as regards pass on and, in relation to the Defendants, their own pricing for caustic soda. Therefore, the parties should consider as and when necessary whether a statement at least initially, such as a pricing statement, will assist the parties.

36. Also, when it comes to giving disclosure from databases, I would expect the parties to have explanatory statements to go with it, so people can understand the data. There have been multiple cases in this Tribunal where people have given various forms of data, and no one can readily understand how it works. That is useless. If a party is going to disclose data, it must give an explanatory statement as to how that data should be used and what its significance is, what the different fields actually mean; and if there is technical data that needs to be explained, then it should be explained.

37. All this has been dealt with in previous cases such as *Suez Groupe SAS and Others v Stellantis N.V, and Others* [2021] CAT 6; and *Wolseley UK Limited and Others v Fiat Chrysler Automobile N.V. and Others* [2020] CAT 15.

Therefore, the parties should bear those cases in mind as they progress through the disclosure exercise.

38. In addition to providing inter partes disclosure, I invited the Claimants to consider what their position is as regards non-party disclosure.

39. As I can see it, there are two general sources for non-party disclosure. The first is getting non-party disclosure from IHS Markit Limited ("IHS"). IHS are the benchmark setters, and their data will be critical in understanding how the prices have been reached. I note the general statement, at paragraph 35 of the Amended Particulars of Claim, which provides as follows:

> "35. The Claimants understand that in order to compile the IHS Index, IHS conducted regular interviews with all European producers of caustic soda and at least 30% of those buyers of caustic soda with freely negotiated contracts which are usually quarterly contracts for which the pricing is not directly tethered to published price indices. Long term contracts are only included in the index once in the month in which the contract begins. IHS used a statistical method (the exact form of which is not known) to create a weighted average of the price movements from the transaction data, with the weighting being carried out between different customer sizes according to purchase quantity and on the supplier side according to capacity share. The IHS Index is subject to quarterly adjustments according to an index formula, and relevant supply prices linked to the IHS Index will in turn be affected by such adjustments."

40. It will be necessary for the Claimants to engage with IHS to get a full understanding as to how IHS put its data together, the sources of information, and to get copies of the submissions of all the alleged cartelists in addition to the two groups that are defendants before this Tribunal. Notably, when one looks at the pleadings, there are non-party alleged cartelists, namely Dow, Covestro and Nobian.

41. IHS is fully entitled to take the position that if the Claimants want documents and information from IHS, they will need to take out an application for non-party disclosure. The Tribunal can deal with such an application. However, IHS may be cooperative and be quite amenable to providing data and information for use in these proceedings, subject to suitable confidentiality undertakings, because it is in their interests that their index is regarded as robust and credible. If there has been any manipulation of the IHS Index as suggested by the Claimants, the sooner that is ascertained and any lessons learned the better –

both for the interests of the whole market, as well as IHS. Therefore, I would not necessarily expect IHS to take a hard line to resisting disclosure. IHS may be willing to provide a substantial amount of data, including how they do the pricing, what information it has. Moreover, insofar as there are telephone calls that are made to or from caustic soda suppliers to help them fix the price, it can be ascertained whether those calls are recorded or if there are any notes of the calls available. Therefore, I expect that IHS documents may provide an important source of disclosure.

42. The second potential source of non-party disclosure is from the non-party alleged cartelists, being Dow, Covestro and Nobian. I would envisage that any requests for non-party disclosure from them would have to await the disclosure exercise being conducted by the Defendants, and any non-party disclosure that has been provided by IHS.

43. Any application for non-party disclosure from IHS should be taken out well before the next CMC. Moreover, I would expect that any order for non-party disclosure is made prior to the next CMC. Therefore, one may envisage that there would be data coming in from IHS prior to the next CMC. It is a matter for the Claimants whether or not they wish to take this application out; but, if they are going to take it out, they should take out the application promptly.

