Neutral Citation Number: [2026] EWHC 2165 (Ch)

Case No: IL-2023-000132

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

Rolls Building
Fetter Lane
London, EC4A 1NL

13 August 2026

Before :

MRS JUSTICE BACON

- -

Between :

(1) ROADGET BUSINESS PTE. LTD
(a company incorporated in Singapore)
(2) SHEIN DISTRIBUTION UK LTD

Claimants

- and -

WHALECO UK LIMITED

Defendant

- -
- -

BENET BRANDRETH KC and **MITCHELL BEEBE** (instructed by **Freshfields LLP**) for the **Claimants**
CHARLOTTE MAY KC, HENRY WARD, HENRY EDWARDS and **AYUSHI AGARWAL** (instructed by **A&O Shearman LLP**) for the **Defendant**

Hearing dates: 11–15 and 20–21 May 2026

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 10:30 am on 13 August 2026 by circulation to the parties or their representatives by email and by release to the National Archives.

MRS JUSTICE BACON:

INTRODUCTION

1. This is the liability trial in a copyright claim brought by the claimants against the defendant. Both are companies within multinational groups competing in the fashion retail sector. The first claimant (**Roadget**) and second claimant (**Shein UK**) form part of a group which operates under the brand name of SHEIN; the defendant operates an online retail platform under the brand name of Temu. I will refer to the parties in this judgment as **Shein** and **Temu**, unless necessary to refer to the claimants individually.

2. Shein alleges that Temu infringed its copyright in various ways contrary to the Copyright, Designs and Patents Act 1988 (the **CDPA**) by using on its UK website www.temu.com/uk photographs of Shein-branded fashion clothing products in which Shein says it owns the copyright. As amended, the claim concerns three categories of photographs for which Shein claims copyright ownership: photographs taken by employees of Guangzhou Shein, photographs supplied by agencies (or freelance photographers), and photographs provided by Shein's suppliers.

3. In total, Shein's claim alleges infringement in relation to 2,559 product listings on Temu's UK site. Of those, Shein says that 2,285 used Shein employee photographs, 263 used supplier photographs and 11 used agency photographs. All the product listings relied on in the claim were notified to Temu for take-down either in Shein's letter before action in June 2023, or under interim injunction orders granted by the court in September 2023 and February 2024 (the **September 2023** and **February 2024 orders**). Those notifications led Temu to remove thousands of product listings from its website.

4. In relation to the supplier and agency works, Temu disputes the basis on which Shein seeks to establish copyright title, and contends that Shein abused the court's process by pursuing claims in relation to photographs when it knew that it did not own the relevant copyrights. More fundamentally, in relation to all categories of photographs, Temu denies that it committed any acts of infringement. In the alternative, if infringement is established, Temu relies on the hosting defence under Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 (the **E-Commerce Regulations**).

5. Temu counterclaims under Shein's cross-undertaking in damages in the September 2023 and February 2024 orders in respect of product listings which it contends were wrongly taken down pursuant to those orders. In addition, it alleges that Shein's conduct infringed both the Chapter I and Chapter II prohibitions in ss. 2 and 18 of the Competition Act 1998. The competition issues have been transferred to the Competition Appeal Tribunal, with the competition liability trial listed to take place in March 2027. Liability under the cross-undertakings in the September 2023 and February 2024 orders is, however, an issue in this trial.

6. The trial was originally listed to be heard in January and February 2026, but was adjourned by consent to May 2026 following the first pre-trial review (**PTR**) in December 2025. There was therefore a second PTR in April 2026 to provide further directions for the adjourned trial.

7. To make the present trial manageable, the liability issues have been tried by reference to a sample of the claim photographs. The original trial sample set consisted of the photographs for 20 product listings, covering employee, supplier and agency works. By the time of the second PTR Shein had abandoned its claims in relation to all the agency works and all but one of the supplier works. The trial therefore proceeded by reference to only five of the original 20 sample product listings: four employee works, and one supplier work referred to as the **Strawberry Nightdress**.

8. During the trial, submissions on behalf of Shein were made by Mr Brandreth KC and Mr Beebe, with cross-examination divided between them. Submissions on behalf of Temu were made by Ms May KC, with Mr Ward dealing with the cross-examination of some of the witnesses, and Mr Edwards and Ms Agarwal assisting as junior counsel. As will be apparent from the remainder of this judgment, the trial raised many very complex issues within a compressed timetable. I am very grateful for the assistance of all the counsel instructed in these proceedings.

THE EVIDENCE

9. As Shein and Temu are both primarily based in the People's Republic of China (**PRC**), many of their factual witnesses provided their witness statements in Chinese, with certified English translations, and gave their oral evidence in Mandarin Chinese, with the assistance of interpreters at the hearing. Temu's PRC law expert, Prof Wang, also provided her written evidence in Chinese and gave her oral evidence in Mandarin Chinese.

10. At the trial, the witnesses and other individuals referred to in the evidence were identified using a mixture of Chinese and Western naming conventions. For consistency, I have adopted the Western naming convention in this judgment, using given names first followed by family names. In some cases, where indicated, witnesses used English given names in addition to their Chinese given names.

Shein's witnesses of fact

11. Shein initially relied on 11 witnesses of fact. Five of these gave evidence for the purposes of establishing Shein's copyright ownership for the four employee works. Following Temu's acceptance of Shein's copyright ownership in those employee works shortly before the trial, the evidence of those witnesses was no longer relevant to the issues for the trial and those witnesses therefore did not need to be cross-examined. The position for the remaining six Shein witnesses was as follows.

12. Huixian Ye, Lingwen Kong and Fang Zhang are senior buyers employed by Guangzhou Shein (another company in the Shein group, described below). Their evidence covered Shein's original design manufacturer (**ODM**) supply channel, the commissioning process for ODM products, photo shoot arrangements, and interactions with photography agencies. Their evidence was not disputed and they were not cross-examined by Temu.

13. Junwei Lin is, together with his brother Junxin Lin (**Junxin**), the person in charge of the supplier for the Strawberry Nightdress, Shantou Jiameiluo Trading Co Ltd (**Jiameiluo**). Mr Lin provided three witness statements (all in Chinese), describing Jiameiluo's business, its relationship with Shein, and the way in which the photographs for the

Strawberry Nightdress were commissioned and obtained from the photographer, Yaqian Chang. He also gave evidence about his relationship with Jiaxin Lin (**Jiaxin**), who operates a Temu store called Sexy Secret, on which the Strawberry Nightdress was listed for sale after it had been delisted on Shein's website. Over the course of his three witness statements, Mr Lin admitted that key parts of his earlier evidence were untrue. In particular, contrary to Mr Lin's initial claim not to know Jiaxin, Jiaxin is in fact Mr Lin's cousin.

14. Mr Lin was cross-examined remotely, giving his evidence entirely in Mandarin Chinese, with the assistance of an interpreter. While he sometimes struggled to understand the questions put to him, it was apparent from his answers that the success of his business relies on Shein, and that this led him to seek to downplay his relationship with Jiaxin and Temu in both his written and oral evidence. Those aspects of his evidence were also inconsistent with the other material before the court. On these points, therefore, I do not regard Mr Lin as a reliable witness. Mr Lin did, however, provide helpful evidence about Shein's business model and the way in which Jiameiluo worked with Shein. That evidence was not challenged and provided useful context for understanding why some Shein products were sold on the Temu platform.

15. Carmen Lin is the Legal Vice President within the supply chain management team in the Shein group. Ms Lin provided three witness statements (all in English), mainly addressing Shein's revised vendor management system. She was cross-examined remotely, with her cross-examination spanning two days. On the first day, she gave her evidence primarily in English, but on the second day she switched to giving her evidence entirely in Mandarin Chinese with the assistance of an interpreter. Her cross-examination addressed not only the creation and roll-out of Shein's new vendor management system, including the new template copyright assignment contracts for suppliers and photographers, but also her role within Shein's supply chain management team, her involvement in preparing take-down notices, and the interviews conducted with suppliers known or thought to be selling on the Temu platform. She initially gave straightforward answers, but when challenged on the purpose of the template copyright assignment letters and Shein's knowledge of its ownership of the relevant copyrights she became evasive, and gave repetitive answers that did not properly engage with the questions put to her. I do not, therefore, consider Ms Lin to be an entirely reliable witness.

16. Yinan Zhu is General Counsel EMEA for Shein, and has overseen this litigation for Shein since the outset. She provided a short witness statement (in English) addressing the initial scope of Shein's claim, the introduction of supplier and agency works into the claim, and Shein's knowledge of the chain of title issues regarding those works. Ms Zhu was cross-examined in person and gave her evidence entirely in English. She struggled to give a coherent justification for Shein's copyright claims in its letter before action, its demands of Temu in that letter, and the introduction of the supplier and agency works into the claim in February 2024, often giving defensive or evasive answers. I do not consider that she was a reliable witness, and treat her evidence with some caution.

Temu's witnesses of fact

17. Temu relied on the evidence of four witnesses of fact: Bell Ouyang, Jensen Xu, Lynn Yuan and Youdi "Andy" Pan. Shein cross-examined all of these save for Andy Pan.

18. Bell Ouyang is a junior member of the Trust & Safety Department at Temu and was the sole employee in charge of handling Shein's complaints in its letter before action. He provided a single witness statement (in Chinese) addressing Temu's notice and take-down procedure and his involvement in handling the LBA complaints. Mr Ouyang was cross-examined remotely and gave his evidence in Mandarin Chinese. He gave measured, careful and consistent answers, careful not to speculate on matters outside his knowledge. I consider that Mr Ouyang was a reliable and helpful witness.

19. Jensen Xu has been the IP Director in the Trust & Safety Department at Temu since October 2024 and is a New York qualified attorney. He provided one witness statement (in Chinese) giving evidence on Temu's merchant agreements, UK IP Policy, notice and take-down process and screening measures. Mr Xu was cross-examined (very briefly) remotely and gave his evidence in Mandarin Chinese. He gave straightforward and clear answers that were consistent with his witness statement, and his evidence was largely unchallenged. I consider that Mr Xu was a reliable witness.

20. Luyan "Lynn" Yuan is a Seller Development Manager at Temu, and is responsible for registering merchants that wish to sell products through Temu, and ongoing relationship management for those merchants. She provided two witness statements (both in Chinese) addressing various aspects of the operation of Temu's UK subpage including product listings, order fulfilment, refunds/returns and sales campaigns. She was cross-examined remotely and gave her evidence in Mandarin Chinese. While some of her evidence concerning the product listing process and the functioning of Temu's site was uncontroversial and not disputed, in relation to the question of Temu's active relationship with its merchants she gave the impression of adherence to a prepared account, and frequently gave evasive or unconvincing answers. Ultimately, I do not consider that Ms Yuan was a particularly reliable or helpful witness on those aspects of her evidence.

21. Youdi "Andy" Pan is a lawyer at Yuanda Partners (a law firm in Shanghai) and was engaged by Temu to undertake factual investigations in relation to the Strawberry Nightdress, on which he gave evidence in three witness statements (all in English). In particular, Mr Pan gave evidence about the location of the stores run by the Lin brothers and their cousin in the Shimao Mall in Guangzhou.

The PRC law experts

22. The parties' experts on PRC law were Professor Guobin Cui and Professor Yanfang Wang. They produced initial reports in November 2025 and reply reports in December 2025, and Prof Wang produced a further third report in February 2026. A joint expert statement was produced in December 2025. Ultimately, very little turned on their evidence. The main relevant point of dispute was the approach to contractual interpretation under PRC law. Other issues addressed in their evidence were ultimately not relevant to the proceedings, following the abandonment by Shein of its claim in respect of the agency samples and all but one of the supplier samples. Since they were cross-examined at some length, however, it is appropriate to make some comments on their evidence.

23. Prof Cui, Shein's PRC law expert, is a Professor of Law at Tsinghua University School of Law. His reports were written in English, and he was cross-examined in person, giving most of his evidence in English with the occasional assistance of an interpreter. Prof Cui was clearly knowledgeable and thought carefully about his answers to the questions put

to him, providing reasoned explanations for the propositions in his evidence. While some of his answers did not squarely engage with the questions put to him, that appeared to be in large part a linguistic issue rather than reflecting any reluctance to assist. Overall, I consider that Prof Cui was a helpful witness.

24. Prof Wang, Temu's PRC law expert, is a Professor at the School of IP Law at East China University of Political Science and Law. Her reports were prepared in Chinese and translated into English, although she said that her written English was reasonably strong and that she had reviewed both Chinese and English versions of her draft reports. She was cross-examined in person and gave her oral evidence in Mandarin Chinese, with the assistance of an interpreter. I considered her oral evidence to be somewhat defensive, evasive, and not always consistent with her written evidence. Both her written and oral evidence gave the impression of advocacy for her client. I therefore regard Prof Wang's evidence with some caution.

The translation experts

25. The parties' translation experts were Yolanda Jia and Cong Shang. They produced initial reports in November 2025, and a further four reports in December 2025 and January 2026, all in English. A joint expert report was also produced in December 2025. As with the expert evidence of PRC law, the volume of the translation evidence was regrettably disproportionate to its importance to the case. By the time of the trial, the remaining translation disputes had narrowed to the translation of a few words in Article 19 of the PRC Copyright Law, and two words in clause 12(11) of the ODM Agreement between Shein and Jiameiluo. Both experts were cross-examined on those issues, giving their evidence in English without the assistance of an interpreter.

26. Ms Jia, Shein's translation expert, is qualified to practise law in China and California, but has no formal qualifications in translation and is not a member of any professional translation bodies. She was a measured witness, but did not always engage directly with the questions put to her, and her evidence was ultimately not compelling.

27. Mr Shang, Temu's translation expert, has degrees from China and the US, including a Master's degree in English Translation and Interpretation and several Master of Laws degrees. He is a professional legal translator with extensive experience translating between Chinese and English, and holds a UNLPP-certified conference interpreter qualification. When cross-examined, Mr Shang gave clear, straightforward answers and was not seriously challenged on any of his evidence. I consider Mr Shang to have been a helpful and reliable witness.

FACTUAL AND PROCEDURAL BACKGROUND

Shein's business

28. The first and second claimants are part of a group of companies operating an online fashion and lifestyle retail business through websites featuring the SHEIN brand. The company was founded in China in around 2012 and entered the UK market in approximately 2014. Initially, the products advertised and sold on Shein's website were its own branded products. In 2023, Shein expanded its activities to include a marketplace for third-party sellers.

29. Roadget, the first claimant, is a company registered in Singapore, which is the parent company of the Shein group of companies. Shein UK, the second claimant, is the company within the Shein group which, prior to 2 November 2023, operated the Shein UK website at the domain name shein.co.uk. Shein UK is incorporated in the UK and is a wholly owned subsidiary of Roadget. Since 2 November 2023 the Shein UK website has been operated by Infinite Towers Services Limited, another UK company which is not a claimant in these proceedings. Sales on that website are made either by Shein UK (for Shein branded products) or by third-party sellers.

30. A further Shein group company relevant to this claim is Guangzhou Shein International Import & Export Ltd (**Guangzhou Shein**), which is a company incorporated in Guangzhou, China, and is also a wholly owned subsidiary of Roadget.

31. Shein-branded garments are procured from suppliers under several supplier models, two of which were referred to in these proceedings. Under the ODM supply model, suppliers create initial product designs for which Shein provides guidance and then later refines the designs. Under the original equipment manufacturer or OEM model, Shein provides complete product designs and detailed specifications to suppliers, who then manufacture the products for Shein. The present case is solely concerned with products supplied to Shein under its ODM model.

32. All product listings on Shein's website are accompanied by one or more photographs of the relevant product. The photographs are derived from three sources: as explained above they are either employee works, agency works or supplier works. For the employee works, the photographs are taken by employees of Guangzhou Shein. Supplier works might comprise either photographs taken by the suppliers themselves or photographs taken by agencies or freelance photographers engaged by the suppliers.

33. Roadget is the entity which is said to own the relevant rights in the photographs that are the subject of this action, with Shein UK using the photographs on the website on the basis of an exclusive licence from Roadget, entered into on 19 July 2023. The way in which the rights in the photographs are said to have passed to Roadget for the purposes of this claim is addressed in detail below. For present purposes it suffices to note that for photographs taken by employees of Guangzhou Shein, Shein relies on an assignment of copyright from Guangzhou Shein to Roadget. For agency and supplier works, Shein relies on assignments in agreements with the relevant agencies (or individual photographers) and/or suppliers.

34. An important part of the background to the present case concerns the reason why some Shein products came to be listed on the Temu website. The explanation for that emerged from the evidence of Mr Lin, as well as some of the contemporaneous materials. What became apparent was that Shein's procurement policies often leave suppliers with unsold Shein stock. Mr Lin's evidence was that to meet Shein's performance and delivery requirements, Jiameiluo often produces stock of around 1,000 units for a new style. Shein's typical initial order is, however, only for around 200 pieces, and if weekly sales do not reach 40–50 units the product will be delisted within around a month. That leaves suppliers such as Jiameiluo with hundreds of items of dead stock. Mr Lin said that disposing of that dead stock through the general inventory disposal market in China would leave Jiameiluo with a significant loss, whereas clearing some of the stock through Lin Jiaxin would produce a better return.

35. At least initially, it appears that when such suppliers listed their products on Temu, they often used the same photographs as had been used on Shein's website. That continued until Shein intervened to put a stop to that practice. In the case of the Lin brothers, that occurred in December 2023 when Mr Lin and Junxin were interviewed by Shein to discuss why Shein products supplied by Jiameiluo were being listed on Temu with the same photos.

Temu's business

36. Temu operates the UK arm of a global online retail platform branded as Temu. The Temu platform first launched in the US in September 2022, and expanded into the UK in April 2023. The platform allows third-party merchants to sell a range of goods, including not only fashion clothing products that are the subject of these proceedings, but also products such as homewares. By contrast with Shein, Temu does not sell its own products on its platform. The merchants who sell on Temu's platform are independent entities who are not affiliated with Temu and are free to sell their products elsewhere, such as to Shein.

37. As with Shein's website, every product listing on the Temu platform is accompanied by one or more photographs of the product. Merchants selling products on the Temu platform are responsible for the content of their listings, including the photographs. The Temu Platform Seller Service Agreement requires merchants to warrant that they have the right to use the photographs, undertake that the photographs do not infringe intellectual property rights, and provide a non-exclusive licence to Temu to use the photographs.

38. The Temu UK website operates a notice and take-down process through which intellectual property rights owners may submit complaints concerning alleged infringements. Mr Xu gave evidence of the way in which his team reviews complaints submitted to Temu. He explained that once a product listing on Temu UK has been identified by a reviewer as one which may infringe intellectual property rights, the listing is flagged and removed. Merchants then have the option to appeal that decision.

Shein's letter before action

39. From early 2023 Shein started sending complaints to Temu in relation to the photographs used for product listings on the Temu US website. Mr Ouyang's evidence was that by June 2023 Temu's Trust & Safety Department was handling around 10,000 complaints in relation to the US website, sent in around ten tranches each month.

40. On 6 June 2023, Shein sent Temu a letter before action in relation to the UK website, contending that Shein "owns the copyright in all photographs of models and products that appear on the SHEIN Website", and alleging that Temu had copied Shein's content and was using it on the Temu UK website without Shein's consent, constituting copyright infringement. The letter appended a schedule listing 8,036 Temu URLs which Shein alleged incorporated infringing content. The letter demanded that Temu permanently remove and disable access to all of the allegedly infringing content by 9 June 2023 (three working days after the letter was sent).

41. The vast majority of the product listings complained of were supplier or agency works rather than employee works. In relation to the supplier and agency works, Shein now accepts that it did not know, when the letter before action was sent, whether it did in fact

own the copyright title in those photographs. Furthermore, in relation to the employee works, Shein accepts that at the time of the letter before action it did *not* own the copyright in any of those photographs. That is because the employer of the relevant photographers was Guangzhou Shein, which was therefore (under the relevant employment contracts) the first owner of copyright in the relevant photographs. Guangzhou Shein did not assign its copyright in the photographs of Shein products to Roadget until 13 July 2023, more than a month after the letter before action was sent.

42. Temu was not aware of this, and sought to process Shein's complaints on the assumption that Shein did indeed own the copyright in the relevant photographs. Mr Ouyang said that Temu had never before received such a large volume of complaints in a single submission. That made the task of reviewing and processing Shein's complaints very challenging, especially given the large volume of complaints in relation to the Temu US website which he was already helping to process. That was why, as Mr Ouyang explained, he was unable to begin the task of reviewing and removing the photographs complained of by Shein until mid-July 2023.

43. When Mr Ouyang did begin that task, the review process was further complicated by the fact that there were errors in numerous of the Shein website links provided in the schedule to the letter before action, as discussed in more detail below. On around 23 August 2023, when Mr Ouyang had dealt with less than half of the product listings in Shein's letter before action, Temu decided to remove the remaining listings in bulk without further review.

The September 2023 order

44. Shein issued its claim in these proceedings on 7 August 2023. As initially filed, by contrast with the scope of the letter before action, the claim was limited to employee works. An annex to the particulars of claim listed a "representative" selection of 88 images from 32 product listings relied upon by Shein as having been copied by Temu. On the same day Shein filed an application for an interim injunction seeking to require Temu to remove copyright images notified to it by Shein within 24 hours of receipt of a notice from Shein. The application was heard and a preliminary interim injunction granted on 28 September 2023: [2023] EWHC 2646 (Ch).

45. The scope of the injunction granted differed in several respects from the order sought by Shein. First, Shein sought the order in terms that would have permitted it to give notification that either Shein "or a related or group company" owned or had an exclusive licence to use the copyright in the Shein work. The order granted was, however, confined to notifications of alleged infringements falling within the scope of the claim, namely photographs for which Shein contended that Shein itself owned or had an exclusive licence to use the copyright. Secondly, the order limited Shein to one take-down notice per calendar day, with a maximum of 100 images identified in each notice. Thirdly, the order provided for Temu to remove infringing images within two business days, rather than the 24 hours sought by Shein. Fourthly, the order set out a process whereby Temu could object to the identification of an image as suitable for removal, with images subject to an objection suspended from the requirement for Temu to remove them from its website. The order was supported by a conventional undertaking in damages from Shein.

The February 2024 order

46. In the period between 28 September 2023 and 5 February 2024, Shein notified around 770 sets of product photographs for take-down under the September 2023 order. In November 2023, however, Temu became aware that more than half of the photographs notified under the September order were supplier or agency works that until then were not part of Shein's pleaded claim. It also became apparent that in the case of those supplier or agency works Shein was *not* verifying the chain of title to ensure that it did in fact own the copyright in the photographs, contending that it was unworkable for it to do so. Instead, Shein was simply relying upon warranties given in the standard form contracts, such as its ODM Agreement.

