Case No: HC09C04852

Neutral Citation Number: [2011] EWHC 3747 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: Friday, 16 December 2011

BEFORE:

MR JUSTICE HILDYARD

- - - - - -

BETWEEN:

(1) ELECTRICAL WASTE RECYCLING GROUP LIMITED
(2) CITY ELECTRICAL FACTORS LIMITED

Claimants

- and -

(1) PHILIPS ELECTRONICS UK LIMITED
(2) GE LIGHTING LIMITED
(3) OSRAM LIMITED
(4) HAVELLS SYLVANIA UK LIMITED
(5) RECOLIGHT LIMITED

Defendant

- - - - - -

Digital Transcript of Wordwave International, a Merrill Communications Company
165 Fleet Street, 8th Floor, London, EC4A 2DY
Tel No: 020 7422 6131 Fax No: 020 7422 6134
Web: www.merrillcorp.com/mls Email: mlstape@merrillcorp.com
(Official Shorthand Writers to the Court)

- - - - - -

JOHN TURNER QC, CHARLES MORGAN and ROBERT O'DONOGHUE (Instructed by Messrs Paul Dodds Solicitors) appeared on behalf of the Claimants

MARK HOSKINS QC and SARA COCKERILL QC (Instructed by Messrs Eversheds LLP) appeared on behalf of the Defendants

- - - - -

Judgment

MR JUSTICE HILDYARD:

1. By an amended application notice dated 29 January 2011, the claimants seek permission to amend again their Re-Amended Particulars of Claim and Reply and an order that the issue of quantum of damages resulting from the alleged infringements of competition law be determined separately from the trial of the issues presently fixed to take place in the period 14 May 2012 to 31 July 2012.

2. Many of the proposed amendments comprise deletions which restrict the claimants' case. Subject to the issue of costs, these are not opposed by the defendants. Others, however, comprise additions. The claimants' present these as required to clarify their case; the defendants contend that they extend the claimants' case and introduce new claims and allegations that they cannot fairly and properly address in due time before the date set for trial. They oppose permission to introduce such amendments accordingly.

3. The defendants also oppose the application for a split trial. They contend that the parties have conducted their cases on the basis and spent time and money on the footing that liability and quantum would be tried together and that a split trial would increase costs without any sufficient justification. They contend that the reality is that the claimants' real reason for seeking a split trial now is not efficient case management, but to give themselves time and room in which to prepare their case on the quantum of a newly fashioned case they seek permission to put forward. There is thirdly, and this is something of an iceberg point, in that its shape above the water belies the size of the disparity between the parties' differing points of view, a dispute as to the ambit of disclosure. The defendants, put shortly, contend that the ambit of disclosure was agreed to be limited to the period before 23 December 2009 and that any extension will take a great deal of time. The claimants, on the other hand, now press for disclosure to the present day and continuing and say it may reasonable expeditiously and efficiently be given. This disclosure point naturally knits in with the defendants' objections to various of the proposed amendments which, by their nature, would require disclosure of documents relating to the period after December 2009.

4. Avoiding any cynical reflections, such as "of course", both parties have strenuously maintained before me that they wish to retain the trial dates fixed pursuant to the order of Lewison J made on 1 February 2011. The conundrum thus posited is a not unfamiliar one. The defendants say that, if that date (that is to say May next year) is to be saved, permission for the amendments sought must be refused. Further, they contend that that would be so whether or not a split trial is directed. On the other hand, the claimants maintain that there is no real conundrum and that, especially given the resources of the defendants and the size of their legal teams, there is time to accommodate the amendments and ancillary exercises, including further disclosure and expert evidence well in time. They add that the splitting of the trial would further assist this, as well as being inherently justified.

5. The position of the court is an invidious one. It is by no means easy or even

possible to judge between these opposing contentions put forward by responsible and experienced leading counsel and their teams. Any judgment of mine is on the basis of an inevitably recent and relatively superficial view of the case, and what is involved in its preparation. The most that can be achieved to is to balance the risk of injustice as best one can. There is no perfect or risk-free solution.

6. The nature of this dispute more generally is clearly and helpfully set out in the judgment of Daniel Alexander QC (sitting as a Deputy High Court Judge in this Division) delivered at the end of July 2010 and determining in favour of the defendants their application for summary judgment in respect of what was then paragraph 55 of the Amended Particulars of Claim, which I understand comprised a freestanding claim which did not, as such, give rise to competition issues. I adopt the description there given and with gratitude simply set out paragraphs 3 to 5 of that judgment:

> "3. Before turning to the claims in detail, it is necessary to outline the nature of the dispute. The First Claimant, "EWRG", is a company whose principal activity is the collection and recycling of waste materials, including gas discharge lamps. The Second Claimant, "CEF", is a wholesaler of electrical goods, including lamps. Since 2006, it has also produced lamps under the brand name "Edison". That it is a producer as well as a reseller of lamps, is one of the key facts underlying the claim.
>
> 4. The First to Fourth Defendants are manufacturers of lamps and, in the case of the Fourth Defendant, luminaires. They are referred to in the Particulars of Claim as the "big four" because, together, they hold the lion's share of the market for the sale of lamps in the United Kingdom. There is no need, for the purposes of this application, to distinguish between them. The Fifth Defendant, "Recolight", is a company which operates a producer's compliance scheme established pursuant to the Waste Electrical and Electronic Equipment Regulations 2006 (SI 3289) ("the Regulations"), which implements Directive 2002/96 EC of the European Parliament and of the Council of 27th January 2003 on Waste Electrical and Electronic Equipment, usually known as the "WEEE Directive" and to which I shall refer as the "Directive" in this judgment.
>
> 5. The claim, put shortly, is for a declaration that the arrangements whereby the First to Fourth Defendants charge the same fee to their customers as a recycling charge on the occasion of the sale of new lamps and pass the proceeds of that charge on to Recolight are contrary to Article 81 of the EC Treaty (or, since 1st December 2009,

> Article 101 TFEU), in that they prevent, restrict or distort competition. The claim is also for (i) an injunction requiring Recolight to treat EWRG fairly and in a non-discriminatory manner in the award of contracts for the recovery and recycling of waste lamps; (ii) an injunction requiring Recolight to accept and pay for the recovery and recycling of waste lamps regardless of their producer; and (iii) a restitutionary claim for repayment of certain sums paid by CEF as recycling charges on lamps and luminaires. In addition, there is a claim for a declaration that the First to Fourth Defendants are obliged to continue to make supplies of lamps available to CEF on normal trading terms and at normal prices, but without the requirement that CEF should pay any additional recycling charge referable to the Regulations."

7. There are thus presently two main heads of claim in the main proceedings. The first main head of claim advanced is a competition law plea under section 2 of the Competition Act 1998 and/or Article 101 of TFEU as follows: (a) by means of their arrangements with and/or carried out by means of Recolight (the fifth defendants) the first four defendants, who are rival major producers of new lamps have avoiding competing against each other on a significant element of their respective costs, namely compliance services; (b) the first four defendants have colluded with each other on the form and manner in which the recycling charge element of their costs will be passed to customers as part of their price for the supply of lamps; (c) this has led to higher lamp prices to consumers in the United Kingdom, including CEF (the second claimant) than would otherwise have arisen. I should pause there to point out that in my description of these heads of claim, taken from the skeleton argument of the claimants, the first has been labelled the "upstream claim"; and the Defendants contend that it was not part of the pleadings as they exist.

8. The second main head of claim is that Recolight, the fifth defendant, has abused its dominant position contrary to section 18 of the Competition Act 1998 and Article 102 TFEU by seeking to weaken and/or drive the first claimant out of business. The essence of this claim, as pleaded by the claimants is, first, that the fifth defendant exerts market power as a purchaser of lamp waste collection and treatment services. Its members account for the vast majority of all the relevant lamp waste that has to be collected. It is an indispensable trading partner for the first claimant and is dominant for the purposes of competition law. Secondly, that the fifth defendant has abused that dominance by adopting and maintaining a purchasing strategy since around May or June 2009, the aim or effect of which has been to deprive the first claimant of lamp collection and treatment business by various means.

9. I should perhaps add two further glosses. First, one of the amendments which is not opposed is the withdrawal of the claim for restitution which is described by Mr Daniel Alexander and its substitution by a claim for damages in what will inevitably be a lesser amount. The second is that, since Mr Daniel

Alexander's judgment and pursuant to an order of Lewison J in February 2011, the main action has been consolidated with a second action. This second action has been brought by the fifth defendant against the first claimant and includes the counterclaim. The subject matter of that second action is that the fifth defendant leased lamp recycling containers from the first claimant in 2007 and the action concerns contested breaches by each side of that lease agreement. The first claimant also claims that the fifth defendant misappropriated its containers and their valuable waste contents. I note that this misappropriation is also proposed to be relied on in the main action as an example of abuse of dominance.

10. The claimants' application before me is supported by three witness statements of the solicitor with conduct of the proceedings on their behalf, a partner in the firm of Paul Dodds called Mr Dominic Martin Cassidy ("Mr Cassidy"). These are his sixth, seventh and eighth witness statements in the proceedings and are dated respectively, 29 November, 8 December and 12 December 2011. In opposition there are three witness statements of the solicitor with conduct of the matter on behalf of the defendants, Mr Richard McDonald Little ("Mr Little"). Mr Little is a partner in the defendants' solicitors, namely Eversheds LLP. His sixth and seventh witness statements are dated 7 December and 9 December respectively, and he has recently introduced a further witness statement, his eighth, dated 15 December 2011.

11. I have been ably and patiently assisted by counsel on both sides, namely, Mr John Turner QC and Messrs Charles Morgan and Robert O'Donoghue for the claimants and Mr Mark Hoskins QC and Miss Sara Cockerill QC for the defendants.

12. Mr Cassidy's sixth witness statement in the proceedings contains in paragraphs 3 to 17 a useful review of the chronology of the proceedings thus far and so far as presently anticipated in the future:

> "3. Proceedings in Claim No. HC09C04852 were commenced by way of Claim Form issued on 23 December 2009, with Particulars of Claim attached and running to almost 40 pages. The main heads of claim were, broadly, (a) restitution; (b) breaches of competition law through the making and carrying out of a restrictive agreement; (c) breaches of competition law through an abuse of dominance.
>
> 4. A lengthy Defence (almost 50 pages) was served on 3 March 2010. The Reply was served on 13 April 2010. The Defendants' Rejoinder and Response to a Claimants' Request to Information were served on 14 July 2010.
>
> 5. By Order of Master Teverson the matter was set down for trial for a 15-day estimate in a window between 2 May 2011 and 29 July 2011, with a standard set of directions to

trial (see DMC6/Exhibit 1, pages [1-5]).

6. Thereafter, the proceedings became increasingly heavy and complicated.

7. In May 2010 the Defendants sought to strike out and/or summary judgment in respect of one paragraph 'of the Particulars of Claim, which concerned a self-contained issue arising under the Waste Electrical and Electronic Equipment Regulations 2006 ("WEEE Regulations"), the main piece of environmental legislation in the case. Summary judgment was granted by order of Daniel Alexander QC sitting as a Deputy High Court judge on 29 July 2010 (see DMC6/Exhibit 1, pa ges [6-8]). By their Amended Particulars of Claim dated 4 A ugust 2010, the Claimants made the amendments consequential upon t he Order of Daniel Alexander QC, with the Amended Defence following on 12 August 2010.

8. The Claimants and the Defendants then made a series of applications for a number of further interim orders. Notably, the Claimants sought additional disclosure from the First to Fourth Defendants. The Defendants had initially only given disclosure for the period from 1 .March 2006 t o 23 D ecember 2009. By Application Notice dated 22 November 2010 t he Claimants sought disclosure of documents for the period beginning in 2001. The Claimants also sought permission to make certain amendments to the Amended Particulars of Claim.

9. At around the same time the Defendants made various applications. Notably, these included requests for orders that the Claimants further particularise their Schedule of Loss. The Defendants sought further information by letter dated 23 November 2010, failing provision of which they reserved the right to bring a strike out claim in relation to several heads of loss. The Defendants then made an application for an order under CPR Part 18, and to "strike out" eight separate heads of loss.

10. All the various applications were listed for hearing in the week of 31 J anuary 2011. The parties were able to reach a more or less final measure of agreement immediately prior to the hearing date. A proposed consent order was presented to Lewison J on the morning of the hearing. He approved the order, with a small number of his own amendments, and I attach a copy of the Order as made on 1 F ebruary 2011 as DMC6/Exhibit l; pages [9-75].

11. The Order sets out the various steps to trial. Among

the more salient points for present purposes are as follows:

> (a) The Claimants were to make any amendments to the Amended Particulars of Claim (including the Schedule of Loss) by 14 February 2011 with any consequential amendments to the Defendants' Defence served by 14 March 2011.
>
> (b) The First to Fourth Defendants were required to give disclosure for the period starting from 1 January 2001, by 18 July 2011 (with inspection no later than 7 August 2011).
>
> (c) The parties were to serve witness statements of fact on 23 December 2011, and expert reports on 10 February 2012.
>
> (d) The trial date set down for summer 2011 in the Order of Master Teverson was vacated. It was replaced by a trial window between 14 May 2012 and 31 July 2012.
>
> (e) The trial estimate was increased to 45 days.

12. The need to provide for a longer trial was raised by the Defendants in the Third Witness Statement of Richard Little (at paras 72-77), then with an estimate of eight weeks. This was on the basis that (a) the number of potential witnesses had increased to 40 (the Defendants envisaged calling up to 28 witnesses themselves); (b) large numbers of documents had been disclosed (over 30,000 electronic documents and 40 files of hard copy documents); and (c) the number of heads of loss claimed by the Claimants had increased.

13. In the period immediately prior to the hearing on 31 January 2011, there were discussions between counsel as to the directions to trial, including, I understand, the trial estimate. I was not directly a party to these discussions, although I was kept abreast. There was eventually consensus (or at least no open disagreement between the parties) that a nine-week trial estimate was sensible overall to deal with issues of liability and quantum.

14. Since January 2011, there have been a number of relevant further developments.

15. First, the Defendants have launched further requests for information and documents aimed at the Claimants' Schedule of Losses, including a very detailed 13-page request served on 20 June 2011: see DMC6/Exhibit 1,

pages [76-92].

> 16. The Claimants' legal advisers have had to spend several hundred hours in total addressing these requests so far. More pertinently, it has become painfully clear in this process that the exercise is largely impracticable. The quantum issues are not only contingent on liability being established; they are also contingent on the precise extent to which, and the ways in which, liability might ultimately be established at trial. It is in many respects a whole separate area of inquiry from the liability issues.
>
> 17. The quantum issues also raise detailed and discrete questions of lost profits, for which the Claimants have very recently instructed a forensic accountant to assist them."

13. Also I should add, since it is of particular relevance to the request for a split trial, that there has been a series of court orders requiring proper particularisation of the claimants' quantum claims pursuant to which the claimants have served:

> (a) a schedule of loss served on 15 September 1010;
>
> (b) a revised schedule of loss served on 9 November 2010 with an additional column now to indicate which paragraphs of the Particulars of Claim each head of loss relates to; and
>
> (c) an amended schedule of loss served on 4 March 2011.

14. The cost of these proceedings so far and anticipated have been and are forecast to be very considerable indeed, not to say eye-watering. Taking this from the defendants' skeleton argument, it would seem that the defendants have incurred around £5.5 million to date in costs. Even without the proposed re-re-amendments, it is estimated by them that their cost to trial may exceed £10 million. This in part reflects both the weight of the case and the volume of disclosure, or the iceberg point which I have identified. The claimants' costs are markedly less but not modest, so far over £2 million, as indicated by Mr Cassidy in his seventh witness statement. This difference in cost reflects the very considerable team deployed in Eversheds, according to Mr Cassidy some 47 legal personnel, as well as two QCs and five junior counsel. I note this also supports the claimants' contention that the defendants do indeed have plenty of manpower with which to address the work which is necessary to get this matter fit for trial.

15. Experts have been instructed on both sides and have been for some time, though I am not sure exactly for how long. I think I can safely assume that on both sides, they are well up to speed with the issues and will already have done preparatory work.

16. Against that background, I turn to the first substantive issue, which is whether the amendments now sought by the claimants should be permitted, notwithstanding the opposition of the defendants. In doing so, I am acutely aware that, as is so often the case, the issues are in the nature of a cat's cradle. The strings of the trial date, whether to split the trial, and a margin of appreciation for the time really necessary for a full and fair preparation are all connected, and a pull on one affects them all. It is necessary, however, to start somewhere and I do so with the present pleadings. These are inevitably complex, presently stretching in the case of the Re-Amended Particulars of Claim to some 50 pages, and in the case of the Re-Amended Defence to some 59 pages. There is a Reply and also a Rejoinder as well. If and to the extent that amendments are permitted, they will no doubt occasion amendments of all subsequent pleadings too. I will have something to say at the conclusion of the judgment as to whether the process of pleading has clarified or obfuscated the issues, and what the best thing to do would be in order to ensure that a trial, whenever it takes place, is as confined and defined as possible.

