



UNIVERSITY  
OF ABERDEEN

## **LS5905 Professional Arbitration Skills**

### **Award Writing Assessment 2020-21**

#### **Instructions**

1. Students are required to write and submit a valid, enforceable, comprehensive and clearly reasoned award, based on the Case Papers and Notes on Evidence below. Students may not have regard to any material which is not within the documents below, including the 'Background Information', any materials circulated in connection with any of the course activities or in relation to any other assessment. **Only the material in this document is to be used for this assessment.**

2. The award submission deadline is **12 August 2021 at 12.00 noon UK time**, and submission must be by electronic drop box. The drop box will be available on MyAberdeen from a date to be notified.

3. Students will be marked on the CGS scale on the basis of the following criteria (listed in no particular order):

Coverage of relevant issues in dispute

Understanding of the law

Assessment of evidence

Soundness of factual and legal conclusions

Award formalities

Reasons for assessment of evidence and conclusions

Use of legal authority

Structure of Award

Clarity of expression

4. Students are advised to take account, in particular, of the materials made available by Ben Giaretta in preparing the Award.

5. Where there are any ambiguities or discrepancies in the material provided (whether in the Case Papers or Notes of Evidence), students should form a view on these when writing the award, as that is part of the task of being an arbitrator.

6. The maximum word limit for the award is **4,500 words**. There is no minimum word limit. A penalty of two grade points will be imposed should the maximum word limit be exceeded.

**LS5905 Professional Arbitration Skills**

**Award Writing Assessment 2020-21**

**A. Case Papers**

**Mototête SA v Visorworld Pty Ltd**

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## **1. Correspondence**

**LOI de VIVRE  
AVOCATS  
12 Rue de Vagabonds  
Montmartre  
Paris**

15 May 2021

Dear Professor Tomlinson

### **Mototête SA. v Visorworld Pty Ltd**

I act for the Claimant in the above dispute. I write to ask you if you would be willing to act as arbitrator in this case. A Notice was served on the Respondent yesterday (copy attached) and I await service of the Response. I am hopeful that the Respondent will agree to your appointment in the event that you are willing to accept.

I look forward to hearing from you.

Yours faithfully

[Signed]

Patrice Toutlemonde

Avocat

Cc: Visorworld, 15 Chamber Street, McNamara Creek, Brisbane, Australia

**Meetham, Feeham and Dumpham  
Lawyers  
13-15 Cricket Lane  
Woolloongabba  
Brisbane  
Australia**

1 June 2021

Dear Professor Tomlinson

### **Mototête SA. v Visorworld Pty Ltd**

We act for the Respondent in the above dispute. We attach a copy of the Notice of Response on behalf of our client, the original having been served on the Claimant today.

With reference to the Claimant's representative's letter of 15 May 2021, we would concur in your appointment as arbitrator, as we are confident that you will deal with the issues fully and fairly.

We would be happy to consider your terms and conditions of appointment, should you be willing to accept.

Yours hopefully,

[Signed]

Mr Will U Feeham

Senior Partner

Meetham, Feeham and Dumpham

Cc: Patrice Toutlemonde, Loi de Vivre, Avocats, 12 Rue de Vagabonds, Montmartre, Paris

**Arbitrate, Arbitrate, Arbitrate Ltd.**

**15 Beach Boulevard**

**Aberdeen, UK**

4 June 2021

Dear Sirs,

**Mototête SA. v Visorworld Pty Ltd**

I am delighted to be asked to arbitrate this dispute. I have considered the Notice and Response, and can confirm that I have no conflict of interest which would prevent me from accepting appointment under the UNCITRAL Arbitration Rules 2013.

I enclose my terms and conditions, including hourly rates.

Please sign and return a copy of the attached terms and conditions.

If you accept my terms and conditions, I would propose beginning the process by holding a Preliminary Meeting on 18 June 2021 at 10.00am British Summer Time (BST) by video conference. When you respond, please let me know if this date and time are suitable.

[Signed]

Professor [assume student name inserted]

Arbitrate, Arbitrate, Arbitrate Ltd.

15 Beach Boulevard

Aberdeen, UK

**[Note for students: the above letter was sent to Mr Toutlemonde and Mr Feeham. Assume your terms and conditions are attached.]**

**Arbitrate, Arbitrate, Arbitrate Ltd.**

**15 Beach Boulevard**

**Aberdeen, UK**

11 June 2021

Dear Sirs,

**Mototête SA. v Visorworld Pty Ltd**

Thank you for your response to my letter of 4 June 2021, enclosing my terms and conditions of appointment, duly signed as accepted.

I note that you will be able to take part in a Preliminary Meeting as proposed in my letter of 4 June 2021. My secretary will be in touch with dial-in instructions.

I look forward to discussing this case further at that stage. I do not intend to issue an agenda for that meeting, unless requested by both parties to do so.