47. Those issues were addressed at a hearing on 5 February 2024. At that hearing, among other things, Temu advanced objections to several hundred of the photographs notified by Shein across 14 take-down notices served between November 2023 and January 2024, and applied to vary the September 2023 order. Shein in turn applied to amend its particulars of claim to include supplier and agency works, and to include those within the scope of the injunction.

48. At the hearing the court allowed Temu's objection applications on the basis that, contrary to Shein's submissions, the September 2023 order was limited to the scope of the pleaded claim. Shein was nevertheless permitted to amend its claim to include supplier and agency works, and the court granted a new interim injunction covering those photographs. Notifications of supplier and agency works under that injunction were, however, subject to an express requirement that Shein should provide material demonstrating the author of the photograph, the first owner of copyright in the photograph and the chain of title between the first copyright owner and Roadget. Explaining those terms, the judgment commented that, contrary to Shein's contentions at the hearing, it was "not sufficient for the claimants simply to rely on the warranties provided by their suppliers". Again, the order was supported by a conventional undertaking in damages from Shein.

49. On 20 February 2024, Shein served amended particulars of claim introducing supplier and agency works to the proceedings, and adding these to the annexes to the claim. On the basis of the February order, Shein served take-down notices in May 2024 which included some supplier and agency works. That led to a dispute as to the interpretation of the February order, which was raised with the court for further directions. On 10 June 2024 directions were provided confirming that the February order required Shein to identify (among other things) the author and the first owner of the copyright, and that "simple assertions by the Claimant as to the existence of a chain of title" were insufficient.

50. Following those directions, no new agency or supplier works were notified by Shein for take-down under the February 2024 order. Shein did, however, continue to notify employee works to Temu for take-down, with the most recent notification being sent on 16 December 2024.

51. The allegedly infringing product listings were eventually consolidated in a schedule listing 2,559 Shein products, broken down into employee works, supplier works and agency works.

Temu's counterclaims

52. On 5 February 2024 Temu filed its defence and counterclaim in the proceedings. The counterclaim alleged that Shein had adopted a "deliberate and multi-pronged strategy … to undermine Temu's ability to compete in the [ultra-fast fashion market]", which was in breach of both the Chapter I and Chapter II prohibitions under the Competition Act 1998, and which caused Temu to suffer loss and damage in that it led to the removal of lawful product listings from Temu's UK website, and impeded Temu's UK expansion (the **competition counterclaim**). The matters set out in the competition counterclaim were also relied on for one specific point in Temu's defence. Temu also advanced a counterclaim for damages based on Shein's damages undertakings under the September 2023 and February 2024 orders, in respect of its removal of product listings for which Shein did not in fact own the copyright to the photographs notified for take-down (the **IP counterclaim**).

53. At the third CMC on 29 July 2025, the competition issues were transferred to be heard in the Competition Appeal Tribunal. There were then further CMCs in both the Chancery Division (on 17 September 2025) and the Competition Appeal Tribunal (on 8 October 2025) to determine how the proceedings should be split as between liability and quantum. The effect of those CMCs was to split the proceedings into three trials: (1) the present IP trial to determine issues of copyright infringement, together with liability under the IP counterclaim; (2) the competition trial, to determine the competition counterclaim and (if necessary) the one related competition defence point; and (3) a quantum trial to determine the quantum of loss in relation to the IP claim and IP counterclaim, as well as loss and quantum in respect of the competition law issues.

The sampling process for the present trial

54. Meanwhile, it was necessary to determine how the present first trial could workably proceed in circumstances where Shein was alleging infringement in relation to several thousand product listings. At the first CMC in November 2024, an order was made directing that the issues of subsistence, ownership and infringement of copyright for the purposes of both the IP claim and the IP counterclaim should proceed by reference to a representative sample of the allegedly infringing works.

55. In order to identify that sample, an initial **selection sample** set of photographs corresponding to 100 product listings was chosen by means of a random selection of a specified number of product listings from each of the three categories of photographic sources relied on by Shein: 35 employee works, 60 supplier works, and five agency works. The selection samples were generated on 24 April 2025. Initial disclosure was then given by Shein on the selection samples over the course of June to September 2025.

56. Following that initial disclosure, the **trial samples** were selected on 26 August 2025, comprising the photographs for 20 product listings, with ten selected by each side. Those consisted of four employee works, 13 supplier works and three agency works. The parties were directed to set out their detailed cases on the subsistence, ownership and infringement of copyright, and any defences, for the trial samples, in a **trial sample statement of case**. Shein's part of that document was initially set out on 7 October 2025, with Temu's responsive case set out on 24 October 2025.

Amendment of Shein's case on chain of title

57. Once Shein had carried out a detailed investigation of its chain of title for the supplier and agency works, for the purposes of the initial disclosure exercise for the 100 selection sample product listings, it became apparent to Shein that it was likely to encounter difficulties in establishing a chain of title in respect of a large number of the photographs in the trial samples, in particular the supplier and agency works. Shein therefore sought permission to make extensive and complex amendments to its particulars of claim, which in substance amounted to a comprehensive repleading of Shein's case on the basis of its claim to subsistence and ownership of copyright across the claim photographs as a whole.

58. The application to amend was heard on 17 September 2025, and refused on the basis that there was no evidential support for Shein's claim that the amended bases for establishing chain of title would apply (as Shein contended) to all of the claim photographs; and that in any event there was no prospect of the trial proceeding on the timetable then listed (i.e. in January and February 2026) if the amendments were permitted: [2025] EWHC 2393 (Ch).

59. Shein then returned with a more limited set of amendments to its particulars of claim, pleading "catch-up assignments" which retrospectively assigned copyright and a right to sue for past infringements in relation to eight specific samples in the trial sample set, consisting of six supplier works and two agency works. Permission to make those more limited amendments was given at a hearing on 27 October 2025. Shein was also given permission to make consequential amendments to its trial sample statement of case.

Non-pursuit of claims regarding 15/20 of the trial samples

60. Shein's trial sample statement of case, initially filed on 7 October 2025, stated that Shein no longer pursued claims of infringement in relation to four of the trial sample supplier works. Shein's amended trial sample statement of case filed on 28 October 2025 stated that Shein also no longer pursued claims of infringement in relation to one other trial sample supplier work. On 19 March 2026, shortly before the originally-listed date for the second PTR, Shein abandoned its claims in relation to another six of the trial sample supplier works, and all three of the agency works. The second PTR was therefore adjourned to allow Temu to consider the implications of the narrowing of Shein's case.

61. On 17 April 2026, the morning of the relisted PTR, Shein abandoned one of the remaining two supplier works. Accordingly, at the PTR judgment was entered for Temu in respect of Shein's claims for copyright infringement in respect of each of the (by then) 15 non-pursued trial samples.

The Dishang communications

62. At the second PTR Temu also pursued an application for Shein to disclose and produce copies of documents consisting of a message chain between Shein's lawyers and a supplier called Dishang, relating to one of the non-pursued supplier samples. That application led to a judgment in favour of Temu ([2026] EWHC 919 (Ch)), an (unsuccessful) application by Shein for permission to appeal to the Court of Appeal, and a further hearing on 6 May 2026, the day before the trial skeleton arguments were due to be filed. In the event, notwithstanding the considerable time spent by the court and the

parties on this matter, the Dishang communications did not feature materially in Temu's submissions at the trial.

THE TRIAL SAMPLE WORKS

63. Following the narrowing of the case as set out above, Shein is now pursuing claims of infringement in relation to only five trial sample works: all four employee works and one of the supplier works, the Strawberry Nightdress. The following paragraphs shortly summarise the facts in relation to each of these. It will be necessary to return in more detail to the Strawberry Nightdress when addressing the copyright ownership issues for that work.

The four employee works

64. **Batwing Sleeve Blouse.** The photographs for this product were taken on 1 March 2023 by Ken Zhao, a Chinese national and an employee of Guangzhou Shein. Shein provided evidence of both an employment contract and an Intangible Asset Ownership Agreement (**IAOA**) signed on 3 June 2021. The photographs were uploaded to the Shein website on 7 March 2023. As noted above, Guangzhou Shein assigned its copyright and rights of action to Roadget on 13 July 2023. The photographs were uploaded to the Temu website on 23 January 2024. Shein then notified the product listing to Temu in a take-down notice dated 24 January 2024, under the September 2023 order.

65. **Wide Leg Trousers.** The photographs for this product were taken on 10 June 2021 by Wills Zhu, a Chinese national and an employee of Guangzhou Shein. Shein provided evidence of both an employment contract and an IAOA signed on 15 June 2020. The photographs were uploaded to the Shein website on 29 June 2021. As above, copyright and rights of action were assigned to Roadget on 13 July 2023. The photographs were uploaded to the Temu website on 10 August 2023. Shein then notified the product listing to Temu in a take-down notice dated 26 October 2023, under the September 2023 order.

66. **Graphic Biker Shorts.** The photographs for this product were taken on 12 December 2020 by Baoping Chen, a Chinese national or at least Chinese resident, who was employed by Guangzhou Shein at the time but left the company in 2021. Ms Chen's supervisor was Mr Ma, who gave evidence as to her employment by Guangzhou Shein; Ms Chen also executed an IAOA on 17 July 2023. As above, copyright and rights of action were assigned to Roadget on 13 July 2023. The photographs were uploaded to the Temu website on 26 April 2023. Shein then notified the product listing to Temu in the letter before action of 6 June 2023.

67. **Ruffle Hem Trousers.** The photographs for this product were taken on 4 May 2023 by Justin Luo, a Chinese national and an employee of Guangzhou Shein. Shein provided evidence of both an employment contract and an IAOA signed on 29 November 2021. The photographs were uploaded to the Shein website on 20 May 2023. As above, copyright and rights of action were assigned to Roadget on 13 July 2023. The photographs were uploaded to the Temu website on 5 September 2023. Shein then notified the product listing to Temu in a take-down notice dated 16 October 2023, under the September 2023 order.

The remaining supplier work

68. The Strawberry Nightdress was supplied to Shein by Jiameiluo, a company operated by Mr Lin and his brother Junxin. Jiameiluo had been producing garments for Shein since July 2022. On 9 February 2023 Roadget and Jiameiluo entered into an ODM Procurement Cooperation Framework Agreement (the **ODM Agreement**), which set out the terms of Shein's procurement of products from Jiameiluo. It is relevant to note, at this point, that Jiameiluo was not the only clothing business owned by Mr Lin and his brother. As discussed further below, Mr Lin and Junxin owned several other companies that were registered sellers on the Temu platform.

69. The design of the Strawberry Nightdress was discussed with Mr Lin during May–June 2023, and Shein's initial order was placed on 2 June 2023. The photographs were taken between 2 and 14 June 2023 by Yaqian Chang, a freelance photographer and model who had photographed most of Jiameiluo's Shein products up to that time. It is common ground that it was Mr Lin (and not Junxin) who dealt with Ms Chang and commissioned the photographs from her. Ms Chang sent the photographs to Mr Lin on 14 June 2023, and Mr Lin paid her from his personal bank account. Mr Lin agreed, in his oral evidence, that Ms Chang was not concerned with which part of the family business she was supplying her photographs for, and did not know at the time that the photographs of the Strawberry Nightdress were specifically for the Shein product listing.

70. The Strawberry Nightdress was then listed on the Shein website on 23 June 2023. It did not sell well – of the 900 units produced by Jiameiluo, only around 200 were sold on Shein, and the product was delisted. The evidence does not disclose the date of delisting, but Mr Lin's evidence as to Shein's practices suggested that it would probably have been delisted within around a month of it going online. On 7 September 2023 the Strawberry Nightdress was listed on Temu under the Sexy Secret store. Shein served a take-down notice in respect of the listing on 18 October 2023, under the September 2023 order.

71. On 26 June 2024 Roadget entered into a Framework Agreement with Jiameiluo (the **Framework Agreement**) which provided that all intellectual property rights in existing and future works, designs, photographs, videos, products and images created during their relationship would belong to or be assigned to Roadget, including copyright and related rights of reproduction, distribution, online communication, enforcement rights and accrued cause of action. Three days later, on 29 June 2024, Jiameiluo entered into an Agency Commissioning Agreement with Ms Chang (the **Agency Commissioning Agreement**) which provided that Ms Chang would assign to Jiameiluo, in return for the agreed fees, all worldwide intellectual property rights in both future and certain previously supplied photographs and videos, including copyright, reproduction, distribution, online communication, and infringement-enforcement rights.

ISSUES

72. By the time of the trial, the abandonment by Shein of most of the trial samples as well as the decision by Temu not to pursue certain of the issues meant that the remaining issues in dispute were significantly narrower than set out in the agreed list of issues. The following is a summary of the issues that were ultimately addressed at the trial, in respect of the five remaining trial samples.

73. **Copyright ownership issues.** The first issue concerns Shein's ownership of the copyright title in the trial samples, and its right to bring a claim in respect of any accrued cause of action. Prior to the trial, Temu's position was that it put Shein to proof on the ownership of copyright in relation to the four employee samples, but disputed copyright ownership and rights of action in relation to the Strawberry Nightdress. By the start of the trial, copyright ownership and corresponding rights of action were no longer disputed by Temu for the four employee samples. The issues of copyright ownership and rights of action were therefore limited to the sole supplier sample in issue at the trial, namely the Strawberry Nightdress. In those respects, the questions for determination are as follows:

    i) Who commissioned the photographs for the Strawberry Nightdress from the photographer, Yaqian Chang?

    ii) What rights were transferred to Shein's supplier Jiameiluo or Mr Lin on the initial commissioning of the photographs?

    iii) What was the effect of the Framework Agreement between Shein and Jiameiluo and the Agency Commissioning Agreement between Jiameiluo and Ms Chang?

    iv) Should the claim in respect of the Strawberry Nightdress be struck out on the grounds of abuse of process, on the basis that Shein knew of the defects in its chain of title when it introduced supplier works into the claim?

74. **Infringement and defences.** These issues arise in relation to the four employee samples, and the Strawberry Nightdress in so far as any rights of action passed to Shein. The questions for determination are as follows:

    i) In relation to the Strawberry Nightdress only: did Jiameiluo and/or Mr Lin consent to the use of the photographs on the Temu Sexy Secret store?

    ii) Did Temu authorise UK web-users to reproduce the sample photographs through viewing them on a web-browser without the licence of the copyright owner, contrary to s. 17 CDPA? This includes the question of whether any acts of reproduction were acts which amounted to the making of temporary copies within the meaning of s. 28A CDPA.

    iii) Did Temu communicate the sample photographs to the public without the licence of the copyright owner, contrary to s. 20 CDPA?

    iv) Did Temu without the licence of the copyright owner possess, exhibit in public or distribute in the UK articles which Temu knew or had reason to believe were infringing copies of the sample photographs, contrary to s. 23 CDPA?

    v) Is Temu entitled to rely on the hosting defence under Regulation 19 of the E-Commerce Regulations?

75. **Additional damages.** Is Shein entitled to additional damages under s. 97(2) CDPA?

76. **IP counterclaim.** Is Shein liable under the undertakings given by Shein in the September 2023 and February 2024 orders, and if so for which works?

77. In relation to the copyright ownership issues, as explained in more detail below, it will be necessary to consider the impact of PRC law and the evidence on that. In relation to some of the issues of infringement and defences, it will be necessary to consider the EU case-law. That is because various relevant provisions of the CDPA were introduced or amended by the Copyright and Related Rights Regulations 2003, in order to transpose into UK law the provisions of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the **Information Society Directive**); and Regulation 19 of the E-Commerce Regulations was likewise introduced to implement Article 14 of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the **E-Commerce Directive**). It will therefore be necessary to consider the EU case-law on the equivalent provisions of the Information Society and E-Commerce Directives.

78. In that regard, relevant judgments of the CJEU dating from before IP Completion Day (i.e. before 11pm on 31 December 2020) constitute assimilated case-law and are therefore binding on this court: s. 6(3) of the European Union (Withdrawal) Act 2018. Judgments of the CJEU dating from after IP Completion Day are not binding but may be referred to so far as relevant: ss. 6(1) and (2) of the 2018 Act. The Court of Appeal and Supreme Court have the power to depart from assimilated case-law, but only on the same basis that would apply to the Supreme Court in deciding whether to depart from its own case law: s. 6(5A) of the 2018 Act and the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020, SI 2020/1525.

COPYRIGHT OWNERSHIP ISSUES

Overview of the issues

79. As noted above, the copyright ownership issues only now arise in relation to the one supplier sample in the trial, the Strawberry Nightdress, which was supplied to Shein by Jiameiluo, a company operated by Mr Lin and his brother Junxin.

80. Shein's position on this changed significantly in the course of the various iterations of its pleaded case and its trial submissions. The end-result was a set of submissions of quite extraordinary complexity. Shein ultimately relied on a primary and an alternative case as to what rights were transferred upon the initial commissioning of the photographs from Ms Chang in 2023 (and in that regard the effect of the ODM Agreement), and two alternative routes to its analysis of the effect of the Framework Agreement and the Agency Commissioning Agreement in 2024.

81. Temu disputed both Shein's primary and alternative cases as to the initial transfer of rights, and likewise disputed both of Shein's alternative analyses of the effects of the Framework Agreement and the Agency Commissioning Agreement.

82. Temu also contended that Shein introduced the supplier works into the claim knowing that it did not have title in those works, such that the claim in respect of the Strawberry Nightdress should be struck out as an abuse of process. Shein's response was that it relied on the warranty given in the ODM Agreement, and that the evidence did not establish either knowledge or blind-eye knowledge that Shein lacked the copyright title in the supplier works at the relevant time.

83. I will address in turn below the question of who commissioned the photographs from Ms Chang, the effect of the initial commissioning of the photographs and the ODM Agreement, the effect of the subsequent Framework and Agency Commissioning Agreements, and the abuse of process arguments. Before doing so, it is necessary to set out the overarching legal framework, in respect of both English and PRC law, as well as the relevant provisions of the three agreements. I will then address, as a preliminary point, the evidence as to the various companies owned and/or operated by Mr Lin, his brother Junxin, and his cousin Jiaxin. That evidence is an important part of the background to the questions that arise in considering the rights that arose and were transferred on the commissioning of the photographs. It is also relevant to the discussion further below of whether consent was given for the photographs to be used on the Sexy Secret Temu store.

Legal framework

English or Chinese law?

84. Shein's case is that Temu has infringed Shein's English rights of copyright in the photographs for the five trial sample works still in issue in this trial. It is therefore common ground that questions of ownership, subsistence and infringement of copyright fall to be addressed as a matter of English law.

85. PRC law is nevertheless relevant for several purposes. First, for the purposes of establishing Shein's ownership of copyright in the Strawberry Nightdress, it is necessary to address the effect of the contractual agreements between Shein, its supplier Jiameiluo, and the photographer Ms Chang. As set out above, three agreements are in issue: the ODM Agreement, the Framework Agreement and the Agency Commissioning Agreement. All of those agreements are governed by PRC law and fall to be construed on the basis of principles of contractual interpretation under PRC law. The relevant provisions of the three agreements are therefore set out below, along with the relevant provisions of contractual interpretation under the PRC Civil Code. The evidence and submissions on the interpretation of the agreements are addressed in the discussion of the copyright ownership issues.

86. Secondly, in order for an agreement to have been an effective assignment of English copyright, it must not only be effective to transfer the copyright under English law, but must not be invalid by its proper law: *Peer International v Termidor Music* [2002] EWCA Civ 1156, §7. No dispute as to the validity of assignments of copyright under PRC law arose in the present case. But Temu did raise an issue regarding the absence of PRC law evidence on the assignability of a licence, relevant to the construction of the ODM Agreement.

87. Thirdly, Shein relied on Article 19 of the PRC Copyright Law as informing the question of whether an agreement to assign copyright could be inferred from conduct at the time of the commissioning of the photographs. There was considerable evidence on the interpretation of this provision. For the reasons set out below, however, my conclusion is that nothing turns on that evidence.

88. In addressing any disputed questions of PRC law, as with any disputed issue of foreign law, the court's task is to determine what the highest relevant court in the foreign legal system would decide if the point were to come to it: *Perry v Lopag* [2023] UKPC 16, §11. Where the experts disagree on that issue, the judge is required to reach a view based

on the assessment of each expert's evidence as a whole, and an evaluation of each expert's reasoning: *Perry v Lopag*, §14. As the Supreme Court held in *TUI v Griffiths* [2023] UKSC 48, §38, what really matters in most cases is the reasons given for the opinion.

Relevant provisions of the CDPA

89. Section 11(1) CDPA provides that the author of a work is the first owner of any copyright in it, subject to exceptions that are not material in the present case. The "author" of a work is defined in s. 9(1) as "the person who creates it".

90. Under s. 90(1) CDPA, copyright is transferable by assignment. Section 90(3) provides, however, that an assignment of copyright is not effective "unless it is in writing signed by or on behalf of the assignor".

The PRC Civil Code and SPC Interpretation

91. In relation to contractual interpretation, the PRC law experts relied on Articles 142(1), 466(1), 490(2) and 566 of the PRC Civil Code. Article 466(1) provides simply that if the parties dispute the interpretation of a contract clause, the meaning of that clause is to be determined in accordance with the provisions of Article 142(1). Article 142(1) provides:

> "Where an expression of intentions is made to a counterparty, its interpretation shall be based on the words and sentences used, taking into account the relevant clauses, the nature and purposes of the parties' conduct, customs and the principle of good faith, so as to ascertain the meaning of the expression of intentions."

92. Article 490(2) provides a limited exception to a requirement for a contract to be concluded in writing, in the following terms:

> "When a contract is required to be concluded in writing in accordance with laws or administrative regulations or as agreed by the parties, if the parties fail to make the contract in writing, but one of the parties has already performed the principal obligation, the contract is formed at the time the other party accepts such performance."

93. Article 566 sets out the default consequence of contractual termination in the following terms:

> "Upon the termination of a contract, any unperformed obligations under such contract are discharged …"

94. The experts also agreed that it was relevant to consider the judicial interpretation principles set out in the Supreme People's Court (**SPC**) Interpretation of the Contract Part of the PRC Civil Code, published in 2023 (the **SPC Interpretation**). Article 1(1) and (2) of the SPC Interpretation provides:

> "(1) When interpreting contract clauses according to Article 142(1) and Article 466(1) of the Civil Code, the people's court shall determine the

meaning of a disputed clause based on the ordinary meaning of the words and sentences used, taking into account the relevant clauses, the nature and purposes of the contract, customs and the principle of good faith, and making reference to the background and negotiation process of the contract as well as the parties' conduct in performance of the contract and other factors.