17. The amendments to the Particulars of Claim for which permission is now sought are in appearance quite extensive. The defendants contend they introduce a wholly new case. The claimants contend, as I have indicated above, that they are for the most part clarificatory. Rather than describe them at great length, I think it is sufficient and more helpful to attach to this judgment the draft setting out the proposed amendments in pink. My references to paragraph numbers below are, unless otherwise stated, to paragraphs in the draft Re-Re-Amended Particulars of Claim ("RRAPC") attached marked "A". The most important of the paragraphs in issue are paragraphs 74, 96, 97A, 104A, 105A, 105B, 114 and 119.

18. Before descending into the detail, perhaps the simplest way of explaining the overall gist of the amendments is to describe the objections to their introduction. Three principal objections are advanced. The first is that, as leading counsel for the defendants told me, and confirmed expressly on my questioning him further, the defendants have never, before receipt of the proposed re-re-amendments, understood the claimants' case to raise any self-standing competition issue in respect of the structure of the arrangements between the first four defendants, which are carried on through the fifth defendant. Their confirmed position is that they did not appreciate that the claimants' case as previously pleaded extended to claiming that such arrangements, and in particular the arrangements between the first four defendants, to become and remain members of the fifth defendant, are uncompetitive and unlawful as being contrary to Article 101 TFEU. They contend further that, if such a claim (as to which see especially paragraph 61 of the RRAPC) is permitted to be introduced, the defendants would wish to rely for their part on the exemptions from the restrictions in Article 101 TFEU which are provided for by Article 101(3). The burden would be upon them to establish that such exemptions apply, and the exercise would, they say, involve investigation and consideration of a wide range of factual and expert economic issues which have not been raised in the proceedings to date. Counsel referred in this regard to the Commission's guidelines on the application of Article

81(3) of the Treaty, to illustrate the sort of far-reaching and detailed analysis and evidence that would be required.

19. The Defendants contrasted what they presented as this new claim, which they labelled the "upstream claim", with what they presented as the existing downstream claims. These have as their focus the arrangements for the first four defendants to pass on to consumers, penny for penny as I understand it, the recycling charge which they are charged by the fifth defendant, which they own, to cover its operating expenses in collecting and recycling electronic and electrical waste, and in particular discharge lamps. This is in order to comply with the Waste Electrical and Electronic Equipment Regulations 2006, which implement the Waste Electrical and Electronic Equipment Directive. These downstream claims do not require any reference to or reliance on Article 101(3).

20. The second raft of objections is as to what again are described by the defendants as new claims or allegations in support of what they accept is an existing claim by the claimants that the fifth defendant has a dominant position and is abusing it contrary to Article 102 TFEU and the Competition Act. More particularly, the defendants contend that the proposed new paragraph 74(3)(i) of the draft RRAPC introduces a new claim or allegation that the fifth defendant has abused its dominant position by "adopting and maintaining an overall purchasing strategy since around May or June 2009, the aim of which is to deprive the first claimant of lamp collection and treatment business by various means". They also describe as new factual allegations or particulars intended to be put forward by the claimants in support of this claim.

21. The basis of the defendants' objections to permission being given to these other new allegations is rather different than their objection to the introduction of what they depict as the new upstream claim which I addressed first. I do not understand the defendants to contend, or at least to put in the forefront in this case, that these proposed amendments would cause them to have to run a new defence requiring detailed and factual and expert analysis. Rather, at the forefront of their objection in this second category of proposed amendments, is that they call for and would require a new disclosure exercise focused, as is inherent in the nature of the proposed amended pleas, on the period since May or June 2009 and continuing.

22. This point, which I have referred to earlier as something of an iceberg point, has been the focus of much dispute. Suffice it for the present to say that the defendants' estimate as to how long this would all take, first estimated until July 2012, and has now increased inexorably towards 2013 as the hearing has progressed. On any view, the defendants say, the exercise would make a fair trial in May 2012 quite impossible. The claimants disagree.

23. I think I can, without doing too much damage to the more sophisticated categories advanced before me, lump into a third general category of objection a group of proposed amendments which are said to introduce new factual averment that will require an analysis and also extended disclosure past

December 2009. Within this third group are the following. First, allegations as to the object and motivation of the fifth defendant to marginalise and grind down the first claimant. Second, allegations said to recast or re-clothe claims in respect of which, in their original form, Mr Daniel Alexander QC granted summary judgment. Third, allegations that all the abusive conduct of the fifth defendant, was the product and result of an unlawful agreement between the first four defendants.

24. These are all objected to on slightly more amorphous grounds as being (a) new, (b) too late, (c) requiring additional, inappropriate and disproportionate disclosure. I turn to discuss, as briefly as I feel able, each of the three categories of objection, now taking into account the claimants' response to these objections.

25. As to the first category and the defendants' objection that the case has hitherto been restricted to the downstream allegations with respect to the pass through of the recycling charge to consumers and is now sought to move upstream to the lawfulness of the structure that the fifth defendant represents, the claimants' response is simple; it is that the case is not new at all and that the defendants and their advisers cannot reasonably have thought it was not advanced, albeit with less clarity previously.

26. Leading counsel for the claimants suggested at one moment in his oral submissions that the defendants actually knew that the upstream claim was intended to be advanced, but this was and remains a difficult line to pursue in light of the express confirmation by leading counsel for the defendants to which I have already referred, to the effect that this was not their perception or understanding. It would involve me, if I were to pursue this line, having to make a decision as to whether the court was being intentionally misled. Mr Turner stepped back from this and I think he was right to do so. That being so, the question of what the defendant should have understood is relevant to whether permission should be granted when that question is, as it were, addressed in a vacuum; but the claimants want not only amendment, but, and they do this strenuously, they want to preserve the existing trial date. The practical point really in issue is whether the existing trial date is sensibly feasible if the amendments are permitted.

27. As to the first part, whether, objectively tested, the proposed amendments do introduce a new upstream claim, I must admit that my mind has wavered according to the speaker. Both leading counsel have been persuasive in the course of their submissions, and the issue to my mind does look different through their two different lenses. The fact that both perceptions may be justified in a sense tells its own story. However, in the end, and assisted by some other considerations, I have concluded, so far as necessary or relevant for me to do so at all, that at least the shape or spectre or the upstream claims is discernible in the pleadings as they stand and the more so to a reader alert to the risk of a broader interpretation rather than a reader intent on strict construction and limiting the claims against him.

28. That conclusion is based on a reading of the existing pleading as a whole, but in particular I consider that an objective and indeed unstrained or natural meaning of paragraph 68 of the existing pleading, sufficiently connotes for these purposes, even if it may not clearly adumbrate, an upstream claim. In that particular context, Mr Hoskins QC sought to persuade me that the reference which is important at the end of the relevant paragraph to their being a " uncompetitive joint venture" between the defendants, does not connote a claim, and was not read as connoting a claim, that the arrangements between them achieved through membership of the fifth defendant, were and are uncompetitive. He said this relying on the fact that the expression "joint venture" seems to be a term of art in the European competition context, having in that context especially limited meaning. He referred me in this regard to **Bellamy and Childs European Community Law of Competition** (6th Ed) paragraph 7.002, where it is stated:

> "The term 'joint venture' … as used by industry, resists clear definition. [Joint ventures] range from arrangements which are akin to mergers through to mere cooperation agreements for research and development, production or distribution (although many [joint ventures] do not contain all of these features). Terms such as joint venture, strategic alliance, cooperative arrangements are loosely applied to commercial agreements between two or more parties with a wide variety of objectives and economic effects. However, in the context of the EC competition rules, the Commission has applied the term 'joint venture' only to an undertaking that is (i) a separate business entity, and (ii) jointly controlled by at least two parents."

29. The question raised then is whether, in the particular context of the pleading, the expression was intended to be used for such a limited meaning or whether it was deployed with the intent of it carrying a more general meaning that it usually does in other commercial contexts. I take into account that of course this is a competition case and that one should expect and usually give effect to the vocabulary of competition law. But in context, I have concluded that the broader meaning was intended and is discernible, or at least that it was a risk which a request for further particulars would have clarified.

30. As I have said, I reach my view not only on the basis of that particular point, but it does fortify my more general conclusion that, looked at objectively, the correct lens in this particular context, is that provided by the claimants. My conclusion in that respect is consistent with, and to my mind supported by, various factors outside the four walls of the pleading to which my attention was specifically drawn by Mr Turner. The first is that in June 2011 the parties prepared a travelling draft list of issues to be covered by expert economic evidence which though, as Mr Hoskins has contended was not clear, does seem to identify as one such issue "objective justification in relation to Article 101 TFEU, including any consumer benefits and/or efficiency gains resulting from the practices". This, as it seems to me, is likely to be a reference to the Article 101/101(3) point. I should perhaps add, secondly, that my conclusion

may also be supported by the minutes handed up to me of a meeting with the OFT and which may also suggest at least some focus on the part of the defendants on the upstream lawfulness of the structure and that there might be an issue in this regard. I do not place much weight on this in this context, although it had more relevance in the context of assessing how long a time it should reasonably take the defendants to prepare a case on Article 101(3) exemption.

31. The corollary of the view I have taken is that I consider it would be unfair to the claimants to refuse permission to clarify their upstream case. The objections to permission based on the case being a new one, and the objection which was also advanced that the real reason for the changes is that the claimants have recently changed leading counsel, which was not itself a sufficient basis for adjourning a trial, are not established. Obviously the other side of the coin of that conclusion is that it might then be argued by the claimants that, since the defendants should have appreciated that there was an upstream claim, they have only themselves to blame in not preparing for it. But to my mind that is not established either, and I do not consider it would be fair or proportionate to deprive the defendants of such time as they strictly and reasonably need to establish their case for exemption under Article 101(3). This, to my mind, almost inevitably has repercussions in terms of the practical trial date. I shall return to that after more briefly stating my view with respect to the other two categories of proposed amendments.

32. The second category of objections has, as its basic issue, the question of extended disclosure and in particular the need, if this raft of amendments is permitted, for disclosure for the period after December 2009 (the iceberg point as I have labelled it). As previously indicated, this is intertwined with the question whether, first, the claimants agreed that the scope of discovery be temporarily limited, and secondly, if so, whether they are stuck with that; and if so, whether the amendments that rely on the limitation being swept away should be disallowed on that footing.

33. The claimants say there was no such agreement and certainly none such as for all purposes to restrict disclosure. They emphasise in this context three principal points. First, they point out that the existing pleading uses the present tense in various of its allegations, connoting continuing breaches of competition law (paragraph 98 is an example) and also in parts already making allegations in respect of the period post 2009 (paragraph 115 is an example). That seems to me to be so, but it casts an odd light on the accepted fact that disclosure has so far been temporally limited. Second, they point out that any acceptance of a temporal limitation was really in order to avoid a disproportionate trawl through correspondence and documentation that the defendants' solicitors assessed was likely to be largely comprised of privileged material. In this context I was handed a letter dated 3 September 2010 from the defendants' solicitors, Eversheds, to Paul Dodds, which includes the following statement. Under the heading "End Date":

> "Our clients' position remains that the appropriate end date is 23 December 2009, being the date when your

> clients' claim was issued. We re-stated our previous justifications for proposing this date which are essentially that, to the extent that there is any relevant correspondence between the Defendants after this date, any correspondence would fall within the remit of legal privilege and would not, in any event, be disclosable. Searching for correspondence which may not be subject to privilege would be entirely disproportionate.
>
> You confirmed that you will consider our position further and provide us with your views at the start of next week."

34. The difficulty in this context is that the claimants did not reply to that nor, apparently, did they demur from the temporal time limit there suggested.

35. Third, it seems that the fifth defendant now intends itself to break through any temporal limitation and provide specific disclosure in respect of matters since December 2009. This last of the claimants' points does seem to me of some force, in this and other contexts, and especially the question of how long the defendants need time to take a more extensive disclosure exercise.

36. I must admit to some surprise, in light especially of their pleadings, that the claimants appear to have gone along with the temporal limitation thus far. However, after anxious thought, I do not think it would be justified or fair to elevate that into a binding agreement preventing, or estopping or otherwise precluding them from requiring the ordinary entitlement to disclosure now that its need is clearer and the perception of that need is shared to some extent at least by at least one of the defendants. It follows that I do not consider that there is a self-imposed bar to disclosure and thus to amendments requiring it as the defendants have urged. The question then is whether the fact that further disclosure is required is nevertheless a reason for refusing permission.

37. In this context I bear in mind particularly the authorities cited to remind me of the proper approach that the court should take in deciding whether to give such permission. These are quite familiar, and I need not dwell on them. They are outlined in the White Book at 17.3.5 and they are shortly described in the claimants' skeleton as follows:

> "… the key proposition is that, in view of the principles of justice and fairness and the overriding objective, amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to any party caused by the amendment can be compensated for in costs, and the public interests in the administration of justice is not harmed."

The claimants' skeleton then continues:

> "These principles have been recently applied in the case of

> Beresovsky v Abramovich … applying Swain-Mason v Mills & Reeves. These make clear additionally:
>
> a) the Court's discretion to permit an amendment is a 'broad' one…
>
> b) in determining whether to exercise its discretion, the Court must have regard to all the circumstances and the overriding objective, and strike a balance between the interests of the parties…
>
> c) in the case of a '*very late amendment*', a '*heavy onus lies'* on the party seeking to amend are justified…"

But it is then noted that Gloster J held in the Beresovsky case that "an application to amend brought six months prior to the start of a long 3 month trial, was not an application brought at a 'very late stage'."

38. As regards, of course, that latter point, everything really depends on the context. What is really in issue is whether prejudice will be caused, such as to dislodge the rebuttable presumption that in the ordinary course, parties ought to be allowed to amend their pleadings in order that the trial should be properly focused.

39. The defendants' skeleton argument introduced the further rider that given the direction of the procedure rules now in the CPR and the allowance that they make for the interests of other litigants, an application to amend should not be allowed if to do so would offend the overriding objective. The defendants therefore urge in this application that I should take account of all relevant circumstances, including prejudice to the defendants. Prejudice would be caused to the defendants as they maintain it. They indicated especially that the re-re-amendments would place a significant additional burden on them, particularly in respect of further disclosure and witness interviews.

40. It comes down, in the end, as most of these case management issues do, to a balance of prejudice. The balance I propose to strike in this case is to permit these amendments with the concomitant consequence of further disclosure and a delay to the practical trial date. Having concluded that there was no binding agreement, I do not consider that the claimants should be shut out of the newer claims on the ground that the disclosure train has left and the trial is nigh. In my judgment, in this case there is not sufficient to displace what I accept is the general, though displaceable presumption, in favour of permitting amendments before trial, to enable the parties to define and confine their case properly and fairly prior to such trial.

41. In light of that conclusion, I propose to address the third category of amendments and objections to them very quickly. I do not consider that a sufficient basis for displacing that presumption in the context of those proposed amendments. It is not suggested that they do not make sense and I think they should be permitted, subject to one caveat in respect of the

amendments to paragraph 105A and, of course, subject also to the question of costs. The caveat that I should record here is that one of the contentions of the defendants is that paragraph 105A, (which is an allegation in respect of the fifth defendant's obligations under the WEEE Regulations, that Recolight is obliged to purchase evidence generated in relation to WEEE Treaty by the first claimant of its own volition and not with the fifth defendant's prior request or approval) is merely a recasting of the issue originally raised at paragraph 55 in the Particulars of Claim in respect of which Daniel Alexander QC has already granted summary judgment to the defendants. I canvassed this with counsel, who both agreed that this issue, that is to say whether that claim as introduced now, is or is not another way of reintroducing the claim that was rejected by Mr Daniel Alexander, any argument would have to take place on another date. Nothing I say is intended to preclude such an application and such a hearing on that matter.

42. I turn to the question of how and when all this is to be done and how long a delay in the trial date is required. I do so with diffidence, since they involve an appreciation or guesstimate of how much work is really necessary and what timescale is really appropriate and required in a field which is not my usual stamping ground. Even if it were, the exercise called for is not a scientific analysis, but a more artistic impression. It would, I think, be somewhat presumptuous to gainsay with certainty the considered estimates of those whose acquaintance with the case is so much more profound.

43. The main points to address are the obvious ones. First, the disclosure exercise, second the witness statements that will be required and third, the expert evidence. There is perhaps, not unusually, a wide divergence between the parties as to what truly will be entailed.

44. However, taking first the question of the time needed for the further disclosure exercise, the gap between the parties is more than usually great, and I regret to note that my efforts to encourage discussion with a view to narrowing that gap appear to have had the opposite effect. In his sixth witness statement, made as recently as 7 December, Mr Little on behalf of the defendants said this at paragraph 63.3:

> "63.3.1 Identifying the areas of dispute between the parties on the new allegations following the close of pleadings;
>
> 63.3.2 Considering with each of the five Defendants who the custodians are who are likely to hold electronic and or hard copy documentation in relation to the proposed amendments;
>
> 63.3.3 Discussing with the Claimants, which may perhaps take a month, the scope of e-disclosure as regards the number and identity of custodians and the key words to be applied to any search. Time should be allowed for either party to apply to Court for directions on the scope of the

e-disclosure search should it not be possible to agree this;

63.3.4 Engaging the services of KPMG to harvest the potentially relevant files from the electronic equipment on which they are stored and to carry out a de-duplication exercise in relation to these documents;

63.3.5 Conducting a first and second line review of all of the electronic documents harvested by KPMG to identify those that fall within standard disclosure, or within the scope of disclosure agreed between the parties;

63.3.6 Collating any hard copy documents Defendants which are potentially amendments; in the control of the five relevant to the proposed

63.3.7 Reviewing the hardcopy documents to identify those that fall within standard disclosure, or within the scope of disclosure agreed between the parties;

63.3.8 Considering with and taking instructions from the five Defendants in relation to which documents should be included within the Confidentiality Ring;

63.3.9 Liaising with each of the five Defendants in relation to signing their disclosure statements;

63.3.10 Arranging for the Claimants' solicitors to have access to the electronic documents; and

63.3.11 Arranging for copies of the hard copy documents to be provided for inspection by the Claimants' solicitors."

Also 63.4 states:

"I estimate that a realistic time frame by which this process could be completed is the end of July 2012."

