1. This is an action for threats of proceedings for infringement of trade mark. The first claimant, a United States corporation and its UK subsidiary the second claimant (which I shall refer to together as “Best Buy US”) planned to open a series of consumer electronics shops in the UK and in other countries in Europe under the Best Buy name, a name which the first claimant has used extensively for that purpose in the United States. Since the alleged threats complained of they have gone ahead with the opening of these shops, at least in the UK. The defendant is a Spanish corporation which owns a number of national and Community registered trade marks including the words Best Buy in combination with devices and other matter. I shall call the defendant “España”, as did Mr Peter Prescott QC and Mr Jonathan Hill who appeared for them. Mr Iain Purvis QC appeared for Best Buy US.

2. On 28th August 2008, Field Fisher Waterhouse (“FFW”) wrote on behalf of Best Buy Enterprises Services Inc. (“BBES”), a US company related to Best Buy US, to Maria Virtudes Gonzales Gomez, a trade mark attorney acting on behalf of España. The background to the letter was that BBES had applied for a Community trade mark incorporating the words “Best Buy”, and España had opposed it. The opposition was
based on two Community trade mark registrations owned by España, numbers 970707 and 3565348, each of which combined the words “Best Buy” with other wording and a logo including five stars. It is relevant to note that CTM 970707 is in respect of products in Class 9. I shall refer to these marks as “the España CTMs”. BBES had filed a revocation action against CTM 970707 on the grounds of non use.

3. The letter of 28th August 2008 claimed that BBES had a “significant reputation for the retail services that it provides under or by reference to the Best Buy mark”. FFW pointed out that the results of some investigations in relation to the geographical coverage of España’s use of its marks, had led them to believe that this use was predominantly within Spain. The letter went on to say this:

“Notwithstanding the above background, and without prejudice to our clients’ rights in the “Best Buy” name, our client believes that there may be scope for co-existence within the European Union between their business of retail services and your client’s products branded under their Best Buy and Star Device mark. Indeed, there may even be commercial opportunities between our clients’ respective businesses.

In the circumstances, and to avoid any unnecessary expense within the opposition proceedings our client would be prepared to agree to an extension of the cooling-off period to allow further time within which to discuss the terms of a possible co-existence agreement. We enclose an extension request. If you agree to extend this period please have this signed and sent to OHIM by the deadline of 29 August 2008.

We would be grateful if you could confirm that your client would be interested in discussing this further and look forward to hearing from you at your earliest opportunity”

4. The letter was followed up by a chaser on 9th September 2008 in which FFW asked again whether España were prepared to discuss possible terms of a co-existence agreement. The reply came from Clifford Chance S.L. Abogados who are Spanish lawyers instructed by España. This is the alleged threatening letter of which complaint is made. I shall call it “the CC letter”. The first paragraph of the CC letter began by saying that the letter was in relation to the earlier communications from FFW in the context of the opposition to BBES’s CTM application, and that it was for the purposes of replying to those communications “as well as making the following statements”. The letter then set out particulars of a number of España’s Spanish trade marks and the España CTMs.

5. The key features of the letter are the following:

i) España had learned from several press articles that BBES was planning to expand into the “European market including the Spanish one” in the near future;

ii) The use by BBES of the Best Buy trade mark “in Europe and in particular in Spain, as well as in advertising and in the media, as at present, represents a
conflict with the intellectual property rights duly registered by my client in Spain and Europe which would entitle it to take the appropriate legal action to defend its interests”;

iii) España’s various Best Buy trade marks had been used on the Spanish and European markets so that Best Buy had become a distinctive and reputed brand;

iv) in relation to the application to revoke CTM 970707 for non-use, there had been used of the trademark in Spain and therefore in the EU;

v) the use by BBES of the Best Buy trade mark "on the European market … would cause confusion and lead to an unacceptable association with my client’s products causing irreparable and irreversible damage which would undoubtedly entail the cessation of its activity". Examples were given of how the coexistence of Best Buy shops “in Spain and other European countries” with products sold by España under the Best Buy label would lead to confusion in Spain, and the extinction of España’s business.

6. The last three paragraphs of the CC letter read as follows:

“If, taking into account the above, [BBES] were to remain interested in using the BEST BUY trademark in Europe my client would be prepared, taking up the proposal made by your client in your facts of 28 August 2008, to reach a negotiated solution which would enable your client to do so while at the same time compensating my client for the cessation of its activity that this would undoubtedly entail.