[Signed]

Professor [assume student name inserted]

Arbitrate, Arbitrate, Arbitrate Ltd.

15 Beach Boulevard

Aberdeen, UK

**[Note for students: the above letter was sent to Mr Toutlemonde and Mr Feeham; both acknowledged receipt but neither requested an agenda for the Preliminary Meeting]**

## **2. Pleadings**

**Mototête SA. ("Mototête")**

**Claimant**

**Visorworld Pty Ltd ("Visorworld")**

**Respondent**

### **NOTICE OF ARBITRATION**

#### **I. Parties**

1. Mototête is a société anonyme (SA) formed under French law. Mototête's principal office is located at 66 Rue de la Bicyclette, La Défense, Paris. Mototête manufactures and sells motorcycle helmets, with customers across the globe in some 100 countries. All correspondence for Mototête should be addressed to their lawyers, Loi de Vivre.

2. Visorworld is a proprietary company incorporated under the laws of Australia. Visorworld's principal office is located at 15 Chamber Street, McNamara Creek, Brisbane, Australia. Visorworld manufactures and supplies motorcycle visors to motorcycle accessory retailers worldwide.

#### **II. The Dispute**

3. On 12 June 2019, Aiden O'Reilley, a resident of Dublin, Ireland, set off on a motorcycle tour of parts of Europe and Asia with friends. Prior to his departure, he bought a motorcycle helmet manufactured by the Claimant from his local motorcycle supplier. The visor on the helmet was manufactured and supplied to the Claimant by the Respondent. Mr O'Reilley's route took him through Turkey. On 10 October 2019, while travelling through Eastern Istanbul, and while taking a corner in the road, Mr O'Reilley lost control of his motorcycle and crashed. As a result, he sustained serious injuries, including partial loss of his eyesight.

4. The partial loss of Mr O'Reilley's eyesight following the accident was caused by the shattering of his motorcycle helmet visor as a result of the impact of the said accident, resulting in some plastic shards from the visor entering his eyes. Following the accident, Mr O'Reilley required medical treatment in order to save his sight. He has had to give up his employment as an engineer with the US oil and gas company Drillit. This led to him sustaining substantial loss of earnings, in the region of \$175,000 US per year (after deductions). He has also suffered extreme pain in his eyes, and will continue to do so for some time. He has been unable to pursue his hobbies of motorcycling and rock climbing, both passions of his. His enjoyment of life generally with his wife, two teenage children, his sister and his friends has been seriously impaired. He has been prescribed medication by his doctor, for a depressive illness, caused by flashbacks of the accident.

5. On 20 January 2020, Mr O'Reilley filed a Civil Bill in the High Court of Ireland against Mototête seeking damages for personal injury. Following meetings between lawyers representing Mr O'Reilley and the lawyers for the Claimant, an out of court settlement with Mr O'Reilley in the sum of \$2,000,000 US in full and final settlement of all claims he may have against the Claimant arising out of the said accident was agreed. That agreement was in October 2020.

6. Following the accident, the Claimant suffered some significant adverse media coverage, causing a loss of reputation. The press reported that Mr O'Reilley was wearing a Mototête helmet, and that he was preparing to sue the Claimant in the Dublin courts. Sales of the Claimant's helmets started to decrease. In order to stem the downward sales spiral, on 7 February 2021, for a period of three months, the Claimant decided to offer to all of their customers a credit note worth \$50, redeemable against any future purchase of Mototête goods within a one-year period. This gesture was essential in order to prevent future loss of regular custom. To date, 100,000 of those credit notes have been redeemed, leading to a loss of income for the Claimant of \$5,000,000. It is estimated that a further 100,000 credit notes will be redeemed by 6 May 2022, being date by which the last credit note may be redeemed. A total of 500,000 credit notes were issued over the three month period of the operation of the discount scheme.

7. The losses incurred by the Claimant, as outlined above, were caused by a breach of contract by the Respondent. Reliance is placed on clause 55 of the contract between the parties, executed on 10 May 2017:

"Visorworld undertakes to take all reasonable steps to ensure that all visors supplied by them under this contract are shatter resistant."

Further, the Respondent relies heavily on the 'shatterproof' quality of its visors in promotional literature and on Visorworld's website. Much is made of this quality, which is referred to in all promotional material as 'a revolution in visor design'. The promotional material goes on to claim that 'all visors manufactured by Visorworld are scientifically tested to reduce the risk of being shattered as a result of impact; this is achieved by a special non-shatter varnish applied to all visors which strengthens and bonds the thick plastic visor material'.