45. My apparently counter-productive intervention has now prompted a further witness statement, Mr Little's eighth, dated 15 December, which I have already had occasion to mention briefly. The effect of that new evidence has, I think, reasonably accurately been summarised in a written summary prepared by counsel for the claimants, also encouraged by my intervention. I quote from paragraph 13 on page 4 of that summary. They make the point that in his eighth witness statement:

"… Mr Little appears to have increased substantially his estimate for doing the work that he thought could be completed by the end of July 2012. H e now estimates that, including all five defendants in the exercise will generate some 1.08 million reviewable items. Secondly that, based on his estimated review rates, it would take a

> team of 20 reviewers 13½ months to conduct the first review. Thirdly, this would suggest that using a team of 20 reviewers, the disclosure process could not be completed before January 2013." [Quote unchecked]

46. In the same note to me, counsel for the claimants then sets about undermining or seeking to dislodge the factual premises and guesstimations which lie behind Mr Little's present estimates.

47. The claimants then go on, not only to question the assessments, but to suggest a rather more streamlined approach, all pointing to their desired conclusion that, if the trial is to be moved at all, it should certainly not be moved beyond early Michaelmas Term 2012. In that context I should note that the claimants' note to me commences with an expression of dismay, that we should be contemplating a start date for the trial being delayed to 2013 simply because of (a) a disclosure exercise relating to only a two year period, that is to say 2010/2011; (b) the allegations in question that are entirely already present on the pleadings and relatively limited; and (c) where the allegations revolve around the actions taken by a single organisation in the form of the fifth defendant in relation to the first claimant in that period; and (d) when Mr Little has already stated that the witness statements that Eversheds were preparing to serve on 23 December this year would be accompanied by voluntary further disclosure.

48. The gist of the approach advocated by the claimants in their note may be, I think, summarised as follows. First of all, they say that, if necessary, they will agree to a limitation on standard disclosure in the years 2010 and 2011 from the fifth defendant. They say that this should significantly reduce the scope of the exercise and the time needed to complete it. By way of support for their estimate that that should very much limit the time required, they draw attention to the fact that disclosure given for the first four defendants covering a period of over five years from 2001 to 2006, was undertaken within the period of 2½ months after Newey J had ordered e-disclosure by his order of 18 July 2011. They note also that even limiting that process of e-disclosure to the top 20 per cent of relevancy hits, ultimately yielded 36 lever arch files, indicating the extensive scope of the exercise undertaken successfully in that time period.

49. Secondly, they indicate ways of cutting down the time limit for each step. I can summarise that as follows. The steps are first, identifying the areas of dispute, second, identifying the custodians and thirdly, agreeing the key words. The long and the short of it is that the claimants consider, in their estimation, that those steps could be radically reduced from terms of weeks to days thereby accelerating the process.

50. Thirdly, a point has been raised which may further delay the process of disclosure: this is the need for confidentiality and for confidential assessment by each of the defendants. The claimants in that regard suggest as a practical solution that disclosure and inspection should take place within a confidentiality ring, and proceed without delay whilst the relevant clients are

reviewing their own position on confidentiality. The claimants in this context also make the overarching point that the defendants have a very large legal team. I have already referred to the size of this previously, and I recognise, of course, that it is a mighty army. I also recognise that, however mighty the army, in the end various parts of the process call for work assessment and verified evidence by a single person in the shape of an expert and in each case, by the various deponents in witness statements who, of course, must face the burden of cross-examination in the end. The third risk is one of under-estimation, that is to say of me, from the position I sit, safe in the fact that I will not have myself to be involved in the work, simply under-estimating exactly what is involved.

51. My overall impression is that it should be possible to undertake the disclosure exercise in time for a trial commencing late in October 2012. But this is subject to a consideration of further stresses which will be involved in the preparation of the case. In this regard I bear particularly in mind the obvious need for far-reaching expert evidence in the context of the case for exemption which the defendants have notified me they will inevitably have to introduce, and which they have described as a notoriously laborious process.

52. I have also mentioned, but do so again, the Commission's guidance in this regard, which makes clear that a very broad assessment of the market and an economic analysis will be required in that context. This does seem to me also a matter which, although one can expect the firm of experts or the expert whose firm is instructed to have a large body of support, is a matter which will, in order for it to be reliably put forward to the court, require to be verified by the expert himself and which may very well, in the nature of things, take some considerable amount of time.

53. Perceiving my concern in this regard, the claimants' counsel put forward various points to dissuade me from my initial inclination that this really was something which needed time to bed down. His first point was this: that the Commission's guidance to which I referred show in general, and in unspecific terms, the conditions that have to be satisfied, but he noted that the defendants had not put forward details as to the factors that they would perceive they would need to rely on in the particular circumstances of the case in hand. He did not say so, but I took this to be an indication that I should discount some of the weight of the exercise which was envisaged.

54. His second point was this (and this did weigh with me) that the defendants' experts and the defendants themselves, should not be starting from a standing start. In this regard, the point that was made was that the defendants must already be familiar with the arrangements that they have made, and must have investigated the competition issues arising in implementing them through the fifth defendant, at least for the purpose of discussing them with the OFT, as I have indicated they have. The claimants urged that I could safely assume that the economists and experts to be instructed in the matter must have already been looking at the effect on the arrangements within the market and therefore would start, as it were, 30 love up.

55. The third point which flows from that is that, in the nature of things, the defendants must have been taking into consideration and addressing the efficiency gains and consumer benefits in case their arrangements were ever questioned and that they must have been doing so for years. The fourth is simply a point which reflects a point already made, but which was supported by my being handed up a note of a meeting between the defendants and the competition authorities to discuss the potential availability of defences in respect of any query.

56. All these points have weighed with me and I must say that I consider it to be difficult to assess how long is truly needed to ensure proper preparation for trial. At the end, I have felt that a trial in October, particularly at the end of October, was probably doable, but I did not have sufficient evidence to persuade me that it was doable in a way which would permit the parties to be sure that their respective cases had bedded down and were in a state that could, with all proper fairness and efficiency, be undertaken at trial. It is notorious that, although time estimates assessed a year before the event can seem easily achievable and the prospect of further wastage of time discounted, when it comes to it, the time taken is usually greater than expected, and there is always the danger that in the rush to achieve an early trial date, the efficiencies which would have accrued had a little bit more time been taken will be lost.

57. In those circumstances, therefore, and again although I have found this a difficult decision, especially given the submissions which I invited to be made immediately prior to giving this judgment as to what additional prejudice might be caused by a delay from, say, October 2012 to, say, the beginning of January 2013, I have concluded that the safer course, and the best balance of prejudice, is to delay this matter until January. I have taken account of the fact that prospectively there may be additional losses which may be very damaging to the first claimant. But I have balanced against that the fact that a final resolution is some way off in any event. For example, in order to calibrate those losses, there would have to be an assessment of quantum which an early trial could not include; and in order to stop the strains which are said to arise in light of what are regarded as the unfair competition practices inherent in the structure, there would have to be a decision, first of all, by a trial judge immediately upon conclusion of a very long trial; and even then there would be a real prospect of a stay in the event of any appeal, which cannot be an unlikely possibility given the importance of the matter to the parties and the weight of resources which have been so far expended on the whole process.

58. Put shortly, my anxiety has been lest for the sake of two months, I direct, and ask special acceleration for, a trial into October or November, which then proves unsustainable in matters as they unfold. I think that the safer course is, if it is possible to do so under the listing arrangements, to obtain a trial date commencing immediately on the first day, if possible, or soon thereafter as possible, of the Hilary Term of 2013.

59. After inquiries I have indicated, though I cannot bind the listing officers and it will be a matter to be checked and confirmed through the usual channels, that a

trial date will be made available in light of (a) the expedition previously accorded to this case; (b) the importance of the matter to the parties; (c) having regard to the continuing erosion of the financial position of the first claimant, which is accelerating, and (d) the fact that there is a public interest if there be a breach of competition law which is resulting in additional cost to consumers, that that matter should be adjudicated just as soon as possible. Having regard to those factors, I am confident, though not sure, that a trial date will be made available in January 2013. I would regard that as being a date which no-one can reasonably object to in terms of the matter being made ready for trial, though I regret that the claimants will inevitably be a little disappointed, not to say discomforted, that the matter should have been adjourned for, effectively, six months.

60. To summarise: on the matters which I regard as the first two important matters, that is to say whether the amendments should be allowed and, having regard to that, whether the trial should take place, I have decided that the amendments should be permitted, that the trial date in July is simply not achievable and would result in a harum scarum to no good effect, that the real choice is between October/November and January and that the safer course, and the one I intend to follow, with the help of the listing, is to start in January.

61. That brings me to the question of whether that trial in January should be confined to liability or whether it should extend also to quantum. In this regard the status quo, or the present way in which the parties have conducted the proceedings thus far, is that there has been no split between quantum and liability. Indeed, as I have indicated or foreshadowed, the claimants have, pursuant to order of the court, provided at least two schedules identifying with precision down in one case to a pound, what their loss would be. It is only recently and coincidentally with, though not necessarily because of, a different view taken by new leading counsel who has been instructed, that the schedules have, as it were, gone backwards (I do not mean that pejoratively) but in terms of their definition have become less precise, to the extent that it is now the claimants' position that they would not be able properly and fairly to put forward quantum calculations, at least for a July trial; and indeed I have a sense they would find it hard work to do so before January. In any event they say, it is a position which is taken in justification of split trials almost in every case, that a split is here justified and appropriate because it would reduce costs for the simple reason that the quantum investigation would be restricted to the permutations as found at trial, rather than the permutations which might possibly be found if the exercise is undertaken now.

62. With regret and with apology to the parties, I have to say that this is a matter which I do not think I should decide now. I wish to defer this to a further occasion, or at least a further written judgment, once I have more clearly identified precisely what the split would entail. I say this because, although the question of whether to split or not is, in a sense, a matter of broad assessment, there is one area where a split is capable of reasonably scientific definition and that is in the area of precisely what issues are to be allocated to liability and what issues are to be allocated in quantum. Perhaps unfairly I

have the sense that this is still a matter of some uncertainty and, in my view, it would be useful to wait that which I am promised on behalf of the defendants will be available by 23 December, which is their definition, having consulted their own experts, of exactly what the issues are, so that the parties can then together combine to determine what would be split and what would not, and naturally I ask and expect the parties to use all best endeavours to seek to agree these matters, which should, in my view, be capable of agreement.

63. I would ask that those two matters, that is to say the identification of the defendants of the issues involved, and a recitation, as I hope it will be, of an agreement as to what a sensible split, even if not a desired one, would be in terms of the issues' allocation, be lodged with me; whereupon I shall do my very best, either simply to provide a written judgment or, if I need further explanation and assistance, to have a short further hearing which can be undertaken with a more skeletal attendance perhaps, some time very early in the new term.

64. I do that with reluctance, but nevertheless in the knowledge that this should not hold up trial preparation and that there is more time for a considered view in the light of the conclusion that I have reached as to when the trial should now take place.

65. I propose that also on that occasion, if not before (and I will have submissions from counsel shortly as to whether this is a matter which should be dealt with now), I will also be able, if there is a need for an oral hearing to consider the question of the disposition of costs and in particular, the defendants' suggestion that the withdrawn claim should be treated as discontinued claims with the result, so it is alleged, that the costs of and occasioned by such discontinuance should be paid by the claimants in any event.

66. As I say, it is with regret (since it defers the decision) that I do not place my head above the parapet any further than that in that regard. But I do attach a very considerable importance in this case, where I think the balance between a split trial and a non-split trial is fairly keen, to identifying precisely what issues would be proposed to be allocated to each part of a split trial; and I believe that is a matter on which I would benefit from more detailed assistance.

67. I would add, as a postscript (but as I had intended to do originally) that I do have a more general concern that the issues in this case may have become obfuscated rather than elucidated by the now considerably re-amended pleadings. As I indicated in the course of the hearing, I consider it necessary for there to be identified and agreed a definitive list of issues, to provide a sure and undisputed guide and check-list to what is required to be addressed and adjudicated at Trial. It will also provide a record against which to test any future proposed amendments.

68. This, amongst other matters, can be dealt with at a CMC after my decision on

the split trial.

- - - - - -

ATTACHMENT

A. Re-Re-Amended Particulars of Claim (below)

IN THE HIGH COURT OF JUSTICE **Claim No. HC09CO4852**
CHANCERY DIVISION

BETWEEN:-

(1) ELECTRICAL WASTE RECYCLING GROUP LIMITED
(2) CITY ELECTRICAL FACTORS LIMITED

Claimants

- and –

(1) PHILIPS ELECTRONICS UK LIMITED
(2) GE LIGHTING LIMITED
(3) OSRAM LIMITED
(4) HAVELLS SYLVANIA UK LIMITED
(5) RECOLIGHT LIMITED

Defendants

RE- RE-AMENDED **PARTICULARS OF CLAIM**

THE PARTIES

1. The First Claimant, Electrical Waste Recycling Limited ("EWRG") is a company limited by shares incorporated in Scotland as Lampsafe Recycling Limited on 27 June 2000. Until 30 April 2009 its principal shareholder was CEF Holdings Limited. Its principal activity is the collection and recycling of waste materials, including gas discharge lamps, hereinafter referred to as "lamp waste" or "waste lamps".

2. The Second Claimant, City Electrical Factors Limited ("CEF"), is a wholly-owned subsidiary of CEF Holdings Limited. It operates principally as a wholesaler of electrical goods, including lamps. It also, since 2006, produces and sells lamps under the brand name "Edison".

3. The First, Second, Third and Fourth Defendants (described below in the alternative as "The Big Four") are manufacturers of lamps. Between them the Big

Four hold a share in the market for the sale of lamps in the United Kingdom of approximately 80%.

4. The Fifth Defendant, Recolight Limited ("Recolight"), is a company limited by guarantee and without share capital incorporated on 1 July 2005. It operates as a not-for-profit company.

5. Recolight is a producer compliance scheme ("PCS") established pursuant to the Waste Electrical and Electronic Equipment Regulations 2006 ("the WEEE Regulations") which are described in more detail below and which implement the Waste Electrical and Electronic Equipment Directive (2002/96/EC) ("the WEEE Directive").

6. According to clause 3 of its Memorandum of Association, Recolight's principal objects on incorporation are:

> "To offer, on a fair, open and non-discriminatory basis, a collection and recycling system in the United Kingdom to all interested producers, distributors and importers of waste electrical and electronic lamps, lighting and related products (together "WEEE lamps") to enable them to fulfil their obligations under the WEEE Directive and relevant implementing legislation in the United Kingdom….
>
> "To make arrangements for the collection, treatment, recovery and environmentally sound disposal of WEEE lamps waste in accordance with applicable European Community and United Kingdom legislation."

7. Clause 4 of its Memorandum of Association includes as powers in furtherance of these objects:

> "4.1 To arrange, control, manage and generally be responsible for the national collection and treatment of all WEEE lamp waste in the United Kingdom.
>
> 4.2 To enter into any contracts or arrangements with independent service providers with the view to delegate the collection and treatment activities to such service providers.

4.4 To invoice or otherwise make charges to the participants to the collection and recycling systems for any costs and other disbursements incidental to the running of such system.

4.8 To enter into contractual relations with any collection and recycling body in the United Kingdom for that body to provide services for the collection and recycling of WEEE Lamps on behalf of the Company."

8. Recolight operates an open scheme in that membership is open to any producer, manufacturer or importer of lamps. In April 2007, it had 33 members. By December 2008 it had some 54 members, which, according to Recolight's 2008 report, it is estimated represents approximately 85% of lamps put on the market in the United Kingdom in 2008. By October 2011, it had 99 members, which the Claimants estimate represent over 90% of lamps put in the market in the United Kingdom.

9. The subscribers to Recolight's Memorandum of Association are the First, Second, Third and Fourth Defendants and Recolight's directors are each individual appointees of the First, Second, Third and Fourth Defendants.

10. In effect, Recolight, although it also has some ~~50~~ 95 other members which hold between them approximately 10% ~~5%~~ of the UK lamp market, acts for and on behalf of the Big Four in fulfilling their obligations under the WEEE Regulations.

11. Each of the Defendants is an undertaking for the purposes of ~~Articles 81 and 82 of the EC Treaty,~~ Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") and sections 2 and 18 of the Competition Act 1998.