Until a negotiated solution is reached, we hereby request that your client refrain from using the BEST BUY trademark in Europe, issuing any press articles or making any announcements of its imminent activities in Europe (news that has already caused confusion and concern among my client’s customers).

In order to ensure that my client is able to protect its rights in a proper fashion, we hereby request that, within a term of fifteen (15) calendar days as of the date of receipt of this letter, you reply to us in writing confirming (i) [BBES’] willingness to start a negotiation process with my client in order to attempt to find a negotiated solution to the conflict; or (ii) your client's undertaking to not use the BEST BUY trademark in Europe, or issue any news in the press or make any announcements of any imminent activity in Europe, or indeed use such trademark in any other way.”

7. In a letter dated 8th October 2008, FFW replied stating that their client was willing to commence a negotiation process in an attempt to resolve the matter amicably. The second paragraph of that letter reads as follows:
"Notwithstanding the above, for the avoidance of doubt any negotiations are without prejudice to our client's position [is] that its use of the BEST BUY Mark would not infringe your client's rights on the basis that, among other things, our client's proposed use is not confusingly similar to your client's registered marks and the words BEST BUY as depicted in your client's logos are not distinctive."

8. The letter requested details of certain matters referred to in the letter of 23 September 2008 “to enable [BBES] to properly assess the position for the purposes of negotiations”. Clifford Chance S.L. replied on 16 October. Amongst other things the letter provided copies of correspondence between España and its customers to support the suggestion that damage was being caused by the rumoured entry of BBES into the Spanish market. The documents were provided solely for the purposes of “these negotiations” and were to be kept confidential.

9. Discussions ensued about a date and venue for a meeting. A meeting was held but did not produce an agreement. So, on 13 February 2009 the claimants issued the present proceedings in this court without any prior warning, and subsequently served them.

10. The issues which arise are therefore these:

   i) Was the CC letter threatening “proceedings for infringement” of the España CTMs?

   ii) If so, was the threat made in relation to an infringement which is excluded from the operation of section 21(1) of the Trade Marks Act 1994 (“the Act”)?

   iii) If a non-excluded threat was made, is evidence of it inadmissible by virtue of the "without prejudice" rule?

   iv) Are the claimants "persons aggrieved" by the making of a non-excluded and admissible threat?

   v) If so, are the claimants entitled to relief?

Law

11. Section 21 of the Act provides as follows:

   “(1) Where a person threatens another with proceedings for infringement of a registered trade mark other than—

   (a) the application of the mark to goods or their packaging,

   (b) the importation of goods to which, or to the packaging of which, the mark has been applied, or

   (c) the supply of services under the mark,"
any person aggrieved may bring proceedings for relief under this section.

(2) The relief which may be applied for is any of the following—

(a) a declaration that the threats are unjustifiable,

(b) an injunction against the continuance of the threats,

(c) damages in respect of any loss he has sustained by the threats;

and the plaintiff is entitled to such relief unless the defendant shows that the acts in respect of which proceedings were threatened constitute (or if done would constitute) an infringement of the registered trade mark concerned.

(3) If that is shown by the defendant, the plaintiff is nevertheless entitled to relief if he shows that the registration of the trade mark is invalid or liable to be revoked in a relevant respect.

(4) The mere notification that a trade mark is registered, or that an application for registration has been made, does not constitute a threat of proceedings for the purposes of this section.”

12. Section 21 was extended to Community trade marks by paragraph 6(1) of the Community Trade Mark Regulations 2006 (SI 2006 No 1027). That paragraph states:

“(1) The provisions of section 21 apply in relation to a Community trade mark as they apply to a registered trade mark.”

**Threat of proceedings in which courts?**

13. This is the first time, so far as I am aware, that a threats provision of this nature has been applied to a Community-wide right. What sort of trade mark infringement proceedings must be threatened in order to come within the section? Mr Purvis submitted that the provision applied to any threat of proceedings to enforce a registered trade mark, provided that the Court had jurisdiction to hear it. He says that the Act, whether before or after extension to Community trade marks by the Community Trade Mark Regulations, is not specific about the locality of the proceedings. Taking section 21 itself, he submits it is wide enough to cover an action for infringement of a UK-registered national trade mark even if brought in a foreign court. So when the section is applied to CTMs, the position should be analogous.