> (2) Where there is evidence to prove that the parties have a common understanding of a contract clause that is different to the ordinary meaning of the words and sentences, and a party claims that the interpretation of the contract clause should be based on the ordinary meaning, the people's court shall not uphold such claim."

The PRC Copyright Law

95. Under Article 10 of the PRC Copyright Law, copyright encompasses among others the right of reproduction (Article 10(5)) and the right of distribution (Article 10(7)).

96. Article 19 provides as follows:

> "The ownership of the copyright in a commissioned work *[can be/shall be]* stipulated in a contract between the commissioning party and the commissioned party. Where there is no explicit stipulation in the contract or no contract is concluded, the copyright in such work shall belong to the commissioned party."

97. The italicised words were the subject of a translation dispute. Ms Jia, for Shein, contended that the correct translation is a permissive "can be". Mr Shang, for Temu, contended that the correct translation is an imperative "shall be".

98. Article 27 of the PRC Copyright Law requires a post-creation assignment of copyright to be in writing:

> "A written contract shall be concluded for the assignment of the rights provided in items (5)–(7) of the first paragraph of Article 10 of this Law.
>
> A copyright assignment contract shall contain the following main content:
> (1) the title of the work;
> (2) the specific type of assigned rights and their geographical scope;
> (3) the assignment price;
> (4) the date and method of delivery of the assignment price;
> (5) liability for breach of contract;
> (6) other content that the parties believe should be agreed upon."

99. Article 29 of the PRC Copyright Law provides:

> "Where the copyright owner has not explicitly licensed or assigned a right in a licence or assignment contract, the other party may not exercise that right without the copyright owner's consent."

The ODM Agreement

100. The ODM Agreement concluded between Shein and Jiameiluo followed the terms of Shein's standard template ODM Agreement applicable at that time. Part I, clause 12 of that agreement set out provisions regarding the intellectual property rights in the products supplied and the images of those products.

101. Clauses 12(1) and (2) referred to the commissioning of styles by Shein, referred to as "Party A", from the supplier, referred to as "Party B", and set out the requirements for the supplier to adhere to the specifications determined by Shein in that regard. Clause 12(3) then provided:

> "All rights, titles and interests in the ownership and intellectual property rights worldwide arising out of the aforementioned Styles as well as their corresponding and related pictures and videos (including but not limited to the rights to apply for, register, file and enforce the intellectual property rights with respect to those Styles, pictures or videos …) shall belong to Party A. …"

102. Shein also relied on the following warranty clause in clause 12(11):

> "Party B warrants that the Styles, pictures and videos etc. that it provides to Party A are its original creations, or that it has obtained *[full rights/sufficient rights]* to transfer them to others, and such Styles, pictures and videos do not infringe upon the intellectual property rights of any third parties … If the Styles, pictures or videos etc provided by Party B infringe upon the rights of a third party, Party A shall have the right to require Party B to assume the responsibility … If the remedies provided in the annexes to this Agreement or the relevant updates thereof are insufficient to cover the actual loss suffered by Party A, Party B shall be liable for compensating the actual loss incurred by Party A."

103. Again, the italicised words were the subject of a translation dispute. Ms Jia, for Shein, contended that the correct translation is "full rights". Mr Shang, for Temu, contended that the correct translation is "sufficient rights".

The Framework Agreement

104. As with the ODM Agreement, the Framework Agreement refers to Shein as Party A and to Jiameiluo as Party B. Part I, section I sets out definitions, which include the following:

> "(1) '**Products**': refer to the goods that Party A purchases or has the right to purchase from Party B according to the provisions of this Agreement, including but not limited to clothing, shoes, bags and accessories (if applicable).
>
> …
>
> (3) '**Purchase Cooperation**': refers to the various cooperation measures, exchanges and actions taken by both Parties to conduct the purchase under

this Agreement, including but not limited to Product design, creation, development, pattern making, photography, production, packaging, supply, storage, transportation, quality inspection, etc. conducted by Party A and/or Party B to conduct sales or purchase transactions."

105. Part I, section II is then entitled "Purchase Cooperation". Within that section, clause 8 (which for convenience I will refer to hereafter as **clause II.8**) is headed "Other Intellectual Property Provisions". It provides:

> "We attach great importance to the Purchase Cooperation between both Parties. In order to better launch into the market Products that are suitable for the market and have originality, we will work together with you to develop, produce and launch Products into the market. For any styles, patterns, pictures or videos provided, developed, designed or created by either Party in the Purchase Cooperation, or any works related to this Agreement ('Works'), both Parties agree that:
>
> …
> (4) The worldwide intellectual property (including copyrights) and all other rights or interests of any existing or future Works, Final Products and Final Images related to the Purchase Cooperation shall belong to Party A; in the event that the above intellectual property and all other rights or interests do not directly belong to Party A, Party B agrees to transfer the intellectual property and all other rights or interests of the Works, Final Products and Final Images to Party A; Party B hereby agrees to cooperate with Party A and provide assistance in any legal proceedings that may be necessary to achieve the purpose of this article. The amount of consideration for the entrusted creation or transfer of intellectual property and all other rights or interests has been included in the purchase cost paid for Final Products. The above transfer will occur when our first Order for Final Products comes into effect.
>
> …
> (6) You confirm that the ownership and transfer of the intellectual property and all other rights or interests of Works, Final Products and Final Images related to Purchase Cooperation include but are not limited to the following: the ownership and transfer of rights include (i) exclusive rights such as reproduction, distribution (including public release) and information network communication rights, as well as any similar or other rights under the laws of any country or region; and (ii) the right to sue for past, present or future infringement of such intellectual property or other rights, and to recover damages and any other relief (including injunctive relief)."

106. Part I, section III is entitled "Effects". Within that section, clauses 3 and 4 (**clauses III.3 and 4**) provide:

> "3. If both Parties sign the 'Purchase Cooperation Framework Agreement' or any other contract (hereinafter referred to as the 'Original Agreement') before the date of signing this Agreement, the Original Agreement shall be terminated from the date of signing this Agreement.

4. After Party B signs this Agreement, if Party B and Party A still have cooperation on the old products under the Original Agreement, both parties agree to continue the cooperation on the old products in accordance with the provisions of this Agreement. If Party B does not agree to sign this Agreement, it shall submit a written objection to Party A within 10 days from the date of receiving this Agreement and negotiate the signing of the agreement with Party A separately."

The Agency Commissioning Agreement

107. The Agency Commissioning Agreement refers to Jiameiluo as the Company and Ms Chang as the Photographer/Key Opinion Leader (or KOL). It covers both new photographs and existing photographs. In relation to the new photographs, the position is straightforward: the agreement provides for all worldwide intellectual property rights to vest in or be assigned to Jiameiluo. In relation to the rights in existing photographs, Section VI clauses 3 and 4 of the agreement (**clauses VI.3 and 4**) provide as follows:

> "3. The works that the Photographer/KOL has previously created and provided to the Company in the form of photographs and other types of works in connection with the photography services previously rendered to the Company, and which the Company has transferred, claims to have transferred, or intends to transfer to SHEIN (Roadget Business Pte Ltd) for purposes including but not limited to the global display, sale, and other promotional activities of goods on the worldwide website or App of 'Shein' … are defined as the 'Existing Works'. In consideration of the fees paid by the Company for each prior photography service rendered, the Photographer/KOL hereby acknowledges and agrees that all remaining worldwide intellectual property rights (including but not limited to copyright) and other intangible rights in, relating to, or protecting any Existing Works shall vest in the Company, and hereby absolutely assigns such rights to the Company. …
>
> 4. The Photographer/KOL hereby acknowledges that the vesting and assignment of rights as stipulated in [section VI, clauses 2 and 3] of this Contract shall include … (ii) the right to institute legal proceedings, claim damages and other remedies for any past, present or future infringement of such intellectual property rights."

The Lin family companies

108. It is common ground that Jiameiluo is operated by Mr Lin and his brother Junxin. The registered legal representative for Jiameiluo is, however, not one of the Lin brothers but is another individual named Muxu Zhang, who is the father-in-law of Mr Lin's brother Junxin. Mr Lin and Junxin are also involved in various further companies that are registered sellers on Temu. These include, at least, the following Temu stores:

i) **Sexy Secret.** This is the Temu store that uploaded the disputed photographs of the Strawberry Nightdress. It is operated by Jiaxin, through Jiaxin's company Guangzhou Yuexiu District Fahuoni Clothing Trading Firm (**Fahuoni**). In Mr Lin's first witness statement, he said that he did not know who Jiaxin was. In his second witness statement, he said that Jiaxin was someone that he "knew locally" and was his friend but was not a relative. In Mr Lin's third witness statement, he admitted that Jiaxin is in fact his cousin. Sexy Secret's address for samples is Unit 28 of the Shimao Apparel Shopping Mall in Liwan, Guangzhou.

ii) **Miss Pumpkin.** This is a Temu store operated by Junxin through his company Guangzhou Yuexiu District Musen Clothing Trading Firm. Miss Pumpkin's address for samples is Unit 33 of the Shimao Apparel Shopping Mall. Mr Pan visited the mall on three occasions in 2025, and his (unchallenged) evidence was that Unit 33 is physically located next to Unit 28, which is the address for Sexy Secret. Mr Pan was told that Unit 33 belonged to the same business as Unit 28. From observing the work being carried out in the two units, Mr Pan's impression was that they were indeed being operated as a single business, with the warehouse/storage functions carried out in Unit 28 and the office functions carried out in Unit 33. Mr Lin, when asked about this in his cross-examination, gave confused and contradictory answers.

iii) **Fahotnini.** This is a Temu store set up through the company Foshan Nanhai District Aileisi Garment Factory (**Aileisi**), which is Mr Lin's company. Mr Lin communicated with Temu using his personal WeChat account, and Mr Lin's personal bank account was used to take payments from Temu between April 2023 and June 2024. There was evidence before the court indicating that the Fahotnini store sold some of the same products as were being sold on the Sexy Secret store. Mr Lin claimed that although his company registration (i.e. for Aileisi) was used to establish the Temu store, the day-to-day operation of the store was carried out by Jiaxin. In or around June 2024 Mr Lin changed the operating entity of Fahotnini to his ex-wife's company.

109. Mr Lin admitted that until late 2023 Jiameiluo had used the Sexy Secret store to clear its surplus inventory of Shein products. He explained, however, that Shein had discovered that he was doing so and "we understood that we could not continue with that arrangement". That was a reference to a lengthy interview of Mr Lin and Junxin and Mr Lin on 21 December 2023, conducted by representatives of Guangzhou Shein, in which Junxin was asked about Jiameiluo's practice of clearing excess inventory through Temu. Mr Lin was unsurprisingly aware of that interview, the transcript of which was before the court. He said that once he realised that Shein was (in his words) "unhappy" about its products being sold on Temu, he stopped selling Shein dead stock to Jiaxin for listing on Temu.

110. Mr Lin, throughout his evidence, sought to downplay the extent of his relationship with Jiaxin and the Temu stores operated by Jiaxin. Although, as described above, he eventually admitted that Jiaxin was his cousin, he continued to insist that Jiaxin's business was separate from his own and Junxin's businesses. Those assertions were unconvincing, and I consider that Mr Lin did not give a frank explanation of the relationship between the businesses. Rather, it appears that he was attempting to distance himself from Jiaxin's Temu business, in order to preserve his relationship with Shein. That was not surprising, in circumstances where Shein is a very important, and perhaps even the most important, customer of Jiameiluo. Unfortunately, in my view, that led Mr Lin to give evidence that was untruthful, which included his evidence about the way in which the Sexy Secret store came to obtain the disputed photographs of the Strawberry Nightdress.

111. I consider that the reality is likely to be that the Lin family business is run by (at least) Mr Lin, Junxin and Jiaxin, working closely together through multiple different companies, which include Jiameiluo and the Temu stores/companies listed above. Irrespective of who operated specific companies on a day-to-day basis, it is clear that the companies were very closely connected, including apparently (on the basis of Mr Pan's evidence) using some of the same premises. That is the reason why Jiameiluo used the Sexy Secret Temu store to clear its surplus Shein inventory, including the Strawberry Nightdress once it had been delisted by Shein.

Who commissioned the photographs?

The parties' submissions

112. The evidence set out above is important context for the question of who commissioned the photographs of the Strawberry Nightdress.

113. Shein contended that the photographs were commissioned by Mr Lin acting on behalf of Jiameiluo, on the basis that Jiameiluo was the entity that had been commissioned by Shein under the ODM Agreement to create and produce the Strawberry Nightdress. While Mr Lin paid Ms Chang from his personal bank account rather than an account in the name of Jiameiluo, Shein said that was irrelevant, because that was simply the way that Mr Lin and his brother operated the business. Shein also relied on the Agency Commissioning Agreement under which Ms Chang assigned all copyright and rights of action to Jiameiluo. Shein said that she would not have done so if she had thought that she was providing services to Mr Lin personally rather than Jiameiluo.

114. Temu did not dispute, at the trial, that Shein commissioned Jiameiluo to produce the Strawberry Nightdress. But it disputed that the photographs were commissioned by Mr Lin specifically for Jiameiluo. Temu contended, instead, that Ms Chang was indifferent to which part of the Lin family business was making use of her photographs and indeed did not know which companies in the business were going to use the images.

Discussion

115. I accept Temu's submissions on this point. It is apparent from the discussion above that Mr Lin, Junxin and Jiaxin were involved in multiple clothing companies, including several companies that were registered sellers on Temu. While Mr Lin had commissioned Ms Chang to photograph some of Jiameiluo's Shein products, it seems very likely, on the material before the court, that she had also photographed products for sale on some of the Lin family's Temu stores, including (at least) Fahotnini and Sexy Secret. Mr Lin's evidence on this, during his cross-examination, was rather evasive, but the following exchange reveals what I consider to be the true picture:

> "Q. Chang Yiaqian knows that you use photos to sell in your various Temu stores, in the family business, doesn't she?
> A. Chang Yiaqian only knows that I reach out to her for the photo shoot and only when there was the copyright authorisation did she know that I was selling at Shein.
> …
> Q. But Chang Yiaqian was not concerned which part of your family business she was supplying her photos for.

A. Correct. (Pause)”

116. That exchange undermines Mr Lin’s claims that the Strawberry Nightdress photographs were taken specifically for Jiameiluo. There was no evidence that Ms Chang was either told or understood, at the time of taking the photographs, that they were commissioned on behalf of Jiameiluo specifically, rather than for one of Mr Lin’s other companies. As Mr Lin accepted in the exchange above, she did not know that the Strawberry Nightdress was a Shein product, and was in general not concerned by which business she was supplying photographs for. She was simply asked by Mr Lin to provide photographs for particular products, and did so.

117. That conclusion is not undermined by the fact that Ms Chang later executed the Agency Commissioning Agreement assigning copyright and rights of action to Jiameiluo. Since Mr Lin’s evidence (cited above) was that Ms Chang only dealt with him and didn’t know that he was supplying the Strawberry Nightdress to Shein until she signed that agreement, the fact of that agreement cannot be taken as evidence that Ms Chang previously thought that she was providing her services to any particular entity.

Rights transferred on initial commissioning of the photographs

The parties’ submissions

118. It is not disputed that Ms Chang, as the creator of the photographs, was the first owner of the copyright in those images: s. 11(1) CDPA. There is also no dispute that when the photographs were taken Ms Chang did *not* assign the copyright (at least in law) in those photographs to either Jiameiluo or Mr Lin, since there was no written contract between those parties governing the assignment of copyright in the photographs taken by Ms Chang. There was therefore no written assignment of copyright for the purposes of s. 90(3) CDPA.

119. The dispute concerns the question of how, in those circumstances, any rights in respect of the photographs passed from Ms Chang to Jiameiluo, and the scope of those rights. On that matter Shein advanced a primary and an alternative case:

   i) The primary case was that Ms Chang granted a licence to Jiameiluo (and no other entity) to use the photographs, and that licence was then transferred to Roadget under the ODM Agreement.

   ii) The alternative case was that there was an implied agreement between Ms Chang and Jiameiluo that copyright was to be transferred to Jiameiluo, giving rise to an equitable assignment of the copyright to Jiameiluo, which was transferred to Roadget under the ODM Agreement. The legal title was then perfected by the Framework Agreement and Agency Commissioning Agreement.

120. Temu disputed both Shein’s primary and alternative analyses, and said that the only right transferred by Ms Chang upon the initial commissioning of the photographs was a non-exclusive licence granted to Mr Lin, not limited to the use of the photographs by Jiameiluo. Thereafter, Temu accepted that Mr Lin would have licensed Roadget to use the photographs, but said that any such licence did not preclude him from also licensing the Sexy Secret store to use the photographs on Temu’s platform.

Shein's primary case

121. Shein's primary case was that Mr Lin commissioned the photographs from Ms Chang on behalf of Jiameiluo and that Jiameiluo thereby obtained a licence (either exclusive or non-exclusive) from Ms Chang to use the photographs. The effect of clause 12(3) of the ODM Agreement was therefore, according to Shein, that whatever licence Jiameiluo obtained was immediately transferred to Roadget, since clause 12(3) provided that "All rights, titles and interests in the ownership and intellectual property rights … shall belong to Party A." Accordingly, Shein submitted, Jiameiluo thereafter had no subsisting rights in the photographs to grant to anyone else, and could not consent to the use of the photographs by Jiaxin/Sexy Secret.

122. There are several problems with that analysis. First, while Temu did not dispute that Ms Chang must have granted some form of licence to use the photographs, as discussed above the evidence does not establish that the licence was granted to Jiameiluo, as distinct from Mr Lin personally, since Ms Chang did not know that the photographs were for use by Jiameiluo (or thereafter by Shein) specifically. Temu was therefore correct, in my judgment, to describe the position as being that Mr Lin had a general permission to use the images however he wanted. On that basis, there was nothing preventing Mr Lin from providing consent for the photographs to be used by Jiaxin on the Sexy Secret Temu store, which I will address below.

123. Secondly, Shein's analysis relied on the argument that the effect of clause 12(3) of the ODM Agreement was to transfer to Shein any licence that Jiameiluo obtained to use the photographs, whether that was an exclusive or a non-exclusive licence, leaving Jiameiluo with no subsisting licence itself. This argument was raised by Shein for the first time in its opening skeleton argument for the trial, and was completely unpleaded. Shein's trial sample statement of case for the Strawberry Nightdress relied on an assignment of *copyright* pursuant to the ODM Agreement. It did not suggest that the ODM Agreement also operated to assign any *licence* obtained by Jiameiluo to Roadget, at the time the photographs were created and sent to Mr Lin.

124. Mr Brandreth said that it was not necessary to plead the effect of clause 12(3), since this was simply advanced as a response to Temu's contention, in its defence, that a licence had been granted to Jiaxin/Sexy Secret. I do not accept that submission. The authorities rightly deprecate the taking of technical pleading points, and a trial judge can always permit a departure from the pleaded case where it is just to do so: *Satyam Enterprises v Burton* [2021] EWCA Civ 287, §35, and *Ali v Dinc* [2022] EWCA Civ 34, §25. But the point of a pleading is to enable the parties to know the issues that need to be addressed in their evidence and submissions.

125. In the present case, the consequence of Shein not pleading the clause 12(3) point is that Temu was not able to consider whether it was necessary to obtain further evidence from the PRC law experts that might be relevant to the construction of clause 12(3) of the ODM Agreement, which is an agreement governed by PRC law. That is important, because it is not at all obvious from the face of clause 12(3) that it should be construed in the manner contended for by Shein: the clause specifically concerns the assignment of the rights and interests in the "ownership and intellectual property rights" arising out of the styles commissioned by Shein and related photographs, and does not refer to the assignment of contractual rights such as a licence to use a copyright work. In addition,

while both experts addressed the framework for assignment of *copyright* under PRC law, they did not address the question of whether under PRC law a *licence* of this nature is assignable and if so under what conditions.

126. Mr Brandreth's response was to say that while the grant of the licence occurred under a contract governed by PRC law, the effect of the licence interest in the subsistence of English copyright is a matter of English law. That submission, however, did not address the evidential gaps relevant to the construction of clause 12(3) and assignability of licences, both of which are matters of PRC law that fall to be addressed before any conclusion can be drawn as to the effect of an assigned licence interest on the subsistence of English copyright. Indeed Shein's own submissions accepted the relevance of PRC law, as described at §§85–86 above.

127. I do not, therefore, accept the analysis in Shein's primary case. While it is common ground that on the initial commissioning of the Strawberry Nightdress photographs Ms Chang must have granted Mr Lin some form of licence to use the photographs, that licence was not limited to use of the photographs by Jiameiluo (or Shein thereafter). Furthermore, given the absence of relevant PRC law evidence, it is not now open to Shein to advance an unpleaded point that Jiameiluo's rights under that licence (whatever they were) were transferred to Shein under the ODM Agreement.

Shein's alternative case

128. Shein's alternative case was that it can be implied from the conduct of Ms Chang and Mr Lin/Jiameiluo that, at the time of the commissioning of the photographs from Ms Chang, there was an agreement between Jiameiluo and Ms Chang that copyright was to be transferred to Jiameiluo, for the purposes of Chinese copyright and pursuant to Article 19 of the PRC Copyright Law, read together with Article 490 of the PRC Civil Code. That agreement is said to have been confirmed in particular by the (later) Agency Commissioning Agreement, which Shein said was relevant evidence for the purposes of the application of Article 19 and Article 490 as a matter of PRC law. Shein contended that the effect of the implied agreement was that there was an equitable assignment of the (English) copyright in the photographs from Ms Chang to Jiameiluo. That equitable right and all rights of action were then immediately transferred to Roadget under clause 12(3) of the ODM Agreement.

129. Shein said that Roadget's legal copyright title was subsequently perfected by the execution of the Agency Commissioning Agreement and the Framework Agreement. At that point, therefore, Roadget held both legal and equitable copyright title, and the rights of action to bring a claim in relation to any infringement by Temu.

130. There were several reasons for advancing this alternative case. The first was to provide an alternative basis for the transfer to Roadget of Jiameiluo's rights in the photographs, on initial commissioning of the photographs, in the event that Shein's primary analysis was rejected (as I have indeed done, for the reasons set out above). The second reason was to address Temu's contention that the operation of s. 136(1) of the Law of Property Act 1925 (**LPA**) gives rise to a procedural bar to Shein bringing the present claim in relation to the Strawberry Nightdress. I address the question of whether there is such a procedural bar below. For present purposes it is sufficient to note that the alternative case sought to avoid the issue by establishing an assignment to Roadget of all rights of action pursuant to the ODM Agreement.