12. This Claim involves ~~two~~ separate but connected markets: ~~one~~ being:

(1) ~~the~~ a market or markets for the sale of lamps in the United Kingdom;

(2) ~~and the other being the~~ a market or markets for the collection and/or ~~recycling (encompassing~~ treatment, ~~recovery and disposal)~~ of waste lamps in the United Kingdom;

(3) a market for the supply of PCS services to producers of lamps and/or other obligated producers in the United Kingdom.

LAMP WASTE RECYCLING IN THE UK PRIOR TO 1 JULY 2007

13. Part II of the Environmental Protection Act 1990 ("the 1990 Act") addressed generally the collection, recycling, deposit and other forms of disposal of waste, in particular by imposing a duty of care upon those handling "controlled waste" as defined in the 1990 Act (including lamp waste, in respect of which no special provision was made).

14. The Waste Management Licensing Regulations 1994, made pursuant to the 1990 Act, created a detailed licensing régime for businesses handling waste, including lamp waste in respect of which no special provision was made.

15. The Special Waste Regulations 1996 created a particular regulatory régime for special waste, including "fluorescent tubes and other mercury containing waste".

16. The Landfill (England and Wales) Regulations 2002 required the Environmental Agency to categorise all landfill sites as inert, non-hazardous or hazardous waste. Fluorescent tubes thereafter could only be either fully recycled and reused or disposed of in a hazardous waste landfill site. Since there were only a few such sites available in the UK it became increasingly hard and expensive to dispose of waste lamps to landfill.

17. The WEEE Directive was adopted by the European Parliament and Council on 27 January 2003. The implementing legislation in the UK, the WEEE Regulations, did not fully take effect until 2007, but from 2002 onwards the lamp and recycling industries began to prepare for and adapt to the new régime, which introduced for the first time the concept of producer responsibility for the separate collection, recycling and disposal of waste electrical and electronic equipment, including waste lamps.

18. The Special Waste Amendment (Scotland) Regulations 2004 amended and tightened in respect of Scotland the Special Waste Regulations 1996, in particular by requiring in Scotland the separation of special waste (including fluorescent lamps) from other waste.

19. The Hazardous Waste (England and Wales) Regulations 2005 imposed in England and Wales the same requirement for the separation by businesses of special waste, including lamp waste, and contained detailed provisions concerning the timing and frequency of collections and restrictions on container sizes.

20. Almost every business disposing of lamp waste had to register with the Environment Agency in England and Wales, or the Scottish Environmental Protection Agency in Scotland, as a producer, obtain a site reference number and maintain quarterly reports which were to be submitted to the Agency. Consignment notes were issued in respect of every waste collection.

21. From before 2000 onwards a competitive market (or markets) was developed for the collection and/or treatment ~~recycling~~ of lamp waste. A number of companies, including EWRG, offered their services on this market (or these markets) and undertakings requiring collection ~~disposing~~ of lamp waste paid for these services.

22. The principal category of undertakings that were engaged in disposing of waste lamps was wholesalers of new lamps. In particular, this was because wholesalers would acquire waste lamps from their customers on the occasion of the sale of new lamps when a building was re-lamped, which in general would take place every 12 to 18 months. Wholesalers were thereby lumbered with the obligation to dispose of waste lamps in accordance with the restrictions imposed by the applicable legislation.

23. The UK wholesale market consists of the following: the Rexel Group (including Hagemeyer, WF Electrical, Newey & Eyre, Rexel Senate, Denmans (c. 550 branches)); CEF (c. 400 branches); Edmundson Electrical (c. 300 branches); Electric Center (c. 150 branches); and other independent electrical wholesalers (c. 2000 outlets).

24. It is estimated that the UK market in gas discharge lamps is approximately 225 million lamps per year.

25. In the years 2001-2006, the amounts of gas discharge lamps collected in the UK for recycling increased annually as follows:

Year	Lamps recycled (millions)
2001	1
2002	1
2003	3.5
2004	10
2005	15
2006	20

26. Operators providing services on the market or markets for the collection and/or treatment ~~recycling~~ of lamp waste provided different types of ~~recycling~~ services. Some merely crushed lamps on the customer's site and some partially recycled in-house. Only four operators, including EWRG, provided a fuller collection, recovery and recycling service, and even then some of these did not have the ability to receive and treat sodium lamps.

27. Of all the companies offering services on the ~~collection and recycling~~ relevant markets, EWRG was and remains the only company with multiple recycling plants and multiple licences, the only company with a bespoke HID (high intensity discharge lamps) plant and bespoke CFL (compact fluorescent lamps) plant, and the only company with multiple distillers (3) which are of significantly greater capacity than the rest. EWRG is the only company registered in Scotland with the Scottish Environmental Protection Agency to carry out full recycling in Scotland. It is the only company to have invested in an End Cut Technology Plant to separate phosphor from lamps.

28. By virtue of this, EWRG became very successful on the collection and treatment ~~recycling~~ market (or markets), particularly through arrangements for the provision of services to electrical wholesalers who are the source of the vast majority of waste lamps.

29. Wholesalers not only received at their own premises the return of waste lamps from customers and users but also entered into arrangements with their customers (principally electrical contractors and large commercial and institutional users of lamps) for the collection of waste lamps directly from the premises where such waste arises, irrespective of quantity and with no *de minimis* rule in accordance with hazardous waste regulations. These arrangements were, in view of the strict regulatory control of such waste, extremely convenient and commercially attractive to the wholesalers' customers and also highly conducive to the increased proper and separate collection and recycling of waste lamps.

30. Prior to 1 July 2007, producers of new lamps had little or no interest in the collection and/or treatment ~~recycling~~ market or markets as they were under no obligations to collect or recycle used lamps. Producers were however considering and creating PCSs, being the regulatory mechanism through which their forthcoming producer responsibilities would be discharged under the WEEE Regulations.

THE WEEE DIRECTIVE AND THE WEEE REGULATIONS

31. The purpose of the WEEE Directive, as stated in Article 1 of the Directive, is, as a first priority, the prevention of waste electrical and electronic equipment ("WEEE") and, in addition, the reuse, recycling and other forms of recovery of waste so as to reduce the disposal of waste. It also seeks to improve the environmental performance of all operators involved in the life cycle of electrical and electronic equipment, e.g. producers, distributors and consumers and, in particular, those involved in the treatment of WEEE.

32. Articles 5-7 of the WEEE Directive provide *inter alia* as follows:

> "**Article 5**
> **Separate collection**
>
> 1. Member States shall adopt appropriate measures in order to minimise the disposal of WEEE as unsorted municipal waste and to achieve a high level of separate collection of WEEE.
>
> 2. In the case of WEEE other than WEEE from private households… Member States shall ensure that producers or third parties acting on their behalf provide for the collection of such waste.
>
> **Article 6**
> **Treatment**
>
> 1. Member States shall ensure that producers or third parties acting on their behalf … set up systems to provide for the treatment of WEEE using best available treatment, recovery and recycling techniques. The systems may be set up by producers individually and/or collectively.
>
> …
>
> **Article 7**
> **Recovery**
>
> 1. Member States shall ensure that producers or third parties acting on their behalf set up systems either on an individual or on a collective basis … to provide for the recovery of WEEE collected separately in accordance with Article 5.
>
> 2. … (d) for gas discharge lamps, the rate of component, material and substance reuse and recycling shall reach a minimum of 80% by weight of the lamps."

33. Article 9 of the WEEE Directive provides that Member States shall ensure that, by 13 August 2005, the financing of the costs of collection, treatment, recovery and environmentally sound disposal of WEEE from users other than private households from products put on the market after 13 August 2005 is to be provided for by producers. Producers and users other than private households may, without prejudice to the Directive, conclude agreements stipulating other financing methods.

34. Regulation 9 of the WEEE Regulations provides *inter alia* as follows:

> "**9. Financing: WEEE from users other than private households**
>
> (1) Each producer shall finance the costs of the collection, treatment, recovery and financially sound disposal of –
>
> (a) WEEE from users other than private households arising during a compliance period from EEE put on the market in the United Kingdom on or after 13th August 2005 by that producer; and
>
> (b) WEEE from users other than private households arising during a compliance period from EEE put on the market in the United Kingdom before 13th August 2005 ("the relevant WEEE") where that producer is supplying new EEE that
>
> (i) is intended to replace the relevant WEEE, and
>
> (ii) is of an equivalent type or is fulfilling the same function as that of the relevant WEEE.
>
> (2) Nothing in paragraph (1) shall prevent a producer from concluding an agreement whereby the parties to the agreement make alternative arrangements between themselves to finance the costs of the collection, treatment, recovery and financially sound disposal of WEEE."

35. Regulation 10 of the WEEE Regulations imposes on a producer an obligation to belong to an approved PCS. Membership exempts the producer from compliance with Regulation 9 by shifting the obligation to the PCS.

36. Regulation 23 of the WEEE Regulations provides as follows:

"**Financing: WEEE from users other than private households**

(1) …. The operator of [a] scheme shall be responsible for financing the costs referred to in regulation 9(1) for which each scheme member is responsible under regulation 9 in any compliance period, or any part of a compliance period, during which his membership of that scheme subsists.

(2) Nothing in paragraph (1) shall prevent an operator of a scheme who is acting on behalf of a scheme member from concluding an agreement whereby the parties to the agreement make alternative arrangements between themselves to finance the costs of the collection, treatment, recovery and financially sound disposal of WEEE."

IMPOSITION OF A "RECYCLING CHARGE" BY THE FIRST, SECOND, THIRD AND FOURTH DEFENDANTS ON SALES FROM 1ST JULY 2007 ONWARDS

37. On 1 July 2007, the first compliance period under the WEEE Regulations commenced.

38. From that date onwards, the First, Second, Third and Fourth Defendants, together with other members of the Recolight scheme, imposed on sales to wholesalers, including CEF, and other customers a separately identified so-called "recycling charge" of 15p per lamp for all types of lamps, purportedly in order to cover the costs of collection and ~~recycling~~ treatment by Recolight of waste lamps. Subsequently, from 3 December 2007, they introduced a standard 3p "recycling charge" per lamp for all CFLi Lamps which are commonly known as domestic compact fluorescent energy saving lamps. Save for CFLi lamps (in respect of which the lower charge of 3p *per* lamp continued) from 1 July 2010 both the Recolight charge to its members and the amount of the "recycling charge" on sales to customers were reduced from 15p *per* lamp to 10p *per* lamp.

39. Of the 225 million gas discharge lamps sold annually in the United Kingdom, about 150 million are integrated compact fluorescent lamps attracting a 3p charge and the remaining 75 million are other types of lamp attracting a 15p charge (10p since 1 July 2010). Recolight members enjoy about ~~85%~~ 90% of that market. ~~Thus Recolight's annual income may be approximately calculated as: £0.15 x 75,000,000 x 85% = £ 9,562,500 £0.03 x 150,000,000 x 85% = £ 3,825,000.~~ Recolight's annual income from these charges has been:

2008	£8,236,903
2009	£8,137,657
2010	£8,378,234

40. The recycling charge was variously (but consistently) described:

(1) by the First Defendant as follows (by undated letter):

> ".. the recycling charge to cover the cost of collection and recycling of all discharge lamps will commence on July 1st 2007 .... we have set the recycling charge at 15 pence per lamp which reflects the costs we expect to incur to fulfil our obligations under WEEE. Please note that this recycling charge will be shown on invoice as a separate line .... This recycling charge is a nett nett (sic) figure not subject to any further discount, rebate or cash settlement and will not appear in any turnover reports produced by Philips";

(2) by the Second Defendant as follows (by letter dated 19 April ~~2009~~ 2007):

> "Recolight will charge GE a fixed fee for every Gas Discharge Lamp we sell into the UK market. Thus all Gas Discharge Lamps invoiced to you on or after 1st July 2007 will show a separate visible fee for the WEEE costs (the Recolight fee). This fee will not be subject to rebate or settlement .... ";

(3) by the Third Defendant as follows (by letter dated 3 April 2007):

> ".... Recolight .... will charge us a fixed amount on all our sales of Gas Discharge Lamps at a per lamp rate to cover recycling costs. Consequently ..... all OSRAM invoices on or after [1 July 2007] will include the collection and recycling costs as a fixed visible fee, which will be shown as an additional, separate line on the invoice ..... This cost will be invoiced to you at exactly the same level as it is charged to us ..... The WEEE visible fee will not be included in our turnover calculations and therefore will not attract any rebate or discount ....";

(4) by the Fourth Defendant as follows (by letter dated 2 April 2007):

> "Recolight will charge each producer member a set fee for all discharge lamps and fixtures. The [Fourth Defendant's] policy is

> to invoice WEEE costs (Recolight fee) separately on invoice without any uplift, to ensure a fair and transparent treatment of these costs for our customers. Consequently [the Fourth Defendant] will pass on the fee for lamps and fixtures with effect from 1st July 2007".

41. However, the imposition of the "recycling charge" on the wholesalers or other customers is made independently of the recycling of waste lamps. The charge is imposed solely by reason of the sale of new lamps and is not in fact dependent on that sale being linked to the simultaneous recovery of any waste lamps by Recolight.

42. Moreover the "recycling charge" is not a prior payment in respect of the collection and recycling of the new lamp by Recolight when it subsequently becomes waste lamp at the end of its life.

43. In fact , the proceeds of the "recycling charge" are passed by the Big Four and other Recolight members to Recolight in order to create a fund to cover Recolight's operating expenses.

44. It is generally recognised as being impractical and prohibitively expensive to distinguish between brands of lamps at the collection stage. In practice, collection of waste lamps by all operators on the collection and treatment ~~recycling~~ market or markets is made without discrimination as to the brand of waste lamps.

45. Recolight does not generally distinguish as to the brand of waste lamps when it arranges for the collection and treatment ~~recovery~~ of such waste lamps. On the contrary, it contracts for the collection and treatment ~~recovery~~ of all waste lamps that are delivered to the relevant collection point.

~~46. Another PCS Lumicom Limited ("Lumicom"), similarly constituted to Recolight, performs for the Fourth Defendant in respect of luminaires (i.e. the fittings which hold lamps and connect power to them) the same function as that performed in respect of lamps by Recolight. Lumicom is a company limited by guarantee incorporated on 6 September 2005 with objects in relation to luminaires essentially similar to those of Recolight in relation to lamps. Now and at all material times the Lighting Industry Federation Limited is and was the only member of that company. The Claimants plead further as to the relationship between the Lighting Industry Federation Limited and the First to Fourth Defendants at paragraph 62A below.~~

IMPOSITION OF THE "RECYCLING CHARGE" ON SALES OF LAMPS AND LUMINAIRES TO CEF

47. CEF, being a wholesaler, has had to pay substantial amounts by way of the "recycling charge" in respect of the acquisition of new lamps produced by the Big Four. The sums paid by CEF to each of the Big Four as "recycling charges" for lamps since 1 July 2007 are particularised in Schedule 1 annexed hereto. ~~CEF has also been required to pay a similar "recycling charge" in respect of the acquisition from the Fourth Defendant of luminaires at the rate of 20p per luminaire. The sums paid by CEF to the Fourth Defendant as "recycling charges" on luminaires since 1 July 2007 are also particularised in Schedule 1.~~

48. However, CEF is also a producer of Edison lamps, which account for approximately 45% of its sales of new lamps.

49. CEF, being a producer, has its own PCS, known as WERCS, for the purposes of fulfilling its obligations under the WEEE Regulations. WERCS ~~and~~ uses the services of EWRG ~~WERCS~~ for the collection and treatment ~~recycling~~ of lamp waste for which CEF is responsible. ~~all of the waste lamps and luminaires that are presented to it on the sale of new lamps and luminaires, including lamps and luminaires produced by the Big Four~~.

~~50. This practice is similar to Recolight's practice of accepting the collection and recycling of all waste lamps, regardless of brand.~~

51. Pursuant to the scheme of the WEEE Regulations, the producer is liable to bear the costs of collection and treatment ~~recycling~~ of waste lamps ~~and luminaires~~. Where the producer is a member of a PCS, that obligation is assumed by the PCS, to whom the producer will pay fees intended to reflect those costs.

~~52. Pursuant to that obligation, CEF is content that it bears the costs of WERCS's activities in so far as those costs relate to the collection and recovery of waste lamps in an amount proportionate to its sales of Edison lamps. That cost is passed on in its sales to its customers.~~

~~53. However, the Big Four, whilst they charge CEF the "recycling charge" on all sales of their new lamps, do not contribute any of the revenue from those charges to cover the remaining costs of WERCS's activities in so far as they relate to the collection and recycling of waste lamps and luminaires. Instead, all of the~~

proceeds of the Big Four's "recycling charges" are given to Recolight (for lamps) or Lumicom (for luminaires), each of which provides no services of any nature to CEF (save that Recolight does collect lamps from CEF branches in Northern Ireland).

54. Accordingly, CEF is forced to pay all the costs incurred by WERCS as well as the costs of the Big Four's "recycling charge" from which it gains no benefit or return.

55. The First, Second, Third and Fourth Defendants have, accordingly, breached their obligations under the WEEE Regulations to bear the costs of recovery of waste lamps and luminaires and have caused CEF loss and damage, being the costs incurred in paying WERCS in relation to the collection and recycling of lamps other than Edison lamps and luminaires.