14. Mr Prescott submitted that the threatened proceedings must be proceedings in the United Kingdom. Otherwise, he submits, Section 21 will be a trap for the unwary practitioner in 26 countries of the European Union who cannot be assumed to know of this peculiarly UK provision. It may be the practice, or even a requirement, in some
countries, he suggested, to write a letter before action setting out the relief it is intended to seek. It would be unfortunate if that which was a requirement of proceedings in one country could become an actionable wrong in another. The court should be astute not to impose aspects of our domestic trade or competition policy on other countries in the absence of a common approach to these questions.

15. On this issue I prefer Mr Prescott’s submission. I think that section 21 refers, in context, to proceedings for infringement in the courts of this country, and its extension to Community trade marks has no widening effect. Section 21 is to be found in a group of sections which are concerned broadly with the relief which the court (by section 75, a United Kingdom court unless the context otherwise requires) may grant where an infringement of trade mark is established. It is not on its face concerned with the harmful effects of proceedings threatened in other jurisdictions.

16. I accept that one consequence of this is that a harmful threat could be made by making it clear that the only proceedings contemplated will be abroad. But this would not be the only anomaly created by this home-grown action. It cannot sensibly be argued, for example, that the section extends to threats of infringement of foreign nationally registered marks: a registered trade mark is one registered under the Act. So one can threaten with impunity to bring an action here for infringement of a foreign mark.

Approach to interpretation of threats

17. There are similar but not identical provisions to section 21 in other statutes concerned with registered intellectual property rights. In *Prince v Prince Sports Group Inc.* Neuberger J (as he then was) applied the same approach to determining whether a threat of proceedings has been made as was applied in relation to the threats provision in the Patents Act 1977. He followed the approach taken by Aldous LJ in a patent case, *Brain v Ingledew, Brown, Bennison & Garrett* [1996] FSR 341 at 349, where he said that:

“[T]he conclusion as to whether a document amounts to a threat of patent proceedings is essentially one of fact. It is a jury-type decision to be decided against the appropriate matrix of fact. Thus a letter or a statement may on its face seem innocuous, but when placed in its context it could be a threat of proceedings. The contrary is less likely but could happen.”

18. Neuberger J also applied a statement of principle by Laddie J in *Brain v Ingledew, Brown, Bennison & Garrett (No. 3)* [1997] FSR 511 at 521 where he said:

“… the meaning and impact of the letters in issue has to be decided in accordance with how they would be understood by an ordinary reader … What is particularly important is the initial impression which the letters would have on a reasonable addressee. During court proceedings, it is inevitable that the lawyers, parties and judge will read and re-read the offending passages with ever closer attention. Such meticulous analysis is not what would happen in the real world and the court must guard against being led down a path of forensic analysis to a meaning which is narrower or broader than would occur to the
ordinary recipient reading the letter … in the normal course of business"

19. In *Prince*, Neuberger J also rejected the suggestion that it would be appropriate to construe an alleged threatening letter by reference to subsequent correspondence. He said at 27:

> "Whilst I would readily accept that the justifiability of section 21 proceedings, the nature of the relief to be granted, and the appropriate order as to costs, can all be influenced, in some cases decisively, by communications made after the document which when properly construed, constitutes a threat, those subsequent communications cannot, in my judgement, alter the fact that the first communication constituted a threat."

20. For present purposes I would add only that it will also be justifiable in some circumstances to look at subsequent correspondence for the purposes of determining whether the threat was made within the "without prejudice" cloak.


> "The policy represented by the first statutory threats provision (section 32 of the Patents, Designs and Trade Marks Act 1883) was clearly to stop patentees who were (in Pope's words about Addison) "willing to wound but afraid to strike" from holding the sword of Damocles above another's head: see Simon Brown LJ in *Unilever PLC v Procter & Gamble Co.* … In summary, the term "threat" covers any information that would convey to a reasonable man that some person has trademark rights and intends to enforce them against another. It matters not that the threat may be veiled or covert, conditional or future. Nor does it matter that the threat is made in response to an enquiry from the party threatened ..."

**Approach to applicability of exceptions**

22. Section 21 excludes certain types of infringement proceedings from its scope ("excluded acts"). The excluded acts correspond to some but not all of the acts which are deemed, by section 10(4) to be use of a sign for the purposes of infringement. Thus, for example, exporting goods under the sign is deemed to be use of the sign for the purposes of infringement, but is not an excluded act. Similarly, and more relevantly, offering or supplying services under the sign is deemed use for infringement purposes, but only supply of services (and not offering to supply) is an excluded act.