131. I do not, however, accept Shein's alternative case, for numerous reasons. In the first place, at the first PTR in December 2025 Ms May objected that Mr Brandreth's skeleton for that hearing suggested that he was intending to run a case on the equitable ownership of copyright title, pointing out that this was not pleaded. On that basis she objected to certain passages in the evidence of certain of the Shein factual witnesses, as being irrelevant. Mr Brandreth, in a subsequent exchange with the court, expressly agreed that he was *not* running a case on equitable ownership. The PTR order recorded, in the last recital, the confirmation by counsel for Shein that Shein did "not seek in their evidence to raise issues beyond their pleaded case", and in light of the confirmation in that recital no order was made on Temu's application in relation to Shein's factual evidence. (In the event, the only one of those witnesses called to give evidence at trial was Mr Lin, whose evidence is discussed above.)

132. Secondly, Shein's analysis relied on Article 19 of the PRC Copyright Law, as interpreted by Shein's PRC law expert Prof Cui. Both Prof Cui and Prof Wang devoted a substantial part of their expert reports to the interpretation of Article 19, and they were both cross-examined on the point. In very short summary, the dispute between the experts focused on the question of whether a stipulation of ownership, for the purposes of Article 19, can arise through conduct or even silence, potentially read together with subsequent confirmatory statements (Prof Cui's position), or whether evidence of a clear and explicit agreement at the relevant time is required (Prof Wang's position). There was also, as noted above, a dispute between the translation experts Ms Jia and Mr Shang as to the correct translation of the first sentence of Article 19.

133. I do not have to resolve either the translation or the construction of Article 19, however, because the effect of that provision was not pleaded by Shein as part of its case on the Strawberry Nightdress. It was only pleaded as part of Shein's trial sample statement of case in relation to one of the supplier works in the trial sample that was abandoned by Shein on 19 March 2026. Again, that is not a mere technical pleading point, because it meant that there was no pleading of the relevant factual matters that related to this point, still less any consideration of that in the evidence at the trial.

134. That was a critical omission, because it left Mr Brandreth unable to explain in his closing submissions how Article 19 of the PRC Copyright Law could be relevant to the question of the equitable assignment of copyright under English law. He accepted that, for the purposes of this point, he had to establish as a matter of fact that the agreement for which he contended could be inferred from the parties' conduct. While he said that the position under PRC law (assuming that Prof Cui's position was correct) might have informed what the parties thought they had achieved, he accepted that there was no evidence that either Ms Chang or Mr Lin ever considered the effects of Article 19.

135. Thirdly, even leaving aside the relevance of Article 19, on the question of fact that Mr Brandreth accepted he had to establish, Shein did not plead any agreement (whether express or implied) between Ms Chang and Jiameiluo, or even Ms Chang and Mr Lin, concerning the assignment to Jiameiluo of the copyright in the photographs of the Strawberry Nightdress. Had that been pleaded, it could have been explored with Mr Lin in his evidence. As it was, Mr Lin did not give any evidence on the existence of any such agreement. Furthermore, what he did say contradicts the suggestion that any agreement to assign the copyright to Jiameiluo could have arisen or should be implied, given that he

accepted that when the photographs were commissioned Ms Chang did not know which part of the business she was supplying the photographs for.

136. Finally and for completeness, Ms May noted that in *Robin Ray v Classic FM* [1998] FSR 622, p. 642, Lightman J considered in some detail the principles governing the respective rights of a contractor and client in the copyright in a work commissioned by the client, and found that if it is necessary to imply some grant of rights, the implication must be the minimum necessary. Accordingly, if the need could be satisfied by *either* the grant of a licence *or* an assignment of the copyright, the implication will only be the grant of a licence.

137. In the present case, Mr Lin's requirements were plainly met by the grant by Ms Chang of a licence to use the photographs. Indeed, Shein's primary case on this stage of the transaction was precisely that Jiameiluo had used the photographs pursuant to a licence granted by Ms Chang. In those circumstances, any argument as to the inferences that could or should be drawn from the conduct of Ms Chang and Mr Lin/Jiameiluo would need to address whether it was indeed (contrary to Shein's primary case) necessary for an assignment of copyright to be established. Mr Brandreth did not offer any answer to that point.

138. I therefore reject Shein's alternative case.

Effect of the Framework Agreement and Agency Commissioning Agreement

The parties' submissions

139. The effect of my conclusions above is that until June 2024 Shein did not have any copyright title or rights of action in respect of the photographs of the Strawberry Nightdress. Instead, Shein simply had a non-exclusive licence to use the photographs, granted by Mr Lin. Shein's case (as advanced at the trial) was that even if that was the position prior to June 2024, it obtained both copyright title and accrued rights of action by the combined effect of the Framework Agreement and the Agency Commissioning Agreement.

140. Although the amendments to Shein's particulars of claim to plead "catch-up assignments" (introduced as described at §59 above) indicated that Shein would rely on an argument that one or both of the Framework Agreement and the Agency Commissioning Agreement had retroactive effect, that argument was not pursued at the trial. Instead, Shein's analysis was as follows:

    i) On the signing of the Agency Commissioning Agreement on 29 June 2024, the copyrights and accrued rights of action in relation to the photographs provided by Ms Chang to Jiameiluo (on whatever basis) were assigned from Ms Chang to Jiameiluo.

    ii) Once that happened, those rights immediately passed to Roadget under the Framework Agreement, which had been signed three days earlier on 26 June 2024.

141. Temu did not dispute that the Agency Commissioning Agreement was effective to assign any copyrights and accrued rights of action in the Strawberry Nightdress photographs

from Ms Chang to Jiameiluo. It was also not disputed that clause II.8(4) and (6) of the Framework Agreement was effective to transfer to Roadget any copyrights and accrued rights of action that Jiameiluo obtained in relation to the Strawberry Nightdress photographs, *if* that clause applied to photographs that were created during the term of the ODM Agreement. The dispute between the parties was whether clause II.8(4) and (6) did indeed apply to the photographs of old products.

142. On that point Shein advanced two alternative "routes" to the application of clause II.8(4) and (6):

i) The first route was that the parties were still cooperating on the Strawberry Nightdress within the meaning of clause III.4 of the Framework Agreement, with the result that pursuant to that clause the other provisions of the Framework Agreement were applicable to that cooperation.

ii) The second route was that the terms "Works" and "Purchase Cooperation" referred to in the preamble to clause II.8 covered products and photographs supplied under the ODM Agreement.

143. Temu said that neither of those routes worked, as a matter of contractual interpretation pursuant to PRC law. It also (in any event) disputed Shein's entitlement to bring a claim relying on a purely equitable assignment of the accrued rights of action.

144. The question of contractual interpretation under PRC law was the subject of considerable evidence from the PRC law experts, Prof Cui and Prof Wang. I will address that first, before turning to Shein's two "routes" for its analysis of the effect of the Framework Agreement.

Evidence on contractual interpretation under PRC law

145. The experts were agreed that, as set out in Article 142(1) of the PRC Civil Code, the process of contractual interpretation may take into account the parties' intentions, customs and the principle of good faith. The dispute concerned the emphasis to be placed on the contractual language used in the hierarchy of the interpretation process.

146. Prof Cui's evidence was that while the starting point is the words used in a contract, PRC courts are permitted under Article 142(1) to take into account a broad range of contextual factors. He described that as a holistic approach, which weighed all relevant elements to determine the interpretation that most closely represented the parties' shared intent, with an emphasis on the spirit of the underlying agreement over strict linguistic interpretation.

147. Prof Wang took the view that literal interpretation is the primary rule of contractual interpretation under PRC law, and that other factors should only be considered where the literal interpretation is unclear or ambiguous. She relied on, among other things, extracts from a commentary prepared by the SPC on Article 1 of the SPC Interpretation (the **SPC Commentary**). A fuller version of the relevant section was provided, and was the subject of cross-examination of the experts.

148. It was common ground that the SPC Commentary is not binding under PRC law, but is persuasive authority. In a section giving an overview of Article 142, the SPC

Commentary states that:

> "… paragraph 1 of this article further clarifies that, in interpreting a contract, the court shall take as its basis the ordinary meaning of the words and expressions used, and determine the meaning of the disputed term by combining the relevant terms, the nature and purpose of the contract, custom, and the principle of good faith, while also referring to factors such as the background to the conclusion of the contract, the negotiation process, and the parties' conduct in performance. This explains the rule of contractual interpretation that unifies subjective and objective approaches."

149. The Commentary goes on to repeat that the generally considered view is that Article 142 unifies subjective and objective approaches to contractual interpretation:

> "in interpreting contracts and other declarations of intention made to a counterparty, the role of the words and expressions should be emphasised rather than directly seeking the actor's true intention. However, this emphasis does not exclude other interpretative methods. They should be considered together so as to achieve a balance between autonomy of will and protection of reliance."

150. The Commentary nevertheless emphasises the importance of considering the ordinary meaning of the words used as the starting point:

> "[Article 142(1)] provides that contractual interpretation shall take the ordinary meaning of the words and expressions as its basis, making clear that the objective approach occupies a foundational position."

151. The objective approach to the construction of the words is further explained in a section of the Commentary addressing the "Standard for literal interpretation", which describes this as follows:

> "This means taking a relatively objective standard, using literal interpretation as the basis, and forming an understanding in light of the particular transactional background and the comprehension ability of a generally reasonable person. … Full consideration should also be given to the negotiation process, trade usage, preparation for performance and course of performance."

152. Finally, a section of the Commentary entitled "Practical Issues" notes that:

> "For declarations made to a counterparty, if interpretation is required, the first step is to interpret according to the words and expressions used. If that makes the declaration clear, no further step is needed. If it remains unclear, it should be interpreted in conjunction with the relevant terms, the nature and purpose of the act, custom and the principle of good faith."

153. Prof Wang also referred to case-law which indicated that when interpreting a contract according to the principles set out in Article 142(1), the starting point is to look at the words and phrases used, and if the meaning is clear from that then there is no need to look further to other interpretative methods.

154. The underlying PRC law materials provided by Prof Wang were helpful. Her oral evidence on this point was, by contrast, rather defensive. As I have already noted, Prof Wang was not an impressive witness and I therefore treat her expressed opinions with some caution.

155. Prof Cui was, as already noted, a careful and measured witness. When cross-examined he fairly agreed that the SPC Commentary takes the view that a literal interpretation of the contract is at least the starting point, and that this is a view supported by most academic authors and the case-law of the SPC. He disagreed, however, with any suggestion that if the contractual language is clear and unambiguous it is unnecessary to go beyond literal interpretation, pointing out that (as Article 1(2) of the SPC Interpretation states) this would not be the case if there is evidence establishing a common understanding that differs from the literal meaning of the words. His view was therefore that the weight to be given to the various factors referred to in Article 142(1) will differ from case to case.

156. Ultimately I do not consider that there was any material difference between the experts on this issue. I did not, eventually, detect any difference of view as to the point that the starting point in contractual interpretation under PRC law is the words and expressions used in the relevant agreement. The SPC Commentary makes clear, however, that this starting point takes an objective approach requiring consideration of the ordinary meaning of the language used, from the perspective of a reasonable person, in light of the relevant transactional background and the negotiation process. An initial consideration of the language used does not therefore require the court to look at the words in a vacuum, but rather to interpret them within the context of the nature and background of the transaction.

157. As Prof Cui said, the weight to be given to other factors such as the parties' intentions, customs and good faith will depend on the facts of the case. As a matter of practicality, if the construction is clear from a consideration of the language used (and absent facts indicating that the parties' true intention differed from that language), the court may need to go no further. In other cases, extraneous factors may carry greater weight. The wording of Article 142(1) of the PRC Civil Code and Article 1(1) of the SPC Interpretation make clear that there are no hard rules excluding particular factors. I did not understand Prof Wang to take a different view, in that regard.

158. In the present case, for the reasons set out below, it is not in my view necessary to go beyond the language used by the parties in the interpretation of the Framework Agreement.

Shein's first route: clause III.4

159. As discussed above, the Strawberry Nightdress was delisted on the Shein website, most likely within around a month of it going online, i.e. by around the end of July 2023. It is therefore common ground that the supply of the product by Jiameiluo to Shein took place and terminated during the period in which the relationship between Shein and Jiameiluo was governed by the ODM Agreement. Once the Framework Agreement was signed on 26 June 2024, the effect of clause III.3 of that agreement was to terminate the ODM Agreement.

160. The question is therefore whether title to the Strawberry Nightdress photographs was transferred under clause II.8(4) and (6) of the Framework Agreement once the Agency Commissioning Agreement entered into force, in circumstances where the supply of the Strawberry Nightdress had taken place, and the photographs had been created, long before either the Framework Agreement or the Agency Commissioning Agreement entered into force.

161. Shein's first route contended that clause II.8(4) and (6) were engaged as a result of clause III.4. That clause provides that if the parties "still cooperate" on the old products under the original agreement, the parties agree to cooperate on the old products in accordance with the Framework Agreement. In other words any ongoing cooperation between the parties in relation to old products covered by the ODM Agreement is continued under the terms of the Framework Agreement, from the date of entry into force of that agreement. Shein's case was that there was ongoing cooperation on the Strawberry Nightdress, in circumstances where Jiameiluo had not yet completed the transfer to Roadget of all rights in the Strawberry Nightdress photographs, as it was required to do under clause 12(3) of the ODM Agreement.

162. On that basis, Shein's case was (as outlined above) that once the Agency Commissioning Agreement was signed by Jiameiluo and Ms Chang, title to the photographs and any accrued rights of action passed to Jiameiluo under clause VI.3 and 4 of the Agency Commissioning Agreement; and then on to Roadget under clause II.8(4) and (6) of the Framework Agreement.

163. Temu disputed that, arguing that the Strawberry Nightdress (once delisted) was no longer a product for which there was ongoing cooperation between Roadget and Jiameiluo, and it was therefore not covered by clause III.4. Temu argued that the effect of the termination of the ODM Agreement was to extinguish any obligations that might have subsisted under that agreement. Temu said that this reflected the words and purpose of the ODM and Framework Agreements, the default effect of Article 566 of the PRC Civil Code, and the requirement in Article 29 of the PRC Copyright Law that any copyright assignment must be clearly stipulated.

164. Temu's arguments were attractively presented by Ms May, but I do not accept them. The correct analysis is in my judgment as follows:

    i) On a plain reading of clause III.4 (even without the necessity to embark on a consideration of extraneous factors such as the parties' intentions), the Framework Agreement applied to products on which there was ongoing cooperation between Roadget and Jiameiluo. That conclusion is unaffected by Article 566 of the PRC Civil Code, because (as the experts agreed) Article 566 is a default rule which may be displaced by agreement.

    ii) Temu's submissions as to the cessation of the parties' cooperation focused on cooperation on the supply of products under the agreement. But cooperation for the purposes of clause III.4 must be understood in light of the definition of "Purchase Cooperation" in the Framework Agreement, which explicitly includes photography.

    iii) In that regard, although the Strawberry Nightdress as a product had been delisted before the Framework Agreement entered into force, Roadget and Jiameiluo were continuing to cooperate in relation to the photographs for that product, in order to effect the transfer of rights required by clause 12(3) of the ODM Agreement. That was plainly "cooperation on the old products under the Original Agreement".

iv) Contrary to Temu's submissions, I do not think that it matters that the parties' cooperation took place in the context of this litigation: the language of clause III.4 refers to cooperation without limitation to any specific context.

v) There was therefore ongoing cooperation between the parties, within the meaning of clause III.4 of the Framework Agreement, in relation to the Strawberry Nightdress.

vi) Accordingly, clause II.8(4) and (6) operated to transfer to Roadget any rights that Jiameiluo acquired in relation to the photographs for the Strawberry Nightdress, both in respect of copyright and accrued causes of action (albeit that in relation to the accrued causes of action the effect of s. 136 LPA needs to be considered, which is discussed below). Clause II.8(4) and (6) thus constituted an explicit assignment for the purposes of Article 29 of the PRC Copyright Law.

165. Shein's "first route" to the analysis of the Framework Agreement is therefore in my view correct, and there is therefore no need to consider the "second route". I will, however, do so for the sake of completeness.

Shein's second route: definition of "Works" and "Purchase Cooperation"

166. Shein's "second route" to the analysis of the Framework Agreement is to say that the Strawberry Nightdress photographs are "works related to this Agreement" within the meaning of the preamble to clause II.8. That preamble, as set out above, provides that the subsequent provisions of the clause apply to:

> "… any styles, patterns, pictures or videos provided, developed, designed or created by either Party in the Purchase Cooperation, or any works related to this Agreement ('Works') …"

167. Shein said that the disjunctive "or" means that photographs may be "works related to this Agreement" even if they were not created under the defined "Purchase Cooperation" under the Framework Agreement. Furthermore, Shein argued, the phrase "related to this Agreement" should be given a broad meaning, to encompass anything that is related to the relationship between Jiameiluo and Roadget.

168. In the alternative, Shein contended that "Purchase Cooperation" should in any event also be regarded as extending to products already supplied under a previous agreement between the parties (i.e. in this case the ODM Agreement). Shein said that it was necessary to construe either "works related to this Agreement" or "Purchase Cooperation" in this way so as to give effect to the purpose of clause II.8(4) and (6), which was to ensure that "any and all copyrights are swept up and move over to Roadget".

169. These arguments are not, in my judgment, convincing. Taking the starting point of the ordinary meaning of the language (as both experts agreed is the right approach under PRC law), the definition of "Purchase Cooperation" is clearly limited to the cooperation

measures taken by the parties to conduct purchases "under this Agreement". It does not concern cooperation in relation to purchases under a previous agreement. Indeed, if it did extend to such purchases, clause III.4 addressing continued cooperation on old products would be redundant.

170. As to the scope of the preamble to clause II.8, the Framework Agreement is clearly not, on its face, an agreement that is expressed to govern the entire relationship between Jiameiluo and Roadget in an abstract or general sense, but is an agreement that governs the purchase of products by Roadget from Jiameiluo, as specified in the definitions of "Products" and "Purchase Cooperation". The ordinary meaning of "works related to this Agreement" must therefore denote works that are related to the transactions governed by the Framework Agreement, i.e. purchases by Roadget from Jiameiluo under the terms of the Framework Agreement.

171. That interpretation is supported by the fact that clauses II.8(4) and (6) both refer specifically to the intellectual property in works "related to the Purchase Cooperation". Those clauses are therefore on their face confined to a transfer of intellectual property rights that are "related to the Purchase Cooperation", as defined by reference to purchases "under this Agreement", rather than extending to rights that arise in relation to purchases under any previous agreement. That is why the extension of those provisions to cooperation in relation to old products is explicitly required, and is addressed in clause III.4.

172. To the extent that Shein relies on the purpose of the Framework Agreement as displacing the ordinary meaning of the words "works related to this Agreement" and/or the definition of "Purchase Cooperation", it would be necessary for Shein to adduce evidence as to that purpose. There was, however, no evidence that the purpose of the Framework Agreement was to address intellectual property rights that are unrelated to the transactions governed by the Framework Agreement, other than those that fall under the scope of the continuation provision in clause III.4.

173. The correct route to Shein's analysis of the effect of the Framework Agreement is therefore the first route relying on the scope of clause III.4.

The s. 136 LPA point

174. Temu's final argument was that whatever the effect of the Framework Agreement, it could not operate to transfer *legal* title to accrued rights of action in relation to the Strawberry Nightdress, because both of those agreements were executed before Jiameiluo obtained the copyright via the Agency Commissioning Agreement. Under s. 136(1) LPA, legal title to a cause of action is only assigned if (i) the assignment is in writing, (ii) the assignment is absolute, and (iii) express notice is given in writing to the person from whom the assignor would be entitled to claim.

175. Temu said that no notice of the assignment was given to the photographer Ms Chang. In addition, since an absolute assignment requires an assignment that is not dependent or conditional on a future "uncertain event" (*Durham Brothers v Robertson* [1898] 1 QB 765, 773), Temu argued that any assignment of rights of action in relation to the Strawberry Nightdress under the Framework Agreement was not absolute, given that those rights did not vest in the assignor (Jiameiluo) at the time of the Framework

Agreement, but were conditional on a future event, namely the execution of the Agency Commissioning Agreement.

176. The effect of those problems, Temu said, was that any assignment to Roadget of an accrued cause of action effected by the combined operation of the Framework Agreement and the Agency Commissioning Agreement was an equitable assignment only, which would only entitle Shein to pursue a claim if the legal titleholder (Jiameiluo) was joined to the action. Temu made this point in its trial sample statement of case in relation to the Strawberry Nightdress.

177. As set out above, Shein sought to avoid the s. 136 LPA issue through its alternative case on the rights transferred on the initial commissioning of the photographs. For the reasons set out above, I have rejected that case.

178. In the alternative, Shein accepted that the Framework Agreement did not operate as an absolute assignment of unvested rights of action in relation to the Strawberry Nightdress photographs, with the result that once the Agency Commissioning Agreement was executed Roadget only held equitable but not legal title to those rights of action. But Shein contended that this did not operate as a procedural bar to the present claim. The reason was, Shein said, that it was not necessary to join Jiameiluo in the circumstances of the present case, where Jiameiluo could not itself bring an action in the UK for copyright infringement (being the holder of a bare legal title to the accrued rights of action in the relevant photographs, with no title at all to the copyright in those photographs); and that it was in any event fanciful to suppose that Jiameiluo, a small family-run Chinese business, would bring a claim against Temu in this regard. There was therefore no risk of Temu being vexed twice, which was the purpose of the procedural requirement to join the legal title-holder to the action: *National Westminster Bank v Kapoor* [2011] EWCA Civ 1083, §31.

179. Shein's alternative response was, in my judgment, well-founded, and Temu offered no answer to it. Indeed, while Ms May said in her oral closing submissions that Temu still pursued its s. 136 LPA objection, that point was not addressed in Temu's written closing submissions, nor did Ms May say anything further about it in her oral closing submissions. I do not, therefore, consider that the effect of s. 136 LPA is to create a procedural bar on Shein bringing a claim in respect of the Strawberry Nightdress.

Abuse of process

The parties' submissions

180. The final matter to be addressed in relation to the copyright ownership and chain of title arguments is Temu's argument that the claim in respect of the Strawberry Nightdress should be struck out on the grounds of abuse of process, on the basis that when Shein introduced the supplier works (including the Strawberry Nightdress) into the claim in February 2024, it knew that it did not have title in those works, because it knew that its suppliers had not obtained assignments of copyright from the original photographers.

181. Temu did not identify any evidence that Shein knew that it did *not* own the copyright in the Strawberry Nightdress photographs specifically, when that was added to the claim in February 2024. Temu said, however, that at the very least blind-eye knowledge could be inferred from the following matters:

i) On 26 September 2023 Gwen Zhang, an in-house legal counsel at Shein, discussed obtaining photographer contract evidence for supplier works: "For photos provided by suppliers, we need to check with the suppliers whether they have the original photos or photographer contract evidence".

ii) On 8 December 2023 Ms Lin circulated a "to do" list to an internal team, which included as item 1: "For those [suppliers] that are uncooperative but highly suspicious, before taking further commercial actions, to first secure the ownership of SHEIN images and styles (by having the photographers sign an assignment letter). @Liu Chang to provide a template of the letter."