8. The Respondent breached clause 55 of the contract of 10 May 2017 by supplying a visor to the Claimant, then sold to Mr O'Reilley, which was not shatterproof. That visor shattered as a result of the impact caused during the said accident. This resulted in the said injuries to Mr O'Reilley's eyes. This breach of contract by the Respondent gave rise to Mr O'Reilley's claim against the Claimant, leading to the out of court settlement referred to above. That breach of contract also led to the reputational damage caused to the Claimant which required to be compensated by the discount scheme referred to above. Due to the operation of that scheme (to date and as projected) the Claimant has been (and will continue to be) caused direct financial loss, as noted above. The damage caused by the breach of contract is recoverable under the relevant parts of the CISG.

### **III. Arbitration Agreement**

9. In the said contract between the parties dated 10 May 2017, clause 100 provides:

"100. Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules (as revised in 2013). The number of arbitrators shall be one. The seat of the arbitration shall be Edinburgh."

### **IV. Arbitrator**

10. In accordance with rules 7 and 8 of the UNCITRAL Arbitration Rules, 2010, the Claimant suggests the appointment of Professor Gwen Tomlinson.

### **V. Place of arbitration and language**

11. The Claimant proposes that the arbitration hearings take place in Hong Kong.
12. The Claimant proposes that the language of the arbitration proceedings is English.

## **VI. Relief**

13. The Applicant seeks the following findings/awards from this Tribunal:

1. That it has jurisdiction to hear this dispute.
2. That the Claimant has suffered loss and damage as a result of the Respondent's breach of contract.
3. That the sum sought by the Claimant, totalling \$12,000,000 US, is reasonable and should be awarded.
4. That the expenses of this arbitration are awarded against the Respondent.
5. That interest at an appropriate rate on any sum awarded to the Claimant is also awarded, from a date to be determined by the Tribunal.

Signed

Patrice Toutlemonde

Loi de Vivre, Avocats, Paris

14 May 2021

**Mototête SA. ("Mototête")**

**Claimant**

**Visorworld Pty Ltd ("Visorworld")**

**Respondent**

## **RESPONSE TO THE NOTICE OF ARBITRATION**

### **I. Parties**

1. Visorworld confirms that it is a proprietary company incorporated under the laws of Australia, with its registered office at 15 Chamber Street, McNamara Creek, Brisbane, Australia. Visorworld accepts the characterisation of its business in paragraph 2 of the Notice of Arbitration (the "Notice"). All correspondence for Visorworld should be addressed to its lawyers, Meetham, Feeham and Dumpham.

2. Visorworld notes the corporate and contact information of Mototête in paragraph 1 of the Notice. Visorworld has no prior knowledge of the geographic scope or customer size of the Mototête business.

### **II. The Dispute**



3. Visorworld has no independent knowledge of the alleged accident involving Mr O'Reilley or of the facts alleged generally in paragraphs 3, 4 and 5 of the Notice. Visorworld will accept production of the Irish High Court Civil Bill filed by Mr O'Reilley as evidence that he made claims against Mototête. Visorworld does not accept and/or disputes the other implications of those paragraphs: namely that Mototête was liable to Mr O'Reilley in the first instance; and that in the event Mototête was liable, that its liability was \$2,000,000 US.

4. Visorworld has no independent knowledge of the statements in paragraph 6 and notes that how Mototête chooses to run its business and price its products is a matter for Mototête. Visorworld disputes any direct or indirect connection to these decisions.

5. Visorworld confirms clause 55 of the contract between the parties as reproduced in the Notice, and the statements about its visors which are attributed to Visorworld in paragraph 7 of the Notice.

6. Visorworld denies and disputes the allegation that it is in breach of clause 55. At no time did Visorworld claim or suggest that its visors would not shatter at all. In clause 55 itself the obligation is to take all reasonable steps to deliver visors that would not shatter, and the promotional material clearly states that the risk of shattering is reduced. Furthermore, Visorworld is not in breach of any conformity obligations as found in the applicable law, Article 35 of the United Nations Convention on Contracts for the International Sale of Goods (the "CISG").

7. Even if Visorworld is in breach of clause 55, the so-called damages alleged by Mototête are not damages at all, but simply costs arising from the manner in which Mototête itself chooses to run its business.

8. Even if these so-called damages were to be found to be correctly characterised as damages in the broadest sense of that term, they are not recoverable damages within the scope of the applicable law, Article 74 CISG.

9. Even if these, as heads of damage, are recoverable damages within the scope of Article 74 CISG, the method of calculation is arbitrary, random and unrealistic, and it would be contrary to the principle of full compensation to find Visorworld liable in these amounts.

### **III. Arbitration Agreement & Arbitrator**

10. Visorworld will not be disputing the jurisdiction of this tribunal, and agrees to the appointment of Professor Gwen Tomlinson.