23. In *Prince* (see above) the plaintiff only supplied services. The defendant made a general threat without limiting it to proceedings in respect of goods or services. The defendant argued that the threat would be understood as relating only to services, as that is all the plaintiff provided. Neuberger J rejected this argument, holding that the
threat was perfectly general and that there was no basis for saying that it fell within the exception. He said this at page 33:

“… in the end I consider that the language in section 21(1), when read as a whole, is clear. … I consider that one takes the communication, and decides whether it would be understood by a reasonable person in the position of the recipient to be a threat of infringement proceedings. If it is such a threat, then one must decide whether, on its face, the communication nonetheless is outside section 21(1), because it falls within one of the three excepting paragraphs.

Although at first sight this may not appear to comply with the philosophy behind section 21(1), I believe that, on analysis, it does. The section is concerned to ensure that threats of infringement proceedings are not made casually or recklessly, because of the potential damage and concern they can cause. Anyone who wishes to write a letter raising the possibility of infringement proceedings is, therefore, required to consider with care whether he has any case, and, if he is to communicate with another, to take care in expressing himself. If, therefore, the person making such communication wishes to take advantage of one or more of the excepting paragraphs of section 21(1), it is incumbent upon him to indicate this in terms.”

24. I have no hesitation in agreeing with the guidance of Neuberger J in the second quoted paragraph, that those who wish to take advantage of the exception must take care to frame their threat in such a way that it is clearly limited to proceedings in respect of excluded acts. Mr Purvis submitted that the learned judge was going further and excluding from consideration the recipient’s knowledge of the scope of his own activities. Neuberger J viewed this conclusion as being consistent with the approach of the Court of Appeal in Cavity Trays v RMC Panel Products [1996] RPC 361, which it is. In that case the defendant had argued for a wide construction of the section to allow threats of proceedings for patent infringement to be made against any primary infringer, even though the relevant exclusion was on its face narrower in scope. That construction of the Act was rejected. However the Court of Appeal did not decide that the decision as to whether a threat was within the exclusion was a decision to be taken on the face of the document alone, or that it was necessary to indicate in terms that that it is sought to take advantage of the statutory exception.


“even if it be assumed that the letter contained a threat in general terms it does not follow that the recipient would read it as making a threat of proceedings in respect of all potentially infringing acts. A letter, such as the letter of June 13, when written to a person who only operated a process, could be understood as being a threat of infringement by carrying out the process; whereas a letter written in general terms to a person
who not only carried out the process but sold the products of that process, could be understood in a different way.”

26. It is true that this was said in the context of proceedings for summary judgment. Nevertheless, in the light of this authority, I think that the right approach both in deciding whether there is a threat of proceedings for infringement and in deciding whether the threat is limited to an excluded act is the same: the court has to consider the impact of the letter on the recipient. One must ask whether the recipient would understand the threat to be limited to proceedings in respect of excluded acts.

** Threats made "without prejudice"

27. Statements made orally or in writing in the course of negotiations which are genuinely aimed at settlement of litigation are generally treated as inadmissible in evidence. The clearest statement of the rule is that of Lord Griffiths in *Rush & Tomkins v Greater London Council* [1989] 1 AC 1280, 1299. It is a rule based in part on public policy and in part on implied contract. A threat of patent infringement proceedings which is issued in the course of discussions which are expressly "without prejudice" will not be admissible in evidence to prove the alleged threat: *Unilever v Procter & Gamble* [2000] FSR 344. In *Schering Corporation v CIPLA Ltd* [2005] FSR 25; [2004] EWHC 2587, Laddie J had to determine whether a party had made an admissible threat to infringe a patent (as opposed to whether it had made threats of proceedings) in a letter expressly headed "without prejudice" and containing an expression of an intention to launch a potentially infringing product and an offer to negotiate. Having considered the authorities including *Standrin v Yenton Minster Holmes Ltd* (Court of Appeal unreported June 28 1991), he said:

“… it seems to me that the Court of Appeal indicated that in determining the nature of correspondence and, in particular, in determining whether or not it is to be treated as bona fide without prejudice, it is necessary to consider all the circumstances. In that case, the common practice of negotiating when a reference to the Land Tribunal was in prospect was one factor which the Court of Appeal took into consideration. But it also took into consideration the fact that the document was headed with the words "without prejudice". As Parker LJ made clear, merely putting those words on a document does not conclusively mean that the document is privileged. However the occurrence of those words may well be an important factor in determining the document’s status.