182. Shein's "catch-up" assignments in the form of the Agency Commissioning Agreement and Photographer Undertaking were rolled out in early 2024, following the 5 February 2024 hearing.

i) Those assignments were referred to in a presentation given by Ms Lin to suppliers on 7 March 2024, explaining the types of documents and agreements that suppliers should obtain from photographers and agencies in order to demonstrate chain of title.

ii) Temu said that adverse inferences should be drawn from the failure of Gwen Zhang and Mr Wei, another in-house counsel for Shein, to attend the trial to give evidence, and from Shein's failure to provide disclosure of relevant documents.

183. On the basis of these matters (and Ms Lin's responses in her oral evidence when asked about those documents), Temu said that the court should infer that Shein had at the very least a firmly-grounded suspicion that the necessary assignment documents were not in place, which it failed to investigate properly.

184. Shein's position was that it had relied on the truth of contractual warranties in its agreements with suppliers to support its case on title. The specific warranty relevant to the Strawberry Nightdress was clause 12(11) of the ODM Agreement. In addition, Shein said that there was no specific evidence of the knowledge asserted by Temu; and disputed the inferences that Temu sought to draw from the matters set out above.

Legal principles

185. The relevant legal principles were not materially disputed. It is an abuse of process for a claimant to initiate proceedings in the knowledge that the cause of action is owned by another party: *Pickthall v Hill Dickinson* [2009] EWCA Civ 543, §15. It is also an abuse to continue proceedings in that knowledge: *Pathania v Adedeji* [2014] EWCA Civ 681, §15.

186. This type of abuse of process requires actual knowledge of the lack of title to the cause of action. It is not sufficient to rely on what the claimant ought to have known: *Pathania*, §15. It is, however, established that actual knowledge encompasses blind-eye knowledge or "Nelsonian blindness": *Manifest Shipping v Uni-Polaris Shipping* [2003] 1 AC 469, §112. In that case, Lord Scott described the test as follows (at §116):

> "In summary, blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that

> they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state of mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe. …"

187. Temu relied on the (rebuttable) presumption that a party with access to legal advice knows the law and understands its rights: *Peyman v Lanjani* [1985] Ch 457, p. 487 and *URE Energy v Notting Hill Genesis* [2025] EWCA Civ 1407, §85. Temu also relied on inferences to be drawn from the non-attendance at trial of relevant witnesses: *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324, p. 340; and from the failure to provide disclosure of relevant documents: *Yuchai Dongte v Credit Suisse* [2018] EWHC 2580 (Comm), §17.

188. It is not, however, permissible to draw adverse inferences from the invocation of privilege in relation to disclosure, since that would undermine the principles on which privilege is founded: *Munday v Hilburn* [2014] EWHC 4496 (Ch), §44.

Application in this case

189. It is first necessary to address the significance of the warranty in clause 12(11) of the ODM Agreement. Mr Shang's translation of that clause as warranting that the supplier had obtained "sufficient rights" to transfer them to others was carefully explained and compelling. He referred in particular to the literal translation of the Chinese phrase, based on several authoritative dictionaries for that purpose. Ms Jia accepted that Mr Shang's literal translation was correct, but suggested that "full rights" should be preferred based on a Bing search indicating a more frequent usage of the latter expression in legal language. That analysis was not at all persuasive.

190. I therefore accept Mr Shang's translation of the clause as warranting that the supplier had obtained "sufficient rights" to transfer them to others. Mr Brandreth's argument was that even if this was the case, "sufficient rights" must necessarily have meant "all rights", since otherwise the supplier would be unable to satisfy clause 12(3). That submission was, however, difficult to follow given that clause 12(3) simply operated to transfer to Roadget whatever rights the supplier had; it did not purport to transfer any specific substantive intellectual property rights, such as copyright titles.

191. Moreover, as Temu pointed out, any warranty provided by the suppliers in the terms of clause 12(11) did not mean that the supplier did in fact *have*, as a matter of law, any particular rights to transfer to Roadget; all that such a warranty did was to provide Roadget with a contractual claim if it turned out the supplier did not have the rights warranted (whatever they were). That was precisely the point made by Temu at the 5 February 2024 hearing, in response to Shein's submission that it was entitled to rely on the warranties as establishing its copyright title in the supplier works. The judgment at that hearing rejected Shein's contention, making clear that it was not sufficient for Shein simply to rely on supplier warranties (see §§46–48 above). Mr Brandreth did not offer any real answer to that point in his submissions.

192. Ms Lin nevertheless repeatedly relied on the warranties as part of her insistence that Shein had ownership of the relevant rights from the outset, and said that the catch-up assignments were simply put in place to "double-check" that the chain of title from the photographers was clearly established. She repeatedly denied that there was a risk that without that documentation, Shein might not have obtained copyright title. Her evidence was, as I have already found, evasive and unreliable. On this particular point, it was evident that she was essentially repeating a script rather than properly engaging with the questions put to her. Ms Zhu was likewise unable to explain the basis on which Shein believed that it owned the copyright in supplier and agency works. Neither witness ultimately offered any explanation of how clause 12(11) could have provided Shein with any comfort as to its ownership of the copyright title in any of the supplier works.

193. The reality was that, as Shein accepted in its particulars of claim, when it sent the letter before action it simply did not know whether it owned legal or equitable title in the supplier works. Nor had its knowledge improved by the time that the supplier works were introduced into the claim (including the Strawberry Nightdress), because it had not sought to establish, for each of those supplier works, a comprehensive chain of title from the original photographer to Roadget. Indeed, in a witness statement for the February 2024 hearing, Gwen Zhang said that it would be "commercially impractical and unworkable for Shein to look behind the warranties provided by suppliers and to trace the chain of title in each and every Image back to the original photographer before including an Image in a Notice". Ms Zhu made the same point in her evidence for this trial. Shein therefore did not know what title it held in relation to any of the supplier works when those were introduced into the claim. That is precisely why Shein put in place catch-up assignments in the form of (among others) the Photographer Undertaking and Agency Commissioning Agreement, apparently believing that it could rely on them in one way or another.

194. It does not follow, however, that Shein had blind-eye knowledge, still less actual knowledge, that it did not own the copyright title for the Strawberry Nightdress photographs. As the comments of Lord Scott in *Manifest Shipping* make clear, blind-eye knowledge will not be inferred lightly, and a general suspicion is not sufficient. What is required is a suspicion that is firmly grounded and targeted on specific facts, together with a deliberate decision to avoid confirming those facts.

195. I do not consider that the evidence is sufficient, in this case, to establish that Shein had a firmly grounded suspicion targeted on "specific facts" that it *did not* own the copyright title in the relevant photographs. Rather, the evidence shows no more than that Shein had a concern that in many or even most cases it *might not* be able to establish copyright title, and it therefore sought to regularise the position retrospectively if it could. The 26 September 2023 message from Gwen Zhang is consistent with a belief that at least some suppliers might have evidence of contracts with their photographers, hence the suggestion of checking whether that was the case.

196. The high point of Temu's evidence to the contrary was Ms Lin's acknowledgment, in her oral evidence, that it was uncommon for clothing suppliers to sign written agreements with their photographic agencies, on the grounds that this would have been considered cumbersome. That certainly supports the conclusion that Shein suspected that, in general, it might not be able to establish copyright title for all of the supplier works. But it does

not suggest that Shein was aware of any "specific facts" which indicated that it did not have copyright title in the Strawberry Nightdress.

197. Nor does the evidence establish the second element of the blind-eye knowledge test, namely the existence of a deliberate decision to avoid confirming the facts. On the contrary, the facts relied on by Temu indicate that Shein was indeed considering what documentary evidence was available in relation to the supplier works, even if it did not (as acknowledged in the witness statement of Gwen Zhang referred to above), specifically verify the documentary evidence for each of the supplier works before they were included in the claim.

198. I do not consider that there is any basis for adverse inferences to be drawn from the selection of Shein's witnesses. Shein put forward both Ms Lin and Ms Zhu, senior lawyers within its in-house legal team, to explain the introduction of the supplier and agency works to the claim, Shein's knowledge of chain of title in relation to those photographs, and the introduction of Shein's revised vendor management system in 2024. Ms Lin was directly involved in the introduction and communication of the revised vendor management processes, and Ms Zhu was the most senior Shein in-house lawyer within the UK and European legal teams during the period leading up to and around the time of issuing the UK proceedings. Although the oral evidence of both of those individuals was, in the event, rather unsatisfactory, that was not because they were inherently unsuitable witnesses for the issues covered by their evidence.

199. The fact that there were other lawyers involved in those processes such as Gwen Zhang and Mr Wei, who had previously given evidence in these proceedings, therefore does not mean that Shein should have put forward additional evidence from those witnesses or that adverse inferences should be drawn from its failure to do so.

200. Finally, in relation to Shein's alleged non-disclosure of documents, Temu's objections were only faintly pursued and appeared to rely essentially on the fact that in the competition part of the case various documents had been disclosed that were not disclosed for the purposes of the present trial. As Mr Brandreth explained, the reason for the discrepancy was that in the competition part of the proceedings there had been accidental disclosure of documents marked as privileged for the purposes of this part of the proceedings. There is no basis for any adverse inferences to be drawn from that situation.

201. I do not, therefore, consider that the inclusion of the supplier works in the claim was an abuse of process.

Conclusions on copyright ownership

202. It follows from my conclusions above that until June 2024 Shein had a non-exclusive licence to use the photographs of the Strawberry Nightdress, but did not have any copyright title or rights of action in relation to those photographs. Once the Framework Agreement and Agency Commissioning Agreement were executed, Shein acquired copyright title in the photographs on the basis of clause II.8(4) and (6) read together with clause III.4 of the Framework Agreement. Shein also acquired equitable title to any accrued rights of action, and is not barred from bringing the present proceedings based on that equitable title.

203. The evidence does not, however, indicate that Shein knew (or had blind-eye knowledge) that it did not have copyright title in the Strawberry Nightdress photographs at the time that those works were introduced into the claim. I therefore reject the submission that Shein's claim in this regard was an abuse of process.

INFRINGEMENT AND DEFENCES

Overview of the issues

204. Shein initially alleged infringement by Temu on the basis that Temu had reproduced Shein's copyright photographs on its website contrary to s. 17 CDPA. That allegation was not pursued at the trial, since Shein accepted that Temu's servers are located outside the UK, and any act of reproduction was therefore outside the territorial scope of s. 17. Instead, Shein alleges infringement by Temu on three alternative bases:

   i) Primary infringement under s. 17 CDPA, by authorising users of Temu's UK website to reproduce the trial sample photographs by viewing them on a web browser.

   ii) Alternatively, primary infringement under s. 20 CDPA, by communicating the copies of the photographs to a "new public" in the form of the users of the Temu UK website.

   iii) Alternatively, secondary infringement under s. 23 CDPA, by exhibiting and distributing the photographs to users on the UK website, with knowledge or reason to believe that the photographs are infringing copies.

205. Temu denies infringement on essentially five grounds. The first applies only to the Strawberry Nightdress; the second, third and fourth grounds apply to all five of the trial sample works:

   i) In relation to the Strawberry Nightdress only, Temu relies on consent granted to Jiaxin to use the photographs on the Temu website.

   ii) Infringement under s. 17 CDPA is denied on the grounds of lack of evidence of reproduction of the trial sample photographs in the UK, and that insofar as users of its UK website did reproduce those photographs, that constituted the making of temporary copies permitted by s. 28A CDPA. In the alternative, Temu says that it did not "authorise" any acts of copyright infringement.

   iii) Infringement under s. 20 CDPA is denied on the grounds that Temu did not have "knowledge of the consequences of its actions" as required by the case-law, in circumstances where it did not know that the photographs infringed Shein's copyright.

   iv) Infringement under s. 23 CDPA is denied on similar grounds, that Temu did not know or have reason to believe that the photographs infringed Shein's copyright.

   v) In relation to all of the alleged infringements, Temu relies on the so-called hosting defence under Regulation 19 of the E-Commerce Regulations.

206. Each of these is addressed in turn below. First, however, it is necessary to set out the overarching legal framework within which these issues fall to be determined.

Legal framework

Relevant provisions of the CDPA

207. Section 16 CDPA provides, in particular:

> "**The acts restricted by copyright in a work**
>
> (1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom—
>
> (a) to copy the work (see section 17);
>
> …
>
> (d) to communicate the work to the public (see section 20);
>
> …
>
> and those acts are referred to in this Part as the 'acts restricted by the copyright'.
>
> (2) Copyright in a work is infringed by a person who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright."

208. Section 17 provides, in particular:

> "**Infringement of copyright by copying**
>
> (1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.
>
> (2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form.
>
> This includes storing the work in any medium by electronic means."

209. Section 20 CDPA, which was introduced to give effect to Article 3(1) of the Information Society Directive, provides:

> "**Infringement by communication to the public**
>
> (1) The communication to the public of the work is an act restricted by the copyright in— (a) a literary, dramatic, musical or artistic work, …
>
> (2) References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include— … (b) the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them."

210. Section 23 CDPA refers to secondary infringement by possessing or dealing with an infringing copy. It provides:

> “**Secondary infringement: possessing or dealing with infringing copy**
>
> The copyright in a work is infringed by a person who, without the licence of the copyright owner—
>
> (a) possesses in the course of a business,
>
> …
>
> (c) in the course of a business exhibits in public or distributes …
>
> an article which is, and which he knows or has reason to believe is, an infringing copy of the work.”

211. Chapter III of the CDPA is entitled “Acts permitted in relation to copyright works”. Among the provisions of that chapter, s. 28A was introduced to implement Article 5(1) of the Information Society Directive, and provides:

> “**Making of temporary copies**
>
> Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable—
>
> (a) a transmission of the work in a network between third parties by an intermediary; or
>
> (b) a lawful use of the work;
>
> and which has no independent economic significance.”

Regulation 19 of the E-Commerce Regulations

212. The hosting defence is set out in Regulation 19 of the E-Commerce Regulations, which were introduced to implement Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the **E-Commerce Directive**). Regulation 19 specifically implements Article 14 of the E-Commerce Directive. It provides:

> “Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—
>
> (a) the service provider—
>
> (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent

to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider."

213. Regulation 2 states that the expression "information society services" is summarised in recital (17) of the E-Commerce Directive as covering "any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing … and storage of data, and at the individual request of a recipient of a service".

214. Article 14 of the E-Commerce Directive falls under section 4 of that Directive, which is entitled "Liability of intermediary service providers". The provisions in section 4 are explained in recitals (40)–(48) of the Directive. Recital (42) comments that:

> "the exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted and stored."

Consent (Strawberry Nightdress only)

The parties' submissions

215. Temu did not rely on consent in relation to any of the employee works. It did, however, rely on consent for the Strawberry Nightdress, contending that either Mr Lin or his brother Junxin granted Jiaxin a licence to use the photographs of the Strawberry Nightdress on the Sexy Secret Temu store.

216. There was no dispute that, for the purposes of s. 16(2), if Mr Lin obtained from Ms Chang a licence to use the photographs, that licence also permitted him to authorise others to use the photographs, in so far as any interest in the photographs had not already been transferred in its entirety to Roadget. Shein's case was, rather, that (i) any rights in the photographs were granted exclusively to Jiameiluo and then transferred to Roadget under the ODM Agreement, leaving no residual rights that could be granted to others; and (ii) as a matter of fact neither Mr Lin nor Junxin did grant a licence to Jiaxin to use the photographs on the Sexy Secret Temu store.

Discussion

217. I have already addressed and rejected the first of those arguments. As to the second argument, that requires consideration of the evidence of Mr Lin.

218. I have already found that Mr Lin, Junxin and Jiaxin were working closely together in the family business, which is why Jiameiluo used the Sexy Secret Temu store to clear its surplus Shein inventory. Mr Lin would have known that in order to sell the product on the Temu store it would have been necessary to upload photographs. It would have made no sense for Jiaxin to commission new photographs, when Mr Lin already had a full set of photographs from Ms Chang. That is no doubt why Sexy Secret used the photographs taken by Ms Chang for its listing of the Strawberry Nightdress.

219. Mr Lin insisted that neither he nor Junxin nor Jiameiluo had ever provided any product photographs to Jiaxin, nor had they authorised Jiaxin to use "Shein photographs". He said that he did not know how Jiaxin obtained the photographs, and suspected that Jiaxin might have copied or downloaded the relevant images directly from Shein's website and re-uploaded them to the Temu listings page without Mr Lin's knowledge or permission.

220. While that explanation was consistent with Junxin's responses to the questions from Guangzhou Shein in the interview of 21 December 2023, I consider it to be implausible. By the time that the Strawberry Nightdress was uploaded to the Sexy Secret Temu store, it had (most likely) been delisted from Shein for some time. Mr Lin did not give any convincing explanation for how, in those circumstances, Jiaxin could have downloaded the images from Shein's website. Nor did he offer a credible basis for suggesting that while (at least until late 2023) Mr Lin engaged Jiaxin to sell the stock through Temu, in order to avoid having to sell to stock clearers at a loss, he nevertheless withheld the photographs of that stock from Jiaxin.

221. As I have already noted, Mr Lin gave repeated untruthful evidence regarding his relationship with Jiaxin. His denials that he gave Jiaxin any photographs of products to be sold on Temu, or authorised Jiaxin to use those photographs, were likewise in my judgment not truthful. The most likely and indeed obvious explanation for the use of the Strawberry Nightdress photographs on the Sexy Secret Temu store is that Mr Lin provided those photographs to Jiaxin and permitted him to use them for the Temu listing. Mr Lin was able to provide that consent given my conclusion above that the licence granted by Ms Chang to Mr Lin was not limited to the use of the photographs by Jiameiluo or Shein.

222. It follows that in relation to the Strawberry Nightdress the evidence establishes consent within the meaning of s. 16(2) CDPA. That is therefore the end of the infringement claim for that work. I will, however, go on to consider Temu's other defences, since it is necessary to address these in any event for the four employee works.

Authorising reproduction of images (s. 17)

The parties' submissions

223. Shein's case is that Temu authorises the users of its UK website to reproduce the copyright works on the website by copying the photographs into the RAM of their computer, mobile phone or tablet device on which they browse. Shein refers in particular to clause 8.4 of Temu's Terms of Use which grants the users of the website a "limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal and non-commercial use of the Services", with the "Services" defined to be Temu's "applications, products, services and websites". Shein contended that Temu's business model depends on the user viewing the image of products that are offered for sale; and

that reproduction of photographs on Temu's website is inevitably bound to occur when a user accesses the website.

224. Temu said that there was no evidence that users of its website had reproduced the trial sample photographs in the UK. Its main argument, however, was that any acts of reproduction are permitted under s. 28A CDPA. In the alternative, if s. 28A does not apply, Temu said that it had not authorised reproduction of copyright images, in circumstances where it has no direct control over the content uploaded by merchants on its platform, and takes substantial steps to prevent infringement including by prohibiting the uploading of infringing content and operating an IP complaints and take-down process.

Evidence of reproduction in the UK

225. There is no direct evidence that the users of Temu's UK website viewed, and thereby reproduced on their devices, the trial sample photographs specifically (as opposed to other photographs on the website). The trial sample photographs were, however, all on Temu's UK website. Temu must have page-view data and logs that would enable it to determine whether those pages have been viewed, but it has not produced them.

226. Absent any such data showing positively that the trial sample photographs were not viewed by anyone in the UK, the court is entitled to infer that photographs that were displayed on a UK-targeted retail product page were in fact viewed by at least some UK users. Ms May in her closing submissions did not offer any reason why such an inference should not be drawn.

Section 28A CDPA

227. Section 28A CDPA, which is based on Article 5(1) of the Information Society Directive, permits the temporary reproduction of works where the act of reproduction fulfils the following five conditions: (i) it is temporary; (ii) it is transient or incidental; (iii) it is an integral and essential part of a technological process; (iv) the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary, or a lawful use of the work or protected subject-matter; and (v) the act has no independent economic significance.

228. The application of these conditions to the viewing of copyright material on the internet was considered by the Supreme Court in *Public Relations Consultants v Newspaper Licensing Agency* (***Meltwater***) [2013] UKSC 18. Lord Sumption reviewed the case-law of the Court of Justice in three cases: Case C-5/08 *Infopaq v Danske Dagblades Forening* (***Infopaq I***) EU:C:2009:465, Cases C-403 and 429/08 *Football Association Premier League v QC Leisure* (***Premier League***) EU:C:2011:631 and Case C-302/10 *Infopaq v Danske Dagblades Forening (**Infopaq II**)* EU:C:2012:16, and applied the principles derived from those cases to the provision of reports with links to newspaper articles. As Lord Sumption noted, the same question would potentially affect millions of users of the internet who might view copyright material on the internet without the authority of the rights owner, for example because it has been unlawfully uploaded by a third party.

229. Lord Sumption held that the case fell within s. 28A CDPA. In particular, he stated that it was clear from recital 33 to the Information Society Directive that the exception was

intended to include "acts which enable browsing" on a web browser. He noted at §§27–28 that:

> "The acts of temporary reproduction which 'enable' browsing to occur are … the making of temporary copies in the internet cache of the end-user's hard drive and on his screen. It follows that the recital expressly envisages that the exception will apply to end-user viewing of web pages.
>
> Once it is accepted that part of the purpose of article 5.1 is to authorise the making of copies to enable the end-user to view copyright material on the internet, the various conditions laid down by that article must be construed so far as possible in a manner consistent with that purpose. It must, if the exception is to be coherent, apply to the ordinary technical processes associated with internet browsing."

230. As regards the five conditions for the application of s. 28A CDPA, the following propositions may be drawn from the *Meltwater* judgment:

i) The first and second conditions (temporary copying which is transient or incidental) are satisfied by web browsing where the copyright material is retained for no longer than the ordinary processes associated with internet use continue. The object of the restriction to temporary or transient copies is to ensure that the exception does not protect downloading or other forms of digital or physical copying, which would remain in existence until the user chooses to delete or destroy them (§31).

ii) The third condition (integral and essential part of a technological process) is satisfied by web browsing of copyright content where the technological processes required to browse the internet could not function correctly and efficiently without the acts of reproduction concerned (§29).

iii) The fourth condition (sole purpose to enable transmission by an intermediary, or lawful use of the work) is satisfied by web browsing that is in itself lawful, save for the lack of authorisation by the copyright owner (§29).

iv) The fifth condition (no independent economic significance) does not mean that the making of the temporary copy must have no commercial value. Rather, it means that it must have no *independent* commercial value, i.e. no value additional to that which is derived from the act of digitally transmitting or viewing the material. That is satisfied by web browsing where the sole economic value derived from accessing the material is derived from the mere fact of viewing the material on screen (§§26(v) and 29).