### **IV. Place of arbitration and language**

11. Visorworld agrees to both the proposed place and language.

### **VI. Relief**

12. Visorworld requests this Tribunal to:

1. Dismiss the Claimant's claim.
2. Award costs in favour of Respondent.

Signed

Mr Will U Feeham

Meetham, Feeham and Dumpham,

Brisbane, Australia

1 June 2021

### **3. Procedural Order No. 1**

#### IN THE MATTER OF AN ARBITRATION BETWEEN

Mototête SA. ("Mototête")

Claimant

Visorworld Pty Ltd ("Visorworld")

Respondent

#### **Procedural Order No.1**

Following the preliminary meeting held today by video conference, I order and direct as follows:

1. There will be a hearing (at which evidence and submissions will be taken) on 14, 15 and 16 July 2021, from 10.00am each day, in Office Suite 1234, 25th floor, Nangtung Building, 83 Tin Kwong Road, Ma Tau Wai, Hong Kong. No fresh pleadings are necessary, the hearing will proceed on the basis of the current Notice and Response.

2. The Claimant will lead evidence from the following four witnesses, and 14 July 2021 is allocated for this purpose:

Madame Marie Mangetout, Managing Director of Mototête SA

Mr Aiden O'Reilley

Professor M.Y.Opic, consultant ophthalmologist, Utah Eye Clinic, US

Dr Al Clear, expert in plastic failure analysis, University of Ontario, Canada

3. The Respondent will lead evidence from the following two witnesses and 15 July 2021 is allocated for this purpose:

Mr Bruce Barnaby, Chief Executive of Visorworld Pty Ltd,

Professor Patrick Limerick, Chair in Law of Obligations, University of Lilliput, Ireland

4. Oral submissions following the evidence will be delivered on 16 July 2021.

5. The parties will lodge with me and exchange all expert reports, and any other documentary material to be relied upon, by 5.00pm, 6 July 2021.

6. The Claimant will lodge a copy of the pleadings in the Irish High Court civil case pursued by Mr O'Reilley against the Claimant following upon the accident on 10 October 2019 by 5.00pm, 6 July 2021.

7. The proceedings will be conducted in English, and will be audio recorded. The applicable procedural rules are the UNCITRAL Arbitration Rules 2010. The applicable law will be the United Nations Convention on Contracts for the International Sale of Goods 1980 ('CISG').

Professor Gwen Tomlinson

Arbitrator

Arbitrate, Arbitrate, Arbitrate Ltd.

15 Beach Boulevard

Aberdeen, UK

Date: 21 June 2021

#### **4. Further information**

1. Summary of pleadings in the Irish High Court civil case pursued by Mr O'Reilley against the Claimant (see Notice of Arbitration, paragraph 5) following upon the accident on 12 October 2019, lodged with the arbitrator and intimated by the Claimant to the Respondent, both on 6 July 2021:

Claim for damages of \$4,500,000 US in total to include loss of earnings, pain and suffering, and loss of leisure pursuits, based on negligence of Mototête in causing Mr O'Reilley's eye-damage.

Response denying liability and claiming Mr O'Reilley was to blame for the accident by driving too fast.

2. Information on Visorworld's website as at 20 June 2019, copy of web-pages produced and intimated by the Claimant on 2 July 2021:

"All of Visorworld's visors are manufactured to ensure that they are safe to use. In the event of an accident, motorcyclists can feel reassured that they are safe from visor related injuries. All visors manufactured by Visorworld are scientifically tested to reduce the risk of being shattered as a result of impact; this is achieved by a special non-shatter varnish applied to all visors which strengthens and bonds the thick plastic visor material."

The website then carried a graphic of a helmet with a graphic of a hammer seeming to bounce off the visor.

3. The contract between the parties, signed on 10 May 2017, contains the following clauses:

"3. This contract regulates the supply by Visorworld to Mototête of all helmet visors as specified in this contract for a one year period from today's date."

"55. Visorworld undertakes to take all reasonable steps to ensure that all visors supplied by them under this contract are shatter resistant."

"100. Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules (as revised in 2013). The number of arbitrators shall be one. The seat of the arbitration shall be Edinburgh."

## **LS5905 Professional Arbitration Skills**

### **Award Writing Assessment 2020-21**

#### **B. Notes on Evidence**

##### **Mototête SA v Visorworld Pty Ltd**

**Note for students: the following are the notes you took as arbitrator during the evidence and submissions in the case. Where you have made a note for yourself, to remind you of an impression you experienced at the time, this is in square brackets.**

**14 July 2021**

Start of day 1. No preliminary matters. Claimant invited to call first witness.

#### **Madame Mangetout (MM) – examination in chief – Patrice Toutlemonde.**

Managing Dir. of Claimant for five years. MBA from Harvard, US. First heard of Mr O'Reilley's accident when read about it in *Le Monde* newspaper on 13th October 2019. First heard of mention of Claimant in connection with accident when called in November 2019 by a French national TV company planning a programme on 'rogue traders'. She declined to talk to them. Documentary ran on French TV later that month covering alleged defects in Mototête's visors, and Mr O'Reilley's accident mentioned then. Mr O'Reilley interviewed on programme. Read an article in Time magazine in December which claimed to be an exposé of the visors on Mototête's helmets. O'Reilley interviewed as part of that article. A number of other newspaper articles from around the globe passed to her by her press office including in New York, London, Bangkok and Adelaide, all featuring O'Reilley's claim that the visor had shattered, causing him eye damage. All coverage included claims by Mototête about their visor safety. MM confirmed that she had declined to comment or be interviewed, as she did not wish to fuel the controversy.