44. Turning now to the question of early disclosure. As previously indicated, early disclosure has been suggested in one of two forms. The first is the proposal by the Westlake Defendants and, to a certain extent, by the Ineos Defendants for initial disclosure along the lines of PD57AD at paragraph 5, which provides as follows:

> "5. **Initial Disclosure**
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> 5.1 Save as provided below, and save in the case of a Part 7 claim form without particulars of claim, each party must provide to all other parties at the same time as its statement of case an Initial Disclosure List of Documents that lists and is accompanied by copies of —
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> (1) the key documents on which it has relied (expressly or otherwise) in support of the claims or defences advanced in its statement of case (and including the documents referred to in that statement of case); and

(2) the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

5.2 This form of disclosure is known as 'Initial Disclosure'.

5.3 Initial Disclosure is not required where —

(1) the parties have agreed to dispense with it (see paragraph 5.8 below);

(2) the court has ordered that it is not required (see paragraph 5.10 below); or

(3) a party concludes and states in writing, approaching the matter in good faith, that giving Initial Disclosure would involve it or any other party providing (after removing duplicates, and including documents referred to at paragraph 5.4(3)(a)) more than (about) whichever is the larger of 1000 pages or 200 documents (or such higher but reasonable figure as the parties may agree), at which point the requirement to give Initial Disclosure ceases for all parties for the purposes of the case.

Documents comprising media not in page form are not included in the calculation of the page or document limit at (3) but, where provided pursuant to a requirement to give Initial Disclosure, should be confined strictly to what is necessary to comply with paragraph 5.1 above.

5.4 A party giving Initial Disclosure —

(1) is under no obligation to undertake a search for documents beyond any search it has already undertaken or caused to be undertaken for the purposes of the proceedings (including in advance of the commencement of the proceedings);

(2) Need not provide unless requested documents by way of Initial Disclosure if such documents —

(a) have already been provided to the other party, whether by disclosure before proceedings start (see CPR 31.16) or through pre action correspondence or otherwise in the period following intimation of the proceedings (and including when giving Initial Disclosure with a statement of case that is being amended); or

(b) are known to be or have been in the other party's possession;

(3) need not disclose adverse documents by way of Initial Disclosure.

5.5 Unless otherwise ordered, or agreed between the parties, copies of documents shall be provided in electronic form for the purpose of Initial Disclosure. The Initial Disclosure List of Documents should be filed but the documents must not be filed.

5.6 In proceedings where a statement of case is to be served on a defendant out of the jurisdiction Initial Disclosure is not required in respect of that defendant unless and until that defendant files an acknowledgement of service that does not contest the jurisdiction, or files a further acknowledgement of service under CPR 11(7)(b).

> 5.7 For the avoidance of doubt, Initial Disclosure does not require any document to be translated.
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> 5.8 The parties may agree in writing, before or after the commencement of proceedings, to dispense with, or defer, Initial Disclosure. They may also agree to dispense with the requirement to produce an Initial Disclosure List of Documents. Each party should record its respective reasons for any agreement, so that those reasons may be available to the court, on request, at any case management conference. The court may set aside an agreement to dispense with or defer Initial Disclosure if it considers that Initial Disclosure is likely to provide significant benefits and the costs of providing Initial Disclosure are unlikely to be disproportionate to such benefits.
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> 5.9 The court shall disregard any prior agreement to dispense with Initial Disclosure when considering whether to order Extended Disclosure.
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> 5.10 A party may apply to the court for directions limiting or abrogating the obligation to provide Initial Disclosure. In particular, if a party is requested but does not agree to dispense with Initial Disclosure, the requesting party may apply to the court with notice to the other party for directions limiting or abrogating the obligation to provide Initial Disclosure if it considers compliance with the obligation will incur disproportionate cost or be unduly complex. Such an application must be made by application notice, supported by evidence where necessary, and, save in exceptional cases, will be dealt with without a hearing or at a short telephone hearing.
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> 5.11 In an appropriate case the court may, on application, and whether or not Initial Disclosure has been given, require a party to disclose documents to another party where that is necessary to enable the other party to understand the claim or defence they have to meet or to formulate a defence or a reply.
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> 5.12 A complaint about Initial Disclosure shall be dealt with at the first case management conference unless, exceptionally and on application, the court considers that the issue should be resolved at an earlier hearing.
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> 5.13 A significant failure to comply with the obligation to provide Initial Disclosure may be taken into account by the court when considering whether to make an order for Extended Disclosure and the terms of such an order. It may also result in an adverse order for costs.
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> 5.14 For the avoidance of doubt, nothing in this paragraph affects the operation of paragraph 7.3 of Practice Direction 16."