56. Alternatively, CEF is entitled to restitution of all amounts of the "recycling charge" paid to the First, Second, Third and Fourth Defendants since none of the "recycling charges" paid by CEF is ever used to cover the costs of recovery of the lamps and luminaires sold to it by the First, Second, Third or Fourth Defendants. Those sums have been paid by CEF:

(1) under economic duress and illegitimate pressure, in that CEF could not obtain supplies of lamps and luminaires manufactured by the Big Four unless it paid the sums invoiced, including the separate "recycling charge"; CEF needed such supplies in order to provide a full range of available products to its customers and to compete effectively in its own market of the wholesale supply of electrical goods; and/or

(2) for no consideration; and/or

(3) on the basis that the vendor was meeting, in respect of the lamps and luminaires sold, the related costs of compliance with the WEEE Regulations when in fact that was not the case.

57. Further or alternatively, Recolight having since refused to collect waste lamps from CEF and there being in practice no collection by Lumicom of luminaires from CEF, the basis upon which the said sums were paid has failed and/or the purpose for which the said sums were paid has thereby been frustrated.

58. Further or alternatively, by payment of the said sums CEF has conferred upon each of the Big Four a benefit in circumstances whereby each of the Big Four has been unjustly enriched by CEF or should otherwise make repayment of the sums paid by way of restitution.

59. In the event, CEF is entitled:

(1) to repayment of all such sums paid since 1 July 2007; and

(2) to withhold payment of any similar sums demanded in future.

INFRINGEMENT OF ARTICLE 101 TFEU 81 EC /SECTION 2 1 OF THE COMPETITION ACT 1998

60. The arrangement or arrangements or practice whereby each of the members of Recolight and Lumicom respectively charge the same "recycling charge" to their customers and pass the proceeds of that charge on to Recolight or Lumicom to cover its respective operating expenses constitute or are the effect of an agreement or agreements between undertakings or a concerted practice or practices or a decision or decisions of an association of undertakings within the meaning of Article 101 TFEU 81 of the EC Treaty and Chapter I section 2 of the Competition Act 1998. Pending further disclosure of the background to this arrangement, CEF is unable to specify which of an agreement, a concerted practice or a decision of an association is the applicable arrangement in each case. Producers of all other categories of WEEE have included the costs of compliance with the WEEE Regulations within their internal production costs and do not provide for any similar system of recycling charges.

61. These arrangements constitute either an a restrictive agreement or agreements between the First, Second, Third and Fourth Defendants and Recolight and/or Lumicom or a concerted practice or practices by the First, Second, Third and Fourth Defendants.

(1) By means of their arrangements with, and/or carried out by means of, Recolight, the First to Fourth Defendants, who are rival major producers of new lamps, have avoided competing against each other in the United Kingdom on a significant element of their respective costs, namely PCS compliance services;

(2) the First to Fourth Defendants are, and have at all material times been, fully aware that each of the others, although major rivals, would not undercut them on this element of the overall cost of supply of lamps;

(3) the First to Fourth Defendants (or the undertakings, within the meaning of Art. 101 TFEU/section 2, to which they belong) have agreed with each other to adhere to their restrictive arrangement with and/or carried out by means of Recolight. On at least one occasion, when the Second Defendant indicated an intention to leave Recolight and to join another PCS in late 2007, the First, Third and Fourth Defendants and/or companies within their groups (and belonging to the same undertakings within the meaning of Art. 101 TFEU/section 2) exerted pressure on the Second Defendant (or the undertaking to which it belongs) to continue to adhere to Recolight in view of, among other matters:

(i) a commitment which the Second Defendant (or the undertaking to which it belongs) had given to adhere to the restrictive arrangement;

(ii) the concern that the Second Defendant would or might achieve lower PCS charges for its lamps, thereby conferring on it a competitive advantage over the other lamp producer Defendants;

(iii) the wider market impact, in terms of the stimulation of competition between rival producers of new lamps, if the Second Defendant were to join another PCS.

(4) the First to Fourth Defendants have, by agreement and/or a concerted practice, also colluded with each other on the form and manner in which the recycling charge element of their costs would be passed to customers as part of the price for the supply of lamps.

(5) The matters set out above have led to higher lamp prices to customers in the United Kingdom, including CEF, than would otherwise have arisen;

(6) CEF, as a major wholesaler, has suffered loss and damage because it has been overcharged by the First to Fourth Defendants on the sales of new lamps, and/or because CEF has sold fewer lamps because of their higher costs, and so has made lower profits.

62. Further or alternatively, if and insofar as the arrangement arises pursuant to decisions of Recolight ~~and/or Lumicom~~ which are imposed on their ~~respective~~ members, those are decisions of an association of undertakings, being, in particular, the First, Second, Third and Fourth Defendants by reason of their dominant control over Recolight's ~~and/or Lumicom~~'s activities.

PARTICULARS IN SUPPORT OF PARAGRAPHS 60 TO 62

62A ~~Prior to full disclosure the~~ The Claimants rely upon the following further facts and matters:

(1) At the end of 1996 the European Parliament asked the European Commission to present proposals on a number of priority waste streams including electrical and electronic equipment. By then, by virtue of the Special Waste Regulations 1996 fluorescent lamps were already categorised as special waste in England and Wales.

(2) By 2001 the European lighting industry generally including the First to Fourth Defendants and/or their parent companies were generally aware that a WEEE directive was proposed and that it would be necessary for the industry both to lobby as to its content and to plan and prepare for the national implementation of such a directive.

(3) The First to Fourth Defendants are and were at all material times prominent and influential members of the Lighting Industry Federation which is the usual title of Lighting Industry Federation Limited ("the LIF"), a company limited by guarantee whose purpose is to represent the interests of the lighting manufacturers in the United Kingdom.

(4) In March 2001 the LIF acquired an "off-the-shelf" company which it renamed "Sustainalite Limited" (hereinafter referred to as "Sustainalite") and in which it held the only issued share.

(5) The avowed principal purposes of Sustainalite were to represent all participants in the life cycle of lamps (producers, electrical contractors, retailers, recyclers and logistics companies) and to promote the "Recyclite Scheme" for the separate collection and treatment ~~recycling~~ of gas discharge lamps. Its activities included an accreditation system for lamp recyclers, who were permitted to participate in the activities of Sustainalite

but were not represented on its board, which comprised entirely nominees of the LIF. Sustainalite received from recyclers annual returns of lamps collected.

(6) Sustainalite was in practice controlled by the First to Fourth Defendants by virtue of their influence in the LIF and their participation in the management of Sustainalite.

(7) The WEEE Directive entered into force on 13 February 2003 and required national implementation by 13 August 2005.

(8) During 2003 the LIF lobbied the Department of Trade and Industry on behalf of gas discharge lamp makers as to the form of the United Kingdom regulations, adopting the paper "Let There Be Light" produced by the European Lighting Companies Federation ("the ELC", a body of which the Second Defendant and the respective European parent companies of the First Defendant, Third Defendant and Fourth Defendant formed 4 of the 8 members, representing over 90% of the European market in new lamps).

(9) The ELC generally and more particularly through their document "Let There Be Light" sought to promote on an EU-wide basis a mandatory "~~a~~ single visible fee" on a "pay as you go" basis and a single "Collection and Recycling Service Organisation" ("CRSO") operating on behalf of all producers and appointing recyclers on the basis of competitive tenders.

(10) The LIF further promoted the concept that the CRSO should set the single visible fee and that "market forces would be used to bring down costs of collection and treatment" and that Sustainalite (which it owned) should be the CRSO for the United Kingdom.

(11) Both the LIF and Sustainalite made the relevant decisions entirely for the benefit of and in the interests of the producers and regardless of the effect that the above proposals would have upon the independent recycling market, in particular that the CRSO would be the only purchaser of the services of the recyclers and would set prices in the market. During 2003 Sustainalite resisted all attempts by its recycler members to participate in its management or decision-making or its lobbying of the Department of Trade and Industry.

(12) Whilst in 2004 Sustainalite did permit token representation of recyclers on its board it remained in the control of the First to Fourth Defendants and its position did not alter in any material respect, being essentially that of the ELC and the LIF.

(13) On 2 April 2005 Sustainalite first presented to its members the proposal of a separate entity to act as the single CRSO or compliance scheme with producer members only, with Sustainalite to continue for the purposes of registration and accreditation of suppliers, political lobbying and as an industry forum.

(14) On 14 June 2005 Sustainalite presented to its members the creation of a compliance scheme to be called "Recolight" and which would be structured and would act in every material respect consistently with the approach of the ELC and the LIF.

(15) On 1 July 2005 the Fifth Defendant was incorporated, ~~each of~~ the First to Fourth Defendants ~~holding 1 subscriber share~~ being the four subscriber members.

(16) It is accordingly the case of the Claimants that the subsequent decisions:

(a) of the Fifth Defendant to impose upon its scheme members a uniform charge *per* lamp sold (and, correspondingly, of each of the First to Fourth Defendants not to compete over this element of their costs);

(b) of each of the First to Fourth Defendants to pass on that charge to their respective customers in the same amount as an upfront visible "recycling charge" of the same amount;

were in fact pre-ordained by the series of events particularised above and constitute arrangements of the kind alleged.

(17) ~~For the avoidance of doubt, presently and in the absence of disclosure by the First to Fourth Defendants for the period from 1 January 2001 to 28 February 2006, In~~ In the premises, the ~~Claimants' case is~~ Claimants aver that:

(a) the Second Defendant and the European parents of the First Defendant, Third Defendant and Fourth Defendant participated jointly in the above-mentioned decisions and policy-making of the ELC, as manifested in particular in the document "Let There Be Light"; such policy included an agreed consensus between the Second Defendant and the European parents of the First Defendant, Third Defendant and Fourth Defendant as to:

(i) the existence of a single visible fee;

(ii) that the Second Defendant would pass on such visible fee to be displayed on the invoices;

(iii) that each of the European parents of the First Defendant, Third Defendant and Fourth Defendant would pass on such visible fee and seek to have it visibly displayed on invoices and/or instruct their European subsidiaries in each country to do likewise;

(b) the Second Defendant thereafter acted in the manner set out below in the course of its activities within the United Kingdom in furtherance of the consensus identified in (a) above;

(c) the European parents of the First Defendant, Third Defendant and Fourth Defendant also acted in furtherance of the consensus identified in (a) above, including by:

(i) instructing the First Defendant, Third Defendant and Fourth Defendant to act in furtherance of the consensus identified in (a) above; and/or

(ii) at least informing the First Defendant, Third Defendant and Fourth Defendant of the existence of such consensus;

(d) from 2001 onwards the First to Fourth Defendants

participated jointly in the management of Sustainalite as the vehicle for promoting ELC policy in the United Kingdom; for the avoidance of doubt, such joint participation included implementation and/or furtherance of the consensus identified in (a) above;

(e) from 2005 onwards the First to Fourth Defendants participated jointly in the promotion, direction and management of Recolight, which continued as the manifestation in the United Kingdom of ELC policy and the consensus identified in (1) above, achieving in particular:

(i) their joint ownership and control of a single PCS (when such was not compelled by the Regulations);

(ii) their combination in collective membership of a single PCS (when such was not compelled by the Regulations);

(iii) the imposition by that PCS of membership fees determined by way of a fixed charge per unit sale of new lamps (when such was not compelled by the Regulations);

(f) in the premises insofar as the First to Fourth Defendants thereafter:

(i) passed on the whole of the above-mentioned fixed charge in the price of new lamps (when such was not compelled by the Regulations);

(ii) made the act of passing-on visible by the creation of a separate invoice line stipulating a "recycling charge" in an amount exactly equal to the incremental membership fee resulting from the sale (when such was not compelled by the Regulations);

(iii) remained within a single PCS in the United

Kingdom, namely the Fifth Defendant;

such acts were not unilateral acts of each of the First to Fourth Defendants but formed part of the consensus identified in ~~(1)~~ (a) above;

(g) in acting in the manner set out in (f) above the First to Fourth Defendants each acted:

(i) by direct agreement *inter se*; and/or

(ii) on the instructions of their respective European parents (save in the case of the Second Defendant, which was acting directly); on the information presently available to the Claimants, the persons involved in giving such instructions include:

Mr. Frank de Leeuw (an employee of the European parent of the First Defendant and a member of the ELC "WEEE Implementation Team" and "Expert Panel Logistics" for the purposes of the practical implementation of the WEEE Directive in each member state; Mr. de Leeuw advised Recolight on the tender process during 2006 and also deputised for Recolight's chief executive Eddie Taylor and/or acted as a "consultant" to Recolight during at least the period April 2008 to January 2009);

Mr. Rob Koppejan (an employee of the European parent of the First Defendant and a member of the ELC "WEEE Implementation Team" and Core Team and Project Team Leader WEEE Lamps, who was on 7 February 2008 appointed as a director of Recolight);

Mr. Martin de Jager (an employee of the European parent of the First Defendant and a member of the ELC "WEEE Implementation Team"

and Core Team, who was on 2 July 2009 appointed as director of Recolight in place of Mr. Koppejan);

Ms Katalin Pilinyi (an employee of the Second Defendant and a member of the ELC "WEEE Implementation Team" and Core Team);

Mr. Christoph Von Rautenfeld (an employee of the European parent of the Third Defendant and a member of the ELC "WEEE Implementation Team" and Core Team);

Mr. Christian Brehm (an employee of the European parent of the Fourth Defendant and a member of the ELC "WEEE Implementation Team" and Core Team);

and/or

(iii) in the knowledge of the consensus identified in (a) above or in confident expectation (arising either from agreement or from the above-mentioned course of events) that each of them would act in an exactly similar manner;

(iv) accordingly, without the need to give any consideration to absorbing any part of the cost of compliance with the Regulations through membership of a PCS and free from concern that the other Defendants as competitors would so act; and accordingly in an anti-competitive manner contrary to Article 101 of the Treaty on the Functioning of the European Union as pleaded;

(h) further or alternatively, even if the First Defendant, Third Defendant and Fourth Defendant were unaware of the consensus reached between the Second Defendant and the European parents of the First Defendant, Third Defendant and Fourth Defendant, as identified in (1) above, insofar as the First Defendant, Third Defendant and Fourth Defendant

implemented that consensus through the acts identified in (f) above, they too infringed Article 101 of the Treaty on the Functioning of the European Union (as did the Second Defendant which acted directly in the ELC, Sustainalite and Recolight).

63. The said agreements, concerted practices or decisions have as their object or effect the prevention, restriction or distortion of competition within the common market and/or within the United Kingdom.

PARTICULARS OF PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION

64. The WEEE Regulations impose a duty on producers of lamps in respect of the collection, treatment, recovery and disposal of lamp waste.

65. That duty gives rise to a cost to each producer which, pursuant to the Regulations, is to be borne by the producer.

66. That cost represents a potentially significant element in the total production and operating costs of producers of new lamps.

67. In the normal course, competing undertakings sell finished goods to their customers without identifying individual elements of their production and/or operating costs.

68. By means of their arrangement for the common acquisition of PCS services from Recolight at a uniform and agreed charge per lamp, and/or identifying a putative "recycling charge" as being intended to cover the costs incurred in complying with the WEEE Regulations, and/or agreeing the extent of that charge and passing that charge directly onto customers, the members of Recolight ~~and/or Lumicom~~ have prevented, restricted or distorted any competition as between themselves in relation to that element of their costs of production. Given the significant proportion of the First, Second, Third, and Fourth Defendants' costs represented by the ~~15p~~ upfront fees ~~(and, since 1 July 2010, the 10p upfront fee)~~, and the homogenous nature of the First, Second, Third, and Fourth Defendants' lamps sold in the United Kingdom, the agreements and/or decisions giving effect to the upfront fee create a significant degree of cost commonality, thereby reducing competition on price between the First, Second, Third, and Fourth Defendants in

the market for the sale of lamps in the United Kingdom. Further, given that the members of Recolight account for ~~85%~~ 90% of production of lamps sold in the United Kingdom, of which some 80% is accounted for by the First, Second, Third, and Fourth Defendants, the agreements and/or decisions giving effect to the Recolight upfront fee(s) affect price competition to an appreciable extent. In the premises, Recolight, and the various arrangements giving effect to the upfront fee, constitute an anticompetitive joint venture between Recolight and the First, Second, Third and Fourth Defendants.

~~69. Further or in the alternative, the agreement whereby all the "recycling charges" are passed on to Recolight or Lumicom respectively to cover its operating costs prevents or restricts, in practice, the First, Second, Third and Fourth Defendants from arranging for other methods of complying with its obligations under the WEEE Regulations.~~

~~70. In particular, where lamps are sold through a wholesaler who is also a producer of lamps and has its own PCS, the First Second, Third and Fourth Defendants are prevented or restricted from entering into arrangements directly or indirectly with that PCS.~~

71. The fact that the WEEE Regulations provide that producers may act collectively does not entitle them to act in any way anti-competitively. In any event, the WEEE Regulations, based on the WEEE Directive which is secondary EC legislation, cannot override the application of the provisions of Article ~~81 of the EC Treaty~~ 101 TFEU/section 2 of the Competition Act 1998.