By mid-January 2021, sales figures were slipping badly, by 30% or more when compared with the same time the previous year. At an emergency board meeting, MM agreed to come up with a plan to boost sales. On 1 February 2021, she presented her proposal to a further board meeting. This involved, for a period of three months, offering \$50 credit note on all sales, to be redeemed within one year on any Mototête product. The board approved the plan, to begin on 7 February 2021. To date, 120,000 credit notes had been redeemed; most were redeemed against another purchase within a few weeks of being issued. 500,000 had been issued over the 3 months of the scheme. MM thought a further 80,000-100,000 would be redeemed by the deadline for the last credit note on 6 May 2021. MM also gave evidence about the result of some focus group sessions with customers they had held to gauge the reason for the downturn in sales. These sessions had been held in January 2021, and in all of the groups, there was a strong view that the Mototête brand had been damaged by the publicity over the O'Reilley accident; it was the talk of the motorcycling world, and it had been said by some customers that people were throwing away their Mototête helmets and buying new ones from rival manufacturers.

MM explained that the main reason for using Visorworld for the visors was their claim about being shatter resistant. She felt angry and let down when she heard about Mr O'Reilley's accident and his eye damage. She personally authorised the settlement of Mr O'Reilley's claim at \$2M US, and was told by her Irish lawyers that this figure was 'a bargain' especially as proceedings had not got far, so legal fees would be low; this is why the Claimant had not claimed in these proceedings for legal costs, which ran to \$50,000. This was a gesture of goodwill.

At the end of MM's evidence in chief, Mr Feeham objected to the evidence about the focus groups. Mr Toutlemonde responded that he was too late, the evidence had been led. I decided to rule on the admissibility of this evidence later, after hearing submissions.

**Madame Mangetout (MM) –cross examination – Will Feeham.**

MM was asked about the adverse publicity, and whether it was about O'Reilley and the visors only. MM seemed hesitant in her reply; on being pressed, she admitted that the publicity was also about Mototête helmets generally. On being pressed further, she accepted that some of the publicity was around the durability of the fibreglass body of the helmets, and there was some evidence that they had developed cracks, and that they had 'disintegrated' upon impact in some accidents. She claimed that the main thrust of the publicity, however, was about O'Reilley's accident and his eye damage. She was asked to quantify the proportion, but could not do so, just saying that the articles were little to do with the general alleged defects, mainly about the visors.

Mr Feeham then asked MM to look at a sample of some of the newspaper/magazine articles. Mr Toutlemonde objected; these had not been lodged, and there was no reference to them in the pleadings. Mr Feeham agreed that this was the case, but part of his cross-examination tactic was to not give advance warning of his line of questioning as this would ruin it; it was evidence which directly related to the claims MM had made in her oral evidence and so was relevant. I agreed to allow these to be put in the meantime and would rule on admissibility later.

MM was pressed hard to admit that these articles were a general attack on the safety reputation of Mototête, and that O'Reilley's accident was one of at least five different incidents identified in the articles. She would not do so, until Mr Feeham made reference to four other accidents one by one; she had to accept these as these were being put to her. She admitted that all four were about cracking of the fibreglass body of the helmet, and only O'Reilley's case was mentioned in connection with the visors.

She was asked to justify her estimate of a further 80,000-100,000 credit note redemptions; she responded that this was based on 'common sense'. Suggested to her that since (as she had stated in her evidence) most credit notes were redeemed within a few weeks, and since the last notes were issued on 6 May 2021, most of those issued which would be redeemed had already been redeemed. MM did not seem to understand the question, despite being put several times [my impression was that she was feigning a lack of understanding to avoid the answer; she is very bright so I find it hard to accept that she did not understand such a simple line of questioning]. Put to her that the contract, clause 55, only obliged Visorworld to 'take all reasonable steps' to ensure that visors are shatter resistant and they had done this – MM responded that clearly they had not since the visor in this case shattered. It was put to MM that there is a difference between shatter resistant and shatterproof; MM did not agree, and that according to Visorworld's web pages, they held their visors out as being safe, in that they would not shatter on impact; Mr Feeham suggested that the website is one thing, the

contract another; MM did not see that there was any distinction; Mototête relied on the website content when considering whether to enter into the contract with Visorworld.