45. As regards the legal principles in relation to such applications, they are dealt with in Matthews and Malek, *Disclosure* (6th ed., 2024), paras. 5.34-5.37. They are also dealt with in *The State of Qatar v Banque Havilland SA & Ors* [2020] EWHC 1248 (Comm). In that judgment various pertinent observations were made by Mrs Justice Cockerill at paragraphs [16], [18] and [19] which provide as follows:

> "16. In so far as concerns the early disclosure arguments, to an extent that may be less acutely felt in the light of the determination I have come to on further

> information. I am not going to make an order for early disclosure. I am not persuaded that there was a breach in relation to initial disclosure. Initial disclosure is very tightly focused. That is key documents on which reliance has been placed, such as, for example, a contract or a key meeting note potentially which evidences a contract having been made or a particular representation made, but sub paragraph (2) provides for key documents necessary to understand the case which has been met.
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> …
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> 18. One also has to bear in mind that the purpose of the disclosure pilot is to streamline and not to complicate disclosure and so it would be unlikely that what was had in mind by the drafters of the disclosure pilot was a scheme whereby initial disclosure required something more than really very necessary documents; in other words that it required the disclosure of an evidence base required to test the evidence rather than to support the very key allegations.
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> 19. Then in so far as concerns the questions of ordering the disclosure early in any event. Starting with the forensic investigation, the fact that documents have been gathered does not mean that those are key documents needed to understand the case. There was really, perhaps understandably, given that the claimants do not know what those documents are, a lack of clarity about why the supporting documents would be necessary to understand the case. That is a substantial category of documents which the defendants would not otherwise be obliged to disclose at this stage."

46. Early disclosure in the form of initial disclosure can be very useful in some cases. I can see some merit in getting earlier, or at least spread-out, categories of disclosure which are clearly relevant and readily available to both parties.

47. The Westlake Defendants seek six categories of documents as articulated in paragraph 29 of their skeleton argument, extracted below:

> "29.1 Lenzing's supply contracts with the Ineos and Westlake Defendants which form the factual basis of the key allegation in APOC § 38 that 'prices charged to the Claimants by the Westlake/Vinnolit Undertaking and the Ineos/Inovyn Undertaking during the Cartel Period displayed a similar trend to that observed in the IHS Index during the Cartel Period'.
>
> 29.2 Lenzing's supply arrangements with non-Defendant cartelists (Dow, Covestro and Nobian corporate groups) during the Relevant Period which are alleged to display 'similar patterns' to the prices charged by the Defendants (Cf APOC § 33).
>
> 29.3 Negotiating documents concerning the allegation that Westlake, Ineos and 'a number of other suppliers of caustic soda' 'required' Lenzing to price contracts by reference to the IHS Index which is said to have been manipulated (Cf APOC § 33). Lenzing say that the imposition of this requirement was a way in which the Defendants implemented the alleged cartel.
>
> 29.4 Lenzing's negotiating documents demonstrating the rejection by the alleged cartelists of Lenzing's proposals for 'price caps, floors and discounts'.

> Lenzing alleges that this was 'a coordinated strategy on the part of Cartelists, to ensure that the effects of their manipulation of the IHS Index were not undermined by bilateral contractual negotiations' (Cf APOC § 41(f)).
>
> 29.5 The price announcement letters which Lenzing alleges were sent out by the Defendants and other cartelists 'at similar times' (APOC § 41(j)).
>
> 29.6 The specific press releases and annual reports relied upon by Lenzing in support of their (vague) allegation that European suppliers of caustic soda achieved 'record profits' and had 'consistent market shares' which they infer (without further reasoning or particulars) was the result of the operation of the alleged cartel during the Relevant Period (APOC § 41(k))."

48. Having listened to counsel for the Claimants and Defendants, it seems that there may be some element of confusion regarding category 5, as there may in fact be no documents – or at least no documents by the Defendants, let alone by the Claimants – falling within that category, so this should be deleted. Therefore, when it comes to conducting the initial disclosure – not in the initial disclosure sense, but in relation to the rolling Redfern Schedule process articulated above – I would expect the remaining 5 categories to be prioritised and to be disclosed relatively early in the process, given that they are relatively well structured and confined categories of documents which by and large should be readily available.

49. The Claimants are seeking various categories of documents in their skeleton argument. In their skeleton argument (para. 19), they resist the application for initial disclosure against them. I consider that having made the order for the general disclosure to be done on a rolling basis, there is no necessity to make an order for initial disclosure. As noted above, the categories of documents, apart from category 5, sought by the Westlake Defendants are all sensible and I would expect those documents to be collated and disclosed relatively early in the process.

50. The Claimants seek, relatively early on in this process, documents which are evidence of the collusion which, in my view, is a wide category of documents and is unlikely to be in the first tranche of documents in the rolling process, therefore I am not going to order initial disclosure. However, I note that I do expect certain categories of documents to be prioritised within the disclosure process.