Behind this, it seems to me, is the following principle. The court has to determine whether or not a communication is bona fide intended to be part of or to promote negotiations. To determine that, the court has to work out what, on a reasonable basis, the intention of the author was and how it would be understood by a reasonable recipient. If a document is marked "without prejudice", that is some indication that the author intended the document so to be treated as part of the negotiating process, and in many cases a recipient would
receive it understanding that that marking indicated that that was the author's intention."

28. That case was concerned with whether a document expressly marked “without prejudice” was a bona fide attempt to reach a negotiated settlement. However, it is well settled, at least in England and Wales, that documents not expressly so marked may attract the without prejudice privilege: see Chocoladefabriken Lindt & Sprüngli v Nestlé [1978] RPC 287. In that case Megarry VC said at 268:

"From the authorities put before me by Mr Prescott, it seems plain that the courts favour the protection of discussions which take place between actual or prospective litigants with a view to avoiding the expense and burden of litigation, and are very ready to hold that discussions made with this purpose are inadmissible in evidence. Men ought to be able to attempt to "buy their peace" without prejudicing their positions if the attempt fails and hostilities break out or continue. The mere failure to use the expression "without prejudice" does not conclude the matter. The question is whether there is an attempt to compromise actual or impending litigation, and whether from the circumstances the court can infer that the attempt was in fact to be covered by the "without prejudice” doctrine.”

29. It is clear from the authorities that even the opening shot in negotiations can, depending on the circumstances, amount to bona fide without prejudice correspondence and be privileged accordingly: Schering at [18].

30. The authorities also show that the decision as to whether correspondence for discussions are "without prejudice" is highly sensitive to context. It may be clear that, even though a letter contains an offer of settlement, the party writing it intends or reserves the right to show it to a third party or the court. There may be many reasons for this, for example a tactical desire to show a willingness to negotiate: see for example the decision of Gloster J in English and American Insurance Company Ltd v Axa Re SA [2006] EWHC 3323 (Comm). The court should not shut its eyes to the possibility that an offer to negotiate is an open one.

Was the CC letter a threat?

31. I must endeavour to place myself in the position of a reasonable businessman in the position of BBES who received the CC letter with knowledge of the relevant background. The background to the CC letter included the fact that BBES had themselves written a letter setting out their litigation stance, but indicating “without prejudice to our clients’ rights in the "Best Buy" name” a preparedness to discuss co-existence as well as to extend time for steps to be taken in the opposition.

32. Putting aside for a moment the without prejudice point, and also the point about where the proceedings in question would be brought, it seems to me that the recipient would understand from the CC letter in the clearest terms that proceedings for infringement of trade mark were being threatened. Having said in the fourth paragraph that the activities of BBES represented a "conflict with the intellectual property rights duly registered by my client in Spain and Europe which would entitle
it to take the appropriate legal action to defend its interests”, the letter concluded with a demand for undertakings "in order to ensure that my client is able to protect its rights in a proper fashion". The threat was undoubtedly conditional upon BBES declining to negotiate and not ceasing use of the mark, but as L’Oreal v Johnson & Johnson shows, conditionality is not an answer¹. Therefore, the CC letter included a threat.

Was the CC letter a threat to sue here?

33. I turn therefore to consider whether the CC letter would be read by a reasonable businessman in the position of BBES to be a threat to bring proceedings in the courts of the United Kingdom. Mr Prescott drew attention to the fact that defendants’ business was in Spain, and it was this business to which the letter referred when it complained of a risk of extinction. He accepts that the provisions on jurisdiction made these courts a possible forum for litigation of the dispute, but contended that it would be considered an unlikely one.

34. Mr Purvis submitted that the threat was to bring proceedings wherever such proceedings could effectively be brought. He relied on the fact that the letter stressed the European-wide protection which España had. He also pointed to the fact that Best Buy US’s plans, which had received wide publicity, were to launch their shops first in England and later in other countries in Europe. Although, from España’s perspective, the focus of interest was Spain, the focus from the claimants’ point of view was the UK.

35. On balance I think that the correct view is that the reasonable recipient would consider that España had a range of options as to the forum in which they could bring the proceedings and that they were not limiting themselves to bringing proceedings in Spain. The recipient would recognise that if a major launch was to take place in the UK, then the UK would be a likely choice for proceedings. It has to be remembered that the reasonable businessman is not an expert on trade mark law, or jurisdiction. Accordingly I do not think that the CC letter escapes the threats provision on this ground.