231. Shein did not suggest that any of the first four conditions are not satisfied in this case. I agree with Temu that they plainly are. The dispute between the parties focused on the last condition, namely that the temporary copying inherent in viewing photographs on Temu's website must have no independent economic significance.

232. Shein contended that in the present case the copyright works are not viewed for the works themselves, but are viewed in order to facilitate the consumer's decision whether to purchase the products shown in the works. Shein said that this was of economic value to

both Temu, for which the image is the means to the economic end of selling products on its platform, and the user, who is going to Temu's website to make purchasing decisions.

233. I do not accept that submission. In assessing whether there is economic significance in making the temporary copy, it is the economic significance to the person making that copy that matters. This point was explained by the CJEU in *Infopaq II*, which (similar to the facts of the *Meltwater* case) concerned a commercial media monitoring service. The CJEU held that the requirement of no independent economic significance meant that the economic advantage derived from the act of temporary reproduction must not be either distinct or separable from the economic advantage derived from the lawful use of the work concerned, and must not generate an additional economic advantage "going beyond that derived from that use of the protected work" (§50). It further noted that an advantage derived from the act of temporary reproduction is distinct and separable if the "author of that act is likely to make a profit due to the economic exploitation of the temporary reproductions themselves" (§52).

234. That makes clear that the question is not the economic value to the person responsible for the website, but rather the economic value to the "author of the act" of reproduction, namely the user of the website. In the present case, therefore, the question is whether the user of Temu's UK website obtains an economic advantage that is distinct and separable from the advantage derived from simply viewing the copyright material.

235. The answer to that question is that the website user who simply views copyright material on Temu's website gains no independent economic advantage from that act. The economic advantage to the user lies in the ability to view photographs on the website in order to decide whether to make a purchasing decision. It is the online equivalent of looking at products in a bricks and mortar shop window, or in the shop itself. That is an economic advantage that is solely derived from the fact of viewing the photographs; there is no distinct or separate economic advantage, such as the exploitation of the temporary copies to make a profit.

236. Mr Brandreth sought to draw a distinction between the present case and cases such as *Premier League*, which concerned the viewing of football matches, and the *Infopaq* cases, which concerned viewing of news content. He said that in those cases the viewing was the purpose of the activity, whereas in the present case the photographs on Temu's website are viewed in order to inform a purchasing decision.

237. There is, however, nothing in the case-law to suggest that the application of s. 28A differs according to whether the copyright content is viewed for purely entertainment or informative purposes, or in order to inform a purchasing decision. If that were the case, the exception would apply differently to the user of Temu's website depending on whether they were intending to make a purchase, or simply browsing because they enjoyed looking at the latest fashion trends. That would be absurd, and contrary to the purpose of the exception as described by the Supreme Court in *Meltwater*.

238. Rather, the cases recognise that viewing copyright material will necessarily have economic value of some kind to the viewer (*Premier League* §174, *Infopaq II* §48, *Meltwater* §29). The fact that browsing copyright material in itself provides the user of a website with an economic advantage (including informing or facilitating a retail transaction) therefore does not take that outside the scope of the s. 28A exception. The

exception will, by contrast, not apply if there is economic exploitation "of the temporary reproductions themselves" (*Infopaq II* §52); but that is not the case here.

239. I therefore accept Temu's submission that the s. 28A exception is engaged in the present case. The consequence is that the users of Temu's UK website do not, by viewing copyright photographs including the trial sample photographs, infringe copyright within the meaning of s. 17, and there can therefore be no infringement under that section.

Authorisation

240. It is therefore not necessary to go further and consider whether Temu does indeed "authorise" UK web users to infringe the trial sample photographs. I will nevertheless address that briefly for completeness.

241. In *Twentieth Century Fox v Newzbin* (***20C Fox***) [2010] EWHC 608, §90, Kitchin J described the circumstances in which a defendant is liable for authorising infringement as follows:

> " … 'authorise' means the grant or purported grant of the right to do the act complained of. It does not extend to mere enablement, assistance or even encouragement. The grant or purported grant to do the relevant act may be express or implied from all the relevant circumstances. In a case which involves an allegation of authorisation by supply, these circumstances may include the nature of the relationship between the alleged authoriser and the primary infringer, whether the equipment or other material supplied constitutes the means used to infringe, whether it is inevitable it will be used to infringe, the degree of control which the supplier retains and whether he has taken any steps to prevent infringement. These are matters to be taken into account and may or may not be determinative depending upon all the other circumstances."

242. Applying those factors, he considered that the defendant had indeed authorised infringement of copyright by operating a platform that (among other things) enabled premium members to search for and acquire unlawful copies of films. In particular, applying the factors set out above, he found that the Newzbin platform provided a sophisticated searching facility, which allowed members to download films indexed on the platform, a very large proportion of which were commercial and very likely to be protected by copyright. The defendant had not taken steps to prevent that, but actively encouraged the provision of links to infringing copies of films (§§98–101). He concluded that a reasonable member would think that the defendant had "sanctioned, approved and countenanced" the copying of the claimants' films (§102).

243. Those factors were subsequently applied by Arnold J in *Dramatico Entertainment v British Sky Broadcasting* [2012] EWHC 268 (Ch), a case which (similar to *20C Fox*) concerned a file sharing website called The Pirate Bay (**TPB**) on which users could upload links through which other users could download films or music for free. Arnold J applied the factors identified by Kitchin J, and noted that TPB provided a sophisticated interface that allowed users to search for and access copyright content, such that TPB was "in no sense a passive repository" of that content, but went to great lengths to facilitate and promote the download of files by its users (§§75–6); the means by which users were able to infringe copyright was the files that were indexed, arranged and

presented by TPB (§77); infringement was not merely an inevitable consequence of the provision of the content by TPB, but was the objective and intention of the operators of TPB (§78); and TPB was able to prevent infringement of copyright but took no steps to do so, instead actively encouraging it (§§79–80).

244. Arnold J concluded that the operators of TPB authorised users' infringing acts of copying and communicating to the public, by conduct which went far beyond merely enabling or assisting, and extended (as in *20C Fox*) to sanctioning, approving and countenancing the users' infringements of copyright, as well as purporting to grant users the right to do those acts (§81).

245. The facts of the present case are entirely different to those of *20C Fox* and *Dramatico*. While the Temu website provides a platform on which merchants can upload product photographs, which users can then view, and while (as the present case demonstrates) in some cases merchants upload copyright photographs, it is not inevitable that infringing content will be uploaded or viewed, and there is no evidence suggesting the use of infringing content on anything like the scale present in *20C Fox* and *Dramatico.*

246. Nor, importantly, is there any evidence that Temu encourages, sanctions or approves the use of infringing content, or purports to grant users the right to do so. To the contrary, Temu contractually prohibits merchants from uploading infringing content to the platform, and has an IP complaints process by which rightsholders can notify product listings for take-down. Users can also report listings that are believed to contain infringing material. Mr Xu's evidence was that complaints are generally handled within days. While the processing of Shein's complaints took considerably longer, that was because of the volume of product listings complained of by Shein, as Mr Ouyang explained in his evidence.

247. Shein's case effectively relies on a contention that the mere fact of providing a retail platform on which it is possible for a merchant to upload a copyright image and for a user to view that image, combined with evidence of some copyright infringements on the platform, is enough to constitute the "authorisation" of a copyright infringement. It is, however, clear from *20C Fox* and *Dramatico* that this is not sufficient to establish authorisation, which requires conduct that goes beyond merely enabling or assisting.

248. I do not therefore consider that Temu's conduct amounted to the authorisation of copyright infringement by the users of Temu's UK website.

Communication to the public (s. 20)

The parties' submissions

249. Shein's case is that Temu communicated the trial sample photographs to a "new public" by making them available on the Temu UK website, which targets the UK. Shein argued that what was required for a s. 20 CDPA infringement was a deliberate intervention by Temu in operating a retail website through which the photographs were transmitted to UK users, and that Temu had the requisite knowledge of the consequences of its actions because it knew that the images were being made available to users of its platform. Shein contended that it is not necessary to go further and show that Temu was aware that the photographs were a copyright infringement.

250. Temu said an online platform is not liable under s. 20 CDPA merely because users or merchants make infringing content available on that platform. Rather, Temu submitted that liability requires knowledge that the relevant content is being made available unlawfully. Temu said that it had no such knowledge: the photographs were uploaded by independent merchants, Temu did not select or promote the allegedly infringing content, it prohibited infringement in its merchant terms, and it operated take-down and screening processes in relation to content said to be infringing.

The interpretation of s. 20 CDPA

251. The interpretation of s. 20 CDPA was considered in detail by Arnold LJ in *Warner Music v TuneIn* [2021] EWCA Civ 441, [2021] RPC 11, a case concerning an online radio service which enabled users (through hyperlinks) to access radio stations around the world, including music radio stations. That was found to be an infringement of the claimants' copyright in sound recordings, including on the basis that it amounted to a communication to the public within the meaning of s. 20.

252. Arnold LJ conducted an extensive survey of the CJEU case-law, which he summarised at §70 with a series of 15 propositions (with references in each case to the relevant cases). For present purposes the material propositions from that summary are as follows:

    i) Communication to the public must be interpreted broadly, and covers any transmission or retransmission of the work to the public not present at the place where the communication originates by wire or wireless means, including broadcasting: §70(1) and (2).

    ii) Communication to the public involves two cumulative criteria: first, an act of communication of a work, and secondly, the communication of that work to a "public": §70(4).

    iii) Communication refers to any transmission of the work, irrespective of the technical means or process used: §70(5).

    iv) A user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give its customers access to a protected work, particularly where, in the absence of that intervention, those customers would not be able to enjoy the work, or would be able to do so only with difficulty: §70(8).

    v) It is sufficient for there to be "communication" that the work is made available to the public in such a way that the persons forming that public may access it, whether or not those persons actually access the work: §70(9).

    vi) Where there is a communication of works by the same technical means as a previous communication, it is necessary to show that the communication is to a new public, that is to say, a public which was not considered by the right holder when it authorised the original communication: §70(13).

    vii) It is not irrelevant that the communication is of a profit-making nature. A profit-making nature is not, however, an essential condition for a communication to the public: §70(14).

viii) In order to establish whether the fact of posting hyperlinks to protected works which are freely available on a third party website without the consent of the copyright holder constitutes a communication to the public, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website, or whether the links are provided in a situation where that knowledge must be presumed: §70(15).

253. While the Court of Appeal had been invited to depart from the CJEU case-law on communication to the public, on the basis of its power to do so under s. 6(5A) of the European Union (Withdrawal) Act 2018, Arnold LJ declined to do so, referring in particular to the absence of any change to s. 20 following the UK's departure from the EU, the fact that the issue was also regulated by international treaties such that courts of the contracting states should be "striving for consistency of interpretation", the CJEU's "unrivalled experience" in addressing the issue, in jurisprudence that had been developed and refined over time, and the fact that it would create considerable legal uncertainty if the UK were to return to the drawing board and start all over again (§§76–83).

254. In the present case, the focus of the dispute was on the interpretation of the requirement for an intervention "in full knowledge of the consequences of its action" (the proposition set out at §70(8) of *TuneIn*). Specifically, the parties' submissions concerned the question whether in the case of a platform such as Temu, an act of communication to the public within the meaning of s. 20 requires knowledge by the defendant that it is providing access to protected copyright works.

255. It is not in dispute that s. 20 itself contains no requirement that the defendant should know of a copyright infringement. All that is required, under s. 20, is "the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them". Nevertheless, successive judgments of the CJEU applying Article 3(1) of the Information Society Directive, on which s. 20 is based, have considered the extent to which knowledge of the infringing nature of the content is required for there to be an act of communication under Article 3(1), in cases where the communication in question is that of an accessory or intermediary in relation to a primary communication made by a third party.

256. An early case in the development of this line of authority was Case C-160/15 *GS Media v Sanoma Media* EU:C:2016:644, where the CJEU considered whether posting a hyperlink to a third party website on which a copyright work was made available without the consent of the rightholder constituted a communication to the public within the meaning of Article 3(1). The court repeated the general principle established in previous case-law that (§35):

> "the Court emphasised, in the first place, the indispensable role played by the user and the deliberate nature of its intervention. The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work".

257. The court considered that posting a hyperlink for non-profit-making purposes would not constitute a communication to the public if the person posting did not know and could not reasonably know that the relevant work had been published without the consent of the copyright holder. By contrast, if it was established that the person knew or ought to have known that the hyperlink provided access to a work illegally placed on the internet, for example because they were notified of that by the copyright holder, that constituted a communication to the public (§§47–49). In addition, where the posting of hyperlinks was carried out for profit, it could be expected that the person posting carried out the necessary checks to ensure that the work was not illegally posted on the third party website, such that there was a (rebuttable) presumption that the posting occurred with the full knowledge of the protected nature of the work and the possible lack of consent to publication by the copyright holder (§51).

258. In Case C-527/15 *Stichting Brein v Wullems (**Filmspeler**)* EU:C:2017:300 the court considered the sale of the "filmspeler" multimedia player with pre-installed add-ons containing hyperlinks to third-party websites on which copyright films and TV shows were illegally available. That was found to be a communication to the public, on the basis that Mr Wullems had full knowledge of the fact that the add-ons on the filmspeler player gave access to protected works published on streaming websites without the consent of the copyright holders. Indeed, that was the main attraction of the multimedia player for potential purchasers (§§41 and 51).

259. In Case C-610/15 *Stichting Brein v Ziggo* EU:C:2017:456, another case concerning the file-sharing site The Pirate Bay, the CJEU cited (among others) *GS Media* and *Filmspeler*, commenting that it could be inferred from that case-law that, "as a rule, any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an 'act of communication' for the purposes of Article 3(1)" (§34). It emphasised that in the case before it, the operators of TPB had indeed intervened, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allowed users to share those works within the context of a peer-to-peer network (§36).

260. Concluding that there was a communication to a new public, the court relied on the further facts that the operators of the online sharing platform TPB were informed that the platform provided access to works published without authorisation of the rightholders; that the operators expressly stated that their purpose was to make protected works available to the users, and encouraged users to do so; and that the operators of the online sharing platform TPB could not be unaware that the platform was providing access to works published without the consent of the rightholders (§45).

261. These conclusions were consistent with the observations of Advocate General Szpunar, at §§51–52 of his opinion, EU:C:2017:99, that:

> "It is true that such a site merely indexes the content that is present on the peer-to-peer network, that is to say the metadata relating to works that are offered for sharing by users of the network. The operator of the site therefore has, in principle, no influence over the appearance of a given work on that network. It is only an intermediary which enables users to share the content on a peer-to-peer basis. Therefore, the decisive role in the communication to the public of a given work cannot be attributed to it if it is unaware that the

work has been made available illegally or if, once it has been made aware of the illegality, it acts in good faith to rectify the matter. However, from the moment that operator has knowledge of the fact that making available took place in breach of copyright and does not take action to render access to the work in question impossible, its conduct may be regarded as being intended to allow, expressly, the continuation of the illegal making available of that work and, hence, as an intentional action.

I should like to make clear that the site's operator must have actual knowledge of the facts. That is so, inter alia, in a situation where that operator has been expressly alerted by the rightholder of the illegal nature of the information appearing on the site. …"

262. In Case C-682/18 *Peterson v Google* EU:2021:503 a Grand Chamber of the CJEU considered the application of Article 3(1) to the YouTube (video-sharing) and Uploaded (file-hosting and sharing) platforms, where users are responsible for uploading content to the relevant platforms. The court noted that the operator of such a platform plays a role that is indispensable when its users make potentially illegal content available, because absent that platform it would be impossible or at least more complex to share the content on the internet (§77). Nevertheless, it is necessary to consider whether the intervention of the platform operator is deliberate (§§78, 80 and 83).

263. Referring to its judgment in *Ziggo*, the CJEU explained the deliberate nature of such an intervention as "the act of intervening in full knowledge of the consequences of doing so, with the aim of giving the public access to protected works" (§81). In that regard, the mere fact that the operator knows "in a general sense" that protected content is available illegally on its platform is not sufficient, even if the platform has the aim of making a profit (§§85–86). On the other hand, factors that may indicate that the intervention by the platform operator was deliberate include:

i) Whether the operator knows or ought to know that users of its platform are making protected content available to the public illegally via its platform, but refrains from putting in place technological measures that can be expected from a reasonably diligent operator in its situation so as to counter credibly and effectively copyright infringements on that platform (§84).

ii) Whether the operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content, or knowingly promotes such sharing (§84).

iii) Whether the operator has adopted a financial model that encourages users of its platform illegally to communicate protected content (§84).

iv) Whether the operator has been warned by the rightholder that protected content is being communicated illegally to the public via its platform, but refrains from taking expeditious measures to make that content inaccessible (§85).

264. While the court noted the comments in *GS Media* as to the presumption of knowledge that could be made where the posting of hyperlinks was carried out for profit, it distinguished the situation of a person posting a hyperlink on their own initiative, knowing the content to which that hyperlink leads, from the situation of an operator of a

video or file sharing platform where that operator does not know specifically what protected content is uploaded to the platform by users, and does not contribute to giving access beyond merely making the platform available (§89).

265. Specifically in the case of YouTube, the court noted that factors to be taken into account in making that assessment included the facts that YouTube does not intervene in the creation or selection of content uploaded to its platform by platform users, and does not view or monitor that content before it is uploaded (§92); that YouTube clearly informs users that it is forbidden to post protected content on the platform in breach of copyright, and warns users that their accounts will be blocked in the event of repeated infringements (§93); that YouTube has put in place technological measures to prevent copyright infringements, including a notification button and a procedure for reporting and arranging for illegal content to be removed (§94); that the processing of search results by YouTube is not intended to facilitate or promote the illegal sharing of protected content (§95); that YouTube's financial model did not appear to be based on the fact that there was illegal content on the platform, nor was the aim of the model to encourage users to upload such content (§96); and that the purpose or principal use of YouTube was not the illegal sharing of protected content (§96).

266. The court's conclusion (at §102) was that:

> "the operator of a video-sharing platform or a file-hosting and sharing platform, on which users can illegally make protected content available to the public, does not make a 'communication to the public' of that content, within the meaning of that provision, unless it contributes, beyond merely making that platform available, to giving access to such content to the public in breach of copyright. That is the case, *inter alia*, where that operator has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or where that operator participates in selecting protected content illegally communicated to the public, provides tools on its platform specifically intended for the illegal sharing of such content or knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform."

267. The *Peterson* judgment was handed down on 22 June 2021, after IP Completion Day. It is therefore not binding on this court, but may be taken into account where relevant. It has, moreover, already been applied (on a different point) by the Court of Appeal in *Montres Breguet v Samsung Electronics* [2023] EWCA Civ 1478, §§114–115.

268. The judgment of Arnold LJ in *TuneIn* specifically referred to the judgments of the CJEU in *GS Media*, *Filmspeler* and *Ziggo*; but it was handed down three months before the delivery of the CJEU's judgment in *Peterson*. The propositions set out at §70 of the

TuneIn judgment must therefore be considered in light of the later conclusions of the CJEU in *Peterson*. In particular, *Peterson* specifically addressed, for the first time, the question of the required knowledge of the operator of a platform onto which users can upload content which *may* constitute a breach of copyright, for the purposes of Article 3(1) of the Information Society Directive. That is precisely the question that arises in the present case in the application of s. 20 CDPA.

269. *Peterson* makes clear that the operator of a platform such as a video or file sharing platform, on which users can unlawfully make copyright content available to the public, does not itself make a "communication to the public" unless it contributes to giving access to that content in a way that goes beyond merely making the platform available. Relevant factors are those set out above, including in particular the question of whether the operator has "specific knowledge" that protected content is available illegally and refrains from expeditiously deleting it or blocking access to it.

270. Mr Brandreth submitted that *Peterson* was wrongly decided and should not be followed by this court. He argued that the "full knowledge of the consequences" requirement should be interpreted as merely a requirement that the defendant's intervention is deliberate, in the sense that the defendant knows what its system does and that by operating its platform it is giving the public, or a public not contemplated by the rightsholder, access to the works. He sought to explain the knowledge requirements in the earlier cases as being confined to hyperlinking.

271. I do not accept the submission that *Peterson* was wrongly decided. While it is true that *GS Media*, *Filmspeler* and *TuneIn* all concerned the provision of access to protected material through hyperlinks to third party websites, the reasoning in those cases was given more general application in *Ziggo* which concerned (more relevantly for present purposes) the operation of an intermediary platform on which users can share content.

272. In *Ziggo*, as set out above, the court drew from the previous case-law the proposition that an act of communication would arise, in such a case, where the operators of the platform provided access to protected works "with full knowledge of the relevant facts". The court went on to emphasise the relevance of the fact that the operators of TPB were informed and must have been aware that their platform was providing access to works published without the authorisation of the rightsholders. The court thereby echoed the comments of its Advocate General in the passage cited at §261 above.

273. The judgment of the CJEU in *Peterson* is entirely consistent with its previous judgment in *Ziggo*, as well as the opinion of the Advocate General in that case. Mr Brandreth is correct to say that the analysis of the hyperlinking cases is to some extent different to the analysis of cases involving platform operators. But that difference is not that hyperlinking cases are unique in requiring the alleged infringer to have full knowledge of the fact that access was being given to protected works. Rather, the difference lies in the presumptions that may be drawn from the fact that hyperlinks are posted for profit. As the CJEU explained in *Peterson*, although the profit-making nature of the intervention is not in principle irrelevant, the presumption referred to at §51 of *GS Media* cannot be transposed to a case where the alleged infringer is not posting content on their own initiative, but operates a platform on which users upload content, and where the platform operator does not know whether that content is protected or not.

274. Mr Brandreth argued that *Peterson* wrongly incorporated a threshold of knowledge of the infringement, which was inconsistent with the act being one of strict liability. But (as some commentators have recognised) the effect of *GS Media*, *Filmspeler* and *Ziggo* is that an infringement of copyright by communication to the public is *not* interpreted as an act of strict liability where what is in issue is accessory liability by a person who is not the primary communicator of the relevant infringing content.

275. Mr Brandreth also objected that the effect of the *Peterson* judgment, by referring to the actions taken by the platform operator to make the infringing content inaccessible, conflated the existence of a communication to the public with the hosting defence. Ms May acknowledged that in certain cases, particularly cases such as the present which concern the acts of intermediaries such as platform operators, there may be a substantial degree of overlap in the factors that the court is required to consider in relation to communication to the public and the availability of the hosting defence. As she pointed out, however, that does not render the hosting defence redundant, given that it is a defence that is not confined to acts of communication to the public, but also applies to other acts restricted by copyright.