51. As regards the Claimants' documents, the ones to be prioritised are the ones which I have just dealt with. As regards the Defendants' documents, I would expect them to prioritise, for example: one is the financial data that falls within category 6 sought by the Westlake Defendants; and another is the provision of all the documents they have sent to IHS in the relevant period, as that goes to the core of the case.

52. There are other categories which will be dealt with following this ruling which will fall within, I would say, the area of clean and easily defined categories. The process of getting those collated and disclosed should start as soon as practicable. Once again, for these reasons I am not going to order initial disclosure.

53. The second form of early disclosure is KADs disclosure which is sought by the Claimants (Claimants' skeleton argument, para. 9). This form of disclosure sought is derived from PD57AD, paragraphs 2.7 to 2.9:

> "2.7 Disclosure extends to 'adverse' documents. A document is 'adverse' if it or any information it contains contradicts or materially damages the disclosing party's contention or version of events on an issue in dispute, or supports the contention or version of events of an opposing party on an issue in dispute, whether or not that issue is one of the agreed Issues for Disclosure.
>
> 2.8 'Known adverse documents' are documents (other than privileged documents) that a party is actually aware (without undertaking any further search for documents than it has already undertaken or caused to be undertaken) both (a) are or were previously within its control and (b) are adverse.
>
> 2.9 For this purpose a company or organisation is 'aware' if any person with accountability or responsibility within the company or organisation for the events or the circumstances which are the subject of the case, or for the conduct of the proceedings, is aware. For this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation."

54. These provisions have been considered in some detail in *Castle Water Ltd v Thames Water Utilities Ltd* [2020] EWHC 1374 (TCC) at [10]-[12]:

> "10. The question then arises what the obligation of a party may be to discover whether it has any 'known adverse' documents that must be disclosed. Paragraph 2.9 states that 'for this purpose it is also necessary to take reasonable steps to check the position with any person who has had such accountability or responsibility but who has since left the company or organisation.' This

> provision, taken in conjunction with the fact that there needs to be a degree of assurance that adverse documents will not simply be ignored or buried, leads to the conclusion that a party is obliged to take reasonable steps to check whether it has any known adverse documents. The Practice Direction gives no guidance on what has to be done to amount to 'reasonable steps to check' and the specific steps to be taken will be fact and context sensitive. However, it may be asserted with some confidence that, in a case of any complexity at all or an organisation of any size, reasonable steps to check whether a company or organisation has 'known adverse documents' will require more than a generalised question that fails to identify the issues to which the question and any adverse documents may relate. Similarly, it will not be sufficient simply to ask questions of the leaders or controlling mind of an organisation, unless the issue in question is irrelevant to others.
>
> 11. There is a clear distinction between carrying out checks and carrying out searches. A known adverse document is one of which a party is aware without undertaking any further search for documents: see paragraph 2.8. However, the requirement to disclose known adverse documents would be emasculated if there was no obligation at all to look for adverse documents of which the party is aware. Paragraph 3.4 states that 'where there is a known adverse document but it has not been located, the duty to disclose the document is met by that fact being disclosed, subject to any further order that the court may make.' To take an example cited by counsel during argument, it would be absurd if a party were able to say 'I know I have an adverse document, but I don't know whether it is in the left hand drawer or the right. I have therefore not located it.'
>
> 12. Adopting the Practice Direction's touchstone of what is 'reasonable and proportionate' I would hold that a party must undertake reasonable and proportionate checks to see if it has or has had known adverse documents and that, if it has or has had known adverse documents, it must undertake reasonable and proportionate steps to locate them. Any other conclusion seems to me to be a rogue's charter, which is not the intended purpose or function of the Practice Direction. If, however, the provisions about known adverse documents are operated in the manner I have suggested, the other party and the court should have some assurance that the most significant adverse documents are likely to be disclosed as a matter of routine without an order for Extended Disclosure."

55. The PD57AD provisions on KADs have also been considered in *Elizabeth Helen Coll v Alphabet Inc. and Others* [2024] CAT 25 ("*Coll*") at [17], [53] and [55]. As regards the Tribunal's comments in *Coll*, they should be put in their true context. They are specific to the facts of that case, where the case was going to be dominated by expert evidence.

56. These proceedings are less likely to be dominated by expert evidence than in *Coll* and will be highly factual. Of course, I appreciate that experts will have a role in ascertaining the level of overcharge and ascertaining the level of pass on. However, I do not see this case as one where the experts are driving the litigation in the same way as in some other cases before the Tribunal.