MM was asked about the duration of the contract, and she confirmed that, as indicated in clause 3, it ran for a year from 10th May 2017. MM indicated that it had not been renewed since they were happy with Visorworld and saw no need to go to the hassle and expense of a new contract; they continued as before. Mr Feeham asked her about a telephone call between her and Mr Barnaby of the Respondent in November 2018 during which Mr Barnaby had told her that the non-shatter varnish was not now being used on their visors due to a dispute with the varnish manufacturers, and so it could not be guaranteed that the visors were shatter resistant, and that MM had accepted this. [I thought MM looked genuinely puzzled by this question]. MM responded that she had no recollection of such a call, and poured scorn over the idea that she would simply have accepted this position, especially over the phone, given the importance to Mototête of the shatterproof properties of the visor.

Mr Toutlemonde objected to this last line of questioning as he had no warning of it – again I decided to allow the evidence meantime and rule on admissibility later.

[my impression of the witness – bright and defensive- seemed very angry when faced with the questions over the newspaper articles]

No re-examination of MM.

**Mr Aiden O'Reilley (AO) – examination in chief – Mr Toutlemonde.**

AO asked to narrate events of 10 October 2019, and explained that he had been on a motorcycle tour of Europe, was in Turkey, and was rounding a corner when he came off his bike; next thing he remembers waking up in a hospital bed in Istanbul. He explained that he had undergone three operations to take out plastic from his eye and to try to save his sight. He had been left with only 10% vision in each eye, he could hardly see anything. He had suffered some fractured bones and internal bleeding, but all of this had healed. He had split from his wife as a result of the depression he suffered following the accident – flashbacks and the like. Lost earnings from Drillit of \$175,000 per year net, been unable to work again, and had planned to retire in 2023 when he turned 60. No more motorcycling or rock climbing. Devastated by the accident. AO confirmed that he bought helmet from Mototête since he knew of its reputation for safety. Since the accident, he had been approached to give interviews for media outlets, and he had told his story. He had accepted the offer of \$2M US for the personal injury case against the advice of his Irish lawyers, since he just wanted the whole thing over and done with; his lawyers told him he could get much more if he let the action go on for a couple of years before settling; they had just started negotiations. However, he just wanted it all over, the strain had become too much. He now regretted this since he had spent most of the money.

[I thought witness seemed very genuine and credible – tearful throughout evidence, seemed a broken man].

**Mr Aiden O'Reilley (AO) – cross-examination – Mr Feeham.**

AO was asked about his marriage. He became very defensive and refused to answer questions about it. He was asked if he had had a drink problem before the accident. Mr Toutlemonde objected, but I allowed the questioning, again to be ruled on later. He admitted that he liked a drink. Was asked if he had been drinking on the day of the accident; he shouted that he had not, how dare he be asked such a question. Was asked if the police had

checked his blood-alcohol level from samples taken at the hospital. Mr Toutlemonde objects vociferously, asking why this questioning is being permitted when there is no mention in the pleadings. Again, allowed it to continue meantime. AO stated that he did not know if his blood-alcohol level had been checked [at this point, for the first time in his evidence, he seemed ill at ease and wary, the tears were gone, and he had fallen quiet, seeming to wish to get his evidence over with]. He was asked if his marriage had been in trouble due to his drinking before he went on his tour. Objection again, but again I indicated that would rule on it later. AO shook his head sadly and burst into tears. He composed himself and stated that his wife had filed for divorce in May 2019, and that he had gone on his tour to get away from the constant arguments about his alcohol intake, which his wife thought was excessive, he thought was 'sociable'. He had accepted then that his marriage seemed over.

When asked about his flashbacks of the accident, he accepted that he had not sought psychiatric help, and had simply taken anti-depressants from his GP (just the same prescription as he had had since the start of his marital troubles in May 2019). When asked why he had not asked to be referred to a psychiatrist, he explained, rather sheepishly, that he felt ashamed and weak and did not want to be thought of as someone who had mental problems; he therefore just muddled along.

Asked if he was travelling fast when he rounded the corner at the time of the accident; he denied this. He was asked about a witness statement lodged in the Irish court case for compensation; the witness claimed that he was speeding at the time of the accident, and that just before it, he had been attempting a 'wheelie'. Before he could answer, Mr Toutlemonde objected; again, I allowed the evidence subject to a ruling later. AO responded that he may have been going at a 'decent speed' but not enough to cause him to lose control. When asked what had caused the accident, he said: 'Nothing, was just an accident'.