276. Section 20 CDPA is therefore, in my judgment, properly to be interpreted in the manner set out in *GS Media*, *Filmspeler*, *Ziggo* and *Peterson*. In following *Peterson*, notwithstanding its status as a judgment given after IP Completion Day, I am also mindful of the comments of Arnold LJ in *TuneIn* as to the desirability of consistency with the interpretation of the CJEU on a point that is also the subject of international treaties.

277. It follows that in a case concerning content uploaded by users to a platform operated by the defendant, a communication to the public within the meaning of s. 20 CDPA is not established simply by showing that the platform operator provided the means by which infringing content could be uploaded by users and accessed by other users of the platform; and that the platform operator knows "in a general sense" that some of the content uploaded by users is content that is protected by copyright whose publication has not been authorised by the rightsholder. Rather, it is necessary to consider whether the conduct of the platform operator is to be regarded as a deliberate intervention "in full knowledge of the consequences of doing so, with the aim of giving the public access to protected works", having regard to the factors referred to at §§84–85 of *Peterson*, set out at §263 above.

Application in this case

278. In the present case, there is no doubt that Temu is aware that some of the photographs uploaded by merchants may infringe copyright. There is, however, nothing in the evidence before the court to suggest that the Temu platform incorporates tools specifically intended to facilitate the uploading of infringing images, or that Temu encourages or promotes the use of infringing images. As already discussed above in relation to authorisation, Temu contractually prohibits merchants from uploading infringing content, and has an IP complaints process enabling rightsholders and users to notify product listings with infringing content. The evidence of Mr Xu was that complaints are generally addressed promptly by Temu.

279. The present case therefore exhibits none of the factors referred to at §§84–85 of *Peterson* as being indicative of a deliberate intervention with the aim of providing the

public access to protected works. I do not, therefore, consider that Temu's conduct amounted to a communication to the public of the trial sample photographs.

280. There was a subsidiary debate as to the extent to which Temu's website is targeted at the UK for the purposes of s. 20 CDPA. Given my conclusion above, that question does not arise. In any event, it is sufficient to say that while Temu admits that its UK website at www.temu.com/uk is targeted at the UK, there is no evidence supporting Shein's contention that any other national subpages of the Temu website are also targeted at the UK. The fact that it is possible to access those pages from the UK is not sufficient: *Lifestyle Equities v Amazon UK Services* [2024] UKSC 8, §18.

281. The allegation of infringement by communication to the public is therefore not, in my judgment, made out on the facts of this case.

Exhibiting and distributing images (s. 23)

The parties' submissions

282. As an alternative to its allegations of primary infringement of copyright under ss. 17 and 20 CDPA, Shein says that Temu is liable for secondary infringement within the meaning of s. 23 CDPA by using the infringing photographs to advertise products on the Temu UK website, which Shein says amounted to both exhibiting in public and distributing infringing copies of copyright works. Shein contends that Temu had at all times at least reason to believe that it was using infringing works, and that it had actual knowledge that the photographs were infringing once Shein had notified it of complaints regarding those photographs.

283. Temu accepts for these purposes that following *Getty Images v Stability AI* [2025] EWHC 2863 (Ch), §§567–591, s. 23 CDPA can apply to intangible information in the form of digital image files, while reserving the right to argue the contrary on appeal. Its main response to the allegation of infringement under s. 23 is, however, that the knowledge requirement is simply not satisfied on the evidence, since knowledge in the abstract that some merchants might post infringing content is not enough. Rather, what is required is knowledge or reason to believe that specific works were infringing. Temu could not have had any basis to consider that the trial sample works were infringing until notified by Shein. Once notified, Temu contends that it removed the listings within a reasonable period of time.

The interpretation of s. 23 CDPA

284. Section 23 CDPA requires the defendant to possess, exhibit in public or distribute an article which is and which the defendant knows or has reason to believe is an infringing copy of a protected work. The requirement is therefore for either actual knowledge that the relevant article is an infringing copy, or reason to believe that it is infringing.

285. "Reason to believe" requires knowledge of the facts from which a reasonable person would arrive at the relevant belief; and also implies a period of time to enable the evaluation of the facts so as to convert those facts into a reasonable belief: *LA Gear v Hi-Tec Sports* [1992] FSR 121, 129. A defendant is not required to accept a claimant's assertions at face value, and may make reasonable inquiries: *Nouveau Fabrics v*

Voyage Decoration [2004] EWHC 895 (Ch), §48. The scope and length of time of a reasonable inquiry will necessarily turn on the facts of each individual case.

Application in this case

286. There are millions of product listings on Temu's UK website, and multiple images associated with each listing. Temu cannot possibly know, or have reason to believe, that any of the photographs posted by merchants on its platform are infringements of copyright, unless and until that is brought to its attention in a specific case.

287. As set out at §§64–67 and 70 above, four of the trial sample works were notified to Temu in take-down notices served under the September 2023 order. Temu removed those product listings, in compliance with that order, within two business days. That two-day period was not, on any basis, sufficient for Temu to investigate Shein's claim to ownership and infringement of copyright. Rather, the basis of the two-day time period specified in the order was Shein's submission that Shein (rather than Temu) was required by the order to verify in advance that it owned or had an exclusive licence to use the copyright in the relevant work, and that the image was an infringement of the UK copyright. On any view, therefore, Temu removed the relevant product listings before it had time to establish the requisite knowledge for the purposes of s. 23 CDPA.

288. In relation to the Graphic Biker Shorts, which were notified to Temu in the letter before action sent on 6 June 2023, Shein did *not* in fact own the copyright in the work at the time of the notification. As explained at §41 above, Shein only obtained the copyright in the employee works on 13 July 2023 when Guangzhou Shein assigned its copyright rights to Roadget (and, notably, it did not inform Temu of that fact at the time). The product listing was taken down by Temu on or around 23 August 2023, i.e. just under six weeks after Shein obtained title to the photographs in question.

289. The reason for the delay in removing the photographs notified in the letter before action was explained in Mr Ouyang's evidence. As set out at §§41–43 above, the huge number (8,036) of product listings appended in the schedule to Shein's letter before action made the task of reviewing the complaints very challenging, not least given that the relevant team within Temu was already reviewing a large volume of complaints made by Shein in relation to the Temu US website, with a backlog of around 10,000 complaints to deal with for that.

290. The way in which Shein had notified its complaints also slowed down the task. In particular, Mr Ouyang explained that Shein only provided image comparison screenshots for 287 product listings, claiming that it was "disproportionate and not cost effective" for Shein to provide a full dossier of screenshots for the 8,036 listings notified. That meant that for all other product listings Mr Ouyang had to open the various linked images to conduct a visual comparison to establish whether or not the images were identical or substantially similar. When he did so, however, he discovered numerous errors in the links provided. As an example, Shein had used the image of a single Shein product listing to file complaints against 477 Temu listings, all but one of which contained images completely different to the images of the Shein listing. In other cases the website links provided by Shein could not be opened, but redirected to error pages.

291. By around 23 August 2023, Mr Ouyang (with some support from colleagues) had processed more than 3,000 of the listings notified in the letter before action, at a rate of

around 100 a day, with Mr Ouyang alone spending around six to seven hours each day solely on this task. At that point, given the number of listings still outstanding, a decision was taken by Temu that it was too time-consuming to carry out an individual review of Shein's complaints, and the remaining listings were removed in bulk without further review.

292. Shein contended that, in the context of an undertaking advertising and selling over the internet, expeditious removal of the infringing photographs should be measured in days rather than months. It objected to the fact that Mr Ouyang had not started reviewing the letter before action listings until mid-July 2023, and to the fact that Temu had not chosen to deploy additional resource to review the listings notified by Shein.

293. I do not accept those objections. Temu was entitled to take steps to verify that the notified photographs were indeed copyright infringements. But it was also entirely reasonable for Temu to try to deal with the backlog of thousands of complaints made by Shein in respect of the US website first. Once Temu did turn to the letter before action, Mr Ouyang was assigned almost full-time to review the listings notified in the letter, with some support from other colleagues. Mr Ouyang's evidence indicates that he reviewed the listings rapidly: around 100 listings reviewed in around six hours each day suggests that he was spending about four minutes on each listing. That was plainly a reasonable amount of time for Temu to spend to establish that the allegedly infringing listings were indeed identical or substantially similar to photographs on Shein's website.

294. I do not accept Shein's contention that Temu should have deployed additional resource for these purposes. As Mr Ouyang said, prior to Shein's complaints the Temu Trust & Safety Department typically handled complaints in volumes of no more than a few dozen at a time. If Shein chose to send Temu complaints relating to over 8,000 products, without attaching images showing the similarity of the respective images (on grounds of proportionality), it cannot reasonably have expected that Temu would immediately engage additional personnel to deal with that volume of complaints.

295. Moreover, it is also important to note that the time spent by Mr Ouyang and his colleagues on processing Shein's complaints was clearly insufficient for them to investigate the chain of title in the images. As noted at §§46 and 193 above, Shein said that it was unworkable for Shein itself to establish chain of title for the supplier and agency works before notifying them to Temu. Shein did not, therefore, do so until it was required to provide initial disclosure for the selection sample of 100 product listings (see §55 above). Nor did Shein establish, prior to its letter before action, that it owned copyright in the employee works: it turned out that it did not do so until the assignment executed by Guangzhou Shein on 13 July 2023. In those circumstances, it is difficult to see how Temu could possibly have established a reason to believe that the notified works were infringing in the time between the letter before action and the eventual take-down of all the listings on or around 23 August 2023.

296. Shein's objections rely on an assumption that Temu should have accepted without investigation Shein's claims to both copyright ownership and infringement. As a matter of law, Temu was not required to do so: *Nouveau Fabrics* (above). As a matter of fact, Temu decided to take down the listings notified in the letter before action before it had managed to investigate even infringement, let alone having time to investigate copyright ownership if it had sought to do so.

297. It follows that Temu removed the product listings for all of the trial sample works before it had time to establish the requisite knowledge for the purposes of s. 23 CDPA. Shein's case of secondary infringement by exhibiting or distributing infringing works is therefore not made out on the facts.

Hosting defence

298. It follows from my conclusions above that it is unnecessary for me to address the hosting defence. I will, however, do so for completeness given that there was considerable argument and evidence at the trial on this issue.

The parties' submissions

299. It is common ground that there are four cumulative conditions for the operation of the hosting defence under Regulation 19, derived from construing Regulation 19 consistently with Article 14 of the E-Commerce Directive:

i) The defendant is an "information society service provider" which provides a service consisting of the storage of information provided by a recipient of the service.

ii) The defendant is an "intermediary" whose activity is of a "mere technical, automatic and passive nature".

iii) The defendant either (a) does not have actual knowledge that it is storing infringing content and is not aware of facts or circumstances from which that is apparent; or (b) if it does obtain such knowledge, it acts expeditiously to remove the unlawful content.

iv) The recipient of the service is not acting under the authority or control of the service provider.

300. If the hosting defence applies, the consequence is that the service provider is not liable for damages or any other pecuniary remedy or criminal sanction as a result of the storage of infringing content. The defence does not, however, operate as a defence to injunctive relief.

301. As to the first condition, there was no serious dispute that Temu provides an information society service, in the form of an online marketplace which processes and stores information provided by third-party merchants. eBay, which is a similar online marketplace, was regarded as an information society service in Case C-324/09 *L'Oréal v eBay* EU:C:2011:474, [2011] RPC 27, §§107–111. There was also no suggestion that merchants on Temu's platform are acting under Temu's authority and control, so as to put in doubt the fourth condition. The issues in dispute in the present case therefore focused on the second and third conditions above: whether Temu provides a passive intermediary service, and the extent of Temu's knowledge and/or expeditious removal of unlawful listings.

302. As to those issues, Shein argued that Temu falls outside the hosting defence because it plays an active role in relation to product listings. Shein relied on evidence that Temu controls product pricing, manages promotions, controls product listings in various ways,

offers image-editing tools, and offers delivery, customer service and warehousing facilities. Shein contended that these matters demonstrated a degree of control inconsistent with the neutrality required by Regulation 19. In addition, Shein argued that Temu knew Shein suppliers were selling on both platforms, and that its response to the letter before action was unreasonably slow.

303. Temu argued that the relevant question is not whether it exercises control over its business in a general sense, but whether it plays an active role in relation to the specific information alleged to be unlawful, namely the trial sample photographs. In that regard, Temu said that its role was passive and that there is no evidence that it reviewed or controlled the trial sample photographs in the present case. Regarding the knowledge requirement, Temu's submissions were essentially the same as for Shein's s. 23 CDPA case, namely that once notified it acted expeditiously to remove the listings said to infringe Shein's copyright.

Intermediary role of the service provider

304. The requirement for a service provider to play a passive or neutral role, in order to benefit from the hosting defence, was considered by the CJEU (again Grand Chamber) in Case C-236/08 *Google France v Louis Vuitton* EU:C:2010:159, as follows:

> "112. In order for the storage by a referencing service provider to come within the scope of Article 14 of Directive 2000/31, it is further necessary that the conduct of that service provider should be limited to that of an 'intermediary service provider' within the meaning intended by the legislature in the context of section 4 of that Directive.
>
> 113. In that regard, it follows from recital 42 in the Preamble to Directive 2000/31 that the exemptions from liability established in that Directive cover only cases in which the activity of the information society service provider is 'of a mere technical, automatic and passive nature', which implies that that service provider 'has neither knowledge of nor control over the information which is transmitted or stored'.
>
> 114. Accordingly, in order to establish whether the liability of the referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores."

305. The application of these conditions to an online marketplace was subsequently considered in *L'Oréal v eBay*, a reference from the High Court concerning a trade mark dispute. The questions referred asked not only about the applicability, in general, of Article 14(1) of the E-Commerce Directive, but also specifically asked:

> "if the [disputed use by eBay of L'Oréal's sign] does not consist exclusively of activities falling within the scope of Article 14(1) … but includes such activities, is the operator of the online marketplace exempted from liability to the extent that the use consists of such activities and if so may damages or

other financial remedies be granted in respect of such use to the extent that it is not exempted from liability?"

306. Advocate General Jääskinen's conclusion at §§153 and 183(9)(b) of his opinion was that the operator of an electronic marketplace should remain exempted as regards the activities covered by Article 14(1), but not exempted as regards the activities not covered. The CJEU (again Grand Chamber) took a similar approach in the following passage:

> "111. … the fact that the service provided by the operator of an online marketplace includes the storage of information transmitted to it by its customer-sellers is not in itself a sufficient ground for concluding that that service falls, in all situations, within the scope of Article 14(1) of Directive 2000/31. …
>
> 112. In that regard, the Court has already stated that, in order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is essential that the provider be an intermediary provider within the meaning intended by the legislature in the context of Section 4 of Chapter II of that directive …
>
> 113. That is not the case where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data …
>
> 114. It is clear from the documents before the Court and from the description at paragraphs 28 to 31 of this judgment that eBay processes the data entered by its customer-sellers. The sales in which the offers may result take place in accordance with terms set by eBay. In some cases, eBay also provides assistance intended to optimise or promote certain offers for sale.
>
> 115. … the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 …
>
> 116. Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.
>
> 117. It is for the referring court to examine whether eBay played a role such as that described in the preceding paragraph in relation to the offers for sale at issue in the case before it."

307. The reference in §114 to assisting sellers to optimise or promote offers for sale reflected the fact recorded at §31 of the judgment that:

> "In some cases eBay assists sellers in order to enhance their offers for sale, to set up online shops, to promote and increase their sales. It also advertises some of the products sold on its marketplace using search engine operators such as Google to trigger the display of advertisements."

308. The relevant question for the referring court was therefore not whether eBay should be regarded, in general, as an intermediary within the terms of section 4 of the E-Commerce Directive. Rather, it was necessary to consider "in relation to the offers for sale at issue in the case" whether eBay had played an active rather than a neutral role.

309. In *Peterson v Google*, addressed above in relation to communication to the public under s. 20 CDPA, the CJEU considered the application of the hosting defence under Article 14 of the E-Commerce Directive to the YouTube and Uploaded platforms. It commented that the defence would not apply if either of the platforms contributed "beyond merely providing its platform, to giving the public access to prohibited content in breach of copyright" (§§107–108), but that the implementation of technological measures aimed at detecting infringing content did not itself mean that the platform operator played an active role giving it knowledge and control over the relevant content (§109).

310. Shein relied on the suggestion of Advocate General Saugmandsgaard Øe at §152 of his opinion in the *Peterson* case that a service provider plays an "active role" if (among other things) it presents the information to the public "in such a way that it appears to be its own". The Advocate General did not, however, refer to any authority for that proposition, and it was not endorsed by the CJEU.

311. More recently, in *Montres Breguet v Samsung Electronics* [2023] EWCA Civ 1478, the Court of Appeal reviewed the CJEU jurisprudence on the hosting defence, and applied it in the context of the Samsung Galaxy App store, which contained (among other things) apps for Samsung's smartwatches developed by third party app developers, which were said to have infringed the claimants' trade mark rights. The arguments in relation to the hosting defence raised the same issues as arise in the present case, namely whether Samsung's activities were active rather than passive, and whether it was aware of the illegal activity in question.

312. The judgment of Arnold LJ noted (at §99) that the trial judge had doubted whether Samsung's activities were "technical, automatic and passive", noting in particular that third party apps were subject to both a technical review, to ensure functionality and compatibility with Samsung's operating system, and a manual content review to ensure compliance with Samsung's internal content review guide. The judge had also found that Samsung had taken active steps to facilitate and encourage the design of apps, marketed its smartwatches by reference to the availability of watch face apps in its app store, derived a commercial benefit from product sales by doing so, and promoted some of the apps in question. The judge had, nevertheless, preferred to base her conclusion on the knowledge requirement in Article 14(1)(a) (the equivalent of Regulation 19(a)(i)) rather than on the question of whether Samsung was an intermediary within the meaning of section 4 of the Directive.

313. On appeal, Arnold LJ held that Samsung's acts were indeed active rather than merely technical, automatic and passive; and that accordingly the hosting defence was inapplicable (§104). In reaching that conclusion, he emphasised at §102 that app stores are not inevitably covered by the hosting defence, since:

> "Article 14(1) is concerned with the acts in issue, not the type of business that has carried out those acts. The question here is whether Samsung's acts in relation to the particular apps in dispute went beyond the merely technical, automatic and passive. Samsung did not merely decide to make the apps available and check them for illegality."

314. Arnold LJ acknowledged that an intermediary who chose to undertake content review would have to accept the risk that it might not be able to rely on the hosting defence. In any event, however, Samsung's acts went beyond merely making the content available after a content review (§103).

315. The above authorities all, of course, concerned the interpretation of Article 14 of the E-Commerce Directive rather than (specifically) Regulation 19 of the E-Commerce Regulations. Both parties, however, relied upon the case-law on the interpretation of Article 14, and neither of them suggested that Regulation 19 should be interpreted in any different way to the interpretation of Article 14.

316. The authorities discussed therefore make clear that an online marketplace may fall within the scope of the hosting defence under either Article 14 or Regulation 19. Whether it does so in a particular case depends not on the character of the marketplace's business in the abstract, but on the role played by the operator in relation to the specific disputed content. The question is whether, in relation to that specific content, the operator's role is neutral, in the sense of being merely technical, automatic and passive, or whether it has played an active role of such a kind as to give it knowledge of, or control over, the relevant content.

Whether Temu was an "intermediary"

317. Shein's submission was that Temu is not a merely passive marketplace but a "hybrid operation". It relied on evidence that Temu exercises control over product pricing, by using platform data to inform suppliers where their price is uncompetitive. Shein asserted that this might amount to a compulsory price adjustment policy, by delisting higher price items. It also relied on the fact that at least in some cases Temu requests product samples for review. In relation to the marketing of products, Shein said that Temu manages promotions and discusses with its suppliers how they can maximise their performance in the sales, and that it requires discounting or removal of listings with no or low sales activity. Shein also said that Temu requests the sale of specific products and product variations, offers image editing tools to suppliers, takes responsibility for delivery of goods ordered on its website, provides customer service on at least some merchants' behalf, and makes available warehousing facilities in China.

318. At the outset, Temu strongly disputed Shein's characterisation of the evidence. It said that Shein's contentions as to Temu's business operations were not supported by any primary witness evidence, but were based on points that were put to Ms Yuan and expressly denied by her, as well as unattributed internet third party articles and blog posts

(including materials not put to Ms Yuan in cross-examination), some of which Shein had mischaracterised in any event.

319. As noted at §20 above, I did not consider Ms Yuan to be a particularly reliable witness, and her answers in cross-examination strongly indicated an attempt to downplay Temu's role in relation to its merchants. There is nevertheless, in my judgment, considerable force in Temu's submissions about the quality of Shein's evidence in this regard. As Sharp J noted in *Miller v Associated Newspapers* [2012] EWHC 3721 (QB):

> "36. … As the authors of *Phipson on* Evidence, 17th edition, say at paragraph 29-15, 'the [Civil Evidence] Act is not intended to provide a substitute for oral evidence. The basic principle under which the courts operate is that evidence is given orally with cross-examination of witnesses, and the admission of hearsay evidence is, and should be the exception to the rule. Caution should be exercised before tendering important evidence through hearsay statements. Hearsay evidence is better used where the evidence is peripheral or relatively uncontroversial.'
>
> 37. It seems to me that selective snippets of hearsay from individuals who have not been called, particularly where it has been 'cherry picked' from material which casts it in a different light, provides an obviously unsatisfactory evidential basis upon which to invite a court to find facts and/or draw adverse inferences whether as to the conduct of those individuals or anyone else."

320. Ms May pointed out that Shein could have sought to procure evidence as to Temu's operation of its platform from merchants. Shein has conducted extensive interviews with many of its merchants who have sold on Temu (such as its December 2023 interview of Mr Lin and Junxin referred to above), and could have asked any of them about Temu's practices. Instead it relied on a patchwork of materials adduced at trial as hearsay, some but not all of which were put to Ms Yuan.

321. Some of the evidence relied upon by Shein originated from Temu's disclosure, such as an exchange between Temu and the supplier of one of the trial samples that was abandoned by Shein, which Ms Yuan addressed in her first witness statement. The evidential quality of much of the materials relied upon by Shein was, however, very weak. By way of example, Mr Brandreth asked Ms Yuan about a post by a blogger calling themselves a ceramic cup seller. In a comment that was double-hearsay, the blogger said that:

> "Additionally, sellers report that even when products are selling well, the platform will directly delist higher-priced items simply because a more competitive product appears."