57. I accept that KADs disclosure can be helpful, however for two reasons it is not suitable in this case. The first is that the level of KADs disclosure that has been sought is going to be far in excess of the modest amount of documents that one normally gets in relation to KADs disclosure. Secondly, it is not necessary on the facts of the case, given the rolling disclosure basis directed above.

C. LIST OF ISSUES

58. The second major issue for determination at this CMC is the list of issues. The parties have produced an extremely useful document on the list of issues. A properly formulated list of issues is of great assistance to the Tribunal and is also capable of assisting the parties on other aspects of the proceedings, such as disclosure. In some cases, the Tribunal, and certainly the Business and Property Courts have ordered separate lists of issues for the issues in the case and for the issues as regards disclosure. It's certainly not necessary in this case, given the way that the list of issues has been formulated.

59. There is one issue between the parties regarding the list of issues. Issue 8(iv) has not been agreed between the parties and currently provides as follows, noting that the wording in square brackets is proposed by the Defendants and opposed by the Claimants.

> "During the Relevant Period, to what extent (if at all) and over what period or periods (if any) did the Defendants collude with one another and/or with other suppliers of caustic soda (allegedly entities within the Dow, Covestro and Nobian corporate groups) in respect of the price of caustic soda, in particular in relation to (i) the submission of artificially high pricing information to IHS Markit Limited and/or (ii) failing to disclose accurate pricing information to IHS Markit Limited and/or (iii) rejecting proposals for caps, floors and discounts on market price increases and/or (iv) the exchange of sensitive information about each other's pricing [through their membership in trade associations, attendance at trade conferences, and/or as part of their sending price announcement letters.]" (internal footnote, referring to relevant pleadings, omitted).

60. The Claimants submit that if the additional words are included, they have the effect of limiting the way in which they have pleaded their case, which is a lot more, let's say, wide open.

61. The Defendants say: no, the relevant paragraph of the pleading follows on from an earlier paragraph. The relevant paragraphs in the pleading are paragraphs 40 and 41(i) of the Claimants' Amended Particulars of Claim, which provide as follows:

> "40. The Claimants infer that the explanation for the price trends observed in the IHS Index in the Cartel Period (and the corresponding trends in the prices actually paid by the Claimants during the Cartel Period) is that the Westlake/Vinnolit Undertaking, the Ineos/Inovyn Undertaking (together the 'Defendant Cartelists') and entities within the Dow, Covestro and Nobian corporate groups (together the 'Non Defendant Cartelists') colluded with one another in order to manipulate the IHS Index, through the co-ordinated submission of artificially high pricing information and/or a failure to disclose accurate price information. Such collusion had the result that the prices reported in the IHS Index were artificially high during the Cartel Period thereby also resulting in the prices charged by the Defendant Cartelists and the Non-Defendant Cartelists (together the 'Cartelists') being inflated to artificially high levels that would not have arisen in the absence of the Cartel.
>
> 41. As set out above, the Claimants do not have direct knowledge of the internal workings of the Cartel. The bases for the inferences set out in the preceding paragraph include the following:
>
> …
>
> i. Experience from contract negotiations. The Claimants' experience from contract negotiations with the Cartelists, including the Westlake/Vinnolit Undertaking and the Ineos/Inovyn Undertaking, is that those suppliers tended to be more well-informed about each other's prices than the Claimants would expect in the absence of collusion. The Claimants infer that the Cartelists exchanged sensitive information about each other's pricing during the Cartel Period as an aspect of the collusion referred to at paragraph 40 above."

62. I can see an argument that when it comes to the issues between the parties for trial that the additional wording in square brackets may be appropriate, however certainly when it comes to disclosure, those words are not appropriate as they unduly limit the disclosure process.

63. On disclosure, I would expect that the Defendants are going to go through their records and look for evidence of collusion and communications on pricing among the Defendants, as well as communications with other alleged cartelists on pricing. Such searches should not necessarily be specific to pricing on the indices, as manipulation of the indices may be less direct than that, but on anything to do with pricing as between the cartelists, such as sharing pricing data. I would expect such evidence to be disclosed. I also expect the Defendants

to disclose whatever communications they had with IHS in relation to actual pricing and the operation of that index.

64. Therefore, I approve the list of issues as formulated, taking out the words in square brackets in paragraph 8(iv). I direct that an updated list of issues is filed in advance of the next CMC.

Hodge Malek KC
Chair

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 12 May 2025