No re-examination of AO

## **Lunch**

### **Professor M.Y. Opic (MO) – examination in chief – Mr Toutlemonde.**

Consultant ophthalmologist, Utah Eye Clinic, US. Thirty years' experience in treating traumatic eye injuries. Professor in Utah University where he taught an eye trauma elective on a Masters course in Emergency Medicine. Had written ten books/book chapters and around 20 journal articles on aspects of eye trauma injuries and treatments. Had operated on AO three times, and had around 10 follow-up visits with him; he had been asked to take on AO's case despite the cost involved given the extent of his injuries and the limited specialism in other countries in this area. Had full access to AO's medical notes. Shards of plastic removed by A&E doctors in Istanbul – in medical notes. Had saved 10% of eyesight, very lucky to be able to do that as eye damage extensive. Confirmed that there was reference to depression in AO's medical notes, but unwilling to comment further since he was not a psychiatrist. When pressed, was willing to say that in his experience most sufferers of eye damage of this magnitude also suffered mental problems. Unwilling to comment on flashbacks, although can remember AO talking about these during a number of consultations he had following surgery; had advised AO to seek psychiatric help, but he seemed reluctant to do so. Confirmed that day to day life for AO would have been devastated; unable to work again, drive, and rock climbing out of the question. One of the worst cases of eye damage from shards he had seen – around 50 lacerations of the retina and iris.

### **Professor M.Y. Opic (MO) – cross-examination – Mr Feeham.**

MO was asked if AO had mentioned marital problems during consultations with him; he replied no. Was asked about the origin of the plastic shards; he replied that he had no idea, he had never seen them, they were taken out by the A&E doctors. He had assumed that they came from the visor, but was unable to confirm this [I thought he seemed put out by this line of questioning, as if he had never thought that the origin of the shards was in question]. Asked if the damage to the eye inevitably pointed to the shards of plastic as coming from the visor and not from elsewhere; he answered that he could not comment on the origin of the shards, only that there was shard damage; he had not been asked about this before, even in his statement in connection with the compensation claim. Mr Toutlemonde objected to this line of questioning – nothing in the pleadings – once again I noted the objection and would rule on it later. MO asked whether he could be sure the damage was even caused by shards of plastic; could it have been caused by some other material, such as stone, grit or even metal? MO indicated that he had no firm idea; he had been told by AO that the shards were from the visor, that is what had been in the notes, he had simply accepted this; he had no interest, really, in the origin of the material, he only treats the injuries.

#### **Re-examination of M.Y. Opic (MO) – Mr Toutlemonde.**

MO asked about the references to shards in AO's medical notes; he responded that he had seen references to plastic from the visor; this included such references in the A&E records as well as those since then.

#### **Dr Al Clear (AC) – examination in chief – Mr Toutlemonde.**

AC is an expert in plastic failure analysis based in the University of Ontario, Canada. He has written five articles in academic journals on the trajectory of fractured plastics in road traffic accidents. This was the subject matter of his PhD as well as his articles. He had been an academic at the University of Ontario for five years now, lecturing undergraduate students on the University's Plastics Analysis BEng. He had been asked to provide a report in connection with the civil claim by AO following his accident. He had been sent a sealed package from an A&E consultant at Istanbul Hospital, following a request from AO's lawyers. The package was labelled 'Plastic visor shards – Aiden O'Reilly – 10 October 2019'. On examination, they were found to be of toughened glass of the type one would find on a typical motorcycle helmet visor. AC was asked how durable the plastic seemed to be; he answered: 'relatively durable'. AC was asked if it would withstand the pressure of impact following a high speed accident, to which he replied: "nothing made of plastic can withstand such a trauma". AC was asked if there was anything that could have been done to make the material stronger, so as to be more likely to withstand impact; he responded: 'no, plastic is plastic'. Asked if there was evidence of any varnish on the surface of the plastic. AC looked puzzled by the question and responded: 'no, I don't understand why there would be'. AC asked if varnish could be applied to a plastic surface to make it stronger; AC laughed, assuming the question was in jest; he composed himself and answered: 'if so, I have never heard of such a thing'.

#### **Dr Al Clear (AC) – cross-examination – Mr Feeham.**

AC asked how many cases he had instructed on to provide expert evidence; he responded: 'Around ten'. AC asked if any had involved examination of shards from a motorcycle helmet – none. AC asked if these shards were definitely from a motorcycle helmet visor – he said he assumed they were, that their properties were consistent with such a source. Asked if the shards were of a material which could reasonably be described as 'shatter resistant', AC replied: 'there is no such thing as a shatter-proof plastic; all plastics have a shatter point'. AC was asked to answer the question; he was not asked about a shatter-proof plastic, he was



asked about shatter-resistant plastic; he replied that some plastic could be 'double bonded' meaning that it is strengthened plastic, designed to be strong and to withstand a reasonable level of force. AC was asked if the sample he examined in this case was from a 'double bonded' source, he replied: 'I can't say, the shards were too small'.

No re-examination of AC.

[I was left wondering if this witness was well-versed in his area of claimed expertise; he seemed hesitant in answering some questions, and over-confident in answering others; a general impression of limited understanding].

End of day 1 – broke to resume at 10.00am tomorrow

## **15 July 2021**

No preliminary matters. Invited Respondent to call first witness.