322. Ms Yuan said that she had "not heard of any incidents like this and in addition for the platform, the platform would not delist a product simply because the price is higher." Shein nevertheless cited the blog in its written closing submissions as evidence of the proposition that "Temu takes far more than a passive role to price setting". In another blog post, a beauty seller said that "due to a lack of awareness and insufficient attention to product quality, many of my listings were flagged and taken down". That blog comment was not put to Ms Yuan, but Shein cited the comment for the proposition that

Temu exercises control over products of low quality. Shein similarly cited a comment from another blog post for the proposition that products with ratings below 4.5 stars were likely to be delisted. Again, Ms Yuan was not asked about the blog post relied upon. Nor was she asked, even in general terms, about delisting of products on the basis of quality problems.

323. Mr Brandreth said that he could rely on the materials in the court file without putting every document to Ms Yuan or other Temu witnesses. That misses the point that the documents relied upon by Shein for its claims as to Temu's control over merchant listings placed very heavy reliance on materials such as snippets of hearsay complaints from bloggers, which constitutes inherently weak evidence. Their evidential value is even more limited if neither those documents nor the propositions drawn from them were put to the relevant Temu witness. I do not, therefore, think that it is possible to draw reliable conclusions about Temu's business practices from the materials relied upon by Shein.

324. More importantly, even if Shein's evidence could be regarded as sufficiently reliable to establish a greater degree of general involvement by Temu in aspects of its marketplace operation than Ms Yuan was prepared to admit, that would not answer the question that is relevant for the purposes of Regulation 19. As discussed above, it follows from the approach taken in both *L'Oreal* and *Montres Breguet* that the relevant question is not Temu's control over its platform generally, nor the extent of its general dealings with merchants listing products for sale, but whether Temu acted as an "intermediary" in relation to the specific disputed content in the present case, namely the trial sample photographs.

325. There was, however, no evidence before the court that Temu had played any active role in relation to any of the trial sample works. Starting with the products themselves, there was no evidence of any active control by Temu in relation to any of the trial sample works. Shein's only suggestion was by way of inference: it referred to a discussion between Temu and Sexy Secret, the supplier of the Strawberry Nightdress, about another product, and asked the court to infer that Temu asked for samples of the Strawberry Nightdress to be provided. But the fact that Temu discussed another product with Sexy Secret does not imply that it had any interaction at all with that supplier regarding the Strawberry Nightdress. Nor was there any particular reason why samples of the Strawberry Nightdress would have been requested. Indeed, if there had been such a request, the obvious person to confirm that would have been Mr Lin; but he did not make any mention of that in his evidence.

326. As to the photographs of the trial sample works, the uploading of photographs of product listings on Temu's platform is carried out by merchants using the platform's standard upload tools. Ms Yuan's evidence was that Temu provides a designated template area for uploading images, which includes technical specifications for image size and resolution. Those requirements are designed to ensure that the website functions properly and that consumers have a consistent high-quality viewing experience on the website. Temu also provides editing tools for images, but the use of those is entirely optional. Other than that, however, Temu is not involved with the product photographs. It does not intervene or provide requirements for the contents of photographs. Elements such as angles, aesthetics, perspective or number of photographs are left to the discretion of the individual merchants. Furthermore, during the period relevant to the trial sample photographs, when merchants uploaded images, Temu did not check whether they were

original or retouched images. Rather, as long as the images met the basic size and resolution requirements they could be uploaded.

327. Shein did not dispute that evidence or ask Ms Yuan, or any of Temu's witnesses, about Temu's control over the images on its site. While Shein's closing submissions made extensive comments on Temu's control in general over pricing, product quality and selection, marketing, and logistical matters such as transportation and customer service, none of that is evidence of an active role in the control of the disputed content at issue in these proceedings, namely the trial sample photographs.

328. The only specific points made by Shein about Temu's control over the images uploaded by merchants were the following:

    i) Shein noted that Temu provides image editing tools. As explained by Ms Yuan, that is simply part of the functionality of the site, and the use of the editing tools is entirely optional. The provision of editing tools is therefore purely passive and neutral. It also seems, in any event, that Temu's image editing tools were only used for one of the original trial samples, and that sample is no longer in contention in this trial.

    ii) Shein claimed that Temu "reviews and approves the photographs" for every product. As Temu explained, that is not correct. The sole photograph "review" process is an automatic one, in the sense that a product cannot be uploaded without at least one photograph that complies with the technical specifications in the designated template.

    iii) Shein claimed that "Temu suppliers have complained that the approval process takes significant time and that Temu has made use of its power to reject photographs". The only support for that statement was the blog post by the ceramic cup seller referred to above, which complained about images for products not being approved by Temu. While Mr Brandreth asked Ms Yuan about other parts of that post, he did not ask Ms Yuan about this issue, and there is therefore no further explanation about what the problem might have been. I do not think that it is possible to draw any conclusions from a single comment in a blog post introduced into evidence by way of a hearsay notice, with no further evidence from either party on the issue.

329. It appears, therefore, from the evidence at the trial that Temu's role in relation to the use by merchants of photographs for their products on the platform is indeed of a "mere technical, automatic and passive nature". There was no evidence of active conduct by Temu in relation to photographs on its site. Still less was there any evidence of active conduct in relation to the trial sample works remaining in issue in this trial.

330. I therefore conclude that in the present case Temu did indeed play an "intermediary" role so as to bring it, in principle, within the scope of the hosting defence, subject to the knowledge requirement discussed below.

The knowledge condition

331. The final question is therefore the extent of Temu's knowledge of unlawful activity, and whether Temu acted expeditiously once it was notified by Shein of the alleged infringing

product listings.

332. The leading authority on the knowledge requirement for the purposes of the hosting defence is *Peterson v Google*. Having considered the intermediary requirement, as discussed above, the CJEU went on to address the knowledge conditions. In relation to the question of whether the relevant service provider had actual knowledge, or was aware of facts from which the unlawful activity was apparent, the Court held that:

> "111. As regards the condition laid down in Article 14(1)(a) of the Directive on Electronic Commerce, that condition cannot be regarded as not being satisfied solely on the ground that that operator is aware, in a general sense, of the fact that its platform is also used to share content which may infringe intellectual property rights and that it therefore has an abstract knowledge that protected content is being made available illegally on its platform.
>
> 112. … it is apparent from the wording, objective and scheme of Article 14(1) of the Directive on Electronic Commerce and from the overall context in which it occurs that the situations mentioned in Article 14(1)(a) – namely the situation where the service provider concerned has 'actual knowledge of illegal activity or information' and the situation where such a provider is 'aware of facts or circumstances from which the illegal activity or information is apparent' – refer to specific illegal information and activities.
>
> 113. … according to the wording of Article 14(1)(a) of the Directive on Electronic Commerce, the illegality of the activity or information must be a matter of actual knowledge or must be apparent, that is to say, it must be specifically established or readily identifiable … Article 14(1) reflects the balance which the directive seeks to strike between the various interests at stake, which include observance of freedom of expression, as safeguarded by Article 11 of the Charter. Thus, first, the providers of the services concerned cannot, in accordance with Article 15(1) of that directive, be subject to a general obligation to monitor the information which they transmit or store or to a general obligation actively to look for facts or circumstances indicating illegal activity. Second, pursuant to Article 14(1)(b) of the Directive on Electronic Commerce, those providers must, as soon as they actually obtain knowledge or awareness of illegal information, act expeditiously to remove or to disable access to that information, and must do so with due regard to the principle of freedom of expression. As the referring court has also pointed out, it is only in relation to specific content that such a provider is able to fulfil that obligation.
>
> …
>
> 115. As regards, more specifically, … the situation relating to '[awareness] of facts or circumstances from which the illegal activity or information is apparent', the Court has held that it is sufficient that the service provider concerned has become aware, in one way or another, of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted in accordance with Article 14(1)(b). That includes, inter alia, the situation in which such a provider uncovers,

> as the result of an investigation undertaken on its own initiative, an illegal activity or illegal information, as well as a situation in which the operator is notified of the existence of such an activity or such information. In the second case, although such a notification admittedly cannot automatically preclude the exemption from liability provided for in Article 14, given that notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated, the fact remains that such notification represents, as a general rule, a factor of which the national court must take account when determining, in the light of the information so transmitted to such a provider, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality …
>
> 116. In that context, it should be observed that a notification that protected content has been illegally communicated to the public via a video-sharing platform or a file-hosting and -sharing platform must contain sufficient information to enable the operator of that platform to satisfy itself, without a detailed legal examination, that that communication is illegal and that removing that content is compatible with freedom of expression."

333. It is clear from this reasoning that "general" or "abstract" awareness that a platform is used to share content that may infringe intellectual property rights is not sufficient. Rather, what is required is knowledge of "specific illegal information and activities", or in other words "the illegality in question" in the relevant case. Where that knowledge is said to arise from a notification to the platform operator that its content includes illegal material, the notification must contain sufficient "precise" and "substantiated" information for the operator to establish, without a detailed legal examination, that the communication is illegal.

Temu's knowledge in the present case

334. Even if (contrary to my conclusions above) Temu is liable for infringement of Shein's copyright on any of the bases set out above, it is clear on the evidence that it did not have the requisite knowledge so as to disapply the hosting defence. Alternatively, if it did have that knowledge, it acted expeditiously to remove the relevant product listings.

335. As set out above, one of the trial sample works was notified under the letter before action, and the other four were notified under the September 2023 order. It is therefore necessary to consider, first of all, the position when the letter before action was sent; and secondly, the position for listings notified under the September order.

336. Starting, therefore, with the position when Shein's letter before action was sent, it is apparent from the evidence that Temu was aware, in general terms, that there were some merchants who were both suppliers to Shein and sellers on Temu's platforms. Temu was also aware that this might not always have been consistent with Shein's policies. Ms Yuan indicated, in her evidence, that she was aware of attempts by merchants to "circumvent Shein's restrictive policies". That does not, as Shein suggested, imply that Temu was aware or should have been aware – even in general terms – that those merchants were uploading product photographs onto its site that infringed Shein's copyright. The fact that a merchant may have been attempting to circumvent Shein's

commercial policies does not indicate that the merchant was also engaging in copyright infringement. Still less is there anything in this evidence to indicate that Temu was aware of any specific infringing photographs.

337. Once the letter before action was sent, Temu was aware that Shein *contended* that there were infringements of its copyright on a substantial scale, including the photographs for one of the trial sample works. But Temu could not have known that the identified photographs did in fact infringe Shein's copyright. Contrary to the stipulation in §§115–116 of the *Peterson* judgment, the letter before action did not provide "precise" and "substantiated" information such as to enable Temu to satisfy itself, "without a detailed legal examination", that the photographs of the products set out in the schedule to the letter were indeed illegal. Indeed, as noted above, the letter before action did not even contain sufficient information for Temu to satisfy itself of the similarity of the photographs on the Shein and Temu websites referred to by Shein, since Shein chose on grounds of proportionality not to attach comparisons of the overwhelming majority of the allegedly infringing photographs.

338. Nor did Shein provide any information at all as to the basis on which it claimed copyright in each of the listed photographs – unsurprisingly, since Shein did not know that itself. As already discussed, in the case of the employee works, Shein did not own the copyright until more than a month after the letter before action was sent. In relation to the supplier and agency works, Shein had not investigated its copyright title in relation to those works prior to the letter before action, and did not investigate that until the selection sample set was chosen for the trial. Given that by the time of the letter before action, Shein either did not own or did not know whether it owned the copyright in the photographs used on its site, any suggestion that Temu could have been aware of any specific copyright infringements is hopeless.

339. In any event, even if the letter before action had provided sufficient information for Temu to become aware of any infringements of copyright (on the assumption, contrary to my primary conclusions, that there were any such infringements) Temu acted expeditiously to investigate and remove the allegedly infringing product listings from its platform. In fact, as explained above in relation to the alleged s. 23 CDPA infringement, Temu ultimately removed most of the listings referred to in the schedule to the letter before action in bulk, without having had time to verify whether there were any grounds for complaint at all.

340. In relation to the four trial sample works notified under the September 2023 order, again as set out above, Temu removed the product listings within two business days, in compliance with that order. That period was, as I have already found, too short for Temu to investigate Shein's claim to ownership and infringement of copyright. Those product listings were therefore all removed before Temu had time to acquire the relevant knowledge from the notification made by Shein (and indeed in relation to the Strawberry Nightdress Shein itself had not verified its chain of title by then).

341. It is therefore clear from the evidence that in so far as any infringements could be established in this case, Temu did not have either actual knowledge of the infringements or awareness of facts or circumstances from which the infringements would have been apparent. Furthermore, even if the letter before action and the notifications made under the September 2023 order could be regarded as having provided Temu with sufficient

information for those purposes, Temu acted expeditiously to remove the relevant product listings in both cases.

342. The knowledge condition for the purposes of the application of the hosting defence is therefore satisfied in the present case. On that basis, even if an infringement had been established in this case, I would have concluded that Temu met the requirements of the hosting defence.

Additional damages

343. It follows from my conclusions above that the additional damages issue does not arise.

IP COUNTERCLAIM

The parties' submissions

344. The final issue to determine is whether Shein is liable under Temu's counterclaim for loss arising from wrongful notifications under the September 2023 and February 2024 injunctions, pursuant to the cross-undertakings given by Shein in those orders. At this stage, Temu pursues counterclaims on three bases:

i) First, Shein notified 15 out of the 20 trial sample works under the September 2023 order. Those notifications led in total to 22 product listings being removed (because some of the trial sample works corresponded to more than one Temu product listing). 11 of those 15 samples were abandoned before the trial; and it follows from my conclusions above that Shein's case falls to be dismissed in relation to the remaining four samples that were pursued at the trial (the Batwing Sleeve Blouse, the Wide Leg Trousers, the Ruffle Hem Trousers and the Strawberry Nightdress). Temu therefore counterclaims in relation to all 15 of the trial sample works notified under the September 2023 order.

ii) Secondly, the 5 February 2024 judgment found that the September 2023 order did not include supplier and agency works. They were therefore wrongly notified under that injunction, and Temu therefore counterclaims in relation to all of the product listings removed in consequence of those wrongful notifications.

iii) Thirdly, under the February 2024 order Shein notified supplier and agency works, without identifying the author and first owner of the copyright. That resulted in the 10 June 2024 directions from the court confirming that this was not compliant with the terms of the February order. Prior to those directions, however, Temu had removed five product listings following take-down notices sent by Shein on 9 and 20 May 2024. Temu counterclaims in relation to those product listings.

345. Temu contends that the September 2023 and February 2024 orders were (between them) the effective causes of its loss in relation to the removed product listings in the three categories set out above. The effect of the orders was to require Temu to take down the notified product listings within two business days, which Temu did.

346. Shein's response is to say that the September 2023 and February 2024 orders only required Temu to remove the notified photographs, and not the entire product listings.

On that basis Shein says that Temu's conduct broke the chain of causation. Shein also says that under Temu's normal IP policy it would have been required to take the same steps as it took under the injunctions, indicating that that the injunctions were not the dominant and effective cause of any loss. Finally, Shein says that Temu took no steps to mitigate its loss by alerting its merchants to provide replacement photographs, or in the case of the February 2024 order by challenging the May notifications under that order.

Legal principles

347. It is common ground that a claim under a cross-undertaking in damages proceeds by analogy with a claim for breach of contract: *Hone v Abbey Forwarding* [2014] EWCA Civ 711, §31 and *Smith & Nephew v Convatec* [2014] EWHC 3162 (Pat), §34. On that basis, in the latter case, Birss J adopted the approach to causation set out in *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360, p. 1374, namely that the relevant act must have been a dominant or effective cause of the loss, explaining that this went beyond a mere "but for" test of liability (see §§35–36).

348. A similar approach, albeit not in an intellectual property context, was adopted by the Court of Appeal in *SCF Tankers v Privalov* [2017] EWCA Civ 1877, describing the test as being that the person claiming under the cross-undertaking must show that the order and undertakings were "an effective cause" of the loss (§§42 and 45).

349. For there to be a break in the chain of causation, in contract, the true cause of the loss must be the conduct of the claimant rather than the breach of contract by the defendant. But where the defendant's breach of contract remains *an* effective cause of the loss, the chain of causation will not ordinarily be broken: *Borealis v Geogas* [2010] EWHC 2789 (Comm), §44. As the court went on to hold in that case, at §45, it is unlikely that anything less than unreasonable conduct on the part of the claimant will break the chain of causation.

350. As to the question of remoteness, the normal contractual rule (as set out in the seminal case of *Hadley v Baxendale* (1854) 9 Exch 341, pp. 354–355), is that the damages should be such as may "fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things" from the breach, or such as "may reasonably be supposed to have been in the contemplation of both parties" as the probable result of the breach.

Application in this case

351. I am satisfied that the September 2023 and February 2024 orders were a dominant and effective cause of Temu's losses in relation to the product listings removed pursuant to those orders. While the obligation under both the September and the February orders was to remove any notified "image" from the Temu UK website (subject to the procedure for objections set out in those orders), Temu's platform does not permit a product listing to be uploaded without an accompanying photograph. Removal of photographs said to infringe Shein's copyright therefore inevitably had the effect of removal of the relevant product listings; and Shein must have known that this would be the case. I do not accept Shein's suggestion that Temu should have uploaded a blank page placeholder. The fashion products at issue in these proceedings cannot sensibly be sold without photographs. Uploading a blank page placeholder would therefore have had the same practical effect as removing the product listing.

352. Temu's decision to take down the relevant product listings following the notifications under the orders did not, therefore, break the chain of causation. That decision was not only reasonable, but was in practice inevitable, as Shein must have known.

353. Shein's written closing submissions included, very faintly, a suggestion that the chain of causation was also broken if Temu did not have a licence to use the relevant photographs. There was no explanation of that point and Mr Beebe did not pursue it in his oral closing submissions on the counterclaim. I do not, therefore, say anything more about that.

354. I also reject Shein's contention that under Temu's standard IP policy Temu would have had to take the same steps that it took in relation to the injunctions, such that the injunctions were not the dominant or effective cause of the loss. In the first place, I do not see how that argument assists Shein, given that Shein did *not* notify the relevant listings under Temu's standard IP policy, but did so under the September 2023 and February 2024 orders. In any event, Mr Xu said in his witness statement that a complainant under Temu's standard IP policy is typically asked to provide documents evidencing subsistence and ownership of the asserted intellectual property rights, which Shein did not provide with its notifications under the injunctions (and could not have provided for the supplier and agency works, for the reasons already discussed). Mr Brandreth did not take any issue with that evidence in his cross-examination of Mr Xu.

355. As for mitigation, it is unrealistic to suggest that Temu could have mitigated any loss by alerting merchants to obtain replacement photographs, within the two-day deadline for removal of notified allegedly infringing photographs. While merchants might have responded to delisting by taking replacement photographs, they are not under Temu's control, and the short deadline for removal of allegedly infringing images under the injunctions meant that it would have been very difficult for the relevant merchants to obtain and upload new photographs within that timeframe.

356. Finally, Shein contended that in relation to the supplier and agency works that were wrongly notified under the February 2024 order, Temu could and should have avoided its loss by challenging the notifications of those works under the objection procedure set out in the February order. That procedure permitted Temu to notify Shein of its objection and then to issue an application to the court for a declaration that the relevant images did not fall within the terms of the order. If that procedure was followed, Temu did not have to remove the disputed images from its website.

357. There is no dispute that Temu could have followed that procedure for the supplier and agency works notified under the February 2024 order. But the duty of mitigation only requires the injured party to take "reasonable steps" to avoid the consequences of a wrong: *Sharp Corp v Viterra* [2024] UKSC 14, §85. If Temu had brought an application under the objection procedure in the February order, there would then have been a contested hearing, leading to no doubt material expenditure and diversion of resources. Instead, Temu sought a written ruling from the court, which was determined on the papers and produced the 10 June 2024 directions as explained at §49 above.

358. I agree with Temu that this was an entirely reasonable course for it to take. Notably, in the course of the 5 February 2024 hearing, having observed the very considerable expense incurred by both parties in dealing with the issue of the scope of the September 2023 order, the court had exhorted the parties that in future if there was a dispute about the meaning of an order, the better approach would be for the parties to send brief

submissions to the court and ask the court to make a direction clarifying the matter. In circumstances where Temu's objection to the notices served under the February 2024 order was indeed based on a dispute as to the meaning of that order, Temu very properly adopted that course and sought to resolve the matter by asking for the court's directions. By doing so Temu obtained a rapid resolution of the dispute as to the construction of the order, which was far more efficient than issuing an application under the order.

359. I do not, therefore, consider that Temu's conduct represented a failure to mitigate its loss. On the contrary, it was a reasonable and proportionate way of dealing with the dispute.

360. Temu's case on liability under the IP counterclaim therefore succeeds. The quantum of Temu's loss will be a matter to be determined at the third trial.

CONCLUSIONS

361. For the reasons set out above, my conclusions are as follows:

i) The Strawberry Nightdress photographs were commissioned by Mr Lin, and were not specifically said to be for the use of Jiameiluo or Shein. The photographer Ms Chang did not know which part of the Lin family business was to make use of the photographs.

ii) Before June 2024, Shein held a non-exclusive licence to use the Strawberry Nightdress photographs, but did not own the copyright in those photographs or hold any rights of action in respect of them.

iii) After the Framework Agreement and the Agency Commissioning Agreement were executed, Shein acquired the copyright in the Strawberry Nightdress photographs, together with equitable title to accrued rights of action sufficient to maintain the present claim. Shein has therefore established title to sue in respect of those photographs.

iv) Shein's pursuit of the claim in relation to the Strawberry Nightdress photographs was not an abuse of process.

v) Mr Lin consented to the use of the Strawberry Nightdress photographs on the Sexy Secret Temu store. The infringement claim in respect of that work therefore fails on that basis in any event.

vi) Shein's primary infringement claim under s. 17 CDPA fails. Although I infer that the trial sample photographs were viewed by users of Temu's UK website, any temporary reproductions made by those users fell within s. 28A CDPA. In any event, Temu did not authorise copyright infringement by users of its website.

vii) Shein's alternative primary claim under s. 20 CDPA also fails. Temu did not make a communication to the public of the trial sample photographs, because its conduct did not amount to a deliberate intervention, in full knowledge of the relevant consequences, to give the public access to protected works.

viii) Shein’s secondary infringement claim under s. 23 CDPA also fails. Temu did not know, and had no reason to believe, that the relevant photographs were infringing copies before the trial sample listings were removed.

ix) If any infringement had been established, Temu would have been entitled to rely on the hosting defence under Regulation 19 of the E-Commerce Regulations.

x) It follows that Shein’s claim for additional damages under s. 97(2) CDPA does not arise.

xi) Temu’s IP counterclaim succeeds on liability. The quantum of any loss under that counterclaim will be determined at the third trial.