~~71A. The Defendants agreed collectively that Recolight would not collect lamps from CEF and/or Recolight, as an association of undertakings, made a decision to this effect, which decision was strongly supported by the First, Second, Third, and Fourth Defendants. In an email dated 22 June 2009, Recolight's Chief Executive, Nigel Harvey, stated that "...[i]*n the last 4 weeks they* [EWRG] *have attempted to invoice us for the entire recycling costs of* [CEF]*'s own compliance scheme (City Compliance). If we accept this our members will have subsidised/paid for the recycling of the CEF own brand (Edison)*." In reply emails dated 22 June 2009, 28 June 2009, and 1 July 2009, the First, Second, Third, and Fourth Defendants agreed with Recolight's proposal not to accept lamps from the First Claimant and noted in this connection that CEF's Edison brand competed with lamps sold by the First, Second, Third, and Fourth Defendants. This agreement and/or decision limits CEF's ability to compete in the following respects:~~

(1) Increasing CEF's costs compared to rival wholesalers (whose used lamps are collected free by Recolight)

(2) Penalising CEF for dealing in lamps other than those of Recolight's members, which has the effect of protecting Recolight members from competition from their rivals.

(3) Acting as a disincentive to other wholesalers to buy lamps other than those of Recolight's members, since they too would thereby lose the "free" collection service from Recolight.

71B. Recolight's upfront fee further distorts competition in recycling services. Recolight's upfront fee model has enabled Recolight to set up its own RecoNet collection service. By requiring wholesalers to pay upfront for this service, bundled with the supply of recycling and compliance services (when they purchase the Recolight members' lamps), the upfront fee and associated services have excluded and/or marginalised recycling operators who previously charged wholesalers for the provision of this service at the end of lamp life. By reserving this collection activity for itself, Recolight denies possible scale or network benefits to rival recycling schemes and PCSs, which serves to raise the costs of such schemes, giving an unfair and unjustified advantage to Recolight. This limits CEF's ability to benefit from price and non-price competition between PCSs and the ability of those PCSs to compete with Recolight, including WERCS (which is 100% owned by EWRG, which in turn was until 30 April 2009 owned and controlled by the same parent company that owns and controls CEF).

72. Paragraphs ~~46 to 52~~ 47 to 51 above are repeated.

73. CEF has suffered loss and damage as a result of this breach of Article ~~81 EC~~ 101 TFEU and/or section 2 of the Competition Act.

INFRINGEMENT OF ARTICLE ~~82 EC~~ 102 TFEU / SECTION 18 OF THE COMPETITION ACT 1998: RECOLIGHT'S ABUSIVE DEALINGS WITH EWRG

74. The relevant market is the market in the United Kingdom for services for the collection and recycling (encompassing treatment, recovery and disposal) of lamp waste. In so far as that market may be subdivided on regional or local lines or as

~~between collection and recycling activities, no material consequence affects the following particulars.~~ The Claimants aver that:

(1) There is a relevant market or markets for the provision of collection and/or treatment and/or recovery and/or disposal services for lamp waste in the United Kingdom. The said services are provided in particular to PCSs such as Recolight, that have obligations under the WEEE Regulations.

(2) Recolight can and does exert market power as a purchaser of such services. It does so both directly through its commercial agreements with service providers, and indirectly by means of purchasing evidence notes from such suppliers for the purpose of demonstrating to the Environment Agency that it has discharged its obligations under the WEEE Regulations. Recolight has a dominant position in the said relevant market or markets, within the meaning of Art. 102 TFEU and s.18 of the Competition Act 1998.

(3) Recolight has abused its dominant position on the said market or markets, by:

(i) adopting and maintaining an overall purchasing strategy, since around May or June 2009, the aim of which is to deprive EWRG of lamp collection and treatment business by various means;

(ii) further or alternatively, by refusing to purchase evidence notes or services from EWRG on fair and reasonable terms, the effect of which has been (and remains) to weaken EWRG, and if continued, eventually to force it out of the relevant market or markets.

(4) The effect of weakening EWRG, and of eventually forcing it out of the market or markets, will be to alter the structure of competition, to deprive customers of services that they value, and/or to reduce the overall quality, choice and/or volume of collection, treatment and recovery services provided to customers.

(5) If and insofar as necessary, it is further averred that the motivation for Recolight adopting the said exclusionary purchasing strategy against EWRG has been, or has included, the following:

(i) Recolight and its major lamp producer members, the First to Fourth Defendants, have regarded EWRG as a business associated with a rival producer of lamps, namely CEF, and therefore as a threat to the interests of the First to Fourth Defendants.

(ii) The Defendants have been concerned to prevent a situation in which EWRG is in a position to offer lower cost and/or otherwise more attractive lamp collection, treatment and disposal services to CEF's own PCS scheme (WERCS), and to the actual or prospective members of that scheme. That would confer on CEF a competitive advantage over the First to Fourth Defendants in the supply of lamps. It would create pressure on the First to Fourth Defendants to leave Recolight and join WERCS in order to remove the competitive advantage.

(iii) One concern of the Defendants has been EWRG's contracts with major national wholesalers (such as Rexel, Edmundsons and Hagemeyer). These account for significant proportions of the waste lamps that must be collected and treated each year in order that PCS schemes to which the major lamp producers belong can discharge their obligations under the WEEE Regulations. The Defendants have been concerned that, among other matters, if EWRG secures contracts covering the majority of the electrical wholesaler collection points, then the "CEF group" would have a competitive advantage over Recolight in the supply of PCS services to lamp producers (through WERCS), and ultimately (through CEF) over the First to Fourth Defendants in the supply of lamps. This could provoke one or more among the First to Fourth Defendants to leave Recolight and join WERCS.

(6) By reason of Recolight's abusive and unlawful conduct directed at EWRG, EWRG has suffered and continues to suffer loss and damage.

75. Whereas prior to the coming into effect of the WEEE Regulations, services were provided by recyclers to, in particular, wholesalers, since 1 July 2007 Recolight has established itself as the dominant purchaser of lamp waste ~~recycling~~ collection and treatment services on the relevant market or markets by placing itself between wholesalers and other waste generators and providers of collection and ~~recycling~~ treatment services. Recolight's members account for approximately ~~85%~~ 90% of

UK lamp sales, with the First, Second, Third and Fourth Defendants alone accounting for 80%. In establishing Recolight, those members have entrusted the supply of producer compliance services to them by Recolight on an exclusive or *de facto* exclusive basis. These elements place Recolight in a pivotal position as a *de facto* monopoly buyer of lamp waste recycling services in the United Kingdom. This position affords Recolight the ability to price discriminate in its sub-contracting arrangements, and to discriminate against actual or potential competitors, such as EWRG. In the premises, Recolight acts as a "superdominant" buyer on the relevant market.

~~76. Further or alternatively, by reason of their control over Recolight and their interest in securing compliance collectively under the WEEE Regulations, the First, Second, Third and Fourth Defendants are, together with Recolight, jointly dominant on the market in the United Kingdom for services for the collection and recycling of lamp waste. While the First, Second, Third and Fourth Defendants are not themselves physically active in the collection and recycling of lamp waste, their entrustment of these services to Recolight, the important role played by their Directors within Recolight, and the parallelism of interest between Recolight and the First, Second, Third and Fourth Defendants in this regard makes it appropriate to treat them and Recolight as jointly dominant. The First, Second, Third and Fourth Defendants and Recolight for all practical purposes behave as a single entity on the market in so far as concerns the purchase of lamp waste recycling services and the associated supply of producer compliance services.~~

77. Recolight does not itself collect, treat, recover or dispose of lamp waste and does not have the infrastructure to do so. Rather, it contracts with providers of collection and ~~recycling~~ treatment services in respect of lamp waste in order to ensure the fulfilment of its members' obligations under the WEEE Regulations.

78. Although wholesalers and their customers continue to need to ~~dispose of~~ have lamp waste collected and disposed of in accordance with their lawful obligations, Recolight has become the dominant purchaser of these services in view of (i) the fact that its members account for the overwhelming majority of all lamps in the United Kingdom which require to be collected and recycled in each annual compliance period in accordance with the WEEE Regulations; (ii) Recolight's stated aim of maximising waste collection; and (iii) by offering to arrange for services to wholesalers and others for free. ~~Since Recolight's members' customers are charged the "recycling charge" up front on the sale of new lamps,~~

~~they naturally do not wish to pay again for the actual recovery, collection, transport and recycling services.~~

79. Hitherto EWRG charged a fee to wholesalers for its services, based on a competitive market in collection and ~~recycling~~ treatment services.

80. Since 1 July 2007, EWRG offers and provides its services to Recolight and also continues to offer its services to wholesalers and other lamp waste creators directly.

81. In respect of services to Recolight, EWRG sought to offer its services on similar open market terms as it had previously charged to wholesalers and other waste lamp creators. In this respect, it expected to be in a fair and open competitive tender process (an invitation to tender or "ITT" process) with other recyclers.

82. In respect of services that are continued to be provided directly to wholesalers and other waste lamp creators ("existing business arrangements"), EWRG no longer always charges such customers directly, but seeks to agree with such customers exclusive collection agreements for free and to agree separately with Recolight a fair market price for the collection and ~~recycling~~ treatment of the lamps on the ground that EWRG satisfies Recolight's obligations under the WEEE Regulations.

83. Recolight has abused its dominant position ~~and/or the First, Second, Third and Fourth Defendants have abused their position of joint dominance on the market~~ as identified in paragraph 74 above ~~for collection and recycling of waste lamps in the United Kingdom by seeking to exclude EWRG from that market and/or by imposing unfair and/or discriminatory prices and conditions on EWRG and/or by excluding from collection arrangements lamps from producers that are not Recolight members~~ contrary to Article ~~82(a), (b) and (c) EC~~ 102 TFEU and section 18(1) ~~(a), (b) and (c)~~ of the Competition Act 1998.

PARTICULARS OF ABUSE

84. Recolight has abused its dominant position as set out in paragraph 74(3) above ~~and/or the First, Second, Third and Fourth Defendants have abused their position of joint dominance~~ by means of ~~inter alia~~ the following conduct:

~~(i) the imposition of costly requirements upon EWRG that are not imposed upon other operators including:~~

~~(a) expensive onboard weighing and recording devices;~~

~~(b) the acceptance of difficult loads of mixed lamps without extra charge;~~

~~(c) a laborious and expensive invoice auditing régime;~~

~~followed by assertions that EWRG can no longer compete on price;~~

~~(ii) despite (i), the aggressive downward negotiation of prices in circumstances where EWRG has no alternative buyer in the market;~~

~~(iii) the requirement that EWRG should disclose its existing customer base on a confidential basis, followed by the active poaching of those customers and referral of their business to competitor companies;~~

(i) ~~(iiia)~~ discriminatory and/or predatory and/or other illegitimate conduct in relation to EWRG's customers

(ii) ~~(iv)~~ the exclusion of EWRG from both Recolight's invitation to tender ("ITT") business and the distribution of *ad hoc* business;

(iii) ~~(v)~~ a refusal to deal with EWRG in relation to EWRG's existing arrangements with its customers;

(iv) ~~(vi)~~ exaggeration of the magnitude and significance of temporary deficiencies in the operation of the EWRG plants at Harlow and Glasgow;

(v) misappropriating containers belonging to EWRG, including the lamp waste contents, and failing to pay charges for containers leased by EWRG to Recolight, since September 2010: see the counterclaim in (consolidated) claim HC11C00495.

(vii) greatly delayed payment of sums due to EWRG, on slender or specious grounds.

(i) imposition of discriminatory costly requirements

85. In early 2007, Recolight informed EWRG that the company that would win most business in its ITT process would need to have on-board weighing facilities and PDAs so that it could notify Recolight immediately of a collection. In response EWRG spent £134,000 on fleet extras. This was not required of or provided by other recyclers.

86. Recolight required EWRG to tender on the basis of a single price for handling mixed lamp waste. Another recycler, Wiser, was allowed to charge extra fees direct to Recolight's customers for the removal of tape and packaging and in respect of shatterproof lamps, HID lamps and sodium lamps.

87. EWRG was paid a lower price for waste consignment notes than Recolight paid to other recyclers.

88. EWRG was paid less for container rentals than Recolight paid to other recyclers.

89. Each of these obligations imposed on EWRG was unfair and/or discriminatory.

(ii) aggressive downward negotiation of prices

90. With effect from July 2007, prices were agreed between Recolight and EWRG of £600 per tonne for treatment plus transport costs in respect of its ITT business and £1500 per tonne, with reductions for volume, in respect of EWRG's existing business arrangement. A flat rate was also agreed of £600 per tonne in respect of Recyclers Collection Points, i.e. containers at EWRG sites where customers could deposit waste lamps.

91. Since then, Recolight aggressively sought to push prices downwards. In May 2008 the rate for existing business was reduced to a flat rate of £1100 per tonne and pressure was applied to reduce the rate to £900 per tonne, when in fact higher rates were being paid to other recyclers.

92. Recolight has further during 2009 sought unilaterally and in breach of contract to categorise all collections of less than 200 kg in weight as "Recyclers Collection Point" business paid at £513 *per* tonne for treatment and without any contribution for transport instead of categorising it correctly as "Existing Arrangements" business payable at £1100 *per* tonne for collection and treatment. There is no contractual warrant whatsoever for this purported recategorisation, nor any in logic, since transport is inevitably involved in such collections; indeed Recolight are now making discrete payments to haulage contractors to perform precisely the same work of transport for which they seek to pay nothing to EWRG.

93. This constitutes unfair and/or discriminatory behaviour by Recolight.

(iii) disclosure of customer base

94. Recolight insisted on being given information about the identity of EWRG's customers on the ground that it was absolutely necessary for its checking purposes and that it would make no other use of the information. Recolight expressly promised in its letter dated 25 June 2007 to EWRG that it would treat such information "on a strictly confidential basis."

94A. At a meeting on 29 May 2007 between Recolight (Alex Hawkins and Frank de Leeuw) and EWRG (Keith Patterson) Recolight further orally agreed that in the event (which shortly thereafter occurred) that Recolight and EWRG entered into an agreement in relation to Existing Arrangements business then Recolight would not enter into any conflicting direct arrangements with such customers during such periods. Recolight (Alex Hawkins) confirmed that agreement in writing by an e-mail to EWRG (Keith Patterson) dated 30 May 2007 0737.

94B. In its Invitation To Tender sent to EWRG on 10 November 2008 Recolight further expressly promised at clause 1.18:

> "Without prejudice to any legal obligation, the parties undertake not to reveal any information to third parties that is contained in the agreement, or any information exchanged between them during the period of the agreement. In the case of information expressly indicated to be confidential by one of the parties, these undertakings remains valid for 10 years following the ending or cancellation of the agreement. Except with the recycler's written consent, Recolight undertakes to use confidential information provided by the recycler solely for the purpose of performing its legal obligations e.g. to report. The parties are legally responsible

for the consequences should any of their employees violate this confidentiality undertaking."

94C. In consideration of and/or in reliance upon the above-mentioned promises and assurances EWRG entered into agreements with Recolight and provided information in the circumstances more particularly described at paragraph 80 of the reply.

94D. In the premises, Recolight:

(1) expressly promised orally and in writing that Recolight would not enter into direct arrangements with EWRG's Existing Arrangements customers as pleaded at paragraph 94A above;

(2) expressly orally promised not to make any approach to any customer of EWRG whose identity was revealed by EWRG to Recolight, in the circumstances pleaded at paragraph 80(7)(b) of the reply;

(3) expressly promised in writing not to use customer information for any purpose other than the fulfilment of Recolight's own legal obligations, as pleaded at paragraph 94B above;

(4) became under a general duty in equity not to take unfair advantage of customer information provided by EWRG in the above circumstances.

94E. In breach of the above-mentioned promises and obligations, Recolight has entered into agreements or arrangements with EWRG's Existing Arrangements customers and/or has used the information provided by EWRG to make approaches to customers of EWRG and has thereby used the information provided by EWRG to its unfair advantage.

PARTICULARS OF CUSTOMERS

Prior to further disclosure the best particulars that EWRG can provide are as follows:

- Amey Roads
- ASDA / City Facilities Management
- Ashfield Supplies Limited
- Aurora Ltd.
- Birmingham International Airport Limited
- Blue Water Management Suite
- Bolton MBC
- De Montfort University
- Dumfries and Galloway Council
- East Riding of Yorkshire
- Electric Centre
- Environmental Storage Solutions
- Foreman Recycling
- Harlite Installations
- Kemps Neon
- Lampforce
- Medlock Electrical
- Merson Signs
- Mews
- Mico Lighting Ltd.
- Planned Lighting Maintenance
- Quicklight
- SEC
- Strathclyde University
- Tayside Contract
- TEP Electrical Distributors Ltd.
- Thorn Lighting
- Tom White Waste
- Trafford MBC
- WEEEcycled UK Ltd.
- Whitefriars Housing
- William Wilson

~~(iiia)~~

(i) discriminatory and/or predatory and/or other illegitimate conduct in relation to EWRG's customers

95. ~~Recolight has since actively approached EWRG's customers offering to match any service that EWRG is providing~~. ~~Further or alternatively,~~ Recolight has engaged in discriminatory and/or predatory and/or other illegitimate conduct in relation to EWRG by selectively targeting actual or potential customers of EWRG. It has selectively offered special deals and inducements in order to match or beat any arrangement with EWRG, with the strategic purpose and/or the effect of starving EWRG of income.