### **Mr Bruce Barnaby - examination in chief – Mr Feeham.**

Owner and Chief Executive of Visorworld Pty Ltd. Started the company 20 years ago motivated by a love for motorcycles. Large international selling base, supplies to more than 40 countries. Annual turnover of \$30 million (Australian).

Asked about how the Mototête contract came about. Said he has been contacted by MM in early 2017. Could not remember exactly when, thought probably mid-March. Negotiations very simple and straight forward, only concerned quantity and price. Culminated in a supply contract dated 10 May 2017 – standard terms for Visorworld contract. Contract specified expected quantities over a period of 1 year. Visorworld had calculated the visor unit price based on the anticipated quantities. Contract term ended but the supply orders kept coming. Was negotiating another much larger contract at the time, so simply decided to fill supply orders for existing unit price. Was comfortable with that price for the time being.

Asked if he had had any further direct contact with MM. Indicated he had spoken to her in November 2017 to advise of a dispute with varnish supplier and so could not presently guarantee visors were shatter resistant. Stated that MM acknowledged this situation. Dispute with varnish supplier was resolved and normal supply resumed in January 2019. Questioned about knowledge of Mototête. Knew them as a good helmet manufacturer in the good old days but now their star was on the wane. [Mr Toutlemonde objected to this on the basis that it was opinion about a topic in which Barnaby had not been recognised as an expert. Feeham argued Barnaby was qualified because of his participation in the industry. I upheld the objection and indicated that that statement would not be considered.] Feeham continued with Barnaby's knowledge of Mototête. Barnaby said he had no particular knowledge of the size of the business.

### **Mr Bruce Barnaby - cross-examination – Mr Toutlemonde.**

Focussed on negotiations prior to the contract. Suggested there was a little more to the discussions than just price and quantity wasn't there? Asked if MM had said why she was wanting to contract with Visorworld. Barnaby at first said no, but presumed because they had the best product and a reputable product. Toutlemonde queried reputable – did Barnaby mean that Visorworld visors had a reputation as being shatterproof? Yes. Did MM mention this during negotiations? May have done.

### **Mr Bruce Barnaby - re-examination – Mr Feeham.**

Referred to Toutlemonde's question about reputation as being shatterproof. Asked if Barnaby had heard the question correctly. Barnaby said "shatter proof, did he say shatter proof, sorry thought he said resistant". Seemed to have genuinely misheard. Made an off the cuff remark about often confusing those two.

**Professor Patrick Limerick, Chair in Law of Obligations, University of Lilliput, Ireland - examination in chief – Mr Feeham.**

Only just took up chair at university – just moved from practice, had qualified in 1993. Practice areas of expertise: personal injury claims and negligence more broadly.

Feeham asked if he was familiar with the O'Reilley case. Limerick said he had first read about it in the newspaper, and had since been given a copy of the High Court Civil Bill filed on behalf of Mr O'Reilley. Commented that he did not think much of the Civil Bill – poorly drafted.

Feeham put to him O'Reilley's evidence that his lawyers had advised him not to settle and that he could have got more than the \$2million. Limerick doubted he would have given the same advice. On the information he had before him \$2million was an extraordinary win for O'Reilley. O'Reilley's injuries may well have been worth a lot more, but the content of the Civil Bill had effectively capped him at \$1million. Lawyers for O'Reilley and Mototête should have known that.

**Professor Patrick Limerick, Chair in Law of Obligations, University of Lilliput, Ireland - cross-examination – Mr Toutlemonde.**

Asked Limerick to explain in his own words his understanding of why he had been called as an expert witness. "To answer questions regarding the Irish Law of Obligations". Toutlemonde asked about Limerick's publications on the law of obligations. Limerick had only two short articles written for legal industry magazines. Asked what had prompted the move to academia: wanted an easy life – joked that he was fast discovering it was possibly more demanding than practice. Toutlemonde asked to speak to me and Feeham alone. I asked everyone to leave. Toutlemonde stated that Claimant challenged the expertise of Limerick. At best he could be considered to give legal advice about how to run a case. Feeham rejected this assertion stating that Limerick was a lawyer of considerable experience in the area of personal injury and that where he gained that experience – practice or academia – was irrelevant. I decided to allow Limerick's evidence to proceed and would rule on admissibility later.

When the witness returned, Toutlemonde asked Limerick to clarify his comment that the injuries may have been worth a lot more. How much? \$4million if properly pleaded. Could O'Reilley have amended his pleadings in order to improve his claim? "Yes, it would have been the first thing I did if I had been running the case."

[my impression was that this witness knew how to run a case, but his knowledge of pure law was not so strong]

Lunch

Oral submissions delivered for both parties a day earlier than expected. Adjourned the case at the end of the day to start to prepare my award.

**[Students: no notes produced here, you have to assume that clear and competent submissions made on all relevant points].**