Excluded acts?

36. España contend that as the claimants planned to open shops, the reasonable recipient would have understood the threat to apply only to the supply of services, and therefore to be made in relation to an excluded act. In my judgment the reasonable recipient would not have understood the proceedings threatened to be so limited. The letter seeks undertakings in respect of any use of the mark, as well as refraining from issuing press articles and announcements of activity in Europe. This goes much wider than the supply of services, and must include offering to do so. Moreover, far from being limited to the supply of services, it is explicit in seeking to restrain other acts. The letter also makes specific reference to España’s Class 9 Community trade mark registered in respect of goods alone. Whilst there may be legal difficulties in alleging that use by opening shops is an infringement of a goods mark, those are niceties with

¹ An exception would be a case where there is no question of the condition being met, e.g. the “If it were not Assize time…” type of conditional threat, which would be understood as a statement that proceedings would not be taken: Tuberville v Savage (1669) 1 Mod. Rep. 3
which the reasonable recipient is not likely to be familiar. He would consider that it was being said that his activities in relation to the mark went beyond the supply of services.

37. So I would reject the defence based on excluded acts.

**Without prejudice**

38. There is no doubt that both the CC letter and the letter which preceded it contained offers to negotiate. The FFW letter of 28th August said that "without prejudice to [BBES’s] rights in the "Best Buy" name … there may be scope for co-existence within the European Union between [BBES’s] business of retail services and your client's products branded under their Best Buy and Star Device mark.” The offer to negotiate was made in the context of litigation which was on foot: subsisting opposition proceedings between España and BBES in relation to BBES’s trade mark application and based on the España CTMs, one of which BBES had applied to revoke as well. The offer was made during a cooling-off period no doubt intended for the parties to negotiate a consensual solution to their trade mark conflicts. España’s response was to make clear the strength of its own European trade mark position and to make BBES aware of the fact that it considered BBES’s commercial activities to be highly damaging to its business. Nevertheless, there was scope for a negotiated solution involving cessation by España of use of the mark in response for compensation. The letter requested a response confirming either a willingness "to start a negotiation process" or an undertaking not to use the trade mark Europe.

39. This is not a case where either party has clearly indicated its intention that its letters are to be treated as without prejudice so that their contents should be inadmissible in any court proceedings. Mr Purvis was prepared to accept that España’s case on this point would be stronger had the CC letter been expressly so marked. The question would then be whether the letter was bona fide part of a negotiating process. However he submits that, in the absence of such marking, it is impossible to distil from the letter any intention, far less a clear intention, that the letter should be treated as without prejudice.

40. Mr Prescott submits that here were two businesses seeking an alternative to litigation, and their efforts to do so should not result in an admissible threat having been made. He relies on the entire course of correspondence which I have endeavoured to summarise above.

41. In my judgment the CC letter was part of a negotiating process and falls within the protection of the without prejudice rule. Having been invited by BBES to negotiate within the cooling off period, with BBES plainly asserting the strength of its own position, España’s response was doing no more than the same thing in relation to its own rights. Parties are to be expected, if invited to negotiate, to start from a position of strength, and then to indicate where concessions might be possible. The CC letter indicated, for example, that notwithstanding España’s monopoly position in Europe under these trade marks, potentially giving it the right to exclude BBES altogether by litigation, it might be prepared to give up those rights in return for money. That is a concession, albeit a limited one, which in accordance with the public policy basis for the rule, attracts the protection of the privilege.
Mr Purvis’ strongest point was that, despite what was said about negotiation, the real purpose of the letter was to serve as a letter before action. That was said to be clear from the fact that the CC letter was a reply to the FFW offer to negotiate “as well as making the following statements” and the reference to starting a negotiation process. I reject that interpretation. It seems to me, overall, that the letter was setting out a negotiating position. Some of it was strictly in reply, whereas other parts were raising the strength of España’s position. Given that España’s negotiating position involved enforcing its trade marks, it was natural to draw BBES’s attention to the consequences of the failure of the negotiations. Indeed it must have been obvious to BBES that this is the sort of response that they would get. I do not think it is possible to divide the CC letter notionally into those parts which are in response to the request to negotiate and those which are not. Viewed as a whole, and in the context of what preceded it, it was a comprehensive negotiating response to BBES’s proposal.

Accordingly, on this ground, the action fails. It is therefore not necessary to decide yet further points based on whether Best Buy US were persons aggrieved, and as to the relief to which they would be entitled.