PARTICULARS

96. Recolight has in particular so conducted itself in relation to the Rexel group of companies ("Rexel") with whom EWRG has, to Recolight's knowledge, a fixed term agreement for the collection and treatment of WEEE including lamp waste.

96A. Until 1 June 2009, Mercury Recycling Limited ("Mercury"), a waste recycler, was servicing the Rexel business. During that time, Recolight paid Mercury for the consignment (or evidence) notes that arose in relation to the Rexel business. When Rexel was re-tendering this business, Recolight agreed with Rexel to fund whichever recycler Rexel ~~choose~~ chose to engage. EWRG won the Rexel contract on 8 January 2009, to take effect from 1 June 2009. Since then (and despite its earlier assurances as to a non-discriminatory funding policy), Recolight has refused to pay EWRG anything for the Rexel arisings.

96B. Recolight ~~has further~~ offered during July 2009 to provide to Rexel either free containers or a contribution of £20 per month for each of Rexel's own containers or to purchase any containers owned by Rexel group companies on a net book value basis with payment in full being made during that financial year in an endeavour to induce Rexel to break its contractual relationship with EWRG or at any rate not to renew it. Overall, Recolight offered Rexel a commitment to match any arrangement in place with EWRG, and put forward an offer which consciously closely followed the outline of Rexel's contract with EWRG as far as possible. Recolight even offered, on top of its offer to match EWRG, to give cash for marketing support to the Rexel group, to the value of £100,000 during 2010. This had no connection at all with the subject-matter of the proposed commercial

arrangement with Rexel. Its only purpose and/or function was to serve as an inducement to Rexel to switch its business away from EWRG.

96C. Further still:

(1) in early January 2011, Mercury Recycling carried out a free of charge collection for a Rexel branch in Surrey, which was under contract with EWRG;

(2) on or around 19 January 2011, Recolight funded the Rexel arisings collected by Mercury Recycling, whilst at the same time maintaining its policy vis-à-vis EWRG that it would not fund collections at Rexel made by EWRG.

Recolight was fully aware that EWRG had a contract with Rexel.

96D. In the premises, Recolight has evinced a clear willingness to fund third parties to collect Rexel lamp waste (and has in fact done so), in breach of Rexel's contract with EWRG, whilst refusing to pay EWRG for waste from the same customer collected pursuant to a lawful contract.

97. Recolight has also approached the wholesalers Edmundsons Electrical Limited ("Edmundsons") with whom EWRG also has, to Recolight's knowledge, a fixed term agreement for the collection and treatment of WEEE including lamp waste. Recolight has told Edmundsons that Recolight will not pay for or contribute towards the cost of collections by EWRG but will give Edmundsons "anything they [EWRG] can give you" provided that Edmundsons' waste is collected by any recycler other than EWRG. Recolight stated that it was ready to discuss providing a "like for like service" to Edmundsons.

97A. Recolight's selective targeting of customers of EWRG appears to have extended beyond the Rexel and Edmundsons accounts. One of the distinctive characteristics of EWRG's service offering has consistently been that it has been prepared to make small collections of lamps from customers (i.e., generally less than 200 kilograms). In June 2009, Recolight started offering a service of small collections for customers (pursuant to which service it would treat the waste so collected without making any charge), whereas Recolight refused to pay EWRG for the treatment of any waste so collected from its customers.

98. ~~Such~~ Recolight's selective targeting of customers of EWRG ~~behaviour~~ is discriminatory, predatory and/or otherwise unfair and is designed to destroy EWRG's direct business arrangements with its existing customers with a view to Recolight taking that business and placing it out to its chosen recycler. It amounts to an abusive and discriminatory and/or otherwise illegitimate boycott against EWRG, motivated by Recolight's concerns as set out at paragraph 74(5) above, and/or its desire to remove or marginalise EWRG as an independent recycler from the market(s) and to ensure that EWRG remains in the market(s), if at all, as a supplier of services to Recolight (via tender or *ad hoc* business) and not as a direct competitor.

~~**(iv)**~~

(ii) exclusion of EWRG from ITT and *ad hoc* business

99. Recolight divided the United Kingdom into twenty regions for ITT purposes.

100. With effect from July 2007, EWRG successfully tendered for 9 of these regions. However, in three cases the contract was only for 6 months, and in all others only for 18 months.

101. By the beginning of 2009, EWRG only had contracts for four regions and these were stated to continue only until June 2009.

102. EWRG was awarded two Scottish regions for ITT business, but even there Recolight is awarding valuable ad hoc business to other recyclers and is not offering this business to EWRG. Further, unlike other recyclers, EWRG has no automated link to ITT collection sites. Requests by customers for collections are made to Recolight directly and in breach of agreement collections from those sites are allocated to other recyclers and not to EWRG.

103. The result is that, since June 2009, EWRG has been effectively cut out from all of Recolight's ITT business in England and Wales and is discriminated against in Scotland.

104. This treatment is unfair and/or discriminatory.

104AA. First, the decision not to award EWRG any tender regions after June 2009 (and to remove the four regions that EWRG had hitherto served) had no

good justification and was in fact taken pursuant to the wider abusive strategy of marginalising and excluding EWRG from business, described at paragraphs 74(3) and 74(5) above.

104A. Second, the decision not to award EWRG any *ad hoc* business from around April 2009 was taken pursuant to the abusive strategy of depriving EWRG of income that would permit it to provide attractive terms of service provision to major electrical wholesalers. In the circumstances particularised at paragraph 83 of the reply, at around the beginning of 2009 Recolight (Eddie Taylor) expressly orally agreed with EWRG (Keith Patterson and Alan Jackson) that it would nominate EWRG to collect all *ad hoc* business coming onto Recolight. In March 2009, Mr. Hawkins of Recolight assured Mr. Patterson of EWRG that EWRG would receive all *ad hoc* business coming onto Recolight for a quarter year, followed by a review. EWRG has since received ~~not one single~~ virtually no *ad hoc* ~~job~~ jobs (notwithstanding that Recolight itself estimated that the volume of *ad hoc* collections that would be needed in only four tender regions (8, 10, 11 and 14) would be equivalent to the full demands of a small to medium tender region). There were merely two jobs given to EWRG in Scotland in May 2010. This was only a few weeks after, and likely prompted by, the Claimants' Reply.

~~**(v)**~~

(iii) refusal to deal on existing business

105. EWRG has entered into contractual arrangements with wholesalers and other waste lamp creators on terms that EWRG will take away and treat their waste lamps and that of their trade customers free of charge in the reasonable expectation that Recolight would purchase the resulting evidence, at least at fair market rates, in order to discharge its responsibilities and those of its members under the WEEE Regulations.

105A. Recolight has abused its dominance by refusing to purchase evidence notes from EWRG since mid 2009:

(a) Recolight is obliged, under Regulation 23 of the WEEE Regulations, to finance the collection, treatment, recovery and disposal of waste for which its members are responsible under Regulation 9(1)(a) and (b).

(b) On the face of Regulation 9(1)(a), in particular, Recolight's members must finance the costs of dealing with waste lamps which were put on the market by them on or after 13 August 2005 (i.e., now more than 6 years ago).

(c) Within the second half of the 2009 compliance period, and in the 2010 and 2011 compliance periods, EWRG has been collecting and treating large quantities of waste lamps produced by the First to Fourth Defendants, who account for the vast majority of all new lamps placed on the market in the United Kingdom over the last 6 years at least.

(d) Under the WEEE Regulations, these are waste lamps for which Recolight's members are directly responsible under Regulation 9(1), and therefore, by extension, for which Recolight itself is directly responsible under Regulation 23.

(e) Recolight accordingly has a duty to finance the costs for which each of its scheme members are responsible. It has failed in its obligation under Regulation 23 by its continuing refusal to finance - on any terms - the collection and treatment operations which have been carried out by EWRG in relation to the waste lamps of the First to Fourth Defendants.

(f) The continuing breach of Recolight's duties under the WEEE Regulations is causing EWRG severe harm, since Recolight is an indispensable trading partner for the purposes of financing EWRG's business activities in the collection and treatment of waste lamps in the United Kingdom. The continuing refusal by Recolight to finance EWRG's functions in collecting and treating the waste lamps of Recolight's producer members is not sustainable.

(g) Recolight's conduct has been and is a breach of its duty to EWRG under Art. 102 TFEU and/or section 18 of the Competition Act 1998. Its purpose and/or ultimate effect is to weaken EWRG and/or force EWRG out of business, as referred to at paragraph 74 above and thereby to reduce competition in the collection and treatment of waste lamps in the UK. The termination of existing arrangements business at the beginning of July 2009 with EWRG in particular brought to an end (and was designed to bring to an end) arrangements which Recolight considered were assisting

EWRG to provide a free of charge lamp, general WEEE, and battery collection service to Edmundsons, Newey & Eyre, Senate and WF Electrical, and thereby to enable EWRG to secure the business of those electrical wholesalers.

(h) Recolight has breached a duty to finance EWRG's activities at least at the level which Recolight pays to other recycling companies for evidence notes.

105B. Recolight cannot objectively justify its refusal to deal on the basis of health and safety and environmental concerns relating to EWRG's treatment activities. These are not proper objective justifications since:

(a) Recolight has continued to purchase evidence notes for household waste from EWRG, without interruption, throughout 2009 up to November 2011. This includes treatment using all three plants at Harlow, Glasgow and Huddersfield, for material periods and including 2011.

(b) Recolight has, until the end of 2010, used EWRG's services without demur in relation to the treatment of waste lamps at the Glasgow plant, under the tender contract arrangements.

(c) The First Defendant has continued to use EWRG for the collection and treatment of their waste lamps which have not been placed on the market.

(d) The Fourth Defendant has continued to use EWRG for collecting and treating lamps on which it has paid a recycling charge to Recolight, and on terms that payment for EWRG's services is settled by the compliance scheme.

(e) EWRG has in 2011 reluctantly submitted to the audit upon which Recolight insists for its Harlow and Glasgow plants. The Glasgow plant was found to be "satisfactory" and to meet its minimum requirements in all respects. The Harlow plant was found to be satisfactory in all respects save one minor point, namely that the plant's PPC permit, issued on 22 November 2005, requires certain progressive improvements be made, and the auditors considered it a "major deficiency" that these had not been made - notwithstanding the Environment Agency has not, in six years,

expressed any concern on this point, nor indeed was it a matter of concern to Recolight in 2007-2009.

(f) EWRG's activities have, moreover, also been subject to audits conducted by the wholesalers who contract with it, in pursuance of their obligations under sections 33 and 34 of the Environmental Protection Act 1990, the Environmental Protection (Duty of Care) Regulations 1991 and the Hazardous Waste (England and Wales) Regulations 2005, which ought to be considered equivalent guarantees to an audit by Recolight for these purposes.

(g) By reason of the aforesaid, Recolight's refusal to purchase evidence notes has not been justified even by reference to Recolight's own "audit" arrangements, which it has decided to overlay on top of the general regulatory arrangements by the public authorities.

(h) In this connection, the Claimants also refer to and rely on the matters set out at paragraphs 113 to 116 below, under the heading "Temporary deficiencies at Harlow and Glasgow plants".

(i) Further and in any event, a dominant undertaking cannot justify its abusive refusals to deal by claiming that the behaviour is intended to enforce or enhance regulatory standards. This is a matter for the competent public authorities, not the dominant undertaking.

105C. Apart from a few days at the end of 2008 when the Environment Agency suspended EWRG's approval as an Approved Authorised Treatment Facility, EWRG has operated Approved Authorised Treatment Facilities with which Recolight should have been prepared to deal, on fair terms.

~~106. The Big Four charge these wholesalers the "recycling charge" on the sale of new lamps so that wholesalers legitimately do not expect to have to pay twice for the service.~~

~~107. In the case of Rexel Senate which EWRG acquired as a new direct customer in January 2009, Recolight has refused to pay EWRG for this service.~~

~~108. Recolight is actively seeking to encourage Rexel Senate to return to Recolight for its recovery and recycling services.~~

~~109. Recolight has from the outset of its dealings with EWRG refused to pay for or make any contribution towards the collection or treatment of waste lamps arising *via* CEF. This is so despite the fact that CEF has since 1 July 2007 paid to Recolight scheme members as "recycling charges" approximately £500,000, for which it has in these circumstances received no value whatsoever.~~

~~110. Recolight has adopted a similar stance in relation to waste lamps arising *via* the wholesaler Hagemeyer.~~

111. Further, Recolight has maintained this stance even in respect of 3 transactions on 30 April ~~2008~~ 2009 in which it in fact agreed contractually to acquire from EWRG paper evidence relating to approximately 335 tonnes of lamp waste which to its knowledge had arisen *via* CEF and/or Hagemeyer branches at a total price of ~~approximately £400,000~~ £411,596.21.

PARTICULARS

Huddersfield	£ 66,636.35
Harlow	£231,442.75
Glasgow	£ 59,830.65
	£359,909.75
VAT @ 15%	£ 53,686.46
	£411,596.21

EWRG provided the evidence to Recolight and Recolight used the evidence as part of its annual returns to the Environment Agency pursuant to the Regulations. Recolight has nevertheless invoked the provenance of the waste as a ground for withholding from EWRG all payment in respect of these transactions. ~~Recolight has further falsely informed Rexel Group (of which Hagemeyer is a part) that it has paid EWRG in respect of all collections made by EWRG from Hagemeyer.~~

111A. EWRG is accordingly entitled to the sum of £411,596.21 together with interest thereon pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 at the rate of 8.5% *per annum* amounting from 1 September 2009 to 23 December 2009 (the date of issue of these proceedings) to the sum of £10,927.03 and accruing thereafter at the daily rate of £95.85. Alternatively EWRG claims interest at the same rate and in the same amount pursuant to section 35A of the Supreme Court Act 1981.

111B. EWRG is further entitled in respect of the 3 above-mentioned transactions to compensation in the fixed sum of £100 *per* transaction pursuant to section 5A of the Late Payment of Commercial Debts (Interest) Act 1998, in the total sum of £300.

111C. In the circumstances more particularly described at paragraphs 70 to 73 of the reply, on 3 July 2009 Recolight terminated altogether any support of any of the Existing Arrangements business of EWRG and has since refused to purchase from EWRG any evidence arising out of such business at any price.

112. Recolight's behaviour in this respect is unfair. It is also discriminatory as it continues to engage with other recyclers in respect of direct existing customers business. In the premises, it amounts to an abuse of dominance. In relation to the three transactions on 30 April 2009, Recolight's behaviour is also in breach of contract.

~~(vi)~~

(iv) temporary deficiencies at Harlow and Glasgow plants

113. EWRG has three plants at Harlow, Huddersfield and Glasgow. Each is a state-of-the-art treatment plant for all types of waste lamps and is authorised under the WEEE Regulations as a treatment facility. Huddersfield is also a plant for treatment of all types of WEEE.

114. During 2008 and 2009 Recolight expressed concerns about the environmental audits that it carried out at the Harlow and Glasgow plants. On 26 June 2009, it used this as an excuse to withhold and withdraw business from EWRG in respect of the Harlow plant. In particular, Recolight purported to rely on an audit of the Harlow plant which had taken place on 25 June 2009. It had in fact decided to withdraw and withhold business in respect of that plant before the audit had taken place, as shown by an email sent at 8.32am on 25 June 2009 from Nigel Harvey to Alex Hawkins. The email set out the draft of a letter to be sent to EWRG subsequently, stating: *"Following the results of the audit of your Harlow facility yesterday, and of an internal review of the performance of your company, we have concluded that Lampcare has failed to implement the operational and other changes we need...."* On 16 October 2009, it raised concerns regarding the Harlow plant specifying numerous matters that needed to be addressed before it was able to consider that facility for use in the treatment of waste lamps. Such a stance is specious, since (a) (as Recolight well knew) EWRG was perfectly

capable if necessary of continuing to treat all waste lamps at its Glasgow plant alone – a process with which Recolight was manifestly content since it had in June 2009 appointed EWRG to service Recolight's Scottish regional business in the knowledge of the results of the November 2008 audit of the Glasgow plant; and (b) in view of the matters set out at paragraph 105B above.

115. In the result, Recolight has since July 2009 denied EWRG all business save that in Scotland, an area which is relatively expensive and unpopular to service because of large transport costs and the relatively small magnitude of business to be had. The overall result, as Recolight well foresaw and intended, is that EWRG has changed from a position of market leader to seeing its business languish in a growing market.

116. Recolight's behaviour in this respect toward EWRG is unfair and unwarranted in the circumstances. Moreover, it is discriminatory in that other recyclers contracted by Recolight are engaged without any similar plant and, indeed, some merely crush the lamps on site, with all the inherent dangers ranging from broken glass to escape of mercury vapour.

(v) Misappropriating containers and their valuable contents belonging to EWRG, and failing to pay charges for containers leased by EWRG to Recolight, since September 2010

116A. Since September 2010, Recolight has misappropriated containers belonging to EWRG (including the lamp waste contents), and has failed to pay charges for containers leased by EWRG to Recolight: see paragraphs 46 - 70 of the counterclaim in Claim HC11C00495. This conduct has contributed to damaging EWRG commercially. It is averred that the motivation for this conduct is the matters set out at paragraph 74(5) above.

~~**(vii) delayed payment of sums due**~~

~~117. During 2007, Recolight told EWRG that, in view of the volume of business, it required consolidated invoicing. Recolight additionally required EWRG to provide at its own considerable expense a financial audit of its business invoiced to Recolight. Recolight have since declined to pay any part of extremely large invoices until every single query has been resolved even though it was in respect of a small value and despite EWRG's quick response to all queries.~~

~~118. By mid-March 2008 unpaid invoices amounted to approximately £865,000, causing EWRG significant cash-flow problems. Other recyclers are subject by Recolight to only a small selection of auditing on a random basis. In May of 2009 unpaid invoices totalled approximately £800,000 (including the disputed transactions referred to at paragraph 111 above).~~

~~119. Such behaviour is unfair and/or discriminatory.~~

INFRINGEMENT OF ARTICLE 101 TFEU / CHAPTER 1 OF THE COMPETITION ACT 1998: AGREEMENT BETWEEN THE FIRST TO FOURTH DEFENDANTS AND RECOLIGHT TO TAKE STEPS TO WEAKEN AND EXCLUDE EWRG

119. Further or alternatively to the case on abuse of dominance set out at paragraphs 74 to 118 above, the conduct of Recolight was the result of an unlawful agreement between the First to Fourth Defendants and Recolight, contrary to Article 101 TFEU and/or section 2 of the Competition Act 1998.

~~INFRINGEMENT OF ARTICLE 82 EC/SECTION 18 OF THE COMPETITION ACT 1998; RECOLIGHT'S ABUSIVE DEALINGS WITH CEF~~

~~119A. On 7 March 2007 in the factual circumstances more particularly set out in paragraph 46 of the reply (and in terms admitted in paragraph 72(a) of the defence and paragraph 8.1 of the rejoinder) Recolight refused to include CEF branches in its Recolight Network of its collections because CEF insisted that those collections should be made by EWRG and subject to prior satisfaction of CEF's obligations under the Regulations.~~

~~119B. This constituted an abuse by Recolight of its above-mentioned dominant position alternatively an abuse by Recolight and/or the First to Fourth Defendants of their above-mentioned position of joint dominance.~~

~~119C. By reason of the above, CEF has suffered and/or will suffer loss and damage in the manner set out in Item 2 of Part 2 of the Claimants' Amended Schedule of Loss annexed hereto.~~

RECOLIGHT'S DECISION TO COLLECT ONLY LAMPS MANUFACTURED BY ITS MEMBERS

120. In or around July 2009 Recolight ~~has~~ ordered that only waste lamps manufactured by its members should be collected in Recolight containers.

121. This constitutes an abuse of Recolight's dominant position, in particular by limiting production and/or markets to the prejudice of consumers contrary to Article 82(b) EC and section 18(1)(b) of the Competition Act 1998.

~~122. Alternatively this constitutes an abuse of the position of joint dominance held by the First, Second, Third and Fourth Defendants.~~

PARTICULARS OF ABUSE

123. Recolight's members account for approximately ~~85%~~ 90% of the market for lamps in the United Kingdom.

124. In practice, where lamp waste is collected, this is on the occasion of a sale of new lamps, for example, when a building is being refurbished. Lamps have a life span of a few years, at most.

125. In dominating the collection of waste lamps, Recolight is seeking to ensure that only lamps produced by its members will be used in future.

126. It is generally impractical for two or more collection containers to be used at the same time. Recolight's requirement that only its members' lamps be collected would inexorably lead to wholesalers declining to sell other brands and would consequently limit sales of those brands to the prejudice of consumers.

126A. Whilst in or around October 2009 Recolight purported to withdraw its above-mentioned order, it indicated (in its October 2009 newsletter) that it might revisit that decision at the end of 2010. In any event, the mere general statement of an intention to withdraw that order would not of itself ensure that those to whom it was originally directed would either learn of its withdrawal or thereafter act as if the original order had not been given.

127. The Second Claimant, being a producer of Edison lamps, is likely to suffer loss and damage as a result of this breach of Article ~~82 EC~~ 102 TFEU and/or section 18 of the Competition Act 1998.

PARTICULARS

127A. The natural reaction of large purchasers of lamps to the above-mentioned order would be and in fact was to ensure that thereafter they purchased new lamps produced by members of Recolight to avoid potential difficulties of end-of-life collection which might otherwise arise.

127B. Wholesalers of lamps were aware of the above-mentioned order and of its impact upon the views of purchasers and in turn would and in fact did manifest a preference thereafter to stock lamps produced by members of Recolight.

127C. The Second Claimant is unable to identify or quantify any resulting actual loss or damage to itself to date and accordingly does not pursue any claim in respect thereof. ~~The~~ Given Recolight's indication that it might revisit this issue the Second Claimant does however seek declaratory relief as to future conduct in the terms set out in the prayer for relief below.

127D. Further or alternatively the fact of such conduct is material to and probative of the allegation of abuse of a dominant position by Recolight. ~~and/or the First, Second, Third and Fourth Defendants.~~

127E. The Second Claimant's case is that the immediate occasion for the above-mentioned order was the withdrawal by the company Megaman Limited from its membership of the Recolight scheme; indeed Recolight's July 2009 newsletter gave the above-mentioned order in the following terms:

> **"Check which lamps you are collecting!**
>
> Please be aware that Megaman has chosen to opt out of the Recolight compliance scheme and is no longer a member. Therefore it is crucial that you ensure you are not collecting or accepting lamps for collection which are not covered by our scheme. For a full list of members, which includes all the big lamp producers, Philips, GE, Osram and Sylvannia *[sic]* please see our website ....."

127F. As already pleaded (see paragraphs 12 and 25(3) of the reply) Megaman had during its membership protested at the conduct of Recolight in terms similar to some of the complaints of the Second Claimant herein. The conduct of Recolight upon Megaman's withdrawal from membership:

(a) relied upon the dominant position occupied by Recolight ~~and/or the First to Fourth Defendants~~ and was an abuse of it and is thus probative of the propensity of the ~~Defendants~~ Fifth Defendant to act in such a way;

(b) directly affected the Second Claimant and indeed all other producers of lamps who were not members of the Recolight scheme, since the terms of the above-mentioned order were wide enough to embrace all of them.

NO OBJECTIVE JUSTIFICATION FOR ABUSIVE BEHAVIOUR

128. While the issue of objective justification is for the Defendants to raise and prove, the Claimants aver that there is no objective or proportionate justification for such actions as described above.

129. On the contrary, the reasons for the action taken by Recolight are as set out in paragraph 74(5) above. ~~in order to permit Recolight to take full control of the market in recycling waste lamps in the United Kingdom. Recolight has attacked EWRG as described above primarily because EWRG has sought to maintain and expand its business directly with wholesalers, in particular the new direct arrangements with Rexel Senate.~~

~~130. Further, or in the alternative, Recolight's actions in so far as they concern the collection of lamps other than those produced by Recolight's members are intended to allow Recolight's members, in particular the First, Second, Third and Fourth Defendants, to increase even further their share of the lamp market in the United Kingdom.~~

EFFECT ON TRADE

131. The conduct outlined above, on the part of each of the Defendants, has an appreciable effect on trade between Member States of the European Union for the purposes of Articles 101 and 102 TFEU ~~81 and 82 of the EC Treaty~~.

132. Lamps are mostly manufactured in the Far East, but there remains some manufacturing with the European Union, including in Poland and Hungary and some Scandinavian countries. Lamps manufactured in the Far East are generally generic and are branded only after production with the name of a particular producer. Moreover, the distribution of lamps takes place across borders within the European Union.

133. Waste lamps disposed of in the United Kingdom may be and are sent to the other Member States for recycling.

134. Further or alternatively, the conduct outlined above has an effect on trade in the United Kingdom for the purposes of sections 2 and 18 of the Competition Act 1998.

TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

135. In so far as any of the alleged infringements of Article 81 EC or Article 82 EC continue on or after 1 December 2009, references in these Particulars of Claim to Article 81 EC and Article 82 EC are to be read as referring to Article 101 and Article 102 respectively of the Treaty on the Functioning of the European Union.

CLAIMANTS' LOSS AND DAMAGE

136. As a result of the infringements of Articles 101 and 102 TFEU ~~81 and 82 EC~~ and/or Sections 2 and 18 of the Competition Act 1998, the Claimants have suffered loss, for which they claim damages. ~~The Claimants intend to provide full particulars of loss (which is continuing) in due course~~. The Claimants rely upon the Re-Amended Schedule of Loss annexed hereto, which relates to heads of damages rather than debt.

~~136A. For the avoidance of doubt, the Claimants contend that, further or in the alternative to the more specific aspects of abuse pleaded above, the following items of loss claimed in the Amended Schedule of Loss were also caused by the general modus operandi of Recolight in further infringement of Article 82 EC/Article 102 TFEU:~~

~~**PARTICULARS**~~

~~**Part 1- Losses of EWRG**~~

~~Item 8 Loss of Container Rental Business~~

~~Item 9 Poaching of Customers~~
~~(in those instances, if any, where the loss of the customer was caused not by reason of any of the matters complained of at paragraph 94E above but simply by Recolight's general ability to defeat all competition in the market).~~

137. The Claimants further claim interest pursuant to section 35A of the ~~Supreme Court~~ Senior Courts Act 1981 on such damages as way be awarded at such rate and for such period as the Court deems fit.

EWRG CLAIM IN DEBT RE APRIL 2009 TENDER ACCOUNT

137A. In respect of the April 2009 tender account Recolight has withheld from EWRG the sum of £6,489.08 on the false ground that an agreed rate reduction was operative from 1 April 2009 rather than (as orally agreed between Alan Jackson of EWRG and Eddie Taylor of Recolight) 1 May 2009.

137B. EWRG is accordingly entitled to the sum of £6,489.08 together with interest thereon pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 at the rate of 8.5% *per annum* amounting from 1 June 2009 to 23 December 2009 (the date of issue of these proceedings) to the sum of £311.29 and accruing thereafter at the daily rate of £1.51. Alternatively EWRG claims interest at the same rate and in the same amount pursuant to section 35A of the Supreme Court Act 1981.

137C. EWRG is further entitled in respect of the above-mentioned transaction to compensation in the fixed sum of £100 pursuant to section 5A of the Late Payment of Commercial Debts (Interest) Act 1998.

138. The Claimants have complied with Sections III and IV of the Practice Direction - Pre-Action Conduct by an exchange of correspondence between their solicitors and those acting for the Defendants comprising a letter dated 23 October 2009 from the Claimants' solicitors, a reply dated 10 November 2009 from the

Defendants' solicitors and a response dated 15 December 2009. The Claimants' invitations therein to the Defendants to enter into discussions have not been the subject of any reply and the Defendants have made an outright rejection of the Claimants' claims.

AND THE CLAIMANTS CLAIM

(1) A declaration that the arrangement whereby the First, Second, Third and Fourth Defendants procure their PCS services in respect of waste lamps in common and at a uniform and agreed charge per lamp by means of Recolight ~~the same fee to their customers as a "recycling charge" on the occasion of the sale of new lamps and pass the proceeds of that charge on to Recolight~~ constitutes an agreement between undertakings ~~or a concerted practice or a decision of an association of undertakings~~ which prevents, restricts or distorts competition within the meaning of Article 81 of the EC Treaty and, after 1 December 2009, Article 101 of the Treaty on the Functioning of the European Union and ~~Chapter I~~ section 2 of the Competition Act 1998 ~~and is, accordingly, prohibited~~ and is accordingly prohibited, since it has resulted and continues to result in a situation whereby major lamp producers in the United Kingdom avoid competing with each other in respect of a significant element of their respective costs of supply of lamps, thereby raising prices to customers and consumers.

(2) A declaration that the arrangement whereby the First, Second, Third and Fourth Defendants charge the same fee to their customers as a "recycling charge" on the occasion of the sale of new lamps constitutes an agreement between undertakings, or a concerted practice which prevents, restricts or distorts competition within the meaning of Article 81 of the EC Treaty and, after 1 December 2009, Article 101 of the Treaty on the Functioning of the European Union and Chapter I Section 2 of the Competition Act 1998.

~~(2)~~

(3) An injunction requiring Recolight to treat EWRG fairly and in a non-discriminatory manner in the award of contracts for the ~~recovery and recycling~~ collection and treatment of waste lamps.

(4) A declaration that Recolight is

1. required by the WEEE Regulations to finance the collection and treatment by EWRG of relevant waste lamps of the First to Fourth Defendants arising as referred to in regulation 9 of the WEEE Regulations; and

2. under a duty pursuant to section 18 of the Competition Act 1998 and/or Article 102 TFEU, as the dominant purchaser of collection and/or treatment services in the UK for waste lamps, to treat EWRG fairly and in a non-discriminatory manner in relation to the purchase of evidence notes relating to the collection and treatment by EWRG of waste lamps.

~~(3) An injunction requiring Recolight to accept and pay for the recovery and recycling of waste lamps regardless of their producer.~~

(4A) Damages on behalf of the First Claimant, to be assessed, together with interest thereon pursuant to section 35A of the Senior Courts Act 1981

~~(4)~~

(5) ~~An order for repayment by the First, Second, Third and Fourth Defendants, respectively, to CEF of the sums particularised in Schedule 1 hereto~~ Damages on behalf of the Second Claimant, to be assessed together with interest thereon pursuant to section 35A of the ~~Supreme Court~~ Senior Courts Act 1981.

~~(5) A declaration that each of the First, Second, Third and Fourth Defendants is obliged to continue to make supplies of lamps to CEF on normal trading terms and at normal prices but without the requirement that CEF should pay any additional "recycling charge" referable to the WEEE Regulations.~~

(5A) A declaration that the repromulgation by Recolight of an order that only waste lamps produced by its members should be collected in its containers would be unlawful as an abuse of dominant position by Recolight contrary to Article 102 TFEU and section 18 of the Competition Act 1998 ~~and/or the First to Fourth Defendants.~~

(5B) under paragraph 111A above the sum of £411,596.21 with interest of £10,927.03 to the date of issue of these proceedings and accruing thereafter at the daily rate of £95.85 until judgment or sooner payment

(5C) under paragraph 111B above the sum of £300;

(5D) under paragraph 137B above the sum of £6,489.08 with interest of £311.29 to the date of issue of these proceedings and accruing thereafter at the daily rate of £95.85 until judgment or sooner payment

(5C) under paragraph 137C above the sum of £100;

~~(6) Damages to be assessed.~~
~~(7) Interest.~~
(8) Costs.
(9) Further or other relief

CONOR QUIGLEY Q.C.
CHARLES MORGAN

CONOR QUIGLEY Q.C
CHARLES MORGAN

CONOR QUIGLEY Q.C
CHARLES MORGAN
ROBERT O'DONOGHUE

JON TURNER Q.C.
CHARLES MORGAN
ROBERT O'DONOGHUE

~~Dated the 4th day of August 2010~~

~~Dated the 4th day of March 2011~~

Dated the 22nd day of December 2011

Paul Dodds Solicitors 70 High Street East Wallsend Tyne & Wear NE28 7RH
Solicitors for the Claimants

Statement of truth

The First Claimant believes that the facts stated in these re-amended particulars of claim are true.

Signed ……

Name ……

Position ……

Dated ……

The Second Claimant believes that the facts stated in these re-amended particulars of claim are true.

Signed ……

Name ……

Position ……

Dated ……

SCHEDULE 1

SUMS PAID BY CEF TO THE BIG FOUR AS RECYCLING CHARGES ON LAMPS AND LUMINAIRES

Between 1 July 2007 and ~~30 September 2009~~ 31 December 2010 the sums paid by CEF to each of the Big Four as "recycling charges" levied on the sale of new lamps was as follows:

Philips Electronics UK Ltd.	~~£11,848.02~~	£22,682.95
GE Lighting Ltd.	~~£72,444.40~~	£107,650.64
Osram Ltd.	~~£75,937.14~~	£103,212.69
Havells Sylvania UK Ltd.	~~£240,853.20~~	£272,520.95

~~Between 1 July 2007 and 30 September 2009 the further sums paid by CEF to the Fourth Defendant as "recycling charges" levied on the sale of new luminaires was £147,362.87.~~

CEF has continued since 1st October 2009 to make similar payments of "recycling charges" on purchases of new lamps and luminaires from each of the Defendants and is still continuing to do so. ~~and will particularise and seek recovery of the further sums paid in due course.~~

Claim No. HC09CO4852

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

BETWEEN:-

(1) ELECTRICAL WASTE RECYCLING GROUP LIMITED

(2) CITY ELECTRICAL FACTORS LIMITED

Claimants

- and –

(1) PHILIPS ELECTRONICS UK LIMITED

(2) GE LIGHTING LIMITED

(3) OSRAM LIMITED

(4) HAVELLS SYLVANIA UK LIMITED

(5) RECOLIGHT LIMITED

Defendants

RE-RE-AMENDED PARTICULARS OF CLAIM

Paul Dodds Solicitors
70 High Street East
Wallsend
Tyne & Wear
NE28 7RH
[ref: DMC 47750]